HIGH COURT OF AUSTRALIA

KIRBY, HAYNE, HEYDON, CRENNAN AND KIEFEL JJ

MINISTER ADMINISTERING THE CROWN LANDS ACT APPELLANT

AND

NSW ABORIGINAL LAND COUNCIL RESPONDENT

Minister Administering the Crown Lands Act v NSW Aboriginal Land Council
[2008] HCA 48
2 October 2008
S217/2008

ORDER

Appeal dismissed with costs.

On appeal from the Supreme Court of New South Wales

Representation

M J Leeming SC with J A Waters for the appellant (instructed by Crown Solicitor (NSW))

J T Gleeson SC with M L Wright for the respondent (instructed by Chalk & Fitzgerald)

CATCHWORDS

Minister Administering the Crown Lands Act v NSW Aboriginal Land Council

Aboriginals – Land rights – Whether land "claimable Crown land" under s 36(1) of *Aboriginal Land Rights Act* 1983 (NSW) ("Land Rights Act") – Whether land "lawfully used or occupied" under s 36(1)(b) of Land Rights Act – Whether steps taken preparatory to intended sale of land constituted lawful use and occupation of land.

Statutes – Construction – Meaning of "lawfully used or occupied" – Whether "lawfully used or occupied" is compound expression with single meaning – Whether "used" and "occupied" to be considered separately – Meaning of "use" – Meaning of "occupied".

Statutes – Construction – Meaning of "lawfully used or occupied" – Whether Land Rights Act to be interpreted beneficially and remedially – Whether reliance on beneficial and remedial purpose of Land Rights Act necessary and useful to resolve contested question of interpretation of Land Rights Act.

Words and phrases – "claimable Crown lands", "lawfully used or occupied", "use", "occupied".

Aboriginal Land Rights Act 1983 (NSW), s 36(1)(b).

1 KIRBY J. The interpretation of legislation is one of the most important functions of Australian courts. A significant change in this area is the move away from the notion that language has clear and incontestable meanings that are ascertainable from a close study of the words alone.

2 This "literal" or "grammatical" approach to interpreting statutory texts has gradually given way to an appreciation that legal interpretation is a more complex task. Whilst the starting point in interpretation must still always be the *text*[1], it is now appreciated that *context* and *purpose* are also vitally important. Further, this approach is not limited to cases where the text appears on its face to be ambiguous[2].

3 A sub-species of this context and purpose rule is a principle of interpretation that arises where a contested text appears in a statute that has an apparently beneficial or remedial purpose. Where different literal interpretations of such a text appear to be available to the decision-maker, it is valid, and sometimes helpful, to identify the beneficial or remedial purpose discerned. The decision-maker should then endeavour (so far as the text allows) to adopt a construction that advances that purpose in preference to one that would frustrate or diminish the attainment of the apparently intended benefits and reforms.

4 This beneficial or remedial reading principle is by no means new. It simply re-expresses, in the current age of enlarged legislation, a very old canon of interpretation that enjoins decision-makers to address the "mischief" perceived in the legislation[3]. This is in contrast to upholding an interpretation that results in the legislation misfiring and missing its obviously intended mark[4].

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1 *Re Bolton; Ex parte Beane* (1987) 162 CLR 514 at 518; [1987] HCA 12; *Trust Company of Australia Ltd v Commissioner of State Revenue* (2003) 77 ALJR 1019 at 1029 [68]; 197 ALR 297 at 310; [2003] HCA 23.

2 *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 381-382 [69]-[70]; [1998] HCA 28; *Boral Besser Masonry Ltd v Australian Competition and Consumer Commission* (2003) 215 CLR 374 at 498 [383]; [2003] HCA 5.

3 cf *Inland Revenue Commissioners v Ayrshire Employers Mutual Insurance Association Ltd* [1946] 1 All ER 637 at 641; *Kingston v Keprose Pty Ltd* (1987) 11 NSWLR 404 at 424 per McHugh JA.

4 The rule in *Heydon's Case* (1584) 3 Co Rep 7a at 7b [76 ER 637 at 638]. See eg *North Ganalanja Aboriginal Corporation v Queensland* (1996) 185 CLR 595 at 614-615; [1996] HCA 2; *James Hardie & Coy Pty Ltd v Seltsam Pty Ltd* (1998) 196 CLR 53 at 81 [72]; [1998] HCA 78.

5 I agree with most of the reasons of Hayne, Heydon, Crennan and Kiefel JJ ("the joint reasons"). Certainly, I agree with the ultimate conclusions stated there and with the order proposed[5]. The joint reasons acknowledge (as did Mason P in the decision below in the Court of Appeal of New South Wales)[6] that the legislation in question was designed to be beneficial and remedial.

6 However, the joint reasons state that "[i]t is not necessary to invoke some principle of 'beneficial construction' to resolve the issue in this case"[7]. Moreover, the joint reasons also state that "[n]o question is presented … which requires a choice to be made between competing constructions of s 36(1)(b) [of the *Aboriginal Land Rights Act* 1983 (NSW) ('the Land Rights Act')], one described as 'broad' and the other as 'narrow'"[8]. For the joint reasons, the contested statutory question is only whether the official activities cited by the Minister for Lands (NSW) ("the Minister") constituted a lawful "use" of the land (or "use or occupation") at the time the New South Wales Aboriginal Land Council ("the Land Council") made its claim upon the land.

7 Not for the first time[9], with respect, I see in this approach hints of a return to the literal interpretation of legislation which this Court has (in my view rightly) earlier discarded. It is as if words, without more, will yield the answer to a problem of statutory interpretation presented by a case such as the present. I would resist any return to that earlier narrowing of the judicial focus. Consequently, I am bound to explain why the beneficial and remedial character and purpose of the Land Rights Act is an important ingredient in the reasoning that I would adopt to reject the arguments of the Minister before this Court and to sustain the decision and orders of the Court of Appeal.

8 Without this ingredient, I am not convinced that I would reach the same conclusion. The basis for my doubt is that the critical word "use", in relation to land, is inherently unclear in its meaning. It is ambiguous and could potentially yield contradictory results. In resolving which result should be preferred by a

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5 Joint reasons at [78].

6 Joint reasons at [47], citing Mason P in the Court of Appeal: *NSW Aboriginal Land Council v Minister Administering Crown Lands Act* (2007) 157 LGERA 18 at 24 [20].

7 Joint reasons at [48].

8 Joint reasons at [48].

9 See eg *Foots v Southern Cross Mine Management Pty Ltd* (2007) 82 ALJR 173 at 194 [95]; 241 ALR 32 at 56; [2007] HCA 56.

court, the accepted beneficial and remedial characterisation of the Land Rights Act is, for me, a significant factor in the decision-making process.

9 This Court has repeatedly admonished decision-makers in other courts (and this is now reflected in general legal and administrative practice) to look beyond the words of the text and to consider the statutory and social context so as to understand those words more clearly[10]. Giving weight to the beneficial and remedial purposes of the Land Rights Act is part of that operation. Only this approach will give effect, in such a context, to the beneficial and remedial purposes of Parliament in preference to a view of the text that might tend to frustrate, narrow or limit the attainment of such purposes.

10 It is important for this Court to expose and apply the principles of statutory interpretation consistently in a case such as the present. That is the explanation for my separate reasons, notwithstanding that I reach the same result as the joint reasons. A court must be consistent in what it says and does in its approach to interpretation (whether of the Constitution, or of a statute, contract, or other document[11]). Otherwise, the court will expose itself to criticism that its inconsistent *approaches* produce inconsistent *outcomes*. Concerns will then be expressed that judicial dispositions represent little more than intuitive opinions of judges based on a reading of words in contested texts as viewed through their own narrow verbal lens. The search for consistent approaches to statutory interpretation is part of an endeavour by the courts to introduce elements of the rule of law into this most common and important contemporary judicial function. To encourage that endeavour is a proper objective of a court such as this Court.

Some common approaches

11 *Facts, legislation and proceedings*: The relevant facts[12], the applicable provisions of the Land Rights Act[13] and the decisional history[14] of this appeal are stated in the joint reasons. Similarly, the joint reasons briefly describe the precursors to the Act, namely the report that recommended "land rights for New

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10 See, for example, *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384 at 408; [1997] HCA 2; *Coleman v Power* (2004) 220 CLR 1 at 21 [3]; [2004] HCA 39; *R v Lavender* (2005) 222 CLR 67 at 81 [33]; [2005] HCA 37.

11 See Kirby, "Towards a Grand Theory of Interpretation: The Case of Statutes and Contracts", (2003) 24 *Statute Law Review* 95.

12 Joint reasons at [50]-[59].

13 Joint reasons at [42]-[43], [46].

14 Joint reasons at [60]-[64].

South Wales Aboriginal citizens"[15]. The preamble to the Land Rights Act[16] expresses, in general terms, the beneficial and remedial objects of the New South Wales Parliament in enacting that Act.

12 Against the background of prolonged, deep-seated, reinforced and, ultimately, widely accepted discrimination in the law against the rights to traditional lands of the indigenous people of Australia[17], the objects evident in the Land Rights Act could fairly be described as little short of revolutionary. The discriminatory common law principle that lay at the source of the denial to indigenous people in Australia of rights to land existed despite the fact that such recognition was accorded to the land rights of the settlers and their successors. There was a further fundamental correction to this principle some years after the Land Rights Act was adopted, notably in the decisions of this Court in *Mabo v Queensland [No 2]*[18] and *Wik Peoples v Queensland*[19]. However, the contextual consideration of these decisions does not, in any way, diminish the important shift in direction in the law of New South Wales achieved by the enactment of the Land Rights Act[20].

13 *Advances in interpretive techniques*: I could not agree with any needless reversion to literal techniques of statutory interpretation. Any attempt to understand, and give effect to, the language and purpose of the Land Rights Act without placing that statute in its historical, legal, social and human rights context risks such a reversion. Formally, the reason that I could not agree is the repeated authority of this Court to the contrary effect. But an additional reason is the fact that the decisional authority is ultimately based upon a more accurate consideration of the way human beings understand communication as expressed through language. Human beings gain understanding not only by reference to the words used in the communication but also through other essential indicators, relevantly of context and purpose, and in particular any intended beneficial or remedial purpose.

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15 Joint reasons at [45].

16 See joint reasons at [46]-[47].

17 See *Northern Territory v Arnhem Land Aboriginal Land Trust* (2008) 82 ALJR 1099 at 1114-1115 [70]; [2008] HCA 29.

18 (1992) 175 CLR 1; [1992] HCA 23.

19 (1996) 187 CLR 1; [1996] HCA 40.

20 See the ministerial speech by Mr Walker, Minister for Aboriginal Affairs, in support of the Bill for the Land Rights Act: New South Wales, Legislative Assembly, *Parliamentary Debates* (Hansard), 24 March 1983 at 5088-5097.

14 The interpretation of the meaning of words in written texts is not (nor can it be reduced to) a purely mechanical process[21]. There have been attempts to introduce consistency through common approaches and accepted or enacted canons of construction. However, as recently expressed by this Court, it is not unusual for such principles and canons to "jostle" for acceptance in a given case[22].

15 The changes to the pre-existing law introduced by the Land Rights Act are significant and historic. To ignore the beneficial and remedial character of the legislation, or to treat it as immaterial to the present function of interpretation, would risk misunderstanding or narrowing the words used in the statutory text. Effectively, it would read the words once again (as our forebears were wont to do) divorced from their context and apparent purposes. We should not make that mistake.

16 A review of two decades of decisions by New South Wales courts following the enactment of the Land Rights Act discloses that such courts, and particularly the Court of Appeal, have not made that error. With a very high measure of consistency, those courts have evidenced a consciousness of the history that preceded the Land Rights Act and the high objects apparent in the decision to enact it. Indeed, the Court of Appeal has elaborated and explained the meaning of lands "not lawfully used or occupied"[23] on a number of occasions. That Court has done so by referring to the necessity to read the text of the Land Rights Act, as far as the language permits, in such a way as to advance, and not to frustrate, the attainment of the beneficial and remedial objectives that lay at the heart of Parliament's imputed intention.

17 *Beneficial and remedial interpretation*: After the enactment of the Land Rights Act, the Court of Appeal considered the matter in *Minister for Natural Resources v New South Wales Aboriginal Land Council*[24] ("the *Tredega Claim* case"). In my reasons in that decision, in words that have been quoted and applied many times since, I observed:

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21 cf *Sons of Gwalia Ltd v Margaretic* (2007) 231 CLR 160 at 209 [116]; [2007] HCA 1; *Forsyth v Deputy Commissioner of Taxation* (2007) 231 CLR 531 at 549-550 [48]; [2007] HCA 8.

22 See *Gedeon v Commissioner of the New South Wales Crime Commission* [2008] HCA 43 at [51].

23 Land Rights Act, s 36(1)(b).

24 (1987) 9 NSWLR 154 at 157.

> "Clearly, [the Land Rights Act] was enacted to give important rights in Crown land to the representatives of the Aboriginal people. … Against such a background, and given its purposes and context with other land rights and similar remedial legislation, the [Land Rights Act] should be given by the courts the most beneficial operation compatible with its language."

18 This principle of construction has been given effect in many decisions of the Court of Appeal and the Land and Environment Court of New South Wales[25]. It is undesirable for this Court now to endorse a different approach. After all, the principle is perfectly orthodox. It is regularly applied in analogous circumstances involving quite different legislation[26]. It should not be disclaimed in this instance even though the correct outcome can still be reached. If it is disclaimed here, a failure to consider it in the next case may yield a different, and erroneous, outcome.

19 I adhere in this Court to what I said in the *Tredega Claim* case. Rightly, in my view, Spigelman CJ observed in *Minister Administering the Crown Lands Act v Deerubbin Local Aboriginal Land Council [No 2]*[27] that the principle mandating a beneficial and remedial interpretation of the Land Rights Act requires that exceptions to the right to claim land under that Act should be construed narrowly. The same principle necessarily applies to the interpretation of disqualifications from entitlements under the Land Rights Act.

20 Furthermore, in interpreting legislation that has a substantive impact upon Aboriginal rights, enjoyed by statute or by the common law, any ambiguity should be resolved in a way that is favourable to the rights of Aboriginal

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25 *New South Wales Aboriginal Land Council v Minister Administering the Crown Lands (Consolidation) Act and the Western Lands Act (The Winbar Claim [No 2])* (1988) 64 LGRA 240 at 244; *Darkingung Local Aboriginal Land Council v Minister Administering the Crown Lands (Consolidation) Act* (1988) 65 LGRA 96 at 101; *Tweed Byron Local Aboriginal Land Council v Minister Administering the Crown Lands (Consolidation) Act* (1990) 72 LGRA 177 at 180-181; *New South Wales Aboriginal Land Council v Minister Administering the Crown Lands Act (The Department of Education Claim)* (1992) 76 LGRA 192 at 195; cf *R v Kearney; Ex parte Jurlama* (1984) 158 CLR 426 at 433; [1984] HCA 14.

26 See eg *Patton v Buchanan Borehole Collieries Pty Ltd* (1993) 178 CLR 14 at 17 (which considered the *District Court Act* 1973 (NSW), s 79A); [1993] HCA 23; *Newcastle City Council v GIO General Ltd* (1997) 191 CLR 85 at 101-102 per Toohey, Gaudron and Gummow JJ (which considered the *Insurance Contracts Act* 1984 (Cth), s 40); [1997] HCA 53.

27 (2001) 50 NSWLR 665 at 674 [53]-[54]. See (2007) 157 LGERA 18 at 24 [21].

peoples[28]. Any attempt by Parliament to restrict those rights must be clear and plain[29]. If courts in other common law countries, with relevantly similar histories post-settlement, adopt this approach there is no reason why this Court, following *Mabo*[30] and *Wik*[31], should not do so. Indeed, given the more significant history of dispossession in Australia, now reaffirmed[32], there is every reason why it should.

21 To treat the language of the Land Rights Act as if it were purely machinery or technical law, devoid of significant historical and social objectives, would betray a serious legal error[33]. It was not an error made by the Court of Appeal or by the primary judge. We also should not make such an error.

22 *Concurrence with joint reasons*: I can, however, still endorse most of the reasons of my colleagues. Thus, I concur that:

- Considering the proper disposition on the substance of the appeal, it is neither necessary nor appropriate for this Court to determine the motion filed by the Land Council that the special leave earlier granted should be revoked because the Minister had attempted to shift his ground by raising fresh arguments in the appeal[34];

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28 *Griffiths v Minister for Lands, Planning and Environment* (2008) 82 ALJR 899 at 919-920 [108]; 246 ALR 218 at 241; [2008] HCA 20; *R v Van der Peet* [1996] 2 SCR 507 at 536 [23] per Lamer CJ ("generous and liberal"), 592 [154] per L'Heureux-Dubé J ("generous, large and liberal").

29 *Griffiths* (2008) 82 ALJR 899 at 919 [107], 920 [110]; 246 ALR 218 at 241-242; *Northern Territory v Arnhem Land Aboriginal Land Trust* (2008) 82 ALJR 1099 at 1113-1114 [67]; *United States v Dion* 476 US 734 at 738-739 (1986); *Van der Peet* [1996] 2 SCR 507 at 652 [286] per McLachlin J.

30 (1992) 175 CLR 1.

31 (1996) 187 CLR 1.

32 See *Northern Territory v Arnhem Land Aboriginal Land Trust* (2008) 82 ALJR 1099 at 1114-1115 [70]-[72] (referring to the National Apology).

33 cf *Griffiths* (2008) 82 ALJR 899 at 919 [105]; 246 ALR 218 at 240; *Northern Territory v Arnhem Land Aboriginal Land Trust* (2008) 82 ALJR 1099 at 1114 [69].

34 Joint reasons at [66].

- The starting point for resolving the statutory controversy must, as always, be the applicable legislative text[35];

- That text requires, at a minimum, that the decision-maker must examine the critical phrase "not lawfully used". The decision-maker must do this within the larger statutory expression, namely "are not lawfully used or occupied"[36]. Moreover, that disqualifying phrase must, in turn, be read in the context of the other exceptions to the Crown lands of New South Wales for which a claim might be made under the Land Rights Act;

- The observations in this case, like the earlier observations in the decisions of the Court of Appeal, are necessarily addressed to the particular facts disclosed by the evidence and findings[37]. They will not exhaustively define the meaning of the expression "use or occupation" of land – least of all for the rather special context here in question[38]; and

- "Use or occupation" of land in the Land Rights Act encompasses notions of "utilisation, exploitation and employment of the land". However, that leaves to be decided the type, degree, duration, object and extent of the "utilisation, exploitation and employment of the land"[39].

23 *Protean "use" invokes special rule*: It is in this respect that the statutory words need to be understood in the special context of the Land Rights Act. That context helps to resolve the problem derived from the inherent ambiguity of the contested statutory expression when applied to the facts of the present case. The joint reasons correctly acknowledge that the word "use" is protean in its content[40]. Consequently, it cannot really be denied that the resulting statutory phrase, as a whole, is potentially ambiguous. This Court is thus justified in resorting to well-established interpretive tools to resolve the ambiguity.

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35 Joint reasons at [68].

36 Land Rights Act, s 36(1)(b). See joint reasons at [68].

37 Joint reasons at [69].

38 cf joint reasons at [69].

39 Joint reasons at [73].

40 Joint reasons at [69] citing (2007) 157 LGERA 18 at 25 [32] per Mason P.

The source of the statutory ambiguity

24 *Arguable "use" of the land*: In the factual context of this appeal, which substantially represented common ground, it is impossible to say that there is no ambiguity in the word "use" in relation to the subject land. Depending upon whether a "broad" or "narrow" approach to the word "use" was adopted, I could not deny that, upon one construction, the conduct of the governmental authority at the time when the claim upon the land was made might conceivably have amounted to a lawful "use" of the land[41]. Were that so, the land would have fallen within the statutory disqualification from a claim. To say that there was no ambiguity would effectively deny the arguability of the Minister's appeal. That would contradict my impression of the situation. It would also be rather unlikely, given that the Minister was granted special leave to appeal by Gummow and Heydon JJ inferentially because his submissions were reasonably arguable.

25 Disregarding the unpursued or abandoned steps taken earlier by officers of the Department of Lands in relation to the subject Crown land does not end the debate. A number of other preliminary steps were undoubtedly taken which, to a degree, constituted utilisation, exploitation and employment (and thus "use") of the land, viewing the word "use" in an abstract way. Such steps would arguably include:

- The decision, reduced in December 2004 to a written report with a recommendation, that the subject land be disposed of by sale. The resulting recovery would then be paid into the State Treasury for the general purposes of the State[42];

- The ensuing publication of an advertisement in the local newspaper indicating the departmental intention to revoke the reservation of the land from sale[43]; and

- Other activities, such as the initiation of an identification survey; the request to issue the certificate of title; the formal cancellation of the reservation of the land; the engagement of a real estate agent to effect a sale; the inspection of the property by the agent with recommendations anterior to sale; and the consideration of how the land might be physically prepared for sale[44].

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41 Under the Land Rights Act, s 36(1)(b).

42 Joint reasons at [53].

43 Joint reasons at [55].

44 Joint reasons at [55]-[58].

26 *Viewing the "use" in context*: In other contexts, and for different statutory purposes[45], the foregoing acts of dominion over the land might indeed constitute "use" of the land. The word "use" can cover a wide or narrow range of activities. In some contexts, an owner could undeniably assert that a power to sell and the preliminary steps then taken to ready the land for sale might constitute "use" of the land, at least for that limited and terminal purpose.

27 This is why it is essential to understand the contested phrase in the statutory context in which it appears in the Land Rights Act. It must not be considered in isolation, or disjoined, from that context with the important beneficial and remedial purposes of that Act.

28 What was the reason for excluding the three stated categories mentioned in s 36(1) of the Land Rights Act from "claimable Crown lands"[46]? In the context, the applicable reason was to define those categories of land which, alone of the remaining Crown lands in the State, would be placed beyond the land generally available for a claim under the Land Rights Act. Thus the beneficial and remedial character of the Land Rights Act encourages a narrow or strict interpretation of the exceptions. This feature of the exceptions led the Court of Appeal to introduce the explanation that the "lawful use or occupation" (in s 36(1)(b) of the Land Rights Act) must ordinarily be something "more than notional" so that the land is "actually used". In other words, the land must be used in fact and not merely intended to be used or used to a notional degree[47].

Resolving the ambiguity: upholding the statutory purpose

29 *Requirement of "actual use"*: The Court of Appeal introduced a requirement for "actual use" and use beyond a "merely notional degree" in

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45 Such as, for example, a statute providing for the payment of just terms for the acquisition of land used or occupied by an owner.

46 Section 36(1) of the Land Rights Act has been amended several times to provide further exceptions from the definition of "claimable Crown lands". Most importantly, s 36(1)(b1), as inserted by *Aboriginal Land Rights (Amendment) Act* 1986 (NSW), Sched 1, item 13, excepts "lands which, in the opinion of a Crown Lands Minister, are needed or are likely to be needed as residential lands". See also *Native Title (New South Wales) Act* 1994 (NSW), Sched 1, item 3, which inserted s 36(1)(d) and (e).

47 *Daruk Local Aboriginal Land Council v Minister Administering the Crown Lands Act* (1993) 30 NSWLR 140 at 164; *Minister Administering the Crown Lands Act v NSW Aboriginal Land Council* (1993) 31 NSWLR 106 at 121.

interpreting the words of the Land Rights Act[48]. This represented the correct approach. It construes the statutory expression "not lawfully used or occupied" in a way that furthers the beneficial and remedial purposes of the Land Rights Act. It does not frustrate the achievement of those purposes.

30 This approach addresses the physical use of the land rather than a purely notional, potential, contingent or future "use" or a "use" which has not yet been translated into any actual physical use. I therefore agree with Mason P in this analysis[49]. It is supported by the contextual and purposive construction of the Land Rights Act. Specifically, it is supported by the narrow interpretation of the exceptions in s 36(1) of that Act. Such a narrow interpretation is appropriate in interpreting exceptions to the grant of the beneficial and remedial rights expressed in such a legislative context.

31 In a series of earlier decisions, the Court of Appeal has held that mere proprietorship is insufficient to establish either "use" or "occupation" of the relevant land[50]. This is consistent with the principle of a beneficial and remedial interpretation of the Act. To be "used", the land must be "actually used" or "used in fact", not merely used in "a nominal sense" or to a "notional degree"[51]. A contemplated or intended use is not, therefore, a "use" within the meaning of s 36(1)(b)[52].

32 *Insufficiency of contingent "use"*: The fact that the "use" or "occupation" must be "actual" rather than "notional" is further supported by the proposition that, in our legal theory, the Crown is the "universal occupant" of land over which sovereignty is asserted[53]. As Priestley JA pointed out in *Daruk Local*

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48 (2007) 157 LGERA 18 at 25 [33].

49 (2007) 157 LGERA 18 at 25 [32]-[33].

50 *Minister Administering the Crown Lands (Consolidation) Act v Tweed Byron Local Aboriginal Land Council* (1992) 75 LGRA 133 at 140 per Clarke JA (with whom Samuels and Meagher JJA agreed); *Daruk* (1993) 30 NSWLR 140 at 163 per Priestley JA (with whom Cripps JA agreed, Mahoney JA dissenting).

51 *Daruk* (1993) 30 NSWLR 140 at 164 per Priestley JA; *Minister Administering the Crown Lands Act v NSW Aboriginal Land Council* (1993) 31 NSWLR 106 at 108 per Priestley JA, 119 per Sheller JA (with whom Clarke JA agreed).

52 *Minister Administering the Crown Lands Act v NSW Aboriginal Land Council* (1993) 31 NSWLR 106 at 121 per Sheller JA (Clarke JA agreeing).

53 *Attorney-General v Brown* (1847) 1 Legge 312 at 316; *Mabo v Queensland [No 2]* (1992) 175 CLR 1 at 33.

Aboriginal Land Council v Minister Administering the Crown Lands Act[54], such a notional or theoretical interpretation of "occupation" could not be accepted as applicable to s 36(1) of the Land Rights Act without effectively excluding *all* lands from "claimable Crown lands". This is a further indication that the exclusion envisaged by s 36(1)(b) of the Land Rights Act involves something more than notional, theoretical, potential or intended future use or occupation. This view is also reinforced by the purpose the phrase fulfils in the Act. That purpose is to make available a substantial pool of Crown land in the State which is actually unused and unoccupied at the time a claim is made. It is because that land is unused or unoccupied that it is subject to the possibility of a claim, the purpose of which is to redress and repair the acknowledged historical dispossession of land from the State's indigenous peoples.

33 Without an additional ingredient, *all* Crown land is contingently subject to sale, certainly to long-term plans for sale. If, however contingent, such plans, notions or ideas of sale of such land would remove the land from the pool of "claimable Crown lands", the ambit of available lands would be drastically reduced, certainly in potential. To exclude particular land from the potential of being claimed would merely require postulation by a relevant official of a possible future sale. This would amount to a disqualifying incident of "use" or possibly "occupation". That could not be what this beneficial and remedial legislation intended.

34 The foregoing conclusions oblige a court resolving an issue, such as that raised by this appeal, to look in practical terms at the land in question. Understood against the historical background and with a view to achieving the beneficial and remedial objectives of the Land Rights Act, the court must then consider whether, for these special statutory purposes, the land was "used or occupied". When that question is considered in relation to the identified land in Wagga Wagga, derelict as shown in the exhibited photographs, the approach taken and the response given by Mason P in the Court of Appeal was clearly open. Moreover, that response is the better approach to the contested phrase, read in the context of the Land Rights Act with its beneficial and remedial purposes.

35 *Application of meaning to the case*: According to the facts found by the primary judge, the land was vacant and unused in any actual sense of the word "use". It was in a serious state of disrepair and incapable of being rented. It was no longer used for any of the previous uses to which it had been put. It was surplus to the then current needs of any department or agency of the State of New South Wales. There clearly was no continuing, separate, actual "use" of land for State purposes, co-existing with a decision of the Minister, given substantive

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54 (1993) 30 NSWLR 140 at 160-162.

effect, to sell the land. It was instead "non-use" of the land with no present or actual intended "use" for State purposes. That "non-use" ultimately resulted in a decision to dispose of the land. "Use" was not resumed in any "actual" sense before the subject claim was made.

Conclusion and order

36 It follows that, without introducing the beneficial and remedial character of the Land Rights Act, the Minister's submissions before this Court were highly persuasive. Certainly, they were open to acceptance. When, however, this ingredient is added to the resolution of the contested issue in the appeal, it requires rejection of the Minister's argument.

37 If the Minister insists that "not lawfully used or occupied" has a different meaning to that preferred by the Court of Appeal in this case (and in earlier decisions), the Minister can introduce legislation to clarify the purpose of the Land Rights Act accordingly and reduce the "claimable Crown lands", as defined. The Minister would then have to accept both political and historical accountability for adopting such a course[55]. That course would significantly narrow the benefits available to Aboriginal claimants under the Land Rights Act. However, without a clearer expression of the exceptions, it is not an interpretation that this Court should adopt. It would not be consistent with this Court's repeated insistence upon the tripartite modern approach to interpretation of legislation, namely, interpretation by reference to text, context and purpose.

38 This is why I agree in the outcome reached in the joint reasons. The appeal from the orders of the Court of Appeal should be dismissed with costs.

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55 cf *Griffiths* (2008) 82 ALJR 899 at 919 [106]-[107]; 246 ALR 218 at 240-241; *Northern Territory v Arnhem Land Aboriginal Land Trust* (2008) 82 ALJR 1099 at 1114 [69]. See also *United States v Dion* 476 US 734 at 739 (1986).

39 HAYNE, HEYDON, CRENNAN AND KIEFEL JJ. On 23 May 2005, the respondent, the New South Wales Aboriginal Land Council ("the Land Council"), on behalf of the Wagga Wagga Local Aboriginal Land Council ("the Wagga Land Council"), made a claim under the *Aboriginal Land Rights Act* 1983 (NSW) ("the Land Rights Act") to some land at Wagga Wagga. The Minister for Lands refused the claim. The Minister concluded that "when the claim was made the land was not claimable Crown land" within the meaning of the Land Rights Act because "the land was lawfully used and occupied by the Department of Lands in preparing the land for sale".

40 Pursuant to s 36(6) of the Land Rights Act the Land Council appealed to the Land and Environment Court of New South Wales against the refusal of its claim. That Court (Biscoe J) dismissed[56] the appeal. The Land Council appealed to the Court of Appeal of the Supreme Court of New South Wales. That Court (Mason P, Giles and Tobias JJA) allowed[57] the Land Council's appeal and set aside the orders of the Land and Environment Court. The Court of Appeal made consequential orders declaring that the land claimed is claimable Crown land and ordering the Minister to transfer the land to the Wagga Land Council.

41 By special leave, the Minister now appeals to this Court. As in the courts below, the central issue in this Court is whether the land in question is claimable Crown land. That turns upon whether, when the claim was made, the land was "not lawfully used or occupied"[58] and more particularly upon whether, as the appellant submitted, the activities undertaken prior to its intended sale constituted a lawful use of the land. The appellant's submission should be rejected. At the time of the claim the land was "not lawfully used or occupied". The appeal should be dismissed with costs.

The Land Rights Act

42 The Land Rights Act constitutes[59] the Land Council as a body corporate and as originally enacted provided for Local and Regional Aboriginal Land

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56 *New South Wales Aboriginal Land Council v Minister Administering the Crown Lands Act* [2007] NSWLEC 158.

57 *NSW Aboriginal Land Council v Minister Administering Crown Lands Act* (2007) 157 LGERA 18.

58 *Aboriginal Land Rights Act* 1983 (NSW), s 36(1)(b).

59 As originally enacted s 22(1) constituted the Land Council. See now s 104(2).

Councils[60]. Part V of the Act (ss 28-34), as originally enacted, provided for payment from the Consolidated Fund in each year between 1984 and 1998, into a bank account to be maintained by the Land Council, of an amount equal to seven and a half percent of the amount paid as land tax in respect of the previous year. Part V further provided for the Land Council to disburse that money to Local and Regional Aboriginal Land Councils.

43 Part VI of the Land Rights Act as originally enacted dealt with land rights. Section 35 of the Act provided for the vesting of certain former trust lands in Aboriginal Land Councils and Div 2 of Pt VI (ss 36-37) dealt with the subject of claimable Crown lands. Section 36(1) defined "claimable Crown lands" as:

> "lands vested in Her Majesty that, when a claim is made for the lands under this Division—
>
> (a) are 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; and
>
> (c) are not needed, nor likely to be needed, for an essential public purpose".

By the time of the claim that gives rise to these proceedings that definition had been amended by adding three further paragraphs: one[61] excluding lands which, in the opinion of a Crown Lands Minister, are needed or likely to be needed as residential lands and two[62] excluding lands which are the subject of a claim under the *Native Title Act* 1993 (Cth) or a determination of native title under that Act. Nothing turns on those added provisions.

44 In argument, both in this Court and in the courts below, some emphasis was given to the proposition that the Land Rights Act is legislation intended for beneficial and remedial purposes. That this is so is evident both from extrinsic

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60 Part II (ss 5-13) dealt with Local Aboriginal Land Councils; Pt III (ss 14-21) dealt with Regional Aboriginal Land Councils.

61 s 36(1)(b1).

62 s 36(1)(d) and (e).

materials that preceded the enactment of the Land Rights Act, and from the text of the Act itself.

45 In 1980, a Select Committee of the Legislative Assembly of New South Wales ("the Keane Committee") published a report making "recommendations regarding land rights for New South Wales Aboriginal citizens"[63]. The Keane Committee recommended that claims to land be founded on any or all of four bases: needs, compensation, long association, and traditional rights. Following the presentation of the Report of the Keane Committee, a Bill for what was to become the Land Rights Act was introduced into the New South Wales Parliament in 1983. A Green Paper, published before the Bill was introduced, said[64] that "[w]hilst claimable Crown lands are very limited in comparison to the overall land stock of New South Wales, they will provide a compensatory resource for Aboriginal community groups".

46 The preamble to the Land Rights Act records that:

> "(1) Land in the State of New South Wales was traditionally owned and occupied by Aborigines:
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> (2) Land is of spiritual, social, cultural and economic importance to Aborigines:
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> (3) It is fitting to acknowledge the importance which land has for Aborigines and the need of Aborigines for land:
>
> (4) It is accepted that as a result of past Government decisions the amount of land set aside for Aborigines has been progressively reduced without compensation".

47 In the Court of Appeal, Mason P identified[65] the claims process which allows for Aboriginal Land Councils to claim limited categories of Crown lands as the "primary mechanism" for giving effect to the beneficial and remedial purposes of the Land Rights Act. It may readily be accepted that the claims

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63 New South Wales, Legislative Assembly, *First Report from the Select Committee of the Legislative Assembly upon Aborigines*, August 1980 at 19.

64 New South Wales, Minister for Aboriginal Affairs, *Green Paper on Aboriginal Land Rights in New South Wales*, December 1982 at 11.

65 (2007) 157 LGERA 18 at 24 [20].

process does give effect to those purposes. Whether, as the appellant submitted, it is better to see the provisions for annual payment of substantial sums of money to the Land Council in each year between 1984 and 1998 as a more important means of giving effect to those purposes is a question that need not be pursued.

48 It is not necessary to invoke some principle of "beneficial construction" to resolve the issue in this case. No question is presented in this matter which requires a choice to be made between competing constructions of s 36(1)(b), one described as "broad" and the other as "narrow". Rather, it is necessary to focus upon whether, as the appellant submitted, the activities that were undertaken by or on its behalf prior to the intended sale of the land constituted a lawful use of the land.

49 It is necessary to say something more about the land.

The land

50 The land is a corner allotment of about 815 square metres in the business district of Wagga Wagga. At the time of the claim a two storey brick building stood on the site. The land was fenced on three sides.

51 From 1958 until 1985 the land was reserved for "public buildings (motor registry)" and was used as a motor registry. The reservation for "public buildings (motor registry)" was revoked in September 1985 and replaced by a reservation for "public buildings (Government Supply Department Office and Workshop)". Between 1985 and 1998 the land was used by a succession of New South Wales government departments for storage.

52 In 2000, the New South Wales Department of Lands decided to refurbish the site for use as a laboratory. In May 2000, the Wagga Land Council claimed the land and, while that claim was considered, the proposal to refurbish the site for use as a laboratory was not implemented. The claim that was made in May 2000 was refused in June 2003. No appeal was brought from the refusal of that claim.

53 The proposal to use the land as a laboratory was finally abandoned in February 2004. Between about March and November 2004, officers of the Department of Lands made various investigations with a view to preparing a recommendation about the future use or disposal of the land. In December 2004, the officer of the Department who had the carriage of the matter prepared a report recommending that the powers under Pt 4 of the *Crown Lands Act* 1989 (NSW) (which include the power to sell Crown land) be exercised without first making an assessment of the land under Pt 3 of that Act. The report stated that the

"preferred use" of the land was disposal under the current zoning and that there was "no known reason for [the land] to be retained by the State of NSW and any future use [was] better managed by private interests after disposal". It was said that:

> "The financial return to government from the disposal of this property would provide Treasury with recurrent funds that can be allocated to priority areas of core of government services that will be in the best interests of the State."

The officer's recommendation was approved on 23 December 2004.

54 As the respondent correctly pointed out, acceptance of this recommendation did not irrevocably commit the Minister to sale of the land. Nonetheless, the decision to accept the recommendation to waive the requirement for land assessment under Pt 3 of the *Crown Lands Act* is properly identified as a decision to sell the land. Thereafter, several steps were taken towards selling the land.

Steps towards sale

55 On 1 February 2005, notice of intention to revoke the reservation of the land from sale was published in the Wagga Wagga *Daily Advertiser*. Later that month, several local real estate agents were invited to express interest in acting for the vendor on the sale of the land by public auction. In late March 2005, one of those agents was appointed to act for the vendor.

56 During April 2005, an identification survey of the land was made and the Land Titles Office was asked to issue a certificate of title. On 29 April 2005, the reservation of the land for "public buildings (Government Supply Department Office and Workshop)" which had been made in 1985 was cancelled by notice published in the *Government Gazette*.

57 In May 2005 (before the Land Council made its claim on 23 May 2005), the real estate agent was given the keys to the property. Later that month, but again before the claim, the Registrar-General issued a certificate of title; an auction date of 8 July 2005 was fixed; and a notice of intention to sell the land was prepared but not published.

58 When the claim was made, and for some time before that, the building on the land was in a state of disrepair. In early May 2005, the real estate agent retained to sell the land inspected the property and described it as "rather dirty and in need of a tidy up". The agent referred to some fallen tiles on a staircase as

"pos[ing] a potential risk to prospective purchasers" and noted that there were "a number of broken windows at the property".

59 When the claim was made, some office furniture was stored on the site. It was described[66] as "old, damaged, disused furniture from the time that the Department refurbished the building in 2000" and as "stored on two levels in the building". In this Court the appellant expressly disclaimed any argument that storing this furniture amounted to a use or an occupation of the building.

The decisions below

60 In the Land and Environment Court, Biscoe J concluded[67] that "the decision to sell the subject land and the steps taken in furtherance of that intention were an actual use of the land, notwithstanding that they were passive in the sense the land was not physically being used apart from storage of some furniture".

61 In the Court of Appeal, it is evident that the parties' arguments focused upon questions of use of the land and not upon occupation. All members of the Court of Appeal accepted the Land Council's argument that the land was not being used when the claim was made.

62 Much of the reasoning of the Court of Appeal was directed to earlier decisions of that Court concerning what amounts to a relevant use of land. In particular, by reference to earlier decisions of the Court of Appeal, Mason P concluded[68] that (a) the "protean word 'use' must be construed in its particular statutory context"[69]; (b) use "must be more than notional and be present use when the claim is made rather than contemplated or intended use"[70]; and (c) "[t]he word 'used' in s 36(1)(b) means 'actually used' in the sense of being used in fact

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66 [2007] NSWLEC 158 at [46].

67 [2007] NSWLEC 158 at [67].

68 (2007) 157 LGERA 18 at 25 [32]-[33].

69 *Daruk Local Aboriginal Land Council v Minister Administering the Crown Lands Act* (1993) 30 NSWLR 140 at 164; *Minister Administering the Crown Lands Act v NSW Aboriginal Land Council* ("*Nowra Brickworks [No 1]*") (1993) 31 NSWLR 106 at 121.

70 *Nowra Brickworks [No 1]* (1993) 31 NSWLR 106 at 121.

and to more than a merely notional degree"[71]. 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.

63 By contrast, Giles JA concluded[72] that action to sell land can be "part of the functioning of government in providing accommodation for those providing government services" and gave[73] as an example, "if ... the government department has outgrown the accommodation and there is sale of the land and purchase of other land with a prompt transition". Giles JA further concluded[74] that "[t]here can be use without physical use". But, like the other members of the Court, Giles JA concluded that the land in question was not being used when the claim was made.

64 The third member of the Court of Appeal, Tobias JA, was of opinion[75] that "Crown land does not necessarily become claimable whenever its sale is put in train" and that "[t]his would be so where ... it [the land] continues to be actually used and/or occupied until the date of completion of a contract for its sale". These circumstances were contrasted by Tobias JA with what he identified[76] as "[s]teps taken preparatory only to the sale of Crown land (including steps taken to implement a decision to sell) [which] whether regarded individually or cumulatively, are incapable of constituting a lawful user for the purposes of s 36(1)(b)" of the Land Rights Act.

The argument on appeal to this Court

65 In its Notice of Appeal, the appellant alleged that the Court of Appeal had erred "in finding that the activities undertaken by and on behalf of the appellant in respect of Crown land prior to its intended sale immediately before the making of a claim did not constitute a lawful use of the land within the meaning of

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71 *Daruk* (1993) 30 NSWLR 140 at 164; *Nowra Brickworks [No 1]* (1993) 31 NSWLR 106 at 121.

72 (2007) 157 LGERA 18 at 31-32 [70].

73 (2007) 157 LGERA 18 at 31 [65].

74 (2007) 157 LGERA 18 at 32 [70].

75 (2007) 157 LGERA 18 at 33 [80]; see also at 30 [58] per Mason P.

76 (2007) 157 LGERA 18 at 33 [80].

s 36(1)(b)" of the Land Rights Act. In the course of both written and oral argument, however, the appellant necessarily invited attention to the relevant statutory expression, "not lawfully used or occupied", as a whole.

66 The respondent submitted that, to the extent that the appellant directed attention to questions of occupation, the appellant put its case in a way that had not been advanced in the courts below. This, so the respondent submitted, should lead to a revocation of special leave because this Court would be called upon to decide questions about the meaning of "not lawfully ... occupied" without the benefit of any examination of those questions in the Court of Appeal. The respondent further submitted that for this Court to embark on such questions without them having been raised in the Court of Appeal would, in some unspecified sense, be "unfair" to the Court of Appeal. But the respondent did not submit that principles of the kind considered in cases like *Suttor v Gundowda Pty Ltd*[77], *Coulton v Holcombe*[78], or *Water Board v Moustakas*[79] were engaged. That is, the respondent did not submit that any issue about whether the land was occupied was an issue about which the respondent could have called, or would have wished to consider calling, evidence at trial. To the extent, then, that the appellant raised in this Court for the first time any question about whether the land was occupied, the point would be about the legal characterisation of the facts established in the courts below and that would not be a point which the appellant should necessarily be precluded from raising on appeal. And because the appellant's arguments should be rejected and the appeal dismissed, it will be neither necessary nor appropriate to consider separately whether, as the respondent submitted, special leave should be revoked.

67 But in the end, the appellant's arguments are not to be understood as seeking to make some separate point about whether the land was "lawfully ... occupied" when the Land Council made its claim. Rather, as in the courts below, the appellant's arguments were directed to denying that the land was "not lawfully used" at the relevant time, while acknowledging that the expression "not lawfully used" formed part of a larger statutory expression.

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77 (1950) 81 CLR 418 at 438; [1950] HCA 35.

78 (1986) 162 CLR 1 at 7-8; [1986] HCA 33.

79 (1988) 180 CLR 491 at 497-498; [1988] HCA 12. See also *O'Brien v Komesaroff* (1982) 150 CLR 310 at 319; [1982] HCA 33; *University of Wollongong v Metwally [No 2]* (1985) 59 ALJR 481 at 483; 60 ALR 68 at 71; [1985] HCA 28.

68 It is, however, desirable to say something further about the degree of attention given to the question of use of the land. As has so often been emphasised by this Court, the starting point in a case such as the present must be the relevant statutory text[80]. In both the Land and Environment Court and in the Court of Appeal it was, of course, necessary to consider what had been said by the Court of Appeal in its earlier decisions about s 36 of the Land Rights Act and about s 36(1)(b) in particular. Inevitably, what was said in those earlier decisions responded to the arguments advanced about the particular facts and circumstances of each case. And it is no doubt for that reason that the focus of the decisions in *Daruk Local Aboriginal Land Council v Minister Administering the Crown Lands Act*[81] and in *Minister Administering the Crown Lands Act v NSW Aboriginal Land Council*[82] was upon whether the land then in question was "not lawfully used". But it is important to recall that the question presented by s 36(1)(b) of the Land Rights Act is whether the lands in question "are not lawfully used or occupied".

69 No matter whether the question is framed in the statutory terms ("not lawfully used or occupied") or, as here, is framed more narrowly as one about use, attention must be given to identifying the acts, facts, matters and circumstances which are said to deprive the land of the characteristic of being "not lawfully used or occupied". Of course, it is necessary to measure those acts, facts, matters and circumstances against an understanding of what would constitute use or occupation of the land. But three points should be made. First, nothing that was said in the earlier decisions of the Court of Appeal, and nothing that is said in these reasons, should be understood as attempting some exhaustive definition of when land is not lawfully used or occupied or of what is relevant use or occupation that will take lands outside the definition of claimable Crown lands. Secondly, as Mason P rightly said[83], "use" is a protean word. Thirdly, recurring physical acts on the land, by which the land is made to serve some purpose[84], will usually constitute a use of the land. And a combination of *legal* possession, conduct amounting to *actual* possession, and some degree of

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80 See, for example, *Weiss v The Queen* (2005) 224 CLR 300; [2005] HCA 81.

81 (1993) 30 NSWLR 140.

82 (1993) 31 NSWLR 106.

83 (2007) 157 LGERA 18 at 25 [32].

84 cf *Council of the City of Newcastle v Royal Newcastle Hospital* ("the *City of Newcastle Case*") (1957) 96 CLR 493 at 508 per Kitto J; [1957] HCA 15.

permanence or continuity[85] will usually constitute occupation of the land. But while these propositions may sufficiently identify the most common cases where it can be said that there is use or occupation of the land, they are not propositions that chart the metes and bounds of those ideas. As the decision[86] in *Council of the City of Newcastle v Royal Newcastle Hospital* ("the *City of Newcastle Case*") shows, land adjoining hospital grounds and purposely kept in its natural state to provide clean air and quiet undeveloped surroundings, can be said to be "used or occupied by the hospital for the purposes thereof".

70 Hence the importance of directing attention to what are the acts, facts, matters and circumstances which are said to show that land does not meet the description of "not lawfully used or occupied". It is the specification of those acts, facts, matters and circumstances which will provide the greatest help in deciding whether land meets the relevant description. And in the present case, the appellant contended that it was the steps taken towards sale of the land that prevented characterisation of the land as "not lawfully used".

Not lawfully used?

71 It was not disputed that the land was not lawfully used or occupied for some time after it ceased to be occupied as a motor vehicles registry. The appellant submitted, however, that once the relevant officials decided that the land should be sold, began the administrative processes necessary to permit sale of the land, and took steps both within the public service and with external parties to implement the decision to sell the land, it was lawfully used.

72 This conclusion was said to follow from reading "lawfully used or occupied" as having a single meaning which is its ordinary meaning as a matter of English language. That ordinary English meaning was said to include the utilisation, exploitation and employment of the land for purposes for the benefit of the State. One form of relevant utilisation, exploitation and employment was identified as sale of the land.

73 It is not necessary to decide whether "lawfully used or occupied" has a single meaning or is better understood by separate consideration of the words "used" and "occupied". This is not a case in which some relevant aspect of the

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85 *City of Newcastle Case* (1957) 96 CLR 493 at 507 per Kitto J.

86 (1957) 96 CLR 493 and, on appeal to the Privy Council, (1959) 100 CLR 1; [1959] AC 248.

meaning of the word "used" is illuminated by the juxtaposed word "occupied". Whether there could be any such illumination in some other case need not be considered. It may be accepted that whether or not the expression is a compound expression having a single meaning, it is an expression that encompasses utilisation, exploitation and employment of the land.

74 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 let alone its lawful occupation. 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.

75 As Fullagar J correctly pointed out[87], in his dissenting opinion in the *City of Newcastle Case*, "[t]he root of the fallacy lies in the assumption that deriving an advantage from the ownership of land is the same thing as using the land". That is, while it is probably true to say that a person who uses land derives an advantage from it, the converse proposition, that deriving an advantage from ownership of the land is *using* the land, is false[88]. In particular, taking steps towards selling the land may be directed to the owner deriving the advantages of disposing of an asset and receiving the proceeds of sale. But identifying that the owner seeks to derive these advantages does not show that the land is being used. Rather, what are the acts, facts, matters and circumstances which are said to show that the land is being used?

76 In the present case, subject to the possible qualification required by reference to some transitory visits to the land, 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. The only possible qualification to that general proposition is that, in the present case, the land was surveyed and the agent appointed to sell the land had gone there and looked inside the building. But even if the agent did this more than once (and there is nothing to suggest that the agent had visited the land more than once) such transitory visits by surveyors and a real estate agent could not be said to amount to a use of the land. And apart from the survey, and

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87 (1957) 96 CLR 493 at 506.

88 *City of Newcastle Case* (1957) 96 CLR 493 at 506 per Fullagar J.

the agent inspecting the land, there was no evidence of *anything* else being done on the land in connection with the proposed sale or for any other purpose. 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. Those steps concerned the land in the sense that they were directed towards its sale. They were steps directed to deriving the advantages of disposing of the asset and receiving the proceeds of sale. They did not amount to a *use* of the land. The land was not being lawfully used when the respondent claimed it.

77 It is not necessary, in this case, to decide whether there are steps, taken on the land in preparation for its sale, which are steps of a kind that could constitute use or occupation of the land. It suffices to conclude that neither the decision to realise this land, nor the steps taken within the administration of government to achieve that end, which were all steps that occurred away from the land, constituted use of the land.

78 The appeal should be dismissed with costs.