

# HIGH COURT OF AUSTRALIA

GAGELER CJ,  
GORDON, EDELMAN, STEWARD AND JAGOT JJ

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LA PEROUSE LOCAL ABORIGINAL LAND  
COUNCIL & ANOR

APPELLANTS

AND

QUARRY STREET PTY LTD & ANOR

RESPONDENTS

*La Perouse Local Aboriginal Land Council v Quarry Street Pty Ltd*  
[2025] HCA 32  
*Date of Hearing: 13 March 2025*  
*Date of Judgment: 3 September 2025*  
S121/2024

## ORDER

1. *Appeal allowed.*
2. *Set aside the orders made by the Court of Appeal of the Supreme Court of New South Wales on 10 May 2024 and, in lieu thereof, order that:*
  - (a) *the appeal be dismissed; and*
  - (b) *the appellant pay the second and third respondents' costs of and incidental to the appeal.*
3. *The first respondent pay the appellants' costs of and incidental to the appeal.*

On appeal from the Supreme Court of New South Wales



## **Representation**

B W Walker SC with O R Jones for the appellants (instructed by Chalk & Behrendt, Lawyers & Consultants)

B K Lim with C J Beshara for the first respondent (instructed by Hall & Wilcox)

Z C Heger SC with O J Ronan for the second respondent (instructed by Crown Solicitor for NSW)

Notice: This copy of the Court's Reasons for Judgment is subject to formal revision prior to publication in the Commonwealth Law Reports.



## CATCHWORDS

### **La Perouse Local Aboriginal Land Council v Quarry Street Pty Ltd**

Aboriginal and Torres Strait Islander peoples – Land rights – Claimable Crown lands – Where land claimed under s 36(2) of *Aboriginal Land Rights Act 1983* (NSW) ("Act") subject to lease granted by Crown – Where lessee had not undertaken purposeful activity on land – Where "claimable Crown lands" in s 36(1) of Act means lands vested in Crown that are "not lawfully used" – Whether land "lawfully used" for purpose of s 36(1)(b) of Act merely because land subject to existing lease from Crown.

Words and phrases – "actual use", "claimable Crown lands", "constructive use", "Crown lands", "doctrine of concurrent leases", "estate or interest in land", "exploitation of rights to land", "land", "land claim", "land vested", "lands", "lands vested", "lawfully used or occupied", "lease", "occupation", "occupied", "physical area", "possession", "purposeful interaction", "remedial or beneficial legislation", "reversionary interest", "rights to land", "rights to the physical area", "used", "vested".

*Aboriginal Land Rights Act 1983* (NSW), Pt 2, ss 4(1), 36, Sch 4, cl 8.

*Conveyancing Act 1919* (NSW), ss 7(1), 117, 118, 119.

*Crown Land Management Act 2016* (NSW), ss 1.5(1), 1.7(a), 1.10, 1.12, 3.3, 3.13(1).

*Crown Lands Act 1989* (NSW), ss 3(1), 80(1), 87(1), Sch 7.

*Crown Lands Consolidation Act 1913* (NSW), s 5(1).

*Interpretation Act 1987* (NSW), ss 3(3), 5, 6, 8(c), 13, 68(3), Sch 4.

*Native Title Act 1993* (Cth), ss 10, 184, 186(1)(e), 223(1), 225, 253.

*Real Property Act 1900* (NSW), ss 3(1)(a), 13(2), 13D, 13J, 40(3), 42(1), 46C.



1 GAGELER CJ. The central question in this appeal from a decision of the Court of Appeal of the Supreme Court of New South Wales<sup>1</sup> concerns the scope and operation of s 36 of the *Aboriginal Land Rights Act 1983* (NSW) ("the ALR Act"). The purposes of the ALR Act are expressed to include "to provide land rights" for Aboriginal persons<sup>2</sup> and "to vest land" in Aboriginal Land Councils.<sup>3</sup>

2 Part 2 of the ALR Act is headed "Land rights". Division 2 of Pt 2 is headed "Claimable Crown lands". Within Div 2 of Pt 2, s 36 is headed "Claims to Crown lands". The section pursues those two purposes concurrently.

3 Section 36 permits an Aboriginal Land Council established under Pt 5 or Pt 7 of the ALR Act to make "a claim for land".<sup>4</sup> An Aboriginal Land Council can do so by lodging a written claim describing or specifying "the lands in respect of which it is made" with the Registrar appointed under Pt 9 of the ALR Act.<sup>5</sup> The section goes on to require the Registrar to refer such a claim<sup>6</sup> to the Minister or each Minister administering any provisions of the *Crown Lands Consolidation Act 1913* (NSW) ("the CLC Act") or the *Western Lands Act 1901* (NSW) ("the WL Act") under which "lands are able to be sold or leased" ("the Crown Lands Minister").<sup>7</sup>

4 Legislative developments since the enactment of the ALR Act have involved the repeal and substantial reenactment of the CLC Act and of the WL Act. Those legislative developments mean that the continuing references in s 36 of the ALR Act to the CLC Act and the WL Act need to be read in accordance with s 68(3) of the *Interpretation Act 1987* (NSW) ("the Interpretation Act"). The references in s 36 of the ALR Act to the CLC Act and the WL Act are accordingly to be taken to have referred in the period from 1990 to 2018 to the *Crown Lands Act 1989* (NSW) ("the CLA") and the WL Act and to have referred since 2018 compendiously to the *Crown Land Management Act 2016* (NSW) ("the CLM Act").

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1 *Quarry Street Pty Ltd v Minister Administering the Crown Land Management Act 2016* (2024) 114 NSWLR 534.

2 Section 3(a) of the ALR Act.

3 Section 3(c) of the ALR Act.

4 Section 36(2) and (3) of the ALR Act.

5 Section 36(4)(a) and (b) of the ALR Act.

6 Section 36(4)(c) of the ALR Act.

7 Section 36(1) (definition of "Crown Lands Minister") and (4)(c) of the ALR Act.

5 The consequence of the Registrar referring a claim made by an Aboriginal Land Council to the Crown Lands Minister is and has always been to require the Minister to make a binary decision under s 36(5) of the ALR Act. The Minister must grant the whole or a part of the claim if "satisfied" that "the whole of the lands claimed is claimable Crown lands" or "part only of the lands claimed is claimable Crown lands".<sup>8</sup> Conversely, the Minister must refuse the whole or a part of the claim if "satisfied" that "the whole of the lands claimed is not claimable Crown lands" or "part of the lands claimed is not claimable Crown lands".<sup>9</sup>

6 Where the Crown Lands Minister grants the whole or a part of a claim, upon being satisfied that the whole or relevant part of the lands claimed is claimable Crown lands, the Minister is required to make that grant by transferring the whole or relevant part of those lands to the claimant Aboriginal Land Council.<sup>10</sup> Except where the transfer is of lands within a category of claimable Crown lands which is subject to certain provisions formerly contained in the WL Act and now contained in the CLM Act, which are of no present relevance,<sup>11</sup> s 36(9) of the ALR Act requires that "any transfer of lands to an Aboriginal Land Council under [s 36] 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". If and to the extent the transfer would not otherwise be authorised by the CLC Act or the WL Act or an applicable successor Act "the transfer of the lands in accordance with [s 36] shall be deemed to have been authorised by whichever of those Acts the lands were subject to immediately before the transfer".<sup>12</sup>

7 The expression "claimable Crown lands" is defined in s 36(1) of the ALR Act to mean "lands vested in Her Majesty" (that is to say, lands vested in the Crown in right of New South Wales<sup>13</sup>) which meet specified conditions when a claim is made. The first of those conditions, specified in s 36(1)(a), is expressed to be that the lands "are able to be lawfully sold or leased, or are reserved or dedicated for any purpose, under the [CLC Act] or the [WL Act]". The second condition, specified in s 36(1)(b), is that the lands "are not lawfully used or occupied". Other conditions, specified in s 36(1)(b1) and (c) respectively, are that the lands "do not comprise lands" which, "in the opinion of a Crown Lands Minister, are needed or are likely to be needed as residential lands" and "are not needed, nor likely to be

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8 Section 36(5)(a) of the ALR Act.

9 Section 36(5)(b) of the ALR Act.

10 Section 36(5)(a) of the ALR Act.

11 Section 36(9A) of the ALR Act.

12 Section 36(13) of the ALR Act.

13 Section 13 of the Interpretation Act.

3.

needed, for an essential public purpose". The remaining conditions, specified in s 36(1)(d) and (e) respectively, are that the lands are not the subject of "an application for a determination of native title" or "an approved determination of native title ... (other than an approved determination that no native title exists in the lands)" under the *Native Title Act 1993* (Cth) ("the Native Title Act").

8 The short but important question at the centre of this appeal concerns the second of those specified conditions. The question is whether lands vested in the Crown in right of New South Wales are "used" within the meaning of s 36(1)(b) of the ALR Act merely by reason of those lands being the subject of an existing lease from the Crown. If so, then the prior grant by the Crown Lands Minister of a lease from the Crown under the CLC Act or the WL Act or successor legislation is enough to prevent lands vested in the Crown from being claimable Crown lands, irrespective of the purpose of the lease and irrespective of whether the purpose of the lease is being fulfilled.

9 The correct answer to that question is "no". Lands vested in the Crown are not "used" within the meaning of s 36(1)(b) of the ALR Act merely by reason of the existence of an unexpired lease of those lands from the Crown. That is because the "use" of "lands" vested in the Crown in right of New South Wales to which s 36(1)(b) of the ALR Act refers is limited to physical deployment of physical lands.

10 Adopting the analysis of the reasoning of the Court of Appeal undertaken by Jagot J, I move immediately to the concepts of "land", "lands" and "use" and to the relationship between those concepts in the context of the ALR Act.

### Land and lands

11 Like the word "property",<sup>14</sup> the word "land" can be employed in two quite distinct senses. One is to refer to a physical thing: in the case of "land", to refer to "the land itself" as a "physical"<sup>15</sup> or "topographical"<sup>16</sup> entity, comprising a "solid portion of the earth's surface"<sup>17</sup> or, more precisely, "the concrete physical mass, commencing at the surface of the earth and extending downwards to the centre of

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14 See *Yanner v Eaton* (1999) 201 CLR 351 at 365-366 [17]-[18] and 389 [86], quoting Hohfeld, "Some Fundamental Legal Conceptions as Applied in Judicial Reasoning" (1913) 23 *Yale Law Journal* 16 at 21-22.

15 *Jennings Construction Ltd v Burgundy Royale Investments Pty Ltd [No 2]* (1987) 162 CLR 153 at 162.

16 *North Sydney Council v Ligon 302 Pty Ltd* (1996) 185 CLR 470 at 481.

17 *Risk v Northern Territory* (2002) 210 CLR 392 at 407 [42]; *Northern Territory v Arnhem Land Aboriginal Land Trust* (2008) 236 CLR 24 at 64 [52].

the earth" defined at the surface of the earth to be within described or specified "metes and bounds".<sup>18</sup> The other is to refer to a legal or equitable right in relation to that physical thing: in the case of "land", to refer to a legal or equitable "estate" or "interest" in such a portion of the earth's surface.<sup>19</sup>

12 Like the different senses of the word "property", the different senses of the word "land" are often conflated in legal discourse. That is nothing new: "[t]he world of the common lawyer has always been a curious blend of the physical and the abstract, a commixture of the earthly pragmatic and the deeply conceptual".<sup>20</sup>

13 Blending of the physical and the abstract is to be seen in the generic definition of "land" in the Interpretation Act: "land includes messuages, tenements and hereditaments, corporeal and incorporeal, of any tenure or description, and whatever may be the estate or interest therein".<sup>21</sup> The generic definition is of long standing and is widespread, having been derived, albeit only in part, from Lord Brougham's *An Act for shortening the Language used in Acts of Parliament 1850* (UK),<sup>22</sup> having first appeared in *An Act for shortening Acts of the Legislative Council 1852* (NSW) ("the New South Wales Acts Shortening Act"),<sup>23</sup> having been reenacted in the *Interpretation Act 1897* (NSW),<sup>24</sup> and having been replicated in

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18 *The Commonwealth v New South Wales* (1923) 33 CLR 1 at 33, 37. See also *Queensland v Congoo* (2015) 256 CLR 239 at 253 [6]; Edgeworth, *Butt's Land Law*, 7th ed (2017) at 42.

19 Gray and Gray, "The Idea of Property in Land", in Bright and Dewar (eds), *Land Law: Themes and Perspectives* (1998) 15 at 27.

20 Gray and Gray, *Elements of Land Law*, 5th ed (2009) at 6 [1.1.10]. See also Whitman, *From Masters of Slaves to Lords of Lands: The Transformation of Ownership in the Western World* (2025) at 254-255.

21 Schedule 4 (definition of "land") to the Interpretation Act.

22 Section 4 of 13 & 14 Vict c 21: "the Word 'Land' shall include Messuages, Tenements, and Hereditaments, Houses and Buildings, of any Tenure, unless where there are Words to exclude Houses and Buildings, or to restrict the Meaning to Tenements of some particular Tenure". Compare *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* (2009) 239 CLR 27 at 32 [7].

23 Section 6 of 16 Vict No 1.

24 Section 21(e).

the *Acts Interpretation Act 1901* (Cth) ("the Commonwealth Acts Interpretation Act")<sup>25</sup> and in the interpretation legislation of other States and Territories.<sup>26</sup>

14 The generic definition of "land", now in the Interpretation Act, applies to the word "land" as used in that or another Act of the New South Wales Parliament "except in so far as the contrary intention appears" in that Act or the other Act.<sup>27</sup> The definition needs to be read in conjunction with the further generic definition of "estate", which likewise first appeared in the New South Wales Acts Shortening Act<sup>28</sup> and which the Interpretation Act likewise applies to the word "estate" as used in that or another Act of the New South Wales Parliament except in so far as the contrary intention appears. The generic definition is that "estate includes interest, charge, right, title, claim, demand, lien and encumbrance, whether at law or in equity".<sup>29</sup>

15 Expressed as it is to be no more than inclusive, the generic definition of "land" implicitly treats "the physical substance" as "the natural and primary meaning of the word" and operates as "merely extending" that natural and primary meaning.<sup>30</sup> The references to messuages (houses together with their curtilages<sup>31</sup>) and corporeal hereditaments ("substantial and permanent objects"<sup>32</sup>) are references to physical characteristics of the physical land. The reference to incorporeal hereditaments ("creatures of the mind" which "exist only in contemplation" examples of which are easements and profits à prendre<sup>33</sup>) is a reference to legal or equitable rights in relation to the same physical land, as are the references to any

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25 Section 2B.

26 See Dictionary (definition of "land") to the *Legislation Act 2001* (ACT); s 17 (definition of "land") of the *Interpretation Act 1978* (NT); Sch 1 (definition of "land") to the *Acts Interpretation Act 1954* (Qld).

27 Sections 3(3) and 5(2) of the Interpretation Act.

28 Section 6 of 16 Vict No 1.

29 Schedule 4 (definition of "estate") to the Interpretation Act.

30 *The Commonwealth v New South Wales* (1923) 33 CLR 1 at 49-50.

31 *Re Lehrer and the Real Property Act 1900-1956* [1961] SR (NSW) 365 at 370.

32 Gray and Gray, *Elements of Land Law*, 5th ed (2009) at 13 [1.2.11], quoting Blackstone, *Commentaries on the Laws of England* (1766), bk 2, ch 2 at 17.

33 Gray and Gray, *Elements of Land Law*, 5th ed (2009) at 13 [1.2.12], quoting Blackstone, *Commentaries on the Laws of England* (1766), bk 2, ch 2 at 17. See also *Re Lehrer and the Real Property Act 1900-1956* [1961] SR (NSW) 365 at 370-371.

tenure and to any estate or interest in the land. The reference to incorporeal hereditaments therefore imports into the definition "every interest which in law is, or savours of, realty".<sup>34</sup> The reference to tenements is more obscure, the term originally and possibly still referring only to types of buildings<sup>35</sup> but having at one stage been said "in its original, proper and legal sense" to signify "everything that may be holden, provided it be of a permanent nature; whether it be of a substantial and sensible or of an unsubstantial ideal kind".<sup>36</sup>

16 The generic definition of "land" is displaced in the context of the entirety of the ALR Act by the contrary intention which appears from the presence of the more specific definition of "land" in s 4(1) of the ALR Act. Read with the chapeau to s 4(1), the more specific definition is as follows: "In this Act, except in so far as the context or subject-matter otherwise indicates or requires: ... land includes any estate or interest in land, whether legal or equitable".

17 The more specific definition of "land" in s 4(1) of the ALR Act resembles the generic definition in the Interpretation Act in implicitly taking as its starting point that the natural and primary meaning of a reference to "land" in a provision of the ALR Act is limited to physical land. Where it applies, the definition extends such a reference to "land" in a provision of the ALR Act beyond physical land to refer also to a legal or equitable "estate" or "interest" in land, its employment of the word "estate" in that context needing further to be understood in light of the generic definition of that word in the Interpretation Act as encompassing "interest, charge, right, title, claim, demand, lien and encumbrance". But the terms in which the definition of "land" in s 4(1) is introduced make clear that the extended meaning has no application to a reference to "land" in a provision of the ALR Act where the context or subject-matter of the provision indicates that the reference does not extend beyond the natural and primary meaning of "land" as a physical entity.

18 There are numerous references to "land" in provisions of the ALR Act in respect of which the extended meaning supplied by the definition in s 4(1) is readily applicable. Most of those provisions are within Divs 4, 4A and 5 of Pt 2. The subject-matter of Div 4 of Pt 2, as indicated by the heading to that division, is "Land dealings by Aboriginal Land Councils". Regulating that subject-matter,

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34 *Re Lehrer and the Real Property Act 1900-1956* [1961] SR (NSW) 365 at 370; *Risk v Northern Territory* (2002) 210 CLR 392 at 418 [82].

35 See also *Jennings Construction Ltd v Burgundy Royale Investments Pty Ltd* [No 2] (1987) 162 CLR 153 at 163, querying whether a lease is a tenement.

36 *Re Lehrer and the Real Property Act 1900-1956* [1961] SR (NSW) 365 at 370, referencing *Beauchamp v Winn* (1873) LR 6 HL 223 at 241-242 quoting Blackstone, *Commentaries on the Laws of England* (1766), bk 2, ch 2 at 17.

Div 4 refers throughout to "land" and to "dealings" with "land" in contexts which readily bear the extended meaning in s 4(1).<sup>37</sup> Divisions 4A and 5 also contain provisions referring to "land" or to "dealings" with "land" in contexts which bear the extended meaning.<sup>38</sup> So much is confirmed in relation to the provisions of Divs 4 and 4A by a note to the definition of the expression "deal with land" for the purpose of Divs 4 and 4A which draws attention to the definition of "land" in s 4(1) and repeats the terms of that definition.<sup>39</sup> Other references to "land" to which the meaning as extended by the definition in s 4(1) can be seen to be applicable are within Pts 5, 7 and 11 in provisions concerning the powers and functions of Aboriginal Land Councils and administrators.<sup>40</sup>

19 In contrast to those other provisions, s 36 of the ALR Act contains numerous indications that its frequent references to "lands" and occasional references to "land" do not extend beyond land as a physical entity and therefore do not attract the application of the extended meaning in s 4(1). The strongest indication inheres in the subject-matter of s 36 which, adopting the description in the heading to the section, is "claims to Crown lands": "claimable Crown lands" being a category of "lands vested" in the Crown in right of New South Wales which the Crown Lands Minister is obliged by the section to grant, on application, to a claimant Aboriginal Land Council by transferring those lands "for an estate in fee simple".

20 To begin with, the word employed in the expression "claimable Crown lands" in s 36 of the ALR Act, and in the definition of that expression in s 36(1) as "lands vested" in the Crown in right of New South Wales meeting specified conditions, is not "land" but "lands". In many legislative contexts, reference to a word in the plural form will include reference to the word in the singular form.<sup>41</sup> In this context, however, the legislative choice to employ the plural form has a significance beyond the semantic. The significance lies in the purposeful consistency at the time of enactment of the ALR Act of the choice of the expression "claimable Crown lands" and of the definition of that expression as a category of "lands vested" in the Crown in right of New South Wales, with the standard expression of "Crown lands" and the standard definition of that expression as

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37 Sections 40-42P of the ALR Act.

38 Sections 42R(1) and (2), 43(1) and 44A of the ALR Act.

39 Section 40(1) (definition of "deal with land") of the ALR Act.

40 Sections 52C(5) and (6), 116(1)(c) and 230(1) of the ALR Act.

41 Sections 5(1) and (2) and 8(c) of the Interpretation Act.

"lands vested" in the Crown in right of New South Wales which then appeared in both the CLC Act<sup>42</sup> and the WL Act.<sup>43</sup>

21 That standard expression of "Crown lands", defined as "lands vested" in the Crown in right of New South Wales, can be traced to the expressions and definitions first adopted by the Parliament of New South Wales in the *Crown Lands Alienation Act 1861* (NSW)<sup>44</sup> and the *Crown Lands Occupation Act 1861* (NSW).<sup>45</sup> The expression "Crown Lands" had there been adopted as a different way of referring to "Waste Lands of the Crown", which had been defined in similar terms in the *Australian Colonies Waste Lands Act 1842* (Imp)<sup>46</sup> and the *Australian Colonies Waste Lands Amendment Act 1846* (Imp)<sup>47</sup> and which had been understood to refer in that context to "the mass of general undisposed of land in the Colony".<sup>48</sup>

22 Before the enactment of the ALR Act, it had been observed that "[t]he underlying object of the Crown lands legislation from 1861 onwards was to control the Crown prerogative of disposing of the waste lands of the Colony at will and to provide the subjects of the Crown with a statutory right, upon the performance of conditions, to have a grant of land from the Crown".<sup>49</sup> Consistently with that observation, the word "vested" in the reference to "lands vested" in the Crown in right of New South Wales in the standard definition of "Crown lands" had been held to have a "legal meaning" not confined to "vested in possession" such as to include land the subject of a perpetual lease in respect of which the Crown was still the legal owner of the reversion.<sup>50</sup> That holding is consistent with the "lands"

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42 Section 5(1) (definition of "Crown Lands") of the CLC Act.

43 Section 3(1) of the WL Act as at 1983.

44 Section 1 (definition of "Crown Lands") of 25 Vict No 1.

45 Section 1 (definition of "Crown Lands") of 25 Vict No 2.

46 Section 23 of 5 & 6 Vict c 36.

47 Section 9 of 9 & 10 Vict c 104. See *Wilson v Anderson* (2002) 213 CLR 401 at 436 [66]-[67]; *New South Wales Aboriginal Land Council v Minister Administering the Crown Lands Act* (2016) 260 CLR 232 at 274-280 [104]-[120].

48 *Williams v Attorney-General for New South Wales* (1913) 16 CLR 404 at 441.

49 *Walsh v Minister for Lands (NSW)* (1960) 103 CLR 240 at 254.

50 *Hawkins v Minister for Lands (NSW)* (1949) 78 CLR 479 at 492. See also *Jennings Construction Ltd v Burgundy Royale Investments Pty Ltd [No 2]* (1987) 162 CLR 153 at 161.

so "vested" in the Crown – that is to say, the subject-matter in respect of which the Crown has an existing legal interest – being physical land.<sup>51</sup> What is more, the underlying object to which both the CLC Act and the WL Act continued to be directed made it beyond question that the reference to "lands vested" in the Crown in right of New South Wales in the standard definition of "Crown lands" in the CLC Act and the WL Act, as in all predecessor legislation, was to physical land located in New South Wales in respect of which the Crown held "radical title" from which radical title estates and interests were able to be "carved out"<sup>52</sup> by Crown grants made under the authority of those Acts or other legislation.

23        Shortly before the enactment of the ALR Act, the *Real Property (Crown Land Titles) Amendment Act 1980* (NSW) inserted a new Pt III into the *Real Property Act 1900* (NSW) ("the Real Property Act"). Part III of the Real Property Act provided and continues to provide for the Registrar-General to "bring under" the provisions of that Act any "land"<sup>53</sup> that was, was in the course of being or was capable of being "sold, leased, dedicated, reserved or otherwise disposed of or dealt with ... by or on behalf of the Crown" under any of a number of specified Acts, which included the CLC Act.<sup>54</sup> The Registrar-General was and remains empowered to do so by creating a folio in the Land Titles Register recording "The State of New South Wales" as the proprietor of the land<sup>55</sup> in which event "the estate to which that recording relates is an estate in fee simple".<sup>56</sup> The effect of registration was and is to make the State of New South Wales the holder of the registered estate in fee simple.<sup>57</sup> The relevant emanation of the State of New South Wales for the holding of the registered estate in fee simple, subject to applicable legislative provision to the contrary, was and remains the Crown in right of New South Wales.<sup>58</sup>

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51    Compare *Coverdale v Charlton* (1878) 4 QBD 104 at 120.

52    *Wik Peoples v Queensland* (1996) 187 CLR 1 at 91-92; *Newcrest Mining (WA) Ltd v The Commonwealth* (1997) 190 CLR 513 at 635.

53    Section 3(1)(a) (definition of "Land") of the Real Property Act.

54    Section 13(2) of the Real Property Act.

55    Section 13D of the Real Property Act.

56    Section 13J of the Real Property Act.

57    Section 42(1) of the Real Property Act.

58    Compare *Hocking v Director-General of the National Archives of Australia* (2020) 271 CLR 1 at 40-41 [75].

24 Plainly enough, the same concept of "Crown lands" as "lands vested" in the Crown in right of New South Wales as was manifested in the CLC Act and the WL Act at the time of enactment of the ALR Act was carried over into the definition of "claimable Crown lands" in s 36(1) of the ALR Act. The "Crown lands" rendered claimable through the application of the definition in s 36(1) were to be a subset of the "Crown lands" referred to in the CLC Act and the WL Act: physical land located in New South Wales in respect of which the Crown held radical title and in respect of any portion of which the State of New South Wales might or might not be the holder of an estate in fee simple depending on whether the Registrar-General had brought that portion under the Real Property Act.

25 The scheme of s 36 of the ALR Act was to require the transfer to an Aboriginal Land Council, from the totality of the physical land located in New South Wales from time to time as would continue to comprise "Crown lands", such of that physical land as the Aboriginal Land Council might claim and as the Crown Lands Minister might be satisfied met each of the conditions necessary to constitute claimable Crown lands at the time of claim. The transfer was to be "for an estate in fee simple", necessarily involving the carving out of an estate in fee simple from the radical title by way of the grant itself if an estate in fee simple had not already been created by registration under the Real Property Act.

26 The definition of "land" in s 4(1) of the ALR Act was no more applicable to the definition of "claimable Crown lands" in s 36(1) of the ALR Act than was the generic definition of "land" in the Interpretation Act applicable to the standard definitions of "Crown lands" in the CLC Act and the WL Act for the simple reason that the "lands" in each case were limited to "lands" vested in the Crown in right of New South Wales in respect of which the Crown held either the radical title or through registration an estate in fee simple.

27 Furthermore, the end point of s 36 of the ALR Act being that "lands" which the Crown Lands Minister is satisfied are claimable Crown lands are transferred to the claimant Aboriginal Land Council for an estate in fee simple, the transfer of lands for an estate in fee simple is wholly inconsistent with the "lands" claimed and so transferred being understood in accordance with the definition of "land" in s 4(1) of the ALR Act so as to include "*any* estate or interest in land, whether legal or equitable" (emphasis added). An estate in fee simple is "the most extensive in quantum, and the most absolute in respect to the rights which it confers, of all estates known to the law", conferring "the lawful right to exercise over, upon, and in respect to, the land, every act of ownership which can enter into the

imagination"<sup>59</sup> and being "for almost all practical purposes, the equivalent of full ownership of the land".<sup>60</sup>

28 Section 36 of the ALR Act could not operate in accordance with its terms to require a transfer of "claimable Crown lands" for an estate in fee simple were the plural "lands" to be read to include the singular "land" and interpreted in accordance with s 4(1) of the ALR Act to include any legal or equitable "estate or interest" in land because a legal or equitable estate or interest in land falling short of an estate in fee simple would be incapable of sustaining a transfer for an estate in fee simple. No transfer from the Crown for an estate in fee simple could be possible, for example, were the Crown merely the lessee of a leasehold estate or the holder of an easement or a profit à prendre. Nor would such a transfer be possible if the Crown merely held an "estate" understood according to the extended meaning of that word in the Interpretation Act to include any "interest, charge, right, title, claim, demand, lien [or] encumbrance". The lesser cannot include the greater.

29 Like the generic definition of "land" in the Interpretation Act, the specific definition of "land" in s 4(1) of the ALR Act can therefore have no application to extend the meaning of the word "lands" in s 36 of the ALR Act. The words "lands" and "land" are employed in s 36 of the ALR Act according to their natural and primary meaning to refer only to physical land.

30 The same conclusion can be couched in language drawn from that of Gummow J in *Risk v Northern Territory*,<sup>61</sup> in denying the relevance of the generic definition of "land" in the Commonwealth Acts Interpretation Act to the resolution of the issue in that case concerning the territorial reach of the word "land" in the expressions "Crown land" and "unalienated Crown land" in the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth). The conclusion is that the concern of s 36 of the ALR Act in referring to "lands" and "land" in the context of "claimable Crown lands" is not with the identification of "particular interests in realty" but instead with the identification of "a portion of the surface of the earth".

31 The correctness of the conclusion that the "lands" vested in the Crown in right of New South Wales to which the definition of "claimable Crown lands" in s 36(1) refers are confined to physical land is confirmed by the language and, even more so, the substance of the conditions specified in s 36(1)(d) and (e) that those lands "do not comprise lands" that are the subject of an application for a

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59 *The Commonwealth v New South Wales* (1923) 33 CLR 1 at 42.

60 *Fejo v Northern Territory* (1998) 195 CLR 96 at 126 [43], quoting *Nullagine Investments Pty Ltd v Western Australian Club Inc* (1993) 177 CLR 635 at 656.

61 (2002) 210 CLR 392 at 418 [82].

determination of native title that has been registered under the Native Title Act or of an approved determination that native title exists under the Native Title Act. An application for a determination of native title that has been registered under the Native Title Act involves an assertion that a person or persons "hold native title in relation to a specified area of land or waters"<sup>62</sup> the registered particulars of which must include "the area of land or waters covered by the claim".<sup>63</sup> Correspondingly, an approved determination that native title exists under the Native Title Act involves a determination that "native title exists in relation to a particular area ... of land or waters".<sup>64</sup> The definition of "land" for the purposes of the Native Title Act is expressed in terms which make clear that it is concerned only with physical land.<sup>65</sup> That is consistent with the definition of "native title" for the purposes of the Native Title Act, which relevantly refers to "the communal, group or individual rights and interests of Aboriginal peoples ... in relation to land or waters", where "the rights and interests are possessed under the traditional laws acknowledged, and the traditional customs observed, by the Aboriginal peoples" and "the Aboriginal peoples ..., by those laws and customs, have a connection with the land or waters", and where "the rights and interests are recognised by the common law of Australia".<sup>66</sup> Indeed, it would be a nonsense for the concept of native title as first recognised by the common law of Australia and as "recognised, and protected, in accordance with" the Native Title Act<sup>67</sup> to be sought to be applied to anything other than physical land or waters. Not being "an institution of the common law" but having its origin in and being given its content "by the traditional laws acknowledged by and the traditional customs observed by the [I]ndigenous inhabitants of a territory",<sup>68</sup> native title is a concept that is wholly incapable of meaningful application to a legal or equitable estate or interest in land because a legal or equitable estate or interest in land is the abstract creation of a different system of law.

32 For completeness, it needs to be explained how continuing to construe the references to "lands" and "land" in s 36 of the ALR Act according to their natural and primary meaning to refer only to physical land has been and remains consistent

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62 Section 184 of the Native Title Act.

63 Section 186(1)(e) of the Native Title Act.

64 Section 225 of the Native Title Act.

65 Section 253 of the Native Title Act.

66 Section 223(1) of the Native Title Act.

67 Section 10 of the Native Title Act.

68 *Mabo v Queensland [No 2]* (1992) 175 CLR 1 at 58-59; *The Commonwealth v Yunupingu* (2025) 99 ALJR 519 at 539 [58]-[59]; 421 ALR 604 at 621.

with reading references in that section to the CLC Act and the WL Act, in accordance with s 68(3) of the Interpretation Act, to have referred, in the period from 1990 to 2018, to the CLA and the WL Act and to have referred since 2018 compendiously to the CLM Act.

33 Departing from the nomenclature of the CLC Act, the CLA referred to "Crown land" instead of "Crown lands" but defined "Crown land" in relevantly identical terms to the definition of "Crown lands" in the CLC Act as "land that is vested in the Crown".<sup>69</sup>

34 Upon the commencement of the CLM Act, "land" that had been "Crown land" under the CLA became "Crown land" under the CLM Act<sup>70</sup> and thereby became "vested in the Crown ... as an estate in fee simple"<sup>71</sup> irrespective of registration under the Real Property Act.<sup>72</sup> As to the meaning of "land", the CLM Act contains the general definition that "[i]n this Act ... land includes any waters on or under the surface of the land",<sup>73</sup> making clear that "land" is confined to its natural and primary meaning of physical land.

35 The result is that, at the time of the enactment of the ALR Act and at all times since, the reference to "lands" in the definition of "claimable Crown lands" in s 36(1) of the ALR Act has been confined to the natural and primary meaning of "land" so as to refer only to physical land. The reference has not been extended through application of the definition of "land" in s 4(1) of the ALR Act to include any legal or equitable estate or interest in land. The view that "lands" in s 36(1) is extended by the definition of "land" in s 4(1) to include a legal or equitable estate or interest in land, adopted in the Court of Appeal and defended by the respondents in argument on the appeal to this Court, is wrong.

## Use

36 Once acknowledged that the word "lands" in the definition of "claimable Crown lands" in s 36(1) and throughout s 36 of the ALR Act is and always has been confined to physical land, it cannot seriously be questioned that the words "used" and "occupied" in the reference in s 36(1)(b) to lands "not lawfully used or occupied" are and always have been confined to physical use or occupation. The argument of the respondents that, although "occupied" in s 36(1)(b) can be

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69 Section 3(1) of the CLA.

70 Section 1.7(a) of the CLM Act.

71 Section 1.10(1) and (2) of the CLM Act.

72 Section 1.12 of the CLM Act.

73 Section 1.5(1) (definition of "land") of the CLM Act.

confined to physical occupation of the physical land, "used" in s 36(1)(b) can be extended to legal utilisation of a legal or equitable estate or interest only needs to be stated to be recognised as unsustainable.

37 There is no reason to read "used" in s 36(1)(b) of the ALR Act differently from the same word appearing in the reference to "land which is vested in the Crown ... and is used for a public reserve",<sup>74</sup> which had been interpreted in *Randwick Corporation v Rutledge*<sup>75</sup> more than two decades before the enactment of the ALR Act to refer to "the actual use to which the land is put by the persons who in law control it for the time being".<sup>76</sup>

38 To attribute such a meaning to "used" in s 36(1)(b) of the ALR Act conforms with the understanding of that word in s 36(1)(b) of the ALR Act expressly adopted by the Court of Appeal in each of *Daruk Local Aboriginal Land Council v Minister Administering the Crown Lands Act* ("Daruk"),<sup>77</sup> *Minister Administering the Crown Lands Act v New South Wales Aboriginal Land Council* ("the First Nowra Brickworks Claim Case")<sup>78</sup> and *Minister Administering the Crown Lands Act v La Perouse Local Aboriginal Land Council* ("La Perouse").<sup>79</sup> It is also consistent with the meaning implicitly attributed to that word by this Court in both *Minister Administering the Crown Lands Act v New South Wales Aboriginal Land Council* ("the Wagga Wagga Motor Registry Claim Case")<sup>80</sup> and *New South Wales Aboriginal Land Council v Minister Administering the Crown Lands Act* ("the Berrima Gaol Claim Case").<sup>81</sup>

39 Just as "occupied" was explained in *Daruk* and confirmed in *La Perouse* to mean "'actually occupied' in the sense of being occupied in fact and to more than a notional degree", in respect of which "[p]hysical acts of occupation, the exercise

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74 Section 132(1)(c) of the *Local Government Act 1919* (NSW).

75 (1959) 102 CLR 54.

76 (1959) 102 CLR 54 at 88.

77 (1993) 30 NSWLR 140.

78 (1993) 31 NSWLR 106.

79 (2012) 193 LGERA 276.

80 (2008) 237 CLR 285.

81 (2016) 260 CLR 232.

of control, maintaining of lands are all factors which are relevant",<sup>82</sup> so "used" was explained in *Daruk* to mean "'actually used' in the sense of being used in fact and to more than a merely notional degree".<sup>83</sup> Neither the *Wagga Wagga Motor Registry Claim Case* nor the *Berrima Gaol Claim Case* involved any departure from that conception of "use" as substantial physical use.

40 The *Wagga Wagga Motor Registry Claim Case* involved consideration and rejection of an argument that lands were "used" by reason either of a decision having been made to sell the lands or of steps having been taken to achieve that end. The plurality adopted the language of Fullagar J in *Council of the City of Newcastle v Royal Newcastle Hospital* ("*Royal Newcastle Hospital*")<sup>84</sup> in highlighting the fallacy of assuming that "deriving an advantage from the ownership of land is the same thing as using the land".<sup>85</sup>

41 The *Berrima Gaol Claim Case* did not require consideration of whether lands were in any way "used" within the meaning of the ALR Act. Rather, to the extent now relevant, the outcome in that case turned on the majority's consideration and rejection of the proposition that lands which had been the subject of continuous physical possession could be characterised as lands which were not "occupied". Writing separately as a member of the majority in that case, I noted that the explanations in *Daruk* and the *First Nowra Brickworks Claim Case* conformed to the distinction between the overlapping concepts of "use" and "occupation" spelt out by Kitto J in *Royal Newcastle Hospital*, the essential distinction being to the effect that the concept of "occupation" is that of "conduct amounting to actual possession, and some degree of permanence" whereas the concept of "use" is that of "physical acts by which the land is made to serve some purpose".<sup>86</sup> That being so, as the ultimate outcome in *Royal Newcastle Hospital* itself illustrates, physical acts by which the land is made to serve a particular purpose might well be passive.<sup>87</sup>

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82 (1993) 30 NSWLR 140 at 162-163. See (2012) 193 LGERA 276 at 285-287 [41]-[47].

83 (1993) 30 NSWLR 140 at 164.

84 (1957) 96 CLR 493 at 506.

85 (2008) 237 CLR 285 at 307 [75].

86 (2016) 260 CLR 232 at 269-270 [85]-[87], quoting (1957) 96 CLR 493 at 507-508.

87 See *Council of the City of Newcastle v Royal Newcastle Hospital* (1959) 100 CLR 1 at 3-4; [1959] AC 248 at 255.

42           Within the meaning of s 36(1)(b) of the ALR Act, and conformably with the distinction so recognised, physical "lands" are accordingly "used" only if and to the extent those lands are physically deployed.

**Disposition**

43           I agree with the orders proposed by Jagot J. The effect of those orders is to restore the first instance judgment of Preston CJ in the Land and Environment Court of New South Wales.<sup>88</sup>

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**88**   *Quarry Street Pty Ltd v Minister Administering the Crown Land Management Act 2016* [2023] NSWLEC 62.

44 GORDON AND STEWARD JJ. The present appeal concerns part of a land claim lodged on 19 December 2016 under s 36 of the *Aboriginal Land Rights Act 1983* (NSW) ("the ALR Act") by the second appellant, the New South Wales Aboriginal Land Council ("the NSW ALC"), in respect of the "Paddington Bowling Club", being Lot 5 of Deposited Plan 1156846 in the State of New South Wales ("the Land").<sup>89</sup> The registered proprietor of the Land is the State of New South Wales ("the State").

45 Part 2 of the ALR Act addresses land rights. Where a claim for land is made under the ALR Act, the Crown Lands Minister<sup>90</sup> ("the Minister") shall, if satisfied that the land is "claimable Crown lands", grant the claim by transferring "the whole or that part of the lands claimed" to the claimant Aboriginal Land Council ("the Land Council") or, where the claim is made by the NSW ALC, to a Local Aboriginal Land Council nominated by the NSW ALC.<sup>91</sup>

46 The definition of "land" in the ALR Act is important. It is defined, "except in so far as the context or subject-matter otherwise indicates or requires", to include "any estate or interest in land, whether legal or equitable".<sup>92</sup> "[C]laimable Crown lands" are then defined in s 36(1)<sup>93</sup> relevantly to mean:<sup>94</sup>

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89 This was part of a bulk land claim lodged under s 36 of the ALR Act for all reserves within the meaning of s 78 of the *Crown Lands Act 1989* (NSW) within the boundary of the first appellant, the La Perouse Local Aboriginal Land Council, save for three specified areas. The boundary extends from northern Wollongong to North Head and includes Paddington.

90 "Crown Lands Minister" is defined in s 36(1) of the ALR Act to mean the Minister for the time being administering any provisions of the *Crown Lands Consolidation Act 1913* (NSW) or the *Western Lands Act 1901* (NSW) under which lands are able to be sold or leased. The reference to the *Crown Lands Consolidation Act* is to be read as a reference to, from 1 May 1990 to 1 July 2018, the *Crown Lands Act* by operation of Sch 7 and Sch 8, cl 21(1) of that Act. From 1 July 2018, it is to be read as a reference to the *Crown Land Management Act 2016* (NSW) by operation of Sch 7, cl 39 and Sch 8 of that Act.

91 ALR Act, s 36(5)(a).

92 ALR Act, s 4(1) definition of "land".

93 Subject to qualifications: ALR Act, s 36(5) and (5A).

94 As at the date of the claim, the reference to the *Crown Lands Consolidation Act* should be read as a reference to the *Crown Lands Act*: see fn 90 above.

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"... 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,
- ...
- (c) are not needed, nor likely to be needed, for an essential public purpose, and ..." (emphasis added)

Any transfer of lands to a Land Council under s 36 of the ALR Act is for an estate in fee simple, subject to any native title rights and interests existing in relation to the lands immediately before the transfer.<sup>95</sup>

47 At the date of the claim by the NSW ALC, the Land was subject to Reserve 1024528 for community and sporting club facilities and tourist facilities and services,<sup>96</sup> and a registered lease granted by the Minister on behalf of the State of New South Wales<sup>97</sup> to Paddington Bowling Club Ltd (then subject to a Deed of Company Arrangement) ("the Club") for 50 years from 1 December 2010 ("the Crown Lease"). The terms of the Crown Lease included that the initial rent was \$52,000 per annum and was subject to CPI adjustments and periodic reviews to market; the lessee was given the right to occupy and use the premises for the purpose of "Community and Sporting Club Facilities, Tourist Facilities and Services, Access" ("the Permitted Use"); 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; and no assignment, sublease, mortgage or other dealing with the Crown Lease was permitted except with the consent of the State.

48 In December 2011, the Crown Lease was assigned by the Club to CSKS Holdings Pty Ltd ("CSKS") pursuant to a registered dealing. 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 [were] overrun with weeds". CSKS did not

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95 ALR Act, s 36(9), subject to s 36(9A).

96 *New South Wales Government Gazette*, No 200, 11 December 2009 at 6044-6045.

97 *Crown Lands Act*, s 34A.

use the Land for the Permitted Use. The bowling greens were unattended. The clubhouse was in disrepair.

49 On 10 April 2016, an officer of the Department of Primary Industries ("the Department") required CSKS to remedy alleged breaches of the Crown Lease in relation to the state of repair of the clubhouse and grounds on the Land within 28 days and foreshadowed the potential forfeiture of the Crown Lease ("the Notice"). On 22 April 2016, CSKS's solicitors responded to the Notice by denying that any of the alleged breaches constituted a breach of the Crown Lease which would justify its forfeiture and requesting that it be given until 31 July 2016 to respond to the Notice. The Department did not respond to that letter.

50 On 6 May 2016, CSKS's solicitors again wrote to the Department in response to the Notice. That letter stated that CSKS did not admit that any of the items listed in the Notice constituted a breach of the Crown Lease sufficient to enable the Crown to terminate the Crown Lease. The letter also stated that "the property [was] unoccupied and it [was] not intended that the property [would] be used for public purposes without substantial renovation and refurbishment" and that CSKS considered that its "only real obligation [was] to keep the building structurally sound and waterproof". However, the letter went on to state that "in order to prevent any attempted claim of forfeiture of the [Crown] Lease, [CSKS] ha[d] engaged contractors to rectify the matters ... raised or to provide certification from a suitably qualified expert that the item [was] not presently a major structural defect". Enclosed with the letter were the identified reports and a response to each of the matters listed in the Notice. During May and June 2016, CSKS and the Crown negotiated about alternative uses of the Land. On 20 June 2016, the Department stated in a letter to CSKS's solicitors that it "remain[ed] available to discuss with [CSKS] alternative uses of the [L]and".

51 On 1 February 2018, the Crown Lease was assigned by CSKS to the first respondent, Quarry Street Pty Ltd ("Quarry Street"), with the consent of the Crown. The assignment was registered in April 2018. One condition of the assignment was that Quarry Street acknowledged that the Land was subject to undetermined Aboriginal land claims and that, if the Land or any part of it was transferred to a Land Council pursuant to a claim under the ALR Act, the Crown Lease (or the relevant part of the Crown Lease) would terminate on the date of the transfer.

52 The claim lodged on 19 December 2016 was determined by the Minister on 10 December 2021 on the basis that he was satisfied that the Land (being part of the claim) was "claimable Crown lands" within the meaning of that term under the ALR Act and was then required to grant the claim by transferring the Land to the La Perouse Local Aboriginal Land Council, the first appellant.

53 By a further amended summons filed on 17 May 2023, Quarry Street sought an order preventing the transfer of the Land, an order in the nature of certiorari to quash the Minister's determination and an order that the application be remitted to the Minister to be determined according to law.

54 The primary judge (Preston CJ of the Land and Environment Court ("the LEC")) dismissed the proceeding. The question on appeal to the Court of Appeal of the Supreme Court of New South Wales was whether the primary judge erred in failing to find jurisdictional error in the decision of the Minister to grant the claim in respect of the Land by reason of the Crown Lease and the material before the Minister regarding the Crown's receipt of rent and its exhibition of a landlord's concern about CSKS's compliance with the Crown Lease. There were two issues on appeal: first, whether it was open to the Minister to be satisfied that the Land met the criterion in s 36(1)(a) of the ALR Act requiring the Land to be able to be lawfully sold or leased or subject to a reservation where the Land was subject to the Crown Lease and, second, whether it was open to the Minister to be satisfied that the Land met the criterion in s 36(1)(b) of the ALR Act requiring the Land not to be lawfully used or occupied.

55 In relation to the second issue, being the only issue relevant to this appeal, the Court of Appeal (White JA, Adamson and Stern JJA agreeing) allowed Quarry Street's appeal on the basis that the phrase "lawfully used or occupied" in s 36(1)(b) was not a composite phrase requiring actual physical occupation and use of the Land. Having adopted that construction, the Court of Appeal found that the Land was lawfully used and therefore not claimable because of the Crown's lease of the Land for value pursuant to s 34A of the *Crown Lands Act 1989* (NSW), which authorised the Minister to lease such land for any purpose compatible with the public interest and to apply the rental proceeds for public purposes. The Court of Appeal reached that conclusion based on the precise terms for which the Crown Lease provided. The Court of Appeal held that, in those circumstances, the only conclusion that was reasonably open to the Minister was that the Land was "used" and, therefore, that it was not "claimable Crown lands" within the meaning of s 36(1) of the ALR Act.

56 The appeal should be dismissed. As will be explained, a Crown lease may constitute "use" of land and, in light of the acts, facts, matters and circumstances of this case, the only conclusion that was reasonably open to the Minister was that the Land was "used" within the meaning of s 36(1)(b) of the ALR Act.

**Can land be "used" within the meaning of s 36(1)(b) of the ALR Act by reason of a lease?**

57 Where an Act has a remedial or beneficial purpose, that purpose may be relevant to its construction.<sup>98</sup> Against this, it must be acknowledged that legislation "rarely pursues a single purpose at all costs" and, as here, a statutory provision may "strike[] a balance between competing interests".<sup>99</sup> Here, the balance that is struck between those interests must ultimately be determined by reference to the text of the provision, read in context.

58 Examination of the text of s 36(1)(b) of the ALR Act, considered in context, reveals that the word "used" is not confined to physical or practical uses of land and may include the use of land by a landlord in granting a lease. That construction is confirmed by the improbable and impracticable consequences of the alternative construction for which the appellants ("the Land Councils") contended.

*Meaning of "used" and "land"*

59 The ordinary meaning of the word "use" is (like its cognate, "used") "protean",<sup>100</sup> in the sense that it is a term of "wide import" and its meaning "depends to a great extent on the context in which it is employed".<sup>101</sup> In its application to land, the ordinary meaning of "use" is not limited to uses of land which involve physical or practical activity on the land. In *Council of the City of Newcastle v Royal Newcastle Hospital*, for example, the hospital "used" vacant bushland adjoining the hospital by leaving it undeveloped "for [its] own special purposes"<sup>102</sup> – to preserve the "natural therapeutic qualities" of the land for its patients,<sup>103</sup> or in pursuit of a "use in a less direct form" than "actual physical

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98 *New South Wales Aboriginal Land Council v Minister Administering the Crown Lands Act* ("Berrima Gaol") (2016) 260 CLR 232 at 255-256 [32]-[33], 270-271 [91]-[94], 288 [146], 297 [174].

99 *Carr v Western Australia* (2007) 232 CLR 138 at 143 [5].

100 *Minister Administering the Crown Lands Act v NSW Aboriginal Land Council* ("Wagga Wagga") (2008) 237 CLR 285 at 306 [69].

101 *Ryde Municipal Council v Macquarie University* (1978) 139 CLR 633 at 637; see also 651. See also *Council of the City of Newcastle v Royal Newcastle Hospital* (1957) 96 CLR 493 at 515.

102 (1959) 100 CLR 1 at 4; [1959] AC 248 at 255.

103 *Royal Newcastle Hospital* (1957) 96 CLR 493 at 504.

occupation and enjoyment".<sup>104</sup> In explaining that decision, Gibbs J observed in *Parramatta City Council v Brickworks Ltd* that "it is not necessary, to constitute a present use of land, that there should be a physical use of all of it, or indeed of any of it".<sup>105</sup>

60 The owner of land may be said to "use" their land, within the ordinary meaning of that term, by leasing it to another person, especially where they derive an income or some other benefit by doing so. In *Ryde Municipal Council v Macquarie University*, Gibbs A-CJ accepted that a person who "owns land may be said to use it for his own purposes notwithstanding that he permits someone else to occupy it, even under a lease".<sup>106</sup> His Honour observed that that is "almost beyond argument when the owner's purpose is to acquire income".<sup>107</sup> His Honour continued by observing that "an owner of premises who leases them is making use of those premises by employing or applying them for the purpose of letting".<sup>108</sup> In that case, the question whether the land was in fact used by the tenant for a particular purpose arose because the rating statute in issue required the relevant use or occupation to be for a particular purpose.<sup>109</sup>

61 There is no basis in the text of s 36(1)(b) or its context to construe the word "used" more narrowly so as to require physical use of land. Three aspects of the text are relevant. First, s 36(1)(b) relevantly requires that the land be "lawfully used". It does not specify use of the land of a particular kind or "for" a particular purpose. This case may be distinguished from cases decided in different statutory contexts where the relevant question was, by contrast, whether the "dominant use" of land (by reference to specified activities) meant that it was used "for primary production",<sup>110</sup> whether land was "used exclusively for or in connection with"

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**104** *Royal Newcastle Hospital* (1957) 96 CLR 493 at 515.

**105** (1972) 128 CLR 1 at 21. See also *Minister Administering the Crown Lands Act v NSW Aboriginal Land Council* ("*Nowra Brickworks (No 1)*") (1993) 31 NSWLR 106 at 120.

**106** (1978) 139 CLR 633 at 638. See also *Tourapark Pty Ltd v Federal Commissioner of Taxation* (1982) 149 CLR 176 at 181.

**107** *Macquarie University* (1978) 139 CLR 633 at 638.

**108** *Macquarie University* (1978) 139 CLR 633 at 638.

**109** *Macquarie University* (1978) 139 CLR 633 at 636-637, 640-641, 651, 653.

**110** *Chief Commissioner of State Revenue v Metricon Qld Pty Ltd* (2017) 224 LGERA 236 at 252 [48], 253 [49], 255 [61].

public charitable purposes,<sup>111</sup> or whether land was used "for a public reserve".<sup>112</sup> Second, the text of s 36(1)(b) is not expressly limited to particular *users* of the land; it refers to "lands" which are "used or occupied". Third, the term "used" in s 36(1)(b) appears in conjunction with the term "lands", the singular form of which is defined in s 4(1) of the ALR Act to include "any estate or interest in land, whether legal or equitable" – that is, rights to land.

62 Taking those features together, it is necessary to examine any uses of the concurrent interests in land (including, as here, both the use of the reversionary interest of a landlord and the use by a tenant in possession). The landlord's reversionary interest is capable of being "used" without any physical or practical activity on the land. Indeed, where the Crown's interest is the estate in land, the only way it can "use" that estate is to grant a leasehold or other right or interest in relation to it, which reinforces the conclusion that the lease of land may constitute "use".

63 Just as the grant of a lease for a specified period of time on specific terms may constitute "use" of the Crown's interest in land, so too may the ongoing operation of that lease for the term of the lease. The lease may, commonly will, and in this case did, impose conditions on use by the tenant in possession. The lease may, and here did, provide for forfeiture if the tenant did not comply with the terms of the lease. The landlord's use of the land constituted by leasing it does not end with the grant of the lease. The landlord's use continues for the term of the lease. The rights and duties created and conferred by the lease record the ongoing use of the fee simple by the landlord and the duties the tenant owes the landlord are the price for which the landlord gives up exclusive possession to the land. That is an ongoing use by the landlord of the land and its rights to the land for the whole of the term of the lease. The landlord continues to use its rights in the land in accordance with the terms of the lease so long as the lease remains on foot.

64 Moreover, s 36(12) identifies certain rights and interests in land to which a transfer of land under s 36 is subject. If a lease were not capable of being a "use", one would expect a transfer of land to be subject to any lease in s 36(12), yet a lease is not listed in s 36(12).

65 The Land Councils submitted that the definition of "land" in s 4(1) of the ALR Act was to be read as referring to the piece of physical land and not extending to any estate or interest in the land. That submission must be rejected. First, "land" is expressly defined to include "any estate or interest in land",

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111 *Commissioners of Taxation v Trustees of St Mark's Glebe* [1902] AC 416 at 419-421.

112 *Randwick Corporation v Rutledge* (1959) 102 CLR 54 at 88.

and there is nothing in the context of the provision to suggest that meaning is displaced. Second, and in any event, the passage in *The Commonwealth v New South Wales* stating that "land" referred to "the concrete physical mass" (in the context of explaining why metals present in the land form part of the land)<sup>113</sup> on which the Land Councils relied is no obstacle to the conclusion that "land" in s 36(1)(b) includes a landlord's reversionary interest: a landlord can be said to deploy the concrete physical mass of land by leasing it to a tenant.

66 Contrary to the Land Councils' further submission, there is no tension in the concept of "land" having a particular meaning when employed in connection with the term "used" as compared to the term "occupied" in s 36(1)(b). Those terms have separate meanings.<sup>114</sup> The definition of "land" applies throughout the ALR Act subject to a contrary intention, and so it may apply distributively. There is therefore no difficulty that an "estate or interest" is not usually described as "occupied". Equally, the fact that, when the term "land" or "lands" is used throughout s 36, different aspects of its meaning have significance does not demand a particular conclusion as to the aspects of its meaning which are engaged when the term is employed in the particular context of s 36(1)(b).

67 Moreover, it may be accepted that one purpose of the definition of "land" as applied to s 36(1)(b) might be to clarify 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". That, however, does not preclude the defined term from also being used to assist in determining which potential "uses" of land are relevant.

68 The conclusion that the construction of the term "used" in connection with land in s 36(1)(b) is not limited to physical use is not denied by examining how the term "Crown lands" (or the singular form, "Crown land")<sup>115</sup> has been defined or understood in other Acts or historical contexts. Reference to historical or other uses of the term "Crown lands" in other contexts does not establish that that term refers only to physical land and not estates or interests in land.<sup>116</sup> Those historical

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**113** (1923) 33 CLR 1 at 33.

**114** *Berrima Gaol* (2016) 260 CLR 232 at 250-251 [14].

**115** See, eg, *Crown Lands Act*, s 3(1) definition of "Crown land".

**116** cf *Crown Lands Consolidation Act*, s 5 definition of "Crown Lands" ("lands vested in His Majesty and not permanently dedicated to any public purpose or granted or lawfully contracted to be granted in fee-simple under the Crown Lands Acts") (emphasis added); *Hawkins v Minister for Lands (NSW)* (1949) 78 CLR 479 at 492 (as to the meaning of "vested in His Majesty").

or other uses of the term shed no relevant light on whether the definition of "land" in the ALR Act applies according to its terms. More particularly, they provide no foundation for concluding that the ALR Act reveals any contrary intention to applying the definition in the Act according to its terms when considering whether land is "used" within the meaning of s 36(1)(b) of the ALR Act.

*Lease may be use of land under s 36(1)(b)*

69 The Land Councils' submissions that a lease cannot constitute use of land for the purposes of s 36(1)(b) should be rejected.

70 First, there is no incongruity in the qualifying and disqualifying conditions for "claimable Crown lands". The Land Councils contended that it would be incoherent if a qualifying condition for a land claim in s 36(1)(a) (that the land is "able to be lawfully ... leased") were also a disqualifying condition, namely that the land is in fact used by being leased. There is no incongruity in the ALR Act treating the existence of a lease as a disqualifying condition for land claims while providing that lands "able to be" leased are claimable. Those are different concepts. It may be accepted that it would be incongruous if the mere notional occupation of land (such as by reference to the fiction that the Crown occupies land regardless of its use<sup>117</sup>) were sufficient to exclude land from liability to claim. But the grant of a Crown lease in exchange for substantial rent and in pursuit of a reserved purpose is not a mere notional or constructive use.

71 Second, the fact that any transfer of land to a Land Council under s 36 of the ALR Act will be for an estate in fee simple<sup>118</sup> concerns the nature of the title to be transferred to the Land Council. It has no bearing on what constitutes use of the land prior to the transfer. On the contrary, the fact that the ALR Act describes what is being transferred when a land claim is granted as the "fee simple"<sup>119</sup> or a "lease in perpetuity"<sup>120</sup> confirms that the extended definition of "land" is being used.

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**117** *Minister Administering the Crown Lands Act v La Perouse Local Aboriginal Land Council* (2012) 193 LGERA 276 at 286-287 [44]-[46], relevantly citing *Attorney-General v Brown* (1847) 1 Legge 312 at 317. See also *Daruk Local Aboriginal Land Council v Minister Administering the Crown Lands Act* (1993) 30 NSWLR 140 at 162.

**118** ALR Act, s 36(9).

**119** ALR Act, s 36(9).

**120** ALR Act, s 36(9A).

72 Third, the Land Councils referred to the existence of 29 different types of leases or licences under Crown lands legislation when the ALR Act was enacted, which varied in their terms and conditions, as support for their narrower construction of "use". They contended that the decision of the Court of Appeal "suggests" that the mere existence of a lease could amount to "use" without an inquiry into the nature or operation of the particular lease. The issue in this appeal is whether this Crown Lease, which required payment by the lessee in exchange for exclusive possession and whose terms were enforced by the Crown, amounted to use of the Land within the meaning of s 36(1)(b) of the ALR Act. That question does not raise for consideration any question about whether other forms of lease of a different character and in a different factual situation would constitute use of land within the meaning of s 36(1)(b) of the ALR Act.

73 Fourth, the Land Councils contended that the transitional provision in cl 8 in Pt 2 of Sch 4 to the ALR Act would be rendered otiose if a lease could constitute "use" within the meaning of s 36(1)(b) of the ALR Act. That provision provides that:

"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."

The Land Councils contended that, since that transitional provision preserves existing leases from the definition of "claimable Crown lands" until they cease to be in force, that provision would have been unnecessary if a lease could constitute "use" of land. That argument should be rejected. It is not unusual for transitional provisions to be included out of caution and Parliament is sometimes guilty of "surplusage".<sup>121</sup> In any event, the transitional provision employs a composite expression which reflects the range of tenure under the *Crown Lands Consolidation Act*,<sup>122</sup> not all of which will necessarily result in land being "used" by its owner. The provision has relevant work to do in respect of gratuitous licences and permissive occupancies, in relation to which the Crown does not obtain a profit or lose the right to engage in activities on the land, unlike in the case of a lease requiring the payment of rent and conferring exclusive possession on a tenant.

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**121** *Leon Fink Holdings Pty Ltd v Australian Film Commission* (1979) 141 CLR 672 at 679; *Western Australian Planning Commission v Southregal Pty Ltd* (2017) 259 CLR 106 at 122 [55].

**122** *Nowra Brickworks (No 1)* (1993) 31 NSWLR 106 at 118.

*Improbable consequences*

74 The text and context tend strongly in favour of the conclusion that "used" in s 36(1)(b) is not confined to physical or practical uses of land and may include the landlord's use of the land by granting a lease. The correctness of that construction is reinforced by the improbable and impracticable consequences of the Land Councils' construction, which suggest that it is unlikely to have been intended.<sup>123</sup>

75 A consequence of the Land Councils' construction would be that the Crown's fee simple would be liable to claim under the ALR Act whenever its tenant ceases to conduct activities on Crown land. The Crown's fee simple would therefore depend on the diligence of a tenant in pursuing the permitted purpose under the lease. Further, as the Minister submitted, frequent monitoring would be required, not only of tenants but also potentially of Crown land managers, to ensure that Crown land was practically "used" to more than a notional degree. And even assuming such monitoring was feasible, the Crown's fee simple would be liable to claim in the period in which the Crown allowed existing tenants time to remedy any inactivity in breach of the lease, and during the period in which it sought to install a new tenant. All of that assumes that the relevant Crown lease, unlike the Crown Lease in issue in this appeal, contained a term prohibiting tenants from inactivity which the Crown could seek to enforce.

76 The Land Councils' construction would also mean that, during periods of development or structural work by private tenants, Crown land may be at risk of claim. Such risk may discourage the deferred use of land by private tenants while they engage in offsite preparatory work which may, in turn, discourage investment in the redevelopment of Crown land in pursuit of the purpose for which the land was reserved.

77 Two further matters should be considered. Quarry Street submitted that, if land subject to a lease was claimable Crown lands, and part of the land covered by a Crown lease was transferred to a Land Council, then the Land Council would receive the fee simple subject to the existing leasehold interest, which would pose practical difficulties not contemplated by the ALR Act. It may be accepted that, following a successful claim in relation to part of the land covered by the lease, the ALR Act does not provide for how a tenant's rights under a lease are to be affected where they would have two landlords in respect of different parts of the land subject to the lease. It is unnecessary to resolve that issue. It is, however,

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123 See *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384 at 408; *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 384 [78]; *Certain Lloyd's Underwriters v Cross* (2012) 248 CLR 378 at 389-390 [25], 404-405 [68].

at least arguable that ss 117 and 119 of the *Conveyancing Act 1919* (NSW) would apply in such a case so that, on "severance" of the reversionary estate, the rent would run with the reversionary estate in the land and conditions of the lease in respect of the severed parts of the estate could be apportioned to those parts.

78 In the Court of Appeal White JA observed:

"For the [Land Councils], it was submitted that the Minister could avoid claims by [Land Councils] by entering into a 'paper lease' where the Crown had ceased its use of lands but had not made a decision as to whether to sell lands that were surplus to the Crown's requirements. [Quarry Street] submitted that [a Land Council] could procure a lessee from the Crown not to use all or part of the lands leased so as to make a claim for land not physically used.

Parliament would not have contemplated that either the Minister or [a Land Council] would abuse his, her, or its position either, in the case of the Minister, to defeat a land claim that was properly available or, in the case of [a Land Council], to procure a transfer of land to which it was not entitled. These are 'extreme examples and distorting possibilities' that are not useful guides for construction".<sup>124</sup>

79 The phrase "paper lease" appears to be an adaptation of the phrase "paper subdivision", a term used to describe a "subdivision of land that may be effected without the necessity for any building work"<sup>125</sup> or "a subdivision that does not facilitate any change to the buildings or works on the land or the nature of the occupation of the land and simply creates lots capable of separate disposal".<sup>126</sup> The possibility that the Crown might enter into a "paper lease" (namely, a lease not contemplating any real use of the land by the tenant) as a form of sham was rightly rejected by the Court of Appeal as a basis for construing "used" in s 36(1)(b) to mean "physical use".

### Cases

80 None of the cases on which the Land Councils relied concerned a claim to land leased by the Crown. Rather, the Land Councils' argument proceeded by

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**124** Citing *Shaw v Minister for Immigration and Multicultural Affairs* (2003) 218 CLR 28 at 43 [32]; *Mondelez Australia Pty Ltd v Australian Manufacturing Workers Union* (2020) 271 CLR 495 at 527 [86].

**125** *Bowen v Willoughby City Council* (2000) 108 LGERA 149 at 155 [30].

**126** *GNL Developments Pty Ltd v Monash City Council* [2019] VCAT 1635 at [40].

seeking to draw analogies with those cases. That argument paid insufficient heed to the plurality's observation in this Court in *Minister Administering the Crown Lands Act v NSW Aboriginal Land Council* ("Wagga Wagga") that "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".<sup>127</sup> Put in different terms, it is important and necessary to recall what was said by Windeyer J, albeit in a different context: the Court should read its previous judgments "in relation to the circumstances of each case and to the arguments which were then adduced" and "[t]o select passages from them and to subject their words to detailed analysis as if they provided a definitive exegesis of [the relevant provision] can be most misleading".<sup>128</sup>

81 This Court's decision in *Wagga Wagga* is important for other reasons. It is true that the plurality observed that there "can be no doubt that sale of the land would amount to exploitation of the land as an asset of the owner" and that it did not follow that "exploitation, by sale, amounts to lawful use of the land let alone its lawful occupation".<sup>129</sup> It is one thing to conclude, as the plurality did in *Wagga Wagga*, that an owner in possession does not "use" land where it takes steps to sell the land but does not otherwise make any use of the land.<sup>130</sup> The sale of land, involving as it does the disposing of the asset, is more akin to an anti-use. It is quite another thing for the Crown to lease land which has been reserved for a public purpose to a private tenant on terms that permit the tenant to use the land for that purpose, in exchange for the ongoing payment of substantial rent.

82 Moreover, the plurality did not say that use requires physical activity on the land, nor is that a necessary consequence of the plurality's reasoning. Significantly, the plurality described the applicable inquiry as "identifying the acts, facts, matters and circumstances which are said to deprive the land of the characteristic of being 'not lawfully used or occupied'" and then measuring "those acts, facts, matters and circumstances against an understanding of what

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<sup>127</sup> (2008) 237 CLR 285 at 305-306 [69].

<sup>128</sup> *Ex parte Professional Engineers' Association* (1959) 107 CLR 208 at 268. See also *Spratt v Hermes* (1965) 114 CLR 226 at 272.

<sup>129</sup> *Wagga Wagga* (2008) 237 CLR 285 at 307 [74].

<sup>130</sup> (2008) 237 CLR 285 at 307 [74].

would constitute use or occupation of the land".<sup>131</sup> That is the task. Unsurprisingly, the inquiry will vary from case to case because the acts, facts, matters and circumstances will vary from case to case. The decided cases must be read paying close attention to what was said in *Wagga Wagga*.

83 So, for example, the passage from Gibbs J's reasons in this Court's decision in *Parramatta City Council* that "it is not necessary, to constitute a present use of land, that there should be a physical use of all of it, or indeed of any of it"<sup>132</sup> demonstrates that this is only part of the inquiry of whether a use falls within the terms of s 36(1)(b). The answer is determined by applying the approach explained by the plurality in *Wagga Wagga*, to which reference has just been made.

84 In the Court of Appeal of New South Wales in *Daruk Local Aboriginal Land Council v Minister Administering the Crown Lands Act*, Priestley JA (with whom Cripps JA agreed) considered that the word "used" in s 36(1)(b) meant "actually used" in the sense of being used in fact and to more than a merely notional degree".<sup>133</sup> Priestley JA was not suggesting that the "use" inquiry is concerned only with practical activity on the land, as is confirmed by his Honour's rejection of the argument that "members of the public made use of [the relevant part of] the land by looking at it".<sup>134</sup> That argument was rejected on the basis that there was no evidence to support that conclusion, not because such activity would not constitute "use".<sup>135</sup>

85 In *Minister Administering the Crown Lands Act v La Perouse Local Aboriginal Land Council* ("*La Perouse*"), Basten JA (Beazley, McColl and Macfarlan JJA agreeing) considered that "transitory physical activities on land do not necessarily amount to use or occupation".<sup>136</sup> Again, the statement is not absolute and nor could it be. The reference to "necessarily" makes that clear. Moreover, it does not follow that their Honours were of the view that physical activity is necessary to establish "use". As in *Wagga Wagga*, the focus on "physical

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131 *Wagga Wagga* (2008) 237 CLR 285 at 305 [69]. See also *Minister Administering Crown Lands Act v Bathurst Local Aboriginal Land Council* (2009) 166 LGERA 379 at 429 [232].

132 (1972) 128 CLR 1 at 21.

133 (1993) 30 NSWLR 140 at 164.

134 *Daruk* (1993) 30 NSWLR 140 at 164-165.

135 *Daruk* (1993) 30 NSWLR 140 at 165.

136 (2012) 193 LGERA 276 at 289 [57].

activities"<sup>137</sup> which took place on the land is explained by the fact that the Crown was the owner in possession of the land.

86 In *New South Wales Aboriginal Land Council v Minister Administering the Crown Lands Act* ("*Berrima Gaol*"), the plurality referred to statements by Priestley JA in *Daruk* that the "occupied" limb could not be satisfied by constructive occupation, that "mere proprietorship could not suffice" and that "[p]hysical acts of occupation, the exercise of control and maintaining the lands were all factors which are relevant".<sup>138</sup> Their Honours went on to conclude that the words "used" and "occupied" "require an examination of activities undertaken upon the land in question".<sup>139</sup> Again, it does not follow from those statements that only physical activities on land may constitute "use". It may be accepted that, where the Crown is in possession of land, an examination of activities undertaken on the land is required; it is quite a different proposition to say that physical activity on the land is required where the Crown is a landlord not in possession.

87 Subject possibly to the first instance decision of the LEC in *New South Wales Aboriginal Land Council – Little Bay v Minister Administering the Crown Land Management Act*,<sup>140</sup> the cases do not foreclose the conclusion that a Crown lease may constitute "use" under s 36(1)(b). That is unsurprising because, to the extent that the cases have considered whether a lease of land amounts to "use" of the land, they have done so by reference to the activities of the lessee.<sup>141</sup> And that was the position in *Little Bay*, where a land claim was granted in part in respect of land the subject of a lease to a surf lifesaving club. Under a term of the lease, the club was required not to use the curtilage to a building on the land except for the purposes of access.<sup>142</sup> In granting the claim in part in relation to the curtilage, the trial judge concluded that the lease was relevant to establish that the occupation and use were lawful but did not consider it "appropriate to consider the [l]ease divorced (either actually or notionally) from the facts, matters and circumstances

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137 *La Perouse* (2012) 193 LGERA 276 at 284 [36].

138 *Berrima Gaol* (2016) 260 CLR 232 at 251-252 [17]-[18], citing *Daruk* (1993) 30 NSWLR 140 at 160-162, 164.

139 *Berrima Gaol* (2016) 260 CLR 232 at 256 [34].

140 [2022] NSWLEC 142.

141 See, eg, *Nowra Brickworks (No 1)* (1993) 31 NSWLR 106 at 120-121.

142 *Little Bay* [2022] NSWLEC 142 at [63], [65].

of the actual use or actual occupation of the [c]laimed [l]and by" the surf lifesaving club.<sup>143</sup>

88 To the extent that the decision in *Little Bay* concerned the question of whether the land was "used or occupied" from the perspective of a lessee, the stated legal principles<sup>144</sup> are largely unexceptional. But to the extent that it is suggested that that decision governs the issues raised in this appeal, that contention must be rejected. The stated principles relating to "use" are necessarily incomplete; the principles do not consider the use of land by a lessor or the fact that "use" in s 36(1)(b) does not necessarily require physical activity on the land.<sup>145</sup> So much is clear from the statement by the trial judge that her Honour did not consider it appropriate to consider the lease divorced (either actually or notionally) from the facts, matters and circumstances of the actual use or actual occupation of the claimed land by the tenant.

89 Finally, the plurality's warning in *Wagga Wagga* against reading the decided cases as attempting some exhaustive definition of "used" applies also to cases decided in different statutory contexts. The risk is illustrated by the following observations of Windeyer J in *Randwick Corporation v Rutledge*:<sup>146</sup>

"If, instead of considering in what ways the land might lawfully be used, we consider how in fact it is used and has been used, the respondents are in no less difficulty. There is no suggestion that they and their tenant the club are not acting in accordance with the trusts and conditions of the grant and in accordance with the *Australian Jockey Club Act*. But is the land used for a public reserve? 'This provision', as Dixon J, as he then was, said in a similar matter, 'looks to the actual use ... of the land'. The only way in which the trustees use the land is by leasing it to the club, to be used by it as a racecourse in accordance with the grant and the *Australian Jockey Club Act*. Indeed the land is not really used by the trustees at all, for they have parted with the use and occupation of it for the term of the lease. When the Act speaks of land used for a public reserve it is referring to the

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143 *Little Bay* [2022] NSWLEC 142 at [59].

144 [2022] NSWLEC 142 at [25]. See also *New South Wales Aboriginal Land Council v Minister Administering the Crown Land Management Act 2016* [2024] NSWLEC 41 at [81]; *Deerubbin Local Aboriginal Land Council v Minister Administering the Crown Land Management Act* (2024) 262 LGERA 244 at 257-258 [57].

145 See [59]-[68] above.

146 (1959) 102 CLR 54 at 88 (emphasis added; citations omitted).

*actual use to which the land is put by the persons who in law control it for the time being."*

The question in *Rutledge* was whether the land was "used" for a particular purpose – a public reserve. As a matter of construction, that context gave the word "used" a particular meaning. There is no requirement under s 36(1)(b) of the ALR Act that land be used for a particular purpose.

**Land was lawfully "used" within the meaning of s 36(1)(b)**

90           What then were the acts, facts, matters and circumstances which were said to deprive the Land of the characteristic of being "not lawfully used or occupied" and, having identified "those acts, facts, matters and circumstances", how did they measure "against an understanding of what would constitute use or occupation of the [L]and"?<sup>147</sup>

91           As noted above, on 11 December 2009, the Land was reserved pursuant to s 87 of the *Crown Lands Act* for the purpose of "Community and sporting club facilities and tourist facilities and services". Under s 34A(1) of the *Crown Lands Act*, the Minister was empowered to grant a lease over a Crown reserve "for any ... purpose the Minister thinks fit". However, the Minister was not empowered to grant a lease unless the Minister was satisfied that it was "in the public interest" to do so and the Minister had "had due regard to the principles of Crown land management".<sup>148</sup> Those principles relevantly included that public use and enjoyment of appropriate Crown land be encouraged,<sup>149</sup> that, where appropriate, Crown land be used and managed in such a way that both the land and its resources are sustained in perpetuity<sup>150</sup> and that Crown land relevantly be leased in the best interests of the State.<sup>151</sup>

92           The Minister exercised his power under s 34A of the *Crown Lands Act* to enter the Crown Lease with the Club for a term of 50 years from 1 December 2010. The lessee was given the right to occupy and use the premises for a purpose broadly consistent with the reserved purpose, namely "Community and Sporting Club Facilities, Tourist Facilities and Services, Access". The Minister was entitled to substantial rent under the Crown Lease. Under s 34A(4) of the *Crown Lands Act*,

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<sup>147</sup> *Wagga Wagga* (2008) 237 CLR 285 at 305 [69].

<sup>148</sup> *Crown Lands Act*, s 34A(2)(c).

<sup>149</sup> *Crown Lands Act*, s 11(c).

<sup>150</sup> *Crown Lands Act*, s 11(e).

<sup>151</sup> *Crown Lands Act*, s 11(f).

the proceeds from the Crown Lease were "to be applied as directed by the Minister". Without limiting that discretion, the proceeds could be paid into the Consolidated Fund or the Public Reserves Management Fund, or to a relevant government agency.<sup>152</sup>

93 On 30 December 2011, the Crown Lease was transferred from the Club to CSKS. As at the date of the claim, CSKS was not using the Land for purposes permitted by the Crown Lease but was nonetheless required to pay substantial rent to the Crown. The Crown took steps to secure CSKS's compliance with the conditions of the Crown Lease and CSKS advised the Crown that it had undertaken and completed steps to comply with the lease terms. At the same time, the Crown invited CSKS to engage with it about proposed alternative uses of the Land.

94 There was no dispute between the parties that CSKS's activities, such as they were, did not constitute "use" of the Land. However, that is not the end of the inquiry. The Crown reserved the Land for a public purpose and put a tenant into possession under a lease whose terms required the tenant to pay substantial rent and permitted the tenant to use the Land for purposes which were broadly consistent with the reserved purpose and no other purpose. That is not to say that any lease will constitute "use" of land for the purposes of s 36(1)(b) of the ALR Act. For example, a lease in respect of which no rental income is required to be paid and there is no real prospect of the land ever being used for the purpose permitted under the lease would not be sufficient. But those are not the facts in this appeal. The Crown was entitled to receive substantial rent from the Crown Lease, it sought to enforce the tenant's compliance with the lease terms and the tenant advised the Crown and provided reports to the Crown to substantiate that it had taken steps to remediate alleged breaches of the Crown Lease.

### **No other conclusion was reasonably open to the Minister**

95 Where a court is required to assess whether an exercise of statutory power is unreasonable, the question is whether the decision is unreasonable having regard to the scope of the power and the available evidence.<sup>153</sup> That inquiry may be

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**152** *Crown Lands Act*, s 34A(5).

**153** *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332 at 351-352 [30], 363-364 [67], 367-369 [77]-[85], 370-371 [90], 378-380 [114]-[124]; *Minister for Immigration and Border Protection v SZVFW* (2018) 264 CLR 541 at 551 [12], 565 [54], 572 [78], 574 [84].

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outcome-focused: it is not necessary to identify a particular error of reasoning.<sup>154</sup> It may be that the decision lacks evident and intelligible justification or that it falls outside of "a range of possible, acceptable outcomes which are defensible in respect of the facts and law".<sup>155</sup>

96 Before the Minister in making the decision to approve the claim in relation to the Land was information to the effect that the Crown conferred exclusive possession on CSKS in exchange for substantial rent, that the Crown permitted CSKS to use the Land for a purpose broadly consistent with the reserved purpose, and that the Crown had recently sought to enforce compliance with the terms of the Crown Lease, in response to which CSKS advised the Crown that it had undertaken and completed steps to comply with the lease terms. In light of those acts, facts, matters and circumstances and the others already referred to, and once it is apparent that a Crown lease may constitute "use" of land, the only conclusion that was reasonably open to the Minister was that the Land was "used" within the meaning of s 36(1)(b) of the ALR Act.

### Conclusion and orders

97 For those reasons, the appeal should be dismissed, with the Land Councils to pay Quarry Street's costs of the appeal. Otherwise, there should be no order as to costs, given that the Minister does not seek his costs.

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<sup>154</sup> *Li* (2013) 249 CLR 332 at 364 [68], 365-366 [72], 367 [76]; *SZVFW* (2018) 264 CLR 541 at 573 [81]; see also 583 [131].

<sup>155</sup> *Li* (2013) 249 CLR 332 at 367 [76], 373 [98], 375 [105], quoting *Dunsmuir v New Brunswick* [2008] 1 SCR 190 at 220-221 [47].

EDELMAN J.

**The issues in this case: fundamentals of "property" and "land"**

98 The Roman jurists of the classical period of Roman law consistently spoke of things, including physical (corporeal) things, as property.<sup>156</sup> It was not until the 17th century, after more than a millennium of dogmatic slumber, that it was appreciated that the law is generally concerned with rights (or, more precisely, legal relations) between people and that a physical thing is relevantly the object of a person's rights. Thus, Grotius wrote that "law exists between persons, to whom the right belongs, and between things, over which the right extends".<sup>157</sup> But even today confusion persists because words like "property" and "land" are commonly used as shorthand to describe a person's right to some thing or a person's right to land.

99 This Court attempted to resolve that confusion in *Yanner v Eaton*.<sup>158</sup> In that case, Gleeson CJ, Gaudron, Kirby and Hayne JJ reiterated the understanding that had persisted for more than four centuries that, "as elsewhere in the law", the noun "property" in the relevant legislation "does not refer to a thing; it is a description of a legal relationship with a thing".<sup>159</sup> Their Honours added that "[m]uch of our false thinking about property stems from the residual perception that 'property' is itself a thing"<sup>160</sup> and pointed out, quoting Bentham, that "in common speech" in a phrase like "the object of a [person's] property", "the words 'the object of' are commonly left out".<sup>161</sup> A fifth member of this Court, Gummow J, quoted from Hohfeld, saying that although "property" is sometimes "employed to indicate the physical object to which various legal rights, privileges, etc, relate" the word is

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156 D 1.8.1, D 1.8.2; G 2.1, G 2.12-14; Inst 2.1.pr, Inst 2.1.11.

157 Grotius, *The Jurisprudence of Holland*, trans Lee (1926), vol 1, bk 1, ch 3 at 15 [1]. See also Suárez, "De Legibus, Ac Deo Legislatore", in Williams, Brown and Waldron (trans), *Selections from Three Works of Francisco Suárez* (1944), vol 2, bk 1, ch 2 at 30.

158 (1999) 201 CLR 351.

159 *Yanner v Eaton* (1999) 201 CLR 351 at 365-366 [17].

160 *Yanner v Eaton* (1999) 201 CLR 351 at 366 [18], quoting Gray, "Property in Thin Air" (1991) 50 *Cambridge Law Journal* 252 at 299.

161 *Yanner v Eaton* (1999) 201 CLR 351 at 366 [18] fn 74, citing Harrison (ed), *An Introduction to the Principles of Morals and Legislation* (1948) at 337 fn 1.

used "with far greater discrimination and accuracy" to denote the "legal interest ... appertaining to such physical object".<sup>162</sup>

100 The issues in this appeal cannot be understood without distinguishing between things and rights to things. In particular, the starting point to resolving the central issue in this appeal is the distinction between land and rights to land. That distinction arises in the context of the question whether derelict land that is the subject of a lease from the Crown (being the body politic of the State of New South Wales<sup>163</sup>) is excluded from the definition of "claimable Crown lands" in s 36(1) of the *Aboriginal Land Rights Act 1983* (NSW) because it is "land[] ... not lawfully used or occupied" within the meaning of that phrase in s 36(1)(b). The central issue, put simply, is whether "land" is "used" when it is the subject of a lease.

101 The starting point is whether the Parliament of New South Wales neglected more than four centuries of basic understanding in s 36(1) of the *Aboriginal Land Rights Act* so that, despite dealing with both the physical thing that is land and the legal relations with that physical thing, the Parliament somehow intended "land" to have a meaning that described only the physical thing, to the exclusion of legal rights to the thing. The Court of Appeal of the Supreme Court of New South Wales effectively concluded that the Parliament of New South Wales did not make such a basic error. The Court of Appeal was plainly correct on this point. The Parliament of New South Wales: (i) defined "land" in s 4(1) in a manner that included rights to land; and (ii) used "land" in s 36(1)(a) in a manner that was undeniably concerned with rights to land.

102 The dispositive question for the appeal is then whether land (which includes rights to land) can be "used or occupied" within s 36(1)(b) not merely by a purposeful interaction with the physical land but also by a continuing exploitation of rights to land at the date of the claim by an extant lease. The Court of Appeal held that since "land" included rights to land, the continuing exploitation of rights was a use of land. In other contexts, such an expanded meaning of "used" has been accepted. Textually, such a meaning of "used" is also open, although there is some strain to conclude that a lessor's rights continue to be used after the point at which the lease is created.

103 Ultimately, however, and contrary to my initial views formed after the benefit of outstanding argument from all parties and consideration of the powerful

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**162** *Yanner v Eaton* (1999) 201 CLR 351 at 389 [86], quoting Hohfeld, "Some Fundamental Legal Conceptions as Applied in Judicial Reasoning" (1913) 23 *Yale Law Journal* 16 at 21.

**163** See *Chief Executive Officer, Aboriginal Areas Protection Authority v Director of National Parks* (2024) 98 ALJR 655 at 684-685 [140]-[142]; 418 ALR 202 at 237-238.

judgment of the Court of Appeal, I conclude that, in the context of s 36(1)(b), "use", like "occupation", refers only to a purposeful interaction with land (in the physical sense). Contrary to the first respondent's notice of contention, that test was not satisfied in this case. The appeal must be allowed.

**The relevant provisions of the *Aboriginal Land Rights Act***

104 Section 36(1) of the *Aboriginal Land Rights Act* relevantly provides that:

**"Claims to Crown lands**

- (1) In this section, except in so far as the context or 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 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,
- (b1) do not comprise lands which, in the opinion of a Crown Lands Minister, are needed or are likely to be needed as residential lands,
- (c) are not needed, nor likely to be needed, for an essential public purpose, and
- (d) do not comprise lands that are the subject of an application for a determination of native title (other than a non-claimant application that is an unopposed application) that has been registered in accordance with the Commonwealth Native Title Act, and
- (e) do not comprise lands that are the subject of an approved determination of native title (within the meaning of the Commonwealth Native Title Act) (other than an approved determination that no native title exists in the lands)."

105 Section 4(1) relevantly provides that "except in so far as the context or subject-matter otherwise indicates or requires", "*land* includes any estate or interest in land, whether legal or equitable" and "*land claim* means a claim for land made under section 36".

106 Section 36(5) relevantly provides that the Crown Lands Minister shall grant the claim by transferring the whole or part of the lands claimed to the Local Aboriginal Land Council nominated by the New South Wales Aboriginal Land Council if the Crown Lands Minister is satisfied that either: "(i) the whole of the lands claimed is claimable Crown lands"; or "(ii) part only of the lands claimed is claimable Crown lands". In these proceedings, the second respondent is the Crown Lands Minister (as defined in s 36(1)) administering the *Crown Land Management Act 2016* (NSW) (namely, the Minister for Planning and Public Spaces) ("the Minister").

107 A transitional provision in Sch 4, Pt 2, cl 8 provides that:

"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."

The appointed day was 10 June 1983.<sup>164</sup>

### **The facts of this case**

108 From 1962 until 1 December 2010, land that is the subject of this appeal, falling in the area of the first appellant, La Perouse Local Aboriginal Land Council ("La Perouse"), included an area ("the Land") which was the subject of a special lease for recreation (bowling) and the erection of buildings (a clubhouse). The Land was "Crown land", which in this case meant that the State of New South Wales was registered as proprietor, holding an estate in fee simple.<sup>165</sup>

109 The lessee was Paddington Bowling Club Ltd. On 1 December 2010, a new lease ("the Lease") was granted to Paddington Bowling Club Ltd for a term of 50 years. The Minister was required to grant the Lease on 1 December 2010 only: (i) upon being satisfied that it was in the public interest to do so; and (ii) with due regard to the principles of Crown land management.<sup>166</sup>

110 The Lease granted on 1 December 2010 was to occupy and use the Land for the purposes of "Community and Sporting Club Facilities, Tourist Facilities and Services, Access" and not for any other purpose. The rent was \$52,000 per annum

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**164** *New South Wales Government Gazette*, No 84, 10 June 1983 at 2691.

**165** *Quarry Street Pty Ltd v Minister Administering the Crown Land Management Act 2016* (2024) 114 NSWLR 534 at 548 [65].

**166** *Crown Lands Act 1989* (NSW), s 34A(2)(c).

with annual adjustments based on the consumer price index and periodic reviews to market. The Lease, by cl 39, required the consent of the Minister to assignment.

111 On 30 December 2011, the Lease was assigned to CSKS Holdings Pty Ltd ("CSKS"). At that time, Paddington Bowling Club Ltd was either the subject of a deed of company arrangement or under administration. Apart from an area of the Land, comprising tennis courts, a shed, and fencing at the northern end of the Land which was used by the Wentworth Tennis Club under an oral sublease, CSKS undertook no purposeful activity on the Land. CSKS did not attend to the bowling greens. The clubhouse also fell into disrepair.

112 It is not clear when the bowling greens fell into desuetude but a news article dated 15 October 2015, contained in the Minister's brief which was in evidence before the primary judge, described Paddington Bowling Club as "a forgotten wasteland" which had been "overgrown and neglected four months after it closed" with "abandoned bowling greens, which are overrun with weeds". An inspection report commissioned by the State of New South Wales dated 16 October 2015, and another dated 15 September 2017, were described in an attachment to the briefing paper to the Minister as showing the clubhouse and grounds to be "in poor condition with little to no maintenance". Both inspection reports identified major structural defects in the buildings.

113 On 10 April 2016, an officer of the Department of Primary Industries ("the Department") wrote to CSKS alleging various breaches of the Lease, generally concerning the maintenance of the premises, and requiring that cause be shown in writing for why the Lease should not be forfeited. The solicitor for CSKS replied, accepting that the property was "unoccupied" and saying that it was "not intended that the property will be used for public purposes without substantial renovation and refurbishment".

114 On 22 April 2016, the solicitor for CSKS wrote to the Department denying that there had been any breach of the Lease that would justify its forfeiture and saying that CSKS had engaged a structural engineer and other building experts to advise about the work that needed to be done on the property. The solicitor acknowledged that "the property is not currently occupied" and that the property "is unlikely to be occupied again as a licensed premises, at least in the foreseeable future". In a further letter on 6 May 2016, the solicitor added that contractors had been engaged to rectify the matters raised in the Department's letter although since "it is not intended that the property will be used for public purposes without substantial renovation and refurbishment, we cannot see how many of the items actually needed to be rectified".

115 On 19 December 2016, the second appellant, the New South Wales Aboriginal Land Council ("the NSWALC"), lodged a "bulk" land claim to various areas, including the Land, under s 36(1) of the *Aboriginal Land Rights Act* with the Minister.

116        Around February 2018, the Lease was assigned to the first respondent, Quarry Street Pty Ltd. The Minister consented to that assignment subject to various conditions and the assignment was registered on 24 April 2018. One of the conditions of the Minister's consent was that if the Land or any part of the Land was transferred to an Aboriginal Land Council pursuant to a claim under the *Aboriginal Land Rights Act* then the Lease or the relevant part of the Lease would terminate on the date of transfer.

117        On 10 December 2021, the Minister determined various claims made by the NSWALC, including the claim with respect to the Land. The Minister allowed the claim in respect of the Land, concluding that it was claimable Crown land. The transitional provision in the *Aboriginal Land Rights Act*, Sch 4, Pt 2, cl 8 defers the operation of s 36 on a lease, licence, or permissive occupancy that existed at the appointed day. Here, the transitional provision did not defer the operation of s 36 because the existing lease at the date of the claim (19 December 2016) had been granted on 1 December 2010, after the appointed day (10 June 1983). The Minister's decision records that it was proposed that title would be transferred to La Perouse "unless advised otherwise by [the] New South Wales Aboriginal Land Council".

### **The decisions of the primary judge and of the Court of Appeal**

118        The primary judge in the Land and Environment Court of New South Wales (Preston CJ) dismissed the application by Quarry Street for judicial review of the decision of the Minister. The primary judge found that the use and occupation by the Wentworth Tennis Club of the tennis courts and associated areas was unlawful. The primary judge also rejected Quarry Street's assertion that CSKS had not given up possession of the tennis courts and associated areas. No appeal was brought from those conclusions of the primary judge.

119        Quarry Street also submitted that the Minister denied procedural fairness to Quarry Street by failing to consider its claim that the existence of a lease by the State of New South Wales to CSKS and, later, to Quarry Street meant that the criterion in s 36(1)(b) was not satisfied. The primary judge held that the Minister had considered Quarry Street's claim. There was no appeal from that conclusion. Alternatively, Quarry Street claimed, the decision of the Minister should be quashed on the ground of error of law, by finding that the criterion in s 36(1)(b) was not satisfied because the Land was lawfully used by the existence of the Lease. The primary judge also rejected this alternative argument. That conclusion was ultimately the subject of Quarry Street's appeal to the Court of Appeal. The issue on appeal reduced to whether it was not reasonably open to the Minister to allow the claim because the grant of the Lease of the Land by the State of New South Wales in 2010, or the factual circumstances relating to the Land at the time of the claim, inevitably meant that the Land did not meet either the criterion in s 36(1)(a) or the criterion in s 36(1)(b).

120 The Court of Appeal (White JA; Adamson and Stern JJA agreeing) held that the criterion in s 36(1)(a) was satisfied because: (i) the concern of s 36(1)(a) (like s 36(5)) is with lands that are "able" to be sold or leased, not lands which are the subject of a contract for sale or lease; (ii) the doctrine of concurrent leases means that the existence of a lease does not preclude the Land from being leased again; and (iii) if the Land were able to be sold then s 36(1)(a) would be met, independently of the Land being able to be leased.<sup>167</sup> In short, the criterion in s 36(1)(a) was satisfied because the *rights* to the Land were of a nature that they were capable of being the subject of a lease. The ground of appeal to this Court did not extend to that finding.

121 As to s 36(1)(b), the Court of Appeal concluded that the Land failed to satisfy this criterion; it was "lawfully used or occupied". The Court of Appeal accepted that the "occupation" of land could not be satisfied merely by exploitation of rights to land.<sup>168</sup> But the Court of Appeal held that the mere entry into the Lease by the State of New South Wales and CSKS was a relevant use of land within s 36(1)(b).<sup>169</sup> The Minister's decision involved jurisdictional error on the basis of unreasonableness because no other conclusion was legally open.<sup>170</sup>

### The meaning of "land"

#### *Legal meanings of "land" as a physical area or as rights to that area*

122 As Blackstone recognised, "land" is a "word of a very extensive signification".<sup>171</sup> It can be used to describe a physical (in the sense of "spatial"<sup>172</sup>) area. More commonly, "land" is used to describe rights to a physical area. When describing "land", lawyers speak of the "maxim" of the law that "the word 'land' includes not only the face of the earth, but every thing under it, or over it",<sup>173</sup> or of

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167 *Quarry Street Pty Ltd v Minister Administering the Crown Land Management Act 2016* (2024) 114 NSWLR 534 at 558 [124]-[129].

168 *Quarry Street Pty Ltd v Minister Administering the Crown Land Management Act 2016* (2024) 114 NSWLR 534 at 557 [118].

169 *Quarry Street Pty Ltd v Minister Administering the Crown Land Management Act 2016* (2024) 114 NSWLR 534 at 556-557 [111]-[120].

170 *Quarry Street Pty Ltd v Minister Administering the Crown Land Management Act 2016* (2024) 114 NSWLR 534 at 557-558 [122]-[123].

171 Blackstone, *Commentaries on the Laws of England* (1766), bk 2, ch 2 at 16.

172 Edgeworth, *Butt's Land Law*, 7th ed (2017) at 34 [1.280].

173 Blackstone, *Commentaries on the Laws of England* (1766), bk 2, ch 2 at 18.

land and "the whole physical mass of the soil"<sup>174</sup> as a "concrete physical mass, commencing at the surface of the earth and extending downwards to the centre of the earth ... to denote the surface and everything above and below it".<sup>175</sup> These statements are not kindergarten errors of geology: treating air as physical land. They are statements of a legal proposition about the extent of rights to land. Rights to the physical thing that is land include rights to the air above it.

123 Sometimes, within the same Act, the word "land" is used in both of these different senses. In *Jennings Construction Ltd v Burgundy Royale Investments Pty Ltd [No 2]*,<sup>176</sup> Brennan, Deane, Dawson and Toohey JJ observed that the *Workmen's Liens Act 1893* (SA) had used "land" in such alternating senses: "[i]n some provisions, 'land' clearly means the physical entity ... But in other sections ... the context shows that the term means the estate or interest in land of an owner or occupier."

124 On other occasions, "land" is expressed in terms that appear to include both the physical thing and rights to the thing, although the terms are really only intended to denote the rights to the physical thing. For instance, the inclusive definition of "land" in the *Interpretation Act 1987* (NSW), Sch 4, describes land as including "corporeal" (physical) things and "incorporeal" (non-physical) things: "messuages, tenements and hereditaments, corporeal and incorporeal, of any tenure or description, and whatever may be the estate or interest therein". That confused amalgam of both physical and non-physical has been rightly said to be concerned with "interests", namely with rights to the physical thing that is land.<sup>177</sup>

*The meaning of "land" in the context of s 36(1)*

125 In order to understand whether "land" in s 36(1) of the *Aboriginal Land Rights Act* is used to describe either or both of (i) a physical area, or (ii) a right to that physical area, a starting point is the definition of "land" in s 4(1) as including "any estate or interest in land, whether legal or equitable". That definition is plainly concerned to include rights to the physical area of land within the meaning of "land". There is no significance in the use of the singular in the definition of "land" in s 4(1) and the use of the plural "lands" in s 36(1). Indeed, immediately after the definition of "land", s 4(1) provides that "land claim" means "a claim for land

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174 *The Commonwealth v New South Wales* (1923) 33 CLR 1 at 37.

175 *The Commonwealth v New South Wales* (1923) 33 CLR 1 at 33, quoting, in part, *Thomson v St Catharine's College Cambridge* [1919] AC 468 at 480.

176 (1987) 162 CLR 153 at 162.

177 *Risk v Northern Territory* (2002) 210 CLR 392 at 407 [41]. See also *Re Lehrer and the Real Property Act* (1960) 61 SR (NSW) 365 at 370.

[singular] made under section 36". And throughout s 36, the section uses "land" and "lands" interchangeably (eg, s 36(9C) "[l]and transferred" and s 36(12) "[a] transfer of lands").

126 The same approach of interchangeable use of the singular and the plural was taken in the *Western Lands Act 1901* (NSW) and the *Crown Lands Consolidation Act 1913* (NSW), which were the legislation relating to Crown lands in force at the time of the introduction of the *Aboriginal Land Rights Act*. At the introduction of the *Aboriginal Land Rights Act*, the terms "Crown land" and "Crown lands",<sup>178</sup> "land" and "lands",<sup>179</sup> and "land vested" and "lands vested"<sup>180</sup> were used interchangeably throughout the entirety of that predecessor legislation. For all these reasons, it is entirely unsurprising that no counsel at any stage in this proceeding sought to make any purely semantic point about the difference between the singular and the plural.<sup>181</sup>

127 Consistently with the definitions of "land" and "land claim" in s 4(1), s 36 refers to lands "vested in Her Majesty". The concept of "vesting" of land can, and can only, refer to the vesting of rights to land. In *Hawkins v Minister for Lands (NSW)*,<sup>182</sup> Dixon J held that land could be vested in the Crown even if a lease in perpetuity had been granted by the Crown so that the Crown no longer had an immediate right to possession. The land was not "vested in possession" because the Crown had no right to immediate possession of the land. But the reason that the land was nevertheless held to remain "vested" in the Crown in that case was that the Crown retained a reversionary interest in relation to the land. As Dixon J said: "[n]o doubt the reversionary interest in the Crown is slight and it may be said to be technical. But a rent is reserved, there are special conditions, the interest is capable of surrender and, for non-payment of survey fees, of forfeiture."<sup>183</sup> The reversionary interest was a sufficient right for the land to remain "vested" in the

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178 See, for instance, *Western Lands Act 1901* (NSW), ss 12, 17CC, 23, 24, 28A, 35C, 44 ("Crown lands"), s 31A ("Crown land"), ss 3, 33A ("Crown lands" and "Crown land"); *Crown Lands Consolidation Act 1913* (NSW), s 5 ("Crown lands"), ss 162, 214, 216, 220, 221, 225, 255, 268 ("Crown land"), ss 25A, 124 ("Crown lands" and "Crown land").

179 See, for instance, *Western Lands Act 1901* (NSW), ss 2, 18A, 35B ("lands"), ss 5, 9, 10, 13, 17A ("land"), ss 17, 17C, 18, 18B, 26, 28B ("lands" and "land").

180 See, for instance, *Crown Lands Consolidation Act 1913* (NSW), s 5(1) ("lands vested"), s 25A(3) ("land vested").

181 See also *Interpretation Act 1987* (NSW), s 8(c).

182 (1949) 78 CLR 479.

183 *Hawkins v Minister for Lands (NSW)* (1949) 78 CLR 479 at 492.

Crown. The expression "vested" was plainly used by Dixon J as a descriptor of the legal relationship between the Crown and the land. It described the rights of the Crown to the land. Exactly the same point was made by Gleeson CJ, Gaudron, Kirby and Hayne JJ later, in *Yanner v Eaton*,<sup>184</sup> when considering the language of "property" in fauna that is "vested in the Crown": "it is a description of a legal relationship with a thing". To treat the "vesting" as being of the physical thing itself, rather than of rights to the physical thing, is to make an error that has not been made by discriminating lawyers for four centuries.

128 Also consistently with the definitions of "land" and "land claim" in s 4(1), s 36(1)(a) uses "land" in a sense that includes "rights to land". Section 36(1)(a) describes land being "sold", land being "leased", and land being "dedicated" or "reserved" for a purpose. Each and every one of these concepts is concerned with rights to land. It is elementary that a "sale of land" is a sale of an estate in, or title to, land. Registration regimes for ownership of land are based upon titles, bought and sold. So too, it is elementary that a lease of physical land is a lease of rights to land. The legal term "lease" is commonly thought of as shorthand for a leasehold estate although, strictly, leases were not part of the feudal system of estates. It is, by definition, impossible to sell or lease "land" without selling or leasing rights to land.

129 So too, a dedication or reservation involves the creation of rights to land and corresponding duties in relation to the physical land.<sup>185</sup> At the time of the land claim in this case, on 19 December 2016, the provisions of the *Crown Lands Consolidation Act 1913* (NSW) to which reference was made in s 36(1)(a) were to be read as references to the *Crown Lands Act 1989* (NSW).<sup>186</sup> The *Crown Lands Act* conferred power on the relevant Minister to dedicate<sup>187</sup> or to reserve<sup>188</sup> land. Such a dedication or reservation would not change the physical land. Rather, it would create rights and duties in relation to the land.

130 The focus upon rights to land in s 36(1)(a) is further reinforced by the reference to the land being "able" to be sold or leased and the land being "lawfully"

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**184** (1999) 201 CLR 351 at 365-366 [17].

**185** *The Commonwealth v Yunupingu* (2025) 99 ALJR 519 at 602-603 [342]; 421 ALR 604 at 701.

**186** *Crown Lands Act 1989* (NSW), Sch 7 (repealing the *Crown Lands Consolidation Act 1913* (NSW)), Sch 8, Pt 1, cl 21(1) (substituting a reference to the *Crown Lands Consolidation Act 1913* (NSW) in other legislation with a reference to the *Crown Lands Act 1989* (NSW)).

**187** *Crown Lands Act 1989* (NSW), s 80(1).

**188** *Crown Lands Act 1989* (NSW), s 87(1).

sold or leased. It would be nonsense to speak of physical land, separately from the rights to that land, being "able" to be sold or leased or unlawfully sold or leased. The legal ability to sell or lease is concerned with the rights to land. That was the essence of the Court of Appeal's reasoning in refusing Quarry Street's ground of appeal in relation to s 36(1)(a), which is not the subject of the ground of appeal in this Court.

131 On the other hand, "land" in s 36(1) is not limited to rights to land. It also includes the physical sense of land. The definition of "land" in s 4(1) is an inclusive definition. It includes rights to land but does not exclude the physical sense of land. The use of "land" in that sense is evident in s 36(1)(b1) and s 36(1)(c), which respectively relate to the need for lands as "residential lands" or for "an essential public purpose". These paragraphs are concerned with the purposes for use of the physical land. So too, ss 36(1)(d) and 36(1)(e) refer to "lands" in the physical sense of being the objects of rights, namely native title.

### **The meaning of "lawfully used or occupied" in s 36(1)(b)**

#### *Two available interpretations*

132 Since "land" in s 36(1) refers to both the physical thing and the rights to that physical thing, the central issue in this case becomes whether the expression "lawfully used or occupied": (i) is confined only to a purposeful interaction with land (in the physical sense); or (ii) also extends to the continuing exploitation of *rights* to the land at the date of the claim, such as by an extant lease (although not the sale of those rights; a disposal is not a use<sup>189</sup>). "The word 'used' is, of course, a word of wide import and its meaning in any particular case will depend to a great extent upon the context in which it is employed."<sup>190</sup>

133 In some contexts, a reference to land being "used or occupied" will include a "use" of rights to the land by the grant of a lease. In *Ryde Municipal Council v Macquarie University*,<sup>191</sup> this Court considered a provision concerning land vested in a university that is "used or occupied" by the university "solely for the purposes thereof".<sup>192</sup> In the majority, which concluded that there had been a use for the

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**189** *Minister Administering the Crown Lands Act v NSW Aboriginal Land Council* (2008) 237 CLR 285 at 307 [74].

**190** *Council of the City of Newcastle v Royal Newcastle Hospital* (1957) 96 CLR 493 at 515. See also *Ryde Municipal Council v Macquarie University* (1978) 139 CLR 633 at 651, 658; *Minister Administering the Crown Lands Act v NSW Aboriginal Land Council* (2008) 237 CLR 285 at 306 [69].

**191** (1978) 139 CLR 633.

**192** *Local Government Act 1919* (NSW), s 132(1)(fii).

university's purposes by a lease to tenants who conducted various commercial businesses for their own benefit and not on behalf of the university, Gibbs A-CJ said:<sup>193</sup>

"A person who owns land may be said to use it for his own purposes notwithstanding that he permits someone else to occupy it, even under a lease. That is almost beyond argument when the owner's purpose is to acquire income. In the ordinarily accepted meaning of the word a building is 'used' for the purpose of acquiring income if rents are derived from it, and an owner of premises who leases them is making use of those premises by employing or applying them for the purpose of letting".

His Honour gave the example of premises used by a university by making them "available as a residence for the vice-chancellor". The lands would be "used" by the university "in the ordinary and natural meaning of that word, if the university grants a lease of the land for the purposes of the university".<sup>194</sup> Even if the vice-chancellor chose not to enter into occupation of the premises that had been made available under the lease, preferring to occupy their own premises, the land would nevertheless still have been used by the university for its purposes by the grant of the lease.

134 In other contexts, and even where the word "land" is used in a sense that includes rights to land, the "use" of land has been held to mean only a purposeful interaction with land (in the physical sense). This is particularly so where the use concerns a particular prescribed purpose or object for which the physical land is to be deployed. An example is *Stephen v Federal Commissioner of Land Tax*,<sup>195</sup> where the relevant provision was concerned with use or occupation of "all land owned by or in trust for any person or society and used or occupied by that person or society solely as a site for ... a ... public recreation ground".<sup>196</sup> The "land" to which reference was made in the provision included "rights to land" since rights are held on trust, not physical things. But rights cannot be used as a "public recreation ground". The "land" that was "used or occupied" for that purpose could only be the physical thing. As Isaacs CJ said, despite leasing part of the relevant land, the leased land was not "used or occupied by the owner of the land at all".<sup>197</sup>

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**193** *Ryde Municipal Council v Macquarie University* (1978) 139 CLR 633 at 638, citing *Commissioner of Income Tax v Hanover Agencies Ltd* [1967] 1 AC 681 at 689.

**194** *Ryde Municipal Council v Macquarie University* (1978) 139 CLR 633 at 639.

**195** (1930) 45 CLR 122.

**196** *Land Tax Assessment Act 1910* (Cth), s 13(g)(7).

**197** *Stephen v Federal Commissioner of Land Tax* (1930) 45 CLR 122 at 132.

And as Dixon J said, not in dissent on this point, the provision "looks to the actual use or occupation of the land".<sup>198</sup>

135 Similarly, in *Randwick Corporation v Rutledge*,<sup>199</sup> this Court considered whether a racecourse was "vested ... in a public body or in trustees and is used for a public reserve" within s 132(1)(c) of the *Local Government Act 1919* (NSW). Windeyer J, referring to the statement by Dixon J above, said:

"But is the land used for a public reserve? 'This provision', as Dixon J, as he then was, said in a similar matter, 'looks to the actual use ... of the land' ... The only way in which the trustees use the land is by leasing it to the club, to be used by it as a racecourse in accordance with the grant ... Indeed the land is not really used by the trustees at all, for they have parted with the use and occupation of it for the term of the lease ... When the Act speaks of land used for a public reserve it is referring to the actual use to which the land is put by the persons who in law control it for the time being."

### *Three interpretive red herrings*

136 The first interpretive red herring is the relative novelty of the interpretive question of whether the "use" of land in s 36(1)(b) of the *Aboriginal Land Rights Act* includes the use of rights to the land. Until this case, it appears that this point had not been directly raised before an appellate court in New South Wales. La Proulx and the NSWALC rightly do not purport to marshal novelty as a standalone submission. The novelty of a point says nothing at all about the merit of the point. Judges could hardly drop their pens or shut down their computers merely because a point of interpretation had not been noticed or had not been necessary to decide, particularly in cases that had been concerned with a subsection of specialised legislation in a single State of Australia.

137 La Proulx and the NSWALC submitted that the novel resolution of this issue by the Court of Appeal might nevertheless have been contrary to the result in three cases; it was submitted that a conclusion that s 36(1)(b) extended to the use of rights to land might have required those three cases to be decided differently.<sup>200</sup> Even putting to one side the sparse or absent argument on this point

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**198** *Stephen v Federal Commissioner of Land Tax* (1930) 45 CLR 122 at 140.

**199** (1959) 102 CLR 54 at 88, quoting *Stephen v Federal Commissioner of Land Tax* (1930) 45 CLR 122 at 140. See also *Commissioners of Taxation v Trustees of St Mark's Glebe* [1902] AC 416 at 420-421, quoted by Aickin J in dissent in *Ryde Municipal Council v Macquarie University* (1978) 139 CLR 633 at 662.

**200** *Minister Administering the Crown Lands Act v NSW Aboriginal Land Council* (1993) 31 NSWLR 106 ("*Nowra Brickworks [No 1]*"); *New South Wales Aboriginal*

in those cases (and hence the weakness or lack of authority of those cases for the proposition<sup>201</sup>), at least two of those cases might not have been decided differently. The first, *Nowra Brickworks [No 1]*, concerned the use of land by a "mining lease"; rights of a nature that may not have conferred exclusive possession.<sup>202</sup> In other words, it was a licence. The grant of the licence is a personal right that does not involve the creation of a right to the land or the use of rights to the land. In the third case, *Doyalson*, the relevant special lease was not on foot at the time of the claim.<sup>203</sup> It is unnecessary to decide whether or not the first instance decision in *Little Bay* would have been decided differently, and whether it was correctly decided even to the extent that its focus was upon the actual use of that part of the land which was reserved for access to the surf club. That single decision, where, at best, the point was asserted rather than carefully argued,<sup>204</sup> does not constitute even a ripple of authority.

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The second interpretive red herring, as the Court of Appeal correctly noted,<sup>205</sup> is the interpretive principle of preferring a beneficial interpretation of beneficial legislation. As four members of this Court observed in *Minister Administering the Crown Lands Act v NSW Aboriginal Land Council*,<sup>206</sup> it is evident from the text (including the preamble) and the extrinsic materials preceding the enactment of the *Aboriginal Land Rights Act* that it is legislation that is "intended for beneficial and remedial purposes". In particular, one intention, as stated in the Parliamentary Debates, is to "provide a substantial amount of resources for the 40 000 [Aboriginal people] in New South Wales to secure land ... [and] vastly increase the amount of land owned by [Aboriginal people] in this

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*Land Council – Little Bay v Minister Administering the Crown Land Management Act* [2022] NSWLEC 142 ("*Little Bay*"); *Darkinjung Local Aboriginal Land Council v Minister Administering the Crown Land Management Act 2016* [2023] NSWLEC 134 ("*Doyalson*").

**201** *R v Warner* (1661) 1 Keb 66 at 67 [83 ER 814 at 815]; *CSR Ltd v Eddy* (2005) 226 CLR 1 at 11 [13]; *Bell Lawyers Pty Ltd v Pentelow* (2019) 269 CLR 333 at 346 [28]. See also Cross and Harris, *Precedent in English Law*, 4th ed (1991) at 158-161.

**202** See *Western Australia v Ward* (2002) 213 CLR 1 at 165-166 [308]. See also *The Commonwealth v Yunupingu* (2025) 99 ALJR 519 at 598-599 [323]; 421 ALR 604 at 695-696, referring to *Wik Peoples v Queensland* (1996) 187 CLR 1.

**203** [2023] NSWLEC 134 at [115].

**204** See, eg, *Little Bay* [2022] NSWLEC 142 at [26], [32], [36], [41].

**205** *Quarry Street Pty Ltd v Minister Administering the Crown Land Management Act 2016* (2024) 114 NSWLR 534 at 556 [112].

**206** (2008) 237 CLR 285 at 300-301 [44]-[46].

State".<sup>207</sup> That principle has real utility when assessing an interpretation of beneficial legislation that would be detrimental to the persons intended to benefit. But the principle says nothing about the extent to which a provision is intended to benefit a person.

139 This Court has described the interpretive principle as one that requires that "remedial or beneficial legislation should be accorded a 'fair, large and liberal interpretation', rather than one which is literal or technical" and that if a section "is ambiguous it should ... be given a broad construction, so as to effectuate the beneficial purpose which it is intended to serve".<sup>208</sup> Despite the reference to ambiguity, this interpretive principle, as Professor Pearce rightly observes,<sup>209</sup> is not confined to circumstances of ambiguous words. Rather, the principle is an aspect of the ordinary language technique by which the meaning of all words is understood by reference to their purpose, here a purpose that involves an intention to benefit Aboriginal people.

140 The reason that this interpretive principle is a red herring in this case is that the beneficial purpose of s 36(1) of the *Aboriginal Land Rights Act* is not in doubt. The issue on this appeal concerns the *extent* to which s 36(1)(b) provides a benefit to Aboriginal people: "[w]here the problem is one of doubt about the extent to which the legislation pursues a purpose, stating the purpose [as a beneficial aim] is unlikely to solve the problem"; since legislation does not pursue its purposes no matter what the cost, "[t]he question is: how far does the legislation go in pursuit of that purpose or object?"<sup>210</sup>

141 The third interpretive red herring is the spectre of the State of New South Wales creating "paper leases"—leases conferred, perhaps at a peppercorn rent, for no purpose at all—merely to extinguish land claims over the paper lease area. Such a speculative possibility was rejected in the Court of Appeal by White JA (with whom Adamson and Stern JJA agreed), who said that the New South Wales

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**207** New South Wales, Legislative Assembly, *Parliamentary Debates* (Hansard), 24 March 1983 at 5090.

**208** *New South Wales Aboriginal Land Council v Minister Administering the Crown Lands Act* (2016) 260 CLR 232 at 255-256 [32], quoting *IW v City of Perth* (1997) 191 CLR 1 at 12, 39 (in turn quoting *Coburn v Human Rights Commission* [1994] 3 NZLR 323 at 333) and *R v Kearney; Ex parte Jurlama* (1984) 158 CLR 426 at 433.

**209** Pearce, *Statutory Interpretation in Australia*, 10th ed (2024) at 364 [9.2].

**210** *Carr v Western Australia* (2007) 232 CLR 138 at 143 [5]-[7]. See also *Construction Forestry Mining and Energy Union v Mammoet Australia Pty Ltd* (2013) 248 CLR 619 at 632-633 [40]; *New South Wales Aboriginal Land Council v Minister Administering the Crown Lands Act* (2016) 260 CLR 232 at 270-271 [92]-[94].

Parliament "would not have contemplated" that the Minister would abuse their power in such a way.<sup>211</sup>

*The best interpretation*

142 For three reasons, the best interpretation of "used" in s 36(1)(b) is the narrower meaning. Land is "used" by a purposeful interaction with land (in the physical sense) at the date of the claim. Land is not used merely by a continuing exploitation of rights to land at the date of the claim.

143 First, the meaning of "used" is affected by the meaning of "occupied". It is established that the meaning of "occupied" in s 36(1)(b) does not include the mere exploitation of rights to land. The term means "'actually occupied' in the sense of being occupied in fact and to more than a notional degree".<sup>212</sup> Hence, in s 36(1)(b), land is not occupied merely because a person exploits a fee simple estate in possession by giving up possession through the grant of a lease: "[o]ccupation is matter of fact ... There must be something actually done on the land".<sup>213</sup> The need for "something actually done" is best expressed as a purposeful interaction with land (in the physical sense) (since, as explained below, the physical action which leads to the interaction with the land might take place on different land). The purposeful interaction is assessed at the date of the claim.<sup>214</sup>

144 The meaning of "occupied" remains relevant to the meaning of "used" despite the holding of this Court in *New South Wales Aboriginal Land Council v Minister Administering the Crown Lands Act*,<sup>215</sup> consistent with longstanding authority in related contexts,<sup>216</sup> that the two terms—"used" and "occupied"—"refer

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211 *Quarry Street Pty Ltd v Minister Administering the Crown Land Management Act 2016* (2024) 114 NSWLR 534 at 547 [60], 558 [131], [132].

212 *Daruk Local Aboriginal Land Council v Minister Administering the Crown Lands Act* (1993) 30 NSWLR 140 at 162.

213 *Council of the City of Newcastle v Royal Newcastle Hospital* (1959) 100 CLR 1 at 4; [1959] AC 248 at 255.

214 *New South Wales Aboriginal Land Council v Minister Administering the Crown Lands (Consolidation) Act and the Western Lands Act* (1988) 14 NSWLR 685 at 692; *Darkinjung Local Aboriginal Land Council v Minister Administering the Crown Land Management Act 2016* (2022) 110 NSWLR 535 at 537 [7], 540 [19].

215 (2016) 260 CLR 232 at 250-251 [14]. See also at 269-270 [87].

216 *Knowles v Newcastle Corporation* (1909) 9 CLR 534 at 545; *Council of the City of Newcastle v Royal Newcastle Hospital* (1957) 96 CLR 493 at 505, 507, 509; *Ryde Municipal Council v Macquarie University* (1978) 139 CLR 633 at 658.

to different concepts and a natural reading of the phrase is that either a lawful use or a lawful occupation of the land will defeat a claim". Although "used or occupied" is not a compound phrase, the meaning of each term in the phrase remains capable of affecting the other term.<sup>217</sup>

145 Secondly, in 1983 when the *Aboriginal Land Rights Act* was enacted, some Crown lands to which s 36(1) applied may not have been the subject of rights held by the State of New South Wales as a body politic. Although many of the claimable Crown lands (like the Land in this case) are now likely to be lands where the body politic of the State of New South Wales is registered as the proprietor of the land holding an estate in fee simple,<sup>218</sup> this may not have been as widespread in 1983 when the *Aboriginal Land Rights Act* was enacted. Without the exercise of sovereign power to create a fee simple over Crown lands, the State of New South Wales may have had only the misnomer of "radical title", which is not title or rights to land at all but the existence of a sovereign power.<sup>219</sup> It involves some strain to describe the exercise of sovereign power to create a fee simple or leasehold estate as the use of rights to land.

146 Thirdly, there is difficulty in describing the existence of a continuing lease as a continuing use of the lessor's rights to land. There is little difficulty in describing a lessor's rights to land as being "used" to create a lease at the moment of the grant. The freehold estate in possession is "used" to create a lease by giving up the right of exclusive possession which is subsequently held by the lessee. But it is very difficult to describe the lessee as continuing to use *the lessor's* right of exclusive possession after the creation of the lease. The lessor's right of exclusive possession, a right to exclude others, has been lost; it does not continue during the term of the lease.<sup>220</sup> The lessor has a right of reversion in equity but that right of reversion is not "used" merely by the continuation of the terms and conditions of the common law lease. Indeed, the same terms and conditions could be enforced under a sub-licence agreement to pay rent or to perform work on land where the sub-licensor has only personal rights under a licence agreement.

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217 *Daruk Local Aboriginal Land Council v Minister Administering the Crown Lands Act* (1993) 30 NSWLR 140 at 164.

218 *Real Property Act 1900* (NSW), ss 13D, 13J.

219 *The Commonwealth v Yunupingu* (2025) 99 ALJR 519 at 589-590 [284]; 421 ALR 604 at 683-684.

220 Rostill, *Possession, Relative Title, and Ownership in English Law* (2021) at 55. See also Douglas, "The Content of a Freehold: A 'Right to Use' Land?", in Hopkins (ed), *Modern Studies in Property Law* (2013), vol 7, 359.

147 Since the continuing terms and conditions of a lease were not, and are not, a use of the lessor's right of exclusive possession (which no longer remains during the term of the lease), it is difficult to describe the lessor, with only an equity of reversion, as the legal owner. Some statutes therefore preserved the notion of a person remaining the holder of a fee simple in possession by extending "possession" from the "ordinary sense of the word"<sup>221</sup> to a "very specific statutory sense"<sup>222</sup> which includes the receipt of rent and profits under the terms and conditions of a lease.<sup>223</sup> There is no such provision in the *Aboriginal Land Rights Act*.

148 Hence, even where the State of New South Wales, as lessor, had a fee simple title to the relevant land and "used" that title to create a lease, at the later date of the claim it is difficult to describe the continuing existence of leasehold rights as a use of the lessor's fee simple in possession. The demand for, and receipt of, rent or income under the lease, or threatened action to enforce the terms of the lease,<sup>224</sup> could be described as a use of rights of possession, and therefore a use of the freehold estate in possession, in a very specific statutory sense where possession had been given that extended meaning,<sup>225</sup> but the *Aboriginal Land Rights Act* contains no such extended definition of possession.

149 Against these three matters, it must be accepted that this interpretation could give rise to difficult practical consequences. As with ordinary language usage concerning practical affairs, in general the more impracticable a consequence that can reasonably be expected to arise from one interpretation compared with another, the less likely that it could be said that the impracticable interpretation was intended.<sup>226</sup> But great care must be taken with such consequentialist reasoning in statutory interpretation. Issues of practicability are not always clear cut. Further, even where clearly impracticable consequences might be reasonably anticipated,

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221 *In re Bennet* [1903] 2 Ch 136 at 140.

222 Gray and Gray, *Elements of Land Law*, 5th ed (2009) at 321 [4.1.33].

223 Dixon, Bignell and Hopkins, *Megarry & Wade: The Law of Real Property*, 10th ed (2024) at 87-88 [4-044]. See *In re Morgan* (1883) 24 Ch D 114 at 116.

224 *Quarry Street Pty Ltd v Minister Administering the Crown Land Management Act 2016* (2024) 114 NSWLR 534 at 537 [10]-[11].

225 See *Conveyancing Act 1919* (NSW), s 7(1). The origin of this provision may have been the *Settled Land Act 1882* (45 and 46 Vict c 38), s 2(10)(i). See also *Law of Property Act 1925* (UK), s 205(1)(xix).

226 See *Ueese v Minister for Immigration and Border Protection* (2015) 256 CLR 203 at 217 [45], 232 [100].

the significance of those consequences in the interpretive exercise may depend upon whether they are consistent with the identified purpose of Parliament.

150 One difficult consequence asserted by Quarry Street was said to arise if Crown land were the subject of a lease which did not have a provision, like that contained in the Lease in this case, by which the lease would terminate upon transfer of the land under s 36(5) of the *Aboriginal Land Rights Act*. In those circumstances, Quarry Street asserted, the tenant would be faced with a lease with terms that required payment of rent to the former registered owner in circumstances in which the land is owned by another person. Moreover, Quarry Street argued, further complications could arise where only part of the leased land is the subject of a claim.

151 The longstanding answer to this concern, at least where the entirety of the claimed land is subject to a lease, lies in s 40(3) of the *Real Property Act 1900* (NSW) and ss 117 and 118 of the *Conveyancing Act 1919* (NSW). Although the purpose of s 40(3) of the *Real Property Act* has been the subject of much debate, it should be seen at least as operating to ensure that the certificate of title of a registered proprietor, including an Aboriginal Land Council to whom land has been transferred under s 36(5) of the *Aboriginal Land Rights Act*, will be treated without more as evidence of holding the reversionary rights to that land. Further, and relevantly, it achieved "a result, whether by accident or design, which anticipated by more than fifty years the provisions of ss 117 and 118 of the [*Conveyancing Act*]". Those provisions of the *Conveyancing Act* ensure that "the rent reserved by a lease and the benefit of the lessee's covenants, as well as the obligations of the lessor's covenants, shall run with the reversion".<sup>227</sup>

152 A more difficult consequence, to which both Quarry Street and the Minister referred in submissions, is the inability of the Minister to monitor leases to ensure that the tenant is engaged in a purposeful interaction with land (in the physical sense). Even if the State of New South Wales inserted a term in a lease that required activity on the land, and even if the State of New South Wales sought to enforce that term, a lack of vigilant monitoring could leave Crown land in New South Wales liable to a claim under the *Aboriginal Land Rights Act* in any period prior to enforcement, particularly given the State's obligations of procedural fairness to a tenant when enforcing any term.

153 A partial answer to this difficulty, although not necessarily one that was contemplated in 1983, was introduced in legislation enacted in 2016 to deal with the management of 580,000 Crown land parcels covering 33 million hectares of

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227 Baalman, *The Torrens System in New South Wales* (1951) at 122.

land.<sup>228</sup> That partial answer, as the Minister acknowledged in submissions, is the power of the Minister to appoint qualified persons as Crown land managers for dedicated or reserved Crown land.<sup>229</sup> The Crown land managers become responsible for the care, control, and management of the Crown land.<sup>230</sup> Indeed, an appointment as Crown land manager can be made of a "Local Aboriginal Land Council under the *Aboriginal Land Rights Act*".<sup>231</sup>

154 Ultimately, however, I do not consider that this practical consequence is sufficient to require the broader interpretation of s 36(1)(b) that extends the meaning of a "use of land" to continuing interactions with rights to land at the date of a claim. In particular, by the transitional provision (set out above) in Sch 4, Pt 2, cl 8 of the *Aboriginal Land Rights Act* the New South Wales Parliament entirely addressed these issues over the transitional period by preventing any lands from becoming claimable Crown lands until any lease, licence, or permissive occupancy, existing at the appointed day of 10 June 1983, ceased to be in force. It was open to the Parliament of New South Wales to have gone further and to have provided for such a consequence to be ongoing, either limited to leasehold interests in land or extending also to licences in relation to the land as was the case during the transitional period.

### **The application of the meaning of "used" in s 36(1)(b)**

155 For the reasons above, the best interpretation of "used" in s 36(1)(b) is a purposeful interaction with land (in the physical sense). That interpretation, however, does not necessarily require physical action to be taken on all, or even any, of the land. As Lord Denning said in the Privy Council in *Council of the City of Newcastle v Royal Newcastle Hospital*:<sup>232</sup>

"An owner can use land by keeping it in its virgin state for his own special purposes. An owner of a powder magazine or a rifle range uses the land he had acquired nearby for the purpose of ensuring safety even though he never sets foot on it. The owner of an island uses it for the purposes of a bird

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**228** New South Wales, Legislative Council, *Parliamentary Debates* (Hansard), 19 October 2016 at 61.

**229** *Crown Land Management Act 2016* (NSW), s 3.3.

**230** *Crown Land Management Act 2016* (NSW), s 3.13(1).

**231** *Crown Land Management Act 2016* (NSW), s 3.3(2)(b).

**232** (1959) 100 CLR 1 at 4; [1959] AC 248 at 255.

sanctuary even though he does nothing on it, except prevent people building there or disturbing the birds."

In every case, all of the facts and circumstances are relevant to ascertain whether at the date of the claim there is a purposeful interaction with the physical area of the land claimed.

156 Quarry Street argued, by a notice of contention, that apart from the existence of the Lease, the Land was "used" by "the following incontrovertible acts, facts, matters and circumstances: (a) the payment of substantial rent by [CSKS] to the [State of New South Wales] ... and (b) the [State of New South Wales] taking active steps to secure compliance with the Lease from at least 10 April 2016 ... and CSKS responding to avoid forfeiture of the Lease by undertaking substantial repairs to the [State of New South Wales's] satisfaction shortly prior to the date of claim". Neither of these matters is sufficient to show that the Minister acted legally unreasonably in allowing the claim on the basis that it was not legally open to the Minister to be satisfied of the criterion in s 36(1)(b).

157 The two matters upon which Quarry Street relies in its notice of contention might support a conclusion that rights to the land were being used, consistently with the reasoning set out above of Gibbs A-CJ in *Ryde Municipal Council v Macquarie University*.<sup>233</sup> Both (i) any demand for, or receipt of, substantial rent paid by CSKS to the State of New South Wales, and (ii) any steps taken to enforce compliance with the State's leasehold rights, might arguably be said to be a use of the State's fee simple title to the land. But demand for, or receipt of, rent and demands for compliance with rights are not purposeful interactions with the physical area of the land claimed.

158 Once the payment of any rent and demands for compliance with any rights under the Lease are excluded, the consequence is that at the date of the claim there was little or no evidence, and no findings, of any purposeful interaction with the physical area of the land claimed. It must be accepted, and was not in dispute, that the uncontradicted evidence before the primary judge (described earlier in these reasons) established that CSKS was engaged in rectification work on the Land at the date of the claim. The rectification work was undoubtedly an interaction with the Land. But there was no evidence that could establish that the rectification work was a purposeful interaction. Indeed, CSKS considered that much of the rectification work was not needed because it was "not intended that the property will be used for public purposes without substantial renovation and refurbishment". Just as occupation only to a "notional degree" is insufficient to satisfy the meaning of occupation in s 36(1)(b), so too an interaction that is only for the notional purpose of maintaining the land in compliance with a lease, so that

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233 (1978) 139 CLR 633 at 638-639.

it is *capable* of being used, is insufficient to satisfy the meaning of "used" in s 36(1)(b).

### Conclusion and costs

159 The appeal should be allowed with Quarry Street to pay the costs of La Perouse and the NSWALC. The orders made by the Court of Appeal of the Supreme Court of New South Wales on 10 May 2024 should be set aside and, in lieu thereof, orders should be made to dismiss the appeal to that Court and require Quarry Street to pay the costs of La Perouse and the NSWALC.

160 In this Court, La Perouse and the NSWALC also sought orders that the second respondent, the Minister, also pay their costs. The Minister was a necessary party to the appeal to the Court of Appeal and to this Court. The Minister accepts that in the Court of Appeal, the Minister played an "active role". It appears that this active role involved making submissions in support of La Perouse and the NSWALC, contending that the Court of Appeal should uphold the determination made by the Minister. On that basis, it seems, costs were ordered against the Minister.

161 The position was different in this Court. Senior counsel for the Minister began her opening submissions with an emphatic statement that the Minister did not contend for any outcome in the appeal and that the factors to which the Minister pointed were merely matters for consideration in the interpretive exercise. The Minister's well-presented submissions were both useful and relatively brief. The central factor upon which the Minister focused—the consequences of the interpretation proposed by La Perouse and the NSWALC (supported by the Minister in the Court of Appeal)—was a matter of administration which the Minister was the best placed person to address. Those consequences favoured the interpretation proposed by Quarry Street but, as explained above, the Minister also made submissions about how those consequences were ameliorated.

162 The Minister did not become a "protagonist" for Quarry Street, the party whom the Minister had played an active role opposing in the Court of Appeal. Further, at no stage of the proceeding in this Court did the Minister seek the costs of this appeal.<sup>234</sup> The role of the Minister on this appeal was not akin to one where submissions are made by a tribunal that might compromise any "impartiality which

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**234** *Muswellbrook Shire Council v Hunter Valley Energy Coal Pty Ltd* (2019) 372 ALR 695 at 711 [67].

it is expected to maintain in subsequent proceedings which take place if and when relief is granted".<sup>235</sup> No order for costs should be made against the Minister.

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**235** *R v Australian Broadcasting Tribunal; Ex parte Hardiman* (1980) 144 CLR 13 at 35-36.

JAGOT J.

### A novel question

163 This case involves a novel question about the meaning and operation of  
s 36(1)(b) of the *Aboriginal Land Rights Act 1983* (NSW).

164 The novel question is this. If:

- (a) after the "appointed day" (10 June 1983)<sup>236</sup> as referred to in cl 8 of Sch 4 to the *Aboriginal Land Rights Act* the Crown in right of the State of New South Wales ("the State"), represented by the Minister Administering the "*Crown Lands Consolidation Act 1913* [(NSW)]"<sup>237</sup> ("the Crown Lands Minister"<sup>238</sup>), lawfully grants a lease of Crown land;

and,

- (b) at the time when a claim is made for the land the subject of the lease under s 36(2) or (3) of the *Aboriginal Land Rights Act*, that lease has not been terminated, forfeited or abandoned,

is the land necessarily outside the scope of that part of s 36(1)(b) of the *Aboriginal Land Rights Act* which provides that "claimable Crown lands" means "lands vested in Her Majesty that, when a claim is made for the lands under this Division: ... are not lawfully used"?

165 As will be explained, this question is to be answered in the negative. The mere fact that land is subject to a lease which has not been terminated, forfeited or abandoned at the time a claim is made for the land under s 36(2) or (3) of the *Aboriginal Land Rights Act* does not mean that the land is necessarily outside the scope of that part of s 36(1)(b) of the *Aboriginal Land Rights Act* which provides that "claimable Crown lands" means "lands vested in Her Majesty that, when a claim is made for the lands under this Division: ... are not lawfully used". Properly construed, land is not "lawfully used" within the meaning of s 36(1)(b) of the

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**236** *Aboriginal Land Rights Act 1983* (NSW), Sch 4, cl 1 and *New South Wales Government Gazette*, No 84, 10 June 1983 at 2691.

**237** The reference to the *Crown Lands Consolidation Act 1913* (NSW) in s 36(1) of the *Aboriginal Land Rights Act* is to be read as a reference to: (a) the *Crown Lands Consolidation Act* from its commencement to 1 May 1990; (b) from 1 May 1990 to 1 July 2018 "the *Crown Lands Act 1989* [(NSW)]", by operation of Sch 7 and Sch 8, cl 21(1) of that Act; and (c) from 1 July 2018 to date the *Crown Land Management Act 2016* (NSW), by operation of Sch 8 and Sch 7, cl 39 of that Act.

**238** See *Aboriginal Land Rights Act*, s 36(1) and (5).

*Aboriginal Land Rights Act* if, when the claim is made, the land is not then actually used in fact. For land to actually be used in fact as required by s 36(1)(b), the land as a physical mass or tract of ground must be presently, and not in a mere future or contingent sense, physically deployed for a purpose, whether that present physical deployment be active or passive, to more than merely a notional degree. The mere existence of a lease in respect of the land at the time a claim is made does not, in and of itself, constitute an actual use of land in fact of any kind.

166 To understand how this is the determinative question in this appeal, reflected in the appellants' sole ground of appeal (that the Court of Appeal of the Supreme Court of New South Wales "erred in concluding that the Minister was *required to find* that the land claimed by the appellants was not 'claimable Crown lands' for the purposes of s 36(1) of the *Aboriginal Land Rights Act 1983* (NSW)"<sup>239</sup>), it is necessary to identify the relevant statutory provisions, the relevant facts, and the confined nature of the proceeding before the primary judge and the Court of Appeal.

### Statutory provisions

#### *Aboriginal Land Rights Act*

167 The relevant statutory provisions include the definitions of "land" and "land claim" in s 4(1) of the *Aboriginal Land Rights Act*, which provides that:

"In this Act, except in so far as the context or subject-matter otherwise indicates or requires:

...

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

**land claim** means a claim for land made under section 36."

168 Section 36(1) of the *Aboriginal Land Rights Act* provides that:

"In this section, except in so far as the context or 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:

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239 Emphasis added.

61.

- (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,
- (b1) do not comprise lands which, in the opinion of a Crown Lands Minister, are needed or are likely to be needed as residential lands,
- (c) are not needed, nor likely to be needed, for an essential public purpose, and
- (d) do not comprise lands that are the subject of an application for a determination of native title (other than a non-claimant application that is an unopposed application) that has been registered in accordance with the Commonwealth Native Title Act, and
- (e) do not comprise lands that are the subject of an approved determination of native title (within the meaning of the Commonwealth Native Title Act) (other than an approved determination that no native title exists in the lands).

***Crown Lands Minister*** means the Minister for the time being administering any provisions of the *Crown Lands Consolidation Act 1913* or the *Western Lands Act 1901* under which lands are able to be sold or leased."

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Section 36(5) of the *Aboriginal Land Rights Act* provides that:

"A Crown Lands Minister to whom a claim for lands (being lands which are, or, but for any restriction on their sale or lease, would be, able to be sold or leased under a provision of an Act administered by the Crown Lands Minister) has been referred under subsection (4) shall:

- (a) if the Crown Lands Minister is satisfied that:
  - (i) the whole of the lands claimed is claimable Crown lands, or
  - (ii) part only of the lands claimed is claimable Crown lands,
 grant the claim by transferring to the claimant Aboriginal Land Council (or, where the claim is made by the New South Wales Aboriginal Land Council, to a Local Aboriginal Land Council (if any) nominated by the New South Wales Aboriginal Land Council) the whole or that part of the lands claimed, as the case may be, or

- (b) if the Crown Lands Minister is satisfied that:
  - (i) the whole of the lands claimed is not claimable Crown lands, or
  - (ii) part of the lands claimed is not claimable Crown lands,
 refuse the claim or refuse the claim to the extent that it applies to that part, as the case may require."

170 Other relevant provisions within s 36 of the *Aboriginal Land Rights Act* include the following:

- "(4A) The Registrar may refuse to refer a claim, or part of a claim, to the Crown Lands Minister if the Registrar is satisfied that:
  - (a) the claim, or the part of the claim, relates to lands that are not vested in Her Majesty, or

...

- (5A) Where, under subsection (5), a Crown Lands Minister is not satisfied that the whole or part of the lands claimed is claimable Crown lands because the lands are needed, or likely to be needed, for an essential public purpose, but that the need for the lands for the public purpose would be met if the claim were to be granted in whole or in part subject to the imposition of a condition (whether by way of covenant or easement or in any other form) relating to the use of the lands, the Crown Lands Minister may, notwithstanding that subsection, where the condition is agreed to by the Aboriginal Land Council making the claim, grant the claim under that subsection subject to the imposition of the condition.

...

- (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.

- (9A) [Concerns lands under the *Western Lands Act 1901* (NSW).]

..."

171 Clause 8 of Sch 4 to the *Aboriginal Land Rights Act* provides:

"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."

172 As noted, the "appointed day" as referred to in cl 8 of Sch 4 to the *Aboriginal Land Rights Act* is 10 June 1983.<sup>240</sup>

#### *Crown lands legislation*

173 Crown lands legislation, as referred to in s 36(1)(a) of the *Aboriginal Land Rights Act*, is also relevant. By "Crown lands legislation" what is meant is the *Crown Lands Consolidation Act 1913* (NSW), the *Crown Lands Act 1989* (NSW), and the *Crown Land Management Act 2016* (NSW).<sup>241</sup>

174 As the land claim in this case was made on 19 December 2016, the relevant Crown lands legislation was the *Crown Lands Act*.<sup>242</sup>

175 Under s 3(1) of the *Crown Lands Act*, "Crown land" was defined to mean "land that is vested in the Crown or was acquired under the Closer Settlement Acts as in force before their repeal, not in either case being: (a) land dedicated for a public purpose, or (b) land that has been sold or lawfully contracted to be sold and in respect of which the purchase price or other consideration for the sale has been received by the Crown".

176 By s 6 of the *Crown Lands Act*, "Crown land shall not be occupied, used, sold, leased, licensed, dedicated or reserved or otherwise dealt with unless the occupation, use, sale, lease, licence, reservation or dedication or other dealing is authorised by this Act or the *Crown Lands (Continued Tenures) Act 1989* [(NSW)]." By s 34(1), the "Minister may, in such manner and subject to such terms and conditions as the Minister determines: (a) sell, lease, exchange or otherwise dispose of or deal with Crown land, or (b) grant easements or rights-of-way over, or licences or permits in respect of, Crown land, on behalf of the Crown". By s 34(6), s 34 "does not authorise the sale of Crown land which is reserved for a public purpose". By s 34(7), "Crown land the subject of a special purpose lease within the meaning of Division 3A may be leased under this section, but only if

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240 See footnote 236.

241 See footnote 237.

242 However, provisions to the same general effect were in the *Crown Lands Consolidation Act* and are in the *Crown Land Management Act*.

the granting of a lease under this section is authorised by, and complies with, the terms of the special purpose lease." By s 34A(1), "[d]espite any other provision of this Act, the Minister may grant a lease, licence or permit in respect of, or an easement or right-of-way over, a Crown reserve for the purposes of any facility or infrastructure or for any other purpose the Minister thinks fit". By s 41, "[t]he term of a lease of Crown land (including any option for the grant of a further term) granted by the Minister is not to exceed 100 years", and, by s 42, "[a] disposition of Crown land by the Minister on behalf of the Crown, expressed to be a lease, is a lease even if exclusive possession of the land is not conferred on any person". By s 84(1), the Minister could, "by notification in the Gazette, revoke the whole or part of a dedication under this Act", subject to certain procedural requirements and parliamentary disallowance. By s 87(1), "[t]he Minister may, by notification in the Gazette, reserve any Crown land from sale, lease or licence or for future public requirements or other public purpose".

177 Section 129(1) of the *Crown Lands Act* provided that the Minister could declare any "holding" to be forfeited on several bases, including if the "holder fails to comply with a provision of this or any other Act applying to, or a condition attaching to, the holding". By s 3(1) of the *Crown Lands Act*, "**holding** means: (a) an incomplete purchase, a perpetual lease, a term lease, a special lease or a permissive occupancy under the *Crown Lands (Continued Tenures) Act 1989*, or (b) a lease or licence under this Act". By s 130, forfeiture of a holding did not take effect until, for land registered under the *Real Property Act 1900* (NSW), the Minister caused a notification of the forfeiture to be entered in the Register kept under that Act.

178 Section 169 of the *Crown Lands Act* provided that a "person who has acquired land from the Crown by way of purchase or exchange (other than a person who has acquired land under a lease from the Crown by way of exchange) under this Act has an estate fee simple in the land".

#### *Overview of key effects of statutory provisions*

179 The upshot of this is that, first, "claimable Crown lands", other than lands to which the *Western Lands Act 1901* (NSW) applies, are necessarily lands vested in the Crown in right of the State capable of being transferred in fee simple. It follows that, when s 36(1)(a) of the *Aboriginal Land Rights Act* says that the lands "are able to be lawfully sold or leased, or are reserved or dedicated for any purpose, under the *Crown Lands Consolidation Act 1913*", it means that the State can sell a fee simple interest in the land or grant a lease in respect of the land.

180 Second, "claimable Crown lands" under s 36(1)(a) of the *Aboriginal Land Rights Act* are not confined to "Crown land" under the Crown lands legislation. This follows from the fact that "land dedicated for a public purpose" is not "Crown land" under Crown lands legislation, but under s 36(1) of the *Aboriginal Land Rights Act* dedication of land is a qualifying condition for a land claim.

181 Third, subject to the Crown Lands Minister complying with the Crown  
lands legislation, ultimately, all land vested in the Crown in right of the State may  
be lawfully sold, leased, reserved or dedicated for any purpose.

**Lot 5 in deposited plan 1156846**

182 The second appellant made land claims under s 36(2) of the *Aboriginal  
Land Rights Act* in respect of the land in lot 5 in deposited plan 1156846, being  
land registered under the *Real Property Act*, on 3 September 2010 and  
19 December 2016. Lot 5 is within the area of the first appellant under the  
*Aboriginal Land Rights Act*. The Crown Lands Minister determined both claims  
on 10 December 2021.

183 The Crown Lands Minister refused the claim in respect of lot 5 made on  
3 September 2010. Relevantly, on the appointed day as referred to in cl 8 of Sch 4  
to the *Aboriginal Land Rights Act* (10 June 1983), lot 5 was the subject of a lease  
and that lease had not ceased to be in force as at the date of this claim, 3 September  
2010. Specifically, special lease 1960/249, granted on 19 May 1962 to Paddington  
Bowling Club Ltd for recreation (bowling greens) and erection of buildings (club  
house), remained in force until its expiry on 1 December 2010.

184 The Crown Lands Minister granted the claim to lot 5 made on 19 December  
2016. In accordance with s 36(5)(a)(ii) of the *Aboriginal Land Rights Act*, the  
Minister was therefore satisfied that lot 5 was "claimable Crown lands" in  
accordance with s 36(1) of that Act.

185 As noted, the special lease to Paddington Bowling Club Ltd expired on  
1 December 2010. On that day, the Crown Lands Minister granted another lease to  
Paddington Bowling Club Ltd for access, community and sporting club facilities,  
tourist facilities and services under s 34A of the *Crown Lands Act*. These purposes  
accord with the purposes specified in a reservation of lot 5 under s 87(1) of the  
*Crown Lands Act* on 11 December 2009. The lease runs for 50 years and  
terminates on 30 November 2060. The lease provides for an initial rent of \$52,000  
per year with periodic market rent reviews thereafter. Clause 39 of the lease  
provides that the lessee will not deal with the lease, including by assignment or  
sub-lease, without the consent in writing of the Crown Lands Minister as lessor.  
Clause 43 of the lease provides that the lessee may abandon the lease if the Crown  
Lands Minister as lessor gives written notice accepting surrender of the lessee's  
interest or forfeiture of the lease. Because this lease was not in force on the  
appointed day as referred to in cl 8 of Sch 4 to the *Aboriginal Land Rights Act*  
(10 June 1983), that clause had no application to the status of lot 5 for the purpose  
of the claim made on 19 December 2016.

186 The lease granted on 1 December 2010 was transferred with the consent in  
writing of the Crown Lands Minister to CSKS Holdings Pty Ltd on 30 December  
2011. On 1 February 2018 the Crown Lands Minister also consented in writing to

a transfer of the lease from CSKS to the first respondent, Quarry Street Pty Ltd. Accordingly, as at the date of the claim made on 19 December 2016, the lessee was CSKS.

### Before the primary judge

187 By a further amended summons filed on 17 May 2023, Quarry Street sought an order for certiorari quashing the decision of the Crown Lands Minister to grant the claim made on 19 December 2016 in respect of lot 5 on grounds including that the Crown Lands Minister misconstrued or misapplied the definition of "claimable Crown lands" in s 36(1) of the *Aboriginal Land Rights Act* in failing to consider that lot 5, at the date of the claim, was used by "the State of New South Wales for the purpose of letting and/or obtaining rental income ... and thus 'lawfully used or occupied'" within the meaning of s 36(1)(b) of that Act.

188 The primary judge, Preston CJ in the Land and Environment Court of New South Wales, noted that "Quarry Street had argued in both of its submissions [to the Crown Lands Minister] that the Crown had inspected the land, on at least two occasions, one in October 2015 and another in May 2016, in regard to CSKS's obligations under the Lease to maintain the grounds. CSKS also had conducted some inspections in response to the Crown's allegations that it was breaching the Lease's conditions."<sup>243</sup>

189 In rejecting Quarry Street's submission that the Crown Lands Minister misconstrued s 36(1)(b) (that the land not be lawfully used or occupied), the primary judge said "Quarry Street has not shown that the Minister's decision that the land was not lawfully used or occupied was not simply a factual one".<sup>244</sup> His Honour explained this point further, saying:<sup>245</sup>

"Certainly, however, it cannot be said that the only available inference that should be drawn from the Minister's decision is that the Minister found as matter of law that the action of the Crown in leasing the land to CSKS could never constitute a relevant use for the purpose of paragraph (b) of the definition of 'claimable Crown lands' in s 36(1) of the [Aboriginal Land Rights] Act. Put another way, it cannot be said that the decision the Minister reached, after a full consideration of the material that

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<sup>243</sup> *Quarry Street Pty Ltd v Minister Administering the Crown Land Management Act 2016* [2023] NSWLEC 62 at [49].

<sup>244</sup> *Quarry Street Pty Ltd v Minister Administering the Crown Land Management Act 2016* [2023] NSWLEC 62 at [49].

<sup>245</sup> *Quarry Street Pty Ltd v Minister Administering the Crown Land Management Act 2016* [2023] NSWLEC 62 at [50].

was before him, is capable of explanation only on the ground of misconception or misconstruction of what can constitute lawful use of land for the purpose of paragraph (b) of the definition of 'claimable Crown lands' in s 36(1) of the [Aboriginal Land Rights] Act: see *Avon Downs Pty Ltd v Federal Commissioner of Taxation* (1949) 78 CLR 353 at 360; [1949] HCA 26."

190 The primary judge's reference to *Avon Downs Pty Ltd v Federal Commissioner of Taxation*<sup>246</sup> is to Dixon J's statement that a decision to be made on the decision-maker being satisfied as to a specified matter is not beyond judicial review as the decision-maker must address themselves to the correct statutory question, must not be affected by a mistake of law, and must consider relevant considerations and disregard irrelevant considerations in reaching the required state of satisfaction. Dixon J also said that, even if the decision-maker has not given reasons for the decision, it may yet be that the decision is "capable of explanation only on the ground of some such misconception".<sup>247</sup>

191 The primary judge's point was that it could not be inferred that the Crown Lands Minister, in reaching the required state of satisfaction that lot 5 was not lawfully used or occupied as at 19 December 2016 (the date of the claim), necessarily construed those words to exclude either lawful use or lawful occupation of that land by the State for the purpose of letting and/or obtaining rental income. Rather, what could not be excluded is that the Crown Lands Minister decided, as a matter of mere fact, that the proved circumstances relating to lot 5 as at 19 December 2016 did not amount to lawful use or occupation of the land.

192 The primary judge, accordingly, dismissed Quarry Street's summons seeking that the Crown Lands Minister's decision be quashed.

### **Before the Court of Appeal**

193 Quarry Street appealed. The relevant ground of appeal was that "it was not open to the Minister to be satisfied that the land met the criterion in s 36(1)(b) ... because it was lawfully used by the Crown for the purpose of leasing the land to CSKS for valuable consideration".

194 The Court of Appeal of the Supreme Court of New South Wales (White JA, in reasons with which Adamson and Stern JJA agreed) allowed the appeal and granted an order quashing the decision of the Crown Lands Minister to grant the claim in respect of lot 5. The Court of Appeal said that "the authorities on

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**246** (1949) 78 CLR 353.

**247** (1949) 78 CLR 353 at 360.

s 36(1)(b) have consistently construed the words 'lawfully used' as referring to physical activities on the land".<sup>248</sup> The Court of Appeal reasoned, however, that: (a) s 4(1) of the *Aboriginal Land Rights Act* provides that "except in so far as the context or subject-matter otherwise indicates or requires – ... *land* includes any estate or interest in land, whether legal or equitable";<sup>249</sup> (b) while the inclusive aspect of that definition of "land" ("includes any estate or interest in land") could not apply to the concept of land being "occupied", "occupied" and "used" are separate concepts (as decided in *New South Wales Aboriginal Land Council v Minister Administering the Crown Lands Act*<sup>250</sup> ("the *Berrima Gaol case*")), and that inclusive aspect therefore could apply to the concept of land being "used"; (c) accordingly, "there is no reason not to apply the definition of 'land' in s 4 where the issue is the use, rather than the occupation, of land"; and (d) "[f]or these reasons, the better construction is that the Minister used the interest held by the Crown in the land by leasing it to CSKS. The fact that CSKS did not physically use the land does not mean that the Minister did not use it by leasing it to CSKS for the purpose stated in the lease."<sup>251</sup>

195 In response to the primary judge's reasoning that "the Minister might not have accepted the ... submission that the Crown, by leasing the land to CSKS in exchange for rent, was using the land for the purpose of leasing it simply as a matter of fact", the Court of Appeal said "[b]ut there was no dispute about the facts. There was no issue that the Minister had entered into the lease with CSKS on the terms for which it provided. If that were a relevant use of the land for the purposes of s 36(1)(b), the Minister's decision to the contrary was both an error of law and legally unreasonable."<sup>252</sup>

196 This reasoning exposes several key errors.

### **Land not used – a question of fact**

197 In saying that there was no dispute about the facts as the Crown Lands Minister had "entered into the lease with CSKS on the terms for which it provided",

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**248** *Quarry Street Pty Ltd v Minister Administering the Crown Land Management Act 2016* (2024) 114 NSWLR 534 at 556 [111].

**249** *Quarry Street Pty Ltd v Minister Administering the Crown Land Management Act 2016* (2024) 114 NSWLR 534 at 541 [24]. See also at 557 [116]-[117].

**250** (2016) 260 CLR 232.

**251** *Quarry Street Pty Ltd v Minister Administering the Crown Land Management Act 2016* (2024) 114 NSWLR 534 at 557 [116]-[119].

**252** *Quarry Street Pty Ltd v Minister Administering the Crown Land Management Act 2016* (2024) 114 NSWLR 534 at 557 [121]-[122].

the Court of Appeal is to be understood as concluding that that fact alone – that the Crown Lands Minister had "entered into the lease with CSKS on the terms for which it provided" – constituted the use of lot 5 when the claim was made on 19 December 2016.

198 To understand the significance of this conclusion, it is necessary to recall Mason J's reasoning in *Hope v Bathurst City Council*,<sup>253</sup> concerning "whether facts fully found fall within the provisions of a statutory enactment properly construed". As Mason J explained, that is a question of law only, unless the provision uses words "according to their common understanding", in which event the question is one of fact.<sup>254</sup> In explaining this, Mason J referred<sup>255</sup> to Kitto J's observations in *NSW Associated Blue-Metal Quarries Ltd v Federal Commissioner of Taxation*, in which his Honour said that in respect of the question whether certain operations answered the description "mining operations upon a mining property" within the meaning of an enactment: (a) it was first necessary to decide, as a matter of law, if the expressions "mining operations" and "mining property" were used in the statute "in any other sense than that which they have in ordinary speech"; (b) having answered that question in the negative, it was next necessary to determine the "common understanding of the words" as a "question of fact"; (c) having so determined, it was then necessary to ask "whether the material before the Court reasonably admits of different conclusions as to whether the ... operations fall within the ordinary meaning of the words as so determined; and that is a question of law"; and (d) accordingly, "[i]f different conclusions are reasonably possible, it is necessary to decide which is the correct conclusion; and that is a question of fact".<sup>256</sup>

199 While it has subsequently been said that a distinction between meaning (as a question of fact) and construction (as a question of law) "seems artificial, if not illusory",<sup>257</sup> it has never been doubted that if different conclusions could be reached as to whether facts as found fall within or outside of a statutory provision, a conclusion one way or another involves a question of fact, not law.

200 The significance of the Court of Appeal's reasoning is that it exposes the premise that the only fact relevant to the question whether lot 5 was "used" as at 19 December 2016 was the existence and terms of the lease. The Court of Appeal did not rely on any other fact, including either: (a) the State's communication to

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253 (1980) 144 CLR 1.

254 (1980) 144 CLR 1 at 7.

255 (1980) 144 CLR 1 at 7-8.

256 (1955) 94 CLR 509 at 511-512.

257 *Collector of Customs v Agfa-Gevaert Ltd* (1996) 186 CLR 389 at 396.

CSKS on 10 April 2016 that CSKS was required 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 lease"; or (b) the response from CSKS's solicitor on 22 April 2016, which denied the alleged breach of the lease and said that the director of CSKS had engaged a structural engineer and other building experts to advise him in relation to what works needed to be done on the property and that "[a]s you are aware, the property is not currently occupied and poses no threat to public safety. It is unlikely to be occupied again as a licensed premises, at least in the foreseeable future".<sup>258</sup>

201 The difficulty with the Court of Appeal's reasoning is that, having correctly accepted that the word "used" in respect of land in s 36(1)(b) is "protean" and involves a core ordinary meaning,<sup>259</sup> the Court's conclusion denies the possibility that the mere existence of a lease at the date of a land claim (that is, a lease not terminated, forfeited or abandoned at that time) might be insufficient to establish that land the subject of such a lease is "used" within the meaning of s 36(1)(b) of the *Aboriginal Land Rights Act*. That is, the Court of Appeal's conclusion means that the mere existence of a lease over land is necessarily sufficient, in each and every case, to establish that the land the subject of the lease is "used" within the meaning of s 36(1)(b) of the *Aboriginal Land Rights Act* so that such land is not "claimable Crown lands" irrespective of any other "acts, facts, matters and circumstances which are said to show that the land is [or is not] being used".<sup>260</sup> This follows from the fact that although the Court of Appeal's reasons referred to "the lease" and the "terms for which it provided", those reasons do not identify any such terms as relevant to or determinative of the conclusion. It is therefore impossible to know whether any particular term was or was not necessary to the conclusion that the lease meant that lot 5 was being used as at 19 December 2016.

202 In response to discussion during the hearing before this Court, Quarry Street filed a notice of contention to address this gap in the Court of Appeal's reasoning. The notice of contention asserts that it was not reasonably open to the Crown Lands Minister to be satisfied that lot 5 met the criteria in s 36(1)(b) of the *Aboriginal Land Rights Act* at the date of the claim "by reason not only of the existence at that date of a Lease granting exclusive possession for value, but also the performance

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258 *Quarry Street Pty Ltd v Minister Administering the Crown Land Management Act 2016* (2024) 114 NSWLR 534 at 537 [10]-[11].

259 *Quarry Street Pty Ltd v Minister Administering the Crown Land Management Act 2016* (2024) 114 NSWLR 534 at 545 [43]. See also *Minister Administering the Crown Lands Act v NSW Aboriginal Land Council* (2008) 237 CLR 285 ("the Wagga Wagga case") at 305-306 [69] and the *Berrima Gaol case* (2016) 260 CLR 232 at 256 [34].

260 *The Wagga Wagga case* (2008) 237 CLR 285 at 307 [75].

of that Lease by the lessor and lessee, as evidenced by the following incontrovertible acts, facts, matters and circumstances": (a) "the payment of substantial rent by the lessee ... to the Crown"; and (b) "the Crown taking active steps to secure compliance with the Lease from at least 10 April 2016 ... and [the lessee] responding to avoid forfeiture of the Lease by undertaking substantial repairs to the Crown's satisfaction shortly prior to the date of claim".

203 Contrary to proposition (a), there was no finding of fact by the Crown Lands Minister, the primary judge or the Court of Appeal that CSKS, as lessee, had been paying rent to the Crown as required by the lease up to the date of the claim. At most, there was a finding that the lease required the lessee to pay rent of "\$52,000 per annum ... subject to annual CPI adjustments and three yearly reviews to market".<sup>261</sup> Nor was there any finding by the Crown Lands Minister, the primary judge or the Court of Appeal that the Crown did anything other than require CSKS, as lessee, to remedy asserted breaches of the lease in relation to the state of repair of the club house and grounds, and foreshadow potential forfeiture of the lease.<sup>262</sup> And there was no finding by the Crown Lands Minister, the primary judge or the Court of Appeal that CSKS as lessee responded by "undertaking substantial repairs to the Crown's satisfaction shortly prior to the date of claim". The only findings were the facts of the communication from the Crown to CSKS and from CSKS's solicitor to the Crown described above.

204 The notice of contention impermissibly conflates the content of material that was available to the Crown Lands Minister when making the decision about the claim with purported findings of the Crown Lands Minister, the primary judge and the Court of Appeal. But, as the primary judge's reasons expose, the Crown Lands Minister gave no reasons for the decision and made no findings other than that lot 5 was claimable Crown lands at the date of the claim. The primary judge (understandably and correctly) made no material findings beyond the fact of the existence of the lease over lot 5 because the primary judge recognised that the application was one for judicial review only. And the Court of Appeal, as said, made no such findings because the essence of its dispositive reasoning was that the mere fact of the existence of the lease "on the terms for which it provided" sufficed to take lot 5 outside of s 36(1)(b), which required the land, to be claimable Crown lands, to be "not lawfully used" as at 19 December 2016.

205 The consequence is that it is not open to Quarry Street in this appeal to assert as incontrovertible acts, facts, matters and circumstances either: the payment of substantial rent by the lessee to the Crown; or the Crown taking active steps to

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**261** *Quarry Street Pty Ltd v Minister Administering the Crown Land Management Act 2016* (2024) 114 NSWLR 534 at 537 [3].

**262** *Quarry Street Pty Ltd v Minister Administering the Crown Land Management Act 2016* (2024) 114 NSWLR 534 at 537 [10].

secure compliance with the lease from at least 10 April 2016 (beyond the fact of the letter of that date) and the lessee responding to avoid forfeiture of the lease by undertaking substantial repairs to the Crown's satisfaction shortly prior to the date of claim (beyond the fact of the letter in response of 22 April 2016).

206 In any event, if it were open to infer that the Crown Lands Minister must have accepted as fact every assertion in the material made available to the Crown Lands Minister for the purpose of the decision, it would follow that the relevant incontrovertible acts, facts, matters and circumstances also included the other assertions in that material, such as that: (a) lot 5 was being "maintained and prepared for sale"; (b) lot 5 was unoccupied and, as at 6 May 2016, was "not intended" to and could not be used for public purposes "without substantial renovation and refurbishment"; (c) any use or occupation of part of lot 5 by a purported sub-lessee of the lessee, CSKS, was not lawful; and (d) lot 5 was being held by CSKS "in a static state for sale of the Lease with some transitory visits, and maintenance – which were reactive in nature to non-compliance actions by the Crown Lands".<sup>263</sup>

207 Further, the material included that, as Quarry Street put in its written submissions, "CSKS and the Crown were actively negotiating about alternative uses for the land; the Crown encouraged CSKS to 'provide information requested' about that and invited CSKS to 'discuss ... alternative uses of the land'". If anything (on the same misconceived basis that all assertions in the material made available to the Crown Lands Minister were accepted to be facts by the Minister), this material would have (or at least could have) confirmed to the Minister that the only act that was occurring at the date of the claim was the payment of rent while CSKS tried to work out what possible *future* use of lot 5 might be viable for the purpose of transferring the lease.

208 Moreover, if these assertions are all incontrovertible acts, facts, matters and circumstances at the date of the claim merely because those matters are referred to in the material that was available to the Crown Lands Minister, it would be impossible to distinguish the present case from this Court's reasoning in *Minister Administering the Crown Lands Act v NSW Aboriginal Land Council*<sup>264</sup> ("the Wagga Wagga case"). In that case Hayne, Heydon, Crennan and Kiefel JJ held that the claimed land was not being "lawfully used and occupied by the Department of Lands in preparing the land for sale" at the date of the claim.<sup>265</sup> Their Honours reasoned that, in circumstances where: (a) the Crown Lands Minister had decided

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**263** *Quarry Street Pty Ltd v Minister Administering the Crown Land Management Act 2016* (2024) 114 NSWLR 534 at 538-539 [18].

**264** (2008) 237 CLR 285.

**265** (2008) 237 CLR 285 at 299 [39]-[41].

to sell the land;<sup>266</sup> (b) administrative steps were being taken to effect sale;<sup>267</sup> and (c) otherwise, apart from some "transitory visits" to the land for the purpose of facilitating its sale (to survey the land and for a real estate inspection), "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",<sup>268</sup> the land was not being "lawfully used" within the meaning of s 36(1)(b). As their Honours put it:<sup>269</sup>

"[A]part from the survey, and 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."

209 Referring to Fullagar J's observation in *Council of the City of Newcastle v Royal Newcastle Hospital*<sup>270</sup> ("the *Royal Newcastle Hospital case*") that it was a fallacy to assume that "deriving an advantage from the ownership of land is the same thing as using the land",<sup>271</sup> their Honours said that:<sup>272</sup>

"... 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?"

210 Applying the same reasoning to the material that was available to the Crown Lands Minister when deciding the claim and on which Quarry Street sought to rely for the purpose of its notice of contention (albeit for purported facts not found by the Crown Lands Minister, the primary judge or the Court of Appeal), it would

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**266** (2008) 237 CLR 285 at 302 [53]-[54].

**267** (2008) 237 CLR 285 at 302-303 [55]-[59].

**268** (2008) 237 CLR 285 at 307 [76].

**269** (2008) 237 CLR 285 at 307-308 [76] (emphasis in original).

**270** (1957) 96 CLR 493.

**271** (1957) 96 CLR 493 at 506.

**272** (2008) 237 CLR 285 at 307 [75].

follow that: (a) before and as at the date of the claim, CSKS, the lessee, had decided to "sell" (that is, assign or transfer) the lease; and (b) to that end, by which the lessee sought to derive the advantages of disposing of the lease and receiving the proceeds of the assignment of the lease, nothing was being done on the land other than transitory visits for the purpose of facilitating the intended assignment of the lease. On that basis, the *Wagga Wagga case*<sup>273</sup> would not be distinguishable. It would have to be held that the mere preparation of lot 5 for the purpose of "sale" of the lease did not constitute a "use" of lot 5 when the claim was made on 19 December 2016.

211 The position thus far, accordingly, may be summarised in these terms. The reasoning of the Court of Appeal is irreconcilable with the reasoning of this Court in the *Wagga Wagga case*<sup>274</sup> because, without considering the acts, facts, matters and circumstances which were said to show that the land was being used, the Court of Appeal held that the mere existence of the lease "on the terms for which it provided" at 19 December 2016 necessarily meant that the land was being used at that time. The notice of contention asserts as incontrovertible acts, facts, matters and circumstances things that may be taken to have been in the material made available to the Crown Lands Minister when making the decision about the claim but which on no view were the subject of findings by the Crown Lands Minister, the primary judge or the Court of Appeal. In so asserting in the notice of contention, Quarry Street otherwise disregards other things that were in the material made available to the Crown Lands Minister when making the decision, including that the lessee, CSKS, had decided to "sell" the lease, that the land could not be and was not being used for any public purpose due to its state of disrepair, and that the only thing being done on the land was preparatory to the intended "sale" of the lease.

212 This exposes why, leaving aside all other issues, the primary judge was correct to refuse to draw any inference about what the Crown Lands Minister must or may have found from the material made available to the Crown Lands Minister to decide the claim.<sup>275</sup> It also exposes why it is impossible, in this case, to have decided that, from the material available to the Crown Lands Minister, no conclusion was reasonably open other than that the existence of the lease on the terms for which it provided necessarily meant the land was being used at the date of the claim. Once it is accepted, as it must be, that other conclusions were reasonably open depending on all the acts, facts, matters and circumstances relevant to the statutory expression "not lawfully used", no order quashing the

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<sup>273</sup> (2008) 237 CLR 285.

<sup>274</sup> (2008) 237 CLR 285.

<sup>275</sup> See *Quarry Street Pty Ltd v Minister Administering the Crown Land Management Act 2016* [2023] NSWLEC 62 at [58]-[59].

decision of the Crown Lands Minister granting the claim over lot 5 could be made. As the Land Councils put it in their notice of appeal, the Court of Appeal erred in concluding that the Crown Lands Minister was *required to find* that the land claimed was not "claimable Crown lands".

213 Even if Quarry Street was entitled, on the one hand, to assert as incontrovertible acts, facts, matters and circumstances that the lessee had paid substantial rent to the Crown and had undertaken substantial repairs to the Crown's satisfaction shortly prior to the date of the claim and, on the other hand, to ignore that the lessee had decided to "sell" the lease and was taking steps to avoid forfeiture of the lease to enable that "sale", the land otherwise not being used for any purpose other than in accordance with the sale at the date of the claim, Quarry Street would confront other insuperable difficulties.

### **Construing s 36(1)(b) – lands "not ... used ..."**

#### *Overview*

214 As will be explained, on its proper construction, neither the mere grant nor the mere continued existence of any estate or interest in land, in and of itself, takes land outside of the expression in s 36(1)(b) of the *Aboriginal Land Rights Act* of "lands ... that, when a claim is made ... are not ... used". Within s 36(1)(b), "lands ... when a claim is made ... are ... used" only if, at that time, there is an actual use in fact of the physical mass or tract of ground the subject of the claim in the sense described above (that is, the land as a physical mass or tract of ground must be presently, and not in a mere future or contingent sense, physically deployed for a purpose, whether that present physical deployment be active or passive, to more than merely a notional degree). The mere existence of an estate or interest in respect of that physical mass or tract of ground does not satisfy that requirement. The question of present actual use in fact is to be determined by reference to the "acts, facts, matters and circumstances"<sup>276</sup> rationally capable of informing the answer to that question. The mere existence of an estate or interest in the land, such as a lease, to which the transfer will be subject does not, in and of itself, answer the question.

#### *Lands "vested in Her Majesty"*

215 When s 36(1) of the *Aboriginal Land Rights Act* refers to "claimable Crown lands" as meaning "lands vested in Her Majesty", it means lands vested in the Crown in right of the State able to be transferred for a fee simple interest. Section 36(9) relevantly provides that "any transfer of lands to an Aboriginal Land Council under this section shall be for an estate in fee simple". To enable a transfer

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<sup>276</sup> The *Wagga Wagga case* (2008) 237 CLR 285 at 307 [75].

in fee simple of the lands, the Crown in right of the State must first have the capacity to do so.

216 Section 36(1) of the *Aboriginal Land Rights Act* thereby accords with the common law as it existed at the time the *Aboriginal Land Rights Act* was enacted. As Gageler J explained in the *Berrima Gaol case*,<sup>277</sup> at that time: (a) common law orthodoxy had caused the Supreme Court of New South Wales to declare in 1847 that "the waste lands of this Colony are, and ever have been, from the time of its first settlement in 1788, in the Crown";<sup>278</sup> (b) this common law orthodoxy that the Crown was "the absolute beneficial owner of all of the land in New South Wales from the time of settlement in 1788" was not overruled until *Mabo v Queensland [No 2]*, following which it was accepted that the Crown held radical title over all such land, enabling the Crown to grant estates and interests in the land;<sup>279</sup> and (c) from the enactment of the *Crown Lands Alienation Act 1861* (NSW), Crown lands legislation in New South Wales has provided to the effect that "[a]ny Crown Lands may lawfully be granted in fee simple or dedicated to any public purpose under and subject to the provisions of [that] Act but not otherwise".<sup>280</sup>

217 This context accords with the Preamble to the *Aboriginal Land Rights Act*, which states that the Act is to "make provisions with respect to the land rights of Aboriginal persons, including provisions for or with respect to ... the vesting of land in [Aboriginal Land] Councils ..." and records as follows:

"WHEREAS:

- (1) Land in the State of New South Wales was traditionally owned and occupied by Aboriginal persons:
- (2) Land is of spiritual, social, cultural and economic importance to Aboriginal persons:
- (3) It is fitting to acknowledge the importance which land has for Aboriginal persons and the need of Aboriginal persons for land:

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<sup>277</sup> (2016) 260 CLR 232.

<sup>278</sup> (2016) 260 CLR 232 at 276 [110], quoting *Attorney-General v Brown* (1847) 1 Legge 312 at 316.

<sup>279</sup> (2016) 260 CLR 232 at 277 [111], referring to *Mabo v Queensland [No 2]* (1992) 175 CLR 1 at 54.

<sup>280</sup> (2016) 260 CLR 232 at 280 [120]-[121].

- (4) It is accepted that as a result of past Government decisions the amount of land set aside for Aboriginal persons has been progressively reduced without compensation:

BE it therefore enacted ... as follows".

218 Accordingly, the *Aboriginal Land Rights Act* functions so that land "vested in Her Majesty" can be transferred to become land "vested in" an Aboriginal Land Council for an estate in fee simple.

*Textual and contextual considerations*

219 The definition of "land" in s 4(1) of the *Aboriginal Land Rights Act* is inclusive. That is, "**land** includes any estate or interest in land, whether legal or equitable". This means that estates and interests in land, while included within the definition, are not exclusive of the common and ordinary meaning of "land" in the *Aboriginal Land Rights Act*, being the physical mass or tract of ground constituting the land.

220 For example, meaning 1a of "land" in the Oxford English Dictionary is the "solid portion of the earth's surface, as opposed to *sea, water*". Meaning 1b is a "tract of land". Meaning 2a is "[g]round or soil ...". Meaning 1 in the Macquarie Dictionary is "the solid substance of the earth's surface". Meaning 2 is "the exposed part of the earth's surface ...". Meaning 3 is "ground". Meaning 4 is "[l]aw an area of ground together with any trees, crops or permanently attached buildings and including the air above and the soil beneath".

221 Barrett A-JA (with whom Macfarlan and Ward JJA agreed) provided a clear exposition of this common or ordinary meaning of "land" in *Chief Commissioner of State Revenue v Metricon Qld Pty Ltd*.<sup>281</sup> In that case the primary judge had to decide if certain land was used for primary production as provided for in the *Land Tax Management Act 1956* (NSW). Section 10AA(3) provided that "*land used for primary production* means land the dominant use of which is for" specified purposes, such as "cultivation". While it was common ground that the land was used for one such purpose (maintenance of animals), the issue was whether that was the dominant use of the land.<sup>282</sup> The primary judge had held that a use of land was not confined to physical use but extended to "the doing of something with it for a purpose, such as putting it to advantage or turning it to account".<sup>283</sup> The primary judge had accepted that a "land developer may use land that is stock in

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281 (2017) 224 LGERA 236.

282 (2017) 224 LGERA 236 at 240 [4]-[7].

283 (2017) 224 LGERA 236 at 242 [13(2)].

trade by engaging in certain activities on the land in preparation for its subdivision and sale", but concluded that there was no such use in the case so that the dominant use was the use of the land for the maintenance of animals, being a primary production use.<sup>284</sup>

222 Barrett A-JA, in the Court of Appeal, gave this example:<sup>285</sup>

"Assume the owner of the fee simple leases a parcel of land to another who devotes it entirely and exclusively to agriculture by raising crops. Three possible characterisations are available. First, it may be said that there are two uses of the land, with the lessee using it 'for' agriculture and the lessor using it 'for' leasing. The second possible view is that there is one use only, with the lessee using the land 'for' agriculture and the lessor also using it 'for' the agricultural purpose that the lessee's activities entail. The third possibility is again that there is one use only, with the lessee using the land 'for' agriculture and the lessor not using it at all."

223 The third possibility, Barrett A-JA noted, was based on the decision of the Privy Council in *Commissioners of Taxation v Trustees of St Mark's Glebe*.<sup>286</sup> In that case the respondents, trustees of United Church of England land, had leased some of the trust's land for residential buildings to be erected. The Privy Council held that, read in context, the statutory requirement for an exemption from land tax, that the lands be "'occupied or used exclusively for or in connection' with public charitable purposes or a church":<sup>287</sup>

"... point[s] ... to the use and occupation of the land itself, and do[es] not primâ facie apply to the use or purpose to which the rents and profits derived from the land may be applied. A private dwelling-house is used and occupied by the owner or lessee of it as a residence for himself and his family, and it would, in the opinion of their Lordships, be a forced construction to say that it was used by the lessors for their own purposes because they apply the rent which they receive in a particular way. If it be said that the land is used by the trustees, though not by the lessees, for the charitable purpose, the answer would seem to be that the land is, strictly speaking, not used by the trustees at all. They have parted with the use and

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**284** (2017) 224 LGERA 236 at 243 [13(9)], [14]-[15].

**285** (2017) 224 LGERA 236 at 253 [50] (footnotes omitted).

**286** [1902] AC 416. See *Chief Commissioner of State Revenue v Metricon Qld Pty Ltd* (2017) 224 LGERA 236 at 253 [50] fn 17.

**287** [1902] AC 416 at 420-421.

occupation of it during the term of the lease. It is the money derived from the rents and profits which they use and not the land."

224 Adopting the same approach to the land tax exemption, Barrett A-JA concluded that the context pointed "strongly towards notions of 'use' and 'dominant use' that pay attention to 'land' in the sense indicated by Isaacs J's reference in *Commonwealth v New South Wales*<sup>[288]</sup> ... to 'the concrete physical mass, commencing at the surface of the earth and extending downwards to the centre of the earth, which is called "land"'.<sup>289</sup>

225 It is to be recalled that while "land" was not defined in the *Land Tax Management Act*, it is defined in the *Interpretation Act 1987* (NSW), Sch 4, as "**land** includes messuages, tenements and hereditaments, corporeal and incorporeal, of any tenure or description, and whatever may be the estate or interest therein". That is, the applicable definition of "land" in *Chief Commissioner of State Revenue v Metricon Qld Pty Ltd*<sup>290</sup> was inclusive of estates and interests in land, as is the definition of "land" in s 4(1) of the *Aboriginal Land Rights Act*. Further, by s 6 of the *Interpretation Act* "[d]efinitions that occur in an Act or instrument apply to the construction of the Act or instrument except in so far as the context or subject-matter otherwise indicates or requires". The same contextual limitation on definitions appears in s 4(1) of the *Aboriginal Land Rights Act* ("[i]n this Act, except in so far as the context or subject-matter otherwise indicates or requires") and in s 36(1) of that Act ("[i]n this section, except in so far as the context or subject-matter otherwise indicates or requires").

226 Accordingly, while "land" in the *Aboriginal Land Rights Act* includes "any estate or interest in land, whether legal or equitable", the common or ordinary meaning of "land" as a physical mass or tract of ground is also within the scope of the definition. Therefore, when s 4(1) of the *Aboriginal Land Rights Act* defines terms "[i]n this Act, except in so far as the context or subject-matter otherwise indicates or requires" and s 36(1) says "[i]n this section, except in so far as the context or subject-matter otherwise indicates or requires", it is not the case that a "use" of land within the meaning of s 36(1)(b) necessarily extends to land subject to an estate or interest in the land, such as a lease. The text, context and purpose of s 36(1) indicates that land is used within the meaning of s 36(1)(b) only when there is an actual use in fact of that physical mass or tract as described (albeit that an actual use of land in fact does not necessarily require physical activity on land, as will be explained).

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288 (1923) 33 CLR 1 at 33.

289 (2017) 224 LGERA 236 at 254 [55].

290 (2017) 224 LGERA 236.

227 Other aspects of the *Aboriginal Land Rights Act* confirm this construction.

228 The overall framework within which s 36 of the *Aboriginal Land Rights Act* operates is that a land claim will be in respect of lands vested in Her Majesty able to be transferred for a fee simple interest and that, if granted, the Crown Lands Minister is to transfer the claimed land to the claimant Aboriginal Land Council "for an estate in fee simple". As Deane, Dawson and Gaudron JJ have explained:<sup>291</sup>

"While the theory of our land law is that the radical title of the Crown lies between the physical land and a freehold estate in it, the ownership of the freehold estate has long been, for almost all practical purposes, the equivalent of full ownership of the land. As a result, the freehold estate is, as a matter of legal and popular language, commonly treated as the land itself".

229 This reflects the common law orthodoxy that:<sup>292</sup>

"A fee simple is the most extensive in quantum, and the most absolute in respect to the rights which it confers, of all estates known to the law. It confers, and since the beginning of legal history it always has conferred, the lawful right to exercise over, upon, and in respect to, the land, every act of ownership which can enter into the imagination".

230 The formula of words used in s 36(1)(a), "are able to be lawfully sold or leased, or are reserved or dedicated", assumes that the State owns a physical mass or tract of ground and is able, by transfer, to vest such ownership in an Aboriginal Land Council.

231 Thereafter, s 36(1)(b1) refers to lands which, in the opinion of the Crown Lands Minister, are not needed or likely to be needed as residential lands. Section 36(1)(c) refers to lands not needed, nor likely to be needed, for an essential public purpose. Section 36(1)(d) refers to lands the subject of a registered application for a determination of native title. Section 36(1)(e) refers to lands that are the subject of an approved determination of native title (other than that no native title exists in the lands).

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**291** *Nullagine Investments Pty Ltd v Western Australian Club Inc* (1993) 177 CLR 635 at 656, referring to Williams, *Principles of the Law of Real Property*, 23rd ed (1920) at 6-7, Megarry and Wade, *The Law of Real Property*, 5th ed (1984) at 13 and Gray, *Elements of Land Law* (1987) at 58.

**292** *The Commonwealth v New South Wales* (1923) 33 CLR 1 at 42, quoting Sweet, *Challis's Law of Real Property*, 3rd ed (1911) at 218. See also *Fejo v Northern Territory* (1998) 195 CLR 96 at 126 [43], 146-147 [93].

232 Working backwards from s 36(1)(d) and (e), "land" is defined in s 253 of the *Native Title Act 1993* (Cth) in these terms: "**land** includes the airspace over, or subsoil under, land, but does not include waters". That is, the concept of "land" in the *Native Title Act* is a physical mass or tract of ground. Accordingly, "lands" the subject of a registered application for or an approved determination of native title in s 36(1)(d) and (e) of the *Aboriginal Land Rights Act* must also be understood as a physical mass or tract of ground subject to a registered application for a determination of native title or an approved determination that native title exists. Consistently with this, s 223(1) of the *Native Title Act* provides that "[t]he expression **native title** or **native title rights and interests** means the communal, group or individual rights and interests of Aboriginal peoples or Torres Strait Islanders in relation to land or waters, where ...". Accordingly, land is the physical mass or tract of ground and native title is a right or interest (analogous to an estate or interest in land at common law) in respect of that physical mass or tract.

233 In s 36(1)(b1) and (c), the concept of "lands" that may be needed or likely to be needed as residential lands or for an essential public purpose also involves the physical mass or tract of ground so needed or likely to be needed. It would make no sense to refer to an estate or interest in land (such as a lease or an easement) as being so needed or likely to be needed.

234 Section 36(4A)(a) and (5) contemplate, respectively, that part of the land the subject of a land claim may not be vested in Her Majesty or may not be "claimable Crown lands", in which event, respectively, that part of the land claim may not be referred to the Crown Lands Minister and cannot be granted by the Crown Lands Minister. The concepts of the whole or "part" of the claim relating to lands, as referred to in s 36(4A)(a), and the whole or part "of the lands claimed" being or not being "claimable Crown lands", as referred to in s 36(5), contemplate that the "land" in question is a physical mass or tract of ground. The same conclusion follows in respect of s 36(5A) and (8), which respectively concern "the whole or part of the lands claimed" and "any land the subject of a claim" being needed, or likely to be needed, in the case of s 36(5A), for an essential public purpose or, in the case of s 36(8), as residential land. In both cases, the need or likely need relates to the physical mass or tract of ground, not the whole or a part of any estate or interest in the land.

235 The language of s 36(9) is also important. On the grant of a land claim, what is to be transferred is the "lands ... *for an* estate in fee simple".<sup>293</sup> Section 36(9), accordingly, treats the land as the physical mass or tract of ground and the transfer of that physical mass or tract as for an estate in fee simple (in contrast to some lesser freehold or non-freehold estate or interest in the land). This is consistent with the fact that "land claim" is defined in s 4(1) as a "claim *for land* made under

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293 Emphasis added.

[s] 36".<sup>294</sup> That is, the claim is for a physical mass or tract of ground and, if granted, what is transferred is the "most extensive in quantum, and the most absolute in respect to the rights which it confers, of all estates known to the law" in that physical mass or tract of ground.

236 Section 36(9C), (10) and (12) are also relevant. By s 36(9C), land transferred to two or more Aboriginal Land Councils under s 36 may be transferred to them as joint tenants or as tenants in common. Section 36(9C) therefore contemplates that the "land" is a physical mass or tract of ground and the estate transferred is the fee simple as a joint tenancy or tenancy in common. By s 36(10), a transfer of lands under s 36 operates to revoke any reservation or dedication of the lands. Section 36(10) therefore contemplates that the "lands" are a physical mass or tract of ground and the transfer has the effect of revoking those two interests in the lands. By s 36(12), a transfer of lands under s 36 is subject to specified estates and interests in respect of the lands. Section 36(12) therefore contemplates that the "lands" are a physical mass or tract of ground and the transfer is subject to the estates and interests in respect of the lands which are specified in s 36(12).

237 Perhaps most importantly, cl 8 of Sch 4 to the *Aboriginal Land Rights Act* specifically identifies those estates or interests in land which mean that land subject to such an estate or interest is not "claimable Crown lands". By cl 8 of Sch 4, if land is subject to a lease, licence or permissive occupancy, that fact alone does not take the land outside of the scope of "claimable Crown lands" unless two conditions are satisfied. First, the lease, licence or permissive occupancy must have been in force on 10 June 1983. Second, the lease, licence or permissive occupancy must continue to be in force at the time when a claim is made for the land.

238 Clause 8 of Sch 4 accords with the manifest object of the legislation, to make available a pool of land vested in the State for land claims which are to be determined having regard to facts made relevant by the statute rather than administrative discretions (including the grant of estates or interests in land after the appointed day of 10 June 1983). That legislative object would be readily defeatable if, contrary to cl 8 of Sch 4, the mere existence of a lease, licence or permissive occupancy of land vested in the State, at the time of a claim being made, operates to take the land outside of the scope of "claimable Crown lands" for the duration of the lease, licence or permissive occupancy. This is particularly so given that, under the Crown lands legislation, a "lease" of land need not involve a grant of exclusive possession and may be granted for a term of up to 100 years.<sup>295</sup>

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**294** Emphasis added.

**295** eg, *Crown Lands Act*, ss 41-42.

239 Clause 8 of Sch 4, by only taking land subject to a lease, licence or permissive occupancy that existed as at 10 June 1983 and continues to exist as at the date of the claim outside of the scope of "claimable Crown lands", evinces a manifest statutory intention that lands otherwise subject to a lease, licence or permissive occupancy – being a lease, licence or permissive occupancy granted after 10 June 1983 – may be "claimable Crown lands" depending on other relevant acts, facts, matters and circumstances.<sup>296</sup> This is hardly surprising. If land subject to a lease (or a licence or permissive occupancy styled as a lease) were "used or occupied" within the meaning of s 36(1)(b) by reason of nothing more than the existence of such an estate or interest in the land, the *Aboriginal Land Rights Act* could be made a dead letter by executive action. Clause 8 of Sch 4 is irreconcilable with any such construction of s 36(1)(b).

*Avoiding statutory incoherence*

240 A "legislative instrument must be construed on the prima facie basis that its provisions are intended to give effect to harmonious goals. Where conflict appears to arise from the language of particular provisions, the conflict must be alleviated, so far as possible, by adjusting the meaning of the competing provisions to achieve that result which will best give effect to the purpose and language of those provisions while maintaining the unity of all the statutory provisions."<sup>297</sup>

241 That lands "able to be lawfully sold or leased" and lands "reserved or dedicated" are independent qualifying conditions for land to be "claimable Crown lands" is important. The former concerns legal capacity (to sell or lease). The latter concerns a fact (of reservation or dedication). If, as is the case, the fact of the reservation or dedication is a qualifying condition and the capacity to sell or lease is also a qualifying condition, it makes no sense for the mere exercise of the capacity to lease to be a disqualifying condition by necessarily constituting either the use or occupation of land within s 36(1)(b). Otherwise, s 36(1)(a) and (b) would be incoherent and incongruent.

242 This potential for incoherence and incongruence has long been recognised and avoided.

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**296** By analogy to *Anthony Hordern & Sons Ltd v Amalgamated Clothing and Allied Trades Union of Australia* (1932) 47 CLR 1 at 7.

**297** *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 381-382 [70] (footnotes omitted).

243 Some 30 years ago, Priestley JA, with whom Cripps JA agreed, first explained the potential for incoherence and incongruity.<sup>298</sup> As his Honour explained:<sup>299</sup>

"Although at the time of its second reading the Bill which became the *Aboriginal Land Rights Act* was vigorously criticised ... the Minister's claim [in the second reading speech] that it went far beyond the Commonwealth Act [the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth)] seems to have been well founded, at least in regard to who could claim land, and what land could be claimed. This is of some relevance in construing the words of s 36(1). In particular, it seems to me, the fact that under the Commonwealth Act the setting apart of land for a public purpose *disqualifies* it from being claimable, whereas under the *Aboriginal Land Rights Act* reservation for any purpose under the *Crown Lands Consolidation Act 1913* is a *qualifying* condition, must have a bearing on the meaning of s 36(1)(b). This is because reserved Crown land is ipso facto lawfully occupied in at least some senses of the word."

244 Priestley JA continued, saying:<sup>300</sup>

"The juxtaposition of par (a) and par (b) of s 36(1) of the *Aboriginal Land Rights Act* makes it clear that occupation in the foregoing broad sense [that is, 'the doctrine of acquisition of sovereignty of territory "by occupation (or 'settlement' to use the term of the common law)'"<sup>301</sup>] is not what par (b) refers to or means. The word 'occupied' in par (b) must have a more limited meaning. How should the limitation be described?"

245 Priestley JA conceived of the required limitation on the meaning of "occupied" in s 36(1)(b) as emerging from the distinction between "constructive occupation" and "actual occupation", so that "occupied" in s 36(1)(b) means "'actually occupied' in the sense of being occupied in fact and to more than a

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**298** *Daruk Local Aboriginal Land Council v Minister Administering the Crown Lands Act* (1993) 30 NSWLR 140.

**299** *Daruk Local Aboriginal Land Council v Minister Administering the Crown Lands Act* (1993) 30 NSWLR 140 at 160 (emphasis in original).

**300** *Daruk Local Aboriginal Land Council v Minister Administering the Crown Lands Act* (1993) 30 NSWLR 140 at 161.

**301** *Daruk Local Aboriginal Land Council v Minister Administering the Crown Lands Act* (1993) 30 NSWLR 140 at 160, quoting *Mabo v Queensland [No 2]* (1992) 175 CLR 1 at 33.

notional degree".<sup>302</sup> Recognising that the same incongruity would otherwise arise in respect of the concept of "used" in s 36(1)(b), Priestley JA said that the same "considerations in my opinion lead to the conclusion that 'used' in par (b) means 'actually used' in the sense of being used in fact and to more than a merely notional degree".<sup>303</sup> In so saying, Priestley JA did not suggest that an actual use, in fact, of land to more than a merely notional degree could not be a passive use for a purpose achievable by ensuring that people do not carry out activities on land.

246 Subsequent authorities have not doubted this approach.<sup>304</sup> Priestley JA was and remains correct that it would be self-defeating for the *Aboriginal Land Rights Act*, on the one hand, to require "claimable Crown lands" to be vested in Her Majesty (so that, at common law, the lands would be occupied by the Crown) and, on the other hand, to disqualify land from being "claimable Crown lands" if it is "occupied" in this constructive sense. The same self-defeating consequence would follow if the mere existence of an estate or interest in land such as or styled as a "lease" suffices to make necessary the conclusion that the land is "used" within the meaning of s 36(1)(b).

247 It is this very same potential paradox in legislative operation that underlies the reasoning in the *Wagga Wagga case*. As Mason P said in the decision of the Court of Appeal in that case, in respect of steps in the sale of land, a "qualifying pre-condition (compliance with para (a)) cannot in the same breath constitute a disqualifying condition (pursuant to para (b)). Were it so, the statutory scheme would be self-contradictory."<sup>305</sup>

248 The Court of Appeal in the present case recognised that "[i]t has always been accepted that ... notional occupation [by land merely being vested in the Crown] is not sufficient to engage the exception in s 36(1)(b). Were it otherwise, the Act would be a dead letter".<sup>306</sup> The Court of Appeal, however, relied on the

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**302** *Daruk Local Aboriginal Land Council v Minister Administering the Crown Lands Act* (1993) 30 NSWLR 140 at 162.

**303** *Daruk Local Aboriginal Land Council v Minister Administering the Crown Lands Act* (1993) 30 NSWLR 140 at 164.

**304** See, eg, *Minister Administering the Crown Lands Act v La Perouse Local Aboriginal Land Council* (2012) 193 LGERA 276 at 279 [8], 287 [47]; the *Berrima Gaol case* (2016) 260 CLR 232 at 251-253 [17]-[23], 258 [44]-[46], 268-270 [81]-[88], 298-299 [179]-[182], 300-301 [185].

**305** *NSW Aboriginal Land Council v Minister Administering Crown Lands Act* (2007) 157 LGERA 18 at 25 [23].

**306** *Quarry Street Pty Ltd v Minister Administering the Crown Land Management Act 2016* (2024) 114 NSWLR 534 at 545 [43].

uncontroversial proposition that "lawfully used or occupied" in s 36(1)(b) is not a composite phrase but is to be read as meaning two separate concepts of "lawfully used" or "lawfully occupied" to conclude that there was "no reason not to apply the definition of 'land' in s 4 where the issue is the use, rather than the occupation, of land".<sup>307</sup> This latter proposition, however, does not follow from the former and creates the very same incoherence and incongruence previously avoided.

249 Whatever function the remedial and beneficial purpose of the *Aboriginal Land Rights Act* might or might not have in construing any individual provision of that Act,<sup>308</sup> s 36(1)(b) is not to be construed in a way that renders the Act effectively incapable of achieving the vesting of any land in Aboriginal Land Councils by the merest expedient, after 10 June 1983, of the grant of any estate or interest in land in the State vested in Her Majesty, including a "lease", thereby placing such land outside the scope of "claimable Crown lands" for up to 100 years. It is not to be accepted that the New South Wales Parliament intended this legislation to be so readily avoided in perpetuity.

*A "use" of land may be passive but not "constructive"*

250 The Court of Appeal's reasoning, adopted in the submissions of Quarry Street in this appeal, also assumes that because a "use" of land under s 36(1)(b) does not necessarily involve the carrying out of any physical activity on the land, the concept of "use" is therefore broad enough to encompass the kind of mere constructive or notional use that is involved in land merely being subject to a lease at the date of a claim.

251 For example, the Court of Appeal said that the "fact that CSKS did not physically use the land does not mean that the Minister did not use it by leasing it to CSKS for the purpose stated in the lease".<sup>309</sup> The Court of Appeal also said that "the authorities on s 36(1)(b) have consistently construed the words 'lawfully used'

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**307** *Quarry Street Pty Ltd v Minister Administering the Crown Land Management Act 2016* (2024) 114 NSWLR 534 at 557 [118], applying the *Berrima Gaol case* (2016) 260 CLR 232 at 250-251 [14].

**308** cf the *Wagga Wagga case* (2008) 237 CLR 285 at 288-289 [3]-[5], 290 [9], 293 [19], 296 [28], 300 [44], 301 [47]-[48]; the *Berrima Gaol case* (2016) 260 CLR 232 at 255-256 [30]-[34], 270-271 [91]-[94], 288 [146], 297 [174], 298 [178], 300-301 [185].

**309** *Quarry Street Pty Ltd v Minister Administering the Crown Land Management Act 2016* (2024) 114 NSWLR 534 at 557 [119].

as referring to physical activities on the land".<sup>310</sup> This statement overlooks the observations in the cases that the purpose of the use "will dictate the degree of immediate physical use required to decide whether [lands] are actually used in more than a notional sense".<sup>311</sup> In rejecting the (false) concept that a "use" of land always requires the carrying out of physical activity on land (which has never been the law), the Court of Appeal conflated a passive use of land with a mere constructive or notional use of land. That conflation is in error.

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In the context of s 36(1)(b), it has long been conventional that the correct approach to "use" does not require any physical activity on the land because the fact of "use" depends on the purpose of the use. Accordingly, as observed by Basten JA, with whom Beazley, McColl and Macfarlan JJA agreed, in *Minister Administering the Crown Lands Act v La Perouse Local Aboriginal Land Council*: (a) "the purpose of any putative use will, inevitably, assist in identifying the physical activities which may be sufficient to constitute use or occupation"; (b) what is required is the "actual use" of land in fact, in the sense of a more than merely notional, present and not merely contemplated or intended, use of the land; and (c) while what is required is such an actual use of land, such actual use need not involve physical acts on the land, as some uses of land are for a purpose which requires no physical activity at all.<sup>312</sup> Examples in the authorities of passive uses of land not necessarily requiring any physical activity but involving the present physical deployment of the land for a purpose include: bushland used as curtilage to a hospital, rifle range or powder magazine;<sup>313</sup> fallow land and soil regeneration

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**310** *Quarry Street Pty Ltd v Minister Administering the Crown Land Management Act 2016* (2024) 114 NSWLR 534 at 556 [111].

**311** *Minister Administering the Crown Lands Act v NSW Aboriginal Land Council* (1993) 31 NSWLR 106 at 121, quoted in, eg, *NSW Aboriginal Land Council v Minister Administering Crown Lands Act* (2007) 157 LGERA 18 at 25-26 [34]. See also *Minister Administering the Crown Lands Act v La Perouse Local Aboriginal Land Council* (2012) 193 LGERA 276 at 284-285 [35]-[40].

**312** (2012) 193 LGERA 276 at 284-285 [35]-[41], referring to the *Royal Newcastle Hospital case* (1957) 96 CLR 493 at 515, *Randwick Corporation v Rutledge* (1959) 102 CLR 54 at 88, *Parramatta City Council v Brickworks Ltd* (1972) 128 CLR 1 at 21, *Eaton & Sons Pty Ltd v Warringah Shire Council* (1972) 129 CLR 270 at 287-288 and *Daruk Local Aboriginal Land Council v Minister Administering the Crown Lands Act* (1993) 30 NSWLR 140 at 162.

**313** *The Royal Newcastle Hospital case* (1957) 96 CLR 493 at 514-515; *Council of the City of Newcastle v Royal Newcastle Hospital* (1959) 100 CLR 1 at 4; [1959] AC 248 at 255.

areas;<sup>314</sup> and nature reserves and foreshore parks.<sup>315</sup> In contrast, the mere holding of land for a future development opportunity has been held not to be a use of land.<sup>316</sup>

253 The Court of Appeal's expressed understanding of the reasoning of Fullagar J (in dissent in the result) in the *Royal Newcastle Hospital case*<sup>317</sup> further exposes its erroneous view that the authorities say that a "use" of land necessarily involves physical activity on the land.<sup>318</sup> Fullagar J's point was that it is a fallacy to conflate the deriving of an advantage from land and the use of land.<sup>319</sup> According to the Court of Appeal, Fullagar J's reasoning assumes "use" of land requires a physical use.<sup>320</sup> Fullagar J, however, was saying only that the mere deriving of an advantage from land (eg, rent, an outlook, a buffer) was not *necessarily* a use of land. Nor does Fullagar J's agreement with the reasoning of Kitto J carry any proposition that "use" needs to involve physical activity on the land.<sup>321</sup> Kitto J, for example, accepted that it was "easy to imagine a case in which hospital buildings may take up a small part only of a large park-like area and yet the proper conclusion of fact may be that the whole area is occupied or used for the purposes of the hospital".<sup>322</sup>

254 In conflating, on the one hand, the possibility that land may be "used" passively without any physical activity being carried out on the land with, on the other hand, land being "used" because of the mere existence of an estate or interest

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**314** *Rainn Pty Ltd v Commissioner of State Revenue (Vic)* 2016 ATC ¶20-597 at 19,247 [35].

**315** *Daruk Local Aboriginal Land Council v Minister Administering the Crown Lands Act* (1993) 30 NSWLR 140 at 143.

**316** *Chief Commissioner of State Revenue v Metricon Qld Pty Ltd* (2017) 224 LGERA 236 at 257 [67].

**317** (1957) 96 CLR 493.

**318** cf the *Wagga Wagga case* (2008) 237 CLR 285 at 307 [75].

**319** (1957) 96 CLR 493 at 506.

**320** *Quarry Street Pty Ltd v Minister Administering the Crown Land Management Act 2016* (2024) 114 NSWLR 534 at 555 [102].

**321** (1957) 96 CLR 493 at 505.

**322** (1957) 96 CLR 493 at 508-509.

in the land, the difference between a mere constructive use of land and an actual use of land in fact is lost.

255 Quarry Street, in its submissions in this appeal, makes the same error. It sought to draw an equivalence between the concept of an owner passively using land, such as the curtilage to a hospital, and the concept of an owner passively using land by parting with exclusive possession of it by grant of a lease such as the lease in this case. No such analogy is available.

256 Nor does *Ryde Municipal Council v Macquarie University*<sup>323</sup> support the arguments of Quarry Street. Gibbs A-CJ said in that case that, as a general observation, a "person who owns land may be said to use it for his own purposes notwithstanding that he permits someone else to occupy it, even under a lease".<sup>324</sup> The relevant issue in that case, however, was whether the university was using land which it had leased for university purposes. There was no dispute about the fact that the leased land was being used to provide facilities and services to staff and students of the university. In that context, the idea that the university itself had to provide those facilities and services to use the land for its purposes and could not lease the land so that others could provide those facilities and services on its behalf without losing its rates exemption was understandably rejected.<sup>325</sup>

257 The facts in *Ryde Municipal Council v Macquarie University*<sup>326</sup> bear no similarity to the present case, in which Quarry Street, it may be inferred, was driven to argue the novel point that the existence of the lease was a "use" of lot 5 by the Crown because CSKS, at the date of the claim, being the person in exclusive possession of lot 5 under the lease, was neither carrying out any physical activity on lot 5 nor passively using that land for any purpose.

*Transfer of part of land effects a statutory severance of the reversionary estate*

258 Quarry Street submitted that the *Aboriginal Land Rights Act* specifically contemplates that only part of the land is claimable, "but has no mechanism for dealing with a registered lease in this circumstance". According to this submission, it follows that land subject to a lease must be outside of the scope of "claimable Crown lands".

259 That submission must be rejected.

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323 (1978) 139 CLR 633.

324 (1978) 139 CLR 633 at 638.

325 See, eg, (1978) 139 CLR 633 at 640.

326 (1978) 139 CLR 633.

260 It is true that s 36 may operate so that the whole or only a part of land subject to a lease may be transferred to an Aboriginal Land Council. If the whole of such land is transferred, the Aboriginal Land Council will own the land subject to the lease and therefore be the lessor under the lease. If only part of such land is transferred, the Aboriginal Land Council will own the part of the land subject to the lease and the State will own the balance of the land subject to the lease. Therefore, there will be two lessors under the lease.

261 It cannot be assumed or inferred, however, that this indicates a legislative intention against land subject to a lease being "claimable Crown lands". To the contrary, s 46C of the *Real Property Act* specifically deals with transfers of land to a person by operation of a statute. By s 46C the "Registrar-General may, of the Registrar-General's own motion, and shall, at the written request (made in the approved form) of a person in whom there has been such a vesting ... register the person in whom any such land is vested as the proprietor of such estate therein as the Registrar-General deems to be appropriate".

262 Sections 117 and 118 of the *Conveyancing Act 1919* (NSW) also operate to ensure that severance of a reversionary estate does not affect the annexure of lease obligations of the lessee and the lessor(s) to that reversionary estate. Most importantly, s 119(1) of the *Conveyancing Act* provides that:

"Notwithstanding the severance by conveyance, surrender, or otherwise of the reversionary estate in any land comprised in a lease, and notwithstanding the avoidance or cesser in any other manner of the term granted by a lease as to part only of the land comprised therein, every condition or right of re-entry, and every other condition contained in the lease, shall be apportioned and shall remain annexed to the severed parts of the reversionary estate as severed, and shall be in force with respect to the term whereon each severed part is reversionary, or the term in any land which has not been surrendered or as to which the term has not been avoided, or has not otherwise ceased, in like manner as if the land comprised in each severed part, or the land as to which the term remains subsisting, as the case may be, had alone originally been comprised in the lease."

263 In other words, no difficulty is caused by the fact that the provisions of the *Aboriginal Land Rights Act* enable transfer of part only of land but do not specify the consequences of such a transfer for land subject to a lease. The provisions of the *Real Property Act* and the *Conveyancing Act* will operate according to their terms in the event of the transfer of part of land subject to a lease. In any event, any concern about the transfer of part only of land subject to a lease overlooks the capacity of a court of equity to mould a remedy suitable to resolve any dispute between the lessee and the lessors after transfer of part of the land subject to the lease as "claimable Crown lands".

*No statutory intention to prevent "loss" of land by the State*

264 Quarry Street submitted that if the existence of a lease over land is not sufficient to constitute a use of the land "the Crown's fee simple would be liable to claim whenever its tenant ceases to conduct 'activities on the land'". According to Quarry Street, and submissions of the Crown Lands Minister to the same effect, it could not have been intended that the status of land as "claimable Crown lands" might depend on the actions or inactions (and thus "delinquency") of the lessee.

265 This submission wrongly assumes a legislative intention of the *Aboriginal Land Rights Act* that land on which no activities are being conducted (including passive activities), but from which the State is deriving money, should not be "claimable Crown lands". This submission is underpinned by numerous unjustified assumptions, such as that the interest of the State is not to "lose" lands vested in it to an Aboriginal Land Council and that the public purpose for which the Crown Lands Minister granted an estate or interest in the land would be "defeat[ed]" by a transfer of the land to an Aboriginal Land Council.

266 These submissions are irreconcilable with the text, context and remedial and beneficial purpose of the *Aboriginal Land Rights Act*, which the Minister for Aboriginal Affairs described in the second reading speech for the Bill as representing the New South Wales Government's "clear, unequivocal decision that land rights for Aborigines is the most fundamental initiative to be taken for the regeneration of Aboriginal culture and dignity, and at the same time laying the basis for a self-reliant and more secure economic future for our continent's Aboriginal custodians", with the Bill providing "a substantial amount of resources for the 40 000 Aborigines in New South Wales to secure land", including by "claims upon unused Crown land".<sup>327</sup>

267 In the face of the manifest remedial and beneficial purpose of the *Aboriginal Land Rights Act*, notions of the State's title to land being "imperilled" by delinquent tenants, of the prospect of the State having to "monitor[]" land to ensure its tenants continue to use it, and of the State having to "cajol[e]" tenants into action to prevent a successful land claim, and thereby an Aboriginal Land Council "defeat[ing]" the State's title to the land, are profoundly misconceived.

*Conclusions on construing s 36(1)(b)*

268 For the purposes of s 36(1)(b) of the *Aboriginal Land Rights Act*, it is difficult to improve on the observation of Windeyer J (Dixon CJ, Fullagar and

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<sup>327</sup> New South Wales, Legislative Assembly, *Parliamentary Debates* (Hansard), 24 March 1983 at 5088-5090.

Kitto JJ agreeing) in *Randwick Corporation v Rutledge* in respect of land that is leased. His Honour said:<sup>328</sup>

"This provision', as *Dixon J*, as he then was, said in a similar matter, 'looks to the actual use ... of the land' ... The only way in which the trustees use the land is by leasing it to the club, to be used by it as a racecourse in accordance with the grant and the *Australian Jockey Club Act*. Indeed the land is not really used by the trustees at all, for they have parted with the use and occupation of it for the term of the lease ... When the Act speaks of land used for a public reserve it is referring to the actual use to which the land is put by the persons who in law control it for the time being."

269 By analogy, the State in this case was not using lot 5 at all at the date of the claim. The State had parted with exclusive possession of lot 5 so that only the person with exclusive possession, CSKS, could use lot 5. But at the date of the claim CSKS was not using lot 5. To the contrary, CSKS was merely maintaining the lease to avoid forfeiting it while it worked out what, if any, future use could be made of lot 5, with a view to the future transfer of the lease. The lease was insufficient to constitute the use of lot 5.

## Orders

270 For these reasons, the appeal must be allowed, the first respondent is to pay the appellants' costs of and incidental to the appeal and the orders made by the Court of Appeal of the Supreme Court of New South Wales on 10 May 2024 are to be set aside and, in lieu thereof, it is to be ordered that: (a) the appeal to that Court be dismissed; and (b) Quarry Street pay the Land Councils' costs of and incidental to that appeal.

271 As to the order for costs of the appeal to this Court extending to the second respondent, the Crown Lands Minister, the Minister submitted that the Minister did not contend for any outcome in the appeal. Before this Court (in contrast to the position adopted below), however, the Crown Lands Minister did not submit only that the mere grant of the lease was part of the "acts, facts, matters and circumstances"<sup>329</sup> which inform whether the land was used in accordance with s 36(1)(b), but also put a series of arguments against the appellants by reason of asserted consequences of acceptance of their construction. While none of those arguments carried any ultimate weight (because they wrongly assumed that it is a part of the function of the management of Crown lands to ensure that land which might otherwise be "claimable Crown lands" continues to be in fact used in

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**328** (1959) 102 CLR 54 at 88, quoting *Stephen v Federal Commissioner of Land Tax* (1930) 45 CLR 122 at 140.

**329** *The Wagga Wagga case* (2008) 237 CLR 285 at 307 [75].

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accordance with any estate or interest in the land granted by the Crown Lands Minister so as to avoid successful land claims), minds may differ as to whether the putting of those arguments involved the Minister adopting an adversarial position in the appeal in substance if not in form. On balance, the Crown Lands Minister should be given the benefit of doubt that the Minister was doing anything more than merely assisting the Court to understand the practical operation of the statutory provisions on the competing constructions of s 36(1)(b). Therefore, no order for costs should be made against the Crown Lands Minister.