HIGH COURT OF AUSTRALIA

FRENCH CJ,
KIEFEL, BELL, GAGELER, KEANE, NETTLE AND GORDON JJ

NEW SOUTH WALES ABORIGINAL LAND COUNCIL — APPELLANT

AND

MINISTER ADMINISTERING THE CROWN LANDS ACT — RESPONDENT

New South Wales Aboriginal Land Council v Minister Administering the Crown Lands Act
[2016] HCA 50
14 December 2016
S168/2016

ORDER

Appeal dismissed with costs.

On appeal from the Supreme Court of New South Wales

Representation

B W Walker SC with B K Lim for the appellant (instructed by Chalk & Fitzgerald Lawyers)

M G Sexton SC, Solicitor-General for the State of New South Wales with H El-Hage for the respondent (instructed by Crown Solicitor (NSW))

M E O'Farrell SC, Solicitor-General of the State of Tasmania with S K Kay for the Attorney-General of the State of Tasmania, intervening (instructed by Office of the Solicitor-General (Tasmania))

R M Niall QC, Solicitor-General for the State of Victoria with K A O'Gorman for the Attorney-General for the State of Victoria, intervening (instructed by Victorian Government Solicitor)

P D Quinlan SC, Solicitor-General for the State of Western Australia with J E Shaw for the Attorney-General for the State of Western Australia, intervening (instructed by State Solicitor (WA))

CATCHWORDS

New South Wales Aboriginal Land Council v Minister Administering the Crown Lands Act

Aboriginal and Torres Strait Islander peoples – Land rights – Claimable Crown lands – Crown land dedicated for public purposes – Where State recorded as registered proprietor – Where Crown land dedicated for gaol purposes – Where Crown land proclaimed as correctional complex and correctional centre – Where gaol closed but dedications continued in force – Where proclamations revoked – Where Crown land held pending decision as to future use – Where activities on Crown land not inconsistent with dedications – Whether land "lawfully used or occupied" under s 36(1)(b) of *Aboriginal Land Rights Act* 1983 (NSW).

Constitutional law (NSW) – Executive power – Power over Crown lands – Whether executive power abrogated by s 2 of *New South Wales Constitution Act* 1855 (Imp) – Whether statutory authorisation required for lawful occupation of Crown lands.

Words and phrases – "actual occupation", "beneficial and remedial legislation", "beneficial construction", "claimable Crown lands", "Crown lands", "dedication", "lawfully used or occupied", "lawful occupation", "the Crown".

Aboriginal Land Rights Act 1983 (NSW), s 36.
New South Wales Constitution Act 1855 (Imp) (18 & 19 Vict c 54), s 2.
Real Property Act 1900 (NSW), ss 13D, 13J.

1 FRENCH CJ, KIEFEL, BELL AND KEANE JJ. This appeal concerns a claim by the appellant, the New South Wales Aboriginal Land Council ("the NSW ALC"), under the *Aboriginal Land Rights Act* 1983 (NSW) ("the ALR Act") over two adjoining parcels of land in Berrima (together, "the claimed land") which have been the site of a gaol and correctional centre. Different parts of the claimed land have been the subject of dedications under statutes which preceded the *Crown Lands Act* 1989 (NSW) ("the CLA"). The first dedication, in 1891, was for "Gaol Site (extension)"; the second, in 1894, was for "Gaol Purposes"; and the third, in 1958, was for "Gaol Site (addition)". At the date of the claim the dedications continued in force under the CLA. The claimed land was also the subject of various proclamations over the years, most recently in 2001 when it was proclaimed to be "Berrima Correctional Centre" and "Berrima Correctional Complex" pursuant to the *Crimes (Administration of Sentences) Act* 1999 (NSW). The correctional centre was closed in about November 2011.

2 Following the closure of the correctional centre, Corrective Services NSW ("CSNSW"), which is a part of what is now the Department of Justice of New South Wales, requested an assessment of the likely future use for the claimed land and buildings thereon. At the date of the claim consideration was being given to the "appropriate future ownership and/or management arrangements for the property". One option being considered was the creation of a Crown Reserve under the management and care of a Reserve Trust.

3 The proclamations of "Berrima Correctional Centre" and "Berrima Correctional Complex" were revoked on 10 February 2012. The NSW ALC's claim was made on 24 February 2012. The claim was refused by the joint Crown Lands Ministers on the basis that the claimed land was "lawfully used and occupied" within the meaning of s 36(1)(b) of the ALR Act.

4 Another fact concerning the claimed land needs to be mentioned. The State of New South Wales was at the date of the claim registered as proprietor of both parcels of land under the New South Wales Torrens system of registration[1]. The conversion of some Crown land appears to have followed amendments to the *Real Property Act* 1900 (NSW) ("the Real Property Act")[2].

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1 See *Real Property Act* 1900 (NSW), s 13D.

2 *Real Property (Crown Land Titles) Amendment Act* 1980 (NSW).

The ALR Act and "claimable Crown lands"

5 The purposes of the ALR Act include the provision of land rights for Aboriginal persons in New South Wales and the vesting of lands in Aboriginal Land Councils in New South Wales[3]. The NSW ALC or a Local Aboriginal Land Council may make a claim[4] to lands which fall within the description of "claimable Crown lands" in s 36(1) of the ALR Act.

6 It cannot be doubted that the purposes of the ALR Act are intended to be both beneficial and remedial. Further, land which may be claimed is not restricted to land to which any Aboriginal person or group has a particular historical connection, as is generally the case with other legislation conferring Aboriginal land rights. The definition of "claimable Crown lands" is broad. Section 36(1) provides:

> "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
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> (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

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3 *Aboriginal Land Rights Act* 1983 (NSW), s 3.

4 *Aboriginal Land Rights Act* 1983 (NSW), ss 36(2), 36(3).

(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."

7 The claimed land might not be thought to fulfil the first part of the description of "claimable Crown lands", namely "lands vested in Her Majesty", for the reason that the State of New South Wales is now registered as the proprietor of it. However, the effect of s 3(2) of the CLA is that land does not cease to be Crown land merely because of the fact of such registration under the Real Property Act. This appears to have been the basis of the concession by the Minister that the claimed land was vested in the Crown at the date of the claim.

8 The CLA also defines "Crown land" as land vested in the Crown[5]. However, s 36(1) of the ALR Act does not define "claimable Crown lands" by reference to the definition of "Crown land" in the CLA. Section 3(1) of the CLA excludes lands dedicated for a public purpose from the definition of "Crown land", whereas s 36(1)(a) of the ALR Act includes lands dedicated for any purpose as "claimable Crown lands".

9 There is no dispute that the dedications fell within one of the two statutes specified in s 36(1)(a). Although the first two dedications of the claimed land were made under an earlier statute, they were deemed to have been made under the *Crown Lands Consolidation Act* 1913 (NSW)[6] and the third was made under that Act.

10 The balance of s 36(1) provides for exclusions from the definition of "claimable Crown lands".

11 Paragraphs (b1) and (c) of s 36(1) exclude land which is needed or likely to be needed for the purposes there stated. The Minister may certify that the land is needed or is likely to be needed for those purposes[7]. The certificate is final

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5 *Crown Lands Act* 1989 (NSW), s 3(1).

6 *Crown Lands Consolidation Act* 1913 (NSW), s 3.

7 *Aboriginal Land Rights Act* 1983 (NSW), s 36(8).

and conclusive evidence of the matters set out in it. The exclusions effected by s 36(1)(d) and (e) are of land which is being dealt with under a different statutory regime, namely the *Native Title Act* 1993 (Cth).

12 The focus of this appeal is upon s 36(1)(b), which, in effect, excludes land which is lawfully used or occupied. It will be recalled that this was the reason given for the refusal of the NSW ALC's claim. The issue subsequently narrowed to one as to whether the claimed land was "lawfully occupied" at the date of the claim.

13 The Land and Environment Court is given jurisdiction by s 36(7) to hear appeals from decisions with respect to claims to land under the ALR Act[8]. The onus is on the Minister to satisfy the Court that the lands, or a part thereof, are not "claimable Crown lands". If the Minister does not discharge that onus, s 36(7) provides that the Court "may … order that the lands … be transferred" to the claimant Aboriginal Land Council or, where the claim is made by the NSW ALC, to a Local Aboriginal Land Council nominated by the NSW ALC. This sub-section provides the Land and Environment Court with the power to transfer land in the event that the Minister does not satisfy it that the land is not claimable Crown lands. It is not a grant of discretion, despite the use of the word "may": in the event that the Minister failed to satisfy the Court that the land is not claimable, the Court would be obliged to order its transfer[9].

Lands lawfully occupied

14 It was not necessary in *Minister Administering the Crown Lands Act v NSW Aboriginal Land Council*[10] ("*Wagga Wagga*") to decide whether "lawfully used or occupied" is a composite expression or is better understood by separate consideration of the words "used" and "occupied". The latter understanding is correct. The two terms refer 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.

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8 *Aboriginal Land Rights Act* 1983 (NSW), s 4(1) ("Court"), s 36(7).

9 See *New South Wales Aboriginal Land Council v Minister Administering the Crown Lands (Consolidation) Act and the Western Lands Act* (1988) 14 NSWLR 685 at 692-694.

10 (2008) 237 CLR 285 at 306-307 [73]; [2008] HCA 48.

The Courts below

15 The Land and Environment Court found that the activities conducted on the claimed land established occupation at the date of the claim and that that occupation was lawful[11]. It would appear from the findings of the primary judge (Pain J) that a security guard was present at all times; the buildings were kept locked; essential services continued to be supplied to the buildings; and the buildings were the subject of a continuing contract for their maintenance. The gardens on the claimed land continued to be maintained, largely by the work of offenders serving community service orders on weekends. The gardens comprised a substantial collection of roses and a vegetable garden. The public could, and did, visit the gardens, after permission was obtained from CSNSW.

16 The Court of Appeal (Leeming JA, with whom Beazley P and Macfarlan JA agreed) upheld the primary judge's findings regarding occupation. The Court approached the question as one of fact[12]. Leeming JA rejected the argument of the NSW ALC that the assessment by the primary judge of occupation was flawed because it was undertaken by reference to the claimed land being held pending a decision as to its future use, rather than by reference to the purpose of its dedications. A difficulty with that argument, his Honour observed, is that, because there was evidence of regular use by offenders under community service orders, the claimed land had not ceased to be used for the purposes of the punishment of offenders[13]. Leeming JA also took the view that acts preparatory to a sale may amount to a lawful use or occupation, so long as the land has not been left unused for a lengthy period, in which case the sale itself would not suffice for use of the land[14].

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11 *New South Wales Aboriginal Land Council v Minister Administering the Crown Lands Act (Berrima)* [2014] NSWLEC 188 at [169].

12 *New South Wales Aboriginal Land Council v Minister Administering the Crown Lands Act* (2015) 303 FLR 87 at 92 [17], citing *Daruk Local Aboriginal Land Council v Minister Administering the Crown Lands Act* (1993) 30 NSWLR 140 at 162.

13 *New South Wales Aboriginal Land Council v Minister Administering the Crown Lands Act* (2015) 303 FLR 87 at 107 [91].

14 *New South Wales Aboriginal Land Council v Minister Administering the Crown Lands Act* (2015) 303 FLR 87 at 107 [92]-[93].

Occupation in fact

17 In *Daruk Local Aboriginal Land Council v Minister Administering the Crown Lands Act*, Priestley JA (with whom Cripps JA agreed) observed[15] that in one sense the Crown can be said always to be in occupation of what were first known as the "waste" lands and then the "Crown" lands of New South Wales, but his Honour considered that a constructive notion of occupation is not appropriate in the context of s 36(1)(b). The better reading of "occupied", in his Honour's view, is "'actually occupied' in the sense of being occupied in fact and to more than a notional degree".

18 His Honour agreed[16] with the approach taken by Clarke JA in *Minister Administering the Crown Lands (Consolidation) Act v Tweed Byron Local Aboriginal Land Council*[17] ("*Tweed Byron*"). In the view of Clarke JA, mere proprietorship could not suffice for occupation under s 36(1)(b). Physical acts of occupation, the exercise of control and maintaining the lands were all factors which are relevant. Clarke JA approved what had been said by Bowen JA in *Commissioner of Land Tax v Christie*[18], that occupation includes legal possession, but also something more – an element of control, of being in a position to prevent the intrusion of strangers. A physical presence on the land and fencing may therefore be evidence of occupation.

19 Clarke JA in *Tweed Byron* considered[19] that, given the diversity of circumstances which could arise with respect to occupation, it was preferable not to attempt to articulate a comprehensive test. For example, it may not be appropriate to enquire about fencing or the possible exclusion of persons in circumstances where land is reserved for public recreation. It may be more important to ask whether there is a person exercising control over and undertaking maintenance responsibilities on the land.

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15 *Daruk Local Aboriginal Land Council v Minister Administering the Crown Lands Act* (1993) 30 NSWLR 140 at 160-162.

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

17 (1992) 75 LGRA 133 at 140-141.

18 [1973] 2 NSWLR 526 at 533.

19 *Minister Administering the Crown Lands (Consolidation) Act v Tweed Byron Local Aboriginal Land Council* (1992) 75 LGRA 133 at 140.

20 The observations in these cases are not inconsistent with statements of this Court in *Wagga Wagga*. In the joint reasons it was said[20] that attention must be directed to the "acts, facts, matters and circumstances which are said to deprive the land of the characteristic of being 'not lawfully used or occupied'"[21]. And it is necessary to measure those acts, facts, matters and circumstances against an understanding of what would constitute use or occupation of the land.

21 In *Wagga Wagga*, the issue was whether the land was being used at the time of the claim. It was held[22] that it was not. Nothing had been done on the land for a considerable time before the claim was made. Only transitory visits had been made to it by surveyors and the agent appointed to sell the land. Whilst the word "use" might encompass exploitation, the sale of the land was an exploitation of it as an asset, rather than use of the land itself.

22 There was no contention in *Wagga Wagga* that the land was occupied at the relevant time. Accordingly, there was no detailed discussion in *Wagga Wagga* of what might amount to occupation, much less lawful occupation. In the joint reasons it was merely observed that a combination of legal possession, conduct amounting to actual possession and some degree of permanence or continuity will usually constitute occupation of the land, but they are not propositions intended to "chart the metes and bounds of those ideas"[23].

23 It was not necessary in *Wagga Wagga* to decide whether there could be steps taken on land in preparation for its sale which are of a kind which could constitute use or occupation[24]. In that case none of the steps taken towards sale had been taken on the land itself. Apart from the surveyor's and agent's visits to the land, everything that was done towards sale took place away from the land.

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20 *Minister Administering the Crown Lands Act v NSW Aboriginal Land Council* (2008) 237 CLR 285 at 305 [69].

21 Referring to *Council of the City of Newcastle v Royal Newcastle Hospital* (1957) 96 CLR 493 at 507-508; [1957] HCA 15.

22 *Minister Administering the Crown Lands Act v NSW Aboriginal Land Council* (2008) 237 CLR 285 at 306-308 [71]-[76].

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

24 *Minister Administering the Crown Lands Act v NSW Aboriginal Land Council* (2008) 237 CLR 285 at 308 [77].

Neither these steps nor the decision to sell the land could therefore be said to constitute a use of the land[25].

The NSW ALC's contentions

24 The NSW ALC does not deny the proposition that "occupied" in s 36(1)(b) of the ALR Act refers to actual occupation, which is to say occupation is to be determined by reference to acts, facts, matters and circumstances. Rather, the NSW ALC submits that lawful occupation could not encompass the mere holding of surplus land pending a decision as to its future use.

25 The NSW ALC submits, by reference to what was said in *Arbuckle Smith & Co Ltd v Greenock Corporation*[26], that an owner who simply maintains and repairs land is not occupying it. It was held in that case that the company which owned a warehouse was not a "person in the actual occupation" of it and it was therefore not rateable. The owner had merely had some alterations carried out preparatory to its possession and use. It was against this background that Lord Reid said[27] that "the owner who merely maintains, repairs or improves his premises is not thereby occupying them: he is preparing for future occupation by himself, his tenant or his disponee". But the facts of that case are far removed from the situation here. In that case the owner had never entered into possession of, or used, the premises. Here there has been a long history of the use of the claimed land and buildings thereon and the question is whether it continued to be occupied. This enquiry directs attention to all that is taking place with respect to the land at the time of the claim.

26 The NSW ALC further submits that to construe s 36(1) of the ALR Act as excluding lands which were held or maintained pending a decision as to future use would defeat the purpose of the ALR Act. It would permit the Crown to deal with any surplus land owned by it so as to defeat a claim. Surplus land is, so it is said, of its nature, the very kind of land which is intended to be claimable.

27 It may be accepted that s 36(1) identifies as "claimable Crown lands" lands which are no longer needed, and so surplus in that sense. This may be inferred from the contrary position which is stated in s 36(1)(b1) and (c) with

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25 *Minister Administering the Crown Lands Act v NSW Aboriginal Land Council* (2008) 237 CLR 285 at 308 [77].

26 [1960] AC 813.

27 *Arbuckle Smith & Co Ltd v Greenock Corporation* [1960] AC 813 at 824.

respect to lands which continue to be needed or are likely to be needed. It is a conclusion which may also be reached about the land to which par (b) refers, which is no longer used or occupied. However, the NSW ALC's argument assumes that land is surplus to needs from the moment that its dedicated purpose is no longer pursued by use for that purpose. Section 36(1)(b) contains no such assumption. It poses a question of fact about the land which must be answered before the land can be said to be claimable: whether it is lawfully used or occupied.

28 Clearly, at the date of the claim, the claimed land and the buildings on it were not deserted. They had been the subject of continuous physical possession. Even if that possession was reduced to a minimum, it was more than notional. The acts of repair and maintenance of the claimed land and buildings, including the tending to the gardens, were acts associated with continued occupation, even if the buildings were no longer being actively put to their former use. The act of permitting the public to enter and view parts of the claimed land was an act consistent with the exercise of control over the claimed land. Viewing these factors as a whole, the claimed land was occupied at the date of the claim.

29 The NSW ALC submits that something more in the nature of an active, as distinct from a passive, occupation is necessary. This meaning is said to be possible by reading "occupied" in collocation with "used". The submission implies that for land to continue to be occupied there must be something of the former use conducted on the land. This would deny "occupied" a separate sphere of operation, contrary to the proper construction of s 36(1)(b).

A beneficial construction?

30 The NSW ALC submits that the ALR Act has a beneficial and remedial purpose, such that it should be construed broadly and the exclusions contained in s 36(1)(b)-(e) should be construed narrowly. This approach accords with that of Kirby J in *Wagga Wagga*. His Honour considered this to be an important aspect of the construction of s 36(1) and warranted because the word "use" was ambiguous[28]. The NSW ALC says "occupy" is likewise capable of a range of meanings.

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28 *Minister Administering the Crown Lands Act v NSW Aboriginal Land Council* (2008) 237 CLR 285 at 290 [8].

31 Kirby J was in the minority in *Wagga Wagga* on that point. In the joint judgment it was said[29] that it was not necessary to invoke a principle of beneficial construction to resolve the issue in that case. No choice was required between competing constructions of s 36(1)(b) or as between broad or narrow approaches. Rather, one needs to focus on the activities undertaken on the land, which is to say on questions of fact.

32 It has been said that remedial or beneficial legislation should be accorded a "fair, large and liberal interpretation", rather than one which is literal or technical[30]. At issue in *R v Kearney; Ex parte Jurlama*[31] was whether a claim could be made under the *Aboriginal Land Rights (Northern Territory) Act* 1976 (Cth) with respect to land which could only acquire the necessary character of being "traditionally owned" by reference to land which lay outside that which was available to be claimed. Gibbs CJ (with whom Brennan, Deane and Dawson JJ agreed) said[32]:

> "If the section is ambiguous it should in my opinion be given a broad construction, so as to effectuate the beneficial purpose which it is intended to serve."

The statute in that case left the question open and provided the Court with choices in its approach to the statute's construction. In such a circumstance the Court was clearly justified in adopting a broader approach on the basis of the beneficial purpose of the statute.

33 That is not the situation which arises with respect to s 36(1) of the ALR Act, where it is the meaning of particular words which is in question. In *Victims Compensation Fund Corporation v Brown* it was pointed out[33] that to commence the process of construction by posing the type of construction to be afforded –

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29 *Minister Administering the Crown Lands Act v NSW Aboriginal Land Council* (2008) 237 CLR 285 at 301 [48].

30 *IW v City of Perth* (1997) 191 CLR 1 at 12, 39; [1997] HCA 30, citing *Coburn v Human Rights Commission* [1994] 3 NZLR 323 at 333.

31 (1984) 158 CLR 426; [1984] HCA 14.

32 *R v Kearney; Ex parte Jurlama* (1984) 158 CLR 426 at 433, 435.

33 *Victims Compensation Fund Corporation v Brown* (2003) 77 ALJR 1797 at 1804 [33]; 201 ALR 260 at 269; [2003] HCA 54.

liberal, broad or narrow – may obscure the essential question regarding the meaning of the words used. It is one thing to say that no restricted construction should be given to legislation which confers benefits; but if the focus is on the meaning of specific words, the circumstance for a liberal application may not arise.

34 True it is that the words "used" and "occupied" might be said to take much of their meaning from context. But that is not to say that they are devoid of a commonly understood meaning in ordinary parlance. They require an examination of activities undertaken upon the land in question and, in the case of "occupied", factors such as continuous physical possession must be taken into account. No question of differing approaches to construction arises for limiting the ordinary understanding of that term by reference to the beneficial purposes of the ALR Act.

Occupation and purpose

35 The central plank of the NSW ALC's argument is that any consideration of whether the claimed land is lawfully occupied cannot be divorced from the purpose for which the claimed land was dedicated, and that the dedicated purpose was not the holding of land pending a decision as to its future use. It is to be expected that land dedicated for gaol purposes would be occupied as a gaol.

36 It may be accepted, as the NSW ALC submits, that the acts taking place on the claimed land as found by the Land and Environment Court do not amount to occupation of the land and buildings as a gaol or for the purposes of a correctional centre. The attendance of the offenders to work in the gardens in compliance with orders for community service could not be said to be for the purpose of continuing the property as a gaol. The Court of Appeal appears to have rejected this submission on the basis that the claimed land was "used for the purposes of punishment of offenders"[34]. However, the claimed land and buildings thereon are not used or occupied for the purpose of the incarceration of offenders. It may be accepted that the Court of Appeal was in error in this regard.

37 The NSW ALC's submissions direct attention to the terms of the dedications. It may be recalled that only one part of the claimed land was actually dedicated for "Gaol Purposes". The balance was dedicated in more

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34 *New South Wales Aboriginal Land Council v Minister Administering the Crown Lands Act* (2015) 303 FLR 87 at 107 [91].

passive terms, for the purposes of "Gaol Site (extension)" and "Gaol Site (addition)".

38 Clearly enough, the purpose for which lands are dedicated may be relevant to the question of whether they are occupied. The discussions in the cases referred to above show that different factors may assume importance depending upon the purpose for which land is reserved or dedicated. Thus, in the case of land reserved for public recreation, such as an extensive forestry park, fencing was not an important factor, whereas the exercise of control over the land was.

39 This is not the exercise to which the NSW ALC's argument is addressed. In reality the NSW ALC's argument is that the dedicated purpose of the land must be actively pursued by the acts which are relied on as constituting occupation of the land. The central submission is really that land dedicated for gaol purposes is to be used as a gaol and that it is not lawfully occupied unless it is actively used as a gaol. The submission again denies the distinction between the use and the occupation of land and it denies occupation its separate sphere of operation[35].

40 The NSW ALC's argument also creates a further requirement for the test of use or occupation. It would necessitate the addition of words to s 36(1)(b), to read it as if it said "lands … not lawfully used or occupied *for the purposes for which they are dedicated or reserved*".

41 There is no warrant in the reference in s 36(1)(a) to dedicated purposes for such an implication. The reference there to lands which are "reserved or dedicated for any purpose" does not direct attention to the particular purpose for which lands are dedicated, as part of the description of the lands the subject of a claim. Lands which are dedicated or reserved for *any* purpose qualify as claimable Crown lands. The phrase is merely descriptive of lands which are reserved or dedicated. If they are set apart from other Crown lands by this means it will be for a purpose, namely a public purpose[36].

42 Further, s 36(1)(a) is not limited in its terms to lands which are reserved or dedicated for purposes. It extends to lands which are able to be sold or leased, to which a purpose is not relevant. This does not suggest as necessary the

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35 *Council of the City of Newcastle v Royal Newcastle Hospital* (1957) 96 CLR 493 at 505.

36 *Crown Lands Act* 1989 (NSW), ss 80, 87.

importation into s 36(1)(b) of part of s 36(1)(a). There is no other contextual indication for such an implication.

43 The adjective "lawfully" which precedes "used or occupied" does not assist the NSW ALC's argument. It may be accepted that the dedication of land has a limiting effect. Its use, benefit and possession must conform to the purpose for which it was dedicated[37]. A use which is made of land which is inconsistent with its dedicated purpose is not a lawful use of it. But the NSW ALC does not suggest that the acts relied upon as constituting occupation are inconsistent with the dedicated purposes. What it does say is that for it to be lawful occupation, those purposes must be pursued. To say that is to say that the claimed land must be actively used for those purposes if it is to be said to be lawfully occupied. There is no basis to be found in s 36(1) for that submission.

44 In *Daruk*, Priestley JA said[38]:

> "[T]he fact that … under the [ALR 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." (emphasis in original)

45 In *Minister Administering Crown Lands Act v Bathurst Local Aboriginal Land Council*[39], Basten JA adopted the same approach, saying:

> "[T]he legal status of the Crown as the holder of the land (whether by way of radical title, fee simple or other interest), being a precondition to land being claimable, must be treated as insufficient to constitute lawful use or occupation, even though it may carry with it a right of control and, possibly, statutory obligations attaching to land ownership."

46 It is one thing to acknowledge that ownership of land is not, of itself, actual occupation for the purposes of s 36(1)(b) of the ALR Act; it is another thing to say that actual occupation by the owner is not lawful occupation.

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37 *New South Wales v The Commonwealth* (1926) 38 CLR 74 at 91; [1926] HCA 23.

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

39 (2009) 166 LGERA 379 at 427 [225].

Legislative authority for occupation?

47 The NSW ALC submits that the claimed land was not lawfully occupied because CSNSW was not empowered or authorised to occupy the claimed land or to authorise its occupation. Further, the claimed land could not lawfully be occupied without statutory authorisation.

48 The latter submission involves the construction of s 2 of the *New South Wales Constitution Act* 1855 (Imp)[40], which provided that "the entire Management and Control of the Waste Lands belonging to the Crown … shall be vested in the Legislature of the said Colony". The submission proceeds upon the assumption that that Act has not been repealed and that the claimed land qualifies as waste lands of the Crown. It rests upon the proposition that the management and control of waste lands has been, since the Constitution Act of 1855, vested in the New South Wales legislature to the exclusion of any non-statutory, executive power. The submission was rejected by the Court of Appeal[41].

49 The term "the Crown" has more than one meaning. In the context of s 2 of the Constitution Act of 1855, it may be taken to refer to that meaning which arose in the course of colonial development in the nineteenth century. It was described in the joint judgment of Gleeson CJ, Gummow and Hayne JJ in *Sue v Hill*[42] as "the paramount powers of the United Kingdom, the parent state, in relation to its dependencies". The Constitution Act of 1855 was drawn on the understanding that the Crown, in the sense just mentioned, was the beneficial owner of Crown lands[43]. That may not now be considered a sufficient explanation of the title held by the Crown[44].

50 The construction of s 2 needs to be approached in its historical context and by reference to its purpose. Prior to the passing of the Constitution Act of 1855, it was not competent for the legislature of the colony of New South Wales to

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40 18 & 19 Vict c 54.

41 *New South Wales Aboriginal Land Council v Minister Administering the Crown Lands Act* (2015) 303 FLR 87 at 115 [137].

42 (1999) 199 CLR 462 at 499 [88]; [1999] HCA 30.

43 *Williams v Attorney-General for New South Wales* (1913) 16 CLR 404 at 426, 439; [1913] HCA 33.

44 *Mabo v Queensland [No 2]* (1992) 175 CLR 1 at 48-51, 81; [1992] HCA 23.

make a law which interfered with the sale of Crown lands or with the revenue from those lands[45]. The purpose of s 2 was to devolve legislative power upon a government which was no longer merely representative, but also responsible in the constitutional sense. In the *Tasmanian Dam Case*[46], Brennan J observed that "power over waste lands and their proceeds was not granted until responsible government was granted".

51 It would follow from the NSW ALC's submission that, whilst the legislative power over Crown lands became vested in the colonial legislature, executive control over them remained in the United Kingdom. This is difficult to accept[47]. More obviously, what occurred was that "[o]n the grant of responsible government, certain prerogatives of the Crown in the colony, even those of a proprietary nature, became vested 'in the Crown in right of the colony'"[48]. The grant of responsible government necessarily involved adding to the executive power of the colony that which had been held by the Imperial Crown as representing the supreme executive power of the British Empire[49]. As was said in the Court of Appeal in this case, the essential purpose of s 2 "was to confirm that it would henceforth be the colonial legislature, not the imperial government, which regulated dealings with the 'waste lands of the Crown'"[50].

52 The purpose of s 2 of the Constitution Act of 1855 was not to abrogate executive power with respect to Crown lands, or, more particularly, to abrogate the executive power of the Imperial Crown to appropriate to itself by way of dedication, use or occupation, waste lands. However, by devolving legislative power to the legislature of New South Wales, the executive's powers became

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45 *Australian Constitutions Act* 1842 (Imp) (5 & 6 Vict c 76), s 29; *Wik Peoples v Queensland* (1996) 187 CLR 1 at 172-173; [1996] HCA 40.

46 *The Commonwealth v Tasmania* (*The Tasmanian Dam Case*) (1983) 158 CLR 1 at 210; [1983] HCA 21.

47 *Williams v Attorney-General for New South Wales* (1913) 16 CLR 404 at 430.

48 *Sue v Hill* (1999) 199 CLR 462 at 500 [89], referring to *New South Wales v The Commonwealth* (1975) 135 CLR 337 at 494; [1975] HCA 58.

49 *South Australia v Victoria* (1911) 12 CLR 667 at 710-711; [1911] HCA 17.

50 *New South Wales Aboriginal Land Council v Minister Administering the Crown Lands Act* (2015) 303 FLR 87 at 112 [120].

subject to the control of the legislature[51]. The exercise of executive power over waste lands may be subjected to statutory prohibition or modification.

53 The Court of Appeal considered that if statutory authority was required, it could be found to be implied by the CLA[52]. At the time of the claim the claimed land was being assessed, with one possibility being that it be reserved on trust for other purposes. This would require revocation of the existing dedications. Assessment of the land is a prerequisite to any further dedication or reservation under the CLA, unless the Minister is satisfied that it is in the public interest not to do so and due regard is had to principles of Crown land management[53]. Such an assessment would obviously take time. The CLA must therefore impliedly confer power to maintain the land to the extent necessary for the exercise of that power.

54 Reliance on an implied statutory power would not seem to be necessary, given that the State of New South Wales is the registered proprietor of the claimed land. Whilst this fact may not prevent a claim being made, as explained earlier in these reasons, it must mean that, like any other holder of an estate in fee simple, the State has a right to occupy its lands.

55 The effect of s 2 of the Constitution Act of 1855 was to bring all the lands within the colony under the legal control of the colonial legislature so that the radical title of the Crown could be exercised only in conformity with the statutes of the colony. The position was then, as described by Knox CJ, Gavan Duffy, Rich and Starke JJ in *New South Wales v The Commonwealth*[54], that Crown land, even when reserved or dedicated for specific purposes, remained "subject always to the legislative powers of the State of New South Wales under its Constitution". And so, once Crown land became vested in the State of New South Wales as an estate in fee simple pursuant to the provisions of Pt 3 of the Real Property Act, the State acquired the rights enjoyed by the owner of a fee simple estate in the claimed land, even if the land remained Crown land for the purposes of s 36(1) of the ALR Act.

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51 *Sue v Hill* (1999) 199 CLR 462 at 499-500 [88].

52 *New South Wales Aboriginal Land Council v Minister Administering the Crown Lands Act* (2015) 303 FLR 87 at 116 [138]-[139].

53 *Crown Lands Act* 1989 (NSW), ss 85, 91.

54 (1926) 38 CLR 74 at 84.

56 While the Minister does not seek to argue that, because the fee simple estate in the claimed land was now vested in the State of New South Wales, the land was no longer Crown land available to be claimed under s 36(1) of the ALR Act, the circumstance that the State of New South Wales is now the registered proprietor of an estate in fee simple in the land has an undeniable bearing on whether the land is "lawfully … occupied".

57 Section 13D(1) of the Real Property Act provides:

> "The Registrar-General may bring under the provisions of this Act any land to which this Part applies … by creating a folio of the Register recording 'The State of New South Wales' as the proprietor of the land."

58 Section 13J of the Real Property Act provides:

> "Where 'The State of New South Wales' is recorded as the registered proprietor of land in accordance with this Act, the estate to which that recording relates is an estate in fee simple."

59 In *Mabo v Queensland [No 2]*[55], Deane and Gaudron JJ noted that:

> "It has … long been accepted as incontrovertible that the provisions of the common law which became applicable upon the establishment by settlement of the Colony of New South Wales included that … upon the establishment of the Colony, the radical title to all land vested in the Crown."

60 The radical title attributed to the Crown by the common law is distinctly not to be equated with the ownership of an estate in fee simple of the land by the State of New South Wales pursuant to s 13J of the Real Property Act. The foundation of the decision in *Mabo [No 2]* was the recognition by the majority of the Justices that the radical title to the land in the colony of New South Wales acquired by the Crown upon the establishment of the colony did not encompass absolute beneficial ownership of the land, even though the exercise of the Crown's radical title might create rights of ownership in itself or dispose of them in favour of others[56].

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55 (1992) 175 CLR 1 at 81.

56 *Mabo v Queensland [No 2]* (1992) 175 CLR 1 at 15, 48-51, 81, 86-87.

61 On the acquisition of the fee simple estate in the claimed land under s 13D(1) of the Real Property Act, the State became the owner of the estate in fee simple over the claimed land. As the owner of that estate, the State enjoyed the right to occupy the claimed land, so that the State's occupation of the land is lawful, subject to any statutory prohibition upon occupation. While the dedications may not permit the claimed land to be actively used for purposes inconsistent with the dedications, occupation for the purpose of preserving the value of the land as an asset of the State of New South Wales so that it may then be used by the State to best advantage having regard to any dedications existing at that time is not occupation inconsistent with the dedications.

62 The Crown in right of the State of New South Wales, as encompassing the executive government of that State, is able to occupy the claimed land without additional statutory permission. It does so through its agents, which includes persons employed by CSNSW. It is not correct to suggest that CSNSW itself occupies the claimed land. It has no legal personality.

Conclusion and orders

63 The appeal should be dismissed with costs.

64 GAGELER J. Berrima Gaol is located on land in the centre of the town of Berrima in New South Wales. The main gaol building is an imposing walled structure built in the nineteenth century from local sandstone. There are accompanying buildings and grounds which include lawns, fruit trees, a notable rose garden and a vegetable garden. "The State of New South Wales" is recorded in the Register maintained under the *Real Property Act* 1900 (NSW) ("the Real Property Act") as the proprietor of the land, as a consequence of which the State holds an "estate in fee simple" in the land by force of that Act[57].

65 Portions of the land, adding up to the whole, have long been dedicated for public purposes described respectively as "Gaol Purposes", "Gaol Site (extension)" and "Gaol Site (addition)". The earlier two of those three dedications were made in the 1890s[58] under the *Crown Lands Act* 1884 (NSW) and the last was made in 1958[59] under the *Crown Lands Consolidation Act* 1913 (NSW)[60]. Each dedication was continued in force by the *Crown Lands Act* 1989 (NSW) ("the Crown Lands Act") as if made under that Act[61]. Each dedication accordingly remains in force unless revoked by a Minister administering that Act acting in accordance with procedures for revocation set out in that Act[62]. For so long as it remains in force, each dedication restricts use of the portion of the land to which it relates to use for the particular public purposes for which the portion was dedicated[63].

66 Berrima Gaol was in fact used as a gaol for a very long time. Most recently, it was operated as the "Berrima Correctional Centre", having been proclaimed a "correctional complex" and a "correctional centre" for the purposes of the *Crimes (Administration of Sentences) Act* 1999 (NSW) ("the Administration of Sentences Act")[64]. Berrima Correctional Centre was operated

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57 Sections 13J and 42(1) of the Real Property Act.

58 *New South Wales Government Gazette*, No 710, 11 November 1891 at 8883; *New South Wales Government Gazette*, No 686, 19 October 1894 at 6598.

59 *New South Wales Government Gazette*, No 122, 5 December 1958 at 3781.

60 Section 24.

61 Sections 80 and 186 of, and Items 1(1) and 20(1) of Sched 8 to, the Crown Lands Act.

62 Section 84 of the Crown Lands Act.

63 *New South Wales v The Commonwealth* (1926) 38 CLR 74 at 84; [1926] HCA 23.

64 *New South Wales Government Gazette*, No 158, 19 October 2001 at 8693-8694.

by "Corrective Services NSW", the name given to the group of staff principally involved in the administration of that Act within the "Department of Justice and Attorney General"[65] established as a Department of the Public Service of New South Wales by the *Public Sector Employment and Management Act* 2002 (NSW) ("the Public Sector Management Act")[66].

67 That use of Berrima Gaol came to an end in November 2011, following a public announcement by Corrective Services NSW that Berrima Correctional Centre would be closed, its population of inmates relocated and its staff redeployed or offered redundancies. The proclamations of Berrima Correctional Centre as a correctional complex and a correctional centre for the purposes of the Administration of Sentences Act were subsequently revoked on 10 February 2012[67].

68 Beginning in November 2011 at the instigation of Corrective Services NSW and continuing through February 2012, the future use of Berrima Gaol was under consideration by the State Property Authority in consultation with the Crown Lands Division of the Department of Trade and Investment, Regional Infrastructure and Services. The State Property Authority was the corporation established by the *State Property Authority Act* 2006 (NSW)[68]. It had statutory functions which included managing, maintaining and disposing of property for the Government of New South Wales and for Departments of the Public Service[69] and it was subject to the direction and control of the Minister for Finance and Services in the exercise of those functions[70]. The Department of Trade and Investment, Regional Infrastructure and Services, like the Department of Attorney General and Justice, was established as a Department of the Public Service[71].

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65 Section 3(1) of the Administration of Sentences Act, definition of "Corrective Services NSW".

66 Section 6(1) and (2) of, and Pt 1 of Sched 1 to, the Public Sector Management Act ("Department of Attorney General and Justice").

67 *New South Wales Government Gazette*, No 18, 10 February 2012 at 404.

68 Section 4 of the *State Property Authority Act* 2006 (NSW).

69 Section 11(1)(a) of the *State Property Authority Act* 2006 (NSW).

70 Section 6 of the *State Property Authority Act* 2006 (NSW); Allocation of the Administration of Acts (NSW).

71 Section 6(1) and (2) of, and Pt 1 of Sched 1 to, the Public Sector Management Act.

69 During the period in which the State Property Authority was considering its future use, Corrective Services NSW assumed continuing responsibility for Berrima Gaol. The buildings were kept locked. Corrective Services NSW entered into an arrangement with ATMAAC Pty Ltd for the presence of an on-site security guard 24 hours each day of the week. Electrical, water and sewerage services were kept on. Essential services and emergency maintenance of the buildings continued to be the subject of a pre-existing contract under which maintenance services were to be provided on request by ProGroup Management Pty Ltd. Corrective Services NSW also organised for groups of between eight and 15 offenders who were the subject of non-custodial community service orders imposed under the *Crimes (Sentencing Procedure) Act* 1999 (NSW) ("CSO workers") to be bussed from Campbelltown to Berrima each weekend to work in the grounds as part of their community service work. The CSO workers mowed the lawns and attended to the fruit trees, the rose garden and the vegetable garden.

70 That is how matters stood when, on 24 February 2012, the New South Wales Aboriginal Land Council ("the Land Council") made a claim for the land under s 36(2) of the *Aboriginal Land Rights Act* 1983 (NSW) ("the Land Rights Act"). The Minister for Regional Infrastructure and Services and the Minister for Primary Industries then had joint administration of the Crown Lands Act[72]. Either therefore answered the description of the "Crown Lands Minister" for the purposes of the Land Rights Act[73]. The Ministers acted jointly to refuse the claim under s 36(5)(b) of the Land Rights Act. From that refusal, the Land Council appealed to the Land and Environment Court of New South Wales under s 36(6) of the Land Rights Act.

71 No distinction was drawn in the appeal to the Land and Environment Court between the two Ministers who had jointly refused the claim. The single named respondent was styled the "Minister Administering the Crown Lands Act", corresponding to the "Crown Lands Minister" for the purposes of the Land Rights Act. Under s 36(7) of the Land Rights Act, that Minister bore the onus of satisfying the Court that the land was not "claimable Crown lands" within the definition in s 36(1) at the date of the claim.

72 The Minister did not contend before the Land and Environment Court that the land was not "vested in Her Majesty", was not dedicated under the Crown Lands Act or was any longer "used". The Minister sought to discharge the onus of satisfying the Court that the land was not claimable Crown lands at the date of

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72 Allocation of the Administration of Acts (NSW).

73 Section 36(1) of the Land Rights Act read with s 15 of the *Interpretation Act* 1987 (NSW).

the claim by satisfying the Court that the land was "lawfully occupied" within the meaning of s 36(1)(b). The Minister identified and relied on the cumulative effect of nine "indicia of occupation". They were: that 24-hour on-site security was maintained; that the buildings were kept locked; that the water supply was maintained; that the electricity supply was maintained; that sewerage services were maintained; that there was a continuing contract for the maintenance of essential services and emergency maintenance; that groups of CSO workers attended the land each week; that gardening tools and implements were stored on the land; and that members of the public wanting to visit the gardens sought permission from Corrective Services NSW or from an on-site security guard.

73 In the Land and Environment Court, Pain J found that the evidence led by the Minister was sufficient to establish each of the nine indicia on which the Minister relied[74]. Her Honour went on to conclude by reference to those indicia that Corrective Services NSW lawfully occupied the land at the date of the claim[75]. Being satisfied on that basis that the land was not claimable Crown lands at the date of the claim, her Honour dismissed the appeal from the refusal of the claim.

74 An appeal from the Land and Environment Court to the Court of Appeal of the Supreme Court of New South Wales is limited by s 57(1) of the *Land and Environment Court Act* 1979 (NSW) to an appeal on a question of law. On appeal by the Land Council from the decision of Pain J, the Court of Appeal rejected challenges to her Honour's findings of fact and held that her conclusion that Corrective Services NSW was in lawful occupation of the land at the date of the claim was not affected by legal error[76].

75 On further appeal by special leave to this Court, the Land Council advances three arguments challenging the Court of Appeal's holding that there was no legal error in the conclusion of Pain J. The first is that the conclusion that the land was occupied at the date of the claim was not open in light of the dedications which remained in force under the Crown Lands Act. The second is that Corrective Services NSW's occupation of the land was unlawful without statutory authority and that there was no statutory authority for Corrective Services NSW to occupy the land once the proclamations under the Administration of Sentences Act were revoked. The third, which is put in the

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74 *New South Wales Aboriginal Land Council v Minister Administering the Crown Lands Act (Berrima)* [2014] NSWLEC 188 at [168].

75 *New South Wales Aboriginal Land Council v Minister Administering the Crown Lands Act (Berrima)* [2014] NSWLEC 188 at [168].

76 *New South Wales Aboriginal Land Council v Minister Administering the Crown Lands Act* (2015) 303 FLR 87.

alternative to the second, is that Corrective Services NSW lacked authority to exercise such non-statutory executive power to occupy the land as may then have existed. The arguments are best taken in turn.

Occupation

76 The Land Council's first argument – that the conclusion that the land was occupied was not open in light of the dedications which remained in force – has as its major premise that determination of whether land that is dedicated for public purposes is land that is occupied within the meaning of s 36(1)(b) of the Land Rights Act can only proceed by reference to those public purposes. The land on which Berrima Gaol stands could not have been occupied at the time of the claim, so the argument continues, because nothing then happening on the land had anything to do with the public purposes for which the land was still dedicated: what was then happening on the land did not constitute "occupation of a gaol".

77 The Land Council seeks support for its major premise in the decision of this Court in *Minister Administering the Crown Lands Act v NSW Aboriginal Land Council* ("the *Wagga Wagga Motor Registry claim* case")[77] and in the decisions of the Court of Appeal in *Daruk Local Aboriginal Land Council v Minister Administering the Crown Lands Act* ("*Daruk*")[78] and in *Minister Administering the Crown Lands Act v La Perouse Local Aboriginal Land Council* ("*La Perouse*")[79]. None of those decisions in truth provides that support.

78 The factual context of the decision in the *Wagga Wagga Motor Registry claim* case was that "subject to the possible qualification required by reference to some transitory visits to the land, nothing was being done on the land when the claim was made, and nothing had been done on the land for a considerable time before the claim was made"[80]. The plurality did not need to decide in that context whether "used or occupied" in s 36(1)(b) referred to one concept or two. The plurality commented that, on either view, "it is an expression that encompasses utilisation, exploitation and employment of the land"[81]. None of that was occurring.

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77 (2008) 237 CLR 285; [2008] HCA 48.

78 (1993) 30 NSWLR 140.

79 (2012) 193 LGERA 276.

80 (2008) 237 CLR 285 at 307 [76].

81 (2008) 237 CLR 285 at 306-307 [73].

79 The plurality in the *Wagga Wagga Motor Registry claim* case nevertheless acknowledged the reasoning of Kitto J in *Council of the City of Newcastle v Royal Newcastle Hospital*[82] as illuminating consideration of when "acts, facts, matters and circumstances ... deprive the land of the characteristic of being 'not lawfully used or occupied'"[83]. The plurality went on to state in language derived from that of Kitto J that "a combination of *legal* possession, conduct amounting to *actual* possession, and some degree of permanence or continuity will usually constitute occupation of the land"[84]. The approach of the plurality was in those respects consistent with acceptance that the distinction drawn by Kitto J carefully between "occupation" and "use" of land when juxtaposed in a statutory context was apposite to s 36(1)(b).

80 *Daruk* was one of two early decisions of the Court of Appeal on s 36(1)(b) to which the plurality in the *Wagga Wagga Motor Registry claim* case referred without disapproval[85]. The other was *Minister Administering the Crown Lands Act v NSW Aboriginal Land Council* ("the *First Nowra Brickworks claim* case")[86].

81 The reasoning in *Daruk* drew heavily on the explanation of the concepts of occupation and use of land given by Bowen JA in *Commissioner of Land Tax v Christie*[87], which echoed the distinction drawn by Kitto J and which was made with express reference to *Royal Newcastle Hospital*. "Occupied" was explained 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 of control, maintaining of lands are all factors which are relevant"[88]. "Used" was separately explained to mean "'actually used' in the sense of being used in fact and to more than a merely notional degree"[89].

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82 (1957) 96 CLR 493 at 507-508; [1957] HCA 15.

83 (2008) 237 CLR 285 at 305 [69].

84 (2008) 237 CLR 285 at 306 [69] (emphasis in original; footnote omitted).

85 (2008) 237 CLR 285 at 303 [62].

86 (1993) 31 NSWLR 106.

87 [1973] 2 NSWLR 526 at 533.

88 *Daruk* (1993) 30 NSWLR 140 at 162-163.

89 (1993) 30 NSWLR 140 at 164.

82 The reasoning in the *First Nowra Brickworks claim* case reiterated an important aspect of the concept of use of land as so explained. The holding was that whether land is used cannot be determined without taking into account the purpose for which the land is claimed to be used, in that "purpose will dictate the degree of immediate physical use required to decide whether [land is] actually used in more than a notional sense"[90].

83 *La Perouse* was a unanimous decision of five members of the Court of Appeal reaffirming *Daruk* after the *Wagga Wagga Motor Registry claim* case. The Court of Appeal there reiterated that in the determination of whether land is used or occupied within the meaning of s 36(1)(b): transitory physical activities on land do not necessarily amount to either use or occupation; an evaluative process is to be undertaken in respect of the facts of each case; and the function of undertaking that evaluation (subject only to an appeal on a question of law) is that of the Land and Environment Court[91].

84 As I have explained, the explanations of the meanings of occupation and use given in *Daruk*, developed in the *First Nowra Brickworks claim* case in relation to use, and reaffirmed in *La Perouse*, were derived from and consistent with the distinction between occupation and use of land drawn by Kitto J in *Royal Newcastle Hospital*. There is utility in now recalling the terms in which that distinction was articulated and illustrated.

85 In *Royal Newcastle Hospital*, after noting that "conduct which satisfies the one word may also satisfy the other" and that the two words were for that reason unsurprisingly treated in some judgments as if they were interchangeable, Kitto J (with whom Fullagar J agreed[92]) explained occupation and use of land to involve different concepts. The concept of "occupation" of land is that of "legal possession, conduct amounting to actual possession, and some degree of permanence"[93]. The concept of "use" of land is that of "physical acts by which the land is made to serve some purpose"[94]. The reasoning of other members of the High Court reflected the same distinction[95].

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90 (1993) 31 NSWLR 106 at 121.

91 (2012) 193 LGERA 276 at 289 [57].

92 (1957) 96 CLR 493 at 505.

93 (1957) 96 CLR 493 at 507.

94 (1957) 96 CLR 493 at 508.

95 (1957) 96 CLR 493 at 500-501, 505, 515.

86 The reasoning of the Privy Council on appeal from the decision of the High Court in that case adopted that distinction and provided a useful illustration of it. The Privy Council was satisfied that the land in question – a large expanse of unfenced virgin bushland located adjacent to a sanatorium for tuberculosis patients – was used, despite having doubt about whether the land was occupied[96]. The Privy Council explained its doubt[97]:

> "The hospital was undoubtedly in legal possession of the two hundred and ninety-one acres; for the simple reason that, where no one else is in possession, possession follows title. But legal possession is not the same as occupation. Occupation is matter of fact and only exists where there is sufficient measure of control to prevent strangers from interfering: *see Pollock and Wright* on *Possession in the Common Law* (1888) pp 12, 13. There must be something actually done on the land, not necessarily on the whole, but on part in respect of the whole. No one would describe a bombed site or an empty unlocked house as 'occupied' by anyone: but everyone would say that a farmer 'occupies' the whole of his farm even though he does not set foot on the woodlands within it from one year's end to another. Their Lordships have some doubt whether these two hundred and ninety-one acres were 'occupied' by the hospital, because they were not fenced in or enclosed in any way, and it is difficult to say they were so much linked with the hospital grounds as to form part of an entire whole."

87 The explanations in *Daruk* and in the *First Nowra Brickworks claim* case conform to the distinction spelt out by Kitto J and adopted and illustrated by the Privy Council in treating occupied and used as distinct in concept, albeit as overlapping in application. Land that is occupied will often be land that is used. But land can be occupied without being used, just as land can be used without being occupied.

88 The aspect of the distinction between occupation of land and use of land that assumes critical importance in the present case concerns the significance of purpose. Occupation of land can be occupation for a purpose, and the purpose for which physical acts are undertaken can inform whether those acts amount to occupation in fact. Unlike the concept of use, however, purpose is not intrinsic to the concept of occupation. Physical acts can be sufficient to amount to occupation in fact irrespective of the purpose for which they are undertaken. To expand on the illustration given by the Privy Council, a farmer might remain in occupation of his farm by staying in his farmhouse and maintaining his fences

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

97 (1959) 100 CLR 1 at 4; [1959] AC 248 at 255-256.

despite having chosen to cease farming and despite not yet having chosen what else he might do with the farmland.

89 Had the question here been whether the land on which Berrima Gaol is situated was used at the date of the claim, an argument of the kind now advanced by the Land Council would have been unanswerable. The only lawful use to which the land could then have been put was use for the dedicated public purposes of a gaol. What was then happening on the land could not be described as use of the land for those purposes.

90 But the question tendered for the determination of the Land and Environment Court was not one of use. The question was one of occupation. Although Corrective Services NSW was not doing anything with the land at the date of the claim, Corrective Services NSW had a continuing presence on the land and remained active in asserting control over the land. The buildings were being kept locked and were not being allowed to fall into disrepair. There was someone on site 24 hours a day. The lawns and gardens were being maintained on a weekly basis. That state of affairs had been in place for some months and it could be expected to continue until the future use of the land was settled. The evaluative conclusion of the Land and Environment Court that the land was occupied was open.

91 The beneficial purposes of the Land Rights Act and the structure of s 36(1) suggest no oddity about that result.

92 The principle that beneficial legislation is to be construed beneficially is a manifestation of the more general principle that all legislation is to be construed purposively. Application of that more general principle to New South Wales legislation is mandated by the requirement of s 33 of the *Interpretation Act* 1987 (NSW) that a construction that would promote the purpose or object underlying the Act is to be preferred to a construction that would not. Neither in its general application nor in its particular manifestation can that principle be applied other than on the understanding that legislation "rarely pursues a single purpose at all costs" and that "[u]ltimately, it is the text, construed according to such principles of interpretation as provide rational assistance in the circumstances of the particular case, that is controlling"[98].

93 Evidently employing "legislative intent" as an orthodox expression of the constitutional relationship that exists between an enacting legislature and a court

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98 *Carr v Western Australia* (2007) 232 CLR 138 at 143 [5]-[6]; [2007] HCA 47; *Construction Forestry Mining and Energy Union v Mammoet Australia Pty Ltd* (2013) 248 CLR 619 at 632-633 [40]; [2013] HCA 36.

doing its best to extract and articulate the meaning of an enacted text[99], the Supreme Court of the United States warned of the danger of overzealous or insufficiently nuanced purposive construction when it stated in *Rodriguez v United States*[100]:

> "Deciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice – and it frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute's primary objective must be the law."

94 The beneficial purpose of the Land Rights Act is reflected in its recital and has repeatedly been acknowledged[101]. Yet the beneficial purpose of the Land Rights Act says nothing of itself about how far the Act goes in pursuit of that purpose. In particular, it says nothing of itself about where the precise limits of claimable Crown lands are to be drawn in applying the detail of the definition in s 36(1). The principle that, as beneficial legislation, the Land Rights Act is to be construed beneficially does not mean that the most expansive view of claimable Crown lands must be taken whenever constructional choice arises in the application of that definition. The principle was not considered by the plurality in the *Wagga Wagga Motor Registry claim* case to provide relevant assistance in giving precise content to the words of s 36(1)(b)[102]. The principle provides no greater assistance in giving precise content to the same words here.

95 Placing s 36(1)(b) within the structure of s 36(1), it is apparent from s 36(1)(a) that land to which the application of s 36(1)(b) can fall to be considered is not limited to land that has been dedicated or reserved for a purpose. That land extends to land able to be lawfully sold or leased under the Crown Lands Act. Land able to be lawfully sold or leased under the Crown Lands Act is, by definition, land that is not dedicated for any public purpose[103]. It is therefore apparent that the application of s 36(1)(b) to particular land is not

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99 Cf *Singh v The Commonwealth* (2004) 222 CLR 322 at 335-336 [19]; [2004] HCA 43.

100 480 US 522 at 526 (1987) (emphasis in original). See also *Brennan v Comcare* (1994) 50 FCR 555 at 572-574; *Victims Compensation Fund v Brown* (2002) 54 NSWLR 668 at 671-672 [8]-[11].

101 See *Minister Administering the Crown Lands Act v Deerubbin Local Aboriginal Land Council [No 2]* (2001) 50 NSWLR 665 at 674 [54].

102 (2008) 237 CLR 285 at 301 [48].

103 Section 3(1) of the Crown Lands Act, definition of "Crown land".

tied by the structure of s 36(1) to such public purposes as for which the land might happen to be dedicated. Section 36(1)(b) mandates a stand-alone inquiry. It is also apparent that s 36(1)(c) is directed to the distinct and logically subsequent question of whether land, which may not currently be used or occupied at all, is land that is needed or likely to be needed for an "essential public purpose". Nothing in the inquiry mandated by s 36(1)(c), or by any other element of the definition of claimable Crown lands, can be read as limiting occupation of land within the meaning of s 36(1)(b) to occupation for public purposes for which that land is currently dedicated.

Lawful occupation without statutory authority

96 The Land Council's second argument – that occupation of the claimed land was unlawful without statutory authority – is founded primarily on the proposition that s 2 of the *New South Wales Constitution Act* 1855 (Imp)[104] ("the Constitution Statute"[105]) operates to vest management and control of the land in the Parliament of New South Wales to the exclusion of non-statutory executive power.

97 The Land Council's reference to non-statutory executive power in this context is to the power or capacity which the Crown, as the executive branch of government, is recognised to have at common law. The argument makes no attempt to dice non-statutory executive power. Whether non-statutory executive power to occupy the land might be seen as an incident of the extraordinary power of executive governance fairly described by the traditional label "prerogative"[106], or as an ordinary incident of "proprietorship", does not matter to the argument. The argument is simply that the power has been abrogated by statute.

98 Since the enactment of the *Australia Act* 1986 (Cth) under s 51(xxxviii) of the Commonwealth Constitution, the legislative power of the Parliament of New South Wales has included power to repeal or amend s 2 of the Constitution Statute[107]. The Minister argues that the Parliament impliedly repealed s 2 by enacting s 6 of the Crown Lands Act, which the Minister argues "on its face, overtakes s 2". That argument is unfounded. There is no inconsistency. The later provision has not displaced or supplanted the earlier provision. For reasons

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104 18 & 19 Vict c 54.

105 As to the appropriateness of the label, see Twomey, *The Constitution of New South Wales*, (2004) at 19-20.

106 Cf *Johnson v Kent* (1975) 132 CLR 164 at 169, 174; [1975] HCA 4.

107 Sections 2 and 3(2) of the *Australia Act* 1986 (Cth).

to be explained, s 2 of the Constitution Statute and s 6 of the Crown Lands Act operate on altogether different planes.

99 The Attorney-General for Victoria, intervening, argues that conferral on the State of New South Wales of an estate in fee simple in the land by force of the Real Property Act was an exercise of legislative power of management and control of the land the result of which was to remove the land from the purview of s 2 of the Constitution Statute. The first part of that argument can be accepted, but the second cannot. For reasons again to be explained, s 2 of the Constitution Statute continues to operate in relation to the land.

100 The answer to the Land Council's argument is that the section does not confer legislative power to the exclusion of non-statutory executive power. Quite the opposite: the section confirms non-statutory executive power in the context of the system of responsible government ushered in by the Constitution Statute.

101 From the settlement of New South Wales in 1788, the Governor was authorised and empowered by the Crown to exercise non-statutory executive power to the extent and in the manner set out in Letters Patent. From 1823, the Governor was authorised and empowered by the Imperial Parliament to exercise legislative power for the welfare and good government of the Colony[108], and from 1828 the legislative power of the Governor was required to be exercised only on the advice of a local Legislative Council appointed by the Crown[109].

102 A New South Wales law promulgated in 1836 in the exercise of that legislative power recited that "Governors … and persons administering the Government of New South Wales" had from time to time been authorised and empowered by Letters Patent "to grant and dispose of the waste lands of New South Wales". For the avoidance of doubt, the law declared that past grants and conveyances were not invalid merely because they had not been executed under the public seal of the Colony[110].

103 Representative, but not yet responsible, government was established in New South Wales by the *Australian Constitutions Act* 1842 (Imp)[111] ("the Australian Constitutions Act (No 1)"). The Legislative Council constituted under that Act was given authority "to make Laws for the Peace, Welfare, and good

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108 4 Geo IV c 96, s 24.

109 *Australian Courts Act* 1828 (Imp) (9 Geo IV c 83), ss 20, 27.

110 *Land Grants Confirmation Act* 1836 (NSW) (6 Gul IV No 16).

111 5 & 6 Vict c 76.

Government of the said Colony" subject to the presently relevant proviso "that no such Law shall ... interfere in any Manner with the Sale or other Appropriation of the Lands belonging to the Crown within the said Colony, or with the Revenue thence arising"[112]. The proviso reflected the influence on the Imperial Parliament at that time of the social theorist Edward Gibbon Wakefield, who advocated that colonial land should be sold at a substantial price and that the proceeds of its sale should be used to fund further emigration to the colonies[113].

104 Enacted barely a month earlier, the *Australian Colonies Waste Lands Act* 1842 (Imp)[114] ("the Waste Lands Act") had instantiated the so-called Wakefield theory. That Act defined "Waste Lands of the Crown" to mean "any Lands situate therein, and which now are or shall hereafter be vested in Her Majesty, Her Heirs and Successors, and which have not been already granted or lawfully contracted to be granted to any Person or Persons in Fee Simple, or for an Estate of Freehold, or for a Term of Years, and which have not been dedicated and set apart for some public Use"[115].

105 The Waste Lands Act provided for the alienation of "Waste Lands of the Crown" situated within the Australian colonies to occur only in accordance with the regulatory scheme set out in that Act[116]. Under that regulatory scheme, alienation was to occur only as a result of conveyance by the Governor by way of sale at or above a specified minimum price[117]. The Waste Lands Act went on to provide for the distribution of the gross proceeds of sale. Half of those gross proceeds were appropriated to be applied to the "public Service" of New South Wales in such manner as the Commissioners of the Imperial Treasury might from time to time direct. The other half were appropriated to be applied to defray expenses of emigration from the United Kingdom[118].

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112 5 & 6 Vict c 76, s 29.

113 McMinn, *A Constitutional History of Australia*, (1979) at 32-33.

114 5 & 6 Vict c 36.

115 Section 23 of the Waste Lands Act.

116 Section 2 of the Waste Lands Act.

117 Sections 5 and 8 of the Waste Lands Act.

118 Section 19 of the Waste Lands Act.

106 The Waste Lands Act contained a proviso to its restriction on alienation expressed in the following terms[119]:

> "Provided always, and be it enacted, That nothing in this Act contained shall extend or be construed to extend to prevent Her Majesty, or any Person or Persons acting on the Behalf or under the Authority of Her Majesty, from excepting from Sale, and either reserving to Her Majesty, Her Heirs and Successors, or disposing of in such other Manner as for the public Interests may seem best, such Lands as may be required for public Roads or other internal Communications, whether by Land or Water, or for the Use or Benefit of the aboriginal Inhabitants of the Country, or for Purposes of Military Defence, or as the Sites of Places of public Worship, Schools, or other public Buildings, or as Places for the Interment of the Dead, or Places for the Recreation and Amusement of the Inhabitants of any Town or Village, or as the Sites of public Quays or Landing Places on the Sea Coast or Shores of navigable Streams, or for any other Purpose of public Safety, Convenience, Health, or Enjoyment; and provided also, that nothing in this Act contained shall extend or be construed to extend to prevent Her Majesty, or any Person or Persons acting on her Behalf or under the Authority of Her Majesty, from fulfilling any Promise or Engagement made or hereafter to be made by or on the Behalf of Her Majesty in favour of any Military or Naval Settlers in the said Colonies respectively, in pursuance of any Regulations made by Her Majesty's Authority in favour or for the Benefit of any such Settlers."

107 Expressed as an exception to the legislatively imposed prohibition on alienation rather than as a legislative conferral of power, that proviso made clear that the prohibition against alienation imposed by the Waste Lands Act was not intended to affect the authority of the Governor and persons acting under his authority to exercise on behalf of the Crown non-statutory executive power to occupy, use and dispose of land for what can be described as public purposes. To the extent that an additional or subsidiary strand of the Land Council's argument that occupation of the claimed land was unlawful without statutory authority is founded on the proposition that the Waste Lands Act abrogated all non-statutory executive power to grant or assume any right of occupation of the waste lands of the Crown to which it referred, the argument is refuted by the terms of that Act.

108 From the beginning, and increasingly over the ensuing decade, the policy implemented by the Waste Lands Act was to be the source of tension between the Imperial Government and colonists in New South Wales. One of the first actions of the newly representative Legislative Council was to petition the

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119 Section 3 of the Waste Lands Act.

Queen, the House of Lords and the House of Commons, calling for repeal of the Waste Lands Act and amendment of the Australian Constitutions Act (No 1) to place the management of waste lands belonging to the Crown and the proceeds of their disposal within the power of the Legislative Council. Those petitions were rejected by the Imperial Government in 1845[120].

109 The following year, the *Australian Colonies Waste Lands Amendment Act* 1846 (Imp)[121] ("the Waste Lands Amendment Act") amended the Waste Lands Act to provide also for the lease or licence of "Waste Lands of the Crown"[122], which it defined to mean described lands "which have not been already granted or lawfully contracted to be granted by Her Majesty, Her Heirs and Successors, to any other Person or Persons in Fee Simple, and which have not been dedicated or set apart for some public Use"[123]. The Waste Lands Amendment Act adopted the scheme of the Waste Lands Act in providing for the resulting "Rent or pecuniary Service" to be distributed in the same way as the gross proceeds of sale[124].

110 Very soon after the enactment of the Waste Lands Amendment Act in 1846, a "bold argument, which then had a political flavour"[125] was put to, and rejected by, the Supreme Court of New South Wales in *Attorney-General v Brown*[126]. The argument was advanced in response to an action for intrusion brought by the Attorney-General of New South Wales against a person who had engaged in mining coal the subject of express reservation from a Crown lease granted in 1840, two years before the enactment of the Waste Lands Act. The argument was that the Crown as represented by the Attorney-General did not have the legal possession necessary to found an action for intrusion for the reason "that the Crown has not and never had any property in the waste lands of the Colony – that is, any beneficial ownership or right to grant any of them without

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120 Sweetman, *Australian Constitutional Development*, (1925) at 185-187.

121 9 & 10 Vict c 104.

122 Section 1 of the Waste Lands Amendment Act.

123 Section 9 of the Waste Lands Amendment Act.

124 Section 2 of the Waste Lands Amendment Act.

125 *Randwick Corporation v Rutledge* (1959) 102 CLR 54 at 71; [1959] HCA 63.

126 (1847) 1 Legge 312.

authority of Parliament"[127]. The conclusion firmly stated by the Supreme Court was[128]:

> "that the waste lands of this Colony are, and ever have been, from the time of its first settlement in 1788, in the Crown; that they are, and ever have been, from that date (in point of legal intendment), without office found, in the Sovereign's possession; and that, as his or her property, they have been and may now be effectually granted to subjects of the Crown."

In the course of explaining that conclusion, the Supreme Court noted the reference to the "Waste Lands of the Crown" in the Waste Lands Act. Of that reference, the Supreme Court said "[i]t will hardly be disputed, that by these words were meant all the waste and unoccupied lands of the colony; for, at any rate, there is no *other* proprietor of such lands"[129].

111 *Attorney-General v Brown* was very long afterwards overruled in *Mabo v Queensland [No 2]*[130] to the extent that it held the Crown to be the absolute beneficial owner of all of the land in New South Wales from the time of settlement in 1788 and to the extent that (in disregard of Aboriginal inhabitants, their laws and their customs) it treated all land which had not been the subject of a grant from the Crown as unoccupied and having no other proprietor. The doctrine of the common law of Australia is now that what the Crown acquired at the time of "settlement" was "radical title" – "no more than a postulate to support the exercise of sovereign power within the familiar feudal framework of the common law"[131] – and that "[a]bsolute and beneficial Crown ownership, a plenum dominium, was established not by the acquisition of radical title but by subsequent exercise of the authority of the Crown" either to grant an interest in land to another or to appropriate land to itself[132].

112 Momentous as *Mabo [No 2]* was in the development of the common law of Australia, its significance for those aspects of *Attorney-General v Brown* that are of present relevance is minimal. Given that the land in question had been the

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127 (1847) 1 Legge 312 at 316.

128 (1847) 1 Legge 312 at 316.

129 (1847) 1 Legge 312 at 319 (emphasis in original).

130 (1992) 175 CLR 1; [1992] HCA 23.

131 *Mabo v Queensland [No 2]* (1992) 175 CLR 1 at 54.

132 *Wik Peoples v Queensland* (1996) 187 CLR 1 at 186; [1996] HCA 40. See *Mabo v Queensland [No 2]* (1992) 175 CLR 1 at 69-70.

subject of the grant of a Crown lease from which the coal in question had been expressly reserved, it is difficult to see how the result in *Attorney-General v Brown* could have been different even if the view which was to prevail in *Mabo [No 2]* had been applied. What would have been different would have been the steps in the analysis leading to that result: instead of the grant and reservation being seen as the exercise by the Crown of a proprietary right which the Crown had as the original absolute owner of all land in New South Wales on and from settlement in 1788, the grant and reservation would have been seen as an exercise by the Crown of non-statutory executive power which had the consequence of creating rights of ownership in respect of the land in question, in the Crown and in the lessee, on and from the time of the exercise of that non-statutory executive power in 1840. Either way, the Crown as represented by the Attorney-General would still have had the possession necessary to found an action for intrusion.

113 The *Australian Constitutions Act* 1850 (Imp)[133] ("the Australian Constitutions Act (No 2)") made no amendment to the Waste Lands Act or to the scope of the power conferred on the Legislative Council by the Australian Constitutions Act (No 1). The Australian Constitutions Act (No 2) did, however, grant permission to the Governor and Legislative Council to enact colonial legislation altering the constitution of the colonial legislature but not the scope of its legislative power. The procedural condition for the enactment of that legislation was that the Bill for the legislation had to be reserved for the signification of Her Majesty's pleasure and to be laid before the Imperial Parliament before that pleasure was signified[134].

114 To say that the Australian Constitutions Act (No 2) was not well received in New South Wales[135] is an understatement; it provoked "a great crisis"[136]. The Legislative Council adopted in 1851 a "Declaration and Remonstrance against the New Constitution Act" recording its "deep disappointment and dissatisfaction" with the Australian Constitutions Act (No 2). Recording in the Declaration and Remonstrance that "[t]he exploded fallacies of the Wakefield theory [were] still clung to" and that "the pernicious [Waste Lands Act] [was] still enforced", the Legislative Council concluded by protesting, insisting and declaring, amongst other things: "[t]hat the Imperial Parliament has not, nor of right ought to have, any power to tax the people of this Colony, or to appropriate any of the monies levied by authority of the Colonial Legislature; – that this power can only be lawfully exercised by the Colonial Legislature"; "[t]hat the

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133 13 & 14 Vict c 59.

134 Section 32 of the Australian Constitutions Act (No 2).

135 Cf Twomey, *The Constitution of New South Wales*, (2004) at 7.

136 Sweetman, *Australian Constitutional Development*, (1925) at 270.

Revenue arising from the Public Lands, derived as it is '*mainly*' from the value imparted to them, by the labour and capital of the people of this Colony, is as much their property as the ordinary Revenue, and ought therefore to be subject only to the like control and appropriation"; and "[t]hat plenary powers of Legislation should be conferred upon and exercised by the Colonial Legislature, for the time being"[137].

115 The Declaration and Remonstrance was rebuffed by the Secretary of State for the Colonies in early 1852, but a resolution of the Legislative Council reiterating the same demands later in 1852 received a more conciliatory response from his successor. Then, in 1853, the Legislative Council adopted a Bill for a Constitution Act which had been drafted to give effect to those demands. Because the Bill went beyond the permission granted to the Governor and Legislative Council by the Australian Constitutions Act (No 2) to enact colonial legislation altering the constitution of the colonial legislature, further Imperial legislation was needed to authorise its enactment[138].

116 The upshot was the enactment by the Imperial Parliament not only of the Constitution Statute but also of the *Australian Waste Lands Act* 1855 (Imp)[139] ("the Waste Lands Repeal Act").

117 The Constitution Statute authorised the Queen to assent to the Bill for what was to become the *Constitution Act* 1855 (NSW)[140] ("the Constitution Act"[141]), the text of which (slightly modified from that which had been adopted by the Legislative Council in 1853) was set out in a schedule to the Constitution Statute. The Constitution Act provided for the Parliament of New South Wales to have power "to make Laws for the Peace, Welfare, and good Government of the said Colony in all Cases whatsoever"[142], adding for good measure that "it shall be lawful for the Legislature of this Colony to make Laws for regulating the Sale, Letting, Disposal, and Occupation of the Waste Lands of the Crown within

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137 New South Wales, Legislative Council, *Votes and Proceedings of the Legislative Council*, 1 May 1851 at 31-32.

138 See generally Sweetman, *Australian Constitutional Development*, (1925) at 256-270; McMinn, *A Constitutional History of Australia*, (1979) at 32-33; Twomey, *The Constitution of New South Wales*, (2004) at 8-10.

139 18 & 19 Vict c 56.

140 18 & 19 Vict c 54, Sched 1.

141 As to the appropriateness of the label, see Twomey, *The Constitution of New South Wales*, (2004) at 19-20.

142 Section 1 of the Constitution Act.

the said Colony"[143] and that "All Taxes, Imposts, Rates, and Duties, and all territorial, casual, and other Revenues of the Crown … from whatever Source arising within this Colony … shall form One Consolidated Revenue Fund, to be appropriated for the Public Service of this Colony"[144].

118 Section 2 of the Constitution Statute relevantly provided in that context that (subject to a proviso of no present relevance) from the date of the proclamation of the Constitution Statute in New South Wales:

> "the entire Management and Control of the Waste Lands belonging to the Crown in the said Colony, and also the Appropriation of the gross Proceeds of the Sales of any such Lands, and of all other Proceeds and Revenues of the same, from whatever Source, arising within the said Colony, including all Royalties, Mines, and Minerals, shall be vested in the Legislature of the said Colony".

119 The Waste Lands Repeal Act was expressed to repeal the Waste Lands Act and the Waste Lands Amendment Act with effect from the date of proclamation of the Constitution Statute[145]. The Waste Lands Repeal Act contained a savings provision to the effect that the regulations imposed by those Acts "respecting the Sale or other Disposal of the Waste Lands of the Crown" were to remain in force until the Parliament of New South Wales made other provision[146].

120 The Parliament of New South Wales made such other provision in 1861, when it enacted the *Crown Lands Alienation Act* 1861 (NSW) ("the Crown Lands Alienation Act") and the *Crown Lands Occupation Act* 1861 (NSW) ("the Crown Lands Occupation Act"). Defining "Crown Lands" to mean "[a]ll Lands vested in Her Majesty which have not been dedicated to any public purpose or which have not been granted or lawfully contracted to be granted in fee simple"[147], the Crown Lands Alienation Act provided in s 3 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" and that "the Governor with the advice of the Executive Council is hereby authorized in the name and on the behalf of Her Majesty so to grant or dedicate any Crown Lands". Adopting

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143 Section 43 of the Constitution Act.

144 Section 47 of the Constitution Act.

145 Sections 1 and 2 of the Waste Lands Repeal Act.

146 Section 6 of the Waste Lands Repeal Act.

147 Section 1 of the Crown Lands Alienation Act.

in substance the same definition, the Crown Lands Occupation Act regulated the renewal of existing leases on Crown lands.

121 Provisions similar in effect to s 3 of the Crown Lands Alienation Act have been a consistent feature of subsequent Crown lands legislation in New South Wales, just as they have been a consistent feature of Crown lands legislation in other States. Section 6 of the Crown Lands Act is the current incarnation. Those provisions have operated to displace non-statutory executive power within their fields of operation[148]. The Privy Council in *Cudgen Rutile (No 2) Pty Ltd v Chalk*[149] accepted as "fully established" the proposition that in Australian States "the Crown cannot contract for the disposal of any interest in Crown lands unless under and in accordance with power to that effect conferred by statute". Together with subsequent statements of similar generality in the High Court[150], what was said in *Cudgen Rutile (No 2)* needs to be understood as a reference to the operation of provisions cognate to s 3 of the Crown Lands Alienation Act.

122 To understand the quite different operation of s 2 of the Constitution Statute, it is necessary to turn back to consider the significance which its language bore on 16 July 1855, the date of the proclamation of the Constitution Statute in New South Wales. Whereas the power to make laws for the peace, welfare and good government conferred on the Legislative Council constituted under the Australian Constitutions Act (No 1) had been expressly limited to exclude the enactment of laws concerning the sale or other appropriation of lands belonging to the Crown, the equivalent power to make laws conferred on the Parliament to be constituted by the Constitution Act, under the authority of the Constitution Statute, was expressly to extend to "all Cases whatsoever". This was a large, even dramatic, change in Imperial policy for which colonists in New South Wales had long campaigned: "[i]ndeed, control of the unalienated land may be said to have been wrested by the colonists from the Imperial authorities by continued argument and protestation"[151].

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148 *Blackwood v London Chartered Bank of Australia* (1874) LR 5 PC 92 at 112; *Lukey v Sydney Harbour Trust Commissioners* (1902) 2 SR (NSW) (Eq) 152 at 165; *De Britt v Carr* (1911) 13 CLR 114 at 122; [1911] HCA 32; *Walsh v Minister for Lands for NSW* (1960) 103 CLR 240 at 254; [1960] HCA 52.

149 [1975] AC 520 at 533.

150 *Mabo v Queensland [No 2]* (1992) 175 CLR 1 at 63; *Wik Peoples v Queensland* (1996) 187 CLR 1 at 173; *Western Australia v Ward* (2002) 213 CLR 1 at 121 [167]; [2002] HCA 28.

151 *New South Wales v The Commonwealth* (1975) 135 CLR 337 at 369; [1975] HCA 58.

123 Against the background of political struggle that had occurred, the principal concerns of which had been highlighted by the Declaration and Remonstrance, s 2 of the Constitution Statute served as a solemn and emphatic declaration by the Imperial Parliament of the scope of the legislative power that was finally being conferred on the Parliament of New South Wales. That legislative power was not to be relevantly constrained, whether by the paramount force of the Waste Lands Act and the Waste Lands Amendment Act or otherwise, but was to extend as declared by that section to "the entire Management and Control of the Waste Lands belonging to the Crown in the said Colony".

124 Section 2 of the Constitution Statute serving in that way to confirm the plenary scope of the legislative power of the Parliament, there appeared no reason to read its reference to the waste lands belonging to the Crown other than in the broadest sense of referring to all land in New South Wales which had not been the subject of a grant from the Crown as at 16 July 1855. That broad reading would eventually be confirmed by the High Court[152].

125 In the short term, however, the position was somewhat clouded by an opinion given by colonial law officers in 1862[153] and by a decision of the Supreme Court of New South Wales two years later in *Attorney General v Eagar*[154]. Each contained statements linking the undefined reference to waste lands in s 2 of the Constitution Statute to the earlier defined meanings of waste lands in the Waste Lands Act and the Waste Lands Amendment Act. In so doing, they appeared to treat s 2 of the Constitution Statute as having the effect of taking land which the Crown had dedicated or set apart for some public use before 16 July 1855 outside the scope of the legislative power of the Parliament[155]. That odd and restrictive reading featured prominently in argument in litigation which commenced with *Attorney-General v Williams*[156] in the Supreme Court of New South Wales, and which wound its way through the High Court to the Privy Council between 1913 and 1915. It will be necessary to give some attention to that litigation after reflecting on what is for present purposes the critical aspect of s 2: that the section spoke only to the scope of legislative power.

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152 *New South Wales v The Commonwealth* (1926) 38 CLR 74 at 83.

153 See *Attorney General v Eagar* (1864) 3 SCR (NSW) (L) 234 at 281.

154 (1864) 3 SCR (NSW) (L) 234.

155 See generally *Randwick Corporation v Rutledge* (1959) 102 CLR 54 at 75.

156 (1913) 13 SR (NSW) 295.

126 If s 2 of the Constitution Statute spoke only to the scope of the legislative power of the Parliament of New South Wales, what of the scope of the non-statutory executive power of the Crown within New South Wales? The Constitution Statute did not address the non-statutory executive power of the Crown at all and the Constitution Act touched on it only to the extent of making provision for the appointment of public officers to be "vested in the Governor, with the Advice of the Executive Council, with the Exception of the Appointments of the Officers liable to retire from Office on political Grounds … which Appointments shall be vested in the Governor alone"[157]. The general understanding underlying the framing of the Constitution Act, to which that provision gave but a glimpse[158], was that its enactment would bring about "responsible government"[159], the nature of which had been outlined in the Canadian context in the well-known report by Lord Durham in 1839[160].

127 In accordance with that conception of responsible government, non-statutory executive power no less broad as to its subject-matter than the legislative power exercisable by the Parliament would be exercisable by or on behalf of the Governor acting on the advice of the Executive Council, at least a majority of whom would in practice be Ministers and who would be members of and politically responsible to the popularly elected chamber of the Legislative Assembly as the Parliament. That conception was realised in practice. By the end of the nineteenth century, it had become constitutional doctrine.

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157 Section 37 of the Constitution Act.

158 Cf *Toy v Musgrove* (1888) 14 VLR 349 at 391-392.

159 See generally *Egan v Willis* (1998) 195 CLR 424 at 472-475 [94]-[99]; [1998] HCA 71; Melbourne, "The Establishment of Responsible Government", in Rose, Newton and Benians (eds), *The Cambridge History of the British Empire*, (1933), vol VII, pt I, ch X. See for example Chapman, *Parliamentary Government; or Responsible Ministries for the Australian Colonies*, (1854) at 10-12.

160 Lucas (ed), *Lord Durham's Report on the Affairs of British North America*, (1912).

128 An orthodox explanation was as follows[161]:

> "The essential features of Responsible Government as stated by Durham, and afterwards elaborated … were the division between imperial and local matters, and the giving over of the latter without reserve into the hands of the colonial legislature. Matters thus given over were to be administered by an Executive responsible to the Assembly. Imperial concerns on the other hand were to be retained absolutely in the control of the British Government; and in regard to these matters the Colonies were to remain mere dependencies. In accordance with this twofold division of powers, the functions of the Governor were to be dual. As regards Imperial matters he was to remain an Imperial officer responsible to the British Government, but as regards domestic affairs he was to assume a rôle comparable to that of a constitutional monarch."

129 The conferral of legislative power in that way brought with it corresponding executive power: "[a]s rights of self-government were conferred on each Colony exclusive rights of executive authority over matters within the ambit of the rights conferred became of necessity vested in the executive power of the Colony"[162] to the effect that "[w]ithin the limits of self-government conferred by its Constitution the executive power of each self-governing Colony, though subject to control by Imperial enactment, [became] as independent of the executive power of the Empire as it [was] of the executive power of any Colony of the Empire"[163].

130 The result was that, through "the silent operation of constitutional principles"[164], there emerged in each Colony a distinct Executive Government of

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161 Hall, *The British Commonwealth of Nations*, (1920) at 25, quoted in Evatt, *The King and his Dominion Governors*, 2nd ed (1967) at 15-16. To similar effect, see Finn, *Law and Government in Colonial Australia*, (1987) at 4, quoted in *Plaintiff M68/2015 v Minister for Immigration and Border Protection* (2016) 90 ALJR 297 at 321 [116]-[117]; 327 ALR 369 at 394; [2016] HCA 1; Pitt Cobbett, "The Crown as Representing the State", (1904) 1 *Commonwealth Law Review* 145 at 146-147, quoted in *Sue v Hill* (1999) 199 CLR 462 at 499-500 [88]; [1999] HCA 30.

162 *South Australia v Victoria* (1911) 12 CLR 667 at 710; [1911] HCA 17. See also *The Commonwealth v Tasmania* (*The Tasmanian Dam Case*) (1983) 158 CLR 1 at 211; [1983] HCA 21.

163 *South Australia v Victoria* (1911) 12 CLR 667 at 711.

164 *The Commonwealth v Kreglinger & Fernau Ltd and Bardsley* (1926) 37 CLR 393 at 413; [1926] HCA 8, quoting *Cooper v Stuart* (1889) 14 App Cas 286 at 293.

the Colony, conventionally referred to as "the Crown in right of the Colony"[165], which on federation was to become the Executive Government of the State.

131 Within the twofold division of the executive responsibilities of the Governor of New South Wales ushered in by the advent of responsible government, management and control of what s 2 of the Constitution Statute described as the waste lands belonging to the Crown fell within that hemisphere of responsibilities in which executive power was to be exercised by or on behalf of the Governor on the advice of his New South Wales Ministers. The entire management and control of those lands came, in short, to be exercisable only by the Executive Government of New South Wales subject only to legislation enacted by the Parliament of New South Wales.

132 Doubt about that, if there ever could realistically have been any, was dispelled in 1913 by the decision of the High Court in *Williams v Attorney-General for New South Wales*[166], affirmed by the Privy Council two years later[167].

133 The litigation in *Williams v Attorney-General for New South Wales* was prompted by a decision of the Executive Government of New South Wales (that is, of the Cabinet, comprised of Ministers responsible to the Parliament) that Government House (which had from 1900 until 1912 been occupied as the Sydney residence of the Governor-General) and its grounds would be opened to the public and that its stable would be turned into an academy of music. The land in question had been set apart by the Crown as a residence for the Governor in the first half of the nineteenth century. Informants in a relator action in the Supreme Court of New South Wales relied on the narrow view of the reference to waste lands belonging to the Crown in s 2 of the Constitution Statute supported by *Attorney General v Eagar* to argue that the Parliament would not have power to alter the use of the land and that "*a fortiori* the Government could not"[168]. The Supreme Court, accepting that argument, was persuaded to declare that the land was "vested in His Majesty the King dedicated to the public purpose of a residence for the Sovereign's representative in New South Wales, and that the action or concurrence of His Majesty's Imperial Government is a necessary condition precedent to their diversion from that purpose". The Supreme Court also issued an injunction which enjoined the defendant "as nominal defendant for and on behalf of the Government of New South Wales and the officers and

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165 *Sue v Hill* (1999) 199 CLR 462 at 500-501 [89]-[90].

166 (1913) 16 CLR 404; [1913] HCA 33.

167 *Attorney-General for New South Wales v Williams* (1915) 19 CLR 343; [1915] AC 573.

168 *Attorney-General v Williams* (1913) 13 SR (NSW) 295 at 296.

servants of the Government from any unauthorised interference with that purpose"[169].

134 The High Court, on appeal, and the Privy Council, on further appeal, each held that the proceeding in the Supreme Court was irregularly constituted. That alone justified setting aside the relief that had been granted. But each also held the informants' arguments to lack merit. The reference to waste lands belonging to the Crown in s 2 of the Constitution Statute, a majority of the High Court held, did not have the restricted meaning in the Waste Lands Act and the Waste Lands Amendment Act. In the words of Barton ACJ, the reference was simply to "such of the lands of which the Crown became the absolute owner on taking possession of this country as the Crown had not made the subject of any proprietary right on the part of any citizen"[170]. Those lands fell within the power of the Executive Government of the State to manage and control, subject to legislation enacted by the Parliament of the State. If there was no relevant State law, there was no relevant restriction on the power of the Executive Government. The result, again in the words of Barton ACJ, was that "the Executive Government of [the] State [was] entitled to put the house and grounds in question to any use not expressly or impliedly forbidden by the terms of its Crown Lands Acts or any other of its laws"[171].

135 The Land Council draws attention to a statement of Isaacs J to the effect that the management and control of waste lands was given under the Constitution Act "not as a matter of *title*" but "as a matter of *governmental function*" and "not to the King in his Executive capacity" but "to the *legislature*"[172]. Plainly, like that of Barton ACJ, the reasoning of Isaacs J proceeded on an unquestioned acceptance of the view stated in *Attorney-General v Brown* that the Crown had become absolute owner of the land at least from the time[173] of settlement in 1788. His point was that the Constitution Act was concerned with the conferral of legislative power and was not concerned to alter that ownership. The point was not made in the context of suggesting that the conferral of legislative power operated to exclude executive capacity. That is made clear by his later specific discussion of the effect of responsible government. He referred in that context to the "uncontrolled management of all land occupied by … public buildings" in New South Wales and said "[c]learly that passed, not as specifically given over

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169 (1913) 13 SR (NSW) 295 at 322.

170 (1913) 16 CLR 404 at 428.

171 (1913) 16 CLR 404 at 430. See also at 465.

172 (1913) 16 CLR 404 at 456 (emphasis in original).

173 Cf *Mabo v Queensland [No 2]* (1992) 175 CLR 1 at 43.

to the control of the legislature, but *as part of the governmental means and property taken over by the self-governing community*"[174].

136 *Williams v Attorney-General for New South Wales*, no less than *Attorney-General v Brown*, has been overruled by *Mabo [No 2]* to the extent that it proceeded on the basis that the Crown had been the absolute owner of all of the land in New South Wales from the time of settlement. But also like *Attorney-General v Brown*, the result in *Williams v Attorney-General for New South Wales* would not have been different if the view which was to prevail in *Mabo [No 2]* had been applied. The reference to waste lands belonging to the Crown in s 2 of the Constitution Statute would simply have been read, as it is to be read now, as a reference to all land that had not been the subject of the grant of a proprietary right from the Crown. The power of the Executive Government of the State, to manage and control that land subject to legislation enacted by the Parliament of the State, would not have been couched in terms of a proprietary right. That power would have been couched, as it is sufficiently couched now, simply as within non-statutory executive power.

137 No argument was put to the High Court in *Williams v Attorney-General for New South Wales* to the effect that s 2 of the Constitution Statute abrogated executive power. But the outcome, and the whole thrust of the reasoning, stands against acceptance of the argument. That is so even allowing for aspects of the reasoning to be reconsidered in light of *Mabo [No 2]*.

138 Before the Privy Council, an argument does appear to have been put for the first time to the effect that the "property could not be disposed of without some legislative act"[175]. From the scant reference to the argument in the report of the case, the argument appears to have been directed to a permanent disposition or alienation. The argument was rejected on the basis that it was based on a misapprehension that the change in use in that case was irrevocable. Implicit in that rejection is the proposition that statutory authority was not required for that change in use to occur.

139 The authority of the Privy Council is not needed, however, to demonstrate that the Land Council's argument that s 2 of the Constitution Statute abrogates executive power is unsound.

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174 (1913) 16 CLR 404 at 460 (emphasis in original).

175 (1915) 19 CLR 343 at 348; [1915] AC 573 at 582.

Lawful occupation by Corrective Services NSW

140 The Land Council's final argument – that Corrective Services NSW lacked authority to exercise non-statutory executive power to occupy the claimed land – can be dealt with quite briefly.

141 Corrective Services NSW, it will be recalled, was the name given to the group of staff principally involved in the administration of the Administration of Sentences Act within the Department of Attorney General and Justice. Established as a Department of the Public Service of New South Wales by the Public Sector Management Act, the Department of Attorney General and Justice had no separate legal personality. The Department was no more than a division of the Executive Government of the State[176].

142 The Executive Government of the State having non-statutory executive power to occupy the land, subject to statute, that power was capable in law of being exercised by any of its Ministers or through any of its Departments[177]. There is no suggestion that Corrective Services NSW was disabled by statute from exercising that power.

Conclusion

143 None of the Land Council's three arguments can be accepted. The appeal must be dismissed with costs.

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176 Cf *Waterford v The Commonwealth* (1987) 163 CLR 54 at 55; [1987] HCA 25.

177 *New South Wales v Bardolph* (1934) 52 CLR 455 at 519-520; [1934] HCA 74.

NETTLE AND GORDON JJ.

Introduction

144 For Crown lands to be "claimable Crown lands" under the *Aboriginal Land Rights Act* 1983 (NSW) ("the Land Rights Act"), the Crown lands must not be "lawfully used or occupied" within the meaning of s 36(1)(b) of that Act. Two parcels of Crown land in Berrima, New South Wales ("the claimed land"), which remain dedicated for "gaol purposes", ceased to be proclaimed or operate as a gaol, with no new use identified. Was the claimed land "occupied" within the meaning of s 36(1)(b) of the Land Rights Act because it was secured, serviced by utilities, guarded by an on-site security guard and maintained intermittently by community service order ("CSO") workers, pending a decision on its future use? That question should be answered "no" and the appeal should be allowed with costs.

145 These reasons will identify the claimed land and the claim, discuss the decisions below, consider the legislative framework (especially the Land Rights Act and its legislative history), and then turn to consider whether the claimed land constituted "claimable Crown lands" under the Land Rights Act.

146 These reasons will show that this last question turns, in this case, on whether "occupied" in the phrase "lawfully used or occupied" in s 36(1)(b) of the Land Rights Act should be understood, in the context of that Act and, in particular, against its important beneficial and remedial purposes, as "occupied" pursuant to the purpose for which the land is dedicated; or simply as "occupied" in the sense that there is possession of, and a presence on, the land. These reasons will also show that only the former view is consistent with the text, context and purpose of the Land Rights Act.

The claimed land

147 The claimed land was used as a gaol from the 1830s. It comprises two parcels. A gaol building was on one of the parcels, along with three other separate buildings, substantial gardens, outbuildings and recreational facilities. The adjoining parcel was substantially occupied by gardens and a small building. Both parcels of land are now held under Torrens title, with "the State of New South Wales" as the registered proprietor.

148 In 1891 and 1894 different parts of the claimed land were dedicated by the Governor for "Gaol Site (extension)" and "Gaol Purposes" under s 104 of the

Crown Lands Act 1884 (NSW) ("the 1884 Act")[178]. In 1958, a different and further part of the claimed land was dedicated for "Gaol site (addition)" under s 24 of the *Crown Lands Consolidation Act* 1913 (NSW) ("the 1913 Act")[179]. Those dedications continued in force at the date of the claim at issue in this appeal. The legal effect of those dedications is addressed later in these reasons[180].

149 By the date of the claim, all proclamations under colonial and State legislation relating to the detention of prisoners on the claimed land had been revoked[181] and the claimed land could no longer lawfully be used as a gaol. The last proclamations to be revoked were two proclamations that took effect on and from 19 October 2001, which proclaimed the land (together with all buildings or premises) to be the "Berrima Correctional Centre" and the "Berrima Correctional Complex" under the *Crimes (Administration of Sentences) Act* 1999 (NSW). Those proclamations were revoked on 10 February 2012, 14 days before the claim was lodged.

150 The claimed land ceased to be used as a correctional centre by no later than February 2012. In late 2011, the Attorney-General described the premises as "mothballed".

151 Although the claimed land was no longer functioning as a gaol at the date of the claim, the primary judge (Pain J) found that the following activities were occurring on and in relation to the claimed land[182]:

> "(a) 24 hour on-site security was maintained;
>
> (b) the premises on the claimed land were kept locked;

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178 *New South Wales Government Gazette*, No 710, 11 November 1891 at 8883; *New South Wales Government Gazette*, No 686, 19 October 1894 at 6598.

179 *New South Wales Government Gazette*, No 122, 5 December 1958 at 3781.

180 See [171]-[172] below.

181 See *New South Wales Government Gazette*, No 94, 22 September 1944 at 1621; *New South Wales Government Gazette*, No 207, 4 November 1949 at 3329; *New South Wales Government Gazette*, No 99, 12 September 1997 at 8038-8039; *New South Wales Government Gazette*, No 158, 19 October 2001 at 8693-8694; *New South Wales Government Gazette*, No 18, 10 February 2012 at 404.

182 *New South Wales Aboriginal Land Council v Minister Administering the Crown Lands Act (Berrima)* [2014] NSWLEC 188 at [103].

(c) water supply to the claimed land was maintained;

(d) electrical supply to the claimed land was maintained;

(e) sewerage services to the claimed land were maintained;

(f) there was a continuing contract for the maintenance of essential services and any emergency maintenance at the claimed land;

(g) approximately every week, 8 to 15 CSO workers attended the claimed land, including replacement of the sprinkler system;

(h) gardening tools and implements were stored on the claimed land for the use of CSO workers [although that evidence was 'vague, imprecise and lacking in probative value'[183]]; and

(i) members of the public wanting to visit the gardens sought permission from [Corrective Services NSW] and/or the on-site security personnel."

None of those findings of fact was challenged on appeal.

Claim and refusal

152 On 24 February 2012, the appellant ("NSWALC") lodged a claim under s 36(2) of the Land Rights Act over the claimed land. On 20 November 2012, the "Crown Lands Minister"[184] advised NSWALC that the Minister was satisfied that the claimed land was "lawfully used and occupied" within the meaning of s 36(1)(b) of the Land Rights Act by Corrective Services NSW ("CSNSW"). The Minister was therefore required to refuse the claim under s 36(5)(b).

153 In the courts below, the Minister later did not contend that the claimed land was "lawfully used". Rather, the Minister contended that the claimed land was "occupied", and that, to the extent that purpose was relevant to "occupation", the asserted occupation of the claimed land was for a purpose of holding the claimed land pending a decision on its future use.

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183 *Berrima* [2014] NSWLEC 188 at [110].

184 In fact, there were two individual Ministers, each a "Crown Lands Minister" as defined in s 36(1) of the Land Rights Act, who acted jointly.

Decisions below

154 On appeal to the Land and Environment Court of New South Wales under s 36(6) of the Land Rights Act, the primary judge found that the claimed land was occupied in fact at the date of the claim[185] and that such occupation by CSNSW was lawful[186]. The claimed land was therefore not "claimable Crown lands" under the Land Rights Act. In reaching the conclusion that the claimed land was "occupied", the primary judge relied on the matters earlier identified[187].

155 Pursuant to s 57(1) of the *Land and Environment Court Act* 1979 (NSW), NSWALC appealed to the Court of Appeal of the Supreme Court of New South Wales on questions of law. In relation to whether the claimed land was occupied, NSWALC contended that the asserted occupation for the purpose of holding land pending a decision on its future use was not lawful occupation within the meaning of the Land Rights Act, and that the activities said to constitute occupation had to be assessed by reference to the gaol purposes for which the claimed land was dedicated.

156 The Court of Appeal (Leeming JA, Beazley P and Macfarlan JA agreeing) dismissed the appeal[188]. Leeming JA concluded that it was open to the primary judge to hold that the claimed land was occupied based on the findings of fact that there was a "24 hours a day, 7 days a week presence of security on the site, retained by the State, who kept the buildings locked, coupled with regular visits on Saturdays and Sundays by offenders under the supervision of a CSNSW officer"[189].

157 In relation to whether such occupation was lawful, Leeming JA rejected NSWALC's submission that s 2 of the *New South Wales Constitution Act* 1855 (Imp) (18 & 19 Vict c 54) had the effect that statutory authorisation was required for control of Crown land[190] and held that, in any case, there was an implied statutory authority under the *Crown Lands Act* 1989 (NSW) ("the CLA 1989") to

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185 *Berrima* [2014] NSWLEC 188 at [126].

186 *Berrima* [2014] NSWLEC 188 at [126], [168]-[169].

187 See [151] above.

188 *New South Wales Aboriginal Land Council v Minister Administering the Crown Lands Act* (2015) 303 FLR 87 ("*Berrima Appeal*").

189 *Berrima Appeal* (2015) 303 FLR 87 at 109 [100].

190 *Berrima Appeal* (2015) 303 FLR 87 at 110 [108], 114-115 [128]-[137].

maintain and secure the claimed land for the time reasonably needed to make a decision about its future use[191]. Leeming JA also rejected NSWALC's submission that the primary judge materially erred in finding that CSNSW, a part of what was known as the Department of Justice and Attorney General or the Department of Attorney General and Justice[192], lawfully occupied the land[193]. His Honour held that the identity of the occupant was not material to the question of whether the claimed land was lawfully occupied[194] and that, in any case, the acts constituting occupation of the claimed land could be attributed simply (and generally) to the Crown in right of New South Wales and not CSNSW[195].

Land Rights Act[196]

158 The Preamble to the Land Rights Act records that land in New South Wales was traditionally owned and occupied by Aborigines, that land is of spiritual, social, cultural and economic importance to them, and that it is fitting to acknowledge the importance which land has for Aborigines and their need for land; and accepts that, as a result of past Government decisions, the amount of land set aside for Aborigines has been progressively reduced without compensation.

159 Against that background, the Land Rights Act was enacted with the express purposes of, amongst other things, providing land rights for Aboriginal persons in New South Wales, providing for representative Aboriginal Land Councils in New South Wales and vesting land in those Councils[197].

160 Representative Aboriginal Land Councils, known as "Local Aboriginal Land Councils" ("LALCs"), are established under Pt 5 of the Land Rights Act.

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191 *Berrima Appeal* (2015) 303 FLR 87 at 116 [138]-[139].

192 s 3(1) of the *Crimes (Administration of Sentences) Act* 1999 (NSW); Pt 1 of Sched 1 to the *Public Sector Employment and Management Act* 2002 (NSW).

193 *Berrima Appeal* (2015) 303 FLR 87 at 117 [147].

194 *Berrima Appeal* (2015) 303 FLR 87 at 116 [141].

195 *Berrima Appeal* (2015) 303 FLR 87 at 117 [146].

196 The Land Rights Act being considered is the historical version for 16 November 2011 to 5 July 2012, being the Act in force at the time of the claim at issue in this appeal.

197 s 3(a)-(c) of the Land Rights Act.

There are currently nine regions consisting of more than 100 LALCs[198]. The stated objects of each LALC are to "improve, protect and foster the best interests of all Aboriginal persons within the Council's area and other persons who are members of the Council"[199]. Their functions are prescribed by Div 1A of Pt 5 and include land acquisition and land use and management, as well as protection, and promotion of awareness, of the culture and heritage of Aboriginal persons in the LALC's area[200].

161 Division 2 of Pt 5 governs the membership of LALCs. Those qualified to be members of an LALC in an area are Aboriginal persons who satisfy one of three different bases for inclusion[201]:

> "(a) the person is an adult Aboriginal person who *resides* within the area of the [LALC] concerned and is accepted as being qualified on that basis to be a member by a meeting of the Council, or
>
> (b) the person is an adult Aboriginal person who has a *sufficient association with the area of the [LALC] concerned* (as determined by the voting members of the Council at a meeting of the Council) and is accepted as being qualified on that basis to be a member by a meeting of the Council, or
>
> (c) the person is an *Aboriginal owner in relation to land* within the area of the [LALC] concerned and has made a written application for membership in accordance with subsection (3)." (emphasis added)

"Aboriginal owners of land" means the "Aboriginal persons whose names are entered on the Register of Aboriginal Owners because of the persons' cultural association with particular land"[202]. The membership roll must indicate whether a member is on the roll "because of residence or association, or as an Aboriginal owner, and must indicate the basis for that inclusion"[203]. An Aboriginal person

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198 See Pt 6 of, and Sched 5 to, the Land Rights Act.

199 s 51 of the Land Rights Act.

200 s 52(2)-(4) of the Land Rights Act.

201 s 54(2A) of the Land Rights Act.

202 s 4(1) of the Land Rights Act.

203 s 54(2B) of the Land Rights Act.

may be a member of more than one LALC but is entitled to voting rights in relation to one LALC only at any one time[204].

162 Consistent with the Preamble and those provisions, s 36 of the Land Rights Act, headed "Claims to Crown lands", relevantly provides:

> "(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 [1913 Act] 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 [1913 Act] or the *Western Lands Act 1901* under which lands are able to be sold or leased.
>
> (2) [NSWALC] may make a claim for land on its own behalf or on behalf of one or more [LALCs].

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204 s 55(1) and (2) of the Land Rights Act.

…

(5) 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 [NSWALC], to [an LALC] (if any) nominated by [NSWALC]) 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.

…

(8) A certificate being:

(a) a certificate issued by a Crown Lands Minister stating that any land the subject of a claim under this section and specified in the certificate is needed or is likely to be needed as residential land, or

(b) a certificate issued by a Crown Lands Minister, after consultation with the Minister administering this Act, stating that any land the subject of a claim under this section and specified in the certificate is needed or likely to be needed for an essential public purpose,

> shall be accepted as final and conclusive evidence of the matters set out in the certificate and shall not be called into question in any proceedings nor liable to appeal or review on any grounds whatever.
>
> …
>
> (10) A transfer of lands pursuant to this section operates to revoke any dedication or reservation under the [1913 Act] to which the lands were subject immediately before the transfer."

163 Section 36(1) defines which Crown lands are "claimable". Sub-section (1)(a) defines the outer limit of the available pool of Crown lands – Crown lands able to be lawfully sold or leased, or that are reserved or dedicated for any purpose, under the 1913 Act or the *Western Lands Act* 1901 (NSW). Importantly, the fact of reservation or dedication of land is not itself *disentitling*; it is a fact that *allows* Crown lands to be claimable.

164 Critically, the question of whether lands are claimable is considered when a claim is made. That is clear from "claimable Crown lands" being assessed "when a claim is made for the lands" under Div 2 of Pt 2[205]. The Land Rights Act recognises that what lands are claimable can and will change. Here, the lands were dedicated within the meaning of s 36(1)(a) of the Land Rights Act and, prima facie, claimable.

165 What facts and factors are relevant to assessing whether those lands were not claimable? It was common ground that the lands were not lands which, in the opinion of the Crown Lands Minister, were needed or are likely to be needed as residential lands (sub-s (1)(b1)); were not lands needed, nor likely to be needed, for an essential public purpose (sub-s (1)(c)); and did not comprise lands that were the subject of an application for a determination of native title that had been registered in accordance with the *Native Title Act* 1993 (Cth) or the subject of an approved determination of native title within the meaning of that Act (sub-ss (1)(d) and (1)(e))[206]. That leaves sub-s (1)(b) – the lands would be claimable if they were "not lawfully used or occupied"[207].

166 It was common ground that the claimed land was not being lawfully used. That is unsurprising – the necessary proclamations had been revoked; the gaol

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205 s 36(1) of the Land Rights Act.

206 *Berrima Appeal* (2015) 303 FLR 87 at 92 [14].

207 *Berrima Appeal* (2015) 303 FLR 87 at 92 [14].

facilities had been decommissioned and could no longer lawfully be used as a gaol. But was the claimed land, dedicated for "Gaol Site (extension)", "Gaol Purposes" or "Gaol site (addition)", "not lawfully used or occupied" at the time the claim was made? Was it otherwise being "occupied" within the meaning of the phrase "not lawfully used or occupied"? It was not in dispute that the respondent, the Minister, bore the onus of establishing that, at the date of the claim, the claimed land was not "claimable Crown lands" because the claimed land was otherwise being "occupied" within the meaning of the phrase "not lawfully used or occupied".

167 Before turning to that issue, however, it is necessary to consider the balance of s 36. Section 36(2) provides that NSWALC may make a claim for land on its own behalf or on behalf of one or more LALCs. An LALC may make a claim for land within its area or, with the approval of the Registrar appointed under the Land Rights Act, outside its area[208]. The definition of "Aboriginal person" in the Land Rights Act is broad[209]. Consistent with the scope and purpose of the Land Rights Act, the definition of "claimable Crown lands" and the ability of an LALC to claim such land is also broad.

168 Any transfer of lands to an Aboriginal Land Council under s 36 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"[210]. Such a transfer of lands "operates to revoke any dedication or reservation under the [1913 Act] to which the lands were subject immediately before the transfer"[211].

Dedication of land

169 As seen earlier, the second half of s 36(1)(a) provides that, subject to the remaining paragraphs in s 36(1), "claimable Crown lands" means lands that are "reserved or dedicated for any purpose, under the [1913 Act]". It was common ground that the claimed land answered that description. As Leeming JA explained, even though the 1891 and 1894 dedications were made under the 1884 Act, s 3 of the 1913 Act deemed them to have been made under the 1913 Act[212]. The 1958 dedication was made under the 1913 Act.

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208 s 36(3) of the Land Rights Act.

209 s 4(1) of the Land Rights Act.

210 s 36(9) of the Land Rights Act, subject to s 36(9A), which is presently not relevant.

211 s 36(10) of the Land Rights Act.

212 *Berrima Appeal* (2015) 303 FLR 87 at 98-99 [50].

170 The CLA 1989 repealed the 1913 Act. Clause 1(1) of Sched 8 to the CLA 1989 deems dedications that were "in force or taken to be in force under a repealed Act immediately before its repeal [to have] effect as if [they] had been made under" the CLA 1989. Clause 1(2) provides that the dedication is for the same purpose and on the same terms as the original dedication and dates from the date of the original dedication. In this appeal, each of the dedications continued in force as at the date of the claim and they are taken to have been made under the CLA 1989[213]. Clause 21 of Sched 8 to the CLA 1989 provides that a "reference in any other Act ... to the [1913 Act] shall be read as a reference to the [CLA 1989]". Accordingly, the claimed land was within the scope of s 36(1)(a).

171 It is the fact of dedication that brings the claimed land within the scope of s 36[214]. The legal effect of a dedication of the kind to which a statutory provision like s 36 of the Land Rights Act refers was explained by Isaacs J in *New South Wales v The Commonwealth* when considering s 3 of the *Crown Lands Alienation Act* 1861 (NSW) (25 Vict No 1), an equivalent provision to that now found in s 80 of the CLA 1989. His Honour stated that a dedication "impresse[s] upon dedicated lands a statutory status limiting their use and benefit, and consequently their possession, in conformity to the purpose to which they were dedicated"[215].

172 The legal effect of a dedication is reinforced by Pt 5 of the CLA 1989. It provides that the Minister has power to dedicate Crown land for a public purpose and that the dedication takes effect on publication of the notification in the Gazette[216]. Before land is dedicated, the Minister must be satisfied that the capabilities of and suitable uses for the land have been assessed under Pt 3 of the CLA 1989, although no assessment is required if it is in the public interest to dedicate the land without such an assessment and the Minister has due regard to the principles of Crown land management[217].

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213 See also s 90 of the CLA 1989.

214 See *Daruk Local Aboriginal Land Council v Minister Administering the Crown Lands Act* (1993) 30 NSWLR 140 at 160.

215 (1926) 38 CLR 74 at 91; see also at 84; [1926] HCA 23.

216 s 80 of the CLA 1989. Land dedicated for a purpose is no longer Crown land under the CLA 1989 (see the definition of "Crown land" in s 3(1) of the CLA 1989) but upon revocation of the dedication, the land reverts to Crown land.

217 s 85 of the CLA 1989.

Legislative history of the Land Rights Act

173 In considering the proper construction of the phrase "not lawfully used or occupied" in s 36(1)(b), the legislative history of the Land Rights Act is instructive. It was helpfully summarised in the joint reasons in this Court in *Minister Administering the Crown Lands Act v NSW Aboriginal Land Council* ("*Wagga Wagga*")[218] and by Priestley JA in *Daruk Local Aboriginal Land Council v Minister Administering the Crown Lands Act*[219]. The following aspects of that history should be noted.

174 First, that the Land Rights Act is legislation intended for "beneficial and remedial purposes" is evident from both the text of the Act and the extrinsic materials[220].

175 Second, in 1980, a Select Committee of the Legislative Assembly of New South Wales ("the Keane Committee") published a report making "recommendations regarding land rights for New South Wales Aboriginal citizens"[221] including a recommendation that claims to land be founded on any or all of four bases: needs, compensation, long association and traditional rights[222]. It was the Committee's opinion that the granting of land rights "should be regarded as an act of elementary justice"[223].

176 Third, following the Report of the Keane Committee, a Bill for what was to become the Land Rights Act was introduced into the New South Wales Parliament in 1983[224]. A Green Paper published before the Bill was introduced

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218 (2008) 237 CLR 285 at 300-301 [43]-[48]; see also at 291 [12]; [2008] HCA 48.

219 (1993) 30 NSWLR 140 at 159-160.

220 *Wagga Wagga* (2008) 237 CLR 285 at 300 [44]; see also at 291 [11]-[12], 292-293 [15]-[21], 295-296 [27]-[29].

221 New South Wales, Legislative Assembly, *First Report from the Select Committee of the Legislative Assembly upon Aborigines – Part I*, (1980) at 19; see also at 21.

222 New South Wales, Legislative Assembly, *First Report from the Select Committee of the Legislative Assembly upon Aborigines – Part I*, (1980) at 8, 68 [4.24]; see also at 62 [4.4]; *Wagga Wagga* (2008) 237 CLR 285 at 300 [45].

223 New South Wales, Legislative Assembly, *First Report from the Select Committee of the Legislative Assembly upon Aborigines – Part I*, (1980) at 61 [3.34].

224 *Wagga Wagga* (2008) 237 CLR 285 at 300 [45].

stated that "[w]hilst claimable Crown Lands are very limited in comparison to the overall land stock of New South Wales, they will provide a compensatory resource for Aboriginal community groups"[225].

177 Fourth, in the Second Reading Speech for the Bill that became the Land Rights Act, the Minister for Aboriginal Affairs said that the Government had "made a 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"[226]. He said that it was the first such Bill in New South Wales and "on many counts goes far beyond land rights legislation existing in the Northern Territory and South Australia"[227]. The Minister also said that the Bill would provide "a substantial amount of resources for the 40,000 Aborigines in New South Wales to secure land" by purchase on the open market and "claims upon unused Crown land"[228].

178 Fifth, after referring to the Preamble to the Land Rights Act, the joint reasons in *Wagga Wagga* readily accepted that the claims process in the Land Rights Act, which allows for Aboriginal Land Councils to claim limited categories of Crown lands, gave effect to the beneficial and remedial purposes of the Land Rights Act[229].

Comparable legislation

179 In *Daruk*, Priestley JA compared the Land Rights Act and the *Aboriginal Land Rights (Northern Territory) Act* 1976 (Cth) ("the Northern Territory Act") and identified two differences between them of "particular relevance to understanding s 36(1)" of the Land Rights Act[230]. The first was the class of

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225 New South Wales, Minister for Aboriginal Affairs, *Green Paper on Aboriginal Land Rights in New South Wales*, (1982) at 11.

226 New South Wales, Legislative Assembly, *Parliamentary Debates* (Hansard), 24 March 1983 at 5088.

227 New South Wales, Legislative Assembly, *Parliamentary Debates* (Hansard), 24 March 1983 at 5088.

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

229 *Wagga Wagga* (2008) 237 CLR 285 at 301 [47].

230 *Daruk* (1993) 30 NSWLR 140 at 160.

potential claimants. Under the Northern Territory Act the class of claimants to land was "Aboriginals claiming to have a traditional land claim to an area of land"[231]. Under s 36(3) of the Land Rights Act, the class of claimants was then, and remains, much broader.

180 The second relevant difference was the land that was claimable land. Under the Northern Territory Act, the land that could be claimed was restricted to "unalienated Crown land or alienated Crown land in which all estates and interests not held by the Crown are held by, or on behalf of, Aboriginals"[232], and "Crown Land" was defined as *not* including "land set apart for, or dedicated to, a public purpose under an Act"[233]. Under the Land Rights Act, claimable Crown land was, and remains, broader, and includes specifically that which is excluded from the Northern Territory Act – land dedicated for a public purpose. As Priestley JA stated[234]:

> "[T]he fact that under the [Northern Territory Act] the setting apart of land for a public purpose *disqualifies* it from being claimable, whereas under the [Land Rights Act] reservation for any purpose under the [1913 Act] 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." (emphasis in original)

181 Priestley JA then turned to the notion of "occupation". His Honour noted that where, in that case, Crown land had been temporarily reserved for public recreation pursuant to ss 28 and 29 of the 1913 Act but the appointment of the local shire as its trustee was some months later, "the Crown undoubtedly remained the occupant of the land [during that interim period], at least in one well recognised sense of the word"[235]. But, as his Honour observed, the "juxtaposition of par (a) and par (b) of s 36(1) of the [Land Rights Act] makes it clear that occupation in [that] broad sense is not what par (b) refers to or

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231 s 50(1)(a) of the Northern Territory Act.

232 s 50(1)(a) of the Northern Territory Act.

233 s 3(1) of the Northern Territory Act.

234 *Daruk* (1993) 30 NSWLR 140 at 160.

235 *Daruk* (1993) 30 NSWLR 140 at 160. See also *Wagga Wagga* (2008) 237 CLR 285 at 297 [32].

means. The word 'occupied' in par (b) must have a more limited meaning"[236]. That issue – the meaning of occupied – is addressed next.

Claimed land not "lawfully used or occupied"

182 Here, the Crown in right of New South Wales has the right to exclusive possession of the claimed land and has actual possession of it. An agency of the Crown – CSNSW – exercises control over the claimed land and undertakes maintenance responsibilities. Clearly enough, the Crown occupies the claimed land in one well-recognised sense of the word. But is that any more than, as Priestley JA described in *Daruk*, reserved Crown land being, by that fact alone, lawfully occupied in a broad sense of the word "occupied"? Does controlling and maintaining the claimed land in those circumstances rise higher than what might be described as "notional" occupation or "legal possession"?

183 In *Council of the City of Newcastle v Royal Newcastle Hospital*, Kitto J reviewed earlier English authorities on the word "occupy" as it was understood in the "specialised" rating context[237]. His Honour discerned from the authorities three "elements" that together would amount to occupation of land: "legal possession, conduct amounting to actual possession, and some degree of permanence"[238]. That formulation was endorsed in the joint reasons in *Wagga Wagga*, subject, however, to the qualification that while those elements "may sufficiently identify the most common cases where it can be said that there is use or occupation of the land" they are not exhaustive of the circumstances in which land might be "used" or "occupied"[239]. As the joint reasons also explained, it is important for the purposes of s 36(1)(b) that attention be "given to identifying the acts, facts, matters and circumstances which are said to deprive the land of the characteristic of being 'not lawfully used or occupied'". It is "necessary to measure those acts, facts, matters and circumstances against an understanding of what would constitute use or occupation of the land"[240] within the meaning of the provision.

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236 *Daruk* (1993) 30 NSWLR 140 at 161.

237 (1957) 96 CLR 493 at 508; [1957] HCA 15.

238 *City of Newcastle* (1957) 96 CLR 493 at 507.

239 *Wagga Wagga* (2008) 237 CLR 285 at 306 [69].

240 *Wagga Wagga* (2008) 237 CLR 285 at 305 [69].

184 It has been observed that "occupied" is a "protean" word[241], capable of different meanings depending on the context in which it is used[242]. That is not a novel proposition. In 1888, Pollock and Wright recognised that "in order to ascertain whether acts of alleged occupation ... are effective as regards a given thing" it may be relevant to consider "(a) of what kinds of physical control and use the thing in question is practically capable[;] (b) with what intention the acts in question were done[;] (c) whether the knowledge or intention of any other person was material to their effect, and if so, what that person did know and intend"[243]. For example, in relation to proposition (a), "[c]onduct which would be almost evidence of abandonment with regard to one kind of land may with regard to another be as good evidence of use and occupation as can be expected"[244]. Thus, within s 36(1)(b), the meaning of "occupied" is informed, in accordance with ordinary principles of statutory construction, by the text, context and purpose of the legislation.

185 As seen earlier, the express legislative purposes of the Land Rights Act include providing land rights for Aboriginal persons in New South Wales[245], in acknowledgement of the importance of land for Aboriginal people and that land traditionally owned and occupied by Aboriginal people had "been progressively reduced without compensation"[246]. The purposes of the Act also include that there is to be a significant pool of land that is claimable for the purpose of compensating Aboriginal persons who were dispossessed[247] and that the claims process in the Land Rights Act, which allows for Aboriginal Land Councils to claim that pool of land, is to be the "primary mechanism" for giving effect to the beneficial and remedial purposes of the Land Rights Act[248]. Hence,

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241 cf *Wagga Wagga* (2008) 237 CLR 285 at 306 [69]. See also *Daruk* (1993) 30 NSWLR 140 at 161-162.

242 cf *Independent Commission Against Corruption v Cunneen* (2015) 256 CLR 1 at 28 [57]; [2015] HCA 14.

243 Pollock and Wright, *An Essay on Possession in the Common Law*, (1888) at 14.

244 Pollock and Wright, *An Essay on Possession in the Common Law*, (1888) at 31.

245 s 3(a) of the Land Rights Act.

246 See Preamble to the Land Rights Act.

247 See *Wagga Wagga* (2008) 237 CLR 285 at 297 [32].

248 See *Wagga Wagga* (2008) 237 CLR 285 at 301 [47].

although Crown land is ipso facto in one sense lawfully occupied[249], a more nuanced understanding of "occupation" better accords with the purpose of the Land Rights Act as informed by both its terms and its important legislative history.

186 The question then is whether "lawful" occupation under the Land Rights Act is satisfied by an assertion of rights as fee simple owner or whether, as NSWALC contended, the occupation of the land is required to be judged against the dedication – here, gaol purposes. The answer is the latter.

187 As the Green Paper recognised, prior to the Land Rights Act, claimable Crown lands were already "very limited in comparison to the overall land stock of New South Wales"[250]. The evident object of the Land Rights Act (consistent with the Preamble, the purposes stated in s 3 of the Act and the overall scheme of the Act) was thus to provide for successful land rights claims on terms broader than those adopted in the Northern Territory Act. To construe "occupation" as not requiring consideration of the purpose for which land has been dedicated would not increase opportunities for successful land rights claims. It would make it easier for land to be excluded from the definition of "claimable Crown lands", thereby reducing the opportunities for successful land rights claims.

188 By contrast, a construction of s 36(1) that requires that "occupied" be tied, in some way, to the relevant dedication accords with the statutory object of the Land Rights Act. It is also supported by the fact that, unlike the Northern Territory Act, dedicated Crown land that is, ipso facto, lawfully occupied in at least some senses of the word is claimable. The fact that the Crown land is dedicated does not disqualify the land from being claimable; quite the opposite, as a dedication qualifies the land as claimable. More is required for "occupation". The acts of occupation must be tied to the relevant dedication.

No occupation here

189 Apart from the fact that the State of New South Wales is the registered proprietor of the claimed land, the only acts upon which the Minister relied as establishing occupation for the purposes of s 36(1)(b) are security, the supply of utilities, and maintenance. But the fact that there are buildings on the claimed land that were once a gaol and that those buildings are connected to utilities and are being "maintained" and "secured" for purposes yet to be decided does not

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249 See *Daruk* (1993) 30 NSWLR 140 at 160.

250 New South Wales, Minister for Aboriginal Affairs, *Green Paper on Aboriginal Land Rights in New South Wales*, (1982) at 11.

mean that the land is being occupied in a way that is tied to its dedication for gaol purposes.

190 No doubt, the nine matters relied on by the primary judge to establish that the Crown (however identified) exercised *control* over the claimed land and was maintaining the land are relevant to assessing occupation[251]. But, in the context of land dedicated for gaol purposes, merely maintaining the land to prevent it from falling into disrepair and ensuring it is secure does not amount to "occupation" tied to its dedication for gaol purposes. In truth, "maintenance" of the buildings on the claimed land is a distraction – the buildings have been decommissioned, vacated and mothballed. Nothing is occurring on the land that is linked to its dedicated gaol purposes. It is not a gaol. There is no relevant proclamation, and if it were likely to be needed in future as a gaol, that would not be enough to exclude it from being "claimable Crown lands", unless the Minister was prepared to certify under s 36(1)(c) that such need or likely need was for an "essential public purpose". The Minister did not. That the dedications might be revoked does not change the fact that, at the date of the claim, the land was dedicated for particular purposes and it was not being occupied for those purposes.

191 The Minister contended that if the acts and conduct here were not sufficient to establish occupation for the purposes of s 36(1)(b), then certain undesirable practical consequences would flow: the Crown would have had to determine what to do with the land before or at the same time as the revocation of the proclamations; and there would have been no period of time in which the Crown could decide what to do with the land after it ceased to be used or occupied for the purposes set out in the dedications.

192 Those potential practical consequences are not persuasive. The timing of the revocation was at the executive's discretion and the Minister had appropriate powers under both the Land Rights Act and the CLA 1989 to deal with the future use of the claimed land. The fact that there was no future use identified is the very reason why the claimed land, dedicated for gaol purposes but no longer used or occupied for those purposes, is claimable. Whether land dedicated for a public purpose is occupied depends on the public purpose identified in the dedication.

Pending decision on future use

193 The Minister made a separate but related submission that it is enough to establish "occupation" for the purposes of s 36(1)(b) that the Crown, through its agencies, maintains the claimed land pending a decision as to its future use and

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251 *Daruk* (1993) 30 NSWLR 140 at 163.

the Crown's conduct is not inconsistent with the dedication and not incompatible with the dedication. That submission should be rejected.

194 The primary judge accepted the submission and held that "the purpose of the occupation was to hold the land pending a decision on its future use"[252]. But that was an error. That purpose had no connection with the purpose for which the land was dedicated: gaol purposes. The conclusion reached did not pay sufficient regard to the other paragraphs in the definition of "claimable Crown lands" in s 36(1) of the Land Rights Act.

195 As has been explained, all of the paragraphs of the definition of "claimable Crown lands" in s 36(1) of the Land Rights Act must be satisfied. Two are relevant in assessing this submission – pars (b1) and (c). Those paragraphs exclude land from the definition of "claimable Crown lands" if the Minister thinks the land is needed, or is likely to be needed, as residential lands, or if the land is needed, or likely to be needed, for an essential public purpose. That is the extent of what may be done to reserve otherwise claimable Crown lands for a future possible use.

196 If land is needed for either residential lands or an essential public purpose, those two provisions provide a sufficient and broad basis on which a claim might be rejected. And if land is not needed for either of those purposes, and instead the Minister intends to sell or lease the land, has a different future use in mind, or has no future use identified, that is precisely when it is intended that Crown lands will be claimable under the Land Rights Act. Otherwise, to use this case as an example, a claim might be rejected if there were merely a suggestion, at the time of the claim, that a new proclamation would be made and the land would again become an operative correctional centre.

Other issues

197 Given the views formed, the further issue about whether statutory authorisation is required for the Crown to occupy Crown land does not arise. Accordingly, it is unnecessary to consider the submissions of the Attorneys-General for Western Australia, Tasmania and Victoria, each of whom intervened in these proceedings and made submissions limited to that issue.

Orders

198 The appeal should be allowed with costs and the orders of the Court of Appeal of the Supreme Court of New South Wales and the Land and Environment Court of New South Wales should be set aside. Further, there

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252 *Berrima* [2014] NSWLEC 188 at [93].

should be an order that the claimed land be transferred in fee simple to the Illawarra Local Aboriginal Land Council under s 36(7) of the Land Rights Act.