IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY No. S168 of 2016

BETWEEN

NEW SOUTH WALES ABORIGINAL LAND COUNCIL
Appellant

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MINISTER ADMINISTERING THE CROWN LANDS ACT
Respondent

SUBMISSIONS OF THE ATTORNEY-GENERAL OF TASMANIA, INTERVENING

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PART I: CERTIFICATION

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

PART II: BASIS OF INTERVENTION

2. The Attorney-General of Tasmania intervenes pursuant to s 78A of the *Judiciary Act 1903 (Cth)* in support of the Respondent on the basis that
30 section 106 of the Constitution is engaged.

PART III: WHY LEAVE TO INTERVENE SHOULD BE GRANTED

3. Not Applicable

PART IV: APPLICABLE CONSTITUTIONAL AND LEGISLATIVE PROVISIONS

4. The applicable Constitutional and legislative provisions are identified
40 in Part VII of the Applicant's Submissions and Part V of the Respondent's Submissions. Tasmania also refers to:

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Australian Waste Lands Act 1855 (18 & 19 Vict c 56), s 5.

PART V: SUBMISSIONS

Tasmania's Position

5. Tasmania wishes to be heard only in relation to the issues set out at paragraph [3] of the Appellant's Submissions and at paragraphs [2(a)], [2(b)] and [2(c)] of the Respondent's Submissions.

6. It is the submission of Tasmania that the Crown in right of a State is legally entitled to occupy lands belonging to the Crown (without any need for statutory authorisation). Further, it is submitted that its authority to do so has not been abrogated, for present purposes by s 2 of the *New South Wales Constitution Act 1855* (18 & 19 Vict c 54) but also, relevantly for Tasmania, by s 5 of the *Australian Waste Lands Act 1855* (18 & 19 Vict c 56). Nor did those Acts operate so as to require statutory authorisation for the Crown to occupy Crown lands.

7. The true effect of the Imperial Acts of 1855 was to confer legislative power on the colonial legislatures (such power having been until then withheld by the Imperial Parliament). It was not to deprive the Crown in right of the colonies of the executive ability to occupy its lands. Nor do the terms of those Acts suggest an understanding that the Crown was not authorised to occupy its lands absent an exercise of legislative power allowing it to do so.

8. Whether the Crown's ability to occupy its lands is modified or regulated by statute made in the exercise of the legislative powers originally conferred in 1855 is another matter entirely.

The Crown may occupy its own waste land

9. In our submission it is beyond doubt that the Crown has the capacity to occupy its lands either as an incident of its prerogative powers or, alternatively, within the scope of its broader executive powers (subject to any statutory curtailment of such powers)[1].

10. The prerogative is often viewed as an ambiguous concept[2]. As such, it may be accepted that whether the Crown's ability to occupy its lands is

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1 *Randwick Corporation v Rutledge* (1959) 102 CLR 54 at 71 per Windeyer J.

2 *Attorney-General v De Keyser's Royal Hotel Ltd* [1920] AC 508, *NSW Rifle Association Inc v Commonwealth* (2012) 293 ALR 158; (2012) 266 FLR 13; [2012] NSWSC 81 at [98],

properly characterised as part of the prerogative is not entirely clear but the better view, in our submission, is that the occupation of Crown land by the Crown is an aspect of prerogative power.

11. For instance, in *Johnson v Kent* (1975) 132 CLR 164, in discussing the legal basis for the erection of a tower on Crown land in the Australian Capital Territory for telecommunication services and to accommodate a restaurant and viewing facilities, Barwick CJ said:

> "what the executive does upon and in respect of such lands will be done by virtue of the prerogative and not by virtue of proprietorship"[3].

In addition, Jacobs J wrote:

> "I am of the opinion that the executive power of the Commonwealth extends to the doing of acts upon its own land within the territory surrendered by a State to the Commonwealth without any statutory authority other than the necessary appropriation of funds if those acts are of the kind which lie within the prerogative of the Crown. The erection of a restaurant and viewing facilities on the lands in question fall within such a category"[4].

12. Furthermore, the Supreme Court of New South Wales had occasion to consider the exercise of powers of the Crown as owner of land in *NSW Rifle Association Inc v Commonwealth* (2012) 293 ALR 158, in the context of a dispute regarding the termination of a contractual licence to occupy Commonwealth land. White J, at [98]) recognised that the entry into the deed of licence could be characterised as an exercise of the prerogative "in some sense" (referring to *Johnson v Kent*)[5].

13. The ability of the Crown to occupy its lands is a property right by its very nature. In *New South Wales v Commonwealth* (1975) 135 CLR 337 at 438, Stephens J stated:

> That originally the waste lands in the colonies were owned by the British Crown is not in doubt. Such ownership may perhaps be regarded as springing from a prerogative right, proprietary in nature.

If the ownership of Crown land springs from a prerogative right, proprietary in nature as suggested by Stephen J, it logically follows that

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Blackshield and Williams, *Australian Constitutional Law and Theory*, 4th ed. 2006 at page 526.

3 at 170, McTiernan and Stephen JJ agreeing at 172.

4 at 174.

5 The court went on to find, in the Rifle Association case that entering a deed of licence was the exercise of a proprietary right. But cf., *Cadia Holdings Pty Ltd v New South Wales* (2010) 242 CLR 195; [2010] HCA 27 at [33].

the ability to occupy such lands forms an incidental aspect of the prerogative.

14. Alternatively, if the ability of the Crown to occupy its land does not arise by virtue of the prerogative, it exists either within the Crown's broader executive capacities or as a common law right deriving from the Crown's ownership of its lands.

15. Whether it derives from the common law or the prerogative, it is clear that the laws brought to Australia included the common law as to the rights and prerogatives of the Sovereign and that in 1901 the law continued to apply to those rights and prerogatives of the Sovereign as head of the States (subject to local repeal) (*R v Kidman* (1915) 20 CLR 425, Griffiths CJ at 435-6). The application of English law to the settled colonies so far as applicable to the conditions of the colony was put beyond doubt by the *Australian Courts Act 1828* (Imp) (9 Geo IV c 83)[6].

16. Any dedication of land for a particular purpose does not prevent the occupation and use of the land for another purpose (unless the dedication involves the creation of a public trust)[7]. The ability of the Crown to occupy land for a particular purpose regardless of an earlier reservation of the land for a different purpose was made abundantly clear in *Williams v Attorney-General for New South Wales* (1913) 16 CLR 404[8].

Statutory abrogation

17. There is a strong presumption that legislation is not intended to limit the Crown's prerogative powers. It is well recognised and accepted that "an intention to withdraw or curtail a prerogative power must be clearly shown"[9].

18. Even if it is successfully argued that the powers of the Crown to occupy land do not strictly fall within the prerogative powers of the Crown, it is nevertheless recognised that a statute will not divest the Crown of its property rights or interests unless there is a manifest intention to do so[10]. In Tasmania's submission, those property rights are at least as broad as the rights of a private land owner over its property and must therefore include the right to occupy that land without any requirement for statutory authorisation.

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6 *R v Kidman* (1915) 20 CLR 425 at 435 per Griffiths CJ; *Cadia* per French CJ at [21]-[23].

7 *Randwick Corporation v Rutledge* at 75-76.

8 affirmed on appeal to the Privy Council: (1915) AC 573; (1915) 19 CLR 343.

9 *Barton v Commonwealth* (1974) 131 CLR 477 at 508 per Jacobs J).

10 *Commonwealth v Western Australia* (1999) 196 CLR 392 at [34] per Gleeson CJ and Gaudron J; Pearce and Geddes *Statutory Interpretation in Australia*, 8th ed. at [5:17]

19. With regard to s 2 of the *New South Wales Constitution Act 1855*, it does not, by express words, or by necessary implication manifest an intention on the part of the Imperial Parliament to abrogate the Crown's prerogative powers in relation to its property rights. Similarly, s 5 of the *Australian Waste Lands Act 1855* indicates an intention to confer legislative power on the Legislature of Van Diemen's Land to regulate the sale and other disposal of Waste Lands of the Crown in that colony by any Act or Acts but does not indicate an intention to impinge upon the executive capacities of the Crown in relation to the occupation of its lands.

20. As was made clear in *South Australia v Victoria* (1911) 12 CLR 667 at 710-711, the grant of legislative power over the waste lands involved a cessation to the executive power of the colony of all rights of possession in public lands for public purposes which had been in the King and if that were not so, "the right of self-government in respect of public lands would have been an empty form"[11].

21. In relation to the role of the executive in managing waste lands at the commencement of responsible government, Brennan J in the *Commonwealth v Tasmania* (1983) 158 CLR 1 at 211 stated that, in Tasmania, when the first Ministry of responsible government took office in 1856, the waste lands of the colony were in its control and the Ministers became the Crown's advisers in regards to the exercise of the prerogative over the waste lands of the colony. The prerogative clearly subsisted at that time despite the fact that section 5 of *Waste Lands (Australia) Acts Repeal Act* (18 &19 Vict c 56) empowered the new bicameral Legislature of Van Diemen's Land by Act "to regulate the Sale and other Disposal of the Waste Lands of the Crown" in the Colony[12]. As Brennan J observed, "what was important was the legislative power to affect the prerogative exercisable over the waste lands of the Colony"[13].

22. Thus, the administration of the waste lands became a function of the colonial government and the prerogative it involved was controlled by the Ministers, but amenable to modification or extinction by Parliament (in Tasmania, the first Act to control the waste lands was passed in 1858[14]). It was also recognised in *The Tasmanian Dam Case* that legislative control of the waste lands was essential to ensure the

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11 *Commonwealth v Tasmania (The Tasmanian Dam Case)* (1983) 158 CLR 1 at 211 per Brennan J.

12 Ibid at 210.

13 Ibid at 211.

14 ibid at 211.

Legislature's control of supply to the executive in the economic circumstances at the time[15]. There were plain policy reasons for this[16].

23. There is no comparable underlying logic, or historical reason, to support an argument that the 1855 Acts restricted the Crown's ability to occupy its waste land. Section 2 of the *New South Wales Constitution Act 1855* ought not to be understood, in our submission, as having a different effect. In that regard, we submit that the Court of Appeal correctly stated at [130] that "section 2 served the same function as s 5 of the *Australian Waste Lands Act 1855*".

24. Indeed, if the appellant's argument is correct, the somewhat illogical result would have been that until such time as the legislature chose to regulate the occupation of the waste lands by statute, the Crown simply had no entitlement to occupy its lands. Plainly, one would have expected such an intention to have been expressed by the Imperial Parliament in very clear terms. Yet, no such terms were included in the Act.

25. This is not a case of a prerogative power being directly regulated by statute, thereby prohibiting the executive from relying on the prerogative power but compelling it to act in accordance with a statutory regime laid down by Parliament. Section 2 of the *New South Wales Constitution Act 1855* did not amount to an attempt to regulate the prerogative nor did it lay down a statutory regime for the occupation of the waste lands. As McHugh, Gummow and Hayne JJ said in *Jarratt v Commissioner of Police for New South Wales* (2005) 224 CLR 44 at [85]:

> Speaking in *Re Residential Tenancies Tribunal (NSW); Ex parte Defence Housing Authority* of the principle laid down in *Attorney-General v De Keyser's Royal Hotel*, McHugh J said:
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> > That principle is that, when a prerogative power of the Executive Government is directly regulated by statute, the Executive can no longer rely on the prerogative power but must act in accordance with the statutory regime laid down by the Parliament.

26. Although it was suggested in *The Tasmanian Dam Case* that Tasmanian legislation had overtaken the prerogative in the control of waste lands of the State [17] (presumably a reference to the *Crown Lands Act 1976 (Tas)* and its predecessors), it is Tasmania's position that Brennan J was confining his attention to the statutory regulation of the sale and

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15 ibid at 213.

16 ibid at 210.

17 *The Tasmanian Dam Case* at 215.

disposal of Crown land rather than to those powers of management which are simply directed towards the exercise of prerogative powers of use and occupation by the Crown[18]. Notably, the *Crown Lands Acts* did not seek to impose a comprehensive regulatory regime in respect of the Crown's occupation of its lands.

27. Nor should the introduction of statutory controls over the sale and disposal of Crown land necessarily extinguish the prerogative power of the State. In *Attorney-General v De Keyser's Royal Hotel* [1920] AC 508 Lord Atkinson wrote:

> It was suggested that when a statute is passed empowering the Crown to do a certain thing which it might theretofore have done by virtue of its prerogative, the prerogative is merged in the statute. I confess I do not think the word "merged" is happily chosen. I should prefer to say that when such a statute, expressing the will and intention of the King and of the three estates of the realm, is passed, it abridges the Royal Prerogative while it is in force to this extent: that the Crown can only do the particular thing under and in accordance with the statutory provisions, and that its prerogative power to do that thing is in abeyance. Whichever mode of expression be used, the result intended to be indicated is, I think, the same – namely, that after the statute has been passed, and while it is in force, the thing it empowers the Crown to do can thenceforth only be done by and under the statute, and subject to all the limitations, restrictions and conditions by it imposed, however unrestricted the Royal Prerogative may theretofore have been.[19]

The Crown does not need statutory authority to occupy its lands

28. It is Tasmania's submission that the legal source of authority for the Crown to occupy its lands is found in the prerogative or, if a narrow approach is taken with regard to the ambit of the prerogative, then alternatively it is submitted that the source of authority derives from the common law powers of an owner of land.

29. Absent an abrogation of such powers, there is no justification for the assertion that statutory authorisation is required for the lawful occupation of Crown land. There is little doubt that the legislature has the power to authorise the occupation of Crown land but such authorisation is not required where the power of occupation is independently reposed in the Crown's non-statutory executive capacities.

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18 see also *Mabo v Queensland (No 2)* (1992) 175 CLR 1 at 71: "in the case of the power of alienation" etc.

19 at 539-540.

30. It was argued in *Johnson v Kent* that any relevant source of power to construct a tower at the top of Black Mountain in Canberra must be statutory. However, Barwick CJ found that "the executive, unless its power is relevantly reduced by statute, may in my opinion do in the Territory upon or with respect to land in the Territory anything which remains within the prerogative of the Crown"[20].

31. It is submitted that the Court of Appeal was correct in its finding that section 2 did not impose a restriction on executive power in relation to the wastelands of the Crown so as to make activity unlawful unless there were statutory authority[21].

32. The situation might be contrasted with the need for statutory authorisation in relation to the prerogative to expel aliens, which arises by virtue of the common law and the *Habeas Corpus Act 1679*[22].

33. Similarly, the present issue can be distinguished from the need for statutory authorisation in relation to the disposal of Crown lands which arose in response to a policy that resulted in a prohibition on the disposal of Crown land otherwise than in accordance with the prescriptions laid down in the *Waste Lands Act 1842* (Imp) (5 & 6 Vict c36, s2)[23]. The policy which resulted in the 1842 Act did not extend to the Crown's occupation of waste lands but operated as a restriction on the power of the Home Government to dispose of land and apply the proceeds[24].

34. The retention of a prerogative or executive capacity in the Crown to occupy its lands following the *New South Wales Constitution Act 1855* may be highlighted by drawing a parallel with the retention of the proprietary prerogative rights in relation to royal metals. As noted by French CJ in *Cadia Holdings Pty Ltd v New South Wales*[25], the Privy Council in *Woolley v Attorney-General of Victoria*[26] characterised s 2 as a formal transfer by the Crown of "its rights in the gold and silver in the colony to be dealt with by the Colonial Legislature". As such, there was "clear legislative authority to grant away the Crown's prerogative rights over mines of gold and silver in New South Wales"[27] from 1855.

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20 at 169.
21 at [137].
22 *Re Bolton; Ex Parte Douglas Beane* 162 CLR 514 at 521-2 per Brennan J.
23 *Cadia Holdings Pty Ltd v State of New South Wales* [2010] HCA 27 at [24] per French CJ; *Randwick Corporation v Rutledge* (1959) 102 CLR 54 at 72-73; *Williams v Attorney-General (NSW)* (1913) 16 CLR 404 at 452 per Isaacs J.
24 *Williams v Attorney-General (NSW)* at 450-451; *Commonwealth v Tasmania* (1983)158 CLR 1 at 209 per Brennan J.
25 ibid at [25].
26 (1877) 2 App Cas 2 163 at 167
27 *Cadia Holdings* at [25].

Yet, the Crown's rights in relation to royal metals were not thereby abolished but remained dependent upon common law prerogative rights[28]. Just as the vesting of royal mines in the legislature did not have the consequence that the Crown's rights depended upon a statutory authorisation, nor did the vesting of management and control of the waste lands in the legislature require statutory authorisation for the Crown to thereafter occupy those lands.

Conclusion

35. In summary it is submitted that the Crown in the right of a State is entitled to occupy its lands in the absence of sufficient statutory abrogation, by virtue of its prerogative, or executive powers. The Imperial Acts of 1855 did not alter that entitlement.

PART VI: ESTIMATE OF TIME FOR ORAL ARGUMENT

36. Tasmania estimates that it will require not more than 10 minutes for presentation of oral argument.

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28 *Wade v New South Wales Rutile Mining Co Pty Ltd* (1969) 121 CLR 177; [1969] HCA 28; *Cadia Holdings* at [26] per French CJ.