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

BETWEEN:

NEW SOUTH WALES ABORIGINAL LAND COUNCIL
Appellant

and

10 **MINISTER ADMINISTERING THE CROWN LANDS ACT**
Respondent

WRITTEN SUBMISSIONS ON BEHALF OF THE ATTORNEY GENERAL FOR WESTERN AUSTRALIA (INTERVENING)

20 ## PART I: SUITABILITY FOR PUBLICATION

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

PART II: BASIS OF INTERVENTION

2. The Attorney General for Western Australia intervenes pursuant to s 78A of the *Judiciary Act 1903* (Cth) in support of the Respondent.

PART III: WHY LEAVE TO INTERVENE SHOULD BE GRANTED

3. Not applicable.

PART IV: RELEVANT CONSTITUTIONAL PROVISIONS AND LEGISLATION

4. The Attorney General for Western Australia adopts the Respondent's statement of applicable constitutional and legislative provisions.

Date of Document: 26 August 2016

Filed on behalf of the Attorney General for Western Australia by:

State Solicitor for Western Australia
David Malcolm Justice Centre
28 Barrack Street
PERTH WA 6000
Solicitor for the Attorney General for Western Australia

Tel: (08) 9264 1888
Fax: (08) 9264 1440
Ref: Amy Preston-Samson (3120-16)
Email: a.prestonsamson@sso.wa.gov.au

PART V: SUBMISSIONS

5. The Attorney General for Western Australia intervenes to make submissions in relation to the following issues:

   (a) Does the Crown in right of New South Wales have the capacity to occupy Crown land in the absence of contrary statutory provision?[1] and

   (b) Did the New South Wales *Constitution Act* 1855 (Imp) ("the *1855 Act*") abrogate any capacity of the Crown to occupy Crown land, such that the Crown's occupation of Crown land must be authorised by statute?[2]

6. The Attorney General for Western Australia does not make any submissions as to whether the relevant acts, facts, matters and circumstances constituted, in the present case, lawful occupation of the claimed land within the meaning of s 36(1)(b) of the *Aboriginal Land Rights Act* 1983 (NSW).[3]

Preliminary: the Appellant's submission and the identification of the relevant issue

7. The first issue in the present case concerns the capacity of the Crown in right of New South Wales (that is, the Executive government) to use and occupy unalienated Crown land in New South Wales, and whether that use and occupation requires statutory authority or, alternatively, whether such capacity exists as part of the prerogative or common law powers of the Crown.

8. This issue must be clearly distinguished from the issue as to the source of the powers of the Crown in relation to the *alienation* of Crown lands or the use and occupation of Crown lands by *persons other than the Crown*.

---

1 Issue (a) identified by the Respondent in its submissions at paragraph 2.

2 Issues (b) and (c) identified by the Respondent in its submissions at paragraph 2 and the issue identified by the Appellant in its submissions at paragraph 3.

3 Issue (d) identified by the Respondent in its submissions at paragraph 2 and the issue identified by the Appellant in its submissions at paragraph 2.

9. The Appellant, in submitting that even prior to the *1855 Act*, the Crown did not have any non-statutory executive power to occupy (or use) Crown land,[4] it is submitted, tends to conflate the two issues.

10. The Appellant, for example, relies upon the proposition that any non-statutory executive power or prerogative to alienate interests in Crown land was abrogated by the *Australian Colonies Waste Lands Act* 1842 (Imp) (and the *Crown Lands Act* 1702 (Imp)).[5] Similarly, the Appellant relies upon the statutory provisions controlling the grant of licences found, *inter alia*, in s 70 of the *Crown Lands Consolidation Act* 1913 (NSW) and s 6 of the *Crown Lands Act* 1989 (NSW).[6]

10 11. As a consequence, the Appellant's submissions refer to the executive power to "alienate interests in Crown land", "occupy Crown land" and "authorise the occupation of Crown land by public bodies" as though these executive acts were interchangeable.[7] They are not and, it is submitted, they have not been so regarded in the authorities.

12. A similar misapprehension was recognised in the advice of the Privy Council in *Attorney-General for NSW v Williams*:[8]

> "It was, indeed, contended that this property could not be disposed of without some legislative act, and that none such is shown or suggested to have taken place. Their Lordships think that this point, which does not
20 appear to have been raised in the Courts below, has been taken under a misapprehension. The argument refers to permanent dispositions, alienations or the like. Here on the evidence, nothing irrevocable has been done. The railings and sentry boxes can be restored, and the public can be excluded from the grounds. The professors can be dispersed from the conservatoire, and the horses brought back to their stables. There may be some disappointment and even discontent, and some expense more or less

---

4 Appellant's Submissions at paragraph 38.

5 Appellant's Submissions at paragraph 38.

6 Appellant's Submissions at paragraph 38.

7 Appellant's Submissions at paragraphs 37-42.

8 *Attorney General for New South Wales v Williams* (1915) 19 CLR 343, per Lord Sumner at 348-349.

considerable, but if, when the lease of the Governor's present residence expires, it should be decided he should once more occupy the house of his predecessors, it does not appear that there has been any disposition or irrevocable change to prevent it."

13. The important difference between the *alienation* of Crown land, on one hand, and its use and occupation by the Crown, on the other, was similarly recognised by Brennan J in *Mabo v Queensland [No 2]*,[9] where his Honour distinguished between the power of appropriation exercised by the Executive government and the power of alienation, which his Honour qualified as being subject to statutes in force from time to time.

14. The occupation of Crown land, *by the Crown*, does not involve the Crown alienating or creating any interests in the land (in a broad or narrow sense) or "authorising" any occupation or any other thing. It involves the Crown using the land in particular ways and performing certain physical acts (through its employees, agents or contractors) on, or in respect of, the land.[10]

15. It is that power which is in issue in the present case.

Issue (a): The Crown's prerogatives in respect of Crown land (in the absence of abrogation by statute)

16. The prerogatives of the Crown are those rights, powers, privileges and immunities which it possesses exclusively (i.e. not in common with private individuals) under the common law.[11]

---

9 *Mabo v Queensland [No 2]* (1992) 175 CLR 1, per Brennan J at 70-71 (Mason CJ & McHugh J agreeing at 15).

10 In relation to paragraph 50 of the Appellant's Submissions, *West Lakes v South Australia* (1980) 25 SASR 389, per Zelling J at 407 is not authority for the proposition that Ministers are not agents of the *Executive government of a State*. Ministers are representatives of the Executive government of a State and are the "directing mind and will" of the State or the Government: *Western Australia v Watson* [1990] WAR 248, per the Court at 266, 281, 273-274. See also *Town Investments v Department of Environment* [1978] AC 359.

11 H. V. Evatt, *The Royal Prerogative*, The Law Book Company Limited, Sydney, 1987 at 7-13; *Joseph v Colonial Treasurer (NSW)* (1918) 25 CLR 32 per Isaacs, Powers & Rich JJ at 48; *Davis v The Commonwealth* (1988) 166 CLR 79, per Brennan J at 108; *Re Residential Tenancies Tribunal (NSW) and Henderson; Ex Parte the Defence Housing Authority* (1997) 190 CLR 410 per Dawson, Toohey & Gaudron JJ at 438; *Cadia Holdings v New South Wales* (2010) 242 CLR 195 per Gummow, Hayne, Heydon & Crennan JJ at [75].

17. As submitted below, in the Australian Colonies, and later the Commonwealth and the States, those prerogatives have always included the doing of acts upon the unalienated land within their respective control. Initially, those prerogatives also extended to the disposal of, and alienation of interests in, such land, although that particular aspect of the prerogative came to be controlled by statute.[12]

18. In relation to the use and occupation of Crown land by the Crown, those common law prerogative powers have continued, *albeit* that, over time, with the conferral of rights of self-government they devolved to the Crown in right of the Colonies and, later, to the Commonwealth and the States.[13]

10 19. Following *Mabo v Queensland [No 2]*,[14] the common law of Australia rejects the notion that upon the acquisition of sovereignty over New South Wales, the Crown acquired absolute beneficial ownership of the land therein and that the land became a royal *demesne*.[15] To the extent that they hold otherwise, *Attorney-General v Brown* (1847) 2 SCR (NSW) App 30, *Randwick Corporation v Rutledge* (1959) 102 CLR 54 and *New South Wales v The Commonwealth* (1975) 135 CLR 337 are no longer good law.

20. Rather, upon the acquisition of sovereignty over New South Wales, the Crown acquired *radical* title to all of the land within the colony.[16] That title was burdened by any antecedent native title rights and interests,[17] *albeit* that if in
20 relation to a particular area native title rights did not exist (for example, because the relevant land was truly uninhabited), the Crown would have taken absolute

---

12 *Walsh v Minister for Lands of New South Wales* (1960) 103 CLR 240, per Windeyer J at 254.

13 Respondent's Submissions at paragraph 12. See also *Cadia Holdings v New South Wales* (2010) 242 CLR 195, per French CJ at [30]-[31].

14 *Mabo v Queensland [No 2]* (1992) 175 CLR 1.

15 *Mabo v Queensland [No 2]* (1992) 175 CLR 1, per Brennan J at 57-58 (Mason CJ & McHugh J agreeing at 15); Deane & Gaudron J at 109.

16 *Mabo v Queensland [No 2]* (1992) 175 CLR 1, per Mason CJ & McHugh J at 15, per Brennan J at 48-54, 69, per Deane & Gaudron JJ at 81, 86, per Toohey J at 182, 216.

17 *Mabo v Queensland [No 2]* (1992) 175 CLR 1, per Mason CJ & McHugh J at 15, Brennan J at 48-54, 57-58, 69, per Deane & Gaudron JJ at 100, 109, 116, per Toohey J at 184, 216.

beneficial ownership, for the reasons given by Stephen CJ in *Attorney-General v Brown.*[18]

21. The identification of the Crown's initial title as radical title, however, serves to emphasise that the Crown's powers of control over Crown land were executive or prerogative powers over that land; powers that were not simply an incident of proprietorship. That is, the acquisition of sovereignty and radical title carried with it, the power, in the Crown, to grant land in the Colony and appropriate it for its own purposes. Where it did so in a manner that was inconsistent with the continued existence of native title rights and interests those rights and interests were extinguished.[19]

22. Such executive power in the Crown, prior to any legislative control, was, therefore, an essential incident of the Crown's radical title.

23. The Crown's prerogative powers in respect of the lands of the Colonies, for example, included powers to alienate those lands for the benefit of the Crown and its revenues.[20] This was true of New South Wales where the management and disposal of colonial waste lands was controlled by "executive fiat"[21] and the early Governors of the Colony of New South Wales were given express powers under their commissions to make grants of land.[22]

---

18 *Mabo v Queensland [No 2]* (1992) 175 CLR 1 per Brennan J at 48, 60.

19 *Mabo v Queensland [No 2]* (1992) 175 CLR 1, per Mason CJ & McHugh J at 15, per Brennan J at 48-54, 68-70. Deane, Gaudron and Toohey JJ arrived at similar conclusions: per Deane & Gaudron JJ at 81, per Toohey J at 180-182. See also *Wik Peoples v Queensland* (1996) 187 CLR 1, per Brennan CJ at 88-94, per Toohey J at 127-129, per Gummow J at 186-190, per Kirby J at 233-235.

20 *A Treatise on the Law of the Prerogatives of the Crown and the Relative Duties and Rights of the Subject*, Joseph Butterworth and Son, 1820, London, at 29-30, 202-205; *The Attorney-General v Brown* (1847) 2 SCR (NSW) App 30; *Mabo v Queensland [No 2]* (1992) 175 CLR 1, per Mason CJ & McHugh J at 15, per Brennan J at 68, per Dawson J at 145.

21 E Campbell, "Crown Land Grants: Form and Validity" (1966) 40 *Australian Law Journal* 35; *Wik Peoples v Queensland* (1996) 187 CLR 1, per Gummow J at 172.

22 See E Campbell, "Crown Land Grants: Form and Validity" (1966) 40 *Australian Law Journal* 35 at 36-38; *Williams v Attorney-General for New South Wales* (1913) 16 CLR 404, per Barton ACJ at 416-417; *Randwick Corporation v Rutledge* (1959) 102 CLR 54, per Windeyer J at 71; The history of the early commissions and instructions are set out in *Mabo v Queensland [No 2]* (1992) 175 CLR 1, per Dawson J at 139-143.

24. Significantly, the Crown's prerogative powers also included the power to reserve land in the Colony from alienation by setting it apart for public purposes and the power to dedicate land to be used for public purposes, including its own purposes.[23]

25. That these powers were incidents of *executive* power is also reflected in *Mabo [No 2]* where it was recognised that the Crown's power to appropriate land to its own use was a sovereign *political* power.[24] For example Brennan J stated,:

> "The radical title is a postulate of the doctrine of tenure and a concomitant of sovereignty. As a sovereign enjoys supreme legal authority in and over a territory, the sovereign has power to prescribe what parcels of land and what interests in those parcels should be enjoyed by others and what parcels of land should be kept as the sovereign's beneficial demesne."[25]

26. Brennan J also observed:

> "The funds derived from sales of colonial land were applied to defray the cost of carrying on colonial government and to subsidize emigration to the Australian Colonies. Further, the power to reserve and dedicate land for public purposes was important to the government and development of the Colonies as it remains important to the government and development of the Commonwealth and the States and Territories. Therefore it is right to describe the powers which the Crown – at first the Imperial Crown and later the Crown in right of the respective Colonies – exercised with respect to colonial lands as powers conferred for the benefit of the nation as a whole, but it does not follow that those were *proprietary* as distinct from *political* powers."[26]

27. In the context of this last passage, Brennan J cited *Reg v Symonds* [1847] NZPCC 387, which held, in New Zealand, that the Crown "has the exclusive right of

---

23 *Randwick Corporation v Rutledge* (1959) 102 CLR 54, per Windeyer J at 71-72; *Williams v Attorney-General for New South Wales* (1913) 16 CLR 404, per Barton ACJ at 417, per Isaacs J at 441, 451, per Higgins J at 463, per Gavan Duffy & Rich JJ at 467; *Mabo v Queensland [No 2]* (1992) 175 CLR 1, per Mason CJ & McHugh J at 15, per Brennan J at 52, 68-70.

24 *Mabo v Queensland [No 2]* (1992) 175 CLR 1, per Mason CJ & McHugh J at 15, Brennan J at 50-53, 68-70,

25 *Mabo v Queensland [No 2]* (1992) 175 CLR 1, at 48. See also *Cadia Holdings Pty Ltd v New South Wales* (2010) 242 CLR 195, per French CJ at [28].

26 *Mabo v Queensland [No 2]* (1992) 175 CLR 1, per Brennan J at 52 (emphasis added).

extinguishing the Native title to land", regardless of what estate the Crown might be said to hold prior to that extinguishment.[27] Such a right and power, being exclusive to the Crown, must necessarily exist, it is submitted, "by virtue of the prerogative and not by virtue of proprietorship".[28]

28. The cases therefore recognise that the Crown had *executive* power to appropriate land to itself and use that land for its own purposes and construct buildings on it for such purposes, including (but not limited to) the purposes of establishing parks, gardens, sports grounds, tourist facilities (such as a restaurant and viewing facilities), post offices, court houses, Governor's residences, conservatoriums of music, admirals or asylums.[29]

29. *Williams v Attorney-General for New South Wales* (1913) 16 CLR 404 ("*Williams* (1913)"), for example, specifically affirmed the power of the Government of New South Wales, in the absence of any statutory authority, to use the land in question for purposes other than a Governor's residence. It was inherent in the informant's case in *Williams* (1913), that the Government of New South Wales did not have that power.[30] It was that case that the Court, and later the Privy Council, rejected.

30. Accordingly, it is submitted, there is no basis for the Appellant's Submission, at paragraph 39, that the statement of Barton ACJ in *Williams* (1913) that "the Executive Government of this State is entitled to put the house and grounds in question to any use not expressly or impliedly forbidden by the terms of its Crown Lands Act or any other of its laws"[31] is a statement about permissible uses of land

---

27 *Reg v Symonds* [1847] NZPCC 387, per Chapman J at 389-390, 390-391.

28 *Johnson v Kent* (1975) 132 CLR 164, per Barwick CJ at 170.

29 *Williams v Attorney-General for New South Wales* (1913) 16 CLR 404, per Barton ACJ at 421, 423-424, 430, per Isaacs J at 451, 460, per Higgins J at 464, per Gavan Duffy & Rich JJ at 467; *Randwick Corporation v Rutledge* (1959) 102 CLR 54, per Windeyer J at 75; *Johnson v Kent* (1975) 132 CLR 164, per Barwick CJ at 169-170, per McTiernan & Stephen JJ at 172, per Jacobs J at 174; *Mabo v Queensland [No 2]* (1992) 175 CLR 1, per Mason CJ & McHugh J at 15, per Brennan J at 70-71.

30 *Williams v Attorney-General for New South Wales* (1913) 16 CLR 404, per Barton ACJ at 415-416.

31 (1913) 16 CLR 404 at 430.

and not one about the source of power to use land. As the immediately preceding sentences in Barton ACJ's judgement reveal, the case was concerned with the Executive Government's *power*.

31. Similarly, the observation made by Higgins J in *Williams* (1913) which is referred to by the Appellant at paragraph 39 must be understood in its full context. The complete sentence reads:

> "It is true that no evidence has been produced, no Act has been cited, to show that such a power of management was ever conferred on the Governor; *but there is no issue raised by the information as to the rights of the King in the absence of dedication; there is no issue to which such evidence, or such an Act, would have been relevant.*" (Emphasis added)

32. There was "no issue raised" as to the Crown's power because, it is submitted, there was no question about its existence. This is made clear by Higgins J earlier in his Honour's reasons where he stated: "[t]he transaction of building and enclosing this residence was approved by the Queen, not *animo donandi* but *animo retinendi.* By the very next mail the Queen could have directed that the residence should be used for an admiral or for an asylum".[32]

33. Gavan Duffy and Rich JJ similarly observed in *Williams* (1913) that "the Imperial Government is no longer concerned with the land, and that the Government of New South Wales is within its legal rights in all that it has done or threatened to do".[33]

34. In advising that the appeal from *Williams* (1913) be dismissed, the Privy Council also clearly confirmed that the result was one upholding the Government's *executive power*: "the action taken is that of the Executive and is within its competence on either hypothesis as to the construction of the Constitution Act".[34]

---

32 *Williams v Attorney-General for New South Wales* (1913) 16 CLR 404, per Higgins J at 464.

33 *Williams v Attorney-General for New South Wales* (1913) 16 CLR 404, per Gavan Duffy & Rich JJ at 467.

34 *Attorney General for New South Wales v Williams* (1915) 19 CLR 343, per Lord Sumner at 348.

35. That the Executive has unfettered power (absent contrary statutory provision) to use and occupy Crown land within its territory, which subsists as a matter of prerogative power and not simply as power "incidental to the Crown's capacity as a legal person to own land and therefore a power that it shares with its subjects",[35] is made clear in *Johnson v Kent*.[36]

36. While *Johnson v Kent* was specifically concerned with the executive power of the Commonwealth (in relation to land within its territory),[37] its authority for these propositions must apply *a fortiori* to the prerogative powers of the States in relation to their land within their territories, given the proprietary nature of the prerogative and the "distribution" of the prerogative upon Federation.[38]

Legislative abrogation or displacement of the prerogative

37. The prerogatives of the Crown may, of course, be affected, and even abrogated, by legislation.[39]

38. Whether, and to what extent, that has been done will be a question of statutory construction, in relation to which the meaning of the relevant statutory provisions is to be derived from the statutory text, considered in its context (including the legislative history) and the purpose of the Act.[40] Objective discernment of statutory purpose is integral to such contextual construction.[41]

---

35 Cf Appellant's Submissions at paragraph 41.

36 (1975) 132 CLR 164, per Barwick CJ at 169-170 (McTiernan & Stephens JJ agreeing); per Jacobs J at 174.

37 See also *Kruger v The Commonwealth* (1997) 190 CLR 1, per Gummow J at 165; *Re The Governor, Goulburn Correctional Centre; Ex parte Eastman* (1999) 200 CLR 322, per Gummow & Hayne JJ at [53]; *Clamback v Coombes* (1986) 78 ALR 523, per Evatt J at 532-533; *Century Metals and Mining NL v Yeomans* (1988) 85 ALR 29, per French J at 52.

38 See *Federal Commissioner of Taxation v Official Liquidator of E O Farley Ltd* (1940) 63 CLR 278, per Evatt J at 322; *Cadia Holdings Pty Ltd v New South Wales* (2010) 242 CLR 195, per French CJ at [33]; per Gummow, Hayne, Heydon & Crennan JJ at [88]-[89].

39 *Attorney General v De Keyser's Royal Hotel* [1920] AC 508.

40 *Federal Commissioner of Taxation v Consolidated Media Holdings Ltd* (2012) 250 CLR 503, per French CJ, Hayne, Crennan, Bell & Gaegler JJ at [39]. *Project Blue Sky v Australian Broadcasting Authority* (1998) 194 CLR 355, per McHugh, Gummow, Kirby and Hayne JJ at [69]-[71].

39. In that context it is necessary to distinguish between laws which "modify the nature of executive power vested in the Crown – its capacities – and legislation which assumes those capacities and merely seeks to regulate activities in which the Crown may choose to engage in the exercise of those capacities".[42]

40. Whether a law abrogates or regulates the exercise of a prerogative power, is itself, an important matter of context. As such powers exist for the benefit of the public[43] and government administration, those powers will not be displaced except by a clear and unambiguous provision, a rule described as "extremely strong".[44] In that regard, the fact that an Act regulates or abrogates certain aspects of a prerogative power does not necessarily mean that it intends to abrogate (or that the Crown intends to abandon) all other aspects of that prerogative power with which the Act does not specifically deal.[45]

41. This assumes particular importance in relation to the statutes relating to Crown land in New South Wales.

Issue (b): Were the Crown's prerogative powers to use and occupy Crown land abrogated by section 2 of the *1855 Act*?

42. In determining whether the Crown's power to use and occupy unalienated Crown land was abrogated by s 2 of the *1855 Act*, it is necessary to have regard to the history of the control of Crown land in New South Wales prior to its passage.

---

41 *Thiess v Collector of Customs* (2014) 250 CLR 664, per French CJ, Hayne, Kiefel, Gaegler & Keane JJ at [23].

42 *Re Residential Tenancies Tribunal of New South Wales; Ex parte Defence Housing Authority* (1997) 190 CLR 410, per Dawson, Toohey & Gaudron JJ at 439.

43 See McCardie J in *Ruffy-Arnell & Co Ltd v The King* [1922] 1 KB 599 at 609, cited in H. V. Evatt, *The Royal Prerogative*, at 10: "[The Royal Prerogative] is a gracious feature of our constitution ... [which exists] as a beneficent instrument for the furtherance of the public weal". See also Brennan J in *Commonwealth v Tasmania* (1983) 158 CLR 1, at 211.

44 *Barton v The Commonwealth* (1974) 131 CLR 477, per Barwick CJ at 487-488. See also McTiernan & Menzies JJ at 491, Mason J at 501 and Jacobs J at 508 as to the rule.

45 *Barton v The Commonwealth* (1974) 131 CLR 477, per Barwick CJ at 484-485, 487-488, per Mason J at 496-498, per Jacobs J at 506-508. See also *Cadia Holdings v New South Wales* (2010) 242 CLR 195, per French CJ at [50].

That history, in particular, informs the purpose of s 2 and the issue to which it was directed. [46]

43. Prior to the passage of the *1855 Act*, the successive grants of legislative power to the Colony of New South Wales carefully reserved to the Crown of the United Kingdom, subject to any Imperial Statute, the lands belonging to the Crown within the Colony and their entire control and management.[47]

44. The first Imperial statute relating to the disposal of land in the Australian Colonies was the *Australian Colonies Waste Lands Act 1842* (Imp) ("the *1842 Act*").

45. The *1842 Act* provided that the waste lands of the Crown could not be conveyed or alienated by the Queen in fee simple or for any lesser estate or interest unless by way of sale conducted in accordance with the requirements of the Act.[48] The term "waste lands of the Crown", by reference to which the terms of the *1842 Act* were to operate, excluded land already granted or agreed to be granted in fee simple or for a term, and land "dedicated and set apart for some public use".

46. In 1846, the *1842 Act* was amended by 9 & 10 Vict. c 104 ("the *1846 Act*"). The *1846 Act* amendments authorised the Queen to grant leases and licences for the occupation of the waste lands of the Crown in the Colonies of New South Wales, South Australia and Western Australia for terms not exceeding 14 years. The definition of "waste lands of the Crown" in the *1846 Act* was similar to that contained in the *1842 Act*, save that the words "dedicated or set apart" were used instead of "dedicated and set apart".

47. The restricted definitions of the term "waste lands of the Crown" in both the *1842 Act* and the *1846 Act* served to prevent, from being dealt with as waste lands, land

---

46 *Cadia Holdings v New South Wales* (2010) 242 CLR 195, per Gummow, Hayne, Heydon & Crennan JJ at [76].

47 *The Australian Constitutions Act 1842* (Imp), s 29; *The Australian Constitutions Act (No 2) 1850* (Imp), s 14; *Williams v Attorney-General for New South Wales* (1913) 16 CLR 404, per Barton ACJ at 424, per Isaacs J at 448-450, 452-453.

48 Section 2 of the *1842 Act*; *Williams v Attorney-General for New South Wales* (1913) 16 CLR 404, per Barton ACJ at 423.

which had already been made the subject of a disposal or a contract for freehold or lesser interests or which had been dedicated or set apart for some public use.

48. The *1842 Act*, as amended by the *1846 Act*, clearly abrogated (by comprehensively regulating) the Crown's prerogative to *alienate* the waste lands of the Crown.[49] However, the reservation or dedication of land by the Crown for use for a particular purpose, in the absence of the creation of a trust did not involve its conveyance or alienation or the creation of rights in any person[50] and the *1842 Act* expressly preserved the Crown's power to except land from sale so that it could be put to various public uses.

10 49. Accordingly, the *1842 Act*, as amended by the *1846 Act*, left unaffected the power of the Crown to reserve or dedicate lands for its own purposes and to use and occupy those lands. Indeed, by excluding such lands from the "waste lands of the Crown", it removed those lands from the operative provisions of those Acts.[51] Nor did the *1842 Act* abrogate the Crown's power to use lands it had dedicated or set aside to one purpose for another purpose.[52]

50. Section 2 of the *1855 Act*, (providing that "the entire management and control of the waste lands belonging to the Crown in the said colony ... shall be vested in the Legislature of the said colony...") must be construed in light of this history of Imperial legislative and executive control over the power of alienation and
20 disposal of Crown lands. This was, relevantly, the "mischief"[53] to which s 2 was directed. Insofar as s 2 can be said to have abrogated any aspect of the

---

49 *Williams v Attorney-General for New South Wales* (1913) 16 CLR 404, per Isaacs J at 450.

50 *Williams v Attorney-General for New South Wales* (1913) 16 CLR 404, per Barton ACJ at 429, per Isaacs J at 440-441, 443, 451, 454-455, per Gavan Duffy & Rich JJ at 467; *Attorney General for New South Wales v Williams* (1915) 19 CLR 343, per Lord Sumner at 346; *Randwick Corporation v Rutledge* (1959) 102 CLR 54, per Windeyer J at 74-75; *Mabo v Queensland [No 2]* (1992) 175 CLR 1, per Brennan J at 66.

51 *Williams v Attorney-General for New South Wales* (1913) 16 CLR 404, per Isaacs J at 451-452.

52 *Williams v Attorney-General for New South Wales* (1913) 16 CLR 404, per Barton ACJ at 430, per Isaacs J at 451, per Higgins J at 463-464, per Gavan Duffy & Rich JJ at 467, per Powers J at 467; *Randwick Corporation v Rutledge* (1959) 102 CLR 54, per Windeyer J at 75.

53 *Cadia Holdings v New South Wales* (2010) 242 CLR 195, per Gummow, Hayne, Heydon & Crennan JJ at [76].

prerogative, it was that part of the prerogative in relation to the *alienation* of Crown lands and the creation of interests in others.

51. That is, the purpose of s 2 of the *1855 Act* was to effect a reversal of policy relating to the division of control between the Imperial polity and the Colonial polity; not to affect the relationship between the legislative and executive powers in the Colonial polity.[54]

52. Moreover, it is clear, it is submitted, from the background and context of the *1855 Act* that the intended purpose and effect of s 2 of that Act was that *legislative power* in respect of the management and control of the waste lands of the Crown was vested in the legislature of the Colony in place of the Imperial Parliament.[55]

53. The conferral of power on the legislature of the Colony to make laws for the peace, welfare and good government of the Colony in all cases whatsoever, including laws for regulating the sale, letting, disposal and occupation of the waste lands of the Crown,[56] did not confer proprietorship in respect of any lands within the Colony.[57] As Isaacs J noted in *Williams* (1913), "the King always owned the Colonial land *in right of his Colony*".[58]

54. Citing this passage of Isaacs J from *Williams* (1913), Brennan J in *Mabo v Queensland [No 2]* stated "[t]he management and control of the waste lands of the Crown were passed by Imperial legislation to the respective *Colonial*

---

54 *Williams v Attorney-General for New South Wales* (1913) 16 CLR 404, per Barton ACJ at 425-427, per Isaacs J at 448-455.

55 *Williams v Attorney-General for New South Wales* (1913) 16 CLR 404, per Barton ACJ at 424, 426, per Isaacs J at 456, per Higgins J at 464-465; *New South Wales v The Commonwealth* (1926) 38 CLR 74, per Knox CJ, Gavan Duffy, Rich & Starke JJ at 83; cf *Mabo v Queensland [No 2]* (1992) 175 CLR 1, per Dawson J at 148.

56 Sections 1 and 43 of the Constitution attached to the *1855 Act* (supported by s 2 of that Act).

57 *Williams v Attorney-General for New South Wales* (1913) 16 CLR 404, per Isaacs J at 455.

58 *Williams v Attorney-General for New South Wales* (1913) 16 CLR 404, per Isaacs J at 455. As noted above, in light of the High Court's decision in *Mabo v Queensland [No 2]*, the reference to "owned" should be understood in the sense of "held radical title to".

Governments as a transfer of political power or governmental function not as a matter of title" (emphasis added).[59]

55. Section 2 of the *1855 Act* did not, of itself, abrogate the prerogative power to use the waste lands of the Crown, that is, the power of the Crown to use its own lands. It simply meant that this prerogative power was now exercisable by the Executive Government of the New South Wales Colony in place of the Crown of the United Kingdom and that it *could* be abrogated by legislation passed by the colonial legislature.

56. This much is clear, it is submitted, from *Williams* (1913) itself. In that case, Barton ACJ accepted the contention that "the land, on the passing of the Constitution Act in 1855, passed out of the control of the Crown of the United Kingdom and may be used by the Executive Government of this State for any purpose which is not in contravention of the Crown Lands Acts".[60] His Honour, at 430, recognised that the grant of legislative power in the *1855 Act* carried with it the continuation of Executive power of the Colonial government "acting under responsibility to the legislature and subject to Statute" to manage, control and use Crown lands.

57. Similarly, Higgins J confirmed that, following the passage of the *1855 Act*:

> "The Colonial legislature could make laws with respect to these lands; but what if there are no laws made applicable? If by virtue of letters patent granted or other authority conferred before the Constitution, the Governor had power to manage the land, and to remove erections thereon (cf 9 & 10 Vict. C.104, sec 10), that power was not affected by the Constitution, but remained. There is nothing in the Constitution to take away any power which the Governor had at the time of the Constitution".[61]

---

59 *Mabo v Queensland [No 2]* (1992) 175 CLR 1, per Brennan J at 53 (emphasis added). A similar observation was made by Stephen J in *New South Wales v The Commonwealth* (1975) 135 CLR 337, at 439.

60 *Williams v Attorney-General for New South Wales* (1913) 16 CLR 404, per Barton ACJ at 423-424, 430.

61 *Williams v Attorney-General for New South Wales* (1913) 16 CLR 404, per Higgins J at 465. See also Isaacs J at 460.

58. The same was true of the position in the other Colonies, as they gained self-government. In respect of the application of s 5 of the *Australian Waste Lands Act* 1855 (Imp) to the self-government of South Australia, for example, O'Connor J observed in *South Australia v Victoria*[62] that the grant of legislative power over public lands "necessarily involved a cession to the executive power of the Colony of all rights of possession in public lands for public purposes which theretofore had been in the King as representing the supreme Executive of the Empire".

59. The continuation of those powers, in the Crown in right of New South Wales, was recognised in the *Crown Lands Act* 1884 (NSW) and the *Crown Lands Consolidation Act* 1913 (NSW), under which the dedications of the subject land were made in the present case. This is also the case with the *Crown Lands Act* 1989 (NSW), under which those dedications are now deemed to have been made. In relation to the Crown's use and occupation of unalienated Crown land, those Acts do not "purport to modify the nature of the executive power vested in the Crown" but rather "assume those capacities and merely seeks to regulate activities in which the Crown may choose to engage in the exercise of those capacities".[63]

60. Section 26 of the *Crown Lands Consolidation Act* 1913 (NSW), for example, provided, in relation to dedicated Crown lands, that the Minister *may* appoint trustees charged with the care and management of such lands.[64] The power was discretionary; there was no requirement to appoint such trustees. In the absence of any such trustees the care and management of those Crown lands would necessarily remain with the Crown. There was no (nor did there need to be) any legislative provision conferring such a power on the Crown; it formed part of the common law prerogative powers which preceded the *Act*, and upon whose assumption the Act was based.

---

62 (1911) 12 CLR 669 at 710-711. See also, in respect of Tasmania, *Commonwealth v Tasmania* (1983) 158 CLR 1, per Brennan J at 208-211.

63 *Re Residential Tenancies Tribunal of New South Wales; Ex parte Defence Housing Authority* (1997) 190 CLR 410 per Dawson, Toohey & Gaudron JJ at 439.

64 Section 106 of the *Crown Lands Act* 1884 (NSW) was to the same effect.

61. The same applies to dedications and reserves under Part 5 of the *Crown Lands Act* 1989 (NSW). While, the Minister may, under s 92 of that Act, establish a reserve trust charged with the care, control and management of a reserve, he or she need not do so. If there is no trust established, the care, control and management of the land must reside with the Crown.

62. In the case of the land the subject of this appeal, no such trust exists. The care, control and management of the land can only take place in the exercise of the Crown's prerogative.

PART VI: LENGTH OF ORAL ARGUMENT

10 63. It is estimated that the oral argument for the Attorney General for Western Australia will take 20 minutes.

Dated: 26 August 2016.

P D Quinlan SC
Solicitor General for Western Australia
Telephone: (08) 9264 1806
Facsimile: (08) 9321 1385
Email: p.quinlan@sg.wa.gov.au

J E Shaw
State Solicitor's Office
Telephone: (08) 9264 1696
Facsimile: (08) 9264 1670
Email: j.shaw@sso.wa.gov.au