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

BETWEEN

NEW SOUTH WALES ABORIGINAL LAND COUNCIL

Appellant

and

MINISTER ADMINISTERING THE CROWN LANDS ACT

Respondent

APPELLANT'S SUBMISSIONS

Part I: Certification

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

Part II: Issues

2 Is land that is dedicated for gaol purposes, but which has ceased to be proclaimed or operated as a gaol, "occupied" within the meaning of para 36(1)(b) of the *Aboriginal Land Rights Act 1983* (NSW) (**Land Rights Act**) by reason of its being secured, guarded by an on-site security guard, and visited intermittently by community service order (**CSO**) workers, pending a decision on its future use? More generally, is the legal test for "occupation" under the Land Rights Act informed in a given case by the purposes, if any, for which claimed land is dedicated?

3 If such land in such circumstances is "occupied", is it "lawfully" occupied within the meaning of para 36(1)(b) of the Land Rights Act in the absence of statutory authorisation, in light of sec 2 of the *New South Wales Constitution Act 1855* (18 & 19 Vict c 54, Sch 1) (**1855 Act**)?

4 If statutory authorisation is required for lawful occupation, did Corrective Services NSW (**CSNSW**) or the Minister for Justice have the requisite statutory authorisation to make provision for the occupation of such land?

5 If statutory authorisation is not required for lawful occupation, was the purported occupation of such land under the non-statutory authorisation of CSNSW or the Minister for Justice nonetheless unlawful because only the Crown Lands Ministers had the requisite authority, whether non-statutory authority or impliedly conferred by the *Crown Lands Act*

Filed on behalf of the Appellant
Chalk & Fitzgerald Lawyers & Consultants
Level 9, 23 Hunter Street
Sydney NSW 2000

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Tel (02) 9231 4544
Fax (02) 9231 4244
Ref Jason Behrendt; 21273

1989 (NSW) (**Crown Lands Act**)? Relatedly, is it necessary to identify the particular emanation of the Crown which occupies land to ask whether *that* emanation was legally authorised to occupy the land, or is it sufficient to say that "the Crown" lawfully occupies land that it owns?

Part III: Section 78B of the *Judiciary Act 1903*

6 The appellant has given notice pursuant to sec 78B of the *Judiciary Act 1903* (Cth) on the limited basis that the matter may, on one view, arise under or involve the interpretation of sec 106 of the Commonwealth Constitution by reason of the questions concerning the construction and application of provisions of the New South Wales Constitution.

Part IV: Citations

7 The judgment of the Court of Appeal (**CA**) is reported: *New South Wales Aboriginal Land Council v Minister Administering the Crown Lands Act* (2015) 303 FLR 87.

8 The judgment of the primary judge (**PJ**) is not reported: *New South Wales Aboriginal Land Council v Minister Administering the Crown Lands Act (Berrima)* [2014] NSWLEC 188.

Part V: Facts

9 On 24 February 2012 (**date of claim**), the appellant (**NSWALC**) lodged a claim pursuant to sec 36 of the Land Rights Act for two adjacent parcels of land in Berrima, New South Wales (**claimed land**).

10 The claimed land is held under Torrens title. The registered proprietor is the State of New South Wales {CA [35]}. On the claimed land is a former gaol, comprising the former gaol complex itself and three associated buildings known respectively as the superintendent's house, the corner residence, and the print house. There are also gardens, outbuildings and some recreational facilities {CA [7]-[8]}. The claimed land appears to have been used as a gaol as early as the 1830s {CA [37]}. In 1891, 1894 and 1958 respectively, different parts of the claimed land were dedicated for purposes described as "Gaol Site (extension)", "Gaol Purposes", and "Gaol Site (addition)". Those dedications continued in force as at the date of claim {CA [38]-[41]}.

11 The claimed land was successively proclaimed under applicable legislation in force from time to time since 1944 as a place of detention or as a correctional complex or, most recently, as a "correctional centre" under the *Crimes (Administration of Sentences) Act 1999* (NSW) (**CAS Act**). As at the date of claim, the proclamation of the claimed land as a correctional centre (and, indeed, all previous proclamations relating to the detention of prisoners on the claimed land) had been revoked {CA [45]-[46]}. The claimed land had

ceased to be used as a correctional centre {PJ [10.6]}. The Attorney-General had described the premises as "mothballed" {PJ [94]}. Consideration was being given to retaining the land in a reserve trust under Pt 5 of the Crown Lands Act, but no such trust had been established {PJ [10.15]-[10.17]}.

12 Although the claimed land was no longer functioning as a gaol at the date of claim, the following circumstances pertained in relation to it {CA [54]}:

(a) 24 hour on-site security was maintained;

(b) the premises on the claimed land were kept locked;

(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;

(h) there was some evidence, which was "vague, imprecise and lacking in probative value" {PJ [110]}, of gardening tools and implements being stored on the claimed land for the use of CSO workers; and

(i) members of the public wanting to visit the gardens sought permission from CSNSW and/or the on-site security personnel.

13 On 20 November 2012, the joint Crown Lands Ministers (**Minister**) refused NSWALC's claim on the basis that the claimed land was lawfully used or occupied within the meaning of para 36(1)(b) of the Land Rights Act. The Minister later abandoned the proposition that the claimed land was lawfully used {CA [14]}. He also contended that the asserted lawful occupation of the land was for a purpose of holding the land pending a decision on its future use {CA [53]; PJ [93], [94], [169]}. NSWALC appealed under sec 36(6) of the Land Rights Act to the Land and Environment Court. It was common ground that the Minister bore the onus, under sec 36(7) of the Land Rights Act, of proving that the claimed land was lawfully occupied and therefore not "claimable Crown lands" {CA [14]}. The LEC dismissed NSWALC's appeal {CA [9]}. Pursuant to subsec 57(1) of the *Land and Environment Court Act 1979* (NSW), NSWALC appealed to the Court of Appeal on questions of law.

14 In relation to whether the claimed land was occupied, NSWALC submitted 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 needed to be assessed by reference to the gaol purposes for which the

claimed land was dedicated {CA [90]}. The Court of Appeal rejected that argument on the basis that "there was ... evidence of regular use of the land ... by offenders serving Community Service Orders" and that therefore it was "not the case that the land had ceased to be used for the purposes of punishment of offenders" {CA [91]}.

15 In relation to whether the asserted occupation of the claimed land was lawful, the Court of Appeal rejected NSWALC's submission that sec 2 of the 1855 Act had the effect that statutory authorisation was required {CA [128]-[137]} and held further that there was an implied statutory authority under the Crown Lands Act to maintain and secure the claimed land for the time reasonably needed to make a decision about its future use {CA [138]-[139]}. The Court of Appeal also rejected NSWALC's submission that the primary judge materially erred in finding that CSNSW, a part of the Department of Justice, lawfully occupied the land {PJ [168]}. It held that the identity of the occupant was not material to the question of whether the claimed land was lawfully occupied {CA [141]-[145]} and held further that the acts constituting occupation of the claimed land could be attributed simply to the Crown in right of New South Wales {CA [146]}.

16 NSWALC appeals to this Court by special leave.

Part VI: Argument

Summary

17 NSWALC advances the following three propositions, the acceptance of any one of which would be sufficient for the appeal to be allowed.

18 ***First proposition: the claimed land was not occupied (Grounds 2(a), 5).*** Determining whether claimed land is lawfully occupied within the meaning of the Land Rights Act, with the consequence that the land is disqualified from claim, requires an assessment of the acts, facts, matters and circumstances in light of what *would* constitute occupation having regard to the nature of the land and the purposes, if any, for which it is dedicated. The Court of Appeal erred in not applying the correct construction of lawfully occupied. It also erred in holding that the visitation to the claimed land of CSO workers, which it described as "use[] for the purposes of punishment of offenders" rendered the relevant acts, facts, matters and circumstances occupation for the dedicated gaol purposes {CA [91]}. That is because punishment by way of community service order is distinctly not punishment by way of imprisonment, and the two kinds of punishment are mutually exclusive, statutory alternatives.

19 ***Second proposition: in the alternative to the first proposition, the claimed land was not lawfully occupied because there was no statutory authorisation (Grounds 2(b), 2(c), 3, 4, 5).*** Even if the claimed land was occupied in fact, it was not "lawfully" occupied within the

meaning of the Land Rights Act. The entire management and control of the claimed land is vested by sec 2 of the 1855 Act in the legislature, with the consequence that statutory authority is required to occupy the claimed land lawfully. The statutory authority of CSNSW to occupy the claimed land ceased with the revocation of the proclamations of the land as a correctional centre. No other statutory authority exists. If, as the Court of Appeal held {CA [138]-[139]}, the Crown Lands Act impliedly confers power to occupy or maintain and secure the land pending a decision on its future use, that power is impliedly conferred only on the Crown Lands Ministers, who played no role in relation to the claimed land in this case.

20 ***Third proposition: further or in the alternative to the second proposition, the claimed land was not lawfully occupied because only the Crown Lands Ministers had the requisite legal authority (Grounds 2(b), 4, 5).*** Even if the 1855 Act did not require that there be statutory authorisation for the occupation of the claimed land, NSWALC submits that CSNSW or the Minister for Justice, being those emanations of the Crown which in fact occupied or purported to authorise the occupation of the claimed land, had no authority to do so in any event. It is not the case that a given aspect of the non-statutory executive power of the Crown in right of New South Wales can be exercised by any and all emanations of the Crown. In particular, CSNSW or the Minister for Justice had no authority in relation to the claimed land after the revocation of the proclamations of the claimed land as a gaol. Any power to occupy the claimed land vested in the Crown Lands Ministers. Further, NSWALC embraces for this purpose the proposition that the Crown Lands Act impliedly confers authority on the Crown Lands Ministers to manage, control and occupy dedicated land pending a decision on its future use. The purported occupation of the claimed land at the behest of the CSNSW or the Minister for Justice was therefore contrary to the Crown Lands Act and unlawful.

First proposition: the claimed land was not occupied

Applicable principles

21 Providing for the management and control of Crown land has, historically as well as in more recent times, brought about the evolution of the constitutional and quasi-constitutional arrangements in New South Wales. The management and control of the claimed land was: vested in the New South Wales legislature by sec 2 of the 1855 Act; limited by dedications for gaol purposes made under applicable Crown Lands legislation from time to time and now taken to have effect as if they had been made under the Crown Lands Act; and, most recently, radically affected by the scheme for return of claimable Crown land to indigenous people under sec 36 of the Land Rights Act.

22 The scheme of the Land Rights Act — the most recent of the relevant quasi-constitutional adjustments of the control and management of Crown land — can be seen, broadly speaking, to effect the return of certain land in New South Wales to Aboriginal people. Traditional ownership and occupation by indigenous Australians is expressly acknowledged in the preamble to the Land Rights Act, as is the historical reduction without compensation of land set aside for indigenous Australians as a result of past Government decisions. The Land Rights Act was intended to make available "vast tracts of Crown land ... to redress the injustices of dispossession": Minister's Second Reading Speech in support of the Bill for the Land Rights Act, New South Wales, Legislative Assembly, *Hansard*, 24 March 1983 at 5095. That dispossession has been described as a "parcel by parcel" dispossession of the Aboriginal peoples "to make way for expanding colonial settlement": *Mabo v Queensland (No 2)* (1992) 175 CLR 1 at 69.

23 The primary mechanism for giving effect to the remedial purpose of the Land Rights Act is the claims process established by sec 36: see *Minister Administering the Crown Lands Act v New South Wales Aboriginal Land Council* (2008) 237 CLR 285 (***Wagga Wagga HCA***) at 301 [46]-[47] (Hayne, Heydon, Crennan and Kiefel JJ). The lands which are to be available for return to indigenous Australians are the "claimable Crown lands", being lands which (subject to limited exclusions) are vested in Her Majesty and are able to be lawfully sold or leased, or are reserved or dedicated for any purpose, under the Crown Lands Act.[1] The beneficial and remedial purposes of the Land Rights Act find particular expression in the mandatory character of the Minister's obligation to grant a qualifying claim (para 36(5)(a)) and of the Land and Environment Court's power to order the transfer of claimable lands (subsec 36(7)): *New South Wales Aboriginal Land Council v Minister Administering the Crown Lands (Consolidation) Act and the Western Lands Act (Winbar No 3)* (1988) 14 NSWLR 685 at 691, 693. It also finds expression in the limited categories of Crown land that are disqualified from being claimable (paras 36(1)(b)-(e)) and the settled principle of construction that those limited categories are themselves to be "narrowly construed": *Minister Administering the Crown Lands Act v Deerubbin Local Aboriginal Land Council (No 2)* (2001) 50 NSWLR 665 (***Maroota***) at 674 [53]-[54] (Spigelman CJ, with whom Heydon and Powell JJA agreed).

24 One of the limited categories of land that is disqualified from claim under sec 36 is land which is "lawfully used or occupied": sec para(1)(b). The construction of that phrase was

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1 The reference in para 36(1)(a) to the *Crown Lands Consolidation Act 1913* is taken to be a reference to the Crown Lands Act: Item 21(1) of Sched 8 of the Crown Lands Act.

considered in *Wagga Wagga HCA* (2008) 237 CLR 285, although that case focussed on the notion of lawful use. The present case focuses on the notion of lawful occupation.

25 Like "use" (as to which see *Wagga Wagga HCA* (2008) 237 CLR 285 at 306 [69]), "occupy" is a protean or elastic word, capable of bearing a range of different meanings: *Daruk Local Aboriginal Land Council v Minister Administering the Crown Lands Act* (1993) 30 NSWLR 140 (***Daruk***) at 161E (Priestley JA). Such an "expression of indefinite connotation" is, of course, "especially susceptible to context": *Independent Commission Against Corruption v Cunneen* (2015) 318 ALR 391 at 406 [59] (French CJ, Hayne, Kiefel and Nettle JJ). For example, a statute contemplating occupation of university premises by a union, association, club or other organisation was construed to embrace a notion of occupation "such as is appropriate for the typically informal, usually unincorporated bodies" designated, namely an occupation "of a nature more practical than conceptual": *Harris v McKenzie* (1987) 9 NSWLR 139 at 144 (Kirby P), 152 (Mahoney JA), 153 (McHugh JA). Similarly, "occupation" of land by a native title claim group for the purposes of disregarding prior extinguishing acts is understood as a "traditional" form of occupation, sufficiently indicated by "use ... which is neither random nor co-incidental but in accordance with the way of life, habits, customs and usages of the group", "rather than according to common law principles and judicial authority relating to freehold and leasehold estates and other statutory rights": *Northern Territory v Alyawarr, Kaytetye, Warumungu, Wakaya Native Title Claim Group* (2005) 145 FCR 442 at 491 [172]; see also at 496-497 [193]-[196] (Wilcox, French and Weinberg JJ). In different contexts, such as the ratings context, however, occupation has a stricter connotation, requiring not only legal possession, but actual possession, some degree of permanence or continuity, and perhaps even an overt act amounting to user: *Newcastle City Council v Royal Newcastle Hospital* (1957) 96 CLR 493 at 507-508 (Kitto J, albeit dissenting).

26 Giving meaning to the notion of occupation in the context of the Land Rights Act must therefore depend on close attention to the statutory text, read in its context. The following textual and contextual features are important. *First*, the occupation referred to is "lawful" occupation (para 36(1)(b)). *Secondly*, the word "occupied" appears in collocation with the word "used", so as to suggest a form of active rather than merely passive occupation: cf *Wagga Wagga HCA* (2008) 237 CLR 285 at 306-307 [73]. *Thirdly*, and of particular importance, is that it is a form of occupation which must be adapted to the expressly contemplated possibility that the land in question may, as in this case, be dedicated for

identified purposes (sec 36(1)(a)). *Fourthly*, and relatedly, it is an occupation which, when present, operates to disqualify land from claim under the remedial scheme of sec 36.

27 These contextual features point to a distinct rather than diffuse meaning of what will constitute occupation for the purposes of the Land Rights Act. Thus, the occupation referred to has been held to be an "actual" rather than "constructive" or "notional" occupation: *Daruk* (1993) 30 NSWLR 140 at 162 (Priestley JA); *Minister Administering the Crown Lands Act v La Perouse Local Aboriginal Land Council* (2012) 193 LGERA 276 (***Malabar***) at 286-287 [44]-[47] (Basten JA with whom Beazley, McColl and Macfarlan JJA agreed). This Court has said 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": *Wagga Wagga HCA* (2008) 237 CLR 285 at 306 [69]. The quality of conduct that will amount to actual possession, and the requisite degree of permanence or continuity in any given case, must depend upon "measur[ing]" the acts, facts, matters and circumstances which are said to deprive the land of the characteristic of being not occupied "against an understanding of what would constitute ... occupation of the land": *Wagga Wagga HCA* (2008) 237 CLR 285 at 305 [69].

28 Consideration of "what would constitute" occupation of a given parcel of land requires attention to the purposes, if any, to which the land is dedicated under the Crown Lands Act. That is so not least because a dedication takes land outside of the definition of "Crown land" within the meaning of the Crown Lands Act (subsec 3(1)) and hence the restriction in sec 6 of that Act upon the "occupation" (or indeed alienation) of the land. That important restriction does not apply to dedicated land *precisely because* sufficient restrictions are imposed by the dedication itself and by the usual requirement for assessment prior to dedication (subsec 85(1)). It is of constitutional importance that the occupation of dedicated land be in conformity with the dedication: cf *Fensom v Cootamundra Racecourse Reserve Trust* [2000] NSWSC 1072 at [5] (Bryson J), quoted in {CA [24]}.

29 A question arises in this appeal in relation to what might be described as "interim dealings" with Crown land – whether and in what circumstances maintaining and securing Crown land pending its alienation or some decision on its future use can amount to lawful occupation under the Land Rights Act. A similar question arose in the *Wagga Wagga* case about whether acts preparatory to the sale of land constituted a lawful use of the land. The Court of Appeal in that case held not: *New South Wales Aboriginal Land Council v Minister Administering the Crown Lands Act* (2007) 157 LGERA 18 (***Wagga Wagga CA***) at 29 [55] (Mason P), 33 [79]-[80] (Tobias JA). The High Court affirmed the holding that the acts in

question in that case did not amount to use, but expressly reserved the question whether there may be steps, taken on land in preparation for its sale, which could constitute use or occupation: *Wagga Wagga HCA* (2008) 237 CLR 285 at 308 [77]. Contrary to the *obiter dictum* of the Court of Appeal in the present case {CA [92]–[93]}, *Wagga Wagga HCA* was not "inconsistent with" the reasoning of Mason P and Tobias JA in *Wagga Wagga CA*.

30 The question of interim dealings must be answered conformably with the statutory purpose of the Land Rights Act, which is relevantly to provide for the return of claimable Crown lands to indigenous people. Lands that are surplus to requirements are precisely the lands that are intended to be claimable. It would be incongruous for those lands to most easily be rendered non-claimable by the assertion of occupation or use merely for the purpose of holding the land pending a decision as to its future use, or indeed alienation to persons other than the indigenous owners whose rights are surely to be seen as statutorily protected by the Land Rights Act. When lawful use or occupation of Crown land ceases, then the policy of the Land Rights Act is that the land is susceptible to claim. It would be contrary to the policy and scheme of the Land Rights Act to permit claims to be defeated by interim dealings amounting to no more than preparation for sale (as in *Wagga Wagga*) or maintaining the land pending a decision on some potential future use (as in the present case). NSWALC embraces what was said by Tobias JA in *Wagga Wagga CA* (2007) 157 LGERA 18 at 33 [80]:

> [U]se or occupation must be more than notional. ... [T]here would not be such a user where the land is to be sold because it is surplus to the needs of the Crown but services and utilities such as electricity, water, air conditioning, lifts and fire safety equipment are maintained, the land is patrolled by security [personnel] to discourage vandalism and it is to be accessed by estate agents...

Application of principles

31 The acts, facts, matters and circumstances pertaining to the claimed land must be measured against an understanding of "what would constitute" occupation of land that is dedicated for gaol purposes. Land that is dedicated for gaol purposes must be expected to be occupied as a gaol.

32 The primary judge erred by not doing this. Instead, her Honour held that occupation could be assessed without reference to any purpose, or alternatively that the acts, facts, matters and circumstances could be measured by reference to a purpose which the Minister asserted of "hold[ing] the land pending a decision on its future use which is a purpose that does not require substantial occupation in order to be fulfilled" {PJ [92]-[94], [169]; CA [53]}. The Court of Appeal erred in failing to correct that error and in treating the dedication of the claimed land as relevant only to the question of whether any occupation was

"lawful", and not as relevant also to the question of whether the land was occupied in fact {CA [19]-[20], [90]-[92]}.

33 When the assessment is properly carried out, one sees that none of the acts, facts, matters or circumstances has anything whatsoever to do with gaol purposes. On the contrary, those acts were undertaken on account of the claimed land *not* being any longer used as a gaol — indeed, one might say, on account of the land *not* being occupied. The maintenance of essential services such as water, electricity and sewerage do not of themselves bespeak occupation, but are equally consistent with non-occupation. Neither do the maintenance contract {PJ [106]; CA [54]} or the maintenance performed by CSO workers {PJ [109]; CA [91]} indicate occupation in the requisite sense, because maintenance and repair are incidents merely of an owner's preservation or improvement of an asset. In a ratings context, Lord Reid said that "the owner who in some way enjoys the accommodation is occupying the premises, but ... the owner who merely maintains, repairs or improves his premises is not thereby occupying them: he is preparing for future occupation": *Arbuckle Smith & Co Ltd v Greenock Corporation* [1960] AC 813 at 824; see also at 821-822 (Viscount Kilmuir LC), 829 (Lord Radcliffe). The same is true in the context of the Land Rights Act and in relation to the claimed land in this case.

34 The locking of the premises also does not bespeak occupation, but can be seen to be an incident of the claimed land's disused and unoccupied status: the lock is but a form of protection against the vulnerability that arises from the land being unoccupied. The Minister's case for occupation might be thought to be strongest in relation to the 24-hour on-site security. But the security guard is, in function if not form, the same as the lock. He or she does not "occupy" the land in the requisite sense. Security for the otherwise vacant land might have been provided by boundary patrols, and it would be capricious (and anti-purposive) if the claimability of the land under the Land Rights Act were to turn on the side of the boundary on which the security guards were stationed. In *Wagga Wagga CA* (2007) 157 LGERA 18 at 33 [80], Tobias JA did not consider that security patrols rendered land unclaimable.

35 In disposing of NSWALC's submission that the asserted occupation needed to be assessed against the gaol purposes for which the claimed land was dedicated, the Court of Appeal held that the claimed land was still "used for the purposes of punishment of offenders" because of transient visits on weekends by offenders serving community service orders {CA [91]}. (This was a characterisation of the facts not advanced by the Minister and in relation to which NSWALC did not have an opportunity to make submissions.) It was

erroneous for the Court of Appeal to hold that these visits were sufficiently connected with the dedicated gaol purposes so as to render the acts, facts, matters and circumstances "occupation" within the meaning of the Land Rights Act. Punishment of offenders by way of community service order is definitionally not punishment by way of imprisonment. In fact, the two forms of punishment are mutually exclusive, statutory alternatives. "*Instead of* imposing a sentence of imprisonment on an offender, a court may make a community service order …": subsec 8(1) of the *Crimes (Sentencing Procedure) Act 1999* (NSW) (emphasis added). The coincidence that these transient visitors happened to be CSO workers could not advance the discharge of the Minister's onus of demonstrating that the land was occupied, having regard to the dedicated gaol purposes, within the meaning of the Land Rights Act and it was erroneous for the Court of Appeal, of its own volition, to hold otherwise.

36 The Court of Appeal, in applying a test for "occupation" that does not account for the dedicated purpose of the land, but which permits the Minister to rely upon acts, facts, matters and circumstances directed only to the holding of Crown land pending a decision on future use, has perpetrated the "self-levitating" construction of para 36(1)(b) which was rejected in *Wagga Wagga CA* (2007) 157 LGERA 18 at 29 [55] (Mason P), 33 [79] (Tobias JA). The claimed land was no longer being occupied (or used) for the only thing for which it was permitted to be occupied (or used) — that is, as a gaol — and it thereby became susceptible to claim within the scheme of the Land Rights Act. The Court of Appeal's construction of the Land Rights Act is anti-purposive and for that reason erroneous, because it permits the Crown to deal with any surplus land (the very kind of land that is intended to be claimable) so as to defeat a claim: cf *Malabar* (2012) 193 LGERA 276. All that is required, on the approach of the Court of Appeal, is that the Crown secure and maintain the vacant land pending a decision on its future use, or indeed, on its alienation to private interests. Parliament may be regarded as having in mind that the Crown would be prudent in its stewardship of surplus land. It cannot be regarded as treating such basic norms of conduct in the public interest as amounting to occupation so as to stifle a claim under the Land Rights Act.

Second proposition: in the alternative to the first proposition, the claimed land was not lawfully occupied because there was no statutory authorisation

Requirement for statutory authorisation

37 Section 2 of the 1855 Act vested the "entire management and control of the Waste Lands belonging to the Crown" (including the claimed land) in the New South Wales legislature. As a consequence, statutory authority is required for the lawful management and control, including occupation by agents of the Crown itself, of the Waste Lands.

38 There was in 1855, and is now, no non-statutory executive power, prerogative or otherwise, to alienate interests in Crown land: *Australian Colonies Waste Lands Act 1842* (Imp) (5 & 6 Vict, c 36); see also *Crown Lands Act 1702* (1 Ann c 1). This longstanding constitutional restraint extends beyond control of the alienation of proprietary interests in the strict sense and also controls the grant of mere licences to occupy Crown land: see sec 17 of the *Australian Colonies Waste Lands Act 1842* (Imp) (5 & 6 Vict, c 36) permitting pasture and timber licences not exceeding 12 months in duration; see also secs 5 and 81 of the *Crown Lands Act 1884* (NSW); sec 70 of the *Crown Lands Consolidation Act 1913* (NSW); sec 6 of the Crown Lands Act.

39 Because the Crown can act only through its agents, there is also no non-statutory executive power to authorise the occupation of Crown land by public bodies. The negative power to exclude strangers from real property, which is an incident of proprietorship or legal possession, cannot be conflated or confused with an affirmative power to occupy land or to authorise the occupation of land. The statement of Barton ACJ in *Williams v Attorney-General* (1913) 16 CLR 404 at 430 to the effect that the executive government can put Crown land "to any use not expressly or impliedly forbidden" by statute is a statement about permissible *uses* of land, not one about the source of *power* to use land, let alone to occupy it. Indeed, Higgins J said in that case that, while the 1855 Act may not have taken away the pre-existing powers of the Governor, there was nothing "to show that … a power of management was ever conferred on the Governor": *Williams* (1913) 16 CLR 404 at 465.

40 It is therefore a distraction to ask whether the 1855 Act abrogated a non-statutory executive power to occupy Crown land {CA [131]}, because none existed in the first place. The power to authorise the occupation of Crown land was long vested in the Imperial legislature and that governmental function was transferred to the New South Wales legislature in 1855.

41 Alternatively, if there was any non-statutory executive power to occupy Crown land, it was abrogated by sec 2 of the 1855 Act. Contrary to the reasoning of the Court of Appeal {CA [131]} it is not necessary for there to be express words or necessary implication to effect such an abrogation because any power to occupy the land was not a *prerogative* power in the strict sense of "the enjoyment by the executive government of preferences, immunities and exceptions peculiar to it and denied to the citizen": *Cadia Holdings v New South Wales* (2010) 242 CLR 195 at 223 [75]. It is, at most, a non-statutory executive power incidental to the Crown's capacity as a legal person to own land and therefore a power that it shares with its subjects. In any event, the language of sec 2 of the 1855 Act is sufficiently clear: it vests

the "entire management and control" of the waste lands in the legislature. "Entire" means what it says, and thus encompasses the capacity or power to occupy as an aspect of management and control. It is relevant that the 1855 Act, although undoubtedly concerned to transfer power from the Imperial polity to the colonial polity {CA [130]}, was also concerned to establish responsible government in New South Wales and thus to divide power between the legislative and executive arms of the polity. As Isaacs J explained, the control of the waste lands was "given, not to the King in his Executive capacity, but to the legislature" and not as a matter of title but as a matter of governmental function: *Williams* (1913) 16 CLR 404 at 456.

42 Furthermore, the express reference in sec 2 of the 1855 Act to "all royalties mines and minerals" indicates that, where non-statutory executive power was to be preserved or continued, sec 2 said so expressly. Contrary to the reasoning of the Court of Appeal {CA [132]-[137]}, that express reference supports rather than denies NSWALC's submission in relation to the absence of any continuing non-statutory executive power to occupy the land.

Absence of statutory authorisation

43 No statute expressly authorised the occupation of the claimed land as at the date of claim. The proclamations of the claimed land as a correctional centre having been revoked, none of the powers in or deriving from the CAS Act was engaged. The Court of Appeal held that the Crown Lands Act impliedly conferred authority "to maintain and secure the land for the time reasonably needed to perform the obligations imposed by that Act" in respect of assessing the land pending a decision to revoke the dedication {CA [138]-[139]}. The Court of Appeal did not identify *on whom* the Crown Lands Act impliedly conferred that authority. Assuming that such an authority is properly implied as a matter of construction, it could *only* be conferred on those responsible for dedicated land or Crown land and who administer the Crown Lands Act, namely, the Crown Lands Ministers: see secs 10(e) and 12(1) of the Crown Lands Act; sec 15(2) of the *Interpretation Act 1987* (NSW).

44 Bearing in mind the Minister's onus of proof in the proceeding (sec 36(7) of the Land Rights Act), the evidence did not establish that any Crown Lands Minister had any involvement in authorising the occupation of the claimed land.

Third proposition: further or in the alternative to the second proposition, the claimed land was not lawfully occupied because only the Crown Lands Ministers had the requisite legal authority

45 Even if statutory authority was not required, there was no relevant non-statutory authority which authorised the occupation of the claimed land *by those who in fact occupied it.*

46 The primary judge found as a fact that "CSNSW lawfully occupied the claimed land" as a "manifestation of the Crown in NSW" {PJ [167]-[168]}. CSNSW is not, of course, a legal person but part of the Department of Justice, for which the responsible Minister at the date of claim was the Minister for Justice: definition of "Corrective Services NSW" in sec 3 of the CAS Act; *Allocation of the Administration of Acts* as at 24 February 2012.

47 The Court of Appeal accepted that it was "highly artificial" in those circumstances to speak of lawful occupation by CSNSW {CA [143]}, but it held that there was no material error of law in the primary judge's reasons because the identity of the occupant was immaterial {CA [141]-[145]}. With respect, that cannot be correct: the identity of the occupant will in many if not all cases be essential to determining whether occupation by *that* occupant is lawful.

48 The Court of Appeal held further that, if it was necessary to identify the occupant, then the occupant was simply "the Crown in right of New South Wales" {CA [146]}. Implicit in that holding is the erroneous proposition that, if a given parcel of land is amenable to occupation by the Crown in right of New South Wales, that occupation can be effected by *any* and *all* of the Crown's emanations. Again with respect, that cannot be correct for the following reasons.

49 The executive branch of the New South Wales polity is not a monolithic juristic entity which, in any or all of its manifestions, is legally authorised to perform or to authorise acts amounting to occupation of land owned by the polity, especially land that has been dedicated under the Crown Lands Act. The executive branch of the polity consists of different emanations, each having different, or at least potentially different, functions and duties. It is an elementary constitutional principle that an emanation of the Crown can lawfully do only what it is legally authorised to do, and there is nothing at all unusual about different emanations of the Crown having different spheres of authority. The notion of "lawful" occupation within the meaning of sec 36(1)(b) of the Land Rights Act requires attention to the particular emanation of the polity that is said to have performed or authorised the acts amounting to occupation.

50 Ministers of the Crown are "not the servants or agents of the juristic entity the State": *West Lakes v South Australia* (1980) 25 SASR 389 at 407 (Zelling J). They perform a constitutional role in the administration of the juristic entity; they are not interchangeable with "the State", nor are they interchangeable with each other in the performance of their respective functions and duties, save in the circumstances expressly provided for in the Constitution: see secs 35-37A of the *Constitution Act 1902* (NSW). The respective functions

and duties which might be exercised by a particular Minister include not only functions conferred or imposed by an instrument but also "by official or other custom": sec 37A of the *Constitution Act 1902* (NSW).

51 With the revocation of the proclamations, the Minister for Justice (and those responsible to him including the employees of his Department who comprise CSNSW) ceased to have authority to occupy, or to authorise the occupation of, the claimed land. Because the claimed land remained dedicated, and therefore within the regime of the Crown Lands Act, any authority to occupy it devolved to the Crown Lands Ministers.

52 In relation to this point, NSWALC embraces, if it is necessary to do so, the proposition that the Crown Lands Act impliedly conferred authority on the Crown Lands Ministers to secure and maintain the claimed land pending a decision as to its future use {CA [138]-[139]}. Exercising that stewardship by any emanation of the Crown *other than* the Crown Lands Ministers or those authorised by them would be contrary to the exclusive authority impliedly conferred on those Ministers and unlawful for that reason.

53 The Court of Appeal erred in failing to hold that the primary judge erred in finding that CSNSW lawfully occupied the claimed land. The Minister did not prove that the Crown Lands Ministers, who are the only persons with any possible legal authority to look after, and perhaps thus to occupy, the claimed land, in fact occupied or authorised the occupation of the claimed land. Accordingly, it is not open to hold that the claimed land was lawfully occupied at the date of claim.

Part VII: Legislation

54 The following applicable statutory provisions, as at 24 February 2012 (being the date of claim), are reproduced in Annexure A; the provisions have not changed materially since that date:

Aboriginal Land Rights Act 1983 (NSW), sec 36
Constitution Act 1902 (NSW), secs 35, 36, 37, 37A
Crimes (Administration of Sentences) Act 1999 (NSW), sec 3 (in part)
Crimes (Sentencing Procedure) Act 1999 (NSW), sec 8(1)
Crown Lands Act 1989 (NSW), secs 10, 12(1)
New South Wales Constitution Act 1855 (18 & 19 Vict c 54), sec 2

Part VIII: Orders sought

55 The orders sought are:

(1) Appeal allowed with costs.

(2) Set aside the orders of the New South Wales Court of Appeal made on 16 November 2015 and in their place order that:

(a) the appeal be allowed with costs;

(b) the orders of the Land and Environment Court made on 1 December 2014 be set aside;

(c) the respondent transfer Lot 7304 DP1146099 and Lot 447 DP751252 (**the land**) in fee simple to the Illawarra Local Aboriginal Land Council;

(d) the respondent do all things necessary to enable the transfer of the land in accordance with Order (c) within 6 months of the date of these orders.

Part IX: Time estimate

56 The appellant estimates that it requires no more than 2½ hours for the presentation of its oral argument, including reply submissions.

22nd July 2016

	Bret Walker		Brendan Lim
Phone	(02) 8257 2527	Phone	(02) 8228 7112
Fax	(02) 9221 7974	Fax	(02) 9232 7626
Email	maggie.dalton@stjames.net.au	Email	blim@elevenwentworth.com

Counsel for the appellant

ANNEXURE A

Aboriginal Land Rights Act 1983 **(NSW)**

36 Claims to Crown lands

(1) In this section, except in so far as the context or subject-matter otherwise indicates or requires:

claimable Crown lands means lands vested in Her Majesty that, when a claim is made for the lands under this Division:

(a) are able to be lawfully sold or leased, or are reserved or dedicated for any purpose, under the *Crown Lands Consolidation Act 1913* or the *Western Lands Act 1901*,

(b) are not lawfully used or occupied,

(b1) do not comprise lands which, in the opinion of a Crown Lands Minister, are needed or are likely to be needed as residential lands,

(c) are not needed, nor likely to be needed, for an essential public purpose, and

(d) do not comprise lands that are the subject of an application for a determination of native title (other than a non-claimant application that is an unopposed application) that has been registered in accordance with the Commonwealth Native Title Act, and

(e) do not comprise lands that are the subject of an approved determination of native title (within the meaning of the Commonwealth Native Title Act) (other than an approved determination that no native title exists in the lands).

Constitution Act 1902 **(NSW)**

35 Definitions

In this Part:

functions includes powers, authorities and duties.

unavailable, in relation to a Minister of the Crown, means unavailable by reason of the Minister's absence or disability or for any other reason.

36 Authority for Minister of the Crown to act for and on behalf of another Minister of the Crown

(1) The Governor may, from time to time, authorise a Minister of the Crown to act for and on behalf of another Minister of the Crown for any period specified or described by the Governor.

(2) Where a Minister of the Crown is authorised under this section to act for and on behalf of another Minister of the Crown, any function appertaining or annexed to the office of that other Minister may, while the authority remains in force, be exercised or performed from time to time by the Minister so authorised instead of by that other Minister.

(3) An authority under this section may be revoked by the Governor.

(4) A Minister of the Crown may be authorised under this section by reference to his name or by reference to the title of the office which he holds as Minister of the Crown.

(5) Notice of an authority under this section, or the revocation of such an authority, may be published in the Gazette at any time, and, where such a notice is so published, judicial notice shall be taken of the notice and of the authority or revocation, as the case may be.

(6) Every authority under this section shall be recorded by the officer in charge of the records of the Executive Council.

37 Unavailability of Minister of the Crown

A Minister of the Crown may exercise or perform for and on behalf of another Minister of the Crown a function appertaining or annexed to the office of that other Minister if the firstmentioned Minister is satisfied that the other Minister is unavailable and that any Minister of the Crown authorised under section 36 to exercise or perform that function is unavailable.

37A Provisions ancillary to sections 36 and 37

(1) Sections 36 and 37 apply to the functions appertaining or annexed to the office of a Minister of the Crown, whether those functions are conferred or imposed by the terms (express or implied) of an Act or instrument under an Act, or by or under any other law, or by official or other custom, but do not apply to the functions appertaining or annexed to that office by virtue of an authority under section 36.

(2) Any act, matter or thing done or omitted by a Minister of the Crown while acting for or on behalf of another Minister of the Crown:

(a) under an authority under section 36, or

(b) under the authority of section 37,

shall be valid and effectual and shall have the same consequences as if the act, matter or thing had been done or omitted by that other Minister.

(3) In all proceedings and before all persons acting judicially, it shall be presumed, in the absence of evidence to the contrary, that a Minister of the Crown who purports to act for or on behalf of another Minister of the Crown was authorised by or under section 36 or 37 so to act.

Crimes (Administration of Sentences) Act 1999 (NSW)

3 Interpretation (in part)

(1) In this Act:

Corrective Services NSW means that part of the Department of Justice and Attorney General comprising the group of staff who are principally involved in the administration of this Act.

Crimes (Sentencing Procedure) Act 1999 (NSW)

8 Community service orders

(1) Instead of imposing a sentence of imprisonment on an offender, a court may make a community service order directing the offender to perform community service work for a specified number of hours.

Crown Lands Act 1989 (NSW)

10 Objects of Act

The objects of this Act are to ensure that Crown land is managed for the benefit of the people of New South Wales and in particular to provide for:

(a) a proper assessment of Crown land,

(b) the management of Crown land having regard to the principles of Crown land management contained in this Act,

(c) the proper development and conservation of Crown land having regard to those principles.

(d) the regulation of the conditions under which Crown land is permitted to be occupied, used, sold, leased, licensed or otherwise dealt with,

(e) the reservation or dedication of Crown land for public purposes and the management and use of the reserved or dedicated land, and

(f) the collection, recording and dissemination of information in relation to Crown land.

12 Responsibility of Minister

(1) The Minister is responsible for achieving the objects of this Act.

New South Wales Constitution Act 1855 **(18 & 19 Vict c 54)**

2 From the day of the proclamation of this Act in the said Colony of New South Wales (the said reserved Bill as amended as aforesaid having been previously assented to by Her Majesty in Council as aforesaid) so much and such parts of the several Acts of Parliament mentioned in the Schedule (2) of this Act as severally relate to the said Colony of New South Wales and are repugnant to the said reserved Bill amended as aforesaid shall be repealed and 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 Provided that so much of the Acts of the thirteenth and fourteenth years of Her Majesty chapter fifty-nine and fifth and sixth years of Her Majesty chapter seventy-six mentioned in the said Schedule as relates to the constitution appointment and powers of the Legislative Council of the said Colony of New South Wales shall continue in force until the first writs shall have issued for the Election of Members to serve in the House of Assembly in pursuance of the provisions of the said reserved Bill amended and assented to as aforesaid but no longer Provided that nothing herein contained shall affect or be construed to affect any contract or to prevent the fulfilment of any promise or engagement made by or on behalf of Her Majesty with respect to any lands situate in the said Colony in cases where such contracts promises or engagements shall have been lawfully made before the time at which this Act shall take effect within the said Colony nor to disturb or in any way interfere with or prejudice any vested or other rights which have accrued or belong to the licensed occupants or lessees of any Crown Lands within or without the Settled Districts under and by virtue of the provisions of any of the Acts of Parliament so repealed as aforesaid or of any order or orders of Her Majesty in Council issued in pursuance thereof.