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

BETWEEN **NEW SOUTH WALES ABORIGINAL LAND COUNCIL**
Appellant

MINISTER ADMINISTERING THE CROWN LANDS ACT
Respondent

APPELLANT'S REPLY

Part I: Certification

1 This reply is in a form suitable for publication on the internet.

Part II: Submissions in reply

Reply in relation to first proposition: claimed land not occupied

2 The Minister professes to accept that any dedication of land is relevant to whether the land is lawfully occupied {MS [42]} but does not confront the circumstance that the Court of Appeal took the dedication into account *only* in relation to the question of whether the asserted occupation was lawful and not in relation to the question of occupation itself {AB 362 [19]-[20]; AB 383-385 [90]-[92]}. The Minister invokes the reasons of Windeyer J in *Randwick Municipal Council v Rutledge* (1959) 102 CLR 54 at 75 where his Honour said that it would be a mistake "to think that lands appropriated and taken into use by the Crown for a particular purpose ... became dedicated to that purpose and could not thereafter be used by the Crown for another purpose" {MS [34], [43]}. The submission appears to be that a dedication of land cannot inform the question of *factual* occupation under the Land Rights Act because the "significance" of a dedication is limited in some relevant respect.

3 The submission should not be accepted. Windeyer J was speaking of the Crown putting land to use in a way that did *not* amount to a dedication; his Honour was not speaking of land "dedicated" in the Crown Lands legislation sense. Dedications in accordance with Crown Lands legislation, as Windeyer J recognised in *Rutledge* at 77, are "immutable" unless and until revoked {see also AB 363 [23]}. Accordingly, the dedications of the claimed land in this case, which were not revoked, operate to lend colour to the question of "What would

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constitute occupation?", which is central to the statutory test under para 36(1)(b) of the Land Rights Act: *Wagga Wagga HCA* (2008) 237 CLR 285 at 305 [69].

4 The Minister also submits that the dedications of the claimed land, if they are to inform the question of occupation, can be characterised as having an "essentially passive" purpose which "may be fulfilled simply by a gaol being constructed" or "physically located" "on the site" {MS [44]}. Relatedly, the Minister appears to suggest that the purpose of the asserted occupation was "holding the land in its current state as the physical site of gaol buildings and associated gardens and pending a decision on future use" {MS [48]}.

5 These submissions should be rejected. *First*, neither the primary judge or the Court of Appeal characterised the acts, facts, matters and circumstances said to constitute occupation as the holding of any "gaol" physically located on the site. That is because there was no "gaol", only a former gaol in light of the revocation of the proclamations which previously rendered the building a "gaol" building, in the sense of a "correctional centre" {AB 369 [45]–[46]}. *Secondly*, the Minister asserted and the courts below accepted an occupation based not on holding a "gaol" on the claimed land, but simply on "hold[ing] the land pending a decision on its future use" {AB 372 [53]}. The Minister cannot now resile from the case that he advanced and that was upheld in the courts below by adding a new gloss to it. *Thirdly*, "occupied" within the meaning of para 36(1)(b) of the Land Rights Act means actually occupied, not merely constructively or notionally occupied {AB 361 [16]-[17]; AS [27]}. The Minister's suggestion that the Court should assess whether the claimed land was *actually* occupied against an "essentially passive" reading of the dedications should therefore be rejected.

6 At MS [45], the Minister submits that NSWALC erroneously "isolates" each of the asserted indicia of occupation and assesses their sufficiency separately. NSWALC accepts that the asserted indicia are to be assessed together, but the Minister does not explain how the aggregation of several asserted indicia, no one of which is actually indicative of occupation, can support a finding of occupation sufficient to satisfy para 36(1)(b) of the Land Rights Act. Nor does the Minister appear to contest that each asserted indicium taken individually is not indiciative of occupation.

7 The Minister's attempt at MS [46]-[47] to distinguish the *Wagga Wagga* case is unpersuasive. The finding of occupation in the present case, based on acts, facts, matters and circumstances directed to a purpose of merely holding the claimed land pending a decision on its future use, tends to defeat the claimability of *all* surplus land, which is the very category of land intended to be claimable. The asserted "holding" purpose is calculated to support acts of

occupation that are merely notional or constructive and which do not amount to actual occupation as required under the Land Rights Act; a purpose that "does not require substantial occupation in order to be fulfilled" {AB 310 [93]}. In that sense, the Minister's construction of para 36(1)(b) is erroneous for the same reasons that it was erroneous in *Wagga Wagga CA* and contrary to the purpose of the Land Rights Act.

Reply in relation to second proposition: statutory authorisation required

8 Contrary to MS [19], the *Australian Colonies Waste Lands Act 1842* (Imp) (5 & 6 Vict, c 36) did not merely "allow the sale of Crown land" in accordance with the Act; like its ancient precedents in England, it *prohibited* the disposition of interests in, or the granting of licences to occupy, Crown land and thereby abrograted any common law power to do the same. Any common law powers that thereafter passed from the Imperial Crown to the Executive government of New South Wales upon self-government could not have included power to dispose or authorise occupation of Crown land. Contrary to MS [20], this submission is not inconsistent with *Attorney-General v Brown* (1847) 1 Legge 312, which concerned a grant of land made in 1840, prior to the enactment of the 1842 Act.

9 The 1855 Act then relevantly passed power to the New South Wales legislature alone (or alternatively abrogated any pre-existing common law power). In circumstances where the eventual practice of the Governor to act on the advice of local, rather than Imperial, ministers was still evolving, the choice to effect local management and control of Crown lands by vesting the power of management and control in the undeniably local legislature is unsurprising. Gummow J explained of the equivalent Queensland provision that "the result was to withdraw from the Crown, whether represented by the Imperial authorities or by the Executive Government of Queensland, significant elements of the prerogative. The management and control of waste lands in Queensland was vested in the legislature and any authority of the Crown in that respect had to be derived from statute": *Wik Peoples v Queensland* (1996) 187 CLR 1 at 173-174. Occupation of land is an aspect of the land's management and control, as the Minister accepts {MS [21]}.

10 The assumption in MS [26] that sec 2 of the 1855 Act merely conferred legislative power "to make laws" is not correct and is not supported by the text of the statute. Where the 1855 Act merely conferred power to make laws, it used ordinary and familiar language to do so, as in sec 4, which commences, "It be lawful for the Legislature of *New South Wales* to make Laws ... in the same Manner as any other Laws for the good Government of the said Colony". In contrast, the express vesting of "the entire Management and Control of the

Waste Lands" connotes more than a power to legislate, which greater power is effected by a concomitant denial of power to other branches of government.

11 Such denial of executive power to occupy the waste lands without statutory authority (whether the Crown's title is a mere radical title or a fee simple) did not amount to a divestment of any proprietary right (contrary to Tas [13]; see also Vic [46]); an affirmative governmental power to carry out acts of occupation is distinct from the negative powers of exclusion that are attendant upon title to land (or "ownership" as it is put in the quotation relied upon at Tas [13]). Accordingly, contrary to MS [29], Vic [27], and Tas [18], the constructional presumption against legislative interference with property rights (*Commonwealth v Western Australia* (1999) 196 CLR 392 at [34]) is not engaged; nor are the other cases relied on by the Minister, which concern wholly different interactions between statute and common law. Relatedly, it is no part of NSWALC's case, contrary to MS [32], that statutory authority is required to "hold" land; the submissions on this point highlight the Minister's conflation of holding and occupation, which is at the heart of the appeal: merely holding is not occupation and that is why the land, despite being "held", is nonetheless claimable because it is not "occupied".

12 Contrary to MS [30], it would be quite odd for a provision said to have a *narrower* effect (sec 6 of the Crown Lands Act on the Minister's submission) to repeal merely impliedly a *wider* prohibition (sec 2 of the 1855 Act). But it is not necessary to decide whether the 1855 Act has been impliedly repealed because the historical work which that Act did in allocating governmental power in New South Wales (on NSWALC's case) was done in 1855 and cannot be undone merely by subsequent repeal.

Reply in relation to third proposition: actual occupants had no lawful authority

13 The Minister and interveners do not identify any source of lawful authority specifically empowering "the group of staff" at the Department of Justice and Attorney-General "who are principally involved in the administration of" the *Crimes (Administration of Sentences) Act 1999* (NSW) (that is, "Corrective Services NSW" as defined) to occupy or authorise the occupation of the claimed land. Whether or not *statutory* authority was required (the issue raised by NSWALC's second proposition), *some* authority was required.

14 The Minister is driven to assert an *at-large* common law or prerogative power to occupy land that the State owns. Implicit in the Minister's submissions is that *any* employee of the Executive government of New South Wales can lawfully exercise the asserted power. If that is not the Minister's submission, then *no* reason is offered why those employees who comprise "Corrective Services NSW", and not all other employees, can exercise the power.

The proposition is one of extraordinary width and should be rejected. Indeed, "Corrective Services NSW" is statutorily defined precisely in order that certain statutory powers may be conferred on the employees comprising it. Those employees are distinguished from all others *only* by their special statutory role. Once the claimed land ceased to be proclaimed as a correctional centre, Correctve Services NSW had no special responsibility for the land; to accept that those employees could occupy or authorise the occupation of the land would be to accept that a police officer or a school teacher could lawfully do the same.

15 The Minister also relies on a statutory power said to be impliedly conferred by the Crown Lands Act {MS [35]}. Also implicit in that submission is that *any* employee of the Executive government of New South Wales can lawfully exercise the asserted statutory power. That proposition should also be rejected. It would be unnecessary and unworkable, and therefore erroneous, to construe the Crown Lands Act as conferring the requisite power on *all* government employees, or even *all* Ministers of the Crown. The Crown Lands Act is administered by particular Ministers, who are also identified in the statute as having responsibility for achieving the objects of the Act: sub-sec 12(1). Any implied power would be conferred on them and no-one else.

Disposition of appeal

16 It is the practice of the Court not to decide constitutional questions unless necessary to do so: *Wurridjal v Commonwealth* (2009) 237 CLR 309 at [355]; *Lambert v Weichelt* (1954) 28 ALJR 282 at 283. That practice should extend to questions of State constitutional law, not least because those questions may be federal constitutional questions by reason of sec 106 of the Constitution. Notwithstanding the order in which NSWALC has identified its three propositions, the Court should determine: first, whether the Court of Appeal erred in holding that the claimed land was occupied in fact; secondly, and only if the Court of Appeal did not so err, whether the Court of Appeal erred in holding that the identity of the occupant of the claimed land was immaterial, or in holding that the claimed land was lawfully occupied simply by the Crown (whether under a statutory or non-statutory authorisation); thirdly, and only if necessary to do so, whether statutory authorisation was required.

2nd September 2016

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