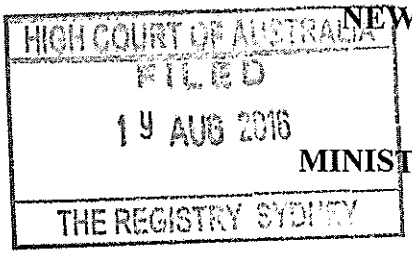
IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No. S168 of 2016

BETWEEN:



NEW SOUTH WALES ABORIGINAL LAND COUNCIL
Appellant

MINISTER ADMINISTERING THE CROWN LANDS ACT
Respondent

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SUBMISSIONS ON BEHALF OF RESPONDENT

PART I: INTERNET CERTIFICATION

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

PART II: CONCISE STATEMENT OF THE ISSUES

2. The respondent submits that the following issues arise:

   (a) does the Crown possess the capacity to occupy land it owns in the absence of
20 contrary statutory provisions? If so, was this capacity reposed in the colonial Executive and, upon Federation, the Crown in right of New South Wales?

   (b) did the New South Wales Constitution Act 1855 (Imp) (18 & 19 Vic, c 54) (**the 1855 Imperial Act**) abrogate any capacity of the Crown to occupy its own land?

   (c) is there is a requirement that the Crown's occupation of land be authorised by statute? and

   (d) did the relevant acts, facts, matters and circumstances constitute lawful occupation of the claimed land for the purposes of s 36(1)(b) of the Aboriginal Land Rights Act 1983 (NSW) (**ALR Act**)?

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PART III: S 78B NOTICES

3. The appellant has given notice pursuant to s 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 s 106 of the Commonwealth Constitution. The respondent certifies that he considers that no other notice is required to be given.

PART IV: FACTS

4. The primary facts relevant to the appeal are not in contention, and are summarised in the appellant's submissions at [9]-[16]. However, the factual findings made by the primary judge extend beyond those summarised in the appellant's submissions and included, relevantly, findings that:

    (a) considered collectively, the activities on the claimed land show that the claimed land was occupied in fact at the date of the claim by Corrective Services NSW (**CSNSW**) as a manifestation of the Crown in right of New South Wales (see, e.g., the primary judge's judgment (**PJ**) at [112]-[113], [126], [165]-[168]: Appeal Book (**AB**) 318, 323, 337-339); and

    (b) the purpose of that occupation was to possess, secure, control and maintain the land pending a decision on its future use (PJ [93]: AB 310-311).

PART V: LEGISLATION

5. The respondent does not rely on any legislation in addition to that listed by the appellant at AS [54] other than:

    (a) Crown Lands Act 1989 (NSW) (**CL Act**), s 3(1) and Pt 5;

    (b) New South Wales Constitution Act 1855, Sch 1;

    (c) Australia Act 1986 (Cth), s 3;

    (d) Imperial Acts Application Act 1969 (NSW), s 8; and

    (e) Australian Courts Act 1828 (Imp) (9 Geo IV c 83).

PART VI: ARGUMENT

Respondent's submissions in summary

6. The respondent submits that:

   (a) at common law the Crown possesses the capacity to occupy land, by virtue of its prerogative powers or, in the alternative, the capacity possessed by ordinary persons. This power, or in the alternative, capacity, came to be reposed in the colonial Executive and, upon Federation, the Crown in right of New South Wales;

   (b) the 1855 Imperial Act does not abrogate the Crown's prerogative power or capacity to occupy land, nor does it render the occupation of the land unlawful;

   (c) there is no requirement that the Crown's occupation of land be pursuant to statutory authority, though, nevertheless, in the circumstances here, there was implied statutory authority to occupy the claimed land under the CL Act; and

   (d) both the primary judge and the Court of Appeal (**CA**) were correct to find that the acts, facts, matters and circumstances of occupation were sufficient to constitute lawful occupation of the claimed land for the purpose of s 36(1)(b) of the ALR Act.

7. The submissions below address each of these propositions in turn.

The powers of the Crown

8. The sovereign's common law powers are the historical source of the Crown's non-statutory executive powers: see, e.g., Winterton, Parliament, the Executive and the Governor General (Melbourne University Press, 1983) at 31.

9. In this context, it is necessary, first, to identify what is meant by the Crown. This assumes considerable relevance when considering the acts of occupation which underpin the conclusions of both the primary judge and the CA that the claimed land was lawfully occupied.

10. As Gleeson CJ, Gummow and Hayne JJ stated in Sue v Hill (1999) 199 CLR 462, the Crown can be identified, relevantly, both as referring to the executive branch of government (at 499 [87]) and to "the paramount powers of the United Kingdom, the parent state, in relation to its dependencies" (at 499 [88]). This latter use of the term arose during the course of colonial developments in nineteenth century (and thus assumes relevance in this appeal) and was explained by Professor Pitt Cobbett in the passage quoted in full by their Honours at 499 [88]:

> In England the prerogative powers of the Crown were at one time personal powers of the Sovereign; and it was only by slow degrees that they were converted to the use of the real executive body, and so brought under control of Parliament. In Australia, however, these powers were never personal powers of the King; they were even imported at a time when they had already to a great extent passed out of the hands of the King; and yet they loom here larger than in the country of their origin. The explanation would seem to be that, in the scheme of colonial government, the powers of the Crown and the Prerogative really represent, – not any personal powers on the part of the Sovereign, – but those paramount powers which would naturally belong to a parent State in relation to the government of its dependencies; although owing to the failure of the common law to recognise the personality of the British 'State' these powers had to be asserted in the name and through the medium of the Crown.

The "colonial" prerogative, as Professor Cobbett styled it, is that which "although consisting originally of powers reserved to the parent State, has with the evolution of responsible government, been gradually converted to the use of the local executive, and so brought under the control of the local Legislature".

11. As to the nature of the prerogative, H V Evatt in The Royal Prerogative (1987) at 30-31 "divided the prerogative powers of the Crown into three categories for analytical purposes" (per Hayne J in Williams v Commonwealth (2012) 248 CLR 156 at 253 [202]): executive powers; immunities and privileges; and proprietary rights. It was said by Dr Evatt that prerogatives in the nature of property, "includ[e], for instance, the ownership of lands in a new Colony, [and] are ordinary rights of property against all the world".

12. This aspect of the Imperial Crown's prerogative (ie, powers originally reserved to the parent State), including those of a proprietary nature, on the grant of responsible government, became vested "in the Crown in right of the colony": Sue v Hill (1999) 199 CLR 462 at 500 [89]; New South Wales v Commonwealth (1975) 135 CLR 337 at 494 per Jacobs J. O'Connor J noted in South Australia v Victoria (1911) 12 CLR 667 at 710-711 that:

> As rights of self-government were conferred on each Colony exclusive rights of executive authority over matters within the ambit of the rights conferred became of necessity vested in the executive power of the Colony. ... That grant 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. If that were not so, the right of self-government in respect of public lands would have been an empty form.

13. In Walsh v Minister for Lands for New South Wales (1960) 103 CLR 240 Windeyer J noted (at 254) that the underlying object of Crown lands legislation from 1861 onwards was "to control the Crown prerogative of disposing of the wastelands of the Colony at will".

14. In turn, these powers which vested in the colonies were, upon Federation, inherited by the States and are an aspect of the executive power of the Crown in right of New South Wales.

15. Here, it should be noted that the nature of State Executive power is not greatly illuminated by the Constitution Act 1902 (NSW), which merely references some of the constituent parts of this branch of the government: Anne Twomey, The Constitution of New South Wales (The Federation Press, 2004) at 583. Nevertheless, the content of State Executive power relies, for its source, "upon constitutional implications derived ... from the common law and long established convention", including the prerogative: ibid at 584.

16. In Johnson v Kent (1975) 132 CLR 164 Barwick CJ (with whom McTiernan and Stephen JJ agreed) observed (at 169-170):

> ... whatever the position in other parts of Australia, the executive, unless its power is relevantly reduced by statute, may in my opinion do in the [Australian Capital] Territory upon or with respect to the land in the Territory anything which remains within the prerogative of the Crown. ... what the executive does upon and in respect of such lands will be done by virtue of the prerogative and not by virtue of proprietorship.

Jacobs J said on the same question (at 174):

> I am of the opinion that the executive power of the Commonwealth extends to the doing of acts upon its own lands within a territory surrendered by a State to the Commonwealth without any statutory authority other than the necessary appropriation of funds if those acts are of the kind which lie within the prerogative of the Crown.

17. In the alternative, even if there is no State prerogative power to occupy Crown lands, it cannot be doubted that "the Executive possesses what have been described as the 'capacities' which may be possessed by persons other than the Crown" itself: per French CJ in Pape v Federal Commissioner of Taxation (2009) 238 CLR 1 at 60 [126]; see, e.g., Williams v Commonwealth (2012) 248 CLR 156 at 184 [22] per French CJ (esp footnote 71).

18. The comments of French CJ accord with the observations of Griffiths CJ in Clough v Leahy (1904) 2 CLR 139, where drawing upon common law principles, the Chief Justice observed that that which is lawful to an individual may be done by the Crown through its officers. Griffith CJ held that because the NSW Royal Commission, with which the proceeding was concerned, lacked coercive powers and could not interfere with individuals' liberty, its powers were analogous to the powers of an individual and, therefore, intra vires because (at 157) "that which is lawful to an individual can surely not be denied to the Crown". The Executive's capacity to make inquiries at common law was thus extended to a broad proposition that all lawful capacities of individuals, which did not interfere with an individual's liberty or reputation or course of justice, could lawfully be exercised by the Executive.

19. The appellant denies (at AS [38]) that non-statutory executive power, prerogative or otherwise, extends to a right to alienate Crown land, or to create other lesser interests

therein. It relies on the Australian Colonies Waste Lands Act 1842 (Imp) (5 & 6 Vic, c 36) and the Crown Lands Act 1702 (1 Ann c 1) in support of this proposition. As to the former, section II did no more than allow the sale of Crown land provided it was in accordance with "the Regulations herein-after prescribed". As to the latter, the Crown Lands Act 1702 operated to regulate the form of grants of land by the sovereign in England and Wales. It could not have been "applied within the said Colonies" as at 25 July 1825 as required by the Australian Courts Act 1828 (Imp) (9 Geo IV c 83): see Carney, The Constitutional Systems of the Australian States and Territories (Cambridge University Press, 2006), at 137-141. In any event the Crown Lands Act 1702 was either expressly repealed by s 8(1) of the Imperial Acts Application Act 1969 (NSW) or impliedly repealed by s 6 of the CL Act as authorised by s 3(2) of the Australia Act 1986 (Cth).

20. The appellant's denial is also inconsistent with The Attorney-General v Brown (1847) 1 Legge 312 at 316-318 where the Supreme Court of NSW rejected the proposition that the "Crown has not and never had any property in the waste lands of the Colony—that is, any beneficial ownership or right to grant any of them without authority of Parliament". Furthermore, in Randwick Corporation v Rutledge (1959) 102 CLR 54 at 71 Windeyer J observed that "... when in 1847 a bold argument, which then had a political flavour, challenged the right of the Crown, that was to say of the Home Government, to dispose of land in the colony, it was as a legal proposition firmly and finally disposed of by Sir *Alfred Stephen C.J.*: *The Attorney-General v. Brown*" (citation omitted).

21. The appellant argues (at AS [39]), that the existence of proprietorship does not lead to a capacity to *lawfully* occupy land. Yet the relevant authorities indicate that the Crown possesses, by virtue of its prerogative the power or, in the alternative, as cases such as Clough suggest, the capacity, to occupy land it owns. So much is implicit in the reasoning of Barton ACJ in Williams v Attorney-General for New South Wales (1913) 16 CLR 404 at 429-430 (affirmed in Attorney-General for New South Wales v Williams [1915] UKPC 5; (1915) 19 CLR 343), where his Honour said that the empowering of the "local legislature" to deal with Crown lands necessarily empowered the Executive government of the colony to manage, control and use those lands, subject to the oversight of the legislature. So too, Isaacs J at 454 stated that "the

whole control and management of waste lands of New South Wales and their proceeds were parted with absolutely by the [Imperial] Crown, as well as *all other powers of local government* not expressly excluded" (emphasis added). The notion of control plainly imports "occupation", the lawfulness of which falls to be considered separately. The appellant's contention would also be inconsistent with the understanding that the wastelands formed the demesne lands of the Crown: see eg R v Steele [1834] NSWSupC 111; The Attorney-General v Brown (1847) 1 Legge 312 per Stephen CJ, Dickinson and Therry JJ; Randwick Corporation v Rutledge (1959) 102 CLR 54 at 71 per Windeyer J; New South Wales v Commonwealth (1975) 135 CLR 337 at 438-439 per Stephen J.

22. Having established that the Crown possesses the prerogative power, or alternatively capacity, to occupy land and that this came to be reposed in the colonial Executive (and, upon Federation, in the Crown in right of New South Wales), it is necessary to consider the effect of s 2 of the 1855 Imperial Act on the Crown in right of New South Wales' power or capacity to occupy land.

The 1855 Imperial Act

23. The appellant submits that any non-statutory executive power to occupy land was abrogated by s 2 of the 1855 Imperial Act: AS [41]. This proposition turns on the construction of that provision, which stated that it vested in the Colonial legislature "the entire Management and Control of the Waste Lands belonging to the Crown in the said Colony".

24. The "task of statutory construction must begin with a consideration of the text itself … [t]he language which has actually been employed in the text of legislation is the surest guide to legislative intention": Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue (2009) 239 CLR 27, at 46-47 [47], per Hayne, Heydon, Crennan and Kiefel JJ (citations omitted). It is trite that a court construes the words used in a statute in accordance with their ordinary and natural meaning: Thompson v Judge Byrne (1999) 196 CLR 141, at 149 [19], per Gleeson CJ, Gummow, Kirby and Callinan JJ and [45], per Gaudron J; Marshall v Director General, Department of Transport (2001) 205 CLR 603, at 623 [37], per Gaudron J. Further, a court will have regard to the context in which words appear and their purpose: Monis v The Queen

(2013) 249 CLR 92, at 202 [309] per Crennan, Kiefel and Bell JJ. The "task remains throughout to expound the meaning of the statutory text, not to divine unexpressed legislative intention or to remedy perceived legislative inattention. Construction is not speculation, and it is not repair": Taylor v Owners – Strata Plan 11564 (2014) 253 CLR 531 at 556-557 [65]-[66] per Gageler and Keane JJ.

25. The respondent submits that the construction of s 2 of the 1855 Imperial Act adopted by the CA at [130] (AB: 396) is correct. That construction pays proper regard to the purpose of the 1855 Imperial Act, in light of the historical context from which it emerged: see CA [122]-[127]: AB 393-395. Although the "entire Management and Control" was vested in the legislature by s 2 of the 1855 Imperial Act, nevertheless, upon the receipt of responsible government in New South Wales (which was carried into effect by the 1853 Constitution Act, itself a schedule to the 1855 Imperial Act; see Williams v Attorney-General for New South Wales (1913) 16 CLR 404 at 459-460 per Isaacs J), the Executive retained its prerogative power in the absence of contrary statutory provisions.

26. The conferral of legislative power to make laws with respect to a subject matter does not mean that executive power to do things falling within that subject matter is extinguished (*cf.* Williams v Commonwealth (2012) 248 CLR 156). As such, there is no inconsistency between the existence of a non-statutory executive power, or capacity, to occupy land and the language of s 2 of the 1855 Imperial Act. The point made by Isaacs J in Williams v Attorney-General for New South Wales at 456 was that s 43 of Sch 1 to the 1855 Imperial Act transferred legislative power in respect of the waste lands to the Legislature, not that Executive authority or responsibility for the management and control of the waste lands passed to the Legislature: *cf* AS [41].

27. The respondent does not accept the appellant's submission at AS [41] that it is not necessary for there to be express words or necessary implication to effect an abrogation of any non-statutory executive power to occupy Crown land because, referring to Cadia Holdings v New South Wales (2010) 242 CLR 195, at 223 [75] per Gummow, Hayne, Heydon and Crennan JJ, any power to occupy the land was not a prerogative power in the strict sense. In Cadia Holdings v New South Wales at [75], their Honours proceeded to recognise that the prerogative also concerns the enjoyment by the Executive government of "an exceptional right which partakes of the nature of

property" (citations omitted). There is accordingly no error with the CA's analysis at CA [131] (AB: 396) that the Crown's prerogative could only be affected by express words or necessary implication and that s 2 does not contain sufficiently clear language to deprive the Crown of its non-statutory right to occupy land owned by it.

28. It is also not correct to say (as at AS [42]) that, because s 2 of the 1855 Imperial Act vested "Proceeds and Revenues ... arising from ... all Royalties, Mines and Minerals" in the legislature, "where non-statutory executive power was to be preserved or continued, sec 2 said so expressly". On the contrary, as reasoned at CA [132]-[137] (AB: 396-398), that such matters continued to be regarded as part of the prerogative supports the proposition advanced above at paragraph 25 that the section merely acknowledged that the Executive was, in certain respects, subject to oversight by the colonial legislature as an incident of responsible government.

29. Furthermore, and in the alternative, even if the Crown's non-statutory executive power to occupy Crown land was not an incident of the prerogative (noting the discussion in Williams v Commonwealth (2012) 248 CLR 156 at 185-186 [25], per French CJ) the analysis at CA [131] (AB: 396) is correct because the Crown's "capacity" is a right conferred by the common law. It follows from this that clear and unambiguous words are necessary before a statute will be taken to affect that capacity: see, eg, Bishop v Chung Bros (1907) 4 CLR 1262 at 1273 per Barton J; Sargood Bros v Commonwealth (1910) 11 CLR 258 at 279 per O'Connor J; Davern v Messel (1984) 155 CLR 21 at 31 per Gibbs CJ; and Commonwealth v Western Australia (1999) 196 CLR 392 at 410 [34] per Gleeson CJ and Gaudron J and the authorities cited therein. The language of s 2 of the 1855 Imperial Act is not sufficiently clear to deprive the Crown's capacity to occupy land.

30. In any event, as suggested at CA [119] (AB: 393) it is probably the case that s 2 of the 1855 Imperial Act has been impliedly repealed. First, s 3(2) of the Australia Act 1986 (Cth) (UK and Cth) relevantly provides that the powers of the Parliament of a State include the power to repeal or amend any "Act, order, rule or regulation" of the United Kingdom, insofar as it is part of the law of the State. Thus the New South Wales Parliament has legislative competence to repeal an Imperial Act. Secondly, the CL Act, by s 6, provides that "Crown land shall not be occupied, used, sold, leased, licensed, dedicated or reserved or otherwise dealt with unless the occupation, use, sale,

lease, licence, reservation or dedication or other dealing is authorised by this Act or the *Crown Lands (Continued Tenures) Act 1989*". This provision, on its face, overtakes s 2 of the 1855 Imperial Act and, thus, should be regarded as impliedly repealing s 2 of the 1855 Imperial Act (Butler v Attorney-General (Victoria) (1961) 106 CLR 268 at 290 per Windeyer J; Dossett v TKJ Nominees Pty Ltd (2003) 218 CLR 1 at 13-14 [43] per Gummow, Hayne and Heydon JJ), with the consequence that any restriction that might have been imposed on the Crown's prerogative power or capacity to occupy by s 2 is rendered otiose. There is no need to finally resolve this issue if the respondent's contentions regarding the powers or capacity of the Crown and the effect of s 2 of the 1855 Imperial Act are accepted.

The Crown needs no statutory authorisation to occupy land

31. The major premise of the appellant's argument is that there is no non-statutory executive power to occupy land. As demonstrated at paragraphs 8-21 above, there is a notional capacity to occupy land as an incident of the Crown's prerogative power or its common law capacities which it shares with ordinary persons. This power or capacity is not conditioned by the existence of authorisation by statute. That is so for the following reasons.

32. The function in issue in Williams v Commonwealth (2012) 248 CLR 156 was the Commonwealth Executive's power to contract and spend public monies. Subject to any inconsistency with federal law by reason of s 109 of the Constitution or inconsistency with a constitutional implication in the Constitution, the States exercise plenary powers within their territories and can be compared as a polity to the United Kingdom rather than to the Commonwealth. The Crown in right of New South Wales simply occupies the land by virtue of its prerogative or, in the alternative, owns the land the subject of the appellant's claim under the ALR Act. In these circumstances, it is not apparent why some statutory authority for it holding the land would be required.

33. Secondly, and taking into account the proposition advanced at paragraph 25 above, the appellant has not identified any statute under which it says the legislature has exercised its power to make laws with respect to the management and control of the claimed land in such a way as to render unlawful any acts undertaken by the Executive on or with respect to the claimed land.

34. Thirdly, as to the issue of occupation of the land, it is not correct to say, as the appellant does at AS [51], that the dedications which remained in place in respect of the land had the effect of limiting the Crown's prerogative or *capacity* to occupy it and restricting that capacity to the Crown Land Ministers. So much follows from Randwick Municipal Council v Rutledge (1959) 102 CLR 54 at 75 per Windeyer J (with whom Dixon CJ, Fullagar and Kitto JJ agreed) where his Honour described it as a mistake "to think that lands appropriated and taken into use by the Crown for a particular purpose (without the creation of any trust) became dedicated to that purpose and could not thereafter be used by the Crown for another purpose" (this passage was referred to by the CA at [22] (AB: 363). This statement follows from Williams v Attorney-General for New South Wales (1913) 16 CLR 404, which was referred to by Windeyer J at 75-76.

35. Further and in any event, even if there was a need for separate statutory authority to occupy the claimed land, there was implied statutory authority to occupy the land, in view of the fact that necessary requirements were being complied with under the CL Act at the time that the claim was made, as reasoned at CA [138]-[139] (AB: 398-399). The effect of the CL Act is elaborated further in the submissions below.

The land was lawfully occupied

36. The land was lawfully occupied by the Crown in right of New South Wales.

37. The claimed land was the subject of dedications for gaol purposes made under the Crown Lands legislation that applied from time to time (see CA [37]-[41]: AB: 367-368).

38. It is true that the Crown is not a monolithic juristic entity, as the appellant submits (at AS [49]), but here it is to be understood as referring to the Executive government of New South Wales. Yet the appellant's submission requires an acceptance that the CL Act confers a positive authority on the respondent to the exclusion of the authority of any other "emanation of the Crown" (which includes the government of New South Wales and in turn CSNSW): see CA [146]: AB 400; note Commonwealth v Western Australia (1999) 196 CLR 392 at 429 [105] per Gummow J and Sue v Hill (1999) 199 CLR 462 at 497-503 [83]-[94] per Gleeson CJ, Gummow and Hayne JJ. There is no error in the CA's reasoning on this point. The relevant provisions of the CL Act do

not have that effect. Because at the time the claim was lodged, the claimed land was subject to dedications for a public purpose, it was not "Crown land" as defined in s 3(1) of the CL Act. Part 5 of that Act deals with the dedication and reservation of land and there is no provision in that part that could support the exclusive authorisation that the appellant's submission is premised upon.

39. The lands which are able to be claimed under the ALR Act are "claimable Crown lands", being, relevantly, "lands vested in Her Majesty that ... are able to be lawfully sold or leased, or are reserved or dedicated for any purpose, under the Crown Lands Consolidation Act 1913 ... [and] are not lawfully used or occupied".

10 40. The test for whether land is lawfully used or occupied for the purposes of s 36(1)(b) of the ALR Act has been expounded by this Court (Minister Administering the Crown Lands Act v NSW Aboriginal Land Council (2008) 237 CLR 285 (**Wagga Wagga HCA**) at 303-306 [60]-[70] per Hayne, Heydon, Crennan and Kiefel JJ) and given further gloss by the New South Wales Court of Appeal on a number of occasions (Minister Administering the Crown Lands Act v Bathurst Local Aboriginal Land Council (2009) 166 LGERA 379 (**Bathurst**) at 406-408 [119]-[122] per Tobias JA, 427-431 [225]-[240] per Basten JA; Minister Administering the Crown Lands Act v La Perouse Aboriginal Land Council (2012) 193 LGERA 276 at 282-287 [28]-[47] per Basten JA (with whom Beazley, McColl and Macfarlan JJA agreed). The "acts, facts,
20 matters and circumstances" that are sufficient to establish occupation will be different in every case.

41. As to the approach to determining the meaning of "lawfully ... occupied" in s 36(1)(b), the respondent repeats the submission made above at paragraph 24 above. As such, the term falls to be construed in accordance with its ordinary meaning and the accepted rules of construction. The Court will be mindful of the remedial and beneficial nature of the Act. However, the issue of construction is not informed solely, or primarily, by that fact. Of course, the remedial and beneficial purpose of the ALR Act is not an issue which bears on the construction of the CL Act.

42. The respondent accepts that where land has been dedicated for a public purpose, the
30 purpose of that dedication is relevant to the determination of whether claimed land was lawfully used or occupied at the relevant time (see Bathurst per Basten JA at [236]).

Both the primary judge and the CA in the present case took account of that dedication as a relevant matter when considering the "acts, facts, matters and circumstances": PJ [93], [128], [150]-[154]: AB: 310-311, 323-325, 332-334; CA [49]-[51]: AB: 370-371.

43. Nevertheless, the suggestion that the dedication operated so as to circumscribe what, as a matter of fact, would constitute lawful use or occupation (at AS [31]-[32] and [35]) runs into the difficulties explained above at paragraph 34 above with respect to the significance of dedications for use of Crown land.

44. Acts in furtherance of, incidental to or ancillary to, or not unrelated to, the purposes for which land is dedicated are lawful: Minister Administering the Crown Lands Act v New South Wales Aboriginal Land Council [2014] NSWCA 69 at [28], [40] and [44] per Macfarlan JA and [58] per Barrett JA (Bergin CJ at CL agreeing at [60]); Minister Administering the Crown Lands Act v New South Wales Aboriginal Land Council (Goomallee Claim) (2012) 84 NSWLR 219 at 228 [37] per Basten JA (Beazley JA (at 221 [1]), McColl JA (at 221 [2]) and Macfarlan JA (at 229 [42]). In the present case, the lots comprising the claimed land have dedications for the essentially passive public purpose of, respectively, 'Gaol Site (extension)' (AB: 97) and 'Gaol site (addition)' (AB: 111), which may be fulfilled simply by a gaol being constructed on that site: see, e.g., discussion in Western Australia v Sebastian (2008) 173 FCR 1 at 55-58 [193]-[208]. A public purpose of 'Gaol Purposes' (AB: 99) (applicable to one of the affected Lots in addition to the gaol site purpose) may entail physical activity, but may also be fulfilled simply by a gaol being physically located on the site.

45. At AS [33]-[34], the appellant raises issues with the sufficiency of the acts, facts, matters and circumstances which were occurring on the land at the time that the claim was made. The appellant does so by isolating each of the relevant acts and questioning their sufficiency separately. That is incorrect, particularly in light of the approach endorsed in Wagga Wagga HCA (which the appellant does not challenge). The respondent submits that these matters must be considered in aggregate and that when they are in the circumstances of this case no relevant error on the part of the primary judge or the Court of Appeal is established.

46. As to AS [36], the CA's application of a test for "occupation" which permits the Minister to rely upon acts, facts, matters and circumstances directed to the holding of Crown land pending a decision on future use does not engage in the "self-levitating" construction of s 36(l)(b) rejected by Mason P and Tobias JA in Wagga Wagga CA (2007) 157 LGERA 18 at 29 [55] and 33 [79], respectively. Relevantly, Mason P noted that the dispositive finding of the primary judge was that "the decision to sell was itself the actual use of the land" (emphasis added), and that the primary judge's findings "did not establish that any steps were taken on site by way of preparing the land for sale" (at [53]-[54]).

47. Mason P rejected the Minister's argument that acts preparatory to sale could constitute actual use as "self-levitating" because it ignored the requirement to first determine whether use by sale was lawful use for the purposes of s 36(1)(b) – which his Honour held it was not. Unlike the present case, the decision to sell was the actual use, not the purpose for which the acts, facts, matters and circumstances constituting actual use were undertaken. In any event, the approach seemingly adopted by Mason P was not entirely consistent with the approach taken by this Court in Wagga Wagga HCA: CA [92]-[93]: AB: 384-385.

48. In the present case, the acts, facts, matters and circumstances demonstrating occupation included physical acts on the claimed land for the lawful purpose of holding the land in its current state as the physical site of gaol buildings and associated gardens and pending a decision on future use. The extensive physical acts are set out in the primary judge's judgment at [102]-[116]: AB: 314-319. It might be noted that in the very month the appellant's claim was made there was seven visits to the site by groups of persons subject to community service orders to carry out work on the premises. Any decision on future use might require revocation of the existing dedications and an assessment prior to a fresh dedication or reservation: see ss 84, 85 and 91 of the CL Act.

PART VII: ORAL ARGUMENT

49. The respondent estimates that it requires no more than 2 hours for the presentation of its oral argument.

19 August 2016

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