HIGH COURT OF AUSTRALIA

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Details of Filing

File Number:	S121/2024
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Important Information

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IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

BETWEEN:

LA PEROUSE LOCAL ABORIGINAL LAND COUNCIL ABN 89136607167

First Appellant

NEW SOUTH WALES ABORIGINAL LAND COUNCIL ABN 82726507500

Second Appellant

and

QUARRY STREET PTY LTD ACN 616184117

First Respondent

MINISTER ADMINISTERING THE CROWN LAND MANAGEMENT ACT 2016

Second Respondent

FIRST RESPONDENT'S REPLY SUBMISSIONS

PART I: CERTIFICATION

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

PART II: REPLY TO MINISTER

2. The occasion for Quarry Street to reply to the Minister now hardly arises. The Minister "does not challenge" the Court of Appeal's conclusion that the Minister was legally bound to conclude that the Crown was lawfully using the land within the meaning of s 36(1)(b) of the *Aboriginal Land Rights Act 1983* (NSW): Minister's Submissions (**MS**) [6]. The Minister's "three matters of statutory context and purpose" all support the Court of Appeal's construction: The *Crown Lands Act 1989* (NSW) and its successor, the *Crown Land Management Act 2016* (NSW), "reflect a clear legislative intention to enable the Crown to achieve the public purposes for which land may be dedicated or reserved by leasing that land to third parties" (MS [8]); the framework of the *Crown Lands Act* "reflects the reality" that land may be reserved for purposes which are "legitimately (and, in some circumstances, more appropriately) … fulfilled by private tenants" (MS [14]); and judicial authority, the "statutory framework under which the Minister granted the Lease", and extrinsic materials support that the Crown may effectuate public purposes by the activity of leasing land to private sector tenants (MS [16]-[18]). The Minister's Submissions direct attention to difficulties for the Crown's management of reserved lands,

including but going beyond those identified in Quarry Street's Submissions at [44]-[47], that would result from acceptance of the Land Councils' construction: MS [19]-[33].

3. The Minister's Submissions thus reinforce the point that he was not properly instructed as to the meaning and application of s 36(1)(b) in connection with his decision to grant the land claim in this case. The brief to the Minister prepared in May 2021 failed to identify, among other things, the very important considerations now raised in the Minister's own submissions: cf ABFM 5, 8, 13-15.

4. There is occasion to reply to the Minister's Submissions on costs. In the event that the Land Councils' appeal is allowed, Quarry Street should not be required to pay the Minister's costs below. The suggestion that it should, "having regard to the more active role the Minister took below" (MS [34]), ought to be rejected. The Minister, who emphasises his *Hardiman* status, was not required to play any "active role". The Land Councils defended the Minister's decision and fully contradicted Quarry Street both in the Land and Environment Court and in the Court of Appeal. Quarry Street was an involuntary third party affected in its property by the Minister's decision to grant the Land Councils' claim. It would not be just in all the circumstances to require Quarry Street to pay two sets of costs below, in effect funding the Minister's inessential choice to play a "more active role": see *Oshlack v Richmond River Council* (1998) 193 CLR 72 at 90 [46] (Gaudron and Gummow JJ), 126 [141] (Kirby J). It is appropriate for only one set of costs to be awarded where the parties otherwise entitled to costs are aligned in interest, even where those parties are driven by "different motivations": see, eg, *Attorney-General (SA) v Marmanidis (No 2)* [2019] SASCFC 77 at [17]-[19].

Dated: 6 December 2024

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