



HIGH COURT OF AUSTRALIA

14 December 2016

NEW SOUTH WALES ABORIGINAL LAND COUNCIL v MINISTER ADMINISTERING THE
CROWN LANDS ACT
[2016] HCA 50

Today the High Court, by majority, dismissed an appeal from the Court of Appeal of the Supreme Court of New South Wales. The majority held that land in Berrima which had been the site of a gaol and correctional centre ("the claimed land") was not claimable under s 36 of the *Aboriginal Land Rights Act* 1983 (NSW) ("the ALR Act") because it was "lawfully ... occupied" under s 36(1)(b) of that Act.

Section 36(2) of the ALR Act allows the appellant, the New South Wales Aboriginal Land Council ("NSW ALC"), to make a claim for land. Under s 36(5), the Crown Lands Minister shall grant the claim if satisfied that the land is "claimable Crown lands", which is defined in s 36(1) to include Crown land that has been "dedicated for any purpose" under certain legislation, except where, relevantly, land is "lawfully used or occupied" within the meaning of s 36(1)(b). On 24 February 2012, the NSW ALC made a claim under s 36(2) for the claimed land. Different parts of the claimed land were relevantly dedicated for the purposes of "Gaol Site (extension)", "Gaol Purposes" and "Gaol Site (addition)". Proclamations of the claimed land as the "Berrima Correctional Centre" and "Berrima Correctional Complex" had been revoked, and consideration was being given to its future use and ownership. Pursuant to s 13D of the *Real Property Act* 1900 (NSW), the State of New South Wales was registered as proprietor of the claimed land. The claim was refused by the joint Crown Lands Ministers on the basis that the claimed land was lawfully used and occupied by Corrective Services NSW ("CSNSW").

The NSW ALC appealed to the Land and Environment Court. Pain J dismissed the appeal, holding that the activities conducted on the claimed land at the date of claim established lawful occupation. Her Honour referred to the following factors: a security guard was always present; the buildings were locked at all times; essential services continued to be supplied to the buildings; the buildings were the subject of a continuous contract for their maintenance; the gardens continued to be maintained, largely by offenders serving community service orders; and the public could, and did, visit the gardens with permission from CSNSW. The NSW ALC appealed to the Court of Appeal, which dismissed the appeal (Leeming JA, Beazley P and Macfarlan JA agreeing). The Court of Appeal upheld Pain J's findings regarding occupation and rejected the NSW ALC's argument that Pain J erred in assessing occupation by reference to the claimed land being held pending a decision as to future use, rather than by reference to its dedicated gaol purposes. The Court also held that statutory authorisation was not required for "lawful occupation".

By grant of special leave, the NSW ALC appealed to the High Court. A majority of the High Court held that the claimed land was occupied at the date of claim by reference to the activities taking place on it, and that it did not need to be actively used for its dedicated gaol purposes to be "lawfully occupied" as that would deny "occupied" a separate sphere of operation from "used" in s 36(1)(b). The majority considered the NSW ALC's argument that the claimed land could not lawfully be occupied without statutory authorisation. It held that s 2 of the *New South Wales Constitution Act* 1855 (Imp) did not abrogate the executive's power to appropriate waste lands to itself by way of dedication, use or occupation. Rather, s 2 made the executive's power over waste lands subject to the control of the legislature of New South Wales. The majority rejected an argument that CSNSW was not empowered to occupy the claimed land. As the owner of the claimed land, the State could lawfully occupy the claimed land through the executive government and its agents, including employees of CSNSW.

- *This statement is not intended to be a substitute for the reasons of the High Court or to be used in any later consideration of the Court's reasons.*