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

ANNOTATED SUBMISSIONS OF THE ATTORNEY-GENERAL FOR THE STATE OF VICTORIA (INTERVENING)

Part I: CERTIFICATION

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

Parts II & III: INTERVENTION

2. The Attorney-General for the State of Victoria intervenes pursuant to s 78A of the *Judiciary Act 1903* (Cth) in support of the respondent.

Part IV: APPLICABLE PROVISIONS

3. The applicable provisions are those that the appellant and respondent identify, as supplemented by provisions annexed to these submissions in the Annexure.

Part V: ARGUMENT

A. Introduction

4. These submissions address the issue of whether the claimed land was not lawfully occupied because there was no statutory authorisation of the State of New South Wales' occupation of the land (ie, the appellant's second proposition).

5. Victoria submits that the Crown can occupy Crown land without legislative authority, so long as there is no legislative prohibition on the Crown's exercise of the right to occupy the land.

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6. Victoria does not (unlike the appellant and respondent) consider the central issue to be whether s 2 of the *New South Wales Constitution Act 1855* (18 & 19 Vict c 54, Sch 1) (the **Constitution Act 1855**[1]) abrogated a prerogative power to occupy land. Rather, in light of this Court's decision in *Mabo v Queensland (No 2)*,[2] the appellant's second proposition raises two discrete issues, namely whether s 2 of the Constitution Act 1855 abrogated:

   (a) the Crown's prerogative power[3] to appropriate to itself beneficial interests in waste lands; and

   (b) the Crown's right (which, depending on the source of the power to appropriate the right, may be prerogative or non-prerogative) to occupy land that the Crown held by virtue of its exercise of a statutory or non-statutory power to appropriate to itself beneficial interests in the land.

7. In summary, in relation to the appellant's second proposition, Victoria makes the following submissions:

   (a) Section 2 of the Constitution Act 1855 did not abrogate the prerogative power of the Executive to appropriate to the State beneficial interests in waste lands. Rather, s 2 conferred on the Crown[4] in right of the Colony the power to manage and control the waste lands, so that the Colonial Legislature acquired, under a system of responsible government, a power to control the Executive's exercise of the power to appropriate to itself beneficial interests in the waste lands.

   (b) Victoria does not make any submission on whether, since 1855, there has been any statutory abrogation of the prerogative power of the Executive to appropriate to the State of New South Wales beneficial interests in waste lands.

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[1] Section 24(iv) of the *Interpretation Act 1897* (NSW) states that: 'The Bill contained in the Schedule to the Constitution Statute may be cited in all Acts, instruments, documents, and proceedings as 'The Constitution Act.''

[2] (1992) 175 CLR 1.

[3] The term 'prerogative power' is used to refer to either: (a) those 'prerogatives which partake of the nature of property' (*Commissioner of Taxation (Cth) v Official Liquidator of E O Farley Ltd (in liq)* (1940) 63 CLR 278 at 321 per Evatt J) and which arise out of the Crown's relationship with Crown lands; or, even if understood more narrowly (b) a 'sovereign political power over land' (*Mabo v Queensland (No 2)* (1992) 175 CLR 1 at 53 per Brennan J), which includes the sovereign power to deal with radical title to Crown lands.

[4] The 'Crown' is used in the sense of the Crown necessarily divisible in right of the Colony in a context of a grant of responsible government that should carry with it powers necessary 'for state systems of government'; Cheryl Saunders, 'The Concept of the Crown' (2015) 38 *Melbourne University Law Review* 873 at 885; see *Sue v Hill* (1999) 199 CLR 462 at 501 [90] per Gleeson CJ, Gummow and Hayne JJ.

(c) Where, as in this case,[5] the Executive has, pursuant to statutory authority,[6] appropriated to itself the estate in fee simple, it is not necessary for the State to identify any legislative permission for its occupation of the land over which it holds the estate beyond that which inheres in the ownership of the estate itself. Rather, the Crown may occupy that land so long as there is no statutory prohibition to the contrary.

(d) The power of a State to exercise its right to occupy lands exists (subject to statutory abrogation) whether or not the Court recognises the State as having 'the common law capacities of a juristic person'.[7]

B. Section 2 did not abrogate the prerogative power to appropriate waste lands to itself

8. This case does not raise for determination the issue of whether the Crown can, absent any statutory authority, alienate to the private domain beneficial interests in waste lands. It may be that the Executive's exercise of the prerogative power to alienate to any other legal person beneficial interests in the waste lands is, by virtue of s 2 of the Constitution Act 1855, 'subject … to the statutes of the State in force from time to time'.[8] Even if that is assumed (without conceding it) to be so, the exercise of the State's prerogative power to appropriate to itself beneficial interests in the waste lands is not, by virtue of s 2 of the Constitution Act 1855, exercisable only pursuant to statutory authority. That is, s 2 of the Constitution Act 1855 did not abrogate the prerogative power of the Crown to appropriate land to itself.

9. As Brennan J noted in *Mabo v Queensland (No 2)*,[9] and after referring to both 'the power to alienate or to appropriate to itself waste lands of the Crown',[10] 'these powers are and at all material times have been exercisable by the Executive Government subject, in the case of the power of alienation, to the statutes of the State in force from time to time.'[11]

10. With respect, Brennan J was right to consider the Executive's power of appropriation (unlike its power of alienation) to be exercisable without statutory authority. There are three reasons why s 2 of the Constitution Act 1855 should

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[5] See the Court of Appeal's decision (**CA**) at [35], cf [116]-[117] per Leeming JA; Appeal Book (**AB**) 367, 391-2.
[6] Section 13D(1) and 13J of the *Real Property Act 1900* (NSW).
[7] Cf *Williams v Commonwealth* (2012) 248 CLR 156 at 185 [25] per French CJ. Victoria notes that this case does not raise for determination the issue of whether the State Executive has the power, which is ground in no more than the State's being a juristic person, to act with the capacities of a juristic person.
[8] *Mabo v Queensland (No 2)* (1992) 175 CLR 1 at 70-1 per Brennan J; see also Brennan J at 63 in relation to ss 30 and 40 of the *Constitution Act 1867* (Qld).
[9] (1992) 175 CLR 1.
[10] *Mabo v Queensland (No 2)* (1992) 175 CLR 1 at 70.
[11] *Mabo v Queensland (No 2)* (1992) 175 CLR 1 at 70-1.

not be construed as abrogating the Executive's prerogative to appropriate to the State beneficial interests in the waste lands.

(i) The purpose was the devolution of legislative power and the creation of responsible government; not an abrogation of prerogative power

11. The **first** reason is that the purpose of s 2 of the Constitution Act 1855 was not to abrogate executive power with respect to Crown land (or, more accurately, to vest the power exclusively in the Colonial Legislature) or to abrogate the Crown's beneficial interests in unalienated Crown lands.[12] Rather, it was to devolve legislative power to the Colonial Legislature,[13] and thereby to grant a system of responsible government in which the Parliament controlled the Executive's exercise of its powers.[14]

12. The historical context in which s 2 of the Constitution Act 1855 was enacted is well known. The Act for regulating the Sale of Waste Land belonging to the Crown in the Australian Colonies Act 1842 (the **1842 Act**) 'was a *restriction* on the power of the Home Government to dispose of the waste lands and apply the proceeds, but it did not in any manner profess to confer any such power on the Colonial legislature.'[15] The 1842 Act 'represented a distinct line of policy – that of maintaining, under regulation, the exclusive Home right of disposing of waste lands.'[16]

13. In the same year, '[a]n element of representative government was provided by the *Australian Constitutions Act 1842* (Imp),[17] but s 29 excluded from the competence of the New South Wales Legislative Council any law which interfered in any manner with the sale of Crown lands in the colony or with the revenue arising therefrom.'[18]

14. The Imperial authorities refused 'to grant power to control waste lands and their proceeds to the Governor and the Legislative Council of New South Wales'.[19] That refusal:[20]

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[12] Principles of statutory interpretation apply to the interpretation of the Constitution Act 1855: *Cooper v Commissioner of Income Tax (Qld)* (1907) 4 CLR 1304 at 1321 per O'Connor J. Section 2 is therefore to be given 'a construction that would promote the purpose or object underlying the Act': s 33 of the *Interpretation Act 1987* (NSW).

[13] *New South Wales v Commonwealth* (*Seas and Submerged Lands Case*) (1975) 135 CLR 337 at 369 per Barwick CJ.

[14] *The Commonwealth v Tasmania* (the *Tasmanian Dams Case*) (1983) 158 CLR 1 at 210 per Brennan J.

[15] *Williams v Attorney-General for New South Wales* (1913) 16 CLR 404 at 450 per Isaacs J (emphasis in original).

[16] *Williams v Attorney-General for New South Wales* (1913) 16 CLR 404 at 452 per Isaacs J.

[17] (5 & 6 Vict c 76).

[18] *Wik Peoples v Queensland* (1996) 187 CLR 1 at 173 per Gummow J.

[19] *The Commonwealth v Tasmania* (the *Tasmanian Dams Case*) (1983) 158 CLR 1 at 208-10 per Brennan J.

'evoked a remonstrance from the Legislative Council [of New South Wales] that "the land revenue, which 'derived as it [was] mainly, from the value imparted ... by the labour and capital of the people of [the] colony, [was] as much their property as the ordinary revenue', [and] should be appropriated by the Council".'

15. In that context, s 2 of the Constitution Act 1855 was passed by the Imperial Parliament. Section 2 of the Constitution Act 1855 devolved legislative power, by vesting 'the entire management and control of the waste lands belonging to the Crown in the said colony ... in the Legislature of the said colony.'

16. The devolution of legislative power enabled the grant of responsible government. As Brennan J noted in the *Tasmanian Dams Case*:[21]

'power over waste lands and their proceeds was not granted until responsible government was granted, a constitutional development that would have been impossible in the mid-nineteenth century if the colonial legislatures had not secured control of the revenues derived from sale or other appropriation of waste lands.'

17. In order to devolve the power over waste lands from the Imperial Parliament to the Colonial Legislature, it was not necessary for the Colonial Legislature to exercise its devolved power exclusively of the Colonial Executive. Instead, under the system of responsible government, the Executive retained its prerogative powers:[22]

'On the grant of responsible government, certain prerogatives of the Crown in the colony, even those of a proprietary nature, became vested "in the Crown in right of the colony", as Jacobs J put it in New South Wales v The Commonwealth[23]*.'*

18. Indeed, in the view of O'Connor J in *South Australia v Victoria*,[24] the grant of responsible government:[25]

'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.'

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[20] *The Commonwealth v Tasmania* (the *Tasmanian Dams Case*) (1983) 158 CLR 1 at 208-10 per Brennan J, quoting W.G. McMinn, *A Constitutional History* of *Australia* (1979) at 48.
[21] *The Commonwealth v Tasmania* (the *Tasmanian Dams Case*) (1983) 158 CLR 1 at 210 per Brennan J.
[22] *Sue v Hill* (1999) 199 CLR 462 at 500 [89] per Gleeson CJ, Gummow and Hayne JJ.
[23] (1975) 135 CLR 337 at 494.
[24] (1911) 12 CLR 667.
[25] *South Australia v Victoria* (1911) 12 CLR 667 at 710-1.

19. The Executive merely became answerable to the Colonial Legislature, so that its exercise of its prerogative power to appropriate waste lands to itself was 'brought under control of Parliament.'[26] Thus, with s 2 of the Constitution Act 1855, 'the old Acts passed away with the policy of which they formed part, and the Colonial Government succeeded to control [of waste lands] as if those Acts had never been passed.'[27] As the Executive's power to appropriate land to itself is, under a system of responsible government, 'brought under control of Parliament',[28] the power is not exercisable in the event that Parliament passes an Act to abrogate the power or the circumstances in which it is validly exercisable.

10 20. That the purpose of s 2 was to devolve legislative power, and not to abrogate the prerogative power to appropriate land to itself, is clear from the words and structure of s 2. The word 'entire' was used to effect what Isaacs J described as 'a complete transfer of political power',[29] rather than to vest the Colonial legislature with an exclusive power to appropriate land to itself. The word 'entire' ensured that the devolution of the legislative power from Imperial Parliament to Colonial Legislature was as complete as possible. That is, it ensured a complete lifting of the previous '*restriction* on the power of the Home Government to dispose of the waste lands and apply the proceeds'[30] in the 1842 Act.

20 21. This interpretation of the word 'entire' is preferable, not only in light of the purpose of, and legislative history concerning, s 2, but also in light of the section's structure. The second and third paragraphs of s 2 set out limitations on the first paragraph's grant of legislative power and qualify the entirety of the 'management and control' that was vested in the Colonial Legislature. Those exceptions concern – not the ways that the executive retained aspects of any prerogative powers – but the ways that the Imperial Parliament's Acts retained residual validity; ie, the continued validity of Acts of the Imperial Parliament (in the second paragraph), or contracts 'or other rights', created pursuant to those Acts (in the third paragraph).

30 22. It is therefore clear that s 2 of the Constitution Act 1855 did not clearly and unambiguously vest exclusively in the Legislature the power to appropriate waste lands to the State.

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[26] Pitt Cobbett, 'The Crown as Representing the State' (1904) 1 *Commonwealth Law Review* 145 at 146-7, discussing the prerogative powers of the Crown generally, quoted in *Sue v Hill* (1999) 199 CLR 462 at 499-500 [88] per Gleeson CJ, Gummow and Hayne JJ.

[27] *Williams v Attorney-General for New South Wales* (1913) 16 CLR 404 at 454 per Isaacs J (emphasis added).

[28] Pitt Cobbett, 'The Crown as Representing the State' (1904) 1 *Commonwealth Law Review* 145 at 146-7, discussing the prerogative powers of the Crown generally, quoted in *Sue v Hill* (1999) 199 CLR 462 at 499-500 [88] per Gleeson CJ, Gummow and Hayne JJ.

[29] *Williams v Attorney-General for New South Wales* (1913) 16 CLR 404 at 453 per Isaacs J (emphasis added).

[30] *Williams v Attorney-General for New South Wales* (1913) 16 CLR 404 at 450 per Isaacs J.

(ii) Presumption against the abrogation of prerogative power and divestiture of proprietary rights

23. **Secondly**, there is a well-established and 'extremely strong'[31] rule 'that the prerogative of the Crown is not displaced except by a clear and unambiguous provision'.[32] The prerogative here engaged being a reflex of the Crown's relationship with Crown lands.

A. Relationship between the Crown and Crown lands

24. The Crown's powers in right of the Imperial Crown cannot be transplanted to the colonies.[33] Even allowing for that difference, the Executive power with respect to Crown lands is a fundamental 'sovereign political power over land'[34] that, since Federation, has been 'subject to the Constitution of the Commonwealth of Australia',[35] and so a prerogative power. The Crown's relationship to Crown lands can be understood by reference to two timeframes:

(a) The pre-Mabo (No 2) understanding, by which the Crown was the absolute beneficial owner of Crown lands;[36] and

(b) The post-Mabo (No 2) understanding, by which the Crown held radical title, being 'merely a logical postulate required to support the doctrine of tenure (when the Crown has exercised its sovereign power to grant an interest in land) and to support the plenary title of the Crown (when the Crown has exercised its sovereign power to appropriate to itself ownership of parcels of land within the Crown's territory).'[37]

B. Prerogative powers

25. Post-Mabo (No 2), the Crown's 'sovereign political power over land'[38] bifurcated into discrete prerogative powers concerning the alienation of Crown lands to the private domain and the appropriation of beneficial interests to the Crown itself. Post-Mabo (No 2), the Executive has the power (subject to statutory abrogation) to appropriate lands to itself by means of an Executive instrument, reservation or dedication.

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[31] *Barton v Commonwealth* (1974) 131 CLR 477 at 488 per Barwick CJ.
[32] *Barton v Commonwealth* (1974) 131 CLR 477 at 488 per Barwick CJ. See also McTiernan and Menzies JJ at 491 and Mason J at 501.
[33] *Sue v Hill* (1999) 199 CLR 462 at 502 [94] per Gleeson CJ, Gummow and Hayne JJ.
[34] *Mabo v Queensland (No 2)* (1992) 175 CLR 1 at 53 per Brennan J.
[35] *Mabo v Queensland (No 2)* (1992) 175 CLR 1 at 67 per Brennan J.
[36] *Williams v Attorney-General for New South Wales* (1913) 16 CLR 404 at 428 per Barton ACJ and at 439 per Isaacs J. See also below at paragraph 32 of these submissions.
[37] *Mabo v Queensland (No 2)* (1992) 175 CLR 1 at 50 per Brennan J.
[38] *Mabo v Queensland (No 2)* (1992) 175 CLR 1 at 53 per Brennan J.

26. Clear and unambiguous words are needed to displace the Crown's power to appropriate to itself beneficial interests in Crown lands.[39]

C. Prerogative rights

27. There is a related presumption 'that a statute does not divest the Crown of its property, rights, interests or prerogatives unless that is clearly stated or necessarily intended.'[40] In 1940, Wrottesley J noted 'the principle [that] has been discussed and applied, or not applied, in a number of decisions during the last hundred years' as follows:[41]

> *'if an Act of Parliament would otherwise devest the Crown of its property, rights, interests or prerogative, it is not to be construed as applying to the Crown unless the Crown is mentioned either expressly or by necessary implication.'*

28. The Crown's rights in unalienated land are 'prerogatives in the nature of proprietary rights'.[42] As 'the Crown in right of the several States is entitled and alone entitled to exercise the Prerogatives of the King in respect of his ownership of lands',[43] it may be concluded that the Crown's proprietary right to appropriate land to itself is, like the prerogative of the Crown in respect of gold and silver mines,[44] or the right to escheats,[45] 'an exceptional right which partakes of the nature of property'.[46]

29. As the submissions below at paragraphs 30 to 37 of these submissions outline, s 2 of the Constitution Act 1855 does not clearly and unambiguously vest exclusively in the Legislature the power to appropriate waste lands to the State.

(iii) The assumption that 'waste lands belong[ed] to the Crown'

30. **Thirdly**, s 2 of the Constitution Act 1855 did not abrogate the prerogative power to appropriate to the State beneficial interests in the waste lands because, to the extent the section was concerned with the power, it merely assumed that its exercise was unnecessary.

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[39] *Barton v Commonwealth* (1974) 131 CLR 477 at 488 per Barwick CJ. See also McTiernan and Menzies JJ at 491 and Mason J at 501.
[40] *Commonwealth v Western Australia (Mining Act Case)* (1999) 196 CLR 392 at 410 [34] per Gleeson CJ and Gaudron J.
[41] *Attorney-General v Hancock* [1940] 1 KB 427 at 439, cited in *Commonwealth v Western Australia (Mining Act Case)* (1999) 196 CLR 392 at 410 [34], footnote 68 per Gleeson CJ and Gaudron J.
[42] *New South Wales v Commonwealth (Seas and Submerged Lands Case)* (1975) 135 CLR 337 at 440 per Stephen J.
[43] HV Evatt, *The Royal Prerogative* (1987) at 237.
[44] *Cadia Holdings Pty Ltd v New South Wales* (2010) 242 CLR 195 at 223 [75] per Gummow, Hayne, Heydon and Crennan JJ.
[45] *Commissioner of Taxation (Cth) v Official Liquidator of E O Farley Ltd (in liq)* (1940) 63 CLR 278 at 321 per Evatt J.
[46] *Cadia Holdings Pty Ltd v New South Wales* (2010) 242 CLR 195 at 223 [75] per Gummow, Hayne, Heydon and Crennan JJ.

31. The phrase 'waste lands belonging to the Crown' should be interpreted by reference to that phrase's meaning as at 1855. This is because:

(a) It is well established that 'in interpreting a statute it is necessary to determine the meaning of the words used as they were understood at the time when the statute was passed.'[47] It is also settled that a comparable principle of interpretation applies to the Commonwealth Constitution, so that '[t]he words of the Constitution are to be read in that natural sense they bore in the circumstances of their enactment by the Imperial Parliament in 1900.'[48] Applying these principles to the Constitution Act 1855, 'an essential step in the task of construction' of the Constitution Act 1855 is to ascertain 'what particular constitutional expressions meant, and how words were used'[49] in 1855.

(b) The 'existing state of the law' at the time of a statute's enactment is part of a statute's context.[50]

32. In 1855, the expression 'waste lands belonging to the Crown' was a reference to those unalienated lands of which the Crown had absolute beneficial ownership. This is evident in three ways:

(a) Parliament's use of the words 'waste lands belonging to the Crown' and not, for example, 'waste lands held of the Crown'[51] indicates the legislative assumption that the Crown was the absolute beneficial owner of the 'waste lands'.

(b) As noted by Isaacs J in *Williams v Attorney-General for New South Wales*,[52] '[i]n 1836 Mr Wakefield, in giving evidence to the House of Commons Committee, on whose report the [1842] Act 5 & 6 Vict. c. 36 was framed and passed, constantly referred to the "waste lands" of Australia as opposed to the land appropriated, that is, by settlers'.[53]

(c) The 'existing state of the [case] law'[54] even 60 years after the Constitution Act 1855 defined 'waste lands' in this way. In *Williams v Attorney-General for New South Wales*,[55] Barton ACJ held that 'Waste

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[47] *Brown v The Queen* (1986) 160 CLR 171 at 189-90 per Wilson J.
[48] *King v Jones* (1972) 128 CLR 221 at 229 per Barwick CJ.
[49] *Singh v Commonwealth* (2004) 222 CLR 322 at 385 [159] per Gummow, Hayne and Heydon JJ.
[50] *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384 at 408 per Brennan CJ, Dawson, Toohey and Gummow JJ.
[51] For the distinction between 'the land law rule in England that all land is *held* of the Crown from the notion that all land is *owned* by the Crown', see *Mabo v Queensland (No 2)* (1992) 175 CLR 1 at 45 per Brennan J.
[52] (1913) 16 CLR 404.
[53] *Williams v Attorney-General for New South Wales* (1913) 16 CLR 404 at 440 per Isaacs J.
[54] *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384 at 408 per Brennan CJ, Dawson, Toohey and Gummow JJ.
[55] (1913) 16 CLR 404.

lands of the Crown, where not otherwise defined, are simply, I think, such of the lands of which the Crown became the absolute owner on taking possession of this country as the Crown had not made the subject of *any* proprietary right on the part of any citizen.'[56] Justice Isaacs noted that '[i]t has always been a fixed principle of English law that the Crown is the proprietor of all land for which no subject can show a title.'[57]

33. For these reasons, it should be concluded that the term 'waste lands', like the term 'crown land' in the *Land Act 1910* (Qld) and the *Land Act 1962* (Qld),[58] was included in s 2 of the Constitution Act 1855 at a time at which 'the belief, which has been current since *Attorney-General (NSW) v Brown*, [was] that the absolute ownership of all land in [New South Wales] is vested in the Crown until it is alienated by Crown grant.'[59]

34. One implication of the expression 'waste lands belonging to the Crown' bearing the meaning outlined above is that it was unnecessary for the Crown to exercise any prerogative power over the waste lands in order for the Crown to acquire property rights over those lands. As Isaacs J held in *Williams*, 'no act of appropriation, or reservation, or setting apart, was necessary [on the part of the Crown] to vest the land in the Crown.'[60]

35. This conclusion of Isaacs J was affirmed, in a roundabout way, on appeal to the Privy Council. *Williams* concerned land on Sydney Harbour. The High Court had characterised the land as 'waste lands' for the purposes of s 2 of the Constitution Act 1855 (though the Privy Council considered it unnecessary to decide the point).[61] Governor Macquarie built some of the buildings on the land for 'the use of himself and his successors.'[62] At the end of 1912, 'the grounds were thrown open to the public' and the State decided to use the Governor's stables as 'a conservatorium or school of music.'[63] The Attorney-General brought the proceedings 'on the relation of sundry private persons'[64] seeking a declaration that the land had been vested in His Majesty the King and 'dedicated to the public purpose of a residence for the Sovereign's representative in New South Wales'.[65] He also sought an injunction against the defendant

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[56] *Williams v Attorney-General for New South Wales* (1913) 16 CLR 404 at 428 per Barton ACJ (emphasis added).
[57] *Williams v Attorney-General for New South Wales* (1913) 16 CLR 404 at 439 per Isaacs J.
[58] *Mabo v Queensland (No 2)* (1992) 175 CLR 1 at 66 per Brennan J.
[59] *Mabo v Queensland (No 2)* (1992) 175 CLR 1 at 66 per Brennan J. See also Dawson J at 155: 'the Crown (and its agents) assumed full power to deal with the land as it saw fit. Indeed, the creation of reserves out of Crown land was itself the exercise by the Crown of its rights of absolute ownership over the land.'
[60] *Williams v Attorney-General for New South Wales* (1913) 16 CLR 404 at 439 per Isaacs J.
[61] *Attorney-General for New South Wales v Williams* [1915] AC 573 (PC) at 581.
[62] *Attorney-General for New South Wales v Williams* [1915] AC 573 (PC) at 578.
[63] *Attorney-General for New South Wales v Williams* [1915] AC 573 (PC) at 578.
[64] *Attorney-General for New South Wales v Williams* [1915] AC 573 (PC) at 578.
[65] *Attorney-General for New South Wales v Williams* [1915] AC 573 (PC) at 578.

(representing the Government of New South Wales) 'from using the house and grounds otherwise than in accordance with such declarations.'[66]

36. In *Attorney-General for New South Wales v Williams*,[67] the Privy Council dealt with an argument raised before it, apparently for the first time.[68] The argument was 'that this property could not be disposed of without some legislative act, and that none such is shown or suggested to have taken place.'[69] In rejecting this argument, the Privy Council noted that 'it does not appear that there has been any disposition or irrevocable change to prevent' the State from re-occupying the land.[70] The Privy Council considered the action that the State would need to take if the Government of New South Wales should decide that the Governor 'should once more occupy the house of his predecessors' and if the State were to occupy the 'waste lands' once more. Their Lordships noted that the only necessary action was action so that '[t]he professors can be dispersed from the conservatoire, and the horses brought back to their stables.'[71] They did not consider that the Executive needed to exercise any power, let alone any power pursuant to a statutory authorisation, in order to occupy the 'waste lands'.

37. Thus, given the way the expression 'waste lands belonging to the Crown' was understood in 1855, and for many years after, Parliament should be taken to have assumed that s 2 of the Constitution Act 1855 could have had no impact on the Crown's prerogative power to appropriate land to itself. Parliament should therefore be taken to have intended that the section did not abrogate the prerogative power.

C. Section 2 did not abrogate the power (prerogative or otherwise) to occupy lands appropriated to the State

38. Section 2 of the Constitution Act 1855 did not vest exclusively in the legislature the power (prerogative or otherwise) to exercise the State's proprietary rights.

39. On the appellant's construction of s 2 of the Constitution Act 1855, s 2 does not merely abrogate the Executive's prerogative power to appropriate land to itself (so that the power is exercisable only pursuant to a statutory authority). The argument goes the further step of saying that s 2 also vests exclusively in the legislature the power to exercise any proprietary rights that are vested in the State upon its exercise of the power to appropriate land to itself.[72]

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[66] *Attorney-General for New South Wales v Williams* [1915] AC 573 (PC) at 579.
[67] [1915] AC 573 (PC).
[68] *Attorney-General for New South Wales v Williams* [1915] AC 573 (PC) at 582, noting that the point 'does not appear to have been raised in the Courts below'.
[69] *Attorney-General for New South Wales v Williams* [1915] AC 573 (PC) at 582.
[70] *Attorney-General for New South Wales v Williams* [1915] AC 573 (PC) at 582.
[71] *Attorney-General for New South Wales v Williams* [1915] AC 573 (PC) at 582.
[72] Appellant's Submissions dated 22 July 2016 at [41], p 12.

40. The appellant submits that, as a consequence of its interpretation of s 2 of the Constitution Act 1855, 'statutory authority is required to occupy the claimed land lawfully.'[73] This is because, so the argument runs, '[t]he 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.'[74]

41. The appellant does not submit merely that statutory authority is required for the Executive to alienate to a legal person (other than the State) a licence to occupy land over which the Crown holds radical title. By applying this construction of s 2 to the facts of this case, the appellant contends that it is not enough for the Crown to be vested with fee simple in the land, and to be so vested upon the exercise by the Executive of a power that statute granted to the Executive. It is also necessary for the legislature to authorise each and every occasion that the State exercises the right of occupation that the estate in fee simple vested in it.

42. However, the critical problem with this submission is that s 2 of the Constitution Act 1855 cannot apply to land that has been the subject of the State's exercise of the power to appropriate to itself an estate in fee simple in the land. Upon the State's exercise of this power, the land is no longer 'waste land'; regardless of whether 'waste lands' in s 2 is defined by reference to the common law's description, pre-Mabo (No 2) or post-Mabo (No 2), of the State's interest in 'waste lands'. The State is no longer the 'absolute beneficial owner' (on the common law's description of the State's interest in 'waste lands' pre-Mabo (No 2)[75]) because its estate is merely an estate in fee simple. And the State's title to the claimed lands is much more than a mere 'radical title' (on the common law's description of the State's interest in 'waste lands' post-Mabo (No 2)).

43. Further, it would mean that the appropriation becomes no more than a predicate for the exercise of statutory power in relation to the land. That would render the appropriation a hollow act and would not be an advance on radical title itself. Plainly, something more is carried by the act of appropriation namely the concomitant rights to use and occupy the land. That is particularly so if the act of sovereignty is the conferral of an estate in fee simple in favour of the Crown.

D. The *Real Property Act 1900* (NSW) authorised the appropriation of the claimed land

44. The exercise of the power in s 13D(1) of the *Real Property Act 1900* (NSW) (the **RPA**) constitutes an exercise of the 'sovereign power'[76] or 'governmental

[73] Appellant's Submissions dated 22 July 2016 at [19], p 5.
[74] Appellant's Submissions dated 22 July 2016 at [40], p 12.
[75] *Williams v Attorney-General for New South Wales* (1913) 16 CLR 404 at 428 per Barton ACJ and at 439 per Isaacs J.
[76] *Mabo v Queensland (No 2)* (1992) 175 CLR 1 at 48 per Brennan J.

function'[77] in relation to land. On the grant of fee simple under s 13D(1) of the RPA:

(a) The State became the owner of the estate in fee simple over the claimed land, and therefore has the right to occupy the claimed land, in consequence of an exercise of a statutory power contained in s 13D(1) of the RPA.

(b) The State's occupation of land is lawful subject to any statutory prohibition.

(i) The State's proprietary right to occupy the claimed land

45. Section 13D(1) of the RPA conferred on the Registrar-General the power to record the State 'as the proprietor of the land'. This is because the claimed land was 'land to which this Part [ie, Part 3 of the RPA] applies'. Part 3 of the RPA (which is entitled 'Crown Lands and Lands Acquired from the Crown to be subject to the Act') applied to the claimed land, pursuant to s 13(2) of the RPA, for these reasons:

(a) The claimed land was dedicated in 1891 and then 1894 under the *Crown Lands Act 1884* (NSW), and then dedicated in 1958 under the *Crown Lands Consolidation Act 1913* (NSW);

(b) The Acts under which these dedications were made (ie, the *Crown Lands Act 1884* (NSW) and the *Crown Lands Consolidation Act 1913* (NSW)) are 'Crown Lands Acts' for the purposes of s 13(2) of the RPA. This is because both Acts fall under the definition in s 3 of the *Crown Lands Act 1989* (NSW) of 'Crown Lands Acts'.[78]

46. Section 13D(1) of the RPA was an exercise by the legislature of the power to manage and control waste lands, in that it authorised the Executive to exercise the power to appropriate to itself an estate of fee simple in the land. By authorizing the Registrar-General to record the State as the proprietor of the land, s 13D(1) authorised the Registrar-General to record the State as the holder

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[77] Appellant's Submissions dated 22 July 2016 at [40], p 12.

[78] The *Crown Lands Act 1884* (NSW), being the Act under which the Land was dedicated in 1891 and 1894, is a 'Crown Lands Act' because:

(a) s 3 of the *Crown Lands Act 1989* (NSW) defines 'Crown Lands Act' to include at (b) 'the Acts repealed by the Crown Lands Consolidation Act 1913'; and

(b) the *Crown Lands Consolidation Act 1913* (NSW) repealed (pursuant to s 2, and the first item of the First Schedule, of that Act) the *Crown Lands Act 1884* (NSW).

The *Crown Lands Consolidation Act 1913* (NSW), being the Act under which the Land was dedicated in 1958, is a 'Crown Lands Act' because:

(a) s 3 of the *Crown Lands Act 1989* (NSW) defines 'Crown Lands Act' to include at (c) 'the Acts repealed by this Act'; and

(b) the *Crown Lands Act 1989* (NSW) repealed (pursuant to s 185, and the sixth item of the Schedule 7, of that Act) the *Crown Lands Consolidation Act 1913* (NSW).

of an estate in fee simple.[79] Upon the Registrar-General's exercise of that power to vest the estate in fee simple in the State of New South Wales, the State held the right of occupation 'that the legislation created.'[80]

(ii) Characterising the State's occupation, and not its acts, as lawful

47. Upon the State being vested with the estate in fee simple in land, the issue becomes whether any statutory prohibition prohibits the State's exercise of a right of occupation incidental to the estate in fee simple, and not whether any statute permits the State's exercise of that right.

48. It may be accepted that '[m]ere proprietorship is insufficient to constitute occupation',[81] so that the fact that the State of New South Wales is registered proprietor of the claimed land, or the fact of 'dedication [of the claimed land] for a specified purpose does not, of itself, mean that the lands are lawfully used or occupied for that purpose.'[82] It is those acts of occupation that constituted 'utilisation, exploitation and employment of the land.'[83]

49. However, being the owner in fee simple, the State can occupy Crown land in the sense of 'utilisation, exploitation and employment of the land'[84] without legislative authority, so long as there is no legislative prohibition to the contrary. On this analysis, the object of the Court's inquiry is not whether any legislation permitted the State to occupy the claimed lands. It is noted that s 224(1) of the *Crimes (Administration of Sentences) Act 1999* (NSW) did not purport to authorise the Executive to authorise the State's occupation of land, but merely the State's use of land to which it already held a right of occupation. Rather, the question is whether any legislation prohibited the State from exercising the right of occupation that was vested in it by virtue of the State acquiring the estate in fee simple. On that question Victoria makes no submission.

E. The State's right to occupy the land to which it holds the estate in fee simple

50. The power of a State to exercise its beneficial interests in property exists (subject to statutory abrogation) whether or not the Court recognises the State as having 'the common law capacities of a juristic person'.[85] It is necessary merely

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[79] Section 13J of the RPA.
[80] *Yanner v Eaton* (1999) 201 CLR 351 at 370 [30] per Gleeson CJ, Gaudron, Kirby and Hayne JJ.
[81] CA at [16] per Leeming JA (emphasis added), citing *Minister Administering the Crown Lands (Consolidation) Act v Tweed Byron Local Aboriginal Land Council (Tweed Byron)* (1992) 75 LGRA 133 at 140; AB 361.
[82] *Minister Administering the Crown Lands Act v Bathurst Local Aboriginal Land Council* (2009) 166 LGERA 379 at 427 [223] per Basten JA.
[83] *Minister Administering the Crown Lands Act v New South Wales Aboriginal Land Council* (2008) 237 CLR 285 at 307 [73] per Hayne, Heydon, Crennan and Kiefel JJ.
[84] *Minister Administering the Crown Lands Act v New South Wales Aboriginal Land Council* (2008) 237 CLR 285 at 307 [73] per Hayne, Heydon, Crennan and Kiefel JJ.
[85] Cf *Williams v Commonwealth* (2012) 248 CLR 156 at 185 [25] per French CJ.

to recognise the State as having rights 'peculiar to it'.[86] The rights are peculiar for one of two reasons:

(a) In the case of rights vested in the State pursuant to an exercise of the prerogative power to appropriate land to itself, the rights are peculiar because of the peculiar nature of the power exercised.

(b) In the case of rights vested in the State pursuant to an exercise of the statutory power to vest an estate in fee simple, the rights are peculiar because they vest a beneficial interest that expands, but continues to co-exist alongside, the State's peculiar radical title.

10 *(i) Property rights vested in exercise of a non-statutory authority to appropriate land*

51. The State exercises property rights that are vested in the State in exercise of a non-statutory, 'paramount power'[87] to appropriate land to itself by virtue of each of these property rights being 'an exceptional right which partakes of the nature of property', and which is 'peculiar' to the State and 'denied to the citizen'.[88]

52. In *Johnson v Kent*,[89] Barwick CJ held that 'what the executive does upon and in respect of such lands [belonging to the Commonwealth[90]] will be done by virtue of the prerogative and not by virtue of proprietorship.'[91] In that case, Jacobs J
20 characterised the acts by which the Crown used its land as 'acts ... of the kind which lie within the prerogative of the Crown.'[92]

(ii) Property rights vested in exercise of a statutory authority to vest the estate in fee simple

53. As the holder of the estate in fee simple, the State, like any juristic person, had the proprietary right to occupy the land and to 'use the land as [it] sees fit and may exclude any and everyone from access to the land.'[93] However, unlike any juristic person, the State's acquisition of an estate in fee simple entails an

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[86] *Cadia Holdings Pty Ltd v New South Wales* (2010) 242 CLR 195 at 223 [75] per Gummow, Hayne, Heydon and Crennan JJ.
[87] *Mabo v Queensland (No 2)* (1992) 175 CLR 1 at 58 per Brennan J.
[88] *Cadia Holdings Pty Ltd v New South Wales* (2010) 242 CLR 195 at 223 [75] per Gummow, Hayne, Heydon and Crennan JJ.
[89] (1975) 132 CLR 164.
[90] *Johnson v Kent* (1975) 132 CLR 164 at 168 per Barwick CJ (with whom McTiernan and Stephen JJ agreed).
[91] *Johnson v Kent* (1975) 132 CLR 164 at 170 (with whom McTiernan and Stephen JJ agreed), referred to in the Respondent's Submissions dated 19 August 2016 at [16], pp 5-6.
[92] *Johnson v Kent* (1975) 132 CLR 164 at 174, referred to in the Respondent's Submissions dated 19 August 2016 at [16], p 6.
[93] *Fejo v Northern Territory of Australia* (1998) 195 CLR 96 at 128 [47] per Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ.

expansion of 'the radical title of the Crown to absolute ownership'[94] or rather, an estate almost akin to absolute ownership.

Part VI: ESTIMATE OF TIME FOR ORAL ARGUMENT

54. Victoria estimates that it will require 20 minutes for the presentation of oral submissions.

Dated: 26 August 2016

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[94] *Mabo v Queensland (No 2)* (1992) 175 CLR 1 at 53 per Brennan J.

ANNEXURE

Real Property Act 1900 **(NSW)**

13 Application of this Part

(1) For the purposes only of this Part, "perpetual lease from the Crown" includes a homestead selection under the Crown Lands Acts.

(2) This Part applies to land:

(a) sold, leased, dedicated, reserved or otherwise disposed of or dealt with,

(b) in the course of being sold, leased, dedicated, reserved or otherwise disposed of or dealt with, or

(c) capable of being sold, leased, dedicated, reserved or otherwise disposed of or dealt with,

by or on behalf of the Crown under the Crown Lands Acts (as defined in the Crown Lands Act 1989) or under any of the Acts specified in Schedule 2, being land in respect of which a grant has not issued and which, unless the context otherwise indicates or requires, is not under the provisions of this Act.

13D Bringing of other Crown land under Act

(1) The Registrar-General may bring under the provisions of this Act any land to which this Part applies (not being land referred to in section 13A (1) or 13B (1)) by creating a folio of the Register recording "The State of New South Wales" as the proprietor of the land.

(2) Where the Registrar-General creates a folio of the Register in respect of land to which subsection (1) applies, the Registrar-General may record in that folio such particulars relating to any dedication, reservation, lease, licence, permit, occupancy or other matter affecting that land from time to time as the Registrar-General considers appropriate.

(3) The Registrar-General may, in respect of a lease the particulars of which are recorded in a folio of the Register pursuant to subsection (2), create a folio of the Register in the name of the person who, in the Registrar-General's opinion, is entitled to be the registered proprietor of the lease.

13J Estate in land where the State is recorded as proprietor

Where "The State of New South Wales" is recorded as the registered proprietor of land in accordance with this Act, the estate to which that recording relates is an estate in fee simple.

Crimes (Administration of Sentences) Act 1999

224 Correctional complexes

(1) The Governor may, by proclamation, declare any premises specified or described in the proclamation to be a correctional complex for the purposes of this Act.

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