RESIDENTIAL LANDS

UNDER THE *ABORIGINAL LAND RIGHTS ACT 1983* (NSW):

RECENT DEVELOPMENTS

by Jason Behrendt

INTRODUCTION

Section 36(1) of the *Aboriginal Land Rights* Act 1983 (NSW) ('ALRA') allows for claims to Crown lands. If the land is '*claimable Crown land*' it is required to be transferred to the Local Aboriginal Land Council. Meanwhile, section 36(1)(b1), ALRA provides that land is not 'claimable Crown land' if it comprises 'lands which, in the opinion of a Minister, are needed or are likely to be needed as residential lands'.

Unlike the other provisions in s 36(1), s 36(1)(b1) is not premised on the existence of an objective need for land. It requires the existence of an '*opinion of a Crown Lands Minister*' that the lands are needed or likely to be needed as residential lands.

Furthermore, in contrast to s 36(1)(c), s 36(1)(b1) does not require that the need for residential lands be to fulfil any 'essential public purpose'. Indeed, in *La Perouse Local Aboriginal Land Council v Minister Administering the Crown Lands Act,* after noting that 'essential' in s 36(1)(c) meant 'necessary or indispensable', Bannon J doubted that residential development would be an essential public purpose.[1] This is understandable as merely making land available for residential purposes through sale does not guarantee that any residential development will occur, even if the land carries a residential zoning. The distinction between a private development and the fulfilment of a public purpose was a matter which was discussed by Justice Pain in *Darkinjung Local Aboriginal Land Council v Minister Administering the Crown Lands Act*.[2] While there is an acknowledgement that public infrastructure built or owned by the private sector for the benefit of the community may be a public purpose, developments for private housing, as opposed to public housing, would not appear to fall within that category.[3]

INTERPRETATION OF S 36(1)(B1), ALRA

Until 2008, the leading case on s 36(1)(b1) was the *Londonderry Claim*.[4] In that case Justice Bignold held that in discharging its functions under s 36(7) to hear and determine an appeal the Court was not bound by an 'opinion' of a Crown Lands Minister. That view was given in response to the Minister's submission that the relevant opinion could be formed by the Minister at the time of refusing the claim.[5] Bignold J concluded that s 36(1)(b1) should be approached in the same way as other exclusions to 'claimable Crown land' in s 36(1) and that whether the land was needed or likely to be needed was to be objectively determined by the Court in any appeal and by reference to circumstances at the date of claim.[6] In the *Londonderry Claim* and the subsequent case of *Wanaruah*,[7] this involved the Court assessing matters such as the amount of available residential land and projected population growth to determining whether the land was truly to be needed or likely to be needed as residential land.

More recent decisions have shed light on the interpretation of s 36(1)(b1). In *New South Wales Aboriginal Land Council v Minister Administering the Crown Lands Act (No 2)* [2008] NSWLEC 13 ('*Nambucca [No:2]*') Justice Jagot refused to follow the approach of Justice Bignold. Her Honour held that the requirement of an 'opinion of a Crown Lands Minister' was a central component of the provision. That approach has since been followed in the Land and Environment Court[8] and the Court of Appeal. The requirements of s 36(1)(b1) following *Nambucca [No:2]* are generally as follows:

1. The exclusion from 'claimable Crown lands' in s 36(1)(b1) requires that there be an 'opinion of a Crown Lands Minister' that the land is needed or likely to be needed as residential lands: *Nambucca [No:2]* per Jagot J at [72].[9]
2. The relevant opinion needs to be in existence at the time when the land claim is made, as that is the relevant date at which the claim is determined: *Nambucca [No:2]* at [72].[10]
3. An opinion of the Minister for the purposes of s 36(1)(b1) may be shown 'by direct evidence or inferentially on the whole of the evidence': *Nambucca [No:2]* at [106].
4. Actions by officers of the Department of Lands ('the Department') on behalf of, or under delegation from the Minister, may evidence an opinion of the Minister for the purposes of s 36(1)(b1) but whether this is so is a question of fact in each case: *Nambucca [No:2]* at [107].

5. The extent that an opinion may be able to be held by a person other than the Minister through implied or imputed delegation under the Carltona Principle[11] remains unclear. In Minister Administering the Crown Lands Act v New South Wales Aboriginal Land Council & Anor (2009)171 LGERA 56 ('Berowra') Macfarlan JA noted (at [128]) that if an officer in the Crown Lands Minister's department held an opinion

> the starting point for drawing such an inference would have existed, although a question of statutory construction would have remained as to whether the legislative intent was that the relevant opinion referred to in s 36(1)(b1) be formed by the Minister personally.[12]

6. At the very least the *Carltona Principle* does not extend to actions of officers outside the Minister's Department.[13] Accordingly, an opinion held by officers at Landcom[14] or a local government body[15] does not, of itself, evidence an opinion of a Crown Lands Minister.
7. Facts about 'population growth, available land areas, and market demand when the claim was made' are not necessarily irrelevant to the issue under s 36(1)(b1).[16] In *Nambucca [No:2]* Justice Jagot noted that '[i]n a particular case those matters may bear upon the process of finding facts and drawing inferences relevant to the existence or not of the required opinion'.[17]

Whether the relevant opinion of the Minister exists in terms of the principles outlined above is a question of fact to be determined in the first instance by the Minister and then by the Court if an appeal is lodged.[18] Recent examples of how the approach to s 36(1)(b1) in *Nambucca [No:2]* has been applied, include the following:

- *Awabakal Local Aboriginal Land Council v Minister Administering the Crown Lands Act* [2008] NSWLEC 124 ('*Awabakal*') involved land that the Department had originally placed on a Crown Lands Homesites Program. That program became the responsibility of Landcom when it was created.[19] Prior to the claim being lodged, Landcom sought the Department's approval to 'commit the area to Landcom use' and to 'agree to not take any action in respect of the subject land or any adjacent land without discussion with Landcom.' Landcom's submission was attached to the letter proposing Landcom's acquisition of the land. An officer in the Department approved the submission on behalf of the Minister.[20] Contemporaneously with the date of claim a subdivision application made by Landcom was approved by the local council. The concurrence given by the Minister remained. Justice Pain held that

  > at the date of the claim the relevant Crown Lands Minister through the actions of the officers in the Department of Lands had formed the opinion that the claimed land was needed or likely to be needed for residential land under the Crown Lands Homesites Programme.[21]

- In *Griffith Local Aboriginal Land Council v Minister Administering the Crown Lands Act* [2008] NSWLEC 108 ('*Hillston*') a local government body had, prior to the date of claim, expressed an interest in acquiring Crown land from the Department for residential purposes. The Department had agreed to the acquisition and taken steps to facilitate it. It had also carried out a land capabilities study under the *Crown Lands Act* 1989 (NSW) ('CL Act'). Justice Pain accepted a submission that

  > there is no evidence that the Minister or his Department had the same intention or desire as the Council in relation to future use of the claimed land nor that anyone formed the particular opinion that the land was needed or likely to be needed. An opinion that it was suitable does not satisfy the requirements of the ALR Act.[22]

- The Court found that actions taken by the Department to facilitate the Council's proposed acquisition was not evidence of the required opinion. The Court held that

  > [t]he conduct of the Department in carrying out its usual functions in administering the CL Act does not give rise to any inference that anyone on behalf of the Minister formed an opinion that the land was needed or likely to be needed for residential land.[23]

- In *New South Wales Aboriginal Land Council & Anor v Minister Administering the Crown Lands Act* [2008] NSWLEC 241 ('*Berowra LEC*') Landcom had undertaken an environmental study which concluded that 23 Lots could be developed on a number of parcels of land. Landcom adopted those recommendations prior to the date of claim. The Minister for Planning subsequently announced that the recommendations would be adopted.[24] However, neither the Department nor the Minister for Lands was aware of the contents of the study or the adoption of the recommendations until after the date of claim. Justice Sheahan held that in those circumstances it could not be said that the Minister held the relevant opinion.[25]
- In *Nambucca [No:2]* a development application made by the Department on behalf of the Minister had been approved subject to conditions. The development application had not lapsed prior to the claim being lodged. Justice Jagot held that the development application was not a presumptive answer to whether there was an opinion that land was needed or likely to be needed as residential land.[26] The factors that contributed to the finding that the relevant opinion was not held included that the Department was aware the land had significant constraints, there were other

parcels of land available for development, and the land had been taken off the homesites program.[27]

COMMENTARY

Whether the Minister holds the relevant opinion for the purposes of s 36(1)(b1), ALRA is likely to be the subject of considerable debate in future cases. In the first place, the extent to which the opinion can be held other than by the Minister personally or in any way delegated is not settled.

Secondly, whether in a particular case it can be said that the Minister holds the opinion inferentially from all the facts will be a matter of contest. It is well established that the mere fact that land is zoned for particular purposes,[28] or is capable of being used for residential purposes[29] does not establish need or likely need. Furthermore, government departments inevitably take action in relation to land as part of their normal duties in relation to it. As the decisions in *Hillston* and *Nambucca [No:2]* demonstrate, such administrative steps are not necessarily determinative of any need or likely need for residential land. Selling land, even if it is zoned residential, may be undertaken for a variety of reasons other than addressing land needs. It may be to raise revenue. In those circumstances land development can occur to maximise the return. Alternatively, the sale of land may be because there is an interested buyer and the Government has no other use for the land. Even if such land is sold, in the absence of any agreement as to how the land will be used, there is no guarantee that once in private ownership the land will be used for residential purposes at all. Such possibilities warrant caution in determining that administrative actions of the Department support a finding that there was an opinion that the land was needed or likely to be needed as residential land.

Thirdly, it would seem fundamental that in order for a Crown Lands Minister to have a relevant opinion, the Crown Lands Minister would at least need to have regard to the subject matter in relation to which an opinion needs to be formed. As *Berowra* demonstrates, if the Minister was unaware of that subject matter then he could not feasibly have had any opinion in relation to it.

Where there is no record of consideration in relevant matters, or pertinent material was not before a person or body, a Minister will have difficulty satisfying the Court that the Minister held the relevant opinion.[30] In *Manly Council v Hortis* (2001) 113 LGERA 321[31] the Court held that

> an inference that a consent authority considered a specific precondition to its power to grant a development consent will not normally be derived from material which demonstrates no more than that the consent authority was aware of the issues which were relevant to its decision whether or not to grant consent if it had power to do so.[32]

Similarly, in *Parramatta City Council v Hale* (1982) 47 LGRA 319 Moffitt P considered (at 337) that an inference would be drawn that matters were not taken into account as a result of 'inadequacy of information before' the relevant decision making body and the failure of that body 'to obtain or receive matter which would inform or better inform' it, and the reasonableness of the decision. Moffitt P noted (at 340) that '[b]y remaining ignorant of relevant environmental matters, an authority could not avoid its obligation to consider and, in its ignorance, give a valid consent…'.

Similar considerations are arguably relevant in considering whether an inference should be drawn that a Minister holds an opinion for the purposes of s 36(1)(b1), ALRA. The scheme of the ALRA is not one which authorises retrospective fictions. To do so would abrogate a right of the land council to have the land transferred in circumstances where land was claimable at the date of claim. It would be equally inconsistent with the scheme of the ALRA to infer that a Crown Lands Minister held an opinion in relation to a matter of which at the time neither he, nor his Department had any knowledge, or to which they had never put their mind to.

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1 *La Perouse Local Aboriginal Land Council v Minister Administering the Crown Lands Act* (1991) 74 LGERA 176 ('La Perouse') per Bannon J at 183.

2 *Darkinjung Local Aboriginal Land Council v Minister Administering the Crown Lands Act* (2006) 149 LGERA 162 per Pain J at [139]-[141]. See also *New South Wales Aboriginal Land Council v Minister for Natural Resources* (1986) 59 LGRA 318 at 331.

3 *La Perouse* per Bannon J at 183.

4 *Daruk Local Aboriginal Land Council v Minister Administering the Crown Lands Act [The Londonderry Claim]* (1995) 89 LGERA 194 per Bignold J.

5 *The Londonderry Claim* per Bignold J at 200.

6 Ibid per Bignold J at 203.

7 *Wanaruah Local Aboriginal Land Council v Minister Administering the Crown Lands Act* (2001) 113 LGERA 163 per Lloyd J.

8 See for example *Griffith Local Aboriginal Land Council v Minister Administering the Crown Lands Act* [2008]

NSWLEC 108 ('Hillston') per Pain J at [90].

9 The approach outlined by Jagot J in *Nambucca [No:2]* was approved by the Court of Appeal in *Minister Administering the Crown Lands Act v New South Wales Aboriginal Land Council* [2009] NSWCA 151('*Nambucca (CA)*') per Basten JA (with whom Beazley and Tobias JJA agreed) at [33] and [68]. See also *Minister Administering the Crown Lands Act v New South Wales Aboriginal Land Council & Anor* (2009) 171 56 LGERA 182 ('Berowra').

10 *Berowra* per Macfarlan JA at [121] and [125].

11 See *Nambucca [No:2]* per Jagot J at [65]; and *Hillston* per Pain J at [99] and [106]-[107].

12 See also *Berowra* at [128] and *Nambucca (CA)* at [63] where Basten JA notes assumptions made in those cases in relation to the opinion being held other than by the Minister personally, without endorsing the assumptions.

13 *Berowra* per Basten JA at [62]-[63] and Macfarlan JA at [127]-[128].

14 *New South Wales Aboriginal Land Council & Anor v Minister Administering the Crown Lands Act* [2008] NSWLEC 241 ('*Berowra LEC*') per Sheahan J at [139]-[141].

15 *Hillston* per Pain J at [126].

16 *Nambucca [No:2]* per Jagot J at [91].

17 Ibid per Jagot J at [91]. See also *Hillston* at [124]-[125].

18 See ss 36(5) and 36(7) ALRA.

19 *Awabakal* per Pain J at [13]-[14 and [83]].

20 Ibid per Pain J at [24].

21 Ibid per Pain J at [102].

22 Hillston per Pain J at [117] and [126].

23 Ibid per Pain J at [128].

24 Berowra LEC per Sheahan J at [61]-[68].

25 Ibid per Sheahan J at [139]-[142].

26 Nambucca [No:2] per Jagot J at [108].

27 Ibid per Jagot J at [109]-[120].

28 See for example the *Londonerry Claim* per Bignold J at 204 and *Wanaruah* per Lloyd J at [14].

29 See for example *Hillston* per Pain J at [118].

30 *Manly Council v Hortis* (2001) 113 LGERA 321 per Powell JA, Giles JA and Fitzgerald JA at [21] and [32]. See also *Skouteris v Auburn City Council and Anor* [2005] NSWLEC 207 per Cowdroy J at [25]-[32].

31 This case was cited by Justice Jagot in *Nambucca [No:2]* at [76].

32 *Manly Council v Hortis* (2001) 113 LGERA 321 at 334. See also *Curry v Sutherland Shire Council* (1998) 100 LGERA 365 .

Ceremonial Women
Megan Cadd

Acrylic on French linen
560mm x 410mm

Depicted are women going off to participate in a ceremony in their emu feather skirts.