JURISDICTION	:	WARDEN'S COURT
LOCATION	:	PERTH
CITATION	:	HAWTHORN RESOURCES LTD and GEL RESOURCES PTY LTD v TISALA PTY LTD [2018] WAWC 1
CORAM	:	WARDEN J O'SULLIVAN
HEARD	:	22 March 2018
DELIVERED	:	20 June 2018
FILE NO/S	:	Plaint 505998
TENEMENT NO/S	:	M31/78, M31/79, M31/113, M31/284, G31/4, L31/32 and L31/65
BETWEEN	:	**HAWTHORN RESOURCES LTD and GEL RESOURCES PTY LTD** (Plaintiffs) AND **TISALA PTY LTD** (Respondent)

Catchwords: Summary judgment; Construction of s20(5)(c) & (e) *Mining Act 1978 (WA);* meaning of "occupier";

Legislation:

- *Mining Act 1904 (WA) ss25, 28*
- *Mining Act 1978 (WA)ss8, 16(3), 18, 19, 20(5) & 21*
- *Constitution Act 1890 (Imp)*
- *Land Act 1898 (WA) ss39 & 40*
- *Land Act 1933 (WA)ss4, 29N, 30 & 32*
- *Land Amendment Act 1960 (WA) s2*
- *Land Administration Act 1997 (WA) ss3, 4, 14, 18, 19, 41, 46, 267(2) & 275A*
- *Limitation Act 1935 (WA) s36*
- *Limitation Act 2005 (WA) s75*
- *Transfer of Lands Act (WA)*
- *Money-Lenders and Infants Loans Act 1941-1961 (NSW) s24(1)*
- *Mining Amendment Act 1985 (WA) s13*
- *Landlord and Tenant Act 1948 (VIC)*
- *Aboriginal Land Rights Act 1953 (NSW)s36(1)(b)*

Cases referred to:

- ***Western Australia v Ward*** [2002] CLR 1;
- ***Lansen v Olney*** (1999) 100 FCR 7;
- ***Commonwealth v Western Australia*** (1999) 160 ALR 638;
- ***Cudgen Rutile (No. 2) Pty Ltd v Chalk*** [1975] AC 320;
- ***O'Keefe v Williams*** (1907) 5 CLR 217;
- ***State of New South Wales v Bardolph*** (1934) 52 CLR 455;
- ***Forrest & Forrest v Wilson*** [2017] 346 ALR 1;
- ***Bull v Attorney General*** (1913) 17 CLR 370;
- ***Commonwealth v Western Australia*** (1999) 196 CLR 392;
- ***Simpson v Nominal Defendant*** (1976) 13 ALR 218;
- ***DCT (NSW) v Mutton*** (1998) 12 NSWLR 104;
- ***James v Western Australia*** (2010) 184 FCR 582;
- ***YZ Finance Company Pty Ltd v Cummings*** (1964) AAGL 667;
- ***Du Buisson Perrine v Chan*** [2016] WASCA 18;
- ***FSS Trustee Corporation v Eastaugh*** [2017] VSCA 29
- ***Shannon Realties v Ville de St Michel*** [1924] AC 185
- ***Shilken v Taylor*** [2011] WASCA 255
- ***Deputy Commissioner of Taxation v Lafferty*** [2017] WASC 257
- ***Minister Administering the Crown Lands Act v Bathurst Local Aboriginal Land Council*** [2009] NSWCA 138

- ***Minister Administering the Crown Land Act v NSW Aboriginal Land Council*** (2008) 237 CLR 285
- ***Daruk Local Aboriginal Council v Minister Administering the Crown Lands Act*** (1993) 30 NSWLR 140
- ***R v St Nicholas Rochester*** (1833) 110 ER 773
- ***Lamont v Commissioner of Railways*** (1963) 80 WN (NSW) 1242
- ***Forrest & Forrest v Richard Marmion, Minister for Mines and Petroleum*** [2017] WASCA 153
- ***CIC Insurance Ltd v Bankstown Football Club Ltd*** (1997) 187 CLR 384
- ***Saeed v Minister for Immigration and Citizenship*** (2010) 84 ALR 204
- ***Kingston v Keprose Pty Ltd*** (1987) 11 NSWLR 404
- ***City of Newcastle v Royal Newcastle Hospital (1957) 96 CLR 493***
- ***Minister Administering the Crown Lands (Consolidation) Act v Tweed Byron Local Aboriginal Land Council*** (1992) 75 LGRA 133
- ***Dey v Victorian Railway Commissioner*** (1949) 78 CLR 62 at 91
- ***Australian Can Co Pty Ltd v Levin & Co Pty Ltd*** [1947] VLR 332
- ***Western Australia v Rothmans of Pall Mall (Aust) Ltd*** [2001] WASCA 25
- ***Southern Region Pty Ltd v The Minister for Police and Emergency Services*** (2003) VSCA 105
- ***New South Wales Aboriginal Land Council v Minister Administering Crown Lands Act*** [2016] HCA 50
- ***Woodcock v South Western Electricity Board*** [1975] 1 WLR 983
- ***Trajkoski v Director of Public Prosecutions (WA)*** [2010] WASCA
- ***Minister for Immigration and Ethnic Affairs v Teo*** (1995) 57 FCR 194
- ***Kennedy v Australia Fisheries Management Authority*** (2009) 182 FCR 411

Texts

- PM Lane; Australian Land Law; in JJ Gleeson SC & Ors (Eds); Historical Foundations of Australian Law; (2013)

- Pearce & Geddes; Statutory Interpretation in Australia 7th Ed; (2011).

Result:

1. Application for partial summary judgment granted.

Representation:

Counsel:

Plaintiff	:	Mr A Papamatheos
Respondent	:	Mr G McIntyre SC

Solicitors:

Plaintiff	:	Ensign Legal
Respondent	:	McKenzie & McKenzie

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1 Hawthorn Resources Ltd and Gel Resources Pty Ltd have been granted mining leases[1] by the Minister for Mines and Petroleum on which the Anglo Saxon Gold Mining Project is being developed. The Anglo Saxon mine site is located on the Pinjin pastoral lease (No. 49526) at the former township of Pinjin[2].

2 The tenements owned by Hawthorn and Gel also traverse a number of Crown Reserves[3]. The Pinjin pastoral lease adjoins the Crown Reserves. Tisala Pty Ltd holds the Pinjin pastoral lease and to varying degrees Tisala makes use of the Reserves.

3 Hawthorn and Gel have initiated proceedings in the Warden's Court against Tisala. Among other things they allege that Tisala has interfered with their mining operations both on the Pinjin pastoral lease and, in particular, Crown Reserve 10041.

4 A central feature of the dispute between the parties is whether Tisala is an "occupier" of the Crown Reserves for the purposes of s20(5) of the *Mining Act 1978 (WA)*. For present purposes I am only concerned with land the subject of the Crown Reserves and not land that forms part of the Pinjin pastoral lease. Tisala did not contend otherwise.

5 The primary area of dispute concerns the operation of s20(5)(c) of the *Mining Act* which prohibits a tenement holder, without the written consent of the occupier, from mining on any Crown land that is situated within 100 m of any land that is in actual occupation and on which a house or other substantial building is erected. There is also a dispute as to the construction of s20(5)(e) which prohibits mining, without the written consent of the occupier, on land the subject of a pastoral lease that is situated within 400 m of any water works, race, dam, well or bore.

[1] M31/78, M31/79, M31/113 & M31/284

[2] The Pinjin Township was almost deserted by 1914; see Ex 1 Affidavit of William Donald Lloyd; sworn 25 October 2017; WDL10 at 113

[3] 9736,10041,10060, 10190 & 11438

6 In order to resolve these issues Hawthorn and Gel have made an application for partial summary judgment. It is said that the determination of these issues will go some way to resolving what has been a long running dispute between the parties.

7 Section 8 of the *Mining Act* says, unless the contrary intention appears, an occupier:

> *"in relation to any land includes any person in actual occupation of the land under any lawful title granted by or derived from the owner of the land".*

8 Hawthorn and Gel say that to be an occupier for the purposes of s20(5) not only is actual occupation required but lawful title granted or derived from the owner of the land. Tisala, they say, does not have lawful title.

9 Tisala says it does not need to demonstrate it has lawful title as the term "occupier" is expansive and is not confined to only those with lawful title.

10 Tisala says further that its occupation of the Crown Reserves constitutes lawful title as it has permission from the relevant authorities responsible for the Reserves. Tisala points, in particular, to its use of Crown Reserve 10041, which is reserved as a common, since the 1960's. This includes relocating the Pinjin homestead onto the Reserve and building a number of other structures.

11 Tisala accepts that the State is the lawful owner of the Crown Reserves and that it cannot rely on adverse possession of Crown land.[4] It is not in dispute that Tisala has no registered lease, sublease or licence on the Landgate Register for the Crown Reserves.

12 This application gives rise to three questions:

(1) does the term "occupier" as used in s20(5)(c) of the *Mining Act* require "actual occupation under any lawful title granted or derived from the owner of the land"?

[4] s76; *Limitations Act 2005(WA); s36; Limitation Act (1935) WA*

(2) if the answer to question (1) is "yes", is Tisala an occupier?

(3) does s20(5)(e) only prohibit mining on a pastoral lease that is within 400 m of water works, race, dam, well or bore on a pastoral lease?

13 As is readily apparent from the exhibits tendered in the proceedings[5] and the submissions both oral and written, the resolution of these questions of statutory construction have serious consequences for the parties, all of whom, in one way or another, have made a considerable investment in the Crown land the subject of this dispute.

14 In my view, the term "occupier" in s20(5)(c) is exhaustive and thereby requires that actual occupation be "under any lawful title granted by or derived from the owner of the land". It follows that Tisala having taken possession of Crown Reserve 10041 and used the other Reserves without lawful title granted by or derived from the Crown, is not an "occupier" of the Reserves for the purposes of s20(5)(c) of the *Mining Act*. Further, s20(5)(e) is confined in its operation to prohibit mining on land the subject of a pastoral lease that is situated within 400m of any water works, race, dam, well or bore on that pastoral lease.

Principles of Statutory Construction

15 In ***Forrest & Forrest Pty Ltd v Richard Marmion, Minister for Mines and Petroleum*** the Court of Appeal observed:

> *"The identification of the conditions for the valid exercise of the relevant statutory power is entirely a question of statutory construction. That construction of the relevant statute is reached by the application of rules of interpretation accepted by all arms of government in the system of representative democracy.*
>
> *Those rules require primary attention to be directed to the text of the relevant provision.*
>
> *There must be regard to the language of the statutory instrument viewed as a whole, considered in its context*

[5] An Exhibit list is Annexure A to these reasons

> *An important part of that context will be the purpose of the legislation, ascertained from what the legislation says (rather than any assumption about the desired or desirable reach or operation of the relevant provisions)*
>
> *Once the purpose of the legislation is established, a construction that would promote that purpose shall be preferred to a construction that would not promote the relevant purpose". (footnotes deleted)."*

16 Adopting a particular meaning in order to avoid an unreasonable result is only permissible where the alternative construction is reasonably open[6].

17 The court may have regard to extrinsic material in circumstances of ambiguity or absurdity but that extrinsic material cannot be used to alter the statutory text. [7] Where only one meaning is reasonably open on the language of a provision, the court must adopt that meaning. Even if a drafting error is suspected or the literal meaning gives rise to absurdity, that meaning must prevail unless an alternative interpretation is reasonably open on the language in fact used by the legislature[8].

18 Where more than one meaning is reasonably open, the court may adopt that meaning which best achieves the purpose or object of the statutory provision. The court must always consider context and extrinsic material in the first instance, regardless of whether ambiguity appears on the face of the legislation.[9]

19 As Lord Shaw of Dunfermline observed in ***Shannon Realties v Ville de St Michel:***[10]

> *"Where the words of a statute are clear they must of course, be followed; but, in their Lordships' opinion, where alternative constructions are equally open, that alternative is to be chosen which will be consistent with the smooth working of the system which the statute purports to be regulating; and the alternative is to be rejected which will introduce uncertainty, friction or confusion into the working of the system."*

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[6] ***CIC Insurance Ltd v Bankstown Football Club Ltd*** (1997) 187 CLR 384
[7] ***Commissioner of Taxation v Consolidated Media Holdings Ltd*** (2012) 250 CLR 503 [39]
[8] ***Cooper Brookes (Woollongong) Pty Ltd v Federal Commissioner of Taxation*** (1981) 147 CLR 297 at 320
[9] ***Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue*** (2009) 239 CLR 27 at [47]
[10] [1924] AC 185 at 192-193

Summary Judgment: Legal Principle

20 It is not in dispute that the Warden is empowered by s134(5) and (6) of the *Mining Act* to order summary judgment in an appropriate case.

21 Nor is it contested that summary judgment should only be granted in a clear case where there is a high degree of certainty as to the ultimate outcome should the matter proceed to trial.[11]

22 Upon the applicant for summary judgment satisfying the court there is no real question to be tried, the evidential burden shifts to the defendant to show there is a triable issue or an arguable defence.[12]

23 An applicant for summary judgment is not disentitled because the transaction is intricate if the case is sufficiently clear[13].

24 Extensive legal analysis may be necessary to demonstrate that the defendant's case does not give rise to an arguable defence and there is no question that ought be tried[14].

25 While a court may refuse to dispose of difficult and substantial questions of law without full argument, that fact does not preclude a court from ordering summary judgment if the facts are undisputed and the case is sufficiently clear[15].

26 Whenever summary judgment is sought, it is open to the court to reach a conclusion on a question of law, even one involving argument, if at the end of the day the matter is plain. However, that will be appropriate if and only if the conclusion is in aid of the grant of summary judgment. When summary judgment is sought by the plaintiff, the question is whether the court is satisfied the plaintiff's claim must succeed. If so, ordinarily summary judgment will follow.

[11] *Shilken v Taylor* [2011] WASCA 255 [30]-[41]
[12] *Deputy Commissioner of Taxation v Lafferty* [2017] WASC 257 at [54]
[13] *Dey v Victorian Railway Commissioner* (1949) 78 CLR 62 at 91
[14] *Australian Can Co Pty Ltd v Levin & Co Pty Ltd* [1947] VLR 332 at 334
[15] *Western Australia v Rothmans of Pall Mall (Aust) Ltd* [2001] WASCA 25 [1] [2] [20][36]

27 Where, however, the plaintiff's application fails, the appropriate course is to allow the matter to proceed to trial. Summary judgment differs from a preliminary issue to be determined before trial. An application for summary judgment is not the occasion for determining, adversely, to the plaintiff and finally, a question of law[16].

Tisala's occupation of the Crown Reserves

28 Pinjin Pastoral station comprises about 127,135 ha within the Boulder and Menzies shires. It is situated about 170 km north-east of Kalgoorlie[17].

29 Reserve 10041 was set aside in 1906 as a common for the use of local residents and small scale farmers to use for grazing and watering of stock and the collection of firewood.[18]

30 According to Landgate records between 1964 and 1966 the Pinjin Station homestead was relocated onto Reserve 10041.[19] I note that no evidence has been presented to confirm that authorisation to relocate the homestead was sought or granted by the Crown or its representatives. Nor is there any evidence that Tisala paid for the land or the use of the land.

31 The old pastoral leases were surrendered and a new pastoral lease was issued to Tisala on 26 June 1967.[20] Neither the old pastoral leases nor the current Pinjin pastoral lease include the Crown Reserves.

32 Despite the apparent lack of authorisation, the Crown, through its instrumentalities, was aware Tisala had taken up residence on Reserve 10041 and its use of the other Crown Reserves.

33 On 28 March 1969, DM Smith, the Chief Pastoral Inspector wrote [21]:

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[16] ***Southern Region Pty Ltd v The Minister for Police and Emergency Services*** (2003) VSCA 105 per Phillips JA at [14] (with whom Buchanan JA agreed)
[17] Ex 9 Affidavit of Steven Lionel Kean; sworn 14 February 2018; SK12
[18] Ex 7 Affidavit of Lawrence Craig Thomas sworn; 9 February 2017; Annexure LT38; p141;
[19] Ex 7 Affidavit of Lawrence Craig Thomas sworn; 9 February 2017; Annexure LT34; p141
[20] Ex 9 Affidavit of Steven Lionel Kean; sworn 14 February 2018; SK1; p5
[21] Ex 9 Affidavit of Steven Lionel Kean; sworn 14 February 2018; SK4; p8

> *"The 379,826 acre lease has been subdivisionally fenced into 35 paddocks. Reserves 10041, 11438, 8935 and portions of Reserves 10035 and 17325 are being utilised by the lessees. The property is supplied by 47 made stock waters and many miles of pipeline and a further 12 tanks, 21 miles of pipeline and 1 dam are proposed by the lessee".*

34 A map attached to the letter shows the location of the homestead on Reserve 10041 and various pipelines. It shows that Reserve 10041 is entirely surrounded by the pastoral lease.[22]

35 According to Mr Lawrence Thomas, since he became a director of Tisala on 4 November 2005, Tisala has maintained infrastructure on Crown Reserves 10041, 11438 and 10190. This includes, but is not limited to, the homestead, demountable buildings, sheds, pipelines, fencing, cattle yard, troughs, windmills and other water points and an airstrip, a dam. Old equipment is stored on Crown Reserve 10190. Mr Thomas says that all of the Crown Reserves are used for grazing purposes and for various other unspecified purposes.[23]

36 Since 2005 the Shire of Menzies has been the management body with care, control and management of the Reserve 10041. The Shire of Menzies have allowed Tisala to continue to occupy the Reserve in order to oversee its pastoral operations.[24]

37 Since 2012 Tisala has been directed by the Pastoral Lands Board to upgrade infrastructure on the pastoral lease. It would appear that the Board approved a development plan in February 2015 which included repairs and refurbishment, of the Pinjin Station homestead, even though it is located on Reserve 10041 and is not on the pastoral lease.

38 On 14 October 2016 the Department of Mines and Petroleum (DMP) wrote to Hawthorn confirming that the Department of Lands had asked the DMP to

[22] Ex 9 Affidavit of Steven Lionel Kean; sworn 14 February 2018; SK5; p9
[23] Ex 7 Affidavit of Lawrence Craig Thomas, sworn 9 February 2017; [11] & [12]
[24] Ex 7 Affidavit of Lawrence Craig Thomas, sworn 9 February 2017; LT34 p141

approve, under s16(3) of the *Mining Act*, a request by Tisala for the inclusion of Crown Reserves 10041, 11438 and 9736 into the Pinjin pastoral lease.[25]

39 Minutes of the Ordinary Meeting of Council of the Shire of Menzies held on 27 October 2016 reveal that the Shire passed a motion to surrender Reserve 10041 to allow its amalgamation into the Pinjin pastoral lease.[26] The Council also approved the amalgamation of the Reserve into the Pinjin pastoral lease and confirmed that no portion of the Reserve had been transferred, granted, created or reserved in a registerable form in favour of any other person.[27]

40 It is to be assumed that the approval of the Minister for Mines and Petroleum was not forthcoming as there is no evidence any amalgamation took place.

41 A letter from the Department of Planning, Lands and Heritage (DPLH)[28] to Tisala dated 20 November 2017 confirms that the Department recognises Tisala's occupation. The letter also says:

> *"It is not uncommon for pastoral infrastructure to be located on non-pastoral lease land such as water reserves and stock routes. In most cases this does not cause operational issues. However, where practical, DPLH supports the amalgamation of non-pastoral lease land into the pastoral lease to ensure clarity and transparency for all parties".*[29]

42 Notwithstanding all of the above, Tisala has no registered lease, sublease or license in relation to any of the Crown Reserves nor have any of the Reserves been amalgamated with the Pinjin pastoral lease.

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[25] Ex 1 Affidavit of William Donald Lloyd; sworn 25 October 2017; WDL 19 p549

[26] Ex 2 Affidavit of William Donald Lloyd; sworn 22 November 2017; WDL 56 p120.

[27] Section 14 of the *Land Administration Act* provides that the Minister, where practicable, is to consult the local government in the relevant district before exercising any power in relation to Crown land.

[28] The DPLH is the responsible agency according to the Crown Land Title; see Affidavit of Timothy Iren Masson; sworn 4 December 2017; TIM6 p188

[29] Ex 7 Affidavit of Lawrence Craig Thomas; sworn 9 February 2017; LT34 at 141

Legislative History

43 The *Mining Act 1904* preceded the *Mining Act*. While a miner's right has a very different meaning in the *Mining Act*, in the *1904 Act* it provided considerable rights to the holder.

44 Section 26 gave the holder of a miner's right the ability, among other things, to take possession of and mine and occupy Crown land for mining purposes. It also enabled the holder to "erect and remove any building or structure on any Crown land lawfully occupied".

45 Section 28 of the *1904 Act* provided:

> *"28. The undermentioned Crown lands shall be exempt from occupation by the holder of a miner's right:-*
> *(1) Land already occupied by virtue of a miner's right;*
> *(2) Land in lawful occupation as a yard, garden, orchard, or cultivated field;*
> *(3)* ***Land in actual occupation on which a house or other substantial building has been erected; and***
> *(4) Land on which an artificial dam or reservoir has been made or a well or bore sunk:*
> *Provided that any such land, not being a claim, may be occupied as a claim*
> *(a) if the miner shall first make compensation for any improvements to the occupier of the land, such compensation to be assessed by the warden; or*
> *(b) for mining below the surface on conditions prescribed by the regulations." (my emphasis)*

46 Section 28 exempted certain Crown lands from occupation by the holder of a miner's right. This included "land in actual occupation on which a house or other substantial building has been erected".

47 Section 28 is, however, subject to a proviso that Crown land not being a claim (ie already the subject of a miner's right) may be occupied as a claim if the miner first makes compensation to the occupier. Compensation was to be assessed by the Warden.

48 There is no definition of occupier in the relevant Part of the *1904 Act*. Interestingly, the word occupation is not used uniformly throughout s28. Subsection (2) refers to "lawful occupation" in contradistinction to "actual occupation" in subsection (3).

49 Whatever meaning was attributed to the term "occupier" in s28, it did not provide a right to veto mining, it only provided a right to be compensated.

50 Unquestionably, the *1904 Act* made it clear that mining was to be given priority in terms of access to Crown land as even those in actual occupation of a house in accordance with s28(3) could not veto mining.

51 Section 20(5) of the *Mining Act* represents the modern version of s28 of the *1904 Act*. As first drafted s20(5) provided marginally improved protection for occupiers in that, if the occupier did not consent to mining taking place on certain Crown land, the Warden could not direct otherwise unless satisfied that the land was bona fide required for mining purposes and that compensation had been agreed or determined. This change from the position in the *1904 Act* demonstrated that in appropriate circumstances mining did not take priority over other land usages. In particular there was a concern to protect the interests of pastoralists.[30]

52 Other significant changes included the introduction of a definition of "occupier" in s8 and the delineation between the rights of "occupiers" and "owners" in s20(5).

53 As a consequence of s13 of the *Mining Amendment Act 1985 (WA)* two material changes were made to s20(5). First, the reference to subparagraph (c) has been removed from subparagraph (ea) which provides that the Warden can overrule the occupier's decision to withhold consent. As a consequence an occupier of

[30] Mr Mensaros; Minister for Mines; Legislative Assembly; 24 August 1978; p2621

land in actual occupation on which there is a house or other substantial building erected has an absolute right of veto that cannot be overruled by the Warden.

54 The second reading speech [31] reflects that this amendment was introduced to protect the interest of pastoralists.

55 Second, the words "any Crown land" in s20(5)(c) were deleted and replaced by the words "any land". This manifests an intention to broaden the operation of subparagraph (c) so that mining cannot take place on any Crown land within a 100m of Crown land or, for example, private land on which a house or other substantial building is erected.

56 It is unlikely either of these amendments altered the meaning of occupier as the definition in s8 has remained unchanged since the *Mining Act* was proclaimed.

57 Other than the references to pastoralists in the second reading speech to the *Mining Act* and the second reading speech to the *Mining Amendment Act 1985*, neither the second reading speech to the *1904 Act*, the Report of the Committee of Inquiry into the Mining Act 1904, the Western Australia Report of the Inquiry into aspects of the Mining Act (1983) nor the Report of the Select Committee into the *Mining Amendment Bill 1985* shed any light on the operations of s20(5) of the *Mining Act* or its predecessor.

The ordinary meaning of the words "occupier" and "actual occupation"

58 The ordinary meaning of the word "occupier" is canvassed in the following dictionaries:

Cambridge Online Dictionary:

> *"Someone who lives or works in a particular room, building or piece of land, or someone who is using it".*

Macquarie Online Dictionary:

[31] Mr Parker, Minister for Minerals and Energy; Legislative Assembly; 13 March 1985; 888-889

> *"a person having the legal right to reside, or who is residing in a house, on land etc".*

Oxford Online Dictionary:

> *"a person or company residing in or using a property as its owner or tenant or (illegally) as a squatter".*

Shorter Oxford English Dictionary:

> *"A person holding a possession of property, esp, a dwelling or land, or a position or office; spec. a person living in a dwelling as its owner or tenant".*

59 A detailed consideration of the terms "occupation" and "actual occupation" has been undertaken in various decisions concerning whether Crown land is "not lawfully used or occupied" so as to be claimable land in accordance with s36(1)(b) of the *Aboriginal Land Rights Act 1953 (NSW)* (*ALR Act*). There is no definition of "occupied" in the *ALR Act* and the term is to be understood in accordance with its common understanding.[32]

60 For the purposes of the *ALR Act* it is accepted that "occupation" must mean actual occupation. This is because the Crown is the universal occupant of land over which sovereignty is asserted and therefore in theory all Crown land is notionally occupied by the Crown and would not be claimable land. The alternative construction would undermine the object of the *ALR Act* in making available a substantial pool of Crown land which is actually unused and unoccupied. It is because it is unused and unoccupied that it is subject to the possibility of claim.[33]

61 Hayne, Heydon, Crennan and Kiefel JJ in ***Minister Administering the Crown Lands Act v New South Wales Aboriginal Land Council*** observed:[34]

> *"[a] combination of legal possession, conduct amounting to actual possession, and some degree of permanence or continuity will usually constitute occupation of the land."*

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[32] ***Minister Administering the Crown Lands Act v Bathurst Local Aboriginal Council*** [2009] NSWCA 138 per Ipp JA [28] & Tobias JA [160]
[33] See ***Minister Administering the Crown Lands Act v NSW Aboriginal Land Council*** [2008] HCA 48 per Kirby J at ?
[34] [2008] 82 ALJR 1505, see also ***New South Wales Aboriginal Land Council v Minister Administering Crown Lands Act*** [2016] HCA 50 at [22]

62 The High Court pointed out that this was not an exhaustive definition and did not chart the "metes and bounds" of "occupation". Attention must be given to identifying the acts, facts, matters and circumstances which are said to deprive the land of the characteristic of being "not lawfully used or occupied". Their Honours referred to ***Council of the City of Newcastle v Royal Newcastle Hospital*** as an example of the breadth of circumstances to which these words may have application. In that case land adjoining hospital grounds had been purposely kept it in a natural state to provide clean air and quiet undeveloped surroundings and was considered to be "used or occupied by the hospital for the purposes thereof".

63 In ***Minister Administering the Crown Lands (Consolidation) Act v Tweed Byron Local Aboriginal Land Council***,[35] Clarke JA (with whom Samuels and Meagher JJA agreed) said:

> *"[M]ere proprietorship is not sufficient to establish the lands are occupied. Something more is needed. Physical acts of occupation, the exercise of control, maintaining of lands are all factors which are relevant. However, the diversity of the circumstances in which the question whether the Crown lands are occupied can arise cautions me against attempting to articulate a comprehensive test for resolving that question. In some instances the fact that the lands are fenced may be significant, in other[s] the use to which the land is put might be determinative...*
>
> *[C]ontinuous physical presence on every part of the land does not have to be shown to establish occupation. For instance, the fact that a public authority charged with the care, control and maintenance of land reserved for public recreation improves only part of the land for public use and leaves the rest in a natural state does not lead inevitably to the conclusion that the part it has not improved is not occupied by it. The fact that land is left in its natural state does not mean it is not an important recreation area."*

64 In ***Daruk, Local Aboriginal Land Council v Minister Administering the Crown Land Act***[36] Priestley JA drew a distinction between constructive occupation and actual occupation. His Honour attributed to "constructive occupation" the meaning given to the term by Denman CJ in ***R v St Nicholas Rochester***[37] in which the statutory provision in a question said:

[35] (1992) 75 LGRA 133 at [140]
[36] (1993) 30 NSWLR 140 at 161-162
[37] [1833] 110 ER 773

> *"No person shall acquire a settlement in any parish by reason of such yearly hiring of a dwelling house or building or of land, or of both, as in the said Act expressed, unless such house or building or land, shall be actually occupied (my emphasis) under such yearly hiring by the person hiring the same".*

65 ***St Nicholas Rochester*** concerned a pauper who had sublet a portion of a parish house leased to him. Denman CJ held that the pauper was only in constructive possession of those parts of the house he had sublet. The subletting did not constitute actual occupation.

66 Denman CJ[38] said:

> *"A constructive occupation will not satisfy these words. The statute requires in terms of an actual occupation. Here it appears that the pauper underlet the two upper floors, and occupied the ground floor himself. It is impossible to say in the face of the statute, that the pauper, who occupied the ground floor only, actually occupied the whole house".*

67 Priestly JA [39] concluded that actual occupation means being occupied in fact and to more than a notional degree.

68 In ***Walsh v Public Trustee & Ors*** [40] the *Landlord and Tenant Act 1948 (Vic)* provided that a person, not being a lodger or boarder, who resided with the lessee of prescribed premises immediately prior to the lessee's death is actually in possession of the premises shall have a right to continue in possession.

69 Herring CJ and Gavan Duff J[41] concluded:

> *"Effect must be given to the word "actually" as a matter of construction and it seems to us that the person the Legislature must be taken to have intended to benefit by the words "actually in possession" is one in actual occupation in contradistinction to a person with a legal right to possess but not in actual occupation."*

[38] At 776
[39] (with whom Cripps JA agreed) at 162
[40] [1956] VLR 525
[41] At 525

The definition of "occupier" in s8 of the *Mining Act*

70 There are two significant features of the definition of "occupier" is in s8 of the *Mining Act.*

71 First, the definition is prefaced by the words "unless the contrary intention appears". The starting point is that there is a presumption that defined words in a statute have their defined meanings which is not to be displaced without good reason.[42]

72 As Forster J in ***Simpson v Nominal Defendant*** [43] observed, the proper approach is to assume that the expression is used as defined and then ask whether, in the particular context in which it appears, a contrary intention can be shown.

73 In ***DCT (NSW) v Mutton,***[44] Mahoney JA referred to the following circumstances as possibly indicative of a contrary intention:

(a) where the definition provides that one thing shall be done and the Act or section in question provides that another shall be done;

(b) where the context of the Act as a whole indicates that the definition is not to apply;

(c) where, if the definition were to be applied, the provisions of or the procedure established by the section in which the defined term is used would not appropriately work;

(d) where the application of the statutory definition would lead to confusion.

74 Ultimately, the question that the court needs to determine in deciding if there is a contrary intention is whether the legislature intended the statutory definition should apply to the particular section.

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[42] *Qantas Airways Ltd v Chief Commissioner of State Revenue* [2008] NSWSC 1049 at (38)
[43] (1976) 13 ALR 218 at 214
[44] (1998) 12 NSWLR 104 at 108; see generally Pearce & Geddes; Statutory Interpretation in Australia 7th Ed; (2011) at 255

75 Second, the definition of "occupier" is also prefaced by the word "includes", thereby adding yet another level of complexity to its application.

76 As Newnes JA observed in ***Du Buisson Perrine v Chan***:[45]

> *"A definition is to provide aid in construing the statute and is not therefore to be construed in isolation but in the context of the statute. As McHugh J pointed out in* ***Kelly v The Queen*** *[2004] HCA 12; (2004) 218 CLR 216:*
>
> > *Nothing is more likely to defeat the intention of the legislature than to give a definition a narrow, literal meaning and then use that meaning to negate the evident policy or purpose of a substantive enactment [103].*
>
> *It is the case that where 'includes' (as opposed to 'means') is used in a statutory definition it will ordinarily not be intended to be exhaustive but rather simply to enlarge the ordinary meaning of the term to bring within it something that would otherwise not be within it:* ***Owen v Menzies*** *[2012] QCA 170; [2013] 2 Qd R 327 [106];* ***Transport Accident Commission v Hogan*** *[2013] VSCA 335 [47]. It may also be used to avoid possible uncertainty by expressly providing for the inclusion of particular borderline cases:* ***Corporate Affairs Commission (SA) v Australian Central Credit Union*** *(1985) 157 CLR 201, 206 – 207."*

77 The potential uncertainty surrounding the word "includes" is widely appreciated.[46] As Pearce and Geddes [47] point out, the neat distinction between "means" and "includes" is not always adhered to. Sometimes, despite the use of the word "includes", the definition was intended to be exhaustive.

78 In ***YZ Finance Company Pty Ltd v Cummings,***[48] the High Court considered whether as promissory note was a "security" for the purposes of section 24(1) of the *Money-Lenders and Infants Loans Act 1941-1961 (NSW).* Section 24(1) provides that a money lender shall not be entitled to institute any proceedings other than for the enforcement of the security to recover any amount payable under the contract.

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[45] [2016] WASCA [55]; see also ***FSS Trustee Corporation v Eastaugh*** [2017] VSCA 29 at [76] per Keogh AJA (with whom Tate and Santa Maria JJA agreed).
[46] ***Blacktown Workers' Club Ltd v O'Shannessy*** [2011] NSWCA 265 at [20] per Basten JA
[47] At 248
[48] (1964) AAGL 667

79 The term "security" was defined as including bill of sale, mortgage, lien, and charge of any real or personal property, and any assignment, conveyance, transfer or dealing with any real or personal property to secure repayment of any loan.

80 The Court referred to the statement by Lord Watson in ***Dilworth v Commissioner of Stamps*** [49] that "includes" is susceptible, if the context supports it, to a construction equivalent to "means and includes" and is thereby exhaustive.

81 The majority, McTiernan, Kitto, Taylor and Windeyer JJ, held that despite the use of the word "includes" in the definition of security, the list of items was exhaustive.

82 In ***Y2 Finance***, in the relevant definition clause, the verb "includes" was follows by a list of specified things. The specified things were heterogeneous; each had a common element from which could be discerned an intelligible policy behind the provision; and the things were so widely described as to cover all possible forms of the subject of the definition.[50]

83 According to Kitto J [51] even though the word "security" may have a secondary or popular meaning wide enough to comprehend a promissory note, the policy of the Act precluded its inclusion. The Act did not contemplate a money lender having both a right to get his or her money out of property and a right to sue on the personal obligation of the borrower to pay.

84 His Honour remarked:[52]

> *"Unlike the verb 'means', 'includes' has no exclusive force of its own. It indicates that the whole of its object is within its subject, but not that its object is the whole of its subject. Whether its object is the whole of its subject is a question of the true construction of the entire provision in which the word appears."*

85 Kitto J rejected that "includes" is equivalent to "means" and "includes". His Honour also cautioned against taking the statement of Lord Watson in ***Dilworth***

[49] [1899] AC 99
[50] ***Du Buisson Perriene v Chan*** [2016] WASCA 18 at [133] per Murphy JA
[51] At 671
[52] At 670

too literally so as to reduce the inquiry to an inquiry about the meaning of "includes".

86 Although the drafter has selectively used the words "means" and "includes" variously throughout the definitions in s8 of the *Mining Act* so as to indicate that the decision to use one or the other term is deliberate, precision by the drafter is not determinative.[53]

Section 20(5) of the *Mining Act*

87 Part III of the *Mining Act* is headed 'Land open for mining'. Division 1 is headed 'Crown land'.

88 Section 18 provides that all Crown land, not being Crown land that is the subject of a mining tenement, is open for mining.

89 Section 19 empowers the Minister to exempt any land not being private land or land that is the subject of a mining tenement or an application therefore from mining, a specified mining purpose, the *Mining Act* or a specified provision of the *Mining Act*.

90 Section 20 appears in Division 1 of Part III and is headed "Protection of Certain Crown Land".

91 Crown land is defined in s8 of the *Mining Act* in the following terms:

> "***Crown land*** *means all land except —*
>
> *(a) land that has been reserved for or dedicated to any public purpose other than —*
>
> *(i) land reserved for mining or commons;*
> *(ii) land reserved and designated for public utility for any purpose under the Land Administration Act 1997;*
>
> *(b) land that has been lawfully granted or contracted to be granted in fee simple by or on behalf of the Crown;*

[53] ***Lamont v Commissioner of Railways*** (1963) 80 WN (NSW) 1242

(c) land that is subject to any lease granted by or on behalf of the Crown other than —

(i) a pastoral lease within the meaning of the Land Administration Act 1997, or a lease otherwise granted for grazing purposes only; or

(ii) a lease for timber purposes; or

(iii) a lease of Crown land for the use and benefit of the Aboriginal inhabitants.

(d) land that is a townsite within the meaning of the Land Administration Act 1997.

*"**20. Protection of certain Crown land***

[(1)-(4) deleted]

(5) Notwithstanding that any Crown land to which this subsection refers may be marked out as or be included in a mining tenement, a mining tenement or Miner's Right does not entitle the holder thereof to prospect or fossick on, explore, or mine on or under, or otherwise interfere with, any Crown land that is —

(a) for the time being under crop, or which is situated within 100m thereof;

(b) used as or situated within 100m of a yard, stockyard, garden, cultivated field, orchard, vineyard, plantation, airstrip or airfield;

*(c) **situated within 100m of any land that is in actual occupation and on which a house or other substantial building is erected;***

(d) the site of or situated within 100m of any cemetery or burial ground;

*(e) **land the subject of a pastoral lease within the meaning of the Land Administration Act 1997 which is the site of, or is situated within 400m of the outer edge of, any water works, race, dam, well or bore, not being an excavation previously made and used for mining purposes by a person other than a lessee of that pastoral lease,***

without the written consent of the occupier, unless —

(ea) the warden in relation to any land other than land referred to in paragraph (c) otherwise directs; or

(eb) in the case of mining, it is carried out not less than 30m below the lowest part of the natural surface of the land,

but nothing in this subsection prevents such a holder from passing and repassing over any Crown land that is situated within —

(f) 100m of any Crown land that is —

(i) for the time being under crop; or

(ii) used as a yard, stockyard, garden, cultivated field, orchard, vineyard, plantation, airstrip or airfield; or

(iii) in actual occupation and on which a house or other substantial building is erected; or

(iv) the site of any cemetery or burial ground;

or

(g) 400m of any Crown land that is the site of any water works, race, dam, well or bore,

in order to gain access to other land (not being Crown land referred to in paragraph (f) or (g)), for the purpose of prospecting or fossicking on, exploring, mining on or under, or marking out that other land but a warden shall not give a direction under paragraph (ea) unless he is satisfied that the land is bona fide required for mining purposes and he is satisfied that compensation in accordance with section 123 for all loss or damage suffered or likely to be suffered by an owner or occupier of the land has been agreed upon or otherwise determined, or is assessed and settled in accordance with this Act.

(5a) The holder of a mining tenement or Miner's Right who passes or repasses over any Crown land that is situated within —

(a) 100m of any Crown land referred to in subsection (5)(f); or

(b) 400m of any Crown land referred to in subsection (5)(g),

in order to gain access to the other land referred to in subsection (5) for the purpose referred to therein shall —

(c) before so passing or repassing, take all reasonable and practicable steps to notify the occupier of the Crown land so situated of his intention to do so; and

(d) when so passing or repassing —

(i) take all necessary steps to prevent fire, damage to trees or other property and to prevent damage to any property or damage to livestock by the presence of dogs, the discharge of firearms, the use of vehicles or otherwise; and

(ii) cause as little inconvenience as possible to the occupier of the Crown land so situated; and

(iii) comply with any reasonable request made by the occupier of the Crown land so situated in relation to the manner in which that holder so passes or repasses;

and

(e) restrict the number of occasions on which he so passes or repasses to the minimum necessary for the purpose of prospecting or fossicking on, exploring, mining operations on or under, or marking out that other land; and

(f) make good any damage caused by that passing or repassing to any improvements or livestock on the Crown land so situated,

and the occupier of the Crown land so situated is entitled to be compensated by that holder for any damage referred to in paragraph (f) that is not made good by that holder, and, in respect of land under cultivation, for any other loss or damage for which that holder is liable in accordance with section 123.

(5b) The amount of any compensation payable under subsection (5a) by the holder of the mining tenement or Miner's Right concerned to an occupier of Crown land referred to in that subsection shall be determined —

(a) by agreement between that holder and that occupier; or

(b) in default of agreement, by the warden's court on the application of that holder or that occupier.

(5c) A determination made by the warden's court under subsection (5b) is, for the purposes of section 147(1), a final determination of the warden's court."

(my emphasis)

92 It is not in dispute that the Crown Reserves are Crown land.

What does "occupier" mean in s20(5) of the *Mining Act*?

93 The definition of "occupier" must not be construed in a vacuum. A definition is but an aid to construction; its true meaning is ultimately to be derived from the context in which it is employed. That context involves a consideration of the objects of the *Mining Act* and the terms of the substantive provision.

94 As Basten JA observed in ***Blacktown Workers' Club Ltd v O'Shannessy:***

"... The value of a dictionary in providing common (and indeed uncommon) uses of words is undeniable; the pitfalls with respect to their use in statutory construction derive from their strengths. A common word may have a core meaning, but it may also be used analogically, figuratively, metaphorically and sometimes merely to raise illuminating associations. The danger was famously identified by judge Learned Hand in ***Cabell v Markham*** *(1945) 148 F.2d 737 at 730:*

> *"But it is one of the surest indexes of a mature and developed jurisprudence not to make a fortress out of the dictionary; but to remember that statutes always have some purpose or object to accomplish, whose sympathetic and imaginative discovery is the surest guide to their meaning."*

The importance of this approach, cited with approval in ***Residual Assco Group Ltd v Spalvins*** *[2000] HCA 33; 202 CLR 629 at [27], is reflected in*

the obligation to adopt a construction of a statute which would 'promote the purpose or object underlying the Act'."

95 A primary object of the *Mining Act* is to ensure, as far as practicable, that land which has either known potential for mining or is worthy of exploration will be made available for mining or exploration.[54] Mining is to be encouraged because of the royalties earned for the benefit of the State.[55]

96 The pursuit of that objective calls into play the inevitable question as to how the *Mining Act* deals with what land, including Crown land, is to be made available for mining and the balancing of competing land usages.

97 Hawthorn and Gel rely on s16(3) of the *Mining Act* which provides that no Crown land that is in a mineral field shall be leased, transferred in fee simple, or otherwise disposed of under the provisions of the *Land Administration Act 1997 (WA) (LAA)*, without the approval of the Minister for Mines and Petroleum. Hawthorn and Gel say that s16(3) demonstrates that mining sits atop the hierarchy of land usages and that only those in actual occupation under any lawful title granted by or derived from the owner of the land, are able to veto mining in accordance with s20(5)(c).

98 While s16(3) makes it plain that mining is important to the State, it does not address how mining and other land usages are to be accommodated. That question falls, so far as Crown land is concerned, to be determined in accordance with s20(5). The significance of mining to the State is evident from the fact that apart from subparagraph (c), s20(5) enables the Warden to direct that mining proceed despite the occupier refusing to consent. Unlike the *1904 Act*, under the *Mining Act* provisions mining is not to proceed at all costs.

99 Section 20 appears to have two objectives. The first is to create a buffer zone on Crown land between mining and certain areas of land so as not to interfere with the occupier's use of the land, unless the occupier consents or the Warden (except

[54] ***Forrest & Forrest v Richard Marmion, Minister for Mines and Petroleum*** [2017] WASCA 153 at [96]
[55] ***Re: Minister for Resources; Ex Parte Cazaly Iron Pty Ltd and Another*** [2007] WASCA 175 per Buss JA [24]

in relation to subparagraph (c)) otherwise directs. Should the Warden so direct, the occupier and owner are to be compensated.

100 The second is to allow the holder of a mining tenement to pass over Crown land within the buffer zone in order to gain access to other land (not being Crown land within the buffer zone) to conduct mining on that land.

101 So far as s20(5)(a)-(e) is concerned, only the occupier's consent is relevant. If, excluding subparagraph (c), the Warden overrules the occupier's refusal to provide consent and allows mining to proceed, then the miner is required to compensate both the occupier and owner for any damage sustained.

102 Where, however, the miner, in accordance with subparagraphs (f) or (g), wants to pass or repass over the Crown land referred to subsection (5)(a)-(e) the miner is required to make good any damage caused by that passing or repassing to any improvements or livestock on the Crown land. The occupier in accordance with s20(5a) is entitled to be compensated by the miner for any damage not made good and in respect of land under cultivation, for any loss or damage for which the miner is liable in accordance with s123. Significantly, the owner of Crown land has no rights under s20(5a).

103 As is readily apparent, particularly so far as s20(5)(c) is concerned, the essential question is who is to be considered an occupier in the event a house or other substantial building is erected on Crown land?

104 Tisala places reliance on ***Western Australia v Ward*** [56] wherein the majority of the High Court commented in relation to the definition of "occupier" in the *Mining Act*:

> *"When the use of the term 'includes' is contrasted with the term 'means' in the definition of 'owner', it may be that the Act does not limit what otherwise might be meant by the term 'occupier'."*

[56] (2002) 213 CLR, at [310]

105 It is relevant to observe that immediately following the passage quoted above the majority said:

> *"However, it is not necessary to reach any conclusion on this matter, nor is it necessary to determine whether the relevant native title holders were 'occupiers' under the WA Mining Act."*

106 Callinan J is, however, more definitive, concluding that the definition of "occupier" in the *Mining Act* is capable of applying to native title rights:

> *"It can be seen that the definition of "occupier" is expressed inclusively and does not exclude occupation according to its ordinary meaning of being in possession by having a physical presence on the land."*

107 McHugh J[57] having expressed general agreement with the analysis of Callinan J specifically rejects his Honour's comments about the word "occupier":

> *"The matter to which I refer is the statement in his Honour's judgment (668) (sic 854) that native title holders come within the definition of "occupier" in the Mining Act 1978 (WA). I do not think that it can be said that the title of native titles holders has been 'granted by or derived from the owner of the land'."*

It is implicit from this comment that his Honour concluded that the definition of occupier in the *Mining Act* is constrained by the words "under any lawful title granted by or derived from the owner of the land."

108 Tisala also rely on ***James v Western Australia*** [58] where the Full Federal Court, referring to ***Ward***, acknowledged that the definition of "occupier" is inclusive but said determining whether the native title claimants were "occupiers" required findings of fact to be made that went beyond the scope of the facts contained in the Special Case.

109 Three observations can be made about ***Ward*** and ***James***. First, both involve native title claims in which it was acknowledged that the native title claimants could not be said to hold lawful title granted or derived from the owner of the

[57] At [559]
[58] (2010) 184 FCR 582 at [78]-[79]

land as the Crown is not apt to be described as the owner of land the subject of native title.

110 Second, both the majority of the High Court in ***Ward*** and the Full Federal Court in ***James*** did no more than acknowledge that the orthodox position arising from the use of the word "includes" is that it extends the definition, but did not undertake a detailed consideration of the issue.

111 Third, while Callinan and McHugh JJ gave the issue some consideration, neither examined what the word "occupier" meant in the context of s20(5)(c) or (e) of the *Mining Act*.

112 The words "actual occupation **under** any lawful title ..." arguably commands that an "occupier" is someone who satisfies both parts of the definition. In reality these words could be considered words of qualification not expansion.

113 An alternate construction involves "includes" either signalling that the words "actual occupation under any lawful title ..." in no way limit the ordinary meaning of the term "occupier" or removing any uncertainty that may exist as to that term's inclusion in the definition. It was also suggested that s20(5) is a beneficial provision and an expansive construction ought to be preferred.

114 In my view the word "occupier" when used in s20(5) of the *Mining Act* is exhaustive for the following reasons.

115 First, the use of the word "includes" in the definition of "occupier" is not consistent of either of the orthodox uses of that term described by Newnes JA in ***Du Buisson Perrine***.[59]

116 As the term "actual occupation under any lawful title granted by or derived from the owner of the land" is consistent with the ordinary meaning of the word occupier, it is unlikely the term was specifically included with a view to extending the ordinary meaning of "occupier". Usually "includes" is used in

[59] See [76] above

combination with a list of items from which it can be discerned the breadth of the term. There is no list in this case. Similarly, there is no reason to believe that the term gave rise to any uncertainty as to whether it falls within the ordinary meaning of occupier or is otherwise a marginal case requiring clarification.

117 The term "actual occupation under lawful title ..." represents a more definitive form of occupancy than actual occupation. If the definition of "occupier" in s8 is intended to be expansive and thereby include actual occupation, how is that achieved by including a more definitive form of occupancy as the only example?

118 Second, an expansive meaning is inconsistent with the words used. In particular the linking of "actual occupation" to "any lawful title ..." conveys the intention that only those who meet both parts of the definition are "occupiers".

119 Third, an expansive construction would result in "actual occupation" without more falling within the definition. This renders the qualifying words "under any lawful title ..." redundant. Given every person in "actual occupation under any lawful title ..." would, by necessity, be in actual occupation, the words of qualification would never apply.

120 Fourth, the requirement that actual occupation be under lawful title granted by or derived from the owner of land is consistent with the objects of the *Mining Act*.

121 While the *Mining Act* provides greater protection for occupiers of Crown land than the *1904 Act*, that enhanced protection is subject to the introduction of a more restricted definition of occupier.

122 The right to withhold consent to mining and receive compensation requires more than actual occupation alone. Were it otherwise, any person in actual occupation of Crown land, even a trespasser, could withhold consent. It cannot have been intended that a person with no title to Crown land can withhold consent and be entitled to compensation[60]. That the "actual occupation" must not only be under

[60] *Woodcock v South Western Electricity* Board [1975] 1 WLR 983

lawful title but be "granted by or derived from the owner of the land" is also significant as it negates any suggestion that possession alone amounts to a legal interest.

123 It must also be remembered that s20(5) deals exclusively with mining on Crown land. The requirement that actual occupation be under lawful title is consistent with the provisions of the *LAA* [61] which deals with the disposition of the waste lands of the State.

124 It is also consistent with the long line of authority to which the High Court referred in ***Forrest & Forrest v Wilson***[62] in support of the proposition that the disposition of Crown land must be in compliance with statute.

125 In my view, the requirement in s16(3) of the *Mining Act* that no Crown land in a mineral field shall be leased, transferred or otherwise disposed up under the *LAA* without the approval of the Minister for Mines and Petroleum is also significant. When the term "occupier" in s20(5) is considered in that context, it is clear that the legislature contemplated that an interest in Crown land would require a formal process of approval and registration in accordance with the relevant statutes. The scheme of the *LAA* and, in particular, the definitions of "interest" in relation to Crown land, "Crown land interest holder", and "Certificate of Crown land and title" together with s275A support this conclusion.

126 Fifth, as is evident from the second reading speeches to the *Mining Act* and the *Mining Amendment Act 1985 (WA),* s20(5) is primarily directed to protecting the interests of pastoralists. Most of the subparagraphs of s20(5) relate to uses of land commonly associated with pastoral leases. The term occupier in s8 is also consistent with the form of occupation (actual occupation under lawful title granted by the owner of the land) enjoyed by pastoralists. It is doubtful when s20(5) was drafted that the legislature had in mind protecting houses or buildings

[61] See ***Coverdale v West Coast Council*** [2016] 259 CLR 164 at [42]; ***Trajkoski v Director of Public Prosecutions (WA)*** [2010] WASCA 119 at [50] per Buss JA & Owen JA at [1]
[62] [2017] 346 ALR 1 [64]-[65]

erected on Crown land that was not the subject of a pastoral lease or some other lawful title.

127 Sixth, an expansive construction would mean that the definition of occupier also extends to constructive occupation. As was the case with "actual occupation", yet again a less definitive form of occupation than the only example provided in the definition in s8 would be included. It would also mean that the words "actual occupation" in the definition are redundant despite it being clear that the words "any lawful title ..." qualify the term "actual occupation".

128 The inclusion of constructive occupation is also inconsistent with the object of s20(5) which draws a distinction between the interests of occupiers and owners. Section 20(5)(a)-(e) provides that only the occupier's consent is relevant. Excluding subparagraph (c), if the Warden directs that mining is to proceed despite the occupier withholding consent, both the occupier and owner are to be compensated for any damage sustained should mining proceed.

129 The fact that an owner has no power to veto mining on Crown land supports the conclusion that only the interests of those who are immediately affected by mining nearby are to be considered. This is reinforced by the fact that an owner has no right to compensation in accordance with s20(5a) for damage or loss sustained arising from a miner passing or repassing over land referred to in s20(5)(f) and (g).

130 The term "owner" in relation to any land is defined in s8 to mean "... the lessee or licensee from the Crown in respect thereof ..."

131 While a lessee or licensee have lawful title and may be entitled to possession, unless they are in actual occupation, they are not occupiers for the purposes of s20(5)(a)-(e).

132 Seventh, if the definition of "occupier" in s8 is exhaustive, it does not cause disharmony when the *Mining Act* is read as a whole. Because the definition in s8 is subject to the words "unless the contrary intention appears" it

accommodates the multitude of other circumstances where the word "occupier" appears in the *Mining Act*.

133 Section 21 deals with the resumption of land for mining purposes and is one such example where a contrary intention is manifest.[63]

134 Eighth, the suggestion that the term "occupier" be given a broad construction on the basis that s20(5) is a beneficial provision belies the fact that the *Mining Act* represents a compromise between competing interests. To give the term "occupier" in s20(5) a broad and generous construction has the propensity to undermine the interests of those wishing to mine on Crown land and in turn the interests of the State in encouraging mining.

135 As the Full Court of the Federal Court said in ***Minister for Immigration and Ethnic Affairs v Teo:***[64]

> *"The result, if the statute and the regulations are taken as a whole, is to disclose a compromise which represents a balance between various competing interests which are involved. The particular pattern which is set in this way is not to be distorted by treating one element in it other than in accordance with the fair meaning allowed by the language that has been used".*

The Significance of the Words "actual occupation" in s20(5)(c) of the *Mining Act*

136 I have given consideration to the significance of the words "actual occupation" which are used in s20(5)(c) without the words of qualification that accompany that term in the definition of "occupier".

137 The obvious question that arises is whether the inclusion of "actual occupation" without qualification in s20(5)(c) represents an intention to depart from the definition of occupier in s8.

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[63] See ***Clissold v Perry*** [1904] 1 CLR 363 at 373 per Griffith CJ (Barton & O'Connor JJ concurring)

[64] (1995) 57 FCR 194 at 206; see also ***Kennedy v Australia Fisheries Management Authority*** (2009) 182 FCR 411 at 426-429

138 Hawthorn and Gel seek to rationalise the inclusion of the words "actual occupation" in subparagraph (c) by attributing to those words the same meaning as the term "occupier" in s8.

139 Just as ignoring some of the words used in a provision is inconsistent with the general rule that each word must have work to do, [65] nor are words to be read into a provision lightly.

140 In order to do so the court must be able to identify the mischief with which the Act is dealing and be satisfied that by inadvertence the legislature has overlooked an eventuality that must be dealt with if the purpose of the Act is to be achieved. Finally, the court must be able to state with certainty the word the legislature would have used to overcome the omission if its attention had been drawn to the defect.[66]

141 If the definition in s8 was intended to apply, then there was no need to have included the words "actual occupation" in subparagraph (c) at all. It also seems unlikely the legislature simply omitted to include the words "any lawful title granted by or derived from the owner of the land".

142 In my view, it is more likely either the words "actual occupation" in s20(5)(c) are a legacy from the *1904 Act* and remained by inadvertence or they were retained for a reason.

143 Bearing in mind that s28(3) of the *1904 Act* was transposed in almost identical terms in s20(5)(c) of the *Mining Act*, it is possible that no consideration was given to whether those words were required in light of the inclusion of a definition of occupier in the *Mining Act*.

144 In the event that the words "actual occupation" were retained deliberately, there are two possible explanations.

[65] ***Saeed v Minister for Immigration and Citizenship*** (2010) 84 ALR 204 at 215
[66] ***Kingston v Keprose Pty Ltd*** (1987) 11 NSWLR 404 at 423

145 First, on a plain reading s20(5)(c) is amenable to the construction that as long as the land in question has a house or other substantial building on it, then mining cannot encroach within 100 m of the land, not merely the house.

146 On this construction if a pastoral lease covers 500 km^2 and has a house on it, mining cannot take place within 100 m of the boundary of the lease even though the house may be 100 km from the boundary.

147 That outcome could not have been intended and would leave large tracks of land potentially unavailable for mining, despite there being no real prospect that mining would interfere with the occupier's use of the house or other buildings.

148 It is also inconsistent with the second reading speech to the *Mining Amendment Act 1985* in which the Minister for Mining and Energy[67] said:

> *"This proposes to give protection to occupied land on which a dwelling or substantial building has been erected. This provision will give pastoralists power to veto mining for this type of land within a 100m radius of any such improvements."*

149 Against that background the words "actual occupation" may have been included to make it clear that the section is only concerned with the land on which the house or building is erected, not the entire lease. In this way the section is distinguishing between houses or building that are in use and derelict or abandoned houses or buildings.

150 It is arguable that the inclusion of these words is not directed to departing from the definition of the word "occupier" in s8 but to identify as a matter of fact the houses or buildings with which the section is concerned.

151 This construction is consistent with the purpose of s20(5) which is to ensure that mining does not interfere with the rights of those in actual occupation rather than constructive occupiers. An abandoned house or building should not prevent mining taking place on a pastoral lease or other Crown land.

[67] Mr Parker, Minister for Minerals and Energy; Legislative Assembly; 13 March 1985; 888-889

152 The alternate construction is that the words "actual occupation" in s20(5)(c) manifest an intention to depart from the definition of occupier in s8 of the *Mining Act*.

153 Section 20(5)(c) differs from the other subparagraphs in that it is the only one that refers expressly to land in actual occupation.

154 In my view, it is more likely that the words "actual occupation" as they appear in s20(5)(c) are either a legacy of the *1904 Act* or have been deliberately retained to make it clear that subparagraph (c) is confined to the house or other substantial building.

155 Whatever may have been the purpose of those words in the *1904 Act* there is no reason to believe they were retained in the *Mining Act* to manifest an intention to depart from the definition of "occupier" in s8.

156 In my view, the context of the *Mining Act* considered as a whole does not support that conclusion. Nor is it the case that the defined term would not work appropriately or create confusion[68] if it applies to subparagraph (c).

157 Also, the application of the definition to s20(5)(c) ensures that the same meaning is given to "occupier" in relation to all the subparagraphs of s20(5) and s20(5a).

158 Furthermore, bearing in mind s20(5) is primarily concerned with the interests of pastoralists; if "actual occupation" was all that was required, it would not further secure the interests of pastoralists as they have lawful title granted by or derived from the Crown.

Does Tisala have a lawful interest granted or derived from the owner of the land?

159 As the High Court acknowledged in ***Western Australia v Ward*** [69] the disposition of Crown lands in Western Australia has, since the coming of representative government, been wholly regulated by statute. It follows that the Crown cannot

[68] *DCT v Mutton* (1998) 12 NSWLR 104 at 108 per Mahoney JA
[69] [2002] CLR 1 at [2016] per Gleeson CJ, Gaudron, Gummow and Haynes JJ

give or confer an interest in Crown land other than in accordance with statute.[70] Any attempt to create a right against the Crown wholly without statutory authority is void.[71]

160 A similar view has been expressed by the majority of the High Court with respect to rights to exploit the State's mineral wealth:[72]

> ***"When a statute that provides for the disposition of interests in the resources of a State 'prescribes a mode of exercise of the statutory power, that mode must be followed and observed'. The statutory conditions regulating the making of a grant must be observed. A grant will be effective if the regime is complied with, but not otherwise.***
>
> ***This approach to statutory construction had its origin in colonial times in legislation which vested the disposition of land not already disposed of by the Crown in the legislatures of the Australian colonies. Nothing said in Project Blue Sky diminished the force of the authorities which support this approach. Adherence to this approach supports parliamentary control of the disposition of lands held by the Crown in right of the State. It gives effect to an abiding appreciation that the public interest is not well served by allowing non-compliance with a legislative regime to be overlooked or excused by the officers of the executive government charged with its administration. To permit such a state of affairs might imperil the honest and efficient enforcement of the statutory regime, by allowing scope for dealings between miners and officers of the executive government in relation to the relaxation of the requirements of the legislation. One can be confident that such a state of affairs was not intended by the Act."*** (my emphasis)

161 As is readily apparent these comments by the High Court also apply to the disposition of Crown land.

162 The legislation that controls land in Western Australia begins with the *Constitution Act 1890 (Imp)* which vests the waste lands of the State in the Western Australian legislature.[73]

163 Section 39 of the *Land Act 1898* appears in Part III – Reserves. It empowered the Governor to create reserves for a variety of enumerated purposes, including

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[70] See *Lansen v Olney* (1999) 100 FCR 7 [43] per French J *Commonwealth v Western Australia* (1999) 160 ALR 638 at 666 per Gummow J *Cudgen Rutile (No. 2) Pty Ltd v Chalk* [1975] AC 320 at 533, see also *O'Keefe v Williams* (1907) 5 CLR 217 at 225: *State of New South Wales v Bardolph* (1934) 52 CLR 455 & 496.
[71] *Bull v Attorney General* (1913) 17 CLR 370 at 378 per Barton ACJ; see also PM Lane; Australian land Law; in JJ Gleeson SC & ORS (Eds) Historical Foundation of Australian Law; (2013)
[72] *Forrest & Forrest v Wilson* [2017] 346 ALR 1 [64]-[65]
[73] *Commonwealth v Western Australia* (1999) 196 CLR 392 [240] per Hayne J

subsection (14); "For commons for the use of the inhabitants of any town or settlement".

164 Section 40 required that a full and complete description of every reserve and the purpose for which it was made are to be published in the Government Gazette.

165 The *Land Act 1933* replaced the *Land Act 1889* and so far as the creation of reserves was concerned substantially replicated the *1889 Act*. Commons are referred to in s29N. Once again, a common is reserved for the use of the inhabitants of any town or settlement, a description of which is to be published in the Gazette (s30).

166 Section 4 of the *Land Act 1933* acknowledged that the repeal of the *1889 Act* did not affect any right, title, interest already created, existing or incurred or anything lawfully done.

167 Section 32 saw the introduction, for the first time of a power vested in the Governor, to grant a lease over any reserve not immediately required for the purpose for which it was made. The *Land Act 1933* was amended in 1960 to permit leasing and licensing of certain kinds of reserves for depasturing stock.[74] The *Land Act 1933* was still in place when the *Mining Act* was enacted in 1978.

168 The *LAA* replaced the *Land Act 1933*. Section 3 of the *LAA* states:

> *"**Interest**, in relation to Crown land, means except in Parts 9 and 10, charge, Crown lease, easement, lease, mortgage, profit and a prendre or other interest, including such interests as are lawfully granted or entered into by a management body, and their counterparts under the repealed Act, but does not include:-*
>
> *(a) care, control and management of a reserve, mall reserve or road; or*
> *(b) caveat; or*
> *(c) licence or*
> *(d) mining, petroleum or geothermal energy right"*
>
> ...

[74] *Land Amendment Act 1960 (WA)* s2

> ***certificate of Crown land title*** *means certificate of Crown land title (being a certificate of the radical title of the Crown) referred to in section 29 and showing the interests, dealings or caveats granted, entered in to or lodged in respect of a parcel of Crown land, and, except in that section, includes any subsidiary certificate of Crown land title —*
>
> *(a) created in relation to part of that parcel; and*
>
> *(b) referred to in that certificate of Crown land title; and*
>
> *(c) showing the particular interests, dealings or caveats granted, entered into or lodged in respect of that part;*

169 Section 275A of the *LAA* deals with the disclosure of information about Crown land interest holders. Subsections (1) relevantly provides that a Crown land interest holder means the holder of –

(a) A pastoral lease or other lease; or

(b) A licence; or

(c) An interest in relation to Crown land

Subsection (2)(b) empowers the Chief Executive Officer of the Department of Lands to disclose the name and contact details of a Crown land interest holder to the Director General of Mines for providing the information to applicants for or holders of, mining tenements or any other person who is required, under the Mining Act, to give notice to a Crown land interest holder.

170 Not only does the *LAA* bind the Crown (s4) but, importantly, 18(1) provides:

> *"A person must not, without authorisation under subsection (7) assign, sell, transfer or otherwise deal with interests in Crown land or create or grant an interest in Crown land".*

171 Section 18(2) prohibits the granting of a lease or licence under the *LAA* or a licence under the *Local Government Act 1995* in respect of Crown land in a managed reserve without authorisation. It also prohibits the holder of a lease or licences from granting a sublease or sublicense in respect of the whole or any part of that Crown land.

172 Section 18(6) relevantly provides that an act done in contravention of subsections (1) or (2) is void.

173 Section 19 relevantly proscribes that a dealing in Crown land created or lodged under this *LAA* or the *Transfer of Lands Act* does not become effective until it is registered.

174 Clause 14(2) of Schedule 2 of the *LAA* provides that any land reserved under s29 of the *Land Act 1933* that remained so immediately before the appointment day of the *LAA* is taken to be land reserved under s41 of the *LAA*. This provision applies to all of the Crown reserves the subject of this matter except 10041.

175 Unlike its predecessors, the *LAA* vests the power in the Minister rather than the Governor to create reserves on Crown land (s41).

176 Section 46(1) empowers the Minister by order to entrust the care, control and management of a reserve for the purpose for which it was reserved and for ancillary or beneficial to the purpose to a person(s) (the management body).

177 As noted earlier, care, control and management of Reserve 10041 was entrusted to the Shire of Menzies.

178 Subsection (3)(a) enables the Minister to confer on the management body power, subject to s18, to grant a lease, sublease or licence over the whole or any part of the Crown Reserve for the purposes referred to in subsection 1.

179 Importantly, s46(5) stipulates that an order made under subsections (1), (2), (3), or (3a) does not create any interest in Crown land in the relevant reserve in favour of the management body of the reserve.

180 An interest can, however, be created in accordance with subsection (3b). It relevantly provides that the Minister's approval under s18 is not required for the exercise of a power conferred under s(3)(a) unless the person on whom the power is conferred is a body corporate that is constituted for a public purpose under an

enactment and is an agency of the Crown in right of the State, and the order provides that the Minister's approval under s18 is required.

181 The parties advanced differing interpretations of this section. Hawthorn and Gel say that the conferral of care, control and management alone, without the exercise of power in subsection (3)(a) means the Shire of Menzies has no power to grant a lease, sublease or licence. Tisala, on the other hand, say that as the Shire of Menzies is not an agency of the Crown, the Minister's approval is not required.

182 Although I accept that the Shire of Menzies is not an agency of the Crown,[75] in my view subsection (3)(b) only comes in to operation if an order is made under subsection (3)(a).

183 Tisala says, further, that given the Shire of Menzies gave permission for Tisala to use Reserve 10041, it had, in effect, granted Tisala a licence.

184 The Management order vesting care, control and management of Reserve 10041 in the Shire of Menzies[76] does not empower the Shire to grant a lease, sublease or licence. Furthermore, even if the Shire of Menzies had such a power there is no evidence that it purported to exercise the power or that Tisala's interest, had one been created, was registered.[77]

185 Although Tisala concedes it does not have a registered lease, sublease or licence in accordance with the *LAA*, it says that a legal interest in land can be an unregistered interest.[78] Tisala says further that a person who is in possession of land adverse to the true owner is one such example.

186 Tisala relies in particular on ***Clissold v Perry*** [79] wherein the High Court considered a claim for compensation by Clissold who was in possession of land at the time it was resumed.

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[75] ***Sydney City Council v Reid*** (1994) 34 NSWLR 506 at 521 per Meagher JA
[76] Ex 3 Affidavit of Timothy Iren Masson; sworn 4 December 17; TIM8; p192
[77] Ex 2 See Affidavit of William Donald Lloyd, sworn 22 November 2017; WDL 56; p120
[78] ***Dial a Dump Industries Pty Ltd v Roads and Maritime Services*** [2017] NSWCA 73 per Beazley P [49]-[54]
[79] [1904] 1 CLR 363

187 It was not in dispute that the original owner could not be found. It was contended by the resuming authority that despite Clissold being in possession for ten years, he had not shown any title to the land except possession and was merely a trespasser. Griffith CJ [80] remarked that as a general rule to be followed in the construction of statutes of this kind, they are not to be construed as interfering with vested interests unless the intention is manifest.

188 ***Clissold v Perry*** stands as authority for the proposition that possession is good title against all the world except the true owner. Although Tisala acknowledges that its title does not prevail as against the State as the true owner, it says it stands as against any third party including Hawthorn and Gel.

189 The question, however, is not whether Tisala has better title than a third party other than the true owner. On the contrary, the question is whether Tisala is an occupier for the purposes of s20(5)(c) of the *Mining Act*. That question does not involve balancing the competing interest of the parties. Hawthorn and Gel are entitled to mine within 100m of the homestead if Tisala is not an occupier for the purposes of s20(5)(c).

190 This case is unlike ***Clissold v Perry*** in a number of material respects. The land in question is not private land that has been abandoned by the true owner. The Reserves are Crown land in relation to which no claim of adverse possession lies. Moreover, Crown land exists for the benefit of the people of the State. As the authorities to which I have already referred confirm, an interest in Crown land is only to be created in accordance with statute.

191 While it may well be the case that possession amounts to a legal interest in land, the definition of "occupier" is s8 of the *Mining Act* requires that lawful title be granted by or derived from the owner of the land.

192 The fact that Tisala is in possession of Reserve 10041 does not establish that either the Governor or the Minister for lands at any time granted Tisala any form

[80] At 373 (Barton & O'Connor JJ concurring)

of title. Even had they purported to do so, no interest in Crown land can be created other than in accordance with statute. The *LAA* and its predecessor required that interests in Crown land be registered. Unlike adverse possession, time cannot cure Tisala's defect in title.[81]

193 Tisala says further that it has lawful title on the basis that its occupation of Reserve 10041 is subject to permission.

194 In support of its contention it has permission Tisala relies on a letter from the Under Secretary of Lands dated 7 May 1975,[82] a letter from the DPLH dated 20 November 2017[83] and the permission purportedly provided by the Shire of Menzies said to be within its power as manager of the Reserve.[84]

195 The letter from the Under Secretary for Lands says:

> "Your plan of development submitted in respect of the above mentioned station has been approved by the Hon. Minister for Lands and you may now proceed with improvements in accordance with the plan."

196 It is said that this letter confirms that Tisala was lawfully on Reserve 10041. A number of observations can be made about the letter. First, the development plan the Minister is said to have approved is not attached to the letter. Second, the letter makes no reference to Reserve 10041 or the Pinjin homestead or that the development plan includes improvements to land the subject of the Reserve.

197 Third, even were the letter to constitute permission, in my view, it does not give rise to an interest in Crown land as an interest at that time could only be created in compliance with the provision of the *Land Act 1933* or subsequently under the *LAA*. Section 32 of the *Land Act 1933* empowers the Governor to grant a lease or licence.

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[81] ***Bull v Attorney General of New South Wales*** [1913] 17 CLR 370 per Barton ACJ at 375 and Gavan Duffy and Rich JJ at 394

[82] Ex 9 Affidavit of Steven Lionel Kean, sworn 14 February 2018; Annexure SK7

[83] Ex 7 Affidavit of Lawrence Craig Thomas; sworn 9 February 2017 LT 34; p141

[84] Ex 11 Affidavit of Leo Winston Thomas; sworn 20 March 2018; LVT1; p3

198 In my view, the fact that Shire of Menzies and the DPLH gave permission for the Tisala to continue to use Reserve 10041 suffers from the same deficiency. As I observed earlier the Shire had no power to grant an interest nor did it purport to exercise such a power. The same observation can be made of the DPLH. It is the Minister for Lands who is empowered to approve transactions in accordance with s18 of the *LAA* unless that power has been delegated in accordance with s9. No instrument published in the Gazette to that effect has been produced.

199 Tisala also contends that as a consequence of receiving permission it has a good defence to any suggestion that it is residing on Crown land without the permission of the Minister or a reasonable excuse in contravention of s267(2) of the *LAA*.

200 The fact that Tisala may have a good defence to an allegation of trespass does not establish it occupies Reserve 10041 under any lawful title. The former proposition need not depend only on the latter.

201 Finally, Tisala contends that as Reserve 10041 is a common, for the use of local residents, its use and occupation of the Reserve is within the terms of s20(5), (b) and (c) of the *Mining Act*. This, says Tisala, represents an adaption of the right of common which existed in England to Australian circumstances.

202 As PM Lane observed in tracing the development of land law in Australia:[85]

> *"The earliest commons were from 1804 and comprised commons of pasturage to the west of Sydney. They differed substantially from the commons evolved from feudal custom in England. Once land was granted under statutory authority, the terms of those statutes controlled the nature and scope of the rights that could be granted ..."*

203 The designation of land as a reserve for certain purposes did not, without more, create any right in the public or any section of the public.[86]

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[85] PM Lane; Australian Land Law; in JJ Gleeson SC & Ors (Eds); Historical Foundations of Australian Law (2013) p236

[86] ***Western Australia v Ward*** [2002] 213 CLR 1 at [221] per Gleeson CJ, Gaudron, Gummow & Hayne JJ

204 The fact that a person is lawfully on land does not of itself create a lawful interest in that land. Members of the public routinely access Crown land throughout the State. Permission to access Crown land is not enough. Were it otherwise those within a miner's right would have an interest in Crown land.

205 Once again if Tisala had an interest in Reserve 10041 that interest could only have been granted by the Minister for Lands or before that, the Governor.

206 It is doubtful that the setting aside of Reserve 10041 as a common for the use of local residents and small scale farmers for grazing and watering of stock and the collection of firewood ought to have been seen as an invitation for the holder of a large pastoral lease, without authorisation, to relocate its homestead to the Reserve and treat the Reserve as part of its pastoral lease. Nothing about the purpose for which a common is created suggests that it was available to be amalgamated with a pastoral lease without statutory approval.

207 Because of the remote location of the Reserve and its proximity to the Pinjin pastoral lease, it may have been thought by executive government that its acquiescence to Tisala's continued occupation of the Reserve was unlikely to cause "operational issues". That acquiescence may have further encouraged Tisala to make improvements to the Reserve.

208 As the High Court made plain in the passage from ***Forrest & Forrest v Wilson*** which I reproduced earlier, the public interest in the proper and orderly disposition of the State's resources requires that the legislative regime must be observed.

209 The failure to comply with that legislative regime means that Tisala's occupation is not "under any lawful title granted by or derived from the owner of the land".

Section 20(5)(e)

210 Sections 20(5)(e) relevantly provides that, subject to subparagraph (ea), mining, among other things, is not to take place on any Crown land that is the subject of

a pastoral lease which is the site of, or is situated within 400 m of the outer edge of, any water works, race, dam, well or bore, (not being an excavation previously made and used for mining purposes by a person other than a lessee of that pastoral lease) without the written consent of the owner.

211 Section 20(5)(e) seems to state plainly that it is confined to Crown land that is the subject of a pastoral lease. It follows that mining can take place on Crown land other than a pastoral lease within 400m of water works without any need for the occupier's consent.

212 Despite the operation of s20(5)(e) being confined to pastoral leases, subparagraph (g) imposes obligations on miners passing over Crown land within 400m of water works. On its face subparagraph (g) is not confined to pastoral leases.

213 The net result is that there is no prohibition on mining taking place within 400m of water works on Crown land other than a pastoral lease but if passing within 400m of water works on that Crown land, all of the obligations in subparagraph (g) apply including an obligation to pay compensation for any damage in accordance with s20(5a).

214 In my view, such a construction is unreasonable and absurd and could not have been intended. The only way to reconcile these two provisions is for the words "the subject of a pastoral lease" to be inserted after the words "Crown land" in subparagraph (g).

215 Although Tisala made no mention of the anomaly to which I just referred, it contends that s20(5)(e) ought to be given an expansive meaning and that its operation is not confined to land the subject of a pastoral lease.

216 I do not accept Tisala's construction for the following reasons.

217 First, the opening words of s20(5)(e) make it clear that the Crown land to which the subparagraph relates is land the subject of a pastoral lease. The words mining

is not to take place on "any Crown land that is land the subject of a pastoral lease" are not capable of any other meaning than mining is only prohibited on the pastoral lease, not any adjoining Crown land.

218 Second, had the legislature intended subparagraph (e) to operate in the expansive way suggested by Tisala, then words similar to those employed in subparagraph (c) could have been used or subparagraph (e) could simply have said "any Crown land".

219 Third, none of the other subparagraphs in s20(5) specifically refer to pastoral leases. The construction advanced by Tisala ignores those words which invariably confine the operation of the section.

Conclusion

220 In my view it has been established that:-

(a) The Crown Reserves do not form part of Tisala's pastoral lease; and

(b) Tisala is not an occupier of the Crown Reserves for the purposes of s20(5) of the *Mining Act*.

221 Furthermore, in my view, the operation of s20(5)(e) of the *Mining Act* is confined to mining that takes place on Crown land the subject of a pastoral lease which is situated within 400 m of the outer edge of any water works, race, dam, well or bore on that pastoral lease.

222 It follows, therefore, that the application for partial summary judgment is granted.

223 I will hear from the parties as to the appropriate orders.

Warden J O'Sullivan

20 June 2018

ANNEXURE A

Exhibit List

1 Affidavit of William Donald Lloyd sworn 25 October 2017

2 Affidavit of William Donald Lloyd sworn 22 November 2017

3 Affidavit of Timothy Iren Masson sworn 4 December 2017

4 Affidavit of Timothy Iren Masson sworn 6 December 2017

5 Affidavit of Timothy Iren Masson sworn 18 January 2018

6 Affidavit of Kim Rosmund Samiotis sworn 18 January 2018

7 Affidavit of Lawrence Craig Thomas sworn 9 February 2018

8 Affidavit of Lawrence Craig Thomas sworn 13 February 2018

9 Affidavit of Steven Lionel Kean sworn 14 February 2018

10 Affidavit of Steven Lionel Kean sworn 20 March 2018

11 Affidavit of Leo Winston Thomas sworn 20 March 2018