

Definition of terms relating to Aboriginal land claims



Over time, courts have provided some guidance on the definition of terms surround the Aboriginal Land Rights Act 1983 (NSW) and the assessment of Aboriginal land claims

Lawful use and/or occupation

Lawful: The term lawful means the activity being conducted on the claimed land at the date of claim was being conducted with the appropriate authority to do so. For instance, if the activity required the approval of the reserve trust, then that approval had been granted.

Lawful use: Lawful use of claimed lands occurs when the use is to more than a notional degree. The level required to demonstrate the use is more than notional will depend on the purpose for which the land is reserved. For example, a reserve for public recreation would be expected to have a higher level of use than a reserve for tree plantation.

The use of the land needs to be consistent with the reserve purpose; for a purpose that is in furtherance of or ancillary to the reserve purpose; or an authorised secondary interest. The use needs to be actual, not just contemplated or intended.

Lawful occupation: Lawful occupation encompasses legal possession, conduct amounting to actual possession and some degree of permanence. It involves an element of control, of preventing or being in a position to prevent the intrusion of strangers. Continuous physical presence on every part of the land is not required; however, some physical occupancy is required. Mere activities of maintenance in isolation are insufficient.

Needed or likely to be needed for an essential public purpose

Needed: Needed means required or wanted. Where lands are needed for an essential public purpose, a manifestation of political will is required to establish need. Where lands are likely to be needed for an essential public purpose, the question is whether it is likely that there will in the future be a government requirement; and if this is addressed by considering a trajectory, then the trajectory needs to be towards a requirement at the appropriate government level at the specified time in the future.

Likely: The term likely refers to a real, or not remote, chance; a real chance or possibility. It does not refer to something being more probable than not (possibility being a lower legal standard than probability). The essentiality of the need must be sufficient to counteract the beneficial intent of the Act. A 25- to 30-year time frame is appropriate when establishing a likely need.

Essential public purposes: Essential public purposes are those that are required and created by the government, or purposes of the administration of the government. To be essential, the purpose must be indispensable, or at least material and important. The use of the word essential sets a high standard. Public purposes may be served by private interests. Purposes carried out under statutory authority or requirement, for example, the *Local Government Act 1993* (shire councils), can be public purposes.

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