

PLANNING AND GOVERNANCE COURSE

LAND ACQUISITION AND COMPENSATION IN W.A.

Lecture Summary

SCOPE OF THE TOPIC

Resumption is the term imprecisely used to denote the process of compulsory acquisition, whether by the Crown or other authorities. Compulsory acquisition is closely interwoven with the practice of planners, but they are also concerned at times with non-compulsory acquisition by agreement, and the associated matters of compensation, valuation and injurious affection. The subject covers a very wide area, and this lecture is intended merely to introduce the subject by reference to the following matters:

1. Principal statutes in W.A;
2. Other land acquisition statutes;
3. Whether town planning schemes confer special powers;
4. Compulsory acquisition procedure under Land Administration Act;
5. Compensation provisions under Land Administration Act;
6. Valuation;
7. Injurious affection;
8. The Commonwealth Lands Acquisition Act 1955 (as amended)
9. Problems and possible reforms.

1. Principal Statutes in W.A.

- (a) Previously TP&D Act (s.6 and First Schedule, s.11, s.12, s.13, s.14); and
- (b) MRTPS Act (ss.36, 36A, 36B, 37, 37A, 38), and MRS cll.40 and 41 - now P&D Act Part 11;
- (c) Public Works Act 1902.
- (d) Land Administration Act 1997.

2. Other Land Acquisition Statutes

- (a) Country Areas Water Supply Act 1947;
- (b) Country Towns Sewerage Act 1948;
- (c) Forests Act 1918;
- (d) Government Railways Act 1904;

- (e) Industrial Lands Development Authority Act 1966;
- (f) Local Government Act 1995 (with s.161 of the Land Administration act 1997);
- (g) Metropolitan Water Supply Sewerage and Drainage Act 1909 and also Metropolitan Water Authority Act 1982;
- (h) State Energy Commission Act 1979;
- (i) State Housing Act 1946;
- (j) Water Boards Act 1904;
- (k) East Perth Redevelopment Act 1992;
- (l) Subiaco Redevelopment Act 1994;
- (m) Midland Redevelopment Act 1999;
- (n) Hope Valley Wattleup Redevelopment Act 2000;
- (o) Armadale Redevelopment Act 2001;
- (p) Perry Lakes Redevelopment Act 2005.

All of these statutes to a greater or less degree rely upon the provisions of the Land Administration Act for their land acquisition procedures. The power to acquire is generally contained in the individual statutes but see now the LG Act 1995 which leans on the Land Administration Act for the power to acquire. The compulsory acquisition procedures are contained in the Land Administration Act 1997 Part 9. The Perry Lakes Redevelopment Act is a specially draconian case of acquisition and compensation by statute.

3. Whether Town Planning Schemes Confer Special Powers

In W.A., it has been common for development schemes to incorporate special provisions for the making of land available for scheme purposes, and special provisions for land acquisition, compensation and the valuation of land.

In resumption schemes, the procedure generally is for all of the land in the scheme area to be compulsorily acquired and for owners to be given the opportunity to participate in the scheme, This is done by making an offer to all owners at the time their land is acquired. If they elect to participate in the scheme, they waive any claim for compensation. If they elect not to participate in the scheme, then they receive compensation for the resumption of their land, generally in accordance with the provisions of the Land Administration Act.

On occasions, doubt has been expressed as to whether the TP&D Act confers the power to include in a scheme text provisions for land acquisition, compensation and valuation. The consequence of that issue may be different in the case of resumption schemes as opposed to guided development schemes.

If there had been no power in the TP&D Act permitting schemes to incorporate special provisions for land acquisition, compensation and valuation, then it may be that the justification for the "participating owner" provisions in resumption schemes can be justified on the basis that a participating owner by accepting an offer to participate in a scheme agrees

to waive his claim for compensation under the Land Administration Act in return for the right to participate in the scheme.

Note that under s.206 of the LA Act, no compensation is payable if provision is otherwise made in any other written law. This section probably has limited application, and probably would not have applied in the case of the TP&D Act unless it could be said that land was taken or resumed under the provisions of s.13 of the TP&D Act only. The issues are resolved by the provisions of the P&D Act.

The Claim

The period limited for making a claim for compensation under the LA Act is 6 months after the registration of the relevant taking order or entry. However the Minister for Lands may extend the 6 month period "if he is satisfied that the application is reasonable and made in good faith" (s.207(2)).

Section 208 indicates by whom compensation may be claimed.

Section 211 specifies the general particulars that must be included within the claim for compensation. The form of claim is set out in the Third Schedule of the PW Act.

It is clear from s.211(1)(d) that the nature and extent of each matter on account of which compensation is claimed is a necessary particular to be specified in the initial claim. Provided that the correct particulars are inserted in the claim, the next step depends upon the reaction of the acquiring authority to the claim. The claim may be agreed immediately by the authority or alternatively agreement may be impossible, in which case recourse must be had to arbitration or court proceedings.

Title

Section 214(1) allows the acquiring authority to require that further particulars of the claim be furnished within 30 days. Note the draconian provision in s.214(2) absolutely barring a claim when there is a failure to provide particulars within 60 days. Alternatively, the acquiring authority may dispute the claimant's title or interest in the land any may serve notice in the approved form disputing the claims to title. The failure on the part of the authority to dispute the title of the claimant within the 60 day period deems the authority to have admitted the claimant's title. (s.215(2)).

Section 216 makes provision for a claimant to apply to the Supreme Court as to questions of title. Section 216(3) is significant in that it prohibits a claimant from adducing further evidence as to title than what was furnished with the original claim unless he has the consent of the acquiring authority, and this emphasizes the need for care in the drafting of the claim for compensation.

Offer

Under s.217 if there is no query as to title, or after any request for further and better particulars of title has been supplied, or after any question of title has been settled by the Supreme Court, the acquiring authority must within 90 days cause the claim to be examined, a report made as to the value of the land and as to the damage sustained by the claimant by reason of the taking of the land. The acquiring authority is then obliged to tender an offer of compensation with respect to the land or the part of the land in respect of which title is not disputed (s.217(3)). There does not appear to be any obligation upon the acquiring authority to make an offer which corresponds with the report received as to the value of the land.

Section 218 permits, at any time before the claim for compensation is settled in full, or before proceedings for compensation have been commenced in any Court, the giving of a notice by a claimant amending his claim as to the amount claimed, or the giving of a notice by the respondent authority amending the offer of compensation.

Rejection of Offer

An important provision for claimants is s.219 which provides that a claimant may within 60 days of the service of an offer of compensation serve on the acquiring authority a notice rejecting the offer, and the section further provides that if a notice of rejection is not given within the 60 day period, then the offer "is deemed to have been accepted". However see the minimal protection given by the notification requirement in s.217(4).

Under s.220, after a notice has been served rejecting an offer of compensation, the compensation may be determined by any one of three methods namely:

- (a) by agreement between the acquiring authority and the claimant; or
- (b) by an action for compensation by the claimant against the respondent (generally in the Supreme Court); or
- (c) by reference of the claim to the Compensation Court.

By inference, where there is no agreement, the choice of venue lies with the claimant. That was previously expressly stated in s.47B of the PW Act.

Compensation Proceedings

Section 221-225 inclusive contain provisions relating to the commencement of proceedings before the Compensation Court or proceedings in a compensation action. Under s.224, the service of a notice appointing an assessor amounts to an election to proceed in the Compensation Court, which may be in the Local Court, the District Court or the Supreme Court, depending on whether the amount of the claim falls within the jurisdictional limit of the LC or the DC. Note the new procedures in s.224. See also s.226 as to the presiding person. Note also the possibility of a single person court (s.228).

Advance Payment

Section 248 permits the acquiring authority as soon as practicable to offer and pay to the claimant as and by way of an advance or interim payment on account of the compensation, such amount as the authority thinks fit. The claimant may require the authority to pay an advance or interim payment equivalent to 90% of the compensation offered.

4. Compulsory Taking Procedure Under Land Administration Act

Registration of an appropriate Taking Order is the effective act of taking or resumption of land. However there is no express provision for registration of a Taking Order. This is probably a mistake. Division 3 operates "if any land is required for a public work".

Notice of Intention to Take

There are preliminary options for agreement or taking by consent (s.168). Otherwise there is a preliminary step of Notice of Intention (s.170). The Minister is required to register the

notice, and is required as soon as possible then to publish the Notice of Intention in a daily newspaper circulating throughout the State, and to serve a copy of the Notice of Intention on the principal proprietor and on the occupiers either personally or by certified mail, to serve a copy on the Director General of Mines, and advise the persons receiving a notice under s.170(5)(b) of their rights to compensation. Publication of the notice of intention enables parties interested in the land to lodge an objection in the form prescribed.

Note the particulars to be included in a Notice of Intention (s.171).

Land the subject of a notice of intention to resume is frozen from further dealings without the consent of the Minister (ss.172, 173 and 174). A period of 60 days is stipulated as the period within which to lodge s.175(2). If after consideration by the Minister for Lands of the objections and representations, or alternatively if no objections are lodged within the 60 day period, then the Minister may proceed with the taking or resumption.

Note that by the effect of s.191(3) of the P &D Act, there is no notice of intention to take in the case of resumption carried out pursuant to s.191(1) of the P&D Act for the purpose of a scheme. The public advertising and submission provisions in relation to schemes render a further notice of intention pointless, one must assume.

Taking Order

The Taking Order must be registered within 12 months of registration of Notice of Intention. The content of a Taking Order is dealt with in s.178. S.179 deals with the effect of registration of a Taking Order.

The Taking Order has effect according to its tenor, and every interest is extinguished. The interest of every person in the land taken is converted to a claim for compensation (s.179). Notice in this regard the position of mortgagees, lessees and other persons holding as estate or interest in the land less than fee simple.

A copy of the Taking Order must be served on the owner of the land either personally or by certified mail (s.177).

Under s.180, a Taking Order may be annulled or amended within 90 days after its registration. Query the position if a defect in the resumption procedure is detected after the expiration of the 90 day period.

Land not Required

Note the provisions in Division 5, for dealing with land taken but not required for the public work for which it was taken.

Easement in Gross

Note in particular that s.195 provides for creation in favour of the State etc or a local government of an easement in gross, i.e. an easement without a dominant tenement.

5. Compensation Provisions Under Land Administration Act

Right to Claim Compensation

The right to claim compensation is conferred by s.202 on "every person having an interest in land which is taken under Part 9 ...". Compensation is claimed from the acquiring authority (s.202(1)).

References:

Fogg, "Australian Town Planning Law".

Stein, "Urban Legal Problems".

Brown, D. "Land Acquisition" 4th Ed. (1996) Butterworths.

McLeod, D.W. "Local Government - Land Acquisition" Law Society, Local Government Law - Paper 4, 1983.

Claim

Division 2 deals with the claim. See comments above.

Compensation Court

Division 3 and 4 deals amongst other things with the constitution of and the conduct of proceedings by the Compensation Court.

Note that most compensation claims in W.A. are settled by agreement between the parties, or by arbitration. Usually the arbitration is of a quite informal nature. More often than not claims are settled by negotiation between valuers appointed by the opposed parties, and where arbitration occurs, generally it is a valuer who acts as arbitrator. Acquiring authorities tend to encourage this method of resolving disputes by a willingness to pay the costs of valuers and arbitrators.

Assessing Compensation

The provisions for the assessing of compensation are set out in Division 5. Note that in determining compensation, regard is to be had solely to the following matters:

- (a) The value of the land with any improvements thereon as at the date of gazettal of the notice of resumption, without regard to any increased value occasioned by the proposed public work (s.241(2)).
- (b) Where land is entered before resumption, the relevant date for assessment of value is the date of entry into possession.
- (c) Loss or damage sustained by the claimant by reason of removal expenses, disruption and reinstatement of a business, the halting of building works in progress, architect's fees or quantity surveyor's fees in respect of a building which cannot be commenced or continued, or any other fact which the acquiring authority or the Court considers it just to take into account in the to circumstances of the case (s.241(6)).

- (d) Damage sustained by severance of the acquired land from other adjoining land or by reduction in value of the adjoining land in the nature of injurious affection, provided that any increase of value by reason of the carrying out of the work may be set off against any such damage (s.241(7)).
- (e) At the discretion of the acquiring authority or the court, a further amount of up to 10% may be offered (s.241(8) and (9)). However that does not apply to land taken by agreement.

Note that s.63(c) of the PW Act added the important provision that where the acquiring authority or the Court is of the opinion that the application of the provisions of the Act would not result in the assessment of compensation adequate to meet the special circumstances of the case, the respondent or the Court may determine such compensation as it considers adequate for compulsory taking.

Della Vedova v. SPC (Compensation Court Decision No. 2 of 1986)
Cook and Edwards v. City of Stirling (Supreme Court delivered March 1991)

- (f) Rent or profit in the case of income earning property, or at the option of the respondent, interest in lieu of rent or profit.
- (g) Where the land taken does not produce any rent or profit, interest shall be paid "at the rate payable in respect of overdraft accommodation granted by the Commonwealth Trading Bank of Australia" ruling either at the date of resumption or at the date of entry into possession of that is earlier, and the interest shall be payable either from the date of service of the claim for compensation on the acquiring authority or from the date of entry into possession. Note that if the compensation awarded is not more than the amount offered by the respondent, then the compensation shall only bear interest to the date when the offer of compensation was served on the claimant.
- (h) Where part payment of compensation has been made to the claimant, interest is only payable on the outstanding balance from the date of the part payment. If an acquiring authority offers a part payment but that is not accepted by the claimant, then interest is not payable in respect of the amount of the part payment offered.

6. Valuation

Apart from the specific matters referred to in s.241, it is clear from the provisions of the section that the most significant part of any compensation award is the value of the land. An assessment of compensation for the compulsory acquisition of land therefore commences with the basic test of land value, namely what the ready willing but not over-anxious vendor will accept and what the ready and willing purchaser would pay:

Spencer v. The Commonwealth of Australia (1907) 5 CLR 418.

It is necessary for the body assessing compensation -

"...to suppose that on the date of the resumption a sale had resulted from voluntary bargaining between a vendor and a purchaser each willing to trade but neither so anxious to do so that he would overlook any ordinary business consideration".

Verbes Investment Pty ltd v. Commissioner for Main Roads (1972) 25 LGRA 391 at p.393

For this purpose, the acquiring authority is treated as a willing purchase without compulsory powers available to it. In other words, it cannot discount the amount it pays because of its ability to threaten compulsory acquisition (*Edinburgh Pty Ltd v. The Minister* (1962) 8 LGRA 45, at p.52)

There may, in addition, be some special value of the land to the owner, (as distinct from some emotive value) and, if so, compensation is payable in respect of that special value:

"That is to say, one supposes that the owner of the land, with the knowledge of its and its suitability for the special purposes to which he has been putting it, was considering buying that land for that purpose from a willing seller. The sum he would pay to secure that land for those purposes rather than lose it will be the value of the land to him. The knowledge and experience he had of the particular use to which it could successfully and lawfully be put must be reflected in that sum"

Dangerfield v. Town of St. Peters [No. 2] (1972) 27 LGRA 43, at pp.45-46.

Potential zoning

7. Injurious Affection

Note that injurious affection may be relevant for general purposes in assessing compensation under s.241 of the LA Act. However for the purposes of planners, the provisions relating to injurious affection contained in Part 11 of the P&D Act are of greater significance.

Under s.11 of the TP&D Act, a claim for compensation for injurious affection could relate to land or property (not just land) injuriously affected by the making of a town planning scheme (not just by a resumption). P&D Act s 173(1) now refers to land.

Under the TP&D Act, there was no claim for compensation for injurious affection by reason of any provision in a town planning scheme unless the scheme -

- (i) permits development on that land for no purpose other than a public purpose; or
- (ii) prohibits wholly or partially the continuance of any non-conforming use of that land or the erection, alteration or extension on the land or any building in connection with or in furtherance of, any non-conforming use of the land etc. (s.12(2a)(b)).

Clearly therefore there could be no claim for compensation for injurious affection by reason of the re-zoning, or perhaps more specifically the de-zoning of land. The most common situation where injurious affection is claimable is where land is reserved under the provisions of a scheme for a public purpose.

By the provisions of s.11(1) of the TP&D Act, a scheme could limit the time for making a claim for compensation for injurious affection, but the time was not to be less than 6 months in any event. These issues are now dealt with, often quite differently, in Part 11 Division 1 of the P&D Act.

Section 36 of the MRTPS Act incorporated the provisions of the TP&D Act for the purposes of the MRS. However s.36(3) of the MRTPS Act imposed a further limitation on the right to claim compensation by reason of the reservation of land under the MRS. Claims can only be made in one or other of the following circumstances:

- (a) Where the land is first sold after the imposition of the reservation, compensation can be claimed by and is payable to the person who was the owner of the land at the time of the imposition of the reservation.
- (b) A person who applies for approval to commence development of the land and whose application is refused or is subjected to unacceptable conditions may claim compensation for injurious affection.

That situation is now generalised to all schemes by Part 11 of the P&D Act.

8. Problems and Possible Reforms

Consider:

- (1) Whether in this day and age reinstatement value in most circumstances would be a more appropriate basis for valuing compensation than market value?
- (2) Whether the provisions of s.241 of the LA Act, allowing the court or respondent to “pay compensation at a higher amount for exceptional circumstances” is adequate to overcome injustice.
- (3) The conflict between community interests and private interests. If the public interest demands that the private property interests of a person be set aside, should the public be required to pay a special price or should the person whose land is taken be required to defer to the public interest?
- (4) Should the injurious affection provisions in s.241(7) of the LA Act permit a claim in respect of land or property injuriously affected by the public work regardless of whether or not it adjoins land compulsorily acquired for the public work?

References

Law Reform Commission Report No. 14 - "Land Acquisition and Compensation"

Fricke, G.L. "Compulsory Acquisition of Land in Australia". Law Book Co. 1982.

Gifford, K.H. "Compulsory Acquisition and Compensation" 27 Town Planning and Local Government Guide pp.204-217 and 256-265.