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Getting it right before the deal is done

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What this paper is about

Much of the focus in acquisition law is on matters relating to compensation. This is an understandable emphasis, given the substantial amounts of public money involved in large acqusition campaigns and the imperative that public money is properly spent.

This paper, however, addresses three critical aspects of compulsory acquisitions in New South Wales that arise before an authority even opens its chequebook, being:

- properly identifying the interest to be acquired;
- ascertaining whether there is a power to acquire that interest; and
- the recent reforms to the *Land Acquisition (Just Terms Compensation) Act 1991* ("Just Terms Act") – made in response to David Russell SC's 2014 review of the Act – requiring a mandatory period of negotiation before an acqusition can take place.

Each of these matters could go to the fundamental validity of an acquisition.

If an authority gets these matters wrong, the risk of a legal challenge is magnified.

My intention in writing this paper is ensure that readers are aware of the potential pitfalls and are alert to the risks when exercising acquisition powers.

Step 1: Identifying the interest

The fundamental term "land" is defined in the Just Terms Act to include any "interest" in land.

An "interest" in land is in turn defined in the Just Terms Act as meaning:

(a) a legal or equitable estate or interest in the land, or

(b) an easement, right, charge, power or privilege over, or in connection with, the land.

Accordingly, an acquiring authority is by no means limited to only acquiring the freehold of land. There is considerable flexibility in identifying precisely what interest in land the authority needs to satisfy its purposes.

Section 32 of the Just Terms Act provides for the acquisition of an interest that did not previously exist in relation to the land – in practical terms, this means that an acquiring authority could create a new easement right or a leasehold interest or impose new restrictions on use.

In *Yanner v Eaton* (1999) 201 CLR 351 at 356-6, the Court invoked a concept used in law-schools around the world, namely the idea that "Property, in relation to land, is a bundle of rights exerciseable with respect to the land". Using this analogy of a bundle, the Just Terms Act allows an acquiring authority to untie that bundle, choose from the loosened rights exactly what it wants – and acquire only those rights.

As simple as this appears in theory, there is still risk involved in this process. The risk is that an acquiring authority may select something from the bundle of rights that looks and feels

like an interest in land, but is more properly described as a contractual right or a right in personam. In such a case, there is no interest capable of acquisition and the Just Terms Act is not enlivened.

In Bradbrook, MacCallum and Moore's Australian Real Property Law 6th Edition, the authors outlined the principal proprietary estates and interest in land at para. [1.205]:

> "Not all rights in relation to land confer proprietary interests in relation to the land. As well as the freehold and leasehold estates, the principal proprietary interests in land recognised by the common law and/or equity are mortgages, rent charges, profits á prendre, easements and restrictive covenants. To determine whether an arrangement confers a proprietary interest, the arrangement must be examined to see if it satisfies the definition of any one of the recognised proprietary interests."

There are two important attributes of proprietary interests – one is the ability to exclude others and the other is the ability to dispose of that interest. These elements are referred to in the examples below.

Example 1: Leases, including statutory tenancies at will

A company which had been in occupation and exclusive possession for 20 years of land owned by its parent company was held to have an interest, even though there was no written lease agreement: *Peter Croke Holdings Pty Ltd & Ors v Roads and Traffic Authority* (NSW) (1998) 101 LGERA 30. In that case the land was used for a mobile home display and sale business prior to the acquisition. The first applicant company claimed as the registered proprietor of the acquired land and the second applicant as "the lessee and occupier" of the land. Rent was paid annually but only by way of book entry between the two companies at the end of each financial year by the companies' accountant who advised the companies as to the amount of rent.

Bignold J held at p. 35:

> "[i]t is clear that the second applicant's occupation of the acquired land for the continuous period 20 years prior to the acquisition date constituted an "interest" in the acquired land within the meaning of the Just Terms Act being a legal or equitable leasehold estate or interest.
>
> In so concluding, I do not think it is necessary to determine the precise form of the tenancy, it being sufficient to say that it was probably a periodic tenancy from year to year (either at common law or in equity) or at the very least a statutory tenancy at will..."

Example 2: Mere contractual licence – no exclusive possession

A mere contractual licence to use land was held not to create a legal or equitable interest in land in *West v Roads and Traffic Authority* (NSW) (1995) 88 LGERA 266. In that case Talbot J considered whether the applicant's company, Shalinda Pty Limited, was in a landlord/tenant relationship with the owners, Mr and Mrs West. Mr and Mrs West were the alter ego of the company. The business of the company was conducted on part of the

downstairs area of the house. It was claimed that the company paid rent, calculated as a share of rates, taxes and outgoings, which payments were made by adjustments to the company accounts. No direct or specific periodic payment was paid to Mr and Mrs West.

His Honour found that although the evidence established that payments were made as a recompense for the company's use of the property, it was not shown that the payments were in the nature of rent. While his Honour found that the payment of rent was not an essential element to the relationship of landlord and tenant, he found it was necessary to look at the substance of the transaction to determine whether the occupier had a right of exclusive possession of the premises.

Talbot J found that as there was no evidence as to whether the area used by the company was formally separated from the domestic areas of the house, the Court could not be satisfied that Shalinda had exclusive possession of that part of the premises.

His Honour concluded that the legal relationship between Shalinda and Mr and Mrs West was a mere contractual licence, which is not capable of creating a legal or equitable estate or interest within the meaning of para (a) of the definition of "interest" in the Just Terms Act.

Step 2: Power to Acquire Land

In order to compulsorily acquire land in New South Wales, the acquiring authority, either a NSW Government agency or local council, must have the requisite power under statute.

In NSW, there are 47 statutes that empower authorities to acquire land by compulsory process. These statutory powers include the obvious and the frequently used (such as the *Roads Act 1993* and the *Local Government Act 1993*) and less obvious and less frequently used acqusition powers (such as those under the *Cancer Institute (NSW) Act 2003* and the *Soil Conservation Act 1938*). The power to compulsorily acquire land is so commonly found in statute that, if a person has an email address ending in ".gov.au", the chances are good they can compulsorily acquire land.

The potential for legal risk arises in exercising those acqusition powers for an improper purpose.

The permitted purposes for which an acquisition power may be exercised differ in scope, as can be seen from the following examples:

- Roads and Maritime Services is authorised to compulsorily acquire land for "any of the purposes of" the *Roads Act 1993* under ss. 177 and 178 of that Act;
- The Minister for Education under s. 125 of the *Education Act 1990*, "may, for the purposes of this Act or jointly for those purposes and purposes of or associated with public education or recreation, acquire land (including an interest in land)";
- The Minister for the Environment under s. 145 of the *National Parks and Wildlife Act 1974* may acquire land "for the purpose of obtaining land for reservation ... of conserving threatened species, populations or ecological communities, or their habitats or of preserving, protecting and preventing damage to Aboriginal objects or Aboriginal places";

- The Health Administration Corporation, with the approval of the Minister, under s. 10 of the *Health Administration Act 1982* may acquire "for the purpose of the exercise by the Minister, Department, Director-General, Corporation or Foundation of their functions";
- Local councils are authorised to compulsorily acquire land "for the purpose of exercising any of their functions" under ss. 186 and 187 of the *Local Government Act 1993*, or for the purposes of the *Roads Act 1993*.

The precise text of an acquisition power is of critical importance. If an acquiring authority exceeds its statutory powers to acquire an interest in land, it would be vulnerable to a judicial review challenge of its decision.

Purpose and Improper Purposes

The common law imposes a duty upon decision makers (such as acquiring authorities) to make their decisions in good faith and for proper purposes. A public body exercising statutory powers must, as was set out in *Westminster Corporation v London and North Western Railway Co* [1905] AC at 430:

> "take care not to exceed or abuse its powers. It must keep within the limits of the authority committed to it. It must act in good faith. And it must act reasonably. The last proposition is involved in the second, if not in the first."

An improper purpose is **any** purpose other than the purpose or purposes for which the power is conferred (*Warringah Shire Council v Pittwater Provisional Council* (1992) 26 NSWLR 491 at 508).

The relevant legal test as applied specifically to the exercise of acquisition powers was set out by the High Court in *Samrein Pty Ltd v Metropolitan Water, Sewerage and Drainage Board* (1982) 56 ALHR 678 at 679:

> "The critical question ... is whether the purposes for which the Board proposes to acquire the land are purposes of the Act. If the Board is seeking to acquire the land for an ulterior purpose, there will be an ostensible but not a real exercise of the power granted by the Act. The attempted exercise of power will be vitiated even if the ulterior purpose was not the sole purpose of the acquisition; it will be an abuse of the Board's powers if the ulterior purpose is a substantial purpose in the sense that no attempt would have been made to acquire the land if it had not been desired to achieve the unauthorised purpose: see *Thompson v Randwick Corporation* (1950) 81 CLR 87 at 106 and *Minister for Public Works v Duggan* (1951) 83 CLR 424."

This test was put to use recently in the landmark case of *Roads and Maritime Services v Desane Properties Pty Limited* [2018] NSWCA 196 at [296].

Roads and Maritime Services v Desane Properties

In this case, the Court of Appeal dealt with proceedings related to the giving of a Proposed Acquisition Notice ("PAN") under the Just Terms Act. The PAN was a notice of a proposed compulsory acquisition of land held by Desane Properties in Rozelle. The position of Roads

and Maritime Services was that it required the land for Stage 3B of the WestConnex project, being the Rozelle Interchange.

Desane Properties had, at first instance in the Supreme Court, successfully argued that the acquisition was for an improper purpose as the land would ultimately be used for open space and parkland – being purposes beyond the acquisition powers given to Roads and Maritime Services under the *Roads Act 1993* (as set out above).

The Court of Appeal accepted that Roads and Maritime Services was not entitled to acquire the Desane property for the purpose of building a park – that issue was not in contest. The critical point was that despite some residual uncertainty in how Roads and Maritime Services would use the Desane land within the envelope of a construction site, there was no uncertainty that it would be used as part of the construction site. The legitimacy of this purpose was not undermined by the inherent (if remote) risk that the construction may not proceed. Moreover, the open space and parkland use of the Desane property was only contemplated after the conclusion of construction and was not an actuating purpose behind the acquisition.

At [310], the Court of Appeal summarised its conclusions as to the proper purpose actuating Roads and Maritime Services' acquisition of the Desane property as follows:

> "On the basis of the evidence as a whole, the inference we draw is that RMS sought to acquire the Desane property for *Roads Act* purposes. The Rozelle Interchange was likely to proceed, for which land would be needed for construction. **Under all plausible scenarios, the Desane property was required by RMS as a construction site. That purpose was sufficient to meet the threshold of being an actuating purpose**. The legitimacy of this purpose is not invalidated because there was a risk that the purpose may not at some future point be realised. There is a degree of uncertainty inherent in every large-scale construction project. The mere fact that it was certain that the land would ultimately be used as a park does not mean that the *Roads Act* purpose was not an actuating purpose."
>
> [Emphasis added]

Step 3: Mandatory negotiation period

Legislative changes

On 1 March 2017, the operative parts of the *Land Acquisition (Just Terms Compensation) Amendment Act 2016* commenced. Among other changes, a new s. 10A was inserted into the Just Terms Act to impose a minimum period of negotiation for acquisition by agreement before the initiation of the compulsory acquisition process (that is, the issuing of a PAN).

The mandatory negotiation period imposed under s. 10A is six months, however this can be abridged by agreement between the interest holder and acquiring authority or in circumstances where the relevant Ministers are satisfied the urgency of the matter or other circumstances make it impracticable to have a six month period.

The mandatory negotiation period does not apply at all in circumstances where the interest being acquired is a subsurface right or Crown land, or in circumstances where the interest holder notifies the acquiring authority that it is not prepared to negotiate an agreement.

Regarding the nature of the negotation period, the new s.10A only provides that the acquiring authority must make "a genuine attempt to acquire the land by agreement".

The Court of Appeal's judgment in *Roads and Maritime Services v Desane Properties Pty Limited* [2018] NSWCA 196 provides some guidance as to the nature of the negotiations required under s. 10A of the Just Terms Act.

At [258] of the judgment, the Court held in obiter that:

> "The content of good faith negotiations required by the *Just Terms Act* plainly includes the requirement upon an acquiring authority, if asked, to provide such information about an acquisition so as to permit a landowner to negotiate about sale price."

Similarly, at [269] of the judgment, the Court held:

> "In order for there to be "a genuine attempt to acquire the land by agreement for at least 6 months before giving a proposed acquisition notice" within the meaning of s 10A of the *Just Terms Act*, a public authority would need to co-operate in good faith to provide such relevant information and material to the landowner as was available. ... [T]hat relevant information and material ... is likely to go far beyond the mere description of the "public purpose" of the acquisition."

The only other case to date that has engaged with the new s.10A of the Just Terms Act is *Joyce v Health Administration Corporation* [2018] NSWSC 1979. In that case, the plaintiff challenged a decision by the relevant Minister to abridge the six month negotiation period to five months. Ultimately, it was unnecessary to decide the validity of this decision, as the Court found there had in fact been eight months of genuine negotiations.

The critical point was made at [11] of the judgment, namely that:

> "There is no prescribed form or other statutory prerequisite for the commencement of the six month period referred to in subs (2) of s 10A. The documents tendered on this application strongly indicate that a genuine attempt was made by HAC to negotiate a mutually acceptable price to acquire the land by agreement."

Administrative changes

In addition to the legislative enactment of a mandatory negotiation period, policy changes have been made on an administrative level to encourage agreement being reached and to ensure that owners of interests proposed for acqusition are treated with respect and sensitivity.

The administrative changes include requiring an acquiring authority to approach land owners in person to explain the proposed acquistion and commence negotiations.

Acquiring authorities are also now required to appoint:

- **Personal Managers,** to coordinate all interaction between the landowners and the acquiring authority. These Personal Managers will be the primary point of contact, put landowners in touch with professional advisers (such as valuers and solicitors) and assist in relocation (including assistance in finding new schools for children, new business premises and help moving).
- **Transaction Managers,** who are responsible for carrying out the necessary steps to purchase the property by agreement (including negotiating compensation, preparing contracts for sale etc.)
- **Community Place Managers,** who are the points of contact for any questions relating to the acquisition campaign as a whole, including questions regarding construction impacts and notifications regarding work.

Putting it all in context

The matters discussed in this paper all arise at the very earliest stages of the land acquisition process.

Properly identifying the interest to be acquired, ascertaining the legal power to acquire the interest and engaging in mandatory negotiations are all steps that in the ordinary course would precede any acquisition under the Just Terms Act - being:

- acquisition of land (not available for public sale) by agreement;
- acquisition of land by compulsory process with the consent of the land owners (that is, an acquisition under s. 30 of the Just Terms Act); and
- compulsory acquisition of land where the pre-acquisition procedures under Div. 1 of Pt. 2 of the Just Terms Act apply.

Given the fact that the three preliminary steps in this paper must precede practically all acquisitions under the Just Terms Act, they are of fundamental importance. It is my hope that this paper will serve as a useful guide to the pitfalls and risks involved with these fundamental matters.