



LEGAL UPDATE: COMPENSATION ISSUES

API NSW Country Conference

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Topics

1. Compulsory acquisition statistics

2. Recent Court of Appeal cases:

a) RMS v United Petroleum Pty Ltd [2019] NSWCA 41

b) Melino v RMS [2018] NSWCA 251

c) Moloney v RMS [2018] NSWCA 252

3. Section 10A: Minimum negotiation period

STATISTICS

“99% of all statistics only tell 49% of the story” – Ron Delegge II



Acquisition statistics

- Department of Finance review of compulsory acquisitions in the period 2011/12 to 2016/17:
 - 2,970 acquisitions (average of 371 per year).
 - Of those, 2,552 by agreement (85%).
 - 343 were compulsorily acquired (12%).
 - 106 objections lodged with the Land and Environment Court (4%).
- Land and Environment Court statistics:
 - Between 2007-2015 there were 330 compensation cases filed with the Court.
 - 242 of those were completed before trial. 88 were determined by the Court.
 - Out of a sample of 58 determined cases, the compensation awarded by the Court was, on average, **57.84% higher**.
 - Between 2016 to 2019 – 65 Class 3 compensation cases have been determined.
 - Of those, 31 cases were resolved at a s34 conference.
 - Acquiring authorities include, RMS, TfNSW and local Councils.



Study of sample cases in the LEC

- Random sample of 58 cases determined by the Court between 2007 to September 2016.

Table 1: Average change (%) in compensation for market value of compulsorily acquired land after hearing, 2007 to mid-September 2016, by land type		
Land category	Number of cases	Average change (%)
Easements	3	109.08%
Rural industrial	1	0%
Rural other	8	14.99%
Rural residential	16	42.14%
Urban commercial	7	70.46%
Urban industrial	2	32.16%
Urban other	11	122.72%
Urban residential	10	32.62%
All residential cases	26	38.48%
All cases	58	57.84%

Note: "Other" refers to land that is vacant or used for public purposes

Tom Gotsis, NSW Parliamentary Research Service (September 2016), e-brief Issue 6/2016, "Compulsory acquisition of land: A brief legislative and statistical overview"

Current and future infrastructure projects

- 2018/2019 Budget (Half-Yearly Review): The NSW Government has pledged \$89.7 billion in infrastructure spending over four years.



- Major projects include:

WestConnex

- Sydney Light Rail (March 2020)
- Parramatta Light Rail (2023)
- Sydney Metro (Northwest and City & Southwest) (2024)
- M12 (Northern Road to M7) (2028+)
- Northern Road Upgrade
- Nancy Bird Walton (Western Sydney) Airport (2026)



RECENT CASES

*“The matter does not appear to me now as it appears to have appeared to me then” –
Preston CJ (quoting Mason P)*



NSW Court of Appeal: *Melino* and *Moloney*

- **Location:** *Melino*, Wardell (South of Ballina), NSW. *Moloney*, Tyndale (North-east of Grafton), NSW.
- **Background**
 - Both cases involved partial acquisitions of sugar cane farms. *Melino* also used part of its land for cattle grazing.
 - RMS compulsorily acquired land for the upgrade of the Pacific Highway.
 - Both appellants sought to claim the costs of constructing replacement homes and farm buildings on the residue land.
 - *Moloney* also claimed the loss of profits from the sale of sugar cane that could have been cultivated on the acquired land.
- **Court of Appeal determined:**
 - Cost of the dwelling houses were captured in the market value of the acquired land.
 - However, in *Melino*, the cost of the farm structures were different. They were compensable under “special value” because those structures were “incidental” to the owner’s use of the acquired and residual land.
 - Claim for loss of profits dismissed because the ***“right to potential profits from growing sugar cane after the date of acquisition is encapsulated in the market value of the land”***.
 - Basten JA considered that the meaning of “financial costs” in section 59(1)(f) should be constrained to mean only “ancillary” costs not costs to rebuild structures.

NSW Court of Appeal: *United Petroleum*

- **Location:** Harwood Island (West of Yamba), NSW.
- **Background**
 - *United was the tenant under a tenancy at will terminable on one month's notice. Freehold owners were related parties of United.*
 - *Owner agreed \$3M+ for the market value of the land.*
 - *United successfully claimed \$1.9M in lost profits and \$83K for additional rent before Robson J of the LEC.*
 - *Robson J determined that United's claim was to be assessed on an extinguishment basis.*

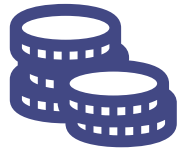


United Petroleum: Separate judgments, unanimous decision

■ Court of Appeal determined:

- *A loss of opportunity to operate on the land is not a “financial cost” for the purposes of section 59(1)(f).*
- *The acquisition caused the business to suffer a “loss of revenue”. It did not cause United to reasonably incur the termination of the business.*
- *Loss of profits assessed in perpetuity was not a “financial cost” incurred in relation to the “actual use” of the land as a “direct and natural consequence of the acquisition”.*
- *The right to future profits from the land was captured in the market value of the land.*
- *A number of the Appeal Judges expressed an opinion that “financial costs” in section 59(1)(f) should not include financial losses. The question is still undecided and will need to wait for the determination of an appropriate case.*

United Petroleum: Loss of profits



- Overturns previously settled principles governing compensation for loss of profits established in *George D Angus*.
- Claims for loss of profits based on an extinguishment of a business may no longer be available. If they are at all, they must be limited by the term and circumstances of the business' interest in the land.
- For the moment, loss of profits may still be claimed on a relocation basis.
- Acquiring authorities may, however, be more reluctant to pay compensation for **financial losses** under section 59(1)(f).



United Petroleum: Consequences for valuers



- Dispossessed tenant businesses will need to consider if they are able to make claims for loss of profits under other heads of compensation.
- Valuations may be framed to include claims which would have traditionally been categorised as disturbance.
- The valuation methodology adopted for the value of the freehold interest may impact on the business' leasehold claim.
- In *United Petroleum*, the market value of the freehold estate was valued by capitalising the maintainable net operating earnings of the business.
- In partial acquisitions, section 55(f) requires that regard must be had to “any increase or decrease” in the value of adjoining land owned by the same owner. A claim for loss of profit might instead now be categorised as “injurious affection”.

United Petroleum: Applying Aerated Water

- Basten JA reaffirmed that the three valuation principles established by the High Court in *Aerated Water* continue to apply to the valuation of leasehold interests.
- **First**, the market value of leasehold interests is to be assessed by using the *Spencer* test.
- **Second**, a lease must be valued with regard to the “*nature and circumstances of the interest in question and the term of the interest*”. They are considerations that relate solely to the land and not the **personal** interests (or hope) of the dispossessed owner.
- **Third**, compensation for disturbance must be limited by the term of the lease.



SECTION 10A

“An ounce of mediation is worth a pound of arbitration and a ton of litigation” – Joseph Grynbaum



Six-month minimum negotiation period

- The acquiring authority must “make a genuine attempt to acquire the land by agreement for at least 6 months before giving a proposed acquisition notice”.
- Section 10A does not apply to acquisitions of:
 - *Crown land;*
 - *An easement, or right to use land, under the surface for the construction or maintenance of works; and*
 - *Sub-stratum acquisitions for the construction of a tunnel.*
- The owner and the authority may agree to a shorter or longer period.
- The Minister may shorten the minimum period unilaterally if satisfied that the circumstances require it.
- Section 10A does not give rise to a civil cause of action.



Why was section 10A inserted?

- Section 10A commenced operation on 1 March 2017.
- Recommendation 1 of the Russell Review (February 2014).
- “Encourage parties to direct substantial efforts towards reaching agreement by the end of the fixed negotiation period.” (Russell Review, page 35)
- Strike a balance between the necessary timing requirements of planning and delivering an infrastructure project and the ability of the landowner to receive informed advice.



What to consider when participating in negotiations during this period

- Acquiring authorities are engaging with owners earlier during the project's design phase. Consequently:
 - *Initial acquisition areas may be revised.*
 - *Key aspects of the project's construction and operation may not yet have been finalised or considered.*
 - *No certainty that the acquisition will proceed.*
 - *How can there be a “genuine” attempt to negotiate by the State if the acquisition (and its impacts) are still fluid?*
- Owners will not have a statutory right to seek compensation for fees incurred during the negotiation period if the acquisition is substantially altered or withdrawn before a proposed acquisition notice has been issued.



I thought I was indecisive -- Now I'm just not sure.

QUESTIONS?

“I would rather have questions that can’t be answered than answers that can’t be questioned.”

– Richard Feynman



LUNCH

“A man may be a pessimistic determinist before lunch and an optimistic believer in the will’s freedom after it.”
– Aldous Huxley

