EPLA Twilight Seminar

Compulsory acquisition and compensation: 2020-2021

Andrew Beatty, Ballanda Sack, Timothy Allen, Sebastian Hanscomb

Beatty Hughes & Associates

Beatty Hughes & ASSOCIATES

Topics

1. The last 12-18 months at the coalface:
   Acquiring authorities, the VG and number of matters going to appeal
2. Recent cases in the NSWCA & LEC
   - The public purpose (56(1)(a))
   - G Capital: actual use & relocation (s59(c),(d) & (f))
   - Special Cases: native title and substratum
   - Related parties – compensable interests falling between the cracks
   - Leasehold interests & profit rent
   - Disturbance – legal fees (s59(1)(a))
   - Reinstatement (s56)
3. Looking forward

Acquiring Authorities

1. Busy last 12-18 months for acquiring authorities – primarily transport projects (Sydney Metro, North Connex, WestConnex, Regional highway upgrades)
   (TfNSW usually 200 acquisitions each year)
2. COVID not impacting property values & COVID response driving infrastructure projects
3. Properties being acquired in high value markets (e.g. Parramatta and Sydney City CBD)
4. Issues around timeframes, “genuine attempt” to acquire land by agreement – s10A
5. Government under pressure around probity issues; e.g. Camellia, Legislative Council Inquiry into the acquisition of land in relation to major transport projects – to report March 2022

Acquiring Authorities – s10A – genuine attempt

Section s10A(2)

> *The authority of the State is to make a genuine attempt to acquire the land by agreement for at least 6 months before giving a proposed acquisition notice*

[Exceptions for Crown land, easements and substratum land, if parties otherwise agree to a different period or if the Minister shortens the period]

Section 10A introduced early 2017 (following Russell Review). July 2019 "Minimum Negotiation Period for Acquisition of Land" guidelines. Satisfaction of s 10A(2) is a jurisdictional precondition to the valid issue of a PAN. (*Roads and Maritime Services v Desane Properties Pty Ltd* [2018] NSWCA 196.)

Elmasri v Transport for NSW [2021] NSWSC 929
[Land in Kemps Creek acquired for the M12. Opening letter August 2019, 3 offers and PAN issued March 2021. Complications re full or partial acquisition, draft EPIs, extent of contamination, lack of investigation & TfNSW offers decreased over time]

- Does the conduct of the authority of the entire period prior to the issue of the PAN meet the description of a genuine attempt and was that period at least 6 months?
- Was there a lack of "bona fides"? Requires good faith (determined objectively) including the provision of information by the authority (if asked). Need not be perfect

Conduct of external valuer vs conduct of TfNSW

Non-publication order (re offers made or analysis for other land) until Nov 2022 & usual costs order NOT "indemnity costs" (as requested by TfNSW)

[I]n the end result some tardiness, some missteps and a lack of explanation for some aspects of its conduct does not necessarily mean a genuine attempt was not made. Transport had at times worked hard to engage with the plaintiffs and encouraged them to engage with it. …

Their processes, timeliness and communications were not perfect but considered individually or collectively they did not demonstrate a lack of bona fides either. In the end result, the PAN was issued in circumstances where the parties were so far apart that the prospect of agreement was extremely remote.

The fact that [the TfNSW external valuer] might be either wrong or rigid or both does not mean that Transport was not making a genuine attempt to acquire the plaintiffs' land by agreement. …

Merely because [he] *may have adopted a different approach to aspects of his valuation of the two properties does not indicate a lack of bona fides on the part of Transport.*

Valuer General

Valuer General strips powers from staff to decide on compo for property owners

- Focus on process improvements:

- *"Future Initiative 3 "timeliness for the compulsory acquisition process":*
  - *New process – allow both parties to raise corrections to matters of fact following issue of preliminary report*
  - *"The process has now been redesigned and the redesign is moving into implementation phase with a view to complete determinations within the 45 days specified under the Act. – see* Standing Committee, 14th Report in progress – June 2021 (link).

- Publication of 8 new policies and guidelines in 2021

- Statistics (for 2019-2020):

- *The average time taken to issue determinations in 2019-20 was 171 days, a marginal increase compared to the 166 days in 2018-19* (link).

- The overall number of determinations of compensation decreased to 128 in 2019-20 from 254 (excluding substratum) in 2018-19 (link).

Class 3 Compulsory Acquisition

"Recent" Cases in the NSWCA/LEC

The public purpose and its disregard *(Desane & Apokis)*

G Capital: Actual Use and Relocation

Special Cases:

Acquisition of land subject to Native Title *Timber Creek; Saunders; Bandjalang & Lawson*

Compensation for substratum for underground rail *(Landan, Sydney Opera and Kritikos)*

Compensable interests falling between the cracks *(Alexandria Landfill and Olde English Tiles)*

Leasehold interests in trade related properties (*Eureka)*

Legal fees and ancillary experts *(Eureka, Sales & Gaudioso)*

Reinstatement where there is no general market – *Whitcurt*

NSWCA

7 cases (Azizi, Alexandria Landfill, Noubia, Apokis, Barkat, G Capital and Cappello)

LEC

- 34 Compulsory acquisition cases in the LEC since June 2019
- 19 resolved in s34 (before a Commissioner)
- Remaining 15 determined by judge
- 21 cases involved Sydney Metro/RMS

End of several "sagas":

- UTSG (6 Cases + 3 with the landlord)
- G Capital (6 cases)

The Public Purpose in the NSWCA

The public purpose:

- justification for the right of acquisition (under Acquiring Authorities' statutory powers);
- any increase or decrease in value of land caused by the public purpose must be disregarded in determining market value of the acquired land (s56(1)(a)); and
- right to compensation for decrease in value of severed/adjoining land due to the public purpose (s55(f))

Definition of the "public purpose" (NSWCA on appeal from Supreme Court)

Cappello: RMS "*may acquire land for any of the purposes of this Act" (*the Roads Act)(s177). Issue whether acquisition for the purposes of a tollway which when constructed would be a "private road" was within power. Objects of the Roads Act under s3 generally limited to functions in relation to "public roads". Purposes of Act to be determined by Act reads as a whole.

Desane: Issue was validity of the PAN and alleged improper purpose where acquired land to be used as a temporary construction site for the Rozelle interchange and then to be used for parkland and open space. PAN not required to comply with "approved form" and not required to state the public purpose. No improper purpose.

The critical time for assessing purpose is not at the time the PAN is issued but at the time the power to acquire is exercised, being at the time of acquisition

The Public Purpose cont.

The statutory disregard: Impact of the public purpose on market value

s56(1)(a): disregarding …..any increase or decrease in the value of the land caused by the carrying out of, or the proposal to carry out, the public purpose for which the land was acquired

Apokis: Quarry resources in acquired land used in Highway project. Resources only of value due to the public purpose and hence value to be disregarded

Barkat: Would the land have been rezoned residential but for the public purpose – Public purpose broadly construed to include associated planning strategies.

Where there is a nexus between planning controls and resumption, the steps in the planning process that had an effect on the value of the land must be ignored. The effect on value must be ignored if there is a direct relationship between the potential rezoning and the public works.

Market Value & Zoning Uplift cases

Azizi: Land rezoned by Council to RE1 & reserved for acquisition (to become part of Blenheim Park). Current issue as to whether absent the public purpose the land would have been zoned R3 or R4

Noubia: Not a CA case. Planning constraints imposed for a broader environmental purpose involve a public purpose. Asserted HaBU would not have been approved by Council

Gaudioso: On facts unlikely land would have been rezoned

G Capital

Actual Use

(f) any other financial costs reasonably incurred (or that might reasonably be incurred), relating to the actual use of the land, as a direct and natural consequence of the acquisition.

G Capital 2019 NSWCA & LEC (Pain J) proceedings (Question of Law: was there an actual use)

- Use at the time of the acquisition rather than proposed future or potential use
- Property management activities under standard commercial lease not actual use of land

Relocation

(c) financial costs reasonably incurred in connection with the relocation of those persons (including legal costs but not including stamp duty or mortgage costs)

(d) stamp duty costs reasonably incurred (or that might reasonably be incurred) by those persons in connection with the purchase of land for relocation (but not exceeding the amount that would be incurred for the purchase of land of equivalent value to the land compulsorily acquired),

G Capital 2021 Moore J

"something tangible (and not merely the concept of ownership) must be relocated for such an entitlement to arise"

Special Categories

Substratum Compensation for substratum for underground rail under the TA Act. Right to compensation only arises when and if surface land disturbed or support of that land affected *(Landan – separate question).* Proposed further separate question to determine whether had in fact been the necessary "impact". Question as to impact of tunnel on future development potential. In April 2020 Robson J decided matters should go to hearing without separate question.

Native Title / Cultural Loss: In NSW land subject to NT can be acquired.

"To put money on cultural loss is just flawed but the Act requires me to do it"

Question of value to be placed on NT rights (e.g. loss of cultural access to land): ***Timber Creek***

Quantum will vary according to the compensable act, the identity of the native title holders, the native title holders' connection with the land or waters by their laws and customs and the effect of the compensable acts on that connection

Amount of compensation will reflect "*a social judgment, made by the trial judge and monitored by appellate courts, of what, in the Australian community, at this time, is an appropriate award for what has been done; what is appropriate, fair and just*"

VG Draft Paper in June 2021 titled: "*Review of Forms of Cultural Loss and the Process and Method for Quantifying Compensation for Compulsory Acquisition*". Suggestion in Timber Creek that it best falls under special value

Bandjalung Aboriginal Corporation: s34 Agreement and hence no judicial consideration of the appropriate valuation methodology

Related parties & Falling between the Cracks

United Petroleum

- *Need for secure tenure:* Disturbance losses are necessarily circumscribed by the nature of the interest in land which has been acquired.
- Accordingly, the identification of the compensable interest is the first and most important step as it will inform the nature and basis of compensation claimed under every part of the Just Terms Act.

Alexandria Landfill

- A landlord or licensor's interest, no matter how secure, will not give rise to claim for loss of profits under s 59(1)(f) where they do not themselves actually use the land.
- Not all uses of land will constitute an "interest" which is compensable.
- Unsatisfactory structures between related entities may result in a situation where part of the compensation payable in respect of a site as a whole is lost for want of a strict legal basis.

Olde English Tiles

- The existence of a compensable interest is a necessary precondition to any claim for compensation at all, not just market value.
- A personal right which cannot be sold or transferred, and depends on a relationship between the legal owner and occupier or user of land is not one which is compensable.
- In the absence of an interest in land, even one without a readily ascertainable legal interest, no claim for disturbance losses such as loss of business profits may be made.

Profit Rent and Leasehold Interests

- Ordinarily the market value of a lease may be ascertained by considering whether the tenant pays less than the market rate for rent.

- 'Profit rental' is only appropriate as a measure of the lessee's interest where the best economic use of the land is as an investment property. Where the endeavour undertaken by a lessee represents the best economic use of the land, the value of its lease must also be reflected in the land's capacity to generate profits in the future (where they are "trade related premises").

- The market value of a leasehold interest may be over and above any profit rent (*Eureka):*

"The use of the concept of a profit rent may be appropriate where the profit-making use of the land is relatively unrelated to physical and locational attributes of the land (a first floor office use on a high street as an example). However, where the occupation of land that has inherent profit-making features for a particular use, the exploitation of which is largely open to any occupier of that land, I consider that such would have value over and above a profit rent." (Eureka at [96])

- The fundamental question is always one of the hypothetical transaction between willing but not anxious parties. In the valuation of a leasehold interest the question is simply what a hypothetical assignee would pay.

Experts' fees (other than lawyers and valuers)

- Section 59(1)(a) for legal, (b) for valuation.
- Section 59(1)(f) previously available → some uncertainty in the wake of constraints on (f) (*United Petroleum*, "in the alternative", etc.)
- Now put under s 59(1)(a) legal fees
- *Eureka Operations Pty Ltd v Transport for New South Wales* [2021] NSWLEC 41 (Duggan J).
- [153] "…if they are reasonably incurred and to that extent if they are reasonably necessary for the legal practitioner to provide the advice relating to the acquisition"
- Forensic accountant/business valuer not allowed under (b).

Experts' fees (other than lawyers and valuers)

- *Sales and Ors v Transport for NSW (No 2)* [2021] NSWLEC 96 (Robson J re town planning fees):
- [272] 'I accept that the reasonable costs of obtaining legal advice includes the costs of obtaining third party information and advice, where this third-party information and advice directly informs, in the sense of being required for the provision of, the legal advice. Simply stated, if a legal practitioner requires third party information and advice to provide proper and comprehensive legal advice, then this information and advice is properly considered a legal cost."
- Urban designer in *Antonino Gaudioso v Transport for New South Wales* [2021] NSWLEC 91 (Duggan J again)

Reinstatement – s 56(3)

- ***The Trustee for Whitcurt Unit Trust v Transport for NSW*** **[2021] NSWLEC 82**
- Lease terminable on 2 months' notice – intended longer lease argued.
- Equipment owned by landlord IWC.
- Relocation/fit out costs and business shutdown/ramp-up.
- No "near certainty" of longer lease – shorter term lease held – insecure tenure (*United Petroleum*)
- S 59(1)(c) claim rejected – weak tenure, equipment owned by someone else, no loss of profits on a two-month lease.

Reinstatement – s 56(3)

- Special value in the alternative.
- [164] "…special value would have to be found to exist in relation to the use of fixtures not owned by the Applicant, being the critical infrastructure owned by the IW Council at the date of acquisition."
- No supportive cases identified to assist the Applicant.
- Weak tenure ultimately the main obstacle.

Reinstatement – s 56(3)

(3) If—

a) (a) the land is used for a particular purpose and there is no general market for land used for that purpose, and

b) (b) the owner genuinely proposes to continue after the acquisition to use other land for that purpose,

the market value of the land is taken, for the purpose of paying compensation, to be the reasonable cost to the owner of equivalent reinstatement in some other location. That cost is to be reduced by any costs for which compensation is payable for loss attributable to disturbance and by any likely improvement in the owner's financial position because of the relocation.

Reinstatement – s 56(3)

- First judicial consideration of s 56(3).
- Particular purpose + no general market + intention to continue use + reasonable cost – discount.
- Chapter 14 of Alan Hyam, *The Law Affecting Valuation of Land in Australia*.
- Cases from other jurisdictions.
- No general market for golf facilities
- Genuine intention to continue use
- No actual reinstatement – better tenure, *big* discount for improvement in financial position.
- S 56(1) does not take precedence over (3).

Looking Forward

1. Due to the higher values of properties being acquired challenges in the Court becoming commercially more viable
2. Given number of infrastructure projects & consequent value uplift and current Legislative Council Inquiry anticipate that future case law/ Government policy regarding:
   - *public purpose disregard in circumstances where there are multiple overlapping infrastructure projects (e.g. Aerotropolis);*
   - *"just terms" compensation for homeowners who cannot afford to buy back into an area (e.g. Orchard Hills)*