COMPULSORY ACQUISITION: THE ASSESSMENT OF COMPENSATION UNDER THE *ACQUISITION OF LAND ACT 1967* (Qld)

Presented by: Grant Allan
Barrister-at-Law
Level 20
Inns of Court
107 North Quay
Brisbane Qld 4000

March 2013

"The property of subjects is under the eminent domain of the State, so that the State, or he who acts for it, may use and even alienate and destroy such property, not only in cases of extreme necessity, in which even private persons have a right over the property of others, but for ends of public utility, to which ends those who founded our society must be supposed to have intended that private ends should give way. But it is to be observed that when this is done, the State is bound to make good the loss to those who lose their property, and to this public purpose, he who has suffered the loss must if needs be contribute."

Hugo Grotius, *De Jure Belli et Pacis*, 1624

"So great moreover is the regard of the law for private property, that it will not authorize the least violation of it; no, not even for the general good of the whole community. If a new road, for instance, were to be made through the grounds of a private person, it might perhaps be extensively beneficial to the public; but the law permits no man, or set of men, to do this without consent of the owner of the land. In vain may it be urged, that the good of the individual ought to yield to that of the community; for it would be dangerous to allow any private man, or even any public tribunal, to be the judge of the common good, and to decide whether it be expedient, or no. Besides, the public good is in nothing more essentially interested, than in the protection of every individual's private rights, as modelled by the municipal law. In this, and similar cases the legislature alone can, and indeed frequently does, interpose, and compel the individual to acquiesce. But how does it interpose and compel? Not by absolutely stripping the subject of his property in an arbitrary manner; but by giving him a full indemnification and equivalent for the injury thereby sustained. The public is now considered as an individual, treating with an individual for an exchange. All that the legislature does is to oblige the owner to alienate his possessions for a reasonable price; and even this is an exertion of power, which the legislature indulges with caution, and which nothing but the legislature can perform."

William Blackstone, *Commentaries on the Laws of England 1* (1765) 139

TABLE OF CONTENTS

.

COMPULSORY ACQUISITION: THE ASSESSMENT OF COMPENSATION UNDER THE *ACQUISITION OF LAND ACT 1967* (Qld)

TABLE OF CASES – (Land Court: LC; Land Appeal Court: LAC; Court of Appeal: CA)

PART 1

1. *Adelaide Clinic Holdings Pty Ltd v Minister for Water Resources* (1988) 65 LGRA 410
2. *Alex Gow Pty Ltd v Brisbane City Council* (2001) 22 QLCR 292 (LAC)
3. *Anderson v Bowles* (1951) 84 CLR 310
4. *Arkaba Holdings Limited v Commissioner of Highways* (1969) 19 LGRA 398
5. *Banno & Anor v Commonwealth of Australia* (1993) 81 LGERA 34
6. *Barns v Director-General, Department of Transport* (1996-1997) 16 QLCR 22 (LAC)
7. *Belcher v The Council of the City of the Gold Coast* (1965) 32 QCLLR 234 (LC)
8. *Blower v Queensland Electricity Corporation* (1997-1998) 18 QLCR 342 (LC)
9. *Boland v Yates Property Corporation* (1999) 167 ALR 575
10. *Brisbane City Council v Lansbury* (1977) 4 QCLR 502 (LAC)
11. *Brisbane City Council v Mio Art Pty Ltd* (2011) 183 LGERA 352 (CA)
12. *Brisbane City Council v Zoeller* (1973) 40 QCLLR 198 (LAC)
13. *Bull v Attorney-General (NSW)* (1913) 17 CLR 370
14. *Commissioner for Railways v Buckler* (1994) 15 QLCR 262 (CA)
15. *Commissioner of Succession Duties (SA) v Executor Trustee and Agency Company of South Australia* (1947) 74 CLR 358
16. *Commonwealth DPP v Hart & Ors* [2003] QCA 495
17. *Crisp & Gunn Co-Operative Ltd v The Lord Mayor, Alderman and Citizens of the City of Hobart* (1963) 110 CLR 538
18. *Crompton v The Commissioner of Highways* (1973) 5 SASR 301
19. *Crouch v The Minister* (1976) 36 LGRA 254
20. *Dell Holdings Ltd v Toronto Area Transit Operating Authority* [1997] 1 S.C.R 32 (S.C.C.)
21. *Dennehy v Reasonable Endeavours Pty Ltd* [2003] FCAFC 158
22. *Edwards v The Minister of Transport* [1964] 2 QB 134
23. *FAI Insurances Limited v Winneke* (1981-1982) 151 CLR 342
24. *Flotilla Nominees Pty Ltd v Western Australian Land Authority* (2003) 129 LGERA 65
25. *Gallagher v Brisbane City Council* (1975) 2 QLCR 368 (LAC)

26. *Gilmour v The Crown* (1981) 7 QLCR 160 (LAC)
27. *Gold Coast City Council v Suntown Pty Ltd* (1971) 6 QCLLR 196 (LAC)
28. *Haber v Chief Executive, Department of Main Roads* (2003) 24 QLCR 387
29. *Hall & Hedge v The Chief Executive, Department of Transport* (1997-1998) 18 QLCR 284 (LC)
30. *Harvey v Crawley Development Corporation* [1957] 1 All ER 504
31. *Heavey Lex No 64 Pty Ltd v Chief Executive Department of Transport* (2000) 22 QLCR 170 (LAC)
32. *Hill v The Crown* (1980) 7 QLCR 128 (LAC)
33. *Hill v The Director General, Department of Transport* (1992-1993) 14 QLCR 205 (LC)
34. *Horn v Sunderland Corporation* [1941] 2 KB 26
35. *Howard & Ors v Commissioner for Railways (Resumption for Gladstone-Moura Railway)* (1967) 34 QCLLR 140 (LC)
36. *Jenkins v Chief Executive, Department of Transport* (1996-1997) 16 QLCR 635 (LC)
37. *Kabale Holdings Pty Ltd v Chief Executive, Department of Transport* (1997-1998) 18 QLCR 166 (LAC)
38. *Kabale Holdings Pty Ltd v Director-General, Department of Transport* , Unreported, A94-34, Land Court, 11 August 1995
39. *Kraljevich Lake View and Star Limited* (1945) 70 CLR 647
40. *LGM Enterprises v Brisbane City Council* [2004] QLC 0178
41. *London County Council v Tobin* (1959) 1 All ER 649
42. *Mandurah Enterprises Pty Ltd & Ors v Western Australian Planning Commission* (2010) 240 CLR 409
43. *Maroochy Shire Council v Maroochy Central Holdings Pty Ltd* (2003) 24 QLCR 77 (LAC)
44. *Maroochy Central Holdings Pty Ltd (No.2) v Maroochy Shire Council* (2007) 28 QLCR 6 (LAC)
45. *Marshall v The Director-General, Department of Transport* (2001) 205 CLR 603
46. *Marshall v Department of Transport* (2004) 25 QLCR 7 (LC)
47. *Melwood Units Pty Ltd v Commissioner of Main Roads* [1979] AC 426
48. *Merewether v Brisbane City Council* (1974) 1 QLCR 126 (LC)
49. *Merivale Motel Investments Pty Ltd v The Brisbane Exposition and South Bank Redevelopment Authority* (1985) 10 QLCR 268 (LAC)
50. *Minister for the Environment v Florence* (1980-81) 45 LGRA 127
51. *Minister for Public Works v Thistlewayte* [1954] AC 475
52. *Minister of Transport v Lee* (1965) 2 All ER 986
53. *Mio Art Pty Ltd v Brisbane City Council* (2010) 178 LGERA 387 (LAC)
54. *Murray v Queensland Electricity Generating Board* (1984) 10 QLCR 69 (LAC)
55. *Nelungaloo Pty Ltd v The Commonwealth* (1948) 75 CLR 495

56. *Newcrest Mining (WA) Limited v The Commonwealth* (1996-1997) 190 CLR 513
57. *O'Hara & Anor v Brisbane City Council* (1972) 39 QCLLR 246 (LC)
58. *Pastoral Finance Association Ltd v The Minister* [1914] AC 1083
59. *Perpetual Executors and Trustees Assoc. of Australia Ltd v FCT* (1948) 77 CLR 1
60. *Pott v The Commissioner for Railways* Unreported; A89-17, Land Court, Brisbane, 3 August 1989
61. *Project Blue Sky Inc and Others v Australian Broadcasting Authority* (1998) 194 CLR 355
62. *R & R Fazzolari Pty Ltd v Parramatta City Council* (2009) 237 CLR 603
63. *Re An Arbitration Between Lucas and Chesterfield Gas and Waterboard* [1909] 1 KB 16
64. *Redland Shire Council v Edgarange Pty Ltd* (2008) 29 QLCR 91 (LAC)
65. *Reseck v FCT* (1975) 133 CLR 45
66. *Samad and Others v District Court of News South Wales and Another* (2001-2002) 209 CLR 140
67. *Shellray Pty Ltd as trustee for the Jonley Unit Trust v The Chief-Executive, Main Roads* Unreported, A98-27, Land Court, Brisbane, 29 September 1999
68. *Savina v Department of Main Roads (No.2)* (2001) 23 QLCR 29 (LC)
69. *Sisters of Charity of Rockingham v The King* [1922] 2 AC 315
70. *Small & Anor v Brisbane City Council* (1968) 35 QCLLR 239 (LAC)
71. *Sorrento Medical Service Pty Ltd v Chief Executive, Department of Main Roads* (2007) 151 LGERA 328 (CA)
72. *Spencer v The Commonwealth* (1907) 5 CLR 418
73. *Stanfield v Brisbane City Council* (1990) 70 LGRA 392 (LAC)
74. *State of Queensland v Pajares* (2004) 25 QLCR 165 (LAC)
75. *State of Queensland v Springfield Land Corporation (No.2)* (2009) 171 LGERA 38 (CA)
76. *Stephens v The Council of the Shire of Albert* (1992-1993) 14 QLCR 356 (LC)
77. *Steven v The Commissioner of Water Resources* (1990-91) 13 QLCR 75 (LAC)
78. *Szites v Pine Rivers Shire Council* (1969) 36 QCLLR 97 (LC)
79. *The Commissioner of Main Roads v Geyl and Others* (1981-1982) 8 QLCR 225 (LAC)
80. *The Commonwealth v Arklay* (1952) 87 CLR 159
81. *The Commonwealth v Milledge* (1953-54) 80 CLR 157
82. *The Crown v Corbould* (1986) 11 QLCR 50 (LAC)
83. *Thirty-Fourth Philgram v The Crown* (1992-1993) 14 QLCR 13 (LC)
84. *Townsville City Council* v *Moyses* (1979) 6 QLCR 271 (LAC)
85. *Turner & Anor v Minister for Public Instruction* (1955-1956) 95 CLR 245

86. *Universal Sands and Minerals Pty Ltd v Commonwealth Australia* (1980) 30 ALR 637
87. *Victims Compensation Fund Corporation v Brown & Ors* (2003) 201 ALR 260
88. *Wanless v Brisbane City Council*, Unreported, A01-01, Land Court, Brisbane, 21 December 2001
89. *Walker Corporation v Sydney Harbour Foreshore Authority* (2008) 233 CLR 259
90. *Waters v Welsh Development Agency* [2004] 1 WLR 1304
91. *Weir v Thuringowa Shire Council* (1980) 7 QLCR 72 (LC)
92. *Wilson v Ipswich City Council* (2011) 32 QLCR 55 (LC)
93. *Wilson & Anor v Ipswich City Council (No. 2)* [2011] QLC 0037 (LC)
94. *Wyatt v Albert Shire Council* [1987] 1 Qd R 486 (Sup Crt, Qld, FC)
95. *Yalgan Investments Pty Ltd v Council of the Shire of Albert* (1997) 17 QLCR 401 (LAC)
96. *Young & Co v The Mayor and Corporation of Royal Leamington Spa* (1883) 8 App Cas 517
97. *Zoeller v Brisbane City Council* (1973) 40 QCLLR 24 (LC)

PART 2 (* Cases also referred to in PART 1)

1. *AMP Capital Investors Ltd v Transport Infrastructure Development Corporation* (2008) 163 LGERA 245
2. *Doolan Properties Pty Ltd v Pine Rivers Shire Council* [2001] 1 Qd R 585 (CA)
3. *Fraser v City of Fraserville* [1917] AC 187
4. *Gosford Shire Council v Green* (1980) 48 LGRA 201
5. *Housing Commission of NSW v San Sebastian Pty Ltd* (1978) 140 CLR 196
6. *Hudsons & Sons Pty Ltd v The Commissioner of Main Roads* (1981-82) 8 QLCR 150 (LC)
7. *Hutchins v Council of Shire of Woongarra* (1992-1993) 14 QLCR 286 (LAC)
8. *Inland Revenue Commissioner v Clay* [1914] 1 KB 339
9. *Ipswich City Council v Wilson & Downey* (2011) 32 QLCR 357 (LAC)
10. *Melwood Units Pty Ltd v Commissioner of Mains Roads* [1979] AC 427*
11. *Mt Lawley Pty Ltd v Western Australian Planning Commission* (2007) 34 WAR 499
12. *Nelungaloo Pty Ltd v The Commonwealth* (1948) 75 CLR 495*
13. *Pointe Gourde Quarrying & Transport Company Ltd v Sub-Intendent of Crown Lands* (1947) AC 565
14. *Queensland v Springfield Land Corporation (No.2)* (2009) 169 LGERA 284 (Sup Crt, Qld)
15. *Re An Arbitration Between Lucas and Chesterfield Gas and Waterboard* [1909] 1 KB 16*
16. *Redland Shire Council v Edgarange Pty Ltd* (2009) 164 LGERA 447* (CA)
17. *Road &Traffic Authority (NSW) v Damjanovic Pty Ltd* (2006) 146 LGERA 192

18. *Roads & Traffic Authority (NSW) v Muir Properties Pty Ltd* (2005) 143 LGERA 192
19. *Roads & Traffic Authority v Perry (NSW)* (2001) 116 LGERA 244
20. *Rugby Water Board v Shaw Fox* [1973] AC 202
21. *San Sebastian Pty Ltd v Housing Commissioner of New South Wales* (1977) 37 LGRA 191
22. *Smith v Roads and Traffic Authority* (NSW) [2005] NSWLEC 438
23. *South Eastern Railway Co v London County Council* [1915] 2 Ch 252
24. *State of Queensland v Springfield Land Corporation (No.2)* (2009) 171 LGERA 38* (CA)
25. *Springfield Land Corporation (No 2) Pty Ltd & Anor v State of Queensland* (2011) 242 CLR 632
26. *Steven v The Commissioner of Water Resources* (1990-91) 13 QLCR 75 (LAC)*
27. *The Crown v Murphy* (1990) 71 LGRA 1
28. *Transport for London v Spierose Ltd* [2009] 1 WLR 1797
29. *Wanless v Brisbane City Council* Unreported, Land Court, Brisbane, A01-03, 21 December 2001*
30. *Walker Corporation Pty Ltd v Sydney Harbour Foreshore Authority* (2008) 233 CLR 259*
31. *Waters v Welsh Development Agency* [2004] 1 WLR 1304*
32. *Wilson v Ipswich City Council* (2011) 32 QLCR 55* (LC)
33. *Wilson v Liverpool City Council* [1971] 1 WLR 302

PART 1 – *ACQUISITION OF LAND ACT 1967*: PROCEDURAL AND SUBSTANTIVE PROVISIONS

Preliminary

1. In Queensland, the statute which prescribes the law in relation to the acquisition of land for public works and public purposes is the *Acquisition of Land Act 1967* ("the Act").[1]

2. The Act is concerned with the procedures by which land may be taken and the assessment of compensation subsequent to its taking.

3. ***"Land"*** is defined in s 2 of the Act to mean land, or any estate or interest in land, that is held in fee simple, including fee simple in trust under the *Land Act 1994*, but does not include a freeholding lease under that Act.[2]

4. The principal focus of Part 1 of this paper is the substantive provisions of the Act: "Part 4 – Compensation (ss 18 to 35)", specifically s 20 of the Act.[3] The machinery and procedural provisions which govern the process by which land is taken under the Act and the manner in which a claim for compensation is lodged are also considered.

5. Unlike many statutes in Queensland, the Act has not been substantially amended since its commencement on 23 March 1968. A number of important amendments were made to the Act on 23 February 2009 (the more relevant amendments are referred to subsequently in this paper) upon the commencement of the *Acquisition of Land and Other Legislation Amendment Act 2009 (No.5).* For those who have an interest in such matters, I have briefly outlined hereunder the origins of the Act.

---

1 In this paper, all references to "the Act" (unless otherwise stated) are to the Act currently in force as at the date of this paper and including all amendments that had commenced on 29 August 2012.

2 See later reference to *Sorrento Medical Service Pty Ltd v Chief Executive, Department of Main Roads* (2007) 151 LGERA 328 (CA) as the nature of the interest in land necessary that a person must hold in order to establish a right to claim compensation.

3 There are a number of other statutes in Queensland which incorporate, by reference, the provisions (both procedural and substantive) of the Act – including Part 4 and apply those provisions to a 'taking' of land under the relevant legislation. I have not reviewed the provisions of those other Acts in this paper. However, by way of example:- see s 82(6)(a) and s 125(7) of the *State Development & Public Works Organisation Act 1971*; see also s 221 of the *Land Act 1994* which applies Part 4 of the Act to a claim for compensation in respect of a resumption of a lease or easement: see Division 1 of Part 3 of Chapter 5 of *the Land Act 199*4; see also s 231 of the *Land Act 1994* which incorporates Part 4 of the Act to a claim for compensation in respect of the resumption of a Lease, Deed of Grant or Deed of Grant in Trust containing a reservation for a public purpose: see Division 3 of Part 3 of Chapter 5 of the *Land Act 1994*.

The origins of the Act: A brief history

6. The Act, particularly the compensation provisions, was based on the *Public Works Land Resumption Act 1906* (Qld), which in turn was based on the New Zealand *Public Works Act 1894*. Other relevant resumption acts referred to in the second reading of the *Land Acquisition Bill 1967* were the *Railways Act 1914* (Qld) and the *English Act of 1845*,[4] on which the *Railways Acts 1914* (Qld) was based.[5]

7. Upon enactment of the Act, the following Acts *inter alia* were repealed:[6]

   (i) *Public Works Land Resumption Act 1906;* and

   (ii) *Railways Acts 1914.*

8. Relevant provisions of the *City of Brisbane Improvement Act 1916* were also repealed.

9. On 6 December 1967 the Minister for Lands, Mr Fletcher, in his second reading speech of the Acquisition of Land Bill stated, *inter alia*:

> "*The principles for the assessment of compensation are unchanged from those which presently operate*. The existing principles are well established and require no change. They are in fact largely conventional to the law of English-speaking nations. They are well tried and proven, and their interpretation is assisted by a great body of case law covering every aspect of their application."[7] (Emphasis added.)

10. The observations of the Minister, Mr Fletcher, echo a presumption at law that applies when undertaking the task of statutory construction, namely that:

> "… Parliament is presumed to have a mastery of the law, both the common law and the statute law. It is also presumed to know the cases which interpret statutes."[8]

---

4 A reference to the *Lands Clauses Consolidation Act 1845* c.18 (England).

5 Second reading speech of the Acquisition of Land Bill, Hansard 1967. See Mr Lickiss, Member for Mount Coot-tha, pages 2301-2302; and Mr Fletcher, Minister for Lands, at page 2301.

6 Section 3(1) and First Schedule to the Act.

7 Second reading speech of the Acquisition of Land Bill, Hansard 1967, page 2296 at page 2299.

8 *Dennehy v Reasonable Endeavours Pty Ltd* [2003] FCAFC 158 at [16] per Finkelstein J (with whom Madgwick and Dowsett JJ agreed). See also *Smith v Papamihail* (1998) 88 FCR 80 at 95 per Carr J; *H. Young & Co v The Mayor and Corporation of Royal Leamington Spa* (1883) 8 App Cas 517 at 526 per Lord Blackburn (with whom Lord Watson and Lord Bramwell agreed).

The statutory nature of claims for compensation under the Act

11. Compensation claims are statutory and depend on the claimant establishing a statutory right under the relevant legislation to compensation following resumption of his land.[9]

12. In *The Crown v Corbould* (1986) 11 QLCR 50 at 56, the Land Appeal Court quoted, with approval, the words of Lord Parmoor in *Sisters of Charity of Rockingham v The King* [1922] 2 AC 315, where his Lordship explained that compensation for compulsory acquisition of land is founded in statute:

> "Compensation claims are statutory and depend of statutory provisions. No owner of lands expropriated by statute for public purposes is entitled to compensation, either for the value of the land taken, or for damage, on the ground that his land is "injuriously affected" unless he can establish a statutory right."

The meaning of the "common law" in compulsory acquisition law

13. In Queensland (and in other jurisdictions) a cautionary approach is adopted before applying principles of law from cases decided in other jurisdictions in respect of different legislation. In that respect, a proper understanding of the meaning of the "common law" in the context of compulsory acquisition cases is essential.

14. The meaning of the "common law" as it should be understood in compulsory acquisition law was explained in the decision of the High Court in *Walker Corporation v Sydney Harbour Foreshore Authority* (2008) 233 CLR 259 where, at paragraph [30], Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ stated:

> "The reference in *Melwood*[10] to "the common law" is better understood as a reference to a body of case law which may be built up in various jurisdictions where there are in force statutes in the same terms, or at least, in relevantly similar terms."

---

9 See *The Crown v Corbould* (1986) 11 QLCR 50 at 56 (LAC); *Mandurah Enterprises Pty Ltd & Ors v Western Australian Planning Commission* (2010) 240 CLR 409 at paragraph [32]. The High Court (French CJ, Gummow, Crennan and Bell JJ) stated: "Compulsory acquisition and associated compensation is entirely the creation of statute". The High Court cited *Walker Corporation Pty Ltd v Sydney Harbour Foreshore Authority* (2008) 233 CLR 259 at paragraphs [29]-[30], and *R & R Fazzolari Pty Ltd v Parramatta City Council* (2009) 237 CLR 603 at 619 at paragraph [41] per French CJ.

10 The High Court had earlier, at paragraph [29], referred to the decision of the Privy Council in *Melwood Units Pty Ltd v Commissioner of Main Roads* [1979] AC 426 at 435.

15. In *Walker Corporation*, The High Court also explained at paragraph [31] why a cautionary approach was required when considering judicial decisions of Courts from other jurisdictions. The High Court stated:

> "The caution required in construing modern Australian legislation by reference to "principles" derived in this way is indicated by McHugh J in *Marshall v Director-General, Department of Transport*[11]. That case concerned the expression "injuriously affecting" as it appeared in s 20 of the *Acquisition of Land Act 1967* (Qld); ss 49 and 63 of the 1845 Act[12] had used the same phrase as had the subsequent legislation in various jurisdictions. Differing interpretations had been given to the expression in question. McHugh J noted the similarity in the terms of the legislation and went on at paragraph [62]:
>
> > 'But that does not mean that the courts of Queensland, when construing the legislation of that State, should slavishly follow judicial decisions of the courts of another jurisdiction in respect of similar or even identical legislation. The duty of courts, when construing legislation, is to give effect to the purpose of the legislation. The primary guide to understanding that purpose is the natural and ordinary meaning of the words of the legislation. Judicial decisions on similar or identical legislation in other jurisdictions are guides to, but cannot control, the meaning of legislation in the court's jurisdiction. Judicial decisions are not substitutes for the text of the legislation although, by reason of the doctrine of precedent and the hierarchical nature of our courts system, particular courts may be bound to apply the decision of a particular court as to the meaning of legislation'."

THE MACHINERY AND PROCEDURAL PROVISIONS OF THE ACT

Who may take land: *The constructing authority*

16. In Queensland, land can only be taken by a "constructing authority" pursuant to the statutory authority given under an Act. The term "***constructing authority***" is defined in section 2 of the Act to mean –
    (a) the State; or
    (b) a local government; or
    (c) a person authorised by an Act to take land for any purpose.

17. The purposes for which land may be taken under and subject to the Act are listed in the Schedule (Parts 1 to 14) of the Act. Familiar examples of "purposes" for which land may be taken include: "Roads" (Part 1 of the Schedule); "Schools" (Part 3 of the Schedule) and "Dams" (Part 7 of the Schedule).

---

11 (2001) 205 CLR 603 at 632-633, paragraph [62].

12 The High Court was referring to the *Land Clauses Consolidation Act 1845* (UK) 8 & 9 Vict c 18.

Nature of the 'interest' in land necessary to establish a right to compensation

18. Identification of the 'nature' of the interest in land is necessary in order to establish a right to compensation. This requirement was recently considered by the Queensland Court of Appeal in the decision of *Sorrento Medical Service Pty Ltd v Chief Executive, Department of Main Roads* (2007) 151 LGERA 328.

19. The issue in *Sorrento* was whether the appellant was entitled to claim compensation under the Act in respect of land resumed by the Department of Main Roads over which the appellant had a contractual licence, namely, carparking rights, for its medical centre.

20. The Court of Appeal decided by majority (McMurdo P and Chesterman J, Holmes JA dissenting) that the appellant was entitled to claim compensation under the Act. The initial denial of the claim for compensation by the Land Court[13] was on the basis that the Court lacked jurisdiction as the contractual right of personal property arising under the licence did not amount to an "interest" under s 12(5) of the Act.

21. The Court of Appeal had cause to consider whether the wider meaning of "interest" in relation to land contained in the *Acts Interpretation Act 1954* (Qld) s 36 applied.[14]

22. The majority in the Court of Appeal held that the appellant's licence constituted an "interest" under s 12(5) of the Act. Therefore it had a right to compensation.

23. The Court held that whilst the 'contractual right' was not an interest in land, it was a '… right, power or privilege over or in relation to land…" in accordance with the definition in s 36 of the *Acts Interpretation Act 1954.* Accordingly, pursuant to that extended definition of 'interest,' under s 12(5) of the Act the appellant had a right to claim compensation.

---

13 The Land Court had determined it had no jurisdiction to hear and determine the appellant's claim for compensation under the Act: *Sorrento Medical Service Pty Ltd v Department of Main Roads* (2005) 26 QLCR 98 (LC). This decision was affirmed on appeal by the Land Appeal Court: *Sorrento Medical Service Pty Ltd v Department of Main Roads* (2006) 27 QLCR 51 (LAC). *Sorrento* appealed from the decision of the Land Appeal Court to the Court of Appeal.

14 The word "interest" in relation to land as defined under s 36 of the *Acts Interpretation Act 1954* means: (a) a legal or equitable estate in the land; (b) a right, power or privilege over, or in relation to, the land.

The Process by which Land is taken under the Act

24. Land may be taken under and pursuant to the Act either by agreement (see s 15 of the Act); or by compulsory process which commences by the "constructing authority" issuing a *Notice of Intention to Resume* ("NIR": see s 7 of the Act).

25. A NIR is required to be served on any and every person, who to the knowledge of the constructing authority –

    (a) will be entitled to claim compensation under the Act in respect of the taking of the land concerned; or

    (b) a mortgagee of the land.[15]

26. A NIR is required to be in writing and to state the particular purpose for which the land is taken together with a description of the land.[16]

27. The NIR is also required to give notice to the owner of the "interest in land" of their entitlement to serve on the constructing authority an objection (being a date not less than 30 days after the date of the notice) an objection in writing for the taking of the land.[17]

28. The NIR is frequently accompanied by a *Statement of Reasons* albeit the *Statement of Reasons* is not expressly referred to in or required to be given under section 7 of the Act. The *Statement of Reasons* typically explains in greater detail the "purpose" for which the land is taken. It will invariably contain a description (accompanied by plans incorporating the subject property) of the "public works" or "project" or the "Scheme of Resumption" (see later discussion of the *Pointe Gourde* principle in Part 2 of this paper) of which the particular resumption in question forms part.

29. Any person who lodges an "objection" has an *entitlement to be heard* by the constructing authority *or* its delegate in support of the grounds of objection.[18]

30. The constructing authority is required to consider the grounds of objection to the taking of the land.[19]

---

15 See s 7(2) of the Act.

16 See s 7(3)(a) and (b) of the Act

17 See s 7(3)(b) of the Act and see also s 7(3)(e) which provides for the contents of the Notice of Objection which include that it must contain of the grounds of objection and the facts and circumstances in support of those grounds.

18 See s 7(3)(e)(iii) of the Act.

19 See s 8(2) of the Act.

31. If the objector has been heard by the *constructing authority*, the consideration of the grounds of objection must include those matters put forward by the objector in support of the ground.[20]

32. If the objector is heard by a *delegate*, then the constructing authority is required to consider the report prepared by the delegate after the hearing of the objection.[21]

33. The constructing authority has a discretion under the Act, following the consideration of the grounds of objection *or* the report of the delegate, to:

    (a) discontinue the resumption;[22] or
    (b) amend the Notice of Intention to Resume.[23]

34. If a resumption is discontinued *before* the publication of the "Gazette Resumption Notice"[24] in the Government Gazette, the discontinuance can be affected by the service of a notice under s 16(1) of the Act (see later reference to this section) stating that the constructing authority is discontinuing the resumption.[25]

35. A person who receives a notice of discontinuance is entitled to claim "compensation" for *costs or expenses* incurred by the person who was served with the notice and any *actual damage done to the land* concerned by the constructing authority (see s 16(1A) of the Act).

The Process if the Resumption Proceeds

36. If after consideration of the objection, the constructing authority forms the opinion that the land in question is required for the purpose for which it was proposed to be taken, the constructing authority must apply to the Minister for the land to be taken in accordance with the process set out in s 9 of the Act.[26]

37. Any application to the Minister must be made within 12 months after the date of the Intention to Resume.[27] If the application to the Minister is not made within 12 months after the date of the Notice of Intention to Resume then the process has to be started again.

---

20 See s 8(2)(a) of the Act.

21 See s 8(2)(b) of the Act.

22 See s 8(2A) of the Act.

23 See s 8(2A) of the Act.

24 The formal notice of the taking of the land.

25 See later reference to "discontinuance".

26 See s 9(2) of the Act.

27 See s 9(3) of the Act.

38. The Minister then considers the application and has a discretion to request further particulars and information in respect of the application.[28]

39. One of the matters that the Minister must consider is whether the land to be taken may be taken and should be taken for the purpose for which it is proposed to be taken.[29] The Minister also has responsibility when considering the application to ensure that the constructing authority has complied with the provisions of the Act in terms of the issuing of the Notice of Intention to Resume and the objection process.

40. An example of a taking of land for an unlawful purpose[30] is where a constructing authority (in the absence of statutory authority) resumes an area of land over and above that which is required to achieve the primary purpose of the taking or for any purpose incidental to the carrying out of that primary purpose with a view to future sale and or development of that land to defray the costs of the project itself.

41. If the Minister is satisfied of the matters set out in s 9(6) of the Act, then the final step to the taking of the land is the publication in the Government Gazette by the Governor in Council that the land particularised in the notice is taken for the purpose mentioned in the notice. This notice is called the ***gazette resumption notice***[31]***.*** The taking is effective on the day of publication of the ***gazette resumption notice***[32]***.***

42. A ***gazette resumption notice*** may be *amended* by the governing Council in the limited circumstances described in s 11(1) and s 11(1B) of the Act. Such circumstances include where there is a mis-description of the land purportedly taken or an error "in form or substance" in relation to the taking. The amendments are given effect at law by the publication of an ***amending gazette notice*** by the Governor in Council.

43. The Governor in Council, in Queensland, means the Governor acting with the advice of the Executive Council.[33] In other words, the Governor acts <u>on</u> the advice of the Executive Council.

---

28 See s 9(5) of the Act.

29 See s 9(6)(a) of the Act.

30 An administrative act is "unlawful" if done in breach of a section of an Act of Parliament; See *Project Blue Sky Inc and Others v Australian Broadcasting Authority* (1998) 194 CLR 355 at 393, paragraph [100].

31 See s 9(7) of the Act.

32 See s 9(8) of the Act; compare s 20(2) of the Act which states: "Compensation shall be assessed according to the value of the estate or interest of the claimant in the land taken on the date when it was taken"

33 See s 36 of the *Acts Interpretation Act 1954*.

44. As Mason J explained in the decision of the High Court, *FAI Insurances Limited v Winneke*:[34]

> "As the Governor ultimately acts in accordance with advice tendered to him, the final decision is not a decision for which he has to account. The effective decision is that of the Executive Council or the Minister. **It is the Government and the Minister who are responsible for that decision to the Parliament and to the electorate**." (Emphasis added.)

45. In my opinion, (accepting others may be of a different view), notwithstanding that s 9(7) of the Act provides: "the Governor in Council *may* by Gazette Notice, declare that the land particularised in the Notice is taken for the purpose mentioned in the Notice", once the Minister has been satisfied of the matters he is required to be satisfied of under s 9(6) of the Act, the Governor in Council *does not* have any discretion to exercise. The Governor *must* act on the Minister's advice. In other words, the resumption cannot be fettered or prevented by the Governor in Council and the word "may" in s 9(7) of the Act ought to be read as "must".[35]

Section 12(5) of the Act: Conversion of the interest in the land taken into a right to claim compensation

46. As and from the date of publication of the ***gazette resumption notice***, the land becomes vested in the constructing authority free of all trusts, obligations, mortgages, charges, rates, contracts, claims, estates or interests of any kind whatsoever *and* the dispossessed owner's interest or estate in the land which has been taken is *converted* into a right to claim compensation under the Act.[36]

47. Pursuant to s 12(5A) of the Act, the amount of compensation may be agreed upon between the constructing authority and the claimant subject to the consent of any mortgagee of the land taken.

48. Pursuant to s 12(5B) of the Act, in the absence of any agreement, a claim for compensation may be enforced against the constructing authority, subject to and in accordance with the Act and the constructing authority (in the words of s 12(5B) "… shall be liable accordingly".

Land may be taken by Agreement: Section 15 of the Act

49. In circumstances where the land is taken by agreement pursuant to s 15 of the Act, generally, the process by which the land is taken is similar to the situation when s 15 is not invoked, with the obvious exceptions that the processes provided for in s 7

---

34 (1981-1982) 151 CLR 342 at 367.

35 See *Samad and Others v District Court of New South Wales and Another* (2001-2002) 209 CLR 140 at 152-153.

36 See s 12(5) of the Act.

(*Notice of Intention to take land)* and s 8 (*Dealing with objections*) of the Act do not apply.

50. In a similar way to land which is taken through the ordinary process by issue of a NIR, the Act provides that where land is taken by agreement the parties may agree on the amount of compensation or agree to have the compensation determined by the Land Court upon the reference of either party.[37]

51. Pursuant to s 13(1) of the Act, where a constructing authority proposes to take *part* of any land and the taking of the part leaves a parcel which by reason of its small size or shape be of no practical use or value to the owner, then if the constructing authority and the owner agree in writing, the constructing authority may take the whole of the land.

Discontinuance of a Taking of Land: s 16 of the Act

52. It sometimes happens that a constructing authority decides *after* the issue of a NIR but *prior* to the publication of the ***gazette resumption notice*** not to proceed with the resumption. In such circumstances, s 16(1) of the Act permits the constructing authority to serve a Notice of Discontinuance on the person who has been served with the Notice of Intention to Resume.

53. Where the resumption has been discontinued compensation is confined to the costs and expenses incurred by the person who was served with the Notice and any actual damage done to the land concerned by the constructing authority.[38]

54. The amount of compensation for the discontinuance of the resumption can be agreed between the constructing authority and the claimant. Alternatively, (as noted previously), in the absence of any agreement, the amount of compensation to be paid under s 16(1A) of the Act may be determined by the Land Court.[39]

55. If the constructing authority does not make the application to the Minister to have the land taken within 12 months after the date of the NIR,[40] then pursuant to s 16(2) of the Act the constructing authority is *deemed* to have discontinued the resumption and if the land is to be lawfully taken, the resumption process has to be commenced again.

---

37 See s 15(5)(a) and s 15(5)(b) of the Act.

38 See s 16(1A) of the Act.

39 See s 16(1B) of the Act.

40 See s 9(2) and s 9(3) of the Act.

Reversing the Resumption Process – Section 17 of the Act

56. Under s 17(1) of the Act, if at any time after the publication of the ***gazette resumption notice*** but *before* the amount of compensation to be paid is determined by the Land Court, it is found by the constructing authority that the land taken is not required for that purpose, then the Governor in Council may by publishing a Revoking Gazette Notice, and subject to the consent of the person entitled as owner to compensation, revest the land in the owner.[41]

57. The procedure by which the land is revested is prescribed in ss 17(2) – (5) of the Act.

58. In the case where there has been a publication of a ***revoking gazette notice***, the owner entitled to compensation under the Act in respect of the taking of the land, upon the revesting of the land, can claim from the constructing authority compensation for the loss or damage and (if any) costs or expenses incurred by the person in consequence of the taking of the land and prior to its revesting.[42] If the constructing authority and the claimant cannot agree on the amount of compensation to be paid under s 17(4) of the Act, they may agree to refer the matter to the Land Court to determine the amount of compensation available.[43]

59. In the last decade there have been a number of cases in the Land Court and the Land Appeal Court dealing with the issue of whether or not the constructing authority upon deciding (or resolving in the case of a Council) that the land is no longer required for the purpose it was taken, must follow the procedure prescribed under s 17 (where the pre-conditions to the operation of that section are satisfied) or whether the constructing authority has an *election* not to follow the procedure under s 17 of the Act whereby the constructing authority may offer the land back for sale to the former owner at a price to be determined by the Chief Executive of the Department administering the *Land Valuation Act 2010* in accordance with s 41 of the Act.

60. Section 41 of the Act states *inter alia:*

> "(1) Notwithstanding any provision of any other Act, where land has been taken either pursuant to an agreement under s 15 or by compulsory process under this Act and, within seven years after the date of taking, the constructing authority no longer requires the land, then the constructing authority shall offer the land for sale to the former owner at a price to be determined by the Valuer-General under the *Land Valuation Act 2010*.
>
> …."

---

41 See s 17(1) and s 17(1A) of the Act.

42 See s 17(4) of the Act.

43 See s 17(5) of the Act.

61. The present state of the law is that a constructing authority has an *election* to proceed under either s 17 or s 41 of the Act to dispose of land that had been resumed but was no longer required.[44]

PART 4 OF THE ACT: COMPENSATION

Section 18 of the Act: By whom compensation may be claimed

62. I have previously referred to s 12(5) and s 12(5B) of the Act in respect of the right to claim compensation and the right to enforce that claim for compensation.

63. Section 18(1) of the Act reinforces the right given under those sub-sections to claim compensation from the constructing authority which claim may be made "…under, subject to and in accordance with the provisions of Part 4".[45]

64. Section 12(5) of the Act provides the *right* to claim compensation. Section 18(1) of the Act provides that, in respect of those who have the *right* to claim compensation under s 12(5) of the Act, such compensation may be claimed "under, subject to and in accordance with the provisions of [Part 4 – Compensation]".

65. However, s 18(1) also provides that the *right* under s 12 is "… subject to subsections (2), (3), (4A) and (5)". It is not clear why the foregoing qualification was necessary. If compensation is to be claimed "under, *subject to*[46] and in accordance with the provisions of this Part", then it is otiose to also specifically state "subject to subsections (2), (3), (4A) and (5)."

66. Clearly, the more specific provisions in s 18 take precedence over the general provisions of s 20 in the event of conflict.[47]

67. Accordingly, if a person who is entitled, pursuant to s 12(5) of the Act, to compensation does not fall within any of the other provisions of s 18,[48] then that person is the person *who is permitted* to claim compensation.

---

44 See *Maroochy Shire Council* v *Maroochy Central Holdings Pty Ltd* (2003) 24 QLCR 77 (LAC); *Maroochy Central Holdings Pty Ltd (No.2) v Maroochy Shire Council* (2007) 28 QLCR 6 (LAC).

45 Section 18(1) is expressed to be "subject to" subsections (2), (3), (4A) and (5) of the Act.

46 The words "subject to" as they are first mentioned in s 18(1) of the Act are "…a standard way of making clear that where another provision [of the Act, another Act or law] which is not so qualified conflicts with that [section] the unqualified provision is to prevail": *Newcrest Mining (WA) Limited v The Commonwealth* (1996-1997) 190 CLR 513 at 577, McHugh J. It is not possible to treat the phrase "subject to and in accordance with the provisions of [Part 4 – Compensation]" in s 18(1) as superfluous or to ignore "its declaration of priority": *Newcrest Mining (WA) Limited* at 577, McHugh J

47 The syntactical presumption or rule of construction *generalia specialibus non derogant* applies [where there is conflict between general and specific provisions, the specific provisions prevail]: see *Perpetual Executors and Trustees Assoc. of Australia Ltd v FCT* (1948) 77 CLR 1 at 29 per Dixon J; note however that the rule is only invoked where there are two inconsistent provisions that cannot be reconciled as a matter of ordinary interpretation: *Reseck v FCT* (1975) 133 CLR 45 at 53 per Stephen J: "Such a rule has its place where contrariety is manifest …" [authorities omitted.]

48 That is, other than s 18(1) of the Act.

68. However, if the person – who is entitled pursuant to s 12(5) of the Act to compensation – falls within one of the other provisions of s 18,[49] then it is *some other person* who is permitted to claim compensation *on behalf* of the first mentioned person.

Formal Requirements: Claim for Compensation: Section 19 of the Act

69. The formal requirements for a claim for compensation as set out in s 19 of the Act. The claim has to be in writing and signed by the claimant and must be accompanied by:

(a) a description of the land taken and a statement of the area;

(b) a statement of the nature and particulars of the claimant's estate or interest in the land taken;

(c) a statement verified by way of statutory declaration as to whether or not the claimants interest or estate in the land is subject to any trust, obligation, mortgage, lease agreement to lease or charge, rate, claim or any estate or interest whatsoever and the nature of that "encumbrance";

(d) an itemised statement of the claim showing the nature and particulars of each of the items and the amount claimed in respect thereof;

(e) the *total amount* of the compensation claimed.

70. If the claimant's interest in the land is not registered or notified in the Land Registry, the claim must be accompanied by proof of title of the estate or interest claimed.[50]

71. Following the amendments to the Act which commenced on 23 February 2009, a claim for compensation can only be served on the constructing authority within a period of three years after the day the land was taken.[51]

72. However, the constructing authority may accept and deal with a claim for compensation served more than three years after that day if it is satisfied that it is "… reasonable in all the circumstances to do so".[52]

---

49 That is, other than s 18(1) of the Act.

50 See s 19(2) of the Act.

51 See s 19(3) of the Act.

52 See s 19(4) of the Act.

73. In circumstances where the constructing authority does not accept a claim served by a claimant more than three years after the date the land was taken, the claimant has a right to apply to the Land Court to decide whether it is reasonable in all the circumstances for the constructing authority to accept the claim.[53]

74. The provisions of s 19(3) to (6) of the Act do not apply (that is the three year time limit for making a claim) in relation to a claim for compensation where the land was taken prior to 23 February 2009. [54]

Advance against Compensation: Section 23 of the Act

75. Once the claim has been served on the constructing authority, an advance against compensation may be claimed from the constructing authority pursuant to s 23 of the Act.

76. The amount of the advance is prescribed in the s 23 of the Act. Section 23(3) of the Act provides:

> "(3) The amount of an advance under this section shall not exceed—
>
> (a) where the constructing authority *has made* to the claimant an **offer in writing** of an amount of compensation in settlement of the claimant's claim—that amount; or
>
> (b) where the constructing authority ***has not* made the offer** mentioned in paragraph (a)—an **amount equal to its estimate of the amount of compensation payable to the claimant**." (Emphasis added.)

77. As is clear from s 26A of the Act (*jurisdiction about recovery of advance against compensation*), an advance against compensation is not the equivalent to the payment of compensation in respect of the taking.

78. In *Maroochy Shire Council v Maroochydore Central Holdings Pty Ltd* (2003) 24 QLCR 77, the Land Appeal Court stated at paragraph [35]:

> "An advance in respect of compensation is not equivalent to the payment of compensation in respect of the taking. Although the amount of the advance is calculated by reference to any offer made by the constructing authority in respect of the claim for compensation or, if no offer has been made, the constructing authority's estimate of the amount of compensation payable to the claimant, that is merely a means for calculating what amount can be advanced on account of the compensation and is not necessarily equivalent to

---

53 See s 19(5) of the Act.

54 See s 46 of the Act.

> the compensation as determined or agreed. It may be that in some cases the amount of the advance coincides with the amount of the compensation ultimately determined or agreed. The possibility of that coincidence does not change the character of an advance, as described in s 23 of the Act, as an advance payment on account of the compensation claimable by the claimant, but not yet determined or agreed, at the time the advance payment is made."

79. Section 26A was inserted into the Act on 23 February 2009. The effect of that section is that if the Land Court decides an amount of compensation payable to the claimant that is less than the amount advanced by the constructing authority then the Land Court has jurisdiction to make an order that the outstanding amount be paid by the claimant to the constructing authority.[55]

80. The Land Court also has power pursuant to s 26A(5) to order a claimant to pay interest on the outstanding amount (namely, the difference between the total amount of compensation decided by the Land Court and the amount of the advance) for any or part of the period commencing on the day that the amount was advanced to the claimant and ending at the beginning of the day that the claimant pays the outstanding amount to the constructing authority.[56]

81. Pursuant to s 47 of the Act, the provisions of s 26A of the Act do not apply in relation to land taken by constructing authority before 23 February 2009 if, before 23 February 2009 a proceeding for the recovery of an amount of an advance made under s 23 for the land has started.

Reference of the Claim for Compensation to the Land Court

82. Pursuant to s 24(1) of the Act, either the constructing authority or the claimant may refer the claim to the Land Court for the hearing and determination of the amount of compensation. Referral of the claim is by way of filing an "Originating Application" in the Registry of the Land Court in accordance with the *Land Court Rules 2000*.[57]

83. Once the jurisdiction of the Land Court is invoked, a claim for compensation can only be amended with the leave of the Land Court.[58] I will say more a little later in respect of the amendment of the claim as it relates to claiming compensation under the heading of "disturbance".

84. However, *prior* to the jurisdiction of the Land Court being invoked, there is no impediment to a claimant serving an amended claim for compensation on the constructing authority in circumstances where the claimant, at a later point in time, is in receipt of improved expert advice as to the nature of the claim for compensation:

---

55 See s 26A(1); (2) and (3) of the Act.

56 See s 26A(5) of the Act.`

57 See r 7(1) of the *Land Court Rules 2000*.

58 See s 24(3) of the Act

State of Queensland v Pajares (2004) 25 QLCR 165 (LAC) at paragraphs [149] to [151].

The Jurisdiction of the Land Court

85. Section 26 of the Act provides:

> "(1) The Land Court has jurisdiction to hear and determine *all matters relating to compensation under this Act*." (Emphasis added.)

86. The general jurisdiction of the Land Court is described in s 5 of the *Land Court Act 2000* ("the LCA") in the following terms:

> "(1) The Land Court has the jurisdiction given to it under any Act.

87. If jurisdiction for a proceeding is expressly conferred on the Court under any Act, the jurisdiction *is exclusive,* (s 5(2) of the LCA).

88. Section 26 of the Act expressly confers jurisdiction on the Land Court and accordingly, pursuant to s 5(2) of the LCA, that jurisdiction is exclusive.

Section 20 of the Act: The Assessment of Compensation

89. The heart of the Act is Part 4, ss 18 to 35, which is entitled "Compensation".

90. Section 20 of the Act is the main provision and is headed "Assessment of compensation". It prescribes the matters to be considered "in assessing the compensation to be paid": s 20(1). That subsection refers *inter alia* a number of different terms *including:* "compensation"; "damage" and "costs":

> "20(1) In assessing the **compensation** to be paid, regard shall in every case be had not only to the **value** of land taken but also—
>
> (a) to the **damage**, if any, caused by any of the following—
>
> (i) the **severing** of the land taken from other land of the claimant;
>
> (ii) the exercise of any statutory powers by the constructing authority otherwise **injuriously affecting** the claimant's other land mentioned in subparagraph (i);
>
> (b) to the claimant's **costs** attributable to disturbance." (Emphasis added.)

91. It is also necessary to set out s 20 (3) of the Act which provides:

> "20(3) In assessing the compensation to be paid, there shall be taken into consideration, by way of set-off or abatement, any **enhancement** of the value of the interest of the claimant in any land adjoining the land taken or severed therefrom by the carrying out of the works or purpose for which the land is taken."

92. The expression "cost attributable to disturbance" in s 20(1)(b) is exhaustively defined in s 20(5) of the Act.

93. Atypically, for reasons elaborated further upon below, the concepts of "compensation", "damage", and "costs" (none of which is defined in the Act) are used interchangeably and synonymously.

94. For example, paragraph (g) of the definition of "costs attributable to disturbance" in s 20(5) states: "other economic losses and costs reasonably incurred by the claimant that are a direct and natural consequence of the taking of the land." In any other form of civil litigation, this type of "loss" or expense would generally be described as an "item of damage" and fall for consideration as part of the damages claimed in the proceeding.

95. In civil litigation generally, "costs" are not items of damage in the substantive claim,[59] but are usually discretionary awards made in the wake of the substantive orders in an attempt to reduce the winning litigant's out-of-pocket expenses in relation to the legal costs and other outlays which were incurred by that winning litigant in pursuing the claim.

96. In the general parlance of civil litigation, the expression "damages" has usually been referred to when seeking a monetary award via common law remedies; and "compensation" has been referred to when seeking a monetary award via equitable remedies.

97. As referred to above, s 20(1)(a) refers to a number of terms which are not defined in the Act. In addition, the term "enhancement" as used in s 20(3) of the Act, is not defined. Accordingly, it is necessary to have recourse to the *general law* (see later analysis) specifically in respect of the meaning of the following terms:

    (a) compensation;
    (b) value;
    (c) severing (severance);
    (d) injuriously affecting (injurious affection);
    (e) enhancement.

---

59 See and cf. *Anderson v Bowles* (1951) 84 CLR 310 at 322 per Dixon, Williams, Fullagar and Kitto JJ.

The Decision of the Queensland Court of Appeal in *Brisbane City Council v Mio Art*

98. The *text* of s 20 of the Act was the subject of recent judicial consideration by the Queensland Court of Appeal in *Brisbane City Council v Mio Art Pty Ltd* (2011) 183 LGERA 352.

99. At page 361, paragraph [30] Fryberg J (with whom McMurdo P and Fraser JA agreed) stated:

> "Two points follow from the text of s 20. The first is that the value of the land taken is quite separate from damage caused by severance or injurious affection and disturbance costs. They are not elements of land value under the Act. The second is that, unlike compensation for the value of land taken [subsection 20(2)], compensation for severance, injurious affection and disturbance is not explicitly required to be assessed by reference to the date of acquisition. They are indirectly connected to that date by the requirement for causation ("damage … caused by", "costs attributable to"), but the section gives no indication of the appropriate test of remoteness of damage. Whether that test is one of foreseeability by the hypothetical purchaser, as suggested in the Council's submission, need not be determined on this appeal. It is sufficient to observe that compensation for severance, injurious affection and disturbance is awarded in respect of matters which often will arise or be quantified after the taking."

100. It is patently clear from the foregoing observations and the text of s 20(1)(a) and s 20(2), that the purpose of those sub-sections is directed towards the assessment of compensation in circumstances of:

(a) a taking of the '*whole*' of the relevant land where no severance damage or injurious affection can arise; or
(b) a *partial taking* of the relevant land ("partial resumption") where severance damage and/or injurious affection, offset by any enhancement [s 20(3) of the Act] may have arisen by reason of the taking.[60]

101. In *Brisbane City Council* v *Mio Art*, the principal issue considered by the Court of Appeal concerned whether a local planning instrument that came into existence some three to four months after the date of resumption could be taken into account in assessing market value.

102. The Brisbane City Council had contended that a planning instrument that raised the permissible building height on the land that had been resumed which would lead to an increased land value, ought to have been disregarded because it was published after the date of acquisition.

103. The Land Appeal Court held that it was foreseeable at the acquisition date that building heights would be increased with the review of the planning instrument and

---

[60] See later reference to the 'Before and After' method which is applicable in the case of a partial resumption of land.

therefore it was admissible as evidence confirming what was foreseeable. The Council appealed.

104. The Court of Appeal held that in assessing *market value* pursuant to the decision in *Spencer v The Commonwealth* (1907) 5 CLR 418 (see the reference below), the knowledge of the hypothetical parties includes knowledge of a future possibility but only as a possibility with the weight that would be attached to it by a prudent person.

105. In allowing the appeal and thereby confirming the decision of the Land Court in respect of the principal issue, the Court of Appeal held that a hypothetical purchaser would have been aware that the planning instrument was under review, but not the content of that review. Therefore, the subsequent publication of the planning instrument could not affect the finding of the Land Court as to the *value* of the subject land at the date of resumption.

106. Before referring to the accepted meaning of the word "value" as it appears in s 20 of the Act, it is first necessary to refer to the meaning of "compensation" under the general law.

Meaning of "Compensation' under the General Law: The "Principle of Equivalence"

107. In *Nelungaloo Pty Ltd v The Commonwealth*,[61] Dixon J (as he then was) said:

> "***Compensation prima facie means recompense for loss*, and when an owner is to receive compensation for being deprived of real or personal property his pecuniary loss must be ascertained *by determining the value to him of the property taken from him***. As the object is to find the money equivalent for the loss, and, other words, the pecuniary value to the owner contained in the asset, it cannot be less than the money value into which he might have converted his property had the law not deprived him of it. **You do not give him any enhanced value that may attach to his property because it has been compulsorily acquired by the governmental authority for its purposes**. … Equally you exclude any diminution of value arising from the same cause. The hypothesis upon which the inquiry into value must proceed is that the owner had not been deprived of the exercise of compulsory powers of his ownership and his consequent of rights of disposition existing under the general law at the time of acquisition."[62] (Emphasis added).

108. In a later case, *Turner v Minister for Public Instruction*,[63] Dixon CJ said:

> "**The ultimate purpose of the inquiry is to find a figure which represents adequate compensation to the land owner for the loss of his land.**

---

61 (1948) 75 CLR 495.

62 At pages 571-572, cited with approval by the High Court in *Walker Corporation Pty Ltd v Sydney Harbour Foreshore Authority* (2008) 233 CLR 259 at paragraph [34]; and also in *Wilson v Ipswich City Council* (2011) 32 QLCR 55 (LC) at paragraph [21], The President.

63 (1956) 95 CLR 245 at 264.

> **Compensation should be the full monetary equivalent of the value to him of the land. All else is subsidiary to this end**." (Emphasis added.)

109. It is clear that the general purpose and policy of the Act is that dispossessed owners be fairly compensated when their land is taken. In that regard, the Act reflects the "*principle of equivalence*" referred to in the passages extracted above from the decisions in *Nelungaloo* and *Turner.*

110. It follows that in construing Part 4 of the Act, including s 20, that those provisions relating to compensation are *remedial or beneficial* in nature. Accordingly, the law requires that they be construed liberally (that is in favour of the person sought to be benefited).[64]

111. Isaacs J in *Bull v Attorney-General (NSW)*[65] enunciated the orthodox view with respect to the approach to be adopted in construing remedial legislation:

> "In the first place, this is a remedial Act, and therefore, if any ambiguity existed, like all such Acts should be construed beneficially… This means, of course, not that the true signification of the provision should be strained or exceeded, but that it should be construed so as to give the fullest relief which the fair meaning of its language will allow."

112. In the Supreme Court of Canada, in *Dell Holdings Ltd v Toronto Area Transit Operating Authority*[66], Corey J articulated the same principle in the specific context of compulsory acquisition legislation:

> "20. The expropriation of property is one of the ultimate exercises of governmental authority. To take all or part of a person's property constitutes a severe loss and a very significant interference with a citizen's private property rights. It follows that the power of an expropriating authority should be strictly construed in favour of those whose rights have been affected. This principle has been stressed by eminent writers and emphasized in decisions of this Court. See P.A Cote, *The Interpretation of Legislation in Canada* (2nd ed. 1991), at p. 402; E. Todd, *The Law of Expropriation and Compensation in Canada* (2nd ed. 1992), at p. 26; *Manitoba Fisheries Ltd. v. The Queen*, 1978 CanLII 22 (S.C.C.), [1979] 1 S.C.R. 101, at pp. 109-10; *Diggon-Hibben Ltd. v. The King*, 1949 CanLII 50 (S.C.C.), [1949] S.C.R. 712, at p. 715; and *Imperial Oil Ltd. v. The Queen*, 1973 CanLII 155 (S.C.C.), [1974] S.C.R. 623.
>
> 21. Further, since the *Expropriations Act* is a remedial statute, it must be given a broad and liberal interpretation consistent with its purpose. Substance, not form, is the governing factor. See *Pacific Coast Coin Exchange of Canada Ltd. v. Ontario Securities Commission*, 1977 CanLII 37 (S.C.C.), [1978] 2 S.C.R. 112, at p. 127. In *Laidlaw v. Municipality of Metropolitan Toronto*, 1978 CanLII 32 (S.C.C.), [1978] 2 S.C.R. 736, at p. 748, it was observed that "[a] remedial statute should not be

---

64 See for example *Marshall v Director-General, Department of Transport* (2001) 205 CLR 603 at 636-627, at paragraphs [47] – [48]

65 (1913) 17 CLR 370 at 384.

66 [1997] 1 S.C.R. 32 (S.C.C); 1997 CanLII 400 (S.C.C.).

> interpreted, in the event of an ambiguity, to deprive one of common law rights unless that is the plain provision of the statute." …
>
> 23. It follows that the *Expropriations Act* should be read in a broad and purposive manner in order to comply with the aim of the *Act* to fully compensate a land owner whose property has been taken."

113. The fact that it is settled law that - in assessing the evidence and determining compensation - any doubts are resolved in favour of the dispossessed owner, supports the beneficial approach to construing the compensation provisions as well.[67]

114. The beneficial approach to construing the term *injuriously affecting* as it appears in s what is now s 20(1)(a)(ii) of the Act (previously, s 20(1)(b)) was taken by the High Court in the decision of *Marshall v Director-General, Department of Transport* (2001) 205 CLR 603 which is referred to in more detail hereunder.

115. From the foregoing analysis, it may readily be accepted that a court, when construing the provisions of the Act, will construe its compensation provisions employing a "beneficial approach". However, the adoption of that approach does not mean that:

(a) compensation can be awarded for *disappointed hopes unless* such hopes before their nullification by the resumption would have, in fact, a present monetary value to a prudent purchaser;[68]

(b) a determination of compensation, once made, may be reviewed. That an assessment of compensation is a "once and for all" exercise was explained by the Land Appeal Court in *Gilmour v The Crown*:[69]

> "The assessment of compensation is a 'once and for all' exercise limited, unless the resuming statute otherwise provides, to assessing the value of the loss suffered as at date of resumption. **The Court cannot reapproach its task if circumstances materially change after a determination is handed down and have another look at the matter, say in the light of the constructing authority's refusal to carry out any accommodation works or the effect of any such works on the balance land consequent upon the matter in which the works are carried out.** Our task, per medium of the sum of money awarded in our judgment, is to place the claimant back into his original position as far as money is able." (Emphasis added.)

---

67 *Commissioner of Succession Duties (SA) v Executor Trustee and Agency Company of South Australia Limited* (1947) 74 CLR 358 at 373-374, Dixon J cited in *Marshall v Director General, Department of Transport* (supra) at [48]; see also *Gallagher v Brisbane City Council* (1975) 2 QLCR 368 at 383 (LAC), per Stable J who delivered the judgment of the Court; cf. *Commonwealth DPP v Hart & Ors* [2003] QCA 495 at [12] per McMurdo P (with whom McPherson JA agreed); see also *Victims Compensation Fund Corporation v Brown & Ors* (2003) 201 ALR 260 at [28]-[33] per Heydon J (with whom McHugh ACJ, Gummow J, Kirby J and Hayne J agreed) as an example of the limitations that may apply when using the "beneficial approach" to construction.

68 Per Mr Smith, *Belcher v The Council of the City of the Gold Coast* (1965) 32 QCLLR 234 at 237.

69 (1981) 7 QLCR 160 at 165 (LAC).

Onus of proof

116. There is, based on my researches at least, remarkably little case law that deals with the onus of proof in compulsory acquisition proceedings in Queensland (or in other jurisdictions). That is perhaps readily understandable because ultimately, under s 20 of the Act, the Court is charged with awarding a sum of money, representing fair compensation, to place the claimant back in his original position as far as money is able to do so (refer the passage from *Gilmour* above). Indeed, it is open to the Land Court in assessing compensation not to accept the evidence from either the claimant or the respondent as to the amount of compensation that should be awarded. Further, the Land Court is entitled (or more accurately, obliged), provided there is evidence to justify such an award, to assess compensation in an amount *exceeding* the final amount claimed by the claimant.

117. It is trite law in civil proceedings that '…he who alleges must prove..'. It follows that a 'claimant' will necessarily assume both a legal and evidentiary burden in order to "prove up" his final claim for compensation.

118. At least in the context of that head of compensation described as "disturbance" there are decisions from the Land Court which clearly state that the onus is on the claimant to prove [on the balance of probability] the various heads of such a claim. For example, in *O'Hara & Anor v Brisbane City Council* (1972) 39 QCLLR 246 at 253 the Land Court stated:

> "I think it is incumbent on the claimants in these proceedings to prove the various heads of claim which they contend constitute disturbance and this is not a matter of adopting an allowance made by the constructing authority."[70]

119. Equally, there are clear statements from the Land Court and the Land Appeal Court (see the later decision of the Land Court in *Zoeller v Brisbane City Council* (1973) 40 QCLLR 24, affirmed on appeal by the Land Appeal Court: 40 QCLLR 198) that confirm that the onus of proof is on the constructing authority who alleges enhancement.

120. The issue as to which party (the claimant or the constructing authority) bore the onus of proof in the context of the *Pointe Gourde* principle (see later analysis of this decision in Part 2 of this paper) was the subject of the Court's consideration in *Crompton v Commissioner of Highways* (1973) 5 SASR 301.

121. At page 309 Wells J stated:

> "**In discussions of what I shall call the *Pointe Gourde* principle in the decided cases I have been unable to discover a clear expression of**

---

70 This passage was cited with approval in *Pott v The Commissioner for Railways* Unreported, Land Court; A89-17; A89-18 at page 30 of 33 per the President, Mr White.

> **opinion as to whether any sort of onus rests on one or other of the parties, and, if so, on which**. Council did not refer me to any passages from which any such opinion ought to be inferred and indeed land and valuation cases generally seem to singularly free of questions of onus.
>
> **But the existence of an onus cannot be disregarded**. Mrs Stevens conceded that, in this connection, **some species of onus rested on the acquiring authority, and, in my judgment, that concession accords with principle.** The acquiring authority began the process leading to the present hearing and it seems to me in accordance with ordinary justice and common sense that, if the claimant puts forward evidence of sales and other material from which a value may be inferred, it will be for the acquiring authority to demonstrate, by reference to the evidence, that the inferences as to value that would ordinarily be drawn should not be drawn. To the extent that the acquiring authority fails in that demonstration, the evidentiary material should be permitted to have its usual operation." (Emphasis added)

122. Clearly, Wells J did not state (for reasons that are apparent from the text of the foregoing passage) or identify in the traditional language of civil litigation in the context of the 'burden of proof', which party bore the "legal burden" and/or the "evidentiary burden" or alternatively, whether those 'burdens" (each or both of them) were borne by the constructing authority.

123. For my part (again, accepting others may be of a different view and also that it may be of little consequence as ultimately, issues of onus rarely arise in Land Court proceedings in Queensland) in compulsory acquisition proceedings in Queensland, the claimant bears both a legal and evidential burden to prove all the 'heads' of claim that go to comprise the claim for compensation and, the constructing authority also bears both a legal and evidential burden to "prove" the amount of compensation it contends ought to be awarded. Those "burdens" on the constructing authority clearly go beyond the constructing authority having an onus to prove, in the case of a partial resumption, enhancement to the value of the claimant's interest in "…any land adjoining the land taken or severed therefrom by the carrying out of the works or purpose for which the land was taken.." (see s 20(3) of the Act). There is some support for my conclusion in the provisions of the Act including s 27(2) which states, *inter alia*:

> "If the amount of compensation as determined is the amount finally claimed by the claimant in the proceedings or as nearer to that amount **than to the amount of the valuation finally put in evidence by the constructing authority** …"

Meaning of "the value of … land taken": *The Spencer case*

124. The meaning of "the ***value*** of land taken" in s 20(1) of the Act and the meaning of "… the value of the estate or interest of the claimant in the land taken …" as those words appear in s 20(2) of the Act was recently confirmed in the decision to which earlier

reference has been made of the Queensland Court of Appeal in *Brisbane City Council v Mio Art Pty Ltd* (2011) 183 LGERA 352.

125. In *Mio Art* Fryberg J noting that the term "value" is not defined in the Act, stated at paragraph [31]:

> "It has long been accepted in Queensland, and indeed throughout Australia, that the value referred to in this section is the value to the dispossessed owner.[footnote omitted] Ordinarily that value is the market value determined in accordance with the decision of the High Court in *Spencer v The Commonwealth* [(1907) 5 CLR 418]. Exceptionally, cases arise where the land has additional or special value to the owner over and above its market value."

126. Fryberg J then made reference at paragraph [32] to the well known passages from *Spencer* in the decision of Griffith CJ and Isaacs J. These passages are set out below.

127. In *Spencer v The Commonwealth,* Griffith CJ held (at 432):

> "In my judgment, the test of value of land is to be determined, not by enquiring what price a man desiring to sell could actually have obtained for it on a given day, i.e. whether there was in fact on that day a willing buyer, but by enquiring what would a man desiring to buy the land have had to pay for it on the day for a vendor willing to sell it for a fair price but not desirous to sell.
>
> It is, no doubt, very difficult to answer such a question, and any answer must be to some extent conjectural. The necessary mental processes to put yourself as far as possible in the position of persons conversant with the subject at the relevant time, and from that point of view to ascertain what, according to the then current opinion of land values, a purchase would have had to offer for the land to induce such a willing vendor to sell it, or in other words, to enquire at what point a desirous purchaser and a not unwilling vendor would come together."

128. At page 441 of *Spencer*, Isaacs J amplified the observations of Griffith CJ. He stated:

> "In the first place the ultimate question is, what was the value of the land on 1st January, 1905?
>
> All circumstance subsequently arising are to be ignored. Whether the land becomes more valuable or less valuable afterwards is immaterial. Its value is fixed by Statute as on that day. Prosperity unexpected, or depression which no man would ever have anticipated, if happening after the date named, must be alike disregarded. The facts arising on 1 January 1905 are the only relevant facts, and the all-important fact on that day is the opinion regarding the fair price of the land, which a hypothetical prudent purchaser would entertain, if he desires to purchase it for the most advantageous purpose for which it was adapted. The Plaintiff is to be compensated; therefore he is to receive the money equivalent to the loss he has sustained by deprivation of his land, and that loss, apart from

> special damage not here claimed, cannot exceed what such a prudent purchaser would be prepared to give him.
>
> To arrive at the value of the land at that date, we have, as I conceive, to suppose it sold then, not by means of a forced sale, but by voluntary bargaining between the plaintiff and a purchaser, willing to trade, but neither of them so anxious to do so that he would overlook any ordinary business consideration. We must further suppose both to be perfectly acquainted with the land, and cognizant of all circumstances which might affect its value, either advantageously or prejudicially, including its situation, character, quality, proximity to conveniences or inconveniences, its surrounding features, the then present demand for land, and the likelihood, as then appearing to persons best capable or forming an opinion, of a rise or fall for what reason soever in the amount which one would otherwise be willing to fix as the value of the property."[71]

129. The reference in the aforesaid passage by Isaacs J to the "… most advantageous purpose for which [the land] was adapted [at the date of resumption] …" is a reference to what is termed in compulsory acquisition law (and valuation methodology) the "***highest and best use***" of the land. The *highest and best use* of any land is the "… most advantageous use of the subject land having regard to planning and all other relevant factors affecting its present and future potential" that results in the highest value of the land.[72]

130. In the High Court decision of *Boland v Yates* (1999) 167 ALR 575 at page 649, paragraph [271] Justice Callinan restated the link between compensation for the value of the land resumed and the concept of highest and best use. Callinan J observed:

> "It is now settled for good reason, that a dispossessed land owner should be compensated for the value of his or her land on the basis of its highest and best use."

131. One of the critical assumptions underlying the application of the *Spencer* test is that the hypothetical sale envisaged is an *unconditional sale* between one notional vendor and one notional purchaser[73] with any uncertainty arising over the possible use of the land to be reflected in the sale price and not by way of some condition.[74]

---

71 In addition to these tests being referred to most recently in the Queensland Court of Appeal in the decision of *Mio Art,* the tests of value as set out in *Spencer* have been accepted for the purposes of assessing compensation in numerous High Court decisions including *The Commonwealth v Arklay* (1952) 87 CLR 159 at 169-170; *Turner v Minister for Public Instruction* (1955-1956) 95 CLR 245 at 286 and more recently, *Boland v Yates Property Corporation* (1999) 167 ALR 575 at 649, [269] and *Walker Corporation Pty Ltd v Sydney Harbour Foreshore Authority* (2008) 233 CLR 259 at [51]. The *Spencer* test has also been applied on multiple occasions by the Land Court: see for a recent example, *Wilson v Ipswich City Council* (2011) 32 QLCR 55 at paragraph [75], per the President, Mrs CAC MacDonald.

72 See *Adelaide Clinic Holdings Pty Ltd v Minister for Water Resources* (1988) 65 LGRA 410 at 415, Jacobs J; see also *Turner & Anor v Minister of Public Instruction* (1955-56) 95 CLR 245 at 268 per Dixon CJ – followed by the Land Appeal Court in *Stanfield v Brisbane City Council* (1990) 70 LGRA 392 at 405.

73 See *Flotilla Nominees Pty Ltd v Western Australian Land Authority* (2003) 129 LGERA 65 at paragraph [31].

74 See *Crouch v The Minister* (1976) 36 LGRA 254 at 260: foll. in *Hall & Hedge v The Chief Executive, Department of Transport* (1997-1998) 18 QLCR 285 at pages 305-306 (LC).

'Value to the Owner' may include 'Special Value'

132. However, as noted above, in exceptional circumstances the "value to the owner" may include an additional or "special value" over and above its market value. The meaning of "special value" that has received judicial approval both in the Land Court and the High Court is that stated by Bray CJ in *Arkaba Holdings Limited v Commissioner of Highways* (1969) 19 LGRA 398. At page 404, Bray CJ said:

> "It is, of course, well established that it is the value to the owner which must be paid, even if that value exceeds the market value (*Pastoral Finance Association Ltd v The Minister* ([1914] AC 1083; *Minister for Public Works v Thistlewayte* [1954] AC 475). The additional element is commonly called "special value to the owner", e.g. *Thistlethwayte's case* [1954] AC, at p. 491. *But this special value must, in my view, arise from some attribute of the land, some use made or to be made of it or advantage derived or to be derived from it, which is peculiar to the claimant and would not exist in the case of the abstract hypothetical purchaser*. Would a prudent man in the position of the claimant have been willing to give more for this land than the market value rather than fail to obtain it or regain it if he had been momentarily deprived of it? (*Pastoral Finance* case [1914] AC, at p.1087; per Kitto J in *Turner v Minister of Public Instruction* (1956) 95 CLR 245 at p. 292." (Emphasis added.)[75]

133. In *Re An Arbitration Between Lucas and Chesterfield Gas and Waterboard* [1909] 1 KB 16 at page 29 the Court stated:

> "The principles upon which compensation is assessed when land is taken under compulsory powers are well settled. The owner receives for the lands he gives up their equivalent – ie, that which they were worth to him in money. The property is, therefore, not diminished in amount, but to that extent it is compulsorily changed in form. But the equivalent is estimated on the value to him, and not the value to the purchaser…"[76]

134. It is clear from the meaning of "compensation" as previously referred to in the *Nelungaloo* decision, the passage from *Lucas Chesterfield Gas and Waterboard* and the reasons of Isaacs J from *Spencer*, that the *principle of equivalence* underlies the concept upon which compensation is to be assessed under s 20 of the Act, namely that compensation needs to be based on the "value to the owner".

---

75 This passage was cited with approval by Mr Trickett (as he then was) in the decision of the Land Court: *Thirty-Fourth Philgram v The Crown* (1992) – (1993) 14 QLCR 13 at 38; see also Gleeson CJ in *Boland v Yate*s (1999) 167 ALR 575 at 596, paragraph [80].

76 This passage was recently referred to, with approval, by the High Court in *Walker Corporation Pty Ltd v Sydney Harbour Foreshore Authority* (2008) 233 CLR 239 at paragraph [44]; see also the majority judgment in *Redland Shire Council v Edgarange Pty Ltd* (2008) 29 QLCR 91 at page 98, at paragraphs [31] – [32]; see also the dissenting judgment of Mr Scott at paragraph [61].

The Pointe Gourde principle: Preliminary: An aspect of the "value to the owner" under s 20 of the Act

135. In Part 2 of this paper the nature and application of the *Pointe Gourde* principle in Queensland is considered. It is timely to point out at this stage that the "value to the owner" principle as it has been referred to above is not a separate and distinct principle from the *Pointe Gourde* principle. This was confirmed in the recent decision of the House of Lords in *Waters v Welsh Development Agency* [2004] 1 WLR 1304, where at paragraph [42] Lord Nicholls referred to the basis of the *Pointe Gourde* principle and its application in reverse in the following terms:

> "'The *Pointe Gourde* principle' is not a reference to a principle separate and distinct from the "value of the owner" principle. **It is not more than the name given to one aspect of the long established "value to the owner" principle**."[77] (Emphasis added)

Meaning of "Severance Damage"

136. "Severance damage" (as the term implies) arises from the separate or division of the claimant's land as a result of the resumption. The severance may be by way of a division of the retained land into two parts, for example, by way of a resumption for an intersecting road. It may also arise where part only of the claimant's land is taken leaving a compact parcel. Severance damage is the depreciation in the value of the retained land resulting from its division into two or more parts, or its reduction in area and consequent loss of value for some current or higher "potential use".[78]

Meaning of "Injurious Affection": The *Marshall* decision

137. "Injurious affection", in the terminology of s 20(1)(a)(ii) the Act is the damage (if any) "… caused by … the exercise of any statutory powers by the constructing authority otherwise injuriously affecting the claimant's other [severed] land…".

138. The leading case on the meaning of "injurious affection" is the High Court decision of *Marshall v The Director General, Department of Transport* (2001) 205 CLR 603.

---

77 This passage from *Waters* was also referred to in the dissenting judgment of Mr Scott in *Redland Shire Council v Edgarange Pty Ltd* (2008) 29 QLCR 91 at paragraph [62], (LAC).

78 See generally *Gilmour v The Crown* (1981) 7 QLCR 160 at 165 (LAC); see s 20(2) of the Act; see also *Gold Coast City Council v Suntown Pty Ltd* (1971) 6 QCLLR 196 at 207 (LAC). Note also that in assessing compensation for severance and injurious affection (and insofar as that compensation may be offset by enhancement), the circumstances occurring or likely to occur **after** the date of resumption may be taken into account (see earlier reference to *Brisbane City Council v Mio Art Pty Ltd* (2011) 183 LGERA 352 at 361, paragraph [30]. However, compensation must be assessed as the monetary equivalent **at the date of resumption**.

139. In *Marshall*, the constructing authority (the Director General, Department of Transport) compulsory acquired land for the purposes of extending the highway near Nambour. No part of the widened highway or the consequently altered drainage system was on the resumed land. The acquired land also was not used to carry out work for widening or draining the highway. Mr Marshall, the owner of the land, who retained land abutting the extended highway, claimed compensation, including compensation for injurious affection under s 20(1)(b) of the Act[79] on the basis that the altered drainage system had made the retained land more susceptible to flooding.

140. The decision in *Marshall* is well known. It changed the law in Queensland in respect of the determination of compensation for damage caused by injurious affection. The previous law was based on the English decision: *Edwards v The Minister of Transport* [1964] 2 QB 134.

141. *Edwards* dealt with s 63 of the *Land Clauses Consolidation Act 1845* which contained a provision *similar* to s 20 of the Act.

142. The principle from *Edwards*, shortly stated, as it was applied in Queensland *prior* to the decision of the High Court in *Marshall*, was that in determining compensation for injurious affection under s 20 of the Act, the compensation is restricted to compensation *for the impact of the work done on the actual land taken, and the precise use to which that land was put*.

143. The decision of the High Court in *Marshall* changed this restrictive and plainly wrong interpretation. As to the meaning of s 20(1)(b) of the Act [now s 20(1)(a)(ii) of the Act], the joint judgment of the High Court in *Marshall* said:

> "In our opinion, however the language of s 20(1)(b) of the Act could hardly be plainer. In assessing compensation, **regard is to be had not only to the value of the land taken but also to the damage caused by the exercise of *any statutory powers* by the constructing authority otherwise injuriously affecting such other [the remaining, severed] land**.
> …
> Once the constructing authority acquires land for a statutory purpose and carries out a statutory purpose it must, pursuant to s 20(1)(b) of the Act, *compensate the dispossessed owner for the injurious affect upon the residual land* ***resulting from the undertaking*** *and the* ***implementation of that purpose, actual and prospective***."[80] (Emphasis added.)

144. The Court held that on a correct interpretation of s 20(1) of the Act, compensation for the taking of land is to be assessed having regard not only to the land value but also to the damage caused by the exercise of any statutory powers by the constructing

---

79 s 20(1)(b) of the Act has subsequently been renumbered, the relevant section is now s 20(1)(a)(ii) of the Act.

80 Supra, at page 616, paragraph [20].

authority that injuriously affects the balance land, whether that statutory power is exercised on the relevant resumed land or on other land and whether the damage is physical or not.[81]

145. In the separate judgment in *Marshall*,[82] McHugh J said:

> "Damage for the purpose of s 20(1)(b) is not confined to physical damage to the remaining land. Injurious affection does not include damage resulting from the act of severing the land. That is a separate head of damage. **But it includes any other injurious consequence, resulting from the exercise of the statutory power, which depreciates the value of or increases the cost of using the other land. If the exercise of the power limits the activities on or the use of that land, interferes with the character of the land, deters purchasers from buying the land or makes it more expensive to use the land, the claimant is entitled to compensation for injurious affection.**" (Emphasis added)

146. McHugh J also said in *Marshall* in respect of s 20 of the Act:

> "**Such legislation should be construed with the presumption that the legislature intended the claimant to be fully compensated**."[83] (Emphasis added.

Meaning of "Enhancement": The decision of the Land Court in *Zoeller v Brisbane City Council*

147. In *Zoeller v Brisbane City Council*,[84] Mr Smith, the then President discussed the relevant principles[85] in respect of the issue of enhancement.

148. I have summarised those principles hereunder:

(a) A Court must, as best it can with the evidence before it, estimate the enhancement to the claimant's adjoining land *as at the time of the hearing*. **It does not matter whether at the time of the hearing the works are completed**

---

81 See the joint judgment of Gleeson CJ, Gummow, Kirby and Callinan JJ at paragraphs [20], [33] and [34]; per Gaudron J at [38]-[39]; per McHugh J at [44], [46] and [48]: this summary of the *ratio* of the decision of the High Court appears at paragraph [13] of the decision of Mr Scott in *Marshall v Department of Transport* (2004) 25 QLCR 7:- the decision in respect of the further determination of compensation upon the remittal of the case to the Land Court after the decision of the High Court.

82 Supra at page 625, paragraph [46].

83 At page 627, paragraph [48].

84 (1973) 40 QCLLR 24. The Land Appeal Court affirmed Mr Smith's decision on appeal: see *Brisbane City Council v Zoeller* (1973) 40 QCLLR 198 (LAC). The decision of the Land Court has been followed and applied by that Court on numerous occasions subsequently: see for example *Hill v The Crown* (1980) 7 QLCR 128 (LAC); *Shellray Pty Ltd as trustee for the Jonley Unit Trust v The Chief-Executive, Main Roads* Unreported, A98-27, Land Court, 29 September 1999 at page 35 (of 56) per Dr Divett. The decision of the Land Court in *Zoeller* was recently considered by the Supreme Court in *Queensland v Springfield Land Corporation (No. 2)* (2009) 169 LGERA 284 at paragraphs [30] – [34] affirmed on appeal by the Queensland Court of Appeal: *State of Queensland v Springfield Land Corporation (No. 2)* (2009) 171 LGERA 38.

85 At pages 26-29.

or not provided that at the date of the hearing, there is established the prospect that the works increased the value of the adjoining land;

(b) The **onus of proof** is on the constructing authority alleging enhancement to prove to the Court's satisfaction:

(i) the existence of enhancement; and

(ii) an indication of the degree of enhancement.

(c) The standard of proof required is one of "reasonable probability";

(d) Section 20(3) of the Act does not require a separate estimate of the value of the land resumed and a deduction for set-off then to be made of the extent of enhancement;[86]

(e) Enhancement is "to the value of the interest of the claimant in any land adjoining";

(f) It is not necessary to prove that the adjoining land has been physically enhanced by the works. The emphasis is placed specifically on an increase in value. Providing it can be demonstrated that the market value of the claimant's adjoining land has been increased as a result of an increase in value reasonably and fairly attributable as the probable consequence of the works completed, or in prospect at the date of hearing, then the enhancement, set-off provisions of s 20(3) of the Act are to operate;

(g) In respect of the phrase in s 20(3) of the Act:– " … The *carrying out of the works* for which the land is taken"

(i) the Courts have construed the words in a wider rather than narrower sense;

(ii) the Courts have intended that enhancement be in respect of the underlying scheme of the resumption as an entity;

(iii) where a Scheme of Resumption *does not involve* the construction of works, it is still possible for any enhancement arising from the "purpose" to be set-off against compensation.

(iv) The effect of the phrase in s 20(3) of the Act, read as a whole, requires the cause of the enhancement to be considered as the underlying scheme of the resumption.

---

86 See subsequent discussion of the "Before and After" method which, by its application, deals with this point.

149. If there is enhancement, s 20(4) of the Act creates a statutory prohibition against a claimant being required to make any payment to the constructing authority if the "enhanced value" exceeds the compensation otherwise arising from the resumption.

150. An example of enhancement caused by the underlying scheme of resumption may arise where – in the case of a partial resumption of land for the construction of a major road – the drainage works associated with the road changes the overland flow path of storm waters causing "wet" low lying land which prior to the resumption was regularly inundated during period of moderate rainfall to become, post resumption, "dry" land which is no longer subject to inundation during periods of moderate rainfall. This "improvement" to the flood susceptibility of the remaining land and any resultant increase in value is enhancement which in the terms of s 20(3) of the Act must be "set off" when assessing compensation. The example given is clearly the opposite factual situation to that which existed in the *Marshall* case which, as explained previously, the High Court found, amounted to injurious affection to the remaining land.

"Before and After" Method of Valuation

151. In the case of a partial taking of land, the assessment of the extent of any severance, injurious affection and enhancement can and often is, assessed by the valuer by employing what is termed the "Before and After" method of valuation. This method was approved by the Land Appeal Court in *Brisbane City Council v Lansbury*.[87]

152. In *Lansbury* at page 509, the Land Appeal Court held:

> "The difference between the first mentioned valuation and the total of the last mentioned values must represent the "total loss" suffered by the claimant in that such difference must include the value of the land taken and injurious affection to the residues reduced by any enhancing factor that may arise as a consequence of the resumption and which is automatically reflected in the value of the residue areas."[88]

153. For obvious reasons, the issue as to whether in the "after" situation there has been enhancement to the remaining land is critical in any determination of the amount of compensation the dispossessed owner will receive.

---

87 (1977) 4 QLCR 502 (LAC).

88 The decision of the Land Appeal Court in *Lansbury* has been followed on numerous occasions by the Land Court and applied by the Land Appeal Court: See *Weir v Thuringowa Shire Council* (1980) 7 QLCR 72 at 78 (LC), Mr Smith, The President; *The Commissioner of Main Roads v Geyl and Others* (1981-1982) 8 QLCR 225 at 231 (LAC); *Stephens v The Council of the Shire of Melbourne* (1992-1993) 14 QLCR 356 at 368, The President, Mr Trickett; *Blower v Queensland Electricity Corporation* (1997-1998) 18 QLCR 342, The President, Mr Trickett. See also *Hill v The Crown* (1980) 7 QCLR 128 (LAC); see also *Jenkins v Chief Executive, Department of Transport* (1996-1997) 16 QLCR 635 at page 647 per The President, Mr Trickett.

Disturbance

154. Prior to 23 February 2009, the Land Court recognised that a land owner affected by a compulsory acquisition under the Act is entitled to be compensated not only for the diminution in value of his property but also for any economic loss which results directly from the acquisition.[89]

155. As referred to earlier, on **23 February 2009**, the Act was amended by the *Acquisition of Land and Other Legislation Amendment Act 2009 (No. 5)*. Pursuant to s 14 of the amending Act, for the first time in Queensland, compensation for disturbance was expressly recognised as a separate *statutory* head of compensation.

156. Section 14 of the amending Act inserted, *inter alia*, s 20(1)(b) and s 20(5) which provided that the "claimant's costs attributable to disturbance" (as defined in s 20(5)) were to be assessed as part of the compensation payable.

157. These amendments were "substantive" in nature (that is, they were amendments affecting the claimant's rights to compensation and the constructing authority's liability to pay compensation) as distinct from "procedural" amendments. Accordingly, the amendments do not operate retrospectively. For this reason, the amendments cannot be applied to an assessment of compensation in respect of land which has been resumed under the Act *prior* to 23 February 2009.[90]

158. It follows that where land has been resumed prior to 23 February 2009, the amendments which commenced on that date do not apply and the principles affecting the assessment of compensation in respect of disturbance fall under the *general law* as it was applied in Queensland. I am aware from cases I am personally involved in that are yet to be heard by the Land Court that there are still a number of cases to be decided by the Land Court where the general law principles will be applicable to the assessment of compensation for the disturbance. Often this component of the compensation can amount to a very significant sum of money.

159. A review of some of those decisions (pre - February 2009) is set out hereunder. However initially it is instructive to record the observations of the current President of the Land Court, Mrs MacDonald, in the recent decision: *Wilson v Ipswich City Council* [2011] 32 QLCR 55 where the Learned President observed, to effect, at paragraph [262] that in the context of a resumption (in that case, 15 December 2006) that it was her preliminary view (without deciding) that in respect of whether s 20(5) of the Act applied, the relevant law to be applied should be the law as at the date of resumption. The President stated: "However it is not necessary to express a final opinion because I consider the common law tests are now largely enshrined in ss 20(5)(a) and (g): see *LGM Enterprises v Brisbane City Council* [2004] QLC 0178 at [46]".

---

89 See *Hill v The Director General, Department of Transport* (1992-1993) 14 QLCR 205 at 213, Mr Trickett; see and compare *Universal Sands and Minerals Pty Ltd v Commonwealth of Australia* (1980) 30 ALR 637 at 640.

90 See *Kraljevich v Lake View and Star Limited* (1945) 70 CLR 647 at 652-653, per Dixon J (as he then was)

Assessment of Compensation for Disturbance before 23 February 2009

160. In *Harvey v Crawley Development Corporation* [1957] 1 All ER 504,[91] the English Court of Appeal held (at 507) that compensation is payable for disturbance provided that it is not too remote and is the natural and reasonable consequence of the dispossession of the owner. This decision has been followed by the Land Appeal Court in Queensland: see for example, *Merivale Motel Investments Pty Ltd v The Brisbane Exposition and South Bank Redevelopment Authority* (1985) 10 QLCR 268 at 288.[92]

161. As stated, the component of compensation called "disturbance" is to be assessed in accordance with "common (or general) law" principles[93] applicable to that determination and cannot be determined in accordance with the provisions of s 20(1)(b) and s 20(5) of the Act as presently in force.[94] That is, instead of determining any entitlement for the compensation claimed for disturbance by applying settled principles of statutory construction to the statutory provisions which **are now** – post **February 2009** – the basis upon which such compensation is to be determined, such compensation must be determined in accordance with the principles decided from the relevant case law that "governed" how disturbance was to be assessed prior to **February 2009**.

162. However, as will be apparent from the subsequent non-exhaustive analysis of the relevant cases, there is not a clear body of settled principles emanating from those cases. Rather, there are a number of inconsistencies between the cases (in particular, in a number of the decisions of the Land Appeal Court) which I have attempted to reconcile.

---

91 Foll. *London County Council v Tobin* [1959] 1 All ER 649 at 652-653 per Morris LJ; see also *Minister of Transport v Lee* [1965] 2 All ER 986; *Szites v Pine Rivers Shire Council* (1969) 36 QCLLR 97 (LC); *Howard & Ors v Commissioner for Railways (Resumptions for Gladstone-Moura Railway)* (1967) 34 QCLLR 140 at 151 (LC). These authorities were cited with approval by the then President of the Land Court, Mr D M White, in *Kabale Holdings Pty Ltd v Director-General, Department of Transport,* Unreported, A94-34, Land Court, 11 August 1995 at pages 40-41 of 60.

92 See also *Kabale Holdings Pty Ltd v Chief Executive, Department of Transport* (1997-1998) 18 QLCR 166 at 190 (LAC).

93 As to the meaning of the "common law" in compulsory acquisition cases, see again the decision of *Walker Corporation Pty Ltd v Sydney Harbour Foreshore Authority* (2008) 233 CLR 259 at [29]-[30] per Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ. At paragraph [30] their Honours stated:

> "The reference in *Melwood Units Pty Ltd v Commissioner of Main Roads* [1979] AC 426 is better understood as a reference to a body of case law which may be built up in various jurisdictions where there are in force statutes in the same terms, or at least in relevantly similar terms".

94 See Reprint of the Act in force as at 29 August 2012; see also *Kraljevich v Lakeview Star Ltd* (1945) 70 CLR 647 at 652-653 per Dixon J.

163. It follows from what I have stated above, that where disturbance is not given statutory recognition in the Act and, although it has often been separately assessed by the Land Court for the purpose of assessing compensation, it clearly was not a separate subject or "head of compensation".[95]

164. It has been described as "… merely one of the elements going to build up the purchase price which the owner was fairly entitled in all of the circumstances of the case".[96]

165. For example, the Land Appeal Court in *Murray v QEGB* (1984) 10 QLCR 69 recognised that disturbance is part of the "special value" to the owner and often separately assessed.[97]

166. Where land was valued on the basis of its suitability for some more profitable form of use than that to which it has been put at the date of resumption, it has been held by the High Court that there is no justification for making an addition to the value so ascertained because of disturbance: see *The Commonwealth v Milledge* (1953-54) 90 CLR 157 at 164 and *Crisp & Gunn Cooperative Ltd v Hobart Corporation* (1963) 110 CLR 538 at 546-548.[98]

---

95 See and cf. *Murray v Queensland Electricity Generating Board* (1984) 10 QLCR 69 at 78 (LAC).

96 *Horn v Sunderland Corporation* [1941] 2 KB 26 at 33, Sir Wilfred Greene MR, foll. *Murray v QEGB* (1984) 10 QLCR 69 at 72. Note in *Thirty-Fourth Philgram Pty Ltd v The Crown* (1992-1993) 14 QLCR 13 at 44, Mr Trickett (as he then was) having referred to the foregoing authorities, observed: "The authorities appear to be divided, however, as to whether disturbance should be dealt with as part of the value to the owner or whether it is more conveniently dealt with as a separate head of compensation … **It has been concluded that it probably does not matter whether it is included part of the special value or as disturbance as long as this aspect of compensation is not duplicated**: *Arkaba Holdings Ltd v Commissioner of Highways* (1969) 19 LGRA 398 at 405." (Emphasis added.)

97 See also *Haber v Chief Executive, Department of Main Roads* (2003) 24 QLCR 387 at 408, at paragraph [163], The President, Mr Trickett.

98 Cited by the Land Appeal Court in *Kabale Holdings Pty Ltd v Chief Executive Department of Transport* (1997-1998) 18 QLCR 166 at 189-190; *Murray v QEGB* at pages 72 and 79; see also *Townsville City Council v Moyses* (1979) 6 QLCR 21 at 28-29 (LAC); *Merewether v Brisbane City Council* (1974) 1 QLCR 126 (LC).

167. In *Milledge,* at first instance, the Supreme Court of South Australia, Mayo J, allowed £2,800 in respect of the unimproved value of 3 allotments that had been resumed (the amount claimed was £3,150) and £1,000 for disturbance of a dairy and racing stud business conducted on the land (the amount claimed was £3,011). The High Court set aside the judgment of the Supreme Court and ordered a new trial. Dixon CJ and Kitto J in their joint judgment stated at page 164, *inter alia*, that disturbance is not a separate subject of compensation and considered its relevance to the assessment in terms of the "value to the owner" or "special value". It is noted that the case *did not* concern recovery of compensation under the heading of disturbance for legal and professional fees incurred for preparing a claim for compensation.

168. In *Crisp & Gunn*, compensation was assessed on the basis of the market value of the land resumed. An amount of £4,000 was claimed for disturbance which was carried out on three (3) separate parcels of land used in combination with one of which was resumed. The claim related to the costs of relocating a scantling yard to other land owned by the claimant who had used the resumed parcel for that purpose as part of his business as a timber merchant. The items of expenditure claimed as disturbance included the cost of providing roads, timber racks and other accommodation on the other land and the estimated loss of revenue and increased operational costs which would result from the establishment of a scantling yard some distance from the main premises.[99]

169. Again, as with the decision in *Milledge*, the claim for disturbance *did not* include legal and professional fees for preparing the claim for compensation. The disturbance claim was disallowed because the market value of the land resumed exceeded the "present use" value by an amount in excess of £4,000. In that case, the relevant statute, the *Public Authorities' Land Acquisition Act 1949 (Tas)*, provided that in determining the amount of compensation, regard should be had, not only to the value of the land and other specified items, but also to "disturbance and any other matter not directly based on the value of the land".[100]

---

99 See *Crisp & Gunn Co-Operative Ltd v The Lord Mayor, Alderman and Citizens of the City of Hobart* (1963) 110 CLR 538 at 546.

100 *Crisp & Gunn* at 547-548 was also considered by the Land Appeal Court in *Barns v Director-General, Department of Transport* (1996-1997) 16 QLCR 22 at 68-69 per Mr Trickett and Wall QC DCJ.

170. Accordingly, in Queensland, if land is taken prior to 23 February 2009 and, is valued for a higher and better use than its existing use, then *prima facie*, based on the principles in *Milledge*[101] and *Crisp & Gunn,*[102] the claimant would *not* be entitled to claim compensation under the heading of "disturbance". This was the approach adopted by the Land Appeal Court in *Murray v QEGB*, where the Court disallowed the claim for disturbance which included an amount of $3,975 for legal and valuation fees in preparation of a claim in addition to stamp duty and legal fees for the purchase of a replacement property.

The Decision of the Land Appeal Court: *Murray v QEGB* (1984) 10 QLCR 69

171. In *Murray v QEGB*, at the date of resumption, the resumed land was used for grazing purposes. Whilst expressing some doubts, the Land Court Member had awarded amounts to cover items of disturbance for stamp duty on the acquisition of a small grazing property at Yeppoon, the cost of removal and transporting cattle thereto, mail redirection, telephone connection and legal and valuation fees, but he disallowed stamp duty on the purchase of a new home acquired by the appellant, which sum was covered by the constructing authority's advance against compensation.

172. In dismissing an appeal, the Land Appeal Court reduced the amount of compensation awarded and held that the approach of the valuers below was correct when they envisaged the highest and best use of the land was for subdivision into three sites. The Land Appeal Court said at page 79 of the decision:

> "It seems to us that either of the higher uses envisaged for the property, namely lucerne/grazing or subdivision into sites would invoke the principles of the *Milledge* and *Crisp & Gunn Cooperative Ltd* cases. Additionally, the claim for the payment of stamp duty on the purchase of the house at Yeppoon prior to resumption of the appellant's property cannot succeed in law. The claim offends the rule of *Harvey v Crawley Development Corporation* in that at the time the house was purchased as far as Mr Murray was aware, a small part (34.5 hectares) only of New Regent Park was proposed to be resumed, namely a strip for railway access to the proposed power house.
>
> **As a strict matter of law, we cannot hold the appellants would be entitled to <u>any</u> amount under the heading of 'disturbance'. This Court is bound by the principles enunciated by the High Court in the cases above cited. The principles in turn are explanatory of statutory provisions similar to those of the *Acquisition of Land Act* by which we are also bound. These later provisions are the fundamental basis of our jurisdiction. *Disturbance is not a separate head of compensation authorised by a statute*.**" (Emphasis added.)

---

101 Note that the applicable legislation in *Milledge* was the *Lands Acquisition Act 1906-1936 (Cth)*. The report of the decision does not reveal whether compensation for disturbance was included as part of the statutory provisions in question: cf. the Tasmanian legislation in *Crisp & Gunn*.

102 (1953) 90 CLR 157 at 164.

The Entitlement of a Claimant pre February 2009 to Claim Legal and Valuation Fees as "Disturbance"

173. Despite the strict approach taken by the Land Appeal Court in *Murray v QEGB*, in later decisions, the Land Appeal Court and the Land Court, whilst recognising that disturbance is not a separate head of compensation,[103] have nonetheless awarded compensation under the heading of disturbance for legal and valuation fees involved in the preparation and lodgement of the claim for compensation: see for example, *Merrivale Motel Investments Pty Ltd v The Brisbane Exposition & Southbank Redevelopment Authority* (1985) 10 QLCR 268 at 287-288.

174. At page 288 of *Merrivale Motel Investments*, the Land Appeal Court said:

> "Dispossessed owners are entitled to seek professional advice and assistance in order to comply with the requirements of the *Acquisition of Land Act* insofar as lodging claims for compensation are concerned. Providing the valuation advice is not frivolous or lacking in *bona fides*, a fee based on a claimant's valuation should be reimbursed. To refuse this would be lacking in fairness and generosity to the claimant and too restrictive of its personal right of choice irrespective of whether or not the claim is successful."

175. In *Thirty-Fourth Philgram Pty Ltd v The Crown* (1992-1993) 14 QLCR 13, following a review of the authorities concerning the practice in Queensland to award compensation for disturbance for legal and valuation fees, including the decisions of the High Court in *Milledge* and the Land Appeal Court in *Murray v QEGB* (which were relied upon by the Respondent constructing authority in support of a submission that there was no statutory authority for such an award), Mr Trickett (later President of the Land Court) held that such fees were recoverable under the heading "disturbance" provided they were not too remote and were a natural and reasonable consequence of the dispossession of the owner.

Pre February 2009: The "Cut Off" Date to Recover Legal and Professional Fees as Disturbance for any Amended Claim for Compensation

176. The costs (expert and legal fees) for preparing any *amended* claim are recoverable under the heading "disturbance" provided it is that claim that is referred to the Land Court and prosecuted by the claimant (see *State of Qld v Pajares* (2004) 25 QLCR 165 at [149], Land Appeal Court).

177. Post February 2009 the Act (s 20(5)(a)) now makes it clear that the "cut off" date is the date of filing of the claim.

---

103 Until the amendments to the Act which commenced on 23 February 2009: see earlier discussion.

178. Based upon the *Pajares* decision, the "cut off date" for the recovery of "disturbance" was the date the *final* amended claim was lodged with the constructing authority, *not* the date of the filing of the claim in the Land Court.[104]

179. The legal and professional fees for the preparation of the final (*amended)* claim are recoverable on a "dollar for dollar" basis as compensation provided those fees are reasonable and causally linked to the preparation and formulation of the *amended* claim.[105]

180. The amended claim for compensation, once filed in the Land Court, cannot be amended further without the leave of the Court (see s 24(3) of the Act). If the amended claim is amended *after* it is filed in the Court, the claimant *cannot* recover the legal and professional costs for preparing the amended claim that was served on the constructing authority under the heading of "disturbance". As to the legal and professional costs incurred for the preparation and lodgement of the *original* claim for compensation, the extent to which those fees are recoverable will depend upon the claimants establishing a causal link between that work and the *amended* claim. Clearly, the claimants are not entitled to "double dip".

181. Once the jurisdiction of the Land Court is invoked by the filing of the "amended" claim in the Land Court (s 24(2A) of the Act), all costs incurred by the claimant from that date become "costs of the action" and are recoverable subject to the operation of the provisions of s 27(2) of the Act.[106] Those costs and are generally assessed under the scale of costs prescribed by law for proceedings in the Supreme Court.[107]

Disturbance post February 2009

182. Clearly, given that disturbance is now a specific "head" of compensation under the Act it is necessary to give consideration to the natural and ordinary meaning of the words contained in the section in accordance with the usual principles of statutory construction in order to ascertain whether a party may recover under a particular sub-paragraph of s 20(5).[108]

---

104 See paragraphs [128] – [152] of the decision of the Land Appeal Court in *Pajares*.

105 See *Thirty-Fourth Philgram* (supra); *Heavey Lex No 64 Pty Ltd v Chief Executive Department of Transport* (2000) 22 QLCR 170 at paragraph [74], (LAC). See also the observations of Mr Scott in *Hall and Hedge v Chief Executive, Department of Transport* (1997-1998) 18 QLCR 284 at 306-309 (LC) as to the nature and quality of expert advice that would be obtained in the market place as compared to evidence to be relied upon in Court.

106 See *Wanless v Brisbane City Council,* Unreported, A01-01, Land Court, 21 December 2001 at [96] per Mr Scott.

107 See *Wilson & Anor v Ipswich City Council (No. 2)* [2011] QLC 0037 at paragraph [17] per the President, Mrs CAC MacDonald.

108 See *Project Blue Sky v Australian Broadcasting Authority* (1998) 194 CLR 355 at 381-382, paragraphs [69] – [71]; *Marshall v Director General Department of Transport* (2001) 205 CLR 603 at 632 – 633, paragraph [62] per McHugh J.

Costs: Section 27(2) of the Act

183. The Land Court has a general power to award costs under s 34(1) of the Land Court Act 2000, which provides:

> "Subject to the provisions of this or another Act to the contrary, the Land Court may order costs of a proceeding in the Court as it considers appropriate."

184. However, in cases involving the determination of compensation under the *Acquisition of Land Act*, general discretionary power is restricted. Section 27 of that Act provides:

> "(1) Subject to this section, the costs of and incidental to the hearing and determination by the Land Court of a claim for compensation under this Act shall be in the discretion of that Court.
>
> (2) If the amount of compensation as determined is the amount finally claimed by the claimant in the proceedings or is nearer to that amount than the amount of the valuation finally put in evidence by the constructing authority, costs (if any) shall be awarded to the claimant, otherwise costs (if any) shall be awarded to the constructing authority.
>
> (3) Subsection (2) does not apply to any appeal in respect of the decision of the Land Court or to costs awarded pursuant to section 24(3) or section 25(3)."

185. In *Yalgan Investments Pty Ltd v. Council of the Shire of Albert* (1997) 17 QLCR 401, the Land Appeal Court considered the leading decisions of the Land Court's discretionary power to award costs. In doing so, it identified a number of general principles which must be considered.

186. The Land Appeal Court identified the relevant principles from the cases as follows:

- Compulsory acquisition cases differ from ordinary claims in the significant respect that the claimant, unlike the ordinary plaintiff, had no choice whether to make a claim or not. The mere acquisition by compulsory process gave the claimant a claim for compensation which he or she could hardly be expected to renounce (*Minister for the Environment v Florence* (1980-81) 45 LGRA 127 at 149, *Banno & Anor v Commonwealth of Australia* (1993) 81 LGERA 34 at 53).

- The discretion whether to award costs may not be exercised in an arbitrary manner but must be exercised on principled grounds (*Banno* at p.53) or judicially, that is, for reasons that can be considered and justified (*Wyatt v. Albert Shire Council* [1987] 1 Qd R 486 at 489) by reference to relevant considerations (*Townsville City Council v Moyses* (1979) 6 QLCR 271 at 273).

- In general, a party who is wholly successful in litigation can expect an order for costs in his favour. Where compensation is awarded to one who had already been given, by statute, the right to receive it, it is just to say that the claimant

ought, in the absence of special circumstances, to receive his reasonable costs of obtaining the compensation that is, ex hypothesi, his due. But costs are discretionary and no hard and fast rules will ever be allowed to occupy part of an area controlled by a discretion, however predictable the result of its exercise may be in certain sorts of cases. In some cases, the Land Court may consider that there are sufficient reasons for departing from the general rule (*Townsville City Council v Moyses* (1979) 6 QLCR 271 at 278, *Minister for the Environment v Florence* (1980-81) 45 LGRA 127 at 149-50).

- Although the exercise of the power does not exclude resort to the "settled practice" of a court where such a practice has evolved, a purported exercise of discretion which fails because the mind is closed to relevant considerations through a rigid adherence to preconceptions involves an error of law that is open to correction on appeal (*Wyatt v. Albert Shire Council* [1987] 1 Qd R 486 at 489).

- Section 27(2) of the *Acquisition of Land Act 1967* should not be regarded as a legislative suggestion that, where the claim is substantially more than the amount awarded, and the amount put in evidence by the constructing authority is not substantially less than the amount awarded, the Court should not merely refrain from awarding any costs to the claimant but should award costs to the authority (*Moyses & Others v Townsville City Council* (1979) 6 QLCR 271 at 274).

- Where the Land Court is considering whether it should award costs to a constructing authority, *it could be wrong to have regard merely to the amounts of the claim and of the award and of the value put in evidence by the authority*. Usually it would be more relevant to inquire whether the conduct of the claimant (such as, for example, making an exorbitant claim) has been such as to force the authority, unreasonably and unnecessarily, into litigation (*Townsville City Council v Moyses* (1979) 6 QLCR 271 at 274) or whether the claimant has pursued a vexatious, dishonest or grossly exaggerated claim or presented his case in such a way as to impose unnecessary burdens on the constructing authority or the Court (*Banno & Anor v Commonwealth of Australia* (1993) 81 LGERA 34 at 53).

187. The general rule in civil litigation is that costs follow the event and that the successful party will be awarded costs, unless there are circumstances which require departure from the general rule. In *Commissioner for Railways v Buckler*,[109] McPherson JA noted that compensation cases are different whereby an application of the "general rule" in an unqualified way would enable the claimant to contest the amount of compensation with more or less complete impunity as to costs, as it is rare for no compensation to be awarded.

188. In *Savina v Department of Main Roads (No. 2)* (2001) 23 QLCR 22, the learned President, Mr Trickett, having referred to the principles from *Yalgan* as set out above and the decision in *Buckler*, stated:

---

109 (1994) 15 QLCR 262 at 268-9 (CA).

> "…in general terms, what the court is now required to do in fixing the incidence of costs under this rule is to *look at the final positions taken up by the parties*. In the case of the *claimant, it is the quantum of compensation last claimed.* Theoretically at least, its amount might not be known until the final address of counsel for the claimant. In practice, however, section 24(2A) furnishes a disincentive against conduct like that. It does so by restricting the right to amend a claim once it has been filed in accordance with section 24(2A) of the Act. Thereafter an amendment may be allowed; but on terms including payment of costs: see section 24(3).
>
> On the other hand, *there seems to be no comparable restriction preventing the constructing authority from deferring disclosure of its final position until a late stage in the proceedings*. It will be discoverable only from 'the amount of the valuation finally put in evidence by the constructing authority', which means *that it cannot with confidence be known what the amount of it is until the constructing authority closes its case*." [110] (Emphasis added.)

189. If the amount of compensation awarded by the Court is nearer the amount of the valuation finally put into evidence by the constructing authority that does not mean that the Court should simply award costs to the respondent, as it would be wrong to simply have regard to the amounts of the claim, the award and the valuation put in evidence by the respondent.

190. At page 32 of *Savina*, the President said as to whether costs should be awarded to the Constructing Authority:

> "Rather the authorities suggest that other criteria must be considered in deciding whether costs should be awarded to the respondent:
>
> - whether the conduct of the claimants (eg making an exorbitant claim) has been such as to force the authority, unreasonably and unnecessarily into litigation; or
>
> - whether the claimants have pursued a vexatious, dishonest or grossly exaggerated claim; or
>
> - whether the claimants have presented their case in such a way as to impose unnecessary burdens on the constructing authority or the Court."

191. The aforesaid principles should be remembered by all claimants and their professional advisers. In my experience there has been a tendency, historically, for some claimants to enter upon litigation in the Land Court seeking compensation based on a claim usually formulated by reference to a valuation prepared by their valuer, which is, to put it kindly, overly optimistic in terms of the quantum of the claim. This approach seems to have been adopted because of a perception that, the Court will rarely award the full amount claimed and therefore it is better to inflate the claim

---

110 (2001) 23 QLCR 29 at 32 (LC).

in order to achieve, or more correctly to have a better change of achieving, "fair" compensation. In my opinion, such an approach, if adopted, is fundamentally flawed because it ignores the statutory duty of the Land Court in determining any award of compensation to assess "fair" compensation under s 20 of the Act in accordance with the *principle of equivalence* which I have discussed previously.[111]

192. Whilst the Court must resolve any doubts in respect of uncertainties in the disputed evidence in favour of a claimant,[112] this does not mean it can ignore any lack of probative value in the evidence adduced in support of a claim.[113] If an exaggerated claim is pursued instead of a claim which is soundly supported in law and fact, the potential for an adverse costs order being made are considerably enhanced. The obvious solution is for the claim for compensation (or any amended claim) to be soundly based in point of fact and law.

Interest

193. Pursuant to s 28 of the Act, provision is made for the payment of interest on an amount of compensation awarded.

194. The period for which it is paid commences on and includes the date on and from which any land is taken and includes the day immediately preceding the day on which the payment of compensation is made.[114]

195. The rate that interest is paid is the rate upon which the Land Court fixes by order.[115] The practice of the Land Court is to award interest on the basis of simple, rather than compound interest.[116]

196. The usual practice of the Land Court is to award interest except where the dispossessed owner has remained in possession or derived some other benefit from the resumed land after the date of resumption.[117]

---

111 See s 20(2) of the Act.

112 See *Commissioner of Succession Duties (SA) v Executor Trustee and Agency Co of SA Limited* (1947) 74 CLR 358 at 374.

113 *Mio Art Pty Ltd v Brisbane City Council* (2010) 178 LGERA 387 at paragraphs [122] – [123] (LAC).

114 See s 28(1) of the Act.

115 See s 28(1A) of the Act.

116 See *Thirty-Fourth Philgram Pty Ltd v The Crown* (1992-1993) 14 QLCR 13 at 54 - 55, Mr Trickett (as he then was).

117 See *Small & Anor v Brisbane City Council* (1968) 35 QCLLR 239 (LAC).

197. If interest is ordered to by paid, it is payable as part of the compensation in question and the Court will add the amount of interest to the amount of compensation awarded.[118]

198. The general rule is that interest should be granted unless there are proper reasons for withholding it, one such reason is if the claimant has been guilty of unreasonable delay in prosecuting a claim. However, mere delay should not disqualify the claimant from an award of interest.[119]

199. Interest is not payable in respect of any amount of compensation advanced under 23 of the Act.[120]

---

118 See s 28(1B) of the Act.

119 See *Alex Gow Pty Ltd v Brisbane City Council* (2001) 22 QLCR 292 at 301-306, paragraphs [69]-[100], (LAC).

120 See s 28(2) of the Act.

PART 2 – THE *POINTE GOURDE* PRINCIPLE: AN ASPECT OF THE "VALUE TO THE OWNER" UNDER s 20 OF THE ACT

The *Pointe Gourde* principle

1. The *Pointe Gourde* principle warrants specific consideration in any paper on compulsory acquisition law in Queensland. The principle itself is capable of being readily understood. However, as many cases decided in the highest courts in Australia and the United Kingdom have shown, the principle is notoriously difficult to apply particularly in respect of identifying the scope or extent of the Scheme of Resumption.

2. Briefly stated, the effect of the *Pointe Gourde* principle[121] is that any increase (or decrease) in the value of land **entirely due**[122] to the scheme underlying the acquisition is to be ignored in assessing the compensation payable upon the acquisition of the land.[123] However, whether the principle applies in a particular case, clearly depends on the factual circumstances involved.

3. In order to understand the factual context from which the *Pointe Gourde* principle emerged, it is sufficient for present purposes to repeat the summary of those facts as they appear in the judgment of the High Court in *Walker Corporation Pty Ltd v Sydney Harbour Foreshore Authority* (2008) 233 CLR 251:

> "41. … In *Pointe Gourde* their Lordships first had emphasised that the outcome of the appeal (from Trinidad & Tobago) turned upon 'the actual wording of the enactment' … The colonial law (in s11(2))[124] reproduced s 2(3) of the *Acquisition of Land (Assessment of Compensation) Act 1919 (UK)*. This had been passed to modify the perceived effect of *Inland Revenue Commissioners v Clay* [1914] 1 KB 339, affd [1914] 3 KB 466. That case, had concerned valuation for the purposes of land tax legislation …, not compulsory acquisition…[125]
>
> 42. *Pointe Gourde* arose in very different circumstances. The litigation was a sequel to the Lend Lease arrangements made in 1941 between the United Kingdom and the United States. The United States had a special need for a large quantity of stone for the construction of a naval base on Trinidad, near the subject land. Limestone had been

---

121 The principle is taken from the case *Pointe Gourde Quarrying & Transport Company Ltd v Sub-Intendent of Crown Lands* [1947] AC 565. **It is a principle of law**: *Melwood Units Pty Ltd v Commissioner of Main Roads* [1979] AC 427 at 432, D-E (PC) understood within the limited meaning of "common law" principles in acquisition law: see reference to *Walker Corporation* below.

122 See the High Court's summary of the decision in *Walker Corporation Pty Ltd v Sydney Harbour Foreshore Authority* (2008) 233 CLR 259.

123 See *Redland Shire Council v Edgarange Pty Ltd* (2009) 164 LGERA 447 at 453, paragraph [25], per Cullinane J.

124 Section 11(2) of the *Land Acquisition Ordinance 1941 (UK)*, the parent Act of which was the *Acquisition of Land (Assessment of Compensation) Act 1919* (9 & 10 Geo 5, c 57) (UK); s 11(2) of the Ordinance read: 'The special suitability or adaptability of the land for any purpose shall not be taken into account if that purpose to which it could be applied only in pursuance of statutory powers, or for which there is no market apart from the special needs of a particular purchaser or the requirements of the Government or the Government of the United Kingdom or any department of any such Governments or any local or public authority'.

125 (2008) 233 CLR 259 at pages 273-274.

quarried there and sold for many years. It was held that s 11(2) of the Trinidad Law did not exclude from the compensation award the $15,000 attributable to what would have been increased quarry profits had the land remained in the hands of the appellant. The needs of the United States to quarry stone did not bring the case within the statutory exclusion in respect of "special suitability or adaptability of the land for any purpose", because the exclusion was not concerned with the value attributable elsewhere of the products of the land…

43. Nevertheless, the component of $15,000 was held to have been correctly excluded. Their Lordships held that this was so because (a) "compensation for the compulsory acquisition of land cannot include an increase in value which is entirely due to the scheme underlying the acquisition" [(1947) AC 565 at 572], and (b) here, the relevant scheme "was not merely the acquisition of the quarry, but included the construction of the naval base in the construction …"[126]

44. The Privy Council described the proposition (a) as "well settled" and cited statements … which may be traced back to authorities upon the *1845 Act*, including *Re Lucas and Chesterfield Gas & Water Board* ([1909] 1 KB 16, 28, 35, 37). The distinction was drawn there (as the privy Council later had put it…) between allowing for the possibility of enhancement by the carrying out of an undertaking (permissible) and the value of that realised possibility (impermissible). It was, as Buckley LJ put it in *Lucas* …, the possibility and not the realised possibility of the site being required for the purpose for which it is specially adaptable which ought to be considered.[127]"

4. The *Pointe Gourde* principle has been described as a fundamental principle [of law] in assessing the "value to the owner" of the land resumed.[128]

5. The principle, which is derived from case law in England (*South Eastern Railway Co v London County Council* [1915] 2 Ch 252, 258; *Fraser v City of Fraserville* [1917] AC 187 at 194, Lord Buckmaster), was accepted and applied by the High Court of Australia in *Housing Commission of NSW v San Sebastian Pty Ltd* (1978) 140 CLR 196 at 205 in the context of s 124 of the *Public Works Act 1921 (NSW)*. Section 124 of the New South Wales legislation provided that compensation for land compulsorily acquired should be assessed without regard to any alteration to the value of the land arising from the establishment of any public works upon or for which the land was resumed.

---

126 (2008) 233 CLR 259 at 274.

127 (2008) 233 CLR 259 at pages 274-275; for a more detailed summary of the facts in *Pointe Gourde* see the decision of the Land Appeal Court, (the majority, White J and the President Mr Trickett) in *Redland Shire Council v Edgarange Pty Ltd* (2008) 29 QLCR 91 at paragraphs [25] to [32].

128 See *Hudsons & Sons Pty Ltd v The Commissioner of Main Roads* (1981-82) 8 QLCR 150 at 158 per Mr Smith, President; *Waters v Welsh Development Agency* [2004] 1 WLR 1304 at paragraph [42] cited with approval by Mr Scott in his dissenting judgment in *Redland Shire Council v Edgarange Pty Ltd* (2008) 29 QLCR 91 at paragraph [62], (LAC).

6. Notwithstanding that explicit recognition of the principle is not found in the *Acquisition of Land Act 1967,*[129] the Queensland Court of Appeal has recently observed in *Redland Shire Council v Edgarange* (2009) 164 LGERA 447 that the High Court has recently affirmed the *Pointe Gourde* principle in *Walker Corporation Pty Ltd v Sydney Harbour Foreshore Authority*.[130]

7. Whilst in Queensland the *Pointe Gourde* principle developed independently of express statutory provisions,**[131]** the recognition of the principle, most recently by the Queensland Court of Appeal in *Redland Shire Council v Edgarange Pty Ltd* (2009) 164 LGERA 447, is consistent with the central principle of the law applicable to the assessment of compensation for land that has been compulsorily acquired, namely the purpose of any compensation is to provide the former owner of the land with the full money equivalent of that of which the owner has been deprived (the *principle of equivalence*).[132]

8. One purpose of the principle is to ensure that compensation for land compulsorily acquired should only reflect the value to the claimant/owner of the land taken without recourse to the added value that it obtained because of its special suitability for the public purpose for which it was acquired (*Redland Shire Council v Edgarange Pty Ltd* (2008) 164 LGERA 351 at 361, [33] per White J, Trickett (President) LAC; see also *The Crown v Murphy* (1990) 71 LGRA 1).

9. In The Crown v *Murphy* (1990) 71 LGRA 1, the resumed land was acquired for environmental park proposed for Mon Repos Beach near Bundaberg. The beach was the site of a world renowned turtle rookery. Prior to the resumption an application to rezone the land was refused because of the detrimental effect it would have on the turtle rookery.

---

129 The *Pointe Gourde* principle has not been given express statutory recognition in Queensland under the provisions of the Act: see *Edgarange* (supra) at [26] per Cullinane J. It is a "common law principle" within the limited meaning of "common law" explained in *Walker Corporation Pty Ltd v Sydney Harbour Foreshore Authority* (2008) 233 CLR 259 at [29]-[30], namely, a reference to a body of case law which has been built up in various jurisdictions where there are in force statutes in the same or relevantly similar terms; see also *Springfield Land Corporation (No. 2) Pty Ltd & Anor v State of Queensland* (2011) 242 CLR 632 at [17] where French CJ, Gummow, Hayne & Crennan JJ stated that "… recently the House of Lords has affirmed, consistently with what had been said by this Court in *Walker Corporation Pty Ltd v Sydney Harbour Foreshore Authority* (2008) 233 CLR 259 at 273-275, [41]-[47] that there is no "common law" principle derived from *Pointe Gourde*, **the term "scheme" was there to explain and amplify the term "value" as understood in particular statutory compensation systems commencing with the *Land Clauses Consolidation Act 1845* (UK) 8 & 9 Vict c 18**. These points were made by Lord Walker of Gestingthorpe and Lord Collins of Mapesbury in *Transport for London v Spirerose Ltd* [2009] 1 WLR 1797 at 1803-1806, 1830-1832, respectively; The principle "involves an interpretation of the word 'value' in those statutory provisions which require compensation for compulsory acquisition to include the value of the land taken": *Rugby Water Board v Shaw Fox* [1973] AC 202, at 214-215 per Lord Pearson cited in *Gosford Shire Council v Green* (1980) 48 LGRA 201 at 209 per Mahoney JA; see also *Redland Shire Council v Edgarange* (2008) 164 LGERA 351, paragraph [38] (LAC); see also *Wilson v Ipswich City Council* (2011) 32 QLCR 55 at paragraph [23] per the President, Mrs CAC Macdonald.

130 (2008) 33 CLR 259 at [37]-[47] referred to in *Redland Shire Council v Edgarange Pty Ltd* at paragraph [7] per McMurdo P.

131 See *San Sebastian* at page 205, Jacobs J, with whom Gibbs ACJ, Stephen J, Murphy J and Aickin J agreed; *Redland Shire Council v Edgarange Pty Ltd* (2008) 164 LGERA 351 at paragraphs [37]-[38], per White J, Mr Trickett, The President.

132 See *Nelungaloo Pty Ltd v The Commonwealth* (1947) 75 CLR 495 at 571, per Dixon J, cited in *Edgarange Pty Ltd* per McMurdo P at paragraph [7]; see also *Walker Corporation Pty Ltd v Sydney Harbour Foreshore Authority* (2008) 233 CLR 259 at 271, at paragraph [34]. I have referred to this central 'principle of law' previously in this paper as the 'principle of equivalence'.

10. The High Court held that an attribute of the land which affected its value was its relationship with the turtle rookery. The Land Appeal Court had found as a matter of fact that the existence of "the turtle rookery adjacent to the land was an attribute to the land which affected its value to the extent that the existence of the rookery itself militated against rezoning".

11. The High Court accepted (at page 4) that a characteristic or attribute of the land which affects its value must be taken into account in the assessment of compensation even if the planning restriction which is a step in the process of resumption is dependent upon or directed to that characteristic or attribute. Accordingly, the existence of the rookery which was an attribute of the land had to be assessed on the assumption that the market place would not have attributed any money sum in respect of rezoning.

12. The decision in *Murphy* must be treated with care when applying it. As was observed by McClellan CJ in *Smith v Roads and Traffic Authority (NSW)* [2005] NSWLEC 438: "There will be many parcels of land with inherent characteristics which make them suitable for some public purpose as well as for many private purposes. However, in some cases, of which *Murphy* is an example, the inherent characteristics of the land have the consequence that in the ordinary course the land would not have been given a zoning which permitted private development. Irrespective of whether the land was to be brought into "public ownership … the fact that it adjoined the rookery had the effect that it would not be allowed to develop" (at [110]).

Pointe Gourde "in reverse"

13. Whilst I have referred to it above as the *Pointe Gourde* principle, the *Pointe Gourde* principle also, depending on the factual situation, applies in reverse.[133] As noted in *Edgarange* by McMurdo P at paragraph [6]:

> "The application of the *Pointe Gourde* principle in reverse was explained succinctly by Lord Russell of Killowen in delivering the judgment of the Judicial Committee of the Privy Council in *Melwood Units Pty Ltd v Commissioner of Main Roads*:
>
> > Under the principle in *Point (sic) Gourde Quarrying and Transport Co Ltd v Sub-Intendent of Crown Lands* [1974] AC 565 the landowner cannot claim compensation to the extent to which the value of his land is enhanced by the very scheme of which the resumption forms an integral part: *that principle in their Lordships' opinion operates also in reverse. A resuming authority cannot by its project of resumption destroy the potential of the [land to be resumed] and then resume and sever on the basis that the destroyed potential had never existed*." (Emphasis added.)

---

133 See, for example, *Doolan Properties Pty Ltd v Pine Rivers Shire Council* [2001] 1 Qd R 585. The *Pointe Gourde* principle **in reverse** has been applied on numerous occasions in Queensland.

What constitutes the "Scheme" for the purpose of the *Pointe Gourde* principle?

14. The question as to what constitutes "the scheme" or "schemes" underlying the resumption is a question of fact.[134]

15. In the ordinary case where no issue arises as to whether planning scheme provisions form part of the Scheme of Resumption because a "scheme" essentially consists of a project to carry out certain works for a particular purpose or purposes, if the compulsory acquisition of the subject land is an integral part of the scheme, the *Pointe Gourde* principle will apply accordingly, Both elements of the project[s], the proposed works and the purpose for which they are being carried out are material when deciding which works should be regarded as part of the scheme when applying the *Pointe Gourde* principle to the subject land.[135]

The difficulties associated with identifying the 'scope' or level of generality of the Scheme of Resumption

16. As stated, it is often a very difficult task to identify the "scope" or "extent" of the project or "scheme" underlying the acquisition. In practice, and clearly depending on the particular circumstances of the "project" for which the land was taken, the "scheme" may vary from a relatively high level of generality, for example a section of a major highway, to very specific public works in the nature of readily identifiable infrastructure, for example a bridge.

17. The difficulty in identifying the scope of the scheme of resumption was adverted to by Lord Nicholls of Birkenhead in *Waters v Welsh Development Agency* where his Lordship stated:

> "43. Notoriously, the practical difficulty with the *Pointe Gourde* principle lies in identifying the area of the "scheme" in question. This difficulty does not arise when the enhanced value arises from the authority's proposed user of the subject land. Then, by definition, what is in issue is the proposed use of the subject land. ***But when regard is had to the authority's use or proposed used of other land the application of the principle is not self-defining***. A major development project of a general character, covering a wide geographical area, may proceed in several phases, each phase taking years to implement, and the detailed content and geographical extent of each phase being subject to change and finalised only as the

---

134 *Fraser v City of Fraserville* [1917] AC 187 at 194, cited in *Wilson v Liverpool City Council* [1971] 1 WLR 302 at 309-310, which was followed in *Roads & Traffic Authority (NSW) v Perry* (2001) 116 LGERA 244 at [42] and referred to in *Steven v Commissioner of Water Resources* (1990-1991) 13 QLCR 75 at 81 (LAC): see also *State of Queensland v Springfield Land Corporation (No. 2) Pty Ltd* (2009) 171 LGERA 38 at [41], per Keane JA (with whom Fraser JA and Atkinson JA agreed), citing *RTA v Perry* (2001) 116 LGERA 244 at [63]-[65]; see also *Hutchins v Council of Shire of Woongarra* (1992-1993) 14 QLCR 286 at 290 (LAC).

135 *Waters v Welsh Development Agency* [2004] 1 WLR 1304 at [58] per Lord Nicholls of Birkenhead (with whom Lord Woolf and Lord Steyn agreed); cf. *Walker Corporation Ltd v Sydney Harbour Foreshore Authority* (2008) 33 CLR 259 at [46]; *Roads and Traffic Authority (NSW) v Perry* (2001) 116 LGERA 244 at [65]-[66], per Handley JA (with whom Powell JA agreed) and Hodgson JA at [99]-[100]; *Wilson v Ipswich City Council* (2011) 32 QLCR 55 at [23]-[31] per the President, Mrs CAC MacDonald.

> phase nears the time when the work will be carried out. Is that one scheme or several? …
>
> 61. A similar judgmental exercise is required with regard to the work said to comprise one scheme for the purposes of the *Pointe Gourde* principle. When deciding, for instance, whether a phased development constitutes a single scheme or more than one scheme the Tribunal will consider all circumstances and decide how much weight, or importance, to attach to the various relevant features."[136] [Emphasis added].

18. In determining the scope of the scheme in a particular case, it is instructive to refer to the observations of Hope JA in *San Sebastian Pty Ltd v Housing Commissioner of New South Wales,*[137] where His Honour stated:

> "Thus in the railway cases, … it was not necessary for the exact identity of the proposed site of the works to be known … If the government announced that an existing railway to A was to be extended to B, any resulting increase of the value of land in B would be disregarded, even though the exact route of the railway or the exact site of the new railway station was not known, or, before resumption, was changed to other land.
>
> **The next question concerns the scope of the matters preceding the date of resumption which fall within the ambit of the qualification. That it can apply to matters other than the actual construction of the works, … has long been accepted … The decision to go ahead with the proposal or scheme which has resulted in the resumption of the land is clearly within the ambit of the qualification … such a decision is almost inevitably preceded by actions of many kinds which, if known, show that the works will possibly or probably be carried out. If they are actions by the authority who finally decides to carry out the works … and if they are part of a series of actions leading up to, and done in contemplation of, the making of the decision to construct the works, any alteration to the value of the land resulting from them should … fall within the ambit of the qualification.** In *Rugby Joint Water Board v Shaw-Fox* [1973] AC 202 at p.215, Lord Pearson used the expression 'genesis … of the scheme' to describe actions of the kind I am seeking to define. In describing the effect of the qualification Innes J said in *Black v Commissioner for Railways* (1890) 11 NSWR [L] 160 at p.165 … 'the land is to be assessed at *the value it would have had if the railway for which it is resumed had never been contemplated.*' … In my opinion Innes J correctly construed the qualification'. Emphasis supplied." [Emphasis added.][138]

19. When considering the application of the *Pointe Gourde* principle, it is – as is pointed out in the foregoing passage – only the actions of the "resuming authority" that are to be considered when determining the commencement date and extent of the Scheme of Resumption to be ignored. This was made clear in a recent decision of the High Court

---

136 *Waters v Welsh Development Agency* [2004] 1 WLR 1304 at 1315, 1319 cited with approval in *Queensland v Springfield Land Corporation (No. 2) Pty Ltd & Anor* (2009) 169 LGERA 284 at paragraph [23] per McMurdo J; affirmed *State of Queensland v Springfield Land Corporation (No. 2) Pty Ltd* (2009) 171 LGERA 38 noting further that the decision of the Supreme Court of Queensland (Court of Appeal) was affirmed by the High Court in *Springfield Land Corporation (No. 2) Pty Ltd & Anor v State of Queensland & Anor* (2011) 242 CLR 632.

137 (1977) 37 LGRA 191 at 202-3; affirmed on appeal in *Housing Commission (NSW) v San Sebastian Pty Ltd* (1978) 140 CLR 196.

138 This passage was cited with approval by the President of the Land Court, Mrs CAC MacDonald in *Wilson v Ipswich City Council* (2011) 32 QLCR 55 at paragraph [26].

in *Walker Corporation Pty Ltd v Sydney Harbour Foreshore Authority* (2008) 233 CLR 259.

20. The principle from *Walker Corporation* is that it is the public purpose [the proposal] *for which the acquiring authority is responsible* which must be disregarded under the *Pointe Gourde/San Sebastian* principles[139] and not that of another resuming authority, a council or some aggregation over time of the policies of the local council or the State government. That is, the task when identifying the scope of the "Scheme of Resumption" to be ignored is to examine, in the context of the statutory provisions pursuant to which the land was taken, the steps or actions taken by the "constructing authority" which resulted in the resumption of the subject land.

21. As to the existence of any 'rules' governing a determination of the level of generality of the "Scheme of Resumption" for the purpose of the application of the *Pointe Gourde* principle, this issue was considered by the President of the Land Court in *Wilson v Ipswich City Council* [140] where at paragraphs [27]-[29], the learned President made reference to the decision of the NSW Court of Appeal in *RTA v Perry*:[141]

> "[27] In *RTA v Perry* [FN. 9: (2001) 52 NSWLR 222] compensation was to be determined in accordance with the *Land Acquisition (Just Terms Compensation) Act 1991 (NSW)* which required a determination of the market value of the land taken. Section 56(1)(a) provided that –
>
> > "Market value of land … means the amount that would have been paid for the land if it had been sold … by a willing but not anxious seller to a willing but not anxious buyer, disregarding … (a) 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."
>
> [28] As Handley JA noted in *RTA v Perry*, s 56(1)(a) of the *Land Acquisition Act (NSW)* required the Court to identify the scheme which underlay the acquisition. [FN. 10: (2001) 52 NSWLR 222 at [64], [65]] **The learned Judge said that the particular purposes, in the sense of the use to which particular land will be put, do not exclude the wider public purpose to be served by the acquisition. If so, it is this wider public purpose, scheme or project which underlay the acquisition, which governs the operation of s 56(1)(a).**
>
> [29] Hodgson JA said [FN. 11: (2001) 52 NSWLR 222 at [99], [100]] -
>
> > "In a case such as the present, it is necessary to determine what is the public purpose for which the claimants' land was acquired, including the appropriate level of generality at which the purpose should be identified. …

---

139 See later reference to the *San Sebastian* principle.

140 (2011) 32 QLCR 55, affirmed by the Land Appeal Court in *Ipswich City Council v Wilson; Ipswich City Council v Wilson & Downey* (2011) 32 QLCR 357(LAC).

141 (2001) 52 NSWLR 222; the decision in *Perry* was also analysed and considered by McMurdo J in *Queensland v Springfield Land Corporation (No. 2)* (2009) 169 LGERA 284 at paragraphs [24] – [25], (Sup Crt of Qld).

> **I do not think there are any clear rules determining how the relevant purpose or the appropriate level of generality is to be determined. Factors to be taken into account would, in my opinion, include the degree of continuity and consistency of various elements of what is proposed and done, and fairness to both the claimant and the acquiring authority.**"" [Emphasis added.]

22. In *Springfield Land Corporation (No. 2) Pty Ltd & Anor v State of Queensland & Anor* (2011) 242 CLR 632, the High Court had cause to identify, in the context of s 20(3) of the Act,[142] the extent of "the works or purpose" which may enhance the value of land retained following a partial resumption of land. The decision of the New South Wales Court of Appeal in *Perry* was not considered by the High Court in *Springfield Land Corporation (No. 2)*.

23. In *Springfield,* the High Court held that the relevant "purpose" is that which would provide the basis for the exercise of power compulsorily to acquire land under the *Acquisition of Land Act*.[143] The High Court held that the *content* of the Notice of Intention to Resume land, issued under s 7 of the ALA was determinative. However (as was noted by the Land Appeal Court in *Ipswich City Council v Wilson* (2011) 32 QLCR 357 (LAC) at paragraph [47]), the facts in *Springfield* concerned land transferred by agreement. The effect of the agreement was that compensation was to be determined (by an arbitrator) as if the land had been acquired under the ALA. The High Court also had reference to the terms of the agreement as confirming the identified purpose.

Pointe Gourde in the "wider sense": The steps involved in the valuation process

24. In *Wanless v Brisbane City Council*,[144] Mr Scott made the following observations in respect of the *Pointe Gourde* principle and the "Scheme of Resumption" as it may be applied in the wider sense:

> "[41] Both the *Pointe Gourde* and *Melwood Units* cases were concerned with a project involving some form of positive act on the part of the resuming authority in the form of a project which would have a public benefit, these projects being a naval base and a highway respectively. There is a stream of cases in which the *Pointe Gourde* principle has been considered relevant where projects such as a hospital, school, highway or such like have been involved and in such cases the project has been held to be the "scheme" whose effect on value of the resumed land had to be disregarded. **The concern in such cases is that there is a potential that some**

142 Section 20(3) of the Act states: "In assessing the compensation to be paid, there shall be taken into consideration, by way of set off or abatement, any enhancement of the value of the interest of the claimant and any land adjoining the land taken or severed therefrom by the carrying out of the works or purpose for which the land is taken."

143 *Springfield* at [20].

144 Unreported, Land Court A01-01, 21 December 2001.

> **foreknowledge of the scheme would have an effect on the value of the resumed land and that, therefore, not only the scheme but such foreknowledge ought to be disregarded**. **In other words, the dispossessed owner is entitled to have [his] land valued in accordance with a method and assuming a market environment which would produce a price that the land would expect to achieve in the marketplace as if it was being offered for sale untainted by the presence of the scheme associated with the resumption. The *Pointe Gourde* principle is therefore designed to preserve the right of the dispossessed owner to compensation which is consistent with the measure of [his] loss had the scheme not been thought of and the resumption had therefore not taken place.**
>
> [42] What the *Pointe Gourde* principle requires me to do is to put out of my mind the "scheme" of which the resumption is part. I need to now consider, for present purposes, what that "scheme" is." (Emphasis added.)

25. When applying the *Pointe Gourde* principle where no issue arises as to whether planning provisions form part of the Scheme of Resumption, the actual market value of the resumed land at the date of resumption is the starting point. It is then necessary to determine whether that value has been depressed or elevated by the market's foreknowledge of the possible or likely public purpose and consequent resumption.[145] This application of the *Pointe Gourde* principle has sometimes been referred to by the Land Appeal Court as *Pointe Gourde* in the "wider sense".[146]

The San Sebastian principle: An application of the *Pointe Gourde* principle where planning provisions form part of the Scheme of Resumption

26. The *Pointe Gourde* principle may also arise where there is a ***direct (or indirect) relationship*** between the planning provision (zoning or designation) and the resumption whereby the zoning or designation placed on the land can properly be regarded as a "***step in the process of subsequent resumption***".[147]

---

145 *Housing Commission of New South Wales v San Sebastian* (1978) 140 CLR 196 at 205-206; *Melwood Units Pty Ltd v Commissioner of Main Roads* (1978) 37 LGRA 387 at 394 (Privy Council).

146 *Steven v The Commissioner of Water Resources* (1990-91) 13 QLCR 75 at 82 (LAC).

147 See *Housing Commission of NSW v San Sebastian Pty Ltd* (1978) 140 CLR 196 at 206-207; foll. in *The Crown v Murphy* (1990) 71 LGRA 1 at 4,

27. As stated, the *Pointe Gourde* principle was expressly approved by the High Court in *Housing Commission (NSW) v San Sebastian Pty Ltd*[148] when considering s 124 of the *Public Works Act 1912 (NSW)*.[149]

28. The High Court held that the proposed zoning of the land in question for the residential development, contained only in the draft interim development order which came into force a month after the resumption (July 1975), was a "zoning" for which the land had been resumed and a step in the process of that resumption. The land in question had been resumed for a public housing scheme. Therefore, it had to be ignored in assessing compensation.[150] The dispossessed owner, *San Sebastian*, had intended prior to the intervention of the resumption, to use the land for a private hospital which use had been permissible under the zoning in force when the land was purchased in 1970.

29. Jacobs J gave the leading judgment and said, with reference to the concluding words of s 124:[151]

> "This provision states in statutory form a principle which had been developed in the cases independently of express statutory provision."[152]

30. Whilst *Pointe Gourde* was concerned about the underlying scheme or project of resumption *inflating* the value of the land and *San Sebastian* was concerned about circumstances which, if allowed to be brought into account in the valuation process, would *deflate* the value of the land, the different factual situations do not affect the *general application* of the *Pointe Gourde* principle. If the principle applies and the scheme includes "planning provisions" which are directly (or indirectly) related to the *purpose* for which the land is ultimately resumed, then those provisions form part of the "Scheme of Resumption" and must be ignored when valuing the subject land to the extent they have an effect on the value of the subject land.

---

148 (1978) 140 CLR 196 at 206-207.

149 Section 124 of the *Public Works Act 1912 (NSW)* was repealed on **1 January 1992** on the commencement of the *Land Acquisition (Just Terms Compensation) Act 1991 (NSW)* – Act No. 22, Schedule 1. As set out earlier, s 124 provided that compensation for land compulsorily acquired should be assessed without regard to any alteration to the value of the land arising from the establishment of any public works upon or for which the land was resumed.

150 Note that notwithstanding *San Sebastian* was concerned with a draft interim development order, the principle for which the case stands applies to the provisions of planning schemes generally: *Gosford Shire Council v Green* (1980) 48 LGRA 201 at 205 per Reynolds JA.

151 (1978) 140 CLR 196 at 205.

152 See *Pointe Gourde Quarrying and Transport Company Ltd v Sub-intendent of Crown Lands* [1947] AC 565 at 572: see the summary of the decision of *San Sebastian* that appears in the High Court judgment of *Walker Corporation Pty Ltd v Sydney Harbour Foreshore Authority* (2008) 233 CLR 259 at paragraphs [38] and [40].

31. The application of the *Pointe Gourde* principle as explained and applied by the High Court in *San Sebastian* and as it applies in Queensland, is well summarised by the following passage from the decision by the NSW Court of Appeal in *Griffith City Council v Polegato*:[153]

> "The decision in *Housing Commissioner of NSW v San Sebastian* requires courts, **when assessing compensation for a resumption, to *disregard the effect of the proposed acquisition* in either depressing or increasing land values. It also requires them to disregard the effect on value of *any step* in the proposed resumption *including any re-zoning of the land undertaken or procured by or at the request of the resuming authority to facilitate the fulfilment of the relevant public purpose*.** However, the decision goes no further than authorising the assessment of compensation for the land taken at the date it was taken on a basis which disregards the effect on value at that time of the resumption and the proposed use of the land for public purposes." (Emphasis added.)

When do planning provisions or land use designations form part of the "Scheme of Resumption" that must be ignored for the purposes of the application of *Pointe Gourde*/*San Sebastian* principles?

32. From my review of the relevant case law, the following principles may be discerned when considering whether planning provisions form part of the Scheme of Resumption and must be ignored when the *Pointe Gourde* principle applies:

(i) town planning or zoning provisions *giving effect to* a scheme of resumption are an integral part of the scheme and must be ignored (*Bell v Brisbane City Council* (1972) 39 QCLLR 227 at 235; foll. *Hutchins & Anor v The Council of the Shire of Woongarra* (1992-1993) 14 QLCR 286 at 289; *Housing Commission of New South Wales v San Sebastian Pty Ltd* (1978) 140 CLR 196 at 206-207);[154]

(ii) the *Pointe Gourde* principle may apply in circumstances where there is an *indirect relationship* provided that the planning restriction can properly be regarded as a step in the process of resumption (see *The Crown v Murphy* (1990) 71 LGRA 1 at 4, citing *San Sebastian* at 206-207);

(iii) as to what constitutes a "step" in the process of resumption, that will necessarily depend upon the construction of the statutory provision under consideration;[155]

---

153 (1990) 71 LGRA 208 at 212.

154 Note that notwithstanding *San Sebastian* was concerned with a draft interim development order, the principle for which the case stands applies to the provisions of planning schemes generally: *Gosford Shire Council v Green* (1980) 48 LGRA 201 at 205 per Reynolds JA.

155 See *Mt Lawley Pty Ltd v Western Australian Planning Commission* (2007) 34 WAR 499 at [25]: noting that in Queensland where the principle is not given statutory effect, the task of construing the legislation is confined to construing the word "value" as it appears in s 20(2) of the Act.

(iv) a "step" in the process of resumption must be *attributable to the scheme (or project)* itself and not the Scheme to the step, *that is it must have been taken in order to bring about the Scheme itself*, and may be a "step" even if the form which the proposed scheme then took differed from that which the scheme ultimately took, so long as the difference is not such as to lead to the conclusion that the scheme ultimately created was not substantially that which had been proposed;[156]

(v) in order for the "step" to be *attributable to the scheme*, the step must be taken with the intention of facilitating the scheme or for the purpose of creating it (*Mt Lawley Pty Ltd v WAPC* at [29]);[157]

(vi) a "step" in the process of resumption must have the potential to affect the value of the resumed land at the date of resumption in order that the "step" be disregarded as forming part of the Scheme of Resumption (*Mt Lawley Pty Ltd v WAPC* at [164]-[183]);

(vii) the "step" in the resumption process and the "scheme" itself, must be that of the resuming authority itself and not some other statutory body (see *Walker Corporation Pty Ltd v Sydney Harbour Foreshore Authority* (2008) 233 CLR 259 at [53]-[54]);[158]

(viii) subsequent to the decision in *San Sebastian,* no narrow view should be taken of steps which may affect the value of the land. Nevertheless, it is necessary to distinguish between conduct which constitutes a proper exercise of planning powers irrespective of the ultimate resumption and a use of planning powers in pursuit of a proposed resumption (*San Sebastian* at 207, 211; *Sydney Harbour Foreshore Authority v Walker Corporation Pty Ltd* (2005) 141 LGERA 243 at [85]; foll. *Mt Lawley Pty Ltd v WAPC* at [20]; *Rees v Minister for Planning and Housing* (1991) 76 LGRA 167 at 171; cf. *State of Queensland v Pajares* (2004) 25 QLCR 165 at [62]-[63]);

(ix) in circumstances where the constructing (resuming) authority is not responsible for and has no power to effect changes to the planning designations over the resumed land, any proposed changes to the planning provisions at the date of resumption cannot fall within the public purpose [the Scheme of Resumption] contemplated by the Resuming Authority and accordingly those planning provisions are not required to be ignored when applying the *Pointe Gourde*

---

156 See *Mt Lawley Pty Ltd v WAPC* at [29].

157 As the learned author, Jacobs, stated in the leading text: Law of Compulsory Land Acquisition: "For the *Pointe Gourde* principle to apply, the zoning must properly be regarded as a step in the resumption process": Law of Compulsory Land Acquisition, 2010, Jacobs at page 639.

158 See and cf. *State of Queensland v Pajares* (2004) 25 QLCR 165 at [5]-[9]; [30]-[64] (LAC); see also and cf. *AMP Capital Investments Ltd v Transport Infrastructure Development Corporation* (2008) 163 LGERA 245 at [92]-[100].

principle (*AMP Capital Investors Ltd v Transport Infrastructure Development Corporation* (2008) 163 LGERA 245 at [92] and [100]);

(x) in determining what increase or decrease in value occurs "by reason of" or is "caused by" the carrying out of, or the proposal to carry out the public purpose for which the subject land was acquired, it is first necessary to identify the public purpose [the Scheme of Resumption] and its relevant scope or generality (*Wilson v Ipswich City Council* (2011) 32 QLCR 55 at [25]-[31]; *AMP Capital Investors Ltd v Transport Infrastructure Development Corporation* (2008) 163 LGERA 245 at [96]);

(xi) once the public purpose [Scheme of Resumption] is identified, it may be necessary to identify what is comprehended by "the proposal" to carry it out and/or "the carrying out of" the purpose. Then it may be necessary to identify what occurs "by reason of" or is "caused by" these things. There are no clear rules established to guide such a determination. There may need to be judgments of degree which take into account considerations of reasonableness and fairness (*AMP Capital Investors Ltd v Transport Infrastructure Development Corporation* (2008) 163 LGERA 245 at [98]);

(xii) the mere circumstance that the public purpose is a contributing factor to changes in planning designations which in turn affect value is not sufficient to disregard the planning designation particularly where the changes are dependent on the discretionary decision of a different statutory authority which is <u>not</u> the resuming authority (*AMP Capital Investors Ltd v Transport Infrastructure Development Corporation* (2008) 163 LGERA 245 at [96]-[100]).

Application of the *Pointe Gourde* principle in the case of a partial resumption

33. Previous reference has been made to the use of the "Before and After" method in circumstances where there has been a partial taking of land for the purposes of assessing the extent of any severance damage or injurious affection offset by enhancement. As noted earlier, it is a method of valuation that has been judicially accepted as being appropriate to assess compensation for both the loss of land and "damage" (severance and injurious affection offset by any enhancement) under s 20 of the Act. Whilst it may appear obvious, in the context of applying the *Pointe Gourde* principle, it has been judicially accepted that it is beyond doubt that the principle is applied only in the "before" valuation.

34. This was made clear in the decision of the New South Wales Court of Appeal in *Roads & Traffic Authority (NSW) v Damjanovic & Anor* (2006) 146 LGERA 403.

35. In *Damjanovic*, Tobias JA (with whom Beazley JA and Santow JA agreed) referred to his earlier observations on the "Before and After" method in the decision of *Roads & Traffic Authority (NSW) v Muir Properties Pty Ltd* (2005) 143 LGERA 192 where at paragraphs [103] to [104] Tobias JA stated:

> "103. It is often the case when only part of a dispossessed owner's land is compulsorily required a "before" and "after" valuation exercise of the whole of that owner's land is conducted. In other words, the market value of the land before acquisition is determined (including the acquired land) as its value after acquisition (excluding the acquired land). In this way, the difference between the two values determines not only the market value of the acquired land but also captures any injurious affection to the retained land by reason of the acquisition for the public purpose. This approach will also, in an appropriate case, capture any loss due to the severance of the dispossessed owner's land by that acquisition.
>
> 104. In proceeding according to that approach, there has never been any doubt that the *Pointe Gourde* principle is applied in the "before" valuation exercise. In other words, the "before" value is determined on the basis of disregarding any decrease in the value of the land arising out of the purpose of the compulsory acquisition and any steps in the scheme leading to that acquisition. It is only in the "after" value that any decrease by reason of the proposed implementation of the public purpose for which the resumed land was compulsorily applied is taken into account."

Conclusion

36. This paper has been prepared in two parts. Part 1 examined the procedural and substantive provisions of the *Acquisition of Land Act 1967 (Qld)* to the extent those provisions bear upon the assessment of compensation following the compulsory acquisition of land. The meaning of significant, undefined, terms under the Act was also considered in the context of the general law. Part 2 examined the nature and application of the *Pointe Gourde* principle (and the *San Sebastian* principle) which is an aspect of the "value to the owner" principle under s 20 of the Act.

37. I trust that the analysis and review of the legislation examined in light of the applicable principles of law will be of some assistance to those who practise or wish to practise in this specialised area of law.

G R Allan
Chambers
7 March 2013