COMPULSORY ACQUISITION OF PROPERTY FOR GOVERNMENT PURPOSES AND COMPENSATION FOR LOSS OF RIGHTS

by

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The Land Court of Queensland plays an important role in the legal process concerning the payment of compensation to persons who have had their interest in land compulsorily acquired by a government agency.

I intend to present this paper in three parts, namely:

- The Specialist Nature of the Land Court;
- An Overview of the Legislation by which Rights in Land are Acquired and Compensation Paid; and
- A Practical Example of a Typical Compensation Claim in the Land Court

The Specialist Nature of the Land Court

The Land Court is the second oldest court in Queensland, having been first established in 1897 to deal mainly with issues relating to Crown leasehold land. As the years and decades have passed, so to has the role and jurisdiction of the Land Court changed.

The most recent legislation establishing the Land Court is the *Land Court Act 2000*. Section 4 of the *Land Court Act* is of particular interest. It provides as follows:

> "**4 Establishment of Land Court**
> (1) A specialised judicial tribunal called the Land Court is established.
> (2) The court is a court of record.
> (3) The court has a seal that must be judicially noticed."

So, in short, the Land Court is a specialised judicial tribunal and court of record. What does that mean?

I could easily fill this paper with legal reasoning as to the question of the status of what the Land Court actually is, and the proper way to refer to the persons who preside on the Land Court.

The position has been made clearer by the Court of Appeal decision in *Owen v Menzies & Ors*; *Bruce v Owen*; *Menzies v Owen* [2012] QCA 170. Part of the decision in *Owen* related to the question as to whether or not the Queensland Civil and Administrative Tribunal (QCAT) can be characterised as a court under Chapter III of the *Commonwealth Constitution*. The Court of Appeal found that QCAT is a court of Queensland under section 77(iii) of the

[1] The views expressed in this paper are my own and not necessarily those of the Land Court of Queensland.

Commonwealth Constitution. The reasoning of the Court of Appeal gives the strongest indication that, similarly understood, the Land Court of Queensland is also a court of Queensland for the purposes of Chapter III of the *Commonwealth Constitution*.

Next comes the vexed question as to what a person appointed to the Land Court should be called. The question is easily answered by reference to the form of address during formal court proceedings which, by way of Practice Direction, is to "your Honour". The more complicated question that I am regularly asked is "so you are a judge?". To make matters as clear as possible, I should state categorically that my title does not include that of Judge, as in Judge Smith, but rather Member Smith. Nevertheless, I am part of the Queensland Judiciary and a judge (please note the small j) of the Land Court of Queensland. An example of such a reference to judge as relating to a Member of the Land Court is found in the *Land Valuation Act 2010* in section 174.

Under the *Land Court Act* 2000 the Court as currently established consists of a President, and three Members as well as a Judicial Registrar. The latter is mainly responsible for the Court's Alternative Dispute Resolution (ADR) processes.

The Land Court has two divisions, a general division to which the vast majority of cases are referred and a cultural heritage division. Additional indigenous assessors can be appointed to sit on cultural heritage matters as required. About 1,000 new matters are filed in the Land Court each year

Appeals from the Land Court lie to the Land Appeal Court comprising a Supreme Court Judge and two Land Court Members. On average, about six to eight cases go to this level on appeal each year. Further appeal is to the Queensland Court of Appeal on questions of law and by leave. About two cases per year are appealed to the Court of Appeal. Very occasionally, a case proceeds to the High Court of Australia after grant of special leave.

Currently, jurisdiction is granted to the Court in well over 40 statutes.[2] There is no monetary limit on the Court's jurisdiction in any of its matters. Importantly the Land Court has no inherent jurisdiction; all jurisdiction derives from Statute.

The vast majority of the Court's caseload revolves around four main areas. In brief, these are:

(a) compensation for the compulsory acquisitions of land under the *Acquisition of Land Act 1967* (ALA);

(b) statutory valuations under the *Land Valuation Act 2010*;

(c) energy and resource matters under various acts including the *Mineral Resources Act 1989* (MRA). the *Petroleum Act 1923*, the *Petroleum and Gas (Production and Safety) Act 2004*, the *Geothermal Energy Act 2010* and the *Greenhouse Gas Storage Act 2009,* as well as other mining project specific acts; and

(d) environmental matters relating to mining under the *Environmental Protection Act 1994* (EPA).

The ALA and the Land Court

Whenever the State Government requires the resumption of land for infrastructure or related purposes, it is the Land Court of Queensland which is tasked with the job of determining the

[2] See the Land Court website www.landcourt.qld.gov.au and its Annual Report, 2013 – 2014.

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proper compensation that should be paid to the dispossessed landholder. See for instance the decision of the Land Appeal Court of Queensland in the case of *Brisbane City Council v Bortoli* [2012] QLAC 8 which related to compensation payable following the resumption of land for the North-South Bypass Tunnel Project in Brisbane. There are countless other examples, such as a number of interesting cases arising out of the resumption of easements in land for the Northern Water Pipeline Interconnector Corridor which travels between Brisbane and the Sunshine Coast. In this regard see the case of *Bresnahan v Coordinator-General* [2015] QLC 15.

One of the important roles of the court in determining the compensation payable to a dispossessed owner in an ALA case is the highest and best use that the landowner could have put their land to but for the resumption of the land, assessed through the eyes of a prudent purchaser. In order to ascertain the highest and best use of the acquired land, complex valuation, town planning, and other expert evidence is often provided to the Land Court.

It goes without saying that the determination of the highest and best use of the land may have a very significant impact on the overall amount of compensation that a dispossessed landholder is awarded by the Land Court.

I could give a myriad of examples of acquisition cases before the Land Court which have involved significant expert evidence. A series of cases that may be of some interest relate to the *Mio Art* Land Court decision and subsequent appeals. I am sure that anyone with a keen interest in this area of the law would be fascinated by the various *Mio Art* decisions; they being [2009] QLC 177; [2010] QLAC 7; [2011] QCA 234; and [2012] QLAC 5.

An Overview of the Legislation by which Rights in Land are Acquired and Compensation Paid

Although in Queensland there are quite a number of different ways in which land can be held (tenures), for the purposes of this paper I will concentrate on the two most common, they being freehold land and leasehold land.

Freehold land holdings are the highest form of land tenure that an individual or a company may hold in Queensland. Freehold land has its origins in either a deed of grant of the freehold land by the State; a decision by the State to sell what is otherwise unallocated State land; or the successful application of a person who holds leasehold land to convert that land to freehold land. Generally speaking, those who hold freehold land refer to themselves as the owners of their land, although the State reserves ownership to itself of the minerals and petroleum products that may exist within that freehold land. Almost all of land within and surrounding cities and towns in Queensland, as well as some rural areas of the State, is freehold land. This means that the vast majority of the population of Queensland lives on freehold land.

Approximately 65% of the area of Queensland is covered by leasehold land, and the bulk of this leasehold land falls under the categories of term or perpetual leases for pastoral purposes, which is locally known as pastoral land.

It should be noted that land in Queensland can only be compulsorily acquired by what is referred in the ALA as a "constructing authority". A constructing authority refers to either the State, a local government such as a local City Council, or someone specifically authorised by legislation to take the land.

Whether a landholder has a freehold title or a leasehold of land, they are taken to have an interest in land should that land be compulsorily acquired by a construction authority and their

interest in their land is then converted into a right to claim compensation for the loss of that interest in their land. It is the ALA which sets out how a person is compensated for the loss of their interest in their land. It should also be noted that other persons may also hold an interest in resumed land for the purposes of receiving compensation under the ALA, such as people who may have a commercial lease of a freehold property.

There are a number of pieces of legislation which give a constructing authority rights to compulsorily acquire a person's interests in land. To help keep this paper short, I will not deal separately with all of those pieces of legislation, save to say that they all primarily point to the ALA as the mechanism for both acquiring the landholders interest in the land and determining the amount of compensation that the landholder should be paid for the loss of that interest in the land.

A person may lose their rights in their land in one of three ways. There may be an acquisition of the totality of the persons land; there may be an acquisition of only part of the persons land leaving the balance land under the undisturbed ownership of the owner; or there may be an easement taken over all or part of the land by which only some of the rights of the owner of the land are interfered with.

I will not even attempt to specify all the purposes under the ALA for which land can be taken. These purposes are set out in Schedule 1 of the ALA. In summary, they relate to purposes such as transportation, the environment, educational and cultural facilities, health services, natural resources, recreation, water, primary production, law enforcement, urban planning, sanitation, public construction works and facilities, and those relating to non-profit or not for profit organisations such as charities.

It is important to remember that land is not resumed in Queensland or compulsorily acquired for a private purpose. That is, a private individual who wishes to construct their own private building on another person's land cannot use the provisions of the ALA to compulsorily acquire that persons land. There must be a State purpose mandated under legislation for the acquisition, even if that State purpose involves construction by a private party (for instance, the State may contract a private party to build a new road, but that new road will be fundamentally a State road and the constructing authority would be a State agency which would subcontract the construction of that road to the private party).

In simple terms, the resumption process works like this. The government, through a constructing authority, will make plans for a new piece of infrastructure; say a new freeway. After working out what land it requires to build the freeway, the construction authority must provide to every person who it believes has an interest in the land proposed to be taken which would entitle them to a right to compensation under the ALA with a notice called a Notice of Intention to Resume (NIR). After a person receives an NIR, they have a right to formally object to the resumption of their land. Any objections to the NIR must be made to the constructing authority which is required to consider those objections. Sometimes, because of the contents of a particular objection, the constructing authority may choose to alter their plans so that some land may no longer be required for resumption. In those circumstances, the process with respect to those areas of land not required is completed and the landholders continue on with life as usual. However, if after considering the objections the constructing authority is of the opinion that it is necessary, despite the objections, to resume the land, an application is made by the constructing authority to the relevant State Government Minister to consider if it is appropriate for the land to be resumed for the project. If the Minister is satisfied that it is appropriate, the Minister makes a recommendation to the Governor-in-Council who may declare by gazette notice that the land has been taken. Immediately after a taking of land notice is gazetted, that land vests in the State or the Constructing Authority and is no longer in the ownership of the former landholder. The former landholder's rights have been converted to a right to claim compensation for the loss of their land.

It should be noted that a landholder does not have a right to appeal against a decision to resume their land. This is why the process is referred to as a compulsory acquisition.

After a person's interest in land has been compulsorily acquired, that person may reach an agreement with the constructing authority as to the amount of compensation that should be paid to them for the loss of their interest in their land. However, there are regularly disputes where the person claiming compensation has a very different view as to the amount of compensation that they should receive as compared to the amount of compensation that the constructing authority is prepared to pay. When that happens, the issue of determination of compensation is referred to the Land Court for decision.

For completeness, I should add that a landholder who is happy with the NIR and has successfully negotiated compensation for the loss of their interest in the land may enter into what is called a 'Resumption Agreement' with the constructing authority prior to a formal compulsory acquisition occurring.

When the Land Court hears a case relating to the determination of compensation for the compulsory acquisition of an interest in land, the case proceeds before the Court in the usual way just as one would expect in a civil Court proceeding. However, the Land Court's determination of compensation must be made in accordance with s 20 of the ALA. This section shows the complexities of the law of compensation for acquisition and for those of you with a keen interest in this field of law I will set out s 20 in full:

20 Assessment of compensation

(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); and

(b) to the claimant's costs attributable to disturbance.

Note—

See, however—

(a) the *Geothermal Energy Act 2010*, section 350D in relation to geothermal interests under that Act; and

(b) the *Greenhouse Gas Storage Act 2009*, section 369D in relation to GHG interests under that Act; and

(c) the *Mineral Resources Act 1989*, section 10AAD in relation to mining tenement interests under that Act; and

(d) the *Petroleum Act 1923*, section 124C in relation to 1923 Act petroleum interests under that Act; and

(e) the *Petroleum and Gas (Production and Safety) Act 2004,* section 30AD in relation to petroleum interests under that Act.

(2) 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.

(2A) However, in assessing the compensation, a contract, licence, agreement or other arrangement (a ***relevant instrument***) entered into in relation to the land after the notice of intention to resume was served on the claimant must not be taken into consideration if the relevant instrument was entered into for the sole or dominant purpose of enabling the claimant or another person to obtain compensation for an interest in the land created under the instrument.

(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.

(4) But in no case shall subsection (3) operate so as to require any payment to be made by the claimant in consideration of such enhancement of value.

(5) In this section—

costs attributable to disturbance, in relation to the taking of land, means all or any of the following—

(a) legal costs and valuation or other professional fees reasonably incurred by the claimant in relation to the preparation and filing of the claimant's claim for compensation;

(b) the following costs relating to the purchase of land by a claimant to replace the land taken—

(i) stamp duty reasonably incurred or that might reasonably be incurred by the claimant, but not more than the amount of stamp duty that would be incurred for the purchase of land of equivalent value to the land taken;

(ii) financial costs reasonably incurred or that might reasonably be incurred by the claimant in relation to the discharge of a mortgage and the execution of a new mortgage, but not more than the amount that would be incurred if the new mortgage secured the repayment of the balance owing in relation to the discharged mortgage;

(iii) legal costs reasonably incurred by the claimant;

(iv) other financial costs, other than any taxation liability, reasonably incurred by the claimant;

(c) removal and storage costs reasonably incurred by the claimant in relocating from the land taken;

(d) costs reasonably incurred by the claimant to connect to any services or utilities on relocating from the land taken;

(e) other financial costs that are reasonably incurred or that might reasonably be incurred by the claimant, relating to the use of the land taken, as a direct and natural consequence of the taking of the land;

(f) an amount reasonably attributed to the loss of profits resulting from interruption to the claimant's business that is a direct and natural consequence of the taking of the land;

(g) other economic losses and costs reasonably incurred by the claimant that are a direct and natural consequence of the taking of the land.

Example of costs for paragraph (g)—

cost of school uniforms for children enrolled in a new school because of relocation from the land taken

I realise that the provisions of s 20 of the ALA set out above are complex. To hopefully make understanding this topic a little easier, I now turn to the third aspect of this paper.

A Practical Example of a Typical Compensation Claim in the Land Court

In explaining this part of my paper, I will detail a completely hypothetical situation, but draw on the experiences gained by the Land Court in handling such cases as a normal part of the Court's work. I will continue with the hypothetical example of a constructing authority resuming land for a new freeway. I will also assume that the land being acquired is freehold land currently used for primary production. Let's imagine that the owners block of land is 100 hectares in size and that the constructing authority has resumed only part of the land, being a strip of 20 hectares running north-south just off the centre of the land, leaving the landholder with 50 hectares of land on the left side of his property and 30 hectares of land on the right side. We will call the landholders Mr and Mrs Jones. To keep this example simple, no other person has any interest in their land.

The first step that would usually occur would be that Mr and Mrs Jones would file a claim in the Land Court naming the constructing authority as the respondent. As part of their claim, Mr and Mrs Jones have to detail the amount that they are seeking for compensation. Let's assume the amount they are seeking is $4,000,000. Lets assume that the constructing authority believes that the compensation should be significantly less – say $500,000.

Within a relatively short period of time of the claim being lodged, the Land Court would hold a directions hearing with the Jones' and the constructing authority appearing in Court. As the amount claimed by the Jones' is quite large, we will assume that both parties are represented by lawyers. At the directions hearing, the Land Court Member allocated the case will deal with preliminary matters in the litigation. It is quite usual for a constructing authority to request further and better particulars of the claim made by the Jones', and it would be also be typical for the Jones' to request discovery of relevant documents held by the constructing authority that they believe could assist in the determination of compensation payable. After hearing legal argument, the Court may make orders both for further particulars of the claim and for the constructing authority to allow the Jones' legal representatives to inspect relevant documents held by the constructing authority and to obtain photocopies of those documents. Of course, other orders could also be sought by the parties.

Once those steps have been completed, both sides will have a better understanding of the respective cases of each side. The next usual step would be for both the Jones' and the constructing authority to provide to each other a list of expert witnesses that they propose calling to support their various cases. For instance, the Jones' may be of the opinion that although their land was rural land, it should not be valued as rural land as they believe the land was ripe for residential redevelopment, which would substantially increase the value of the land. They would therefore call relevant town planning and perhaps engineering and traffic evidence to show that the land was both suitable for residential development and that such residential development would have been approved. The constructing authority on the other hand may believe that the land was not suitable for residential development and call their own experts in response to the Jones' experts to argue why that belief was correct. There could also be the additional argument by the constructing authority that, perhaps, say, the Jones' land was low-lying and subject to flooding and therefore the constructing authority would also call expert evidence from a hydrologist. This would normally result in the Jones' also engaging a hydrologist.

Once the areas of expertise proposed to give evidence for both sides was known, the Court would normally order experts in the same field to meet together and prepare a joint report showing which areas they agree in and which aspects they disagree on. This step can be a significant saver of time and money as it means that the various experts will not be required to prepare perhaps very lengthy and expensive reports on matters upon which both sides actually agree. The focus becomes on those areas of disagreement.

A crucial aspect of the expert evidence should the matter proceed to hearing will be that of expert valuers. The expert evidence of the valuers must be viewed alongside the expert evidence of the other experts. They would also normally have a joint meeting, with the valuers joint meeting usually occurring after all of the other experts have had their joint meetings and provided their joint reports.

There will likely also be orders made for the provision of any non-expert evidence by way of statements to the Court. It would be normal for Mr and Mrs Jones to provide statements as to the impact of the resumption of part of the their land on their property, just as it would be normal for the constructing authority to provide evidence from persons closely linked to the construction works showing the steps that the constructing authority went to, or propose to go to, to lessen the impacts on the Jones'.

By the time that the joint reports of the experts in particular have been prepared, it would be quite usual for the Land Court Member to hold a further directions hearing at which orders would be made requiring the Jones' and the constructing authority to attend compulsory mediation in an endeavour to settle their dispute. Such mediation would be undertaken by either a private mediator, with the expense of the mediator shared between the parties, or by Court supervised mediation where the mediation is undertaken by either the Judicial Registrar of the Land Court or another Member of the Land Court. If the Judicial Registrar or another Land Court Member conducts the mediation, neither the Judicial Registrar nor that other Land Court Member may play any part in the future conduct of the litigation of the case, which may be important if there is an appeal to the Land Appeal Court. Court supervised mediation is provided to the parties free of charge by the Land Court.

After the constructing authority and the Jones' have attended mediation, the mediator will provide a short mediation report to the Land Court. This report will either indicate that the matter has been settled at mediation, in which case the matter is concluded and the file will be closed; that the matter has not been settled at mediation, in which case the matter will proceed to a full hearing; or that some aspects of the matter have been resolved by mediation (for instance, the town planners for both sides may have resolved all their differences) but that final settlement of their case was unable to be achieved, in which case the matter would also proceed to hearing, but in those circumstances the hearing would be expected to be of a lesser duration as town planning expert evidence would not be required. Many matters are resolved by the Land Court during the mediation process.

It would be likely that a case of this size would take approximately one week to hear in the Land Court. Depending on the attitude of the parties, it may be necessary for the Land Court and the parties to carry out a physical inspection of the resumed land, the severed land of the Jones', and comparable sale properties referred to by the expert valuers.

After hearing all of the evidence, it is usual for the Land Court Member to adjourn the Court and then consider the Court's decision. The Land Court decision must be in writing, and must consider all of the relevant evidence placed before it and, where there is conflict in the evidence, the Land Court Member must explain why the Court prefers the evidence of one person or expert over that of another.

The Land Court Member is completely independent of government in making their decision as to compensation and may not be directed by any Minister of the government in any way as to what the determination of compensation should be.

As mentioned previously, if either the Jones' or the constructing authority, or indeed both parties, do not agree with the Land Court Member's decision, that decision may be appealed to the Land Appeal Court and from there, if there remains disagreement, to the Court of Appeal of Queensland and ultimately, if special leave is granted, to the High Court of Australia.

I trust that this paper has been of some assistance in explaining the land acquisition process that applies in Queensland.