

Tread carefully on land

GOVERNMENT BODIES MUST CAREFULLY WORK THROUGH THE PLANNING AND IMPLEMENTATION OF COMPULSORY LAND ACQUISITION, HAVING REGARD TO THE LAWS AND FEEDBACK ON THE PRACTICAL IMPLICATIONS FOR CLAIMANTS. BY ANTON DUNHILL

SNAPSHOT

- Project proposals and consultation can set the tone for a project's compulsory land acquisitions and a claimant's experiences.
- The legislation and case law can empower claimants to seek appropriate compensation for the loss of their interest in land.
- Empathy is required for all those who are affected and particularly those who are not adequately protected by the law.

Throughout human history, those with private property have been dispossessed for many reasons, including war, politics, natural disasters and even social prejudice. Historically, the ruling bodies of geopolitical regions (including empires, countries and states) have been expected to protect private property rights to provide social and economic stability to citizens, affecting both the ruling classes and workforce.

The advent of modern cities and complex infrastructure has seen systematic and planned dispossession of landowners for public purposes. As a city's needs change, so too does the need for land for infrastructure, such as public transport and roads, which can require whole or partial land acquisitions. Similarly, modern inventions such as utilities can require acquisitions of interests to facilitate easements for laying large networks of water mains, gas pipes, electrical cables and the like.

Worldwide there are many labels for the lawful forced dispossession of private interests in land. In the US, "eminent domain" invokes images of an all-encompassing and indomitable system allowing dispossession of private property. In the UK, "resumption" indicates perhaps a more anachronistic notion that private property rights can be returned to the Crown. In Australia, we have historically followed British laws and policies, but "resumption" has largely been renamed "compulsory land acquisition" which is most apt, given the Australian public perception of private property rights and the effect of dispossession. However, any terminology can be confusing because the rights arise by virtue of the dispossession of land,

yet the breadth of affected parties includes more than mere landowners. Others usually have legal rights as well, such as tenants, businesses and licence holders.

So the question many pose is, why is it all so difficult? Surely dispossession is straightforward as long as claimants get what is fair and the public gets the benefit of the interest in the land. It gets complicated when considering issues surrounding the merits of projects, the timing of acquisitions, funding for compensation rights and the relevant law. This article intends to touch upon some of the issues concerning the law, approaches to compulsory land acquisition, and the reasons some acquisitions can become more contentious.





Background

The Victorian law is primarily codified in the *Land Acquisition and Compensation Act 1986 (Vic)* (LACA) and the *Planning and Environment Act 1987 (Vic)* (P&E Act), but many other special acts apply to the process, as does common law.

Similar legislation applies in other states and territories, as well as legislation specific to Commonwealth acquisitions in Victoria.¹

The Victorian legislation omits reference to “just terms” which addresses the concept of fairness contemplated in the constitution of Australia, the commonwealth legislation and the legislation in some other states. It is disappointing that the words are not incorporated in the Victorian legislation, but there are appropriate heads of

claim in the legislation that can deliver manageable outcomes for many claimants. Unfortunately, there are claimants with more unusual claims that may not be addressed in Victoria and the claimants cannot rely on “just terms” provisions or other appropriate protections to adequately compensate them for the loss of their interest in the land.

The legal and planning process

A brief synopsis of the Victorian process contained within the legislation is as follows:

- **Stage 1:** planning is undertaken to identify possible future acquisitions²
- **Stage 2:** land is blighted and space is reserved for possible future acquisitions (usually in the form of a public

acquisition overlay or project area designation)³

- **Stage 3:** formal notices (usually, a Notice of Intention to Acquire and later, a Notice of Acquisition) are served to indicate a likely impending compulsory acquisition and then transfer of ownership of the interest to the acquiring authority.

Practitioners should note that potential projects often affect the ability to sell or develop the land. Careful consideration is required of the appropriate process in each case before planners and valuers are engaged.

Further, planning submissions or other decisions made about a client’s interest in the property (such as development, leasing or sale) can lead to the diminution of future rights. The authority is often helpful but cannot provide legal or

valuation advice about how such rights or claims may be diminished. Careful legal analysis is required to maximise present and future claims, taking into account the impact of compensation payouts which can run with the land, affecting future owners.⁴

Difficulties can arise during the early process of Stages 1 and 2, such as authorities circumventing or expediting (lawfully or otherwise) some of the processes. When community consultation is limited or non-existent, claimants are usually aggrieved about the process as well as the project.⁵ It is always expected that some claimants will be aggrieved about any project, but it is possible for claimants to show greater understanding about public needs. This usually occurs when sufficient time has been taken to provide explanations about the proposed project, consideration is given to feedback and consultation from affected parties and experts which should be capable of incorporation in the proposals, and there is a clear understanding about how the project is for the greater good.

When a project is proposed to benefit the public, it remains imperative to balance a claimant's needs against the needs of the many, as provided for by law and the overarching expectations of Australian citizens.

Practitioners should have careful regard to the legal rights and obligations during Stage 3; claims can often include:⁶

- market value
- special value
- loss attributable to severance
- enhancement/depreciation in the value of the claimant's interest in adjoining/severed land
- loss attributable to disturbance
- solatium
- legal, valuation and other professional expenses necessarily incurred
- capital gains tax rollover relief
- stamp duty reimbursement
- conveyancing.

Claimants have rights and obligations following the commencement of Stage 3, usually in the form of a Notice of Intention to Acquire.⁷ However, care is required before the formal Notice of Acquisition as a claimant's decisions can increase or diminish claims, which are assessed as at the date of the Notice of Acquisition.

Steps taken to mitigate loss may be imperative to ensure the relevant heads of claim are not adversely affected before, during or after the formal notices are served. Seemingly obvious decisions like obtaining an advance of the initial offer⁸ must first consider the personal, financial and tax circumstances of a claimant. Indeed, all decisions must be made by considering the needs of the claimant identified in privileged and confidential discussions between practitioner and claimant.

How does an acquiring authority approach compulsory land acquisition?

The acquiring authority's approach is fundamental to the process and the experiences of claimants. Authority staff are often familiar with the processes and careful steps are usually taken to provide empathy and guidance without providing legal advice to claimants.⁹

Even though the Victorian legislation may not specifically provide for "just terms", the concept should be kept front of mind when engaging in empathetic dealings with claimants. Any suggestions of impropriety (whether real or even those that are merely perceived) often serve to complicate what is already a challenging process for claimants and acquiring authorities. Many projects have given rise to questions of propriety in addition to questions about the merits of the project itself.

Recent examples of contentious projects

The project colloquially known as Skyrail¹⁰ attracted significant public criticism arising from the government's attempts to implement the project swiftly, the lack of transparency about the process, and withholding (or not obtaining) relevant expert reports and business cases. As such, questions arise about the explanations provided to justify and rationalise the project. The public's view was affected by the first release of the information in the media in January 2016,¹¹ followed by public announcements in February

2016¹² and what appeared to be the commencement of works at the same time.

While the merits of the Skyrail project deserve considerable debate and expert review, it is clear that the process underlining the project failed to meet the public's expectations of community consultation and justification. Political gestures such as the Voluntary Purchase Scheme ("VPS")¹³ have also created complexities. The outcomes can be difficult to navigate and have differing affects on individuals.

In 2014, the East-West Link Project formally commenced.¹⁴ It was followed swiftly by the formal notices.¹⁵ Many expressed surprise about the speed with which the project unfolded, but there was significant community consultation beforehand, incorporating both support and opposition. The project had been formally contemplated as early as 2008.¹⁶ The project appeared as if it had moved quickly since about 2013, which seems to be the primary source of criticism for the processes (ignoring any debate about its merits). The project was also particularly unusual insofar as the contract and a side letter of agreement were both signed in the lead-up to the November 2014 Victorian elections.¹⁷ Ultimately, a negotiated resolution of the termination of the project was sought and the newly elected government offered to sell back the properties to the original owners. Irrespective of one's views on the project, those most affected were the private property owners and tenants in and around the Project Area Designation.¹⁸

Regional Rail Link was criticised for affecting Footscray residents with short lead times before acquisition. On the other hand, some projects have been debated for decades.¹⁹

Advance notice for projects

Most claimants express the preference for longer lead times before acquisition. The counterpoint to this is, for instance, the Punt Road example wherein Public Acquisition Overlays have been in place for more than half a century, affecting property prices and development opportunities.²⁰ In these cases, most claimants have unequivocal rights to

compensation pursuant to the P&E Act and ultimately LACA.²¹

Further, planning decisions can create significant controversy. For example, some authorities use Precinct Structure Plans, which are effective ways of designating proposed future uses. However, they can serve to diminish the value of land identified for future public purposes without necessarily providing compensation rights to affected persons.²² Unfortunately, this can take years while affected persons can suffer the inability to develop or sell their land, sometimes in difficult personal circumstances.

Conclusion

There cannot be a perfect system of compulsory land acquisition. By its very definition, the public takes something from an individual without the individual's consent. A dispossessed interest holder is often interchangeably referred to as the aggrieved party or claimant. For an aggrieved party to move through the process better, the government bodies must carefully work through the planning and implementation processes, having regard to the overarching laws and feedback as to the practical implications on claimants. Decisions made which contravene the legislation or may be seen to deny procedural fairness or natural justice may be subject to administrative law and judicial review.

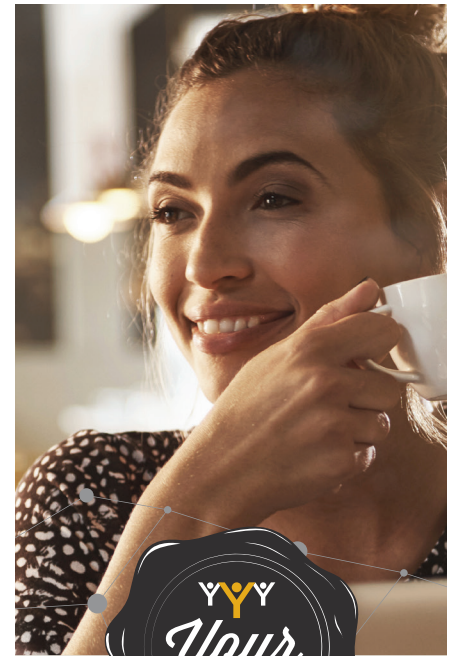
In the event of lawful acquisitions by acquiring authorities, then each party needs to accept the other's role in the process. While some of the effects can be very disruptive or disconcerting, careful guidance from experienced legal and other expert advisers increases the prospects of appropriate and complete claim by claimants. Similar advice to acquiring authorities can lead to appropriate and empathetic responses to each claimant's needs. ■

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1. For example, *Lands Acquisition Act 1989* (Cth) applies to Melbourne Airport land acquisitions.
2. In order to compulsorily acquire land, careful planning is usually undertaken by appropriate authorities or

government bodies. As a project is identified, details usually begin to make their way into the public sphere. Often, community consultation and expert reports are required to facilitate planning and ensure an appropriate project.

3. These blights placed over the land highlight the future intention to acquire an interest in the land and give rise to landowners' rights pursuant to the P&E Act.
4. If P&E Act compensation has previously been paid, then LACA compensation is usually reduced in accordance with ss41(5) and (7) of the LACA.
5. For instance, the Cranbourne-Pakenham Rail Corridor upgrade between Caulfield and Dandenong stations, known as Skyrail.
6. See primarily ss41 and 63 of the LACA.
7. Many rights and obligations are outlined in the Statement to Accompany a Notice of Intention to Acquire, which is required to be served in accordance with s8(2) of the LACA.
8. Claimants are entitled to an advance of the acquiring authority's initial offer without prejudice to either party's rights to seek a greater or smaller compensation payout, in accordance with s51 of the LACA.
9. Acquiring authority personnel often best serve claimants when they liaise closely with the authority's legal and other expert advisers with a view to having careful regard to the needs of claimants, meanwhile balancing the needs of the public, which includes the need to acquire the interest in land and protect the public purse.
10. Cranbourne-Pakenham Rail Corridor upgrade between Caulfield and Dandenong stations.
11. "Skiyrail for Pakenham Cranbourne line outlined in secret Andrews Government plans", *Herald Sun*, 11 January 2016.
12. "No more level crossings between Dandenong and the City", 7 February 2016, Hon Daniel Andrews media release.
13. Which seek to assist some potential claimants (or nearby affected persons) by allowing them to sell their properties to the government authority, but a VPS can also be argued to subvert LACA rights.
14. The Project Area Designation was gazetted on 3 July 2014.
15. Notices of Intention to Acquire were issued in mid-August 2014 and Notices of Acquisition in mid-October 2014.
16. A transport report was prepared by Sir Rod Eddington, commissioned in about 2006.
17. The government of the time signed documents including a contract and side letter in favour of the successful contractors in an attempt to stop any subsequent government terminating the project.
18. Affected persons were left seeking to avail themselves of LACA rights, a VPS, or in some unfortunate cases, no rights were available at all.
19. For example, widening Punt Road, the E6/Outer Metropolitan Ring Road and the construction of the desalination plant at Wonthaggi.
20. Public Acquisition Overlays were implemented in 1955.
21. Noting that compensation payouts run with the land and affect future landowners, as discussed earlier.
22. The problem often stems from the fact that the future purpose is often without funding and authorities can be unwilling or unable to compensate potential claimants until the formal acquisition process is underway. It should be noted that authorities usually dispute compensation rights arising from a PSP, but universally recognise Public Acquisition Overlays, or similar planning instruments, as giving rise to compensation rights pursuant to the P&E Act.



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