

# A PERSPECTIVE ON DEVELOPMENTS IN RESUMPTION COMPENSATION LAW

*Justice Peter Biscoe*

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1. Compensation for the compulsory acquisition of land is deeply embedded in the common law legal tradition. Blackstone in the eighteenth century in his classic treatise on the common law of England wrote that the legislature alone could compulsorily acquire property from an individual, not in an arbitrary manner “but by giving him a full indemnification and equivalent from the injury thereby sustained”.<sup>1</sup> The common law favours the interpretation of statutes which minimise the effects upon property rights.<sup>2</sup> That includes, I suggest, an interpretation that favours providing the dispossessed owner with not less than a full indemnification.
2. Property has been acknowledged as a human right. Echoing *Blackstone*, Article 17 of the Universal Declaration of Human Rights provides: “No-one shall be arbitrarily deprived of his property”.<sup>3</sup> I take this to mean except for a public purpose and with just compensation. Article 1 of the first Protocol of the European Convention on Human Rights provides that: “No-one shall be deprived of his possessions except in the public interest, subject to the conditions provided for by law and by the general principles of international law”.<sup>4</sup> The article recognises that it may sometimes be necessary to override private property rights for a public benefit. It may be necessary to acquire your

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<sup>1</sup>This is an edited version of the speech delivered at the Conference.

<sup>1</sup> William Blackstone, *Commentaries on the Laws of England* (University of Chicago Press, 1765) vol 1, 135.

<sup>2</sup> *Clissold v Perry* [1904] HCA 12, (1904) 1 CLR 363, 373; cited in *R & R Fazzolari Pty Ltd v Parramatta City Council* [2009] HCA 12, (2009) 237 CLR 603 at [42].

<sup>3</sup> *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, 3rd sess, 183rd plen mtg, UN Doc A/810 (10 December 1948).

<sup>4</sup> *Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms*, 213 UNTS 262 (entered into force 18 May 1954).

home in order to build a motorway, but the need must be shown and you must be compensated.<sup>5</sup>

3. In Australia, the Constitution protects property rights to the extent that the compulsory acquisition of property by the Commonwealth must be on just terms. There is no such constitutional protection in respect of compulsory acquisition of property by State governments or authorities under State law. Nevertheless, all States and Territories have statutes providing for the acquisition of land for public purposes and for compensation to be paid to the owners. Why is that so when it not constitutionally required? Writing extra-curially, Chief Justice French suggests two answers. First, respect for property rights is a deeply embedded aspect of our legal tradition. Secondly, it is an aspect of our culture, reflected in the film “The Castle” and Daryl Kerrigan’s immortal line, “Tell them they’re dreaming”.<sup>6</sup>
4. In NSW the statute governing compensation for resumption is the *Land Acquisition (Just Terms Compensation) Act 1991 (Just Terms Act)* in almost all cases.<sup>7</sup> The Land and Environment Court has exclusive Class 3 merits jurisdiction to determine compensation.<sup>8</sup> There have been some significant recent developments in statutory interpretation and application in this area. One test of their soundness, I suggest, is whether they are consistent with the common law tradition of minimising the adverse effects of a resumption.

### **The betterment offset issue: is there a statutory guarantee that compensation will not be less than market value?**

5. Sections 3(1)(a) and 10(1)(a) of the *Just Terms Act* say in their respective contexts (respectively, the objects of the Act and a

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<sup>5</sup> Tom Bingham, *The Rule of Law* (Penguin Books, 2010) 82-83.

<sup>6</sup> Chief Justice Robert French AC, *Property, Planning and Human Rights* (Speech delivered at the Planning Institute of Australia National Congress, Canberra, 25 March 2013) <<http://www.hcourt.gov.au/assets/publications/speeches/current-justices/frenchcj/frenchcj25mar13.pdf>>.

<sup>7</sup> *Just Terms Act* s 5(1). Relevant sections are annexed to this paper. However, in determining the amount of compensation, if any, payable to a reserve trust, regard is to be had only to the matters in s 106A(3) of the *Crown Lands Act 1989*, not the matters in s 55 of the *Just Terms Act*.

<sup>8</sup> *Land and Environment Court Act 1979* ss 19(e), 24.

statement by the resuming authority) that the Act “guarantees” that “the amount of compensation will be not less than market value”. Therefore, if there is s 55(f) betterment of adjoining or severed land, one could be forgiven for thinking that it cannot reduce s 55(a) market value compensation. That was the view of Hodgson JA in the 2008 *AMP* case,<sup>9</sup> with which I agree.

6. In the 2014 *Tolson* case the Court of Appeal held that this view is wrong.<sup>10</sup> They held that s 55(f) betterment of adjoining or severed land should be offset against s 55(a) market value (*the market value decision*), but should not be offset against s 55(d) disturbance loss (*the disturbance loss decision*). The reasons for the market value decision were given by Basten JA,<sup>11</sup> with Beazley P and Preston CJ of LEC agreeing.<sup>12</sup> Each gave separate reasons for the disturbance loss decision.<sup>13</sup>
7. In my view, the market value decision is controversial, but the disturbance loss decision is clearly correct.
8. The *Tolson* market value decision rejects the contrary view of Hodgson JA in *AMP* that ss 3(1)(a) and 10(1)(a) of the *Just Terms Act* disclose a clear legislative intention that compensation be no less than the market value provided by s 55(a), even if there is s 55(f) betterment of adjoining or severed land that exceeds the other elements in s 55. I have cited that *AMP* dicta in several cases.<sup>14</sup> This is the full text of what Hodgson JA said:<sup>15</sup>

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<sup>9</sup> *AMP Capital Investors Ltd v Transport Infrastructure Development Corporation* [2008] NSWCA 325, (2008) 163 LGERA 245 at [62]-[63].

<sup>10</sup> *Tolson v Roads and Maritime Services* [2014] NSWCA 161, (2014) 201 LGERA 367 at [48]-[49] per Basten JA, Beazley P agreeing at [1], Preston CJ of LEC agreeing at [99], [125].

<sup>11</sup> *Tolson* at [30], [37]-[40].

<sup>12</sup> *Tolson* at [1] per Beazley P; [99], [118]-[119] per Preston CJ of LEC.

<sup>13</sup> *Tolson* at [9]-[11] per Beazley P; [83]-[84] per Basten JA; [114]-[115] per Preston CJ of LEC.

<sup>14</sup> For example, *Walker Corporation Pty Ltd v Sydney Harbour Foreshore Authority* [2009] NSWLEC 219 at [25]; *McDonald v Roads & Traffic Authority of NSW* [2009] NSWLEC 105, (2009) 169 LGERA 352 at [14]. In both I thought that Hodgson JA's view in *AMP* was consistent with that of Spigelman CJ in *Leichhardt Council v Roads & Traffic Authority (NSW)* [2006] NSWCA 353, 149 LGERA 439 at [41] and McLellan CJ of LEC in *Smith v Roads & Traffic Authority of New South Wales* [2005] NSWLEC 438 at [65].

<sup>15</sup> *AMP* at [62]-[63].

In my opinion, s 3(a) of the *Just Terms Act* is important here. One object of the *Just Terms Act* is to *guarantee* that compensation be not less than the market value of the acquired land (unaffected by the proposal), that is, the element of compensation provided by s 55(a). Section 10(1)(a) authorises the giving of a notice, stating that the *Just Terms Act* does guarantee this. Although this notice is not given in connection with actual negotiations for compensation or proceedings in which compensation is assessed, and although it cannot give rise to a civil cause of action (s 10(3)), it is plainly intended that the notice be truthful and not misleading. In my opinion, these provisions disclose a clear legislative intention that compensation be no less than that provided by s 55(a), even if there is “betterment” under s 55(f) that exceeds the other elements in s 55.

I see this as consistent with and supported by s 54(1). Where land is compulsorily acquired, it seems to me just that the acquiring authority pay at least the market value of that land (unaffected by the proposal), even if the person from whom the land is acquired owns adjoining land which is increased in value by the proposal, and even if this increase is greater than the market value of the acquired land. Other persons owning land in the area may benefit equally or more from the proposal; so it seems to me unjust that the acquiring authority should get the acquired land for nothing, and that the person whose land is acquired should get nothing for it, just because of a benefit that may be shared by others. Thus a lower limit of the market value (unaffected by the proposal) seems just; and this is what s 3(a) and s 10 indicate is to be guaranteed.

9. The Court of Appeal’s contrary reasoning in *Tolson* was along the following lines. First, “to the extent that” Hodgson JA’s reasoning in *AMP* “was inconsistent with the reasoning” of the Court of Appeal in *MIR* and *Leichhardt*,<sup>16</sup> and “particularly the approach in” *MIR*, it should not be followed.<sup>17</sup> In *MIR* there was an unsuccessful challenge to the appropriateness of a valuation of resumed land on the before and after basis involving a higher value per square metre for the (smaller) retained land in the after scenario than for the (larger) parent land in the before scenario. According to *Tolson*, the *MIR* “claimant said that approach in effect discounted the market value under par (a) by making allowance for an increase in the value of the retained land pursuant to par (f)”.<sup>18</sup> I venture these comments. The Court of Appeal in *MIR* held that there was no “increase” in value (ie, betterment) within s 55(f). Rather, there was simply a determination that the residue land was worth more as a smaller lot after acquisition than it was worth as part of a larger lot before acquisition.<sup>19</sup> *MIR* did not address whether there was a statutory guarantee that compensation would be less than

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<sup>16</sup> *MIR Bros Unit Constructions Pty Ltd v Roads & Traffic Authority of New South Wales* [2006] NSWCA 314; *Leichhardt Council v Roads & Traffic Authority of (NSW)* [2006] NSWCA 353, (2006) 149 LGERA 439.

<sup>17</sup> *Tolson* at [48] per Basten JA, harking back to the analysis in *Tolson* at [39]-[46] of *MIR* and *Leichhardt*.

<sup>18</sup> *Tolson* at [43] per Basten JA.

<sup>19</sup> *MIR* at [51]-[52].

market value such as to quarantine market value from set off against s 55(f) betterment. *Leichhardt* might be thought to be consistent, rather than inconsistent, with Hodgson JA in *AMP*, for Spigelman CJ said:<sup>20</sup>

Section 3(1)(a) of the Act states that it is one of the objects of the Act to “guarantee that ... the amount of compensation will be not less than the market value of the land”. This guarantee confirms that the terminology of “market value” is not used in the sense of “value to the owner”, which was the unifying concept that was applied to reduce the amount of compensation below market value in *Corrie v MacDermott*.

10. Secondly, it was said in *Tolson* that the majority in *AMP* did not adopt Hodgson JA’s approach.<sup>21</sup> On the other hand, the majority in *AMP* did not disagree with it. Thirdly, it was said in *Tolson* that the dicta of Hodgson JA in *AMP* does not accord with the statute.<sup>22</sup> This, of course, is the critical question.
  
11. In *Tolson* Preston CJ of LEC hit the nail on the head when noting that neither s 54 nor s 55 specifies how “regard must be had” to the relevant matters in s 55 in determining the amount of compensation to which the person is entitled under s 54.<sup>23</sup> I would add that the reasoning process involved where a statute requires a court to have “regard to” or “to take into account” of specified matters is seldom explained by the legislature. For his Honour, compensation is on just terms if regard is had to the matters in s 55 concerning the value of land (s 55(a)-(c) and (f)), which are all of a like nature, by aggregating their monetary amounts, thus enabling set off of s 55(f) betterment against s 55(a) market value, s 55(b) special value and s 55(c) loss attributable to severance.<sup>24</sup> His Honour sidelined the primary s 3(1)(a) object of guaranteeing that the amount of compensation will be not less than the market value of the acquired land on the basis that it cannot be used to control the clear language in s 55(f).<sup>25</sup> His Honour pointed out that

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<sup>20</sup> *Leichhardt* at [31].

<sup>21</sup> *Tolson* at [48].

<sup>22</sup> *Tolson* at [49].

<sup>23</sup> *Tolson* at [107].

<sup>24</sup> *Tolson* at [118].

<sup>25</sup> *Tolson* at [121].

another object, in s 3(1)(b), was to ensure compensation on just terms.<sup>26</sup>

12. In *Tolson* an application for special leave to appeal to the High Court was filed. Considerations that might be thought to favour the grant of special leave in relation to the market value decision include the following. First, whilst the Court of Appeal discussed s 3(1)(a), they did not refer to s 10(1)(a). It was the latter in conjunction with the former that caused Hodgson JA to speak as he did in *AMP*. Secondly, in endeavouring to discover the legislative intention, a statute ought to be so construed as to make a consistent and harmonious whole; or, if that cannot be done, so as to produce the greatest harmony and the least inconsistency.<sup>27</sup> The colour and content of the words of ss 54 and 55 are derived from the context, which includes other provisions of the statute and its objects.<sup>28</sup> Sections 10(1)(a) and 3(1)(a) clearly state in their respective contexts that the *Just Terms Act* “guarantees” that “the amount of compensation will not be less than market value”. Under *Tolson*, there is no such guarantee where s 55(f) betterment exceeds the other value elements in s 55. Did *Tolson* construe the statute as a consistent and harmonious whole when the result in that scenario is that a s 10(1)(a) statement is misleading and the primary statutory objective in s 3(1)(a) is unattainable? Thirdly, there is added force in an interpretation that the minimum compensation is an irreducible market value of the resumed land for that is the measure of *actual* loss whereas s 55(f) betterment is *unrealised*, and the post resumption vagaries of the market may affect whether it will ever be realised.
13. However, these considerations have become academic because the High Court (on the day this speech was delivered) refused special leave to appeal on the shortly expressed ground that the appeal had insufficient prospects of success.

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<sup>26</sup> *Tolson* at [126].

<sup>27</sup> *Attorney-General v Sillem* (1863) 159 ER 178 at 217 per Pollock CB.

<sup>28</sup> *Theiss v Collector of Customs* [2014] HCA 12, (2014) 306 ALR 594 at [22]-[23]; *Attorney-General v Prince Ernest Augustus of Hanover* [1957] AC 436 at 461.

## What is the depreciated replacement cost method of valuation?

14. Before the unusually complex 2014 *TMG* case, I had not encountered the depreciated replacement cost (“DRC”) method of valuation.<sup>29</sup> It does not otherwise appear to have been judicially considered in NSW. It is in large part a cost based method. It may be acceptable in the absence of direct market evidence such as sufficiently reliable comparable transactions. It has been said that the result in a given case may well be less than market value, but of course it may be more.<sup>30</sup> It is therefore something of a last resort.
  
15. In *TMG* the market value of the resumed part of the Manly Wharf complex under a 99-year lease was determined by the capitalisation of net income method in the before and after acquisition scenarios. The main issue (among numerous issues) was the determination of the annual market rental value of the Terminal part (the main part) of the resumed land under a rent review provision in a 50-year sublease of the Terminal to Sydney Ferries, as at a rent review date prior to the acquisition. That rent review did not proceed because of the acquisition proposal. In previous five yearly rent reviews, the market rent under the Terminal sublease had been assessed using the DRC method. However, following the 2007 *Walker Report* into Sydney Ferries,<sup>31</sup> the Manly to Circular Quay route was opened up to competition from smaller fast ferries, competing with Sydney Ferries’ traditional large ferries. In this nascent competitive market, I preferred the comparable transactions method referable to fast ferries with large adjustments, rather than the DRC method. It is commonplace to reject comparable transactions that require large adjustments where there are comparable transactions that do not. However, in *TMG* there were no other comparables.

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<sup>29</sup> *TMG Developments Pty Ltd v Roads and Maritime Services* [2014] NSWLEC 177 at [22]-[23], [180]-[222]

<sup>30</sup> *TMG* at [22] citing *Symex Holdings Ltd v Commissioner of State Revenue* [2007] VSC 159 at [112].

<sup>31</sup> Bret Walker (2007), *Report of the Special Commission of Inquiry into Sydney Ferries Corporation*.

## Rent review clauses in leases: who are the hypothetical willing lessor and lessee?

16. The market value assessment in *TMG* required interpretation of a rent review clause in a long sublease of the Manly Ferry Terminal by TMG to Sydney Ferries. The rent review clause was typical in invoking the concept of the hypothetical willing lessor and willing lessee. In *TMG I* analysed this concept as follows:<sup>32</sup>

- (a) The hypothetical willing lessor and willing lessee are abstractions and are not to be confused with the actual lessor and lessee. In a sense, the willing lessor must be the actual lessor (TMG) because only the latter can dispose of the premises, but for the purposes of the rent review clause, the willing lessor is a hypothetical entity with the right to dispose of the premises on the terms of the Terminal Sublease. As such, the hypothetical lessor is not affected by personal ills such as liquidity problems, nor is it indifferent to whether it lets at the rent review date or waits for the market to improve. The hypothetical lessor wants to let the Terminal at the rent review date at a rent that is appropriate to the factors that affect its marketability as ferry wharf premises - for example, location and the market rent of comparable premises. Similarly, the willing lessee is an abstraction - a hypothetical entity actively seeking premises to fulfil ferry wharf needs. The hypothetical lessee would take account of similar factors, but it too will be unaffected by liquidity problems, governmental or other pressures and so on. The hypothetical lessee's profile may or may not fit that of the actual lessee (Sydney Ferries) but it is not that entity.
- (b) The fact that there is no other property on the market that provides the facility provided by the premises is relevant, but its effect on negotiations has to be balanced by the factor that whilst the hypothetical lessee is willing, it is not importunate. The hypothetical lessee wishes to take the lease of the premises at the right price. It is just that it is not considering the proposition or negotiating in a vacuum.
- (c) If in the state of the market there is not likely to be more than one willing lessee, it does not matter if that potential lessee is the actual lessee (Sydney Ferries) or another entity. That is because the potential lessee is assumed to be a willing lessee - neither reluctant nor importunate. Just as the hypothetical lessor cannot rely over much on the fact that no property similar to the Terminal is available in the Manly market, so the hypothetical lessee cannot rely too much on the fact that it has no competitors - it is, and is known to be, a willing lessee. Further, it is known that it will remain a willing lessee so long as the willing lessor does not press its demand for rent beyond the point at which both are ceasing to act as a willing lessor and willing lessee. Monopoly positions on either or both sides do not render hypothetical agreements impossible.
- (d) The concern is with the attitude of the hypothetical willing lessee who is not in occupation of the premises. The rent review clause assumes that there is such a person, and it is irrelevant that there was not.

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<sup>32</sup> *TMG* at [84], following closely the classic judgment of Donaldson J in *FR Evans (Leeds) Ltd v English Electric Co Ltd* (1978) 36 P & CR 185.



## Rent review clauses in leases: goodwill disregard

17. The rent review clause in the Terminal Sublease in *TMG* provided (as such clauses typically do) that the revised rent shall be the current annual market rental value of the premises “taking no account of any goodwill attributable to the premises by reason of any trade or business carried on therein by the lessee”. I held that such a clause does not require disregard of goodwill attributable to the location,<sup>33</sup> as was the case with the Terminal.

## Do s 59(f) “financial costs” include financial losses?

18. The Court of Appeal has confirmed that “financial costs” in s 59(f) of the *Just Terms Act* includes financial losses such as loss of income or profits and is not limited to expenditure: *Health Administration Corporation v George D Angus Pty Ltd.*<sup>34</sup>

## Are loss of mesne profits and damages for trespass compensable?

19. If, prior to compulsory acquisition of freehold land, an acquiring authority holds over under a lease from the owner without paying rent or otherwise trespasses on the owner’s land, the compulsory acquisition may deprive the owner of the ability to recover mesne profits or damages for trespass for the technical reason that the owner can no longer lawfully enter into possession nor succeed in a claim for possession.
20. In the 2014 *Willoughby* case the applicant alleged such a scenario and claimed large consequential compensation.<sup>35</sup> I allowed a relatively small part of the claim for a period when the resuming authority held over under compulsorily acquired leases. I held that if a compulsory acquisition deprives the owner of the ability to recover mesne profits or

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<sup>33</sup> *TMG* at [111]-[114].

<sup>34</sup> [2014] NSWCA 352, dismissing an appeal against the decision in *George D Angus Pty Limited v Health Administration Corporation* [2013] NSWLEC 212 (Preston CJ of LEC).

<sup>35</sup> *Willoughby City Council v Roads and Maritime Services* [2014] NSWLEC 6, (2014) 201 LGERA 177.

damages for trespass, compensation is recoverable under s 59(f) as a financial loss, relating to the actual use of the land, suffered as a direct and natural consequence of the acquisition.<sup>36</sup> I cited my earlier decision in *Caruana* that pre-acquisition rental losses and other losses and costs suffered in other circumstances may be recoverable under s 59(f)<sup>37</sup>. I also cited the Chief Judge's consistent decision in *George D Angus* that "financial costs reasonably incurred" in s 59(f) include financial losses as a consequence of the acquisition.<sup>38</sup>

### **Is the Attorney-General a necessary party where acquired land is held on trust for a charitable purpose?**

21. Land may be vested in a council to be held on trust for a charitable public purpose, such as a park. That was the situation in *Willoughby*. I rejected the resuming authority's submission that only the Attorney-General can bring proceedings in relation to a charitable trust, and that therefore Willoughby City Council's claim for compensation for the resumption of such land must fail. I held:

- (a) Where acquired land is held on an ordinary trust, the trustee is a proper claimant.<sup>39</sup>
- (b) Where the trust is not an ordinary trust but a trust for a charitable purpose, whether joinder of the Attorney-General is required depends on the nature of the proceedings. The Attorney-General is not a necessary party in proceedings to recover property in which the charity claims to be entitled to property or to protect property in which the charity claims to have an interest. Proceedings for compensation under the *Just Terms Act* fall within that description.<sup>40</sup> Any compensation awarded to the Council would be impressed with the trust. Council and the Attorney-

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<sup>36</sup> *Willoughby* at [134], [138].

<sup>37</sup> *Willoughby* at [138] citing *Caruana v Port Macquarie-Hastings Council* [2007] NSWLEC 109 at [39]-[52].

<sup>38</sup> *George D Angus Pty Ltd v Health Administration Corporation* [2013] NSWLEC 212.

<sup>39</sup> *Willoughby* at [26].

<sup>40</sup> *Willoughby* at [30].

General should then consider whether there should be a cy-pres scheme (referring to ss 11-13 of the *Charitable Trusts Act 1993*).<sup>41</sup>

## How is compensation for an acquired easement assessed?

22. Sometimes an acquiring authority will compulsorily acquire an easement over land. Compensation should reflect the diminution in value of the land by dint of the easement, which depends upon the nature of the restriction imposed by the terms of the easement. On a before and after approach, the compensation is the difference between what a willing but not anxious buyer would pay for the land without the easement and what such a buyer would pay for the land with the easement. I confirmed these principles in *Willoughby*.<sup>42</sup>

## When does s 61(b) bar recovery of s 59 financial loss?

23. Financial loss otherwise falling within s 59 of the *Just Terms Act* is not payable if it was necessarily incurred in realising the potential of land on the basis of which market value is assessed: s 61(b) *Just Terms Act*.<sup>43</sup>

Section 61 provides:

### **61 Special provision relating to market value assessed on potential of land**

If the market value of land is assessed on the basis that the land had potential to be used for a purpose other than that for which it is currently used, compensation is not payable in respect of:

- (a) any financial advantage that would necessarily have been forgone in realising that potential, and
- (b) any financial loss that would necessarily have been incurred in realising that potential.

24. Section 61(b) does not bar s 59 disturbance financial loss incurred for reasons other than realising the potential to use the land for that purpose. In particular, it will not bar recovery of legal costs or valuation

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<sup>41</sup> *Willoughby* at [36].

<sup>42</sup> *Willoughby* at [101]-[103]; See also *Tempe Recreation Reserve Trust v Sydney Water Corporation* [2013] NSWLEC 221 at [41]-[44].

<sup>43</sup> *El Boustani v Minister Administering the Environmental Planning and Assessment Act 1979* [2014] NSWCA 33, (2014) 199 LGERA 198 at [99]-[100], [107]-[115], [142]-[143] per Preston CJ of LEC (Beazley P and Gleeson JA agreeing); *Attard & Ors v Transport for NSW* [2014] NSWLEC 44 at [145]-[152].

fees incurred in connection with the compulsory acquisition under s 59(a) or (b).<sup>44</sup>

25. The s 61(b) issue usually arises in connection with relocation costs under s 59(c) and (d), or under s 59(f). For example, where stamp duty is incurred in connection with the purchase of land for relocation where that relocation is necessary to enable the potential to which s 61 refers to be realised, s 61(b) denies a claim for the stamp duty.<sup>45</sup>
26. The idea behind s 61(b) is that if the owner would have to relocate anyway to sell land at its higher value based on its potentiality, then it is inconsistent (and therefore unjust) that the owner should also recover relocation costs as disturbance loss. The idea can be traced back to the majority judgment of the English Court of Appeal in *Horn* in 1941.<sup>46</sup> It was a view with which the distinguished minority in the Court of Appeal and the primary judge in *Horn* disagreed, but it has prevailed.
27. The legislature did not intend in most cases to give relocation costs with one hand under s 59 and take them away with the other hand under s 61. Thus, s 61 only applies where the potential for use for the other purpose is temporally very proximate. The Court of Appeal made that clear in its 2014 *El Boustani* decision. There it was held that the precondition imposed by the chapeau to s 61 is satisfied if the potential for development for the other purpose is temporally very proximate – the land is ripe and would be virtually certain to be developed for the other purpose within the very near future.<sup>47</sup> It was held that if that is not so, it will be difficult to satisfy the s 61(b) requirement that relocation costs would “necessarily” be incurred in “realising” the potential.

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<sup>44</sup> *Sydney Water Corporation v Caruso and Ors* [2009] NSWCA 391, (2009) 170 LGERA 298 at [185] per Tobias JA (Allsop P and Sackville AJA agreeing); *El Boustani* at [111]; *Roads & Traffic Authority v McDonald* [2010] NSWCA 236, (2010) 79 NSWLR 155 at [92]; *Chircop v Transport for NSW* [2014] NSWLEC 63 at [80].

<sup>45</sup> *Sydney Water Corporation v Caruso* at [185]-[188]; *Road & Traffic Authority v McDonald* at [92]; *Attard* at [130]; *Chircop* at [81].

<sup>46</sup> *Horn v Sunderland Corporation* [1941] 2 KB 26.

<sup>47</sup> *El Boustani* at [99]-[100], [112]-[115], [142]-[143] per Preston CJ of LEC (Beazley P and Gleeson JA agreeing); *Attard* at [145]-[152].

28. In *El Boustani* where the potential development would not occur for another 10 years it was held that s 61 did not apply and therefore relocation costs were recoverable.<sup>48</sup>
29. Later, in the 2014 *Attard* case, I determined the market value of residential land on the basis that it was virtually certain that it would be rezoned for residential subdivision but not until about two and a half years after the resumption date.<sup>49</sup> I held that relocation costs were recoverable and that s 61(b) was inapplicable for two reasons. First, two and a half years was not “temporally proximate” such as to satisfy the precondition in the chapeau to s 61. Secondly, the s 61(b) requirement was not satisfied that the relocation costs would “necessarily” be incurred in realising the potential for the land to be used for the other purpose.<sup>50</sup>
30. Section 61 is only triggered if, as the chapeau requires, market value of the resumed land has been “assessed”. In *Attard* I held that s 61(b) did not bar a business claim by a partnership that conducted a business on the resumed land but did not own it. The partnership merely had a limited equitable interest in the land under an informal lease. Compensation for the market value of this interest had never been claimed, let alone “assessed”.<sup>51</sup> I rejected a submission that s 61 was triggered by the Court’s assessment, in separate freehold proceedings brought by one of the partners, of the market value of the land owned by that partner.<sup>52</sup> On that point, I disagreed with a contrary view in the *Peter Croke* case.<sup>53</sup>

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<sup>48</sup> *El Boustani* at [113]-[115], [142].

<sup>49</sup> [2014] NSWLEC 44 at [60]-[61].

<sup>50</sup> *Attard* at [152].

<sup>51</sup> *Attard* at [153]-[154].

<sup>52</sup> *Attard* at [155]-[160].

<sup>53</sup> *Peter Croke Holdings Pty Ltd v Roads and Traffic Authority of New South Wales* [1998] NSWLEC 177, (1998) 101 LGERA 30 at 43-44.

## Are relocation costs compensable for a business conducted unlawfully?

31. Are relocation costs recoverable for a business conducted unlawfully on the resumed land? In *Attard* I held that ss 55(d) and 59 do not contain an implicit requirement of lawfulness of the purpose of the use, such as to automatically exclude a disturbance loss claim for relocation of the business. However, I held further that relocation costs of a business conducted unlawfully would not constitute costs “reasonably incurred” (a requirement of s 59(a)-(f)) if the business is intrinsically unlawful (for example, a business of manufacturing illegal drugs), but that is not necessarily the case where the purpose of the use is permissible with development consent. In *Attard* the use was for a purpose that was lawful with development consent, but the development consent that had been obtained covered some but not all aspects of the business use.<sup>54</sup>

## Are removalist’s costs for a second move compensable?

32. Sometimes it is reasonable for a dispossessed owner to move into temporary premises, and later make a second move into a permanent new base. Both moves can be “relocation” within s 59(c) of the *Just Terms Act* and the costs of both moves are compensable if “reasonably incurred”.<sup>55</sup>
33. In the 2013 *George D Angus* decision at first instance, resumed land at Wagga Wagga had been occupied by the applicant, which was an incorporated medical practice.<sup>56</sup> The applicant relocated to leased premises in Wagga Wagga temporarily. The s 59(c) claim for the costs of a second relocation move, this time from Wagga Wagga to Newcastle, were disallowed because they had not been reasonably incurred.<sup>57</sup> This was because, amongst other reasons, the applicant opted to move to a competitive market where it had no patient base and

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<sup>54</sup> *Attard* at [182]-[188].

<sup>55</sup> *Horton v Wyong Shire Council (No 2)* [2005] NSWLEC 45 at [20]-[21]; See eg, *Attard* at [139].

<sup>56</sup> *George D Angus Pty Limited v Health Administration Corporation* [2013] NSWLEC 212 (Preston CJ of LEC).

<sup>57</sup> *George D Angus* at [135]-[136].

would have needed to establish a medical practice from scratch, and would not even try to earn any income from the services of its medical principal, Dr Angus.<sup>58</sup>

### **Is rent paid to the acquiring authority after resumption compensable?**

34. Rent paid or payable pending relocation from an acquired residence to a new residence is recoverable as compensation under s 59(c) or (f) of the *Just Terms Act*.<sup>59</sup> If a dispossessed owner continues to occupy land after it is compulsorily acquired and pays rent to the acquiring authority under s 34(3) of the *Just Terms Act*, the rent is recoverable as compensation.<sup>60</sup>

### **How are reserve trusts compensated?**

35. Under s 106A of the *Crown Lands Act* 1989 there is a unique regime for determining the amount of compensation (if any) payable to a reserve trust for compulsory acquisition of, or an easement over, a reserve. This regime ousts s 55 of the *Just Terms Act* and mandates that regard is to be had only to the very different matters listed in s 106A(3) of the *Crown Lands Act*. Those matters do not include the market value of the reserve because, by dint of s 106A(4)(a), the Crown (not the reserve trust) is taken to be the owner of the reserve. Therefore, compensation for market value is payable only to the Crown, not the reserve trust.

36. Subsections 106A(3) and (4) of the *Crown Lands Act* provide:

#### **106A Limits on compensation payable to reserve trusts**

...

- (3) Despite section 55 of the *Land Acquisition (Just Terms Compensation) Act 1991*, in determining the amount of compensation, if any, payable to a reserve trust, regard is to be had to the following matters only (as assessed in accordance with this section):

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<sup>58</sup> *George D Angus* at [187]-[191].

<sup>59</sup> *Roads & Traffic Authority v McDonald* at [114].

<sup>60</sup> *Attard* at [128].

- (a) the value to the reserve trust of any improvements (including structures) erected or carried out by the trust on the land being acquired or vested, or over which the easement is vested, on the date the land is acquired,
  - (b) the amount of any loss attributable to the reduction in public benefit from any loss of public open space that arises from the acquisition or vesting of the land,
  - (c) the amount of any reduction in the value to the trust, as at the date the land is acquired or vests, or the easement vests, of any other improvements (including structures) erected or carried out by the trust on other land that is caused by the land acquired being severed from other land of the trust,
  - (d) the cost to the trust of acquiring additional land having environmental benefits that are comparable to the land being acquired or vested,
  - (e) any loss attributable to disturbance (within the meaning of section 59 of that Act), other than loss arising from the termination of a lease or licence over the whole or part of the land being acquired.
- (4) For the purposes of a determination of an amount of compensation:
- (a) the Crown is taken to be the holder in fee simple of the land being acquired or vested, or over which the easement is vested, and
  - (b) section 56 (2) of the *Land Acquisition (Just Terms Compensation) Act 1991* applies as if the value of improvements (including structures) erected or carried out by the trust on the land is the market value of the trust's interest in the land.

37. The 2013 *Tempe Recreation Reserve Trust* case is the only one to have considered s 106A.<sup>61</sup> There Sydney Water Corporation compulsorily acquired an easement over the Tempe Reserve. In a non-compensation context, one might expect the owner of land or the trustee of a reserve trust to contend for a narrow construction of an easement, and for the beneficiary of the easement to contend for a wide construction. However, in the *Tempe Recreation Reserve Trust* case the parties each took the opposite position, thereby maximising the reserve trust's compensation claim and minimising the resuming authority's potential liability. The reserve trust's case largely collapsed because I did not accept its proposed wider interpretation of the easements that they allowed permanent works, such as a large pipeline, to be built above the reserve. However, I did accept that there was or would potentially be some reduction in public benefit from loss of public open space for which compensation was payable under

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<sup>61</sup> *Tempe Recreation Reserve Trust v Sydney Water Corporation* [2013] NSWLEC 221.



s 106A(3)(b). I assessed compensation in a broad way at \$100,000.<sup>62</sup>  
The Court of Appeal dismissed an appeal from my decision<sup>63</sup>.

### **Are offers to purchase relevant?**

38. In *Marroun* (2013) the Court of Appeal confirmed that a genuine offer to purchase may be relevant when determining market value<sup>64</sup>. However, in that case one of the experts gave plausible evidence as to why there was reason to doubt a concluded sale would have resulted at the price offered and why the price was unrealistic. The Court of Appeal held that the refusal of the primary judge to give significant weight to the offer was entirely on a matter of fact and therefore immune from review on an appeal to the Court of Appeal limited to a question of law under s 57 of the *Land and Environment Court Act* 1979.<sup>65</sup>

### **What is the role of the judicial valuer?**

39. In *Marroun* the Court of Appeal confirmed the principle that the Land and Environment Court is not a jurisdiction in which a judicial valuer is obliged to act only on the basis of evidence adduced by expert valuers who appear as witnesses: a judge of that Court is entitled to reject all the expert evidence and draw on the judge's experience.<sup>66</sup>

### **What are the special costs principles in resumption compensation cases?**

40. An owner of land who has been compulsorily dispossessed is entitled to take reasonable steps to seek the judgment of the court in respect of the adequacy of compensation offered. Ordinarily the dispossessed owner is entitled to an order that the acquiring authority pay her the costs of the proceedings, even if she is awarded less than the pre-litigation statutory offer or pre-litigation offers of compromise.<sup>67</sup>

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<sup>62</sup> *Tempe Recreation Reserve Trust* at [69].

<sup>63</sup> *Sydney Water Corporation v Tempe Recreation Reserve Trust* [2014] NSWCA [2014] NSWCA 437.

<sup>64</sup> *Marroun v Roads and Maritime Services* [2013] NSWCA 358.

<sup>65</sup> *Marroun* at [2], [5], [43]-[45], [53]-[59].

<sup>66</sup> *Marroun* at [55] citing *Leichhardt* at [83].

<sup>67</sup> *Brock v Roads and Maritime Services* [2012] NSWCA 404, (2012) 191 LGERA 267 at [93]-[99], following *Dillon v Gosford City Council* [2011] NSWCA 328, (2011) 183 LGERA 179 at [71]-[72].

## How should similar cases be case managed?

41. The usual practice of the Land and Environment Court in resumption compensation cases is set out in its *Practice Note Class 3 Compensation Claims*. In 2014 the Court adopted a case management tool that is likely to be adopted in similar circumstances. It was the establishment of the North West Rail Link List as a subset of the Class 3 Compensation List.<sup>68</sup> In such a subset list, cases relating to resumption of land for the same specific purpose, which might be expected to have similar market values insofar as they are in the same or similar locations, can be case managed more effectively. The Court's market value assessment on a per square metre basis in a number of cases in that list or which would have been in that list if it had been established earlier,<sup>69</sup> showed a range that may have been helpful in contributing to settlement of other cases in the list.

## Conclusion

42. Compensation for the compulsory acquisition of land is not a field for the "blinkered specialist".<sup>70</sup> It is exercised within the framework of statutory constraints and the great tradition of the common law applicable to the way in which our laws are interpreted and applied in the area of vested property rights.

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<sup>68</sup> *Zappia v Transport for NSW* [2014] NSWLEC 38 (Biscoe J).

<sup>69</sup> *Bonomo v Transport for New South Wales* [2014] NSWLEC 25 (Sheahan J); *De Battista v Transport for New South Wales* [2014] NSWLEC 39 (Pain J); *Attard* (Biscoe J); *Chircop* (Biscoe J).

<sup>70</sup> French CJ, above n 6.