SECTION 6

LAND ACQUISITION AND COMPENSATION

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SECTION 6 - LAND ACQUISITION AND COMPENSATION

6.1 Introduction

State Government agencies, statutory authorities and local government are authorised to acquire land by either crown prerogative or by the various Acts establishing particular authorities.

The Land Acquisition and Compensation Act 1986 provides both:

- the procedures for the compulsory or negotiated acquisition of land; and
- the procedures for the determination of compensation.

From the surveyor's perspective, the surveyor may be required to act on behalf of either the acquiring authority or alternatively, the owner or person having an interest in the affected property throughout the acquisition process. Moreover the surveyor acting on behalf of the acquiring authority will be required to comply with the provisions of the planning scheme and more particularly the Subdivision Act 1988 in having a plan of acquisition certified and submitted for registration and approval by the Land Titles Office.

Separate legislation, the Land Acquisition Act 1955, empowers and administers the purchase of land by the Commonwealth. At the time of writing, (1989) a Land Acquisition Bill has been introduced into Federal Parliament and will replace the former 1955 Act.

6.2 History

The Land Acquisition and Compensation Act 1986 (the Act) results from a Government inquiry into acquisition and compensation which was initiated in 1982 and conducted by Stuart Morris. Previously the Gobbo Committee of Inquiry into Town Planning Compensation and the Australian Law Reform Commission identified the need, and made recommendations for reform.

Prior to the commencement of this Act, whilst the relevant legislation was principally contained in the Lands Compensation Act 1958, it was necessary to consider beyond the 1958 Act to ascertain the law applicable to any proposed acquisition.

Other legislation may have been used:

- to empower the authority to compulsorily acquire land, eg State Electricity Commission Act 1958;
- to provide additional procedures, eg. Local Government Act 1958;
- to modify principles for assessing compensation, eg. State Electricity Commission Act 1958;
- to provide for the notification and registration of an acquisition, eg. Transfer of Land Act 1958;

Moreover the Lands Compensation Act 1958 had its origins in the Land Clauses Consolidation Act 1845 which was enacted by the British Parliament to facilitate the acquisition of strips of land for railways and canals in nineteenth century Britain.

As identified by the Australian Law Reform Commission, society has undergone significant change since 1845, which has resulted in the principles and procedures under the Lands Compensation Act 1958 being outmoded.

More particularly:

- the introduction of statutory town planning;
• the greater frequency of blight. Blight occurs when land becomes unsaleable or devalued because of a belief that it will be required for, or affected by some public project;
• inflation;
• increases in home ownership; and
• new attitudes to administrative accountability:
provided the background to the Morris report and his recommendations for what became the *Land Acquisition and Compensation Act* 1986.

6.3 *Land Acquisition and Compensation Act 1986*

6.3.1 General Provisions
The Act provides procedures for the acquisition of land and the determination of compensation.

Acquisition when used in the Act refers to the acquisition of an interest in land either:

• by agreement; or

• by compulsory process.

It is important to note that an interest in land is not restricted to a legal or equitable estate but extends to include the acquisition of:

• an easement, right, charge, power or privilege in, under, over, affecting or in connection with land.

The Act also provides for powers of entry on to and temporary occupation of land; however, it does not affect the powers of authorities under existing legislation to enter land and carry out works such as the provision of the sewers and drains.

6.3.2 The Acquisition Process - An Overview
The basic procedures for the compulsory acquisition of land as detailed in the Act are as follow:

(a) reservation of the land to be acquired;

(b) service of a "Notice of Intention to Acquire" by the authority;

(c) possible advance of an amount of compensation;

(d) notice of acquisition;

(e) entry into possession;

(f) initial offer of compensation by the authority;

(g) advance of compensation;

(h) response by claimant to the offer;

(i) authority's reply to claim;

(j) further response from claimant (if required); and

(k) resolution of claims by negotiation or by arbitration.
6.3.3 The Acquisition Process - in Detail

6.3.3.1 Notice of Intention to Acquire
Section 6 of the Act requires the authority to give "Notice of Intention to Acquire" whenever it intends to acquire an interest in land. Notice must be served on each person having an interest in the land, the local council and the planning authority. A copy is also lodged with the Land Titles Office and an appropriate endorsement entered on title.

Section 7 of the Act provides exceptions to the requirement to serve notice, namely where:

(a) the land is being offered for public sale;

(b) the authority serves notice that it does not intend to acquire the interest by compulsory process. In this case, the authority is prohibited from compulsorily acquiring the land for 12 months;

(c) the authority has commenced negotiations to acquire the interest-In this case the owner may require the authority to either serve Notice of Intention to Acquire, or alternatively serve a notice that it does not intend to acquire by compulsory process;

(d) the Minister so directs.
The Notice of Intention to Acquire which replaces the Notice to Treat under the former Lands Compensation Act 1958 does not constitute an offer or binding agreement. Moreover the notice may be amended or cancelled at any time prior to the interest vesting in the authority.
The Notice of Intention to Acquire lapses after six months unless the authority and the owner (interested parties) agree to an extension(s) of up to 3 months at a time.

Where an authority decides after serving a Notice of Intention to Acquire not to proceed with the acquisition or the authority does not acquire the interest within the prescribed period, then the person affected may claim compensation. Section 46 provides that a claim for pecuniary loss or expenses must be made within two years.

6.3.3.2 Reservation of Land
Prior to acquisition, the land affected must be first reserved for a public purpose under the relevant planning scheme excepting where:

(a) The land is being offered for public sale; or

(b) The authority has served notice that it does not intend to compulsory acquire; or

(c) The Minister recommends that reservation is unnecessary, undesirable or contrary to the public interest.

In addition, Regulation 6 provides the following exemptions:

(a) Where the interest is an easement and the acquisition does not reduce value by more than 10%; or

(b) Where the acquisition is for a minor road widening or deviation of a road and the area involved is not more than 10% of the total area of the allotment. Moreover, the value of the interests is less than 10% of the total value.
6.3.3.3 Advance of Compensation

Following either:

(a) The service of a Notice of Intention to Acquire under section 6; or

(b) where notice is not required to be served by virtue of section 7(i)(c) but the authority has notified the person interested in the land that it proposes to acquire an interest; then section 51(8) of the Act empowers the acquiring authority prior to the date of acquisition to advance an amount of compensation to enable the purchase of a similar interest in other land.

6.3.3.4 Notice of Acquisition

The date of acquisition and vesting of an interest in land in the authority is the date of publication of a Notice of Acquisition in the Government Gazette declaring an interest to be acquired. Subject to an extension or abridgement (section 106) this notice will be published at least two months after the service of the Notice of Intention to Acquire.

6.3.3.5 Service of Notice of Acquisition

Within 14 days (subject to section 106) of the date of acquisition the acquiring authority must serve a copy of the Notice of Acquisition and a statement of rights and obligations upon all parties who received the Notice of Intention to Acquire. Where there was no Notice of Intention to Acquire, the acquiring authority must serve the Notice of Acquisition upon each person having an interest immediately before the date of acquisition.

6.3.3.6 Entry into Possession

An acquiring authority may not enter land used as a principal place of residence or business until the expiry of three months from the date of acquisition and then only on seven days notice, unless there is certification from the Governor in Council or the parties so agree. An authority may enter other land after seven days notice following the date of acquisition. Should an owner, or interested party, refuse to give up or hinder possession of the land, the authority may initiate action in accordance with section 28.

6.3.3.7 Initial Offer of Compensation

Within 14 days of the date of acquisition the authority must make an initial offer of compensation. The offer must be accompanied by:

- a copy of the certificate of valuation upon which the authority based its offer; and
- a statement explaining any difference between its offer and the valuation above; and
- a statement setting out the rights and obligations of persons whose interests have been acquired.

Where no offer is made, section 37 of the Act provides that a person who is entitled to compensation may make a claim within two years of the date of acquisition.

6.3.3.8 Advance of Compensation

All persons entitled to compensation who have received an offer under Part 3 or Part 5 of the Act may serve notice to require the authority to advance the sum offered, provided that the sum advanced does not prejudice the amount of final settlement. Provided also that the offer is $5000 or more.
6.33.9 Response by Claimant to the Offer

Within three months of the authority’s initial offer of compensation the claimant must either:

- serve a notice of acceptance on the authority; or
- serve a notice of claim on the authority.

Where the claimant fails to respond by notice then the matter becomes a disputed claim to be dealt with in accordance with Part 10 of the Act.

Section 34 specifies the form of the notice of acceptance and provides firstly that the acceptance is without prejudice to any matter which is stated in the offer as being subject to negotiation or claim. Secondly section 34 provides that the claimant may accept the offer in part leaving specified matters as being subject to negotiation or claim.

Where a claimant serves notice of a claim, section 35 provides, *inter alia*, that where the claimant disputes the valuation used by the authority in making its offer then the claimant must provide:

- a copy of the certificate of valuation of a registered valuer upon which the claim is based; and
- a statement setting out the method and basis of the valuation.

6.33.10 Authority’s Reply to Claim

The authority must reply in writing to the notice of claim within three months.

The authority may:

- admit the claim in whole or part; or
- offer to vary the original amount; or
- reject the claim and repeat its offer under section 31.

6.33.11 Further Response from Claimant

Where the authority offers to increase or vary the compensation previously offered, the claimant must within 2 months either accept or reject the offer.

Where the claimant accepts a revised offer the claimant may accept the offer in part leaving specified matters to be determined by negotiation.

Where the claimant rejects the revised offer or alternatively the authority rejects the claim by the claimant the claim becomes a disputed claim to be dealt with in accordance with Part 10 of the Act.

6.33.12 Determination of Disputes

Part 10 of the Act provides that the amount in dispute determines the forum for resolution of the disputed claim.

Generally, where the amount in dispute does not exceed $50 000.00 the Land Valuation Board of Review is appointed to resolve the claim.

Where the amount exceeds $50 000.00 the claimant has the option of either the Supreme Court or the Land Valuation Board determining the claim. Where a claimant fails to exercise this choice then the authority may choose the forum.

On application of either party, irrespective of the amount in dispute, the Supreme Court may determine to resolve a dispute where it considers the claim raises questions of unusual difficulty or general importance.
Sections 85 to 88 of the Act provide for compulsory conference as a mechanism for resolving disputes.

6.3.4 Compensation

6.3.4.1 Definitions

Section 40 provides the following definitions:

(a) Loss attributable to disturbance; as meaning any pecuniary loss suffered by a claimant as the natural, direct and reasonable consequence of:

   (i) the service upon the claimant of a Notice of Intention to Acquire where the authority has refused or failed to give consent to the carrying out of improvements to the land or the effecting or obtaining of any sales, transactions, licences or approvals in respect of that land and
   (ii) the fact that an interest of the claimant in that land has been divested or diminished being a pecuniary loss which would otherwise not be provided for in the Act.

Examples:
- removal costs;
- dismantling, removing and reinstating machinery;
- loss of goodwill;
- legal costs in acquiring replacement property.

(b) Loss attributable to severance; as meaning the amount of any reduction in the market value of any other interest of the claimant in the acquired land or any interest of the claimant in other land used in conjunction with the acquired land which is caused by its severance from the acquired land.

Examples
- loss in value of farmland when a strip of land is acquired; eg. pipetrack, road, cutting the farm into two halves, and making it less efficient to operate.
- loss in value of a building site when a large portion is acquired making it uneconomic to build on the remainder.

The usual method of assessing severance is to use the Before and After approach whereby an assessment is made of the value of the holding before the acquisition from which is deducted the value of the residue remaining after the acquisition to determine the value of the compensation.

(c) Market Value; as meaning the amount of money which would have been paid for the interest if it had been sold on that day by a willing but not anxious seller to a willing but not anxious purchaser.

(d) Special Value; as meaning the value of any pecuniary advantage in addition to the market value to a claimant which is incidental to his ownership or occupation of that land.

Example
- the case of paraplegic whose home is fitted out with ramps, instead of stairs, where the extra cost of the ramps is not reflected in the market value of the property.
6.3.4.2 Underlying Zoning

Sections 6(2)(i) and 201 of the Planning and Environment Act introduce the principle of Underlying Zoning which applies where land is either wholly or partly reserved for public purposes under the planning scheme. Where land is so reserved an applicant may apply for a certificate for the purpose of valuing the land for compensation. The authority is then required to provide a declaration setting out the provisions of the planning scheme which would have applied to the land if it had not been reserved.

6.3.4.3 Assessment of Compensation

Section 41 of the Act provides the general principles on which compensation is based.

More particularly due regard must be given to the following factors:

- Market value of the interest on the date of acquisition;
- Any special value of the claimant on the date of acquisition;
- Any loss attributable to severance;
- Any loss attributable to disturbance;
- The enhancement or depreciation in value of the interest of the claimant, at the date of acquisition, in other land adjoining or severed from the acquired land by reason of the implementation of the purpose for which the land was acquired;
- Any legal, valuation and other professional expenses necessarily incurred by the claimant by reason of the acquisition of the interest provided that the expenses are not incurred as a result of a disputed claim (Part 10 of the Act) wherein the Board/Court may award costs (section 91).

Section 41(3) provides for the situation where less than the whole of the land in which a claimant has an interest is acquired in which case the market value of the acquired interest is the difference between the market value of the interest before the acquisition and the market value of the interest after the acquisition (Before and After).

Where land acquired includes the claimant's principal place of residence, then subject to the requirements of section 45 of the Act, an authority may grant a loan to enable a claimant to purchase a house which is reasonably comparable to that acquired.

Matters which must be disregarded in assessing compensation are specified in section 43 of the Act.

6.3.4.4 Solatium

Solatium is loosely defined as a sum of money paid over and above the actual damages as a solace for injured feelings or for the intangible and non-pecuniary disadvantages resulting from the acquisition. Section 44 of the Act provides that the amount of compensation may be increased by up to 10% of the market value of the land. The Act further provides the criteria to be used in determining the amount payable.

6.4 Planning and Environment Act 1987

6.4.1 Compensation

The Planning and Environment Act (The Act) makes provision for the payment of compensation in three different circumstances:
(a) Compensation for the Compulsory Acquisition of Property (as above).

(b) Compensation for loss incurred in the sale of property as a result of the reservation of the land for a public purpose (known as "loss on sale compensation"), (section 106).

(c) Compensation for loss or damage occasioned by virtue of the land being reserved for a public purpose (known as "loss or damage compensation"), (section 98).

6.4.2 Loss on Sale

The right to claim for loss on sale arises under section 98 of the Act whilst section 106 states that a claim for loss on sale compensation arises if:

(a) The owner of the land sold it at a lower price than the owner might reasonably have expected to achieve if the land had not been reserved or proposed to be reserved; and

(b) Before selling the land the owner gave the planning authority not less than 60 days notice of his intention to sell the land.

It is important to note that a claim for loss on sale cannot arise if the vendor became the owner of the land after it was affected by the reservation, unless a subsequent amendment provides more stringent controls.

6.4.3 Loss or Damage

The right to claim compensation for loss or damage arises only after:

(a) The responsible authority has refused to grant a permit for the use or development of the land on the ground that it is or may be required for a public purpose; or

(b) The Administrative Appeals Tribunal directs that a permit must not be granted on the ground that the land is or may be required for a public purpose; or

(d) The responsible authority either fails to grant a permit within the prescribed time, or grants a permit subject to a condition unacceptable to the claimant, and the Administrative Appeals Tribunal disallows any appeal against such failure or condition on the basis that the land is or may be required for a public purpose.

These principles are set out in section 99 of the Act. It is important to note that the effect is such that a claimant can force the responsible authority to pay compensation at a time of his choosing. That is, even though the responsible authority may have no immediate intention of implementing the reservation, by going through the process of permit refusal the claimant establishes a right for compensation which cannot be denied. The responsible authority must therefore be prepared to deal with claims for compensation as soon as it initiates a reservation.

6.4.4 Assessment

Compensation for both loss on sale and loss or damage is assessed on a "Before and After" basis. That is, the difference between:

- The value of the land at the date on which the liability to pay compensation first arose; and

- The value the land would have had at the sale date if the land had not been affected.

In respect of loss or damage compensation, the claim should be assessed at the date the right to compensate arose. That is, the date of refusal of the permit or the date of Administrative Appeals Tribunal decision, whichever is applicable. The valuations obtained in respect of the affected and unaffected value of the property should be made as at that date. As with loss on sale compensation, additional amounts may be payable in respect of costs incurred by the claimant and/or any intangible and non-financial disadvantages arising when a residence is involved.
6.5 Subdivision Act 1988

Section 569(2A) of the Local Government Act currently exempts Government agencies and statutory authorities from the subdivision process when acquiring part of a parcel of land. The Subdivision Act 1988 will henceforth require acquiring authorities to comply with its provisions when acquiring land by subdivision. Importantly the definition of acquire is not restricted to compulsory acquisition but extends to acquisition by agreement.

More particularly, section 35 of the Subdivision Act requires that where an acquiring authority acquires land which cannot be disposed of without being subdivided, the authority must submit a plan to council for certification as if the authority were the owner of the land. Surveyors will need to be conversant with the provisions of both sections 5 and 35 of the Subdivision Act relating to time constraints for submission of plans to councils and notification of vesting dates to the Registrar of Titles. In addition it will be essential to have a detailed understanding of the provisions of section 8A of the Sale of Land Act 1962 in relation to statutory exemptions from the subdivision process.

Importantly section 35 of the Subdivision Act distinguishes between a plan which maintains the number of separately disposable parcels, excluding the acquired land and one which either:

(a) Reduces the number of separately disposable parcels excluding the land to be acquired;

(b) Creates additional lots;

(c) Includes land that the authority does not intend to acquire any part of which abuts other land in the plan;

(d) Includes land any part of which abuts land in the plan that is either vested in or registered in the name of the authority;

(e) Alters the lot entitlement or liability of land on the plan.

Where an acquisition falls into one of the categories (a) to (e) above then the plan must have the consent of the owner and any mortgagee of the land affected.

In the case of General Law land, the Subdivision Act generally requires that the land be brought under the Act as a requirement for certification of the plan by council (section 6) and for registration of the plan by the Registrar of Tides (section 22(i)(e)).

Finally, in terms of the subdivision process, unless a plan of subdivision by an acquiring authority creates additional lots, excluding the acquired land, the plan will be exempt from requirements under Part 3 of the Subdivision Act relating to engineering plans, open space, referral authorities and marking of boundaries.