PRACTICAL TIPS FOR ENFORCED BUSINESS RELOCATION

What happens after the compulsory acquisition of land on which a business is conducted? SHENAL SIRIWARDHANE and ANDREW BEATTY, solicitors with Beatty Legal, discuss the practical issues for NSW business owners when seeking compensation for the relocation and reinstatement of their company.
Faced with the resumption of land in New South Wales on which a business is conducted, dispossessed owners may sometimes have a choice between seeking compensation for the extinguishment of the business, or compensation for relocating and re-establishing it elsewhere.

Typically, dispossessed owners will enter into negotiations with the resuming authority with a view to reaching agreement on the compensation amount prior to the statutory compulsory acquisition process being set in motion.

This article discusses three practical issues that business owners, and those advising them, should consider when assessing the availability and strength of relocation claims they may wish to advance in negotiations with a resuming authority, including:

1. Comparing relocation costs with the value of the business to be extinguished, to determine the ‘reasonableness’ and availability of a claim for relocation.
2. Rationalising compensation for relocation claims, resulting in a better position than pre-resumption position for the business, such as ‘new for old’.
3. Compensation for losses of profits caused by the ‘shadow’ of the resumption before acquisition.

Further to these practical issues, business owners, particularly small and/or family business owners, will initially need to consider whether they have the wherewithal and fortitude to advance relocation claims through negotiations, which are often lengthy and drawn out and can put considerable pressure on day-to-day business operations.

**LEGISLATIVE FRAMEWORK FOR COMPULSORY ACQUISITION**

The NSW Land Acquisition (Just Terms Compensation) Act 1991 (“the Act”) sets out the processes that apply to acquisitions of land (or interests therein) for a public purpose, either by agreement or compulsorily. In either case, the dispossessed owner is entitled to compensation that will justly compensate it for the acquisition of its interest in that land.

The Act encourages the resuming authority to negotiate and reach agreement with dispossessed owners, both before and after the commencement of the statutory process of compulsory acquisition.

Accordingly, prior to the commencement of the statutory process, resuming authorities will generally write to the dispossessed owner to invite negotiations some months in advance of the date by which the land is needed for the public purpose.1

The negotiation process presents a crucial opportunity for affected businesses to strike an agreement with the resuming authority. A negotiated agreement (if one can be struck) avoids the processes surrounding a statutory valuation being undertaken by the valuer-general which, if unsatisfactory, may require an appeal to the NSW Land and Environment Court.

Pre-acquisition negotiations with the resuming authority are still informed by the heads of 1

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compensation provided under s55 of the Act. That is to say, the resuming authority cannot provide a form of compensation under an agreement that is not recognised by the Act.

For business owners seeking to relocate their business, the relevant head of compensation will in most cases be ‘loss attributable to disturbance’ under s59. However, the market value of the land on which the business operates (a separate head of compensation) may be a significant factor in negotiations, especially where the business or a related entity also owns the freehold interest in the land being acquired.

Among other costs and losses associated with acquisition, it is well established that compensation awarded under s59 can include the cost of relocating a business to alternate premises, including the fit-out costs of alternate premises, as well as lost profits caused by the acquisition and forced relocation.3

If your client is a business operator intending to relocate, the availability of a relocation claim in negotiations with the resuming authority will be dependent on several key factors.

**RELOCATION VS. BUSINESS EXTINGUISHMENT**

Section 54(1) provides that the amount of compensation to which one is entitled under the Act is that which will justly compensate the person for the acquisition of the land in which they have an interest.

A potential stumbling block in any negotiations for a relocation claim arises when the cost of relocation is likely more than the value of the business, which will be extinguished by the taking. In these circumstances the ‘reasonableness’ of the intention concerning, and cost of, relocation will be scrutinised carefully.

In NSW, the Courts have considered this issue in the context of the questions posed by the Privy Council in *Director of Building and Lands v Shun Fung Ironworks Ltd* [1995] 2 AC 111:

1. Can the business be relocated?
2. Does the claimant intend to move?
3. Would a reasonable person, in the position of the claimant in the prevailing circumstances, relocate?
4. Is it feasible and practical to relocate within a reasonable time of vacating the resumed land?
5. Will the cost of relocation be less than the cost of extinguishment?

The Land and Environment Court decision in *Hua and Anor v Hurstville City Council* [2010] NSWLEC 61 considered the questions in *Shun Fung* in relation to a relocation claim that was almost double the cost of extinguishment.

In *Hua*, the affected business was a family bakery in a relatively challenging financial position, with doubt over its general profitability sought to be cast by the resuming Council.4

Here, the resuming Council argued that compensation should be awarded on an extinguishment basis because, inter alia, it would not be practical or feasible to relocate the business when tested against the five questions in *Shun Fung*, especially because the relocation would cost almost double that of extinguishment.

In awarding compensation on the more expensive relocation basis, the Judge (Pain J) held that greater latitude may be applied in the case of a family business seeking to relocate.5

Her Honour found that the business owners had demonstrated an intention to relocate, and that the intention was reasonable given that the business provided employment to the entire family. It was believed that a reasonable person in the position of the owners would seek to have the business relocated, notwithstanding its challenging financial position when compared to other businesses.

The reasonableness of the intention to relocate will usually be the determinative factor in negotiating with the resuming authority or persuading a judicial valuer to award compensation for a relocation claim that is greater than the value of the business.

What is reasonable will differ in each case:

“The conclusion to be drawn, in a case where the cost of moving...”

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2 See also s64 of the Land Acquisition (Just Terms Compensation) Act 1991, which provides for compensation, by agreement, in the form of land or the carrying out of works.

3 See for example the following NSW cases where compensation for, inter alia, business relocation claims have been awarded: *Peter Croke Holdings Pty Ltd and Others v Roads and Traffic Authority of NSW* (1998) 101 LGERA 30; *Hua and Anor v Hurstville City Council* [2010] NSWLEC 61; and *Health Administration Corporation v George D Angus Pty Ltd* [2014] NSWCA 352.

4 What is considered “profitable” in the case of a family business may be measured differently to other businesses. See *Keogh v Housing Commission of Victoria* (No 2) (1969) 18 LGERA 295 at 297 where Barber J held, “I am prepared to assume that it is a going concern carried on profitably in the sense that it supplies an income to the Keogh family.”

5 *Hua and Anor v Hurstville City Council* [2010] NSWLEC 61 at 70 citing Wells J in *Commissioner of Highways v Shipp Bros Pty Ltd* (1978) 19 SASR 215 at 222 and the Privy Council in *Shun Fung* at 127.
the business to another site would exceed the present value of the business, is that this is not itself an absolute bar to the assessment of compensation on the relocation basis. It all depends on how a reasonable businessman, using his own money, would behave in the circumstances. In such a case, however, the tribunal or court will need to scrutinise the relocation claim with care, to see whether a reasonable businessman having adequate funds of his own might incur the expenditure… The greater the disparity, the more closely the claim should be examined because the less likely would it be that a reasonable businessman would behave in this way.”

RATIONALISING THE PERCEPTION OF AN ENHANCED POSITION

It would be unreasonable for a dispossessed business owner to expect compensation, whether for relocation or business extinguishment, that would do more than ‘justly’ compensate it.

However, there may be instances when the compensation claimed creates a perception that the displaced business will be put into a better position than was previously the case, for example, by obtaining a larger site, new and better equipment, or a more advantageous location.

One way that courts have dealt with this in the award of a relocation claim for compensation is by adjusting the final compensation amount to account for the perceived benefit.

However, this method of adjusting the perceived enhancement has been criticised as imprecise, as no two sites and no two businesses are the same, and to project perceived business benefits before an actual relocation may give rise to many uncertainties.

In other cases, the courts have rationalised perceived enhancements resulting from relocation claims.

In Peter Croke Holdings Pty Limited v Roads and Traffic Authority of NSW (1998) 101 LGERA 30, the Judge (Bignold J) adopted the following view on the ‘new for old’ issue proffered by Gobbo J in Kozaris v Roads Corporation (1990) 75 LGRA 346 at 352:

“But as has been said in disturbance cases, the owner of a business who is compelled to relocate into more expensive premises that bring him no extra profit, gains no benefit from the enforced relocation and should not have to bring into credit as a deduction — or as a form of enhancement unknown to the law — the amount of the theoretical addition in value represented by the extra amount he has had to spend over the value of his previous premises”

In Home Care Services of NSW v Albury City Council [2003] NSWLEC 433, Bignold J considered a claim where the costs of relocation to a larger premises were awarded to the dispossessed tenant, without adjustment for moving into the larger premises. There his Honour, at 18, accepted that the relocation was reasonable and the costs in relocating were reasonably incurred, as larger premises were the only ones available to the claimant:

“It was those premises or no other available premises. In those circumstances, the fact that the premises were larger and the fit-out was therefore of larger premises conferred no benefit on the claimant such that it would be required to bring that notional benefit into account by way of deduction from the amount of disturbance costs otherwise to which it is reasonably entitled.”

In Hua, the relocation compensation awarded included fit-out costs for, inter alia, new ovens with a longer operational life and lower operating costs.

The Court rationalised the new and better equipment by firstly recognising the ‘reasonableness’ of the intention to relocate, and secondly noting that the nature of the business requires large items of capital equipment that cannot be economically moved, resulting in the high relocation costs. Pain J noted that despite the high relocation costs, for this particular business it did not result in a windfall for the business owners.

Accordingly, where a dispossessed business owner advances a claim for compensation on a relocation basis, subject to the desire to relocate being a reasonable one in the circumstances of the claimant, he or she can rightfully advance a claim for compensation for the total cost of that relocation, even if it would appear to superficially put the business into a more advantageous position.

However, a common sense approach should obviously apply to this proposition when used in negotiations with the resuming authority.
CLAIMING COSTS AND LOSSES IN THE SHADOW OF ACQUISITION

A key consideration for business owners in seeking just compensation is the value of any profits lost or costs incurred in the ‘shadow’ of the proposed acquisition (“shadow losses”). That is to say, losses and costs incurred before the actual compulsory acquisition, but caused by it.

Shadow losses are a discrete area of compensation available to businesses in both relocation and extinguishment claims, and are now well established in NSW cases. The concept of shadow losses was articulated in *Shun Fung*. In assessing whether such a loss is compensable, the Privy Council held that the loss must:

a) be caused by the resumption;
b) not be too remote; and

c) be reasonably incurred.

On causation, the Privy Council held at 135-138:

“...if business losses arising in the period post-incorporation of the scheme and pre-resumption are to be left out of account, a claimant will not receive compensation for those losses, although they are attributable to the scheme. If the threat of resumption drives away customers who need long-term assurance of supply, on resumption no compensation would be payable for this loss of profits. Future losses of profits would be recoverable but not the losses already incurred … In everyday terms, loss caused by the threat of an act, which later eventuates would

normally be regarded as loss caused by the act just as much as loss after the act has happened.”

On reasonableness, their Lordships found:

“If a reasonable person would have continued to trade normally, the land owner cannot claim for compensation for losses incurred by his refusal to accept any more orders. He cannot simply let his business run down, and then seek to recover compensation for his losses.”

*Shun Fung* has been applied in several NSW cases for shadow loss claims such as in *Caruana v Port Macquarie-Hastings Council* [2007] NSWLEC 109 where lost rental profits caused by the shadow of the resumption were awarded, as were the professional costs of attempting to negotiate an agreement with the resuming authority 24 months prior to compulsory acquisition.  

CONCLUSIONS

In addition to the legal considerations discussed, when deciding whether to advance a business relocation claim through negotiation, business owners (and particularly smaller businesses) should be conscious of the costs that will be incurred in retaining valuers and obtaining legal advice. While reasonable professional costs are recoverable under s59, often this occurs much later in the process, which can pose significant cash flow problems for smaller companies.

Further, business owners should also be aware of the significant distraction that the negotiation process for a relocation claim presents to the day-to-day operations of a business. Often it involves significant uncertainty as to the identification of an alternate site and so the future of the business itself.

9 See for example *Murlam Pty Limited v Road and Traffic Authority of NSW* [2008] NSWLEC 1365 at 97 where pre-acquisition business losses were compensated applying the principles of *Shun Fung*; and *Peter Croke Holdings Pty Limited v Roads and Traffic Authority of NSW* (1998) 101 LGERA 30 at 63.