

'REBUILDING NSW' ON PRIVATE LAND: WHO HAS COMPENSATION RIGHTS ?

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The NSW government is embarking on a major overhaul of the State's transport infrastructure.

The 2014-15 budget papers highlighted an estimated \$31 billion in infrastructure-related capital works to be undertaken in the next four years across both regional and metropolitan areas (*NSW Budget 2014-15, Paper No. 4*).

Some of the scheduled works (for instance, the WestConnex project) are already well advanced, whilst others (roads connected with the proposed airport at Badgerys Creek) are still being planned. Despite the apparent benefits of, and necessity for, infrastructure investment in NSW, an inevitable consequence will be the compulsory acquisition of land for the purposes of each project.

With many of these infrastructure developments occurring in already developed precincts, clients will ask practitioners whether they have a compensable interest in land to be taken. In most cases, compensable interests are easily identified as either freehold, leasehold or other legally secured interests, such as mortgages.

Where businesses (in particular, family businesses) are conducted on land to be acquired, informal lease or licence arrangements may often exist.

In these cases it may be difficult to establish whether the occupying business has a compensable 'interest in land' in addition to that of the freehold owner.

This article reviews the relevant and recent case law examining the meaning of an 'interest in land' under the *Land Acquisition (Just Terms Compensation) Act 1991* ('*Just Terms Act*').

In particular, it explores how the courts have dealt with cases involving informal leases and licence arrangements, which are common in family businesses.

Snapshot

- The NSW government plans to undertake over \$31 billion in transport infrastructure-related capital works over the next four years.
- As part of this program, compulsory acquisitions are inevitable and persons or businesses whose interests in land are 'divested, extinguished or diminished' are entitled to compensation under the *Land Acquisition (Just Terms Compensation) Act 1991*.
- An 'interest in land' is broadly defined and may include informal lease and licence arrangements common to businesses operating on land owned by a related party or parties.

Just Terms Act

Many public authorities in NSW are invested with statutory power to compulsorily acquire land for approved public purposes. For the forthcoming infrastructure projects announced by the State, the most relevant agency is Roads and Maritime Services NSW ('RMS'), which has power to acquire public and private land under and for the purposes of the *Roads Act 1993* (NSW) (see s 177).

The processes by which these acquisitions must occur, and the nature and availability of various heads of available compensation, are consolidated and codified in the *Just Terms Act*.

A right to compensation under the *Just Terms Act* is provided to affected owners who have had their 'interest in land ... divested, extinguished or diminished' as a consequence of the compulsory acquisition (see s 37).

The *Just Terms Act* defines a compensable 'interest in land' (s 4) as:

- a legal or equitable estate or interest in the land; or
- an easement, right, charge, power or privilege over, or in connection with, the land.

Judicial consideration

Preston CJ's judgment in *George D Angus Pty Ltd v Health Administration Corporation* (2013) 205 LGERA 357 (affirmed by the NSW Court of Appeal in *Health Administration Corporation v George D Angus Pty Ltd* [2014] NSWCA 352) ('*George D Angus Pty Ltd*'), helpfully draws together many of the earlier cases and summarises the essential qualities of a compensable interest in land.

The main definition of an interest in land incorporates the most commonly affected interests, being legal estates held in freehold, and leases, whether statutory or derived by common law. It also recognises equitable interests held by beneficiaries under trusts.

With respect to the second category of interests (easements, rights, charges, powers and privileges), Preston CJ referred to the general principles articulated by Meagher JA in *Hornsby Council v Roads and Traffic Authority (NSW)* (1997) 41 NSWLR 151 ('*Hornsby Council*'), noting that they must be either proprietary or quasi-proprietary in nature and a corporeal or incorporeal hereditament. Examples of such rights include 'easements, charges, profits à pendre, profits à rendre, licences coupled with interests, etc' (*Hornsby Council* at [155]). It is important to note that Meagher JA's list offers guidance, is not exhaustive, and does not overcome the natural meaning of the words used in the statutory definition.

Informal leases

Registered leases plainly fall within the first class of compensable interests. If, however, an informal, unregistered or even undocumented arrangement is in place, a close analysis of the relationship with the owner or head tenant will need to be undertaken to identify whether a compensable interest exists.

In most cases, the informal arrangement will be a form of tenancy or licence between related parties, frequently a family or associated business. Often bound by a relationship formed in blood or trust rather than commerce, parties in these cases may tend to prefer to avoid the complexities and costs related to the formal drafting, execution, and registration of legal agreements. Even though a lease has not been documented or registered, it may nevertheless be a leasehold interest in substance and fall within the first class of compensable interest under either common law or as a statutory tenancy-at-will. Central to the advancement of such a claim will be the need to demonstrate that the arrangement had the necessary features of a tenancy, in particular the requirement of exclusive possession.

The Land and Environment Court considered these matters in *Peter Croke Holdings Pty Ltd v Roads and Traffic Authority* (1998) 101 LGERA 30 (*'Peter Croke'*). The first and second applicants shared a common director and majority shareholder, the first applicant had held the acquired land in fee simple and had informally provided the use of the land to the second applicant for 20 years for the purposes of a mobile and caravan display and sales centre.

Bignold J, taking into account the relationship between the applicants and accepting evidence of the second applicant's continuous and secure use of the land, determined that such an arrangement qualified as a legal and equitable estate being either a periodic tenancy from year to year or a statutory tenancy under s 127(1) of the *Conveyancing Act 1919* (NSW).

The compensable nature of such an informal arrangement has been confirmed more recently in *George D Angus Pty Ltd*. A husband and wife used separate corporate entities to own land and operate a business on that land, offering gynaecological and obstetric services. Similar to the facts of *Peter Croke*, the business had operated on the land for over 10 years under informal terms, which included the payment of periodic rent.

Noting that no agreement had been reached with respect to the duration of the arrangement, Preston CJ concluded on the affidavit evidence tendered that it was nevertheless the applicant's intention to provide the business with exclusive possession of the land for as long as required to offer its services. On

this basis, his Honour determined that the arrangement was also an express tenancy agreement under s 127(1) of the *Conveyancing Act* and therefore a compensable interest in the land.

Is it a right, power or privilege over, or in connection with, the land?

Even if the informal arrangement doesn't appear *prima facie* to have the necessary elements of a lease, it may still satisfy the second class of interest in land, being a 'right ... power or privilege over, or in connection with, the land'.

In *West v Roads and Traffic Authority of New South Wales* (1995) 88 LGERA 266, the owners, through a corporate entity, operated a marketing services business from their home without a formal lease or licence. The business sought to claim compensation for economic loss suffered as a result of the disruption caused by the acquisition. Due to a lack of exclusive possession, Talbot J opined that, 'at the highest', the interest was a 'contractual licence' with an obligation to pay certain expenses. Nevertheless, considered together, Talbot J concluded that the arrangement amounted to a 'privilege' over or in connection with the land, and therefore a compensable interest under the *Just Terms Act*.

Licences

It is possible that a contractual licence may, in some circumstances, be considered, by itself, an interest in the land. In the Queensland decision of *Sorrento Medical Service Pty Ltd v Chief Executive, Department of Main Roads* (2007) 151 LGERA 328 (*'Sorrento'*), the Queensland Court of Appeal offered some helpful guidance in determining whether such licences have a proprietary and therefore compensable quality.

The Court was asked to determine whether the appellant had a compensable interest in resumed land over which he held a contractual licence under a lease for the exclusive use of certain car parking spots for the purposes of his medical practice. Chesterman J and McMurdo P, (Holmes JA disagreeing), defined the licence to be a proprietary 'right in relation to the land' and therefore compensable. Chesterman J held that even though the appellant's right was not a right in 'real property' it was nevertheless a 'right of property', which would attract injunctive relief if breached and could be assigned with the lessor's approval (at [338]).

Sorrento may provide support for an argument that such contractual rights

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may be covered under the broadly defined second limb of the definition of 'interest in land'. Cases that may also bear consideration involve exclusive suppliers of materials to a business where, as related parties, the loss of the land to which the materials are supplied or at which they are processed, will involve financial loss to the supplier.

Conclusion

Merely because a business does not occupy land under a formal legal arrangement, the resumption of that land and the potential extinguishment of that business may nonetheless be compensable.

In other cases, the taking of land by the State may give rise to substantial loss to parties with no obvious or immediate interest in the land. These parties may enjoy a 'right, power or privilege' over the land, by reason of other related party arrangements and, in some cases, they may have a claim to compensation.

Although accepted as an essential power needed to facilitate development in any modern state, the compulsory taking of land causes dislocation, stress and financial loss whenever it occurs.

In determining who may be entitled to compensation, an important starting point involves focus on two of the key objects of the *Just Terms Act*. First, 'to ensure compensation on just terms for the owners of land that is acquired by an authority of the State when the land is not available for public sale' (s 3(1) (b)), and, second, to provide an amount of compensation 'to which a person is entitled under this Part [which] is such ... having regard to all relevant matters under this Part, [that] will justly compensate the person for the acquisition of the land' (see s 54(1)). **LSJ**