

Common misconceptions over compensation for injurious affection arising from the reservation of land

Compensation for injurious affection arises from the reservation of land under planning schemes. Compensation for injurious affection is often confused with compensation rights that arise through the compulsory taking of land.

The restrictions and limitations to rights to compensation for injurious affection have been the subject of public disquiet and concern. Some of those concerns were recently considered by the Law Reform Commission of Western Australia.

When does the right to claim arise?

A right to claim compensation does not automatically arise upon the reservation of land under a planning scheme.

Compensation for the reservation of land cannot be claimed until one of the following occurs:

- 1 The land is first sold following the date of reservation;
- 2 The responsible authority refuses an application made under the planning scheme for development approval; or
- 3 The responsible authority grants approval of development on the land subject to conditions that are unacceptable to the applicant.

A claim for compensation has to be made within six months of one of these trigger

events. Some of the issues that arise in a compensation claim are discussed below.

Subsequent purchasers

The Western Australian Planning Commission (**WAPC**) has adopted the view that the purchaser of land that is already reserved does not have an entitlement to claim compensation. The leading High Court authority of *Temwood* however left this issue somewhat open so it is not clear whether the WAPC's position is legally correct.

In light of the uncertainty, the Law Reform Commission has recommended that the entitlement to compensation may be formally assigned by the original owner to a purchaser of reserved land and to allow a discretion to the Minister to extend the time limit for making of a compensation claim. The State Government has not yet to announce its position in respect of these recommendations.

Loss of compensation rights through subdivision or other planning processes

The owner of land affected by a reservation is not entitled to claim compensation following any decision made in relation to a subdivision application. Furthermore, the *Temwood* decision confirmed that a responsible authority, such as the WAPC, can validly impose conditions on a

subdivision approval requiring the reserved land to be ceded without compensation, thereby extinguishing the owners rights to claim.

It is of note that an owner seeking to rezone land, or seeking approvals for a structure plan, may be prevailed upon by the responsible authority to cede reserved land in order to gain approval thereby waiving any rights to compensation.

Compensation for injurious affection is not the same as compensation upon a compulsory taking of land

The reservation of land for a public purpose does not impose any enforceable obligation on the responsible authority to compulsorily acquire the land and pay compensation.

Election to acquire not the same as compulsory taking

Although the responsible planning authority (such as the WAPC) is under no obligation to compulsorily take reserved land, where a claim for compensation is made following a development application (which is refused or subject to unacceptable conditions) the responsible authority may elect to purchase the reserved land in lieu of paying compensation. If the responsible authority elects to acquire the land, instead of paying compensation, it may acquire the land

About Lavan Legal:

Lavan Legal is the largest independently owned law firm in Western Australia, made up of more than 200 staff including 22 partners.

Our Planning, Environment and Land Compensation Team offers advice on environmental enforcement and licence conditions, legislation and its impacts on proposed developments, advising government on amendments to planning legislation and sensitive developments which include rail freight facilities and claypit redevelopments. Injurious affection caused by the reservation of land is a frequent issue facing our clients and we represent them in the State Administrative Tribunal for compensation for their land.

We understand the intricate web of environmental laws encompassing all levels of regulation from Commonwealth to Local Government. We service an established client base which includes leading town planners, engineers and environmental consultants, as well as large public and private developers, local councils and State Government authorities.

Our vast experience in land compensation, planning and environmental law allows us to meet all our clients' needs with integrated and highly efficient services.

for the purchase price determined as the unaffected value of the land disregarding the effects of the planning scheme as if the land had never been reserved.

The unaffected value is determined as the market value of the reserved land only and not what the value of the land may be to the owner. It does not include other items that could have been compensated for if the land had been compulsorily taken.

Highest and best potential of land for valuation purposes

The determination of the unaffected value of land is based on the market value of the reserved land assuming that the reservation of the land is to be disregarded.

Although the effects of the reservation are to be ignored, the issue that frequently arises is what is highest and best potential use the reserved land would have had but for the reservation. The assessment often needs to address, on a hypothetical basis, what rezonings and approvals would have been required, and what other requirements such as referral to environmental agencies would have applied.

Prior notice of intention to sell

If the owner of the land at the time that land is reserved intends to sell the land and claim compensation following such sale, the owner is required to give prior notice of the intention to sell to the responsible authority. Notice must be provided prior to settlement.

The Law Reform Commission has suggested there is little justification for the requirement for prior notice to be given and has recommended that the relevant provisions for giving prior notice of intention be repealed.

Claim following first sale after reservation - other requirements

The owner claiming compensation following first sale after the reservation of the land must also show that the owner sold the land in good faith, took reasonable steps to obtain a fair and reasonable price for the land and sold the land at a depreciated price.

Claim following development application – good faith requirement

Where a claim is made following the refusal of a development application (or where

conditions of approval are unacceptable to the applicant) the claimant must show that the development application was made in good faith. The Supreme Court has determined that 'good faith' in this context means that the applicant has a genuine intention to proceed with the proposed development if it were to be approved.

Conclusion

The principles concerning compensation for injurious affection is a difficult area with considerable uncertainty and risks for owners and prospective purchasers. A failure to investigate the issues of compensation could cause loss of or waiver of potential compensation rights. Owners as well as prospective purchasers and developers should seek appropriate legal advice on these matters to protect and advance their interests.

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Building a Better Planning System Consultation Paper March 2009

The Department for Planning and Infrastructure (**DPI**) released a consultation paper titled 'Building a Better Planning System' on 18 March 2009 (**Consultation Paper**).

The Consultation Paper is structured around six key areas that the DPI have identified for reform, being:

- simplify planning approvals;
- more effective planning instruments;
- prioritise major projects;
- integrated coordination of infrastructure and land use planning;
- a comprehensive regional planning framework; and
- strengthen governance and institutional arrangements.

A number of recommended priority actions have been listed in the Consultation Paper, including such actions as:

- simplifying and streamlining of the structure plan process and requirements, as well the removal of dual approvals for structure plans;
- integrating of State planning and environmental approvals, and associated appeals processes;
- providing call-in powers for major land and housing projects of State and Regional significance; and
- developing a strategic vision and plan for the State.

The Consultation Paper can be accessed in full at <http://www.wapc.wa.gov.au/Public+comment/1780.aspx>. DPI has invited written submissions on the Consultation Paper by 1 May 2009. Any submission should be forwarded electronically to betterplanning@dpi.wa.gov.au or via post to the following address:

Submission: Better Planning
Strategy Policy and Management Division
Department for Planning and Infrastructure
Albert Facey House
469 Wellington Street
PERTH WA 6000

Should you require any assistance on making a submission to the DPI on the Consultation Paper, Lavan Legal is more than willing to help.

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Carnaby's Cockatoo and 'Significant Impact' under the *Environment Protection and Biodiversity Conservation Act 1999 (Cth)*

Carnaby's Cockatoo

Carnaby's Cockatoo or *Calyptorhynchus latirostris* is listed as endangered under the *Environment Protection and Biodiversity Conservation Act 1999 (Cth)* (**EPBC Act**) and as such are considered a threatened species within the meaning of the EPBC Act.

Officers from the Department of the Environment, Heritage, Water and the Arts (**DEHWA**) have contacted several landholders and developers in the north-west area of Perth and suggested that the clearing of foraging habitat of the Carnaby's Cockatoo could constitute a 'significant impact' under the EPBC Act, and accordingly, any clearing of foraging habitat more than one hectare in area should be referred to DEHWA for consideration as to whether the clearing is a 'controlled action'.

Section 18 of the EPBC Act provides that a person cannot take an action that has or will or is likely to have a 'significant' impact on listed endangered species such as the Carnaby's Cockatoo. The maximum civil penalty for breaching this provision by a corporation is \$5.5 million.

Section 68 of the EPBC Act provides that actions that have a 'significant impact' on threatened species such as the Carnaby's Cockatoo must be referred to the Minister for Environment for determination as to whether the action is a 'controlled action' within the meaning of the EPBC Act.

'Significant impact' is not defined in the EPBC Act. DEHWA have released Guidelines to ascertain whether a development has a 'significant impact' on matters of national environment significance such as habitat of the Carnaby's Cockatoo (**Significant Impact Guidelines**).

The Significant Impact Guidelines state that in determining the nature and magnitude of an action's impacts, it is important to consider matters such as:

- the sensitivity of the environment which will be impacted;
- the timing, duration and frequency of the action and its impacts;
- all on-site and off-site impacts;
- all direct and indirect impacts;
- the total impact which can be attributed to the action over the entire geographic area affected, and over time;
- existing levels of impact from other sources; and
- the degree of confidence with which the impacts of the action are known and understood.

There have been no specific guidelines issued by DEHWA with respect to the Carnaby's Cockatoo, and in particular, what actions would be considered to have a 'significant impact' on the Carnaby's Cockatoo.

Implications

Since it is not clear exactly what constitutes a 'significant impact', it is recommended that a technical expert is engaged on any matter involving clearing of habitat of the Carnaby's Cockatoo to provide advice on whether the proposed clearing could constitute a 'significant impact' to the Carnaby's Cockatoo.

It should be noted that non-referral to DEHWA may result in the following:

- the Federal Minister for the Environment requesting referral of the proposal ; or
- if clearing occurs without referral to DEHWA, civil prosecution in the Federal

Court for taking an action that has or will or is likely to have a 'significant' impact on listed endangered species such as the Carnaby's Cockatoo without the requisite referral to, and/or approval, from DEHWA.

It is recommended that any developments involving clearing of possible Carnaby's Cockatoo habitat that prior advice is sought to determine whether referral will need to be made to DEHWA.

Future Developments

The Urban Development Institute of Australia (WA Division) is currently lobbying the Federal Minister for the Environment to provide clear guidelines on what extent of clearing will constitute a 'significant impact' under the EPBC Act.

DEHWA is currently also preparing a recovery plan for Carnaby's Cockatoo which may also provide clarity on what will constitute a 'significant impact' to the Carnaby's Cockatoo.

It may be a case of 'watch this space' to see whether the uncertainty surrounding this issue is finally clarified by DEHWA and/or the Federal Minister for the Environment.

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We want your feedback

If you have topics or issues that you would like the team to write about please let us know. Suggestions can be sent to Asha Clucas at asha.clucas@lavanlegal.com.au
Your personal details

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Department of Environment and Conservation Enforcement and Prosecution Policy May 2008

Summary of Policy

The Department of Environment and Conservation (**DEC**) Enforcement and Prosecution Policy (**Policy**) provides guidance as to how the DEC will progress environmental offences.

The Policy will be applied by the DEC in dealing with the community in regard to matters that it regulates. The Policy states that it particularly applies to:

- industry and commercial enterprises, whether regulated or unregulated;
- members of the public;
- Federal, State and local government agencies;
- non-government organisations and interest groups;
- legal practitioners; and
- DEC officers.

The Policy lists the principles that the DEC must take into account when deciding whether to take enforcement action. These include:

- where biodiversity or the environment requires protection or other relevant objectives under DEC legislation require enforcement action;
- when the statutory prerequisites for that enforcement action are satisfied. In any case where a breach of the legislation is established, some form of written enforcement action will result;
- prosecution is to be employed where it is the appropriate response to a particular circumstance and is not an enforcement option to be applied only as a last resort;
- the fundamental objective of prosecution is to bring to justice those who commit offences, to punish those who deserve punishment for their offences, to provide expeditious compensation and restitution to victims of crime and to protect or restore the environment and protect the community;
- DEC officers do not have authority to condone or authorise the continuation of an offence once detected;
- enforcement action will be taken in proportion to the magnitude of the alleged offence and/or the environmental impact, taking into account the conduct of the parties and implications for the administration of the legislation;
- decisions on enforcement action will be taken in a timely fashion;
- the DEC will have regard to the likelihood that the desired outcome will be achieved in a cost effective manner;

- requirements set by enforcement action will be sufficiently clear;
- DEC legislation and enforcement will be applied consistently across all sectors of the community, industry and government; and
- enforcement action will be carried out in accordance with the legislative powers conferred on the DEC.

The DEC has a discretion to determine what enforcement action will be taken. Such a determination will include consideration of who is the appropriate defendant to pursue, the appropriate enforcement action; and whether withdrawal of an enforcement action is appropriate in the circumstances.

In selecting the appropriate defendant, the DEC will consider a range a criteria, including:

- who was primarily responsible for the offence;
- in the case of strict liability, what was the role of the potential defendant;
- potential liability of the corporation, body corporate, directors and executive officers, including vicarious liability;
- potential liability of lending institutions;
- potential liability of legal authorities and
- the likely effectiveness of court orders against the potential defendant.

The DEC has the following enforcement tools available to it in the case of breaches with the *Environmental Protection Act 1986 (WA) (EP Act)*:

- prosecution;
- infringement notice, which is a written allegation that a person has committed an offence which requires the payment of a fine or election to have the matter in court;
- caution notice/written warning;
- modified penalty notice of an alleged Tier 2 offence under the EP Act;
- statutory notices and directions that require certain actions to be taken or ceased within the specified time;
- other written notices such as an Environmental Field Notice, Management Letter or Work Improvement Notice;
- amendment to licence conditions/permit;
- physical intervention by the DEC to remedy a breach, rehabilitate and area or clean up pollution. If this occurs, the offender will be liable for the clean-up costs; and
- suspension or revocation of works approval or permit.

Choosing the appropriate enforcement action will involve an assessment of the seriousness of the incident, the voluntary action to mitigate any harm to the environment, whether the incident was notified promptly and the extent of cooperation with the DEC.

Prosecutions by the DEC will involve a consideration of usual prosecution principles including whether:

- there is sufficient evidence to establish a prima facie case.
- whether the proceedings are in the public interest. This will include an examination of the factors for and against the prosecution, such as the need for punishment and deterrence, the nature of the alleged offence and the alleged offender's previous history of environmental offences or breaches.
- whether there are responsible prospects of securing a conviction against the alleged offender.

Implications

As the DEC have such wide-ranging powers to investigate incidents and take a range of enforcement actions in respect of such incidents, it is recommended that:-

- if an incident with possible environmental consequences occurs, the incident should be notified as soon as possible to the DEC.
- if the DEC conducts an on-site investigation with respect to the incident, ensure that an environmental manager or equivalent is on-site at the same time to manage any queries and response to the DEC.
- attend to any required mitigation measures as soon as possible after the incident. This may include the engagement of environmental consultants, or similar, to determine the extent of the environmental harm caused and the clean-up measures to be undertaken.
- Cooperation with the DEC with any directions or orders with respect to the incident, and the possible associated clean-up.
- Negotiation with the DEC as to the appropriate enforcement tool to be taken, ensuring that the circumstances and nature of the alleged offence and history of environmental offences are made aware to the DEC.

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Property Services Group Planning, Environment and Land Compensation Team

The Lavan Legal Property Services Group consists of dedicated legal teams specialising in:

- Planning, Environment and Land Compensation
- Property
- Tax

Our teams take the time to understand our clients, their businesses and the industries in which they operate. We tailor our teams to suit our clients' business needs, ensuring we provide the most effective and appropriate legal services.

Planning, Environment and Land Compensation Team

Specialising in town planning, environmental and land compensation law, our team provide advice on development and subdivision proposals, the conduct of compensation claims and appeals against planning and environmental decisions. We advise on issues of legal compliance, project management and implementation, as well as providing representation in court and tribunal cases.



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