IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE
COMMON LAW DIVISION
VALUATION, COMPENSATION & PLANNING LIST

Not Restricted

S ECI 2019 00173

ANTHONY CALIGIURI — First Plaintiff

J.I.I. INVESTMENTS PTY LTD (ACN 624 255 812) — Second Plaintiff

v

ATTORNEY GENERAL (ON BEHALF OF THE STATE OF VICTORIA) & ORS (according to the schedule attached) — Defendants

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JUDGE:	GARDE J
WHERE HELD:	Melbourne
DATES OF HEARING:	6-8 May 2019
DATE OF JUDGMENT:	19 June 2019
CASE MAY BE CITED AS:	Caligiuri & Anor v Attorney General (on behalf of the State of Victoria) & Ors (No 2)
MEDIUM NEUTRAL CITATION:	[2019] VSC 365

JUDICIAL REVIEW – Land acquisition – Procedural fairness – Whether procedural fairness requires persons with an interest in land to be acquired to be heard before the Governor in Council can certify on the recommendation of the Minister that it is unnecessary, undesirable or contrary to the public interest for land to be reserved under a planning instrument for a public purpose – Whether obligations of procedural fairness arise before an acquiring authority can decide to serve a notice of intention to acquire land or notice of acquisition – Whether a notice of intention to acquire land is invalid as a result of miscalculation of the area of an easement – Whether a notice of acquisition is invalid due to failure to serve notice of intention to acquire on a party with an interest in the land – *Land Acquisition and Compensation Act 1986* (Vic) ss 1, 3, 4, 5(1), 5(3), 6, 7, 8, 9, 10, 12, 19, 21–24, 26, 105 – *Planning and Environment Act 1987* (Vic) ss 6(2)(c), 20(3)(a)(i).

APPEARANCES:	Counsel	Solicitors
For the Plaintiffs	Mr S Morris QC with Mr E Nekvapil and Ms A Staker	Macpherson Kelley
For the First and Second Defendants	Mr L Brown with Mr R Chaile	Victorian Government Solicitors Office
For the Third and Fourth Defendants	Mr S Goubran with Ms E Murphy	Russell Kennedy

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HIS HONOUR:

Introduction

1 The plaintiffs, Anthony Caligiuri and J.I.I. Investments Pty Ltd (ACN 624 255 812) ('JI') seek judicial review and declaratory relief concerning four decisions ('the decisions') affecting land forming part of a farm at 170 and 174 Donovans Lane, Beveridge ('the property'). The third defendant, Melbourne Water ('MW') and the fourth defendant, Yarra Valley Water ('YVW') are water authorities ('the authorities'), and have served notices to compulsorily acquire 5.64 ha of land ('the acquisition area'), together with 3.89 ha of easements. They propose to construct water storage tanks and supply infrastructure ('water infrastructure') on and near a hill known as Bald Hill on the property as part of the Yan Yean to Bald Hill Pipeline Project ('the project'). JI is a developer and has purchased the property from the registered proprietor, Gregory Heffernan ('the vendor'). It intends to develop the property as a residential subdivision.

2 The decisions challenged by the plaintiffs are:

(a) the decision on 30 October 2018 of the Attorney General as the Minister of the Crown ('the Minister') administering the *Land Acquisition and Compensation Act 1986* (Vic) ('LAC Act') to recommend for certification by the Governor in Council, that reservation of the acquisition area for a public purpose under a planning instrument was unnecessary, undesirable or contrary to the public interest under s 5(3) ('the recommendation');

(b) the Order in Council on 30 October 2018 of the Governor in Council certifying that reservation of the acquisition area for a public purpose under a planning instrument was unnecessary, undesirable or contrary to the public interest under s 5(3) ('the certification');

(c) the decision on 26 November 2018 of the authorities to serve a notice of intention to acquire the acquisition area and easements under s 6; and

(d) the decision on 20 February 2019 of the authorities to publish a notice of

acquisition in relation to the acquisition area and easements under s19.

3 The principal issue in the proceeding is whether the plaintiffs are entitled to be heard by the relevant decision maker before each of the challenged decisions can validly be made. Apart from two matters that I will address later, the plaintiffs do not seek to impugn the challenged decisions on other administrative law grounds.

The authorities

4 MW is a wholesale supplier of water to retail water corporations including YVW, and is concerned with the overall transfer of bulk water around Victoria. YVW is concerned with the retail supply of water within its service area, and is supplied with bulk water by MW. MW and YVW are empowered to acquire land by compulsory process.[1]

5 The authorities seek to provide additional water infrastructure to cater for anticipated population growth in the northern and western growth corridors of Melbourne. The project involves the progressive construction of three drinking water storage tanks and one non-drinking water storage tank on Bald Hill to be serviced initially by YVW's distribution network and later by a 20 km pipeline from the Yan Yean Water Treatment Plant.

The property

6 The property has a total land area of 107.8 ha and has access to Donovans Lane. It is situated in the northern growth corridor of Melbourne and is within a major growth area in Victoria. Following subdivision, JI seeks to achieve a subdivision of 900–1,200 residential lots.

7 The property is within the municipal district of Mitchell Shire Council ('Council') and is subject to the Mitchell Planning Scheme ('planning scheme'). It is within the area of the Lockerbie Precinct Structure Plan ('PSP'). The PSP was approved in May

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1 *Water Act 1989* (Vic) s 130.

2012 as a part of the planning scheme.

The PSP

8 The PSP is a strategic plan that guides the delivery of the future urban environment. It applies to 1,122 ha of land in three municipalities including the property, and sets out the conditions that must be met by future land use and development.

9 The PSP vision speaks of 'a modern, new conurbation that builds upon and enhances existing significant natural assets on the land including the topographic high point of Bald Hill, providing opportunities for high-amenity residential environments with attractive views'.[2] One objective of the PSP is to provide 'a variety of landscape character themes throughout the precinct with landscaping to be complementary to natural areas' including Bald Hill.[3] Another objective is to 'embrace the potential' of Bald Hill to form a 'green spine of open space that allows walking and cycling to the Principal Town Centre'.[4] The Image, Character & Housing plan of the PSP refers to the Northern Precinct as 'dominated by Bald Hill'.[5]

10 Guidance within the PSP as to image and character states that street layout should generally be aligned 'to maximise connection and views to key destination points' such as Bald Hill, and that housing along Bald Hill should be 'site-responsive and demonstrate environmentally sensitive designs, taking account of the topography and environmental conditions'.[6] As to biodiversity and natural systems, the PSP guidelines state that the public use and enjoyment of Bald Hill should be 'maximised' as it is an 'important visual, conservation, ecological and recreation resource'.[7]

11 The PSP states that the Lockerbie principal town centre will have 'a strong

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2 Victorian Planning Authority, *Lockerbie Precinct Structure Plan* (May 2012), 5.
3 Ibid.
4 Ibid.
5 Ibid 10.
6 Ibid 11.
7 Ibid 15.

connection to the natural environment and promote walking and cycling as an important mode of transport'. This is to be achieved by 'maximising view lines and road and footpath connections to existing natural areas' including Bald Hill.[8] Under the objective 'Respecting the environment', the guiding principle of the PSP includes to 'incorporate natural or cultural landscape features' such as 'topographic features' into the design of the town centre as well as to 'integrate views to and from the existing landscape and into the design of the town centre'.[9] The PSP goes on to describe 'visual and physical links to the amenity' of Bald Hill and of 'maximising views to Bald Hill' as organising elements.[10]

12 The PSP contains a plan showing an area on or near Bald Hill as 'proposed water tanks by Yarra Valley Water'.[11]

The acquisition

13 The effect of the notices served by the authorities is to acquire interests in the property for the purpose of constructing water storage tanks and water infrastructure on and near Bald Hill, as listed and shown below:

MW

(a) all interests in Reserve No 1 (5.64 ha);

(b) an easement for drainage and carriageway purposes (0.24 ha) shown as E-2 (to be shared with YVW);

(c) an easement for water supply purposes (2.53 ha but incorrectly shown on the notice of intention to acquire as having an area of 0.67 ha) shown as E-3;

YVW

(d) an easement for water supply purposes (0.51 ha) shown as E-1;

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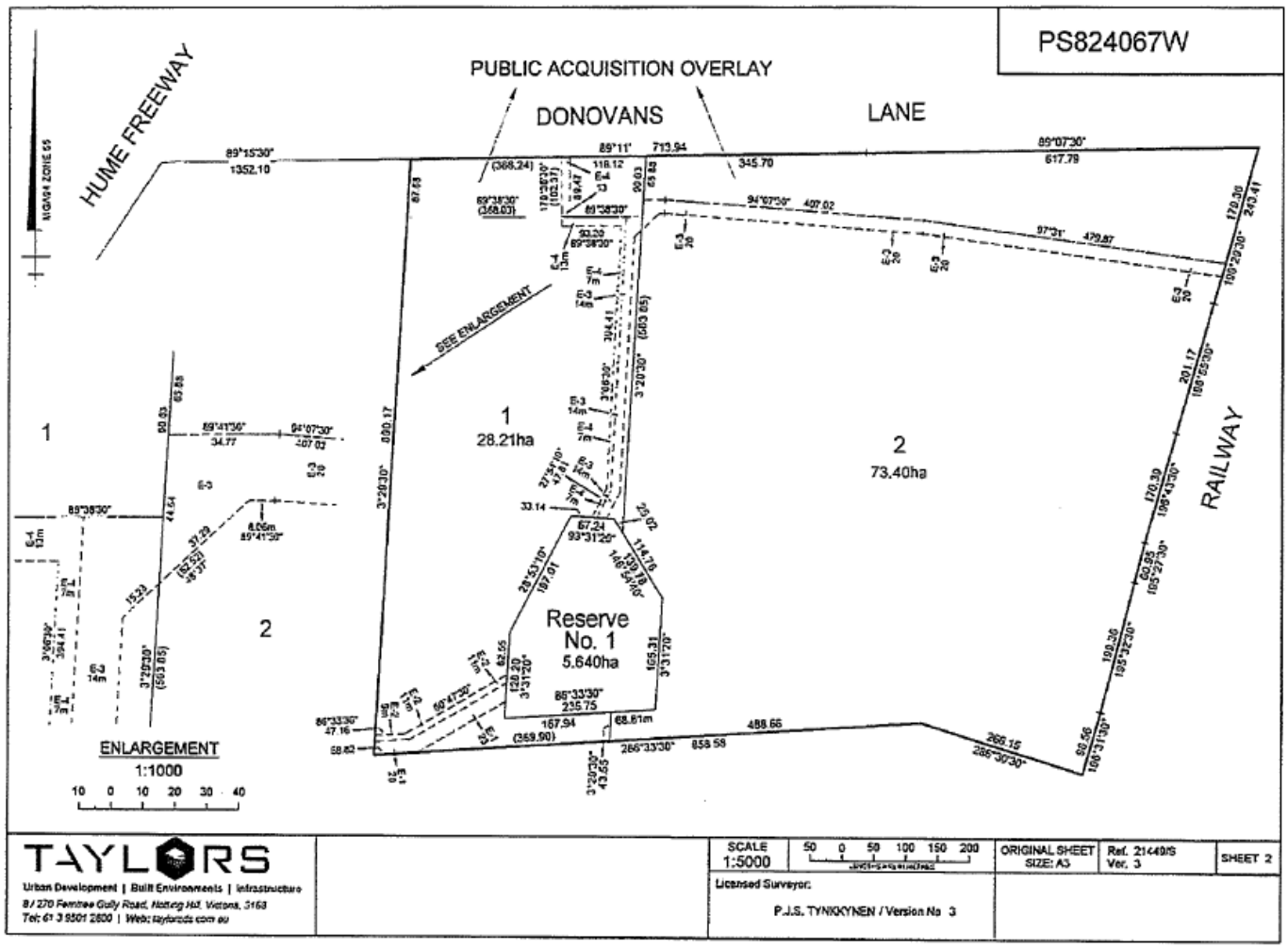
8 Ibid 18.
9 Ibid 19.
10 Ibid 20.
11 Ibid 10.

(e) an easement for water supply and carriageway purposes (0.24 ha) shown as E-2 (to be shared with MW); and

(f) an easement for water supply purposes (0.56 ha) shown as E-4.



Plaintiffs' objections to the acquisition

14 The plaintiffs objected to the acquisition and submitted that there were matters of substance that they wished to put to the decision makers as to where the water infrastructure should be sited and as to why the tanks should be located underground, but were not afforded the opportunity of doing so.

15 They submitted that the visibility of the water tanks was a matter directly affecting their financial interest in the subdivision of the property, and that the overall thrust of the PSP was that Bald Hill was one of the two principal landscape features that provide visual amenity to the precinct. They pointed to PSP recommendations that:

(a) the street layout should generally be aligned to maximise connection in views to key destination points such as Bald Hill;

(b) housing along Bald Hill should be site-responsive and demonstrate environmentally sensitive designs, taking account of topography and environmental conditions;

(c) biodiversity and natural systems should be preserved to maximise the public use and enjoyment of Bald Hill as an important visual conservation, ecological and recreation resource; and

(d) open space should maximise views to Bald Hill.[12]

16 The plaintiffs contend that the construction of the water infrastructure close to the summit of Bald Hill would significantly damage the visual amenity of lots in the proposed subdivision and be detrimental to the objectives of the PSP.

17 The steps taken by the authorities prior to acquisition are largely evidenced in documents. There were some relatively minor differences between witnesses as to what was said at meetings.

The steps taken by the authorities to compulsory acquire

Pre-recommendation meetings and actions

18 In October 2017 the authorities actively began to progress the project. In December 2017, MW sent a bulletin to residents surrounding Bald Hill and the proposed pipeline, including the vendor, advising of the construction of the pipeline from the Yan Yean Water Treatment Plant to the proposed Bald Hill tank site with construction to commence in 2021.

19 On or around 12 December 2017, Rohan Escreet, a senior MW project manager and civil engineer, met with the vendor at his house to seek to buy land for the water

12 *Precinct Structure Plan* (n 1) 11, 15, 20.

infrastructure, and to discuss the project. Mr Escreet provided the vendor with copies of design plans prepared by Jacobs Engineers, and by surveyors ('the Jacobs' plans') showing the location of the Bald Hill tank site and the pipeline route.

20 On or about 5 February 2018, the vendor accepted an offer made by Mr Caligiuri to purchase the property ('the heads of agreement'). The heads of agreement provided for a 90 day due diligence period. If satisfied after due diligence, Mr Caligiuri could acquire the property on the basis of the conditions set out in the heads of agreement.

21 On 28 February 2018, Mr Caligiuri lodged a caveat to give notice of his interest in the property. The caveat claimed a freehold estate in the property arising from the heads of agreement.

22 Mr Caligiuri retained DPM Consulting Group, consulting engineers ('DPM Consulting') to conduct the due diligence for him. They prepared a preliminary development concept plan, and a summary land use budget for residential development. As at the completion of the due diligence, no step had been taken by the authorities to acquire the acquisition area. Mr Caligiuri understood that there was no certainty that the project would actually take place.

23 On or about 14 March 2018, John Mathios of DPM Consulting met with Mr Escreet and other MW officers. They discussed the location of roads and easements on the development concept plan, and the works proposed for Bald Hill. However, Mr Escreet and the other officers did not provide any more detail of the proposed works than was publicly available, as they were not satisfied that Mr Mathios was acting on behalf of the owner, or a future owner of the property.

24 On or about 19 April 2018, YVW provided DPM Consulting with preliminary servicing advice ('servicing advice') in relation to the property. The servicing advice stated that in 2019 the property was planned to be provided with drinking water from the future Bald Hill Reservoir, with non-drinking water available in 2028. It also stated that up to three drinking water storage tanks would be constructed on the eastern slope of Bald Hill - a 10 ML tank in 2019, and tanks of 10 ML and 20 ML

capacity at a future time. An additional tank would be provided for non-drinking water. A pumping station would be required and would be located at Bald Hill or another location.

25 In about May 2018, MW offered to purchase land from the vendor. The vendor rejected the offer.

26 MW decided to expedite acquisition. Mr Escreet met with the vendor on about 14 August 2018, and stated MW's intention to proceed by way of compulsory acquisition of the acquisition area without public reservation.

The sale contract

27 On 22 August 2018, Mr Caligiuri and the vendor signed a contract of sale for the property being the land contained in Certificates of Title Volume 9072 Folios 040 and 041 ('the sale contract'). The Jacobs' plans were incorporated into the sale contract, together with the Bald Hill Reservoir – Concept Design plan provided by YVW.

28 The sale contract is a terms contract with settlement to occur no later than 6 February 2022. Mr Caligiuri nominated JI as the purchaser under the sale contract on 26 October 2018, but remains a guarantor of JI's performance of the sale contract.

29 Special condition 16 of the sale contract notes the intention of MW and YVW to acquire the acquisition area and the associated easements over the property for the project, although the alignment and configuration of each may change. It provides:

> **FUTURE ACQUISITIONS**
>
> 16.1 The Purchaser buys the Land in the knowledge of each of the following matters (collectively 'the Future Acquisitions'), each of which have been taken into account in the determining the Price:-
>
> …
>
> (b) The intention of Melbourne Water Corporation and/or Yarra Valley Water Corporation (collectively 'the Water Corporation') to acquire the following interests in the Land for the specified purposes (collectively 'the Water Infrastructure'):-
>
> (i) easements over the Land for access to Reserve No 1 and for tenure for both the Yan Yean delivery pipeline

and/or the Kal Kallo Pump Station pipeline to Reserve No 1 to be constructed in the future (collectively 'the Water Corporation Easements'); and

(ii) Reserve No 1 for the purpose of water tanks.

The proposed easements and the configuration of Reserve No 1 are shown on the Draft Yarra Valley Water Corporation Plans, a copy of which is attached at Annexure 1 of this Contract.

16.2 The Purchaser acknowledges that, as the Water Corporations are yet to serve formal notice of their intent nor has each complied with their respective obligations under the *Land Acquisition and Compensation Act 1986* prior to so doing, the alignment and/or configuration of the interests in the Land required for the Water Infrastructure may change.

16.2 [sic] Despite the Purchaser having an interest in the Land on the signing of this Contract, the Vendor will, subject to the terms of this Contract:-

(a) conduct the compensation claims (or, where applicable, the negotiations) arising from the Future Acquisitions (including the Vendor's claim for financial loss arising from the sale of the Land in this Contract) and be solely entitled to the compensation or payments, as the case may be, when determined and paid;

…

(c) act reasonably in the conduct of these negotiations/claims and keep the Purchaser fully informed as the sale negotiations or the claim for compensation unfolds;

…

(e) if requested by the Purchaser, the Vendor must report to the Purchaser the outcome of any meetings had with or at the direction of the Water Corporation; and

(f) act on the reasonable direction of the Purchaser, including accommodating any GAIC mitigation strategies desired by the Purchaser in relation to the land required for the Water Infrastructure and including the Purchaser in any meetings with the Water Corporation.

16.3 The Purchaser will not make a claim for compensation arising from the Future Acquisitions but will do all things at the Vendor's cost which area reasonably required to enable the Vendor to conduct each of the compensation claims or negotiations and to enable the interest, when acquired, to be registered on title to the Land.

16.4 The rights to conduct the compensation claims (or, where applicable, the negotiations) arising from the Future Acquisitions will not merge in the settlement of this Contract of Sale and, subject to the terms of

this special condition 16, the Purchaser charges the Land in favour of the Vendor to protect all of its interests hereunder in respect of that part of the land located within the Public Acquisition Overlay for the outer metropolitan ring (OMR Land) and the interests in the land required for the Water infrastructure.

16.5 The parties agree that, following settlement of the Contract of Sale or a Staged Transfer, the Vendor may register a caveat to protect the charge contemplated above and the Purchaser consents to the registration of the caveat on the terms set out in Special Condition 16.4.

…

16.8 The Vendor acknowledges that the Purchaser will treat, deal, negotiate or enter into agreements with the Water Corporations relating to the alignment of any easements to be acquired by it over the Land which may lead to the Water Corporations seeking to secure its access rights by acquisition of a road, whether that be by a water corporation or another authority, rather than a carriageway easement. Regardless of the outcome of these negotiations, the Vendor will conduct the compensation claims (or, where applicable, the negotiations) with the water corporation or the other authority and be entitled to the compensation or the payment, as the case may be.

Request for certification by the authorities

30 In a letter dated 10 September 2018 signed by their respective managing directors, MW and YVW requested the Attorney General to recommend to the Governor in Council under s 5(3) of the LAC Act that the acquisition area be certified as land for which reservation for a public purpose under a planning scheme is unnecessary, undesirable or contrary to the public interest ('the certification request'). The reasons given for seeking the certification were that reservation was:

(1) Unnecessary, as the owner does not need the opportunity to contest the decision to acquire the required land, given that:

(a) the owner does not object to the sale of the required land;

(b) the land is zoned as Rural Conservation Zone and the proposed tank site is clearly marked in the [PSP];

(c) the owner has recently agreed to sell the balance of the land (which is not required by the [authorities]) to a developer; and

(d) the parties have been unable to reach an agreement for the sale of the land to the [authorities].

(2) Undesirable, given that:

(a) the [authorities] require the land to be secured by November 2018;

(b) the [authorities] must commence construction of the [water infrastructure] on the Land by March 2019 in order to meet the timelines for the [project], pursuant to which the [water infrastructure] must be operational by January 2020; and

(c) reservation of land by or under a planning scheme typically takes nine to 18 months and would therefore delay the commencement of construction on the land beyond March 2019 and would prevent the completion of the [project] within the required timeframe; and

(3) Contrary to the public interest, given that:

(a) the matters set out above at paragraph (1) above; and

(b) the benefits which will accrue to residents and the community in the northern and western suburbs of Greater Melbourne from the timely completion of the [project], to ensure that there is adequate water storage and supply in the area and urban development is supported in the planned growth area; and

(c) if the [water infrastructure] and the [project] are not completed by January 2020 this will hinder the growth and development of the surrounding area until such time as the [project] is completed.

31 The vendor is the owner referred to in the certification request as being unable to reach an agreement for the sale of the land to the authorities, but not objecting to acquisition while Mr Caligiuri is the developer. It is common ground that Mr Caligiuri was not informed that the certification request had been made.

Subsequent meetings and steps following certification request

32 On 24 September 2018, Mr Caligiuri, and Eli Goldfinger, a co-director of JI, and representatives from DPM Consulting met with Paul Curtis and Cameron Wilson of YVW. Mr Caligiuri expressed his concern about the aesthetics of the water infrastructure, and highlighted the passages of the PSP which emphasised the significance of Bald Hill. Mr Curtis referred to the low water pressure experienced by existing development south of a proposed road known as Gunns Gully Road. In response to Mr Caligiuri's concern about the aesthetics of the water infrastructure, Mr Wilson said that the reservoir area would be coloured to blend into the

environment and screened. He did not disclose that ministerial intervention had been sought or that the certification request had been made.

33 On 25 October 2018, a partner of the firm of solicitors acting for the vendor phoned Michael Fernon, solicitor for the plaintiffs, and advised that negotiations between the vendor and the authorities had broken down. She advised that the authorities were going to proceed to compulsory acquisition 'by way of Ministerial intervention'. She did not identify the nature of the proposed Ministerial intervention. Mr Fernon was not aware of the form of Ministerial intervention.

34 The following day, Mr Caligiuri nominated JI as the purchaser of the property under the sale contract. Mr Fernon wrote a letter of objection to the Minister for Planning on the assumption that the authorities were seeking an amendment to the planning scheme without notice to provide for a public acquisition overlay over the Bald Hill location. In fact, the authorities had made no such request. Mr Fernon also wrote to Mr Curtis of YVW stating JI's opposition to the construction of the water infrastructure and to any acquisition of land for that purpose. Mr Escreet became aware of JI's involvement in the purchase of the property when he received the letter. He had a telephone conversation with Mr Fernon on 29 October 2018, but again did not disclose that the certification request had been made.

35 On 30 October 2018, the Minister recommended, and the Governor in Council certified under s 5(3) of the LAC Act in substance, that the acquisition area was land for which reservation under a planning scheme was unnecessary, undesirable and contrary to the public interest. The recommendation and certification were published in the Victoria Government Gazette on 1 November 2018.

36 On or about 30 October 2018, Mr Escreet contacted Mr Fernon for a general discussion of JI's concerns and objections to the project. The meeting was held on about 3 December 2018. Mr Goldfinger and Mr Fernon attended on behalf of JI. Mr Escreet spoke of the initial phase of the project which involved the construction of the first tank. This tank was to be 10 m in height and 38 m in diameter. A total of

four tanks were to be constructed over time. Mr Escreet said that the tanks would sit lower than the summit of Bald Hill for three of the four cardinal directions. Landscaping would be used to shield the tanks and reduce silhouetting.

37 On 23 November 2018, a notice of intention to acquire was served on the vendor, and on Mr Fernon on 26 November 2018. Mr Fernon immediately informed Mr Caligiuri and Mr Goldfinger of the receipt of the notice.

Actions following service of the notice of intention to acquire

38 On 14 December 2018, Mr Caligiuri received perspectives showing draft visualisations of the proposed works including views of Bald Hill from different locations, and preliminary tank design drawings.

39 In a letter dated 19 December 2018 to Mr Fernon, the authorities' solicitors corrected the area of easement E-3 as stated in the notice of intention to acquire.

40 Under cover of an email dated 18 January 2019 to the authorities' solicitors, Mr Fernon provided a copy of the originating motion in the proceeding. He stated that JI was aggrieved that it had not had the opportunity to put its objections to the proposed water infrastructure to a planning panel.

41 The authorities' solicitors responded on 21 January 2019 to the effect that MW was not in a position to agree to an undertaking not to serve a notice of acquisition in relation to the acquisition area. They advised that MW was willing to meet with the plaintiffs on a 'without prejudice' basis should they wish to discuss their concerns in more detail.

42 In an email dated 22 January 2019, Mr Fernon responded that the plaintiffs were willing to participate in a 'without prejudice' meeting, but were only able to do so after 4 February 2019. A telephone discussion followed between respective solicitors on 5 February 2019.

43 I heard an application by the plaintiffs seeking an interlocutory injunction on 19

February 2019. It was unsuccessful.

44 On 20 February 2019, the notice of acquisition was published in the Victoria Government Gazette, and served on Mr Fernon the following day. The notice of intention to acquire was served on JI's registered office on 7 March 2019.

45 On or about 12 March 2019, the Council certified plan subdivision PS824067W showing the acquisition area and easements acquired pursuant to the notice of acquisition. The authorities subsequently undertook not to lodge the plan of subdivision for registration until 19 July 2019.

Statutory framework

LAC Act

46 Section 1 sets out the two main purposes of the LAC Act. They are:

> (a) to establish a new procedure for the acquisition of land for public purposes; and
>
> (b) to provide for the determination of the compensation payable in respect of land so acquired.

47 Section 3 of the LAC Act defines 'interest' in relation to land to mean:

> (a) a legal or equitable estate or interest in the land; or
>
> (b) an easement, right, charge, power or privilege in, under, over, affecting or in connexion with land.

48 The definition of 'interest' attracts the definition of 'land' in the *Interpretation of Legislation Act 1984* (Vic) ('the Interpretation Act'). Section 38 of the Interpretation Act provides that 'land' includes buildings and other structures permanently affixed to land, land covered with water, and any estate, interest, easement, servitude, privilege or right in or over land.

49 Section 3 of the LAC Act also defines a 'planning instrument' to mean a 'planning scheme' under the *Planning and Environment Act 1987* (Vic) ('the PE Act').

50 Sections 4 and 5 define when authorities are permitted to acquire land whether by

compulsory process or agreement:

4 Authority to acquire or purchase in accordance with Part

An Authority which is empowered under a special Act to acquire an interest in land by compulsory process must not acquire that interest by compulsory process or by agreement except in accordance with this Part.

5 Reservation or certification of land required before acquisition

(1) The Authority must not commence to acquire any interest in land under the provisions of the special Act unless the land has been first reserved by or under a planning instrument for a public purpose.

(2) Subsection (1) does not apply in respect of prescribed land or land in a prescribed class of land.

(3) Subsection (1) does not apply in respect of land which has been certified by the Governor in Council on the recommendation of the Minister, as land for which reservation is unnecessary, undesirable or contrary to the public interest.

(4) Subsection (1) does not apply to an interest in land if the Authority is not required to serve a notice of intention to acquire that interest because of section 7(1)(a) or (b).

(4A) Subsection (1) does not apply to any land in an area in respect of which a declaration under section 172(2) of the *Planning and Environment Act 1987* is in force.

(4B) Subsection (1) does not apply to any land which is special project land under section 201I(3) of the *Planning and Environment Act 1987*.

(4C) Subsection (1) does not apply to any land specified in an application order under the *Project Development and Construction Management Act 1994* where the Transport Infrastructure Development Agent established under section 40 of the *Transport Integration Act 2010* is the facilitating agency.

(4D) Subsection (1) does not apply to any land that is to be acquired under a work-in-kind agreement within the meaning of Part 9B of the *Planning and Environment Act 1987*.

(5) A certification by the Governor in Council under subsection (3) lapses after three months from the date of its making unless within this period the Authority has served a notice of intention to acquire an interest in the land to which the certification applies in accordance with section 6.

51 Section 6 of the LAC Act requires an authority intending to acquire an interest in land to serve a notice of intention to acquire:

> [I]f the Authority intends to acquire an interest in land for the purposes of the special Act, the Authority must serve upon each person who has an interest in the land, or is empowered by this Act to sell and convey or grant and release or lease such an interest, or such of those persons as, after diligent inquiry, become known to the Authority, a notice of intention to acquire the first-mentioned interest.

52 Section 7 of the LAC Act sets out the circumstances in which a notice of intention to acquire is not required:

> (1) The Authority is not required to serve a notice of intention to acquire under section 6 if—
>
> (a) the interest or the land in which the interest subsists has been publicly advertised for sale and the Authority believes in good faith that the interest is still available for sale at the time the Authority proposes to acquire the interest; or
>
> (b) the Authority serves on the person interested in the land—
>
> (i) a statement in writing that it does not intend to acquire the interest by compulsory process; and
>
> (ii) a statement in the prescribed form setting out the principal rights and obligations of that person under this Act; or
>
> (c) the Minister certifies that to require the service of a notice of intention to acquire would be unnecessary, undesirable or contrary to the public interest.
>
> …
>
> (4) The Minister must cause a copy of a certificate under subsection (1)(c) to be tabled in the Legislative Assembly and the Legislative Council within three sitting days after the certificate is signed by the Minister.
>
> (5) If the Authority acquires or intends to acquire an interest in land which is the subject of a certificate under subsection (1)(c) the Authority must, no later than the date of service of the notice of acquisition in respect of that interest or the date on which an agreement to acquire the interest is made (as the case may be), serve a copy of the certificate upon each person who has an interest in the land, or such of those persons as, after diligent inquiry, become known to the Authority.

53 The form of notice of intention to acquire and the information to be provided in a

notice is set out in s 8 of the LAC Act:

> (1) A notice of intention to acquire an interest in land must—
>
> (a) be in the prescribed form; and
>
> (b) contain title particulars and a description (including, if appropriate, a sketch) sufficient to identify the interest to be acquired and the location of the land; and
>
> (c) give details of the purpose for which the interest is to be acquired; and
>
> (d) specify the reasons why the land is thought to be suitable for that purpose; and
>
> (e) state whether or not—
>
> (i) the land is reserved for a public purpose under a planning instrument; or
>
> (ii) any interest proposed to be acquired is an interest in land which has been prescribed under section 5(2) or which is land in a class of land prescribed under section 5(2); or
>
> (iii) the land has been certified by the Governor in Council under section 5(3); and
>
> (f) if appropriate, state the approximate date upon which the Authority wishes to take possession of the land; and
>
> (g) request the person interested in the land to advise the Authority of—
>
> (i) any other persons who, to the knowledge of that person, may have an interest in the land described in the notice; and
>
> (ii) any unexpired planning permit or building permit existing in respect of the land which has not been acted upon either wholly or in part and of which that person is aware; and
>
> (iii) any sales, transactions, licences or approvals relating to the land or any interest in the land which that person was proposing to make or obtain immediately prior to the date of service of the notice of intention to acquire or which any other person was so proposing to make or obtain and of which the first-mentioned person is aware; and
>
> (iv) any other information which that person may have which would be relevant to the assessment of

compensation in respect of the acquisition of interests in the land.

(2) A notice of intention to acquire must be accompanied by a statement in the prescribed form setting out the principal rights and obligations under this Act of persons interested in the land proposed to be acquired.

54 Section 12 of the LAC Act sets out the restrictions which apply to land in respect of which a notice of intention to acquire has been served:

(1) If a notice of intention to acquire has been served upon a person under section 6, that person must not, while the notice is in force, without the consent of the Authority—

(a) enter into any sale, transaction or arrangement, or obtain or grant any licence or approval with respect to the land; or

(b) make any improvements of a durable nature to the land.

(2) Upon receipt of any document relating to any dealings with an interest in land in respect of which a notice of intention to acquire has been served, the Registrar of Titles must notify the Authority of this fact.

(3) Nothing in this section prevents—

(a) any person from discharging the land from any mortgage affecting the land; or

(b) a mortgagee from exercising a power of foreclosure or sale in respect of the land.

55 Section 19 provides for the service of notices of acquisition:

Subject to this Act, the Authority may acquire an interest in land for the purposes of the special Act by causing a notice declaring that interest to be acquired to be published in the Government Gazette.

56 The minimum period in which acquisition can occur after service of a notice of intention to acquire is set out in s 20:

Subject to section 106(1), the Authority must not acquire any interest in land in respect of which a notice of intention to acquire has been served before the expiration of two months after the service of that notice.

57 Section 21 deals with the form of a notice of acquisition requiring it to be in the prescribed form, and contain a description sufficient to identify the interest in land acquired and the land in which the interest subsists.

58 Section 24(1) is a provision extinguishing almost any interest in land which might diminish the interest acquired. It provides:

> (1) Subject to this section, upon publication in the Government Gazette of a notice of acquisition—
>
> (a) the interest in land described in the notice vests in the Authority without transfer or conveyance freed and discharged from all trusts, restrictions, dedications, reservations, obligations, mortgages, encumbrances, contracts, licences, charges and rates of any kind; and
>
> (b) any interest that a person has in that land is divested or diminished to the extent necessary to give effect to this subsection.

59 Section 105 is concerned with the validity of a notice where there is a misdescription in the notice:

> The validity of any notice or statement under this Act is not affected by any misdescription in it of the land or of any interest in the land if sufficient information appears on the face of the notice or statement to identify the land or interest intended to be affected.

Public purposes reservation

60 Section 6(2)(c) of the PE Act provides that a planning scheme may 'designate land as being reserved for public purposes'. Although the location of proposed water tanks on Bald Hill is shown on a map in the PSP, the planning scheme does not designate the acquisition area as reserved for public purposes.

61 To designate the acquisition area as reserved for public purposes, the planning scheme requires amendment to show the acquisition area on the map showing the areas of land subject to the public acquisition overlay. This may be undertaken under Part 3 of the PE Act. Under s 20(3)(a)(i) of the PE Act, the Minister for Planning cannot exempt a planning authority from the requirement to give notice to the owner of land in relation to an amendment to the planning scheme which provides for the reservation of land for public purposes. Under s 21(1) of the PE Act, a person may make a submission to the planning authority about an amendment of which notice is given. The planning authority is required to consider the

submission.

Need for a planning permit

62 The planning scheme does not designate the acquisition area as subject to a public acquisition overlay and therefore reserved for public purposes.

63 Following the certification under s 5(3) of the LAC Act, the authorities did not require a planning scheme amendment to show the acquisition area as under a public acquisition overlay, as the reservation of the acquisition area for public purposes was no longer needed. However, they still require a permit for the use and development of the property for the water infrastructure.[13] Water infrastructure falls under the land use term of 'utility installation' in the planning scheme.[14] As a utility installation is a section 2 use in the Rural Conservation Zone, the authorities require a permit for the use and development of the property for the water infrastructure.

64 During the trial, the authorities confirmed that they intended to seek a planning permit for the use and development of the property from the Council. When they do, the plaintiffs will have the right to object to the grant of a permit for the proposed water infrastructure or to seek conditions on the use and development if a permit is granted. They will have the right to seek review of the decision of the Council including any conditions that are imposed in the Victorian Civil and Administrative Tribunal ('the Tribunal'). The review is a merits review. The Tribunal is required to by statute to act fairly, and is bound by the rules of natural justice.[15] A party to a Tribunal proceeding may appeal to the Supreme Court of Victoria on a question of law by leave of the Court.[16]

Principles of statutory construction

65 The principles of statutory construction are well established. In *Project Blue Sky Inc v*

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13 *Mitchell Planning Scheme* cl 35.06-1.
14 Ibid cl 73.03.
15 *Victorian Civil and Administrative Tribunal Act 1998* (Vic) ss 97, 98(1)(a).
16 Ibid s 148.

Australian Broadcasting Authority, McHugh, Gummow, Kirby and Hayne JJ said:

> [T]he duty of a court is to give the words of a statutory provision the meaning that the legislature is taken to have intended them to have. Ordinarily, that meaning (the legal meaning) will correspond with the grammatical meaning of the provision. But not always. The context of the words, the consequences of a literal or grammatical construction, the purpose of the statute or the canons of construction may require the words of a legislative provision to be read in a way that does not correspond with the literal or grammatical meaning.[17]

66 The plurality of the High Court emphasised the importance of context in *SZTAL v Minister for Immigration and Border Protection*:

> The starting point for the ascertainment of the meaning of a statutory provision is the text of the statute whilst, at the same time, regard is had to its context and purpose. Context should be regarded at this first stage and not at some later stage and it should be regarded in its widest sense. This is not to deny the importance of the natural and ordinary meaning of a word, namely how it is ordinarily understood in discourse, to the process of construction. Considerations of context and purpose simply recognise that, understood in its statutory, historical or other context, some other meaning of a word may be suggested, and so too, if its ordinary meaning is not consistent with the statutory purpose, that meaning must be rejected.[18]

67 In *CIC Insurance Ltd v Bankstown Football Club Ltd*, the majority of the High Court said:

> [T]he modern approach to statutory interpretation (a) insists that the context be considered in the first instance, not merely at some later stage when ambiguity might be thought to arise, and (b) uses 'context' in its widest sense to include such things as the existing state of the law and the mischief which, by legitimate means such as those just mentioned, one may discern the statute was intended to remedy. Instances of general words in a statute being so constrained by their context are numerous.[19]

68 These principles are consistent with s 35 of the Interpretation Act, which requires that when interpreting a provision of an Act, a construction that would promote the purpose or object underlying the Act is to be preferred to a construction that would not promote that purpose or object.

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17 (1998) 194 CLR 355, 384 [78] (McHugh, Gummow, Kirby and Hayne JJ) (citations omitted).
18 (2017) 262 CLR 362, 368 [14] (Kiefel CJ, Nettle and Gordon JJ) (citations omitted).
19 (1997) 187 CLR 384, 408 (Brennan CJ, Dawson, Toohey and Gummow JJ) (citations omitted).

The key issue

69 The key issue in this proceeding is whether the plaintiffs are entitled to be heard by the relevant decision maker prior to the making of each of the challenged decisions viz:

(a) the Minister's power of recommendation in s 5(3) of the LAC Act;

(b) the Governor in Council's power of certification in s 5(3) of the LAC Act;

(c) the decision of the authorities to serve a notice of intention to acquire under s 6 of the LAC Act; and

(d) the decision of the authorities to publish a notice of acquisition under s 19 of the LAC Act.

70 The plaintiffs first contend that they were entitled to a hearing prior to the exercise by the Minister or Governor in Council of the powers contained in s 5(3). The Minister and the authorities contend that they were not. The plaintiffs then contend they were entitled to a hearing by the authorities prior to their decision to serve the notice of intention to acquire, or the notice of acquisition. The authorities contend that they were not.

71 I now turn to review relevant case law concerning procedural fairness, and the right to a hearing.

Relevant authority

72 The foundational authority for any consideration of procedural fairness is *Kioa v West*, where Mason J said:

> The law has now developed to a point where it may be accepted that there is a common law duty to act fairly, in the sense of according procedural fairness, in the making of administrative decisions which affect rights, interests and legitimate expectations, subject only to the clear manifestation of a contrary intention … But the duty does not attach to every decision of an administrative character. Many such decisions do not affect the rights, interests and expectations of the individual citizen in a direct and immediate way. Thus a decision to impose a rate or a decision to impose a general charge for services rendered to ratepayers, each of which indirectly affects the rights, interests or expectations of citizens generally does not attract this duty

to act fairly.[20]

73 This passage establishes the salient principle that administrative decisions which affect rights, interests and expectations in a direct and immediate way are subject to procedural fairness, subject to the clear manifestation of a contrary statutory intent. They are distinguished from decisions which indirectly affect the rights, interests or expectations of citizens generally.

74 In the same decision, Brennan J said:

> There is no free-standing common law right to be accorded natural justice by the repository of a statutory power. There is no right to be accorded natural justice which exists independently of statute and which, in the event of a contravention, can be invoked to invalidate executive action taken in due exercise of a statutory power.
>
> …
>
> There is no jurisdiction to declare a purported exercise of statutory power invalid for failure to comply with procedural requirements other than those expressly or impliedly prescribed by statute.
>
> …
>
> To ascertain what must be done to comply with the principles of natural justice in a particular case, the starting point is the statute creating the power. By construing the statute, one ascertains not only whether the power is conditioned on observance of the principles of natural justice but also whether there are any special procedural steps which, being prescribed by statute, extend or restrict what the principles of natural justice would otherwise require.[21]

75 As this passage illustrates, by construing the statute creating the power, it can be ascertained whether any special procedural steps prescribed by statute extend or restrict what procedural fairness may otherwise require**.** This principle is significant as the LAC Act contains a number of procedural provisions directing what is to be done when land is acquired by authorities.

76 In *Annetts v McCann*, Mason CJ, Deane and McHugh JJ said:

> It can now be taken as settled that, when a statute confers power upon a

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20 (1985) 159 CLR 550, 584 (citations omitted).

21 Ibid 610–11, 614 (Brennan J).

> public official to destroy, defeat or prejudice a person's rights, interests or legitimate expectations, the rules of natural justice regulate the exercise of that power unless they are excluded by plain words of necessary intendment.
>
> …
>
> In determining whether this Act has excluded the rules of natural justice, [it] need[s] to be kept in mind … that many interests are now protected by the rules of natural justice which less than 30 years ago would not have fallen within the scope of that doctrine's protection.[22]

77 This passage is apposite also. Whereas thirty years ago the need for procedural fairness before compulsory acquisition decisions were made by acquiring authorities might not have been thought of, the High Court has clearly articulated that procedural fairness must be afforded in the exercise of statutory power where a person's rights, interests or expectations are directly affected unless expressly or impliedly excluded by the provisions of the statute. There is no doubt whatever that the compulsory acquisition of land directly affects rights and interests.

78 In *SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs*, the High Court said:

> It has long been established that the statutory framework within which a decision-maker exercises statutory power is of critical importance when considering what procedural fairness requires. It is also clear that the particular content to be given to the requirement to accord procedural fairness will depend upon the facts and circumstances of the particular case.[23]

79 More recently, the plurality in *Plaintiff M61/2010E v Commonwealth* held that:

> It was said, in *Annetts v McCann*, that it can now be taken as settled that when a statute confers power to destroy, defeat or prejudice a person's rights, interests or legitimate expectations, principles of natural justice generally regulate the exercise of that power … It is unnecessary to consider whether identifying the root of the obligation remains an open question or whether the competing views would lead to any different result. It is well established, as held in *Annetts*, that the principles of procedural fairness may be excluded only by 'plain words of necessary intendment'.[24]

80 This is the position here. It is the statutory framework of the LAC Act that is of

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22 (1990) 170 CLR 596, 598–9 (citations omitted).
23 (2006) 228 CLR 152, 160–1 [26].
24 (2010) 243 CLR 319, 352 (French CJ, Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ).

paramount importance when considering whether procedural fairness requires a right to a hearing before the challenged decisions can be made. If a right to a hearing is implied, the content of the right must be determined according to the statutory intent and in the facts and circumstances of the particular case. [25]

81 Moreover, in *FAI Insurances Ltd v Winneke,* the High Court held that the requirements of natural justice do apply to discretionary decisions made by the Governor in Council affecting rights.[26] The fact that the Governor in Council was the repository of the discretion did not warrant the implication that the discretion was free of natural justice obligations and therefore entirely at large.[27] However, the hearing need not be afforded personally by the Governor in Council, or by the Minister. It could be afforded by the relevant department head or other appropriate officer who in fact made the decision.[28]

82 In their submissions, all parties relied extensively on *South Australia v Slipper* ('*Slipper*'), where the Full Federal Court gave consideration to the requirements of procedural fairness in the context of the *Lands Acquisition Act 1989* (Cth) ('Lands Acquisition Act').[29] The federal land acquisition statute has some similarities to, but also differences from the LAC Act. The summary of the law relating to procedural fairness articulated by Finn J and agreed by the other members of the Court is a useful synopsis of the principles to be applied:

> Stated in short form those principles are:
>
> (i) when a statute confers a power on a public official the exercise of which affects a person's rights, interests or expectations, the rules of procedural fairness regulate the exercise of that power unless those rules are excluded by express terms or by necessary implication;
>
> (ii) a legislative intention to exclude the rules will not be assumed or spelled out from indirect references, uncertain inferences or

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25 *South Australia v Slipper* (2004) 136 FCR 259 (Finn, Branson and Finkelstein JJ).
26 (1982) 151 CLR 342.
27 Ibid 349 (Gibbs CJ); 368 (Mason J and Stephen J agreeing); 376-7 (Aickin J); 399-400 (Wilson J); 416 (Brennan J); (Murphy J dissenting).
28 Ibid 350 (Gibbs CJ); 356 (Stephen J).
29 (2004) 136 FCR 259 ('*Slipper*').

equivocal considerations;

(iii) an intention to exclude should not be inferred merely from the presence in the statute of rights which are commensurate with some of the rules of procedural fairness; and

(iv) while the rules may be excluded because the power in question is of its nature one to be exercised in circumstances of urgency or emergency; 'urgency cannot generally be allowed to exclude the right to natural justice'; although it may in the circumstances reduce its content.[30]

83 In the present case, there is no real dispute between the parties as to the applicable principles. They diverge as to whether and how they have application to the operative provisions of the LAC Act. While there is no express exclusion, the Minister and the authorities contend that the right to be heard is excluded by necessary implication.

Genesis of compulsory acquisition under the LAC Act

84 The prerogative powers of the Crown include the right to take land. This is known as 'eminent domain' and is described by Rich J in *Minister of State for the Army v Dalziel* as 'the right to take to itself any property within its territory, or any interest therein, on such terms and for such purposes as it thinks proper, eminent domain being thus the proprietary aspect of sovereignty'.[31] In the United States, the right of eminent domain has been described as an incident of sovereignty.[32]

85 The prerogative power of the Crown to take land is restricted by s 51(xxxi) of the Constitution in the case of the Commonwealth, and by statute, in the case of both Commonwealth and States. Section 51(xxxi) of the Constitution requires an acquisition by the Commonwealth to be on just terms for any purpose for which the Parliament has power to make laws.[33]

86 By 1983, acquisition of land by authorities in Victoria was governed by statute.[34] In a

30 Ibid 279–80 [93] (citations omitted).
31 (1944) 68 CLR 261, 284.
32 *United States v Jones*, 109 US 513, 518 (1883).
33 *Commonwealth of Australia Constitution Act* s 51(xxxi).
34 See *Lands Compensation Act 1958* (Vic).

report to Government, Mr Stuart Morris summarised the position in these terms:

> In most legislation governing the compulsory acquisition of land, an Authority must perform certain preliminary steps before it can serve a Notice to Treat. The steps required differ markedly between different statutory authorities and, by and large, were conceived before town planning became commonplace. Some Acts require the relevant Minister to certify to the Governor-in-Council that the acquisition is necessary or desirable and specify the purposes for which the lands are required … Other Acts make the approval of the Governor-in-Council a condition precedent to acquisition … The Local Government Act 1958 has its own detailed procedure, which includes a requirement of ministerial confirmation (s 514(3)). The Town and Country Planning Act 1961 requires prior ministerial approval (s 40). Some of the Acts referred to have an additional requirement that the Authority advertise the acquisition or proposed acquisition … Some other Acts prescribe no preliminary steps; all the Authority need do is to decide to serve a Notice to Treat ...[35]

87 As can be seen, prior to 1983 it was common, before an authority could proceed with acquisition, to require the relevant Minister to certify to the Governor in Council, or for the Governor in Council to approve of the acquisition and to specify the public purposes for which the land was required. The need for certification or approval as a threshold step prior to acquisition was an important safeguard protective of landowners. Private land could not be compulsorily acquired without approval from the highest executive body in Victoria or in some other cases prior ministerial approval.

88 When it was enacted in 1986, the LAC Act provided additional safeguards. It established the general principle that acquisition was to proceed only after land was designated as land reserved for public purposes in a planning instrument. Certification remained essential in a limited class of cases where acquisition without reservation for public purposes was still possible.

89 The Morris report described the advantages of reservation of land in planning schemes prior to compulsory acquisition:

> The use of this machinery – by requiring that land be reserved in a planning

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35 Stuart Morris, *Land Acquisition and Compensation: Proposal for New Land Acquisition and Compensation Legislation – Report to the Minister for Planning* (Report, January 1983), 20 [415] (citations omitted) (emphasis in original) ('the Morris report').

> scheme or I.D.O. before it can be compulsorily acquired – has much to commend it. In the first place it provides the landowner with an opportunity to contest the decision to acquire his land. Second it brings into play the compensation provisions in the Town and Country Planning Act 1961, which give a landowner relief before his land is ultimately acquired. This can significantly reduce the injustices caused by blight. Third this requirement would strengthen the planning process by ensuring greater co-ordination between specific purpose authorities and those responsible for overall land use planning. And finally the adoption of this requirement could serve to eliminate many preliminary legal steps to the compulsory acquisition process. There would be no need to obtain the consent of the Governor-in-Council or Minister if land was already reserved in a planning scheme or I.D.O. In such a case the Governor-in-Council would already have considered the question of principle – that is, whether the compulsory process should be used – and the only remaining issue would be one of timing. This is properly a matter for the particular Authority or Minister concerned.[36]

90 The Morris report also saw the need to authorise acquisition in exceptional cases where reservation was not considered to be applicable. It described the need in these terms:

> There will be cases where the standard method will be inapplicable. There may be no comprehensive planning scheme or I.D.O. There may be urgency. There may have been some other comprehensive inquiry, such as a parliamentary committee or advisory board. Consequently there needs to be provision for cases where a prior town planning reservation should not be required. It is recommended that notwithstanding the prohibition on the compulsory acquisition of land not reserved in a planning scheme or I.D.O., an Authority be able to compulsorily acquire land if the Minister responsible for the Land Acquisition Act certifies that the prior reservation of the land is not necessary or desirable. The Minister would, no doubt, readily certify if there was no comprehensive planning scheme or I.D.O. or if the acquisition was urgent. He would usually certify if an easement was being acquired. He would probably certify if there had been some other form of comprehensive public inquiry. However certification should not be automatic. As a general principle only reserved land would be compulsorily acquired.[37]

91 The reference to easements in the Morris report was subsequently reflected in reg 6 of the *Land Acquisition and Compensation Regulations 2010* (Vic). Acquisition of land over which an easement is to be acquired does not require reservation if the acquisition of the easement will not reduce the value of the unencumbered freehold interest in the allotment by more than 10%. This exception applies to the easements

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36 Ibid 21 [418] (emphasis in original).

37 Ibid 22 [419] (emphasis in original).

under acquisition in the present case.

The purposes of the LAC Act

92 In the second reading speech, the main objects of the Land Acquisition and Compensation Bill were said to be:

> 1. to establish uniform practices to be adopted by acquiring authorities in the course of compulsory or negotiated acquisition of land;
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> 2. to reform, consolidate and codify the law relating to compensation for interests in land;
>
> 3. to establish a system of land acquisition which is equitable to all land owners and which does not impose such burdens on Government so as to prevent proper planning and public sector activity;
>
> 4. to ensure certainty in the practices of land acquisition;
>
> 5. to encourage a cooperative rather than a confrontational relationship between Government and landowner; and
>
> 6. to establish a speedy system of resolution of disputed claims concerning acquisition of interests in land.[38]

93 Objects 1, 3, 4 and 5 are most relevant. They confirm that Parliament intended to establish uniform practices to be adopted by authorities in land acquisition. The new system of land acquisition was to be equitable to all land owners, but not such as to prevent proper planning or public sector activity. A balance was to be struck between the interests of Government and landowners. A co-operative rather than confrontational relationship was sought between Government and landowners.

The scheme of the LAC Act

94 The LAC Act established a new procedure in Victoria for the acquisition of land for public purposes.[39] Part 2 of the LAC Act deals with the acquisition process and procedure. Most of the other parts of the LAC Act deal with the nature and measure of compensation to be paid following compulsory acquisition. Acquisition of land

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38 Victoria, *Parliamentary Debates*, Legislative Assembly, 8 May 1986, 2013–2014 (Frank Wilkes, Minister for Housing); Victoria, *Parliamentary Debates*, Legislative Council, 11 November 1986, 882 (Jim Kennan, Minister for Planning and Environment).

39 LAC Act s 1(a).

for public purposes is subject to the requirements and procedures specified in the LAC Act. Subject to various exceptions, a notice of intention to acquire and a notice of acquisition must be given to affected landowners within time constraints.

95 An acquisition under the LAC Act brings an identifiable piece of physical land under the dominion and control of an authority for public purposes.[40] To acquire the land effectively, the authority must get in the multiple interests which may exist in a parcel of land. The wide range of interests in land that may need to be acquired is demonstrated by s 24(1), which provides for the interest in land acquired by the authority to be freed and discharged from all 'trusts, restrictions, dedications, reservations, obligations, mortgages, encumbrances, contracts, licences, charges and rates of any kind'.

Process for compulsory acquisition under the LAC Act

96 In identifying the scheme of the LAC Act, it is beneficial to review the acquisition procedure in pt 2. Fundamentally, the provisions of pt 2 outline four steps that must be completed if compulsory acquisition is to occur. They are:

(a) the land must be reserved or certified for compulsory acquisition;

(b) a notice of intention to acquire must be served on persons with an interest in the land, on particular authorities and on the Registrar of Titles;

(c) a notice of acquisition must be served on persons with an interest in the land, published in the Victoria Government Gazette and in a newspaper circulating locally; and

(d) the authority must enter into possession of the acquired land.

97 Each step must be completed in accordance with the applicable provisions of the LAC Act. I now turn to review each step in more detail.

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40 *Urban Renewal Authority Victoria v Obeid* (2013) 193 LGERA 220, 224 [13].

Step one - reservation and certification of land for compulsory acquisition

98 Section 4 of the LAC Act provides that authorities empowered to acquire land by compulsory process or agreement must act in accordance with pt 2.

99 Section 5(1) of the LAC Act states in substance that acquisition of land by authorities must not commence unless the land is first reserved for public purposes by or under a planning instrument.[41]

100 Section 5(1) is, however, subject to a number of exceptions. They are set out in s 5(2)–(4D) of the LAC Act. They include land within a prescribed class; and land which has been certified by the Governor in Council on the recommendation of the Minister as land for which reservation is unnecessary, undesirable or contrary to the public interest.[42] Section 5(5) provides that a certification by the Governor in Council under s 5(3) lapses after three months from the date of certification unless the authority has served a notice of intention to acquire an interest in the land.

101 The exception in s 5(4) involves two classes of cases. The first arises under s 7(1)(a) and is where land has been publicly advertised for sale, and the authority believes in good faith that the interest is still available for sale. The second arises under s 7(1)(b) and is where the authority elects to proceed by way of private, rather than compulsory acquisition, and serves a statement in the prescribed form setting out the principal rights and obligations of the person under the LAC Act.[43]

102 A number of additional exceptions to s 5(1) have been introduced by statutory amendment since 1986. All arise in specified circumstances under the PE Act, or in relation to development projects.[44] No party submitted that any significant insight as to the construction of s 5(3) is to be gleaned from the exceptions.

103 Section 5(3) provides an important safeguard to landowners and property rights. Unless a specific exception applies, unreserved land can only be acquired by an

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41 See Victoria, *Parliamentary Debates*, Legislative Assembly (n 38), 15.
42 LAC Act ss 5(2), 5(3).
43 Ibid ss 5(4), 7(1)(a), (b).
44 Ibid ss 5(4A), (4B), (4C), (4D).

acquiring authority if a certificate has been given by the Governor in Council on Ministerial recommendation. This is expressed in s 5(3) in the form of a dispensing power to the effect that if certification in the terms of the statutory language has been obtained, s 5(1) does not apply.

104 A further safeguard is built into s 5(3). It is the Minister administering the LAC Act who must make the recommendation to the Governor in Council under s 5(3). This Minister is unlikely to be the Minister responsible for the acquiring authority, but a Minister one step removed from this responsibility.[45] Since 1986, the Attorney General has been the responsible Minister administering the LAC Act. This might not always be the preferred ministerial arrangement, but I was informed that the practice has continued since 1986.

105 Finally, it is significant that that the words of the statutory test contained in s 5(3) refer to the public interest, as this suggests that decision making under this provision is in the policy or political realm. The words are found again in s 7(1)(c) of the LAC Act which dispenses with the requirement for an authority to serve a notice of intention to acquire under s 6 if the Minister certifies that to require the service of a notice of intention to acquire would be 'unnecessary, undesirable or contrary to the public interest'. A certificate under s 7(1)(c) must be tabled in the Legislative Assembly and the Legislative Council within three sitting days after the certificate is signed by the Minister.[46] This provides an opportunity for prompt Parliamentary scrutiny of the Minister's certificate.

Step two - the notice of intention to acquire

106 The notice of intention to acquire has an important role, and was an innovation of the LAC Act. In the second reading speech for the Bill, the Minister for Planning and Environment said:

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45 Numerous provisions of the LAC Act refer to the respective separate functions and powers of the 'Minister' and of the 'Minister administering the special Act'.

46 LAC Act s 7(4).

> The effect of the notice of intention to acquire is to serve as a warning to those who deal with the land that the authority is proposing to acquire that land or an interest in the land and also to restrict the dealings with the interest or land which is the subject of the notice.[47]

107 Where land is eligible for acquisition by an authority, a notice of intention to acquire must be served except in certain circumstances where it is not required.[48] A notice of intention to acquire must be served by the authority on each person who has an interest in the land, or is empowered under the LAC Act to sell, convey, grant or release such an interest.[49]

108 The LAC Act imposes a duty of 'diligent inquiry' on the authority to ascertain the identity of persons who may have an interest in the land to be acquired, and to be entitled to receive a notice of intention to acquire.[50] Determination of the persons who are entitled to receive a notice of intention to acquire is often a troublesome task for an authority. Apart from searches at the Office of Titles, there is the need to make inquiries as to the existence of unregistered interests in land, or of persons who claim an interest in the land, or are residents on the land. A wide range of unregistered or security interests may also exist.

109 The form of a notice of intention to acquire is directed by s 8, as well as by regulations. Among other things, it must state whether or not land has been certified by the Governor in Council under s 5(3) of the LAC Act.

110 Section 8(1)(g)(i) provides that a notice of intention to acquire must request the recipient to advise the authority of any other persons who, to the knowledge of that person, may have an interest in the land. By this means, the authority is assisted to identify other persons who may have an interest in the land, and be entitled to receive a notice of intention to acquire. A notice of intention to acquire must be served on interested authorities and on the Registrar of Titles.[51]

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47 Victoria, *Parliamentary Debates*, Legislative Council (n 38).
48 LAC Act s 7.
49 Ibid s 6.
50 Ibid.
51 Ibid ss 9, 10.

111 Service of a notice of intention to acquire affects the rights of a person who has an interest in land. Without the consent of the authority, a person who has been served with a notice of intention to acquire may not enter into any sale, transaction or arrangement, or obtain or grant any licence or approval with respect to the land, or make any improvements of a durable nature to the land.[52]

Step three - the notice of acquisition

112 Unless the acquisition is by agreement, an authority desiring to acquire land must cause a notice of acquisition declaring the interest to be acquired to be published in the Victoria Government Gazette.[53] The notice of acquisition must be in the prescribed form and must be served on all persons on whom a notice of intention to acquire was served. It must be served on all persons who the authority is aware had an interest in the land and on persons who, after diligent inquiry by the authority, become known to it as a person who has an interest in the land.[54]

113 A notice of acquisition must be published in a newspaper circulating generally in the area in which the land is situated.[55]

114 Section 24(1) is an important provision which frees, discharges, divests or diminishes interests which qualify or diminish the interests acquired. This assists the acquisition process and ensures that the acquiring authority obtains the whole of the interest acquired.

Step four - entry into possession

115 The final step in the acquisition process is for the authority to enter into possession of the acquired land.[56] Where part or all of the acquired land is used by a person as a principal place of residence or business, the authority must not enter into possession of the acquired land, before the expiry of three months after the date of acquisition

52 Ibid s 12.
53 Ibid s 19.
54 Ibid s 22.
55 Ibid s 23.
56 Ibid s 26.

and unless the authority has given seven days' notice in writing of its intention to do so to the person in occupation of the land.[57]

116 Again, the Governor in Council may certify that having regard to the urgency of the case or other exceptional circumstances and the public interest, it is not practicable for the authority to delay entry into possession of the land until after the expiration of the required period.[58]

Plaintiffs' submissions

117 The plaintiffs made a number of submissions in support of their contention that a right to be heard was to be implied additionally to the statutory requirements found in the LAC Act. In substance, they were:

(a) They contended that there was no clear and unmistakable clarity in the LAC Act that procedural fairness was excluded altogether, placing considerable reliance on the decision of the Full Federal Court in *Slipper*.[59] The Lands Acquisition Act provided for decisions leading to compulsory acquisition to be subject to merits review. Finn J said that it was one thing to exclude merits review, but another to exclude procedural fairness as such.[60]

(b) Although in *Slipper*, the right to procedural fairness was after the Minister's certificate was given and prior to the acquisition, the plaintiffs submitted that the position under s 5(3) of the LAC Act was different.[61]

(c) Section 24 of the Lands Acquisition Act referred to circumstances where 'there is an urgent necessity for the acquisition and it would be contrary to the public interest for the acquisition to be delayed'. The power in s 5(3) of the LAC Act was broader than its federal counterpart, requiring the reservation to

57 Ibid s 26(2).
58 Ibid s 26(4)(a).
59 *Slipper* (n 29).
60 Ibid 284 [110].
61 Ibid 279 [92].

be 'unnecessary, undesirable or contrary to the public interest'. In *Jarratt v Commissioner of Police (NSW)*, Gleeson CJ referred to the 'very breadth of the statutory power' as an argument for inferring the intention to preserve procedural fairness.[62]

(d) An intention to exclude procedural fairness should not be inferred from the presence in the statute of some rights which were commensurate with some of the rules of procedural fairness.[63] The provisions of the LAC Act should not be taken as excluding the plaintiffs' right to a hearing.

(e) Although private property rights are subject to compulsory acquisition by statute, they have long been protected by the common law. In the interpretation of statutes, there is a presumption against an intention to interfere with vested property rights.[64]

(f) What the plaintiffs sought was the opportunity to put a submission to seek to persuade the decision-maker not to dispense with the usual reservation process.[65]

(g) While the notice of intention to acquire serves as a warning that the authority is proposing to acquire the land, there should be the opportunity for persons with an interest in the land to make submissions about the proposed acquisition advised in the warning.

(h) If the plaintiffs had a right to be heard in relation to the challenged decisions, that right could be satisfied by the opportunity to provide written submissions to the decision-maker within a reasonable time.

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62 (2005) 224 CLR 44, 56 [25].

63 See *Annetts v McCann* (1990) 170 CLR 596, 598; *OzEpulse Pty Ltd v Minister for Agriculture Fisheries and Forestry* (2007) 163 FCR 562, 576 [54]; *Winky Pop Pty Ltd v Hobsons Bay City Council* (2007) 19 VR 312, 325 [41] (Kaye J).

64 See *Fazzolari v Parramatta City Council* (2009) 237 CLR 603, 618–19, [40]–[43] (French CJ).

65 See *Peko Wallsend Ltd & Ors v Minister for Arts Heritage and Environment* (1986) 13 FCR 19, 44–5.

Defendants' submissions

118 The Minister and the authorities made submissions that procedural fairness was excluded by the LAC Act by implication. The Minister's submissions were directed against the imposition of a right to be heard at the stage of recommendation and certification under s 5(3). The authorities submitted that procedural fairness was impliedly excluded at all acquisition stages. In substance, the submissions were:

(a) An obligation to afford procedural fairness must conform to the statutory scheme, and be understood in terms of the decisions made within the statutory framework, including the respective roles of the various decision-makers. Any assertion that a decision maker is required to afford procedural fairness in the course of making a statutory decision is one that must be supportable and justifiable under the statutory scheme.[66]

(b) Where the statutory framework is silent, the intention that is to be implied is that observance of procedural fairness conditions the exercise of the power. The content of procedural fairness may, depending on the nature of the statutory scheme, be diminished, even to nothingness to avoid frustrating the purpose for which the power was conferred.[67]

(c) Whether the exercise of statutory power is conditioned by the requirements of procedural fairness is a practical exercise. Fairness is not an abstract concept. Whether speaking in terms of procedural fairness or natural justice, the concern of the law is to avoid practical injustice.[68]

(d) Because the implication of procedural fairness is specific to a particular statutory and factual context, care must be taken to avoid transposing what might appear as principles from cases that have considered the requirements

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66 See *Salemi v Minister for Immigration & Ethnic Affairs (Cth) (No 2)* (1977) 137 CLR 396, 444 (Stephen J).

67 See *Kioa v West* (1985) 159 CLR 550, 609 (Brennan J); *Minister for Immigration and Border Protection v SZSSJ* (2016) 259 CLR 180, 205 [75] (French CJ, Kiefel, Bell, Gageler, Keane, Nettle and Gordon JJ).

68 See *Re Minister for Immigration & Multicultural & Indigenous Affairs; ex parte Lam* (2003) 214 CLR 1, 14 [37] (Gleeson CJ).

of procedural fairness in different statutory or factual contexts.[69] The ultimate question is what is required in order to ensure that the decision is made fairly in the circumstances having regard to the legal framework within which the decision is to be made.[70]

(e) The decision in *Slipper* does not assist the plaintiffs at the recommendation and certification stage under s 5(3). The Court held that the right to be heard was excluded by necessary implication in relation to the power of certification in s 24(1) of the Lands Acquisition Act. Procedural fairness was required to be provided before a declaration of compulsory acquisition was made under s 41(1) of the Lands Acquisition Act.[71]

(f) The key reasons in *Slipper* as to why procedural fairness attached to a declaration of acquisition under s 41 included:

(1) there was no clear legislative intent positively to exclude procedural fairness prior to a s 41 acquisition declaration;

(2) the Lands Acquisition Act required a copy of a s 24 certificate to be served as soon as possible on each person who the Minister believed after diligent inquiry to be a person affected by the certificate;

(3) while there was an obligation to be heard prior to a s 41 declaration there was no inconsistency with the s 24 power which was not amenable to procedural fairness; and

(4) the nature of the acquisition power was such that its exercise could profoundly affect the owner of the subject land.[72]

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69 See *El Ossman v Minister for Immigration and Border Protection* (2017) 248 FCR 491, 510–11 [77] (Wigney J).

70 *Minister for Immigration and Border Protection v WZARH* (2015) 256 CLR 326, 335 [30] (Kiefel, Bell and Keane JJ).

71 *Slipper* (n 29) 279 [92], 283–4 [106], [108]–[109] (Finn J).

72 Ibid [110]–[111] (Finn J).

(g) Finally, there were four additional reasons why the Court should not impose a duty of procedural fairness in relation to the power in s 5(3) of the LAC Act in the circumstances of this case:

(1) the exercise of power under s 5(3) was a policy decision which indicates that Parliament intended to exclude the application of procedural fairness;[73]

(2) the recommendation and certification decisions affect the public at large and not individual interests. This points to the decisions not being qualified by an obligation to afford procedural fairness;

(3) the plaintiffs have a right to be heard about matters such as the design of the water infrastructure by way of the operation of s 52 of the PE Act which provides for notice of a planning permit application, and for merits review of the decision of the responsible authority by the Tribunal; and

(4) a recommendation or certification under s 5(3) might need to be made in circumstances of urgency.

Issue one - right to be heard

Right to be heard by Minister or the Governor in Council prior to the exercise of the powers of recommendation and certification in s 5(3) of the LAC Act

119 I turn first to consider whether there is a right to be heard prior to the exercise of the powers of recommendation and certification in s 5(3) of the LAC Act.

120 The following matters are fundamental:

(a) there would be conflict and inconsistency between the suggested right to be heard and the procedural provisions in the LAC Act as to how notices are to be given;

[73] See *Stonnington City Council v Roads Corporation* (2010) 30 VR 303, 343–4 [220], [229] (Osborn J).

(b) at this early stage of an acquisition there would often be considerable practical difficulty in identifying the members of the class of persons who might have an interest in the land to be acquired, and the right to be heard;

(c) the fact that the certification of the Governor in Council on the recommendation of the Minister can be given in the public interest, suggests that Parliament did not intend that persons whose interests in land may be affected by the certification be afforded a hearing at this stage; and

(d) although there is a right to be heard under the scheme of the LAC Act, as I will subsequently find, it arises at a later stage in the acquisition process and applies before an authority decides to take a person's interest in land.

Right to be heard in conflict and inconsistent with the provisions of the LAC Act

121 There are three points which highlight the conflict and inconsistency with the scheme of the LAC Act that would arise if a right to be heard were to be implied as a condition precedent to the exercise of the powers of recommendation and certification in s 5(3).

122 They are:

(a) the LAC Act contains detailed provisions governing acquisition procedure. It establishes as a general requirement that an acquiring authority can only acquire reserved land. Section 5(3) operates as a dispensing power to this requirement and is available only in a limited class of circumstances. If the power is to be exercised, the Governor in Council on the recommendation of the Minister must certify that these circumstances exist;

(b) section 6 of the LAC Act directs that an authority is to conduct a diligent inquiry into the persons interested in the land to be acquired. The inquiry is conducted immediately prior to service of the notice of intention to acquire - not at the earlier time of recommendation and certification under s 5(3). It would be fundamentally inconsistent with the scheme of the LAC Act if the

diligent inquiry as to the persons who have an interest in land to be acquired must be undertaken by the Minister at a different and earlier stage in order to ascertain the persons who must be afforded a hearing before a recommendation or certification can be given under s 5(3); and

(c) under the statutory scheme of the LAC Act, diligent inquiry as to the persons who have an interest in the land to be acquired is undertaken by the acquiring authority – not by the Minister. It is inconsistent with the statutory scheme for the Minister or Governor in Council to be required by implication to conduct the same inquiry that the LAC Act expressly requires the authority to undertake at the later notice of intention to acquire stage.

123 It is appropriate to expand on these points. The first and main purpose of the LAC Act is 'to establish a new procedure'.[74] The new procedure specified by the LAC Act governs the acquisition of land by authorities. As I have described above, pt 2 divs 1–2 (ss 4 and 5) of the LAC Act are concerned with the reservation and certification of land for acquisition by an authority. The procedure for notification and acquisition is set out in pt 2 divs 3–4 (ss 6–25).

124 Section 6 directs the authority (not the Minister) to undertake diligent inquiry to ascertain the persons who had an interest in the land, or are empowered by the LAC Act to sell and convey or grant and release or lease such an interest at the time of notice of intention to acquire is served. Under the scheme of the LAC Act, this is the point of time when the identity of persons who have an interest in the land to be acquired is ascertained. It is not done at any earlier time. Implication of an obligation on the part of the Minister to conduct a hearing of persons who have an interest in the land prior to the inquiry to be made by the authority under s 6 would upset, displace and conflict with the procedure directed by the LAC Act.

125 The Minister and the Governor in Council have very different functions to those of

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74 LAC Act s 1(a).

the acquiring authority. While the role of the Minister and Governor in Council is protective of the public interest, it is also protective of landowners by ensuring that an acquisition without reservation can occur only in limited circumstances. The role of the Minister is to make a recommendation to the Governor in Council as to whether reservation is unnecessary, undesirable or contrary to the public interest. It is not the role of the Minister, or the Governor in Council in the scheme of the LAC Act to be required to make detailed inquiries as to the persons who have an interest in the land to be acquired. Parliament has expressly directed that this task be undertaken by the acquiring authority.

The difficulty of identifying the members of the class who have a right to be heard

126 The determination of the identity and whereabouts of persons who have an interest in a parcel of land can be a complicated affair and necessitate investigation of a wide range of potential interests.

127 In addition to persons whose interest is shown on a certificate of title, s 24(1)(a) of the LAC Act provides that a notice of acquisition may extinguish or affect interests such as 'trusts, restrictions, dedications, reservations, obligations, mortgages, encumbrances, contracts, licences, charges and rates of any kind.' Interests are often unregistered, and can arise under testamentary instruments, trusts, mortgages, charges, contracts, family law or partnership proceedings or in some circumstances just from the expenditure by a stranger of money on a property. Interests may exist in the form of drains, pipes, channels, wires or cables for the purpose of drainage, sewerage, salinity mitigation, river improvement, river management, flood mitigation or flood protection or for the supply of water, gas or other electricity or for telegraph or telephone or other like purpose.[75] Interests in land may be divested or merely diminished.[76]

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75 Ibid s 24(3).

76 Ibid s 24(1)(b).

128 Many acquisitions concern multiple properties and not just a single property. If a right to be heard attaches to the power in s 5(3), all persons who have an interest in the properties sought to be acquired by an authority would be entitled to be heard by the Minister or Governor in Council.

129 The difficulty in identifying the complex array of interests in land that may exist in any one property or in multiple properties affected by a scheme of acquisition, and then to ascertain the whereabouts of the persons entitled to the various interests strongly suggests that Parliament did not intend that a right to a hearing be implied before a recommendation or certification can be made under s 5(3) of the LAC Act. Rather, the necessary investigation is conducted by the acquiring authority at the notice of intention stage with the result that under the scheme of the LAC Act, notice of intention to acquire is given to the persons identified as having an interest in the land.

The right to be heard where the decision concerns the public interest

130 Section 5(3) requires the Minister to recommend, and the Governor in Council to certify that the reservation is unnecessary, undesirable or contrary to the public interest. A reservation might be 'unnecessary' where, for example, the parties were unanimous as to what should be done, as might be the case if land was to be acquired to provide a new public park for passive recreation. Reservation might be considered 'undesirable' where, for example, there was great urgency about the need for the acquisition.

131 The reference in s 5(3) to the 'public interest' provides strong confirmation that Parliament did not intend that the exercise of the power in s 5(3) attracted the right to be heard. Rather Parliament saw the need for an acquiring authority to obtain Ministerial recommendation and Governor in Council certification as a safeguard to ensure that the power to dispense with the process of reservation for public purposes was only used sparingly and in appropriate circumstances.

132 In *O'Sullivan v Farrer*, Mason CJ, Brennan, Dawson and Gaudron JJ said:

> Indeed, the expression 'in the public interest', when used in a statute, classically imports a discretionary value judgment to be made by reference to undefined factual matters, confined only 'in so far as the subject matter and the scope and purpose of the statutory enactments may enable ... given reasons to be [pronounced] definitely extraneous to any objects the legislature could have had in view'.[77]

133 On the issue of decision-making in the public interest, Brennan J in *Kioa v West* held that:

> The legislature is not likely to intend that a statutory power of a strictly legislative nature be conditioned on the observance of the principles of natural justice for the interests of all members of the public are affected in the same way by the exercise of such a power. But the legislature is more likely to intend the exercise of a statutory power of an executive, administrative or quasi-judicial nature to be so conditioned if an exercise of the power singles out individuals by affecting their interests in a manner substantially different from the manner in which the interests of the public at large are affected.
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> …
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> It does not follow that the principles of natural justice require the repository of a power to give a hearing to an individual whose interests are likely to be affected by the contemplated exercise of the power in cases where the repository is not bound and does not propose to have regard to those interests in exercising the power. If the repository of the power were authorized to exercise the power in his absolute discretion without taking account of individual interests and he proposed so to exercise the power, the repository might exercise it without hearing the individuals whose interests are likely to be affected.[78]

134 Brennan J said in *South Australia v O'Shea*:

> When we reach the area of ministerial policy giving effect to the general public interest, we enter the political field. In that field a Minister or a Cabinet may determine general policy or the interests of the general public free of procedural constraints; he is or they are confined only by the limits otherwise expressed or implied by statute.[79]

135 Reviewing these and other authorities, Osborn J said in *Stonnington v Roads Corporation*:

> There are obvious reasons why Parliament would vest a residual discretion in the minister to determine matters bearing on road management in the public interest. Conversely, an implication of limitation by way of implied rights to participate in consultation, would be potentially destructive of the minister's

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77 (1989) 168 CLR 210, 216 (citations omitted).
78 (1985) 159 CLR 550, 620–1 (citations omitted).
79 (1987) 163 CLR 378, 411.

> power to act in the public interest. It is possible to postulate circumstances of emergency having regard to the history of this country, such as bushfire, flood, or collapse of major items of infrastructure, when effectual achievement of the plain purpose of the provision might be necessary, namely speedy and effective ministerial direction.[80]

136 Osborn J concluded that the power under consideration was not to be subjected to limitations of procedural fairness:

> In my opinion, the power contained in s 22 is not to be cut down by any limitations save those expressly laid down by the section itself. In the present case, the legislation makes specific provision for limited consultation within a considered statutory structure. It further subordinates the exercise of the power in issue to the threshold formation of the opinion by the minister that that exercise be in the public interest. These two factors considered in context lead to the conclusion that it was not intended that the minister be subject to further requirements as to notice and consultation to affected parties with respect to policy decisions.[81]

Implications of decisions on s 20(4) of the PE Act on the right to be heard

137 The Attorney General and the authorities strongly relied on previous decisions of the Supreme Court concerning the interpretation of s 20(4) of the PE Act. This provision is analogous to s 5(3) of the LAC Act in that it permits a Minister to dispense with the need to give notice of a planning scheme amendment, thereby avoiding the appointment of a panel to consider and hear submissions.

138 Section 20(4) of the PE Act provides:

> The Minister may exempt himself or herself from any of the requirements of sections 17, 18 and 19 and the regulations in respect of an amendment which the Minister prepares, if the Minister considers that compliance with any of those requirements is not warranted or that the interests of Victoria or any part of Victoria make such an exemption appropriate.

139 As to the requirement to give notice, in *East Melbourne Group Inc v Minister for Planning* ('*East Melbourne Group (No 2)*'), Ashley and Redlich JJA said of the policy underlying the same provision:

> The underlying policy behind s 20(4) is to provide a mechanism which avoids the notice provisions and allows the minister to adopt and approve an amendment with responsibility for oversight being removed to Parliament.

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80 (2010) 30 VR 303, 343 [220].

81 Ibid 431 [208] (citations omitted).

> But the discretion is not unfettered. Parliament has provided the circumstances in which the discretion conferred by s 20(4) may be exercised. The discretion has, as its touchstone, the opinion of the Minister – 'the Minister considers' – that compliance with any of the notification requirements 'is not warranted or that the interests of Victoria or any part of Victoria make such an exemption appropriate.' Its exercise is subject to the scrutiny of Parliament; but Parliament has left the validity of the exercise of the power to review by the courts.[82]

140 In the same decision, Warren CJ dissenting, referring to *O'Sullivan v Farrer*, found:

> The discretion conferred on the minister by s 20(4) to determine whether the interests of Victoria or a part of it made exemption from notice provisions appropriate, is a broad power exercised in the public interest. The expression 'in the public interest' in a statute has been interpreted as importing:
>
> > … a discretionary value judgment to be made by reference to undefined factual matters, confined only 'in so far as the subject matter and the scope and purpose of the statutory enactments may enable … given reasons to be [pronounced] definitely extraneous to any objects the legislature could have had in view.[83]

141 As to whether the principles of natural justice applied to the exercise of power under s 20(4), Beach J in *Mietta's Melbourne Hotels v Roper* held:

> It is clear … that in determining whether principles of natural justice apply in the case of the exercise of the statutory power and, if so, what those principles require, will depend as Gibbs J said in *Salemi (No 2)*, on the true construction of the statutory provision in the light of the common law principle.
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> I have already observed that, in drawing up the provision [s 20(4)] appearing in Divisions 1, 2 and 3 of Part 3 of the [P & E] Act in the manner it has, the legislature has gone to some lengths to design a code which affords persons affected by an amendment to a planning scheme the right to make submissions and to be heard in support of their submissions. However, at the same time, it has given the minister power to exempt himself from the requirements of certain of those provisions. It is clear, therefore, that the legislature has addressed itself to the question as to whether a person should be heard in relation to a proposed amendment to a planning scheme.[84]

142 Similarly, in *Grollo Australia Pty Ltd v Minister for Planning & Urban Growth & Development,* Brooking J considered whether principles of natural justice conditioned the exercise of the Minister's power under s 20(4).[85] His Honour declined to follow

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82 (2008) 23 VR 605, 649 [186] (citations omitted) ('*East Melbourne Group (No 2)* ').

83 Ibid 636 [126], referring to *O'Sullivan v Farrer* (1989) 168 CLR 210, 216 (Mason CJ, Brennan, Dawson, Gaudron JJ).

84 (1988) 1 AATR 354 [365] (citations omitted).

85 [1993] 1 VR 627.

the earlier decision of *Antoniou v Roper*,[86] and held:

> [T]he power conferred by s 20(4) is not to be cut down by any limitations save those expressly laid down by the subsection itself …
>
> Parliament [did not intend] that in those circumstances the minister, as a planning authority, having freed himself from each of the onerous requirements of s 17, s 18 and s 19, and having in consequence swept away the requirements about public submissions, should nevertheless be obliged to act in accordance with the requirements of natural justice before adopting the amendment. This conclusion was strongly supported by the consideration that the minister's valid exercise of power under s 20(4) to exempt himself from all the requirements necessitates his having concluded either that compliance with those requirements is not warranted or that the over-riding interests of Victoria necessitate exemption …
>
> [A]s Beach J held … in conferring the dispensing power by s 20(4), [Parliament] has shown with sufficient clarity the intention that, if that dispensing power has been exercised, the exercise of the power to approve and adopt the amendment shall not be subject to the principles of natural justice …
>
> [W]here there has been an exercise of power under s 20(4) to grant a total or partial exemption, the exercise of power to adopt and approve the scheme is not subject to the principles of natural justice …
>
> Parliament has shown, sufficiently clearly, the intention that the exercise of power given by s 20(4) should not be subject to the principles of natural justice. The only procedural requirement of s 20(4) is one of prior consultation with the responsible authority in cases which do not fall within s 20(5).[87]

143 In *East Melbourne Group Inc v Minister for Planning ('East Melbourne Group (No 1)')*, Morris J considered the same issue, and held:

> The question of whether a Minister for Planning is obliged to comply with the rules of procedural fairness in the exercise of the power conferred by s 20(4) of the Act has been considered by this court on three previous occasions. In *Mietta's Melbourne Hotels Pty Ltd v Roper* Beach J held that the minister was under no such obligation. Two years later in *Antoniou v Roper*, Murphy J found to the contrary. Two years after *Antoniou* Brooking J held in *Grollo Australia Pty Ltd v Minister for Planning and Urban Growth and Development* that the minister was under no such obligation. The plaintiff submitted that I should prefer the reasoning of Murphy J in *Antoniou*. The defendants relied on *Mietta's* and *Grollo*.[88]

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86 Ibid 637, citing *Antoniou v Roper* (1990) 70 LGRA 351.

87 Ibid 627, 638–41.

88 (2005) 12 VR 448, [71], [73] ('*East Melbourne Group No 1*') (citations omitted).

144 Morris J concluded:

> Like Brooking J in *Grollo*, I find the reasoning in *Antoniou* unsatisfactory. In defence of Murphy J it can be said that the facts in the case were unique and one can understand why a fair minded judge would have sought to identify a remedy to what was an extraordinary intervention by the minister. But I share the view expressed by Beach J in *Mietta's* and Brooking J in *Grollo* that Parliament did not intend to require the minister to observe the rules of natural justice in making a decision to free himself or herself from the consultation requirements of sections 17, 18 and 19 of the Act. Such an outcome would be odd: it would require the minister to consult before exercising a power that could result in no consultation being necessary. Further, as Brooking J observed in *Grollo*, the fact that the power in section 20(4) of the Act is conditioned upon the minister forming certain views – for example, that the interests of Victoria make such an exemption appropriate – reinforces such a conclusion. I also agree with Beach J and Brooking J that the Act lays down a code as to the giving of notice of planning scheme amendments and, in conferring the dispensing power by section 20(4), the Parliament has shown with sufficient clarity the intention that, if that dispensing power has been exercised, the exercise of the power to adopt and approve the amendment shall not be subject to the principles of natural justice.[89]

145 While the decision of Morris J in *East Melbourne Group (No 1)* was overruled on appeal, there was no disagreement by any judge on appeal with this passage. In *East Melbourne Group (No 2)*, Ashley and Redlich JJA relied on and accepted the decision of Brooking J in *Grollo Australia Pty Ltd v Minister for Planning*, without expressing any disagreement with the decision or the reasoning in it.[90] Likewise, Warren CJ although in dissent adopted the conclusion of Brooking J that 'the power conferred by s 20(4) was not to be cut down by any limitations save for those expressly laid down by the sub-section itself.'[91] Both *East Melbourne Group (No 1)* and *East Melbourne Group (No 2)* stand for the proposition that procedural fairness is not implied as a condition of the Minister's exercise of power under s 20(4).[92]

146 Both s 20(4) of the PE Act and s 5(3) of the LAC Act are dispensing powers, and serve a similar purpose. Both are discretions given to the decision maker to

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89 Ibid [73] (citations omitted).

90 *East Melbourne Group No 2* (n 82) 648–52 [185]–[202], 690 [369] discussing *Grollo Australia Pty Ltd v Minister for Planning* [1993] 1 VR 627.

91 Ibid 638 [135] citing *Grollo Australia Pty Ltd v Minister for Planning* [1993] 1 VR 627, 637.

92 See also *Love v Victoria* [2009] VSC 215 (Cavanough J).

determine whether it is appropriate to grant an exemption from the panel process under the PE Act. In both cases, the criteria embrace consideration of the public interest. It would be consistent with the decisions relating to s 20(4) which now date back over thirty years and include a decision of the Court of Appeal if a similar construction were adopted in relation to s 5(3) of the LAC Act.

147 I accept as submitted by the Minister and the authorities that the right to a hearing before a recommendation or certification may be made or given under s 5(3) is impliedly excluded by the provisions of the LAC Act. In my view, the right to a hearing arises later in the acquisition scheme of the LAC Act.

148 I now turn to the issue whether the authorities are required to afford procedural fairness.

Do the authorities have a duty to afford procedural fairness?

149 The plaintiffs submit that they were entitled to be heard prior to the exercise by the authorities of their power to serve a notice of intention to acquire under s 6 or to publish a notice of acquisition under s 19.[93]

The effect of the notice of intention to acquire

150 The main purpose of a notice of intention to acquire is to warn recipients of the authority's notice of intention to acquire. It informs recipients that the authority intends to take the land specified. It is complementary to the purpose of a notice of intention to acquire that there be an opportunity for a person with an interest in the land to be taken to make a submission to the authority, including as to whether the acquisition should proceed in whole, part, sooner, later or not at all. Such a person may decide to make a submission as to the present or future occupation, use or development of the land, and as to any necessary arrangements for the taking of possession that the recipient of the notice asks the authority to make. The notice of

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93 See *Winky Pop Pty Ltd v Hobsons Bay City Council* (2007) 19 VR 312, 325 [41] (Kaye J); *Pulitano Pastoral Pty Ltd v Mansfield Shire Council* (2017) LGERA 58 (Garde J).

intention to acquire not only warns, but it initiates and encourages communication between the authority and the person with an interest in the land. It is just that an acquiring authority listen to persons who are at risk of losing their interest in land.

151 The statutory obligation placed on the authority by s 6 to make diligent inquiry and serve a notice of intention to acquire on persons with an interest in the land operates as a step in affording procedural fairness. The fact that this step is part of procedural fairness points against the implication of a right to be heard before the power in s 6 is exercised. It points in favour of the implication of procedural fairness after the notice is given. It would be strange indeed if procedural fairness required a statutory notice of intention to be preceded by an earlier notice advising of an intention to issue such a notice. Although I acknowledge that the service of a notice of intention to acquire does affect rights in some respects, the scheme of the LAC Act and the reason why a notice of intention to acquire is given point away from any prior hearing requirement.[94]

The effect of the notice of acquisition

152 The effect of a notice of acquisition under s 19 of the LAC Act is to vest the interest in land described in the notice of acquisition in the acquiring authority freed and discharged from all other interests except those of other public authorities.[95]

153 It is complementary to the statutory scheme that a person with an interest in land to be acquired is given the opportunity to be heard by the authority before the interest in land is taken or diminished for the following main reasons:

(a) It is consonant with the main objectives of the LAC Act as set out in the second reading speech,[96] and would promote those objects especially objects 3, 4 and 5.[97]

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94 See above [111].
95 LAC Act s 24(1), (2).
96 See Victoria, *Parliamentary Debates*, Legislative Assembly (n 38).
97 See above [92].

(b) There is no clear positive legislative intent to exclude a right to be heard as part of procedural fairness prior to a decision by an acquiring authority to serve a notice of acquisition under s 19 of the LAC Act.

(c) It is logical and fair that a person with an interest in the land who has received a notice of intention to acquire should have the opportunity to respond to the acquiring authority concerning the acquisition of the land, and for the authority be required to afford procedural fairness to a person whose interest in land is to be taken or diminished. This will avoid practical injustice.

(d) Through s 8 of the LAC Act, Parliament has directed that when a notice of intention to acquire is served, the person interested in the land must receive a notice in the prescribed form containing specified information concerning the proposed acquisition. The information provided assists an interested person to make a submission to the acquiring authority. The right to a hearing is a natural concomitant of the giving of a notice of intention to acquire.

(e) It is just and convenient for the interested person to be given notice of a hearing at this time. The authority can conveniently advise of the opportunity to be heard, and the manner of hearing at the same time as the notice of intention to acquire is served.

(f) Under the statutory timeframe, there is sufficient time for procedural fairness to be rendered by an acquiring authority.[98]

(g) Parliament imposed protective time limits on the service of a notice to acquire respectful of the position of the person whose interest in land was to be taken or diminished by the compulsory process. Under s 20 of the LAC Act, an interest in land must not be acquired less than two months after the service of the notice of intention to acquire. Although the time can be abridged under s

[98] LAC Act ss 16, 20.

106(1) of the LAC Act, in the absence of agreement between the authority and the affected person, this can only be done by the Governor in Council. Parliament imposed a three month notice period after the date of acquisition and not less than seven days' notice before an authority can enter into possession if all or part of the acquired land is used by a person as a principal place of residence or business of that person.[99] It would be consistent with these provisions for procedural fairness to apply before a notice of acquisition is served.

(h) By this stage of the acquisition process, the class of persons to whom procedural fairness is to be rendered by the acquiring authority has been clearly defined by the inquiry made by the authority at the time when the notice of intention to acquire was served.

(i) Section 19 does not contain any statutory test that must be satisfied. There is no reference to the public interest. The decision to be made by the authority is whether to compulsory acquire the land.

(j) A notice of compulsory acquisition profoundly affects the rights of persons interested in the land including their rights to own, possess, use and develop the land. There is no more serious consequence for a landowner than to be deprived of one's land rights.

(k) The taking or diminution of a person's interest in land is compulsory and without any redress except compensation in money. There is no sign in the LAC Act that Parliament intended compulsion to extend to the denial of procedural fairness at the stage of acquisition.

154 In my view, a person with an interest in land cannot, and should not, be deprived of that interest without the opportunity of being heard by the acquiring authority. Procedural fairness requires that a person who may be deprived of an interest in

[99] Ibid s 26(2).

land, or whose interest in land may be diminished, should have an opportunity to be heard by the acquiring authority before the interest is lost or diminished.

155 The fact that the authorities require a planning permit in this instance to use and develop the water infrastructure is not a sufficient remedy or opportunity for the plaintiffs or persons in a like position. It does not give them any opportunity to object to the acquisition of the land itself. Rather, the acquisition of the land is a fait accompli as far as a responsible authority under a planning scheme or the Tribunal is concerned. In other circumstances, an acquiring authority may have no need to obtain a planning permit.

156 The right to be afforded procedural fairness by an acquiring authority arises in favour of persons whose interest in land is to be taken by an acquiring authority. Reservation and certification are protective of persons with an interest in land and facilitate future planning in the public good, but are not reasons why procedural fairness on acquisition should not be afforded. They do not operate to restrict what procedural fairness would otherwise require. A person whose interest in land is to be acquired will be directly and immediately affected by the acquisition. A right to a hearing would provide a person with an interest in land with the opportunity of making a submission and providing supporting information and material to the acquiring authority.

Did the authorities provide the plaintiffs with the opportunity to be heard prior to publishing the notice of acquisition?

157 By no later than September 2018, the authorities were aware of Mr Caligiuri's caveat, and the interest he claimed in the property. JI was nominated as the purchaser of the property on 26 October 2018. On the same day, Mr Fernon wrote to the Minister for Planning and Mr Curtis of YVW advising of JI's interest in the property. He advised of JI's objection to the construction of the water infrastructure and to any acquisition of land for that purpose.[100] The notice of intention to acquire was served on Mr

[100] See above [34].

Fernon on 26 November 2018.

158 On 3 December 2018, a discussion occurred at a meeting at MW's office between Mr Caligiuri, Mr Goldfinger, and Mr Escreet and other officers of the authorities. The substance of the discussion is set out above.[101] Effectively, the parties did little more than state their positions. There was no statement by officers of the authorities that the plaintiff had the opportunity to be heard by decision makers within the authorities or their delegates by written submission or any other means. Perspectives of the proposed works and preliminary tank drawings were provided a few days later.[102] There was no other meeting prior to the commencement of the proceeding on 18 January 2019. At this time, Mr Fernon in an email again complained that JI had not been heard.

159 From the commencement of the proceeding, the parties adopted the stance of strongly opposed adversaries in litigation. Although a 'without prejudice' meeting may have been held, I am satisfied on the evidence that the authorities did not afford the plaintiffs procedural fairness, or a fair and unbiased hearing of their objections and concerns prior to the decision to serve the notice of acquisition. There is no evidence that at any stage they invited the plaintiffs to make a submission to the decision makers within the authorities or their delegates. There is nothing to suggest that the plaintiffs were given notice that they would be heard within a specified timeframe by the executive officers or senior persons within the authorities who were responsible for making decisions about the acquisition.

160 In my view, procedural fairness at least required the authorities to afford the plaintiffs the opportunity of providing written submissions and other material including expert material as to the effect of the acquisition on them and their proposed subdivision of the property. Just as importantly, it required the decision makers within the authorities or their delegates to give serious consideration to what

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101 See above [36].
102 See above [38].

was submitted by the plaintiffs and to act fairly in making a decision as to whether and how the acquisition should proceed. A submission from the plaintiffs may have assisted the authorities concerning the area and location of land to be acquired, the siting of the proposed water infrastructure, the height, screening and visibility of the tanks, the location of the easements and access, protection of the property during construction and water supply connection issues.

161 The plaintiffs submitted that it would not be unreasonable if the time allowed for them to make a written submission was to be a minimum of two weeks. They said that one month was preferred, but that was the order of time that should be allowed. I accept that procedural fairness is flexible and practical in its content, and that a period of up to one month for written submissions and other material to be provided reflects what procedural fairness requires in the present circumstances.

Conclusion

162 After careful consideration of the scheme of the LAC Act, I have come to the conclusion that procedural fairness requires that a person whose interest in land is to be compulsorily acquired by an authority has, and should have, the right to be heard by the acquiring authority prior to a decision by that authority to take the person's interest in land.

163 This right arises prior to the service of a notice of acquisition. The LAC Act should be construed so that the right to procedural fairness applies in favour of any person whose interest in land is subject to compulsory acquisition.

164 This construction of the LAC Act is comparable to that accepted in *Slipper's* case which also held that there was a right to procedural fairness under the Lands Acquisition Act before acquisition.

Issue two - validity of the notice of intention to acquire

165 The plaintiffs submitted that the notice of intention to acquire was invalid because of an error in the calculation of the area of easement E-3 which was shown in a table on

the notice of intention to acquire as having an area of 0.67 ha rather than its correct area of 2.53 ha.

166 The error as to the area of easement E-3 in the notice of intention to acquire was readily identified by the plaintiffs' solicitor, who pointed it out by letter dated 19 December 2018. There was no misunderstanding or confusion caused by the error.

167 The authorities contend that the error was a minor misdescription and does not invalidate the notice of intention to acquire. If necessary, they rely on s 105 of the LAC Act.[103]

168 I accept the authorities' submission. The notice was generally in accordance with the prescribed form. The error made was minor and of a typographical nature. The land and the interest intended to be acquired were clearly identified on the face of the notice and the accompanying plan. The mistake was obvious. There was no real misunderstanding or confusion. The plaintiffs' solicitor pointed out the error and the correct area of easement E-3 by return correspondence. He did this by calculating the area of easement E-3, based on the plan attached to the notice of intention to acquire. There is no sign in the LAC Act that Parliament intended a slip of this character to invalidate a notice of intention to acquire.

169 In the circumstances, the error in the notice of intention to acquire was not of such a nature as would invalidate the notice.

Issue three - failure to serve the notice of intention to acquire on JI

170 Under s 6 of the LAC Act, a notice of intention to acquire is to be served on each person who has an interest in the land. On 26 October 2018, JI was nominated by Mr Caligiuri as the purchaser of the property. The notice of intention to acquire was served on the vendor and on Mr Caligiuri on 23 November 2018. Mr Caligiuri is a director of JI. Subsequently, it came to the attention of Mr Fernon, the solicitor for JI and Mr Caligiuri. He provided a copy of the notice to the directors of JI. The notice

103 See above [59].

was served at JI's registered office on 7 March 2019 after the notice of acquisition was published on 20 February 2019.

171 It is clear that the authorities were not initially aware of JI's interest. Under s 6 of the LAC Act, the obligation of an acquiring authority is to serve the notice of intention to acquire on persons who have an interest in the land, or such of those persons who after diligent inquiry become known to the authority. I find that the authorities did so, and that the notice of intention to acquire was promptly brought to the attention of JI's solicitor. It was also served on the director of JI who purchased the property and was instrumental in nominating JI as the purchaser under the sale contract. He was the guarantor of JI's obligations under the sale contract.

172 I reject the submission that the notice of intention to acquire was invalid, or that the acquisition process miscarried because of a failure to serve the notice of intention to acquire on JI. There is nothing in the LAC Act that suggests it was Parliament's intention that the acquisition procedure be invalidated because the notice of intention to acquire is served on the person's solicitors and separately on a director and is only served later on the registered office of the company concerned when that has been ascertained.

Other issues

173 The authorities made a number of submissions to the effect that the plaintiffs did not have standing to bring this proceeding, and that there were discretionary factors which should lead to the Court to refuse prerogative or declaratory relief.

174 The authorities' submissions were in substance:

(a) the plaintiffs lacked standing to bring this proceeding;

(b) it would be futile to grant relief;

(c) the plaintiffs were guilty of delay, waiver and acquiescence;

(d) the grant of relief would affect the vendor's position;

(e) the plaintiffs require an extension of time under ord 56 which should not be granted.

175 I will address each of these submissions in turn.

Standing

176 The standing required to seek declaratory relief is determined by the decision of *Australian Conservation Foundation v Commonwealth*.[104] To establish standing, litigants are required to prove they have a 'special interest' in the subject matter of the litigation.[105]

177 In this decision, Gibbs J observed that:

> It is quite clear that an ordinary member of the public, who has no interest other than that which any member of the public has in upholding the law, has no standing to sue to prevent the violation of a public right or to enforce the performance of a public duty. There is no difference, in this respect, between the making of a declaration and the grant of an injunction … A private citizen who has no special interest is incapable of bringing proceedings for that purpose, unless, of course, he is permitted by statute to do so.[106]

178 Gibbs J held that a broad test of special interest was the proper one to apply.[107] The test adopted by Buckley J in *Boyce v Paddington Borough Council*, that a plaintiff needs to suffer some 'special damage peculiar to himself from the interference with the public right', could be equated to a requirement that a plaintiff have 'a special interest in the subject matter of the action.'[108] His Honour concluded:

> I would not deny that a person might have a special interest in the preservation of a particular environment. However, an interest, for present purposes, does not mean a mere intellectual or emotional concern. A person is not interested within the meaning of the rule, unless he is likely to gain some advantage, other than the satisfaction of righting a wrong, upholding a principle or winning a contest, if his action succeeds or to suffer some disadvantage, other than a sense of grievance or a debt for costs, if his action fails. A belief, however strongly felt, that the law generally, or a particular law, should be observed, or that conduct of a particular kind should be

104 (1980) 146 CLR 493 ('*ACF*').
105 Ibid 526.
106 Ibid.
107 Ibid 528.
108 [1903] 1 Ch 109, [81], 114 cited in *ACF* (n 104) 528, 537.

> prevented, does not suffice to give its possessor locus standi. If that were not so, the rule requiring special interest would be meaningless. Any plaintiff who felt strongly enough to bring an action could maintain it.[109]

179 To like effect, Mason J said:

> [A] person, whether a private citizen or a corporation, who has no special interest in the subject matter of the action over and above that enjoyed by the public generally, has no locus standi to seek a declaration or injunction to prevent the violation of a public right or to enforce the performance of a public duty. Depending on the nature of the relief which he seeks, a plaintiff will in general have a locus standi when he can show actual or apprehended injury or damage to his property or proprietary rights, to his business or economic interests.[110]

180 The plaintiffs clearly have a special interest in the proceeding, greater than a mere intellectual or emotional concern, over and above that enjoyed by the public generally. They have an equitable interest in the property under the heads of agreement and the sale contract. Mr Caligiuri was the original purchaser of the property under the sale contract. He lodged a caveat to protect his interest in February 2018. JI is now the purchaser under the sale contract, and Mr Caligiuri has guaranteed performance of its obligations. The authorities propose to acquire the acquisition area and connecting easements. The plaintiffs have property and financial interests that they are entitled to protect. I determine that they have standing to bring this proceeding.

Futility

181 The authorities contend that any breach of the rules of procedural fairness as they apply to the challenged decisions made no difference.

182 In *Stead v State Government Insurance Commission* the High Court held that discretionary relief should be granted where there is a denial of procedural fairness, unless compliance with the requirements of procedural fairness could have made no difference to the result.[111]

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109 (1980) 146 CLR 493, 530–1.
110 Ibid 547 (citations omitted).
111 (1986) 161 CLR 141, 145 (Mason, Wilson, Brennan, Deane and Dawson JJ).

183 In *Ucar v Nylex Industrial Products Pty Ltd,* Redlich JA said as to the discretionary factors in granting relief:

> In my view, the principle laid down in *Stead* contemplates two circumstances in which relief may be refused. It will be refused if upon analysis of the basis for the decision there is an incontrovertible fact or point of law which provides a discrete basis for the decision which cannot be affected by the procedural unfairness. It will then be concluded that the applicant could not possibly have obtained a different outcome. Second, even where the subject of the procedural unfairness touched upon an issue in dispute that was material to the decision, relief may be refused if the respondent can demonstrate that it would be futile to hold a further trial because the result would inevitably be the same.[112]

184 The authorities submitted that Bald Hill had been selected as the site for the new reservoir as early as May 2012, following an extensive assessment. They submitted that after proper and detailed consideration, Bald Hill was incontrovertibly the best site for the location of a new reservoir, and that their decision was not made lightly. Even if the plaintiffs were not afforded an opportunity to be heard, they said that it was the inevitable fact that Bald Hill was the appropriate site for the new reservoir to relieve the strain of imminent population growth in the area.

185 The authorities then submitted that this leaves no possibility of a decision favourable to the plaintiffs. Even if the plaintiffs had been denied procedural fairness, this could not have affected the outcome.

186 The plaintiffs point to the planning scheme and the PSP in support of their objections. They seek that the issues they raise be fairly and genuinely considered and addressed.

187 I do not consider that the objections and concerns that have been expressed by the plaintiffs are of marginal significance or that the opportunity to express their objections or concerns could not realistically have made any difference to the outcome. The main concern of the plaintiffs flows from their financial interest in developing the property, and embraces their objection to the visual appearance of

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112 (2007) 17 VR 492, 519 [75] (citations omitted).

the water infrastructure despite the authorities' willingness to take some steps to minimise the visual impact.

188 I accept that the plaintiffs' concerns are properly and genuinely held and might have a bearing on the acquisition, or the ultimate design and outcome of the project. I reject the submission that the proceeding is futile. The decision as to the location and elevation of the water infrastructure is a matter of fact and opinion. It is a matter of expert planning and engineering evidence, including as to the cost of the different options. There is no incontrovertible fact or law which provides a discrete basis for the authorities' decision.

Delay, waiver and acquiescence

189 The authorities submit that the plaintiffs are guilty of delay, or waived the hearing rule in relation to procedural fairness. They submit that although there is little authority in point, the hearing rule of procedural fairness can be waived.[113]

190 In *Attia v Health Care Complaints Commission*, Walton J said in relation to waiver:

> The question of the waiver of the hearing rule was also discussed by the Northern Territory Court of Appeal in *Lawrie v Lawler*. There the Court of Appeal proceeded on the basis that a waiver of some or all of the hearing rule was possible but reached no final decision on the matter because all members held that the facts could not sustain a claim for waiver.[114]

191 In *Lawrie v Lawler*, Heenan AJ discussed the relevant principles:

> Neither party submitted that this aspect of the hearing rule was incapable of waiver by a person affected but the authorities to that effect are rather limited. There is ample authority to the effect that the bias rule can be waived by a party and once waived is irretrievable. However, on the question of whether this aspect of the hearing rule may be waived such authorities as there are, are rather more tentative. In *Escobar v Spindaleri* a majority of the Court (Kirby P and Glass JA — Samuels JA dissenting) appears to have recognised that this aspect of the rule could be waived but waiver was not established by the evidence in that case. In *MH6 v Mental Health Review Board* it was held that there was no reason in principle or authority to doubt that the full observance of the hearing rule may be waived … As this point was not argued we should proceed on the footing that this aspect of the hearing rule

113 *MH6 v Mental Health Review Board* (2009) 25 VR 382, 392–4, 396 [33], [40], [43], [53]

114 [2017] NSWSC 1066 [223] (citations omitted).

> is capable of being waived either expressly or passively by informed and deliberate action by the party concerned. It is unnecessary and inappropriate to go into this question further on this appeal. It is conceivable, in the context of the present matter, that, insofar as the two-stage process constituted an requirement of the 'hearing rule', that the plaintiff, by his counsel, had waived any right to a hearing on a two-stage basis or otherwise elected not to follow that course.[115]

192 In this decision, there was no ultimate determination that waiver can apply to the hearing rule. However, regard was had to the fact the plaintiff had an opportunity to complain as relevant to the determination of whether or not there was any procedural unfairness in the process.

193 In *Re Association of Architects of Australia; Ex parte Municipal Officers Association of Australia,* Gaudron J, with whom Dawson J agreed said:

> [T]he fact that a hearing has taken place may have particular significance in determining whether or not the opportunity was given. As was pointed out by Deane J in *Sullivan v Department of Transport*, procedural fairness requires only that a party be given 'a reasonable *opportunity* to present his case' and not that the tribunal ensure 'that a party takes the best advantage of the opportunity to which he is entitled'. And it is always relevant to inquire whether the party or his legal representative should reasonably have apprehended that the issue was or might become a live issue.[116]

194 The authorities submitted that the conduct of the plaintiffs over the course of 2018, including that of their consultants DPM Consulting waived the hearing rule in relation to each of the decisions.

195 They submitted that the plaintiffs were made aware of the authorities' need to acquire Bald Hill as a site for water infrastructure during meetings about the designs of the tanks in 2018. They said that the servicing advice advised that land would be required for water infrastructure, and that MW planned up to three drinking water storage tanks on the eastern slope of Bald Hill. In those circumstances, the plaintiffs were on notice of the intended acquisition. The negotiations with the vendor had been ongoing. When the plaintiffs met with YVW in the week commencing 24 September 2018, they did not raise any issue with the land acquisition and easement

115 (2016) 168 NTR 1 [419] (citations omitted).
116 (1989) 84 ALR 208 [19] (citations omitted).

creation. Rather, their concerns were with tank aesthetics.

196 The authorities submitted that the plaintiffs made an informed and deliberate choice not to seek a hearing in 2018, and that they had a reasonable opportunity to present their case on s 5(3) and the acquisition of Bald Hill, but chose not to do so. They said that the plaintiffs were fully informed and waived any right they had in relation to the acquisition.

197 I reject these submissions. When Mr Caligiuri purchased the property no notice of intention to acquire had been given. It would have been normal for the statutory reservation process to be followed. The plaintiffs were not informed that the authorities intended to seek a recommendation from the Minister and a certificate from the Governor in Council under s 5(3) of the LAC Act. They first found out about the use of the power in s 5(3) of the LAC Act in November 2018 after certification had occurred. They consistently objected to what was proposed by the authorities from the time they were informed that the acquisition would take place. Mr Caligiuri has always expressed his concern. The objection was both to the acquisition, and to the proposed use and development of infrastructure. There was no delay, and no waiver of their rights in relation to what they did. They did not acquiesce in the decisions that were made and commenced proceedings promptly in January 2019 before the notice of acquisition was served. In February 2019, they unsuccessfully sought an interlocutory injunction, making a later application again to seek to stop registration of a plan of subdivision. Although they were aware that water infrastructure was planned for Bald Hill, they expected to have an opportunity to object to the acquisition, and to make submissions about design and planning issues and conditions which might be imposed on the project, its footprint and built form.

The position of the vendor

198 I have given consideration to the position of the vendor. If the notice of acquisition is set aside so that the plaintiffs have the opportunity of being heard, the vendor's

claim for compensation will be affected. If the acquisition ultimately proceeds, the relevant date for the assessment of compensation for the acquisition will be later than it is now.

199 Clause 16.2(c) of the sale contract requires the vendor to act reasonably in the conduct of negotiations and claims relating to the future acquisition, and to keep the purchaser fully informed as the negotiations or claim for compensation unfold. Under cl 16.2(e), the vendor must report to the purchaser, the outcome of any meetings had with or at the direction of the authorities if requested to do so. In addition, under cl 16.2(f) the vendor must act at the reasonable direction of the purchaser in relation to the land required for the water infrastructure and include the purchaser in any meetings with the authorities.

200 The evidence below shows that the solicitors for the vendor and solicitors for the plaintiffs have been very active, and worked in a co-operative manner. The evidence shows that the steps taken by or involving the vendor include:

(a) on 23 October 2018, the vendor's solicitor advised the authorities' solicitors that the vendor had entered into a terms contract for the sale of the property. The authorities' solicitors responded and requested a copy of the sale contract so that the authorities could properly consider the position regarding the property in the light of the additional interest. On the same day, the vendor's solicitors wrote to the authorities requesting that all communication in relation to compensation be exclusively directed to them;

(b) on 25 October 2018, the vendor's solicitor advised Mr Fernon that negotiations with the authorities had broken down, and that they were nowhere near each other on price. She told Mr Fernon that the authorities would acquire the land through ministerial intervention;

(c) on 5 November 2018, the authorities' solicitors confirmed with the vendor's solicitor that the authorities would pay $34,143.78 for the vendor's expenses during negotiations with MW;

(d) on 12 November 2018, the vendor's solicitors emailed the authorities referring to the certification and requesting the GPS coordinates for each of the six corners of the acquisition area;

(e) three days later, the authorities' solicitor requested a copy of the sale contract;

(f) on 13 December 2018, the authorities' solicitors provided the vendor's solicitors with the requested GPS coordinates, and requested more information about the sale contract;

(g) on 18 December 2018, the vendor's solicitors advised the authorities' solicitors of the interest of Mr Caligiuri and provided other information about the property and current or intended dealings;

(h) on 19 December 2018, the authorities' solicitors requested the vendor's solicitors to provide more information about the sale contract advising that the mistake in the notice of intention to acquire did not render it invalid;

(i) on 20 December 2018, the vendor's solicitors advised the authorities' solicitors that the vendor had complied with the authorities' request;

(j) on 21 February 2019, the authorities wrote to the vendor's solicitors attaching the notice of acquisition and accompanying statement;

(k) on 7 March 2019, the authorities' solicitors wrote to the vendor's solicitors attaching the notice of acquisition published in the Government Gazette dated 20 February 2019 and the notice of disposition;

(l) on 19 March 2019, the vendor's solicitors wrote to the authorities asking when an offer for compensation would be made;

(m) on 26 March 2019, the authorities' solicitors wrote to the vendor's solicitors advising that an offer for compensation would be made as soon as possible upon receipt of valuation advice and approvals; and

(n) on 11 April 2019, the vendor's solicitors advised the authorities' solicitors that if an offer was not made by 6 May 2019, application would be made to the Court to compel the authorities to make an offer.

201 In addition to conversations between legal advisers, the vendor has been in direct communication with Mr Caligiuri. They met on several occasions at the start of negotiations for the heads of agreement. There were communications between Mr Caligiuri and his representatives and the vendor in the period leading up to the heads of agreement. The vendor provided a raft of information over the period November 2017 to February 2018. In evidence, Mr Caligiuri said that to the best of his knowledge, the vendor complied with his obligations to give access to all information concerning the property that was in his custody, power or control at the time of entering into the heads of agreement. The vendor provided Mr Caligiuri with updates of his negotiations with the authorities in general terms.

202 The vendor and his legal advisers have been aware of the proceeding from the outset and have not chosen to intervene or to provide any evidence as to the vendor's position to the Court. There is no evidence one way or the other as to whether the postponement of the relevant date for the acquisition would affect the amount of compensation that may be awarded to the vendor.

203 On balance, it is my view that I should not exercise my discretion as to relief adversely to the plaintiffs in circumstances where the vendor has chosen not to intervene or be heard in relation to this proceeding or the relief sought by the plaintiffs. The vendor and his solicitors have been actively involved at all stages. The vendor can be expected to have received legal advice from his legal representatives about his position and this proceeding.

Extension of time

204 Under r 56.02.1, a proceeding under ord 56 must be commenced within 60 days after the grounds for the grant of the relief or remedy claimed first arose. Under r 56.02.3, the Court cannot extend the 60 day time limit except in special circumstances.

205 The recommendation and the order in council were made on 30 October 2018, and published in the Victoria Government Gazette on 1 November 2018. The proceeding was filed on 17 January 2019. The notice of acquisition was published on 20 February 2019. The plaintiffs have succeeded in relation to the notice of acquisition, but not the earlier challenged decisions.

206 There is no doubt that the challenge to the validity of the notice of acquisition was in time. The issue of the proceeding preceded in time the decision to serve the notice of acquisition. There was no delay.

Conclusion

207 For the reasons that I have given, the I am satisfied that the authorities were obliged by procedural fairness to give the plaintiffs a hearing prior to deciding to serve the notice of acquisition under s 19 of the LAC Act, and that they did not do so. I am not satisfied that there was any obligation for the Minister or the Governor in Council to hear the plaintiffs prior to the recommendation made by the Minister or certification given by the Governor in Council under s 5(3) of the LAC Act, or that there was an obligation on the authorities to hear the plaintiffs prior to serving a notice of intention to acquire under s 6 of the LAC Act.

208 The Court will grant a declaration to the effect that the notice of acquisition published on 20 February 2019 is invalid and of no effect. This will provide an opportunity for the plaintiffs to be heard by the authorities concerning the acquisition.

SC

ANTHONY CALIGIURI	First Plaintiff
I.I.I. INVESTMENTS PTY LTD (ACN 624 255 812)	Second Plaintiff
ATTORNEY GENERAL (ON BEHALF OF THE STATE OF VICTORIA)	First Defendant
ATTORNEY GENERAL	Second Defendant
MELBOURNE WATER CORPORATION (ABN 81 945 386 953)	Third Defendant
YARRA VALLEY WATER CORPORATION (ABN 93 066 902 501)	Fourth Defendant

PARTIES