HIGH COURT OF AUSTRALIA

FRENCH CJ,
GUMMOW, HAYNE, CRENNAN AND BELL JJ

MANDURAH ENTERPRISES PTY LTD & ORS APPELLANTS

AND

WESTERN AUSTRALIAN PLANNING COMMISSION RESPONDENT

Mandurah Enterprises Pty Ltd v Western Australian Planning Commission
[2010] HCA 2
3 February 2010
P15/2009

ORDER

1. *Appeal allowed in part.*

2. *Declare that:*

   (a) *the taking order of 5 August 2003 made under s 177 of the* Land Administration Act *1997 (WA) relating to:*

      (i) *Lot 7 on Plan 8565, being the whole of the land contained in Certificate of Title Volume 1936 Folio 292 ("lot 7");*

      (ii) *Lot 8 on Plan 8565, being the whole of the land contained in Certificate of Title Volume 1936 Folio 291 ("lot 8");*

      (iii) *Lot 30 on Diagram 74229, being the whole of the land contained in Certificate of Title Volume 1838 Folio 943 ("lot 30"); and*

      (iv) *Lot 49 on Plan 17900, being the whole of the land contained in Certificate of Title Volume 1957 Folio 286,*

   was invalid so far as it purported to apply to those portions of lots 7 and 8 zoned urban under the Peel Region Scheme and that portion of lot 30 zoned industrial under the Peel Region Scheme; and

(b) the interests of the appellants in those portions of lots 7 and 8 zoned urban under the Peel Region Scheme and in that portion of lot 30 zoned industrial under the Peel Region Scheme were not extinguished pursuant to s 179(b) of the Land Administration Act *1997 (WA) following registration of the taking order under s 179.*

3. Set aside orders 1, 3, 4 and 5 of the orders of the Court of Appeal of the Supreme Court of Western Australia made on 17 October 2008, save for so much of orders 1, 3 and 4 as allow the appeal in respect of the zoned portion of lot 30, and in lieu thereof order that:

(a) the appeal be allowed in respect of the zoned portions of lots 7 and 8; and

(b) the orders of the primary judge made on 23 February 2007 be set aside.

4. Respondent to pay one half of the appellants' costs in this Court, and one half of the appellants' costs in the Court of Appeal and at first instance.

5. The application for declaratory and other relief otherwise be referred back to the primary judge for determination in accordance with these reasons and orders.

On appeal from the Supreme Court of Western Australia

Representation

R I Viner QC with L E Rowley for the appellants (instructed by Deacons Lawyers)

R M Mitchell SC with C S Bydder for the respondent (instructed by State Solicitor for Western Australia)

CATCHWORDS

Mandurah Enterprises Pty Ltd v Western Australian Planning Commission

Real property – Compulsory acquisition – Parts of various lots reserved under town planning scheme for Primary Regional Roads – Whole lots subsequently acquired for purpose of railways and primary regional roads – Whether land reserved for one purpose could be acquired for another purpose – Whether valid acquisition under s 13 of *Town Planning and Development Act* 1928 (WA) – Whether valid acquisition under s 161 of *Land Administration Act* 1997 (WA) ("Land Act").

Real property – Compulsory acquisition – Section 161 of Land Act provided that acquisition must be for purposes of public work – Portions of lots cut off from access to public roads by railway – Whole lots acquired to avoid statutory obligation to construct crossings – Whether acquisition incidental to purposes of public work – Whether compulsory acquisition of whole lots valid – Whether severance possible where same taking order effected both valid and invalid acquisitions.

Words and phrases – "for the purpose of a town planning scheme", "for the purposes of the work", "public work", "railway purposes".

Land Administration Act 1997 (WA), ss 161, 177, 179.
Public Works Act 1902 (WA), s 95.
Town Planning and Development Act 1928 (WA), s 13(1).

1 FRENCH CJ, GUMMOW, CRENNAN AND BELL JJ. This appeal from the Court of Appeal of the Supreme Court of Western Australia ("the Court of Appeal") concerns the validity of a taking order which effected the compulsory acquisition of four lots of land, on and adjacent to which the Perth to Mandurah railway was subsequently constructed. In particular the appeal concerns the power of the respondent, the Western Australian Planning Commission ("the WAPC"), to compulsorily acquire the land, and more particularly to do so in circumstances where not all of the land was required for the construction of the railway.

2 On 8 August 2003, the WAPC became the registered proprietor of land previously belonging to the appellants, under the *Transfer of Land Act* 1893 (WA) ("the Transfer of Land Act")[1]. Three days prior, on 5 August 2003, a taking order had been issued under s 177 of the *Land Administration Act* 1997 (WA) ("the Land Act"), declaring that the land described in the Schedule to the taking order had been compulsorily taken under the Land Act ("the taking order"). The Schedule to the taking order included land described as lot 7, lot 8, lot 30 and lot 49 (collectively, "the lots") in the local government area of the City of Mandurah. It also included several other properties. The first appellant, Mandurah Enterprises Pty Ltd, was the registered proprietor of lots 7 and 49. The second appellants, Neil Robert Graham and Valmai Evelyn Graham, were the registered proprietors of lots 8 and 30.

3 Lot 7 is contiguous with and to the west of the TAFE Peel Regional Campus ("the TAFE"). Lot 8 is contiguous with and to the west of lot 7. Lot 30 is contiguous with and to the west of lot 8. Lot 49 adjoins the north-west corner of the TAFE and lies to the north-east of lots 7, 8 and 30. Each of the lots fell within the Peel Region Scheme ("the PRS"), a regional planning scheme prepared by the WAPC under s 18(1)(ba) of the *Western Australian Planning Commission Act* 1985 (WA) ("the Commission Act")[2]. In October 2002 the PRS was gazetted, showing that part of each of lots 7, 8 and 30 and all of lot 49 were reserved for Primary Regional Roads. That reservation represented 3.8%, 41% and 52% of lots 7, 8 and 30 respectively. The balance of lots 7 and 8 were zoned "urban" and the balance of lot 30 was zoned "industrial".

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1 Pursuant to s 63 of the Transfer of Land Act, certificates of title are conclusive evidence that the WAPC is the proprietor of the land with an estate of fee simple.

2 This Act was repealed by the *Planning and Development (Consequential and Transitional Provisions) Act* 2005 (WA) but the parties agreed that there is no material difference in the replacement provisions.

4 The appellants brought proceedings by originating summons in the Supreme Court of Western Australia, seeking a declaration that the taking order was invalid. The primary judge (Le Miere J) found that the appellants did not establish that the taking order was invalid[3]. The appellants then appealed to the Court of Appeal (McLure and Buss JJA and Murray AJA), which upheld the decision of the primary judge except insofar as that decision dismissed the appellants' application for declaratory relief in respect of the portion of lot 30 zoned "industrial" under the PRS[4].

5 In their appeal to this Court, the appellants submitted that the Court of Appeal erred in holding that the taking of the whole of the appellants' land was valid. The appellants contended that the taking of the whole of lots 7, 8 and 30 was invalid, and that therefore the taking order by which the WAPC purported to take the whole of lots 7, 8, 30 and 49 was invalid and of no effect. Issues which were the subject of a Notice of Contention before the Court of Appeal were not pursued in this appeal. What the appellants sought from this Court was a declaration of invalidity in respect of the taking order in relation to each of the appellants' lots with the consequence that there would need to be a fresh valid taking order of only the reserved parts of lots 7, 8 and 30 and the whole of lot 49.

6 The purpose for which the land was taken is identified in the Schedule to the taking order as "Railways" and "Primary Regional Roads". The railway referred to is the South-West Metropolitan Railway, and the Primary Regional Road referred to is the North Mandurah Bypass.

7 The intention in taking each of the lots was to build the South-West Metropolitan Railway over the western parts of lots 7 and 8, the eastern part of lot 30 and the whole of lot 49, which lot was wholly acquired for railway purposes. However, it was not contentious that lots 7 and 8 were taken in their entirety because, when the railway was constructed over the western parts of lots 7 and 8, the eastern parts of lots 7 and 8 not used for the railway could not be accessed by any public road.

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3 *Mandurah Enterprises Pty Ltd v Western Australian Planning Commission* [2007] WASC 43.

4 *Mandurah Enterprises Pty Ltd v Western Australian Planning Commission* (2008) 38 WAR 276.

8 In such circumstances the Public Transport Authority was required by s 102 of the *Public Works Act* 1902 (WA) ("the Public Works Act") to construct such crossings as may be necessary to allow access to the land. The whole of lot 30 was taken in the mistaken belief that the construction of the railway would prevent access to the balance of the lot via any public road and therefore give rise to the abovementioned obligation to build a crossing. The zoned portion of lot 30 taken under the taking order was incapable of being used for the purposes of the railway. So much was held by the Court of Appeal and is not in dispute. In oral submissions this Court was told that after the Court of Appeal had decided the invalidity of the taking order as it related to the zoned part of lot 30, by agreement between the parties, that part has been returned to the ownership of the second appellants without prejudice to rights to be pursued in this appeal. It appears a subdivision has been effected by agreement of the parties, and there has been a transfer of the relevant part under the provisions of the Transfer of Land Act. The main significance for this appeal of the taking of lot 30 concerns severance which is discussed later in these reasons. The claims in relation to the zoned portions of lots 7 and 8 constituted a prominent part of the argument.

9 These reasons seek to show that the taking order is valid with respect to the reserved portions of lots 7, 8 and 30, and the whole of lot 49, but invalid in respect of the zoned portions of lots 7, 8 and 30, and accordingly, the appeal succeeds in part.

The applicable legislation

10 Of a task of construing legislation spread across several revenue statutes of some density of expression, Kitto J said it was the duty of the Court to peer into "this dark jungle, full of surprises and mysteries"[5]. The present task may not be of that order, but the applicable legislation does comprise no less than four statutes and a town planning scheme, and an appreciation of the relationship of each to the others is necessary for determination of the issue on the appeal concerning the powers of the WAPC.

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5 *Livingston v Commissioner of Stamp Duties (Q)* (1960) 107 CLR 411 at 446; [1960] HCA 94.

The Planning Act

11 A power of compulsory acquisition was, at the relevant time, contained in s 13 of the *Town Planning and Development Act* 1928 (WA)[6] ("the Planning Act"), under which compliance with the notification provisions of the Land Act referred to below was not required. Section 13 provided:

> "(1) The responsible authority may, *for the purpose of a town planning scheme*, in the name and on behalf of such authority –
>
> (a) purchase any land comprised in such scheme from any person who may be willing to sell the same; or
>
> (b) with the consent of the Governor, take compulsorily, under and subject to Part 9 of the *Land Administration Act 1997*, (but subject to subsection (2)), any land comprised in such scheme, and whether situate within or without the boundaries of the district of such responsible authority.
>
> (2) When any land is taken compulsorily under the powers conferred by this section the provisions of
>
> (a) sections 170 to 175 inclusive; and
>
> (b) section 184,
>
> of the *Land Administration Act 1997*, shall not apply to or in respect of the land or the taking or in any manner whatsoever, and that Act shall be read and construed as if the provisions were deleted." (emphasis added)

Sections 170 to 175 and s 184 of the Land Act are provisions dealing with notification of intention to take an interest in land.

12 It was agreed that the WAPC had the powers of a "responsible authority" in relation to the relevant town planning scheme under s 37F of the Commission Act.

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6 This Act was repealed by the *Planning and Development (Consequential and Transitional Provisions) Act* 2005 (WA).

The Land Act

13 Part 9 of the Land Act also deals with the compulsory acquisition of interests in land. Section 161 governs the power to take land for public works as follows:

> "(1) Whenever the Crown, the Governor, the Government, any Minister of the Crown, any State instrumentality or any local government is authorised, by this Act, the *Public Works Act 1902* or any other Act, to undertake, construct or provide any public work, and the use of any land or any interest in land is required *for the purposes of the work*, then, unless otherwise specially provided –
>
> (a) any interest in the land held by a person other than the Crown may be taken;
>
> …" (emphasis added)

"Public work" is defined in s 2 of the Public Works Act (definitions from which are incorporated into Pt 9 of the Land Act by s 151 of that Act) to mean and relevantly include:

> "(2) any railway authorised by special Act or any work whatsoever authorised by any Act".

It should also be noted that "railway" as referred to in s 151 has the same meaning as in the Public Works Act. Section 95 of the Public Works Act relevantly defines "railway" as including "the land upon which any railway is made or authorised to be made" and "all land taken, purchased, or acquired for railway purposes".

14 Section 178(2) of the Land Act relevantly provides that a taking order may, as necessary:

> "…
>
> (d) provide that specified interests are to be disposed of or granted in land affected by the order to specified persons;
>
> …
>
> (f) provide as necessary for the cancellation, amendment or issue of … certificates of title."

Section 178(3) provides:

> "The interests which may be disposed of or granted under subsection (2)(d) include the fee simple, a lease of Crown land or any easement or obligation."

Section 180 provides that a taking order may be annulled or amended within 90 days after its registration and s 187 permits the Minister to cancel the designation of land as required for a public work when it is not so required.

15 Division 3 of Pt 9 (ss 168-181) specifies the procedure for taking an interest in land without agreement. Section 170(1) provides that, where it is proposed to take interests in land without agreement, the Minister must issue a notice of intention to take. Section 170(2) contains an exception, that is, that a notice of intention need not be issued "if the proposed taking is for the purpose of a railway authorised by a special Act." It is further required that the notice be sent to the Registrar of Titles or Registrar of Deeds, as appropriate, and for the relevant Registrar to register that notice (s 170(3) and s 170(4)). The WAPC did not register a notice of intention before making the taking order in this matter. Section 175 covers objections to a proposed taking.

16 Section 177 outlines the process for making a taking order where a notice of intention has been registered, in sub-s (1), or where a notice of intention is not required, in sub-s (2) which provides:

> "If a special Act has been passed authorising the construction of a railway, the Minister may make a taking order consistent with that Act."

17 The effect of the registration of a taking order is relevantly described in s 179 as follows:

> "On the registration of a taking order in relation to land –
>
> (a) the order has effect according to its terms;
>
> (b) if the order provides that the land is taken – every registered and unregistered interest in the land not preserved under section 178(2)(a) is extinguished, and each person who formerly held such an interest has that holding converted into a claim for compensation under Part 10; …"

Once the statutory process encapsulated in ss 178 and 179 is completed, an entry is made in the Register established under s 48 of the Transfer of Land Act,

recording the making of the order and the new registered proprietor of the land, which in this case was the WAPC.

18 The assessment of compensation for loss suffered as a result of compulsory acquisition is dealt with in Pt 10 (ss 202-258). It can be noted that s 241(2) provides that, in the case of an interest in land taken for a railway or other work authorised by a special Act, regard is to be had to the value of the land, with improvements, as at the first day of the session of Parliament in which the Act was introduced.

The Railway Act

19 The *Railway (Northern and Southern Urban Extensions) Act* 1999 (WA) ("the Railway Act") provides the specific authority to construct the Jandakot-Rockingham-Mandurah railway in s 4 as follows:

> "(1) A railway, and all necessary, proper and usual works and facilities in connection with the railway, may be constructed and maintained along the line described in Schedule 2.
>
> (2) Despite the deviation specified in section 96(1) of the *Public Works Act 1902*, the railway may deviate to a distance of 4 kilometres on either side of the line described in Schedule 2."

Schedule 2 describes the line in general terms by reference to existing maps, roads and railway lines.

20 The Railway Act is a "special Act" for the purposes of s 177(2) of the Land Act set out above authorising the construction of a railway. Section 151 of the Land Act incorporates the definition of "special Act"[7]:

> "any Act of the Parliament of Western Australia with which this Act is incorporated, authorising the construction of a public work".

Section 96(1) of the Public Works Act provides that:

> "Every railway shall be made only under the authority of a special Act which shall state as nearly as may be the line of the railway and the 2 termini thereof; but it shall be lawful to deviate from such line at a

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7 Defined in s 2 of the Public Works Act.

distance of 1.6 kilometres on either side thereof, or such other distance as may be provided in any special Act."

The Public Transport Authority and its powers

21 The Public Transport Authority is established by s 5 of the *Public Transport Authority Act* 2003 (WA). Its main function, specified by s 12, is "to provide and operate safe and reliable public passenger transport services, either directly or through persons with whom it contracts." The Public Transport Authority may do the following things in respect of any railway authorised by a special Act, under s 99(1) of the Public Works Act:

"…

(c) Make the railway upon, across, over, or under any road, street …;

…

(i) Do all acts necessary for making, equipping, maintaining, altering, repairing, and using the railway."

Under ss 101(2)(a) and 104 of the Public Works Act, the Public Transport Authority has the power to alter or close roads. Such power is also implicit in s 99(1)(i), set out above.

22 The Public Transport Authority also has duties regarding provision of access to land. Section 102 of the Public Works Act provides:

"Where the making of a railway line has cut off all access by road to land other than Crown land, the Public Transport Authority shall make such crossing or crossings as may be necessary to give access to such land."

"Road" is defined in s 84 of the Public Works Act as "a public highway", and therefore the duty in s 102 is not discharged if land remains accessible by private road only.

The Peel Region Scheme

23 It is accepted that the PRS is a "town planning scheme" within the meaning of s 13 of the Planning Act, set out above. The purpose of the PRS is stated in cl 5 as being to:

"(a) provide for the reservation and protection of land for regional transport, conservation, recreation and public uses;

(b) provide for the zoning of land for living, working and rural land uses;

(c) provide a mechanism for landowners to be compensated in a fair and equitable manner where land is reserved for a public purpose;

(d) provide an opportunity for the formal environmental assessment of regional planning proposals and provide increased certainty to such proposals;

(e) provide a mechanism for certain development of regional significance, and development in areas of regional significance, to be considered and approved by the Commission; and

(f) identify and protect land having strategic importance for industrial and future urban use."

Land reserved under the PRS for a public purpose is defined as "reserved land" under cl 2(2) of the PRS, and cl 9 provides:

> "The lands shown as Reserved Lands on the Scheme Map are reserved under the Scheme for the public purposes shown on the Scheme Map."

Categories of public purpose are outlined in cl 10 of the PRS and relevantly include:

"…

(b) Primary Regional Roads – to provide a regional road network to accommodate current and future transport needs on roads declared under the *Main Roads Act 1930*;

…

(d) Railways – to provide for the passage of trains, the marshalling, maintenance and storage of rolling stock, and the conveying of the public and freight by rail;

..."

24 The PRS also deals with zoning of land. Clause 11 provides:

"(1) The region is classified into the zones shown on the Scheme Map.

(2) The zones are delineated and depicted on the Scheme Map according to the legend on the Scheme Map."

Clause 12 relevantly provides:

"Land is classified into zones under the Scheme for the following purposes –

(a) Urban – to provide for residential development and associated local employment, recreation and open space, shopping, schools and other community facilities;

…

(d) Industrial – to provide for manufacturing industry, the storage and distribution of goods and associated uses;

…"

25 Clause 18 provides that, subject to cll 19 and 20, a person must not commence or carry out development on reserved land or development of a kind or class specified in a resolution made by the WAPC unless that person has applied for and obtained the planning approval of the WAPC.

26 Clause 19 relevantly provides:

"The following development on reserved land does not require the planning approval of the Commission –

…

(e) development on reserved land owned by or vested in a public authority that is –

…

(iii) works on land reserved for Railways, or for Primary Regional Roads or Other Regional Roads, for the purpose of or in connection with a railway, but this does not include the construction or alteration of a railway station or any related car parks, public transport interchange facilities, or associated means of pedestrian or vehicular access;

…"

Clause 20(b) of the PRS provides that reserved land owned by or vested in a public authority may be used by the public authority without the approval of the WAPC if the land is used for any purpose for which the land may be lawfully used by the public authority.

The issues

27 Essentially two issues arise on this appeal:

(1) *Power*: What was the proper extent of the power of the WAPC, under the Commission Act, s 13 of the Planning Act or s 161 of the Land Act, to acquire land for the purposes of the PRS? In particular, could a taking order authorise the taking of more land than was reserved or required for a Primary Regional Road, or land reserved for one purpose to be used for another purpose? Could a taking order authorise the taking of more land than was required for the actual construction of a railway and land not reserved for any public purpose under the PRS?

(2) *Severance*: Could part of a lot or the whole of a lot be severed from a taking order where that part or the whole could not be validly taken so as to uphold the taking of the other part of a lot or other lots?

28 The issues so framed were said to give rise to four questions:

(1) By what power was the taking order made, there being alternative possible sources of power?

(2) Was the taking of the whole (ie the reserved and zoned parts) of lots 7 and 8 (and 30) valid?

(3) Was the taking of the zoned portions of lots 7 and 8 (and 30) for the purpose of avoiding a statutory requirement to construct a crossing valid?

(4) If the taking of the zoned portions of lots 7 and 8 (and 30) was invalid, could those parts be severed from the reserved parts of those lots and could the taking of the balance (ie the reserved parts) of lots 7, 8 and 30 and the taking of the whole of lot 49 be valid?

In essence, the WAPC raised the same questions but approached them in a different order.

Submissions

29 The appellants submitted that the Court of Appeal erred in holding that lots 7, 8, 30 and 49 were validly taken by the taking order, save for the portion of lot 30 zoned for industrial use. The Court of Appeal is also said to have erred in construing the power of the WAPC under the Planning Act and the Land Act as extending to a valid compulsory acquisition of the whole of the land, for the purpose of constructing a railway on only some parts of the zoned portions of lots 7 and 8 for the purpose of avoiding the statutory duty under s 102 of the Public Works Act to construct a crossing so as to give access to lots 7 and 8. The appellants further argued that the Court of Appeal should have held that the purported taking of lots 7, 8, 30 and 49 was beyond the power of the WAPC either under s 13 of the Planning Act or under s 161 of the Land Act and was therefore invalid and of no effect.

30 Further, in respect of the finding that the taking of the zoned part of lot 30 was invalid, the appellants submit that the valid taking cannot be severed from the invalid taking, and that the invalidity of part of the taking order means the entire taking order is invalid.

31 The WAPC contended that the taking order was a valid exercise of power under the Land Act, s 161 of which was said to have authorised the taking of lots 7, 8, 30 and 49 other than that portion of lot 30 zoned for industrial use. Alternatively, it was submitted that s 13 of the Planning Act at least authorised the WAPC to take that part of the lots in question classified as reserved under the PRS for railway purposes, and accordingly the taking order to that extent was valid under s 13 of the Planning Act. Importantly, it was conceded by the WAPC that s 13(1) of the Planning Act did not support the taking of those parts of the land which had been zoned under the PRS, which concession explained the WAPC's reliance on s 161 of the Land Act. For the reasons which follow, the appeal should be allowed in part, chiefly by reference to the language of the applicable legislation.

The power of the WAPC to take land

32 The power to compulsorily acquire land is a power to take land for the purpose for which the power is granted[8]. Compulsory acquisition and associated

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8 See *Thompson v Randwick Corporation* (1950) 81 CLR 87; [1950] HCA 33 ("*Thompson*"); *Marshall v Director General, Department of Transport* (2001) 205 CLR 603; [2001] HCA 37 ("*Marshall*").

compensation is entirely the creation of statute[9]. The submissions concerning s 13 of the Planning Act and s 161 of the Land Act raise questions of statutory interpretation to be assessed by reference to the statutory presumption against an intention to interfere with vested property rights[10].

Taking land "for the purpose of a town planning scheme"

33 Section 13 of the Planning Act, set out above, permitted the taking of land "for the purpose of a town planning scheme", here, the PRS. The Court of Appeal (McLure JA, with whom Buss JA and Murray AJA agreed on this point) concluded correctly that in order to be "for the purpose of a town planning scheme" the acquisition must be consistent with the terms and effect of the scheme in question[11]. That conclusion was based on the natural and ordinary meaning of the language of s 13, its distinction from s 161 of the Land Act which provided for the acquisition of land for "the purposes of [a public] work", and the fact that such a construction is consonant with the dispensation of public consultation requirements in ss 170-175 of the Land Act[12]. The legislature dispensed with these requirements due to the fact that the opportunity for objections and public submissions regarding the making or amendment of a regional planning scheme had been conferred through other legislation[13].

34 There is no doubt that the taking of the whole of lot 49 and the portions of lots 7, 8 and 30 reserved under the PRS for purposes identified in conjunction

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9 *Walker Corporation Pty Ltd v Sydney Harbour Foreshore Authority* (2008) 233 CLR 259 at 269-270 [29]-[30] per Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ; [2008] HCA 5; *R & R Fazzolari Pty Ltd v Parramatta City Council* (2009) 237 CLR 603 at 619 [41] per French CJ; [2009] HCA 12.

10 *Clissold v Perry* (1904) 1 CLR 363 at 373 per Griffith CJ; [1904] HCA 12; *Western Australian Planning Commission v Temwood Holdings Pty Ltd* (2004) 221 CLR 30 at 49 [43] per McHugh J; [2004] HCA 63. See also the remarks of Gaudron J in *Marshall* (2001) 205 CLR 603 at 623 [37]-[38].

11 *Mandurah Enterprises Pty Ltd v Western Australian Planning Commission* (2008) 38 WAR 276 at 285 [41].

12 *Mandurah Enterprises Pty Ltd v Western Australian Planning Commission* (2008) 38 WAR 276 at 286 [42]-[46] per McLure JA.

13 Second Reading Speech, Western Australia, Legislative Assembly, *Parliamentary Debates* (Hansard), 21 November 1957 at 3442.

with the reservation would answer the description of land taken "for the purpose of" the PRS. Accordingly, if land reserved for "Primary Regional Roads" may be acquired for the purposes of "Railways" (both of which are identified purposes in the PRS) the compulsory acquisition of lot 49 and the reserved portions of lots 7, 8 and 30 would be for the purposes of the PRS and therefore within the power conferred by s 13(1)(b) of the Planning Act. By way of contrast, the compulsory acquisition of the zoned portions of lots 7, 8 and 30 is not for the purposes of the PRS and a taking of them is beyond the power granted under s 13(1)(b), in the sense explained in *Thompson v Randwick Corporation*[14], set out below[15]. As mentioned above, the WAPC concedes this point concerning s 13(1)(b) in respect of the zoned portions of lots 7, 8 and 30.

35 This leads to the appellants' contention that as the reserved parts of lots 7, 8 and 30 were reserved for "Primary Regional Roads" under the PRS, and since the reserved parts were not reserved for "Railways" under the PRS, the land taken for the railway was taken for an improper purpose. In *Thompson*[16] improper purpose in the context of the resumption of land was explained thus:

> "[T]he Council, in attempting to resume more land than is required to construct the road, is not acting in good faith. By that we do not mean that the Council is acting dishonestly. All that we mean is that the Council is not exercising its powers for the purposes for which they were granted but for what is in law an ulterior purpose."

36 In answer to the allegation that the taking was for an improper purpose, the WAPC relied on the location of the railway reservation in the PRS immediately to the north and south of the taken land as evidencing that it was within the contemplation of the PRS that the railway would run into and share land with the proposed North Mandurah Bypass. More importantly, the WAPC relied on cl 19(e)(iii) of the PRS, set out above, which provides that land reserved for Primary Regional Roads may be developed without development approval for the purpose of, or in connection with, a railway (except for the construction of a railway station, amongst other exceptions). In terms, the PRS authorised the taking of the reserved part of the lots for railway purposes, which has the effect that the taking of the reserved land was not for a purpose ulterior to

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14 (1950) 81 CLR 87 at 105-106 per Williams, Webb and Kitto JJ.

15 At [35].

16 (1950) 81 CLR 87 at 105-106 per Williams, Webb and Kitto JJ.

the PRS. Accordingly, s 13(1) of the Planning Act was the source of power for the taking of the reserved portions of lots 7, 8 and 30 and the whole of lot 49.

Taking land "for the purposes of [a public] work"

37 Section 161 of the Land Act works differently from s 13 of the Planning Act. Section 161 permits an authority under the Act to take land for the undertaking, construction or provision of a "public work", an expression of wider import than the phrase "for the purpose of a town planning scheme" occurring in s 13(1) of the Planning Act. However, the permission in s 161 is limited by the provision that any taking must be "for the purposes of the work". It has already been explained that the railway was a "public work" for the purposes of s 161 and that "railway" was defined to include "railway purposes" in s 95 of the Public Works Act. The question arising under s 161 is whether acquiring land for the admitted purpose of avoiding the obligation to construct a crossing is capable of being a "railway purpose" so as to fall within s 161 as a "purpose of the work". A majority of the Court of Appeal (McLure and Buss JJA, Murray AJA dissenting) found that such an acquisition is capable of being for a railway purpose within s 161[17] and was not an improper purpose as that was explained in *Thompson*[18]. Buss JA essentially found that the purpose for which the zoned parts of lots 7, 8 and 30 were taken was incidental to the "undertaking, construction or provision" of the railway[19]. Murray AJA found that the acquisition, so as to avoid the operation of s 102 of the Public Works Act, was not for railway purposes[20]. As urged by the appellants, that conclusion must be upheld. The WAPC contended that the acquisition of the zoned portions of lots 7 and 8 was for the purpose of giving effect to the decision of the Public Transport Authority regarding the level crossing (ie not to construct it) and it therefore constituted a use of the zoned portions for the purpose of the railway. That convoluted proposition should not be accepted. Alternatively, it was contended that the use of the land, being a passive holding of the land, was incidental to the

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17 *Mandurah Enterprises Pty Ltd v Western Australian Planning Commission* (2008) 38 WAR 276 at 288 [60] per McLure JA.

18 (1950) 81 CLR 87 at 105-106 per Williams, Webb and Kitto JJ.

19 The language derives from s 161(1) of the Land Act, set out above. See *Mandurah Enterprises Pty Ltd v Western Australian Planning Commission* (2008) 38 WAR 276 at 303 [138]-[139].

20 *Mandurah Enterprises Pty Ltd v Western Australian Planning Commission* (2008) 38 WAR 276 at 306 [157].

undertaking, construction or provision of the railway. Reliance was placed on the definition of "public work" to include "proper and usual works and facilities in connection with"[21] the railway, the expression "any work incidental to" the railway[22] and the expression "land required for or in connection with" the railway[23].

38 The evidence of the decision to acquire the zoned portions of lots 7 and 8 (and 30) was contained in the affidavit of Mr Hillyard, who recommended the acquisition as follows:

> "It is further proposed to take several severed portions of land which would otherwise become landlocked as a result of the construction of the railway or require the installation of level crossings, which is not favoured by the WAGRC."[24]

39 It was contended by the appellants that the acquisition was not a use "for the purposes of [a public] work", ie the railway, as contemplated by s 161. It was further submitted that in determining whether the taking was incidental to the undertaking, construction or provision of the railway on the reserved portions of lots 7, 8 and 30 and the whole of lot 49, it was essential to ask whether the taking is necessary to the exercise of the power to otherwise take. As pointed out in *Hudson v Venderheld*[25], the notion of a necessity "must be limited by the extent of the need".

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21 Railway Act, s 4(1).

22 Public Works Act, s 2(21).

23 Public Works Act, s 2(22).

24 The WAPC was the acquiring authority; the WAGRC, that is the Western Australian Government Railways Commission, was the constructing and operating authority. It should also be noted that the Public Transport Authority became the successor to the WAGRC between the making of the original report and the making of the taking order.

25 (1968) 118 CLR 171 at 175 per Barwick CJ, Kitto, Taylor and Owen JJ; [1968] HCA 17, citing *Board of Fire Commissioners (NSW) v Ardouin* (1961) 109 CLR 105 at 118 per Kitto J; [1961] HCA 71; see also *Marshall* (2001) 205 CLR 603 at 626-627 [47] per McHugh J.

40 Acquiring land for the purpose of avoiding the construction of a level crossing is patently not acquiring land for the purpose of a railway or for purposes incidental to the undertaking, construction or provision of a railway. To find otherwise would be to stretch impermissibly the natural and ordinary meaning of the phrases relied on such as "in connection with" and "incidental to" the railway. The zoned portions of lots 7 and 8 (and 30) were not actually required, or necessary, for the work of constructing the railway. Nor could it be said that they were required for "proper and usual works … in connection with the railway" as they were not acquired for any works whatsoever. Rather they were required to avoid the obligation to undertake crossing works. On this analysis s 161(1)(a) does not authorise the taking of the portions of lots 7 and 8 (and 30) which were zoned urban (or industrial) under the PRS.

41 Three of the four questions set out above[26] can now be answered as follows:

(1) s 13(1)(b) of the Planning Act is the source of power of the taking order insofar as it covers the portions of the lots reserved under the PRS;

(2) the taking of the reserved portions of lots 7 and 8 (and 30) is valid by reference to s 13(1)(b) of the Planning Act; the taking of the zoned portions of lots 7 and 8 (and 30) is invalid and that taking is not authorised by either s 13(1) of the Planning Act or s 161 of the Land Act; and

(3) the taking of the zoned portions of lots 7 and 8 (and 30) for the purposes of avoiding a statutory requirement to construct a level crossing is invalid.

These answers direct attention to the effect of the invalidity of the taking order in relation to the zoned portions of lots 7 and 8 (and 30). That requires consideration of the operation of s 179 of the Land Act. The taking order recited that the relevant certificates of title were to be cancelled and new certificates of title to be issued for the lands taken. Provision for cancellation of certificates of title in the taking order was authorised by s 178(2)(f) of the Land Act. Cancellation was evidently to be effected pursuant to, but not by operation of, the order. Section 179(a) provided that on the registration of the taking order it would have effect "according to its terms". By s 179(b), which applied to the taking order in this case, every registered and unregistered interest in the land would be extinguished. The "registration" process applicable to the taking order was not elaborated in s 179. The term "registered" was defined in s 3(1) of the

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26 At [28] above.

Land Act as "registered under Part IIIB of the TLA", TLA being defined in s 3(1) as the Transfer of Land Act. However, Pt IIIB does not make and, as the Court was informed by senior counsel for the WAPC, never has made provision for the registration of taking orders for the purposes of s 179. In this case the existence of the order was endorsed on the relevant certificates of title under the heading "Limitations, Interests, Encumbrances and Notifications". Its "registration" was not a process for which the Transfer of Land Act provided. It was a process for which the Land Act provided with the consequences set out in s 179. The endorsement of the order could not therefore be seen as the endorsement on the certificate of a registered interest for the purposes of the Transfer of Land Act. Given that s 179(b) allows for a partial extinguishment to save specified interests preserved pursuant to s 178(2)(a), it is, as a matter of construction, capable of an application limited to interests validly taken.

42 The findings that the taking order, insofar as it concerns the reserved portions of the lots, is valid, and that it is invalid insofar as it concerns the portions of lots 7 and 8 (and 30) zoned under the PRS, have the consequence that the taking order cannot operate under s 179(b) of the Land Act to extinguish the whole of the appellants' interests in their land. The extinguishment effect of s 179(b) can only apply to so much of the land as is validly included in the taking order as having been taken. The taking order recites relevantly that Certificates of Title Volume 1936 Folio 292 (lot 7), Volume 1936 Folio 291 (lot 8) and Volume 1838 Folio 943 (lot 30) "are to be totally cancelled and new Certificates of Title are to be issued for the lands taken".

43 To the extent that the taking order so expressed includes the portions of lots 7 and 8 (and 30) zoned under the PRS which are invalidly taken, the total cancellation of the relevant certificates of title referred to in the taking order is erroneous. This would appear to give rise to a claim *in personam*, a personal equity in each of the appellants of the kind referred to in *Frazer v Walker*[27], to rectify the Register. The necessary mechanical steps would likely include a subdivision so as to isolate the zoned portions of the lots from the portions reserved under the PRS. The taking order and the relevant entries in the Register would require consequential amendment to achieve a transfer of ownership, to the appellants, of the portions zoned under the PRS. Some such course has already been followed in respect of lot 30, which is now back in the ownership of the second appellants.

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27 [1967] 1 AC 569 at 585. See also *Bahr v Nicolay [No 2]* (1988) 164 CLR 604 at 637-638 per Wilson and Toohey JJ, 653-654 per Brennan J; [1988] HCA 16.

44 Further, s 200 of the Transfer of Land Act empowers a judge to direct the Registrar to cancel a certificate of title "[u]pon the recovery of any land estate or interest by any proceeding at law or in equity from the person registered as proprietor … and to substitute such certificate of title or entry as the circumstances of the case may require".

45 In this context, it needs to be noted that all questions of the indefeasibility of the WAPC's title, and questions arising out of the appellants' delay in asserting their rights, have been expressly reserved by the consent of the parties, to be dealt with by the primary judge on a further hearing of the application. Any claim to enforcement of the appellants' personal equities mentioned above can be expected to constitute part of the further hearing.

Severance

46 The fourth question asked concerns severance. The appellants observed that severance can be applied to widely differing classes of instruments, contracts, legislation, subordinate legislation, warrants, or even to an invalid condition imposed upon a town planning consent. However, the appellants submitted that this was not a case for severance essentially because the taking order did not distinguish between the reserved and zoned portions of lots 7 and 8 (and 30). It was contended that severance is an inappropriate remedy in the context of compulsory acquisition. It was further submitted that if the acquiring authority cannot proceed with all the resumptions in the taking order it has no power in relation to any of them. As such, the taking order is *ultra vires*, invalid and of no effect.

47 The WAPC submitted that the ordinary common law principles of severance can be applied in the compulsory acquisition of land. Further, the WAPC pointed out that the steps necessary to create a separate lot of the eastern balance of lots 7 and 8 (and of the western balance of lot 30) are mechanical steps which can be taken. A survey is ordinarily required for the issue of a certificate of title for a subdivided lot[28] but it is not a requirement specified in the Land Act as a precondition of making a valid taking order.

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28 Transfer of Land Act, ss 166 and 166A; see also the definition of "lot" in s 3(1) of the Land Act, and in s 2(1) of the Planning Act.

48 *Estates Development Co Pty Ltd v State of Western Australia*[29] supports the proposition that the challenged acquisitions by the taking order do not have to be considered *in globo* and that suggests that the common law principle of severance might be applied in the context of compulsory acquisition of land, at least in respect of different lots. Some of the difficulties in the application of the common law principle of severance have been pointed out in *SST Consulting Services Pty Ltd v Rieson*[30]. However, it is unnecessary to make any final determination on the issue of severance because relief applicable to the findings set out above in these reasons renders severance otiose.

Conclusions

49 The taking order of 5 August 2003 is valid in respect of the reserved portions of lots 7, 8 and 30 and the whole of lot 49. It is invalid in respect of the zoned portions of lots 7, 8 and 30. This result constitutes substantial but partial success for the appellants as the WAPC's submissions have succeeded in respect of the reserved portions of lots 7, 8 and 30 and the whole of lot 49. Whilst lot 30 has been restored to the ownership of the second appellants, all rights were reserved by the parties, and declaratory relief is sought by the appellants in respect of all four lots.

Orders

50 The orders made by the Court of Appeal on 17 October 2008, save for so much of orders 1, 3 and 4 as allow the appeal in respect of that portion of lot 30 on Diagram 74229 zoned "Industrial" under the Peel Region Scheme, and save for order 2, be set aside and in lieu thereof it should be ordered that the orders of the primary judge made on 23 February 2007 be set aside, and that the appeal be allowed in respect of the zoned portions of lots 7 and 8.

51 Declarations should be made in the following terms:

1. The taking order of 5 August 2003 made under s 177 of the *Land Administration Act* 1997 (WA) relating to:

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29 (1952) 87 CLR 126 at 142 per Dixon CJ, Webb and Kitto JJ; [1952] HCA 42; see also *Thames Water Authority v Elmbridge Borough Council* [1983] QB 570 at 577-581 per Dunn LJ, 583-585 per Dillon LJ, 585-586 per Stephenson LJ.

30 (2006) 225 CLR 516 at 530 [43] per Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ; [2006] HCA 31.

(i) Lot 7 on Plan 8565, being the whole of the land contained in Certificate of Title Volume 1936 Folio 292 ("lot 7"); and

(ii) Lot 8 on Plan 8565, being the whole of the land contained in Certificate of Title Volume 1936 Folio 291 ("lot 8"); and

(iii) Lot 30 on Diagram 74229, being the whole of the land contained in Certificate of Title Volume 1838 Folio 943 ("lot 30"); and

(iv) Lot 49 on Plan 17900, being the whole of the land contained in Certificate of Title Volume 1957 Folio 286,

was invalid so far as it purported to apply to those portions of lots 7 and 8 zoned urban under the Peel Region Scheme and that portion of lot 30 zoned industrial under the Peel Region Scheme.

2. The interests of the appellants in those portions of lots 7 and 8 zoned urban under the Peel Region Scheme and in that portion of lot 30 zoned industrial under the Peel Region Scheme were not extinguished pursuant to s 179(b) of the *Land Administration Act* 1997 (WA) following registration of the taking order under s 179.

52 The appeal otherwise should be dismissed.

53 Having regard to all the circumstances, the WAPC should pay one half of the appellants' costs in the Court of Appeal and at first instance and one half of the appellants' costs of this appeal.

54 The application for declaratory and other relief should otherwise be referred back to the primary judge for determination of the outstanding issues in accordance with these reasons and orders.

55 HAYNE J. The facts and circumstances giving rise to this appeal are set out in the joint reasons of French CJ, Gummow, Crennan and Bell JJ. I need not repeat them.

56 For the reasons their Honours give, there was power to take a part of each of lots 7, 8 and 30 for the purposes sought, but there was not power to take the whole of any of those lots. The taking order provided that each of those lots was wholly taken. It directed, so far as is now relevant, that Certificates of Title Volume 1936 Folio 292 (lot 7), Volume 1936 Folio 291 (lot 8), and Volume 1838 Folio 943 (lot 30) "are to be totally cancelled and new Certificates of Title are to be issued for the lands taken". I agree with their Honours that the total cancellation of those Certificates of Title and the issue of new Certificates was beyond power.

57 As their Honours foreshadow, the want of power to take the whole of the land comprising each of lots 7, 8 and 30 may well found claims in personam, at the suit of the present appellants as former registered proprietors, against the Western Australian Planning Commission ("the WAPC"). Questions concerning what is alleged to be the indefeasibility of the WAPC's title having been expressly reserved by consent of the parties (to be dealt with by the primary judge on a further hearing of the matter) it would not be appropriate now to express any opinion about the availability of in personam claims.

58 I differ from their Honours about the relief that should be granted in this Court. More particularly, I do not consider that it should be declared that the taking order is properly described as being "valid" or "invalid" as to part. At least in the present context, reference to validity or invalidity is to be understood not just as a reference to the presence or absence of power to make the taking order, but as a statement about the legal efficacy of the taking order. To declare that the taking of the whole of a particular piece of land, or the direction to cancel wholly a Certificate of Title, is valid as to part but invalid as to the balance, decides that the taking or the direction is legally effective as to part, but legally ineffective as to the balance.

59 No satisfactory foundation was established for concluding that the taking order could be read down in its operation with respect to a particular lot that it provided should be wholly taken. Whereas the order could readily be given distributive and discrete operation with respect to each of the lots separately identified in the Schedule to the taking order, no such distributive or discrete operation can be given to the taking order's operation on a part of one of the lots which the taking order provided were wholly taken.

60 No foundation for reading down the taking order in its operation with respect to any of lots 7, 8 or 30 is provided by s 178 or s 179 of the *Land Administration Act* 1997 (WA) ("the Land Act"). Those provisions allow taking of part of an identified piece of land; they allow preservation of specified

interests in land affected by a taking order. But the taking order now in question was expressed as taking the whole of each of lots 7, 8 and 30; it was not expressed as taking part. The taking order now in question did not seek to preserve any relevant interest in the land comprised in any of those lots.

61 Moreover, I consider that, in the circumstances of this case, there is no little danger that the use of the language of validity and invalidity may mislead. Discussing the supposed distinction between void and voidable administrative actions[31], H W R Wade observed[32]:

> "[T]here is no such thing as voidness in an absolute sense, for the whole question is, void against whom? It makes no sense to speak of an act being void unless there is some person to whom the law gives a remedy. If and when that remedy is taken away, what was void must be treated as valid, being now by law unchallengeable."

The terms and operation of the taking order at issue in the present appeal intersect with a system of title by registration. In accordance with the taking order, the WAPC was registered as proprietor of the whole of each of lots 7, 8 and 30 on 8 August 2003. The critical question for the ultimate resolution of the appellants' claim is whether a remedy, in the form of claims in personam, is available to undo what has been done in reliance upon the direction in the taking order. Regardless of whether the taking order was "registered", or registered under provisions made by the *Transfer of Land Act* 1893 (WA), the critical step the appellants need undone is the registration of the WAPC as registered proprietor of each of the lots in question. Only after the question about availability of a remedy to achieve that end has been answered will it be appropriate and possible to describe the relevant direction in the taking order, in so far as it applied to lots 7, 8 and 30, as "invalid", "valid", or "valid in part". Invalidity in this case turns on whether there is a remedy for what was done without power.

62 I would therefore make orders that the appeal to this Court be allowed. Having regard to the limited relief sought by the appellants in their Notice of Appeal to this Court, so much of order 1 of the Court of Appeal made on 17 October 2008 as dismissed their appeal to that Court and order 5 of those orders should be set aside. In their place there should be orders that: (a) the

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31 H W R Wade, "Unlawful Administrative Action: Void or Voidable?", (1967) 83 *Law Quarterly Review* 499 at 507-515 ("Wade"). See also *Minister for Immigration and Multicultural Affairs v Bhardwaj* (2002) 209 CLR 597 at 643 [144]; [2002] HCA 11.

32 Wade at 512.

appeal to that Court is allowed; (b) the orders of Le Miere J made on 23 February 2007 are set aside; and (c) there should be a declaration that the WAPC had no power to take so much of the land described in Certificate of Title Volume 1936 Folio 292 (lot 7), Certificate of Title Volume 1936 Folio 291 (lot 8), or Certificate of Title Volume 1838 Folio 943 (lot 30) as was not reserved land and accordingly that the direction in the taking order made on 5 August 2003, that Certificates of Title Volume 1936 Folio 292, Volume 1936 Folio 291 and Volume 1838 Folio 943 be totally cancelled and new Certificates issued, was beyond power. In my opinion, the WAPC should pay the appellants' costs both in this Court and in the Court of Appeal. I consider that the appellants have substantially succeeded on the issues thus far argued and costs should follow that event. The costs of trial should abide the outcome of the further litigation of the matter. In accordance with the agreement of the parties reserving the issues of indefeasibility there should be a further consequential order remitting the proceedings to the trial judge for further hearing and determination of the remaining issues in the proceedings.