Acquisition of Land and Other Legislation Amendment Bill 2008

Explanatory Notes

General Outline

Short Title

The short title of the Bill is the *Acquisition of Land and Other Legislation Amendment Bill 2008*.

Policy Objectives

The objectives of the Bill are to amend the *Acquisition of Land Act 1967* (the Act) to:

- overcome uncertainties arising from the Queensland Court of Appeal decision of *Sorrento Medical Service Pty Ltd v Chief Executive, Department of Main Roads* (2007) QCA 73 (The Sorrento decision) by narrowing the meaning of the term 'interest' in the Act to limit the class of persons who must be served with a notice of intention to resume and who may be entitled to claim compensation;
- clarify process matters and modernise the Act by codifying current practices, providing transparency and improving consistency of payment of compensation among the constructing authorities such as what constitutes compensable disturbance items (e.g. moving costs, phone, internet reconnections etc);
- impose a statutory time limit on allowing a claim for compensation of three years and provide a safeguard that enables claims outside the statutory period by the constructing authorities at their discretion or by order of the Land Court where it considers it reasonable in the circumstances;
- broaden the class of claimants entitled to be paid consequential costs for the purchase of a replacement property to include consequential costs on investment properties;

- provide the Land Court with jurisdiction over the recovery of overpayment of compensation; and
- contemporise the wording and layout, update and categorise the description of items in the Schedule and remove redundant items.

The Bill will also:

- contain a number of minor technical amendments to the *Land Act 1994* to rectify anomalies that arose as a consequence of the commencement of the *Land and Other Legislation Amendment Act 2007* and also remove several obsolete provisions dealing with the Brigalow and other lands development; and
- make consequential amendments to the *Integrated Planning Act 1997* and the *South Bank Corporation Act 1989*.

Reasons for the Policy Objectives

Acquisition of Land Act 1967

Queensland is experiencing a significant infrastructure boom. It is in the State's interest that compulsory acquisitions are settled expediently to avoid delays in project starting dates and with minimal community objection.

The Act has been in operation for over 40 years and has had no major amendments. The Act provides the processes to be followed by constructing authorities empowered under State legislation to compulsorily acquire land for public purposes. Compulsory acquisition is also guided by an extensive body of case law.

A Court of Appeal decision in May 2007, the Sorrento decision, has substantially extended the class of persons who must be served with a notice of intention to resume and who may be entitled to claim compensation for loss associated with land acquired from them under the Act.

Limiting "interest" in relation to a right to compensation

Prior to the Sorrento decision the provisions of the Act had been interpreted to mean that a person was only entitled to compensation in respect of resumed land where that person had a freehold or a leasehold estate, or interests such as easements or profits à prendre on the land. The decision took a broader interpretation of what constituted an interest in land and extended the class of persons who may be entitled to claim compensation

to include persons who have a personal right existing in the land, but which are not proprietary rights in the land. The case involved a contractual licence for car parks over land.

The Sorrento case has left the scope of what constitutes an interest uncertain. At its broadest, the case could be interpreted in subsequent court actions to extend to other personal rights such as cleaners with a contract to clean a building or oil companies who have a contract with a service station.

Disturbance as a separate head of claim

In the context of compulsory land acquisition, disturbance refers to those incidental costs which are the reasonable and probable results of the acquisition and are not directly reflected in the assessment of value of land taken, such as removal costs, electricity and telephone connections, mail redirect and valuation and legal fees.

Disturbance is not referred to in the section of the Act that sets out the heads of claim to assess compensation. However, it has been recognised as of special value to the owner and is currently assessed separately by constructing authorities in line with a substantial body of case law.

As the law on disturbance comes from case law, claimants and their solicitors are often required to research the case law, thereby increasing the fees of a claimant's solicitor and the time involved in reaching settlement for an acquired property.

Consequential costs for investment properties

The Act does not include specific reference to compensation being payable for the 'consequential costs of the acquisition'. Stamp duty, legal and other consequential costs for the purchase of a replacement principal place of residence are compensable based on case law.

At present the right to claim for consequential costs does not extend to consequential costs for the replacement of an investment property. The right to claim consequential costs for investment properties is a practice adopted by other Australian States.

Notice of Intention to Resume

There is an increasing trend towards community title schemes for residential units, hotels, business parks and commercial offices. Many residential schemes have in excess of 50 units. If a notice of intention to

resume had to be served on all owners, the process would become time consuming and costly.

The complexity of dealing with all owners of common property has been recognised in section 18 of the Act which provides a mechanism to deal with claims for compensation solely through the body corporate. However, the Act does not make it clear that if common property is proposed to be resumed then the body corporate is the only entity that ought to be served with a notice of intention to resume.

Another issue is that currently there is no power under the Act to amend a notice of intention to resume except through the objection process. There are occasions when a constructing authority wishes to amend a notice of intention to resume due to changes in land requirements or following a request of an owner (outside the objection process).

The taking of easements versus the taking of land

The Act is silent on the relationship between an easement that is taken under the Act and other interests in land. Some land owners have been uncertain about the impact of an easement that is taken under the Act.

Amendment of description or area of land in a gazette resumption notice

Currently under the Act there is no power to amend the description or area of land in a gazetted resumption notice. This can cause problems because the resumption plans are approximations of required land only and there are at times minor discrepancies between the resumption plans and the survey plan.

Criteria for taking additional land by constructing authorities on behalf of owner

The heading of section 13 of the Act is "Owner may require small parcel of severed land to be taken". That heading currently relates only to section 13(1) of the Act. This is because section 13(1) was the only operative subsection when the Act commenced. Section 13 of the Act was subsequently amended to introduce the power to take additional land in section 13(2). The original heading is no longer appropriate and can be confusing.

Sometimes a resumption of land divides the remaining land and some owners would like constructing authorities to acquire one of the severed areas usually because it has been rendered impractical for the owner to use. Often it is only after land has been resumed that the owner is in a position

to determine the impact of the take. Owners have in some instances requested a constructing authority to acquire the balance of the land. However, such requests cannot currently be accommodated after the resumption.

Limitation period

Most legal claims have a statutory limitation period. However, there is no statutory limitation on allowing a claim for compensation. Hence, hypothetically, there could be a claim for compensation 20 years after a notice of intention to resume. This unlimited time for claiming compensation allows claimants to wait until such time as "they get around to it" and provides uncertainty from a budgetary perspective for constructing authorities.

Transfer of lands owned by constructing authorities

Constructing authorities do not have the ability, when appropriate, to transfer land that it owns to a claimant to satisfy a claim for compensation. The Act provides that if the Crown is the constructing authority then the Governor-in-Council may grant in fee simple over any unallocated State land. This provision may have been appropriate in the past when State Government land was held under 'Crown' tenures such as reserves, however, land ownership has changed substantially since the Act was introduced and it is now common for the State and constructing authorities to own land in fee simple.

Conferral of further jurisdiction on the Land Court for the recovery of certain sums

In the recent case of *Old Coach Developments Pty Ltd* (Claimant) *v State of Queensland* [2008] QLC 0105 the State paid the claimant an advance against compensation of $4,975,000. The final amount of compensation determined by the Land Court (the Court) was $4,880,610. The State sought orders from the Court that the claimant repay to the State the sum of $78,379 being the balance of the advance on compensation paid by the State in excess of the compensation and interest thereon as determined by the Court. The Court found that whilst it agreed that the State should be entitled to recover the overpayment, the Court had no jurisdiction to make orders about that repayment.

Update of the Schedule to the Act

The Schedule to the Act lists the purposes for which land may be taken under the Act. It is a very large list which, because it is not divided into

categories, is hard for the public to follow. Some of the language in the Schedule is antiquated and some purposes are outdated.

Land Act 1994

The Bill contains a number of minor technical amendments to the *Land Act 1994* to rectify anomalies as a consequence of the commencement of the *Land and Other Legislation Amendment Act 2007*. The Act also contains several obsolete provisions dealing with the Brigalow and other lands development.

How the Policy Objectives will be achieved

The policy is to be achieved by:

Acquisition of Land Act 1967

Limiting "interest" in relation to a right to compensation

The Bill will narrow the meaning of the term 'interest' in the Act to limit the class of persons who must be served with a notice of intention to resume and who may be entitled to claim compensation. The interests for which compensation will be payable will be broader than prior to the Sorrento decision but narrower than the uncertain position at law following the Sorrento case. The amendment will codify existing practice, ensuring that no one who in the past had a right to compensation will lose that right and extend the right to compensation to include some non-proprietary interests, namely persons with a valuable contractual licence over the land. Persons with a valuable contractual licence should be entitled to compensation, even though the interest is not a proprietary interest. Valuable contractual interests may include the location of particular items on land such as automatic teller machines and advertising signs and may extend to car parking arrangements on land. Persons who merely have a contract for service, for example to clean a premise, will be excluded.

Disturbance as a separate head of claim

The Bill introduces a separate head of claim for disturbance items and identifies these items in the Act to simplify the land acquisition process.

Consequential costs for investment properties

The Bill will codify and standardise the practices of constructing authorities regarding what constitutes a consequential cost for the purchase of a replacement principal place of residence.

The Bill will also broaden the class of claimants entitled to be paid consequential costs to include payment of consequential costs for the replacement of an investment property.

Notice of Intention to Resume

The Bill will clarify which entity is to be served with a notice of intention to resume when common property is proposed to be resumed. In the case of the resumption of common property it is the body corporate which will be served with the notice of intention to resume. The body corporate will then be required to ensure that a copy of the notice of intention to resume is sent out with the next notice of general meeting after its receipt of the notice of intention to resume.

The Bill will also provide that the notice of intention to resume states that individual unit proprietors or owners may be entitled to compensation for damage suffered by the proprietor or owner as a result of the taking of the common property and the effect of the taking on the proprietor or owner's lot.

The Bill will allow for amendment of a notice of intention to resume in response to issues raised during the objection period.

The amendments will remove the ability of an objector to make a further challenge to an amended notice of intention to resume where the amendment is made with the agreement of the owner. This will address some of the delays now being incurred by having to re-run the objection period.

The amendments will also insert a general power into the Act to amend a notice of intention to resume. This will remove the necessity to rely on the powers of the *Acts Interpretation Act 1954* to amend an instrument such as the notice of intention to resume. Where a notice of intention to resume is amended under this general provision, the objection period starts again.

The taking of easements versus the taking of land

The Bill will clarify the taking of easements versus the taking of land. The amendment made by the Bill will explicitly state that the taking of an easement over land under the Act does <u>not extinguish</u> any interests over the relevant land.

Amendment of description or area of land in a gazette resumption notice

The Bill will enable the amendment of a description or area of land in a gazetted resumption notice where the change is made solely to accurately describe the area.

Criteria for taking additional land by constructing authorities on behalf of owner

The Bill will allow the taking of severed land where the owner and the constructing authority agree that the severed land is of no practical use or value to the owner. The taking of the additional land may occur after the date of resumption of the primary land.

Limitation period

The Bill will impose a three year limitation period for claims. In addition, the Bill provides a special safeguard to allow a claim for compensation to be accepted outside the statutory period by the constructing authorities at their discretion or by order of the Land Court where it considers it reasonable in the circumstances.

Transfer of lands owned by constructing authorities

The Bill will enable constructing authorities, when appropriate, to transfer land that it owns to a claimant to satisfy a claim for compensation.

Conferral of further jurisdiction on the Land Court for the recovery of certain sums

The Bill will amend the Act to provide a right of action to recover the overpayment of compensation funds and interest and to provide the Land Court with jurisdiction over the recovery of overpayment of compensation and the interest on that overpayment. It is appropriate that a constructing authority be able to recover any funds paid which could not properly be characterised as compensation and go beyond placing an owner in the same position they were in prior to the acquisition. As a result of the decision in *Old Coach Developments Pty Ltd v State of Queensland* [2008] QLC 0105 proceedings to pursue advance compensation overpayments and interest on those overpayments would have to be pursued in either the District or Supreme Court, depending on the amount to be recovered, resulting in further costs to both the constructing authority and the owner of the resumed land.

Update of the Schedule to the Act

The Bill will update and categorise the description of items in the Schedule and remove redundant items in the Schedule of the Act.

Land Act 1994

The Bill will make a number of minor technical amendments to the *Land Act 1994* to rectify anomalies as a consequence of the commencement of the *Land and Other Legislation Amendment Act 2007* and also removes several obsolete provisions dealing with the Brigalow and other lands development.

Alternatives to the Bill

Legislative amendment is the only way to achieve the policy objectives.

Estimated Administrative Cost to the Government for Implementation

Consequential costs of purchasing replacement property

While the cost impact of expanding compensation for consequential costs to investment properties will ultimately depend on the quantity and value of investment properties being resumed, experience to date suggests this should represent a small component (approximately 0.55%) of overall acquisition costs.

Disturbance as a separate head of claim

The clarification of disturbance as a separate head of claim will formalise what currently is happening and is therefore cost neutral or savings may eventuate.

The implementation of the legislation will be undertaken by the Department of Natural Resources and Water from within existing agency resources.

Consistency with Fundamental Legislative Principles

The Bill is generally consistent with the fundamental legislative principles set out in section 4 of the *Legislative Standards Act 1992* (the Legislative Standards Act).

Clause 8 of the Bill amends the Act to clarify that a person does not obtain a right to claim compensation under the Act in relation to a services contract that may be extinguished because of the taking of land under the Act. The principle outlined in subsection 4(3)(i) of the Legislative Standards Act that legislation provide for the compulsory acquisition of property only with fair compensation is of some relevance however the amendment is designed to codify existing practices and ensure that no one who would have had a right to claim compensation before the amendment commences will lose that right.

Also, the amendment potentially extends the right to claim compensation in relation to certain non-proprietary rights in land. This extension of the right to claim compensation is consistent with the Sorrento decision. The amendment is in response to the Sorrento decision and clarifies the types of interest for which compensation may be claimed under the Act.

Clause 18 of the Bill replaces the current schedule of the Act that sets out the purposes for which land may be taken under the Act. The proposed new schedule updates the description of some purposes and omits some purposes which are obsolete. Essentially the new Schedule reorganises the way the purposes are stated in the schedule. Proposed part 14 of the schedule provides for other purposes to be declared under a regulation, and reinserts the regulation-making power under the current schedule.

It is arguable that this proposed part 14 of the new Schedule is a Henry VIII clause and breaches the principle in subsection 4(4)(c) of the Legislative Standards Act that legislation authorise amendment of an Act only by another Act. However, the scope of what may be prescribed under a regulation is limited by:

- the short title to the Act, which makes it clear that the purposes that may be listed under the Schedule are limited to "public works and other public purposes"; and
- the functions of constructing authorities under their various enabling Acts. For example where the constructing authority is a local government, it would be constrained by the *Local Government Act 1993*.

It is necessary to retain the regulation making power because it is not practicable to provide in the Schedule a comprehensive list of every single public work or public purpose for which it may be necessary, in the public interest, to acquire land. It would cause undue delay to the construction of important public infrastructure if the Act had to be amended to add a new

purpose before land acquisition could occur. Having an additional power to prescribe other purposes is consistent with the acquisition legislation in other States and Territories.

At clause 45 of the Bill, proposed section 521T of the *Land Act 1994* retrospectively validates registered changes to the purpose for which particular reserves under the Act are dedicated. This amendment is not inconsistent with the principle in subsection 4(3)(g) of the Legislative Standards Act that legislation does not adversely affect rights and liberties, or impose obligations, retrospectively.

Any registered change to which the provision applies would have been from a purpose that was not a community purpose under the *Land Act 1994* to a purpose that is a community purpose under the Act. The registered changes that have been made sought only to protect and facilitate the purpose for which the land was to be used. The changes do not detrimentally impact on the use of the land by the trustees of the reserves.

Consultation

Community

The Local Government Association of Queensland was consulted about the amendments to the Act contained in the Bill.

Government

Consultation has been undertaken with: Queensland Treasury, the Departments of the Premier and Cabinet, Main Roads, Infrastructure and Planning, Transport, Health, Mines and Energy, Local Government, Sport and Recreation, Public Works, Disability Services Queensland, Queensland Rail, Housing, Tourism, Regional Development and Industry, Queensland Corrective Services, Justice and Attorney-General, Queensland Rail, Brisbane City Council, Queensland Water Infrastructure Pty Ltd., Powerlink and Energex.

Results of consultation

Community

The Local Government Association of Queensland supports the proposed amendments to the Act contained in the Bill.

Government

The proposed amendments are supported by the consulted agencies and organisations.

Notes On Provisions

Part 1 Preliminary

Short title

Clause 1 provides that the short title of the Act is the *Acquisition of Land and Other Legislation Amendment Act 2008*.

Part 2 Amendment of *Acquisition of Land Act 1967*

Act amended in pt 2

Clause 2 provides that this part amends the *Acquisition of Land Act 1967*.

Amendment of s 5 (Purposes for which land may be taken)

Clause 3 amends section 5 of the Act. The amendment is consequential to the amendment made by clause 18 of this Bill to the schedule to the Act, which describes the purposes for which land may be taken. The amendments to the Schedule update and categorise the description of items and remove redundant items. The amendment to section 5 provides that the headings used in the replacement schedule to categorise items are to be used as a guide only.

Amendment of s 6 (Easements)

Clause 4 amends section 6 of the Act to provide that the taking of an easement under this Act does not extinguish any interest in the land subject to the resumption.

The amendments are being made because the Act is currently silent on the relationship between an easement taken under section 6 and pre-existing interests in land. Some land owners have been uncertain about the impact of an easement that is taken under the Act.

Amendment of s 7 (Notice of intention to take land)

Clause 5 amends section 7 of the Act so that where common property is to be taken, only the body corporate of that common property and each entity, who to the knowledge of the constructing authority has an interest in the common property, (other than an owner of a lot) must be served with a notice to resume. The amendment is required because, if a notice of intention to resume has to be served on all owners of residential schemes, the process is cumbersome, time consuming and costly.

The complexity of dealing with all owners of common property has been recognised in section 18 of the Act which provides a mechanism to deal with claims for compensation. However, the Act does not currently make it clear that if common property is proposed to be resumed then the body corporate is the only entity that ought to be served with a notice of intention to resume. In order to ensure that individual unit holders are aware of the resumption and their possible right to claim compensation, the body corporate will be required to send out a copy of the notice of intention to resume with notice of the first general meeting after it received the notice of intention to resume.

The clause also amends section 7 to provide that where the subject of the notice of intention to resume is common property, the notice must:

- state that individual unit owners may be entitled to compensation for damage suffered by the owner as a result of the taking of the common property and the effect of the taking on the owner's lot; and
- state the requirements imposed on the body corporate in relation to the notice of intention to resume.

This amendment is consequential to amendments being made by clause 12 of this Bill to section 18 of the Act to enable claims by individual unit holders for the resumption of common property in certain circumstances.

Clause 5 also requires the following to be included in a notice of intention to resume:

- the time within which a claim for compensation may be made and a claimant's right to apply to the Land Court where a claim is not made within that time; and
- information about how a contract, licence, agreement or other arrangement entered into in relation to the land after a notice of intention to resume is served may be dealt with in assessing compensation.

Clause 5 allows a constructing authority to amend a notice of intention to resume by giving written notice of the amendment to each of the entities served with a notice of intention to resume. If the constructing authority amends the notice of intention to resume the objection period starts again from the date the notice of the amendment is given to the entity.

Clause 5 will also standardise the language of section 7 by requiring that a notice of intention to resume "state" the particular purpose for which the land is to be taken rather than "specify" that purpose. It is not intended that this change have any effect on what currently must appear in these notices. The same level of detail is required.

Amendment of s 8 (Dealing with objections)

Clause 6 amends section 8 of the Act to make it clear that if a constructing authority, after considering an objection, amends a notice of intention to resume with the owner's consent; it does not have to give a further period in which to object. This amendment is intended to remove the ability of an objector to make a second challenge of an amended notice of intention to resume where the amendment is made with the agreement of the owner.

Amendment of s 11 (Amending of gazette resumption notice)

Clause 7 amends section 11 of the Act to enable amendment of the description or area of land in a gazetted resumption notice where the change is made solely to more accurately describe the area. The resumption sketch plans are an approximation of required land only and there are at times minor discrepancies between the resumption plans and the survey plans. This will not disadvantage land owners because compensation is negotiated on the basis of the final surveyed area. Also the practice enables the constructing authorities to minimise the land area to be acquired which benefits owners. Because of the purely technical nature of

these changes they will be able to be made by the relevant Minister or an appropriately qualified delegate of the relevant Minister.

Amendment of s 12 (Effect of gazette resumption notice)

Clause 8 amends section 12 of the Act with regards to the removal of an obsolete provision, the effect of taking leasehold land, and the right to claim compensation.

The omission of section 12(2) and amendment of section 12(2A) of the Act takes into account the ability of the State to hold an interest in freehold land and leasehold land.

The amendment to section 12(4) of the Act takes into account the ability under the *Transport Planning and Coordination Act 1994* and the *Electricity Act 1994* for leasehold land to be acquired under the *Acquisition of Land Act 1967*. Leasehold land acquired under the *Acquisition of Land Act 1967* becomes unallocated State land that must be allocated under the *Land Act 1994*, or any other Act whereby land may be allocated. For example, leasehold land taken for national park purposes may be dedicated as a protected area (national park) under the *Nature Conservation Act 1992*. Under the *Land Act 1994*, any allocation of the acquired land is a means of granting to the constructing authority the most appropriate tenure for the purpose of the acquisition.

The introduction of sections 12(4A) and (4B) confirms that land acquired from a deed of grant in trust or lease under the *Land Act 1994* may be dealt with by the constructing authority disregarding the fact the acquired land becomes unallocated State land on and from the date of the publication of the gazette resumption notice and remains unallocated State land until the land has been allocated under the *Land Act 1994* or any other Act.

The insertion of section 12(5C) in the Act is to provide that a right to claim compensation for an interest affected by an acquisition of land does not extend to an interest under a contract merely for the provision of services on, to, or in relation to land. The amendment will overcome potential uncertainties arising from the Sorrento decision by limiting the meaning of "interest" in the Act.

Prior to the Sorrento decision, the provisions of the Act had been interpreted to mean that a person was only entitled to compensation in respect of resumed land where that person had a freehold or a leasehold estate, or incorporeal interests such as easements or profits à prendre on the land. The Sorrento decision took a broader interpretation of what

constituted an interest in land and extended the class of persons who may be entitled to claim compensation to include persons who have a personal right existing in the land, but which are not proprietary rights in the land. The Sorrento decision involved a contractual licence for car parks over land.

The Sorrento decision has left the scope of what constitutes an interest uncertain. At its broadest, the decision could be interpreted in subsequent court actions to extend to other personal rights such as cleaners with a contract to clean a building or oil companies who have a contract with a service station.

The concept of what will constitute an "interest" under the Bill is broader than prior to the Sorrento decision but narrower than the uncertain position at law following the Sorrento case. The amendments will codify existing practice, ensuring that no one who in the past had a right to compensation will lose that right and extend the right to compensation to include some non-proprietary interests, namely persons with a valuable contractual licence over the land. Persons with a valuable contractual licence should be entitled to compensation, even though the interest is not a proprietary interest.

Amendment of s 12B (Particular land may be dedicated as road)

Clause 9 amends section 12B of the Act. Under section 12B of the Act, land taken under the Act for road purposes and vested in a constructing authority in fee simple may be dedicated as a road by recording a dedication notice for the land in the freehold land register.

With the extension of the power under other Acts to acquire a lease under the *Acquisition of Land Act 1967* for road purposes, the constructing authority should be allowed to dedicate the acquired land as road under this provision. This will provide for administrative efficiency.

Amendment of s 13 (Owner may require small parcel of severed land to be taken)

Clause 10 amends section 13 of the Act to enable, by agreement, the taking of a severance area and to allow the taking of additional land after the date of resumption of the primary land. Sometimes a resumption of land divides the remaining land. Some owners would like constructing authorities to acquire one of the severed areas usually because it has been rendered impractical for the owner to use. The balance land is not necessarily a 'small size'; however the size alone is not indicative of the

owner's ability to use the land. Accordingly the words 'small' and 'shape' should be deleted from section 13(1). Often it is only after land has been resumed that the owner is in a position to determine the impact of the take. Owners have in some instances requested a constructing authority to acquire the balance of the land. However, such requests cannot be accommodated after the resumption.

The clause also amends the heading for the section from 'Owner may require small parcel of severed land to be taken' to 'provision for taking particular additional land'. The heading of this section relates only to section 13(1) of the Act. This is because section 13(1) was the only operative subsection when the Act commenced. Section 13 of the Act was subsequently amended to introduce the power to take additional land in section 13(2). The original heading is no longer appropriate and can be confusing. Accordingly, the heading should be changed to 'taking particular additional land'.

Amendment of s 17 (Revocation before determination of compensation)

Clause 11 amends section 17 of the Act to correct a minor drafting error. Reference to 'subparagraph' in paragraph 17(2)(b) should be a reference to 'section'.

Amendment of s 18 (By whom compensation may be claimed)

Clause 12 amends section 18 of the Act to enable individual unit owners to claim compensation for damage suffered by the owner as a result of the taking of the common property and the effect of the taking on the owner's lot. Currently sections 18(6) and (9) deem the body corporate to be the owner of common property for the purposes of a claim for compensation in respect of common property.

The resumption of common property may impact on units in different ways. For example, units adjacent to the resumed common property may be more adversely affected than units that are not in the vicinity of the resumed common property. The market value of some units may decrease following the implementation of a project.

It is possible that a body corporate will not pursue a claim for damage suffered by an individual unit owner as a result of the taking of the common property and the effect of the taking on the individual unit owner's lot. Even if a claim is pursued, there is no guarantee that the affected unit owner will receive adequate compensation for damage suffered by the

owner as a result of the taking and the effect of the taking on his or her unit. This is because the distribution of compensation must be to owners of lots in shares proportionate to the unit entitlements unless there is unanimous resolution of proprietors or resolution without dissent. There is no incentive for other unit owners to agree to a different distribution of compensation.

Clause 12 also amends section 18 to allow an owner of an investment property which is resumed to make a claim for compensation for particular costs associated with replacing the investment property.

Amendment of s 19 (Claim for compensation)

Clause 13 amends section 19 of the Act to provide that a three year limitation period applies on allowing a claim for compensation arising from the acquisition of land. In addition, a special safeguard is introduced to allow a claim for compensation to be accepted outside the statutory period by the constructing authorities at their discretion or by order of the Land Court where it considers it reasonable in the circumstances. The Land Court will be required to take into account late lodgement when exercising its discretion to decide over what period interest on the amount of compensation will be paid. Currently the Act is silent about a limitation period.

Amendment of s 20 (Assessment of compensation)

Clause 14 amends section 20 of the Act to include power to pay compensation for disturbance. Currently the law on disturbance comes from case law. Claimants and their solicitors are often unclear about what disturbance items are claimable. The complexity of the case law usually increases the professional fees of a claimant's solicitor. Codifying what constitutes compensable disturbance items (e.g. moving costs, electricity, phone and internet connections) based on current practices in the Act will provide transparency and improve consistency of payment of compensation among the constructing authorities.

New subsections 20(5)(a) and (b), inserted by clause 14 of the Bill, list the costs attributable to disturbance which are claimable in relation to an investment property which is the subject of a resumption.

As a safeguard, in assessing compensation, a contract, licence agreement or other arrangement entered into after the notice of intention to resume will not be eligible for compensation unless it was entered into for a bona fide purpose.

Amendment of s 21 (Grant of easement etc. in satisfaction of compensation)

Clause 15 amends section 21 of the Act to provide that the constructing authority can also transfer land in satisfaction or part satisfaction of compensation. The Act currently provides that if the Crown is the constructing authority then the Governor in Council may grant in fee simple any unallocated State land. This is a time consuming process. Land ownership has changed substantially since the Act was introduced and now it is common for the State and other constructing authorities to own land in fee simple.

Insertion of new s 26A

Clause 16 inserts a new section 26A into the Act which provides:

(a) a right of action to recover the overpayment of compensation funds and interest thereon; and

(b) jurisdiction to the Land Court to make orders regarding:

  (i) the recovery of excess amounts paid as compensation, in advance, to a claimant where the amount of compensation is later determined to be less than that paid in advance; and

  (ii) interest on the outstanding balance of the advance.

It is appropriate that a constructing authority be able to recover any funds paid which could not properly be characterised as compensation and go beyond placing an owner in the same position they were in prior to the acquisition. As a result of the decision in *Old Coach Developments Pty Ltd v State of Queensland* [2008] QLC 0105 proceedings to pursue advance compensation overpayments and interest on those overpayments would have to be pursued in either the District or Supreme Court, depending on the amount to be recovered, resulting in further costs to both the constructing authority and the owner of the resumed land.

Insertion of new pt 6, div 3

Clause 17 provides necessary transitional provisions which clarify the operation of sections 19 and 26A in relation to particular claims and land taken before the commencement of the amendments.

Replacement of schedule

Clause 18 amends the schedule to the Act by updating and categorising the description of items in the Schedule, which lists the purposes for which land may be resumed under the Act, and removing redundant items.

Part 3 Amendment of *Land Act 1994*

Act amended in pt 3

Clause 19 provides that this Part amends the *Land Act 1994*.

Due to tight timeframes for the introduction of the *Land and Other Legislation Amendment Act 2007* and the sheer volume of amendments made to the Land Act 1994 several minor errors or omissions were made in the legislation which require correcting.

The amendments made by this Part:

- broaden the intent of the legislation by removing the words "community purpose" when it refers to dealing with reserves so that it refers to a purpose for which a reserve was dedicated (which might not now be a community purpose under the Act). This will allow for reserves for purposes other than community purposes under Schedule 1 to be dealt with which was the original intent. As the Act stands now there is no power to change the purpose of a reserve if that purpose being changed is not a community purpose;
- provide transitional provisions which clarify how applications made prior to the *Land Act 1994* being amended by the *Land and Other Legislation Amendment Act 2007* can be dealt with and another where the number of a provision was duplicated.

Amendment of s 31B (Changing community purpose)

Clause 20 amends section 31B of the Act by amending the heading and subsections 2 to 7 to remove the word "community". Community purposes are purposes set out in Schedule 1 of the *Land Act 1994*. However, not all reserves that were dedicated as reserves for a public purpose under the *Land Act 1962* are community purposes under the *Land Act 1994*. These reserves may be operational reserves such as reserves for school, hospital, departmental and official purposes or local government purposes etc. The

intent of the *Land Act 1994* is and always has been that all reserves should be able to be amended. The *Land and Other Legislation Amendment Act 2007* provisions inadvertently narrowed this intent by inserting the term "community purposes" instead of "the purpose for which a reserve was dedicated". The amendment will enable operational reserves to be amended.

Amendment of s 31F (Notice of registration of action in relation to reserve)

Clause 21 amends section 31F of the Act to remove the word "community" from subsection (4) in line with the amendment made to section 31B under clause 20.

Amendment of s 32 (State leases over reserves)

Clause 22 amends section 32 of the Act by replacing reference to 'Governor in Council' with reference to 'Minister'. Under the *Land Act 1994*, it is the Minister and not the Governor in Council who may grant a lease over a reserve for a term of years. This amendment mirrors other amendments made to the *Land Act 1994* as a consequence of the *Land and Other Legislation Amendment Act 2007*.

Amendment of s 34I (Applying for deed of grant)

Clause 23 amends section 34I(1) of the Act by limiting the right to make an application for the issue of a deed of grant over an operational reserve to a trustee of the reserve who is a constructing authority (including the State). The purpose of the amendment is explained under clause 24.

Insertion of new s 34IA

Clause 24 introduces a new provision to the Act which identifies the matters the Minister must consider prior to making a recommendation to the Governor in Council that a deed of grant be issued to a constructing authority over an operational reserve. Prior to commencement of the *Land Act 1994*, land needed by a constructing authority for a public purpose would be dedicated as a reserve for that purpose and administered by the constructing authority as trustee. As constructing authorities (including the State) can now hold freehold land, land dedicated for a public purpose (and not a community purpose under the *Land Act 1994*) would be more appropriately held as freehold land. However, in line with provisions applying to the granting of a deed to a constructing authority over unallocated State land, similar provisions are introduced under section 34IA to apply to the freeholding of operational reserves.

Amendment of s 34J (Notice of proposal to issue deed of grant)

Clause 25 amends section 34J of the Act to clarify that a submission is made to the Minister who recommends to the Governor in Council that an action takes place and not that the submission is made to the Governor in Council.

Amendment of s 34K (Submissions)

Clause 26 amends section 34K of the Act to clarify that a submission is made to the Minister who recommends to the Governor in Council that an action takes place and not that the submission is made to the Governor in Council.

Amendment of s 35 (Use for community purposes of land granted in trust)

Clause 27 amends section 35 of the Act by removing the words "for community purposes" and "community". The amendment clarifies that a deed of grant in trust must be used for the purpose for which it was granted. This purpose might not necessarily be a community purpose.

Amendment of s 36 (Amalgamating land with common purposes)

Clause 28 amends section 36 of the Act in support of section 14(2) of the Act that states the Governor in Council may only grant land in fee simple in trust for a community purpose.

Amendment of s 38B (Notice of proposal to add community purpose, amalgamate land or cancel)

Clause 29 amends section 38B of the Act to enable the chief executive to notify the persons required under the section in regards to an action under section 35, section 36 or section 38 of the Act.

Amendment of s 57 (Trustee leases)

Clause 30 amends section 57 of the Act in support of the current position that a trustee may enter into a construction trustee lease with the State without obtaining the Minister's written "in principle" approval to the lease. Currently, the Minister must approve merely the registration of a construction trustee lease.

A construction trustee lease enables the State to provide for the construction of transport infrastructure and the provision of transport services on the lease land in order that the land containing the transport infrastructure and services may be subsequently dealt with under the

Transport Infrastructure Act 1994 or dedicated as road for public use under the *Land Act 1994*. As the State will enter into a construction trustee lease in support of the objectives and obligations applying to transport infrastructure under the *Transport Infrastructure Act 1994*, the amendment to section 57 will remove a "red tape" requirement.

Amendment of s 61 (Conditions on trustee leases and trustee permits)

Clause 31 amends section 61 of the Act by deleting the word "community" in subsection (3) and introducing the words "construction trustee lease" in subsection (4). As with previous amendments in the Bill, a reserve under the *Land Act 1962* may not have been dedicated for a purpose other than a community purpose under the *Land Act 1994*.

Section 61 is also amended to clarify that the condition mentioned in subsection (3) does not apply to a construction trustee lease or a building permitted to be built on the land. The reason for this amendment is that it may be impossible to allow the land to be used for the community purpose for which it was reserved or granted in trust without undue interruption or obstruction whilst a construction trustee lease is granted over the land.

Amendment of s 100 (Public notice of closure)

Clause 32 amends section 100 of the Act to remove the requirement for public notice if the road closure application is to close part of a road adjoining transport land and the closure will not adversely affect the balance part of the road being used as a road. Presently section 100 sets out that a public notice of a road closure is not needed if:

(a) the road closure application is to close a no-through road; or

(b the road closure is to close part of a road by a volumetric format plan of subdivision and the closure will not adversely affect the part of the road being used as a road.

However the section does not cover cases where applications are received to further include areas of road into adjoining transport land (such as busways or rail corridors) and it is the State that is applying for the closure. By including the new provision the existing process will be streamlined.

Amendment of s 167 (Provisions for deciding application)

Clause 33 amends section 167 of the Act by omitting present section 167(1)(m) and renumbering existing sections 167(1)(n), (o) and (p). This provision is superfluous due to new section 167(1)(n) which deals with most appropriate tenure for all purposes not just residential and industrial.

Amendment of s 275 (Registers comprising land registry)

Clause 34 amends section 275 of the Act by deleting reference to "and trustees of trust land" in subsection 275(b). The particulars of trust land (including the details of the trustees of such land) are held in the appropriate land register (for deeds of grant in trust- the freehold land register; for reserves- in the register of reserves).

Amendment of s 276 (Registers to be kept by chief executive)

Clause 35 amends section 276 of the Act in line with the amendment being made to section 275 of the Act by clause 34.

Amendment of s 279 (Registration of land management agreements and transition to sale agreements)

Clause 36 amends section 279 of the Act remove reference to section 240P and insert in its place section 240O in subsection (1). This amendment corrects a drafting error.

Amendment of s 360A (Minister may change term leases, other than State leases, or perpetual leases)

Clause 37 amends section 360A(3) of the Act, with appropriate renumbering, to include "(c) the Minister has approved that an area of unallocated State land be included in the lease". Although inclusion of unallocated State land, by adjustment notice, may have been made under section 360A(3)(c) of the Act, it is considered appropriate the new provision be introduced to remove doubt.

Amendment of s 373AA (Compliance with s 373A)

Clause 38 corrects an error in numbering in the *Land Act 1994*. The Act currently contains two sections numbered 373AA. The amendment renumbers the second section 373AA as section 373AB.

Amendment of s 376 (Deed of grant or lease may issue in name of deceased person)

Clause 39 amends section 376(1) of the Act to clarify that a freeholding lease issued in the name of a deceased person is issued by the Governor in Council and a lease in perpetuity or a lease for a term of years is issued by the Minister. This amendment is made in accordance with the powers of leasing land under section 15 of the Act.

Amendment of s 391A (General provision about approvals)

Clause 40 amends section 391A to correct a spelling mistake.

Amendment of s 442 (Lapse of offer)

Clause 41 amends section 442 of the Act to correct a spelling mistake.

Amendment of s 462 (Terms of post-Wolfe freeholding leases)

Clause 42 amends section 462 of the Act to omit section 462(1)(f) which is no longer required. Section 462 deals with the terms of post-Wolfe freeholding leases and sets out the manner of purchasing the land and what requirements must be met before a deed of grant may issue. Section 462 (1)(f) states that "if a lease is at an establishment stage, the Minister may allow the lessee to capitalise the first instalment over the duration of the lease". As the Governor in Council may only issue a freeholding lease following an application to convert a lease made under section 166(1) of the Act, all freeholding leases will be established.

Omission of ch 8, pt 7A (Brigalow and other lands development provisions)

Clause 43 removes Part 7A Brigalow and other lands development provisions as these provisions are now redundant. All loans to the Brigalow Corporation have now been repaid and all leases that issued under the *Brigalow and Other Lands Development Act 1962* have been freeholded. As there is no longer any reason for the Corporation to continue to exist, these now-redundant Brigalow Corporation provisions can be omitted.

Omission of s 521K (Application made before commencement)

Clause 44 omits section 521K. This amendment is required to remove doubt about how the provisions introduced into the *Land Act 1994* by the *Land and Other Legislation Amendment Act* 2007 relate to outstanding applications that were received and being dealt with prior to the commencement of the new provisions and who is the authorised person responsible for making the decision. To achieve the above section 521K is omitted and clause 45 also inserts a new part to Chapter 9 and to insert new sections 521P, 521Q and 521.

Insertion of new ch 9, pts 1F and 1G

Clause 45 inserts a new Chapter 9, parts 1F and 1G into the Act. This amendment is required to remove doubt about how the provisions introduced into the *Land Act 1994* by the *Land and Other Legislation Amendment Act 2007* relate to outstanding applications that were received and being dealt with prior to the commencement of the new provisions and who is the authorised person responsible for making the decision.

Part 1F Further transitional provisions for *Land and Other Legislation Amendment Act 2007*

521Q Definition for pt 1F

New section 521Q provides that in this part "commencement" means the commencement of the new provision.

521R Outstanding applications continued under post-amended Act

New section 521R provides that any outstanding application continues under the provisions of the Act effective since 1 January 2008 (for example, if an application to dedicate part of a lease as road is approved, the road opening may be actioned by registration of a plan of subdivision). However, unless the applicant asks for the application to be considered under the matters which must be considered under the Act since 1 January 2008, the application must be considered taking into account the matters which had to be considered under the Act prior to 1 January 2008.

'521S Particular new leases exempted from particular Provisions

New section 521S provides that a lease offered and accepted by an applicant under the provisions of the Act prior to 1 January 2008 is not subject to the conditions imposed or mandated under section 162A, section 168A or section 176H.

'Part 1G Transitional provision for *Acquisition of Land and Other Legislation Amendment Act 2008*

'521T Provision about change of purpose of reserves'

New section 521T provides that the purpose of an operational reserve changed under section 31B prior to commencement of this provision is taken to have been lawfully changed.

Amendment of sch 6 (Dictionary)

Clause 46 amends the dictionary to remove redundant definitions.

Other Acts amended

Clause 47 provides for consequential amendments to be made to the Acts mentioned in the schedule.