Acquisition of the Fee Simple in Queensland and Natural Justice

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Introduction

One of the major areas in which the State Government exercises its power with considerable effect on the average person, either directly or indirectly through local authorities, is in the area of land acquisition. Australians are most zealous of their personal right to own and control their own land, and consider Government interference with such a right virtually on the same basis as interference with personal liberty. The power to acquire land is given by statute to many Government bodies and in Queensland an Act of Parliament[1] regulates the procedure which should be followed by these bodies[2] in the acquisition process. Any citizen, being the owner of land, upon whom is served a notice of intention to take the land[3] has a right to object to the taking and this somewhat limited right will be the subject of examination herein. Firstly, let us look at the power of the State Government to enact such legislation and the legal context in which such procedure operates.

Resumption or Acquisition?

There has been some controversy[4] over whether the fee simple is actually acquired, presupposing that it belongs to the person who owns it, or whether it is resumed, the latter inferring that the State always owned the land and simply took back full rights and control over it. For a number of reasons, I submit that "resumption" is possibly the more apt word.

The whole of Australia was a settled or occupied colony with no recognised form of land tenure existing at the time of occupation in 1788. Thus, upon settlement, all "waste" lands vested immediately in the British Crown.[5] All cases affirm a fundamental principle, "that the Crown is the source of all title to all land; that no subject can own land allodially, but only an estate or interest in it which he holds mediately or immediately of the Crown. All titles, rights and interests whatever in land, were a direct consequence of some grant from the Crown".[6]

The Crown in Queensland recognised this principle in the Constitution Acts 1867-1964 which makes it lawful for the legislature of the colony to make laws for "regulating the sale letting disposal and occupation of the waste lands of the

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1. Acquisition of Land Act 1967-1969.
2. Called "constructing authorities" and including the Crown or any person or local authority authorised by the Act of any other to take land for any purpose, including the Brisbane City Council or a joint local authority. See S. 4 of 1967 Act.
3. See S. 7 of 1967-1969 Act.
4. See Brown, Land Acquisition, Butterworths, Sydney, 1972, p. 5.
5. Cooper v. Stuart (1889) 14 App. Cas. 286, An Imperial Statute (9 Geo. IV C.83) provided that all laws and statutes in force within the realm of England on 25th July 1828 should as far as applicable be applied in New South Wales.
6. Milirrpum v. Nabalco Pty. Ltd. (1971) 17 F.L.R. 141 at 245-247 per Blackburn J. citing in immediate support of this proposition Williams v. Attorney-General for New South Wales (1913) 16 C.L.R. 404 per Barton A.C.J. at p. 428, Isaacs J. at p. 439 and Council of Municipality of Randwick v. Rutledge (1959) 102 C.L.R. 54 per Dixon C.J., Fullagar and Kitto JJ. at p. 71.

Crown" within the colony.[7] In the same Act[8] the entire management and control of the waste lands belonging to the Crown was vested in the legislature of the colony. Thus the power to make grants vest exclusively with the Queensland Parliament and Crown lands can only be disposed of as prescribed by Statute.[9]

The Crown in right of the Queensland Government exercised its rights by the enacting of the Land Acts 1962-1974 and defined "Crown Land" as "all land in Queensland, except land which is for the time being (a) lawfully granted or contracted to be granted in fee simple by the Crown or (b) reserved or dedicated for public purposes or (c) subject to any lease or licence lawfully granted by the Crown".[10] The Governor-in-Council is empowered[11] to grant in fee simple (or otherwise) any Crown land in Queensland. All land when alienated in fee after 1st January 1862 became subject to the provisions of the Real Property Acts 1861-1974.[12] Thus, the only way in which such land could be theoretically revested in the Crown is by the repeal of the Real Property Acts or revocation of the Grants in which the Crown reserved certain rights and interests therein stated.[13]

It is clear that the State legislature is supreme in the sense that no act of the Executive Government could fetter in any legal sense the future exercise by it of its powers or give to any persons a title other than that which could be conferred by existing legislation.[14] The State Parliament therefore has the power to alter the nature of tenure at any time by statute and of course by order make anew or call up any reservation already granted, especially for a "public purpose".

Apart from this power to "control and manage waste lands" in the State and to amend or repeal existing legislation with respect to land tenure, it should also be remembered that as the State legislature is sovereign, it may enact any laws with respect to acquisition that it deems fit. "The power of the State to expropriate real property by statute is in these days never questioned ... if the property is taken without compensation, that is to say, it is confiscated, the question which arises is constitutional only in the political and not in the legal sense. In other words a statute passed by a sovereign Parliament is equally within the legal rights of the legislature whether it nakedly confiscates property or takes it upon terms of payment more or less".[15] Indeed, therefore, the State legislature

7. S. 30 of Constitution Act 1867-1964 subject to the Australian Waste Lands Act 1855 (Imp.) (18 & 19 Vic. C.56).
8. S. 40 of Constitution Act 1867-1964.
9. Australian Alliance Assurance Co. Ltd. v. Goodwyn (1916) St.R.Qd. 225 at 254 per Lukin J. with whom Cooper C.J. agreed; (1916) Q.W.N. 33.
10. S. 5 of Land Acts 1962-1975.
11. S. 6(1) ibid. (The grant can be made subject to any reservations and being so made shall be valid and effectual to convey to and vest in the person therein named the land therein described for the estate or interest therein noted; see S. 6(2).)
12. See S. 15 The Real Property Acts 1861-1974; apparently though do not expressly bind the Crown; Re Bourke's Application (1896) 7 Q.L.J. 133 per Griffith C.J., cf. Re Kellett's Grant (1896) 7 Q.L.J. 10. See also Power, The Real Property Acts of Queensland, Powell & Co., Brisbane, 1902, p. 223.
13. In the case of land granted in fee simple where the grant contains a reservation of the land or part of the land for public purposes the Crown may resume posession summarily, compensation only being paid for "improvements or developmental works effected" thereon (S. 348(1) Land Acts 1962-1975). See also Ss. 359-360 of that Act providing for the sale or other dealing with such reservation for publlic purposes. Note that "owner" in those sections means the "registered proprietor" in fee simple under the Real Property Acts 1861-1974.
14. Commonwealth of Australia v. State of New South Wales (1929) A.C. 431 at 441 per Lord Warrington P.C. affirming judgment of the High Court (1926) 38 C.L.R. 74. But it has been held that a reservation will not usually operate to cut down compensation payable on compulsory acquisition; see Lyons v. Commissioner of Main Roads (Qld.) (1943) 19 Q.C.L.L.R. 133 (reservation for, inter alia, public roads)
15. Commonwealth v. New South Wales (1915) 20 C.L.R. 54 at p. 77 per Barton J. For an example of where land per se may be taken without compensation, see S. 358(1) of Land Acts 1962-1975.

can pass laws to acquire land on just or unjust terms.[16] As the rights of Parliament to pass such legislation[17] cannot be challenged, the Courts have concentrated upon challenging the mode in which the power has been exercised.

The Intervention of Equity

While it is legally conceivable that the State could enact laws to confiscate property, it is politically inconceivable, especially whilst an Act regulating acquisition was in existence[18] as "when a statute is in force, the thing it empowers the Crown to do can thenceforth only be done by and under the Statute and subject to all the limitations, conditions and restrictions it imposes however unrestricted the Royal Prerogative may therefore have been".[19]

The suppliants in the De Keyser's Hotel Case[20] successfully contended that the taking of land was exhaustively covered by statute law which secured compensation to the private owner, and the case decided that the rights to compensation would now rest upon statute and the Crown could not, by invoking the Royal Prerogative take land for national defence and repudiate the statutory obligation to make payment.[21]

Where Parliament passes statute affecting such a basic right as the ownership of land, interfering or taking, without compensation, and no other construction is open, then the Courts are obliged to construe the Act accordingly.[22] The legislature cannot be fairly supposed to intend that a man's property in the absence of clear words shall be confiscated for the benefit of others without any conpensation being provided for him, although Parliament may in its omnipotence override or disregard this ordinary principle if it sees fit to do so but would only do so by express words.[23]

There is also another factor to be borne in mind. The Courts when construing such an Act which deals severely with basic property rights will do so only on well-established equitable principles. In one compulsory purchase case[24] Lord Evershed M.R. remarked when considering his conclusions: "I should, I hope, be the last to suggest that the proper application, and, where necessary, extension of equitable principles in the present day and age, when so much human activity is controlled by legislation should be restricted, and I have in mind the picturesque language once used by Harman L.J. when he said he thought that Equity was not presumed to be of an age past childbearing".[25]

If the legislature has seen to be harsh in the making of such a law, the Courts, conscious of their role in reading these powers down, will do what they are able to dilute such power or endeavour to see that where possible ordinary principles

16. The Federal Parliament may only make laws with respect to the acquisition of property on "just terms" thus permitting any Federal legislation to be challenged as ultra vires the power of the Commonwealth; see Commonwealth Constitution S. 51(XXXI).
17. E.g. the Acquisition of Land Act 1967-1969.
18. See Attorney-General v. De Keyser's Royal Hotel Ltd. (1920) A.C. 508, at 528 per Lord Dunedin, at p. 554 per Lord Moulton, at p. 563 per Lord Sumner.
19. Ibid. at p. 540 per Lord Atkinson.
20. (1920) A.C. 508. See Hogg, Liability of the Crown, Law Book Company Limited, Sydney, 1971, pp. 171-2.
21. See R.C. Fitzgerald, "The Law and Ethics of the Compulsory Acquisition of Land", Current Legal Problems, 1952, Stevens and Sons Limited, London, 1952, 55 at p. 64.
22. Attorney-General v. Horner (1884) 14 Q.B.D. 245 at p. 257 per Brett M.R.
23. London and North Western Railway Co. v. Evans (1893) 1 Ch. 16 at p. 28 per Bowen L.J.: Parliament balances "what is reasonable and business-like on the one hand and what is natural justice on the other". See also Inglewood Pulp & Paper Co. v. New Brunswick Electric Power Commission (1928) A.C. 492 at pp.498-499 per Lord Warrington.
24. Simpson's Motor Sales v. Hendon Corporation (1964) A.C. 1088.
25. Ibid. pp. 1126-1127.

of natural justice are observed. It is in this light that the Acquisition of Land Act 1967-1969 may be more closely scrutinized.

The Purposes for which Land may be Taken

The purposes are set out in S. 5(1) — (2) of the Act which is substantially reproduced below:

> 5(1). Land may be taken under and subject to this Act—
> (a) Where the constructing authority is the Crown, for any purpose set out in the Second Schedule to this Act; [26]
> (b) Where the constructing authority is a local authority—
> (i) for any purpose set out in the Second Scheduale to this Act which the local authority may lawfully carry out; or
> (ii) for any purpose, including any function of local government, which the local authority is authorised or required by a provision of an Act other than this Act to carry out; or
> (c) In the case of a constructing authority other than the Crown or a local authority—
> (i) for any purpose set out in the Second Schedule to this Act which that constructing authority may lawfully carry out; or
> (ii) for any purpose which that constructing authority is authorised or required, by a provision of an Act other than this Act, to carry out.
> 5(2) The power to take, under and subject to this Act, land for a purpose (in this subsection called the "primary purpose") includes power to take from time to time as required land either for the primary purpose or for any purpose incidental to the carrying out of the primary purpose.

"This Act" means the Acquisition of Land Act 1967 and "constructing authority" is defined in S. 4 as "the Crown or any person of local authority authorised by this Act or any other Act (and whether another Act passed before, on or after the commencement of this Act) to take land for any purpose".

The Brisbane City Council is a local authority for the purposes of the Act. Broadly speaking therefore the power of acquisition is only to be exercised in consummation of a public purpose authorised by an Act of Parliament.

There is no question that the power to resume must be expressly stated in the Act and must be exercised for the specific purpose stated therein. The only way in which the resumption can generally be challenged by land owners (assuming constitutional validity) is, as Brown points out (i) ultra vires (ii) bad faith, or (iii) merits a decision to acquire.[27] There is a thin line between (i) and (ii) in many cases. Giving his interpretation of Lord Campbell's use of the words "mala fide" in an earlier case[28] Vaughan Williams L.J. in the Court of Appeal some forty years later said: "But when Lord Campbell said (the corporation) 'was acting

26. The Second Schedule is set out in The Queensland Statutes 1967 pp. 524-525 and includes (c) "any purpose declared by the Governor-in-Council by Order-in-Council to be a purpose for which the land may be taken under and subject to this Act".
27. Brown, op. cit. p. 80, Since Anisminic Ltd. v. Foreign Compensation Commission (1969) 2 A.C. 147 it could be argued that a decision made in bad faith would be ultra vires in any case as notionally the decision maker in coming to a decision capable of challenge for any reason would, because of this vitiating factor, lose jurisdiction to make the decision. In this case a mistake which might well have been considered a mere error within jurisdiction was held to involve excess jurisdiction, thus stretching "ultra vires" beyond previous recognition in order to circumvent an ouster clause. Cf. The King v. Nat Bell Liquors Ltd. (1922) 2 A.C. 128. "To say that there is no jurisdiction to convict ... is the same thing as saying that there is jurisdiction if the decision is right and noe if it is wrong"; at p. 151 per Lord Sumner.
28. Stockton & Darlington Railway Co. v. Brown (1860) 9 H.L.C. 246 at p. 256.

mala fide and trying under the Act of Parliament to get possession of lands which were to be applied to other and different purposes' than those authorised by the Act, I think he was merely explaining what he meant by mala fides. You are acting mala fides if you are seeking to acquire land for a purpose not authorised by the Act".[29] The expression "acting mala fides" need not necessarily impute "dishonesty" in the usual sense of the word.

One of the most frequent examples of this phenomenon has occurred when a public body, with power to acquire land for streets or roads acquires more land than is necessary in order that it may sell the excess at a profit to subsidise the road work, taking the benefit of an expected increase in capital value.[30] In other words, the statutory purposes are being employed in furtherance of some ulterior object.[31] It is not necessary that this ulterior purpose be the sole purpose, only one of the purposes or a "substantial" purpose.[32] The phrase "dominant purpose" has also been used in similar context in English cases.[33]

It may be extremely difficult for a Court to consider the purpose of the acquisition for there may be a number of purposes achieved thereby, some of which are certainly in the public interest. "One can have a statutory purpose running side by side with another desire—the two could be co-existent".[34]. The determination of this question must largely be a matter of evidence with the onus upon the person endeavouring to impeach the acquisition to prove that it was not carried out for the purposes specified in the Statute. Where the initiative for the acquisition comes from a private company or person, the Courts seem quick to condemn the exercise of the power. "The Legislature did not give the Municipal Councils power to interfere with the private title of A for the private benefit of B".[35] Where the Brisbane City Council had entered into an agreement with a company by which the Council undertook to carry out the resumption of land to be developed by the Company for private gain, the Court restrained the exercise of the Council's power at the suit of an affected private person by injunction.[36]

On weighing the relevant considerations Mansfield C.J. observed: "The main purpose in resolving that any of the plaintiff's lands were required was to assist the 'developmental plan' of the Company notwithstanding in the broad sense the interests of the city and its inhabitants were being served by the subdivision and the essential concomitant—the bridge construction ... The Council was effectively the agent of the Company and not the people when it purported to resume the plaintiff's land".[37] Indeed, this was also a case where the resumption plan was initiated by the representatives of the Company although His Honour pointed out that the service of the public benefit and the fulfilment of private enterprise

29. London and North Western Railway v. Westminister Corporation (1904) 1 Ch. 759 at 767. Approved on appeal although decision reversed: Westminister Corporation v. London and North Western Railway (1905) A.C. 426 at 432 per Lord Macnaughten. See also Wade, Administrative Law, 3rd ed., Clarenden Press, Oxford, 1971, p. 82.
30. See Municipal Council of Sydney v. Campbel (1925) A.C. 338 especially at p. 343 (Duff J. for the P.C.).
31. Thompson v. Randwick Corporation (1950) 81 C.L.R. 87.
32. Ibid. pp. 106-107 per Williams, Webb and Kitto JJ. who distinguished Campbell's case on the basis that the acquisition in the latter case was for the "sole purpose" of profit making be resale and appropriation of betterments arising therefrom.
33. See for example Webb v. Minister for Housing and Local Government (1965) 2 All E.R. 193 per Dankwerts L.J. at p. 207, also Davies L.J. at p. 212.
34. Weribee Shire Council v. Kerr (1928) 42 C.L.R. 1 at 9 per Isaacs J. (dissenting judgment). "Was the act conditional upon a stated purpose, and if so was that purpose departed from by honest error or dishonest design?" Ibid. at p. 9.
35. (1928) 42 C.L.R. 1 at p. 33 per Higgins J.
36. Prentice v. Brisbane City Council (1966) Qd.R. 394.
37. (1966) Qd.R. 394 at p. 410.

were not mutually exclusive.[38] But it is clear that if proposals are so ill-defined that a resumption might be effected for purposes which are proper or improper the latter view will usually be adopted by the Court *ex abundanti cautela*.[39]

Policy and Law

The prospective dispossessed landowner faces greater difficulties in attacking what appears to be an intra vires decision solely on the basis of merits. It has been stated that the constructing authority is the only judge of the merits to acquire.[40] There has been a certain willingness by the Courts to look at the merits of a decision, but only on the same material seen by the acquiring authority; The Court will not look at the matter de novo as if it were deciding the matter in the first instance.[41] Where a Minister who, after consideration of a report drawn by the person, for example, an inspector, who heard the objections, ignores the report and on no apparent grounds comes to a decision, the Court will interfere with that decision. But it is clear that the Minister has overall control over planning policy.[42] However, the reasonable consideration of a report is an inference of fact and the Courts have held that a Minister should not overrule and inspector's recommendation unless there is sufficient material on which to do so. "The question is not one of policy; it is essentially a question of fact that had to be established as a condition precedent to the exercise of the powers to take away a subject's property".[43]

Lord Denning M.R. has summed up the powers of the Court to interfere with a decision of a Minister (or authority) if "he has acted on no evidence; or if he has come to a conclusion to which, on the evidence, he could not reasonably come; or if he has given a wrong interpretation to the words of the statute; or if he has taken into consideration matters which he ought not have taken into account or vice versa;[44] or has otherwise gone wrong in law".[45]

There is much difficulty in locating the boundary between matters which may go to jurisdiction and those purely relating to merits, the latter being to a large extent policy based. If it is government policy to resume land for freeway construction, unless during the hearing of objections, the person or body hearing the objections comes to the conclusion substantively that the land should not be resumed and thus the freeway not constructed and the Minister ignores this report, or acts to the contrary, then, and only then, could the decision be challenged on the merits. Once a project is under way and the resumptions are progressing, then objections on the merits become a very thin possibility indeed. The individual, unless he can find some inherent defect in the decision to resume his land, which may warrant judicial review, is virtually powerless to do anything despite the safeguards built into the Acquisition of Land Act 1967-1969. It is to these safeguards that we will now turn.

38. Ibid. p. 406.
39. See Minister for Works v. Duggan (1951) 83 C.L.R. 424 at 445 per Dixon Williams and Kitto JJ. at p. 445 applying the principles approved in Thompson v. Randwick Corporation (supra).
40. See Re Vinnicombe's Appeal (1910) 4 Q.C.L.L.R. 139, per Rutledge at D.C.J. 140. (Land Appeal Court).
41. Ashbridge Investments v. Minister for Housing (1965) 3 AII E.R. 371 at p. 374 per Denning M.R., at pp. 374-375 per Harman L.J.
42. Lord Luke of Pavenham v. Minister for Housing and Local Government (1968) 1 Q.B. 172, 176.
43. Coleen Properties v. Minister for Housing and Local Government (1971) 1 AII E.R. 1049 per Sachs L.J. at p. 1054 and Sheffield Burgesses v. Minister for Health (1935) AII E.R. Rep. 703 per Swift J. at p. 705.
44. See for example Hanks v. Minister for Housing (1963) 1 Q.B. 999 at p. 1020 per Megaw J.
45. Ashbridge Investments Ltd. v. Minister for Housing (1965) 3 AII E.R. 371 at p. 374.

Statutory Provisions

1. Notice of intention to take land

The relevant part of S. 7 is set out hereunder :

S. 7(1) A constructing authority which proposes to take any land shall serve as prescribed by this section the notice (in this Act called 'a notice of intention to resume').

(2) A notice of intention to resume shall be served upon any land and *every* person who, to the knowledge of the constructing authority—

(a) will be entitled to claim compensation ... in respect of the taking of the land,

(b) is a mortgage of the land.

(3) The notice of intention to resume shall be in writing and shall—

(d) state that the person to whom the notice is directed may, on or before the date specified in the notice (being a date not less than 30 days after the date of the notice) serve upon the constructing authority ... an objection in writing to the taking of the land."

The Statute specifically prescribed the format of the objection and the minimum contents as follows :

"S. 7(3)(e) in relation to the objection (the person) may set out—

(i) that the objection must state the grounds of the objection and the facts and circumstances relied on by the objector in support of those grounds.

(ii) *that any matter pertaining to the amount or payment of compensation is not a ground of objection.*

(iii) that an objector who states in his objection that he desires to be heard in support of the grounds of his objection may appear and be heard by the *constructing authority or its delegate* at the time and place specified in the notice."

To be entitled to a hearing, it is necessary to ask for one. Legal representation is allowed[46] and after consideration of the "grounds of objection" or the "report of the delegate" if the constructing authority is "of the opinion that the resumption should be discontinued" or otherwise it shall act accordingly.

It is thought that largely as a result of the decision in Amstad v. Brisbane City Council (No. 2)[47] that the Queensland Parliament gave objectors a statutory right to be heard in the Acquisition of Land Act 1967-1969.[48] In that case the plaintiff landowners were not given an opportunity of being heard in relation to a resumption of land for the purposes of a drainage easement by the Brisbane City Council under the City of Brisbane Improvement Acts 1916-1953.[49]

W.B. Campbell J. held that "the Council in determining that certain lands are required by it for the purposes of the Act is not acting in a judicial or quasi judicial manner so as to require it to observe the principles of natural justice".[50] Relying upon a passage of Lord Reid in Ridge v. Baldwin[51] His Honour said that while there appeared that although there was no express legislative intention to give a hearing, there was an intention to compensate for loss of property and "the substitution of compensation for the loss of property taken by a public or local authority acting under the statutory power took away the element of prejudice upon which the rule of natural justice was based".[52] At the time there were

46. S. 8(1): This natural justice requirement appears to be satisfied; see Pett v. Greyhound Racing Association Ltd. (1970) 1 Q.B. 46 at 67; Enderby Football Club v. Football Association (1970) 3 W.L.R. 1021 at p. 1025.
47. (1968) Qd.R. 343.
48. Such seems the opinion of Brown, op. cit. p. 99. See also H.J.J. Brown, Compensation for Compulsory Purchase, Recent Developments (1971) J.P.L. 584, 622.
49. This Act was repealed by the Acquisition of Land Act 1967-1969.
50. (1968) Qd.R. at p. 349.
51. (1964) A.C. 40 at 72.
52. (1968) Qd.R. at p. 350. See Brown op. cit., pp. 99-100 for a criticism of this reasoning.

specific provisions in other statutes granting a right to be heard, but not expressly so in the City of Brisbane Improvement Act; Therefore Parliament could never have intended that such right to be heard be granted. There was no question that Parliament had not entrusted this power to acquire in the Brisbane City Council[53] and that the Council acquired the land pursuant to the direct authority of the Statute. But in certain situations the Courts should imply a right to be heard where there is an unquestionable "deprivation of proprietory rights" in the Cooper v. Wandsworth District Board of Works[54] situation. There is little doubt that a body proceeding judicially must observe the requirements of natural justice.[55] Where there is no express duty to hear objections before an opinion is formed affecting person's rights, it is the nature of the power (exercised) itself which predicates the requirement of its being exercised in a judicial manner.[56] However, in the Land Acquisition Acts an objector is entitled to be heard in support of his grounds and the crucial questions remain as to the extent of the objections allowable, their consideration, and in what manner an "opinion" may be formed by the constructing authority or delegate.

The notice of intention to resume should specify the particular purpose for which the land to be taken is required, and the description of the land to be taken[57] so that an objector can be informed of the case he has to meet prior to any hearing. After the objector has been heard, the constructing authority has a statutory duty to "consider the grounds of objection and the matters put forward in support of such grounds" or the "report of the delegate" and upon this material form an opinion. Doubtless, the opinion would take the form of a resolution which could be attacked by declaration if defective.[58] The authority "has the wider task of deciding whether or not it is of the opinion that it is expedient that the proposed work be executed ... this quite clearly opens up matters of public policy and may include consideration of matters not specifically referred to in the matters upon which an objector is entitled to notice".[59] In the Perpetual Trustees case,[60] the substantial complaint of the objectors was that they were not given a fair opportunity to correct or contradict matters in a report made after the initial enquiry which they said were prejudicial to their views put forth at the enquiry.[61] Henry J. held firstly that the Minister or authority was not required to place before an objector any matters other than those set out in the statute defining the issues, nor secondly need the Minister or authority acquaint the objectors with information upon which a decision has been made to effect the proposed taking. The objectors had no right to be heard as if a new matter raised by them was the subject matter of the enquiry itself.[62] Obviously whether the requirement of natural justice has been met must depend upon the facts of each case, but one might have thought that if a report raised matters not specifically

53. (1968) Qd.R. at p. 351. Parliament has power to delegate this authority. See also Cobb & Co. Ltd. v. Kropp (1965) Qd.R. 285 at p. 298 per Gibbs J. (See now S. 37(1) & (3) of The City of Brisbane Acts 1924-1974, and S. 23(6) of The City of Brisbane Town Planning Act 1964-1975).
54. (1863) 143 E.R. 414; W.B. Campbell J. distinguished this case from the instant case. Such a right has been implied previously in the interests of natural justice, e.g. The Council of the City of South Brisbane v. Jeune (1925) St.R.Qd. 108 at p. 118 per McCawley C.J. (demolition of house).
55. B.P. Australia Ltd. v. The Council of the City of the Gold Coast (1967) Qd.R. 307 at p. 325 (F.C.) per Hanger J.
56. Ibid. at p. 329 (F.C.) per Wanstall J.
57. S. 7(3)(a) & (b) of Acquisition of Land Act 1967-1969.
58. Delta Properties Pty. Ltd. v. Brisbane City Council (1955) 95 C.L.R. 11 at p. 18 per Dixon C.J., Webb, Fullagar, Kitto and Taylor JJ.
59. Perpetual Trustees and Anor. v. Dunedin City (1968) N.Z.L.R. 19 at p. 23 per Henry J.
60. 1968 N.Z.L.R. 19.
61. Ibid. pp. 22-23 per Henry J.
62. Ibid. pp. 24-25 per Henry J.

"issues" to be released to the objectors prior to the hearing, then at a subsequent hearing or an adjourned hearing, the objectors should have an opportunity to meet these new "matters or charges". Otherwise the situation appears to give only lip service to the effect of the enquiry. An objector should be able to make further representations upon the material in a report on which the decision to resume is founded as before the "matters" can be met satisfactorily from the objector's point of view further investigation may be required.

Possible Reform

No one denies that any government needs the power to resume land of private persons to effect undertakings of a public nature. Providing that the policy of the government is acceptable, most would agree that the individual good should at some point give way to the general public good, but not at the expense of a denial of individual rights. Although the individual whose land is about to be resumed has a right to be heard, how is this right measured in qualitative terms? There are two basic precepts of natural justice; one is the right to be heard, the other is that "no man should be a judge in his own cause". Perhaps Lord Chief Justice Herwart summed it up when he said: "Justice should not only be done, but should manifestly and undoubtedly be seen to be done".[63]

Under the Act the objector must appear before the constructing authority, the body who actually makes the decision on the merits. Obviously, any constructing authority is probably being funded by the Government, who rightly or wrongly has made a policy decision to be put into execution by the particular body. The Government is entitled to carry out policy, but the public should be entitled, having taken that point that any report or recommendations should be "considered" with a patent degree of equanimity. Perhaps this is asking too much. Indeed the House of Lords has held that the law did not require such impartial consideration at all. A Minister could be a biased as he liked provided he observed procedures.[64] There is no way around this, in fact, except by having an open enquiry under the auspices of an obviously impartial body, not the authority or its delegate. In that way there may be some semblance of fair minded decision making.

Secondly, under the present system, there is no provision for a further enquiry, and it is no answer for an objector to put up a plan for a new scheme.[65]

For example, before a large project, like an construction of a freeway, is commenced, the authority should have an idea of the actual properties to be affected by the schemes and, at that stage, an enquiry should be convened. Once work has commenced, an individual objection becomes impossible having been smothered in the mass of unopposed acquisitions. Certainly, this is the only way the substantive policy objections can be properly heard and possibly met; After commencement it is far too late.

Thirdly, the only other possible objections are those which arise from defects in procedure, which call for judicial review. An aggrieved person should not have the prerogative writs as an only resort. There should be some other tribunal, unconnected with the acquiring authority to whom resort may be had in a fast and inexpensive manner.

Mention should be made of the Land Court to whom the constructing

63. R. v. Sussex Justices ex parte McCarthy (1924) 1 K.B. 256 at p. 259. See generally Wade, op. cit., pp. 175-176.
64. Franklin v. Minister of Town & Country Planning (1948) A.C. 87 especially the judgment of Lord Thankerton.
65. Perpetual Trustees and Anor. v. Dunedin City (1968) N.Z.L.R. 19 at p. 25 per Henry J.

authority or the claimant may make reference in certain circumstances.[66] The jurisdiction of the Court only extends to the hearing and determing of all matters relating to compensation.[67] By the time the matter has reached that Court the resumption per se would be a fait accompli as it is to be remembered that any matter relating to the amount or payment of compensation is *not* a ground of objection.[68] Thus, while the Land Court is indeed a separate body, its jurisdiction is strictly limited to matters of compensation and not other matters which could be considered just as important.

Finally, it should be remembered that once a Proclamation has been registered under the Real Property Acts 1861-1974, in the absence of fraud, it is of no moment that the procedures instituted by the acquiring authority were defective. Whilst action taking upon early discovery of the defect may have rendered the Proclamation voidable, once registration has been effected nothing can be done to upset the indefeasible right of the constructing authority to the title of the land acquired.[69]

In the prevailing climate of objection to urban development, exampled by "freeway protesting", one can well understand the sheer frustration of the objectors, for, by the time the extent of governmental action is realised, all lawful avenues of protest are closed.

66. See S. 24 of Acquisition of Land Act 1967-1969.
67. See S. 26 ibid.
68. See S. 7(3)(3)(ii) ibid.
69. Boyd v. Mayor of Wellington (1924) N.Z.L.R. 1174, 1215 per Salmond J. approved by the Privy Council in Fraser v. Walker and Others (1967) 1 AII E.R. 649, especially at p. 654 per Lord Wilberforce.