

SUPREME COURT OF QUEENSLAND

CITATION: *Kelsall & Anor v State of Queensland & Anor* [2012] QCA 369

PARTIES: **PAUL ANTHONY KELSALL**
(first appellant)
EUNICE YING TENG KELSALL
(second appellant)
v
STATE OF QUEENSLAND
(first respondent)
BRISBANE CITY COUNCIL
(second respondent)

FILE NO/S: Appeal No 10572 of 2011
SC No 5762 of 2011

DIVISION: Court of Appeal

PROCEEDING: General Civil Appeal

ORIGINATING COURT: Supreme Court at Brisbane

DELIVERED ON: 21 December 2012

DELIVERED AT: Brisbane

HEARING DATE: 16 August 2012

JUDGES: White and Gotterson JJA and North J
Separate reasons for judgment of each member of the Court, each concurring as to the order made

ORDER: **Appeal dismissed with costs.**

CATCHWORDS: REAL PROPERTY – COMPULSORY ACQUISITION OF LAND – POWERS OF ACQUISITION – PURPOSE OF ACQUISITION – where appellants owned Lots 70 and 71 as described – where both lots acquired by second respondent “as constructing authority” for “a purpose incidental to the purpose of an approved Tollway Project” – where appellants made a claim for compensation under s 19 of the *Acquisition of Land Act 1967* (Qld) (“the ALA”) – where appellants sought to have the land revested in them under s 17 of the ALA – where the lots were then declared to be required for an additional transport purpose of the first respondent – where the appellants contend that this interfered with their entitlements under ss 17 and 41 of the ALA – where the trial judge concluded that the Minister was empowered by s 26A of the *Transport Planning and Coordination Act 1994* (Qld) (“the TPC Act”) to change the purpose for which the land had

been acquired – where the appellants contend that the trial judge erred in particular to the construction of “transport purpose” and “transport land” in s 3 of the *TPC Act* and the construction of the power to make a declaration under s 26A of the *TPC Act* that “land is required for another stated transport purpose” – whether “transport purpose” and “transport land” are limited to purposes of and land acquired by the first respondent, and the power in s 26A thereby limited to the first respondent – whether s 26A extends to permit a declaration where the “other stated transport purpose” is not one for which the acquiring entity was authorised to acquire the land – whether s 26A permits a declaration to be made in relation to additional purpose, as opposed to a declaration in relation to a different or an alternative purpose – whether the land the subject of the declaration (Lots 70 and 71) was not “transport land”

Acquisition of Land Act 1967 (Qld), s 5, s 17, s 19, s 41

Acts Interpretation Act 1954 (Qld), s 23(1)

Transport Infrastructure Act 1994 (Qld), s 2, s 5(1), s 92, s 93

Transport Planning and Coordination Act 1994 (Qld), s 2, s 3, s 4, s 6, s 8A, s 22, s 23, s 24, s 25, s 26, s 26A, s 27, Pt 4B

Astway Pty Ltd v Council of the City of the Gold Coast (2008) 159 LGERA 335, [\[2008\] QCA 73](#), cited

Clissold v Perry (1904) 1 CLR 363; [1904] HCA 12, cited

Clunies-Ross v The Commonwealth (1984) 155 CLR 193; [1984] HCA 65, cited

Ravenscroft v Nominal Defendant [2008] 2 Qd R 32;

[\[2007\] QCA 435](#), considered

Sevmere Pty Ltd v Cairns Regional Council & Anor

[2010] 2 Qd R 276; [\[2009\] QCA 232](#), cited

Wentworth Securities Ltd v Jones [1980] AC 74, considered

COUNSEL: S Keim SC, with P R Smith, for the appellants
M D Hinson SC for the first respondent
G J Gibson QC, with D A Quayle, for the second respondent

SOLICITORS: Harding Lawyers for the appellants
Crown Law for the first respondent
Brisbane City Legal Practice for the second respondent

- [1] **WHITE JA:** Prior to 2006 the appellants owned Lots 70 and 71 on SP108227 located at Lutwyche Road, Windsor. On 14 February 2006 the second respondent (“the BCC”) issued separate Notices of Intention to Resume Lots 70 and 71 under the *Acquisition of Land Act 1967 (Qld)*, and the *Transport Planning and Coordination Act 1994 (Qld)* (“the *TPC Act*”) and the *Transport Infrastructure Act 1994 (Qld)* (“the *TIA*”) to the appellants.
- [2] The Notices identified the BCC as a constructing authority and the purpose of the resumption was identified as “a purpose incidental (road) to an approved tollway project, namely the North-South Bypass Tunnel Project”.

- [3] Attached to the Notices was a “background information document” which explained the project. The North-South Bypass Tunnel Project is sometimes referred to as “the CLEM7 Tunnel”.
- [4] By a Taking of Land Notice (No 1028) 2006 made by the Governor-in-Council on 29 June 2006 and published in the Queensland Government Gazette of 30 June 2006, Lots 70 and 71 were acquired by the BCC for “a purpose incidental to the purpose of an approved Tollway Project, namely, the North-South Bypass Tunnel Project, in particular, road, as from 30 June 2006,” and vested in the BCC, “as constructing authority, for an estate in fee simple”, Lots 70 and 71.
- [5] The appellants made a claim for compensation pursuant to s 19 of the *Acquisition of Land Act* in respect of the resumed land on 7 March 2009. That claim had not been heard and determined in the Land Court when the present application was heard in the Trial Division. By letter dated 26 November 2009, the appellants, noting that Lots 70 and 71, or a great part of them, were not required for a road incidental to the North-South Bypass Tunnel Project, sought to have the land not required revested in them pursuant to s 17 of the *Acquisition of Land Act*.
- [6] By a Change of Purpose Declaration Notice (No 1958) 2010 published in the Queensland Government Gazette of 8 January 2010, Lot 70 was declared to be:
- “now required for additional transport purposes of: a road transport purpose for the Airport Link Project and busway transport purposes for the Northern Busway (Windsor to Kedron) Project, and is therefore taken for those purposes.”
- [7] By a Change of Purpose Declaration Notice (No 1961) 2010 published in the Queensland Government Gazette of 8 January 2010, Lot 71 was declared to be “now required for an additional transport purpose of: a road transport purpose for the Airport Link Project, and is therefore taken for that purpose.”
- [8] These Change of Purpose Declaration Notices were jointly made by the Minister for Main Roads and the Minister for Transport in reliance on the power conferred on the Minister(s) by s 26A(2) of the *TPC Act*.
- [9] The appellants contend that the Notices were invalid being beyond the power of the Minister. In essence, this is said to be because s 26A(1) is limited to land originally taken by the chief executive and cannot encompass a change of purpose declaration in respect of land taken by a local government. The arguments are developed by reference to the text and statutory context and the historical development of the relevant provisions in the *TPC Act*. The appellants do not challenge the original taking by the BCC. They contend that the land ought to be revested in them as it was not required for the purpose for which it was taken. It may then be compulsorily acquired by the State pursuant to powers granted to the chief executive under s 25 of the *TPC Act* in conjunction with the *Acquisition of Land Act*.
- [10] It was not contentious that the several projects for which the land had been or was sought were, necessarily, integrated. By declaration made on 18 July 2008 the Minister for Main Roads and Local Government declared the Airport Link was a toll road pursuant to s 93 of the *TIA*. In the declaration the Minister said:¹

¹ Supplementary AR 97.

“Airport Link will connect the Inner City Bypass, the North-South Bypass Tunnel and the city via Lutwyche Road and Campbell Street at Bowen Hills to Gympie Road and Stafford Road at Kedron and the East West Arterial and Sandgate Road at Toombul.

Airport Link is approximately 6.7km long, including about 5.25km of tunnels between Bowen Hills and Toombul beneath Lutwyche Road through Windsor, Lutwyche and Kedron and the suburbs of Wooloowin and Kalinga.

Airport Link will consist of two separate north-south tunnels each carrying three lanes of traffic in both directions between Windsor and Lutwyche and two separate east-west tunnels each carrying two lanes of traffic in both directions between Lutwyche and Clayfield.”

- [11] The Inner City Bypass and North-South Bypass Tunnel (the CLEM7 Tunnel under the Brisbane River) are BCC projects. The Airport Link and the Northern Busway project are State projects.
- [12] The primary judge concluded that the Minister, by virtue of s 26A of the *TPC Act*, was empowered to change the purpose for which the land had been acquired and make the declarations in the Notices.² The appellants challenge that finding. They contend that the declarations interfere with any entitlements which they might have pursuant to ss 17 (revocation before compensation) and 41 (disposal to the former owner if no longer required) of the *Acquisition of Land Act*. They submit that their construction of s 26A is informed by the longstanding proposition that an executive power:
- “... to deprive a citizen of his property by compulsory acquisition should be construed as being confined within the scope of what is granted by the clear meaning or necessary intendment of the words by which it is conferred”.³

Grounds of appeal

- [13] On 18 April 2012 the appellants were given leave to abandon ground 2(f) and to substitute grounds 2(fa), (fb) and (fc). As a consequence, the first respondent (“the State”) was directed to file an affidavit relevant to the amended grounds.⁴ At this hearing the appellants sought to file an affidavit to supplement the State’s affidavit.⁵ The respondents objected to its receipt because it was produced late and because it was irrelevant to the matter in issue. The court received the appellant’s affidavit reserving the question of its admissibility.

² It is common ground that the primary judge erred in [16] of her reasons in stating that the land was “transport land” in part because it was required for “toll road purposes (namely an approved tollway project ...)”. It was not. “Toll road” purposes are State government purposes, ss 92 and 93 of the *TIA*; “tollway” purposes are local government purposes, s 28D *TPC Act*.

³ *Clunies-Ross v The Commonwealth* (1984) 155 CLR 193 at 201; *Clissold v Perry* (1904) 1 CLR 363 at 373; *Astway Pty Ltd v Council of the City of the Gold Coast* [2008] QCA 73; (2008) 159 LGERA 335 at 339.

⁴ Affidavit of Jurgen Pasieczny filed 25 May 2012. Mr Pasieczny is employed by the Department of Transport and Main Roads as the Acting Executive Director (Project Delivery). His affidavit detailed the incorporation of Lots 70 and 71 in the Airport Link project and works on Lot 70 for the busway infrastructure.

⁵ Affidavit of Phillip Anthony James Pozzi, surveyor, filed 13 August 2012 offers more detailed information about the use being made of Lots 70 and 71.

[14] The grounds are:

- “(a) The learned trial judge erred in finding that the inclusive definition of ‘transport purpose’ in s. 4 [sic, s 3] *Transport Planning and Coordination Act 1994 (TPCA)* is intended to extend the ordinary meaning of the phrase “transport purpose” to the purposes of other entities than the State of Queensland who are empowered to acquire and hold land. [Ground 1]
- (b) Consequent upon (a), the learned trial judge erred in construing paragraph (a) of the definition of ‘transport land’ as comprehending land acquired by a local government, in this case, the Brisbane City Council, under the *Acquisition of Land Act 1967 (Qld) (ALA)* as opposed to land acquired by the State of Queensland. [Ground 2]
- (c) Consequent upon (a) and (b), the learned trial judge erred in finding that subs. 26A(1) *TPCA* extends the power to make a declaration in s.26A to a power to affect land acquired by Brisbane City Council under the *ALA*. [Ground 3]
- (d) In any event, the learned judge erred in finding that s. 26A *TPCA* extends to permit a declaration in circumstances where the “other stated transport purpose” (in this case, in respect of two projects for which the Brisbane City Council is not the constructing authority) is not a lawful purpose for which the Brisbane City Council was permitted, under the *ALA*, to acquire or retain the land. [Ground 4]
- (e) Further, the learned trial judge erred in finding that a declaration under subs. 26A(2) *TPCA* may declare that land is acquired for an additional purpose (with the former purpose subsisting) as opposed to a different or alternative purpose to that for which the land was originally acquired. [Ground 5]
- (fa) The learned trial judge erred in concluding that the land the subject of the declarations was ‘transport land’; [Additional ground]
- (fb) The learned trial judge erred in concluding that the land the subject of the declarations was ‘transport land’ taken under the *Acquisition of Land Act 1967* for a particular transport purpose; [Additional ground]
- (fc) The learned trial judge erred in concluding that s. 26A *Transport Planning and Coordination Act 1994* was capable of applying to land acquired by an entity other than the chief executive under the *Transport Planning Coordination Act 1994*. [Additional ground]”

The issue

[15] The principle issue for resolution on this appeal concerns the proper construction of s 26A of the *TPC Act* and whether it authorised the change of purpose declaration notices made by the Minister with respect to Lots 70 and 71. The primary judge

concluded that s 26A(2) authorised the land already taken to be declared as required for another transport purpose than that for which it was originally taken. The appellants contend that on the proper construction of s 26A the power to change the purpose applies only where the original acquisition and holding of the land was by or on behalf of the State.

- [16] The BCC adopted the State's arguments in respect of each of the grounds of appeal, adding submissions by way of emphasis, so that reference to "the State" as a party and its submissions should be read as including the position of the BCC if the BCC's submissions are not otherwise identified.

The legislation and its construction

- [17] Section 26A provides:

- “(1) This section applies to transport land taken under the *Acquisition of Land Act 1967* for a particular transport purpose.
- (2) The Minister may, by gazette notice under this Act, declare that the land is required for another stated transport purpose.
- (3) The land is taken to have been acquired for the other transport purpose from the day the declaration is published in the gazette.
- (4) The *Acquisition of Land Act 1967*, section 41 does not apply to the land because of the change of purpose.
- (5) This section does not affect any right of a person to compensation because of the acquisition.
- (6) To remove doubt, it is declared that a declaration under subsection (2)—
 - (a) is not an acquisition of the land; and
 - (b) does not give a right to compensation.”

- [18] The primary judge approached the construction of s 26A on the basis that it comprised three operative parts:

- (i) the conferral of power on the Minister under s 26A(2);
- (ii) the field of operation within which the power may be exercised in s 26A(1); and
- (iii) the consequence of the exercise of the power in s 26A(3)-(6).

Her Honour said, uncontroversially, that the power could be exercised only where the subject land:

- (i) is transport land; and
- (ii) was taken under the *Acquisition of Land Act 1967*; and
- (iii) was for a particular transport purpose.

Her Honour concluded that the land was transport land and that it had been taken under the *Acquisition of Land Act* for a particular transport purpose.

[19] Section 3 of the *TPC Act*, as then in force,⁶ defined “transport land”:

“*transport land* means land that—

- (a) has been acquired for transport purposes or for an incidental or complementary purpose; and
- (b) is required for—
 - (i) the operations of a transport GOC; or
 - (ii) franchised road or toll road purposes; or
 - (iii) the operations of a person who is a railway manager under the *Transport Infrastructure Act 1994*, chapter 7; or
 - (iv) busway transport infrastructure or bus passenger services; or
 - (v) light rail transport infrastructure or light rail passenger services; or
 - (vi) a transport associated development.”

[20] The expression “transport purpose” is defined in s 3:

“*transport purpose* includes any purpose for which the Minister is responsible.”

Grounds 1, 2 and 3

[21] These grounds are connected and may be considered together. They challenge the primary judge’s construction of the definition of “transport land” as including land acquired by a local government and not being confined to land acquired by the State; and by construing the definition of “transport purpose” as including a purpose of an entity other than the State. Central to their contention is a construction of s 26A(1) which would read down its meaning to land acquired by a State acquiring authority, and “transport purpose” as a State purpose only.

[22] The appellants submit that the context of s 26A in the *TPC Act* dictates this limitation. They identify four ways in which this occurs:

- (i) the other provisions of Part 4 of the *TPC Act*;
- (ii) the close association between the term “transport purposes” and the purposes for which the Minister is responsible under the *TPC Act*;
- (iii) the close association between the land subject to s 26A and the activities specified in (b)(ii) of the definition of “transport land”; and
- (iv) the limited reference to land acquired by a local government in Part 4B of the *TPC Act* which is directed to making “special provision” for local government tollways.

⁶ Reprint No 7E. In Reprint No 7I and in subsequent reprints s 3(b)(iii) refers instead to “the operations of a rail infrastructure manager as defined under the *Transport (Rail Safety) Act 2010* who is accredited under that Act”.

Before turning to the provisions in Part 4 (in which s 26A is located) some general provisions in the Act may be mentioned. The long title is “An act about the planning and coordination of transport, and other matters for which the Minister is responsible”. The objectives are to improve the economic, trade and regional development performance of Queensland and the quality of life of Queenslanders:

“by achieving overall transport effectiveness and efficiency through strategic planning and management of transport resources.”⁷

[23] Section 3 comprises definitions. Part 2 requires the chief executive to develop for the Minister’s approval a transport coordination plan to provide a framework for strategic planning and management of transport resources in Queensland in accordance with the objectives of the Act.⁸ By s 6, in undertaking such a coordination plan, regard must be had amongst other things to “local government interests”.⁹

[24] The object of Part 2A is to enable the chief executive to encourage increased integration between land use and transport.¹⁰ That object may be achieved in a number of ways set out in s 8A(2) which need not be further mentioned but which relate to impacts on existing or future public passenger transport and infrastructure, including the impact of road works on local government and a change in management of a local government road and its impact on public passenger transport.¹¹

[25] Part 4: “Functions, powers and property” commences with s 22. It identifies the chief executive’s functions “under the transport Acts”¹² to include coordination of strategic planning and the operation of integrated transport systems in the State; and to ensure the effective planning and development of transport infrastructure. By s 23 any other powers of the chief executive may not be read down (by implication). Section 24 provides for the general powers of the chief executive including:

“... under the Minister and as agent of the State, all the powers of the State that are necessary or desirable for performing the chief executive’s functions.”¹³

[26] Section 25 concerns the chief executive’s general powers with respect to property. Those powers include the power to acquire or otherwise deal with property for the purposes of transport and for incidental purposes and specifically includes power to acquire land by resumption with particular limitations on that power (broadly, for transport purposes). The chief executive is a constructing authority within the meaning of the *Acquisition of Land Act 1967* and, without limiting his powers to take land under that Act, is authorised to take land for any of the purposes mentioned in s 25.

[27] Section 26 provides:

⁷ Section 2.

⁸ Section 4.

⁹ Section 6(b)(iii).

¹⁰ Section 8A(1).

¹¹ Sections 8C and 8D. The present form of the *TPC Act* has no ss 9-21. Part 3 in which they appeared concerned The South-East Queensland Transit Authority which last appeared in Reprint 6A (21 May 2008).

¹² See s 3 for the Acts encompassed in that expression.

¹³ Section 24(1).

“An acquisition of land that will be required at some future time for a purpose for which land may be taken under this Act by the chief executive is an acquisition of land for the purposes of this Act even if the time when the land will be required is indefinite or presently can not be worked out.”

[28] Section 27 permits the chief executive “for the State” to lease, sell or otherwise dispose of transport land:

“(a) if the land is for busway transport infrastructure or bus passenger services—to any person for busway transport infrastructure or bus passenger services; or ...”

[29] It is the case, as the appellants contend, that Part 4 largely concerns the functions and powers of the chief executive. The applicants use the expression “[o]verwhelmingly”,¹⁴ no doubt to suggest that s 26A must, necessarily, be so circumscribed by taking constructive colour from those other provisions. However, the failure to refer to the chief executive in s 26A may well have the opposite effect. The omission points to a deliberate choice by the drafter to refer to a wider field of operation. Section 26A was not inserted until 2000¹⁵ and, as the survey of legislative amendment of the *TPC Act* since 1994 demonstrates,¹⁶ more and more transport activities involving entities other than the State have been provided for.

[30] Section 26 does refer to acquired land which will be required at some future time but limits the acquisition by the chief executive in that circumstance to a purpose for which the chief executive may acquire land – a reference back to ss 24 and 25. Section 26A contains no such limitation.

[31] The construction of s 26A is not assisted in the way contended for by the appellants by reference to the other sections in Part 4.

[32] The appellants submitted that there is a close association between the expression “transport purposes” and the purposes for which the Minister is responsible under the *TPC Act* and this is emphasised by tracing the legislative history of that definition. That is acknowledged by the respondents.

[33] The original s 12 of the *TPC Act* – the forerunner of present s 27 – contained the genesis of the definition of “transport land”. In Reprint No 2, in force on 19 July 1994,¹⁷ “transport purpose” was defined in s 4 to include “any purpose for which the Minister is responsible”. That has remained unchanged. Mr Keim SC for the appellants informed the court, without contradiction, that this definition was included to cover ports which had come into the Ministerial portfolio. He submitted it was important to know this as such information operated as a limitation on the otherwise broad expression.

[34] Reprint No 3, in force on 7 July 1995, includes a definition of “transport land” which, in form, is the same as the definition which governs this appeal but there were fewer subject matters in paragraph (b). The power of the chief executive to deal with transport land was extended in s 12 to include ‘a franchisee or a railway

¹⁴ Appellants’ outline of submissions para 3.

¹⁵ By Act No 40 of 2000 in s 37.

¹⁶ Considered below.

¹⁷ The appellants engaged in this historical legislative survey by reference to the reprints of the *TPC Act* rather than the amending legislation as precise dates of change were unimportant and this was far easier to follow.

- manager”. That section remained unchanged in Reprint No 4 but was renumbered as s 27.
- [35] Section 26A was introduced for the first time¹⁸ in Reprint No 5A and in its present form.
- [36] Reprint No 5C, in force on 14 October 2002, inserted definitions of “busway transport infrastructure” and “light rail transport infrastructure” – State, not local government functions – and added those purposes to the definition of “transport land” in paragraph (b) as (iv) and (v).
- [37] Reprint No 6D was in force on 1 December 2008. It defined “franchised road” and “toll road” by reference to the *TIA* 1994 in sch 6 and s 92 respectively. They are the responsibility of the State and not of local government. The definition of “transport land” includes those purposes. Section 27 has some additions so as to include the chief executive’s power of disposal of land for franchise or toll road purposes or combined purposes.¹⁹
- [38] The appellants contend that the link between s 26A and s 27 can be seen by this preceding legislative history. Section 26A, when introduced, allowed for a greater flexibility in dealing with land than hitherto. Previously there had been power to sell to a private or semi-government entity but no power to change the purpose for dealing with the land which had been acquired.
- [39] While it may readily be accepted that the legislative history demonstrates that transport purposes were added to meet changing transport requirements for which the State was responsible, it does not, without more, limit the ambit of s 26A.
- [40] The next contextual factor advanced by the appellants is the close association between the land the subject of a s 26A declaration and activities specified in paragraph (b) of the definition of “transport land” in as much as those activities are ones for which the Minister or chief executive is directly or indirectly responsible. This is uncontentious.
- [41] The objects of the *TPC Act* and the *TIA* show that the State Government is empowered to give effect to strategic planning for the provision and operation of all transport infrastructure.²⁰ To that end the chief executive is given power to develop strategic transport plans for the Minister.²¹ Those powers include planning and management of matters pertinent to transport mentioned in paragraph (b) of the definition of “transport land”. It is no basis, however, for inclining towards the appellants’ contention that s 26A is confined to land acquired for the State by the chief executive.
- [42] The fourth contextual factor raised by the appellants is a negative one. Part 4B – special provision for local government tollways – was first inserted into the Act in 2005. By s 28D:
- “(1) A local government may acquire, hold, dispose of or otherwise deal with land for—
- (a) an approved tollway project under the *Transport Infrastructure Act 1994*; or

¹⁸ In the Reprint. It was inserted by amendment in 2000.

¹⁹ Section 27(1)(aa) and (ba).

²⁰ *TIA*, s 2; *TPC Act*, ss 2 and 5(2).

²¹ *TPC Act*, s 4(1); *TIA*, s 5(1).

- (b) a local government tollway under the *Transport Infrastructure Act 1994*.
- (2) Without limiting subsection (1), a local government may—
 - (a) acquire land for an approved tollway project or local government tollway with the intention of disposing of it to another person to operate as a tollway; and
 - (b) dispose of land acquired by the local government for an approved tollway project or local government tollway to another person.
- (3) The power conferred by subsection (1) includes power to acquire land by taking it under the *Acquisition of Land Act 1967* if the land is, in the local government’s opinion, required for an approved tollway project or local government tollway, or for an incidental purpose.

...”

[43] The appellants submit two things about the Part 4B provisions: they could not inform the construction of s 26A since they were inserted after the insertion of s 26A; and they make “special provision” for local government tollways. Accordingly, its presence tends against any place for local government in s 26A. What Part 4B does is provide for a particular purpose (tollways) for which a local government may acquire and deal with land. That purpose is not in the schedule to the *Acquisition of Land Act* but, by the insertion of Part 4B, a local authority dealing with land for tollway purposes falls within the *Acquisition of Land Act*.²²

[44] Neither the text nor context, including the legislative history, supports the appellants’ contention that the definition of “transport purpose” should be read down to be confined to State purposes. Similarly, there is no basis for confining “transport land” in that way. Consequently, the primary judge did not err in concluding that the operation of s 26A requires that transport land be taken pursuant to the *Acquisition of Land Act* for a transport purpose and that the identity of the entity which does so is not a limitation on the Minister’s power.

[45] These grounds are not made out.

Ground 4

[46] The appellants contend that s 26A does not extend to declaring that land is required for another transport purpose where that other transport purpose is not one for which the acquiring entity was authorised to acquire the land. The appellants submit that if this were to occur “surprising and unexpected consequence[s]”²³ would follow which could not have been intended by the legislature. Those consequences are:

- (i) the acquiring BCC would be authorised to hold and deal with land for a purpose for which it was not authorised to acquire the land; and
- (ii) the State is not required to compensate the BCC for the land to be used by the State and perhaps sold or otherwise disposed of by the State under s 27 of the *TPC Act*.

²² Section 5(1)(b)(ii).

²³ Appellants’ outline of submissions paras [31] and [32].

- [47] In respect of the first, the primary judge was correct to conclude that a declaration under s 26A is not to be construed as authorising the BCC to undertake the other transport purpose stated in the declaration. The declaration by the Minister does not change the constructing authority named in the Notice nor authorise the BCC to undertake the other stated transport purpose for which the land was required by the Notice.
- [48] The other “surprising” result is that the State is not required to compensate the BCC for land to be used by the State. That proposition overlooks that s 26A(6) provides that a declaration under s 26A(2) is not an acquisition such as to give rise to a right to compensation; s 41 of the *Acquisition of Land Act* does not apply because of the changed purpose. There is no vesting of the title to the land in the State. By contrast, for an acquisition, the land is taken by Notice in the gazette by the Governor-in-Council declaring that the land particularised in the Notice is taken for the purpose mentioned in the Notice.²⁴ Land taken by a gazette resumption notice vests in the Crown or in the constructing authority from the date of publication of the Notice free from all interests.²⁵
- [49] The appellants contend, as an aspect of this ground,²⁶ that in order to give effect to the legislative purpose, paragraph (a) of the definition of “transport land”, that is, “land that ... has been acquired for transport purposes or for an incidental or complementary purpose”, must read as, “... has been acquired by the Chief Executive for transport purposes or for an incidental or complementary purpose”. Since, plainly, it was not the intended purpose of the *TPC Act* that local government acquisitions should fall within s 26A(1), the words should be read into the definition.
- [50] To read those words in requires a consideration of the “Diplock test”.²⁷ It is impossible to conclude that the legislature had, “by inadvertence”, overlooked the present circumstance, namely that it might be a local government, not a State entity, who was the original taker of the land sought for another transport purpose.
- [51] In *Ravenscroft v Nominal Defendant*²⁸ Muir JA said:²⁹
- “And for that to be possible, to put it broadly, the court must conclude that its solution is the one Parliament would have adopted had it become aware of the deficiencies. Consequently, it would be appropriate, rarely if ever, to fill a perceived gap by interfering with the framework or scheme of an Act. Also there are cases in which it is desirable for the court to leave any remedy to Parliament. ...”
- [52] There is no persuasive basis for “filling the gap”. This ground must be rejected.

Ground 5

- [53] Ground 5 states that the primary judge erred in finding that a declaration under s 26A(2) could apply to land acquired for a purpose additional to the former purpose with that original purpose continuing. The appellants contend that “another”

²⁴ Section 9(7) of the *Acquisition of Land Act* 1967.

²⁵ Section 12 of the *Acquisition of Land Act* 1967.

²⁶ Appellants’ outline of submission [34].

²⁷ *Wentworth Securities Ltd v Jones* [1980] AC 74 at 105-106.

²⁸ [2008] 2 Qd R 32.

²⁹ At [52]. See also *Sevmere Pty Ltd v Cairns Regional Council* [2009] QCA 232; [2010] 2 Qd R 276 per Holmes J at 292-296.

purpose means a different or alternative purpose to that for which the land was originally acquired. That is, “another stated transport purpose” must be “an exclusive purpose” and not “an additional purpose”. This ground was directed to the evidence³⁰ that the land continued to be used by the BCC for the purpose for which the land had originally been taken, in conjunction with the use by the State for the Airport Link and Northern Busway.

- [54] The State submits that the ordinary meaning of “another” is “second” or “additional” and not “alternative” or “substitute”. The definition in the Online Oxford English Dictionary of “another” is:

“One more, one further; originally *a second* of two things; subsequently extended to anything additional or remaining beyond those already considered; an *additional ...*”.

The ordinary grammatical meaning of “another” is a sensible meaning to attribute to the expression. Furthermore, the object of the Act is to achieve overall transport effectiveness and efficiency through strategic planning and management of transport resources.³¹ The ordinary meaning achieves that object in as much as it permits land acquired for one purpose to be utilised for another associated purpose without the necessity of undertaking the complex steps required by the *Acquisition of Land Act 1967* to resume the land from the original constructing authority. If the ordinary meaning achieves an appropriate result there is no basis for calling in aid the construction principle of restraint which applies to a compulsory acquisition of land.

- [55] This ground is rejected.

Additional grounds

- [56] In their additional grounds the appellants contend that the land the subject of the declaration was not “transport land” within the meaning of s 3 of the *TPC Act* contrary to the conclusion of the primary judge. The definition of “transport land” and “transport purpose” have already been set out.
- [57] The first characteristic of “transport land” in the definition is that it must be land which has been acquired for transport purposes or for an incidental or complementary purpose.³² As was concluded above in respects of grounds 1, 2 and 3, the identity of the acquiring entity is not an element of this defining characteristic, nor is the manner of acquisition (which may be by purchase or by compulsory acquisition³³). The definition of transport purpose is inclusive. The land was acquired for a purpose incidental to an approved tollway project, namely the North-South Bypass Tunnel Project, in particular, a road. An approved tollway project is a transport purpose, as is a road. Accordingly, the subject land is land which has been taken for transport purposes.
- [58] The second characteristic is that the land “is required” for one (or more, presumably) of the subject matters identified in paragraph (b)(i)-(vi). The declaration identified the road transport purpose of the Airport Link Project and the busway transport purpose for the Northern Busway (Windsor to Kedron)

³⁰ Affidavit of Gregg Robert Buyers at [15]; AR 76.

³¹ *TCP Act*, s 2; *TIA*, s 2.

³² Para (a) of the definition in s 3.

³³ Section 15(3) of the *Acquisition of Land Act 1967*; sections 10, 11 and 242 of the *City of Brisbane Act 2010*; sections 9 and 262 of the *Local Government Act 2009* and ss 24(1) and (3) and 25(1) and (2) of the *TPC Act*.

- Projects. Airport Link is a “franchised road” and a “toll road” as defined by s 3 of the *TPC Act*.³⁴ Busway transport infrastructure has been constructed on Lot 70. The land was required for two of those identified purposes.
- [59] Section 26A(1) identifies the field of operation within which the power to make a declaration about the land may be exercised. There must be “transport land” and that land must have been “taken under the *Acquisition of Land Act 1967*” and taken “for a particular transport purpose”.
- [60] It is uncontested that the other “stated transport purpose” must be a transport purpose within paragraph (b) of the definition of “transport land”. It must be land which “is required” for that other purpose before the Minister may make a declaration. The power to make a s 26A declaration is exercisable when the occasion requires.³⁵ The occasion for the exercise of the power to make a s 26A declaration arises after the land has been taken under the *Acquisition of Land Act 1967* for a particular transport purpose and it “is required”. The appellants contend that the proposition should be expressed “when transport land” has been taken, etc. That is circular. The definition of “transport land” is “land that has been acquired for transport purposes”.
- [61] The State contends that such an occasion arose in January 2010 when the declarations were made. It argues that the land had been taken in February 2006 under the *Acquisition of Land Act 1967* “for a particular transport purpose ... not a paragraph (b) purpose ... [and] the land was required in January 2010 for paragraph (b) purposes.”³⁶ The time for enquiring whether land is transport land is the time when a s 26A declaration is made. The appellants contended that land must be land required for a paragraph (b) purpose prior to the declaration, that is, effectively, at the time it was taken originally. That does not reflect the definition containing, as it does, the temporal bifurcation between paragraphs (a) and (b) – “has been acquired” and “is required”.
- [62] The construction contended for by the appellants requires a limitation on the ambit of s 26A, narrowing it in the following way: the purpose of s 26A is to provide for the State to acquire land which was required for one paragraph (b) purpose and now is required for another paragraph (b) purpose. Section 26A avoids the restrictions in the *Acquisition of Land Act 1967* consistently with the overall planning requirements of the *TPC Act*. That argument is not unattractive, but it does not reflect the ordinary meaning of the words in the section, incorporating the relevant definitions, and there is no construction basis for limiting those words. The meaning contended for by the respondents and accepted by the primary judge is sensible and practical insofar as it gives effect to the objects of the *TPC Act* and permits the State and the BCC to work co-operatively to achieve improved transport infrastructure.
- [63] The primary judge was thus correct in concluding that the subject land was transport land within the meaning of that definition in the *TPC Act*; that s 26A(1) is not restricted to the acquisition of land by the chief executive on behalf of the State; and that it was land which was required for another transport purpose which fell within paragraph (b) of the definition of “transport land” in s 3. Her Honour’s conclusion that the declaration made by the Minister was a valid exercise of the power conferred by s 26A(2) is correct.

³⁴ Affidavit of Pasieczny, paras 5 to 8.

³⁵ *Acts Interpretation Act 1954*, s 23(1).

³⁶ First respondent’s further outline of argument filed 22 June 2012 para. 13.

[64] The additional grounds should be rejected.

[65] In the result, none of the appellants' grounds have been successful.

Further affidavit

[66] It was not necessary in resolving the issue of the appeal – the proper construction of s 26A – to have recourse to the further affidavit sought to be relied on by the appellants. It will not be received.

Order

[67] The order should be that the appeal be dismissed with costs.

[68] **GOTTERSON JA:** I agree with the order proposed by White JA and with the reasons given by her Honour.

[69] **NORTH J:** I have read the reasons for judgment of White JA and agree, for the reasons given, with the proposed order.