SUPREME COURT OF QUEENSLAND

CITATION:	*Lipovsek v BCC* [2013] QSC 185
PARTIES:	**ZVEZDANA LIPOVSEK** (applicant) v **BRISBANE CITY COUNCIL** (respondent)
FILE NO/S:	BS 5337 of 2011
DIVISION:	Trial
PROCEEDING:	Application
DELIVERED ON:	23 July 2013
DELIVERED AT:	Brisbane
HEARING DATE:	26 April 2013
JUDGE:	Jackson J
ORDERS:	**The order of the court is that:** **1. the decision of the respondent made on 22 March 2011 is set aside;** **2. the matter to which the decision relates is remitted to the respondent for further consideration; and** **3. the respondent pay the applicant's costs of the proceeding to be assessed.**
CATCHWORDS:	REAL PROPERTY – COMPULSORY ACQUISITION OF LAND – POWERS OF ACQUISITION – OBJECTIONS – where the Council's resolution records that the Council had considered the objections – where the evidence does not support the proposition that the objection, the substance of its grounds, or the delegates report were considered – whether the council had given "due consideration" to the objections REAL PROPERTY – COMPULSORY ACQUISITION OF LAND – POWERS OF ACQUISITION – PURPOSE OF ACQUISITION – where the Council made an application to the Minister to take land under s 9 of the *Acquisition of Land Act* 1967 (Qld) – where the decision of the Council to take land was for environmental purposes – whether the headings of the separate parts of a schedule constitute purposes – whether the Council's purpose was an authorised purpose for taking land ADMINISTRATIVE LAW – JUDICIAL REVIEW –

GROUNDS OF REVIEW – FAILURE TO OBSERVE STATUTORY PROCEDURE – where the Council's resolution records that the Council had considered the objections – where the evidence does not support the proposition that the objection, the substance of its grounds, or the delegates report were considered – whether procedure required by law to be observed or not observed

Acquisition of Land Act 1967 (Qld), s 5, s 7, s 8, s 9
City of Brisbane Act 2010 (Qld), s 10, s 11, s13, s 242
Judicial Review Act 1991 (Qld), s 20, s 23, s 30

Carltona Ltd v Commissioner of Works [1943] 2 All ER 560, cited
Ipswich City Council v Wilson; Ipswich City Council v Wilson & Downey (2011) QLAC 6, cited
Plaintiff M61/2010E v Commonwealth of Australia (2010) 243 CLR 319; [2010] HCA 41, cited
Springfield Land Corporation (No 2) Pty Ltd & Anor v State of Queensland [2011] HCA 15; (2011) 242 CLR 632, cited
The Commonwealth v Colonial Combing, Spinning and Weaving Ltd (1922) 31 CLR 421 at 437; [1922] HCA 62, cited
Union Steamship Company of Australia Pty Ltd v King (1988) 166 CLR 1 at 9-14; [1988] HCA 55, cited

COUNSEL: A Lyons for the applicant
M Hinson SC and D Quayle for the respondent

SOLICITORS: R J Winter & Associates for the applicant
Brisbane City legal Practice for the respondent

[1] **JACKSON J:** On 22 March 2011, the respondent ("the Council") resolved that it is of the opinion that the land described as lot 2 on registered plan 200289 is required for environmental purposes, that it is necessary to take the land and that application be made for approval of the Minister for the taking of the land for that purpose in accordance with s 9 of the *Acquisition of Land Act* 1967 (Qld) ("the decision").

[2] The applicant is the registered owner of the land. She challenges the validity of the decision under s 20 of the *Judicial Review Act* 1991 (Qld) ("the *JRA*").

[3] The grounds of the application are that the decision was not authorised by the enactment under which it was purported to be made, that the making of the decision was an improper exercise of the power conferred by the enactment under which it was purported to be made, and that there was no evidence or other material to justify the making of the decision.

[4] In support of the improper exercise of power ground, she relies on the references in s 23 of the *JRA* to failing to take a relevant consideration into account in the exercise of a power and to an exercise of power which is so unreasonable that no reasonable person could so exercise the power.

[5] For the reasons which follow, I conclude that a procedure required by law to be observed was not observed and the decision was not authorised by the enactment under which it was purported to be made. Because I have also concluded that the decision should be remitted to the Council, I have analysed some of the other grounds and points which were argued, but have not decided those grounds.

Due consideration of all objections

[6] Ground 3(b)(ii) alleges a failure of the Council to take into account, as a relevant consideration, the suggestion by the applicant's brother to the Council that only 70 percent of the applicant's land be taken. As well, a number of the other suggested relevant considerations set out in the sub-subparagraphs of ground 3(b) were said to be encompassed within the text of the applicant's objection that "the entire area is protected and Council approval is required prior to any work undertaken or removing or adding flora". The applicant identifies relevant considerations which contends that the Council was required to take into account by virtue of that part of the objection in grounds 3(b)(iv) as amplified in paragraphs 45 to 52 of the applicant's statement of facts, issues and contentions, which were summarised in paragraphs 44(a) to (d) of the Council's written submissions.

[7] However, as developed in the applicant's statement of facts, issues and contentions, and written and oral submissions, the focus was not on the subject matter of those things which the Council failed to take into account. Instead, the ground argued was that the Council did not give consideration to the objections at all, because it did not personally consider them.

[8] This ground of review is not, strictly speaking, within the grounds of the application for review. But since it has been in the applicant's statement of facts, issues and contentions since November 2011, and the Council did not object to it being raised, it is appropriate to deal with it.

[9] Section 9 of the *Acquisition of Land Act* ("*ALA"*) provided[1], relevantly:

> **"Ways in which land is to be taken**
>
> (1) …
>
> (2) If within the time stated in the notice of intention to resume no objection is made or if, **after due consideration of all objections**, the constructing authority is of opinion that the land in question is required for the purpose for which it is proposed to be taken, the constructing authority may apply to the Minister that the land be taken as prescribed by this section.
>
> (3) Such application shall be made within 12 months after the date of the notice of intention to resume and not thereafter.
>
> (4) Such application shall contain or be accompanied by each of the following—
>
> (a) a copy of the relevant notice of intention to resume and of any further notice amending the same served under section 7;
>
> (b) …;

[1] Section 9 was amended in a way that is immaterial by s 25 of the *Land, Water and Other Legislation Amendment Act* 2013 (Qld).

(c) …;
(d) …; and
(e) a statement whether or not any person objected in terms of the notice of intention to resume and, in the case of such an objection or objections, the name or names of the objector or objectors, a copy of every objection, and a report by the constructing authority thereon.

(5) The Minister may require any constructing authority to furnish, within a time specified by the Minister, such further particulars and information as the Minister deems fit with respect to an application under this section.

(6) The Minister must consider every application made under this section, including all statements and documents, or copies of documents, accompanying the application to ensure that—
(a) the land to be taken may be taken and should be taken for the purpose for which it is proposed to be taken; and
(b) the constructing authority has taken reasonable steps to comply with sections 7 and 8; and
(c) if the notice of intention to resume has not been served on the owner as defined in section 7(6), that the failure to do so was due to circumstances beyond the control of the constructing authority.

(7) The Governor in Council may, by gazette notice, declare that the land particularised in the notice is taken for the purpose mentioned in the notice.

(8) The taking is effective on the day of publication of the notice."

(emphasis added)

[10] On 9 September 2010, the Council served on the applicant:

(a) a letter headed "Proposed Resumption for Environmental Purposes Lot 2 on Registered Plan 200289 338 Lake Manchester Road, Kholo";
(b) a notice of intention to resume ("NIR"); and
(c) an attached document described as a background information document ("BID").

[11] On 17 September 2010, the Council served an amended NIR on the applicant, correcting the description of the land.

[12] On 17 October 2010, the applicant's brother, on her behalf, made a written objection to the taking of the land.

[13] On 25 October 2010, the applicant's brother, on her behalf, was heard in person by the Council's delegate in support of the grounds of objection.

[14] On 1 November 2010, the Council's delegate prepared a report on the objection.

[15] On 15 November 2010, a Council officer prepared a report in respect of the delegate's report.

[16] On 18 November 2010, the Council gave a copy of the delegate's report to the applicant and invited the applicant to make any additional submission.

[17] On 20 December 2010, the applicant's solicitor, on the applicant's behalf, made a written submission to the Council.

[18] On 14 March 2011, the Council's Establishment and Coordination Committee:

(a) met and considered a submission made to it by the divisional manager, City Planning and Sustainability Division, recommending that the applicant's land be acquired for environmental purposes; and
(b) adopted that recommendation and resolved to report and recommend to the Council accordingly.

[19] On 22 March 2011, the Council:

(a) met and considered the report of the Establishment and Coordination Committee; and
(b) resolved that as it had "duly considered this objection" and that it was "of the opinion that the land … is required for environmental purposes" and that "it is necessary to take the land" and to "direct that application be made for approval of the Minister for the taking of that land …".

[20] Although the Council's resolution records that the Council "has duly considered this objection", the evidence does not suggest that the objection itself or the substance of its grounds were communicated to Councillors. In referring to "this objection", the resolution is referring to an earlier statement within the resolution that "a written objection was received … (shown at attachment 3, objection material, submitted on file)".

[21] The minutes of the Council's meeting do not record any reference to the objection or its contents. It is said that the objection and the report on objections were contained within the file which was taken into the Council's chamber. That may be so, but physical transportation of the documents into the chamber may not amount to "due consideration of" the objection.

[22] Of course, it is every day governmental, including local governmental, practice that the functions of a repository of statutory power are not exclusively carried out by the named functionary but are dealt with by officers, servants or agents who prepare a report to assist the functionary in carrying out or exercising the statutory power. Neither of the parties in the present case sought to explore the limits of any of the relevant principles in the context of this case, including what is known as the "Carltona" principle.[2]

[23] Under the *City of Brisbane Act* 2010 (Qld) ("*CBA*"), the Council is constituted as a body corporate with perpetual succession. The Council is usually constituted by the Mayor and 26 other Councillors who are elected or appointed to the Council or, in default, the Chief Executive Officer.[3] Further, the Establishment and Coordination

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2 *Carltona Ltd v Commissioner of Works* [1943] 2 All ER 560; *Plaintiff M61/2010E v Commonwealth of Australia* (2010) 243 CLR 319 at [68]; [2010] HCA 41.

3 Sections 10 and 13.

Committee is a statutorily recognised body within the Council.[4] It is sometimes known as the Civic Cabinet.

[24] Before the Council meeting at which it resolved that it had duly considered the objection, that the land was required for environmental purposes and that an application should be made to the Minister that the land be taken as prescribed by s 9 of the *ALA*, the report of the Establishment and Coordination Committee was circulated to Council members by email.

[25] Accordingly, although there may have been no reference to a discussion of the objection as such at the meeting itself, it might not follow that there was not due consideration of the objection and the report of the delegate, if they had been communicated to Councillors before they resolved that the land was required and that application should be made to take it.

[26] However, the Establishment and Coordination Committee report which was circulated to Councillors did not deal with the objection beyond saying "the written objection was lodged by the property owner listed in schedule B and the objection was heard. A response to the objection was prepared by Council. The objection, delegate's report, Council's response and further submission from the property owner, are set out in attachment 3, submitted on file."

[27] Is a statement to Councillors before the meeting or at the meeting that the objection and the report of the delegate are located in a particular place enough to constitute due consideration of the objection by the Council? There is no evidence or suggestion in the evidence that either of those documents were in fact communicated to Councillors prior to the meeting of the Council on 22 March 2011 or to the Establishment and Coordination Committee members prior to its meeting on 14 March 2011.

[28] The Council's obligation to deal with the objection was regulated by s 8 of the *ALA* which provided, in part:

> "(2) The constructing authority shall consider the grounds of objection to the taking of any land and—
>
> (a) if the objector has been heard by the constructing authority—the matters put forward by the objector in support of such grounds; or
>
> (b) if the objector has been heard by the delegate of the constructing authority—the report thereon of such delegate.
>
> (2A) If upon such consideration, the constructing authority is of opinion that the resumption should be discontinued or that the notice of intention to resume should be amended, the constructing authority may discontinue the resumption or amend the notice of intention to resume.
>
> (2B) However, a notice of intention to resume shall not be amended so as to include therein land additional to the land the subject thereof."

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[4] Section 24.

[29] Reading s 9(2) (which requires "due consideration of all objections") with s 8(2) requires that the Council "shall consider the grounds of the objection" and where (as in this case) the objector has been heard by the delegate, "the report thereon of such delegate".

[30] In my view, the processes followed by the Council in the present case did not amount to "due consideration of" the applicant's objection. The Council was required, by means quite possibly adapted to the exigencies of getting its business done in general meeting, to consider the grounds of the objection and the report of the delegate on the matters put forth by the objector in support of such grounds. Without deciding that question finally, it may be that those requirements could be fulfilled by a summary of the grounds of objection and a summary of the report of the delegate in a report of the Establishment and Coordination Committee which is given to Councillors before the relevant meeting of the full Council. However that may be, what was done in the present case was not enough.

[31] In my view, the failure of Council to give due consideration to the objections as required by s 9(2) of the *ALA* means that a condition of the Council's entitlement to make an application to the Minister that the land be taken under s 9 of the *ALA* has not been fulfilled.

[32] In the relevant language of the *JRA*, a procedure that was required by law to be observed in relation to the making of the decision to make the application to the Minister was not observed and the Council did not have jurisdiction to make the decision or the decision was not authorised by the enactment under which it was purported to be made.[5]

[33] Under s 30 of the *JRA*, the Court has power to make an order setting aside the decision and an order referring the matter, to which the decision relates, to the Council for further consideration.

[34] It is appropriate to set aside the decision of the Council, that it requires the land in question for the purpose for which it is proposed to be taken and the application to the Minister that the land be taken under s 9 of the *ALA*, as invalidly made.

[35] It is also appropriate, in the circumstances of this case, to make an order referring the matter to which the decision relates to the Council for further consideration. The invalidity of the decision which I have found is procedural invalidity that infected the process of taking the land at the point of dealing with the applicant's objection under s 8 and s 9 of the *ALA*. It did not infect the processes engaged in by the Council prior to that point.

[36] Although the ground already considered is enough to dispose of this case, as other grounds were argued it is appropriate to consider them, at least to some extent. However, none of what follows is a necessary ground of decision for the orders I propose to make.

Power to resume for a relevant purpose

[37] The decision of the Council was also "purported to be made" under the authority of s 5 of the *ALA*. That section provides:

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5 Sections 20(2)(b), (c) and (d) of the *JRA*.

"**Purposes for which land may be taken**

(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 schedule; or

(b) where the constructing authority is a local government—
(i) for any purpose set out in the schedule which the local government may lawfully carry out; or
(ii) for any purpose, including any function of local government, which the local government 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 government—
(i) for any purpose set out in the schedule 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.

(2) The power to take, under and subject to this Act, land for a purpose (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.

(3) The Governor in Council, pursuant to any powers under the *Land Act 1994* to resume land, at the request of a constructing authority other than the Crown, may take on its behalf any land comprised in a lease or any easement on a lease within the meaning of that Act required by such constructing authority for a purpose for which it may take under and subject to this Act land or an easement on land granted in fee simple.

Note— See the *Land Act 1994*, chapter 5, part 3 for the resumption of leases or easements under that Act.

(4) The heading to a part of the schedule in which a purpose for taking land is set out indicates only the type of activity or other thing to which the purpose ordinarily relates and does not limit the matters to which the purpose may relate."

[38] The decision recorded that the land is to be taken "for environmental purposes". Within the text of s 5(1), the role of the relevant purpose is expressed in several places. First, where the constructing authority is the Crown, land may be taken "for any purpose set out in the schedule". Secondly, where the constructing authority is a local government, land may be taken "for any purpose set out in the schedule which the local government may carry out". Thirdly, also where the constructing authority is a local government, land may be taken "for any purpose" including "any function of local government which the local government is authorised or required by a provision of an Act other than this Act to carry out". As well, where the constructing authority is

other than the Crown or a local government, there is a similar structure provided for when land may be taken.

[39] In each of the places where purpose is referred to in s 5(1), the function of the reference is to qualify the power to take land which is granted. That conclusion follows from the text of s 5(1) and s 5(2). The function of s 5(2) is to expand the scope of the power to take land to a taking for any purpose incidental to the carrying out of a primary purpose.

[40] The schedule to the Act is headed "Purposes for taking land" and refers to s 5. The schedule is divided into 14 parts, each of which has a heading commencing with the words "Purposes relating to", except for Pt 14 which is headed "Other purposes". Each of the relevant parts sets out a number of dot points below the heading. Some of the dot points themselves identify purposes, such as "Aviation and related purposes". Other dot points identify particular forms of improvements to land or structures or things, such as "bridges" or "weighbridges" and "ferries". Some dot points are directed towards land use, rather than improvements or things, such as "protected areas within the meaning of the *Nature Conservation Act* 1992, Pt 4 Div 2".

[41] A relevant question in the present case is whether the headings of the separate parts of the schedule themselves constitute purposes, or whether the purposes are only those identified in the dot points. Reading the whole of the schedule in context would support the latter view. In particular, given that the heading of Pt 14 is "Other purposes", a general view that the headings themselves identify the purposes for which land may be taken under s 5 would have the consequence that the ordinary meaning of "Other purposes" would negate and render meaningless any restriction in the range of relevant purposes that might otherwise flow from the language of the text of the dot points under the various headings.

[42] The status of the heading of a schedule to an Act is a little unclear under the *Acts Interpretation Act* 1954 (Qld) ("the *AIA*"). Although a schedule is part of an Act and a heading of a chapter, part, section or provision is part of an Act, it is not expressly provided that a heading of a schedule to an Act is part of an Act. However that may be, in this case the answer to that question under the *AIA* is not of great importance, because the operation of the headings in the schedule to the *ALA* must be resolved having regard to the context of the text of that schedule and the further context of the schedule as part of the Act.

[43] An important part of that context is that s 5(4) of the *ALA* operates in two specific express ways. First, it provides that the heading to a part of the schedule "in which a purpose for taking land is set out" indicates only the type of activity or other thing to which the purpose ordinarily relates. Secondly, it provides that the heading "does not limit the matters to which the purpose may relate". In each of those expressions the relevant "purpose" is not the heading itself and must be a purpose set out in one of the dot points below the heading. If the heading were itself such a purpose, s 5(4) would not operate sensibly.

[44] The Council argued that the dot points under a heading in the schedule should not be seen as restricting the operation of the heading as a statement of purpose but instead should be seen as extending the meaning of the heading or as making it clear that the particular subject matters come within the meaning of the heading. In particular, it relied on the heading to Pt 2 of the schedule: "Purposes relating to the environment" as

wide language denoting relevant purposes in addition to the scope of the text of the dot points appearing under the heading.

[45] In my view, that suggested construction should be rejected. First, looking at the dot point purposes in comparison to the headings throughout the schedule does not support this thesis, although there may be some exceptions to that general proposition. Secondly, where a drafter intends to extend the ordinary meaning of the text or to make clear that a particular subject matter is within the intended meaning, that is usually done by providing that the meaning includes the extended or clarified subject matter. There is no textual support for that view of the operation of the headings in the schedule. Thirdly, at the risk of repetition, reading the schedule in that way generally would include as relevant purposes the "Other purposes" mentioned in the heading of Pt 14. That would make all specific statements of purposes in the dot points articulated under the headings to the various parts of the schedule otiose. Fourthly, in context, the statutory purpose of the schedule is to identify the purposes for which land may be taken. As a matter of statutory interpretation, in the face of the points already made, the proper application of principle does not require the conclusion that the headings state relevant purposes which would have the effect of expanding the scope of the statutory power to take land under s 5.

[46] Ground 1 of the application is that procedures that were required by law to be observed in relation to the making of the decision were not observed. The procedure identified is the service of a notice of intention to resume under s 7 of the *ALA*. The contention is that the notice dated 9 September 2010 and the amended notice dated 17 September 2010 were not valid because they failed to specify the particular purpose for which the land to be taken was required.

[47] Ground 2 of the application is that the decision was not authorised under the enactment under which it was purported to be made. The same facts are relied upon as for ground 1.

[48] For each ground, the applicant relied upon the contention that the ground "for environmental purposes" was too vague and uncertain. That contention is dealt with further below, in relation to the operation of and requirements of s 7.

[49] However, the applicant's written statement of facts, issues and contentions referred to the schedule to the Act and submitted that the requirement of a particular purpose which must be stated under s 7(3) of the *ALA* in a notice of intention to resume means that the notice is required to identify one of the four dot points that appeared under the heading in Pt 2 of the schedule. The applicant contended by its written submissions dated 26 April 2011 that none of the dot points under Pt 2 of the schedule to the *ALA* were engaged.

[50] This led, in oral argument, to the contention that not only was the decision invalid because the notice of intention to resume in the present case did not state a particular purpose within the scope of any of the dot points set out under Pt 2 of the schedule but also that none of those purposes was a purpose engaged in the circumstances of the present case. That is to say, the decision was not authorised by the *ALA* at all, because the Council did not have the power to acquire land under that Act for environmental purposes.

[51] Although this ground is not taken in the application it was obliquely raised by the statement of facts issues and contentions and was dealt with in oral argument without objection by the Council, so that it is appropriate to deal with it to some extent.

[52] For its part, the Council did not rely upon any of the dot points in Pt 2 of the schedule as containing a purpose for which the Council intended to take the land. The power to take land for the purpose of protected areas within the meaning of the *Nature Conservation Act* 1992 (Qld), Pt 4 Div 2 is a power conferred upon the State, not upon the Council. Further, on the facts, neither the purpose of soil conservation, nor the purpose of conservation of koalas on land in a rural living area or regional landscape and rural protection area, nor the purpose of works for the protection of the seashore and land adjoining the seashore was engaged.

[53] Accordingly, the Council's principal argument as to its authority to take land was that s 5(1)(b)(ii) of the *ALA* was engaged. That is, the relevant purpose was a "purpose, including any function of local government, which the local government is authorised or required by a provision of an Act other than this Act to carry out".

[54] The provisions of an Act other than the *ALA* on which the Council relied are ss 11 and 242 of the *City of Brisbane Act* 2010 (Qld) ("the *CBA*"). Section 11 provides:

> "**Powers of council generally**
>
> (1) The council has the power to do anything that is necessary or convenient for the good rule and local government of Brisbane.
>
> *Note*—Also, see section 242 for more information about powers.
>
> (2) However, the council can only do something that the State can validly do.
>
> (3) When exercising a power, the council may take account of Aboriginal tradition and Island custom.
>
> (4) The council may exercise its powers—
> (a) inside Brisbane; or
> (b) outside Brisbane (including outside Queensland)—
> (i) with the written approval of the Minister; or
> (ii) as provided under section 12(5).
>
> (5) When the council is exercising a power in a place that is outside Brisbane, the council has the same jurisdiction in the place as if the place were inside Brisbane.
>
> (6) Subsections (7) and (8) apply if the council is a component local government for a joint local government.
>
> (7) Despite subsection (1), the council may not, within the joint local government's area, exercise a power for which the joint local government has jurisdiction.

(8) However, the council may exercise the power as a delegate of the joint local government."

[55] Section 242 provides:

"**Powers in support of responsibilities**

(1) This section applies if the council is required or empowered to perform a responsibility under a local government related law.

(2) The council has the power to do anything that is necessary or convenient for performing the responsibilities.

(3) The powers include all the powers that an individual may exercise, including for example—
(a) power to enter into contracts; and
(b) power to acquire, hold, deal with and dispose of property; and
(c) power to charge for a service or facility, other than a service or facility for which a cost-recovery fee may be fixed."

[56] It is convenient to deal with s 242 first. That section is engaged "if" there is a relevant "responsibility" and that responsibility is "under a local government related law". Putting s 11 to one side, the Council did not identify any relevant "local government law" which required or empowered a relevant "responsibility". Unless that is done, the power set out in s 242(2) or s 242(3) is not engaged.

[57] Does s 11 operate as a purpose or function which the Council is authorised to carry out under s 5(1)(b)(ii) of the ALA? Section 11 is expressed in terms which limit the power to one that is for the local government of Brisbane and therefore has a territorial restriction or connection. But otherwise, if one were considering a grant of legislative power, the language conforms to a grant of "plenary" power. In *Union Steamship co of Australia Pty Ltd v King*[6] the High Court said that similar words granted "such a power and it was so recognised, even in an era when emphasis was given to the character of colonial legislatures as subordinate law-making bodies." But the power granted under s 11 is not legislative.

[58] It could be argued that s 11 is a grant of local government "executive" power. By way of analogy, in *The Commonwealth v Colonial Combing, Spinning and Weaving Ltd*[7] Isaacs J described the difficulty of defining a power by reference to the words "for the peace welfare and good government of" a State in relation to the constitutional executive authority of the State. But the council is not a polity like a State or the Commonwealth. It is a body corporate with limited delegated legislative power.

[59] Thus, s 11 can also be characterised as a grant of constitutional corporate power by the State. The application of the principles of corporate power to local government corporations is familiar enough. The limit of such corporate power is also familiar territory, via the doctrine of ultra vires.

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6 *Union Steamship Company of Australia Pty Ltd v King* (1988) 166 CLR 1 at 9-14; [1988] HCA 55.

7 (1922) 31 CLR 421 at 437; [1922] HCA 62.

[60] Whatever else is true, it seems that the power conferred by s 11 is intended to be as wide as both the ordinary meaning and the recognised constitutional character of words such as "necessary or convenient for the good rule and local government" of the relevant area connote. Simply put, they operate as widely as the State can legislate to confer power, subject to the territorial connection – "of Brisbane" – and the governmental limit – "local government". The intention otherwise is that the corporation has the executive power of a plenary law making polity, which is as much as the State can confer.

[61] The Council's argument is that the power to do "anything necessary or convenient for the good rule and local government in Brisbane" includes the power to protect and manage the environment in the City of Brisbane. That includes power to engage in a program of purchasing properties that contain significant bushland qualities with a view to protecting and perpetuating quality bush land within the city for the benefit of present and future residents.

[62] There is no reason to doubt the contention that the Council is authorised by s 11 to pursue an active program of acquiring land which it sees as having environmental value in order to preserve that land. But the taking of land under 5 of the *ALA* raises a different question to whether the Council has constitutional power to acquire land by agreement. It is whether a purpose of the Council which it is authorised to carry out because of the grant of capacity and executive power under s 11 of the *CBA* constitutes a relevant purpose within the meaning of s 5(1)(b)(ii) of the *ALA*.

[63] The current case represents a possible example of the surprising outcome which such a construction of s 5(1)(b)(ii) could produce. If s 5(1)(b)(ii) is engaged in respect of any purpose which the Council considers to be convenient for the good rule and local government of Brisbane, the Council would have power to acquire the land "for environmental purposes", having formed the view that it was so "convenient".

[64] This would be so even though the State would not be able to acquire the land "for environmental purposes" if the purpose did not come within the dot points under Pt 2 of the schedule to the Act or some other purpose authorised under the *ALA*.

[65] Although that is a possible interpretation of s 5(1)(b)(ii), such a result seems counterintuitive. As well, if any matter within s 11 of the *CBA* can constitute a purpose or function within the meaning of s 5(1)(b)(ii), it would seem true to say that s 5(1)(b)(i) of the *ALA* is otiose, at least in the case of the Council. However, I recognise that the *CBA* should not be used to construe the *ALA*.

[66] An alternative contention was made by the applicant relying on s 11(2) of the *CBA*. The applicant submitted that the State could not validly take the land "for environmental purposes" under the *ALA*. Therefore, the applicant submitted the Council's power to do so was excluded by s 11(2) because the Council could only do something that the State could validly do.

[67] The Council submitted that s 11(2) had no role to play. Alternatively, it submitted that the State could validly acquire the land under s 5 of the *ALA* because the relevant acquisition would fall within the State's power as a constructing authority to take land under s 5 for a purpose set out in the schedule, being "protected areas within the meaning of the *Nature Conservation Act* 1992, Pt 4 Div 2".

[68] Section 11(2) would be unnecessary if its only purpose were to restrict the Council to matters within the legislative or executive power of the State. The grant of legislative and executive power by the State to the Council cannot exceed the State's powers in the first place. However, the Explanatory Notes to the *City of Brisbane Bill* 2010 provided:

> "Clause 11 empowers the council to do anything that is necessary or convenient to provide good governance and deliver high quality services to Brisbane. This broad power complements the local government principles. That is, the council may do anything within its power in line with the local As the council's power is drawn from the State, the council can only do something the State can legally do."

[69] An alternative view is that s 11(2) has the purpose of limiting the executive power of the Council in the same way that legislation of the State may limit the executive power of the State. The State may by legislation regulate or invalidate particular executive action. Section 11(2) would have the effect of imposing the same restrictions of power on the executive actions of the Council. That is possibly the purpose of and consistent with the ordinary meaning of s 11(2).

[70] Thus, the suggested wide power of the Council to take land for any purpose within the scope of s 11(1) would be conditioned on whether the State could take land for that purpose under its executive power. If it could not, s 11(2) is engaged and extracts the power to do so from the Council's power under s 11(1).

[71] By a note on the provisions of the *Nature Conservation Act* 1992 (Qld) the Council submitted that the State has power to take land for 5 classes of protected areas, constituting 3 different kinds of national park, a conservation park or a resources reserve. Whether the State could take the land under any of those provisions was not explored in argument, for example whether the State would be empowered to take the land for a conservation park. If it could, it would seem to follow that any limit of power under s 11(2) would not be engaged.

[72] It is unnecessary to finally decide these questions in order to dispose of this case.

Statement of particular purposes in the notice of intention to resume

[73] Section 7 of the *ALA* provides in part:

> "**Notice of intention to take land**
>
> (1) A constructing authority which proposes to take any land shall serve as prescribed by this section the notice (a ***notice of intention to resume***) prescribed by this section.
>
> (2) A notice of intention to resume shall be served upon any and every person who to the knowledge of the constructing authority—
>
> (a) will be entitled to claim compensation under this Act in respect of the taking of the land concerned; or
>
> (b) is a mortgagee of the land.

(2A) Despite subsection (2), if the land the subject of a notice of intention to resume is common property within the meaning of, and shown on a building units plan under, the *Building Units and Group Titles Act 1980*, the constructing authority need only serve the notice on—

(a) the body corporate constituted under that Act by the proprietors of the lots in the building units plan; and

(b) each entity, other than the body corporate or a proprietor of a lot in the building units plan on which the common property is shown, who to the knowledge of the constructing authority has an interest in the common property.

(2B) Also despite subsection (2), if the land the subject of a notice of intention to resume is common property for a community titles scheme under the *Body Corporate and Community Management Act 1997*, the constructing authority need only serve the notice on—

(a) the body corporate under that Act for the community titles scheme; and

(b) each entity, other than the body corporate or an owner of a lot in the community titles scheme for the common property, who to the knowledge of the constructing authority has an interest in the common property.

(2C) Subsection (2D) applies if the constructing authority gives a body corporate mentioned in subsection (2A) or (2B) a notice of intention to resume or a notice amending a notice of intention to resume (each a ***relevant notice***).

(2D) The body corporate must ensure a copy of the relevant notice accompanies the first notice of a general meeting of the body corporate given to each of its members after receiving the relevant notice.

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

(a) state the particular purpose for which the land to be taken is required; and

(b) state the description of the land to be taken which description—

(i) if the land is described as a separate lot or parcel in a plan of survey registered in the land registry or deposited in the office of the chief executive (surveys)—shall be that description; or

(ii) if the land is not described as mentioned in subparagraph (i)—may be made in any manner sufficient to substantially identify the land; and

…

(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 at the address set out in the notice an objection in writing to the taking of the land; and
>
> (e) in relation to the objection mentioned in paragraph (d)—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; and
>
> (ii) that any matter pertaining to the amount or payment of compensation is not a ground of objection; and
>
> (iii) that an objector who states in the objection that the objector desires to be heard in support of the grounds of the objection may appear and be heard by the constructing authority or its delegate at the time and place specified in the notice; and
>
> …
>
> (4AA) The constructing authority may, by written notice given to each entity to whom the notice of intention to resume is served under subsection (2), (2A) or (2B), amend the notice of intention to resume.
>
> …
>
> (5) The failure by the constructing authority to serve upon the owner a notice of intention to resume, where such failure is due to circumstances beyond the control of the constructing authority, or the failure of the constructing authority to serve upon any person other than the owner a notice of intention to resume, or the failure of the constructing authority to observe subsection (4), shall not prejudice any gazette resumption notice made under this Act, with respect to any land, and any land included in the notice shall be taken in terms of the notice notwithstanding any such failure, and the failure by the constructing authority to serve upon any person entitled thereto any notice as prescribed by this Act shall not invalidate the continuance or discontinuance of any resumption."

[74] The applicant contends that the NIR is invalid because the stated purpose, that is "for environmental purposes", is too vague.

[75] Notwithstanding the saving affect of s 7(5), a valid notice to resume is an integral part of the statutory process leading to an application to the Minister that the land be taken under s 9 of the *ALA*. Section 9 provides, in part:

> "(2) If within the time stated in the notice of intention to resume no objection is made or if, after due consideration of all objections, the constructing authority is of opinion that the land in question is required for the purpose for which it is proposed to be taken, the constructing authority may apply to the Minister that the land be taken as prescribed by this section."

[76] At the time when the NIR was served in the present case, it had the BID attached. The Council relies on the contents of the BID as a statement of the "particular purpose"

required under s 7(3)(a). The applicant contends that because the BID is not in terms expressed to be particulars limiting the width of the expression "for environmental purposes" in the NIR, it should not be so read.

[77] The BID takes an unusual form. It is divided into sections headed background, materials on which findings of fact were based, findings on material questions of fact and conclusion. Thus, it follows the form of a statement of reasons for a decision. However the conclusion does not make a decision. Instead, it states an opinion as to the worth of the subject property, its contribution to the conservation of the city and the region's biodiversity and the most effective way to ensure the protection of its identified biodiversity values into the future.

[78] It may be inferred that the BID informed the decision to serve a notice of intention to resume under s 7 of the *ALA*. As such, it would not strictly be described as a document which forms the function of stating the particular purpose for which the land to be taken is required in the NIR. But the decision to serve a notice of intention to resume and the purpose of the proposed taking are logically interrelated.

[79] An equivalent document has been treated as something which may be read with a notice of intention to resume.[8]

[80] There is no statutory form which a notice of intention to resume is required to follow. However, the statement of the particular purpose for which the land is to be taken is required performs an important function. The purpose must be a purpose for which land may be taken. The requirement that a notice of intention to resume must state the "particular purpose" is intended to inform the person on whom the notice is to be served of the relevant purpose or purposes.

[81] It is not appropriate to make some factual enquiry beyond the terms of the notice of intention to resume served under s 7 to identify the relevant purpose or purposes. Unless the case is one of bad faith or improper purpose, that is to be ascertained by having regard to the notice of intention to resume itself.[9]

[82] In the present case, reading the NIR and the attached BID together, it is not difficult to identify that the proposed taking of the land "for environmental purposes" is "to ensure the protection management and enhancement of the lands identified by diversity values in the future" by including it "within the Council's conservation reserve network". The Council submitted that the NIR, through the attached BID, made it clear that the "particular purpose for which the land was required was to secure the long term conservation, restriction, management and enhancement of the land's ecological and biodiversity values".

[83] The applicant did not challenge those conclusions if the NIR and the attached BID are able to be read together, as in my view they can. Instead, she contended that the Council's resolution under s 9(2), that it is of the opinion that the land in question is required "for the purpose for which it is proposed to be taken", is invalidated because the resolution of the Council only stated that the land is required "for environmental purposes" and does not include the additional information as to purpose which may be

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8 *Ipswich City Council v Wilson; Ipswich City Council v Wilson & Downey* (2011) QLAC 6 at [66]-[69].

9 *Springfield Land Corporation (No 2) Pty Ltd & Anor v State of Queensland* (2011) 242 CLR 632 at [20] and [21]; [2011] HCA 15; *Ipswich City Council v Wilson* at [64]-[65].

gleaned from the BID. I decline, however, to consider that matter as a ground of review of the Council's decision because it is not a ground taken in the application.

[84] Because I have reached the view that the BID may be considered with the NIR to which it was attached, in determining what particular purpose the land to be taken is required as stated in the NIR, it is unnecessary to consider whether a statement limited to the text of the NIR that the land is to be taken "for environmental purposes" is sufficient. However, I note in passing that there are cases which suggest that a statement of purpose at a high level of generality is sufficient. Further, that conclusion is supported by the breadth of the statement of a number of the particular purposes set out in the schedule to the *ALA*. For example, a statement that land is required "for aviation and related purposes" would follow the text of the first dot point of the purposes identified under Pt 1 of the schedule. Unless the requirement in s 7(3)(a) requires more because the statement must be of "the particular purpose", that would be a sufficient statement of purpose to identify that an acquisition comes within the power to take land under s 5(1)(a) or s 5(1)(b)(i).

[85] I note that the application sought to challenge the decision on other grounds as well, based upon contentions that the decision was an improper exercise of power because the Council could not reasonably conclude that the taking of all the estate in fee simple in the applicant's land was required and that the Council failed to take into account relevant considerations. There is also a challenge that there was no evidence or other material to justify the making of the decision. Given that I propose to set aside the decision and to remit the decision to the Council on the ground that due consideration was not given to the objection, it is not appropriate to express further opinions about the strength or weakness of those arguments. It is unnecessary to do so to decide this application. If the Council on remitter considers the objection and makes another decision whether the land is required, the considerations which may be relevant considerations for the decision and the evidence and other material which may justify the decision may not be the same as those affecting the decision of 22 March 2011.