SUPREME COURT OF QUEENSLAND

CITATION:	*Genamson Holdings Pty Ltd v Moreton Bay Regional Council & Anor* [2020] QSC 84
PARTIES:	**GENAMSON HOLDINGS PTY LTD (ACN 053 174 271)** (applicant) **v** **MORETON BAY REGIONAL COUNCIL** (first respondent) AND **MINISTER FOR NATURAL RESOURCES, MINES AND ENERGY** (second respondent)
FILE NO/S:	BS No 12964 of 2018
DIVISION:	Civil
PROCEEDING:	Originating application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	23 April 2020
DELIVERED AT:	Brisbane
HEARING DATE:	20 and 21 February 2020
JUDGE:	Callaghan J
ORDERS:	**1. The application is allowed.** **2. Declarations are made that:** **(a) Pursuant to s 10 of the *Civil Proceedings Act 2011*, the decision made by the First Respondent on 25 September 2018 to apply to the Second Respondent pursuant to s 9(1) of the *Acquisition of Land Act 1967* for part of the land described as Lot 5 on RP88015 (Land) is void and of no effect;** **(b) Pursuant to s 10 of the *Civil Proceedings Act 2011*, the application which the First Respondent purported to make to the Second Respondent on 4 October 2018 pursuant to s 9(1) of the *Acquisition of Land Act 1967* for part of the Land is void and of no effect; and** **(c) Pursuant to s 10 of the *Civil Proceedings Act 2011*, in accordance with s 7(4B) of the**

***Acquisition of Land Act 1967*, the resumption of the Land is deemed to have been discontinued.**

3. The First Respondent pay the Applicant's costs of the proceeding.

CATCHWORDS: REAL PROPERTY – COMPULSORY ACQUISITION OF LAND – POWERS OF ACQUISITION – GENERALLY – where pursuant to s 7 of the *Acquisition of Land Act* 1967 (Qld) the respondent Council issued a Notice of Intention to Resume – where the applicant objected to the proposed resumption of land – where the first respondent arranged for the objection to be heard by a Delegate at an objections hearing – where the Delegate provided a report recommending the respondent Council give "due consideration" to expert engineer's report on proposed resumption of land – where expert engineer report was not in material before the respondent Council at meeting - where the respondent Council resolved to make an application to the Minister for Natural Resources and Mines to resume the land pursuant to s 9 of the *Acquisition of Land Act* 1967 (Qld) – whether respondent Council failed to take into account a material consideration in making application to resume the land

ADMINISTRATIVE LAW – JUDICIAL REVIEW – GROUNDS OF REVIEW – FAILURE TO OBSERVE STATUTORY PROCEDURE – where the respondent Council resolved to make an application to the Minister for Natural Resources and Mines to resume the land pursuant to s 9 of the *Acquisition of Land Act* 1967 (Qld) – where respondent Council failed to provide all objections material to the Minister in application – whether failure by respondent Council to comply with terms of the *Acquisition of Land Act* 1967 (Qld) – whether jurisdictional error – whether procedure required by law to be observed or not observed

Acquisition of Land Act 1967 (Qld), s 7, s 8, s 9, Sch 2
Civil Proceedings Act, s 10

Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation (1981) 147 CLR 297, cited
Forrest & Forrest Pty Ltd v Wilson & Ors [2017] 262 CLR 510, cited
Hall v Jones (1942) SR (NSW) 203, cited
Project Blue Sky Inc v Australian Broadcasting Authority (1998) 194 CLR 355, cited
McKenzie v Minister for Lands [2011] WASC 335, cited
Minister for Immigration v SZJV [2018] 238 CLR 642, cited

COUNSEL: D O'Brien QC with J Hastie for the applicant

A Skoien with K McAuliffe-Lake for the first respondent
No appearance for the second respondent.

SOLICITORS: HWL Ebsworth for the applicant
Moreton Bay Regional Council Legal Services for the first respondent
No appearance for the second respondent

[1] There is, at Caboolture, a commercial shopping centre which sits on land owned by the applicant. By its nature, the site is of significant value to the community, but it is periodically affected by flooding, both from catchment flows and stormwater.

[2] For that reason, the respondent Council sought to resume part of the applicant's land for the purpose of a "regional detention basin" which could assist with flood mitigation.

[3] It is an extraordinary thing for any authority, however altruistic its motivation, to take the land of another - otherwise than by agreement. But the first respondent can do that – if it follows the process prescribed by the *Acquisition of Land Act* 1967 (Qld) ("the Act"). After taking a series of steps that are set out in the Act, an authority such as the first respondent[1] can make application to the second respondent, the Minister for Natural Resources, Mines and Energy ("the Minister") such that the Governor in Council may ultimately declare particular land to be taken.[2]

[4] In this case, the first respondent purports to have taken the requisite steps. The applicant disputes that and asks the Court for three declarations, namely: [3]

(a) Pursuant to s 10 of the *Civil Proceedings Act 2011* or, alternatively, s 30(1)(c) of the *Judicial Review Act 1991,* that the decision made by the first Respondent on 25 September 2018 to apply to the Second Respondent pursuant to s 9(1) of the *Acquisition of Land Act 1967* for part of the land described as Lot 5 on RP88015 (**Land)** to be taken is void and of no effect;

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1 s 7 of the Act empowers a "constructing authority". Schedule 2 of the Act defines that term, and it includes a "local government".

2 s 9(6) of the Act.

3 There were various iterations of the process, but ultimately leave was granted, without objection, for this application to be disposed on the basis of a further amended statement of claim which sought relief in these terms; Transcript 21/02/2018 at 2-65, line 25.

(b) Pursuant to s 10 of the *Civil Proceedings Act 2011* that the application which the First Respondent purported to make to the Second Respondent on 4 October 2018 pursuant to s 9(1) of the *Acquisition of Land Act 1967* for part of the Land to be taken is void and of no effect;

(c) Pursuant to s 10 of the *Civil Proceedings Act 2011* that, in accordance with s 7(4B) of the *Acquisition of Land Act 1967,* the resumption of the Land is deemed to have been discontinued.

[5] The second respondent has indicated willingness to "abide by the ruling of the Court".[4] Following submissions made by the Crown Solicitor on behalf of the second respondent, an order was made in those terms on 18 December 2018.

[6] It is argued that the first declaration sought should be made because there has been, in terms of the language conventionally used in such situations, a failure to take into account a material consideration.

[7] The second and third declarations are sought on the basis that the Council's application to the Minister involved jurisdictional error, tracing to the failure by the Council to comply with the terms of the Act.

The requirements in the Act

[8] The Act requires adherence to a certain procedure. The various provisions are all centrally located in ss 7, 8 and 9, and involve four phases of activity. The first two phases involve dealings between the constructing authority - that is, the Council – and the party who objects to the resumption (the objector – in this case, the applicant). However, as already noted, it is not the Council itself which is empowered to take land. Understandably, for the purposes of something so radical, the actual power to effect the transfer is invested not in a local authority, but in the Crown. The second two phases involve the interaction, for these purposes, between the Council and the Minister.

The first phase

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4 Transcript 21/02/2020 at 2-2, lines 20 – 25.

[9] The Council must first issue a notice of intention to resume the land.[5] That notice is required to inform the landholder that if it wishes to object to the taking of its land, it must do so within a certain period of time.[6]

[10] The objector must also explain its objection,[7] and may express a desire to be heard about that explanation. Such a hearing can be conducted by the Council itself or its delegate.[8]

The second phase

[11] An obligation then falls upon the Council to do at least two things. There is first a freestanding and mandatory obligation to consider, for itself, the grounds of the objection.[9]

[12] Then, if it hears the objection itself, the Council must consider the matters put forward by the objector in support of its objection. Alternatively, if the objection is heard by a delegate of the Council, the Council is required to consider the report prepared by the delegate who considered the grounds of objection on the Council's behalf.

The third phase

[13] If, after "due consideration"[10] of all objections, the Council remains of the opinion that the land in question is required for its purposes, it may apply - "as prescribed by" s 9 of the Act - to the Minister for the land to be taken.

[14] Section 9 prescribes a number of things, including the requirement that certain material should either be contained in or accompany the application to the Minister. This includes:

> "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."[11]

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5 s 7(1) of the Act.
6 s 7(3)(d) of the Act.
7 s 7(3)(e)(i) of the Act.
8 s 7(3)(e)(iii) of the Act.
9 s 8(2) of the Act.
10 s 9(1) of the Act.
11 s 9(3)(e) of the Act, emphasis added.

[15] Importantly, s 9(2) also prescribes that the application by the Council "shall be made within 12 months after the date of the notice of intention to resume and not thereafter".

[16] There is a consequence if the application is not made within this time – in that case, s 7(4B) deems the Council to have discontinued the resumption.[12]

The fourth phase

[17] The Act goes on to guide Ministers as to the way in which they should go about their task. Two provisions are relevant for current purposes. Section 9(4) provides that the Minister may, with respect to the application, "*require any constructing authority to furnish, within a time specified ... such further particulars and information*" about the application as the Minister deems fit. And even if nothing further is required, s 9(5) provides that the Minister must, when considering the application, consider "*all statements and documents*" that accompany the application. This must be done so that the Minister can ensure, amongst other things, that the Council has taken reasonable steps to comply with the requirements of ss 7 and 8 of the Act.

[18] From that analysis can be distilled certain propositions which influence the resolution of this application:

a) There is a process by which objection can be made to the taking of land. If the local authority delegates the task of considering that objection, it must consider the report of its delegate;

b) If, notwithstanding the objection, the Council resolves that the land should be taken, it may ask the Minister to do that, but must do so

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12 s 7(4B) actually speaks of the "time prescribed by s 9(4)". This is clearly a mistake, and should read s 9(2). That was the effect of the legislation when it was enacted in 1967, and it remained that way until an amendment made by the *Land, Water and Other Legislation Amendment Act* 2013 (Qld). The change was completely unexplained, and is in fact inexplicable other than as a slip. It creates a provision which would otherwise be meaningless - there is no time *prescribed* in s 9(4). The analysis presented in argument by Mr O'Brien QC - and acknowledged by him to have been undertaken by Mr Hastie - demonstrates that this is an error of the kind which entitles the Court to read the legislation so as to give it the meaning that Parliament clearly intended – see *Minister for Immigration v SZJGV* [2018] 238 CLR 642 (French CJ and Bell J) at 651 [9]: "If the language be so intractable that it requires a word or words to be given a meaning necessary to serve the evident purpose of the provision, then such a course may be permissible as a "realistic solution" to the difficulty".

within 12 months of the date when it initiated the whole process by issuing its notice of intention to resume the land;

c) If the application is not made within that time, it is deemed to have been discontinued;

d) An application to the Minister must be accompanied by a copy of every objection; and

e) The Minister has a personal responsibility to ensure that the Council has taken reasonable steps to comply with the requirements of the Act - and those steps include the requirement that it consider the grounds of any objection to the taking of the land.

What happened in this case?

First phase

[19] The "Notice of Intention to Resume" (NIR)[13] was issued on 12 October 2017 - this date is important, as is the fact that nothing thereafter caused any recalibration of the limitation period so as to avoid the guillotine effect created by s 7(4B) of the Act.

[20] The NIR required any objection to be made within 34 days.[14] The applicant complied with that requirement and with the requirement to explain its objection (the "first Objection").[15] It also indicated that a hearing was required.[16] The Council subsequently arranged for the appellant's objection to be heard by a delegate, and appointed Mr Michael Marshall (the "Delegate") for that purpose.

[21] It is not necessary to dwell at length on the intricacies of that which followed, but the process was not without complication, and at least a summary is required. The first objections hearing occurred on both the 22 November 2017 and on 17 January 2018. The Delegate produced a report, as contemplated by section 8(2)(b) of the Act, on 31 January 2018 ("first Delegate report").[17] Following that report, the

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13 Exhibit 5.

14 The NIR stated that the applicant "may on or before the 15th day of November 2017 serve upon the Chief Executive Officer of the Council at the Council Chambers…an objection in writing to take part of the land."

15 Exhibit 2; Trial Book page 577.

16 Exhibit 2; Trial Book page 575.

17 Exhibit 8; Trial Book page 946.

Council issued an amended NIR on 20 February 2018 - this removed a proposal involving an easement, but maintained the intention that part of the land be taken for the purposes of a regional detention basin. The applicant subsequently served the Council with an objection in writing to the amended NIR (the "second Objection").[18] It followed that a further objections hearing was heard by the Delegate, who produced a second report on 24 May 2018 ("second Delegate Report").[19]

The second Delegate's Report

[22] As is clear, the applicant contested the merits of the Council's plan to resume its land. Of relevance to those merits was a report prepared by expert engineer Dr Trevor Johnson. Dr Johnson gave evidence in related proceedings before the Planning and Environment Court, and then prepared a report which considered, amongst other things, the suitability of the land for the purposes for which the Council proposed to acquire it. He also identified alternatives to the resumption. This document, dated 22 December 2017 (the "Johnson report") was placed before Mr Marshall during the second objections hearing on 20 April 2018.

[23] Mr Marshall then prepared the "Second Delegate's Report" for the purposes of s 8(2)(b) of the Act.

[24] Mr Marshall explicitly refrained from expressing any conclusions about Dr Johnson's opinions. What he did do in his report was to say:

> "*Clearly the Council should give due consideration to the report of Dr Johnson when it formulates its opinion as to how it intends to proceed*";[20]
>
> and
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> "*…it is appropriate in my opinion that the Council give consideration to, or further to the report of Dr Johnson and to the PEC Judgment before determining whether to discontinue, amend or*

18 In writing, pursuant to s 7(3) of the Act.
19 Exhibit 8; Trial Book page 959.
20 Trial Book, page 536.

> *proceed with the proposed taking of the land as set out in the Amended NIR*".[21]

Second phase

[25] As noted above,[22] it was mandatory for the respondent Council to consider Mr Marshall's report. It purported to do this at a meeting of its coordination committee on 25 September 2018. The recommendations of that committee were adopted by the Council, at a general meeting, on the same date. Functionally, this was when the respondent decided to apply to the Minister for the land to be taken.[23]

[26] There is agreement about the materials upon which that decision was made. They included:

(a) the first Objection;

(b) the first Delegate Report;

(c) the second Delegate Report;

(d) reasons for judgment in *Genamson Holdings Pty Ltd v Moreton Bay Regional Council* - the related proceedings in the Planning and Environment Court;[24]and

(e) correspondence between the applicant and the respondent from June 2018 to September 2018.[25]

[27] At no stage, however, was Dr Johnson's report before the committee, nor was it ever before the Council members who made the decision to proceed with the application.[26]

Third phase

[28] The Council purported to make its application to the Minister on 4 October 2018.[27] The document which was sent to the Minister that day neither contained nor was it accompanied by a copy of the first Objection, nor of the second Objection. It did

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21 Trial Book, page 537.
22 At [12] and [18](a).
23 Statement of Agreed Facts, [13].
24 [2018] QPELR 55.
25 Statement of Agreed Facts, [14](a).
26 Statement of Agreed Facts, [14](b).
27 Exhibit 7 - self-evidently, this was within 12 months of 12 October 2017, when the NIR was issued.

not contain the first Delegate's report, nor the second Delegate's report.[28] In fact, the standard form application contained a section titled "Objection details". Within that section a box was ticked indicating that "No objection was received".[29] This was, in the circumstances, a startling error.

[29] Some attempt at redressing it was made on 22 October 2018 – by which time 12 months had elapsed since the notice of intention to resume was issued – when an email was sent by the Council to the office of the Minister.[30] This email was accompanied by copies of both Delegate's reports. It was at this stage that the Minister was also provided with a copy of the first written objection.[31] It is common ground, however, that neither at this time nor at any time since has the Minister ever been provided with a copy of the second objection.[32]

Fourth Phase

[30] The Minister's consideration of the application has, understandably, been placed on hold pending the outcome of these proceedings.[33] But there is no evidence that the Minister has, pursuant to s 9(4) of the Act, requested any further information. Any consideration of "all statements and documents" that accompanied the application would, even at this stage, fail to include consideration of "all objections", if only because the second objection has never been supplied**.**

Analysis – the second and third declarations

[31] The case presents as one which requires a straightforward engagement with the statutory provisions. There was no dispute[34] as to the unity of s 9 of the Act – that is, the "application" referred to at any point in that section is:

(a) The means[35] by which the Council could "*apply*";

(b) Something which must be done "*as prescribed*";

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28 Transcript 20/02/2020 at 1-64, lines 13 – 16.
29 Page 2 of 4 of the Application for Resumption; Trial Book page 860.
30 Statement of Agreed Facts, [16].
31 Transcript 21/02/2020 at 2-37 – 2-38; Exhibit 9. What started as a controversy about this proposition was resolved by agreement.
32 Transcript 21/02/2020 at 2-40.
33 Transcript 21/02/2020 at 2-86.
34 Transcript 21/02/2020 at 2-91lines 10 – 15.
35 And the only means.

(c) Something which therefore must be accompanied by "*a copy of every objection*";

(d) Something which must be made "*within 12 months"* of the service of the notice of intention to resume; and

(e) If not made within that 12 month period, deemed to have been "*discontinued*".

[32] The applicant submits that for the document lodged on 4 October 2018 to be described properly as an "application", compliance with the prescribed method was necessary. Clearly, having regard to the omissions noted in [28] above, the process was deficient. For current purposes, regard need only be had to that element in the prescription which required that all objections be contained in or accompany the application. It is not even necessary to decide whether the efforts made on 22 October 2018 might have had some sort of "curative" effect, because it is agreed that the second Objection did not "accompany" documents sent to the Minister on 4 October 2018, nor those sent on 22 October 2018, nor has it been sent at any subsequent time.[36]

[33] It follows that, by reason of its non-compliance with the prescribed method, whatever happened on 4 October 2018 was not an "application" within the meaning of the section. There was no other "application" so, as soon as 12 months had passed from the issuing of the notice of intention to resume, s 7(4B) operated to deem the process to be "discontinued". The declarations requested should therefore be made, so the applicant submits, because the Minister cannot act on an application that is not before him – or put another way, the paper that is before him is not in truth an "application".

[34] The first respondent, however, resists this analysis on the basis that the Act contemplates non-compliance with the requirement for objections to accompany the application as at the time it is lodged. The Minister is, by s 9(4), empowered to compel the provision of further information, and it is at this point that such objections might be provided. If so, then the time limit imposed may well apply to the making of the "application" pursuant to s 9(1), but does not apply to the

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36 Transcript 21/02/2020 at 2- 40.

provision of what is called "supporting material", such as the omitted objection. The situation is not as simple, so the argument runs, as it might appear to be, and the Court must therefore look to the tests that apply when the meaning of a statute is contested.[37]

Legislative purpose and subject matter of statute

[35] As noted, the object of the legislation it is to establish a scheme whereby land may be taken from its owner other than by agreement. Apart from statutes which deal with the removal of personal liberty, it is difficult to contemplate a more intrusive exercise of executive authority over the rights of an individual.[38]

[36] When such processes take away private rights and interests, there is an expectation about the way in which the laws which empower that removal will be construed:

> *"There is a strong and readily identifiable public interest in ensuring that interests in land are only compulsorily acquired by the State in conformity and in strict compliance with those laws*."[39]

[37] It must also be thought that the statute envisaged any such procedure would be highly ordered and provide certainty to all involved. That proposition is relevant to the discussion in [40] below.

Language[40]

[38] Consistent with the proposition that strict compliance will be required, the language employed throughout the relevant sections is consistently expressed in mandatory terms. The words "shall" and "must" are employed throughout ss 7, 8 and 9. In s 9(2) the temporal imperative is emphasised by the inclusion of the words "*and not thereafter*". Had there been a full stop after the word "resume", there would have

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37 See *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 388 (McHugh, Gummow, Kirby and Hayne JJ): "*An act done in breach of a condition regulating the exercise of a statutory power is not necessarily invalid and of no effect. Whether it is depends upon whether there can be discerned a legislative purpose to invalidate any act that fails to comply with the condition. The existence of the purpose is ascertained by reference to the language of the statute, its subject matter and objects, and the consequences for the parties of holding void every act done in breach of the condition".*

38 Including corporate individuals.

39 *McKenzie v Minister for Lands* [2011] WASC 335 at 25 [76] (Martin J).

40 See *Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of* Taxation (1981) 147 CLR 297 (Mason and Wilson JJ) at 320-321: "*The fundamental object of statutory construction in every case is to ascertain the legislative intention by reference to the language of the instrument viewed as a whole. But in performing that task the courts look to the operation of the statute according to its terms and to legitimate aids to construction*".

been little scope for argument about Parliament's intention. The fact that these words - "and not thereafter" - are included can only emphasise the inflexibility of the deadline which, given the importance of the subject matter, is to be expected.

[39] The language used in the Act tells against a regime which contemplates that the timeframe for supplying the Minister with essential information is, in effect, open-ended, and might even, after a period of 12 months, still yet be allowed to drift "thereafter".

Potential consequences[41]

[40] But this would be the consequence of the interpretation for which the respondent contends. If there is no cut-off point for the provision of information, then presumably an authority in the position of the first respondent would be at liberty to provide Ministers with further information of relevance to their decision even after it had been made. If this was in fact the system, a Minister might make a decision based upon inadequate - or at least incomplete - information, and publish that decision. Inevitable public and private consternation would follow. Ministers might then be provided with information which would require them to reconsider subject matter on which they had already spent their highly valuable time. Even if they arrived at the same conclusion, much grief, uncertainty and dislocation would be endured during the process.

[41] Apart from the offensive inefficiency of it all, the operation of such a process would not sit well with the fact that s 9(5) imposes a personal responsibility on the relevant Minister to "ensure" something. It will not be possible for a Minister to "ensure" that the constructing authority has taken reasonable steps to comply with ss 7 and s 8 – that is, has taken reasonable steps to consider the grounds of objection – if they have not been provided with the objections themselves.

Structure of the statute

[42] Much of the first respondent's argument turns on the effect of s 9(4), and its position in the Act. As noted,[42] it does allow the Minister to require the provision of

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41 See Jordan CJ in *Hall v Jones* (1942) SR (NSW) 203 at 208: *"[A] Court is entitled to pay the Legislature the not excessive compliment of assuming that it intended to enact sense and not nonsense"*.

42 At [17].

further "particulars and information". In that way, it does support the suggestion that the statute is structured in a way that, since it contemplates later provision of material, the 12 month deadline is not as ruthless as it appears to be.

[43] However, s 9(4) cannot be read as a permissive provision which facilitates non-compliance with what is otherwise a clear, and clearly necessary statutory provision.

[44] Ministers simply cannot be expected to call for things that they do not know about. And members of the executive branch of the government - in this State at least - are not expected to contemplate that the performance of their function may be compromised by the existence of "known unknowns". They are entitled, by reference to the terms of this Act, to proceed on the basis that if there are objections, they will learn of them in advance of the time at which they make their decision.

[45] In preference to an interpretation which would in effect sanction the failure by a Minister to discharge a personal responsibility imposed by Parliament, the effect of s 9(4) must be limited. It provides for a particular function that might be engaged in particular cases. It has no wider implication than that.

[46] The first respondent has pointed to *Forrest & Forrest Pty Ltd v Wilson & Ors*,[43] and attempts to extract from that case support for its position. There are parts of the decision which may be of interest, but it was decided under a different statutory regime, and to the extent that any further submission can be made in reliance on this authority, or indeed under this heading at all, it must yield to the strength of other arguments.

Conclusion

[47] The potential effect of various other authorities was also canvassed in argument, but I do not consider it necessary in this case to go far beyond the terms of the Act itself.

[48] When regard is had to those terms, the mandatory language in which they are expressed, their place in the statutory regime, the purpose of that regime and the consequences if they were to be interpreted differently, then it is clear that the

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43 (2017) 262 CLR 510.

"purported application" to the Minister was not in fact an "application" for the purposes of the Act. I shall therefore declare, pursuant to s 10 of the *Civil Proceedings Act* 2011 that it is void and of no effect. It follows that I shall make the declaration, also pursuant to s 10 of the *Civil Proceedings Act* 2011 that, in accordance with s 7(4B) of the Act, the resumption of the land is deemed to have been discontinued. That finding is sufficient to dispose of the matter.

Analysis – the significance of the Johnson Report to the making of the first declaration

[49] I indicate, however, that I also accept the applicant's argument that the decision made by the first respondent on 25 September 2018 (to make the application in the first place) is void and of no effect, or alternatively should be set aside. By not considering the Johnson Report, the Council failed to take into account a relevant consideration in the exercise of its discretion to apply to the Minister for the land to be taken.

[50] Much of the hearing was consumed by reference to the proceedings which had occurred in the Planning and Environment Court. As noted, Dr Johnson was a witness in those proceedings. It can be accepted – by reason of its involvement in those proceedings - that the Council was aware of Dr Johnson's existence and of the fact that the applicant relied on his opinions for the purposes of resisting resumption. Indeed, it can be accepted that it was aware of all the matters that were actually placed before it.[44]

[51] It can also be accepted that the weight to be given to the report – and for that matter all the other materials – was a matter for the Council and that the worthy purpose for which the land was to be taken – flood mitigation – may have been their primary consideration.[45]

[52] Indeed, had the case been one that involved merits review, then there might have been cause for closer analysis of the report's contents, Dr Johnson's other evidence and the history of litigation in the Planning and Environment Court. However, even

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44 See [26] above.
45 Transcript 21/02/2020 at 2-51 lines 1 – 34.

allowing for the fact that there might be different views about the significance of the Johnson Report,[46] there was still a need for the Council to consider it.

[53] That is because for the purposes of this case the status of Dr Johnson's report must be determined in the context of the history summarised in [20] and [21] above. Against the background of a dialectic which included the first notice, first objection, amended notice and second objection, it should be found that Mr Marshall[47] effectively incorporated Dr Johnson's report into his own (second) report. Mr Marshall made it clear that he had not made any determinations about the contents of Dr Johnson's report, so it could not be thought that its contents had been summarised or were in any other way reflected in anything he had written. On the other hand, his admonition that the respondent should consider it was unambiguous. In that way it was integrated into the material that did have to be considered. Such consideration cannot properly be said to have been given unless it was actually read. Its absence from the materials made it impossible for that to happen.

[54] By reason of the fact that, functionally, Dr Johnson's report became part of the second Delegate's Report, s 8(2)(b) of the Act made it something which the Council was bound to consider. Its failure to do so was a failure to have regard to a material consideration. Although, as I indicate, given my findings concerning the validity of the application, it is not strictly necessary to do so, I find in the applicant's favour on this ground as well.

[55] The applicant submitted that in light of the decisions in *Kirk v Industrial Court (NSW)*[48] and *Northbuild Constructions Interior Lining Pty Ltd & Ors*,[49] orders under the *Judicial Review Act* 1991 (Qld) were unnecessary.[50] After being informed of the Court's intention to make an order allowing the application, with declarations, in accordance with these reasons, agreement was reached in respect of the appropriate order as to costs. In those circumstances, the orders of the court are:

(a) The application is allowed.

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46 And in particular an issue that arose as to the size of the basin that might be required.
47 At [23].
48 (2010) 239 CLR 531.
49 [2011] 1 Qd R 525.
50 Transcript 21/02/2020 at 2-3.

(b) Pursuant to s 10 of the Civil Proceedings Act 2011, the decision made by the First Respondent on 25 September 2018 to apply to the Second Respondent pursuant to s 9(1) of the Acquisition of Land Act 1967 for part of the land described as Lot 5 on RP88015 (Land) is void and of no effect;

(c) Pursuant to s 10 of the Civil Proceedings Act 2011, the application which the First Respondent purported to make to the Second Respondent on 4 October 2018 pursuant to s 9(1) of the Acquisition of Land Act 1967 for part of the Land is void and of no effect; and

(d) Pursuant to s 10 of the Civil Proceedings Act 2011, in accordance with s 7(4B) of the Acquisition of Land Act 1967, the resumption of the Land is deemed to have been discontinued.

(e) The First Respondent pay the Applicant's costs of the proceeding.