Rob Anderson QC (RA):
Welcome everyone to our continuation today of the Level Twenty Seven virtual CPD series. I am Rob Anderson [QC] and with me is Tim Stork. Together, we will be presenting a short thirty minute discussion on two recent decisions, one from the Supreme Court and one from the Land Court, which deal with current issues in valuation and compulsory acquisition.

A quick reminder before we start that it is possible to ask questions during the course of the presentation using the chat function at the bottom of your screen. And equally, you can do the same thing at the end of the presentation by clearing the video or audio function and speaking directly to Tamara. We will do the best we can to take whatever questions come through and answer them within the time that we have provided.

The other thing to remind you of is that the slides from today will be made available to you by email either later today or tomorrow morning.

Tim has some 17 or 18 years' experience in this and associated areas. We are pleased to say that he joined us here at Level Twenty Seven last year. Tim's topic is the decision of the Land Court in *Conway [& Ors] v Australian Pacific [LNG CSG Transmissions Pty Ltd & Anor* [2020] QLC 26], which addresses the vexed question of what compensation could arise from the reporting of a protected plant on landholder's property. It is worth paying attention to because, in my view, any case that mentions a species as exotic as African lovegrass is well worth that special consideration.

Before he starts, I will deal with the more mundane issue of acquiring land for flood mitigation purposes.

***GENAMSON HOLDINGS PTY HOLDINGS PTY LTD V MORETON BAY REGIONAL COUNSIL & ANOR* [2020] QSC 84**
This was an application by the landowner to have the proposed acquisition of land at the Heritage Plaza Shopping Center in Caboolture declared void. It was successful. In part, the judgment gives rise to the question, when is an application not an application? It provides a lesson in statutory procedure and some people might also argue it provides a lesson on merits review as well, although ultimately that last aspect was not a determining issue in the case.

BACKGROUND TO LAND ACQUISITION BY THE STATE
First a little background because it shapes His Honour's attitude to the statutory interpretation question that fell for consideration in the case. Anyone who has dealt with a litigant in person knows that the source of all rights, liberties and freedoms lies in the Magna Carta. In the field of acquisition of property they might actually be right. Now, this presentation is not intended to be a history in the rights of tenure. But what is notable is the idea that the Crown may acquire a person's property has been considered exceptional for centuries. The *quid pro quo* so to

speak always has been that if property is to be acquired it must be on just or equitable terms. Even the theory that the acquisition of land is fundamentally a public law of the State is not without its limitations. In other words, it is not simply the case that what the State giveth the State taketh away. The so-called eminent domain theory of acquisition, for example, posits that property is under the eminent domain of the State, so that the State or those who act for the State, may use, alienate and even destroy property for any end of public utility. But in doing so it must make good the loss to the property owner. In feudal times, of course, the Crown largely did what it wanted. This is where the Magna Carta comes in. That document provided that no free man shall be deprived of his freehold other than by the law of the land. In other words, the Royal prerogative was no more.

By 1845, the *Land Clauses Consolidation Act* in the United Kingdom had established a regime for the establishment of a compensation scheme to be paid when land was taken. In 1901, our Commonwealth Constitution provided that the Commonwealth may make laws for the acquisition of property, but only on just terms. Of course, in Queensland, the issue is governed now by the *Acquisition of Land Act* 1967 which provides that upon acquisition what was once your right title and interest in land is converted into a claim for compensation. The object of which is to ensure you are compensated for, amongst other things, the value of the estate or interest in the land taken.

What all of this means is that there is real substance to the idea that the exercise by the State of its capacity to resume land must be seen to be exceptional and must be exercised in strict compliance with the statute. In *McKenzie v Minister for Lands* [[2011] WASC 335], a decision from Western Australia, Justice Martin said this:

"The fact that there have been laws authorising the compulsory acquisition of interest in land for many years does not detract from the exceptional character of those laws. The enjoyment of rights and interest in property, including land, is an attribute of our democracy which is highly cherished by the community. Laws providing for the expropriation of private rights and interest by the state are strictly 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."

Consistent with that, in *Genamson*, Justice Callaghan repeatedly noted the actions of the Council there were an "extraordinary thing", "radical", and an exercise over the rights of an individual so "intrusive" that it was eclipsed only by laws permitting the removal of personal liberty.

ACQUISITION OF LAND ACT 1967 (QLD) – PROCEDURES

Against that background, it is perfectly understandable that a failure strictly to comply with the procedure of the *Acquisition of Land Act* led fairly swiftly to the downfall of the exercise.

So what was the procedure? And where did the failures arise? As you will see, in the end, they appear so obvious that it might be wondered how the process got off the ground at all. The critical aspect of the process was the need to seek, consider and advise the Minister of any objections to the proposal to acquire the land.

The process of acquisition commences with the issuing of a notice of intention to resume, as we all know. That occurred here. And with it, Genamson was advised that it could object and could seek to be heard about its explanation for objection. The Council delegated that task as it was permitted to do so.

Under the Act, if after due consideration of all objections, the Council remained of the opinion that the land was in fact required for its purposes, it could apply to the Minister for the land to be taken. In this respect, it will be remembered that ultimately it is the State that takes the land, albeit for the purposes of and on the application of the Council or some other constructing authority.

S 9 of the Act is prescriptive about that process of application to the Minister. Furthermore, it provides that such an application must be made within twelve months after the date of the notice of intention to resume, and notably, and not thereafter. The application to the Minister was required to contain all of the information set out in subsection three of s 9. That section includes a requirement to inform the Minister of the names of all of the objectives and to provide a copy of every objection and to report by the constructing authority on those objections. This level of information is hardly surprising. In the end, it Is the Minister's decision whether to acquire the land over the objection of the landowner and it must be fully informed. By s 9 subsection five, the Minister is required to ensure the constructing authority has taken reasonable steps to comply with the objections process, and that in the end, it is appropriate the land should be taken for the stated purpose. It is not merely a rubber stamping exercise, and nor should it be, having regard to all that has been said about the extraordinary nature of the compulsory acquisition exercise.

In this case, Genamson contested the merits of the plan to resume the land. It provided a report from Dr. Trevor Johnson which included reference to alternatives to the resumption. It was a report that ought not to have surprised the Council as the same issues relating to flooding had been aired some years earlier in the Planning and Environment Court when Genamson had successfully appealed a decision to refuse an application to expand the size of a shopping center. Council's opposition on that previous occasion had included because to do so would create or exacerbate flooding issues. Dr. Johnson had given evidence before the Planning and Environment Court. Ultimately, the Council's position was not accepted. In other words, the application to resume had by now taken on the hallmark of an application to do that which had not been achieved some years earlier. The delegate who had been

assigned the task of considering the objections reported back to Council that Dr. Johnson's report should be considered and further that the Planning and Environment Court decision should be brought to account in determining whether to discontinue, amend or proceed with the proposed taking the land.

The decision whether to proceed then went before the Council's Coordination Committee. For reasons that are not evident from a reading of the judgment, whilst the Planning Court's decision was before it, Dr. Johnson's report was not. Even more startling is that having determined to proceed with the acquisition the Council then initially did not refer to the Minister either of the formal objections that had been lodged by Genamson, either of the delegates report and the standard form application ticked 'yes' in the box asserting that no objection has been received.

Now, there is no suggestion that this was a deliberately deceptive act but as an administrative error was as His Honour described startling. There were attempts at redressing the problems but in the end all of the paperwork still had not arrived with the Minister by the time the twelve month period for the making of the application had elapsed.

His Honour's conclusion was that by reason of that noncompliance with the prescribed method, the making of the application to the Minister, with all of its critical omissions, meant that it was not an application within the meaning of the section. And because the attempts of correction all occurred outside the mandatory twelve month period, no application had been made, and s 7, subsection four capital B then applied, so as to mean the process had been discontinued. Council argued in effect that the time period was fluid because the Act contemplates the Minister might seek further information after receiving the application. But unsurprisingly, His Honour focused on the making of the application itself to determine whether it met the obligations prescribed by the Act and reiterated the statement of Justice Martin in *McKenzie* about the strong public interest in ensuring strict compliance with laws relating to compulsory acquisition. In the end, it was not a properly made application, and was therefore void.

WHAT ARE THE TAKEAWAYS FROM *GENAMSON HOLDINGS V MORETON BAY REGIONAL COUNCIL* – COMPULSORY ACQUISITION DECISION MAKING PROCESS & MERITS

I had said earlier that the case is one that reflects also on the decision-making process and also on the merits. The case does so without deciding those issues but at least the following matters are worthy of mentioning.

The first is that the Council was by virtue of not having considered Dr. Johnson's report at risk of a finding that it had failed to take into account a relevant consideration in the exercise of its discretion to apply to the Minister for the taking of the land.

Secondly, Justice Callaghan considered that it had it been a merits review application there might have been cause for the Court to closely consider the reports, the history of the matter in the Planning and Environment Court and other matters that might in the end also prove decisive in setting aside the decision that had been made.

What does all of this mean? In the end, like so many cases, it is fact specific. The facts here did not permit the conclusion that an application had been made in a prescribed form within the time required, but more informatively can I make the following observations which also arise from the case.

First, it is a reminder that the State cannot compulsorily acquire property without appropriate justification and that includes establishing reasons why it is appropriate to proceed.

Secondly, compliance with the procedural requirements in the Act is strict, and the consequences for non-compliance may be significant.

Thirdly, decisions such as these may be susceptible to merits review, or some other challenges to their validity. It is an important reminder that there are potentially remedies available to aggrieved landowners whose property has been compulsorily acquired.

Thank you, those are the matters that I wanted to raise in relation to *Genamson*. I will hand over now to Tim and of course, a reminder that if you have any questions, either now or towards the end, that you can do so in one or two other ways that we have already described.

***CONWAY & ORS V AUSTRALIA PACIFIC LNG CSG TRANSMISSION PTY LTD & ANOR* [2020] QLC 26**

Timothy Stork (TS):

Thank you, Rob. Thank you very much.

While my case does refer to African lovegrass, I am afraid that the protective planting issue in the case was actually far less excitingly named and certainly there is nothing as exciting as the Magna Carta being mentioned in my presentation.

And then on *Conway* [*& Ors v Australia Pacific LNG CSG Transmission Pty Ltd & Anor* [2020] QLC 26]. The case I want to talk about is a Land Court decision of Member Stilgoe from about the middle of last year. It concerns compensation under the *Mineral Resources Common Provisions Act*, on whether there is compensation for the discovery of a protected plant on land.

I propose to take you through briefly what the protected plants regime looks like, the facts in *Conway v APLNG*, the two key issues that were discussed in the case, [namely] causation and the quantum of any loss, and then some takeaways that come out of that case.

QLD PROTECTED PLANTS REGIME

In 2014, the protected plants regime in Queensland was changed. Of relevance to the case to be discussed, it involved the mapping of Queensland into areas that were known as high risk areas, some people call them blue dot areas. Then there were those areas that were not in high risk areas that did not really have a name, they were just called high risk areas.

The mapping of high risk areas was generated from recorded instances of protected plants. Those plants are those that are endangered or vulnerable or near threatened, or 'EVNT' as some people refer to them. Obligations for clearing depended on whether the land was in a high risk area or not. Whether an area was in a high risk area could be determined by looking at the state mapping or requesting a flora survey trigger map from the Department of Environment and Science.

Within a high risk area, there were obligations on a part of it which was proposing clearing. Outside a high risk area, those obligations generally only arose, and do arise now, if a party is aware of an EVMT plant within that area.

PLANT HIGH RISK AREAS & COMPENSATION

What has this got to do with compensation? Well, it is common for rural properties to be accessed by various third parties, whether it is resources companies, gas and petroleum companies, infrastructure providers, such as powerline companies, or other infrastructure providers, and there are numerous properties where there are lots of providers interacting with the property owners on a relatively regular basis. For a while I have been wondering about whether or not from a compensation perspective there is an implication by one of those third party accesses discovering a protected species on that land. Fortunately, *Conway v APLNG* helps resolve that question, at least on its own facts, and I would say to a degree going forward as well.

The Conways owned a large rural cattle fodder producing property. APLNG had constructed a pipeline and had resource authorities over the land and were conducting a thorough flora survey as part of its activities on the land. The scientists who undertook the survey discovered what they thought was a plant, an ooline, which is a little less sexy than African lovegrass, but nonetheless it is called an ooline, it is a tree. They thought it was this ooline which is a vulnerable plant and so protected by the protective plants legislation and they sent that sample to the Queensland Herbarium which confirmed that it was indeed an ooline and therefore a vulnerable plant.

The version of flora survey mapping that applied to the Conways property at that point in time did not have any high risk areas mapped of relevance to this particular location where the plant was found. A later version though showed a high risk area two kilometers around where the ooline had been found. From a compensation perspective, the Court was considering claim for compensation under s 81 of the Common Provisions Act. It considered two issues, causation and quantum of compensation.

Compensation is payable for what is described in the legislation as a compensatible effect. To be a compensatible effect, it must be caused by the authorised activities, in this case of APLNG or those authorised by it, and that compenstible effect includes the diminution in value of land or the use that land can be put to or an improvement on it and any cost, damage or loss that arises from the carrying out of activities under the resources applies to the land.

The questions the Court looked at were whether in sending the sample to the Queensland Herbarium that was the event that caused a loss to the Conways. Did that result in the new version of the mapping that applied to the Conways land? Or was the presence of the protected plant, the ooline, just a preexisting condition on the land? What was the significance of that?

The Court considered it was obvious that an ecological survey might reveal a preexisting ecological condition adverse to a landowner, it might reveal contamination, a fauna survey might reveal a species that was previously thought to be extinct. As has happened in this case, a flora survey might reveal a vulnerable species of plants. The Court said it cannot be the case that a resource authority holder can be responsible for loss occasioned by the revelation of an ecological condition that existed on the land, regardless of the resource company's activities. In other words, if the resource company discovered something that was already there, any loss cannot be shifted to the resources company. The Court found that the new version of the mapping was not triggered by any referral to the Herbarium. Rather, there was a statewide review of the mapping that had been undertaken based on variety of sources and changes to the mapping were made across the state and not just the Conways property. To suggest that taking one sample might have caused the change in the mapping was absurd. The ooline would have been revealed if the Conways had undertaken a survey, which they would have had to do for doing any clearing themselves. The connection between the taking of that sample, and the alleged loss was simply too remote to satisfy the causation test.

The Court went on to consider what compensation might be payable if it were wrong about the causation issue. Both parties in the matter called valuers and the Court was asked to consider whether there will be a discount to the Conways property as a result of having this high risk area mapping around the ooline. The Conways contended for a discount to that and

APLNG said there should be no discount. The Conways contended for a discount on the basis that there were marketing agents who said that there was likely to be an adverse reaction, or a market resistance, to properties that have the flora mapping, that there had been adverse media coverage of the mapping that have been put in place across the state, and the valuers own experience as a rural land owner and producer and that there might have been some more restrictive mapping to which the land might revert at some point in time.

The Court accepted that it was not bound by the rules of evidence and it did allow valuers is to act on hearsay for comparable sales evidence, and that is a common experience in the Land Court. But, it said that what was being relied on and said by the agents, and therefore the Conways valuer, was just vague hearsay. Importantly, and critically, the comparable sales did not show any discounting at all, if any loss was caused, it was simply AUD 20,000 as a result of having to get expert reports to comply with a more rigorous protected plants regime on the land than previously.

WHAT CAN YOU TAKEAWY FROM *CONWAY V APLNG*? – NO LIABILITY FOR EXPOSING PREEXISITING LAND CONDITION

Well, I think the primary point, at least on the facts, is that there is no liability for exposing a preexisting condition in land. It can be quite difficult, on this case, very difficult for landowners to show that the discovery of that preexisting condition by a resources company or other third party caused a loss to the landowner. That is the case for protected plants as it was in *Conway*. It might also be the case, as the Court pointed out, for the discovery of some other sort of protected fauna, extinct or some other status, contamination discovered in the land, or in my view, the discovery of a significant cultural heritage site that might cause the landowner restrictions in the way it might use the land otherwise.

The other point that comes out of the case is that there is not necessarily a reduction in value due to the high risk area mapping under the protected plants regime, and perhaps also other environmental restrictions that might be placed on land. As the courts have said before, the best evidence in terms of compensation and reduction in value of land is evident from comparable sales. It is far and away the preferred method for the Court to determine any compensation.

Thank you. I think we have some time for questions, if any have come through.

Thank you very much for joining us. It has been a pleasure. Thanks very much.