

**PLANNING AND DEVELOPMENT BILL 2005**

*Assembly's Further Message*

Consideration of the further message from the Assembly resumed from an earlier stage of the sitting.

*Committee*

The Deputy Chairman of Committees (Hon Ray Halligan) in the chair; Hon Adele Farina (Parliamentary Secretary) in charge of the bill.

Debate was interrupted after the motion moved by Hon Kim Chance (Leader of the House) had been partly considered.

**Hon ADELE FARINA:** I will quickly conclude the comments I was making. In view of the wide range of views expressed by members during the debate on what "just terms" means to them, some uncertainty would clearly result if that term were to be incorporated in the clause. It could result in some legal consideration of what was intended by the Parliament when it introduced the words "just terms" into the provision. I think it is fair to say that if that amendment were to have been adopted, there would have been some uncertainty that would have financial implications associated with it. I want also to make one final comment on the government's position on this matter; that is, the government is not opposing consideration of the just terms provision or the legislation. The Attorney General has followed the recommendation of the house committee in referring the matter to the Law Reform Commission. The government has picked up on another recommendation of the house committee on the review of the Land Administration Act. The government has indicated that any future consideration or review of the Constitution would also include consideration of the incorporation of those words in the Constitution. On that basis, I conclude my comments.

**Hon GEORGE CASH:** Early in the parliamentary secretary's response she recited some words - I forget the exact words - along the general line that the just terms compensation clause would in fact turn an injurious affection section of the act into a resumption situation. Will the parliamentary secretary re-read those particular words, because I do not understand how that could occur?

**Hon ADELE FARINA:** I ask the member to put the question again.

**Hon GEORGE CASH:** Earlier in the parliamentary secretary's response, she read from her notes and recited a particular paragraph on the effect of the just terms clause when it was inserted in the injurious affection section of the bill. The parliamentary secretary said that that would have the effect of turning an injurious affection issue into one of resumption. I wonder whether the minister can re-read the words. Clearly she was reciting from the pages before her. I am not asking her to remember what she said; she read from her notes. Will she repeat it so that we can better understand how that could possibly occur?

**Hon ADELE FARINA:** I referred to the possibility that they could, not that they would.

**Hon GEORGE CASH:** I clearly heard the parliamentary secretary say that that "would" be the effect of inserting those words in that part of the bill. The parliamentary secretary was clearly in error in saying that and she now acknowledges the error she made by turning it around and saying that it "could". I do not know how it "could" turn an injurious affection claim into one of resumption. Will the parliamentary secretary explain the principles that "would" cause that to happen?

**Hon ADELE FARINA:** The provisions of the Land Administration Act provide for compulsory acquisition. That is just-in-time acquisition when the land is acquired at the time it is required by the state. The planning legislation provides the compensation for the diminution in the market value of the property as a result of some reservation under a scheme or the like with a caveat being registered, so that the compensation is factored into a future acquisition. Generally the planning legislation is intended to cover only the loss in value at the time the loss accrued rather than compensation for complete surrender. In other words, a landowner could continue to use and enjoy the land with the potential for receiving greater compensation under parts 9 and 10 of the Land Administration Act to accrue at a future date when the land is acquired by the state. The just terms provisions for compulsory acquisition - for example, those embodied in the New South Wales just terms legislation - go well beyond those that would apply in the case of compensation for injurious affection and would result in confusion between the concepts of injurious affection and compulsory acquisition. For those reasons the government is referring the concept of injurious affection to the Law Reform Commission of Western Australia.

**Hon GEORGE CASH:** The parliamentary secretary has already said that. I am asking her what principles would enable an injurious affection claim to become a claim of resumption; it does not make sense. If that is the case, and she said that it "could" rather than it "would", will she explain to me how that could possibly occur?

**Hon ADELE FARINA:** I point out that Hon George Cash is correct. It would not make the injurious affection clause a compulsory acquisition clause, but it would lead to confusion.

**Hon George Cash:** It wouldn't, or it couldn't?

**Hon ADELE FARINA:** It would not, but it could lead to confusion.

**Hon GEORGE CASH:** Would the parliamentary secretary explain the confusion that would be caused?

**Hon ADELE FARINA:** I have already explained that.

**Hon GEORGE CASH:** If that is the case, it was not explained very well, because I followed this issue very closely. I would like the parliamentary secretary to explain to me how she could say that a claim for just terms compensation for injurious affection could cause the matter to be one of resumption, because that was what was said originally. I do not understand. They are two different concepts that are considered in the question of compensation.

**Hon ADELE FARINA:** I state again that Hon George Cash is correct in that it would not make it a compulsory acquisition clause. However, the principles of just terms are principally used in compulsory acquisition, not injurious affection, and therein is where the confusion could lie. I reiterate that Hon George Cash is correct in that it would not make an injurious affection clause a compulsory acquisition clause.

**Hon GEORGE CASH:** Having regard for what the parliamentary secretary just said, is she saying that just terms compensation does not apply to injurious affection claims?

**Hon ADELE FARINA:** Injurious affection is determined on market value, and the question of just terms applying to injurious affection is a matter that will be considered by the Law Reform Commission.

**Hon GEORGE CASH:** Is the parliamentary secretary saying that market value is the only element that is considered in a claim for compensation for injurious affection?

**Hon ADELE FARINA:** Injurious affection is the diminution in the market value, so it is the affected market value as opposed to the unaffected market value.

**Hon MURRAY CRIDDLE:** I just make the point that the letter from Hon Jim McGinty relating to compensation for injurious affection does not include the issue of just terms, and the committee's recommendation 16 was to do with just terms. Will the Attorney General be asking the Law Reform Commission of Western Australia to include that reference?

**Hon ADELE FARINA:** The instructions are a bit unclear. They cover the issue of injurious affection but do not expressly address what we have discussed today. I will undertake to ask the Attorney General to also refer that matter to the Law Reform Commission.

**Hon MURRAY CRIDDLE:** I think that if we look at the report of the Standing Committee on Public Administration and Finance, we will see that it specifically refers to the issue of just terms in conjunction with injurious affection. I thank the parliamentary secretary for taking up the issue with the Attorney General.

**Hon BARRY HOUSE:** I have just received a copy of this letter and I am a bit concerned that the general intent of the committee is not fully reflected in this referral to the Law Reform Commission of Western Australia. Perhaps that is something the parliamentary secretary can take on board and discuss with the Attorney General. I do not have the report in front of me, so I cannot cross-reference that, but I think the report referred to all compensation for land, which may involve injurious affection as well as compulsory acquisition and voluntary acquisition, but it should also incorporate the issue of fair and just terms. I am concerned that this specific reference is narrow and does not encompass the broad intent of that report, if that is what the parliamentary secretary was trying to do.

**Hon ADELE FARINA:** I have a copy of the committee's report. Recommendation 12 states -

The Committee recommends that the Attorney General, independent of the amendment to the *Land Administration Act 1997* contained in Recommendation 10, refer the broad issue of compensation for injurious affection to land in Western Australia to the Law Reform Commission of Western Australia for review.

**Hon GEORGE CASH:** The parliamentary secretary said that just terms is encompassed in the notion of market value. If I have misrepresented what she has said, I stand to be corrected. Can the parliamentary secretary therefore tell me what are the elements in determining market value?

**Hon ADELE FARINA:** I will quote from the High Court decision in the Spencer case.

**Hon George Cash:** To which page are you referring?

**Hon ADELE FARINA:** I am referring to page 418. In the head notes, which sum up the decision of the High Court, it states -

In assessing the value of land resumed under the Act, the basis of valuation should be the price that a willing purchaser would at the date in question have had to pay to a vendor not unwilling, but not anxious, to sell.

**Hon GEORGE CASH:** That was part of the judgment of Griffith in that case. In fact, the decision states more than that; that is just part of the head note. However, that was how the court described the way in which market value should be assessed, notwithstanding that it happened to be a commonwealth case, it dealt with commonwealth legislation and, of course, it had the just terms requirement by way of the Australian Constitution within it. The parliamentary secretary is trying to apply the Spencer case to the Western Australian situation, but we have already agreed that there is no just terms provision in Western Australia. The parliamentary secretary has said that the notion of just terms is used and, as I understand it, she has gone on to say that it is encompassed in the proposition of market value. If just terms is no more than market value, as it is now being applied, what about the external issues of fairness and equity that are generally considered to be part of the concept of just terms? What does the department do about that at the moment?

**Hon ADELE FARINA:** I repeat that the injurious affection provision is intended to compensate for a diminution in the market value of a property. The Spencer case sets out the basis on which market value is determined on just terms. Clearly, there has been a view that injurious affection should be wider than that. That was recognised by the house committee in its report and in the government's reply. It stated that any terms of reference designated to examine the matter further should be directed towards an examination of whether injurious affection should be more precisely defined for the purposes of certain statutes or abandoned in its entirety depending on the degree to which, or circumstances in which, a diminution in value to an owner's land would result in an entitlement to compensation for the landowner.

**Hon GEORGE CASH:** The parliamentary secretary misunderstands my question. I am not talking just about injurious affection; I am talking about the principle of just terms. To say that the concept of just terms is limited to the notion of market value, we should refer to what the High Court said in Spencer and The Commonwealth of Australia in 1907. I should clarify that the parliamentary secretary used the head note when referring to the following -

In assessing the value of land resumed under the Act, the basis of valuation should be the price that a willing purchaser would at the date in question have had to pay to a vendor not unwilling, but not anxious, to sell.

That is a condensation of what all the judges were saying. The then Chief Justice Griffith said it in other terms -

In my judgment the test of the value of land is to be determined, not by inquiring what price a man desiring to sell could actually have obtained for it on a given day, *i.e.*, whether there was in fact on that day a willing buyer, but by inquiring "What would a man desiring to buy the land have had to pay for it on that day to a vendor willing to sell it for a fair price but not desirous to sell?" It is, no doubt, very difficult to answer such a question, and any answer must be to some extent conjectural. The necessary mental process is to put yourself as far as possible in the position of persons conversant with the subject at the relevant time, and from that point of view to ascertain what, according to the then current opinion of land values, a purchaser would have had to offer for the land to induce such a willing vendor to sell it, or, in other words, to inquire at what point a desirous purchaser and a not unwilling vendor would come together.

That is a fuller explanation of what Griffith was saying. It was condensed later with the consideration of what the other judges said in the comment in the head note. If the parliamentary secretary is saying that the concept of just terms compensation is limited to market value - she referred to the Spencer case in respect of the ascertainment of market value using the test suggested in it - I am saying that just terms compensation is wider than that. Does the parliamentary secretary now agree?

**Hon Adele Farina:** I have always agreed.

**Hon GEORGE CASH:** No, the parliamentary secretary has not always agreed. She is changing her mind because two minutes ago it was just market value. Is there a problem, Leader of the House?

**Hon Kim Chance:** Since you ask me, I wonder how this is relevant to the motion. This seems to be an important issue but I cannot relate it to even the third part of the motion.

**Hon GEORGE CASH:** The Leader of the House moved the motion originally. I would have thought that he had some knowledge of this. The whole idea of the motion was to debate whether we should accept or reject amendment 6 to the Planning and Development Bill. That was all about just terms compensation. Therefore, what I am saying is very relevant to the motion. The procedural issue about section 46 is a separate issue. The point that I made to the Leader of the House in the afternoon tea room was that I wanted to ask the parliamentary secretary a question, because what she said earlier was not the fact. She has since either said that what she said was not what she meant, or provided some other reason for saying it. I have now extended that, because I think the parliamentary secretary misunderstands what is part of the concept of just terms compensation. However, the bottom line is that that also is an argument for another day, because it will be part of the argument when we

move for an amendment to the Constitution that provides for just terms compensation. At that stage, if there is a need to spell out the elements that should be considered in determining just terms compensation, part of those elements will include the external issues of fairness and equity.

**Hon Kim Chance:** Yes. I agree with you. That is a very good point.

**Hon GEORGE CASH:** What I am saying is that it is not restricted to market value alone.

**Hon Kim Chance:** Yes, but that is where I think we are going beyond the terms of the motion.

**Hon Ken Travers:** That then conflicts with the term injurious affection, which is why this becomes a complex argument.

**Hon GEORGE CASH:** No. This is the problem. Injurious affection is just one issue in respect of land. The member knows that, because he has been part of land inquiries for a long time. Resumption is another area. Compulsory acquisition is another area. The point is compensation is compensation, notwithstanding which area it focuses on. Just terms compensation applies as much to injurious affection as it does to any other part of a land resumption or land acquisition process, because it is a diminution in value.

**Hon Ken Travers:** I agree with that, but when we relate just terms compensation to different things, it just becomes a different way of calculating it.

**Hon GEORGE CASH:** It is a method of calculating fair and reasonable compensation. It does not stop at market value.

**Hon Ken Travers:** Which is why this matter needs to be referred to get more detail.

**Hon GEORGE CASH:** That is what I said half an hour ago, but there seemed to be some dispute with the parliamentary secretary about what was being said. I could have stopped speaking three minutes after I started.

**Hon Ken Travers:** Our committee recommended that it be further examined.

**Hon GEORGE CASH:** The committee recommended that in respect of injurious affection.

**Hon Ken Travers:** We recommended that it be further examined.

**Hon GEORGE CASH:** Exactly. That should be further examined. However, it should not be limited to that.

**Hon Ken Travers:** No.

**Hon MURRAY CRIDDLE:** Recommendation 12 certainly does say that injurious affection should be referred to the committee that the Attorney General has suggested; namely, the Law Reform Commission. However, if we read recommendation 16, it becomes obvious that just terms compensation is also part of that. That is the message that I want to put to the parliamentary secretary. She did originally state that just terms compensation is part of that. I do not want to carry on about it, but that is the point I want to make.

**Question put and passed.**

*Report*

Resolutions reported, the report adopted, and a message accordingly returned to the Assembly.