

Explanatory note

This explanatory note relates to this Bill as introduced into Parliament.

Overview of Bill

The object of this Bill is to amend the Land Acquisition (Just Terms Compensation) Act 1991 (the Principal Act) to clarify the application of sections 7A and 7B of that Act relating to the acquisition of native title rights and interests and the acquisition of land already owned by the acquiring authority.

Outline of provisions

Clause 1 sets out the name (also called the short title) of the proposed Act.

Clause 2 provides for the commencement of the proposed Act on the date of assent to the proposed Act.

Schedule 1 Amendment of Land Acquisition (Just Terms Compensation) Act 1991 No 22

Section 7 of the Principal Act provides that (subject to sections 7A and 7B) the Act does not empower an authority of the State to acquire land (compulsory acquisitions of land are required to be carried out in accordance with the Act but the power to acquire land is ordinarily conferred by the Act that establishes or regulates that authority of the State). Section 7A of the Principal Act provides that an authority of the State that is authorised by law to acquire land by compulsory process under the Principal Act may acquire native title rights and interests in the land in the same way other interests may be acquired. Section 7B of the Principal Act provides that an authority of the State that is authorised by law to acquire land by compulsory process in accordance with the Principal Act may so acquire land even if the land is vested in the authority itself. Both sections were inserted into the Principal Act by the Native Title (New South Wales) Act 1994.

In the course of allowing an appeal against a decision of the Court of Appeal of the NSW Supreme Court in relation to the validity of the compulsory acquisition of land for the proposed Parramatta Civic Place project by the Parramatta City Council (*R & R Fazzolari Pty Ltd v Parramatta City Council; Mac's Pty Ltd v Parramatta City Council* [2009] HCA 12), the High Court interpreted the power conferred by section 7B as a power to acquire land under the Principal Act and not as a power exercised under the authority of the provisions of the Local Government Act 1993. A power to acquire land under the Local Government Act 1993 may be exercised only for the purpose of the exercise of the council's functions and subject to other rights and restrictions (such as the need to obtain the approval of the Minister). By analogy, the power to acquire native title rights and interests under section 7A may also be characterised as a power conferred by the Principal Act, and not as a power exercised under the authority of another law, and therefore may not be subject to the restrictions and conditions contained in the Local Government Act 1993 and other compulsory acquisition legislation. This was not the original intention of sections 7A and 7B since it is a necessary precondition to the extinguishment of native title rights and interests by compulsory acquisition that the law does not discriminate between the compulsory acquisition of native title rights and interests and other rights and interests in land (section 24MD of the Native Title Act 1993 of the Commonwealth).

Schedule 1 [1] substitutes section 7 of the Principal Act. The substituted section declares that an acquisition of land by compulsory process to which section 7A or 7B applies by an authority of the State that has power under another Act to acquire land by compulsory process is made under and subject to that other Act. Accordingly, the acquisition is limited to the purposes for which land may be acquired by compulsory process under that other Act and other relevant rights and obligations in that other Act will continue to apply to the authority. In the case of the acquisition of land by councils, the applicable provisions are found in sections 186 to 190 of the Local Government Act 1993 (those provisions will now extend to compulsory acquisitions of native title rights and interests and of roads and other land vested in the council). Schedule 1 [2] amends section 7A of the Principal Act to refer to an acquisition of

native title rights and interests “in accordance with” the Principal Act instead of such an acquisition “under” the Principal Act.

Schedule 1 [3] enables regulations of a savings or transitional nature to be made consequent on the enactment of the proposed Act.

Schedule 1 [4] extends the proposed amendments to acquisitions and proposed acquisitions before the commencement of the proposed Act. However, existing court determinations (such as the High Court decision in the Parramatta Civic Place case to invalidate the council’s compulsory acquisition of certain properties) are not affected. In particular, the clause seeks to ensure that any land with native title rights and interests that may have been acquired before the amendments are made (but are not authorised by the amendments) will not extinguish or otherwise affect those native title rights and interests.