[2011] WASC 335

JURISDICTION	**:**	SUPREME COURT OF WESTERN AUSTRALIA IN CHAMBERS
CITATION	**:**	McKENZIE -v- MINISTER FOR LANDS [2011] WASC 335
CORAM	**:**	MARTIN CJ
HEARD	**:**	21 OCTOBER 2011
DELIVERED	**:**	6 DECEMBER 2011
FILE NO/S	**:**	CIV 1742 of 2011
BETWEEN	**:**	NEIL PATRICK McKENZIE First Plaintiff PHILLIP JAMES ROE Second Plaintiff AND MINISTER FOR LANDS Defendant

Catchwords:

Statutory interpretation - Compulsory acquisition of land - *Land Administration Act 1997* (WA) - Relationship with *Native Title Act 1993* (Cth) - Whether persons claiming to have native title rights and interests in land without a determination have standing to challenge a notice under s 171 of the *Land Administration Act 1997* (WA) - Whether notices contained a 'description of land' per s 171 of the *Land Administration Act 1997* (WA)

Legislation:

Aboriginal Heritage Act 1972 (WA)
Interpretation Act 1984 (WA), s 56

Judiciary Act 1903 (Cth), s 39(2)
Land Administration Act 1997 (WA), s 151, s 152, s 161, s 165, s 170, s 170(6), s 171, s 171(1), s 172, s 173, s 175, s 175(3), s 177, s 179, s 184
Museum Act 1969 (WA)
Native Title Act 1993 (Cth), s 11, s 24MD, s 24MD(2), s 24MD(2)(ba), s 24MD(6), s 26, s 26(1)(c), s 29, s 223, s 253

Result:

Application allowed
Declarations of invalidity issued

Category: A

Representation:

Counsel:

First Plaintiff	:	Mr B W Collins QC & Mr M Orlov
Second Plaintiff	:	Mr B W Collins QC & Mr M Orlov
Defendant	:	Mr R M Mitchell SC & Ms F Seaward

Solicitors:

First Plaintiff	:	Chalk & Fitzgerald
Second Plaintiff	:	Chalk & Fitzgerald
Defendant	:	State Solicitor for Western Australia

Case(s) referred to in judgment(s):

Australian Conservation Foundation Inc v Commonwealth (1980) 146 CLR 493
Bodney v Bennell [2008] FCAFC 63; (2008) 249 ALR 300
Boyce v Paddington Borough Council [1903] 1 Ch 109
Members of the Yorta Yorta Aboriginal Community v Victoria [2002] HCA 58; (2002) 214 CLR 422
Onus v Alcoa of Australia Ltd [1981] HCA 80; (1981) 149 CLR 27
Project Blue Sky Inc v Australian Broadcasting Authority [1998] HCA 28; (1998) 194 CLR 355
Robinson v Western Australian Museum (1977) 138 CLR 283
Scurr v Brisbane City Council (1973) 133 CLR 242

The State of Western Australia v Ward [2002] HCA 28; (2002) 213 CLR 1
Western Australia v Native Title Register [1999] FCA 1594
Wilson v Secretary of State for the Environment [1973] 1 WLR 1083

MARTIN CJ:

Summary

1 There are only two issues in this case:

1. Are three notices of intention to take land issued by the Minister for Lands (the Minister) (who is the defendant) for the purpose of acquiring interests in land which may be required to establish a precinct for the processing of liquefied natural gas from the Browse Basin in the vicinity of an area situated on the west coast of the Dampier Peninsula north of Broome and which is known as James Price Point, or as Walmadany to the indigenous people of the area, invalid because they fail to provide a description of the land required (as required by s 171 of the *Land Administration Act 1997*) (the LA Act)?

2. Do Mr Neil McKenzie and Mr Phillip Roe (who are the plaintiffs) have a sufficient interest in the validity of these notices to invoke the jurisdiction of the court?

2 For the reasons which follow, I have concluded both of these questions should be resolved affirmatively, in favour of Mr McKenzie and Mr Roe. I will declare that each of the notices is invalid. However, that declaration will not prevent the Minister from issuing further notices of intention to take land in the area, and for the purpose required, provided that those notices comply with the requirements of the LA Act.

The facts

3 The relevant facts are not in contention. They were established by the tender of an agreed statement of facts and affidavits to which there were no substantive objections. None of the deponents to those affidavits were required for cross-examination.

The gas processing hub project

4 Significant reserves of natural gas have been discovered in the Browse Basin, which is an area situated off the coast of the Kimberley region of Western Australia. A number of different companies and groups have the potential right to exploit those gas resources.

5 Since 2007, consideration has been given to the identification of a site to be made available to proponents wishing to establish processing facilities for the purpose of liquefying natural gas harvested from the

Browse Basin. Following the investigation of a number of potential sites, it was determined that the area in the vicinity of James Price Point (or Walmadany) was the preferred location, and on 23 December 2008, the Minister for State Development and Premier of Western Australia made an announcement to that effect.

6 All the land in the vicinity of James Price Point is unalienated Crown land. However, the traditional owners of the land have claimed native title rights over the land as part of a claim covering a larger area. I will refer in more detail to the native title claims that have been made later.

7 If the precinct is to be developed as a gas processing hub, land will be required for the construction of the following facilities at least:

- A port;
- A processing plant or plants;
- Pipelines through which the gas can be brought from the Browse Basin to the processing plant or plants;
- Light industrial facilities;
- Workers' accommodation;
- A new road connecting the precinct to the road which runs from Cape Leveque to the Broome-Derby Road;
- Connections for services (power, water, etc) to the various developments within the precinct and to the Cape Leveque Road.

8 The State is endeavouring to put in place the necessary land tenure and planning arrangements to enable land to be made available for these purposes. However, development of land for these purposes will only take place:

(a) if and when a proponent makes a firm decision to proceed with the construction of an LNG processing plant;

(b) subject to and in accordance with environmental approvals issued under relevant State and Commonwealth legislation;

(c) in accordance with the *Aboriginal Heritage Act 1972* (WA).

The negotiations with representatives of the traditional owners

9 The traditional owners of the area in which it is proposed to develop the gas hub precinct are the Goolarabooloo and Jabirr Jabirr peoples. They have been represented in negotiations with the State of Western Australia, and in their claims for native title by the Kimberley Land Council Aboriginal Corporation (the KLC). Following negotiations, on 21 April 2009 the State of Western Australia, the KLC and Woodside Energy Ltd (a prospective proponent for the development of gas processing facilities) entered into a Heads of Agreement relating to the establishment of the gas processing precinct. The Heads of Agreement contains terms to the following effect (among others):

(a) at the end of production life, when the gas processing facilities are no longer required, title and other interests in the precinct will be transferred to the relevant native title party, or as otherwise agreed;

(b) at the option of the traditional owners, at the end of the project, Woodside will transfer the ownership of the project accommodation facilities to a traditional owner entity;

(c) the State will grant a leasehold interest to the traditional owners in relation to the component of the precinct to be used for light industrial land; and

(d) the State, the KLC and Woodside will enter into a heritage protection agreement to ensure that the precinct will be developed in a manner that, where possible, avoids impact on Aboriginal sites or minimises any impact on Aboriginal sites.

10 On 13 November 2009, the State, Woodside and the KLC entered into the Heritage Protection Agreement contemplated by the Heads of Agreement. The State and Woodside have undertaken various studies relating to the prospective development of the precinct, including flora, fauna, vegetation and geotechnical studies in accordance with the terms of the Heritage Protection Agreement.

11 Schedule 3 to the Heritage Protection Agreement contains a map which identifies the approximate location of the various components which will comprise the precinct. The same map identifies Woodside's preferred locations for the workers' accommodation and light industrial area, based primarily upon operational safety requirements.

12 During negotiations between representatives of the State, Woodside and the KLC in the latter part of 2009, a representative of the KLC stated that the KLC did not have the time and appropriate resources to focus on the question of what commercial arrangements (during the life of the LNG processing precinct) or use of land (following the closure of the site), the traditional owners might want in the compensation package that related to the workers' accommodation and light industrial sites. The representative of the KLC stated that because of the lack of time and resources, it was not possible for the KLC to then express its preference as to the location of the areas to be used for workers' accommodation and light industrial purposes.

The issue of the notices

13 In about April 2010, officers within various agencies of the State discussed the compulsory acquisition of any interests, more particularly native title interests, in the land which might be used for the gas processing precinct pursuant to the provisions of the LA Act, and the *Native Title Act 1993* (Cth) (the NT Act). At that time, the KLC had not altered its position in relation to its preferred location for the workers' accommodation and the land to be used for light industrial purposes, and in particular, had not expressed its preferences in relation to the location of those areas.

14 By approximately May 2010:

(a) sufficient heritage surveys and discussions between the State, Woodside and the KLC had taken place to enable representatives of the State to accurately describe the land required for the proposed onshore processing precinct, save for the location of the proposed 1.5 km coastal cross-over;

(b) insufficient heritage surveys and discussions between the State, Woodside and the KLC had taken place to enable representatives of the State to accurately locate the proposed 1.5 km coastal cross-over;

(c) insufficient heritage surveys and discussions between the State, Woodside and the KLC had taken place to enable representatives of the State to accurately locate the parcels of land required for workers' accommodation and light industrial purposes, although the broader areas of land required for those purposes were known;

(d) because of the uncertainty relating to the location of the workers' accommodation and the light industrial area, the location of the access roads, pipeline corridors and service corridors associated with the light industrial and workers' accommodation sites could not be accurately identified.

15 Because of the uncertainties with respect to the location of the areas of land required, it was suggested that notices of intention to take might be issued under the provisions of the LA Act specifying the location of a larger area of land within which a smaller area would be taken, but without identifying the location of that smaller area (beyond the fact that it would be somewhere within the larger area). It was decided to take that course, in order to initiate the land acquisition process which, if taken to its ultimate conclusion, would result in the acquisition of any native title interests in the land to be used for the purposes of the precinct.

16 On 2 September 2010, the Minister for Lands issued the three notices of intention to take which are challenged in these proceedings. They are conveniently described as the Precinct Notice, the Infrastructure Notice, and the Roads Notice. The Precinct Notice related to the land to be used for the gas processing plant, workers' accommodation and light industrial (or third party contractor) purposes. The Infrastructure Notice related to the land to be acquired for the port, for a corridor to be crossed by pipelines to the north of the gas processing plant, and to the south of that plant, and for the services corridor required to connect services to Cape Leveque Road, and to connect services within the workers' accommodation and light industrial areas. The Roads Notice related to the land required to construct the new road between James Price Point and Cape Leveque Road, and included areas required for roads connecting that road with the light industrial area and the area to be used for workers' accommodation.

17 Each of the notices followed the format which had been agreed upon by the officers of the relevant agencies of the State. That is, each of the notices identified the location of a larger area of land from which the interests in a smaller area would be acquired, but without identifying the location of the smaller area beyond the fact that it would be somewhere within the larger area. The relativities between the larger area, the boundaries of which were identified, and the smaller area, the boundaries, configuration and location of which were not identified, varied as between the three notices, and as between the areas referred to within each notice. The relativities are accurately identified in a schedule produced during the

hearing which is to be read, conveniently, with a map received in evidence. Both are attached to these reasons.

18 As I have noted, the location of the land required for the gas processing plant was known with relative accuracy. Accordingly, the Precinct Notice specified the location and boundaries of an area of land comprising approximately 2,019 ha, of which the interests in 1,980 ha (about 98%) would be acquired. However, because of the uncertainty relating to the location of the areas required for workers' accommodation and light industrial purposes, the Precinct Notice specified the location and boundaries of an area comprising approximately 1,000 ha, of which the interests in an unspecified 200 ha (or 20%) would be acquired for light industrial purposes, and specified the location and boundaries of an area of 2,000 ha of which the interests in an unspecified 200 ha (or 10%) would be acquired for workers' accommodation.

19 Differing relativities, between the larger area in respect of which the location and boundaries were specified, and the smaller area to be taken, in respect of which the location and boundaries were not specified (beyond the fact that they would be within the larger area) are also seen within the Infrastructure Notice and the Roads Notice. For example, in the Infrastructure Notice, the areas to be taken for the port and pipeline corridors comprise between 45% and 59% of the areas within the larger areas, the location and boundaries of which are specified in the notice. However, in respect of the land required for the services corridor, the relativities are much lower, with the area to be taken varying between about 1% and 12% of the land within the larger area, the location and boundaries of which are specified in the notice. In the case of the Roads Notice, the relativities are similarly low, with the area of land to be taken varying between a little under 2% and a little over 13% of the land within the larger area, the location and boundaries of which were specified in the notice.

20 None of the notices specified the location or boundaries of the land which the Minister proposed to acquire compulsorily beyond identifying the size of the area which would be taken, and the location and boundaries of the larger area within which the land would fall. Nor did any of the notices identify the configuration, boundaries or dimensions of the land to be taken, beyond specifying the total area that would be taken.

The native title claims

21 At the time the three notices were issued, there was only one application for the determination of native title with respect to the land

covered by the notices which had been registered under the provisions of the NT Act. That claim was known as WAD 6002 of 1998 and was a combination of two applications which had been previously made, being an application made on 27 June 1994 by Joseph Roe, Paddy Roe, Phillip Roe, Ronald Rod, Teresa Roe, Richard Hunter, Joseph (Duju) Benedict, Rita Augustine, Gordon Dixon, Mary Tarran, Cyril Shaw and Warren Greatorex and an application made by Joseph Roe on 31 March 1995. At the time the three notices were issued by the Minister, the named applicants in respect of that claim were Joseph Roe and Cyril Shaw, representing the group on who behalf the application was made - namely, the Goolarabooloo and Jabirr Jabirr peoples.

22 At the time the three notices were issued by the Minister there was another application for the determination of native title with respect to the land the subject of the notices which had not been registered under the NT Act. That application was made by Rita Augustine, Cecelia Djiagween, William McKenzie, Ignatius (Iga) Paddy, Patricia Torres and Anthony Watson on behalf of the Jabirr Jabirr people on 20 May 2010. That application (No WAD 124 of 2010) was rejected for registration on 1 October 2010, after the notices had been issued by the Minister, on the grounds that the claim overlapped with the previous claims which had been registered and combined in matter WAD 6002 of 1998.

23 After the Minister issued the three notices, two more applications for determination of native title were made in respect of land which covered the area the subject of the notices. Application WAD 408 of 2010 was made by Rita Augustine, Cecelia Djiagween, William McKenzie, Ignatius (Iga) Paddy, Patricia Torres and Anthony Watson on behalf of the Jabirr Jabirr people on 21 December 2010. That application was rejected for registration on 21 January 2011, and dismissed by orders of the Federal Court made by consent on 17 March 2011.

24 Application WAD 2 of 2011 was made by Joseph Roe, Jason Roe, Terrence Hunter Junior and Brian Councillor on behalf of the Goolarabooloo families on 5 January 2001. That application was rejected for registration on 28 February 2011, although the applicants were subsequently granted leave to amend their application. However, on 28 July 2011 the amended application was rejected for registration.

25 Each of the two applications made after the Minister had issued the notices the subject of these proceedings were rejected on the grounds that they overlapped with the claim which had been received and registered as WAD 6002 of 1998. They were otherwise in order for registration.

26 On 13 August 2010, six members of the native title claim group applied to the Federal Court for an order that they replace Joseph Roe and Cyril Shaw as the named applicants in WAD 6002 of 1998. On 15 February 2011, Gilmour J granted this application, and ordered that Rita Augustine, Anthony Watson and Ignatius (Iga) Paddy replace Joseph Roe and Cyril Shaw as the named applicants on behalf of the Goolarabooloo and Jabirr Jabirr People in matter WAD 6002 of 1998. On 29 April 2011 an application by Joseph Roe for leave to appeal from that decision was dismissed by Siopis J.

The objections to the notices

27 The notices were sent to the Principal Legal Officer of the KLC under cover of a letter dated 3 September 2010 from an officer of the Department of Regional Development and Lands. That letter described the general purposes for which the land was to be taken and included a table which set out the relativities between the total area of land, in respect of which the location and boundaries were specified in the notice, and the size of the area within that location that would be required, and in respect of which the location and boundaries were not identified in the notice (beyond the fact that the land would be somewhere within the larger parcel).

28 The letter included the following paragraph:

> Also, you will note that, for all parcels of land, the Notices identify a larger area within which a smaller area will ultimately be taken. This is to allow sufficient flexibility to identify final locations for each component of the BLNG Project and associated infrastructure taking into account Aboriginal cultural heritage concerns, as well as environmental and geotechnical considerations.

The letter also stipulated that the notices were enclosed by way of formal service on the registered native title claimant and the KLC as the representative Aboriginal/Torres Strait Islander body, pursuant to the relevant provisions of the NT Act.

29 The Minister agreed to extend the time for objections to the notices until 22 December 2010. That period coincided with the period specified for objections under the NT Act. A number of objections were received, the details of which follow.

30 On 4 November 2010 an objection was lodged on behalf of Joseph Roe and Cyril Shaw as the named native title claimants in respect of claim WAD 6002 of 1998.

31 On 5 November 2010 objection was lodged by Cecilia Djiagween, Rita Augustine, Ignatius (Iga) Paddy and William McKenzie as 'native title holders and members of the Goolarabooloo/Jabirr Jabirr native title claim (WAD 6002/98)'.

32 On 8 November 2010 a further objection was lodged by Cecilia Djiagween, Rita Augustine, Ignatius (Iga) Paddy and William McKenzie as members of the Goolarabooloo/Jabirr Jabirr native title claim (WAD 6002 of 1998).

33 On 8 November 2010, a further objection was lodged by Joseph Roe and Cyril Shaw as registered native title claimants in respect of WAD 6002 of 1998.

34 On 22 December 2010, a further objection was lodged by 'registered claimant for the Goolarabooloo/Jabirr Jabirr native title claim'.

35 In a number of cases the grounds of objection included an assertion that the notices issued by the Minister were invalid, because they did not describe the land required and in particular, did not identify the location and boundaries of the land which was proposed to be acquired.

36 After considering the objections, on 15 April 2011 the Minister determined that each notice of intention to take was to stand unchanged (in accordance with s 175(5)(a) of the LA Act). The Minister advised the KLC of his decision by letter dated 15 April 2011.

The plaintiffs

37 Mr McKenzie is an Aboriginal person of Jabbir Jabbir descent. Mr Roe is an Aboriginal person of Goolarabooloo descent. Each of Mr McKenzie and Mr Roe claim to be members of the Goolarabooloo/Jabirr Jabirr native title claim group on whose behalf application has been made for the determination of native title in respect of an area of land which includes the area the subject of the notices issued by the Minister, which application has been registered as WAD 6002 of 1998. On the evidence before me, there is no reason to doubt their claim to be members of that group.

38 Mr McKenzie is also a member of the Jabirr Jabirr native title claim group on whose behalf application WAD 124 of 2010 was brought, although that application was, as I have noted, rejected for registration. As I will note later in more detail, rejection of a claim for registration does not of itself result in the dismissal of the claim.

39 Mr Roe is also a member of the Goolarabooloo native title claim group on whose behalf an application for native title determination was brought (WAD 2 of 2011) but which has been rejected for registration.

40 Mr Roe is a Law Boss of the Northern Tradition which is the traditional law and custom practiced by Aboriginal persons who come from that part of the Dampier Peninsula which contains the land the subject of the notices issued by the Minster. His responsibilities as Law Boss include speaking on behalf of the country, and acting as a custodian and protector of the country in accordance with traditional law and custom.

The statutory scheme

Interplay between the LA Act and the NT Act

41 Part 9 of the LA Act deals with the compulsory acquisition of interests in land. Section 151 of the LA Act defines the word 'interest' to include native title rights and interests, and gives those terms the same meaning as they have in the NT Act. Generally speaking, by s 223 of the NT Act, native title rights and interests are defined to mean:

> [T]he communal, group or individual rights and interests of Aboriginal peoples or Torres Strait Islanders in relation to land or waters, where:
>
> (a) the rights and interests are possessed under the traditional laws acknowledged, and the traditional customs observed, by the Aboriginal people or Torres Strait Islanders; and
>
> (b) the Aboriginal peoples or Torres Strait Islanders, by those laws and customs, have a connection with the land or waters; and
>
> (c) the rights and interests are recognised by the common law of Australia.

42 Section 11 of the NT Act provides that native title is not able to be extinguished contrary to the NT Act. It follows that unless the processes for the compulsory acquisition of interests in land provided by the LA Act conform to the NT Act, they will not be effective to compulsorily acquire native title rights and interests.

43 Section 24MD(2) of the NT Act provides that compulsory acquisition of native title rights and interests under a law of a State is effective to extinguish native title rights and interests in whole or in part if certain requirements are met, including the requirement that the practices and procedures adopted in acquiring the native title rights and interests are

not such as to cause the native title holders any greater disadvantage than is caused to the holders of non-native title rights and interests when their rights and interests are acquired (s 24MD(2)(ba), NT Act).

44 The NT Act confers rights to negotiate upon a variety of persons, including registered native title claimants, in some circumstances where another party proposes to take what is described by the NT Act as a 'future act' which includes, relevantly for present purposes, the compulsory acquisition of native title rights and interest (s 233, NT Act). However, s 26(1)(c) of the NT Act provides that the provisions of the Act relating to the right to negotiate do not apply to the compulsory acquisition of native title rights and interests for the purpose of providing an infrastructure facility. Section 253 of the NT Act provides that the expression 'infrastructure facility' includes roads, electricity generation, transmission or distribution facilities, and dams, pipelines, channels and other water management distribution or reticulation facilities.

45 It is apparent that the notices issued by the Minister have been prepared on the assumption that there is no right to negotiate within the meaning of 'Subdivision P' of the NT Act in respect of the acquisitions the subject of the Roads Notice and the Infrastructure Notice (presumably on the basis that they are acquisitions for the purpose of providing an infrastructure facility within the meaning of that expression in the NT Act). On the other hand, it appears that the Precinct Notice has been prepared upon the basis that the provisions of the NT Act relating to rights to negotiate apply to the acquisitions the subject in that notice. For the purposes of these proceedings it is unnecessary to express any view upon the question of whether these assumptions are correct.

46 Section 24MD(6) of the NT Act provides that, generally speaking, where the provisions of the NT Act conferring to rights to negotiate do not apply, native title holders and any registered native title claimants are to have the same procedural rights as they would have in relation to a proposed compulsory acquisition on the assumption that they held ordinary title to the land, and are, subject to certain exceptions, entitled to be notified of the proposed acquisition. Accordingly, in those cases, the procedural and substantive rights (including the right to compensation) of the native title holders and registered claimants arise under the law pursuant to which the compulsory acquisition is made, applied by s 26MD of the NT Act, and in Western Australia also by the express terms of the LA Act.

47 If the assumptions made by the Minister at the time he issued the notices are correct, it would follow that the registered native title claimants in matter WAD 6002 of 1998 have, in respect of the Infrastructure Notice and the Roads Notice, the same procedural rights under the LA Act as if they were the registered proprietors of the freehold interest in the land, including the right to be served with a copy of the notices, and the right to object. In respect of the Precinct Notice, the rights to negotiate created by the NT Act would apply to that notice, including the right to receive notice of the relevant future act in accordance with s 29 of the NT Act.

48 The significance of registration as a native title claimant was succinctly explained by Carr J in ***Western Australia v Native Title Register*** [1999] FCA 1594:

> [A]n application for registration on the Register is part of a process which is relevantly distinct from an application to the Federal Court of Australia for a determination of whether native title exists. Such an application (to this Court) may proceed whether or not the claim is so registered. Registration on the Register is conditional upon, amongst other things, the Registrar deciding that a prima facie case that at least some of the native title rights and interests claimed in the application can be established. Registration confers a number of statutory benefits on registered native title claimants which are not available to unregistered claimants, including rights to negotiate [2].

49 Subdivision 2 of pt 9 of the LA Act contains a number of provisions dealing with the compulsory acquisition of interests in land which affect native title. Section 152 provides that it is an objective of the relevant provisions of the LA Act to ensure that if the taking of interests in land under the NT Act affects native title, the taking is a valid future act under the relevant provisions of the NT Act, and also to ensure that the LA Act is consistent with the procedural requirements of the NT Act. Other sections within the subdivision contain provisions relating to the service of notice upon native title holders and the provision of compensation to native title holders whose interests are extinguished by compulsory taking.

The LA Act

50 Section 161 of the LA Act provides that any interest in land held by a person other than the Crown may be taken in order to undertake, construct or provide any public work. Section 165 of the LA Act provides that whenever a written law permits the grant of any estate, interest or right in relation to land, and any land is required for the purposes of the grant, the

Minister may by order authorise the doing in relation to the land of any of the acts permitted under s 161. Accordingly when land is required in order that interests in that land can be granted by the State to another party (such as the proponents of the gas processing project), land can be taken compulsorily using the same processes as apply when the land is taken for the purpose of a public work.

51 Division 3 of pt 9 of the LA Act sets out the procedure for taking interests in land. Subdivision 1 is concerned with the procedure for taking interests in land by agreement, whereas subdivision 2 is concerned with the procedure for taking interests in land without agreement.

52 Section 170 of the LA Act provides that if it is proposed to take interests in land without agreement, the Minister must issue a notice of intention to take the interest in accordance with the section. The section provides that as soon as possible after registration of the notice at the Office of the Registrar of Titles, the Minister issuing the notice must cause a copy of the notice to be published once in a daily newspaper circulating through the State and must also cause a copy of the notice to be served on the principal proprietor of any land affected by the notice, the occupier of the land, and the holders of any native title rights or interests, together with advice as to the procedures pertaining to the taking of the land and the payment of purchase money or compensation for the land taken. Section 170(6) provides that the Minister may cancel or amend the notice of intention to take, or cancel the notice and substitute another notice of intention to take by a notice issued, published and distributed in the same way as the original notice.

53 Section 171 of the LA Act stipulates the required content of a notice of intention to take. As it terms are at the heart of the case, it is appropriate to set it out in full:

> **171. Content of notice of intention**
>
> (1) A notice of intention must include -
>
> (a) a description of the land required;
>
> (b) particulars of -
>
> (i) the purpose of the public work for which the land is proposed to be designated;
>
> (ii) the nature of the interests to be taken;

(c) if it is proposed to make a disposition or grant to any person out of the interests proposed to be taken, a statement to that effect and particulars of the disposition or grant to be made;

(d) particulars of -

(i) a place where persons interested may at any reasonable time inspect a plan of the land;

(ii) the reasons why the land is suitable for, or is needed for, the public work;

(iii) the date from which the land is likely to be required;

(iv) the name of a contact officer in the acquiring authority; and

(v) an address for lodging objections;

(e) a statement of the effect of section 172; and

(f) a statement of the effect of section 173.

(2) A notice of intention issued in good faith is not invalidated by reason only that it contains an error or omission in the information required by subsection (1)(d), (e) or (f).

54 Section 172 of the LA Act prohibits entry into a transaction affecting land included in a current notice of intention to take without the written consent of the Minister, and provides that any transaction entered into in contravention of the section is void. Further, s 173 prohibits building on or making any improvement to land the subject of a current notice of intention to take without the approval in writing of the Minister. Section 184 of the LA Act provides that at any time after registration of a notice of intention to take a person authorised in writing by the Minister may at all reasonable times enter on land included in the notice for the purpose of inspecting the land or making an assessment of compensation payable for the taking of interests in the land.

55 When a notice of intention to take is issued by the Minister, any person who is the principal proprietor or occupier of land affected by the notice, and whose interest is affected by the proposal can serve on the Minister a written objection to the taking of the interests in the land (s 175, LA Act). The objection must identify the land and specify the nature of the interest of the objector in the land and the grounds of objection (s 175(3), LA Act). After considering any objections and any

other representations by the objectors, the Minister may either determine that the notice of intention to take is to stand unchanged, or cancel or amend the notice of intention to take, or cancel the notice and substitute another notice. If the notice is amended, or cancelled and another notice substituted, the substituted notice is to be treated as a new notice for the purpose of objections (with certain exceptions) (s 175(6), LA Act).

56 Section 177 of the LA Act provides that if a notice of intention to take has been registered in relation to the land, and the Minister either has received no objections or has determined that the objections received do not warrant the cancellation or amendment of the notice of intention, the Minister 'may make a taking order consistent with the notice of intention'. Section 178 provides that a taking order must identify the land affected by the order and specify that any interest taken is to be held as Crown land in the name of the State of Western Australia. Upon registration of a taking order, the order has effect according to its terms (s 179, LA Act).

Do the plaintiffs have standing?

57 Mr McKenzie and Mr Roe assert that they have a sufficient interest in the validity of the notices of intention to take issued by the Minister to invoke the jurisdiction of this court to rule upon that issue. Their interests are said to arise from the fact that they are members of a group which claims to hold the bundle of communal rights loosely described as native title in respect of an area of land which includes the land the subject of the notices. In addition, in the case of Mr Roe, he has an additional interest in the form of his role and responsibilities as a Law Boss in respect of an area which includes the land the subject of the notices issued by the Minister. Mr McKenzie and Mr Roe assert that these interests give them a 'special interest' over and above the interest which any member of the public has in the performance of the duties imposed upon the Minister with respect to the compulsory acquisition of interests in land, so as to give them standing to enforce the performance of those duties.

58 The Minister submits that the court should dismiss these proceedings without ruling upon the validity of the notices issued by the Minister because Mr McKenzie and Mr Roe lack standing. The argument advanced on behalf of the Minister has three components:

(a) these proceedings involve a matter which arises under laws made by the Commonwealth Parliament (the NT Act), and therefore involves the exercise of federal jurisdiction conferred upon this court by s 39(2) of the *Judiciary Act 1903* (Cth);

(b) the jurisdiction conferred upon this court by s 39(2) of the *Judiciary Act* depends upon there being a 'matter' which in turn depends upon there being a justiciable controversy involving the determination of an immediate right, duty or liability. In the present case, as Mr McKenzie and Mr Roe are not the nominated applicants in a claim for the determination of native title registered under the NT Act, and do not have the procedural rights conferred upon such applicants by the NT Act, it was submitted that there cannot be a determination of an immediate right unless and until Mr McKenzie and Mr Roe have established that they are members of the group which holds native title over the land the subject of the notices issued by the Minister, and that has not yet occurred; and

(c) for there to be a 'matter' within federal jurisdiction, the person claiming relief must have a sufficient interest in the validity of the relevant act or instrument, and in the present case, Mr McKenzie and Mr Roe should not be found to have a sufficient interest in the validity of the notices issued by the Minister unless and until they have established in these proceedings or elsewhere that they are members of a group which holds native title in respect of the land the subject of the notices, and that has not yet occurred.

For the reasons which follow, each of these propositions should be rejected.

Federal jurisdiction

59 The Minister submits that these proceedings involve the exercise of federal jurisdiction conferred upon this court by s 39(2) of the *Judiciary Act* because these proceedings involve the determination of a 'matter' arising under a law of the Commonwealth Parliament - the NT Act. In my view, it is strictly unnecessary to rule upon this submission because even if it is accepted, Mr McKenzie and Mr Roe have sufficient standing to invoke the jurisdiction of this court for the reasons given below. However, for the sake of completeness, I will address the question of whether these proceedings involve the exercise of federal jurisdiction.

60 That question turns critically upon the precise identification of the justiciable controversy or 'matter' before the court. In this case, the task of identifying that controversy is straightforward because (aside from the issue of standing), there is only one issue or controversy which the court must determine, and that is whether or not the notices of intention to take issued by the Minister are invalid because they do not contain 'a

description of the land required' within the meaning properly given to that expression in s 171(1) of the LA Act. That controversy will be resolved by construing a law of the State (the LA Act) and applying that law to the facts uncontroversially established by the evidence. The justiciable controversy does not involve any 'matter' or issue arising under any law of the Commonwealth, nor does it involve the interpretation or application of any law of the Commonwealth, or the assessment or application of any right, duty or obligation arising under any law of the Commonwealth. These proceedings do not involve any 'matter' falling within federal jurisdiction.

61 On behalf of the Minister it is submitted that the validity of the notices of intention to take issued by the Minister under the LA Act has consequences for the application of provisions of the NT Act relating to the extinguishment of native title, and the issue of their validity is, to that extent, bound up with those provisions, such that these proceedings involve matters arising under a law of the Commonwealth. There are two answers to this submission. First, the fact that the resolution of an issue with respect to the validity or invalidity of actions purportedly taken pursuant to State law may have consequences for the application of a law of the Commonwealth does not lead to the conclusion that a court resolving the issue of validity by reference only to State law is engaged upon the resolution of a justiciable controversy arising under a law of the Commonwealth. Second, no question has yet arisen with respect to the extinguishment of native title rights. That question could only arise if and when the Minister purports to compulsorily acquire the interests in the land the subject of the notices of intention, by issuing a taking order under s 177 of the LA Act. If and when such an order is made, and issues arose with respect to the effect of such an order upon native title rights, resolution of those issues would no doubt involve the application of the provisions of the NT Act, and would no doubt involve the exercise of federal jurisdiction. However, those issues have not yet arisen, and do not fall to be determined in these proceedings.

62 The Minister also submits that because Mr McKenzie and Mr Roe base their claim to standing at least in part upon the claims to be part of the group which holds native title over the land the subject of the notices, and because such claims are regulated by the NT Act, this court is exercising federal jurisdiction. The answer to that submission lies in a consideration of the nature of the 'special interest' asserted by each of Mr McKenzie and Mr Roe, and in the nature of native title.

63 Neither Mr McKenzie nor Mr Roe assert any particular status, right or interest arising under the NT Act. They do not rely upon any status as a named claimant in proceedings brought under that Act on behalf of a larger group, nor do they assert that any determination has been made under the NT Act to the effect that any group has established a claim to native title over the land the subject of the notices. To the extent that the 'special interest' which they claim depends upon native title, it is not an interest which arises from any provision of the NT Act.

64 The loose bundle of rights grouped by the expression 'native title' find their origins in laws and customs which evolved prior to the assertion of sovereignty at the time of the colonisation of Australia and which are recognised by the common law of Australia - see ***Members of the Yorta Yorta Aboriginal Community v Victoria*** [2002] HCA 58; (2002) 214 CLR 422, [45] (Gleeson CJ, Gummow and Hayne JJ); ***Bodney v Bennell*** [2008] FCAFC 63; (2008) 249 ALR 300 [143]. The NT Act creates a legal regime for, amongst things, determinations as to whether or not native title rights are held over an area of land and if so, by whom. In the application of that statutory regime, it is the statutory definitions and provisions which are paramount, and which must be applied - see ***The State of Western Australia v Ward*** [2002] HCA 28; (2002) 213 CLR 1, [16]; ***Yorta Yorta*** [32] (Gleeson CJ, Gummow and Hayne JJ).

65 I reiterate that Mr McKenzie and Mr Roe do not assert any interest arising from any right or interest that has been recognised pursuant to the regime created by the NT Act. Rather, to the extent that the special interest which they assert relies upon native title, they claim to enjoy the rights arising from laws and customs which evolved prior to the assertion of sovereignty, and the recognition of those laws and customs by the common law of Australia.

66 In these proceedings Mr McKenzie and Mr Roe base their assertion of standing upon their claims to be members of a group which claims native title. They do not say that their claim to membership of the group has been definitively established although it has not been controverted in these proceedings. Nor do they assert that the group's claim to native title has been established. They assert that their claim to membership of the group, and the group's claim to hold native title are not spurious or colourable. In that context, they rely upon the fact that a claim has been registered on behalf of the group under the provisions of the NT Act. However, the fact of registration is not said to give rise, of itself, to any right or interest which they enjoy - rather, it is put no higher than providing some evidence that their claims are not spurious. It follows that

to the extent that their assertion of a 'special interest' depends upon their claim to native title, the rights to which they refer are the rights arising from the pre-sovereignty laws and customs recognised by the common law of Australia, not any right or status arising under the NT Act.

67 For these reasons, I reject the proposition that this court is exercising federal jurisdiction conferred upon it by s 39(2) of the *Judiciary Act*. However, for the reasons which follow, even if I am wrong in that view, I consider that Mr McKenzie and Mr Roe nevertheless have a sufficient interest in the validity of the notices issued by the Minister to invoke the jurisdiction of this court.

Is there a 'matter' before the court?

68 The second component of the Minister's argument on the issue of standing is the proposition that in order for there to be a 'matter' within the jurisdiction conferred upon this court by s 39(2) of the *Judiciary Act*, the justiciable controversy must involve the determination of some immediate right, duty or liability, and these proceedings lack that characteristic unless and until Mr McKenzie and Mr Roe have established to this court that they are members of a group which is the holder of native title interests over the land the subject of the Minister's notices.

69 Assuming, for the sake of this proposition, that the court is exercising federal jurisdiction in these proceedings (contrary to the view I have expressed), it does not follow that these proceedings do not involve the determination of a 'matter' as that expression is understood within the jurisprudence relating to federal jurisdiction. The issue raised in these proceedings with respect to the validity of the notices issued by the Minister involves determinations as to the duties of the Minister in relation to the notices which he issued, and the rights and obligations flowing from the issue of those notices. To take the most obvious example, if the notices issued by the Minister are invalid, the Minister has no right to issue a taking order in respect of any of the land referred to in those notices. There is no sense in which the substantive issue which arises for determination in these proceedings could be characterised as abstract or hypothetical. It is real and immediate, and the Minister's capacity to lawfully take any interests in any of the land identified in the notices depends upon its resolution.

70 The fallacy which underpins this aspect of the submissions put on behalf of the Minister is the proposition that the immediate right, duty or interest to be determined in a 'matter' must be a right, duty or interest of the applicant for relief. No authority was supported for that proposition,

and I am not aware of any. To the contrary, the cases to which I will shortly turn establish that standing to seek relief of the kind sought in these proceedings does not depend upon the vindication of any right or interest of the applicant for relief. The same fallacy underpins the third component of the Minister's submissions on standing, to which I will now turn.

Does standing depend upon an established right?

71 The third component of the Minister's submissions on the subject of standing is the proposition that as Mr McKenzie and Mr Roe are not the nominated applicants in a registered claim for the determination of native title interests, they should only be found to have sufficient interest in the validity of the notices issued by the Minister to invoke the jurisdiction of the court if they establish to this court that they are members of a group which holds native title in respect of the land the subject of those notices. It is submitted that an unresolved claim to native title does not provide a sufficient interest to invoke the jurisdiction of this court. It was put that in order to entertain these claims, is necessary for this court to effectively usurp the exclusive jurisdiction of the Federal Court of Australia with respect to determinations as to native title, and itself make a determination as to whether the Goolarabooloo/Jabirr Jabirr Peoples are the holders of native title in respect of the land the subject of the notices, and whether Mr McKenzie and Mr Roe are members of that group, notwithstanding the evident impracticality and hazards involved in that course.

72 Although the Australian law of standing has developed significantly over the 100 years or so, its framework is still to be found in the classic formulation of principle by Buckley J in ***Boyce v Paddington Borough Council*** [1903] 1 Ch 109, 114. Buckley J identified two scenarios in which a party might seek relief from the court arising from interference with a public right. The first was the scenario in which the interference with the public right also involved interference with the plaintiff's private right, in which case the plaintiff could sue for the vindication of that right. The second scenario is the scenario in which interference with the public right does not involve any interference with the private right of the plaintiff, but would cause the plaintiff to 'suffer special damage peculiar to himself'. Later cases have developed the second scenario identified by Buckley J as involving a circumstance in which the party invoking the jurisdiction of the court has some 'special interest' in the subject matter of the litigation, over and above the interest enjoyed by every member of the public: see for example, ***Onus v Alcoa of Australia Ltd*** [1981] HCA 80; (1981) 149 CLR 27.

73 The Minister's submission effectively seeks to confine Mr McKenzie and Mr Roe to the first scenario identified by Buckley J, that is to say, to require them to establish interference with a right which they currently enjoy - namely, the right to native title (along with other members of the native title holder group).

74 It was submitted on behalf of the Minister that the second scenario identified by Buckley J in ***Boyce*** has no application to these proceedings, because the provisions of the LA Act dealing with the compulsory acquisition of interests in land do not create or confer upon the public rights which are analogous to the right of the public in the protection of Aboriginal heritage with which the High Court was concerned in ***Onus***, or the right of the public in the protection of the environment with which the High Court was concerned in ***Australian Conservation Foundation Inc v Commonwealth*** (1980) 146 CLR 493, or, inferentially, the right of the public to be free from unauthorised hoardings with which the court was concerned in ***Boyce***. On behalf of the Minster it is submitted that because the legislation is concerned with the compulsory acquisition of interests in land, the only persons with a sufficient interest in the validity of actions taken under the legislation are those who have established that they have an interest in land the subject of the compulsory acquisition.

75 There are at least three reasons why this proposition must be rejected. First, apart from pointing to the character of the laws involved in some of the cases dealing with the second scenario identified by Buckley J, the Minister's submissions do not point to any authority to the effect that the principle is confined to legislation of any particular character being legislation which creates what might be characterised as 'public rights'. Although, perhaps predictably, the cases dealing with legislation of that character often refer to the enforcement of public rights, the cases are also replete with reference to the enforcement of public duties (see, as one of many examples, ***Onus***, 75 (Brennan J)). In the present case, Mr McKenzie and Mr Roe assert that the Minister has not performed the duties imposed upon him by s 171 of the LA Act when issuing the notices of intention to take. If they had established that they are members of a group which holds native title in respect of the land the subject of those notices, they would of course have standing to challenge their validity under the first limb identified by Buckley J in ***Boyce***. However, they are not confined to the first limb. If, as they assert, they have a special interest in the Minister's performance of the duties imposed upon him by s 171 of the LA Act, over and above the interest enjoyed by every member of the public in the Minister's compliance with the law, they will have sufficient standing to invoke the jurisdiction of the court.

76 The second reason for rejecting this aspect of the Minister's submission on standing is that it is not appropriate to characterise the provisions of the LA Act with respect to compulsory acquisition as being only concerned with private rights. The fact that there have been laws authorising the compulsory acquisition of interests in land for many years does not detract from the exceptional character of those laws. The enjoyment of rights and interests 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 interests 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. Accordingly, I would not characterise the public interest in due compliance with the law relating to compulsory acquisition of interests in land in any different way to the public interest in compliance with the laws relating to the protection of the environment or Aboriginal heritage, for the purposes of applying the law of standing.

77 The third reason for rejecting this aspect of the Minister's submissions on standing is that it is directly contrary to relevant High Court authority: ***Robinson v Western Australian Museum*** (1977) 138 CLR 283.

78 In that case, Mr Robinson claimed to have discovered the wreck of a Dutch vessel named Vergulde Draeck (or Gilt Dragon), which had blown off course and foundered on a reef on the west coast of Australia in 1656, near a place now known as Ledge Point. The *Museum Act 1969* (WA) purported to authorise the Western Australian Museum Board to take possession of historic shipwrecks, including any ship referred to in a schedule to that Act. The Gilt Dragon was amongst the vessels specified in that schedule. The Act prohibited any person from altering, removing, destroying or in any way dealing with any historic wreck vested in the Board. The general effect of the Act was therefore, to appropriate to the Museum, on behalf of the Crown in right of Western Australia, all property and right to possession of historic ships, including the Gilt Dragon.

79 Mr Robinson commenced proceedings in which he claimed that the *Museum Act* was beyond the legislative competence of the Parliament of Western Australia. In those proceedings he asserted, in his statement of claim, that he had discovered the wreck and had salvaged many valuable artefacts and coins from the wreck site. Mr Robinson also claimed to be entitled to the right to salvage the wreck, or to be entitled to compensation

for the loss of the right to salvage the wreck. It is important to note that at the time the High Court resolved the issue of standing in his favour, no determination had been made of his claim to have been the discoverer of the wreck or of his right to salvage or compensation.

80 The Museum asserted that Mr Robinson lacked standing to maintain proceedings challenging the validity of the relevant legislation. That assertion was rejected by a majority of the court, in varying terms.

81 Barwick CJ dealt with the question in the following passage:

> I can dispose briefly of the question of the plaintiff's interest to maintain his suit. It is said on behalf of the defendant that the plaintiff has no greater interest than any other member of the public to contest the validity of the Western Australian Acts. That proposition has been pressed upon us by the Solicitor-General for Western Australia. But I am clearly of the opinion that the plaintiff has a greater interest than any other member of the public to seek the assistance of the Court to determine the validity of the legislation. He located and relocated the remains of the ship and, in fact, he has done acts of possession in respect of it, ie of such possession of which such remains are capable. He has 'worked' the ship for a considerable period of time. He claims to have done such acts as would entitle him either to salvage in the strict sense of the word or to fair compensation for his efforts if the Acts in question were not operative. The salvage or compensation he claims to be payable by the Crown in whom the wreck is now vested. If the Acts are not valid the question by whom salvage or compensation might be payable would arise. But there is no need for me to decide which Crown or what other person or body is the person or body liable for salvage or compensation. There are various possibilities and their resolution cannot contribute to the resolution of this case. It is sufficient for present purposes that he has claimed to be entitled either to salvage or compensation.
>
> The Acts would prevent the plaintiff from seeking to assume possession or, if the right conclusion be that he has already been in possession, to continue possession, of the wreck. If valid, his claim to salvage or compensation would seem to be denied by the legislation. True it is that s 20B(3) of the 1959 Museum Act and its replacement in the 1969 Museum Act relates to the consequence of the vesting of the *Gilt Dragon* in the Board or Museum as the case may be. And it may be said that this vesting did not in terms place salvage or compensation beyond the reach of the plaintiff. But his ability to perfect his claim for salvage or compensation is clearly defeated by s 20B(5) of the 1959 Museum Act and its counterparts: and no power is given to the Board or the Museum to pay salvage or compensation nor is any right against the Board or the Museum created.
>
> The plaintiff is not merely in the position of a member of the public who falls within the prohibition of the statute. The Solicitor-General for

> Western Australia, in a somewhat colourful expression, suggested that the plaintiff had no greater interest than a weekend picnicker who happened to drop upon the wreck during his weekend leisure. But it seems to me that such a proposition is untenable. The contrast between the position of the plaintiff and that of the Solicitor-General's artless wanderer is so stark as to be eloquent of the plaintiff's peculiar interest in the operation and validity of the Acts. It is no exaggeration to say that no member of the public is affected to the same extent as is the plaintiff by the provisions of the Acts to which I have referred. I conclude that the plaintiff has a sufficient interest to maintain his suit (292 - 293).

82 Gibbs J took a different approach, and in the following passage held that the court had a discretion whether to proceed to determine the substantive issue, in cases in which the resolution of the claim as to standing would entail the trial of a complex collateral issue:

> The question whether a plaintiff has a sufficient interest to challenge the validity of legislation - an interest greater than that of any ordinary member of the public - may sometimes depend upon the resolution of controverted questions of law or fact. It may be clear enough that if the plaintiff has the right or interest which he claims, and if the legislation has the effect which he ascribes to it, the legislation, if valid, will so affect the plaintiff as to give him standing to sue, but it may be disputed that he has such a right or interest, or that the legislation has such an effect. In such a case it will be a matter for decision whether the court proceeds to determine the disputed questions whose only immediate relevance is to establish whether the plaintiff has standing to sue, or whether it will be satisfied to accord standing to the plaintiff on the ground that he asserts, not implausibly, that his interests are threatened by the operation of the legislation in question. The court has a discretion: it is not bound to take one course rather than the other. If the plaintiff's claim to have a *locus standi* is merely colourable, and can easily be exploded, the court will no doubt proceed immediately to decide the question of standing and, having decided it against the plaintiff, will dismiss the action. But if the investigation of the claim requires the consideration of weighty and complex questions, which may never fall for decision if the issue of validity is decided against the plaintiff, it may be more convenient to proceed immediately to determine the validity of the challenged statute. The court, in balancing the conflicting considerations, will remember that it cannot decide a question of validity as an abstract or hypothetical question. In the present case it is, in my opinion, more convenient to decide the questions of validity raised by the demurrer than to determine the difficult questions that need to be considered only for the purpose of deciding whether the plaintiff has *locus standi*. The facts that the Commonwealth and a number of States have intervened to argue questions of power from different points of view, and that the questions of validity have been very fully examined, in my opinion support the conclusion that those questions should be determined, and that the action should not be dismissed for want of standing (302 - 303).

83 Practical considerations of the kind relied upon by Gibbs J to proceed to deal directly with the substantive question are at least as significant in this case. As I have already observed, the proposition that this court's capacity to determine the substantive issue raised by Mr McKenzie and Mr Roe depends upon them establishing, in this court rather than the Federal Court, that they are members of a group who hold native title over the land in question is completely impractical and unworkable.

84 Mason J dealt with the matter in these terms:

> On the assumption that the plaintiff would have a claim for reimbursement by way of salvage for objects recovered from the wreck, an assumption which I shall examine presently, the operation of the *Museum Act* and the *Maritime Archaeology Act* in relation to the plaintiff is such as to give him, in my opinion, a sufficient *locus standi* to seek a declaration of invalidity of the two Acts. The rule is generally expressed in the proposition that a person not affected in his private rights may not sue for declaratory relief (***London Association of Shipowners and Brokers v London and India Docks Joint Committee*** [1892] 3 Ch 242 ; [1891-4] All ER Rep 462; ***London Passenger Transport Board v Moscrop*** [1942] AC 332 at 344; [1942] 1 All ER 97, and see Zamir, *The Declaratory Judgment* (1962), pp 247 et seq). Sometimes the rule is expressed more liberally, as it was by Gavan Duffy CJ, Starke and Evatt JJ in ***Anderson v Commonwealth*** (1932) 47 CLR 50 at 52, when their Honours said that the right of an individual to bring an action for an ultra vires declaration does not exist 'unless he establishes that he is "more particularly affected than other people" (see *Brice on Ultra Vires*, 2nd ed, p 366)'. The rule is said to be directed against multiplicity of actions. In truth it reflects a natural reluctance on the part of the courts to exercise jurisdiction otherwise than at the instance of a person who has an interest in the subject matter of the litigation in conformity with the philosophy that it is for the courts to decide actual controversies between parties, not academic or hypothetical questions. Reflection on the considerations which underlie the rule do not provide much assistance in defining the nature of the interest which a plaintiff must possess in order to have *locus standi*. However, it does indicate that the plaintiff must be able to show that he will derive some benefit or advantage over and above that to be derived by the ordinary citizen if the litigation ends in his favour. The cases are infinitely various and so much depends in a given case on the nature of the relief which is sought, for what is a sufficient interest in one case may be less than sufficient in another. Here the plaintiff does not seek performance of a public duty; nor does he assert that he will suffer special damage through interference with a public right - cases which are notorious for their difficulties. Here the legislation, if it is valid, deprives the plaintiff of a right of reimbursement which he would otherwise have or be entitled to claim. It also imposes obligations upon him to which he would not otherwise be subject. This is enough to support *locus standi* in an action

> for a declaration of invalidity. As Latham CJ said, with reference to Commonwealth legislation, in ***Toowoomba Foundry Pty Ltd v Commonwealth*** (1945) 71 CLR 545 at 570:
>
> > It is now, I think, too late to contend that a person who is, or in the immediate future probably will be, affected in his person or property by Commonwealth legislation alleged to be unconstitutional has not a cause of action in this Court for a declaration that the legislation is invalid.
>
> See also ***Crouch v Commonwealth*** (1948) 77 CLR 339 at 348-9, 353-4, 357, 359-60. There the fact that the plaintiff could not carry on his business as a car dealer without obtaining permits under the regulations to buy cars was held to give the plaintiff a *locus standi* to challenge the validity of the regulations (327 - 328).

85 It is significant to note that Mason J, like Barwick CJ expressly recognised the existence of an unresolved claim as creating a special interest in the validity of the legislation which would have an adverse impact on that claim over and above that enjoyed by the ordinary citizen. The same view was expressed by Jacobs J in the following passage:

> The plaintiff alleges in his statement of claim that he was the finder of the wreck; that he first found it on or about 6 August 1957; that subsequently he was unable to locate it for several years during which he searched for it by all available means; that in 1963 he led an expedition of search and on or about 14 April 1963 rediscovered the wreck. If it were not for the Western Australian legislation vesting the ship and articles recovered therefrom in the Museum (with exceptions in the case of articles which are not applicable: see s 6(2)(a) of the *Maritime Archaeology Act 1973* and its First Schedule) the plaintiff as the person who located the derelict would be entitled to claim salvage in a court of Admiralty on all property recovered from the derelict, in the past or in the future. If it was condemned unclaimed as a droit he would be entitled to an appropriate reward out of the droit: cf ***R v Two Casks of Tallow*** (1837) 3 Hagg 294 at 299. Whether or not he would recover salvage would be a matter for determination by the court in the light of the evidence as to the contribution which his location of the derelict made to the salving of it. But his right to claim is sufficient to give him a standing to challenge the validity of the Western Australian legislation which stands in the way of such a claim (340).

86 Murphy J resolved the matter on a more general basis [8]:

> The plaintiff has legal standing to maintain these proceedings. The defendant, claiming authority under the challenged State legislation, refuses to allow the plaintiff to work the wreck and, by its control of the wreck, effectively, prevents him from doing so. The State laws appear to debar his salvage claim. In ***Baker v Carr*** (1962) 369 US 186, 204 the

> United States Supreme Court stated that 'the gist of the question of standing' is whether the plaintiff has 'alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions'. (See also ***Flast v Cohen*** (1968) 392 US 83; ***Crouch v Commonwealth*** (1948) 77 CLR 339.

87 Stephen J dissented and would have dismissed the proceedings for lack of standing.

88 It can thus be seen that of the majority of five, three members of the court (Barwick CJ, Mason & Jacobs JJ) expressly held that the assertion of an unresolved claim which would be adversely affected by the legislation if valid, provided Mr Robinson with a sufficient interest, being a special interest over and above that enjoyed by every member of the public, to seek declaratory relief as to the validity of the legislation.

89 ***Robinson's*** case appears to me to be analogous to the present circumstances. Mr McKenzie and Mr Roe assert that they are a member of a group which holds native title over the land the subject of the Minister's notices. It is not suggested that their claims are spurious or colourable. The validity of the notices of intention issued by the Minister is an essential prerequisite to the issue of a taking order by the Minister, which could have effect of extinguishing the claims which Mr McKenzie and Mr Roe have, but which are not yet resolved, in the same way as the *Museum Act* would have precluded Mr Robinson's claim to salvage or compensation (but which had not been resolved). In my view I am bound to hold, consistently with ***Robinson*** that Mr McKenzie and Mr Roe have sufficient standing to seek declaratory relief in relation to the validity of the notices issued by the Minister.

Are the notices valid?

90 Section 171 requires that a notice of intention to take must include a description of the land required. The question of whether the inclusion of 'a description of the land required' is a condition of the validity of a Notice of Intention is a question of statutory construction to be resolved by reference to the particular provisions of the statute (***Project Blue Sky Inc v Australian Broadcasting Authority*** [1998] HCA 28; (1998) 194 CLR 355).

91 There are at least three reasons why s 171 of the LA Act should be construed as providing that the inclusion of 'a description of the land required' is a condition of the validity of any Notice of intention to take

issued pursuant to the LA Act. The first is the use of the imperative expression 'must' (cf s 56 *Interpretation Act 1984* (WA)). The second, and unequivocal indication that the legislature intended that failure to include 'a description of the land required' would result in invalidity of the notice is the express stipulation, by s 171(2), that a notice of intention to take issued in good faith is not invalidated by reason only that it contains an error or omission in the information required by pars (d), (e) or (f) of subsection (1), but which makes no reference to the requirement to include a description of the land required imposed by par (a).

92 The third reason for concluding that, as a matter of construction, the inclusion of 'a description of the land required' is a condition of the validity of the notice is the various other provisions of the Act which attach consequences to the issue of a notice, and to which I will shortly refer in the context of the construction of the expression 'description of the land'. In short, the significant consequences which flow from the issue of a notice of intention to take compel the conclusion that a description of the land required is a condition of the validity of any notice.

93 For these reasons, I have no hesitation in concluding that compliance with the requirement imposed by s 171 of the LA Act to include within the notices issued by the Minister 'a description of the land required' is a condition of the validity of those notices. The Minister did not submit otherwise.

94 The next question which arises is the proper construction of the expression 'a description of the land required' in the context of s 171 of the LA Act. On behalf of Mr McKenzie and Mr Roe it is submitted that the expression imposes a requirement to provide sufficient information within the notice to enable a reader to identify the boundaries of the land to be acquired. On behalf of the Minister it is submitted that the expression should be read as imposing no more than an obligation to provide sufficient information to meet the circumstances for which the information might be required in any individual case.

95 No authorities dealing with the construction of an expression of this kind in this or any analogous legislation have been cited or found. The only cases that the parties have been able to cite as possibly having some bearing on the question of construction are ***Scurr v Brisbane City Council*** (1973) 133 CLR 242 and ***Wilson v Secretary of State for the Environment*** [1973] 1 WLR 1083. Each of those cases involve the interpretation of planning legislation requiring notice of proposed developments to be given. Each case essentially stands for the

proposition that the legislation in question should be construed as requiring that degree of particularity in the notices which is necessary to meet the evident legislative purpose. That proposition appears to me, with respect, to be virtually self-evident, and nothing more than the specific enunciation of a general principle of statutory construction which requires the purpose and object of the relevant statutory provision to be taken into account.

96 A consideration of the purpose and object of the legislative requirement that a notice of intention to take include a description of the land required viewed in the context of the LA Act as a whole, compels the conclusion for which Mr McKenzie and Mr Roe contend - namely, that the notice must contain sufficient information to inform any reader of the boundaries of the land to be acquired. That is essentially because the consequences, under the LA Act, of the issue of a notice of intention to take are profound. Unless the notice contains sufficient information to enable the boundaries of the land to be acquired to be identified, the legal consequences of any notice will be redolent with uncertainty. It would be perverse to attribute that objective to the legislature.

97 I will refer again briefly to the legal consequences which flow from the issue of a notice of intention to take by the Minister. First, any transaction affecting land which is included within the notice is prohibited without the written consent of the Minister. Second, any building or the making of any improvement to the land cannot be commenced or continued without the prior written approval of the Minister. Third, the Minister may authorise a person to enter on land included in a notice for the purpose of inspecting the land at any reasonable time.

98 These are all significant restrictions upon the rights which attend the ownership of an interest in land. In order to ascertain whether, in any particular case, a transaction or improvement work is prohibited, or a person authorised by the Minister has a right of entry, it is essential to be able to identify the boundaries of the land the subject of the notice.

99 There are other provisions of the LA Act which compel the same conclusion. Under s 170 of the LA Act, the Minister is obliged to serve notice on the proprietors and occupiers of any land affected by the notice. The precise content of that obligation, and the question of whether it has been performed, can only be ascertained and resolved if the boundaries of the land are known. Similarly, under s 175 of the LA Act, rights of objection are given to the proprietors and occupiers of the land the subject of the notice, amongst others. Whether or not a particular individual has a

right of objection may, in a particular case, depend upon the boundaries of the land to be acquired. The same section requires an objector to 'identify the land and to specify the nature of their interest in the land'. Unless the objector has information which enables the boundaries of the land to be acquired to be identified, that obligation is incapable of performance.

100 Section 175 of the LA Act also obliges any objector to specify their grounds of objection. Unless the objector knows with certainty the land which the Minister intends to acquire, it will be difficult to include all relevant grounds of objection, and unreasonable to expect the objector to be able to do so. To take an obvious example from the circumstances of the present case, the uncertainty with respect to the boundaries of the land which the Minister intended to acquire made it impossible for any of the objectors who lodged objection in response to the Minister's notice to ascertain whether or not the Minister was intending to acquire land of particular cultural heritage significance.

101 Finally, s 177 requires that a taking order issued by the Minister must be 'consistent with the notice of intention'. Given the process of objection created by the LA Act, the purpose of a requirement that the taking order be consistent with the notice of intention to take is obvious. However, unless the notice of intention identifies the boundaries of the land which it is intended to acquire, it is difficult to see how the question of whether any particular taking order is consistent with any preceding notice of intention to take could ever be definitively resolved.

102 The legislative context of s 171 of the LA Act, and the consequences which flow from the issue of a notice of intention to take compel the conclusion that it is a condition of the validity of any such notice that it contain sufficient information to enable the reader to identify the boundaries of the land to be acquired. There is no support within the LA Act for any contrary view.

103 The three notices issued by the Minister in this case do not contain information which would enable the boundaries of the land to be acquired to be identified. The only boundaries identifiable in those notices are of larger parcels of land within which the smaller areas of land to be acquired will be found. However, beyond the fact that the land to be acquired is somewhere within that larger parcel, the notices do not identify the boundaries and do not therefore comply with s 171(1)(a) of the Act. As compliance with that requirement is a condition of the validity of the notices, it follows that they are invalid.

104 The construction which I have given to the expression 'description of the land required' is sufficient to dispose of the substantive issue in the case. However, even if I had accepted the construction of that expression for which the Minister contended, I would, nevertheless, have arrived at the conclusion that the notices were invalid, for the following reasons.

105 The Minister submitted that the degree of specificity required in a notice of intention to take with respect to the land to be acquired depends upon the circumstances prevailing in the location where the relevant land is situated. In the course of written submissions, the Minister accepted that a notice of intention to take which advised readers that 200 ha would be taken from somewhere within a larger parcel of 2,000 ha of closely developed urban land would be invalid. On behalf of the Minister, it was submitted that the land in the vicinity of James Price Point is very different in character to closely developed urban land, being remote, undeveloped and unallocated Crown land. These characteristics of the land are said to justify a level of uncertainty in the description of the land to be acquired which could not be justified in an urban environment.

106 Counsel for Mr McKenzie and Mr Roe described this submission as patronising. While I quite accept that the submission was not intended by either the Minister or counsel representing the Minister to have that characteristic, counsel's criticism appears to me to have some force. There is no reason to suppose that the precise location of the boundaries of the land in respect of which it is proposed to extinguish native title rights in the vicinity of James Price Point is any less important to the group who claim to have the bundle of rights associated with that title (which they claim they and their ancestors have used and enjoyed since time immemorial) than the precise location of the boundaries of land proposed to be acquired would be to those with an interest in that land in an urbanised environment.

107 The right of objection is a vital attribute of the process which precedes the compulsory acquisition of interests in land under the LA Act, as counsel for the Minister acknowledged. In this case, various objections were in fact lodged by those who claim an interest in the land as members of the group of native title holders. They were required to specify their grounds of objection. It is reasonable to suppose that those grounds of objection, and the force with which the grounds could be expressed, would be significantly influenced by the precise identification of the boundaries of the land to be taken. The precise boundaries of the land to be taken is likely to impact significantly upon the extent to which the taking will interfere with the customs, practices and way of life of the

group who claim to be the traditional owners of the land. The impact upon their traditional role as custodians of the land will be no doubt be affected by the question of the extent to which the land taken will cross song lines or, for example, involve the taking of middens, or lands upon which an ancestor or ancestors have been buried, or which are associated with particular cultural practices. The failure of the notices to identify with precision the boundaries of the land proposed to be taken placed an impossible burden upon the objectors, the practical effect of which was to preclude them from drawing attention to the matters to which I have referred in their notices of objection. The information contained in the notices with respect to the land to be acquired was insufficient to satisfy the evident legislative objective of providing those with an interest in that land with meaningful right of objection to the acquisition.

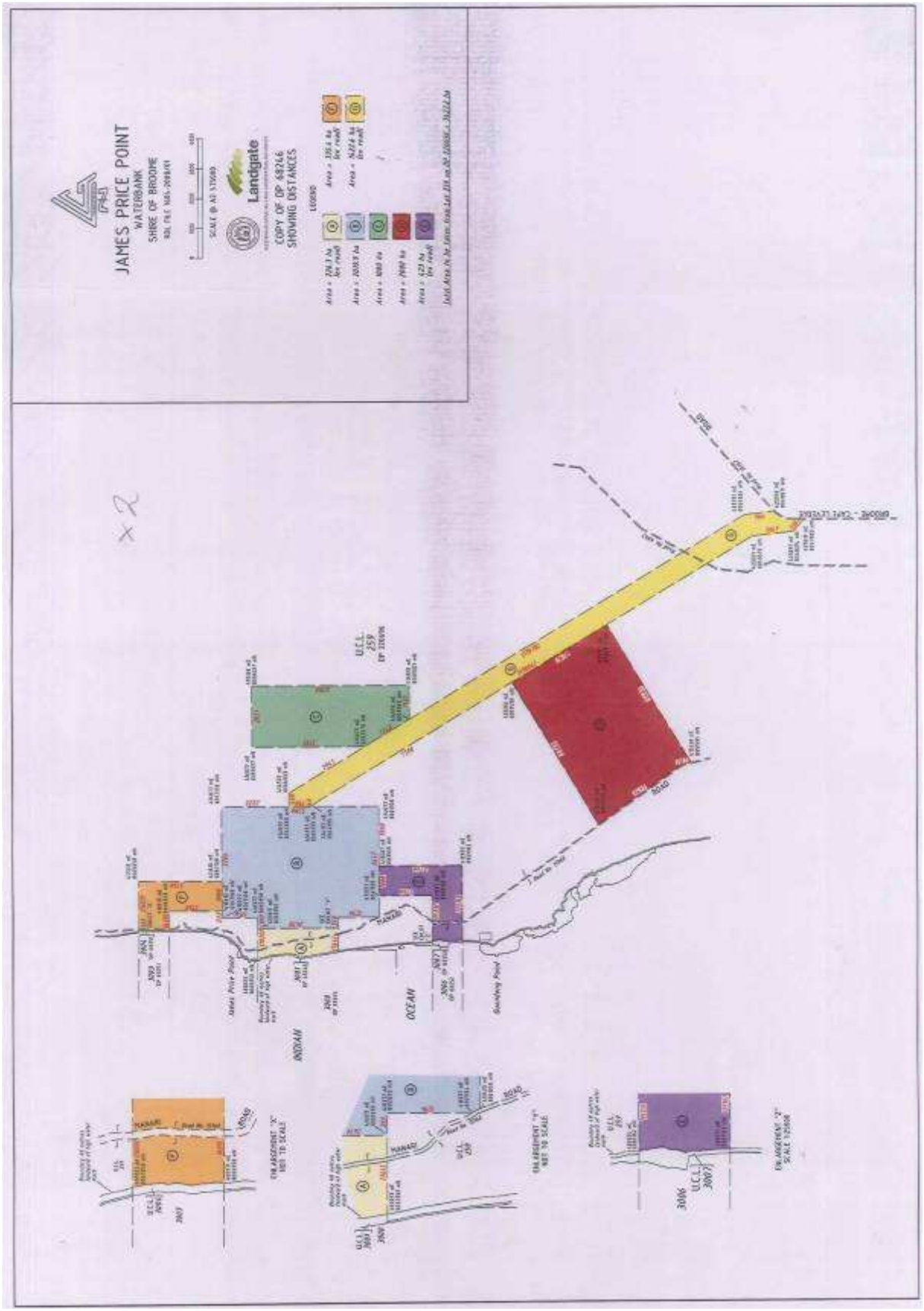
108 Counsel for the Minister sought to overcome this difficulty first by asserting that the grounds of objection could have covered all aspects of cultural significance within the larger envelopes from which the land to be acquired would be taken. However, that proposition, with respect, imposes an unrealistic and unreasonable burden upon those who were charged with the responsibility of exercising the right to object on behalf of the group who claim to be native title holders. To take the example given by counsel for the Minister, to require those objectors to undertake detailed historical, cultural and ethnographic analysis of an entire envelope of 2,000 ha, when only 200 ha is to be taken, is so obviously unreasonable, in my view, as to fall well short of achieving the legislative purpose evident in the procedure which enables objections to be lodged in respect of land the subject of a notice of intention to take.

109 Counsel for the Minister next asserted that the objectors' difficulty was more theoretical than real because development of the land could only take place in accordance with the provisions of the *Aboriginal Heritage Act 1972* (WA) (the AH Act). It is certainly true that the AH Act provides a measure of protection to places and sites of Aboriginal heritage value. It is also true that the Minister responsible for that Act has a discretion to permit actions which include the development and desecration of sites of Aboriginal heritage value. The question of whether or not native title rights including the right to continue use and enjoyment of such a site had been extinguished would be relevant to the exercise of that discretion. It is unreasonable to suggest that in this case, the objectors had no interest in whether the land to be taken would include sites of particular significance because they could be confident that such sites would be protected from development under the AH Act.

110 Accordingly, even if I had accepted the submission made on behalf of the Minister to the effect that the proper construction of s 171(1)(a) of the Act was ambulatory in nature, such that the specificity required depended upon the circumstances and character of the area in which the land was to be taken, I would, nevertheless, have concluded that the notices issued by the Minister did not contain 'a description of the land required' which conformed to the requirements of s 171 and that they were invalid.

Conclusion

111 The three notices of intention to take issued by the Minister are invalid because they do not contain 'a description of the land required'. Mr McKenzie and Mr Roe have a sufficient interest in the validity of those notices to invoke the jurisdiction of the court. Their claims are upheld, and there will be declarations as to the invalidity of the notices. I will invite submissions from counsel as to the precise terms of those declarations.


JAMES PRICE POINT
WATERBANK
SHIRE OF BROOME
COPY OF DP 68246
SHOWING DISTANCES
Landgate
x 2

LAND AREAS TO LOW WATER MARK	NOITT	DEPOSITED PLANS	TOTAL AREA NOTIFIED (APPROX. ha)	AREA REQUIRED (APPROX. ha)	AREA OF LAND REQUIRED AS A PERCENTAGE OF AREA NOTIFIED (i.e. within the described 'envelope')
Port	Infrastructure Notice [s. 24MD (6A & 6B)] parcel No 1	68245 & 68246 (area marked A)	240.31	110	45.8% of the land inside the envelop
LNG Processing Precinct (LNGPP)	Precinct Notice [s. 29] parcel No 1	68246 (area marked B)	2019.0	1980	98% of the land inside the envelope
Third Party Contractor Site (TPCS)	Precinct Notice [s. 29] parcel No 2	68246 (area marked C)	1000	200	20% of the land inside the envelope
Workers Accommodation Site (WAS)	Precinct Notice [s. 29] parcel No 3	68246 (area marked D)	2000	200	10% of the land inside the envelope
Pipelines Corridor (South)	Infrastructure Notice [s. 24MD (6A & 6B)] parcel No 3	68246 (area marked E) & 68252	435.197	245	56.3% of the land inside the envelope
Pipelines Corridor (North)	Infrastructure Notice [s. 24MD (6A & 6B)] parcel No 3	68246 (area marked F) & 68251	340.377	200	58.8% of the land inside the envelope
Road Corridor • Road to LNGPP (100m) • In TPCS (100m) • In WAS (110m)	Roads Notice [s. 24MD (6A)]	68246 (area marked G) 68246 (area C &/or D) 68246 (area D &/or G	1422.6 2422.6 3422.6	191 40 60	13.4% of the land inside the envelope 1.65% of the land inside the envelope 1.75% of the land inside the envelope
Services Corridor • Road to LNGPP (90m) • In TPCS (60m) • In WAS (60m)	Infrastructure Notice [s. 24MD (6A & 6B)] parcel No 2	68246 (area marked G) 68246 (area C &/or G) 68246 (area D &/or G)	1422.6 2422.6 3422.6	172 24 36	12% of the land inside the envelope .99% of the land inside the envelope 1.05% of the land inside the envelope