

**SUPREME COURT OF THE AUSTRALIAN CAPITAL TERRITORY
FULL COURT**

Case Title: Calvary Health Care ACT Ltd v Australian Capital Territory

Citation: [2023] ACTSCFC 1

Hearing Date: 7 June 2023

Decision Date: 9 June 2023

Reasons Date: 23 June 2023

Before: McCallum CJ, Mossop and Baker JJ

Decision: See [128]

Catchwords: **CONSTITUTIONAL LAW** – Acquisition of property – legislative power of the Legislative Assembly under the *Australian Capital Territory (Self-Government) Act 1988* (Cth) does not include power to acquire property other than on just terms – interpretation of *Health Infrastructure Enabling Act 2023* (ACT) which compulsorily acquires a hospital and its assets – statute containing provision requiring just terms to be provided to persons whose interests are acquired under the Act – whether stated obligation to provide just terms is enforceable – whether obligation extends to all acquisitions of property under Act – whether other terms of statute imposing obligations on person whose property is to be acquired render the acquisitions not on just terms – Act not beyond legislative power of the Legislative Assembly

STATUTORY INTERPRETATION – Acquisition of property – provision requiring just terms to be provided for acquisition of property – whether enforceable or merely exhortatory or aspirational – provision to be interpreted to give effect to purpose of legislation and maintain its validity

JURISDICTION OF COURTS – Statutory obligations – statutory obligation to provide just terms for acquisition of property – whether provision enforceable – obligation enforceable in superior court of general jurisdiction

Legislation Cited: *Australian Capital Territory (Self-Government) Act 1988* (Cth) ss 22, 23(1)(a)
Health Act 1993 (ACT), s 23
Health Infrastructure Enabling Act 2023 (ACT), ss 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, Sch 1, Sch 2
Health Infrastructure Enabling Regulation 2023 (ACT)
Health Records (Privacy and Access) Act 1997 (ACT), s 22
Information Privacy Act 2014 (ACT)
Lands Acquisition Act 1994 (ACT), ss 6(1)(c), 17, 78
Legislation Act 2001 (ACT), ss 120, 139, 146
Limitation Act 1985 (ACT)
Migration Act 1958 (Cth), s 357A(3)

Northern Territory National Emergency Response Act 2007 (Cth), s 60
Planning and Development Act 2007 (ACT), s 27
Public Unleased Land Act 2013 (ACT)
Supreme Court Act 1933 (ACT), s 13(2)

Cases Cited:

Anthony Hordern & Sons Ltd v Amalgamated Clothing And Allied Trades Union of Australia (1932) 47 CLR 1
Bank of New South Wales v The Commonwealth (1948) 76 CLR 1
Board v Board [1919] AC 956
Cowell v Rosehill Racecourse Co Ltd (1937) 56 CLR 605
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JT International SA v Commonwealth [2012] HCA 43; 250 CLR 1
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Mutual Pools & Staff Pty Ltd v The Commonwealth [1994] HCA 9; 179 CLR 155
Plaintiff M70/2011 v Minister for Immigration and Citizenship [2011] HCA 32; 244 CLR 144
Project Blue Sky Inc v Australian Broadcasting Authority [1998] HCA 28; 194 CLR 355
R v Toohey; Ex parte Meneling Station Pty Ltd (1982) 158 CLR 327
Re Totalisator Administration Board of Queensland [1989] 1 Qd R 215
Residual Assco Group Ltd v Spalvins [2000] HCA 33; 202 CLR 629
Royal Insurance Co Ltd v Mylius (1926) 38 CLR 477
Saeed v Minister for Immigration and Citizenship [2010] HCA 23; 241 CLR 252
Smith Kline & French Laboratories (Aust) Ltd v Secretary, Department of Community Services and Health (1990) 22 FCR 73
Sunbird Plaza Pty Ltd v Maloney (1988) 166 CLR 245
United States v Hutcheson 312 US 219 (1941)
Wainohu v New South Wales [2011] HCA 24; 243 CLR 181
Wurridjal v The Commonwealth [2009] HCA 2; 237 CLR 309

Texts Cited

J D Heydon, *Heydon on Contract* (Lawbook Co, 2019)

Parties:

Calvary Health Care ACT Limited (Plaintiff)
Australian Capital Territory (Defendant)

Representation:

Counsel

D Williams SC with B Kaplan and C Langford (Plaintiff)
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Solicitors

Thomson Geer (Plaintiff)

File Number: SC 225 of 2023

THE COURT:

Introduction

1. These proceedings involve a challenge to the validity of the *Health Infrastructure Enabling Act 2023* (ACT) (the Act). The Calvary Hospital has been operated by the plaintiff, Calvary Health Care ACT Limited, as a public hospital on a Crown lease in Bruce for many years. The purpose of the Act is to acquire part of the leased land on which Calvary Hospital is situated in order to allow the defendant, the Australian Capital Territory, to build a new public hospital. The Act seeks to do so in a manner which allows the Calvary Hospital to be taken over and run as a public hospital by the defendant. The Act would have the effect of acquiring the land on which the Calvary Hospital operates as well as the assets of the hospital. It would terminate an agreement between Calvary and the Territory relating to the operation of the hospital as a public hospital. Excluded from the acquisition is that part of the relevant lease on which private facilities operated by Calvary have been built.
2. The validity of the Act was challenged by Calvary on the ground that the Act, or parts of it, were beyond the power of the Legislative Assembly to enact. That was said to be because notwithstanding the grant of power to the Legislative Assembly to make laws for the peace, order and good government of the Territory in s 22 of the *Australian Capital Territory (Self-Government) Act 1988* (Cth), provisions of the Act fall within the scope of s 23(1)(a) of the *Self-Government Act* which provides:

23 Matters excluded from power to make laws

- (1) Subject to this section, the Assembly has no power to make laws with respect to:
 - (a) the acquisition of property otherwise than on just terms;
 - ...

Procedural history

3. The Bill for the Act was presented to the Legislative Assembly on 11 May 2023. It was debated on 31 May 2023 and passed on that day. It was notified in the Legislation Register and commenced on 2 June 2023. Regulations for the purposes of the Act, the *Health Infrastructure Enabling Regulation 2023* (ACT) (the Regulations) were notified and came into effect on the same day.

4. On 31 May 2023, the same day the Bill was being debated in the Assembly, Calvary commenced proceedings by Originating Application seeking a declaration that the Act and the Regulations were both invalid and interlocutory orders preventing the Defendant from exercising any right under the Act or Regulations until the proceedings could be finally heard. This application came before McCallum CJ on 1 June 2023, after the Act had been passed but before it commenced. Her Honour did not grant an interlocutory injunction on that occasion but instead listed the matter for final hearing before herself on 7 June 2023. Subsequently, without opposition from the parties, her Honour made an order under s 13(2) of the *Supreme Court Act 1933* (ACT) that the jurisdiction of the court be exercised by a Full Court.
5. The proceedings were heard on 7 June 2023 by the court as presently constituted. At the commencement of the hearing Calvary filed, by leave, an Amended Originating Application dated 7 June 2023. The court indicated that it would address, in the first instance, the validity of the Act and defer for later consideration the validity of the Regulations. Neither party opposed the adoption of that course. It was a course which was adopted because if the Act was invalid then it was not necessary to consider the Regulations. On the other hand, if the Act was valid it would have the effect of acquiring property on 3 July 2023 and it was appropriate, if possible, to determine the validity of that process in advance of that date. If the Act was valid then the validity of the Regulations, which did not affect the acquisition on 3 July 2023, could be considered on a less urgent basis.
6. On 9 June 2023 Mossop J pronounced the orders of the court (set out at the conclusion of these reasons) which dismissed Calvary's challenge to the validity of the Act and reserved the court's reasons. The challenge to the validity of the Regulations was not, at that point, determined. These are the court's reasons for dismissing the challenge to the validity of the Act.

Overview of the Act

7. The Act has six parts. The long title of the Act is "An Act enabling the acquisition on just terms of land and other property for a public hospital, and for other purposes".
8. Part 1 is entitled "Preliminary". Significantly, it includes an express statement of the purposes of the Act. Section 5 provides:

5 Purposes of Act

The purposes of this Act are to—

- (a) enable the Territory to acquire the public hospital land for the construction of a public hospital; and

- (b) enable the transition of the operation of the public hospital to the Territory, including by terminating the network agreements; and
 - (c) provide for the safe and orderly transition of the operation of the public hospital to the Territory, including by—
 - (i) enabling the Territory to acquire the public hospital assets; and
 - (ii) providing for the transition of employment of public hospital employees to the Territory; and
 - (i) providing for the novation and assignment of public hospital contracts to the Territory; and
 - (d) ensure the continued operation of, and maintenance of service delivery standards at, the public hospital during and after the transition; and
 - (e) ensure the Territory can, after the transition, effectively manage its obligations and liabilities in relation to the operation of the public hospital, including liabilities arising in relation to the operation of the public hospital before the transition; and
 - (f) ensure that interests acquired under this Act are acquired on just terms.
9. Section 6 excludes the application of certain other Territory laws. Most significantly, it excludes the operation of the *Lands Acquisition Act 1994 (ACT)*.
 10. Part 2 has the most significant provisions relating to acquisition of property. Section 7 identifies the “acquisition day” as 3 July 2023 but provides that the Executive may, before 3 July 2023, give notice that the acquisition day is an earlier or later date.
 11. Section 8 provides for the acquisition of Calvary’s interest in the “public hospital land”. Through a number of definitions in the Dictionary the expression “public hospital land” is defined as that part of Block 1 Section 1 Division of Bruce which is not “private hospital land”. “Private hospital land” is defined by reference to the plan shown in Schedule 1 to the Act. In substance it shows an area within Calvary’s existing lease which contains a private hospital and clinic which is not to be acquired by the Territory. Section 8 provides that Calvary’s interest in the public hospital land vests in the Territory on the acquisition day (s 8(1)(a)) and is freed from any trust, restriction, dedication, reservation, obligation, charge, encumbrance, lien, contract, licence, rate or any other interest (s 8(1)(b)). An interest in land “divested extinguished or diminished” by s 8(1)(b) “is taken to have been acquired by the Territory under this Act” (s 8(2)).
 12. Section 9 provides, in similar terms, for the acquisition of the “public hospital assets”. “[P]ublic hospital assets” is an expression defined in the Dictionary. It includes a variety of assets of types specified in the definition. They include the “public hospital stock” being the stock in trade and inventory of the public hospital, motor vehicles used for the public hospital and any asset purchased for the public hospital or a public health service before the acquisition day.

13. Section 10 provides that the Territory “must provide just terms to a person from whom an interest is acquired under this Act”: s 10(1). “[I]nterest, in the public hospital land or a public hospital asset” is defined broadly in the Dictionary to the Act. In addition to “the legal or equitable estate or interest in the public hospital land or a public hospital asset” it includes “any other right ... , charge, power or privilege over, or in connection with, the public hospital land or a public hospital asset or an interest in the public hospital land or a public hospital asset”.
14. The definition of “interest” in the Act is limited to interests “in the public hospital land or a public hospital asset”. In the event that other forms of property are acquired, the more general definition of “[i]nterest” in the *Legislation Act 2001* (ACT) will apply. It provides as follows:

interest, in relation to land or other property, means—

 - (a) a legal or equitable estate in the land or other property; or
 - (b) a right, power or privilege over, or in relation to, the land or other property.
15. Section 10(2) identifies some specific matters for which “reasonable compensation” must be paid. Matters included in the concept of “compensation” are set out in s 10(5). Section 10(3) provides a regulation-making power which includes power to make regulations about how just terms for an interest acquired under the Act are provided, how claims for compensation are dealt with and how any dispute about working out compensation is resolved. The scope and proper interpretation of s 10 is discussed in more detail below.
16. Part 3 of the Act is entitled “Acquisition and transition of public hospital operations”. It comprises ss 11-13. Section 11 gives a power exercisable before the acquisition day to an “authorised person” to enter on the hospital land and exercise various powers, which may be generally described as investigation and information-gathering powers, in anticipation of the acquisition of the hospital: s 11(1). An obligation is imposed upon Calvary to give the authorised person reasonable assistance, including access to secured areas of the public hospital, and show the authorised person where records, equipment or other assets are kept: s 11(2)-(3).
17. Section 12 empowers the director-general to request documents or other information from Calvary about a wide range of listed matters relevant to the operation of the public hospital: s 12(1). The provision is not limited to the period prior to the acquisition day. Calvary has an obligation to comply with a request for information and provide it in any stated format or way: s 12(3).

18. Section 13 imposes obligations on both Calvary and the Territory to act in good faith, cooperate and do all other things reasonably necessary to ensure the safe and orderly transition of the operation of the public hospital to the Territory and the continued operation of and maintenance of service delivery standards at the public hospital: s 13(1). Section 13(2) imposes obligations on Calvary to do various things relating to the transfer of the operation of the public hospital to the Territory. These include cooperating with the Territory to develop “a transition plan” for the transfer of the operation of the public hospital, provide all reasonable assistance to enable the Territory to obtain all licences and authorisations required by law to operate the public hospital and provide reasonable access to any records management information technology systems used for public patient health records, employee and payroll records, financial and other operations management records. There is an equivalent obligation on the Territory to cooperate with Calvary to develop the transition plan and ensure that any disruption to Calvary’s operation of facilities on the private hospital land is minimised. The obligations in s 13 are not confined to the period prior to acquisition day.
19. Part 4 of the Act is entitled “What happens on or after acquisition day”. It contains ss 14-19. Section 14 provides that on the acquisition day a number of things happen. The first is that the Crown lease for the hospital is amended as provided by s 19: s 14(1)(a). The operation of s 19 is described below. The second is that the “network agreements” are terminated: s 14(1)(b). The Dictionary defines “network agreement” as including four categories of agreement. They include:
- (a) the agreement between the Territory and Calvary dated 7 December 2011;
 - (b) the “Bruce Health Care Precinct Deed” between the Territory and Calvary dated on or about 7 December 2011;
 - (c) the New Public Hospital Agreement, which is an agreement contemplated by the agreement in (a) that may come into operation as a result of a dispute between Calvary and the Territory; and
 - (d) any other agreement prescribed by regulation but not an agreement excluded by regulation.
20. The third is that obligations are placed on Calvary to vacate the hospital land and do various other specified things in order to achieve the transition of the operation of the public hospital to the Territory and the continued operation and maintenance of service delivery standards at the public hospital: s 14(1)(c).
21. Section 14(2) provides a regulation-making power which includes a power to make regulations relating to the offer of employment by the Territory to public hospital

employees and regulations relating to the novation or assignment of “public hospital contracts” or “other arrangements” in relation to such contracts.

22. Section 15 provides for the granting of reciprocal licences by the Territory and Calvary to enter the public hospital land and the private hospital land respectively for the purposes of the Act and the continued operation of the public hospital and facilities on the private hospital land.
23. Section 16 provides a power to the Territory to grant to Calvary a licence to operate the public hospital on and from the acquisition day “to ensure the continued operation of, and maintenance of service delivery standards at, the public hospital” while matters required to be done under Pt 4 are done: s 16(1). The terms of that agreement are as agreed between the Territory and Calvary: s 16(2).
24. Section 17 provides a power to the director-general to obtain access to certain information held by Calvary after the acquisition day. The categories of information relate to:
 - (a) past, current or future investigations or proceedings in relation to the operation of the public hospital before the acquisition day: s 17(a)(i);
 - (b) the employment of public hospital employees before the acquisition day including in relation to their rights and entitlements; and
 - (c) any other thing prescribed by regulation: s 17(1)(a)(ii).
25. There is also a power to request Calvary do anything reasonably required to store and retain information in those categories: s 17(1)(b). Calvary is obliged to comply with such a request: s 17(3).
26. Sections 18 and 19 relate to amendment of the Crown lease. Section 18 requires the Territory to prepare a draft deposited plan substantially in accordance with the plan at Sch 1 of the Act or otherwise as agreed in writing between the Territory and Calvary. Schedule 1 describes the “Private Precinct Area” which includes the Calvary Clinic and the Calvary Private Hospital. It is this area which is to be retained as part of the Crown lease held by Calvary. Section 19 statutorily amends the Crown lease over Block 1 Section 1 Division of Bruce so that it only applies to the area identified on the plan prepared under s 18.
27. Part 5 of the Act is headed “Miscellaneous”. As its heading suggests, it contains provisions dealing with a variety of different matters.

28. Section 20 provides that certain acts relating to the preparation and presentation of the Bill for the Act do not constitute a repudiation or breach of a “network agreement”: s 20(1). It prevents Calvary from bringing any claim against the Territory for repudiation or breach of a network agreement but does not limit any right of a person to compensation for an acquisition under s 10: s 20(2)-(3).
29. Section 21 provides that if Calvary cannot comply with a requirement of the Act then a “related corporation” of Calvary nominated in writing by the Territory must comply with that requirement or ensure another related corporation does so. “[R]elated corporation” is defined in the Dictionary as meaning “a related body corporate, associate or related entity under the Corporations Act”.
30. Section 22 provides that the transfer of information in a public patient health record or personal information about a public hospital employee does not constitute a breach of the *Health Records (Privacy and Access) Act 1997 (ACT)* or the *Information Privacy Act 2014 (ACT)*.
31. Section 23 provides that references in the Act to the “director-general” means the director-general for the purposes of the *Health Act 1993 (ACT)* and provides a power of delegation.
32. Section 24 provides a power to the Supreme Court to stay proceedings of a security holder which holds security over property acquired under the Act or property not acquired under the Act. It also allows the court to enjoin the security holder from commencing or continuing such proceedings.
33. Section 25 provides a power to the Magistrates Court to make orders enforcing compliance with ss 11, 12, 13, 14 or 17(3).
34. Section 26 provides that a payment made by or on behalf of the Territory to a person under the Act is a good and valid discharge and the Territory is not bound to see the application of any money paid or to the performance of any trust.
35. Section 27 provides that the Planning and Land Authority (established under the *Planning and Development Act 2007 (ACT)*) may execute any instrument or other document for and on behalf of the Territory relating to an acquisition of land under the Act.
36. Section 28 is a regulation-making power in general terms.
37. Section 29 repeals an instrument relating to the road transport legislation. Section 30 contains some consequential amendments to other legislation.

38. Schedule 1 to the Act is the plan showing the “Private precinct area” for the purposes of ss 18-19. Schedule 2 contains some uncommenced amendments.

Relationship between the Act and Regulations

39. Calvary contended that its primary challenge was to the validity of the Regulations but that those regulations cannot be divorced from the provisions in the Act. It submitted that the Act and the Regulations needed to be considered together and that if the scheme in the Act and the Regulations for the acquisition of Calvary’s business was not on just terms then the legislation as a whole was invalid.
40. Such an approach did not pay appropriate regard to the distinction between the Act and the Regulations. Clearly, if the Act was invalid as a whole then the Regulations, being subordinate laws made pursuant to the Act, would also be invalid. However, the converse is not necessarily the case. It would be possible for the Regulations to be invalid either in whole or in part, yet the Act not equivalently invalid. It would only be if the drafting of the Act was such that it was dependent for its validity upon the validity of the Regulations that the position contended for by Calvary would apply. As will become apparent, the Act is not drafted in a way which makes its validity contingent upon the validity of the Regulations. Therefore, it is possible to consider the Act separately from the Regulations.
41. As a consequence, it was possible to adopt the approach that was taken at the hearing of the proceedings to address the validity of the Act separately from the validity of the Regulations.

Issues

42. The Amended Originating Application seeks declarations that the Act and Regulations are both invalid. As indicated above, the court first considered the validity of the Act. In the event that the Act as a whole was not invalid then the Amended Originating Application contended that ss 11, 12, 13, 14(1)(c),14(2), 15, 17, 20 and 25 of the Act were invalid. It is convenient to consider the challenged provisions of the Act individually before considering the challenge to the validity of the Act as a whole. However, in order to assess the merits of the challenge to the validity of the various provisions of the Act, it is necessary first to address Calvary’s submissions in relation to the operation of s 10 of the Act.

Interpretation of s 10

Is s 10(1) merely aspirational?

43. Fundamental to the submissions made by Calvary was the proposition that s 10 of the Act was an “aspirational” rather than enforceable provision. Section 10 provides:

10 Acquisition must be on just terms

- (1) The Territory must provide just terms to a person from whom an interest is acquired under this Act.
- (2) Without limiting subsection (1), just terms for the acquisition includes reasonable compensation for the following:
 - (a) the acquisition of Calvary's interest in the public hospital land;
 - (b) any security right or other interest in land taken to have been acquired under section 8(2);
 - (c) the acquisition of the public hospital assets;
 - (d) any security right or other interest in a public hospital asset taken to have been acquired under section 9(2);
 - (e) things arising as a consequence of an acquisition mentioned in paragraphs (a) to (d) including the following:
 - (ii) the termination of the network agreements under section 14(1);
 - (iii) the termination of any public hospital contract or other contract because of the operation of this Act;
 - (iv) any redundancy or similar payment payable by Calvary to a public hospital employee because of the operation of this Act;
 - (v) anything else prescribed by regulation.
- (3) A regulation may provide for the following matters:
 - (a) how just terms for an interest acquired under this Act are provided;
 - (b) how compensation is worked out;
 - (c) how claims for compensation are made and dealt with;
 - (d) a time limit within which a claim for compensation may be made;
 - (e) information or other things required from a person claiming compensation that is needed to assess their claim and work out any compensation;
 - (f) how any dispute about working out compensation is resolved;
 - (g) how compensation is paid;
 - (h) any other matter relevant to providing just terms to a person from whom an interest is acquired under this Act.
- (4) A claim for compensation is not maintainable if brought after the end of a time limit made for subsection (3)(d), and the *Limitation Act 1985* does not apply to the claim.
- (5) In this section:

compensation, for an acquisition of an interest under this Act, includes the following:

 - (a) monetary payment;
 - (b) the transfer or assumption of a loss, liability or expense;
 - (c) the grant of a right, entitlement or benefit;
 - (d) any other beneficial term.

44. Calvary asserted that s 10(1) is an aspirational provision which is merely “declaratory and/or directive”. Calvary submitted that, rather than looking to the terms of s 10(1), it is necessary to look at the balance of the Act and Regulations in order to ascertain whether in fact just terms are provided. It submitted that the provision was of a similar nature to s 357A(3) of the *Migration Act 1958* (Cth) which provided that “in applying ... Division [5 of Part 5], the [Administrative Appeals] Tribunal must act in a way that is fair and just”. Calvary relies upon the description of this provision by Gageler J in *Minister for Immigration and Citizenship v Li* [2013] HCA 18; 249 CLR 332 at [96] as being aspirational or exhortatory.
45. Calvary’s reliance on *Minister for Immigration and Citizenship v Li* does not assist. It reflects a different conclusion reached in a different statutory context. It does not provide a sound basis upon which to interpret the Act.
46. The Act as a whole, and a central provision such as s 10(1), must be interpreted with two fundamental principles in mind.
47. The first is the direction in s 139 of the *Legislation Act* that an interpretation which best gives effect to the purpose of the legislation is to be preferred to any other interpretation.
48. The second, which is aligned with the first, is the presumption that the legislature intended to enact legislation that is valid. Thus, if there is a choice between reading a statutory provision in a way that will invalidate it and reading it in a way that will not invalidate it, a court must always choose the latter reading when it is reasonably open: *Residual Assco Group Ltd v Spalvins* [2000] HCA 33; 202 CLR 629 at [28]; *Wainohu v New South Wales* [2011] HCA 24; 243 CLR 181 at [97]. In the former case a six-judge majority of the High Court adopted the colourful language of Frankfurter J in *United States v Huteson* 312 US 219 (1941) at 235 when he said that legislation “must not be read in a spirit of mutilating narrowness”. That is undoubtedly the case here.
49. When interpreting s 10, the starting point must be the text of the statute. The first and most obvious feature of the statute is the imperative terms of s 10(1): “The Territory must ...” That language is indicative of an actual obligation rather than a mere aspiration or exhortation. The second feature of the text is that if the language of s 10(1) was interpreted as being merely aspirational and not enforceable then it would add nothing to the terms of s 5(f) which states that a purpose of the Act is to ensure just terms are provided for any acquisition. To interpret the text of s 10(1) in a manner that was merely an unenforceable repetition of the goal stated in s 5(f) would be inconsistent with the principle that a court should strive to give a provision of a statute some effect and prefer a construction that avoids a provision being mere surplusage: *Project Blue Sky Inc v*

Australian Broadcasting Authority [1998] HCA 28; 194 CLR 355 at [71]; *Saeed v Minister for Immigration and Citizenship* [2010] HCA 23; 241 CLR 252 at [39]; *Plaintiff M70/2011 v Minister for Immigration and Citizenship* [2011] HCA 32; 244 CLR 144 at [97].

50. The existence in s 10(1) of an actual obligation is reinforced by five aspects of the context in which that imperative language appears.
51. The first aspect of the context is the express statement of the purpose of the Act in s 5(f): to “ensure that interests acquired under this Act are acquired on just terms”. The Act would only achieve that purpose if the Act itself “ensures” the payment of just terms. It would not “ensure” the payment of just terms if s 10(1) was merely aspirational and the payment of just terms made dependent upon the making by the Executive of regulations. Section 139 of the *Legislation Act* compels the adoption of an interpretation which “ensures” acquisition of property on just terms consistent with the express purpose stated in s 5(f) over an interpretation which does not “ensure” such an outcome.
52. The second aspect of the context in which s 10(1) appears is the terms of s 10(2). It provides that just terms includes reasonable compensation for various specified matters. The proper interpretation of the provision will be discussed further below. However, for present purposes, it is clear that s 10(2) is not a merely aspirational provision and, as its opening words (“Without limiting subsection (1) ...”) make clear, it is integrally related to s 10(1). There is no basis upon which to read s 10(1) as a merely aspirational and unenforceable provision, when it appears in the context of s 10(2) which provides specifically for the content of the just terms requirement.
53. The third aspect of the context which is of significance, is the fact that the making of regulations by the Executive is discretionary rather than mandatory. That is indicated by the use of the word “may” in s 10(3), which s 146 of the *Legislation Act* indicates represents a discretionary power. The fact that the regulation-making power is discretionary tends very strongly against an interpretation of s 10(1) as merely aspirational and leaving to the Regulations whether or not there is an enforceable obligation to provide just terms. Such an interpretation would make the validity of the legislation contingent upon action by the Executive — the making of regulations — which may or may not be taken. It is unnecessary to determine whether such an approach could ever be permissible having regard to the terms of s 23(1)(a) of the *Self-Government Act*. It is sufficient to note that it would be an unusual course to adopt, and not one which the Legislative Assembly should readily be understood to have intended.

54. The fourth aspect of the legislative context of s 10(1) which indicates that it is not merely aspirational are the terms of the regulation-making power in s 10(3). Section 10(3)(a) and (b) refer to “how just terms for an interest acquired under this Act are provided” and “how compensation is worked out”. The use of the word “how” indicates that these paragraphs refer to the mechanics by which an entitlement is to be implemented rather than the source of the entitlement itself. That is consistent with s 10(1) being a source of actual obligation rather than a statement of aspiration not giving rise to any legal right.
55. The fifth and final aspect of the legislative context of s 10(1) is found in s 20. That is the provision which precludes claims by Calvary for breach or repudiation of a network agreement arising from the steps taken in order to introduce the Bill that became the Act. Section 20(3) provides that the prohibition on such claims “does not limit any right a person may have to compensation for an acquisition under s 10 (Acquisition must be on just terms).” Although it is s 10(2) which makes specific reference to compensation for termination of the network agreements, the reference in s 20(3) to a “right a person may have” must be a reference to the terms of s 10(1) which, in terms, imposes an obligation on the Territory. To read s 10(1) as merely aspirational would be inconsistent with the description of the section later in the Act as giving rise to a “right”.
56. Calvary submitted that in order for a provision to effectively provide just terms it was necessary that it be coupled with a right to determination by a court of that reasonable compensation or alternatively an “historic shipwreck” clause such as that in s 78 of the *Lands Acquisition Act* and s 60 of the *Northern Territory National Emergency Response Act 2007* (Cth), which confer jurisdiction on the High Court and the Supreme Court to determine compensation or make such order as is necessary to ensure that the acquisition is on just terms, as discussed in *Wurridjal v Commonwealth* [2009] HCA 2; 237 CLR 309 at [196], [304], [462]. Although such provisions have been found to be effective in protecting Commonwealth legislation from invalidity, no reason was advanced in support of the proposition that such clauses provided the “outer limits” of clauses which might be effective. The obligation upon the court is to interpret the statute actually enacted by the Legislative Assembly rather than compel it to adopt statutory formulations used previously.
57. It is true that s 10(1) does not expressly provide a mechanism for its enforcement. The scheme of the Act is to address issues of process in the Regulations, in particular those made under s 10(3)(c) and (f) which provide for “how claims for compensation are made and dealt with” and “how any dispute about working out compensation is resolved”. If those regulations provide a mechanism consistent with s 23(1)(a) then the requirement for an enforceable entitlement to just terms is met. However, subject to any valid statutory

limitation, it would be open to a person whose interest is acquired under the Act to commence proceedings in the Supreme Court to enforce the entitlement in s 10(1). The Supreme Court is a superior court of general jurisdiction. That status is, so far as the Legislative Assembly is concerned, constitutionally entrenched by s 48A of the *Self-Government Act*. It is a fundamental principle that, if there is a statutory right that exists and no alternative mechanism provided by the statute for the enforcement of that right, then it may be enforced in a superior court of general jurisdiction. That principle was stated by the House of Lords in *Board v Board* [1919] AC 956 at 962-963 as follows:

If [a] right exists, the presumption is that there is a Court which can enforce it, for if no other mode of enforcing it is prescribed, that alone is sufficient to give jurisdiction to the King's Courts of justice. In order to oust jurisdiction, it is necessary, in the absence of a special law excluding it altogether, to plead that jurisdiction exists in some other Court.

See also *Royal Insurance Co Ltd v Mylius* (1926) 38 CLR 477 at 495-496 per Isaacs J; *Re Totaliser Administration Board of Queensland* (1988) 1 Qd R 215 at 217-218.

58. Notwithstanding that the Act does contemplate the making of regulations as to the matters specified in s 10(3)(c) and (f), the existence of a discretionary power to make regulations is not sufficient to indicate an intention to exclude the general jurisdiction of the Supreme Court. Such an exclusion could only occur as a result of "clear words": *Forster v Jododex Aust Pty Ltd* (1972) 127 CLR 421 at 435-436 per Gibbs J (with other judges agreeing at 427, 448 and 450). Indeed, it may be that, in view of s 48A of the *Self-Government Act*, even clear words would not suffice to exclude the general jurisdiction of the Supreme Court.
59. As a result, the operation of s 10(1) is not contingent upon the validity of the Regulations providing for the manner in which the obligation in the subsection may be enforced. The fact that s 10(1) does not, in terms, give jurisdiction to the Supreme Court to enforce the obligation in the subsection, does not preclude the enforcement of that obligation or the interpretation of s 10(1) as imposing an enforceable obligation.

The relationship between ss 10(1) and 10(2)

60. The second principal contention of Calvary was that s 10(2) gives rise to an implication which confines the scope of s 10(1). Having regard to the opening words of s 10(2) ("Without limiting subsection (1)") the case for drawing such an implication is a difficult one to make out. The contention of Calvary was that it is only in relation to the subject matters addressed in s 10(2) that the requirement for "reasonable compensation" applies. The concept of "compensation" in the expression "reasonable compensation" picks up the definition in s 10(5). Calvary draws a distinction between "reasonable compensation" as referred to in s 10(2) and the requirement for "just terms" referred to

in s 10(1). The contention appeared to be that having provided a broad definition of compensation which is picked up in s 10(2), the subject matters addressed in s 10(2) are the only subject matters in relation to which the broad approach to “compensation” may be adopted, limiting the capacity of s 10(1) to provide equivalent compensation in relation to any subject matter going beyond those specified in s 10(2). Calvary put forward the principle articulated in *Anthony Hordern & Sons Ltd v Amalgamated Clothing & Allied Trades Union of Australia* (1932) 47 CLR 1 at 7 in support of such an interpretation:

When the Legislature explicitly gives a power by a particular provision which prescribes the mode in which it shall be exercised and the conditions and restrictions which must be observed, it excludes the operation of general expressions in the same instrument which might otherwise have been relied upon for the same power.

61. The reasoning in *Anthony Hordern* may be applicable where it can be inferred that the legislature, by prescribing a more specific power governed by conditions, did not intend the general power to be applied in a manner which avoided those conditions. It is a principle intended to give effect to the intention of the legislature worked out by reference to the language of the relevant provisions.
62. In the present case, the language of the legislature could not be clearer. The use of the words “Without limiting subsection (1)” are the clearest possible indication that the legislature did not intend an interpretation such as that contended for by Calvary. It would not be appropriate to interpret the section contrary to the clearly expressed language of the legislature. There is no room for the application of the principle articulated in *Anthony Hordern*. If the express language used by the legislature was not clear enough, the principles referred to earlier, that the legislation should be interpreted with a preference to an interpretation that best achieves the purpose of the Act and maintains its validity if such an interpretation is reasonably available, also compel the same answer. To interpret s 10(2) so as to impliedly limit s 10(1) would, unless s 10(2) accommodated every acquisition of property achieved by the Act, render the section as a whole invalid. Such an interpretation would be plainly contrary to the purpose of the legislature and contrary to the principle that legislation should be interpreted so as to maintain its validity.
63. The interpretation put forward by Calvary seeks to place the emphasis in s 10(2) on the words in the chapeau “includes reasonable compensation” as if those words were intended to either extend what might otherwise be considered to be just terms or limit the range of subject matters where just terms involved the payment of monetary compensation. If that was the case, paras 10(2)(a) to (e) could be seen as defining the limited range of subject matters for which the entitlement to “reasonable compensation” might apply. However, the emphasis in s 10(2) is not on expanding the concept of “just terms” or confining the circumstances in which monetary compensation is payable.

Rather the emphasis of the subsection should be understood to be on the different subject matters set out in paras (a)-(e). Those subject matters are intended to identify subject matters which are stated to have been acquired (paras (a), (c)), subject matters which are “taken to have been acquired” by operation of s 8(2) and 9(2) (paras (b), (d)) and matters in relation to which no acquisition occurred or is taken to have occurred but which are “things arising as a consequence of an acquisition” mentioned in the other paragraphs (para (e)). A non-exhaustive list of such matters is provided in subparagraphs (e)(i)-(iv). The listing of these subject matters is designed to make clear, without being exhaustive, particular subject matters in relation to which reasonable compensation is payable. The content of those paragraphs makes it clear that the emphasis in s 10(2) should be placed upon the subject matters rather than on some notion that “reasonable compensation” extends beyond what would be required by just terms or is intended to confine the circumstances in which monetary compensation is payable.

64. This interpretation of s 10(2) is also reinforced by the definition of “compensation” in s 10(5). On Calvary’s interpretation, this definition could be of significance because it represents an expansion of the obligation in s 10(1). However, the breadth of the definition is not such as to differentiate the content of just terms from “reasonable compensation” as defined. Rather, each of the matters in paras (a)-(d) of the definition of “compensation” may, in an appropriate case, be relevant to the giving of just terms. As a consequence, the breadth of the definition is not a factor which would result in s 10(2) being interpreted so that the emphasis was on the concept of “reasonable compensation” as distinct from the various subject matters referred to in the paras of s 10(2).
65. Having addressed Calvary’s contentions in relation to the interpretation of s 10, it is possible to now turn to Calvary’s contentions as to the validity of individual provisions of the Act.

Challenge to s 11

66. Calvary contended that s 11 involves the acquisition of the plaintiff’s exclusive right of possession or its right of quiet enjoyment in the hospital land prior to the acquisition day without paying any compensation or other just terms. Section 11 provides:

11 Territory may enter hospital land

- (1) An authorised person may, at any reasonable time before the acquisition day and with reasonable written notice, do any of the following things:
- (a) enter on the hospital land with any person, vehicle or thing for the purpose of carrying out any necessary or desirable survey, review or other investigation related to the proposed construction by the Territory of a public hospital on the hospital land;

- (b) make surveys, take levels, dig or bore into the hospital land, examine the soil and do any other thing reasonably necessary for the purpose mentioned in paragraph (a);
 - (c) enter on the hospital land to do anything necessary for section 18 (Territory must prepare draft deposited plan) or section 19 (Amendment of the Crown lease etc);
 - (d) enter any operational or service delivery part of the public hospital to do anything reasonably necessary for a purpose of this Act, including any of the following:
 - (i) undertake an inspection or stocktake of public hospital assets;
 - (ii) assess the Territory's requirements for maintaining and operating facilities and public hospital assets after the acquisition day;
 - (iii) assess the Territory's requirements for complying with all licences and authorisations required by law to operate the public hospital after the acquisition day;
 - (iv) assess the Territory's requirements for operating, and maintaining service delivery standards at, the public hospital after the acquisition day;
 - (e) enter on the hospital land to do any other thing reasonably necessary to prepare for or give effect to a purpose of this Act or to otherwise exercise a function under this Act;
 - (f) any other thing prescribed by regulation.
- (2) If requested by an authorised person, Calvary must give the authorised person any assistance reasonably necessary for the authorised person to exercise a function under subsection (1).
- (3) Without limiting subsection (2), Calvary must:
- (a) give an authorised person access to secured areas in the public hospital; and
 - (b) show an authorised person where records, equipment and other assets in relation to the public hospital are kept on the hospital land.
- (4) In entering the hospital land under this section, the Territory must minimise any interference with Calvary's use of the land to the extent reasonably practicable.
- (5) In this section:
- authorised person** means a person authorised in writing by the director-general to exercise a function under this section.

67. Section 11 applies in the period prior to the acquisition day. It gives the Territory a limited right of entry onto the premises to do a variety of things involving the gathering of information likely to be useful to it for the purposes of the transition to the operation of the public hospital under its ownership and management. It imposes an obligation upon Calvary to give any assistance reasonably necessary for this to occur. There is an obligation on the Territory to minimise any interference with Calvary's use of the land to the extent that is reasonably practicable.

68. The provision undoubtedly interferes with Calvary's right of exclusive possession. It is therefore an interference with its proprietary rights. However, an interference with a proprietary right does not necessarily involve an acquisition of that right. Here, a right of entry is created that is for limited purposes and for a limited time. The Act does not purport to create in the Territory a proprietary interest in the land. Accepting that the boundary between an interference with a proprietary right and its acquisition is often difficult to identify: *JT International v Commonwealth* [2012] HCA 43; 250 CLR 1 at [119] per Gummow J, the mere fact that the Territory can be characterised as having obtained some benefit from the exercise of the right of entry does not necessarily convert an interference with a proprietary right into an acquisition of that right. If that was the case, then a variety of statutory powers of entry would be rendered invalid. Calvary's submission was that it was the purpose of the entry, namely, investigations in anticipation of acquisition of property, that rendered the power of entry itself an acquisition of property but did not cite any authority in support of that proposition.
69. Even if the granting of the right of entry under s 11, or its exercise, amounted to an acquisition of property by the Territory, which may be doubted, then that would amount to the acquisition of an "interest" within the meaning of s 10(1). As indicated earlier in these reasons "interest, in the public hospital land" is broadly defined: see [13]-[14] above. The acquisition of that "interest" would attract the obligation on the part of the Territory to provide just terms under s 10(1). Therefore, even though the entry may have taken place prior to the acquisition of the public hospital land effected by s 8, the entry would amount to a separate acquisition for which just terms would need to be provided.
70. Therefore, Calvary's challenge to s 11 fails.

Challenge to s 12

71. Calvary contended that s 12 provides for the acquisition of its confidential information without providing any compensation or other just terms. Section 12 provides:

12 Calvary to provide information

- (1) For a purpose of this Act, the director-general may request Calvary provide documents or other information about any of the following:
 - (a) public patient health records;
 - (b) stock in trade and inventory of the public hospital;
 - (c) fixed and non-fixed assets of the public hospital including asset maintenance records and condition reports;
 - (d) trade debts and other receivables owed in relation to the public hospital;
 - (e) suppliers of goods and services in relation to the public hospital;

- (f) subleases, underleases, licences, easements, rights of way and any other occupancy rights or arrangements in relation to the public hospital land;
 - (g) accounting and financial records in relation to the operation of the public hospital;
 - (h) public hospital employees including employment records and payroll information;
 - (i) public hospital contracts;
 - (j) any trust funds for the public hospital including details about the specific purpose for which the funds are held or the trusts established;
 - (k) any existing or pending investigation, proceeding (whether civil or criminal) or remedy in relation to a right, privilege or liability under a law applying in the ACT in relation to the public hospital;
 - (l) details about any existing security over the hospital land, public hospital assets or other property in relation to the public hospital including—
 - (i) contact details of the securityholder; and
 - (ii) the total amount of debt secured by the security and details of any other security instrument which secures that debt;
 - (m) details of any other personal property security interest in relation to the public hospital or the arrangements to which they relate, including contact details of the security interest holder;
 - (n) intellectual property relating to the operation of the public hospital, including any intellectual property created under a network agreement;
 - (o) public hospital administration records, including any reports, audited materials, regulatory matters, maintenance and operational records;
 - (p) any other matter relevant to a purpose of this Act;
 - (q) anything else prescribed by regulation.
- (2) A request—
- (a) must be in writing; and
 - (b) must state a reasonable period within which the information is to be provided; and
 - (c) may state a reasonable format or way in which the information is to be provided.
- (3) Calvary must—
- (a) comply with the request within the stated period; and
 - (b) provide the information in any stated format or way.
- (4) For a purpose of this Act, the director-general may give any information, including a public patient health record, provided to them by Calvary under this section to a Territory employee or contractor.

72. Section 12 is an information request provision which operates both before and after the acquisition day. Section 17 is an information request provision which operates only after the acquisition day.

73. Section 12 must be assessed in light of the termination of the network agreements by operation of s 14(1)(b) and the obligation under cl 36.9 of the agreement dated 7 December 2011 (which is one of the terminated network agreements) that:

On the expiration or earlier termination of this Agreement, Calvary must deliver to the Territory Contract Material, Territory Material and Health Records (other than copies of material that the Territory has authorised Calvary to retain).

74. Health Records are defined in cl 1.1 as follows:

Health Records means health records (as defined in the *Health Records (Privacy and Access) Act 1997* (ACT) created, written or otherwise brought into existence as part of, or for the purposes of the provision of public health services under this Agreement.

75. Calvary's submissions were pitched at a high level of generality. No particular factual matters were referred to in order to establish the confidential nature of the information other than that "[t]he matters described are by their nature confidential" and a reference to the decision of Gummow J in *Smith Klein & French Laboratories (Aust) Ltd v Secretary, Department of Community Services and Health* (1990) 22 FCR 73 at 120-122. No submissions were directed to the provisions of the network agreement dated 7 December 2011 which permitted the Territory to have access to, inspect and take copies of Calvary's financial records (cls 14.4, 14.6).

76. Even if it is assumed for present purposes that the factual and legal basis was established for documents or information in the categories referred to in ss 12(1)(a)-(q) to constitute property of Calvary, and that the provision of such documents or information to the Territory amounted to an acquisition of that property, that would not be enough to establish invalidity. That is because any such acquisition of property would be caught by the obligation in s 10(1) to provide just terms to Calvary.

77. Calvary's challenge to s 12 fails.

Challenge to s 13

78. Calvary contended that s 13 provides for the acquisition of the plaintiff's exclusive right of possession or right of quiet enjoyment of the hospital land without providing any compensation or other just terms. Section 13 provides:

13 Calvary and Territory must cooperate to ensure safe and orderly transition etc

- (1) Calvary and the Territory must act in good faith, cooperate and do all other things reasonably necessary to ensure—
- (a) the safe and orderly transition of the operation of the public hospital to the Territory; and

- (b) the continued operation of, and maintenance of service delivery standards at, the public hospital.
- (2) Without limiting subsection (1), Calvary must—
- (a) appoint a senior executive to—
 - (i) be the contact person for operational matters relating to the transition of the operation of the public hospital to the Territory; and
 - (ii) coordinate Calvary's role in the transition of the operation of the public hospital to the Territory; and
 - (b) cooperate with the Territory to develop a transition plan for the transfer of the operation of the public hospital and ensure its employees, officers and contractors comply with the plan; and
 - (c) provide all reasonable assistance to enable the Territory to obtain all licences and authorisations required by law to operate the public hospital; and
 - (d) provide reasonable access to any records management information technology systems used for public patient health records, employee and payroll records, financial records and other operations management records; and
 - (e) ensure its employees and officers provide all reasonable assistance to the Territory to assist in the transition of the operation of the public hospital to the Territory and ensure there is sufficient staffing to do so; and
 - (f) ensure all maintenance and repair of public hospital facilities and public hospital assets continues until the acquisition day; and
 - (g) comply with all requirements under this Act as soon as is reasonably practicable; and
 - (h) provide reasonable assistance to the Territory to enable the Territory to comply with its obligations under this Act; and
 - (i) not do anything that hinders, obstructs or delays the transition of the operation of the public hospital to the Territory; and
 - (j) promptly notify the Territory of any matter of which it is aware may hinder, obstruct or delay the transition of the operation of the public hospital to the Territory; and
 - (k) do anything else prescribed by regulation.
- (3) Without limiting subsection (1), the Territory must—
- (a) appoint a senior executive to—
 - (i) be the contact person for operational matters relating to the transition of the operation of the public hospital to the Territory; and
 - (ii) coordinate the Territory's role in the transition of the operation of the public hospital to the Territory; and
 - (b) cooperate with Calvary to develop a transition plan for the transfer of the operation of the public hospital and ensure its employees and contractors comply with the plan; and
 - (c) ensure that any disruption to Calvary's operation of facilities on the private hospital land caused by the transition of the operation of the public hospital to the Territory is minimised to the extent reasonably practicable; and

- (d) comply with all requirements under this Act as soon as is reasonably practicable; and
- (e) provide reasonable assistance to Calvary to enable Calvary to comply with its obligations under this Act; and
- (f) not do anything that hinders, obstructs or delays Calvary in complying with its obligations under this Act; and
- (g) on request by Calvary, provide Calvary with any reasonable assistance to enable Calvary to comply with its obligations under this Act; and
- (h) promptly notify Calvary of any matter of which it is aware may hinder, obstruct or delay the transition of the operation of the public hospital to the Territory; and
- (i) do anything else prescribed by regulation.

79. Section 13 is a provision requiring Calvary and the Territory to cooperate so as to achieve the overall purpose of the Act. It applies both before and after the acquisition date. It involves the imposition of a legal obligation to act in a particular way. It does not acquire property. However, having regard to the fact that the obligations imposed are integrally related to the preparation for and implementation of the acquisition of the public hospital land and the public hospital assets, just terms for those acquisitions require that, if there is a loss to Calvary arising from the operation of this section, Calvary be compensated for that loss. It may be that there is, in fact, no loss of significance to Calvary so far as its staff are involved in activities prior to the acquisition date, because it is the Territory that pays for the operation of the hospital in any event. However, activities post acquisition which are not otherwise funded by the Territory would be encompassed within the requirement for just terms.

80. Calvary's challenge to the validity of s 13 fails.

Challenge to s 14(2)

81. Calvary contended that ss 14(2)(a) and (c) provide for the acquisition of the Calvary's interests in employment agreements with public hospital employees without providing any compensation or other just terms. The challenged provisions of s 14 are as follows:

14 Operation of public hospital—generally

...

(2) A regulation may provide for the following matters:

- (a) the offer of employment by the Territory to public hospital employees and employment by the Territory of those employees and related matters;

...

(c) for public hospital contracts—

- (i) the novation or assignment of the contracts to the Territory; and

- (ii) other arrangements in relation to the contracts, including renegotiation by the Territory of existing contractual arrangements with other parties to the contracts;

...

82. As will be apparent from the terms of s 14(2) set out above, it is a provision which empowers the making of certain regulations. The content and effect of those regulations, as distinct from their subject matter, is not prescribed by the terms of the statute.
83. So far as s 14(2)(a) is concerned, the statute empowers the making of regulations about the offer of employment by the Territory to public hospital employees and employment by the Territory of those employees. It appears that the Territory may wish to offer new contracts to employees of Calvary involved in the operation of the public hospital whose contracts of employment will be either terminated in anticipation of the acquisition of the hospital by the Territory or frustrated by that acquisition. There is nothing about s 14(2)(a) which would render a regulation an acquisition of any of Calvary's property. It simply permits a regulation about offering new contracts to past employees at the public hospital. Section 23(1)(a) of the *Self-Government Act* could not, therefore, provide a basis upon which this provision would be invalid.
84. Section 14(2)(c) empowers the making of regulations about the novation or assignment of "public hospital contracts" to the Territory or other arrangements in relation to such contracts. The term "public hospital contract" is defined in the Dictionary as follows:

public hospital contract—

- (a) means a contract (not including a network agreement) to which Calvary or a related corporation is a party necessary for or ancillary to the operation of the public hospital or a public health service; and
 - (b) includes a contract (not including a network agreement) prescribed by regulation.
85. By empowering, in general terms, the making of regulations covering novation, assignment or any other arrangements in relation to such contracts, the Act does not acquire any property from Calvary or any other identifiable person. Calvary did not establish that its rights under any such contracts necessarily amounted to "property" for the purposes of s 23(1)(a) or that novation, assignment or other arrangements in relation to such contracts necessarily would amount to an "acquisition" for the purposes of that subsection. It is possible that regulations made under this empowering provision may go beyond interference with contractual rights and may involve an acquisition of property. If that was the case then the obligation in subs 10(1)-(2) to provide just terms would be engaged in relation to the person from whom the interest was acquired. Alternatively, if Calvary suffers losses arising from contracts relating to the operation of the public

hospital as a result of the acquisition of the public hospital land and the public hospital assets then those losses would be compensable under ss 10(1) and 10(2)(e).

86. Calvary's challenges to ss 14(2)(a) and (c) both fail.

Challenge to s 15(1)(b)

87. Calvary contended that s 15(1)(b) provides for the acquisition of the plaintiff's exclusive right of possession or right of quiet enjoyment in the private hospital land without providing any compensation or other just terms.

88. Section 15 provides for reciprocal licences to be granted by the Territory and Calvary to enter onto each other's land for the purposes of the Act in order to ensure the operation of their facilities. The section is as follows:

15 Access to hospital land on and after acquisition day

(1) On the acquisition day—

(a) the Territory grants Calvary a licence to enter on the public hospital land and do all things reasonably necessary—

(i) to allow Calvary to comply with its obligations under this Act; and

(ii) to do any other thing reasonably required to ensure the continued operation of facilities on the private hospital land; and

(iii) for any other reason prescribed by regulation; and

(b) Calvary grants the Territory a licence to enter on the private hospital land—

(i) to allow the Territory to comply with its obligations under this Act; and

(ii) to do anything mentioned in section 11; and

(iii) to do any other thing reasonably required to ensure—

(A) the safe and orderly transition of the operation of the public hospital to the Territory; and

(B) the continued operation of, and maintenance of service delivery standards at, the public hospital; and

(iv) for any other reason prescribed by regulation.

(2) The *Public Unleased Land Act 2013* does not apply to the grant of a licence by the Territory under this section except that the licence is taken to be a licence for that Act, section 43 (4) (Offence—use public unleased land without permit).

(3) In entering land under a licence granted under this section, the Territory and Calvary, must minimise any interference with the other party's use of the land to the extent reasonably practicable.

(4) This section expires on the day declared by the Minister.

(5) A declaration under subsection (4) is a notifiable instrument.

89. In contrast to s 11 which is in the form of a statutory right of entry, s 15 uses the language of the grant of a licence. There is nothing in the explanatory material to explain the reason

for the difference. While a licence may in some circumstances be granted in combination with a proprietary interest in the land, the grant of a mere licence does not create an interest in property: *Cowell v Rosehill Racecourse Co Ltd* (1937) 56 CLR 605; *R v Toohey*; *Ex parte Meneling Station Pty Ltd* (1982) 158 CLR 327. Here, the statutory licence granted by s 15(1)(b) is a mere licence as it is not granted in combination with a proprietary interest in land.

90. In the event that the grant of a licence by s 15(1)(b) does involve the acquisition of an “interest” within the meaning of s 10(1), then Calvary would be entitled to just terms for that acquisition: s 10(1). Even if the grant of the licence did not involve the acquisition of an “interest” within the meaning of s 10(1), the granting of a licence is a matter arising “as a consequence of” the acquisition by the Territory of the public hospital land and hence, to the extent that any loss to Calvary arises as a result of its exercise, Calvary is entitled to reasonable compensation under s 10(2)(e).
91. Calvary’s challenge to s 15(1)(b) fails.

Challenge to s 17

92. Calvary contended that s 17 provides for the acquisition of the plaintiff’s confidential information without providing any compensation or other just terms. Section 17 provides:

17 Continued access to records relating to public hospital

- (1) The director-general may at any time after the acquisition day request that Calvary—
- (a) provide documents and other information reasonably required by the Territory in relation to the following:
 - (i) any past, current or future investigation, proceeding (whether civil or criminal) or remedy in relation to a right, privilege or liability under a law applying in the ACT in relation to the operation of the public hospital before the acquisition day;
 - (ii) the employment of public hospital employees before the acquisition day including in relation to their rights and entitlements;
 - (iii) any other thing prescribed by regulation; and
 - (b) do anything reasonably required in relation to the storage and retention of information mentioned in paragraph (a) including storing the information in a stated electronic form.
- Note* Nothing in this section limits any obligation Calvary or a related corporation would otherwise have under a territory privacy law (see s 22).
- (2) A request—
- (a) must be in writing; and
 - (b) must state a reasonable period within which the request must be complied with; and

- (c) may state a reasonable format or way in which the information is to be provided, stored or retained.
 - (3) Calvary must—
 - (a) comply with the request within the stated period; and
 - (b) provide, store or retain the information in any stated format or way.
- 93. Section 17 is considerably more confined than s 12. Subject to other matters being prescribed by regulation pursuant to s 17(1)(a)(iii), it covers past, current or future investigations, proceedings or remedies relating to the operation of the public hospital and information about persons who are public hospital employees before the acquisition day, including in relation to their rights and entitlements. The position in relation to s 17 is similar to that in relation to s 12.
- 94. Even assuming the factual and legal basis necessary in order for the information to be property and assuming that by the provision of those documents or that information to the director-general it is thereby acquired by the Territory, that would not be enough to establish the invalidity of s 17. That is because it would be caught by the obligation in s 10(1) to provide just terms to a person from whom an interest is acquired under the Act or the obligation under s 10(2)(e) or both.
- 95. Calvary's challenge to s 17 fails.

Challenge to s 20

- 96. Calvary contended that s 20 provides for the acquisition of its legal rights in respect of repudiation or breach of a network agreement (including the Calvary Network Agreement between Calvary and the Territory dated 7 December 2011), including its rights to loss of bargain damages without providing for any full compensation or other just terms.
- 97. Section 20 ensures that certain matters do not amount to repudiation or breach of any network agreement:

20 No repudiation etc of network agreements

- (1) None of the following constitutes a repudiation or breach of a network agreement:
 - (a) the development or preparation of the Bill for this Act, or government or Cabinet consideration of policy carried out in developing or preparing the Bill;
 - (b) the presentation of the Bill in, and agreement to the Bill by, the Legislative Assembly, or any processes associated with the passage of the Bill through the Legislative Assembly;
 - (c) the making, notification or commencement of this Act;
 - (d) any act done in accordance with this Act;

- (e) anything done by the Territory to give Calvary notice (whether in writing or orally) of the Territory's intention to do a thing mentioned in paragraphs (a) to (d);
 - (f) any other communication between the Territory and Calvary before the commencement of this Act about a matter mentioned in paragraphs (a) to (e).
 - (2) Calvary or a related corporation may not bring any claim against the Territory for repudiation or breach of a network agreement, and is not entitled to any compensation or remedy for repudiation or breach of a network agreement, because of an event or matter mentioned in subsection (1).
 - (3) Subsection (2) does not limit any right a person may have to compensation for an acquisition under section 10 (Acquisition must be on just terms).
98. Section 20 exists in the context of s 14 which, by statute, terminates the network agreements on the acquisition day. That is an act of the legislature, not of the executive government of the Territory.
99. The purpose of s 20 appears to be to ensure that all claims for compensation are dealt with through a single mechanism, that is, the provision of just terms for the acquisition of property. That is because s 10(2)(e) makes it clear that reasonable compensation must be paid for the "termination of the network agreements under section 14(1)". Thus, the legislation makes it clear that the intention is to provide compensation for the loss of the network agreements even though it limits the processes by which that can occur.
100. Calvary claims that the matters referred to in s 20 amount to a "repudiatory breach" of contract which would entitle it to claim loss of bargain damages. It appeared to contend that the extinguishment of Calvary's right to bring a claim for damages amounts to an acquisition of those rights and that s 20(3) does not provide just terms.
101. This argument assumed that the steps referred to in s 20(1)(a)-(f) could amount to a repudiation or breach of a network agreement. The submissions of Calvary referred to a "repudiatory breach" although the submissions did not clearly articulate why, in circumstances where the network agreements were terminated by the legislature, the earlier actions in formulating the Bill and presenting that to the legislature for consideration could amount to a repudiation or breach of a network agreement. The highest that it might be put was these matters involved the taking of steps in order to terminate the agreements by statute — a termination which by reason of the statute would necessarily be lawful.
102. In the course of oral submissions, counsel for Calvary submitted that the matters in s 20(1) amounted to "an anticipatory breach that's capable of being characterised as a repudiation". However anticipatory breach is a concept which applies *before* the time for performance is due, if the promisor indicates that when performance is due the promisor

will not be ready, willing or able to perform: see J D Heydon, *Heydon on Contract* (Lawbook Co, 2019) at [24.250]-[24.310]. Such a breach is only complete when the repudiation is accepted: Heydon at [24.300]. Accepting that the concept of anticipatory breach could apply in circumstances of long-term agreements which required ongoing acts of performance, nothing was pointed to that indicated that, so long as the network agreements remained on foot, the Territory was not ready, willing or able to perform them. Further, the submissions did not point to any facts which would indicate that any anticipatory breach of the network agreements had been accepted by Calvary as a repudiation of those agreements prior to their termination by s 14(1)(b). Without such an acceptance there was no completed breach and no cause of action had vested.

103. However, it is unnecessary to pursue these issues further. Even if it be assumed that a cause of action accrued by reason of one or other of the matters referred to in s 20(1)(a)-(f), and that vested cause of action was nullified by reason of s 20(2), so as to amount, by parity of reasoning with *Georgiadis v Australian and Overseas Telecommunications Corporation* (1994) 179 CLR 297, to an acquisition of property, s 20(3) makes it clear that there remains the entitlement to compensation for an acquisition under s 10. Section 10(2)(e) expressly provides that reasonable compensation is payable for “the termination of the network agreements under section 14 (1).” Calvary’s submissions did not explain how any contractual right that it might have had as a result of the matters referred to in s 20(1)(a)-(f) would achieve for it a more favourable outcome than is provided for expressly in s 10(2)(e). Plainly enough, Calvary has lost the benefit of the network agreements. It is expressly entitled to reasonable compensation for that loss.
104. Even if the issue had not been dealt with expressly, to the extent that what was acquired were money-making assets, just terms under s 10(1) for the acquisition of the public hospital land and public hospital assets would, in any event, have required for the loss of the benefit of the network agreements to be factored in as part of the process of assessing the value of those assets.
105. Calvary’s challenge to the validity of s 20 fails.

Challenge to s 25

106. Calvary contended that s 25 was invalid to the extent that any or all of ss 11, 12, 13, 14, 15 or 17 of the Act were invalid. Section 25 provides:

25 Court order to enforce exercise of powers

- (1) This section applies if—

- (a) a person hinders or obstructs or intends to hinder or obstruct an authorised person in the exercise of a function under section 11; or
- (b) Calvary does not comply with a requirement under—
 - (i) section 11 (Territory may enter hospital land); or
 - (ii) section 12 (Calvary to provide information); or
 - (iii) section 13 (Calvary and Territory must cooperate to ensure safe and orderly transition etc); or
 - (iv) section 14 (Operation of public hospital—generally); or
 - (v) section 17 (3) (Continued access to records relating to public hospital).
- (2) The Magistrates Court may, on application by the director-general, make an order—
 - (a) authorising a police officer or other stated person to provide assistance or use force as is reasonably necessary to allow an authorised person to exercise their power under section 11; or
 - (b) requiring Calvary, or a related corporation nominated under section 21 (2), to comply with a requirement mentioned in subsection (1) (b).
- (3) The director-general must give a copy of an application under subsection (2) to Calvary or the related corporation.
- (4) Calvary or the related corporation is entitled to appear and be heard on the hearing of the application.
- (5) In this section:

authorised person—see section 11 (5).

107. Section 25 applies in two distinct circumstances:

- (a) a person hinders or obstructs or intends to hinder or obstruct an authorised person in the exercise of a function under s 11 (s 25(1)(a)); or
- (b) the plaintiff does not comply with a requirement under ss 11, 12, 13, 14, 15 or 17 (ss 25(1)(b)(i), (ii), (iii), (iv) and (v)).

108. The Amended Originating Application recognised that Calvary’s challenge to the validity of s 25 was consequential upon its challenge to the provisions which s 25 allows to be enforced. Having regard to the fact that the challenges to the validity of those other statutory provisions have failed, the challenge to s 25 must also fail.

The Act as a whole

109. Having addressed Calvary’s contentions in relation to individual provisions it is necessary to address its arguments about the Act as a whole. These were identified in its Amended Originating Application as follows:

1. The Act as a whole does not provide for acquisition of the property of the Plaintiff on just terms, in that:

- a. it provides for the acquisition of the whole of the assets, undertaking and business of the Plaintiff without providing full compensation;
- b. it provides for other burdensome terms on which the acquisition occurs which are not just;
- c. section 6(1)(c) removes the protections that would otherwise be available to the Plaintiff, including the protections under the *Lands Acquisition Act 1994* (ACT); and
- d. in those circumstances, the acquisition of the whole of the assets, undertaking and business of the Plaintiff is beyond the power of the Legislative Assembly of the Australian Capital Territory (Legislative Assembly) under, and inconsistent with, section 23(1)(a) of the *Australian Capital Territory (Self-Government) Act 1988* (Cth) (Self-Government Act).

110. These grounds must be assessed in light of the proper interpretation of s 10, set out above, and the rejection of each of the specific challenges to provisions of the Act. The contentions in paras a, b and c need to be addressed only to the extent to which they go beyond the challenges to specific provisions. Paragraph d does not need to be separately addressed as it appears to simply state a conclusion arising from the other paragraphs.

Whole of business

111. Calvary submitted that “[a] business is also property for which just terms must be provided”. Its submissions characterised the “business in operating the Calvary Public Hospital” as being additional to the acquisition of the public hospital land and public hospital assets. It submitted that *Bank of New South Wales v Commonwealth* (1948) 76 CLR 1 provided an example of the acquisition of a business for which just terms were required to be provided.
112. The reference to “business” is not useful. That an acquisition might include all of the property of a business operating as a going concern does not convert the “business” into an item of property. There are a series of items of property which make up that business and it is that for which just terms must be provided. If the acquisition of that property has consequences beyond the market value of those items then just terms requires compensation for that loss. To talk separately about the acquisition of the “business” as distinct from using it as a shorthand method of describing an aggregation of particular items of property and rights is not helpful.
113. In the present case, the assets which are expressly acquired pursuant to the provisions of the Act inevitably put an end to the operation by Calvary of a public hospital in the Territory. In that sense, the acquisition under the Act puts an end to its “business”. To the extent to which the acquisition of the assets of the “business” removes an income-earning potential going beyond the value of the assets then the loss of that income-earning potential must be compensated for under the requirement to provide just

terms. Attempting to characterise the acquisition of the “business” as being an acquisition of property additional to the property expressly acquired by the provisions of the Act does not, in this case, alter the content of the requirement for just terms or affect the validity of the Act.

Other burdensome terms

114. Calvary also claimed that ss 11, 12, 13, 14(1)(c), 14(2), 15 and 17 confer powers on the Territory and impose obligations on the plaintiff that amount to burdensome terms upon which its property is acquired and, as a result, the acquisition of its property is not on just terms and beyond power of the Legislative Assembly.
115. This contention would be of significance in circumstances where the rights interfered with by these provisions were found not to be proprietary rights or not to involve acquisitions. The plaintiff contended that these terms operate and render the acquisitions of property effected by ss 8 and 9 to be other than on just terms.
116. The merit of the submissions made by Calvary must be determined in the context of the obligation to provide just terms under s 10(1) and, in particular, the obligation in s 10(2)(e) to provide reasonable compensation for “things arising as a consequence [of one of the acquisitions referred to in s 10(2)].”
117. Calvary’s contention was that the obligations under ss 11, 12, 13, 14 and 17 are all burdensome obligations which may be enforced by the Magistrates Court. On the hypothesis that none of these matters involve an acquisition of property for which compensation is payable, the contention was that they render the acquisitions which do occur of public hospital land and public hospital assets unjust.
118. Three points can be made about this submission. First, insofar as the obligations in ss 11, 12, 13, 14 and 17 do not themselves involve acquisitions then there is no obligation to provide just terms. To that extent the Act imposes burdens upon Calvary but in a way which is within the scope of s 22 of the *Self-Government Act* but outside the scope of the prohibition in s 23(1)(a). Given that the burdens are outside the scope of s 23(1)(a), they are not prohibited.
119. Second, insofar as Calvary suffers loss as a result of the burdens imposed upon it by obligations associated with the implementation of the acquisitions under ss 8 and 9, then it is entitled to be compensated as part of the just terms provided by s 10(1). That is made clear by the terms of s 10(2)(e) which allows compensation for “things arising as a consequence of” the acquisitions referred to in the earlier paragraphs of s 10(2). The obligations imposed upon Calvary which arise as a result of the need to ensure a smooth transition of the public hospital operations from Calvary to the Territory are burdens

which Calvary would not have been required to bear if the acquisition had not occurred and hence fall within the expression “things arising as a consequence of” the acquisition. A possible argument against this is that the burdens in s 11 only exist *prior to* the acquisition day and the obligations in ss 12 and 13 exist *both before and after* the acquisition day. It might be argued that insofar as the sections operate prior to the acquisition occurring then they could not be within the scope of compensation payable under s 10(2)(e). That would be, so the argument goes, because those earlier obligations cannot be characterised as being “as a consequence of” acquisitions which only occur afterwards. Assuming, for the sake of argument, that to be correct, then the obligation in s 10(1) requires just terms for the acquisition of the interests undoubtedly acquired under the Act by ss 8 and 9 and, if that requires further payment to compensate Calvary for the inconvenience, effort or other loss incurred as a result of the operation of s 11, 12 and 13 prior to the acquisition day, then such an amount must be paid. There is no doubt that a payment of money may be an appropriate form of compensation for such obligations. Whether any such payment is required would have to be assessed in light of the actual burdens imposed and the fact that Calvary’s operations up until the acquisition date are funded by the Territory.

120. Third, Calvary is a corporation. Obligations imposed upon it pre or post acquisition are obligations which it may perform through its servants or agents. If the corporation does not wish to perform the obligations directly through its servants, it may take steps to contract them out. The cost of doing so is an expense for which money is an appropriate form of compensation.

Removal of protections under the Lands Acquisition Act 1994 (ACT)

121. The final part of Calvary’s submissions concerned the disapplication of the *Lands Acquisition Act 1994 (ACT)* to the Act. That disapplication is made clear by s 6(1)(c), which provides that the *Lands Acquisition Act* does not apply in relation to anything done under the Act. Calvary submitted that, in assessing whether just terms are provided, it is legitimate to have regard to an Act such as the *Lands Acquisition Act* as a comparator, citing *Grace Brothers Pty Ltd v Commonwealth* (1946) 72 CLR 269 at 291. In that passage Dixon J said:

It will therefore be of some help, when the justice of the terms provided by the Commonwealth legislation is in question, to see how other British and legislatures have regarded the same matter.

122. Calvary submitted that procedural protections that would have been given under the *Lands Acquisition Act* do not exist in the Act and that there are different provisions for compensation. So far as the first of these complaints is concerned, Calvary referred to

the process set out in s 17 of the *Lands Acquisition Act* which includes a pre-acquisition declaration: s 19, the availability of a process for reconsideration of the declaration: s 23, the provision of reasons for confirming, revoking or varying the declaration: s 24 and the fact that a confirmation or variation of a pre-acquisition declaration is a disallowable instrument. It referred to the fact that a decision of the Executive to reject a claim for compensation is reviewable in the ACT Civil and Administrative Tribunal (ACAT): ss 59(3), 104AA, 104AD. It also referred to the potential for the target of the acquisition to remain in occupation of the land for a period of six months or a longer period if there is agreement: s 37.

123. The comparison with the *Lands Acquisition Act* is not a useful one. While it can be seen that a number of provisions in the *Lands Acquisition Act* provided models for provisions in the present Act, the *Lands Acquisition Act* is a law designed for general application to the acquisition of land. It is an empowering provision which lets the executive government take steps to acquire land with only limited potential for review by the legislature. In common with many other decisions of the executive government which affect citizens, there is an entitlement to review in the ACAT.
124. The present legislation is of a substantially different nature. It seeks to acquire both the land and the assets of a major public hospital. It seeks to do so while maintaining the hospital operations during the period of the acquisition. It is legislation which is site-specific, so that the application of the legislation to the land and other assets of Calvary have been specifically approved by the legislature. Having regard to the different nature of the acquisition, it is not surprising that there are different statutory provisions in place. The fact that a legislative choice has been made to adopt the provisions in fact adopted as distinct from other provisions that might have been adopted does not demonstrate a lack of just terms. It is true that other acquisition legislation might provide a comparator, but its value as a comparator is limited by the extent to which the circumstances addressed are comparable and the fact that the ultimate question is not whether something different could have been enacted but rather whether just terms are provided. The terms of the *Lands Acquisition Act* do not demonstrate or provide any adequate foundation for a conclusion that the Act falls within the scope of s 23(1)(a).

Conclusion on challenge to whole Act

125. The additional matters which go beyond the challenges to the individual provisions do not demonstrate that the Act as a whole is invalid.

Conclusion

126. None of the grounds put forward by Calvary demonstrated either that the Act as a whole or any of its provisions were laws which, by reason of s 23(1)(a) of the *Self-Government Act*, the Legislative Assembly had no power to make. It was therefore unnecessary to consider the question of severance pursuant to s 120 of the *Legislation Act*.
127. Insofar as Calvary's proceedings involved a challenge to the validity of the Act, those proceedings were required to be dismissed.

Orders

128. It is for these reasons that on 9 June 2023 the Court made the following orders:
1. The application for a declaration that the *Health Infrastructure Enabling Act 2023* (ACT) is invalid and of no effect is dismissed.
 2. The application for a declaration that sections 11, 12, 13, 14(1)(c), 14(2), 15, 17, 20 and 25 of the *Health Infrastructure Enabling Act 2023* (ACT) is invalid and of no effect is dismissed.
 3. The application for interlocutory orders preventing the defendant from exercising powers granted under the *Health Infrastructure Enabling Act 2023* (ACT) is dismissed.
 4. The undertaking given by the Territory on 7 June 2023 and extended on 8 June 2023 is discharged.
 5. The reasons of the court are reserved.
 6. All questions of costs are reserved.
 7. The balance of the proceedings is adjourned for directions on 16 June 2023 at 9.30am before the Registrar.

I certify that the preceding one hundred and twenty-eight [128] numbered paragraphs are a true copy of the Reasons for Judgment of the Court

Associate:

Date: 26 June 2023