THE LAW SOCIETY
OF NEW SOUTH WALES

Our ref: Environ:JDlb759650

9 August 2013

Just Terms Coordinator
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SYDNEY NSW 2000

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Dear Sir/Madam,

Just Terms Compensation Legislation Review – Consultation Paper

The Law Society appreciates the opportunity to provide comments in response to the Consultation Paper.

The Consultation Paper has been considered by the Law Society's Environmental Planning and Development Committee ("EPD Committee"), Indigenous Issues Committee ("IIC") and Property Law Committee ("PL Committee").

The comments of the EPD Committee are set out in Attachment 1.

The comments of the IIC are set out in Attachment 2.

The PL Committee supports the comments made by both the EPD Committee and IIC.

As key details of any proposed reforms are not yet available, further consultation with stakeholders is essential. The Law Society looks forward to the opportunity to make comments as options are refined during this further consultation and would welcome the opportunity to comment with sufficient notice on any amending legislation prior to its introduction to Parliament.

If you have any questions in relation to this submission, please contact Liza Booth, Policy Lawyer for the EPD Committee, phone (02) 9926 0202 or email: liza.booth@lawsociety.com.au.

Yours faithfully,

per

John Dobson
President

ATTACHMENT 1

Environmental Planning and Development Committee
Submission on Just Terms Compensation Legislation Review

EPD Committee

The Committee represents the Law Society on all matters relating to environmental planning and development law, and advises the Council of the Law Society on issues relevant to those areas of practice. Membership of the Committee is drawn widely from experienced professionals whose expertise has been developed in representing the interests of local government, government instrumentality, corporate and private clients.

Acquisition on 'just terms'

The Committee notes that while criticism[1] of the phrase "just terms" is understandable, it is enshrined in section 51(xxxi) of the Commonwealth Constitution which empowers the Federal Parliament to make laws with respect to "the acquisition of property on just terms from any State or person for any purpose in respect of which the Parliament has powers to make laws".

Given its history, it would be problematic to abandon this terminology.

The Committee also considers that the obligation to acquire on just terms should be seen to be the primary object of the Act and suggests that the objects of the Act in section 3 are reordered to reflect this as the fundamental objective of the Act.

Harmonisation

The Committee supports harmonisation with the Commonwealth legislation and supports referral of the respective States' and Territories' acquisition legislation to the Council of Australian Governments to align these Acts with the principles in the *Land Acquisition Act 1989 (Cth).*

Specific Issues

The Committee's comments on some of the specific issues included in the Consultation Paper are set out below and adopt the headings and numbering used in the Consultation Paper.

Compensation procedures and timeframes

Issues submitted by Transport for NSW

a. **Fixed period of required negotiations**
   Consideration should be given to the establishment of a fixed period of required negotiation, prior to the compulsory consultation period, and to ensure that the pre-formal negotiations do not replicate the compulsory process.

[1] See page 15 of the Consultation Paper.

b. **Compulsory process timeframe**
The current timeframe involved for the formal, compulsory process may take many months. A possible way to reduce the timeframe would be to reduce the "normal" Property Acquisition Notice period from 90 days to 60 days.

c. **Lodgement of claims**
A government acquiring authority must give a landowner or lessee at least 60 days in which to lodge a claim for compensation. This could be reviewed to ensure the efficiency of the process.

d. **Acquiring land from local councils/State Government agencies for the purpose of a new transport project.**

The Committee does not support these proposed changes.

Additional proposals for reform from Transport for NSW:

a. **An amendment to the *Land and Environment Court Rules 2007* to include Class 3 claims for compensation by reason of the acquisition of land in accordance with the Land Acquisition Act, if the applicant is a local Council; and**

b. **The provision of alternative dispute resolution to resolve disputes relating to the compensation amounts and payment, as an alternative to appeals to the Land and Environment Court.**

The Committee considers that there are existing procedures in place to deal with these matters.

Issues submitted by Law Society of New South Wales

1. **Should an acquiring authority have the power to acquire land for resale? If so, on what basis?**

   The Committee considers that an acquiring authority should **not** have the power to acquire land for resale.

2. **Where an acquiring authority acquires land zoned "open space" owned by a local Council, should the legislation require compensation to be payable to that Council on the basis of the cost of replacing that land?**

   Yes.

3. **Is the period of 90 days within which to lodge an objection with the Land and Environment Court against the amount of compensation offered under Section 45 of the Land Acquisition Act sufficient, particularly given the Land and Environment Court's current Practice Direction for such matters?**

   This period is probably sufficient for the majority of cases, although there should be the ability to extend the period in more complex cases. The Committee would be interested in statistics, if available, from the Court on the number of objections that have required an extension to be granted.

Components of compensation

1. Should authorities identify land requirements early in a project?

It is desirable for authorities to identify land requirements early in a project.

2. Once the land is identified, should it be included in a central register, readily available to the public to search?

The Central Register of Restrictions administered by LPI would seem the most appropriate facility for identifying the requirements.

3. Should such a central register be maintained by Land and Property Information NSW?

The Central Register of Restrictions administered by Land and Property Information NSW would be the most appropriate facility for identifying the requirements.

4. Should the authority then be limited to only acquiring the land in this register, and no more?

In general, yes.

5. Should authorities conduct whole acquisitions only?

Yes.

6. If at the end of a project most of the property remains, should the dispossessed owners be given first right of refusal to buy it back?

Yes.

7. Should s 59(b) be removed from s 59 to clarify that the costs incurred are not part of the compensation claim?

No.

8. Should s 59(c) be removed from s 59 and treated separately in the Land Acquisition Act to enable dispossessed owners to be reimbursed in a timely commercial manner?

Yes.

9. What principles should apply to selecting a figure for solatium?

Given the divergence in approaches across the jurisdictions regarding solatium (Consultation Paper page 31) the Committee suggests the existing principles be reviewed as part of the harmonisation discussions referred to above, and pending such discussions the status quo be maintained.

10. Is the present maximum figure too low?

Yes. The Committee's expertise does not extend to nominating an appropriate maximum figure.

The role of the Valuer General

1. **Should the Act provide formal arrangements for payment of the Valuer General's costs?**

   Yes. The Committee supports the objective of greater transparency of the process, but would need to see the legislation to comment further.

2. **Should there be provision in the Act for either the acquiring authority or the landowner to notify the Valuer General of any issues that may affect the determination of compensation within seven (7) days of the acquisition being gazetted?**

   The Act should provide a facility for notification of issues, but the Committee considers that a period of seven days is insufficient.

3. **Should the 30 day timeframe for the issue of determinations by acquiring authorities be amended to 45 days?**

   Yes.

4. **Should the Valuer General be given the authority to extend the time period for which a compensation notice is to be given to 90 days, subject to notification to the parties, in complex matters?**

   Yes. The parties should always be notified if the time is extended.

5. **Should the government establish an approved panel of valuers and fee rates?**

   Yes.

6. **Should the landowner obtain quotes for valuation reports?**

   No.

7. **Should valuers be required to take an "independent view" approach to their task?**

   The Committee considers that it is unnecessary to make specific provision for this.

8. **Should the role of the Valuer General in the process be reviewed, and would another role, such as Independent Advisor, be more suitable to the task required?**

   The Committee considers the role of the Valuer General in this process is appropriate but the Valuer General needs to be adequately resourced to carry out the task.

Hardship Provisions

1. **Does the present hardship test make it too difficult for an owner to initiate compulsory acquisition?**

   No.

2. **Should the hardship test be amended?**

   The test should be broadened to apply to small proprietary companies as well as natural persons.

3. **Should the hardship test revert to the test contained in the then s 27 of the *Environmental Planning and Assessment Act 1979* prior to the 2006 amendments?**

   No. It should be made easier for natural persons and small proprietary companies to apply.

4. **Should the hardship test be framed more along the Victorian lines?**

   No.

Uplift in value

1. **Should the acquisition process respond if more land is required that is necessary?**

2. **Should previous owners be given a first right to purchase land which is found to be excess to requirements?**

   These matters should be given further consideration as part of the harmonisation process.

Reinstatement

1. **How can the issue of reinstatement best be dealt with under the acquisition process?**

2. **Is it the case that the compensation presently paid for acquisition in NSW does not allow people access to an equivalent dwelling?**

   These issues should be the subject of further consideration as part of the harmonisation process.

Electricity Transmission Issues

The Committee reviewed the issues raised by TransGrid and Essential Energy set out at pages 43-45 inclusive of the Consultation Paper.

As a general comment, the Committee considers that the changes proposed by TransGrid and Essential Energy shift the balance too far in favour of the acquiring authority.

In relation to an issue raised by Essential Energy:

6. **Certain parties may have a "right power or privilege" over the land but do not have a compensable interest, such as enclosure permit holders under Part 4, Division of the *Crown Lands Act 1989*, livestock and pest authorities who managed travelling stock grids, Aboriginal land claims under the *Aboriginal Land Rights Act 1983;***

7. **There needs to be greater certainty around what constitutes "right, power or privilege" over land for the purposes of the Land Acquisition Act, or alternatively, "owners" should be restricted to discoverable legal and equitable interests.**

   While the Committee supports clarification of a "right, power or privilege", it is opposed to restricting the operation of the Act to owners having a discoverable, legal or equitable interest.

Future Legislation

The Committee considers that the Act should be reviewed five years after the date of assent.

ATTACHMENT 2

Indigenous Issues Committee
Submission on Just Terms Compensation Legislation Review

Indigenous Issues Committee

The Indigenous Issues Committee ("Committee") represents the Law Society on Indigenous issues as they relate to the legal needs of people in NSW and includes experts drawn from the ranks of the Law Society's membership.

Recognising Indigenous Land Values

The Committee is concerned about the inadequacy of the *Land Acquisition (Just Terms Compensation) Act 1991* (NSW) ("Acquistion Act") in that it does not accommodate Indigenous relationships to land in determining compensation. The deficiency in this regard needs to be addressed and the Review needs to look at ways that the Acquisition Act can be amended to remove the deficiency.

One of the principal objects of the Acquisition Act is to "ensure compensation on just terms for the owners of land that is acquired by an authority of the State when the land is not available for public sale".[1]

The criteria for assessing compensation for the acquisition land is that set out in Division 4 of the Acquisition Act. The valuation of land is principally based on the market value of the land.[2] The circumstances in which additional value or loss to the land owner are considered are themselves premised on western utilitarian notions. For example, the concept of "solatium" is premised on "non-financial advantage" but only by reference to interference with residence[3]. The concept of "special value" is limited to the "the financial value of any advantage, in addition to market value". In *Boland v Yates Property Corp Pty Ltd* (1999) 167 ALR 575 Callinan J (at 654) described the requirement for "special value" as:

> There will in practice be few cases in which a property does have a special value for a particular owner. Obviously neither sentiment nor a long attachment to it will suffice. The special quality must be a quality that has an economic significance to the owner.

In the Committee's view, the criteria for assessing the value of land is deficient in that they do not allow for a proper consideration of Aboriginal relationships to land in determining the land's value. Those relationships are well documented. As Justice Merkel noted in *Rubibi Community & Anor v The State of Western Australia & Ors* [2001] FCA 607 at [1]:

> The traditional relationship between Aborigines and their land has been said to be, above all, a religious relationship (*The Queen v Toohey, Ex Parte Meneling Station Proprietary Limited [1982] HCA 69*; (1982) 158 CLR 327 (" Meneling Station") at 356 per Brennan J). Professor W.E.H. Stanner, in his Boyer Lectures "After the Dreaming" (delivered in 1968 and reproduced in the book of his essays, *White Man Got No Dreaming* (1979) at 230), observed that no English words can adequately express the links between an Aboriginal group and their homeland. He stated that to them it is their "hearth, home, the source and locus of life, and everlastingness of

[1] Section, 3(b), *Land Acquisition (Just Terms Compensation) Act 1991* (NSW) *("*Acquistion Act*")*.
[2] See ss 55 and 56, Acquisition Act.
[3] Section 60, Acquisition Act.

spirit". As such, he suggested that it formed part of the set of constants that gave Aboriginal persons their affiliation with other Aboriginal groups, linked their whole network of relationships and provided the foundation for the complex structure of their social groups. Brennan J and Professor Stanner made their observations in respect of land Aboriginal groups call their "country" that is, their traditional lands.

This relationship to land is not only a utilitarian one; it is primarily a cultural one that is central to Aboriginal identity. Allowing for it to be taken into account would not be simply allowing the special value of the land to Aboriginal people to be taken into account, but also recognition that some land is imbued with cultural values which ought to be acknowledged in the land valuation process.

Importantly, the tenure of the land is not determinative of where Aboriginal people have that relationship. While native title rights and interests may be one category where such a relationship to land might exist, Indigenous people may have a special relationship to land in a variety of contexts. For example:

a. Land with special cultural value or significance (including land on which significant sites are located) may be owned as freehold or leased by Aboriginal organisations or individuals. It is open for Aboriginal people to purchase land which is significant to them.

b. There is now the potential for land to be transferred to Aboriginal communities, including under Indigenous Land Use Agreements, as compensation of past dispossession, the land may therefore have significant value to Aboriginal people because it is land compensation.

c. Because of the historic dispossession of Aboriginal people, land may have particular value to Aboriginal people because it represents all of what they have left of their traditional country.

The value of land to Aboriginal people in those circumstances cannot be assessed in a utilitarian or market framework. The Acquisition Act needs to be amended to allow for consideration of the special cultural relationship Indigenous people may have with land in appropriate cases. That consideration should be an independent consideration and not determined by reference to a percentage of the market value of the land.

In relation to native title rights and interests there is some protection through s 54(2) of the Acquisition Act.[4] However that provision highlights the problem rather than providing an answer. In particular:

a. Section 54(2) was inserted to ensure conformity with guarantee of 'just terms' in s 51(xxxi) of the Constitution in relation to native title rights and interests.[5]

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[4] Section 54, Acquisition Act provides:

(1) The amount of compensation to which a person is entitled under this Part is such amount as, having regard to all relevant matters under this Part, will justly compensate the person for the acquisition of the land.

(2) If the compensation that is payable under this Part to a person from whom native title rights and interests in relation to land have been acquired does not amount to compensation on just terms within the meaning of the Commonwealth Native Title Act, the person concerned is entitled to such additional compensation as is necessary to ensure that the compensation is paid on that basis"

[5] The provision was inserted by the *Native Title (New South Wales) Act 1994* and was required because the acquisition of native title rights and interests is prohibited other than in accordance with Commonwealth legislation.

The fact that such a provision is needed is an admission that the Acquisition Act does not otherwise guarantee that just terms compensation will be provided to Aboriginal people, despite that being an object of the Act.

b. While there is a remedy for the deficiency in relation to native title rights and interests, there is no remedy where there may be special values in relation to other land.

c. Furthermore, s 54(2) is a safety-net provision designed to ensure validity of an acquisition, rather than providing a proactive statement of the special values of land to Aboriginal people to be accommodated, and to set out some clear procedures for that to be addressed. The lack of clear direction on how the matter may be addressed adds uncertainty to the valuing system.

The deficiencies arise in the Acquisition Act largely because it was enacted prior to the recognition of native title and at a time when it was acceptable for Aboriginal relationships to land to be ignored in land management legislation. The recognition of native title, and the rejection that Australia was *terra nullius*, require that legislation such as the Acquisition Act be updated to ensure that where land held by Aboriginal people is the subject of a compulsory acquisition its special value can be taken into account.

Allowing for Aboriginal cultural values to be taken into account in the valuation of acquired land should not be controversial. The Acquisition Act already takes into account special values over and above the market value of the land, albeit in relation to financial values. There is no reason why cultural considerations could not be considered in the same way.

The Committee believes that such a step is necessary so that the Acquisition Act's object of providing for "just compensation" is achieved for Indigenous people. Section 2(2)(a) of the *Constitution Act 1902* (NSW) recognises that Aboriginal people "have a spiritual, social, cultural and economic relationship with their traditional lands and waters". The Committee is of the view that recognition is hollow if the State is unwilling to recognise that relationship in the valuation of Aboriginal land that is the subject of compulsory acquisition.

<u>Land Valuation Appeals</u>

Land valuations appeals are heard in the Land and Environment Court's Class 3 jurisdiction. In the same jurisdiction land claim appeals commenced pursuant to s 36(6) of the *Aboriginal Land Rights Act 1983* (NSW) ("ALRA") are heard by a judge sitting with a Commissioner who has "suitable knowledge of matters concerning land rights for Aborigines and qualifications and experience suitable for the determination of disputes involving Aborigines."[6] The role of the Commissioner is to assist and advise the Court, but shall not adjudicate on any matter before the Court.[7]

The Committee is of the view that, in addition to allowing for Aboriginal cultural values to be considered in determining the value of land to be acquired, there is also the capacity for a judge hearing the matter to be assisted by a Commissioner appointed pursuant to s12(2)(g) of the *Land and Environment Court Act* 1979 (NSW).

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[6] See ss 30(2A), 12(2)(g) and 37(2) of the *Land and Environment Court Act 1979* (NSW) (LEC Act).
[7] See ss 37(2), LEC Act .

Acquisition for Resale

The Consultation Paper raises the issue of whether land should be able to be compulsorily acquired for the purpose of resale. The Committee is opposed to the acquisition of land for resale. It should only be acquired where there is an essential public purpose. Aboriginal people in NSW were dispossessed parcel by parcel through the alienation of land for the private enjoyment of others. If land is needed for private purposes, then the appropriate course is for the sale to be negotiated by consent.

Impact of Conservation Rezoning

The Committee also notes the observation in the Consultation Paper that submissions need not be limited to the issues raised in the Consultation Paper. A further issue that the Committee is concerned about relates to the lack of compensation available for Aboriginal land owners through adverse rezoning[8] designed to achieve public outcomes, particularly in relation to nature conservation objectives. The concern is that these zonings are being used to sterilise the land without the potential for the land owner to require the acquisition of it pursuant to s 21 of the Acquisition Act. The Committee believes that land owners affected by rezoning of this kind ought to receive compensation, or alternatively have the option of requiring its acquisition pursuant to s 21. For this reason the definition of land which may be required to be acquired should be broadened to include land that has been rezoned nature conservation.

Aboriginal Land Claims

The Consultation Paper (at p.9) notes that land claims are outside the scope of the review. However, the Consultation Paper (at p.45) identifies Aboriginal land claims as an issue raised by Essential Energy. The Consultation Paper notes that:

> There needs to be greater certainty around what constitutes a "right power or privilege" over land for the purposes of the Land Acquisition Act, or alternatively, "owners" should be restricted to discoverable legal and equitable interests.

The Committee does not accept that the description of land claims as a mere "right power or privilege" as a complete characterisation of the interest an Aboriginal land council has on the lodgment of an Aboriginal land claim. The interests of Aboriginal land councils in land the subject of an undetermined land claim has been described as "inchoate property rights"[9].Upon the lodging of a land claim (which is required to be listed on a register)[10], an Aboriginal land council does not just have a right to have the land claim determined. Provided the statutory criteria are met, it has the entitlement to have the land transferred in fee simple. There is no discretion not to transfer it.[11] Furthermore, the nature of the interest which it is entitled to have

[8] Some examples are noted in Behrendt, J "Some Emerging Issues in relation to Claims to Land under the Aboriginal Land Rights Act 1983 (NSW)", *University of New South Wales Law Journal*, Vol.34(3), 2011, pp.832-833.

[9] *Narromine Local Aboriginal Land Council v Minister Administering the Crown Lands Act* (1993) 79 LGERA 430 per Stein J at 433-434

[10] See s 36(4), 166 and 167, ALRA.

[11] See *NSW Aboriginal Land Council v Minister Administering the Crown Lands (Consolidation) Act and the Western Lands Act (Winbar [No:3])* (1988) 14 NSWLR 685 per Hope JA at 696E-G.

transferred, is a fee simple interest that is then immune from compulsory acquisition.[12]

The special protections for land held by Aboriginal land councils under the ALRA against compulsory acquisitions should be understood to be remedial and beneficial legislation intended as compensation for the past dispossession of Aboriginal people. It is subversive to that scheme if land claims are left undetermined by the Minister, and as a result land, which would otherwise be vested in a land council and protected from acquisition, is able to be acquired. It is even more unjust where the land has been the subject of an undetermined land claim for an extended period. Indeed, it is not unheard of for claims to be undetermined for over 20 years.[13] To the extent that the Minister administering the *Crown Lands Act 1989* (NSW) acquiesces and consents to such a process, it is inconsistent with her duties under the ALRA to determine the claim.

For this reason, to the extent that there are acquisitions of undetermined land claims, the Committee has doubts as to whether it is lawful. It is at least a process which is inconsistent with the scheme of the ALRA. The Committee believes that where an acquiring authority is interested in acquiring lands the subject of claims, the only appropriate course is for the acquiring authority to request the Minister to determine the claim and to allow for any appeal process to be completed. Alternatively, the acquiring authority should obtain the consent of the land council that lodged the claim. The Review should not be suggesting any other outcome.

[12] See s 42B, ALRA.

[13] See for example, *New South Wales Aboriginal Land Council v Minister Administering the Crown Lands Act (No 2)* [2008] NSWLEC 13 where the land claim to 15 years to determine; *Jerrinja Local Aboriginal Land Council v Minister Administering the Crown Lands Act* (2007) 156 LGERA 65 (*Jerrinja*) where the land claims took 17-20 years to determine; *Muli Muli Local Aboriginal Land Council v Minister Administering the Crown Lands Act* (2010) 176 LGERA 182 where the land claim to 18 years to determine; and *Batemans Bay Local Aboriginal Land Council v Minister Administering the Crown Lands Act* [2007] NSWLEC 800 (*Nelligen*) where the land claim took 20 years to determine.