THE LAW SOCIETY
OF NEW SOUTH WALES

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8 May 2024

Land Acquisition Review
Department of Planning, Housing and Infrastructure
PO Box 1226
NEWCASTLE NSW 2300

By email larp@dpie.nsw.gov.au

Dear Sir/Madam,

Discussion paper – A review of land acquisition in NSW

The Law Society appreciates the opportunity to provide feedback on the Discussion Paper, *A review of land acquisition in NSW.* The Law Society's Environmental Planning and Development and Property Law Committees contributed to this submission.

Overview

The Law Society has long called for a comprehensive review of the *Land Acquisition (Just Terms Compensation) Act 1991* (the Act). Our past submissions,[1] including to the 2021 Parliamentary inquiry into the acquisition of land in relation to major transport projects (the 2021 Inquiry),[2] have highlighted the limited scope of previous reviews and advocated for broad-based consultation. We endorsed recommendations made by David J. Russell SC in his February 2014 Review of the Act (the Russell Review) that the next review of the Act should be informed by:

- consultation with interested parties in relation to the adequacy of compensation in the assessment of business claims,[3] and
- evidence taken through public hearings conducted by an independent reviewer with the assistance of an expert panel comprising representatives of government authorities, user groups, industry groups, academics and dispossessed landowners.[4]

We welcome the Government's commitment to conducting a review of the Act, taking into account the concerns raised in the 2021 Inquiry, and of the whole-of-government approach to property acquisitions. While we acknowledge consultation has occurred with acquiring authorities and that the Discussion Paper is open to the public for comment, we suggest the

[1] Law Society of NSW, Land Acquisition (Just Terms Compensation) Amendment Bill 2016 (8 November 2016), Review of the Land Acquisition (Just Terms Compensation) Act 1991 (21 December 2020), Inquiry into Acquisition of Land in Relation to Major Transport Projects (7 July 2021).
[2] The Legislative Council Portfolio Committee No. 6 was established in March 2021. The Acquisition of land in relation to major transport projects, Report 17, was tabled 10 November 2022.
[3] See Recommendation 6, David J. Russell SC, Review of the Land Acquisition (Just Terms Compensation) Act 1991 (2014) 77.
[4] See Recommendation 20, ibid 79.

THE LAW SOCIETY OF NEW SOUTH WALES
170 Phillip Street, Sydney NSW 2000
ACN 000 000 699 ABN 98 696 304 966
lawsociety.com.au

T +61 2 9926 0333 F +61 2 9231 5809
E lawsociety@lawsociety.com.au

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review would benefit from further targeted engagement, specifically with business groups and former landowners to ensure a diversity of stakeholder views and relevant expertise in this area are captured.

Our feedback on relevant questions in the Discussion Paper is provided below.

Theme 1 – Genuine negotiation

1.1 What do you think of the suggested options within Theme 1?

The Law Society is supportive of measures to encourage parties to reach agreement before a proposed acquisition notice is given. We endorse the introduction of a framework under the Act prescribing how genuine negotiations are to be structured. We would also support the standardisation of documentation to be issued by acquiring authorities to indicate an intention to acquire land and to commence the negotiation process (as discussed further under 8.2 below).

1.2 Do you have any other suggestions to encourage acquisition by agreement?

Commencement of the minimum six-month negotiation period

We have previously raised concerns regarding the application of the six-month negotiation period under section 10A of the Act.[5] Based on the experience of our members acting for landowners, acquiring authorities have claimed that the six-month period commences at the time the acquiring authority first notifies the landowner of the intention to acquire the land. It may be several months before the landowner receives a formal letter of offer. We restate our view that the six-month negotiation period should commence when a letter of offer is received, together with a valuation report and a breakdown as to how the compensation figure is derived. As acknowledged in the Discussion Paper, negotiation cannot effectively begin until a formal offer is provided to the landowner.[6] However, it may be appropriate in exceptional circumstances for the six-month period to be reduced by the Minister for Lands and Property, for example, where the landowner refuses to negotiate or if the acquisition is urgently required for public safety reasons.

In our view, the model for a mandated negotiation period proposed in the Discussion Paper, which consists of a six-month period commencing with the "opening letter" and incorporating a second "mandated negotiation timeframe" of three months running from the date of receipt of the letter of offer,[7] is unnecessarily complex. In addition, while it is intended that the six-month period is extended if the letter of offer is received more than three months after the opening letter, we consider the proposed second mandated negotiation period of three months to be insufficient time to examine and obtain advice on the valuation evidence provided in the letter of offer.

Advance payments

The Law Society supports the introduction of a mechanism for landowners to apply for financial support in the form of advance payments to fund the initial engagement of reasonable legal and valuer's fees and other relevant expertise. For example, it may be necessary, in the course of giving legal advice, to obtain the advice of other expert disciplines such as town

[5] Law Society of NSW submission dated 7 July 2021, n 1.
[6] Department of Planning, Housing and Infrastructure, Discussion paper: A review of land acquisition in NSW, (March 2024) 7.
[7] Ibid.

planning, urban design, engineering, ecology and/ or agronomy where it is directly related to the assessment of compensation.

As mentioned under 3.1 below, in the context of disturbance, we support the removal of restrictions on claiming the costs of accountants and also support advance payments for accountancy advice obtained in connection with the assessment of compensation, for example advice on capital gains tax (CGT) liability on transfer. However, we have some concerns with the suggestion to cap the advance payments that can be claimed as this may be unsuitable for more complex matters. Rather, we suggest the "reasonably incurred" test that applies to disturbance items under section 59 of the Act might also be applied to advance payments.

Non-disclosure agreements

We note the proposal that acquiring authorities are prevented from requiring landowners to enter non-disclosure agreements (NDAs). Generally, we are not in favour of NDAs in this circumstance. However, we are also concerned that a blanket ban may lead to unintended consequences. It is important that parties are not precluded from negotiating non-disclosure of certain sensitive information where appropriate, for example, where a landowner's commercial in confidence information such as business accounting records is shared with the acquiring authority. Accordingly, we consider a better approach may be to issue guidance on the use of NDAs in limited circumstances. The landowner and the authority may wish to discuss and negotiate these terms to suit the relevant circumstances at the time.

Theme 2 – Mediation

2.1 Would a mediation option place landowners in a better negotiating position?

The Law Society supports a voluntary mediation option being made available to the parties during the negotiation period. We agree with the suggestion in the Discussion Paper that an independent mediator is selected from a panel of practitioners. Given the Act encourages the acquisition of land by agreement, and the acquisition process is initiated by the acquiring authority, we also consider it appropriate that the authority bears the mediator's costs. We suggest the procedure for mediation is prescribed by regulation.

2.2 If mediation is introduced, should it be for all land types?

Yes. In our view there is no justification for excluding any land types.

Theme 3 – Clarify compensation provisions

The Law Society strongly supports clarification of the compensation provisions. We reiterate our concern that a comprehensive review of these provisions is required to ensure the objective of compensation on just terms is met in the assessment of all claims including those in relation to acquisitions affecting businesses and land used for investment purposes.

3.1 What do you think of the suggested options to clarify certain compensation provisions?

Disturbance costs

We support amendments to clarify that "non-valuation" expert fees are payable by acquiring authorities and agree that restrictions on claiming the costs of business valuers and accountants should be removed, provided the costs are reasonably incurred.

Lost profit

We agree that the legislation should be clarified to remove any doubt that compensation can be claimed for lost profits arising from the relocation or extinguishment of a business due to an acquisition. Evolving caselaw in recent years has narrowed the scope of financial costs that may be claimed by dispossessed business owners under the Act.[8] Prior to this, loss of profits or income was generally claimed under provisions that were widely interpreted as loss attributable to disturbance for financial costs in connection with relocation or the actual use of land.[9] It is important in reviewing the provisions that consideration is given to the experiences of tenants and owner occupiers who, under a restrictive approach, are no longer entitled to compensation for certain losses. Notably, the land acquisition compensation regimes in other state jurisdictions are more expansively drafted to expressly capture "loss or damage",[10] "loss of profits",[11] or "any pecuniary loss"[12] suffered by a claimant.

Duty

Currently, dispossessed landowners are only entitled to claim compensation for duty and financial costs associated with acquiring a replacement property if the acquired land was used by the former owner as his or her principal place of residence. It is not payable to landowners where the land is occupied by a related entity or is held for investment purposes. The Law Society has previously advocated for reform to allow dispossessed owners of investment properties to claim compensation for duty or to enable an exemption for purchase of a replacement property to an equivalent value as that compulsorily acquired.

Duty associated with purchasing a replacement investment property is a substantial impost for owners whose principal investment strategy is property and who do not wish to invest in anything other than real estate. The purchase of a replacement property involves incurring replacement costs including duty, conveyancing costs and mortgage costs. This represents financial loss to the landowner's investment portfolio that would not have occurred but for the compulsory acquisition.

The approach to duty in this area of law contrasts with the approach by the Australian Taxation Office (ATO) to CGT payable on the transfer of an investment property. The ATO has determined that dispossessed landowners are relieved from the requirement to pay CGT on the compensation received from an acquiring authority by way of deferral or rollover provisions.[13] We note the Discussion Paper has identified that Queensland legislation allows an investor to claim duty and other replacement costs and that the application of duty provisions in NSW might be clarified. In our view, relief from duty, either by way of entitlement to compensation or as an exemption by way of rollover provisions in the *Duties Act 1997 (*NSW), will encourage acquisition by agreement.

Injurious affection

The acquiring authority often provides property adjustment plans for partial acquisitions showing works that will be undertaken by the authority to reinstate or rectify issues because of the project. However, if the matter is determined by the Valuer General, there is no

[8] *Melino v Roads and Maritime Services* [2018] NSWCA 251, [111], *Roads and Maritime Services v United Petroleum Pty Ltd* [2019] NSWCA 41, *Alexandria Landfill Pty Ltd v Transport for NSW* [2020] NSWCA 165
[9] *El Boustani v The Minister administering the Environmental Planning and Assessment Act 1979* [2014] NSWCA 33, [17]; *Roads and Maritime Services v United Petroleum Pty Ltd* [2019] NSWCA 41, [14] Basten JA (Macfarlan JA agreeing), [104] per Sackville AJA, [137] per Preston CJ.
[10] *Land Acquisition Act 1993* (Tas) s 27(1)(f), *Land Administration Act 1997* (WA) s 241(6).
[11] *Acquisition of Land Act 1967* (Qld) s 20(5)(f).
[12] *Land Acquisition and Compensation Act 1986* (Vic) s40.
[13] Australian Taxation Office, Loss, destruction or compulsory acquisition of an asset.

obligation on the acquiring authority to undertake the works. Further, where there is a requirement or commitment to implement mitigation measures under a planning approval or environmental assessment (such as under Part 5 of the *Environmental Planning and Assessment Act 1979* (NSW)), the conditions are often not enforceable by a landowner where the government project is critical state infrastructure.

Where the acquiring authority modifies the proposed measures after the landowner has already accepted an offer of compensation, a claim for any additional compensation would require an appeal to the Land and Environment Court (if it can still be made). This means that some landowners or interest holders are forced to wait until the project is completed to fully appreciate the impacts, and only then can they decide whether to accept or reject the compensation offered because, by then, the statements made by the acquiring authority can be tested. We suggest that only enforceable representations by acquiring authorities should be considered in the assessment of compensation.

Alternatively, there should be flexibility to determine compensation based on whether the works/ measures proposed by the acquiring authority are undertaken. For example, where an acquiring authority may have provided a plan or made statements that proposed mitigation works were to be undertaken, such as the construction of a noise wall, $X compensation is paid if the works are completed, otherwise $Y compensation applies.

Strata and community

We agree that some acquisitions can have significant impacts on strata and community lot owners and would support amendments to allow compensation claims for injurious affection in respect of common property.

Disadvantage resulting from relocation

The Law Society supports a recalibration of these provisions. Currently, compensation for disadvantage resulting from relocation is only paid where a person is required to relocate their principal place of residence and the quantum is determined according to the strength of the tenure rights of the interest holder.[14] In our view, these arrangements warrant examination to ensure fairness to occupiers.

We also suggest consideration is given to expanding the entitlement to compensation for disadvantage caused by relocation of a business. The adverse impacts of relocation for owners of businesses can be significant, particularly where the business has been located on the site for an extensive period and the business owner has established goodwill that cannot be replicated or maintained elsewhere. This, in combination with an inability to claim lost profits, means many commercial tenants may not be adequately compensated.

Reinstatement

The Law Society supports clarification of the provisions allowing for reinstatement compensation and welcomes the Government's in-principle support for the expansion of the entitlement, which is currently limited to unique properties that have a particular purpose for which there is no general market. As discussed in the 2021 Inquiry report, the Russell Review recommended a reinstatement regime in line with all other jurisdictions in Australia, that is, on a "like for like" basis.[15] Moreover, as stated by a representative of the Law Society in evidence

[14] NSW Valuer General, Determination of compensation for disadvantage resulting from residential relocation.
[15] Report 17 (n 2) 56-57. See also Recommendation 17, Russell (n 3) 79.

before the 2021 Inquiry, reinstatement on a like for like basis is an equally significant issue for dispossessed business owners.[16]

3.2 Do you have any other suggestions to clarify compensation provisions?

"Just compensation override"

Historically, legislative formulas for land acquisition compensation to be determined according to an exhaustive "statutory list" of matters (or heads of compensation) generally existed alongside a "just compensation override".[17] The purpose of the override was to confer a judicial discretion in cases "where the [statutory] list will provide a measure of compensation which, in the opinion of the court, is inadequate properly to compensate the loss".[18] This formula has been adopted by the Commonwealth.[19]

In NSW, section 54(1) of the Act sets out the general entitlement to just compensation as follows:

> 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 (emphasis added).

Section 55 lists the heads of compensation:

> In determining the amount of compensation to which a person is entitled, regard must be had to the following matters *only* (as assessed in accordance with this Division) (emphasis added) —
>
> (a) the market value of the land on the date of its acquisition,
> (b) any special value of the land to the person on the date of its acquisition,
> (c) any loss attributable to severance,
> (d) any loss attributable to disturbance,
> (e) the disadvantage resulting from relocation,
> (f) any increase or decrease in the value of any other land of the person at the date of acquisition which adjoins or is severed from the acquired land by reason of the carrying out of, or the proposal to carry out, the public purpose for which the land was acquired.

Differing interpretations on the interaction of these provisions has created uncertainty whether section 54(1) contains a judicial discretion to apply a "just compensation override" should the amount of compensation determined by reference to the matters in section 55 be considered by the court to be inadequate or otherwise unjust.[20] The Law Society has previously advocated for review of these provisions in the context of the entitlement to just terms compensation as an overriding objective. We reiterate that a review is warranted to clarify the intent of the legislature.[21]

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[16] Evidence of Mr Drury, then Deputy Chair, Environmental Planning & Development Committee, Report 17 (n 2) 5.
[17] Commonwealth Law Reform Commission, *Lands Acquisition and Compensation – Report No 14*, Report No. 14 (1980) 120.
[18] Ibid.
[19] *Lands Acquisition Act 1989* (Cth) ss 55, 93.
[20] *Everest Project Developments Pty Ltd v Minister Administering the Environmental Planning and Assessment Act 1979 & The Roads and Traffic Authority of New South Wales* [2010] NSWLEC 88, *Tolson v Roads and Maritime Services* [2014] NSWCA 161.
[21] n 5.

Theme 4 – Hardship

4.1 What do you think of the suggested options regarding hardship?

The Law Society broadly supports the suggested options to ensure consistency in the application of the hardship provisions and clarity with respect to an acquiring authority's powers and obligations in reserving land for a public purpose.

We also support the proposal for the authority to pay the landowner's legal costs, valuation fees and costs for other relevant expertise to determine the appropriate compensation if the hardship application is approved.

4.2 What would be a suitable timeframe for an acquiring authority to acquire the land after a hardship application is made?

We propose that an application for hardship must be determined by the acquiring authority within 28 days after receiving the application and any other information requested by the authority. Where hardship is accepted, the authority must complete the acquisition of the land within a prescribed timeframe, for example within 90 days after the date of the authority's determination of the hardship application (or decision of review of a hardship application).

Theme 5 – NSW Valuer General determinations

5.1 Should the timeframe for the NSW Valuer General to make a determination be extended to 60 days, for example? Note this may not apply to native title determinations.

The Law Society understands there are lengthy delays in the Valuer General providing the determination of the amount of compensation. This has adverse impacts on landowners who do not receive compensation in a timely manner and on acquiring authorities liable to pay interest. The interest rate upon delayed compensation is low and not commensurate with the loss suffered by landowners for disruption and uncertainty, or for missed opportunities to reinstate or replace the land in a reasonable timeframe while they await the determination.[22]

Under section 42 of the Act, an acquiring authority must, within 45 days after publication of the acquisition notice, give the former owner of the land the amount of compensation offered (as determined by the Valuer General). Under section 41 of the Act, the Valuer General is to provide a copy of the determination of the amount of compensation but is under no obligation to provide it within the time required for the acquiring authority to meet its obligation under section 42 to pay compensation within 45 days.

Accordingly, the Law Society supports the proposal to clarify the timeframe for the Valuer General's determination, but suggests an amendment to section 41 to require the determination within 60 days after receiving the authority's notice of Gazettal and list of issues. We also propose that section 42(1) of the Act be amended to clarify that the authority provides the former landowner with the amount of compensation offered (as determined by the Valuer General) within 14 days after the Valuer General has issued its determination.

The Act has no provision for payment of the Valuer General's fees for the determination. The Law Society supports the proposal that a payment obligation is clarified in the Act. If the intention is for the Valuer General to be paid for the determination, then we suggest

[22] NSW Treasury, Schedule of interest rates Payable on compensation moneys for land resumption (nsw.gov.au).

consideration be given to prescribing a schedule of costs based on the amount of compensation offered, or other transparent mechanism.

5.2 Would a stop-the-clock provision provide greater transparency for landowners on when they will receive their determination of compensation?

We support the general proposition of a stop-the-clock provision to provide transparency in the timing of the determination process. However, the need for proper consideration by the Valuer General of all relevant information must be balanced with timely decision making. Therefore, we suggest any additional time reasonably required by the Valuer General to receive critical information should be limited to a further prescribed period.

Theme 6 – Legislative amendments to clarify requirements

6.1 What do you think about these suggested options?

We broadly support the suggested options to clarify requirements.

With respect to the proposed measures to clarify the meaning of "land" and "interest in land", we refer to our earlier comments recommending consultation with business groups and former landowners to ensure a diversity of stakeholder views and relevant expertise are captured in this process.

We also suggest examination of options to clarify and enhance the role of the Centre for Property Acquisition beyond collection and publication of key property acquisition data. Feedback from our members representing landowners is that acquiring authorities have stated they are not bound by the standards and principles+ published by the Centre, and that the practical assistance that can be provided by the acquisition support team is limited. This is relevant to the matters raised in the Discussion Paper under Theme 8 (see 8.2 below)

Theme 7 – Coordination of multiagency acquisitions

Do you have suggestions to improve the coordination of multiagency acquisitions?

We agree that improving coordination of multiagency acquisitions is important for efficiency and consistency. We support the proposed options for centrally coordinated functions.

Theme 8 – Consistency in government acquisition processes

8.1 What do you think of the suggested options within Theme 8?

We broadly support the proposals for improving consistency in the application of acquisition processes by acquiring authorities.

8.2 Do you have any suggestions to improve guidance and consistency for whole-of-government acquisition processes?

Develop minimum requirements and standard documents

We support this proposal and suggest that a suite of notices and documents required to invoke the acquisition process (including the proposed "opening letter/ notice of intention" and "letter of offer") through to claiming compensation are prescribed by regulation.

We also suggest establishing a central location for publication of and access to all critical acquisition information. Currently users must navigate a number of agency websites to locate determinations and prescribed/approved forms including:

- The rate of interest on compensation determined by the Treasurer under section 50 of the Act,[23]
- The section 39 claim for compensation form,[24] and
- The section 42 compensation notice form.[25]

Any questions in relation to this letter should be directed to Sonja Hewison, Policy Lawyer on 02 9926 0219 or sonja.hewison@lawsociety.com.au.

Yours faithfully,

Brett McGrath
President

[23] Ibid.
[24] NSW Valuer General Home - Valuer General of New South Wales (nsw.gov.au).
[25] NSW Government (default files) Property acquisition publications and forms | NSW Government.