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12 November 2021

The Chair  
Inquiry into the Acquisition of Land in relation to  
Major Transport Projects  
NSW Parliament

Dear Chair,

### **Answer to Questions on Notice – 6 October 2021 Hearing**

Thank you for the opportunity to give evidence at the Inquiry on 6 October 2021.

The transcript provided to me by the Secretariat highlighted two similar questions asked by the Hon. Daniel Mookhey that I was to take on notice.

The questions related to whether or not the law in NSW provides for compensation for businesses whose leasehold interests are compulsorily acquired. Please find my answer set out below:

#### **Categories of Compensation**

1. Pursuant to s.37 the *Land Acquisition (Just Terms Compensation) Act 1991* (NSW) (**the Act**), the owner of an interest in land which is divested, extinguished or diminished by an acquisition notice is entitled to be paid compensation.
2. Division 4 of the Act deals with how compensation is calculated. Section 55 of the Act sets out:

#### **55 RELEVANT MATTERS TO BE CONSIDERED IN DETERMINING AMOUNT 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):

- (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.

3. Particular sections that relate to the relevant matters in s. 55 are then set out at ss. 56 to 60 of the Act.
4. The categories of compensation that are most applicable to the acquisition of a typical business leasehold interests are:
  - a. Market value; and
  - b. Loss attributable to disturbance

#### Market Value

5. In relation to the market value of a leasehold interest, a common valuation method of determining the market value is to calculate the extent of the “profit rent” that a leaseholder enjoyed under the lease.
6. A simple example to illustrate this is as follows:
  - a. A tenant pays its landlord \$10,000 per month in rent pursuant to a lease with a 5-year term;
  - b. A valuer assesses the “market rent” for the lease to be \$12,000 per month;
  - c. The tenant therefore enjoys a “profit rent” of \$2,000 per month;
  - d. Extrapolated over the 5-year term, this equates to \$120,000
  - e. The market value of that leasehold interest can be said to be \$120,000, minus a discount for the net present value of the “profit rent” income
7. The above method is well recognised; however, it only provides compensation to a claimant where the rent paid is determined to be below the market rent at the date of the acquisition. A tenant may have a 20-year lease, but if the rent is set at the market rate, the leasehold interest could be said to have a \$0 value.
8. Duggan J’s recent decision in *Eureka Operations Pty Ltd v Transport for NSW* [2021] NSWLEC 41 contemplated a different method of valuing a leasehold interest. In that case, the Court accepted the evidence of *Eureka’s* valuer that the lease should be valued as a “trade related property” (TRP), which could be a property such as a pub, petrol station, restaurant or childcare centre which generally trades on the market place whilst remaining operational. A TRP is usually valued on the basis of its EBITDA, rather than any “profit rent” that a tenant carrying on the business of a TRP may enjoy.
9. In my view, the *Eureka* decision is a welcome addition to the jurisprudence in relation to compensation for business leaseholders. It recognises the reality that a lease is rarely sold separate to the actual business itself – i.e. a lease is not sold in the marketplace because of its profit rent; rather a lease is sold because of the ability of the business being conducted to generate earnings.

#### Loss Attributable to Disturbance

10. In addition to the market value of a lease, the other main category of compensation that a business leaseholder is entitled to if their lease is compulsorily acquired is loss attributable to disturbance. Loss attributable to disturbance is defined in s. 59 of the Act:

"loss attributable to disturbance" of [land](#) means any of the following:

- (a) legal costs reasonably incurred by the persons entitled to compensation in connection with the [compulsory acquisition](#) of the [land](#),
- (b) valuation fees of a [qualified valuer](#) reasonably incurred by those persons in connection with the [compulsory acquisition](#) of the [land](#) (but not fees calculated by reference to the value, as assessed by the valuer, of the [land](#)),
- (c) financial costs reasonably incurred in connection with the relocation of those persons (including legal costs but not including stamp duty or mortgage costs),
- (d) stamp duty costs reasonably incurred (or that might reasonably be incurred) by those persons in connection with the purchase of [land](#) for relocation (but not exceeding the amount that would be incurred for the purchase of [land](#) of equivalent value to the [land](#) compulsorily acquired),
- (e) financial costs reasonably incurred (or that might reasonably be incurred) by those persons in connection with the discharge of a mortgage and the execution of a new mortgage resulting from the relocation (but not exceeding the amount that would be incurred if the new mortgage secured the repayment of the balance owing in respect of the discharged mortgage),
- (f) any other financial costs reasonably incurred (or that might reasonably be incurred), relating to the actual use of the [land](#), as a direct and natural consequence of the [acquisition](#).

11. Of the different subsections of loss attributable to disturbance, subsections (a), (b), (d) and (e) are relatively straightforward.
12. It is my understanding and experience that in NSW, prior to the decision of the NSW Court of Appeal in *Roads and Maritime Services v United Petroleum* [2019] NSWCA 41, a business that had its leasehold interest compulsorily acquired was effectively entitled to either:
  - a. Have the costs incurred in connection with its relocation paid pursuant to s. 59 (1) (c) of the Act; or
  - b. Have the cost of extinguishing its business paid pursuant to s. 59 (1) (f) of the Act
13. The decision in particular of Basten JA in *United Petroleum* effectively ended the ability for business leaseholders to claim any kind of loss of profits or extinguishment resulting from a compulsory acquisition.
14. This is particularly problematic for business leaseholders who are unable to relocate their business, because it means that they are effectively entitled to no compensation.
15. If one of the main categories of disturbance compensation is now effectively eliminated, it provides the opportunity for an Acquiring Authority to simply argue that a relocation is "not reasonable" and again, effectively deny a business leaseholder any compensation.
16. Coupled with the recent change in policy articulated by the Valuer-General that seeks, in my view, to severely limit the scope of compensation for relocation pursuant to s. 59 (1) (c), it is approaching the stage that in NSW, business leaseholders are in danger of being entitled to effectively nil compensation for disturbance.

#### Possible Solutions

17. In my view, the current state of the law in NSW is untenable and extremely unfair. The decision of Duggan J in *Eureka* goes some way to restoring the balance, but it is not enough without legislative change to ensure that just compensation is paid to business leaseholders.

18. The wording of s. 59 (1) (c) is sufficiently broad to be able to encompass a range of potential costs incurred in connection with a relocation. I do not suggest a change to this particular section.
19. In lieu of amending s. 59 (1) (f), additional subsections could be added to s. 59 to encompass a “loss of profits” or business extinguishment item of compensation. Examples of this can be found in the Queensland land acquisition legislation, the *Acquisition of Land Act 1967* (QLD) (**the QLD Act**).
20. In section 20 of the QLD Act, a definition of loss attributable to disturbance contains similar language to s. 59 of the Act, with some key additions:
  - a. At s. 20 (5) (f) *an amount reasonably attributed to the loss of profits resulting from interruption to the claimant’s business that is a direct and natural consequence of the taking of the land;*
  - b. At s. 20 (5) (g) *“other economic losses and costs reasonably incurred by the claimant that are a direct and natural consequence of the taking of the land*
21. Similar additions could be made to the Act, with the causal bar as set out in s. 59 (1) (c) “in connection with”, which would go some way to restoring the balance in favour of business leaseholders after the *United Petroleum* decision.
22. If the Inquiry requires anything further, please don’t hesitate to contact me.

Yours faithfully

Adrian McMillan  
Associate  
**SLATER AND GORDON**