Submission No 36

INQUIRY INTO ACQUISITION OF LAND IN RELATION TO MAJOR TRANSPORT PROJECTS

Organisation: Newhouse & Arnold Solicitors

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NEWHOUSE
&ARNOLD
solicitors

30 May 2021

Our Ref: DJN:108000
Your Ref:

Parliament of NSW
Macquarie Street
SYDNEY NSW 2000

Dear Ms Abigail Boyd MLC

Re: Acquisition of land in relation to major transport projects inquiry

David Newhouse is a partner at Newhouse & Arnold Solicitors, holds a Master's in Environmental and Planning Law, is an Associate Lecturer at Macquarie University, a certified valuer and a former barrister specialising in the NSW Land and Environment Court.

David has more than 20 years of experience and has represented hundreds of landowners, businesses and tenants affected by projects in land acquisition matters across Sydney and New South Wales. Whilst David was a barrister, he was involved in the largest land resumption claim in New South Wales, the acquisition of land for the Jervis Bay National Park.

A. Executive Summary

There are a number of key reforms that the Committee must urgently address, namely:

a) There need to be genuine 6-month negotiations with strict timelines for issuing offers and providing supporting information to prevent Acquiring Authorities from delaying the process.

b) Hardship applications should be treated in the same manner as a general land acquisition and there should be no difference for disturbance items.

c) Affected owners should receive 70% of the Acquiring Authorities' highest offer upon gazettal to avoid delays in payment, or alternatively, 100% of the first offer amount.

d) To address, the differences between residential owners and investors for claims of disturbance such as stamp duty, loss of rent, legal costs, mortgage costs and so on, for a replacement property.

e) Businesses should be entitled to recover loss of profit for a short period of time until their businesses are re-established in the new location.

f) Lastly, stamp duty should be a credit upon the repurchase of a replacement property by both residential and investors, instead of a cash-up-front payment for a period of up to two-years (inline with the ATO CGT guidelines).

B. Background Statistics and Observations

Property Acquisition NSW reports the number of acquisitions in New South Wales each year (see https://www.propertyacquisition.nsw.gov.au/data). In FY2020, of the 143 acquisitions of private property interests, around 88% of matters were resolved by agreement through successful negotiations with Acquiring Authorities, with only 17 properties being referred to the Valuer General. These rates are not dissimilar to those disclosed in the "*NSW Housing Acquisition Review Summary Report*" prepared by the Customer Service Commissioner on 14 September 2016.

More recently, Transport for NSW ("Sydney Metro") has had more than 70 property and business claims referred to the Valuer-General as agreement could not be reached. This should be a cause for alarm as it would be the largest number of properties/businesses referred to the Valuer-General for a single project. Furthermore, many of the matters which did reach agreement were resolved only in the last month (or even last days) before Sydney Metro prepared its Gazette Notices.

It is not only the sheer number of matters recently referred to the Valuer-General that should be of concern to the Committee, but the proportion of those referrals which are related to claims by land and business owners in 2-3 key locations in Sydney, being Burwood/Concord, Clyde and Five Dock. We understand that in Five Dock, nearly every landowner has had their matter referred to the Valuer-General.

In addition, recent matters have, for the first time, seen Sydney Metro engage lawyers and town planners to identify technicalities under the *Land Acquisition Just Terms Compensation* Act ("the Act"). Often these technicalities were never discussed or even disclosed to the landowners during the 9-12 month period of negotiations and many of the matters which involved such issues were forwarded to the Valuer -General. For example, in recent matters, tenants who had been in properties for 5, 10, 20 years were treated differently if they had a month-to-month lease, versus those who had long-term leases. There was no acknowledgement by Sydney Metro of the history of occupation, but rather

a reliance on technicalities to try to reduce compensation payable. This has clearly come about due to recent Court decisions.

Prior to 2021 over the last 5 years, this firm had a 99% success rate in resolving matters with the Acquiring Authority without the need to rely on the Valuer-General to make an independent Determination. In March 2021, around a dozen of our clients' properties and businesses were referred to the Valuer-General for an independent Determination. As at the date of this submission, only two Compensation Notices have been issued, notwithstanding that it has been 72 days since the Sydney Metro Gazetted the properties, and that Sydney Metro has a formal 45-day statutory period to issue its Compensation Notices. Many of these landowners and businesses have yet to receive even a draft Determination. It will be many months before these owners receive any compensation from Sydney Metro.

The timing of this Parliamentary Review is fitting, with the announcement of the acquisition by Sydney Metro of 11 buildings for two new stations in Sydney's CBD and Pyrmont affecting more than 250 property and business owners. To make matters worse, many affected by the announcement are small family businesses operating in the Hunter Connection who have already faced financial hardship over the last four years with Station Upgrades and the reduction in CBD workers following the COVID-19 Pandemic. Now, with the announcement of the new stations, there is unlikely to be adequate compensation for these businesses. Goodwill and financial hardship that has affected these owners will be ignored, as there is nothing under the Act that can provide these businesses with such heads of compensation. Their future is bleak, as there is very little opportunity for these businesses to relocate on a like-for-like basis, many will need to upgrade to more expensive premises with higher rents or simply decide to close. The Act does not provide any adequate compensation for these businesses in such circumstances.

The general principle, that in determining compensation payable to a disposed owner doubts should be resolved in a favour of a more liberal estimate (*Sydney Water Corporation [2009] NSWCA 391*) has nearly all but been lost in recent times. See also *Commissioner of Succession Duties (South Australia) v Executor Trustee and Agency Company of South Australia Ltd* (1947) 74 CLR 358 at 374. Sydney Metro now look for any technicalities to reduce compensation rather than resolve doubts in favour of the dispossessed landowner (which is the present judicial position in these matters).

B. Key Reforms

There are a number of key reforms needed with the current Act which are detailed as follows:

(i) Section 10A – Genuine Attempts To Reach Agreement

1. The object of the Act is "to encourage the acquisition of land by agreement instead of compulsory process" (see section 3(e) of the Act).

2. Section 10A requires the Acquiring Authority to *make genuine attempt to acquire the land by agreement for at least 6 months before giving a proposed acquisition notice*. (see s.10A(2) of the Act.

3. The 6-month period is sufficient, if an Acquiring Authority is making genuine attempts to acquire the land by agreement.

4. In recent times, we understand that Sydney Metro were involved in valuations where not a single dollar more was offered to landowners for their properties from the original offer, notwithstanding that the Sydney Property Market had risen by 1-2% per month over the 9-12 month period.

5. To make matters worse, Sydney Metro valuers were often ignoring their own planning advice, relying on sales 10-15km away from the subject property or would rely on a legal technicality to ignore what improvements were on the land.

6. It is too often that the Acquiring Authority will issue letters of offer 2-3 months into the 6-month process and Acquiring Authorities will always withhold any supporting reports. The affected land or business owners often become aware of any issues/differences in approach between their valuation and the valuation of the Acquiring Authority at the first meeting, often many months into the process. In some instances, issues were only raised by the Acquiring Authority through submissions to the Valuer-General.

Key Reforms Needed for Section 10A

7. The Acquiring Authority must issue an offer for compensation together with its supporting valuation and any other reports relied upon (for transparency) within 28 days of its opening letter, to ensure that the 6-month period can be fully utilised. This will allow the affected landowner to understand the basis of the claim.

8. The Acquiring Authority should pay 100% of the first offer to the land/business owner on the date of the issue of a Proposed Acquisition Notice (PAN)

9. The opening letter must occur within 7 days of the government's announcement (it can take weeks for opening meetings to occur, leaving the land and businesses owners in limbo until they have the opening meeting with the Acquiring Authority).

10. There needs to be a disciplinary process for valuers engaged by Acquiring Authorities to ensure they are held accountable, especially where valuations of an Acquiring Authority are well below market threshold and/or rely on inappropriate information.

(ii) Section 26 – Hardship Applications

11. Hardship applications under Division 3 of the Act are typically for those who have a proposed acquisition noted on their property or planning instruments in the future (usually with no express timeframe) or whose properties are immediately adjacent to a current project. As a result, these owners are unable to sell their property or if they are able to, the project has significantly devalued their property.

12. It does not make sense that reasonable legal fees, valuation fees, loss resulting from severance and other costs are excluded from a hardship claim (see s.26 of the Act).

13. The fact is that there are strict criteria (internal policies) that need to be met before a hardship claim can be accepted https://www.propertyacquisition.nsw.gov.au/sites/default/files/resources/minimum_requirements_-_owner_initiated_acquisition_in_cases_of_hardship.pdf.

14. Although our firm will often assist hardship claims on a pro bono basis (usually as an acknowledgment of their bleak situation), we cannot get valuers to do the same.

15. Owners of land under hardship are significantly worse off, when they are not entitled to reasonable legal fees, valuation fees, stamp duty, removalist costs and so on.

Key Reforms for Section 26

16. Section 26 of the Act should be removed to ensure that disturbance costs are recoverable under a hardship claim. There should be no reason why a hardship application should be treated any different to an affected landowner/business whose interest in property is being acquired.

(iii) Section 42 – Notices and Offers of Compensation

17. The Acquiring Authority has 45 days after the publication of the Gazette to issue a Compensation Notice setting out the amount of compensation as determined by the Valuer-General.

18. The Minister administering the Act (presently Minister Pavey), can extend this period up to 60 days, if so satisfied.

19. Presently, we are aware of (and acting for) former owners and tenants who have not received even a draft Determination from the Valuer-General, with no explanation for the delay, from the Minister for Transport or the Valuer-General, notwithstanding it has been 72 days since the date of Gazettal.

20. These former owners and businesses are continuing to pay loans, rent to the Acquiring Authority and shortly they will have no premises to operate from (as early as 30 June 2021) and in some instances likely to lose their homes all

because of the delays by the Valuer-General and Acquiring Authority to issue a Compensation Notice and pay compensation expeditiously.

21. It should be noted that the Acquiring Authority does not need to pay former owners and businesses any money until 28 days after receiving all the necessary paperwork (which can take 1-2 months for the banks to approve) once a Compensation Notice is issued, i.e. it can take a former owner/business up 5-6 months after Gazettal to receive any moneys from the Acquiring Authority.

22. We have written to the Valuer-General two weeks ago to follow up timing for the issue of draft Determinations for the Sydney Metro project and have yet to receive a reply, being more now 72 days since gazettal.

23. Requests for advance payments were made more than 2 months ago, and these owners have yet to receive a single dollar from Sydney Metro.

Key Reforms for Section 42

24. The NSW Government should require the Valuer-General to issue draft Determinations within 21 days of Gazettal, to allow comments from both sides and finalise Determinations within 45 days.

25. The affected owners should receive 70% of the Acquiring Authorities' last/highest offer on the date of Gazettal, to facilitate mortgage obligations and allow owners/business some compensation to commence relocating. Alternatively, owners should receive a 100% payment of the original offer by the Acquiring Authority upon the issue of PAN.

26. The Acquiring Authority should provide some financial benefit to affected owners who do not receive a Compensation Notice within the statutory timeframe, or at the very least these former owners should be entitled to remain in occupation rent free until 3 months after receiving the Compensation Notice.

(iv) Section 59 – Loss Attributable to Disturbance

27. There appears to be a large injustice between residential owners and investors under the Act.

28. Since the decision of *Speter v Roads and Maritime Services* [2016] NSWLEC 128 (**Speter's Case**), Acquiring Authorities now refuse to pay stamp duty, mortgage costs, loss of (or reduced) rent to any investor unless they can show they are an active investor (i.e. developer), putting the majority of investors in a far worse off position. These disturbance items are paid to residential owners.

29. The Acquiring Authority have more recently not recognised trusts set up for the purpose of owning property by refusing to pay stamp duty, mortgage costs, loss

of (or reduced) rent for a property trust, even though the trust is specifically set up to purchase property.

30. Most of these investors are entitled to defer CGT for up 1-2 years under current ATO rulings provided they repurchase another property, resulting in these investors having to pay stamp duty, legal costs, mortgage costs and so on for the replacement property. For example, many of the Sydney Metro affected investors at Westmead who negotiated settlement with Sydney Metro are typically around 10% worse off when they now repurchase a replacement property.

31. Prior to Speter's Case, acquiring authorities had compensated for stamp duty, legal costs, mortgage costs and so on for the replacement property.

Key Reforms for Section 59

32. All investors should be entitled to all disturbance costs, putting the investor back in the same position as they were but for the acquisition of their property.

33. To ensure that the NSW Government does not pay stamp duty to those who might not decide to repurchase another property, the NSW Government should merely offer a stamp duty credit up to the market value of the property, valid for the same period that CGT can be deferred. This should be applicable to both owner occupiers and investors.

Yours faithfully
NEWHOUSE & ARNOLD SOLICITORS

David Newhouse
Partner