Submission No 39

INQUIRY INTO ACQUISITION OF LAND IN RELATION TO MAJOR TRANSPORT PROJECTS

Organisation: Beatty Legal

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Beatty Legal™

T +61 2 8203 2381
E admin@beattylegal.com
Suite 2303, Level 23, Governor Macquarie Tower
One Farrer Place, Sydney NSW 2000

www.beattylegal.com

Our Ref: ARB:MSS

21 June 2021

Ms Abigail Boyd, MLC
Chair
Portfolio Committee No. 6 – Transport and Customer Service
Parliament House
Macquarie Street
SYDNEY NSW 2000

Dear Ms Abigail Boyd, MLC

Re: Submission to inquiry into the acquisition of land in relation to major transport projects ("Inquiry")

Beatty Legal is a specialist valuation, planning and environmental law firm based in Sydney.

We have represented many businesses, families, individuals, and listed companies who have had their land compulsorily acquired by State government authorities for public projects including the Sydney Metro, WestConnex, and M12 Motorway.

Our submission addresses paragraph 1(d) of the Inquiry's Terms of Reference. We raise serious concerns with, and urgent recommendations to reform, the conduct of negotiations by acquiring authorities in compliance with their statutory duty to "make a genuine attempt to acquire" land by agreement.[1]

Terms of Reference: 1(d)

Paragraph (1)(d) refers to:

> "*how government agencies conduct direct negotiations with landholders in relation to purchasing land/properties prior to, or in parallel with, the compulsory acquisition process, and the extent to which such process is fair, unbiased and equitable*"

Summary

The resumption of one's home or the land on which one's business operates is a very stressful event. Rather than undertaking negotiations with a view to assisting affected owners to manage and move on from the loss of their land, acquiring authorities often adopt an adversarial approach, in which the affected owner bears the burden of convincing the authority and its panel valuer of the reasonableness of its claim.

Affected owners are currently forced to incur substantial costs and expend significant time and energy in order to exercise their right to obtain "just" compensation by participating in a

[1] *Land Acquisition (Just Terms Compensation) Act 1991*, s10A.

foreign, technical, and rigid exercise, at the end of which many of their claims are rejected by the acquiring authority.

Consequently, many affected owners are ultimately pressed to make one of two choices:

1) begrudgingly accept an unsatisfactory offer, which is materially less than what they understand should be paid to them based on the independent expert advice that they have received; or

2) face the substantial risk, further costs, and delay of having their compensation determined by the Valuer General (**VG**) or, on appeal, by the Land and Environment Court (**Court**), a process which may take many months, if not years, to complete.

We submit that the *Land Acquisition (Just Terms Compensation) Act 1991* (**Just Terms Act**) should be urgently reformed to address the following four (4) recommendations:

1) Before commencing negotiations, acquiring authorities should be obliged to pay a (refundable) advance of compensation to facilitate the affected owner's ability to obtain appropriate expert advice.

2) Acquiring authorities should be obliged to engage meaningfully and commercially with all aspects of the affected owner's claim including, in the case of real deadlock between experts, through a suitable process of alternate dispute resolution (**ADR**).

3) Statutory protection should be afforded for any costs reasonably incurred by the affected owner during the negotiation phase where the proposed acquisition is withdrawn before the issue of a Proposed Acquisition Notice (**PAN**).

4) The minimum negotiation period in s10A should be renewed or extended if the acquiring authority's plans for the amount or location of land that it requires changes materially.

Background to submission

Where an affected owner's land (including lesser "interests in land") is needed by a public authority for a legitimate public purpose, the owner's rights are limited under the Just Terms Act to an entitlement to compensation in the form of cash, land, or works.

The Just Terms Act prescribes the manner and process by which an affected owner's compensation is to be determined. Compensation is limited to the six defined heads of compensation specified in s55.

In almost all cases, an affected owner will require expert legal and valuation advice to assist them in understanding their rights and in formulating, quantifying, negotiating, and, if required, prosecuting their claim. It is common for affected owners to also need to obtain the expert advice of town planners and/or forensic accountants. These costs are almost always borne by the affected owner until compensation is paid or an advance payment made.

Compensation is only required to be paid by the acquiring authority to the affected owner when the amount is agreed or, if no agreement is reached, independently determined (either by the VG or by the Courts). However, an acquiring authority must make an advance payment of compensation, being at least 90% of the compensation determined by the VG, within 28 days after an affected owner commences proceedings objecting to the statutory offer in Court.

The negotiation phase ordinarily lasts for at least 9 months (subject to Ministerial intervention). It notionally commences on the issue by the acquiring authority of an "opening letter" and ends on the publication of an acquisition notice in the NSW Government Gazette compulsorily acquiring the land. The phase is generally split into two stages:

1) the minimum 6-month negotiation period mandated by s10A; and

2) the subsequent, 90-day PAN period.

The Just Terms Act provides no guidance as to how negotiations are to be conducted by acquiring authorities save only that they are to "make a genuine attempt" to do so (under s10A). In practice, most acquiring authorities adopt, in our experience, a largely adversarial approach that requires affected owners to submit and plead their claim before the authority and its experts.

Although the VG is required to determine compensation within 45 days after gazettal, it is our experience that most determinations are issued several months after the permitted statutory period (between 2-4 months). Depending on the complexity of the case, such proceedings often take at least 1-2 years from commencement to judgment.

Instead of enabling and helping affected owners to pursue their entitlement to compensation for the loss of their land, and then get on with their lives and livelihoods, the existing negotiation process imposes, in reality, a significant, mandatory, economic burden on them while offering limited opportunity for meaningful negotiations. The process is one that exacerbates the inherent disparity in negotiating power favouring acquiring authorities that arises from the statutory right to compulsorily acquire land, and which forces affected owners to either compromise their claim or to be willing to litigate.

S10A of the Just Terms Act is ineffective

The need to "facilitate bona fide negotiations" was a cornerstone recommendation arising from submissions to Mr Russell SC's independent review of the JTC Act in 2014.[2] It was a view echoed in the findings published by the then Customer Service Commissioner, Michael Pratt AM, in his subsequent 'Housing Acquisition Review'.[3]

[2] 'Review of the Land Acquisition (Just Terms Compensation) Act 1991', David J. Russell SC, February 2014
[3] 'NSW Housing Acquisition Summary Report', Michael Pratt AM, 14 September 2016.

Consequently, Parliament amended the Just Terms Act on 1 March 2017 by, among other things, inserting new section 10A, which is extracted below:

> "*10A Minimum period of negotiation for acquisition by agreement before initiation of compulsory acquisition process*
>
> *(1) This section applies to land that is affected by a proposal for acquisition by an authority of the State, other than a proposal to acquire—*
>
> *(a) Crown land, or*
>
> *(b) an easement, or right to use land, under the surface for the construction or maintenance of works, or*
>
> *(c) a stratum under the surface for the construction of a tunnel.*
>
> *(2) The authority of the State is to make a genuine attempt to acquire the land by agreement for at least 6 months before giving a proposed acquisition notice.*
>
> *(3) The owner of the land and the authority of the State may agree to a shorter or longer period of negotiation for the acquisition of the land by agreement.*
>
> *(4) The Minister responsible for the authority of the State may approve a shorter period of negotiation, but only if the Minister is satisfied that the urgency of the matter or other circumstances of the case make it impracticable to have any longer period of negotiation. Any such approval requires the concurrence of the Minister administering this Act (being concurrence given for the particular approval or given generally for an approval of that kind).*
>
> *(5) This section does not prevent a continuation of negotiation after the giving of a proposed acquisition notice.*
>
> *(6) The authority of the State is not required to comply with this section if—*
>
> *(a) the owner of the land notifies the authority that the owner is not prepared to negotiate with the authority for the acquisition of the land by agreement, or*
>
> *(b) the owner of the land cannot be located after the making of reasonable inquiries.*
>
> *(7) Nothing in this section gives rise to, or can be taken into account in, any civil cause of action.*"

S10A applies to all resumptions of private land except certain substratum acquisitions and relevantly requires the acquiring authority to "make a genuine attempt to acquire the land by agreement for at least 6 months before giving a proposed acquisition notice". Prior to the insertion of s10A, the Just Terms Act did not impose any specific requirements on acquiring authorities to attempt to acquire land by agreement other than a general statement in s 3(1)(e) that it is an object of the Just Terms Act "to encourage the acquisition of land by agreement instead of compulsory process".

Publicly available statistics[4] suggest that s10A has not obviously achieved its primary goal of facilitating fairer negotiations and thereby increasing acquisitions by agreement over resumptions. Further, the data does not disclose the fairness of the negotiation process notwithstanding that compensation might have been agreed. For the reasons outlined above, there are likely to be a substantial number of cases resolved by agreement where the owners have been unsatisfied by the process but have determined to compromise their claim to avoid further costs and delay involved in the VG and Court process.

In the 8-year period (2005-2017) prior to the commencement of s10A, there were 2,970 reported acquisitions in NSW. Of these:

- 2,522 (85%) were by agreement;
- 343 (11.5%) were by compulsory acquisition; and
- 106 (3.5%) objections were lodged with the Land and Environment Court.

Since the commencement of s10A, there has been no relative reduction in the number of resumptions by compulsory acquisition.

The most recent available data is for financial years 2017-2020, which was published by the State Government in four categories: acquisitions by agreement, acquisitions by compulsory process, hardship applications, and acquisitions of government land.

In total during this period, there were 1,021 reported acquisitions in NSW. Of these, 235 were hardship acquisitions or acquisitions between government departments. Of the remaining 786 acquisitions:

- 666 (84.7% of 786) were by agreement and
- 120 (15.3% of 786) were by compulsory acquisition.

Our experience

The lack of any appreciable reduction in acquisitions by compulsory process is not surprising.

In some recent matters with which we are familiar, resuming agencies have:

- been unwilling to entertain any offers to acquire land at a value above what their own panel valuer has determined even where the affected owner has procured and supplied a competing valuation from a senior and experienced valuer using the same methodologies;

[4] www.propertyacquisition.nsw.gov.au/data, Property Acquisition, NSW Government.

- purported to dictate to affected owners which experts they may engage to advise them and at what cost[5];
- refused to participate in any form of mediation or other form of ADR so as to avoid referrals, at significant cost to the taxpayer, to the VG and appeals to the Court[6];
- refused to seek opinions from third party valuers independent of the State and the affected owner to overcome impasses as to the determination of market value, even in an obviously rising market;
- declined to extend the 6-month negotiating period where, during that period, its plans concerning the amount of land required or other aspects of the acquisition (such as access and egress to main roads) change thereby necessitating fresh expert evidence as to market value and potential disturbance; and
- resisted making payments of advance compensation to help affected owners offset the cost of procuring expert reports to allow them to participate meaningfully in the very negotiation which the State is obliged to conduct.

Recommendations

We suggest ***four (4) immediate reforms*** to the current model:

1. Before commencing negotiations under s10A, acquiring authorities should be obliged to pay a (refundable) advance of compensation to the owner sufficient to facilitate their ability to obtain appropriate expert advice and participate in a negotiation. Without this reform, affected owners need to rely upon the good will of experts to await payment of their fees or otherwise cover those costs personally before any payment of compensation by the State. The sum advanced would only be refunded if the total amount of compensation paid, determined or awarded was less than the amount advanced – this is unlikely to occur in the vast majority of matters.
2. The acquiring authority should be obliged to engage meaningfully and commercially with all aspects of the owner's claim for compensation including, in the case of real deadlock between experts, through a suitable process of ADR – such as a mediation (see below).
3. There should be statutory protection for any costs reasonably incurred by the affected owner in the 6-month negotiation phase where the proposed acquisition is withdrawn before the issue of a PAN; this could be achieved by a minor amendment to extend the application of existing s69 of the Just Terms Act to encompass the 6-month negotiation period.
4. If the resuming authority's plans for the amount or location of the land it requires changes materially from when it first notifies the affected owner of an intention to acquire, the 6-month negotiation period should either be re-started or extended.

[5] Notwithstanding that the Courts have consisten ly said that the test is not one solely of reasonable costs but rather whether he decision to engage an expert was itself reasonable in the circumstances
[6] See cl 3.2(d) of the Model Litigant Policy: https://arp.nsw.gov.au/assets/ars/39c2cd625f/Model-Litigant-Policy-for-Civil-Litigation.pdf

Improving the process

In our view, the government should also consider the following process to give proper effect to the intentions behind s10A and to attain the objective enshrined in s3(1)(d) of the Just Terms Act:

1. The authority serves its "opening letter" informing the owner of the proposed acquisition of their land.
2. Concurrently, the Secretary of the Department of Finance, Services and Innovation appoints a mediator from a pool of suitably qualified mediators, in a similar appointment process to the appointment of an independent reviewer for hardship decisions under the Act (see s27A):
    1. This list of mediators will be publicly available. Available mediators will be selected and listed by the Secretary of the Department of Finance, Services and Innovation (Secretary) on merit and experience in consultation with the Law Society of NSW.
    2. In preparing for a mediation, the mediator may obtain his or her own independent expert advice, which will be facilitated by the Secretary.
    3. The costs of the mediator and the meditation are to be borne by the authority and/or the Secretary.
3. Within 1 month of the "opening letter", the acquiring authority is to serve an offer and all supporting expert reports prepared on its behalf on the owner. At the same time, the authority is to make an initial advance payment of compensation to the affected owner to assist them in obtaining relevant expert advice (eg, planner, valuer, lawyer) in the following amounts:
    a. $50,000 to freehold interest owners.
    b. $25,000 to other interest owners.
4. Within 3 months, the owner is, unless they accept the authority's offer, to serve on the authority their claim and all supporting expert reports.
5. Within 5 months, if there is no agreement reached, the parties are to attend, with their experts, a face-to-face mediation before the mediator (and his or her experts). The costs of the landowner preparing for and attending this mediation (with his or her experts) are to be borne by the State. (This brings forward and mirrors the mandatory s34 conciliation process which the Court requires ahead of formal hearings.)
6. If an agreement is unable to be reached at or after the mediation, the authority will be permitted to issue a PAN.

Beatty Legal™

T +61 2 8203 2381
E admin@beattylegal.com
Suite 2303, Level 23, Governor Macquarie Tower
One Farrer Place, Sydney NSW 2000

www.beattylegal.com

We would welcome an opportunity to discuss this submission with the Inquiry if required.

Yours sincerely,

Beatty Legal

Andrew Beatty/Marlon Shou
Director/Senior Associate
Beatty Legal Pty Limited
ABN 44 273 924 764