

**Submission  
No 61**

## **INQUIRY INTO ACQUISITION OF LAND IN RELATION TO MAJOR TRANSPORT PROJECTS**

**Organisation:** The Law Society of New South Wales

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THE LAW SOCIETY  
OF NEW SOUTH WALES

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Ms Abigail Boyd  
Chair  
Portfolio Committee No. 6 – Transport and Customer Service

By email: [portfoliocommittee6@parliament.nsw.gov.au](mailto:portfoliocommittee6@parliament.nsw.gov.au)

Dear Chair,

### **Acquisition of land in relation to major transport projects**

The Law Society appreciates the opportunity to comment on the Terms of Reference for the inquiry into the acquisition of land by Transport for NSW and related agencies in relation to major transport projects. The Law Society's Environmental Planning and Development Committee contributed to this submission.

#### **Overview**

The Terms of Reference focus mainly on the conduct of, and processes implemented by, agencies in the acquisition of land for major transport projects. The Law Society considers, however, that there is an over-riding need for a comprehensive review of the *Land Acquisition (Just Terms Compensation) Act 1991* (Act). The last formal review of the Act took place in 2014 and it was a limited review that did not include consideration of the level of compensation payable for the acquisition of land.<sup>1</sup> There have been several process-focused inquiries since then, but issues remain with both the provisions of the Act and the processes under it as implemented by the relevant government agencies. The Law Society submits that these issues can only be addressed by a comprehensive review of the Act.

We also comment on the following matters: recommendations made by the earlier Russell and Pratt<sup>2</sup> reviews; 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; and make brief comments relating to the identification of land for acquisition and the capture of any uplift in land value as a result of the transport project.

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<sup>1</sup> David J Russell SC, 'Review of the Land Acquisition (Just Terms Compensation) Act 1991', February 2014, 6 accessed at

[https://www.propertyacquisition.nsw.gov.au/sites/default/files/resources/David\\_Russell\\_SC\\_JTC\\_Review\\_Report.pdf](https://www.propertyacquisition.nsw.gov.au/sites/default/files/resources/David_Russell_SC_JTC_Review_Report.pdf).

<sup>2</sup> Customer Services Commissioner Michael Pratt, *Housing Acquisition Review*, 14 September 2016. A Summary Report of the Review is available at:

[https://www.propertyacquisition.nsw.gov.au/sites/default/files/resources/customer\\_service\\_commissioner\\_nsw\\_housing\\_acquisition\\_review\\_summary\\_report.pdf](https://www.propertyacquisition.nsw.gov.au/sites/default/files/resources/customer_service_commissioner_nsw_housing_acquisition_review_summary_report.pdf).

## 1. The need for a comprehensive review of the Act after the Russell and Pratt reviews

The last formal review into the compensation regime for the compulsory acquisition of land was the Russell review in 2014. However, as stated above, the Russell review did not include consideration of the level of compensation payable for the acquisitions of real property. Furthermore, it was a recommendation of the Russell review that further consultation occur to ascertain whether there is adequate compensation in the assessment of business claims and that a review occur some years after the implementation of any amendments to enable their effect to be properly addressed:

**Recommendation 6** That consultation be held with interested parties to ascertain whether the Land Acquisition Act provides adequate compensation in the assessment of business claims, and if not, what amendments should be contemplated to properly compensate such claims.<sup>3</sup>

**Recommendation 20** That the next review of the Just Terms Compensation legislation be conducted by a reviewer who is obliged to hold public hearings and take evidence from interested parties. Further, such reviewer (sic) should be assisted by an expert panel comprising representatives of government authorities, user groups, industry groups, academics, and dispossessed landowners, to report upon the effect of any amendments to the Act adopted as a result of this review, and of the Just Terms Compensation legislation generally.<sup>4</sup>

It has now been over three years since the commencement of the *Land Acquisition (Just Terms Compensation) Amendment Act 2016*, which gave effect to some of the other recommendations from the Russell review, but these important recommendations have not been implemented.

Since the Russell review there has been a series of Land and Environment Court and Court of Appeal cases that affect disturbance, relocation, and extinguishment claims.<sup>5</sup> Due to recent infrastructure projects being clustered in built-up urban areas, these issues have become more pressing and are affecting the parties' ability to reach agreement on compensation and in achieving compensation on just terms, particularly for businesses or where land is used for investment purposes.

Considering the length of time since the Russell review and that the previous reviews did not include consideration of the level of compensation payable, a review should now be conducted which should consider a range of issues, including:

- the applicability of and implementation of section 54(1) - entitlement to just terms compensation as an overriding objective to be considered when interpreting the Act;
- compensation for stamp duty or a rollover provision in the *Duties Act 1997* enabling a stamp duty exemption for purchase of a replacement property to an equivalent value as that compulsorily acquired. Currently this compensation is only payable to owner-

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<sup>3</sup> Russell (n 1) 41.

<sup>4</sup> Ibid 70.

<sup>5</sup> See for example: *Rocco Fraietta v Roads & Maritime Services* [2017] NSWLEC 11; *Qasabian Family Investments Pty Ltd v Roads and Maritime Services*; *Fishing Station Pty Ltd v Roads and Maritime Services* [2017] NSWLEC 73; *Dan Wei Zheng v Roads & Maritime Services* [2017] NSWLEC 77; *Canal Aviv Pty Ltd v Roads and Maritime Services* [2018] NSWLEC 52; *G Capital Corporation Pty Ltd v Roads and Maritime Services* [2019] NSWLEC 12; *Hatzivasiliou v Roads and Maritime Services* [2017] NSWLEC 9; *Speter v Roads and Maritime Services* [2016] NSWLEC 128; *Roads and Maritime Services v United Petroleum Pty Ltd* [2019] NSWCA 41.

occupiers, but it is not payable to owners where the land is occupied by a related entity or person or is held for investment purposes (e.g. held for negative gearing purposes or as part of a self-managed superannuation fund);

- compensation for business costs beyond the term of the lease where that business has a short-term lease but has a long history of and an expectation of renewals;
- explicit provisions for land tax adjustments so that a payment is not made for the whole year when the land is acquired mid-year;
- compensation for business losses or loss of locational goodwill due to relocation or inability to relocate;
- consideration of the impact of income tax on compensation payable;
- compensation for advice other than legal and valuation advice;
- consideration of advance payment for legal, valuation and other costs incurred well before gazettal of the resumption;
- enforceability of property adjustment plans and commitments made as part of the project approval or planning; and
- whether dispossessed occupiers should pay rent to the resuming authority when they have already had to suffer the burden of dispossession.

### **Government Response to the Russell and Pratt reviews**

The subsequent citizen-focused Housing Acquisition Review by Customer Services Commissioner Michael Pratt in 2016 which was a high-level review requested by the then Premier and conducted over five weeks,<sup>6</sup> produced a series of resident 'pain points', guiding principles and recommendations. The Government Response<sup>7</sup> to the Russell and Pratt reviews set out proposed legislative, administrative, and operational changes, with the aim of increasing transparency and fairness in the process. We acknowledge that the implementation of reforms resulting from the recommendations from these reviews has improved the acquisition process, at least in the case of residential owner-occupiers, if not for business owners. However, we submit that some important recommendations remain outstanding. There is further change required to achieve the desired outcome of a transparent and fair process. This is evidenced by, among other things, the findings of the inquiry into the WestConnex project.

### **Impact of the WestConnex Project**

The terms of reference for the 2018 Inquiry into the impact of the WestConnex Project by the Upper House Public Accountability Committee were broad, and compulsory acquisition of land was one of several areas the report focused on. The Committee also reviewed the adequacy of the business case, cost, governance and structure of the project, the extent to which the project met original goals, its relationship with other projects, and other matters.<sup>8</sup>

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<sup>6</sup> Pratt (n 2) 7.

<sup>7</sup> NSW Government, *Response to the Russell and Pratt Review*, (2016), accessed at [https://www.propertyacquisition.nsw.gov.au/sites/default/files/resources/NSW\\_Government\\_Response\\_Property%20Acquisition%20Reform.pdf](https://www.propertyacquisition.nsw.gov.au/sites/default/files/resources/NSW_Government_Response_Property%20Acquisition%20Reform.pdf).

<sup>8</sup> Upper House Public Accountability Committee, Parliament of New South Wales, *Impact of the WestConnex Project* (December 2018) vi accessed at <https://www.parliament.nsw.gov.au/lcdocs/inquiries/2497/Final%20report%20-%20Impact%20of%20the%20WestConnex%20Project%20-%20FINAL%20-%2014%20December%202018.pdf>.

Among other findings, the Committee identified the following issues and made recommendations accordingly:

- The premature issuing of public acquisition notices;
- Inadequacy of communication between landholders and the acquiring authority;
- Undervaluing of properties and claims of bullying tactics used by the acquiring authority;
- Conflicts of interest and lack of independence of the Valuer General from the acquiring authority; and
- Poor planning and management of the acquisition process by the acquiring authority.

Of 27 recommendations made, four related to compulsory acquisitions:

**Recommendation 19:** That the NSW Government ensure that acquiring authorities only issue Proposed Acquisition Notices when they can clearly demonstrate a need to acquire the property.

**Recommendation 20:** That the NSW Government ensure that for any significant project the acquiring authority *must* provide clear and consistent information about the compulsory acquisition process by:

- ensuring relevant staff are sufficiently trained and experienced
- confirming key information in writing in a timely manner
- providing counselling and translation services where necessary.

**Recommendation 21:** That the NSW Government undertake a review into the merits of a process where all offers of compensation are administered by the Valuer General from the beginning of the property acquisition process.

**Recommendation 22:** That the NSW Government:

- devise a mechanism, through which property owners can apply to have the process by which their property was compulsorily required, reviewed
- examine whether Proposed Acquisition Notices are being speedily resolved in the interests of owners.<sup>9</sup>

The inquiry's review of the compulsory acquisition was limited in that it related solely to the WestConnex project. The inquiry also focused primarily on residents and did not examine in detail the impact of the project on small business owners who had their land compulsorily acquired.

However, the inquiry provides some insight into the current state of compulsory acquisitions in NSW, and, in our view, supports the case for a proper review of the legislation and the impact of current processes, particularly on affected small business owners and operators.

## **2. The process of land acquisition by Transport for NSW and related agencies in relation to major transport projects requires review to ensure that it is fair, unbiased, and equitable**

We suggest that, despite reforms introduced because of earlier reviews, many aspects of the current process for acquisition of land require legislative and administrative amendment to ensure that the process is fair, unbiased, and equitable. For example, we note that, based on the experience of some of our members acting for landowners:

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<sup>9</sup> Ibid ix.

- Resuming authorities, other than on an exceptional basis, do not give advance payments. As a result, occupiers and owners must fund their costs arising from the acquisition process until settlement is reached (if at all) or the Valuer-General makes a determination. Given the longer timeframes now for informal negotiations, this means costs are incurred for at least nine months.
- Resuming authorities have claimed that the six-month informal negotiation period under section 10A of the Act starts with a letter noting there is a plan to acquire the land. It may be another two-three months before the owner/occupier gets a letter of offer. The six-month period should commence when a letter of offer is received.
- The first letter of offer can lack adequate details to demonstrate how the offer figure was derived. A valuation report is not generally provided, nor is any indication in general terms given as to how the figure was derived. The only way for an owner/occupier to vet the offer is to obtain their own valuation report, at a cost, without (in many cases) an advance payment. We suggest that resuming authorities should be obliged to reveal the basis for their offers. Instead, resuming authorities commonly indicate it is their “policy” not to provide valuation reports until there is an exchange.
- Under section 34 of the Act, an occupier is entitled to remain in occupation for a further three months after the land is resumed on such terms as may be agreed or on such “reasonable terms as are determined” by the resuming authority. In practice, we understand that the resuming authority prescribes terms at the time the land is taken, which means the occupier has no ability to negotiate or move out in time if the terms are not acceptable. Examples of terms imposed include a requirement for an indemnity and for payment of rental amounts not substantiated by any valuation report that was shared with the dispossessed occupier. Payment of rent in addition to all other disruptions and costs incurred is often burdensome on occupiers, particularly where they were formerly owner occupiers, although we note that for residential acquisitions there is relief from the requirement to pay rent (section 34 (3A)).
- The resuming authority may provide a property adjustment plan for partial resumptions showing works that will be undertaken by the resuming authority to reinstate or rectify issues because of the project. However, if the matter is determined by the Valuer-General, there is no contractual obligation from the resuming authority to undertake the property adjustment plan works.
- Where a planning approval obliges the resuming authority to implement certain mitigation measures, these conditions are often not enforceable by a landowner where the government project is critical state infrastructure. The resuming authority may modify the conditions and where the landowner has already accepted compensation, a claim for any additional compensation would require an appeal to the Land and Environment Court.

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 resuming authority can be tested. We suggest that only enforceable representations by resuming authorities should be considered in the assessment of compensation.

### **3. The earmarking of land for acquisition**

It has been our members’ experience that once a public announcement regarding compulsory acquisition is made, it is very difficult for changes to be made to the acquisition plans. It is difficult to understand why requests to re-evaluate the area to be acquired cannot be met in certain circumstances, for example, where the property does not appear to be directly affected by the proposed transport route.

Land that is required for public purposes is either earmarked for acquisition or as an investigation area in planning instruments. Development cannot usually occur in these areas without the concurrence of the relevant government department. Where land is designated for acquisition, voluntary compulsory acquisitions in cases of hardship is possible, although it is very difficult for companies to make a claim. Where land is designated for investigation, it can result in the land becoming impossible to develop, with no certainty as to future use or timeframes for many years. We acknowledge that some of these problems are unavoidable in certain cases, but they can exacerbate the stress, and potential loss, for landowners affected by the land acquisition process, and the government could consider ways to recognise these effects.

**4. The uplift in value is not taken into account in compensation to dispossessed landowners, and how the government captures that value is unrelated to compulsory acquisition and is a matter of revenue generation and taxation**

Any uplift in value that occurs by virtue of the new infrastructure project for which land is being resumed is not available to a dispossessed landowner due to the definition of 'market value' in section 56 of the Act.

It is often a contested issue in compensation cases as to whether increases in value of resumed land are due to the public purpose for which the land was resumed (which cannot be factored into the market value assessment) or other factors.

The Law Society appreciates the opportunity to participate in the reform process. If you have any questions about this submission, please contact Liza Booth, Principal Policy Lawyer,

Yours faithfully,

Juliana Warner  
**President**