THE LAW SOCIETY
OF NEW SOUTH WALES

Our ref: EP&D:RHlb2007454

21 December 2020

The Hon. Melinda Pavey MP
Minister for Water, Property and Housing
GPO Box 5341
SYDNEY NSW 2001

Dear Minister,

Review of the *Land Acquisition (Just Terms Compensation) Act 1991*

The Law Society of NSW is seeking your support for a comprehensive review of the *Land Acquisition (Just Terms Compensation) Act 1991* (Act). The Law Society's Environmental Planning and Development Committee contributed to this submission.

We note that in 2012, the NSW Government commissioned David Russell QC to undertake an examination of the *Land Acquisition (Just Terms Compensation) Act 1991* (Act) as it applies to real property rights (Russell Review). The terms of reference did not include the issue of the level of compensation payable for acquisitions of real property.

The Russell Review highlighted what were described as recent public concerns about compulsory acquisitions as a driver for the review, and in particular concerns about low offers for properties to be acquired, lack of consultation and the cost of challenging compulsory acquisition valuations.[1] We submit that those concerns remain, because the Russell Review, as the last formal review of the Act, did not consider: the level of compensation payments, current business claims, tax impacts and the stamp duty regime, which are some of the most pressing issues.

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[2] and that a review occur some years after the implementation of any amendments to enable their effect to be properly addressed. It has now been over three years since the commencement of the *Land Acquisition (Just Terms Compensation) Amendment Act 2016*.

[1] David Russell QC, Review of the *Land Acquisition (Just Terms Compensation) Act 1991*, February 2014, 8 accessed at: < https://www.propertyacquisition.nsw.gov.au/russell-review-land-acquisition-just-terms-compensation-act-1991 >.
[2] Ibid 41.

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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.[3] Due to recent infrastructure projects being clustered in built-up urban areas, this issue has become more pressing and is, in our view, affecting the ability to reach agreement on compensation and in achieving compensation on just terms, particularly for businesses or where land is used for investment purposes.

The Law Society's submission to the Russell Review in 2013 noted, among other things, that we support harmonisation with the Commonwealth legislation and the referral of the respective States' and Territories' acquisition legislation to a ministerial council process to align these Acts with the principles in the *Lands Acquisition Act 1989* (Cth). The submission also suggested that there should be a further review of the Act in five years.

The Law Society also recently provided input for a submission by the Law Council of Australia, (attached), in response to the review of the *Lands Acquisition Act 1989* (Cth) by the Department of Finance. That submission also stressed the importance of harmonisation of the State and Commonwealth legislation in this area. We suggest that a review of the Act at this time, to align with the recent Commonwealth review, would promote this objective.

The Law Society would appreciate the opportunity to participate in the reform process. If you have any questions about this submission, please contact Liza Booth, Principal Policy Lawyer, at liza.booth@lawsociety.com.au or on (02) 9926 0202.

Yours sincerely,

Richard Harvey
President

[3] In relation to stamp duty and other financial costs, including relocation, disturbance, 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.

THE LAW SOCIETY
OF NEW SOUTH WALES

Our ref: EPD:RHlB1978294

9 October 2020

Mr Michael Tidball
Chief Executive Officer
Law Council of Australia
GPO Box 1989
Canberra ACT 2601

By email: alexandra.wormald@lawcouncil.asn.au

Dear Mr Tidball,

Review of the *Lands Acquisition Act 1989* (Cth)

The Law Society of NSW appreciates the opportunity to provide its comments to the Law Council of Australia ("LCA") on the Review of the Lands Acquisition Act 1989 (Cth) ("LAA"). The Law Society's Environmental Planning and Development Committee contributed to this submission.

General comments

Review
We note that the LAA has been in operation for thirty years without substantial amendment. We support more frequent reviews of the Act, to give effect to the aims of the current review and to reflect the guiding principles set out in the Discussion Paper.

Professional costs
We note the comments in paragraphs 13 and 14 on page 8 of the Discussion Paper relating to current protracted processes and the effect on the professional costs claimed. We consider that the processes could be reviewed to make them more efficient, as set out in our responses to the specific questions in the Discussion Paper. We do not support any restrictions being placed on the legal or valuation fees claimable by a landowner in the LAA, as this would potentially operate unfairly on claimant landowners. We consider that there are existing channels which adequately deal with disputes in relation to costs.

Specific questions

Our responses to some of the specific questions in the Discussion Paper are set out below.

2. How could acquisitions and their administration be reformed to encourage acquisition by agreement and improve the experience for interest holders?

We suggest that to encourage acquisition by agreement, some of the broader categories of compensation (that would be available if the land was acquired compulsorily) could be

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offered at the discretion of the resuming authority; for example, transfer duty on a replacement acquisition. This could assist in filling the gap between assessments of market value and may encourage the landowner to agree to an acquisition at an earlier stage rather than waiting for a compulsory acquisition. Some authorities use financial payments as incentives, but these incentives can exert undue pressure on a landowner because the additional payment is withdrawn if no agreement is reached within a certain timeframe.

3. What changes could be made to reduce the time to resolve compensation claims? You might like to consider which party should start the process, whether timeframes should apply and the use of face to face meetings and mediation.

There should be flexibility enabling either the claimant or the acquiring authority to start the process, but we consider that if the acquiring authority starts the process then there should be a mandated time period of at least six months so that the landowner can consider a potential compensation claim. Advance payments of valuation and legal fees should be made available to enable the landowner to consider the offer. These fees could be reimbursed upon production of a report and attendance at a face to face meeting.

4. What changes could be made to the types of compensation to ensure expenditure of public money represents value for money? You might like to consider time limits and caps in your response.

See our response above to question 3 where we suggest that there is some reimbursement of expenses, rather than just the current 90% of offered compensation, to encourage discussions. Compensation offers by the authority should set out the basis for the offer so that the offer can be tested and considered.

5. How could the LAA review processes and reconsideration avenues be changed to encourage early resolution?

A balance between the current Commonwealth and State regimes should be considered. The State regimes involve less steps and so may appear to offer an attractive option for this reason. However, we suggest that caution should be exercised, because if the only appeal process is to the Court where the parties fail to reach agreement, this will likely add substantial cost and time to the process, whichever regime is considered.

7. Is the concept of 'public purpose' sufficiently clear? If not, how could it be improved?

We consider that the concept of public purpose is sufficiently clear, based on case law. It is an important measure to ensure that land is only resumed for the greater good and for a specific purpose. That purpose needs to be clear because it has implications for the claim for compensation – in particular injurious affection. Further, it is important for landowners to know the entity they are dealing with and there are likely to be some concerns if the entity with the future benefit of the land and who then carries out the project is a private entity. This is because resuming authorities may make commitments to landowners as part of the acquisition which may not be reflected in the sale contract or any offer of compensation e.g. noise predictions, landscaping, access being maintained.

12. Should amendments be made to the LAA to support future joint projects between the Commonwealth and states and territories?

We consider that harmonisation is important. Inland rail and electricity transmission lines are good examples where the project may be of national importance, but the approach may be different within each State if the State resumes the land as opposed to the Commonwealth.

If you have any questions in relation to this letter, please contact Liza Booth, Principal Policy Lawyer on (02) 9926 0202 or by email: liza.booth@lawsociety.com.au.

Yours sincerely,

Richard Harvey
President