Urban Taskforce
AUSTRALIA

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Land Acquisition Review
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Submitted via email: larp@dpie.nsw.gov.au

To whom it may concern

Compulsory Land Acquisition Review

I write in relation to the review into improving the compulsory land acquisition processes for communities impacted by state infrastructure or other public projects. I would like to thank the Review team for affording the Urban Taskforce an extension to the deadline for public consultation until the 10th May 2024.

Urban Taskforce Australia welcomes this public consultation on an important area of land ownership that has a marked impact on community sentiment surrounding land rights and the way development proponents perceive planning, legislative and sovereign risk.

This review offers an opportunity to correct some of the failings of the *Land Acquisition (Just Terms Compensation) Act 1991* (the Act) that have manifest over time and have left many landowners, homeowners and many in the property development industry disadvantaged and frustrated.

Theme 1 – Genuine Negotiation

Developers require decisive decisions and time lags have a critical impact on project feasibility. At present, the compulsory acquisition process is rife with delays at almost every point in the journey. Every effort must be made to expedite each part of the process.

The cost of time for a developer is high. This is especially true when extensive resources into DAs, rezonings, master planning or construction works are actively being conducted.

In a highly disruptive activity, as compulsory acquisition is, the Government should bear the onus of streamlining the process to provide a less-disturbed negotiation, a fair market valuation and to reduce costs and impact to dispossessed owners.

At present, every aspect of the process appears to be confrontational. The worst aspect of the practice of compulsory acquisition in NSW is the shift away from

government agencies and departments acting as model litigants to instead, in our members' experience, pursue the very worst of predatory tactics.

The instructions to valuers; the length of time taken; the short timeframe often given to the landowner to respond; the variable application of the concept of "public purpose" – in each of these areas there has been a marked shift over time in the attitudes and approach taken by government agencies.

At present, agencies appear to seek to use every possible opportunity to drive the price of acquisition down.

This has a massive impact on the time wasted during this process, as well as the costs borne by all parties in the subsequent legal processes. Those without the means to seek remedy through the courts are left without just compensation and a bitter pre-disposition towards the agency, the government and the entire process.

Timeframes for Lands with Active Works

The acquisition process can be as impactful as the valuation.

Timing effects the dynamics of development costs in myriad ways. Even market value is affected as time passes after an area is marked for acquisition. Compulsory acquisition processes involve notifications, Valuer General determinations, court proceedings, appeal decisions and referrals back to local Councils. Incrementally, these add time to compulsory land acquisition, resulting in cases that have taken over five years.

Government should be obliged to take steps to formally acquire land and properties within a set period of time of (say 6-8 weeks) from the point at which they are aware of the intention to acquire (and not just the issuing of the proposed acquisition notice (PAN)).

The procuring authority should not be able to notify an owner (as sometimes occurs by telephone call) and then let landowners sit in limbo with their land effectively sterilised in term of the value of the land, nor force affected owners to continue to spend money and use resources to develop, when there is full intention for the Government to acquire.

Understanding the stages and processes of development and being accountable for the disruption that occurs at each point is vital to fair and just compulsory acquisition.

An alternative could be to establish a mechanism to allow for the cessation of works and development from the point of the first notification of the intent to acquire, until formal acquisition occurs, without any impact on the valuation of the land.

Such a mechanism would save significant construction and materials costs, wasted expenditure on unnecessary extra demolition, not to mention the environmental impact of building up, only to tear down.

Further to the above point, in order to maintain fair property rights, good negotiation practice and save wasted resources and environmental impact, active works or development on sites that are deemed to be acquired should be halted. This would also stop further land improvement and should be seen as a loss in profits, measurable, not from the 'notification of acquisition' but, at the 'point of acquisition'.

When works are stopped at, or after, the 'point of notification', the market value of the land and property should explicitly measure the land improvement from works/development that would have existed at the 'point of acquisition', had the compulsory acquisition process not taken place.

Recommendation 1: all Government agencies must act as model litigants. Failure to do so should be taken into account when compensation is determined.

Recommendation 2: every aspect of the Compulsory Acquisition process should be expedited. The time taken exacerbates costs for all parties as well as the feeling of loss for the dispossessed landowners.

Recommendation 3: for sites with active works or development, there should be an obligation on the procuring authority to formally acquire land and properties within a set period of time (eg. 8 weeks) from the point of notification to acquire.

Recommendation 4: when acquisition is proposed for land that is subject to building work or development, there should be a mechanism to allow for the cessation of works and development from the point of the first notification of the intent to acquire, until formal acquisition occurs, without any impact on the valuation of the land.

Best-practice documentation for negotiations for all parties

There are power asymmetries inherently involved in compulsory land acquisition outside of the obvious authority to acquire private land. Many dispossessed owners are at a disadvantage for time, resources, knowledge, information and capacities.

To avoid the increasingly widespread perception of predatory activity that can arise from these inequities, accurate information and resources should be offered to dispossessed owners at the first opportunity.

A best-practice guide should be actively used by acquisition bodies and provided to dispossessed owners. Any documentation given to one party, should be provided to all others to reduce inequities.

The best-practice document should include:

- clear explanation of the process and your rights within it drafted in plain English (and available in translated for ESL and NESB landowners).
- a presentation of the negotiation process of compulsory acquisition and options at each point of this process
- the nomination of a single case manager to oversee a project
- the practice of acquisition notices always including acquisition dates
- names of private actors involved in the acquisition process
- provision for dispossessed owners to delegate responsibility for the acquisition process through a specialist
- the compensation rules surrounding the reimbursement of incurred costs from professional fees
- available upfront resources available to dispossessed owners
- the necessity for authorities to negotiate with expert evaluation and advice
- the requirement for all documentation to be submitted before any determination
- an outline of the mediation process and its differences to standards processes
- the dispossessed owners' ability to initiate mediation
- nomination of prohibited coercion measures
- An outline of the 'stop-the-clock' provision and when it applies
- The definition of model litigant and the adoption of this role by Government

Recommendation 5: the NSW Government establish a best-practice negotiation document that provides a clear framework for acquisition bodies and a fairer playing field of dispossessed owners.

Theme 2 – Mediation

Urban Taskforce welcomes the focus on mediation in the Act as a means to promote communication and to facilitate successful negotiation.

The capacity for claimants to initiate this process is important.

Mediation should be used to facilitate agreement on valuation and compensation and should be entered into early in the 's 10A' period.

As a workable and tested framework, 's 34' of the *Land and Environment Court Act 1979* should be utilised as early as possible as the basis of mediation.

Mediators should involve third party publicly listed specialists.

The details of mediation including its initiation, costs, process and the recovery of costs should be communicated in the best practice documentation.

Recommendation 6: mediation should be available early. Mediation should involve representative facilitation and the use of accredited experts to allow necessary details that could resolve issues out of the court system. A plain-English guide to the mediation process should be published.

Theme 3 – Clarifying Compensation Provisions

Defining and Understanding 'Public Purpose'

As Western Sydney develops, we see the scope of public projects and programmes grow in scale and complexity. Under section 56(1)(a) of *the Land Acquisition (Just Terms Compensation) Act 1991*, when a parcel of land's "market value" is calculated, the practice is to disregard "any increase or decrease in the value of the land caused by the carrying out of, or the proposal to carry out, the public purpose for which the land was acquired."

Currently, 'public purpose' is defined as "any purpose for which land may by law be acquired by compulsory process under this Act." However, the recent determination of Goldmate Property Luddenham No. 1 Pty Ltd v Transport for NSW [2024] NSWLEC 39 has made it obvious that clarification is required in regard to defining and characterising 'public purpose'.

Since the relevant public purpose is that of the acquiring authority, that purpose may involve the goals of a coordinated cross-Government strategy, therefore the market value that is disregarded for a valuation can legally involve the broad context of infrastructure involving complex land uplift dynamics.

In effect, and specifically within the Goldmate v TfNSW case, the public purpose was judged to include the rezoning of land as it was a direct consequence of the public purpose and needed to be disregarded when determining market value under section 56(1)(a).

Thus, the valuation was calculated from different zonings (the prior zoning) to those that prevailed at the point of acquisition, and this substantially affected the valuation.

The practice of the NSW Valuer General has increasingly been to expand the concept and use of "public purpose" to justify the use of "betterment" of residual land" as a means to reduce compulsory acquisition payments.

The current ambiguity is costly and results in a highly inefficient process.

The provision of a breakdown on what public purpose betterment valuations can involve would

- manage the valuation expectations of public and industry stakeholders,
- allow better conception of public property rights,
- provide more clarity for investment and,
- reduce the feeling that they are the result of predatory activity from a non-model litigant.

This may involve government projects defining with detail what will be disregarded under that project's 'public purpose' in relation to valuations when acquiring land.

The "public purpose" referred to in the Act (ie. in most cases, the provision of an infrastructure asset) should be narrowly defined as only pertaining to the asset which has directly caused or brought about the compulsory land acquisition.

Specifically, it should not include the value uplift in land as a result of a consent authorities rezoning or applying a "change of use" or delivering other "public purpose infrastructure" in the vicinity which has not burdened the acquired land.

To determine a value for the acquired land, the methodology used should be a valuation on an "as is" comparable basis or on an as discounted residue land basis. The current "before and after" calculation of the residue land assumes betterment, it is unfair, litigious, time consuming and ambiguous.

In response to the questions arising from Theme 6, Urban Taskforce does not support amendments to support the recent Court of Appeal Decision. Quite the opposite.

Recommendation 7: the Act should be changed to provide a clear definition of 'Public Purpose' to establish the boundary of its impact on value in compulsory land acquisition valuations. Government projects should define what they will disregard under 'public purpose'.

Stamp Duty compensation

Part of the dispossession process can involve the purchase of replacement property by the dispossessed owner. Under these circumstances, stamp duty from the purchase of this new land becomes an additional cost within the scope of the land acquisition. While secondary in nature, this is fundamentally a transaction cost involved in the land acquisition process that would not exist had the acquisition not occurred.

Stamp duty compensation on replacement properties, has largely been unavailable under sections 55(d) 59 of the Act. Stamp Duty should be compensated for replacement land purchases, where land was acquired in its

totality or partially, within three years of acquisition date. In order to ensure fairness across the dynamics of replacing land, replacement properties that qualify for this compensation should take into consideration:

- the market value of property: of equal of lesser value, plus land uplift from the disregarded infrastructure or activity (rezoning, etc) therefrom,
- the size of land: equal or lesser, and
- the functional purpose of the replacement land, where this function is the same as the compulsorily acquired land.

Recommendation 8: Stamp Duty costs incurred from the replacement of land are compensated within a three-year period, with consideration to equal or lesser value plus upliftment, size and functional purpose.

Acquisition Management Costs

The acquisition process requires additional attention and management. These costs can be substantial, and work against any intention of a fair process.

The costs of the overheads of the owner should be compensable where that owner has managed the process themselves.

Recommendation 9: the costs associated with the management of the purchase of a replacement property should be compensable.

Special Value

Urban taskforce agrees with the section of the Discussion Paper regarding 'special value' (s 55(b)).

Members advise that this term has been narrowly interpreted with a low claim success rate.

Urban Taskforce supports the redefinition, clarification and broadening of this term with consideration to its use in future mediation as well as the overall intension of compensation to fairly remunerate multiple types of real loss incurred that have not been able to be captured to date.

Recommendation 10: the term 'special purpose' should be redefined with a view to increasing its utilisation in mediation and court proceedings. The term should apply more broadly to capture real loss that has previously been excluded.

Provide greater certainty on disturbance costs

Urban Taskforce concurs that a broadening of experts should qualify for reimbursement. We have been advised that section 59 of the Act, 'Loss attributable to disturbance', has been read unreasonably narrowly by the Court to exclude professional fees, such as planning advice, that were previously allowed under section 59(1)(f), but have seem to be no longer allowed (following adverse court cases) beyond valuation fees provided in section 59(1)(b).

Recommendation 11: the NSW Government redefines the scope of 'reasonable cost' for expenses incurred from a broad range of specialists relating to the acquisition processes.

Development arrangements and interests

Development activity, for the purposes of compensation, is poorly represented in the Act.

Development often creates internal arrangements for property owning entities and operating entities and these, when presented as evidence for claims for disturbance, have had little success. This includes short-term internal lease arrangements that seem to match the intensions of disturbance claims.

These well-documented, non-arm's length internal occupancy arrangements should be considered combined interests in the land in order to preserve operating company claims for disturbance.

Recommendation 12: internal occupancy arrangements should be seen as combined interests and compensable under the 'disturbance' provisions of the Act.

Tunnel Compensation

Under section 62,' Special provision relating to acquisition of easements or rights, tunnels etc', the exclusion from compensation for a tunnel reflects an excessively narrow appreciation of the impact of a tunnel on a potential development and thus, the value of the land. This provision further excludes reasonable loss of development rights. This does not reflect common intentions of land use and does not capture this value.

Recommendation 13: the loss of development rights be captured under 's 62 Special provision relating to acquisition of easements or rights, tunnels etc' and in general as a compensable loss.

Theme 4 – Hardship

Narrow hardship and dormant reservations

Urban Taskforce is advised that under Part 2 Division 3 of the Act, 'Owner-initiated acquisition in cases of hardship', the interpretation of 'hardship' has been unreasonable narrow.

Consideration should be given to the redefining of this term to promote smooth usage in mediation and to include the broad nature of difficult circumstances placed on dispossessed owners.

Timeframes for acquisition should be delivered with the notification to provide certainty and avoid the feeling of a looming oppressive government action. The practice of serving acquisition notices without dates should end.

Provisions should also be included in the Act that allows owners to address dormant reservations and establish a date.

Recommendation 14: the Act deal with 'hardship' in a broad sense with consideration to providing non-oppressive timeframes that avoid leaving owners with unknown and ever-looming acquisition dates.

Theme 5 – NSW Valuer General Determinations

Restore Confidence in the Valuation Process

With the valuation ruling of City of Parramatta Council v Sydney Metro [2024] NSWLEC 23, it is timely that confidence in valuation need to be restored.

This case stands with other case studies (including 'Tolson v Roads and Maritime Services [2014] NSWCA 161') emphasising the need to regain trust in valuations.

Urban Taskforce has been advised that the vast majority of the cases heard in the Land and Environment Court have awarded the affected landowner significantly more than the Valuer General's assessment.

This failure to make a 'genuine offer' raises issues of friction and efficiency in the negotiation process, with owners simply not being capable of accepting the low-ball offers. This causes disruption and hardship to the dispossessed owners and wastes government resources on court cases.

These poor practices upset proponents of housing delivery and give the impression that predatory valuation models and practices have entered into the compulsory

acquisition process, that claw backs are correcting poor planning, and that low balling is used to cover up poor delivery.

The "genuine attempt" required of acquiring authorities under 's 10A' of the Act should be amended to require acquiring authorities to conduct those negotiations as a model litigant and to always act in good faith, to provide third party expert evidence underpinning the offer and genuinely consider the expert evidence submitted to it by dispossessed owners. Failure to do so should be penalised by the court by way of adjustment to the compensation awarded to the dispossessed landowner.

The VG valuations need to truly be a genuine offer and take proper regard of the market price at the point of acquisition.

Recommendation 15: research be conducted to document the difference between the Valuer General's valuation, the amount offered by the Government and the amount awarded at the Land and Environment Court over time, to demonstrate the repeated and persistent low-balled valuations undertaken by the Valuer General and government agencies/departments. Failure to do so should be penalised by the court by way of adjustment to the compensation awarded to the dispossessed landowner.

Recommendation 16: the "genuine attempt, required of acquiring authorities under section 10A of the Act, be amended to require acquiring authorities to conduct those negotiations as a model litigant and to always act in good faith, to provide third party expert evidence underpinning the offer and genuinely consider the expert evidence submitted to it by dispossessed owners.

Theme 6 – Legislative amendments to clarify requirements

Clarifying the meaning of 'land' and 'interest in land'

Urban Taskforce has made a number of Recommendations in this submission for amendments to legislation. Recent Appeal Court decisions have the effect of winding back the payment of compensation to landowners. ***Urban Taskforce does not support the Review Paper's proposal to embed these decisions. Instead, we suggest legislative change to correct them.***

The Act should be amended to correct these decisions (See Recommendations 7, 16 and 17), not reflect them.

The Tolson Case and "betterment"

'Tolson v Roads and Maritime Services [2014] NSWCA 161' showed the capacity of the Land Acquisition (Just Terms Compensation) Act 1991 to alter the concept of compensation where statutory guarantee in cases of betterment was concerned.

The outcome of the Tolson case was overly oppressive on the landowners. The acquiring authority effectively paid nothing for half of a dispossessed owners land after having offered a substantial amount pre-court.

The critical problem with the use of the concept of "betterment" is that it is manifestly unfairly applied to the landowner – but not to all the other properties that are the beneficiaries of that betterment, or the improved value, arising from the delivery of the relevant infrastructure.

It is, in effect, the random drawing of a line on a page that determines that the landowner whose land is being acquired can get paid nothing, while the landowner across the street (not impacted by the delivery of the infrastructure asset) receives the full betterment value arising from the completion of that project.

In simple terms, this very concept works against the very name of the Act.

The primary object of the Act is:

> "*to guarantee that, when land affected by a proposal for acquisition by an authority of the State is eventually acquired, the amount of compensation will be not less than the market value of the land (unaffected by the proposal) at the date of acquisition*".

To re-establish the most basic object of the Act, it should be amended to ensure equity between those that directly benefit from an uplift in land value arising from the completion of the public purpose asset, and those landowners that are dispossessed.

Full market value should be paid for the purchase of any land, based on its zoning and potential at that time, notwithstanding any betterment arising from the public purpose once manifest.

Recommendation 17: the Act should be amended to ensure equity between those that directly benefit from an uplift in land value arising from the completion of the public purpose asset, and those landowners that are dispossessed. In short, full market value should be paid for the purchase of any land notwithstanding any betterment arising from the public purpose once manifest.

Theme 7 – Coordination of multiagency acquisitions

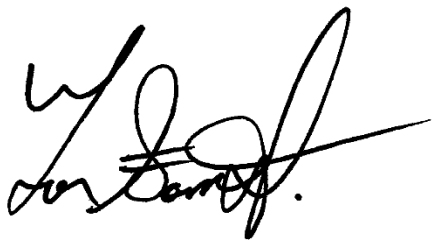
Urban Taskforce agrees with the push for improved coordination between agencies involved in compulsory acquisition.

Theme 8 – Consistency in government acquisition processes

Urban Taskforce supports the suggested improvements to minimum requirements and standardised documents a move in a positive direction.

Should any committee member wish to discuss matters relating to this submission, please contact Planning, Research and Policy Analyst, Benjamin Gellie on 9238 3969 or via email benjamin@urbantaskforce.com.au

Yours sincerely



Tom Forrest
Chief Executive Officer

Summary of recommendations

Recommendation 1: all Government agencies must act as model litigants. Failure to do so should be taken into account when compensation is determined.

Recommendation 2: every aspect of the Compulsory Acquisition process should be expedited. The time taken exacerbates costs for all parties as well as the feeling of loss for the dispossessed landowners.

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