REVIEW OF THE LAND ACQUISITION (JUST TERMS COMPENSATION) ACT 1991

DAVID J. RUSSELL SC

FEBRUARY 2014

This Review is prepared for submission to the Minister for Finance and Services, pursuant to a commissioning letter dated 24 April 2012 from the Director-General of the Department of Finance and Services. That letter stated that the Review is not to be released publicly without Cabinet's endorsement.

TABLE OF CONTENTS

Terms of reference

The terms of reference of this Review are to:

- define and clarify what real property rights or interests in real property are;
- recommend a set of principles to guide the process for how acquisitions of real property should be dealt with by Government;
- consider whether and how these principles should be reflected in current legislation; and
- recommend a process for considering these principles in future legislation.

The terms of reference do not include the issue of the level of compensation payable for acquisitions of real property.

Recommendations

The Recommendations made in this Review are collected in Appendix E.

Conduct of the Review

The Government commissioned the Review to undertake an examination of the State's just terms compensation legislation as it applies to real property rights.

The significant assistance and support provided by Ms Rosemary Chandler, A/Principal Solicitor, who acted as the Coordinator for the Review on behalf of the Department of Finance and Services, is acknowledged.

The Review was initiated by advertising in major metropolitan newspapers and a range of regional newspapers, advising of the terms of reference and inviting interested parties to suggest issues that they wished to have considered. A page on the Have Your Say website was also established, from which key documents could be downloaded.

Direct contact was made with government agencies that administer legislation that contains powers to acquire land, seeking their views as to issues of concern to them and statistics in relation to the extent of land acquisition by NSW Government agencies in recent years.

In response to the call for interested parties to suggest issues that they wished to have considered, 57 responses from a range of parties including private landowners, government agencies and industry associations were received. A list of persons and bodies that submitted issues is contained in Appendix A. Also included at Appendix B are the names of people with whom preliminary meetings were held.

Many of those submissions concerned Government action that restricted the use of land without actual acquisition of the land. Included in these issues were native vegetation legislation, planning matters, aboriginal land claims, or coal seam gas and other mining issues. Clarification was sought from the Government as to whether such issues fell within the Terms of Reference of the Review.

The Government advised that the Review would not be considering native vegetation legislation, planning matters, aboriginal land claims, or coal seam gas and other mining issues. That direction has been observed, save for one technical aboriginal land claim issue which in the opinion of the Reviewer falls within the Terms of Reference.

A Consultation Paper was then prepared which examined relevant legislation in New South Wales, including the Land Acquisition (Just Terms Compensation) Act 1991 (referred to in this Review as the Land Acquisition Act) and a number of other Acts that specifically authorise government authorities to compulsorily acquire land for particular purposes.

A copy of the Consultation Paper was sent to all 57 parties who had submitted issues for consideration. Some expressed disappointment that the Review was not going to consider wider issues. The release of the Consultation Paper was notified on the Have Your Say website, but there was no newspaper advertising of its release.

The Consultation Paper called for submissions to be considered by the Review. Many of the original submissions calling for issues to be considered were quite detailed, and such

preliminary submissions were treated as final submissions and taken into account. In addition, 32 parties made further submissions. These were all published on the Have Your Say website and are referenced in this Review by their website number e.g. "JT1". A list of these submissions is set out in Appendix C.

Joint Standing Committee on the Office of the Valuer General

In May 2013 the Joint Standing Committee ("JSC") on the Office of the Valuer General delivered Report 2/55 entitled "Land valuation system – Report on the inquiry into the land valuation system and the eighth meeting with the Valuer General" ("the JSC Report"). The Government response to the JSC Report was delivered by the Minister for Finance and Services on 4 November 2013. There is some overlap between the JSC Report and the Terms of Reference of this Review, so reference will be made to parts of that Report in later sections of this Review.

Recent public concerns about compulsory acquisition

Landowners who may be affected by the Westconnex motorway project or the eastern suburbs light rail extension project have voiced concerns in the media[1] about low offers for properties to be acquired, lack of consultation and the cost of challenging compulsory acquisition valuations. Landowners whose properties are not being acquired, but whose homes will be devalued by being next door to a motorway ramp or a tram line have expressed how upset they are by what is happening to them.

[1] "Unfair valuation fears" Sun Herald 8 December 2013; "Owners don't value acquisition offers" Sydney Central 11 December 2013; "Concord home owners hit by Westconnex plans consider compensation claim" Sydney Morning Herald 23 December 2013

Background to land acquisition legislation in NSW

In NSW, the Land Acquisition Act[2] prescribes the procedures a government agency must follow to acquire land (whether compulsorily or by agreement) and the principles for determining compensation on just terms.

The general legislative approach to compulsory acquisition of land in NSW is that an Act will authorise a state authority to compulsorily acquire land for particular purposes and that Act will also state whether the acquisition is to be governed by the processes in the Land Acquisition Act or some modification of those processes.

An example of such specific legislation is the *Local Government Act 1993*, which authorises local councils to acquire land for the purposes of that Act and requires any such acquisition to be undertaken in accordance with the Land Acquisition Act.

An example where the processes of the Land Acquisition Act have been modified by the authorising Act is schedule 6B of the *Transport Administration Act 1988*, which provides that if land under the surface is compulsorily acquired for the purpose of underground rail facilities, compensation is not payable under the Land Acquisition Act unless: the surface of the overlying soil is disturbed; the support of that surface is destroyed or injuriously affected by the construction of those facilities; or any mines or underground working in or adjacent to the land are thereby rendered unworkable or are injuriously affected.

An example where the authorising Act prescribes a different process altogether is Division 4 of Part 12 of the *Roads Act 1993*, which sets out an alternate compensation regime from the Land Acquisition Act in relation to compulsory acquisition of public roads owned by Councils.

A list of NSW legislation that contains specific powers of acquisition for particular government agencies is contained in Appendix D of this paper.

Acquisitions by agreement – the RMS example

The Land Acquisition Act encourages acquisition by negotiated purchase, similar to buying a property on the open market, rather than by compulsory acquisition. Roads and Maritime Services (RMS) undertakes approximately 80% of all acquisitions whether by agreement or compulsion, in New South Wales. A large proportion of these acquisitions are by agreement.

In order to achieve acquisition of properties by agreement, RMS says that it writes to property owners advising that a valuer representing RMS will value their property for the purpose of submitting a formal offer for the owners' consideration. The letter also invites property owners to submit an asking price and advises that RMS will reimburse property

[2] Assented to 30 August 1991 and commenced on 1 January 1992

owners for valuation fees reasonably incurred if they engage the services of registered valuers (i.e. registered appraisers).

Despite the additional cost, RMS has advised that it finds the practice of engaging registered valuers effective in facilitating the acquisition process. In general, after the RMS appraiser prepares a valuation report, RMS submits an offer to the property owner. If the property owner asks for a copy of the valuation report, RMS indicates its willingness to exchange valuation reports. This practice further encourages property owners to engage the services of registered valuers.

Where agreement cannot be reached between landowners and RMS, the compulsory acquisition process under the Land Acquisition Act will then be followed.

The Land Acquisition Act

The Land Acquisition Act commenced on 1 January 1992. No regulations have been made under the Act to date.

The Act was intended to reform major problems with the previous system, which included the absence of any statutory obligation for government authorities to pay compensation to land owners based on just terms, the inconsistent treatment of land owners by the various acquiring authorities and the ability of the State Government to acquire land compulsorily without any prior notice to the owner.

In order to overcome the problems of the previous system, the Act introduced the following principles:

- to provide a statutory guarantee that compensation to land owners will be based on just terms whether the acquisition of land is by agreement or compulsory process;
- to consider a number of specified factors in assessing just terms compensation;
- to provide strict time limits for the compulsory acquisition process and also a strict timetable for the payment of compensation;
- to implement a system for resolving compensation disputes in an expeditious manner;
- to allow a land owner to request an advance payment of compensation at any time; and
- to provide for a landowner to request that an acquiring authority acquire their land on the grounds of hardship where the land has been affected by certain designations by an authority as to how the land may be used in the future.

The above principles were intended to achieve the objects of the Act that are set out in section 3 of the Act. The objects are:

- to provide a statutory guarantee that the amount of compensation for land acquired will be not less than market value at the date of acquisition;
- to introduce compensation based on just terms;

- to establish new procedures which simplify and expedite the acquisition process;
- to require an authority to acquire land designated for acquisition for a public purpose where hardship is demonstrated; and
- to encourage the acquisition of land by agreement instead of compulsory process.

The Act applies to acquisitions, whether by agreement or compulsory process, by an authority of the State that is authorised to acquire the land by compulsory process.[3]

The Act is concerned with the acquisition of land or an interest in land. "Land" is defined to include any interest in land. "Interest in land" is defined to mean:

(a) a legal or equitable estate or interest in the land, or

(b) an easement, right, charge, power or privilege over, or in connection with, the land.[4]

The Act does not apply to the acquisition of land that is available for public sale.[5]

Part 2, Divisions 1 and 2 of the Act set out the acquisition process, including pre-acquisition procedures requiring an acquiring authority to give written notice of its intention to acquire land. All owners having a registered interest in the land, who are in lawful occupation of the land or are known to the acquiring authority to have an interest in the land should be given notice.[6] At least 90 days notice is to be given before land is compulsorily acquired.[7]

While notice may have been given by an acquiring authority to acquire land, this does not prevent the land being acquired by agreement. The vast majority of land acquisitions in NSW are in fact by agreement. Negotiations to purchase the land from the landowner will often continue after the issuing of a notice by the acquiring authority to acquire the land. The issuing of a notice does not preclude acquisition by agreement.

If the acquisition is a compulsory acquisition, this is achieved by seeking the approval of the Governor, and publication of notice in the Gazette and if practicable, publication in at least one newspaper circulating in the area in which the land is situated. As a consequence of publication in the Gazette, the land is vested in the relevant authority freed and discharged from all estates and interests over or in connection with the land.[8]

---

[3] See Section 5 (1); also see Section 38 *Land Acquisition (Just Terms Compensation) Act 1991(NSW)*

[4] Section 4 (1) *Land Acquisition (Just Terms Compensation) Act 1991*

[5] Section 5 (2) *Land Acquisition (Just Terms Compensation) Act 1991*

[6] Sections 11 and 12 *Land Acquisition (Just Terms Compensation) Act 1991*

[7] Section 13 *Land Acquisition (Just Terms Compensation) Act 1991*

[8] Sections 19 and 20 *Land Acquisition (Just Terms Compensation) Act 1991*

Division 3 of Part 2 contains provisions that allow owners of land to require the authority to acquire the land on the basis of the owner's claim that he or she will suffer hardship if there is any delay in acquisition.[9] This hardship issue is dealt with in this Review.

Part 3 of the Act covers an owner's entitlement to compensation. The Act specifically states that an owner of an interest in land that is extinguished by an acquisition notice is entitled to be paid compensation. Whether the acquisition is by agreement or is compulsory, the acquiring authority is required to take into account the matters set out in Part 3 of the Act in determining compensation.[10]

Owners are to lodge their claims for compensation with the relevant authority and such claims are to be in the prescribed or approved form as the case may be. Authorities which receive claims are required to provide these to the Valuer General who is authorised to determine the amount of compensation before or after the acquisition takes effect and even though the former owner has not made a claim for compensation. [11]

Where an authority has compulsorily acquired land by publication of a notice in the Gazette, within 30 days of the publication of the notice the authority is required to give the former owners notice of the compulsory acquisition and their entitlement to compensation and the amount of compensation as determined by the Valuer General.[12]

The Act states that the amount of compensation a person is entitled to is such amount as "will justly compensate the person for the acquisition of the land".[13]

Section 55 of the Act requires a number of matters to be taken into account in determining compensation. These matters are discussed in this Review.

The JSC Report summarised[14] the process as follows:

> *"State and local government agencies may acquire land through a compulsory process for a range of purposes. Where an acquiring authority cannot negotiate a settlement for land to be acquired, the land is compulsorily acquired, and the Valuer General is required to determine the amount of compensation to be offered to a dispossessed owner.*
>
> *The compulsory acquisition process is regulated by the Land Acquisition (Just Terms Compensation) Act, and requires that the Valuer General determine the amount of compensation provided to dispossessed landholders. LPI manages this process under delegated authority from the Valuer General.*

---

[9] Sections 21-27 *Land Acquisition (Just Terms Compensation) Act 1991*

[10] Sections 37 and 38 *Land Acquisition (Just Terms Compensation) Act 1991*

[11] Section 41 *Land Acquisition (Just Terms Compensation) Act 1991*

[12] Section 42 (1) *Land Acquisition (Just Terms Compensation) Act 1991*

[13] Section 54 *Land Acquisition (Just Terms Compensation) Act 1991*

[14] JSC Report 1.18-1.20

Section 54 of the Act requires compensation at such an amount as will justly compensate the person for the acquisition of the land, having regard to the following factors:

Market value,

Any special value to the former owner,

Any losses attributable to severance or disturbance,

Solatium,

Any increase or decrease in the value of any other land owned by the former owner at the date of acquisition, which adjoins or is severed from the acquired land by reason of the carrying out of, or the proposal to carry out, the public purpose for which the land was acquired."

Activities affecting land which do not amount to acquisition

The Land Acquisition Act does not apply where a person is simply prevented from making a particular use of the land (for example, by planning or environmental protection legislation).

Some activities may appear to be acquisition but are more properly described as interferences with a landowner's rights instead of being an acquisition of land, or an interest in land.

There are many government activities and rules that adversely affect the use and enjoyment of privately owned land such as environmental, planning and building regulations. "These regulations are not part of acquisition law. Acquisition is the eviction of a land owner and others from property in return for the payment of compensation for the loss of that land".[15] Events that may resemble acquisition may happen in the mining arena, for example, where mining companies acquire rights to access land under the NSW *Petroleum (Onshore) Act 1991*. This legislation provides for compensation for affected landowners arising from mining or coal seam gas access upon their property.

[15] Douglas Brown, Land Acquisition, 6th edition, LexisNexis Butterworths p 6

Relevant legislation in other jurisdictions

Acquisition on 'just terms'

The Commonwealth Constitution empowers the Federal Parliament to make laws with respect to "the acquisition of property on just terms from any State or person for any purpose in respect of which the Parliament has powers to make laws".[16]

"Just terms" is probably not the best phrase to use for an activity which may be regarded by a landowner whose land is being acquired as in fact unjust.

> "*Whether the use of words 'just compensation' means anything more than 'full compensation' or 'reasonable compensation' is unlikely. The term 'just terms' goes beyond the limited scope of a sum of money for the expropriation. It also covers undue delay and as a result a claim for interest where compensation has not been paid promptly*."[17]

By contrast with the Federal Parliament, the State Parliaments have no constitutional restriction in relation to acquisition of land and have no constitutional obligation to provide any compensation whatsoever for such compulsory acquisition. The constitutions of the various States have no equivalent of Section 51(xxxi) of the Commonwealth Constitution. Each State Parliament may enact legislation to compulsorily acquire land with or without the payment of compensation or with reduced compensation.[18]

Each of the States and Territories has enacted legislation to provide compensation on just terms where the government compulsorily acquires land or an interest in land.

Acquisition legislation in Australian jurisdictions

Each of the nine Australian jurisdictions (states and territories and the Commonwealth) has principal acquisition legislation (or resumption legislation as it is sometimes called). This paper will examine some aspects of acquisition legislation and the treatment of the matters in the different jurisdictions.

In NSW, Victoria and South Australia the power for a government agency to acquire land lies outside the just terms compensation legislation and is found in specific legislation. The principal acquisition legislation of the Commonwealth, Queensland, Western Australia and Tasmania contains powers of acquisition. Such powers may also be included in other legislation in these jurisdictions. In the Northern Territory and the Australian Capital

[16] S51 (xxxi) of the Commonwealth of Australia Constitution Act

[17] Brown, op.cit. pp 11-12; and see also Commonwealth v Huon Transport Ltd (1945) 70 CLR 293

[18] Commonwealth v New South Wales (1915) 20 CLR 54

Territory, the principal acquisition legislation enables acquisition to be carried out for purposes which are within the scope of the territory's power to make laws.[19]

Principal acquisition statutes in the nine Australian jurisdictions

The principal statutes governing the acquisition of land in Australia and currently in force are:

(i) *Lands Acquisition Act 1989* (Cth)
(ii) *Land Acquisition (Just Terms Compensation) Act 1991* (NSW)
(iii) *Lands Acquisition Act 1978* (NT)
(iv) *Acquisition of Land Act 1967* (Qld)
(v) *Land Acquisition Act 1969* (SA)
(vi) *Land Acquisition Act 1993* (Tas*)*
(vii) *Land Acquisition and Compensation Act 1986* (Vic)
(viii) *Lands Acquisition Act 1994* (ACT)
(ix) *Land Administration Act 1997* (WA)

Each of the principal statutes contains detailed provisions governing the procedure to be followed where an agency, with powers of compulsory acquisition, commences the process of acquiring land.

The principal statutes also set out the matters which are to be taken into account when determining the amount of compensation to be paid to a dispossessed owner.[20] In summary the legislation in each jurisdiction addresses process and the approach to compensation in a variety of ways.

As observed by Brown, a well-known writer in this area,

> "*None of the nine Acts is a model of excellence. Most of them are tediously and unnecessarily lengthy. Yet it is not defects in the legislation that create the main difficulties in resumption. …. It is the factual complexities in determining compensation that result in such formidable tasks for claimants, administrators, valuers and the courts. … The current legislation is adequate despite its faults, even though some of the legislation appears to make the subject more difficult than it should be*."[21]

Acquisition of interests in land

Each of the principal acquisition statutes is concerned with the taking of land or interests in land, however none of the Acts defines land other than to say that it includes any interest in

[19] Brown, op.cit. p 7

[20] Brown, op.cit p 2

[21] Brown, op. cit. p 3

land, as is the case with the Land Acquisition Act. The Acts do not define "land" in terms of its physical characteristics.

Acquisition legislation is concerned with the change in ownership of land from the dispossessed landowner to the acquiring authority and paying compensation to the owner for the loss that they have suffered. Nearly all of the statutes define an "interest in land" but

> "*None of the definitions is helpful in determining what is or is not an interest in land being resumed and justifying a claim for compensation…. Despite the variations in the definitions, there is probably no significant difference between them. What is regarded as being an interest in one jurisdiction is likely to be regarded as an interest in another*".[22]

The High Court has held that in relation to Federal legislation, what is required is an "acquisition" of property and not a mere "taking". In *Commonwealth v Tasmania* (1983) 158 CLR 1 at 145, Mason J said:

> *"To bring the constitutional provision into play it is not enough that legislation adversely affects or terminates a pre-existing right that an owner enjoys in relation to his property; there must be an acquisition whereby the Commonwealth or another acquires an interest in property, however slight or insubstantial it may be."*

The requisitioning of a ship does not amount to an "acquisition of property" under the Federal constitution.[23] The exercise of a lien over aircraft as security for amounts owed under the *Civil Aviation Act 1988 (Cth)* was held by the High Court not to amount to an acquisition.[24] Legislation which imposes significant restrictions on packaging for tobacco products is not an acquisition.[25]

In *Commonwealth v Tasmania*[26] it was held that prohibition on the use of property for the purpose of constructing a reservoir did not amount to an acquisition. An acquisition had to go beyond legislation adversely affecting or terminating a pre-existing right that Tasmania enjoyed in relation to its property.

Recently the High Court dealt with the replacement of bore licenses issued under the *Water Act 1912 (NSW)* with aquifer access licences issued under the *Water Management Act 2000 (NSW)*. The Court held that such replacement was not an acquisition of property within the meaning of Section 51(xxxi) of the Commonwealth Constitution.[27]

---

[22] Brown, op.cit p 25

[23] Australasian United Steam Navigation Co Ltd v Shipping Control Board (1945) 71 CLR 508

[24] Airservices Australia v Canadian Airlines International Ltd (1999) 202 CLR 133

[25] JT International SA v Commonwealth [2012] HCA 43

[26] (1983) 158 CLR 1

[27] ICM Agriculture Pty Ltd & Ors v The Commonwealth of Australia & Ors 240 CLR 140

Compensation

All of the nine statutes provide for compensation to be provided for loss of land acquired. The terms of the provisions vary in prescribing the matters to be taken into account. The relevant provisions are consistent with each other in requiring the market value of the land to be determined.

The principles of valuation applied in determining the market value of the land are common to each of the nine jurisdictions. The statutory provisions differ in regard to other matters that may be taken into account in addition to market value. Market value by itself is generally regarded as insufficient to be seen as compensation on just terms.[28]

Under Commonwealth, NSW, Queensland, Western Australian, Tasmanian and Australian Capital Territory legislation, the responsibility for making a claim for compensation lies with the claimant. As noted by Brown,

> "*the claimants do not have the benefit of knowing the value the authority places on the land. Almost certainly the authority will have estimated the cost of the resumption and for that purpose will have obtained a valuation of the land. No doubt that valuation will serve as a guide whether or not to accept the claim made by the claimant. If the claimant had the assistance of seeing and examining that valuation, it might assist the claimant in preparing his or her claim*".[29]

All of the acquisition statutes envisage and provide for acquisition by agreement. However, there are no uniform requirements across the jurisdictions as to how best to facilitate acquisition by agreement. It has been suggested that while the Land Acquisition Act supposedly encourages acquisition by agreement, acquiring authorities do not have to provide a system to facilitate this. Roads and Maritime Services, the authority in NSW that undertakes the most acquisitions in this jurisdiction, submitted to the Review that it is very aware of the need to facilitate acquisition by agreement and has developed procedures in this regard[30].

Harmonisation of acquisition laws

Harmonisation of acquisition laws in Australia has been raised as a desirable objective. There appear to be two divergent views on this issue. One view is that "the plethora of statutory enactments, and the fact of competing legislation enabling resumptions at a federal level, cannot be justified on any rational basis, and such a multitude of statutory provisions has sometimes led to confusion as to the identity of the acquiring authority".[31] The other view is that "even if there were a ten page masterpiece of drafting containing all the essential provisions which each of the nine jurisdictions voluntarily and willingly

[28] Brown, op.cit p 103

[29] Brown, op.cit p 106

[30] See pp.9-10 infra

[31] Marcus Jacobs, Law of Compulsory Land Acquisition, Thomson Reuters, 2010, p 27

adopted, it would make little difference to the primary difficulty in valuing the land and awarding fair and reasonable compensation…. Uniform legislation, expertly drafted, would have little impact on solving these problems.[32]

The Australian Property Institute submitted to the Review:

> *"The assessment of compensation payable to a dispossessed owner pursuant to s.59 LAJTCA is not mirrored completely in the other five state jurisdictions nor the two territory jurisdictions. It is the view of the API that cross jurisdictional harmonisation of the principles for the assessment of compensation should be a consideration, given that much infrastructure construction over the next decade will have no respect for geographic jurisdictional boundaries."*

The Property Law Committee of the Law Society of NSW nominated the following issue for consideration by the Review: "Should State law be harmonised with the Commonwealth position in this area?"

United States acquisition legislation

The Fifth Amendment to the United States Constitution imposes limitations on the exercise of eminent domain (as compulsory acquisition is known in the United States). The taking of property must be for public use and just compensation must be paid. All states of the United States have legislation specifying eminent domain procedures within their respective territories.

Canadian acquisition legislation[33]

In Canada expropriation (as compulsory acquisition is known in Canada) is governed by federal or provincial statutes. Canada does not have an equivalent to the Fifth Amendment clause and neither the federal nor provincial governments are under any constitutional obligation to pay compensation for expropriated property although there are such requirements in certain statutes.

At the federal level, expropriation is governed primarily by the Expropriation Act. This law allows acquisition for "public purposes" as well as "public works". It entitles the property owner to compensation and the right to appeal the amount of compensation to the courts.

Under Canadian Federal law the property owner is entitled to fair market value of property and additional compensation is provided if the owner occupied the property at the time of the acquisition or used it as a residence. In the case of land occupied by the owner, the owner must be compensated for the value of any special economic advantage they receive from occupying the land. In the case of residences if the fair market value is insufficient to

---

[32] Brown, op.cit p 3

[33] This section has been largely taken from the Research Report Eminent Domain, Connecticut, Office of Legislative Research (OLR) Kevin E McCarthy, Principal Analyst, 2005-R-0321

allow the owner to buy a new residence reasonably equivalent to his former residence, the amount of compensation must be increased to cover the difference.

The Canadian provinces and territories have their own laws governing expropriation and procedures. For example there is planning legislation such as the *Saskatchewan Planning and Development Act 1983* that allows municipalities to prepare development plans to address a wide range of issues. The Act allows the municipality to acquire land to implement the plan, and to expropriate it if the municipal council cannot purchase the land at a fair price or otherwise acquire the land with the owner's consent.

Acquisition of land in NSW in period 2007-2012

Table of agencies and acquisitions since January 2007

Agency	By agreement	Compulsory	Combined figure - by agreement and compulsory
Hunter Water Corporation	57		
Attorney General and Justice	1		
Education and Communities		17	
Sydney Water Corporation	145	104	
Division of Local Government (Department of Premier and Cabinet)			469
Department of Planning and Infrastructure	153	40	
Office of Environment and Heritage (Department of Premier and Cabinet)	5 to 10	1	
Department of Trade and Investment, Regional Infrastructure and Services	29 (Sydney Catchment Authority) + 1 (State Water)	2 (State Water)	
Department of Family and Community Services (Ageing Disability and Homecare)	490		
Roads and Maritime Services (agency within Transport for NSW)	1,580	347 (over half of these are acquisitions of Crown land)	
NSW Land and Housing Corporation (Department of Finance and Services)	Acquisition legislation has not been used for acquiring whole blocks of land for at least 20 years	6	

The above table was compiled from information supplied by those government agencies which responded to a request for information regarding recent acquisitions and is not a complete record of such acquisitions. Some agencies did not respond to the request for acquisition statistics.

Procedures and timeframes in the Land Acquisition Act

The procedures and timeframes currently contained in the Land Acquisition Act can be summarised as follows:

(a) The compulsory acquisition process is commenced by the service of a proposed acquisition notice (PAN) on the owner of the land (Sections 11 and 12). Copies of the notice are given to the Registrar-General and the Valuer General (Sections 17 and 18).

(b) The minimum period of a PAN is 90 days unless that period is shortened by the Minister (Section 13).

(c) Land is acquired by publication of an acquisition notice (approved by the Governor) in the Government Gazette, which must occur within a period of 120 days from the date on which the PAN was served, unless a longer period is agreed to by the relevant authority and the owner of the land (Section 14).

(d) The acquisition takes effect from publication in the Gazette (Section 20).

(e) A PAN may be withdrawn (Section 16) but land owners may be entitled to compensation (Section 69).

(f) Special provision is made for the acquisition of Crown land (Section 29). If the acquisition is by agreement the pre-acquisition procedure and compensation provisions do not apply. It is still necessary to obtain the approval of the Governor and publish the acquisition notice in the Government Gazette.

(g) In the case of private land, pre-acquisition provisions and compensation provisions do not apply where acquisition is with the agreement of the owner (Section 30). It is still necessary to obtain the approval of the Governor and publish the acquisition notice in the Government Gazette.

(h) Owners of land have a right to compensation in accordance with the provisions of the Act (Sections 37, 37A and 38).

(i) A person wishing to claim compensation is required to lodge a claim and to provide details of other persons who have an interest in land (Sections 39 and 40).

(j) An acquiring authority is to give a copy of any claim for compensation to the Valuer General, who may determine an amount of compensation (Section 41).

(k) An acquiring authority must give written notice of the acquisition, the former owner's entitlement to compensation and an offer of compensation, within 30 days from publication of an acquisition notice (Section 42). This notice is called a "compensation notice". The Act lists the persons to whom the compensation notice is to be given and provides exceptions to the time requirement.

(l) Provision is made in Sections 44 and 45 for acceptance and deemed acceptance of compensation.

(m) A person who has not received a compensation notice may still make a claim for compensation. The acquiring authority must serve a compensation notice if it considers that a claim is justified. Otherwise it should reject the claim (Section 46). There is a deemed rejection of a claim for compensation after 60 days.

(n) The Valuer General is to determine the compensation to be offered to a person claiming compensation (Section 47).

(o) When the acquiring authority pays compensation to an owner and is unaware of the existence of other interest holders, the rights of the other interest holders to recover compensation from the acquiring authority are extinguished, but the other interest holders may still recover compensation from the former owner who has been paid the compensation (Section 5).

(p) Division 4 of Part 3 of the Land Acquisition Act sets out a method for determining the amount of compensation payable. A person who has been offered compensation may appeal to the Land and Environment Court against the amount of compensation offered (Section 66). The acquiring authority has no right of appeal against the amount of compensation determined by the Valuer General.

(q) A person whose claim for compensation has been rejected may appeal to the Land and Environment Court against that rejection (Section 67).

Real Property Rights or Interests

Introduction

The first term of reference of this Review is to:

> *"Define and clarify what real property rights or interests in real property are."*

Section 4 of the Land Acquisition Act provides that *"land"* includes any interest in land. Section 4 also provides that *"interest"* in land means:

> *"(a) a legal or equitable estate or interest in the land, or*
> *(b) an easement, right, charge, power or privilege over, or in connection with, the land."*

Submissions Received

Very few submissions received touched upon this first term of reference. It would seem that most acquisitions of land throw up no problems in understanding the meaning of the terms *"land"* or *"interest"* in land.

Boral Property Group[34] submitted that compulsory acquisition of land such as a quarry should entitle the owner to compensation not just for the surface land itself, but also for the value of the particular reserves that lie below that land area.

Mr Jonathan O'Dea MP[35] noted that in the case of underground land resumptions, special provisions, particularly Schedule 6B of the Transport Administration Act, partially exclude the operation of the Land Acquisition Act. He submitted that the provisions of the Land Acquisition Act should be given full effect to enable a potential claimant to have their claim for compensation, in relation to underground works, assessed in the normal way. He submitted that either the exclusionary provision in the Transport Administration Act should be removed entirely, or it should only apply below a certain depth, for example, 12 or 15 metres below the surface.

Dr Nicholas Brunton[36] submitted that:

(a) The current definition of interest in land is *"overly legalistic and could be improved"*. He suggested that it should specify the types of interest in land that can be acquired, such as licenses, easements and profits a prendre;
(b) He supported the argument that the Land Acquisition Act should be amended to specifically enable the acquisition or imposition of positive or negative covenants

[34] JT 2

[35] JT 6

[36] JT 15

on land, as there is doubt as to whether this is currently available to acquiring authorities.

Both submissions were made in relation to electricity transmission issues, and thus these matters will be included in the section of the Review dealing with that specific topic.

The Law Society of NSW Environmental Planning and Development Committee[37] made the following submissions in relation to electricity transmission issues:

(a) There should be clarification of the meaning of 'right power or privilege';
(b) The operation of the Land Acquisition Act should not be restricted to owners who have a discoverable legal or equitable interest.

These matters will be taken up in the section of this Review dealing with electricity transmission issues.

Apart from specific problems which arise in relation to electricity transmission issues, the submissions to the Review seem to indicate that there are no particular problems in working out the meaning of *"land"* or *"interest in land"*. No changes to the meaning of *"land"* or *"interest in land"* are recommended, apart from what is dealt with later in this Review concerning electricity transmission issues.

Again, it should be recorded that many submissions, particularly those made prior to release of the Consultation Paper, suggested that the operation of just terms compensation should be extended to those situations where land or an interest in land was not acquired, but rather a restriction was placed upon the use of land. As has previously been recited, the Government, upon this matter being raised, indicated that the Review was not designed to cover that topic.

[37] JT 23

Compensation procedures and timeframes

JSC Report

The JSC Report summarised[38] the procedures as follows:

> *"Pursuant to s 11(1) of the Land Acquisition (Just Terms Compensation) Act 1991 landholders whose property is to be compulsorily acquired must receive notice of an intention to acquire at least 90 days prior to acquisition. Acquisition gives rise to a right for compensation, which is to be offered to the owner after a maximum of 60 days after the land is compulsorily acquired. A person entitled to compensation must lodge a claim. A person who is entitled to compensation will usually attach submissions regarding the quantum of compensation to their claim. Compulsory acquisition valuations may be completed by LPI or contractors. In either case, LPI will review the valuation before it is finalised. The valuer may ask for more information from the parties and conduct their own enquiries. In this process, it is possible that they may put adverse information to parties, although there is no process to ensure this opportunity is consistently provided. If a landholder disagrees with their valuation, they can object to the Land and Environment Court under s 66(1). The court has the power to re-value the property.*
>
> *It should also be noted, that the same process applies to people who elect to have their land compulsorily acquired. This right accrues to landholders whose land is designated for acquisition for a public purpose and the owner can demonstrate hardship. Individuals whose land is acquired in this way are entitled to compensation and can object to the valuation to the Land and Environment Court. That right of appeal does not extend to the acquiring authority."*

The JSC came to the view that the system used to value land for compulsory acquisition valuations needed improvement[39]. The Committee's suggestions will be dealt with below.

Submissions by Transport for NSW

Prior to release of the Consultation Paper, Transport for NSW, a Government department, made a detailed submission about reform of acquisition processes and timeframes. It said:

> *"More streamlined procedures will meet the objective of the Act for a simplified and expedited compulsory acquisition process.*
>
> *a. <u>Fixed period of required negotiations</u>*
>
> *Consideration should be given to the establishment of a fixed period of required negotiation, prior to the compulsory consultation period, and to ensure that the pre-formal negotiations do not replicate the compulsory process.*

[38] JSC Report 5.38-5.39

[39] JSC Report 5.63

This may include the requirement for meetings between the Government agency and the claimant party, as an introduction to the process and throughout the negotiation process, rather than relying on third parties to conduct negotiations on their behalf. When acquisitions are not conducted or attended directly by the principals involved, it may lead to extended negotiations due to too many vested interests being served.

b. Compulsory process timeframe

The current timeframe involved for the formal, compulsory process may take many months. A possible way to reduce the timeframe would be to reduce the 'normal' Property Acquisition Notice period from 90 days to 60 days. The necessary procedural steps during this stage can reasonably be managed within a shorter period. This would reduce the period of uncertainty for both parties and maintain focus on resolving a commercial agreement.

c. Lodgment of claims

A Government acquiring authority must give a landowner or lessee at least 60 days in which to lodge a claim for compensation. This could be reviewed to ensure the efficiency of the process. The administration of the preparation, submission and negotiation of claims could be reviewed for efficiency and new management techniques (for example, a Case Manager) should be explored.

d. Acquiring land from local councils/State Government agencies for the purpose of a new transport project

If land is being acquired from a local council/State Government agency for the purpose of a new transport project, there should be a separate, more streamlined, compulsory acquisition process.

The process could be limited to certain types of land (i.e. vacant land, unmade roads, land not required for operational purposes or whose use is not detrimentally impacted by the acquisition) where the notice periods are shorter, the compensation payable fixed at the Valuer General's valuation (except in cases of manifest error) after each party is consulted and able to make submissions, and there are no Section 66 objections to the Land and Environment Court.

A whole of Government approach needs to be taken between State Government agencies and across the levels of Government. This could include an extension of the existing streamlined compensation provisions under the Roads Act 1993 (Part 12, Division 4) to such compulsory acquisitions."

Transport for NSW also suggested the following reforms:

(a) An amendment to the *Land and Environment Court Rules 2007* to include Class 3 claims for compensation by reason of the acquisition of land in accordance with the Land Acquisition Act, if the applicant is a local council; and

(b) The provision of alternative dispute resolution to resolve disputes relating to compensation amounts and payments, as an alternative to appeals to the Land and Environment Court.

Other submissions prior to release of the Consultation Paper

One community group raised the question of whether the Land Acquisition Act should be amended to provide greater flexibility in the timing of acquisitions to better reflect the varying circumstances of affected residents. Currently a 90 day notice period applies before land is compulsorily acquired, after which the acquiring authority is entitled to charge the person market rent if they stay on the property beyond the date on which the property was acquired.[40] The suggestion was that there needed to be more flexibility in the timing of the acquisition process.

Another community suggestion was to amend the legislation to allow registered proprietors of property being compulsorily acquired to have face-to-face meetings with representatives of the acquiring authority to state their views as to whether or not they wish their property to be acquired and upon what terms. That submission also suggested that adequate arbitration processes should be set up under the Land Acquisition Act to allow for mediation and arbitration in disputes between registered proprietors and government.

A similar suggestion was made by two Coffs Harbour citizens who had the experience of waiting 11 years between their land being identified as being within a highway by-pass corridor and the acquisition of that land. Their recommendations were:

> *"There should be in place an independent arbitrator to liaise between the [Roads Authorities] and property owners when negotiations break down. Currently, the only avenue for property owners is to wait for compulsory acquisition to come in before they are able to get a court hearing. The Coffs Harbour by-pass has not reached compulsory acquisition at this time and will not do so for some years yet.*
>
> *There should be a set time frame until compulsory acquisition conditions apply. Property owners can then plan for the future and know that they have a court to rely on as an independent arbitrator in the compensation process."*

Gosford City Council also raised the following administrative matter:

> *"Another concern is the delay that sometimes occurs in obtaining the concurrence of the responsible Minister to the issue of a Proposed Acquisition Notice (PAN). Council has waited in excess of 10 years in one matter. There should be a provision that the person who recommends to the Minister to give concurrence to the issue of a PAN or to decline*

[40] Sections 13 and 34 of the Land Acquisition (Just Terms Compensation) Act 1991

to issue a PAN, should make the recommendations within 6 months of application by the acquiring authority, and that the concurrence be deemed to have been given unless declined within 6 months after receiving the PAN."

The Environmental Planning and Development Committee of the Law Society of NSW submitted the following procedural issues for consideration by the Review:

1. Should an acquiring authority have the power to acquire land for resale? If so, on what basis?
2. Where an acquiring authority acquires land zoned *"open space"* owned by a local council, should the legislation require compensation to be payable to that Council on the basis of the cost of replacing that land?
3. Is a period of 90 days within which to lodge an objection with the Land and Environment Court against the amount of compensation offered under Section 45 of the Land Acquisition Act sufficient, particularly given the Land and Environment Court's current Practice Direction for such matters?

Submissions received after the Consultation Paper

Several of the submissions referred to below were made by landowners who had been through the compulsory acquisition process. The Review was not conducted in an inquisitorial or adversarial fashion, so no response was sought from the acquiring authorities mentioned in the submissions. Nevertheless, it is thought useful to record the perceptions of some landowners who have had experience of the current system.

Mr John Bracey[41] made a submission concerning compulsory acquisition of his home by the Health Administration Corporation. His perception was that the Heath Administration Corporation employed outside experts in an attempt to force him to settle on their conditions, rather than negotiating a purchase price. He and his wife became involved in proceedings in the Land and Environment Court which he described as enormously expensive and stressful. It should be noted that Mr Bracey succeeded in those proceedings in obtaining a higher price for his land[42]. One of his suggestions was that any landowner should acquire at least two independent valuations from qualified valuers, which should be paid for by the acquiring authority. Mr Bracey felt some unease when he learned that the Valuer General does not do most compulsory acquisition valuations, but these are outsourced to a number of third party valuers who specialise in the area. He thought that in the interests of fairness and equitable compensation, the highest valuation given by independent valuers should be used as a benchmark for any acquisition of any property.

[41] JT 10

[42] Penfold and Bracey v Health Administration Corporation [2009] NSWLEC 157

Ms Frances Vumbaca[43] had her land resumed for the South West Rail Link. She did not go to the Land and Environment Court because of the stress involved and concern about legal costs. Her suggestions for improvement were:

- A fixed period should apply to try and come to an agreement before a PAN is sent to the landowner. This should be no less than 120 days especially where there are a lot of acquisitions for the one project. The landowner has to find a valuer and obtain a valuation. The landowner has to take time off work and their business to attend meetings, but there is no compensation for this lost time. She was informed that the acquiring authority would pay $3,000 for her to obtain a valuation, but her enquiry showed that the cheapest valuation from an experienced valuer was likely to cost $10,000.
- The time frame for acquisitions should not be shortened, as there is not enough time for landowners to get valuations, appoint lawyers and look for an alternative property. She said: *"What the Government has to understand is people work, have businesses and have families and have to work around these issues where the Government has staff just to do this work."*
- Before the claim is lodged there should be an independent caseworker helping the landowner, who can be a go-between with the acquiring authority. The caseworker should make sure that all relevant planning instruments and other relevant documents are submitted, and obtain all relevant documents which have been used by the acquiring authority. Interpreters should be provided if necessary at the cost of the acquiring authority.
- Landowners should not be required to pay rent after the property has been acquired, before they receive compensation.
- If a project has not been given final approval or land is not ready to be developed, then there should be no acquisition process started.
- Authorities should not start to acquire land until the project has full approval and the design of the project has been finalised.
- There should be a central register for all property which may be earmarked for acquisitions. This would make it easier for property buyers to investigate when purchasing a property, instead of having to make enquiries of different government agencies.
- There should be meetings with the Valuer General so that all relevant information can be given to the Valuer General prior to providing a valuation.

Urban Taskforce Australia[44] expressed the view that where a landowner does not accept an offer based upon the valuation of the Valuer General, the authority often obtains a further expert valuation *"which invariably values the subject land at a significantly lower amount"*. It describes this approach to negotiation as not being in the spirit of determining just terms compensation. It submitted that the acquiring authority should be required to stand by their original offer.

[43] JT 11

[44] JT 14

Dr Nicholas Brunton[45] is a senior lawyer who has acted in many compulsory acquisition matters for both sides of the record. His suggestions were:

- There is no justification for reducing the current 90 day PAN period although in practice the PAN period can be shortened.
- Councils from whom land is resumed should have the same right of appeal as landowners – thus Councils should be entitled to appeal against the Valuer General's determination.
- The Land and Environment Court has recently adopted a requirement for all compulsory acquisition matters to be subject to a mediation/conciliation conference. This is seen as an efficient mechanism to resolve these proceedings at low cost.
- An authority should not proceed to compulsory acquisition unless the executive arm of Government has expressly granted approval, and the deemed approval approach is inappropriate when it comes to the forced taking of land.
- Acquiring authorities should be compelled to notify landowners when an acquisition notice has been published in the Gazette.
- Section 39 should be amended to enable landowners to lodge a copy of the claim form and any other relevant information with the Valuer General.
- A landowner should be provided with a copy of the Valuation Report that is the basis of a determination by the Valuer General. It should not be left to agencies whether they choose to provide such reports or not.

Rouse Hill Heights Action Group Inc[46] said that the first indication its members have had of proposed acquisition of their land is when a notice or letter is placed in their letterbox advising that the home is required for public purposes and referring them to the provisions of the Land Acquisition Act. The Group suggests that it would be better for acquiring authorities to enter into face-to-face negotiations with parties by explaining personally why their land has been chosen, what the project is, and the benefits to the neighbourhood/State in which we will live. The Group also says:

> *"Many of our members who are currently entangled in the acquisition process complain that it is difficult to get answers from the Department acquiring their property; that often they are told one thing, which is then denied later; that the people they are dealing with are often quite rude; and that there seems to be a lack of compassion from the people who are taking their homes."*

TransGrid[47] submitted that the procedural steps for an acquisition can be managed within a period of less than the 90 day PAN period, and they support a shorter period which would *"reduce uncertainty for both parties involved in the process"*. TransGrid often conducts negotiations with landholders for compensation for many months, if not years, before TransGrid approaches the relevant Minister for approval to issue a PAN. TransGrid only

[45] JT 15

[46] JT 16

[47] JT 17

seeks to commence compulsory acquisition when negotiations have been prolonged and exhausted. TransGrid also suggests that where a *"lesser interest"* such as an easement is being acquired, the PAN period could be reduced to 30 days, providing that negotiations with the landowner had been going on for not less than 12 months.

Ms Sheryll Young[48] suggested that the Land Acquisition Act rewards the acquiring authority for *"coercing the owner to settle before the PAN, while concurrently discouraging the owner from negotiating prior to the PAN"*. She points out that fair negotiations before the PAN are only achievable if both parties have *"equality"*. One of her suggestions is that the acquiring authority should be required to inform the owner of how the acquisition process works, when the land is first designated. Ms Young points to the North West Rail Link Fact Sheet as a good example of the type of information that all acquiring authorities should be obliged to provide the owner. She says: *"That document contains more information about the NSW acquisition process than I have learned from my own lawyers and the acquiring authority over the past five years"*. Ms Young also suggests that an impartial mediator should be made available, at the authority's cost, prior to the PAN. She suggests there should be an obligation on the acquiring authority to negotiate beforehand, for a fixed period. Ms Young has noted TransGrid's submission about lengthy periods of negotiation, but suggests that other acquiring authorities even refused to negotiate until the PAN is imminent. She suggests that the PAN should include an offer value, supported by an independent valuation.

Ms Young also made the following suggestions:

- The minimum notice of 90 days is inadequate for an owner to establish a replacement home or business, especially where there has no forewarning.
- At the owner's request, the acquiring authority should grant owners up to two face-to-face meetings with the authority's decision-makers responsible for the issue of the PAN, prior to determination of a vacancy date.
- When the acquiring authority is a local council, there are presently no means for the owner to communicate during negotiations directly with the decision-makers, being the councillors.
- The 60 days to lodge a claim for compensation is inadequate if the acquiring authority has not attempted negotiations beforehand.
- An owner should have a right to occupy land rent-free until 90 days from the date the acquiring authority pays to the owner a 90% advance. There should be a right to occupy extended by an extra 90 days if the acquiring authority had not made at least an equivalent offer, at least 90 days prior to issue of the PAN.
- There should be an estimate of upfront settlement costs, to be advanced upon issue of the PAN.

[48] JT 18

The Property Council of Australia[49] supported more informal and accessible dispute resolution mechanisms before proceedings are commenced in the Land and Environment Court.

Local Government NSW[50] submitted that in the experience of Councils, the best way to negotiate the compulsory acquisition process is to "engage the landowners and those with a registered interest in the land at as early a stage as possible and to keep them engaged throughout the process". It suggests that some timeframes for voluntary acquisition should be imposed by the Land Acquisition Act. It also supports granting a right of appeal against the valuation of the Valuer General to a council, and not just confining it to a right of appeal given to the landowner.

The Australian Property Institute[51] thought that the requirement for the Valuer General to issue a formal determination of compensation on behalf of the acquiring authority, within 30 days of publication of a PAN, is unrealistic. The Institute recommends a period of 90 days for the issue of a determination of compensation once publication of a PAN occurs. In complex matters, it was suggested that this ought to be extended to 180 days. The Institute also suggested that the receipt of an initial letter from the authority should trigger a requirement that the potentially dispossessed landowner should obtain a certificate from their own solicitor certifying that the provisions of the Land Acquisition Act had been explained. The costs of this certificate should be paid by the acquiring authority. The Institute thought that a cap should be placed on the time expended on negotiations of six months, which could be embodied in amendments to the Land Acquisition Act or in new legislation. It was noted that the Native Title Act 1993 (Cth) provided for a right to negotiate for six months, and after expiration of that period the Federal Court could then determine the matter. This capped timeframe it was said was an example of how parties could be compelled to negotiate in good faith and efficaciously.

The Division of Local Government, Department of Premier and Cabinet[52], also saw merit in imposition of a fixed negotiation period before an acquiring authority receives approval to proceed with an acquisition. The Division thought that this would reduce delays in compulsory acquisitions and would provide greater clarity in situations where a landowner does not respond to approaches by an acquiring authority.

The Valuer General[53] opposed a reduced timeframe for a PAN from 90 days to 60 days. It was pointed out that while an acquiring authority may be able to deal with an acquisition within 60 days, this may not be the case for the owner or the Valuer General. It was said to be impractical for the Valuer General to issue a determination within the desired timeframe of the acquiring authority. Further, it was submitted that in cases where the timeframe has

[49] JT 19

[50] JT 25

[51] JT 27

[52] JT 32

[53] JT 29

been reduced to less than 90 days, the Valuer General should be given authority for immediate commencement and the ability to recover cost.

The Valuer General has noted Recommendation 11 in the JSC Report[54] and indicates by its submission support for the implementation of an alternative dispute resolution process.

The recommendations made by the Valuer General in its submissions are as follows:

1. That the Act be amended to recognise that the Valuer General is required to provide the determination of compensation and is therefore entitled to be reimbursed by the acquiring authority for all reasonable costs incurred.
2. That the Act provide authority for the Valuer General to commence the valuation process at his or her discretion having regard to the complexity of the matter and the resources available, following written advice being provided to the acquiring authority.
3. That the Act require that an acquiring authority must, and a landowner may, provide within 7 days of the gazettal of the acquisition, the reasons that agreement could not be reached with the persons whose interest is being acquired.
4. That the requirement under Section 42(1) to provide a notice of compensation be amended from 30 days to 45 days.
5. That the Act provide the Valuer General the right to request an extension through the Minister, or give the authority to the Valuer General to provide a Notice of Compensation after 45 days but in no less than 90 days, in complex matters, following written advice to the acquiring authority and the owners whose interest is being determined.
6. That the legislation be amended to require that all valuers who provide valuations of compensation under the Land Acquisition Act must be accredited.
7. That Section 26 be clarified by amending *"need not"* to *"are not"*.

Recommendations in the JSC Report

The JSC Report expressed the opinion that procedural fairness was not adequately incorporated into compulsory acquisitions and that the process should be changed so that parties are given notice of adverse information and are provided with the opportunity to respond[55]. The JSC found[56] that while there is presently an adequate opportunity for a party to put their case, there is inadequate disclosure of adverse information. The compulsory acquisition valuation is made by a valuer who considers the information put forward by both parties, but without the parties having knowledge of the material put forward by the opposite party. Thus there is no sufficient opportunity to refute adverse information. The JSC recommended that a fair hearing required:

- Notice of the applicable procedures and substantive criteria;

[54] See pp. 34-35 infra

[55] JSC Report 5.2

[56] JSC Report 5.54-5.64

- The opportunity to put a case;
- Disclosure of any adverse information that is credible, relevant and significant to the decision to be made; and
- The opportunity to refute such information.

The JSC Report recommended[57]:

"That the NSW Government introduce a new valuation review mechanism and compulsory acquisition process to replace the current objection system and compulsory acquisition valuation process, and includes the following minimum standards:

1. *Landholders are entitled to make submissions to the review;*
2. *Landholders are entitled to a conference after they make their submission to the review;*
3. *Landholders are provided with a preliminary valuation review report, along with any other adverse and credible information relevant to the decision;*
4. *Landholders should be given 30 days to make any further submissions, and if they make further submissions they are entitled to a conference to discuss those submissions;*
5. *If a landholder makes further submissions on any material in the preliminary valuation report, the submissions should be considered and the landholder should be provided with written reasons for accepting or rejecting the submissions after the conference.*

A conference is defined as an oral conversation between the landholder and the valuer in person, on the telephone or via some form of online oral communication system.

That these recommendations be legislated, but until then be adopted as far as possible by the Valuer General as a matter of policy."

The JSC Report also recommended[58] that these rights be extended to the acquiring authority:

"That, in the case of compulsory acquisitions, acquiring authorities be afforded the same entitlements as landholders to make submissions, be provided with information and attend conferences, such that:

1. *Where this right is exercised, all submissions to the valuer should be shared between the acquiring authority and the landholder, prior to any conference;*

[57] JSC Report Recommendation 11 (p.91)

[58] JSC Report Recommendation 12 (p.92)

2. *Both parties should be granted the opportunity to respond in writing and orally to any adverse information raised by the other party which they have not addressed; and*

3. *There is an opportunity for some form of joint conference, if required.*

That these recommendations be legislated."

The Government response to these recommendation was that "further work needs to be undertaken, including consultation with impacted stakeholders before it can determine support or otherwise".

Discussion

Many of the submissions concerning procedures and time frames in the Land Acquisition Act were directed towards wider issues which are not the subject of this Review. For example, the questions of whether an acquiring authority should have the power to acquire land for resale, and the question of whether if a project has not been given final approval, there should be no acquisition process started, are really wider planning issues. This Review is confined to just terms compensation, and does not deal with policy matters concerning acquisition itself.

The most common suggestion made to the Review, and this came from both acquiring authorities and landowners, was that procedures needed to be introduced to encourage and facilitate bona fide negotiations for an agreed acquisition price. As previously recited, one of the objects of the Land Acquisition Act is to encourage the acquisition of land by agreement instead of compulsory process. Complaints about the negotiation process ranged from allegations that acquiring authorities were not bona fide in their negotiations, to, on the other hand, complaints that sometimes negotiations dragged on for many years.

The Review suggests that there should be a compulsory period of negotiation, but it should be limited in time. This would encourage parties to direct substantial efforts towards reaching agreement by the end of the fixed negotiation period. A balance has to be struck between providing landowners with enough time to instruct advisors, receive advice and conduct negotiations, while also recognising that acquiring authorities cannot be expected to engage in protracted negotiations conducted at a leisurely pace. The point has been made by several landowners that, while acquiring authorities have paid staff to deal with acquisition negotiations, landowners have to fit these negotiations in with running a business, attending employment or dealing with family responsibilities. A minimum fixed period for negotiations would be 6 months, but arguments could be made that such period should be greater, and up to 12 months.

Several landowners pointed out the disadvantage they were at in dealing with Government authorities, and recommendations by those landowners including provision of *"plain English"* explanation of the acquisition and compensation process by acquiring authorities, appointment of a mediator or caseworker to assist in the negotiation process, and the opportunity for face-to-face meetings between landowners and representatives of the acquiring authority. In the opinion of the Review all of these suggestions have great merit.

As previously recited, one of the landowners pointed out that the North West Rail Link Fact Sheet was an exemplary document explaining the process to landowners. The Review was also provided by RMS with its *"plain English"* documents which it provides to landowners which it proposes to involve in the negotiation process. Those documents also seem to be good exemplars of the type of information which should be made available to landowners before they enter into negotiations. It is to be noted that RMS conducts most of the compulsory acquisitions in the State. It achieves most acquisitions by negotiation rather than by use of the compulsory process. While complaints were made to the Review about planning issues concerning RMS (for example, land is being designated for new freeways for many years without the precise route of the freeway being delineated), there was no real complaint made about the processes adopted by RMS in negotiating with landowners. Based on the small number of landowners who made submissions, it would seem that RMS is doing something right in the way that it conducts its negotiations.

The suggestion for a negotiation mediator (really a conciliator) or a caseworker to be appointed is attractive, but it begs the question of who would be appointed to such a position and what would they do? Who would pay for such experts to assist? Landowners can obtain great assistance in the negotiation process through the use of lawyers and valuers, and the reasonable fees of such experts should be paid by the acquiring authority. If those experts are engaged, there may be no real need for an additional layer of complexity to be added by use of a conciliator or caseworker.

Several landowners raised complaint that they found it hard to get a response from the acquiring authority, and that the person they wanted to speak to changed all of the time, or did not have authority to deal with certain matters. There is little point in suggesting that landowners should deal in writing with the acquiring authority, as most lay people are more comfortable expressing their views verbally. There is a better opportunity to assess whether negotiations are being conducted in a bona fide fashion (on both sides) if there are face-to-face meetings between landowners and persons with appropriate delegation who can speak on behalf of the acquiring authority.

The Review makes the following recommendations:

Recommendation 1

That there be a compulsory negotiation period of 6 months, before any step can be taken to compulsorily acquire land under the Land Acquisition Act, or under any other cognate legislation.

Recommendation 2

That prior to commencement of the negotiation period, the acquiring authority is obliged to provide a detailed written explanation to the landowner, written in "plain English", setting out an explanation of the land acquisition process and setting out the rights and responsibilities of both the landowner and the acquiring authority.

Recommendation 3

That the landowner and the acquiring authority, during the fixed negotiation period, conduct at least one face-to-face meeting, with a view to negotiation of an appropriate acquisition price, unless both parties agree that such meeting is not necessary or can be conducted by a different means e.g. telephone conference.

Submissions concerning the 90 day notice period ranged from acquiring authorities who suggested that the period be shortened, to landowners who suggested that the period be lengthened. Against the background of a recommendation for a 6 month compulsory negotiation period, there does not seem to be any need to change the 90 day period. Much of the work done during the negotiation period can be put to good use during the compulsory acquisition period, if the matter cannot be resolved by negotiation.

Once an acquisition moves into the compulsory phase, there needs to be an adequate opportunity for both parties to put their valuation case to the Valuer General, and there are good arguments to be made that the Valuer General should be fully informed before being required to set an acquisition price. The present system is quite odd, in that one party does not have notice of what the other party has provided to the Valuer General, and does not have the opportunity to respond to that material. The upshot of this is that the Valuer General is providing an opinion without being fully informed about the position of both parties.

The JSC Report dealt extensively with these anomalies and recommended that provisions be introduced to introduce procedural fairness into the valuation for compulsory acquisition purposes. The relevant material in the JSC Report has been summarised above at pp.33-35. The Review supports the recommendations as to procedural fairness in the JSC Report. Submissions made to the Review by landowners have raised complaint about what lawyers would describe as lack of procedural fairness.

The recommendation of the Review is:

Recommendation 4

That a new compulsory acquisition process be adopted, so as to afford procedural fairness. That process should be in accordance with Recommendation 11 made in the JSC Report.

Severance Loss

Severance occurs where part of an owner's land is taken by compulsory acquisition and part is retained by the owner. The owner is entitled to be compensated for the part taken. The value of the retained land may be affected by the severance and the owner may be entitled to compensation where the value of the retained land has diminished.[59]

Section 58 of the Land Acquisition Act defines loss attributable to severance as meaning *"the amount of any reduction in the market value of any other land of the person entitled to compensation which is caused by that other land being severed from other land of that person"*.

Submissions prior to release of the Consultation Paper

Transport for NSW called for a review of severance loss to be undertaken, to better define the purpose and application of compensation for severance.

One practitioner in the field of land acquisition raised the problem which arises when infrastructure projects change during their design stage. Initially part of a property may be acquired, but then the acquiring authority is forced to acquire more from the same landowner later in the project. If the authority later requires the remainder of a property, the authority ends up paying more than had they purchased the whole property from the beginning. That practitioner identified proposed principles to avoid severance loss issues as follows:

1. Authorities should identify land requirements early in a project; in doing so they should not limit themselves to the amount of land;
2. Once the land is identified, it should be included in a central register, readily available to the public to search (in the way that lands were previously reserved in EPIs, without the time taken to prepare an instrument);
3. The authority is then limited to only acquiring the land in this register, and no more;
4. Authorities should conduct whole acquisitions only. If at the end of a project most of the property remains, the dispossessed owners should be given first right of refusal to buy it back; and
5. Such a central register should be maintained by Land and Property Information NSW, which is a far more efficient solution than a multitude of local government authorities and instruments.

Submissions received after the Consultation Paper

Dr Nicholas Brunton[60] opined that severance loss could theoretically be claimed under

[59] Brown, op.cit., p. 166.

[60] JT 15

Section 55(c) of the Land Acquisition Act or under Section 55(f). In his view Section 55(c) was largely superfluous and could be repealed, providing there was some adjustment of Section 55(f).

Discussion

Once again, many of the submissions received in relation to severance loss, deal with planning issues rather than just terms compensation issues.

The view that Section 55(c) was largely superfluous and could be repealed was not supported by other submissions. No real problems were raised by the submissions in relation to the operation of Section 55(c), and it should be retained in its present form.

Recommendation 5

That Section 55(c) of the Land Acquisition Act be retained in its current form.

Disturbance Loss

Section 59 of the Land Acquisition Act defines the meaning of the expression *"any loss attributable to disturbance"* in Section 55(d) to include such items as legal costs, valuation fees and financial costs incurred in relocating. Section 59(d) expressly includes stamp duty reasonably incurred in purchasing other comparable land.

Submissions prior to release of the Consultation Paper

Transport for NSW suggested that the Review should try to better define the purpose and application of the disturbance loss provisions in the Act.

The Australian Property Institute suggested consideration of the following issues:

1. Section 59(b) deals with the costs incurred by a dispossessed owner in preparing a compensation claim. The interests of an acquiring authority and the dispossessed owner would be best served if this provision was removed from Section 59 to clarify that the costs incurred are not part of the compensation claim.
2. Where relocation of buildings and facilities from land to be compulsorily acquired triggers a requirement for the dispossessed owner to obtain development consent, the dispossessed owner has to bear significant professional fees (for example, architectural, engineering and valuation) to prepare the necessary development application.
3. Section 59(c) deals with compensation for such relocation, but such costs may be very significant and the bearing of them until settlement of the overall compensation claim under Section 59 may take many months. Section 59(c) should be removed from Section 59 and treated separately in the Land Acquisition Act to enable dispossessed owners to be reimbursed in a timely commercial manner, rather than be forced to raise an overdraft to pay such professional fees.

Submissions received after the Consultation Paper

Dr Nicholas Brunton[61] disagreed with the argument made by the Australian Property Institute that Section 59(a) and (b) should be removed from the compensation claim. He says that Section 59 in its present form should remain in the Act so that such costs are appropriately claimable by landowners. Further, the presence of those kinds of costs in Section 59 means that such claims are appropriately reviewable by the Land and Environment Court if the matter proceeds to litigation.

The Law Society of New South Wales Young Lawyers[62] submitted that the current scheme for remunerating costs associated with the extinguishment or relocation of a business is cumbersome. A business is remunerated under Section 59(f) which provides:

[61] JT 15

[62] JT 20

"Any other financial costs reasonably incurred (or that might reasonably be incurred) relating to the actual use of the land, as a direct and natural consequence of the acquisition."

The submission suggests that businesses be compensated under a separate head of compensation and that the legislation should provide a more detailed framework for assessment of business claims. The submission agreed with that put forward by the Australian Property Institute that dispossessed business owners can be forced to bear significant costs in relocating buildings and facilities because of the need to obtain development consents for the replacement land. The submission argues that such costs should be expressly provided for under a separate head of compensation rather than under Section 59(c).

Discussion

Two strong submissions were made that Section 59(b) does not adequately provide compensation where the dispossessed owner has been conducting a business on the acquired land and needs to relocate the business. While it was suggested that there needed to be a more detailed framework for assessment of compensation for business claims, the Review was not provided with sufficient detail to enable a recommendation to be made in this regard. Nevertheless, whether or not the Land Acquisition Act inadequately deals with such claims should be further investigated. The recommendation of the Review is:

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.

Solatium

Section 60(1) of the Land Acquisition Act permits the award of solatium for non-financial disadvantage resulting from the necessity of the person to relocate his or her principal place of residence as a result of the acquisition.

Section 60(2) provides that the maximum amount of compensation in respect of solatium is $15,000 or such higher amount as may be notified by the Minister by notice in the Gazette.

The *Lands Acquisition Act* (Cth) permits the award of a lump sum payment where the owner is dispossessed of their residence, to enable acquisition of a "reasonably equivalent dwelling". The ACT legislation has a similar provision.

The *Land Acquisition and Compensation Act* (Vic) provides for an increase of up to 10% in compensation by way of solatium, to compensate the applicant for intangible and non-pecuniary disadvantages from the acquisition. The *Land Administration Act* (WA) also provides up to 10%, with power to award a larger sum in exceptional circumstances.

Solatium is not available in Queensland or South Australia.

The Tasmanian legislation provides for solatium if the applicant cannot move to another comparable residence solely by reason of age, infirmity or want of means.

Submissions prior to release of the Consultation Paper

Transport for NSW called for a review of the principles applicable to an award of solatium.

The Australian Property Institute pointed out that solatium under the Land Acquisition Act is currently limited to the principal place of residence and to a maximum of $24,240[63]. The Institute describes this figure as outdated in relation to current property values and circumstances.

Submissions received after the Consultation Paper

Dr Nicholas Brunton[64] submitted that the current amount for solatium is far below what would provide actual solace to landowners, and should be doubled, then indexed to the CPI.

NSW Young Lawyers[65] submitted that the Victorian and Western Australian systems of adding a percentage of up to 10% to the compensation otherwise payable should be considered.

[63] The amount has since the API submission been raised to $25,595

[64] JT 15

[65] JT 20

Discussion

Those parties who commented on the issue of solatium thought that the present figure was too low. The difficulty in selecting a dollar figure to be awarded for solatium is that in a very real way, no amount of money could compensate a landowner for being put out of their home. Historically awards of solatium in personal injury actions (many years ago when such a figure could be awarded), were only modest awards.

However, it is difficult to think of many events in a person's life which would be more disruptive or upsetting than being dispossessed from the family home. The Review is of the opinion that the solatium figure should be increased substantially. However, the Review does not support making solatium a percentage of the compensation figure. The need for solace to be offered to a homeowner is just as great, whether the home be one of modest value, or one of great value.

Recommendation 7

That Section 60(2) of the Land Acquisition Act be amended to provide that the maximum amount of compensation in respect of solatium is $50,000, and that such amount be indexed yearly to the CPI.

The role of the Valuer General

Introduction

The Land Acquisition Act requires the Valuer General to provide a determination of the amount of compensation to be offered to a person when their property is acquired under the Act. Land and Property Information (LPI) manages the process and provides determinations on behalf of the Valuer General. This involves providing the acquiring authorities with a determination of the amount of compensation they are required to offer to the former owners of the acquired property.

In New South Wales[66] and Victoria[67] the Valuer General is responsible for valuing acquired land for the acquiring authority. While there is no legislative requirement, this is also the practice in some other jurisdictions. [68]

In New South Wales, within 30 days of the publication of the acquisition notice in the Gazette, the authority is required to give the former owners notice of the compulsory acquisition and to advise of the amount of compensation to be offered as determined by the Valuer General.

There is provision for a landowner to lodge an objection with the Land and Environment Court to the amount of compensation offered but there is no such provision for the acquiring authority to challenge the amount of compensation as determined by the Valuer General.[69] This issue has been raised by a number of agencies, with calls being made for the legislation to provide both the land owner and the acquiring authority with the power to challenge compensation as determined by the Valuer General.

The point has also been made that there are difficulties with the current process in that while the Valuer General is required to determine the compensation payable by an acquiring authority, where that determination is challenged, there is no requirement for the Valuer General to defend its determination. This issue was discussed in *Bromley v Housing Commission (NSW)* (1985) 3 NSWLR 407.

Submissions by both the Valuer General and Land and Property Information prior to release of the Consultation Paper

Land and Property Information provided the following management issues for consideration:

---

[66] Sections 18, 41 and 42 Land Acquisition (Just Terms Compensation) Act 1991

[67] Sections 3 (1) and 31 (5) Land Acquisition and Compensation Act 1986

[68] Brown, op.cit., p.212

[69] Gosford City Council v Valuer General (1996) 90 LGERA 413

"1. Issue: The Act does not include a requirement for acquiring authorities to compensate the Valuer General for reasonable costs incurred in determining compensation.

Potential solution: Formal arrangements set out under the Act regarding payment of the Valuer General's costs will ensure transparency of the process.

2. Issue: Section 41 of the Act provides for the 'Valuer General to be given copy of claim for compensation'. However, often the Valuer General is not made aware of the reasons why a matter has not reached agreement.

Potential solution: Consideration should be given for the inclusion of a provision in the Act for either the acquiring authority or the land owner to notify the Valuer General of any issues that may affect the determination of compensation within seven (7) days of the acquisition being gazetted.

This would provide all parties with the opportunity to advise the Valuer General of matters that may affect the determination of compensation so that consideration can be given to the issues. The adoption of this proposal has the potential to reduce matters of dispute and so reduce the time and cost required to determine just compensation.

3. Issue: Section 41(1) of the Act provides 30 days for the issue of determinations by acquiring authorities. The consequences of this provision leaves the Valuer General with insufficient time to investigate, contact the parties, engage valuers and consultants, and consider all issues prior to issuing a determination of compensation to the acquiring authority.

Potential solution: Consideration should be given to amending the 30 day timeframe to 45 days.

4. Issue: Section 42(4) provides an additional 60 days for which a compensation notice is required to be given, subject to Ministerial approval. Ministerial approval is not always granted or sought by the acquiring authority.

Potential solution: Consideration should be given to providing the Valuer General with the authority to extend the time period for which a compensation notice is to be given to 90 days, subject to notification to the parties in complex matters."

Submissions by others prior to the release of the Consultation Paper

The Land Acquisition Act allows an owner to appeal against the quantum of compensation determined by the Valuer General. However, the acquiring authority does not have a right of appeal against the quantum of compensation. Several acquiring authorities, including local government councils, have suggested that the acquiring authority should be given standing to object to the Valuer General's assessment in the Land and Environment Court. Gosford City Council and Lake Macquarie City Council provided examples to the Review of cases where the Valuer General's assessment was vastly different to a valuation obtained by Council itself, and yet Council had no right of appeal against the determination of the Valuer General.

The Law Society of NSW has also raised this issue for consideration.

One valuation firm suggested that there needed to be a change in the methodology for *"Valuer General appointed valuers".* It was also suggested that it may be appropriate to introduce a peer review layer before the offer is communicated to the owner, and a mechanism for any offer, based upon the Valuer General's figure, to be withdrawn if further evidence becomes available.

Transport for NSW, a Government department, submitted the following issues in relation to the role of the Valuer General:

(a) Whether the Government should establish an approved panel of valuers and fee rates;

(b) Whether the land owner should obtain quotes for valuation reports;

(c) Whether valuers should be required to take an "independent view" approach to their task; and

(d) Whether the role of the Valuer General in the process should be reviewed and whether another role, such as independent advisor, may be more suitable for the task required.

Submissions received after the Consultation Paper

Many of the submissions in relation to the role of the Valuer General are dealt with above in relation to procedures under the Land Acquisition Act. In summary, those submissions are:

1. That the Act be amended to recognise that the Valuer General is required to provide the determination of compensation and is therefore entitled to be reimbursed by the acquiring authority for all reasonable costs incurred.
2. That the Act provide authority for the Valuer General to commence the valuation process at his or discretion having regard to the complexity of the matter and the resources available, following written advice being provided to the acquiring authority.
3. That the Act require that an acquiring authority must, and a landowner may, provide within 7 days of the gazettal of the acquisition, the reasons that agreement could not reached with the persons whose interest is being acquired.
4. That the requirement under Section 42(1) to provide a notice of compensation be amended from 30 days to 45 days.
5. That the Act provide the Valuer General the right to request an extension through the Minister, or the authority for the Valuer General to provide a Notice of Compensation after 45 days but in no less than 90 days, in complex matters, following written advice to the acquiring authority and the owners whose interest is being determined.
6. That the legislation be amended to require that all valuers who provide valuations of compensation under the Land Acquisition Act must be accredited.
7. That Section 26 be clarified by amending *"need not"* to *"are not"*.

Recommendations in the JSC Report

The JSC Report made the following recommendations which would drastically change the role of the Valuer General in the compulsory acquisition process:

Recommendation 1 – that the NSW Government establish a Valuation Commission, headed by a Chief Valuation Commissioner responsible for the land valuation functions which are currently undertaken by the Office of the Valuer General and Land and Property Information. This Commission will also support the implementation of the rules-based approach to valuation methodologies and new valuation review and compulsory acquisition systems.

Recommendation 2 – that the Chief Valuation Commissioner issue public guidelines for the valuation of land in NSW, including compulsory acquisition valuations.

Recommendation 20 – there should be two Valuation Commissioners, one responsible for the management of original land valuations for rating and taxing purposes, and the other being responsible for the management of compulsory acquisition valuations under the Land Acquisition Act.

Reference has already been made above to that part of the JSC Report which concerned a perceived lack of procedural fairness in the present system for compulsory acquisition valuations. The JSC came to the view that the present system was inadequate and that the current valuation system undermined the independence of the Valuer General. The formal Government response to Recommendations 1 and 20 was to suggest that further work needs to be undertaken including consultation with those affected, before the Government can determine whether to support the recommendations. The Government did agree with the JSC findings regarding public guidelines for the valuations of land (Recommendation 2), but presumably the person or body which issued those guidelines would depend upon the attitude the Government took to Recommendation 1, after investigation and consultation.

Discussion

Consideration of the future role of the Valuer General has become overshadowed by the recommendations of the JSC Report that the land valuation functions currently undertaken by the Valuer General be handed over to a newly established Valuation Commission.

However, whether that does occur in the future, or the Valuer General retains its present functions in relation to compulsory acquisition, there are improvements which can be made in the process.

The submissions put forward by the Valuer General to improve the service provided by that office are all supported by the Review. The submissions are summarised above, and the recommendations of the Review are:

Recommendation 8

That formal arrangements be set out in the Land Acquisition Act to require acquiring authorities to pay the reasonable costs of the Valuer General for providing a compulsory compensation valuation.

Recommendation 9

That the Land Acquisition Act be amended to require both the acquiring authority and the landowner to notify the Valuer General of any issues that may affect the determination of compensation, within 7 days of the acquisition being gazetted.

Recommendation 10

That the Act be amended so that the 30 day timeframe for the issue of notices by acquiring authorities be amended to 45 days.

Recommendation 11

That the Land Acquisition Act be amended to give the Valuer General authority to extend the time period for which a compensation notice is to be given to 90 days, if in the opinion of the Valuer General such additional time is required.

The JSC Report recommended that public guidelines be issued for the valuation of land for compulsory acquisition valuations and that those guidelines should clearly state the methodologies for valuing land and the circumstances in which those methodologies are applied[70]. The JSC Report also recommended that the public guidelines be binding on valuers, except where a landholder requested the application of an alternate methodology[71].

The JSC Report tied those recommendations concerning public guidelines in with its recommendations regarding a new process to be adopted leading to a compulsory acquisition valuation. That new process is summarised above at pp.33-35. These are the recommendations to give procedural fairness to the parties. As previously indicated, the Review supports those recommendations in the JSC Report.

Several acquiring authorities, and particularly local councils, supported an amendment of the Land Acquisition Act so that acquiring authorities, and not just landowners, could appeal against a compulsory acquisition valuation, to the Land and Environment Court. The JSC Report supported only a merits review of the land valuation by landholders[72]. This of course is the present situation. The JSC Report did not consider whether or not acquiring authorities should also be given a right of appeal.

Several of the submissions to the Review by landowners emphasised the expensive legal fees which could be incurred in appealing to the Land and Environment Court. Many of the submissions by landowners also pointed out, as would be obvious, the stress and

[70] JSC Report Recommendation 2

[71] JSC Report Recommendation 3

[72] JSC Report recommendation 16

inconvenience of becoming involved in legal proceedings.

Landowners would have very limited resources to fund a merits appeal, and this alone operates as a brake on the number of such appeals that are brought. However, if acquiring authorities had a right of appeal, and could do so, effectively at taxpayers' expense, then it is to be suspected that there would be many more appeals. Landowners would be brought into Land and Environment Court litigation against their will, and many of them would not be able to afford the fees.

While there is unfairness in the present system of acquiring authorities not having a right of appeal, there are good reasons why the right of appeal is confined only to landowners.

Recommendation 12

The Review does not support extension of a merits appeals against a compulsory acquisition valuation, to acquiring authorities. The Act should remain as it is.

Hardship provisions

Land Acquisition Act

The Land Acquisition Act contains provisions for a landowner to compel an authority to resume their land. Division 3 of Part 2 of the Act (ss 21-28) contains a procedure in respect of *"owner-initiated acquisition"*.

Under the Land Acquisition Act, hardship claims can be made where land has been designated by an authority for future acquisition for a public purpose or has been reserved by an environmental planning instrument for use exclusively for a purpose referred to in Section 26(1)(c) of the *Environmental Planning and Assessment Act 1979* and the instrument specifies an authority as the authority required to acquire the land[73].

An owner suffers hardship if they are unable to sell the land or are unable to sell it at its market value because of the designation of the land for a public purpose and it has become necessary for the owner to sell without delay because of pressing personal, domestic or social reasons, or to avoid the loss of, or a substantial reduction in, the owner's income.

Section 23 of the Land Acquisition Act provides for the owner of land, seeking application of the hardship provisions, to give written notice to the authority to acquire the land. The authority must acquire the land within 90 days of the notice or such longer period as may be agreed.

Section 24(2) of the Land Acquisition Act provides that an owner of land suffers hardship if:

> *"(a) the owner is unable to sell the land, or is unable to sell the land at its market value, because of the designation of the land for acquisition for a public purpose; and*
>
> *(b) it has become necessary for the owner to sell all or any part of the land without delay:*
>
> *(i) for pressing personal, domestic or social reasons, or*
>
> *(ii) in order to avoid the loss of (or a substantial reduction in) the owner's income."*

Section 26 of the Land Acquisition Act provides that the special value of land, any loss attributable to severance or disturbance, and solatium, need not be taken into account in connection with an acquisition of land pursuant to the hardship provisions.

In 2006 the Land Acquisition Act and the *Environmental Planning and Assessment Act 1979* were amended, by the *Environmental Planning and Assessment Amendment (Reserved Land Acquisition) Act 2006*. Prior to these amendments there were two conflicting procedures which landowners could use to require the relevant authority to acquire their land. The acquisition provisions in an environmental planning instrument made under the

[73] Section 21 of the Land Acquisition (Just Terms Compensation) Act 1991

Environmental Planning and Assessment Act 1979 provided for acquisition on demand. The Land Acquisition Act required a landowner to demonstrate hardship as a result of a delay in acquisition of the land reserved to require an acquisition.

The amendments made by the *Environmental Planning and Assessment Amendment (Reserved Land Acquisition) Act 2006* aligned the provisions for owner–initiated requests in the *Environmental Planning and Assessment Act 1979* with the owner-initiated acquisition provisions of the Land Acquisition Act.

Whether or not the changes that were made to the *Environmental Planning and Assessment Act 1979* in 2006 to link the hardship provisions in the Land Acquisition Act to that Act should be reversed, has been queried by some.

Prior to the 2006 changes, land owners whose land was affected by a planning instrument that reserved their land for use exclusively for a purpose referred to in Section 26(1)(c) of the *Environmental Planning and Assessment Act 1979,* could compel the acquiring authority to acquire their land without having to demonstrate hardship.

Land Acquisition and Compensation Act 1986 (Victoria)

In Victoria, the only other state to deal with hardship, the legislation takes a different approach. Brown[74] describes it as follows:

> *"Section 7(6), Land Acquisition and Compensation Act (Vic) provides that if an authority has commenced negotiations to acquire an interest in land, a person with an interest in the land may require the authority to determine (a) to serve a notice of intention to acquire the interest, or (b) to serve statements that it does not intend to acquire the interest by compulsory process. The effect of the provision is that if an authority opens negotiations for the possible purchase of land, the owner can effectively compel the authority to acquire the land or to abandon its desire to buy the land by voluntary sale."*

Submissions made prior to release of the Consultation Paper

The hardship provisions have been a major topic raised by parties who submitted issues for consideration by the Review. There have been calls to retain the hardship test and to remove it. Others have asked that the test be reviewed.

Those advocating the removal of the "hardship test" suggest that the fundamental principle should be that where land is required for a public purpose, the owner of the land should be entitled to have the authority either remove the reservation, or acquire the land.

Those suggesting a review of the hardship test query whether the definition of hardship under Section 24 of the Land Acquisition Act should be broadened and whether an owner

[74] Brown, op.cit., p. 62

should be given the right to appeal against a decision of an acquiring authority not to acquire land under Section 24.

The Department of Planning and Infrastructure suggested that there needs to be a review of the hardship test.

Transport for NSW, another Government department, also called for a review of the hardship provisions and in particular:

> *"Clarification should also be provided on assessment of hardship and whether the period of time allocated for the completion of such an assessment will be in addition to, or part of, the current 90-day acquisition period required under s23(2) of the Act."*

Urban Taskforce Australia Limited, which represents property developers and equity financiers, has suggested that the Land Acquisition Act should be amended to remove the requirement for an owner of land to only be able to compel an authority to acquire their land that has been reserved for a public purpose unless they are able to demonstrate hardship. It suggests that the fundamental principle should be that where land is required for a public purpose, the owner of that land should be entitled to have the authority to either remove the reservation, or acquire the land.

One community group submitted that the present hardship test set out in Section 24 of the Land Acquisition Act:

> *"…sets the bar so high that owners are effectively denied the opportunity to compel an agency to acquire their property once it has been reserved exclusively in an EP for a public purpose"*.

Another private citizen suggested that:

> *"In practice owner-initiated acquisitions are a long, arduous and costly process. The end result can be that the authority may lift the designation of land and there is no time limit for their decision. Together with the ability to designate without serious study, this has led to authorities designating land on a whim."*

The Environmental Planning and Development Committee of the Law Society of NSW also raised the question of hardship. It asked whether the effect of the 2006 amendments should be reversed. It also raised for consideration the following matters:

1. Should the owner of land be given a right of appeal against a decision of an acquiring authority not to acquire land under Section 24 of the Land Acquisition Act on the grounds of hardship?
2. Should the definition of *"hardship"* under Section 24 of the Land Acquisition Act be broadened?

In contrast to the above views, the Local Government and Shires Association expressed the view that:

"*it is important that an assurance be given that the "hardship" provisions of the Land Acquisition Act be maintained*".

Submissions received after the Consultation Paper

Mr Kevin Conolly MP[75] discussed the 2006 amendments which restricted the hardship provisions. In his view the amendments created *"the potential for unfair impacts on landowners whose opportunity to make decisions about the course of their own lives can be unreasonably circumscribed by the designation of their land for a public purpose in future"*. He strongly supported the introduction of a right of appeal against a decision not to acquire land under Section 24. Further, he recommended the introduction of a second category of owner-initiated acquisition which was not reliant on hardship. This new category of owner-initiated acquisition would trigger a requirement for the acquisition authority to acquire the land within (say) 5 years from the date of the owner's request. Mr Conolly acknowledged that some landowners would choose to wait until the land was actually required, having the comfort of knowing that if their circumstances changed they could subsequently make a binding request for acquisition.

The suggestion of a 5 year period is not unrealistic, having regard to some of the submissions made to the Review. Reference has already been made to the Coffs Harbour landowners who waited over 11 years before a bypass was built. The submission of the NSW Young Lawyers[76] gave the extreme example of *"a strata scheme on New South Head Road, half of which has been designated for the purposes of a future road-widening proposal since it was initially gazetted in 1977"*.

Ms Frances Vumbaca[77] thought that there should be no hardship provision for owner-initiated acquisition and that an owner should not be compelled to stay in any circumstances, until the authority was ready to purchase. She suggested that an acquiring authority should either buy land which it required straight away or remove the requirement for acquisition. She said: *"They should not be made to live where their lives are turned upside down wondering when they will be thrown out of their homes"*.

Urban Taskforce Australia[78] pointed out that the law makes it very difficult for a corporation to satisfy the hardship test, even though corporations are owned by people who have a legitimate right to expect their property rights to be respected. The Taskforce also supported the granting of a merits appeal in relation to the decision of an acquiring authority to decline acquisition on the hardship ground. It also thought that the definition of hardship should be broadened so that a landowner should be able to claim hardship if an envisaged use of the land is no longer practicable, and the land is subsequently devalued, as a result of a reservation for a public purpose. The Taskforce supported a reversion to the

[75] JT 4

[76] JT 20

[77] JT 11

[78] JT 14

pre-2006 version of the hardship provision, so that a landowner could compel the acquiring authority to acquire their land without having to demonstrate hardship. It suggested that the Victorian provision properly addressed the issue.

Dr Nicholas Brunton[79] thought that the major problem with the existing legislation is that a landowner who claims hardship has no effective recourse if the acquiring authority refuses to accept the hardship application. He thought that the Land Acquisition Act should be amended to provide a right to appeal to the Land and Environment Court against a refusal of a hardship application. To deal with potential delays, he suggested that a right of appeal against a deemed refusal should also exist, if the hardship application has not been decided within 45 days after being lodged with the acquiring authority.

Ms Sheryll Young[80] submitted that the 2006 amendments should be abolished. A hardship application, in her view, requires landowners to disclose private and personal information, including details of their financial circumstances, which may disadvantage them in ongoing negotiations with the acquiring authority.

The Young Lawyers[81] submitted that if the hardship requirement is removed, it would be appropriate to allow an acquiring authority to abandon the acquisition proposal within a nominated time period. If the hardship provision is retained, they submitted that landowners should be given a right of appeal to the Land and Environment Court.

Fairfield City Council[82] opposed the abolition of the hardship test. It suggested that if there was no hardship test then *"this approach effectively reduces Council's ability to reserve privately owned land for a public purpose due to financial constraints. In brief, it would be difficult for Council to reserve land for a public purpose unless it had the funds to purchase it immediately"*. Council did acknowledge that the hardship provisions could operate harshly in respect of private landowners, but suggested that one option might be to include provisions in the Land Acquisition Act, which allowed Council and landowners to negotiate an agreed timeframe for acquisition of the land to be determined in consultation with an independent mediator. If the hardship provision were to be changed, then Council suggested that saving provisions should be included in the Land Acquisition Act to ensure that any changes to the hardship provisions did not result in significant financial impacts on Local Government.

This concern was echoed by the submission of the Division of Local Government, Department of Premier and Cabinet[83].

The submission of the Australian Property Institute[84] suggested that Section 26 should be

---

[79] JT 15

[80] JT 18

[81] JT 20

[82] JT 21

[83] JT 32

[84] JT 27

amended to permit access to the additional heads of compensation being special value, severance, disturbance and solatium. The Institute suggested that it was paradoxical that the Land Acquisition Act reduced access to compensation for the landowner at the very time when hardship was being experienced.

Transport for NSW[85] said that sufficient time should be allowed in the Land Acquisition Act for an authority to assess hardship. It also said that such a decision should be subject to an independent review, possibly by an appropriate constituted division of the Administrative Decisions Tribunal[86].

Discussion

There was strong support in the submissions made by landowners for the hardship provisions of the Land Acquisition Act to be removed. Submissions by acquiring authorities urged that the hardship provisions be retained. Those authorities expressed the view that they should be able to designate private land for future acquisition, without taking active steps to so acquire it. It is recognised that there are sound policy and financial reasons for this approach. However, if the necessity to prove hardship were removed, then an acquiring authority would have to make a decision whether to remove the designation upon the land or take active steps to acquire it. Removal of the hardship provision could mean that acquiring authorities were more selective and focussed in designating land for acquisition than under the present scheme.

There was support for removal of the hardship provision not only among landowners, but also in the submissions of Urban Task Force Australia Limited, the Law Society of NSW and Mr Kevin Conolly MP. Mr Conolly suggested that if an owner could initiate acquisition, without having to prove hardship, this should trigger a requirement for the acquisition authority to acquire the land within 5 years from the date of the owner's request. This seems a compromise between the two positions which is worth considering. It has the advantage that the landowner would not have to prove hardship, but the acquiring authority would not be forced to acquire the land straight away. However, a 5 year period is still an imposition on a landowner who may be *"in limbo"* while the authority decides whether or not to acquire the land.

Section 7(6) of the Land Acquisition and Compensation Act (Victoria) provides:

> *"If the Authority has commenced negotiations to acquire an interest in land, the person interested in the land may by notice in the prescribed form require the Authority to determine –*
>
> *(a) to serve a Notice of Intention to acquire the interest; or*
> *(b) to serve statements under sub-section 1(b) in relation to the interest."*

[85] JT 31

[86] Known since 1 January 2014 as the NSW Civil and Administrative Tribunal

By Section 7(7) the Authority must make its determination within 60 days after service of the notice of the interested person and is bound by its determination. Thus in Victoria there is no hardship provision, and if the owner requires the authority to make up its mind, the authority must do so within 60 days.

A further disadvantage of the present New South Wales hardship provision is that its operation depends upon the acquiring authority being itself of the opinion that the owner will suffer hardship if there is any delay in the acquisition of the land[87]. To establish hardship, the owner must prove that it has become necessary for the owner to sell all or part of the land without delay, either *"for pressing personal, domestic or social reasons"* or *"in order to avoid the loss of (or a substantial reduction in) the owner's income"*. While the owner asserts this, whether or not the provision operates depends upon the opinion formed by the acquiring authority. There is no provision for a merits review of that opinion.

The Review considers that the present hardship provision is too harsh and operates unjustly upon landowners. The Review considers that landowners should have a right to require the acquiring authority to either take the land or remove the designation on the land, without the need to prove hardship.

Recommendation 13

That the Land Acquisition Act be amended to remove the requirement for a landowner to establish hardship, and that a landowner have a right to give a notice, without asserting or needing to establish hardship, which obliges the acquiring authority to either acquire the land within 90 days or abandon the proposal to acquire the land.

Recommendation 14

If the Recommendation to abolish the hardship provisions of the Land Acquisition Act is not adopted, then the Review recommends that the Land Acquisition Act be amended to introduce a merits review for landowners whose hardship acquisition application is rejected by an acquiring authority.

[87] Land Acquisition Act, Section 24(1)

Uplift in value

Where property which was compulsorily acquired does not end up being used for the purposes for which it was acquired, and is subsequently sold, should any profit made go to the owner from whom the property was initially acquired? In the alternative, should the prior owner be given a right to re-purchase at the original acquisition price, if it is determined that the land is not required?

This issue has arisen recently in relation to the compulsory acquisition of land in the Leppington area for the South West Railway. Several land owners in that region have complained that more land than was needed for construction of the railway was acquired, and that after construction of the railway, such surplus land will have a greatly increased development value, the benefit of which will flow to the acquiring authority rather than the original land owner.

None of the nine Australian jurisdictions deal with this issue at present.

Submissions received after release of the Consultation Paper

Hunter Water Corporation[88] gave the example of the now withdrawn Tillegra Dam project. A number of landowners asked for the option of a *"first right of refusal"* clause to be written into sale contracts in the event that the project did not go ahead. The Corporation suggests that agencies adopt a standard clause in all compulsory acquisitions providing an opportunity for dispossessed landowners to buy back residual land at the market value of the day, agreed by independent valuation process. The time frame of 6 months to complete from the date of acceptance was considered reasonable. The Corporation submitted that if added value had been created due to the acquisition project, the landowners should not receive a further *"discount"* when buying back as this would create an element of *"double dipping"* and would be likely to be unfavourably received by the general public.

Ms Frances Vumbaca[89] thought that the dispossessed landowner should be able to re-purchase land which was found to be excess to the requirements of the acquiring authority, but at the same price they had been paid for such land. If the excess land were sold off, then her suggestion was that 80% of the profit should go to the landowner and 20% to the acquiring body.

Urban Taskforce Australia[90] submitted that if excess land at the conclusion of an authority project was available, any profit from sale of that land should go to the original owner. Further, if land was acquired but was then rezoned which gave it greater development potential, the uplift in value should be distributed evenly between authority and original landowner.

---

[88] JT 7

[89] JT 11

[90] JT 14

In contrast, Dr Nicholas Brunton[91] thought that the argument that the original landowner should benefit from any uplift in value from the public purpose was *"a nonsense"*. He opposed granting a first right of refusal to the former landowner and suggested that if the former landowner wished to acquire the land, then they should have to pay what the market indicates is an appropriate price.

The Rouse Hill Heights Action Group Inc submitted[92] that the original owner should be allowed to purchase the property at the original purchase cost, with perhaps an adjustment for inflation. If the original owner did not wish to buy back the property, the Group suggested that the original owner should receive the profit when the land is sold. It said: *"It would seem fair and just to first offer the property to the original owner at the end of the project, should some or all of the land remain unused. This would help to ensure that land is not acquired unnecessarily, causing additional heartache and cost for no valid reason"*.

Ms Sheryll Young[93] submitted that an acquiring authority should not have the power to on-sell land, that was designated for a public purpose when acquired, without prior permission from the latest private landowner. She submitted that the acquiring authority should not profit at the owner's loss, and the owner should be given first right of refusal to buy it back, at the same cost at which it was acquired by the authority.

Discussion

Two basic themes emerged in the submissions received. The first was whether or not a *"first right of refusal"* should be given to landowners where their land was acquired but a public project did not go ahead. The second was how any uplift in value should be shared between acquiring authority and former landowner. It is to be noted that these topics are not dealt with anywhere in Australia at the moment.

The submission of Hunter Water Corporation gave an example of how the first right of refusal proposal has worked in practice, upon the abandonment of the Tillegra Dam project. It is not known how many former landowners bought their land back under a first right of refusal clause. It is to be noted that this was achieved by negotiation rather than through any legislative provision.

Where a project is completely abandoned there could be no objection in principle to the former landowners having first right of refusal to acquire their old land. There is a question as to whether they should pay market value for the land or whether they can buy it back at the original price paid by the acquiring authority. If they pay market value then the acquiring authority has had a windfall profit from holding the land for a period of time. If they buy it back at the original purchase price, then the landowners have not had the burden of paying the costs associated with holding that land, during the time after which it had been acquired by the authority.

---

[91] JT 15

[92] JT 16

[93] JT 18

The Review supports the notion of acquiring authorities being obliged to negotiate, inter alia, as to whether the landowner wishes to have a first right of refusal clause in any contract for sale of land. At the same time, the parties could also negotiate about essential matters such as the price at which the land is to be reacquired, and the timeframe for settlement of reacquisition. If such a proposal is adopted, then these issues would need to be covered in the *"plain English"* explanations of the land acquisition process which have already been recommended above.

Recommendation 15

That the Land Acquisition Act be amended to require acquiring authorities to give landowners a first right of refusal to repurchase land, where a project does not proceed at all, or where not all of the acquired land is ultimately needed by the acquiring authority.

The question of uplift in value is more complicated. If a project does not go ahead, then any uplift in value has come about because of the trend over time for land values to increase. However, if a project has gone ahead, and the construction of that project at government expense has lifted the value of all land surrounding the project, a real question of equity arises as to who should take the benefit of that uplift in value if the landowner can purchase part or all of their land back from the acquiring authority. Taxpayer money has been spent in constructing an infrastructure project which has greatly increased the value of surrounding land. There is a good argument that the government should be entitled to the value of that uplift. On the other hand, surrounding land which was not part of the acquisition has had its value greatly increased, by government money being spent on the infrastructure project. That is a windfall for those landowners, and their land has increased in value at no expense to themselves. If the landowner whose land has been partly or wholly acquired is not given the benefit of the uplift, then that landowner is being treated differently, and is at a disadvantage compared to all surrounding landowners.

As previously recited, the submissions received covered the spectrum from giving all the uplift to the original owner, to giving none of it to the original owner, to sharing the value of the uplift between owner and acquiring authority in various suggested ratios.

The question of who should take the benefit of the uplift in value is a difficult one and one which cannot be ignored. When the Land Acquisition Act says nothing about the question, it is the acquiring authority, which is able to resell the acquired land at a greatly increased value, which takes the benefit of the uplift in value. So, while the present legislation says nothing, it does deal with uplift in value, as it were, by omission.

While there is no indication that this has been the case, the present system provides no incentive for acquiring authorities to limit the area of land they acquire to that which is strictly necessary for their particular project. As has been demonstrated in relation to the South West Rail Link, more land was originally acquired than has been needed for construction of the railway. In part, this may be because in New South Wales compulsory acquisition sometimes takes place when the precise route of a freeway or railway has not yet been finalised.

On balance, the Review is of the view that if a dispossessed landowner is able to reacquire part or all of their land, pursuant to a first right of refusal clause, then that reacquisition ought to be at the market price paid by the acquiring authority i.e. the uplift in value accrues to the benefit of the landowner. If the land is really surplus to requirements of the acquiring authority's project, then there is a good argument to be made that it should never have been taken in the first place. In those circumstances, giving the benefit of the uplift in value to the dispossessed landowner, goes some way towards putting them back into the position they would have been had the acquisition either not occurred, or had the acquisition been confined to the land ultimately needed for the acquiring authority's project.

Recommendation 16

That the Land Acquisition Act be amended so that if a dispossessed landowner reacquires part or all of their land (pursuant to a first right of refusal clause) then such reacquisition be at the market price paid by the acquiring authority, so that any uplift in value accrues to the benefit of the dispossessed landowner. Further, such amendment should also operate where it is the acquiring authority which resells the land to a third party, to the intent that the acquiring authority ought to account to the dispossessed landowner for any uplift in value.

Reinstatement

All other Australian legislatures except NSW have included provisions in their compensation statutes which take into account the problems and cost of reinstatement or relocation of a dispossessed owner.[94]

Section 61(2)(b) of the Lands Acquisition Act (Cth) makes provision for compensation to be paid, in respect of a dwelling acquired, for the cost of acquiring a *"reasonably equivalent dwelling"*. The State Acts of Victoria, Western Australia and South Australia provide compensation for the cost of *"reinstatement"* in certain circumstances. The compensation statutes of Tasmania, Northern Territory and the Australian Capital Territory all carry their own provisions for reinstatement.

Compensation on a reinstatement basis is not available under the Land Acquisition Act.

Submissions received after release of the Consultation Paper

Mr Terry Dundas[95], an experienced valuer, submitted that reinstatement had to become a head of compensation. He pointed out that there are numerous properties where the market value does not provide just compensation to the dispossessed owner e.g. a very large ornate residence in a rural town, a purpose-built civic building, or a golf course. Any acquisition of such property at market value would not put the property owner in the position they were in, prior to the acquisition i.e. they could not replace the original property at market value.

By contrast, Dr Nicholas Brunton[96] opposed reinstatement being added to the Land Acquisition Act. In his view it would be rare for the Land Acquisition Act not to provide sufficient compensation for a landowner to acquire an alternative property of similar value to that acquired by the authority.

The Rouse Hill Heights Action Group Inc[97] supported the amendment of the Land Acquisition Act to add a provision similar to the Commonwealth legislation.

The Young Lawyers submission[98] pointed out that access to an *"equivalent dwelling"* is not specifically provided for in the Land Acquisition Act, unlike other jurisdictions. The submission stated that: *"Reinstatement as a principle is concerned with restoring the dispossessed owner of land so that compensation is awarded on the basis of providing an equivalent place for the same use, rather than on the basis of market value"*. The submission raised the question of whether there should be compensation for use of land

---

[94] Brown, op.cit., p.159-160

[95] JT 3

[96] JT 15

[97] JT 16

[98] JT 20

which is specific to the land that is acquired. Their recommendation was: *"That the review consider whether the meaning of 'equivalent' should translate to compensation for use of land which is specific to the acquired land, and consider introducing an express legislative provision to address this issue"*.

The Australian Property Institute[99] thought that the absence of reinstatement in the Land Acquisition Act should be remedied specifically where single owner occupied dwellings are required. It pointed with approval to the Commonwealth provision which refers to a *"reasonably equivalent dwelling"*.

Discussion

It is anomalous that all legislatures except New South Wales have provisions in their compensation legislation to provide for reinstatement or relocation in respect of dwelling houses. Some submissions advocated that reinstatement be part of the legislation in respect of civic buildings and not just dwellings. The Commonwealth legislation provides that the reinstatement compensation should be *"the amount necessary to reimburse the person for the costs of acquiring a reasonably equivalent interest in land that entitles the person to occupation of a reasonably equivalent dwelling"*[100].

Where a landowner is dispossessed from a dwelling, the reality is that they are going to have to use the compensation paid to acquire another home. In those circumstances, there is a strong argument to be made that they should obtain compensation on a reinstatement basis. There can be no reason in principle why New South Wales is the only jurisdiction in Australia that does not offer some form of such compensation.

Recommendation 17

That the Land Acquisition Act be amended so as to provide for compensation on a reinstatement basis, in relation to a dwelling house, in terms similar to those of Section 61(2)(b) of the equivalent Commonwealth legislation.

[99] JT 27

[100] Lands Acquisition Act 1989 (Cth) Section 61(2)(b)

Electricity transmission issues

Many of the problems with the Land Acquisition Act, both in relation to the meaning of "interest in land", and in relation to the procedures, have been brought up in relation to the acquisition of land for electricity transmission purposes.

Submission prior to Consultation Paper - TransGrid

TransGrid is a NSW statutory State owned corporation which is empowered to acquire property for the purposes of exercising its functions of establishing, maintaining and operating facilities for the transmission of electricity. TransGrid has suggested there is a lack of clarity about the meaning of the phrase "interest in land". Firstly, it says that the definition is broad but too legalistic and could be made much clearer by identifying the types of interest in land as "including but not limited to the following…". It points to doubts as to whether a resuming authority can compulsorily acquire a restrictive covenant. TransGrid also suggests that the acquisition of freehold should be dealt with differently to the acquisition of lesser interests in land such as easements.

TransGrid pointed to problems in ascertaining the contact details of holders of an interest in land, where such interest is unregistered. It submits that it is unreasonable to require acquiring authorities to issue a PAN to persons who have certain types of interest in the land. Difficulties in ascertaining the holders of such interests could be overcome if there were powers to compel registered owners of land to provide contact details for the holders of unregistered interests.

TransGrid also had concerns about the procedures under the Land Acquisition Act, which it says need to be reviewed. It says that relevant considerations in approving the compulsory acquisition of an interest in land are not clearly set out and this may expose an acquiring authority to otherwise avoidable legal challenge on administrative law grounds.

TransGrid suggested that the Review should consider the need for essential infrastructure organisations to be able to compulsorily acquire land prior to necessary project planning approvals being obtained, for the purpose of minimizing project cost as well as to preserve corridors prior to future development.

TransGrid suggested that other principles to guide the acquisition of real property include:

1. Consider that acquiring authorities have commonly already undertaken years of negotiations prior to commencing the process of compulsory acquisition, therefore the process of compulsory acquisition should not further extend mandatory timeframes for negotiations to acquire by agreement but should effectively bring the matter to a close as swiftly as possible.
2. Reduce the time and cost impacts on the acquiring authority and the relevant interest holder currently experienced under the existing regime.

3. Encourage acquiring authorities to provide information about the process of negotiation and compulsory acquisition.
4. Acquisitions for the purpose of resale should be permitted where the relevant Minister has consented to the proposal.
5. A Proposed Acquisition Notice should state that, if they have not done so already, landowners are entitled to obtain a valuation of the interest proposed to be acquired, that the acquiring authority will reimburse reasonable costs incurred in obtaining a valuation and that the valuation can then be provided to the Valuer General if the land is then resumed.
6. Resuming authorities should be required to notify land owners as soon as practicable when their land has been compulsorily acquired and remind land owners they are entitled to lodge a claim form and any valuation of their land with the resuming authority who must supply the same to the Valuer General. At present, this is at the discretion of the resuming authority.

Submission prior to Consultation Paper - Essential Energy

Essential Energy is a NSW statutory State owned corporation, with responsibility for building, operating and maintaining Australia's largest electricity network. It has the power of acquisition under s44 of the *Electricity Supply Act 1995*. In the past 3 years approximately 570 easements benefiting Essential Energy have been registered.

Essential Energy raised the following issues for consideration by the Review:

1. Inequity in the quantum of compensation between landowners who adopt a reasonable and timely approach and those who hold out and delay agreement in order to negotiate higher compensation payments;
2. Delays to large scale projects arising from individuals along the route of the transmission lines holding out either to secure higher compensation or in an effort to have Essential Energy consider alternative routes;
3. Owners (including authorities) taking excessive time to either respond to Essential Energy's correspondence or to seek legal and valuation advice;
4. Uncertainty and delay where consent cannot be obtained from parties that have an interest in land where such interest is unlikely to be compensable or would only attract nominal compensation;
5. Unregistered interests can often not be identified without extensive consultation, and can be missed;
6. Certain parties may have a "right power or privilege" over the land but do not have a compensable interest, such as enclosure permit holders under Part 4, Division 6 of the Crown Lands Act 1989, livestock health and pest authorities who manage traveling stock routes and aboriginal land claims under the Aboriginal Land Rights Act 1983;

7. There needs to be greater certainty around what constitutes a "right power or privilege" over land for the purposes of the Land Acquisition Act, or alternatively, "owners" should be restricted to discoverable legal and equitable interests.

Essential Energy provided a number of examples where it has struck problems in identifying persons with an interest in land or in following the processes under the Land Acquisition Act.

Submission prior to Consultation Paper - Local Government Association and Shires Association

The Associations raised their own concerns in relation to electricity transmission, saying:

> *"An electricity authority may be able to use the provisions of Part 5 of the Electricity Supply Act 1995 to avoid the provisions of the [Land Acquisition Act] and the Associations see this as creating the possibility of an unfair advantage over Local Government and other property owners whose assets are affected by electricity supply works. A change to the [Land Acquisition Act] to include electricity authorities in the definition of an authority of the State would both level the playing field and still enable the essential services to be supplied [without] undue delay."*

Submissions after release of the Consultation Paper

TransGrid[101] directly addressed the concerns of the Local Government Association and Shires Associate in their preliminary submission which raised a concern that electricity authorities may be able to use the provisions of Part 5 of the Electricity Supply Act to avoid the provisions of the Land Acquisition Act. TransGrid said:

> *"The Electricity Supply Act expressly provides, at Section 44, that a network operator is authorised to acquire land, and that the acquisition may be by agreement or by compulsory process in accordance with the Just Terms Act. Further, Section 8 of the Just Terms Act provides that the Just Terms Act prevails, to the extent of any inconsistency, over the provisions of any other Act (including the Electricity Supply Act) relating to the acquisition of land. It is clear, in TransGrid's view, that TransGrid (and other electricity operators) is an 'authority of the State' for the purposes of the Just Terms Act, and that it receives no advantage over Local Government and other property owners affected by electricity works."*

The Property Council of Australia[102] expressed the view that Ausgrid could acquire easements without paying compensation. It said:

> *"Most NSW Councils impose a Standard DA condition on landowners which requires the landowner to dedicate an area of land within the development site to an energy supplier,*

[101] JT 17

[102] JT 19

free of cost, to enable an electricity substation to be installed, if required.

This results in a perverse situation where Ausgrid (or another energy supplier) is permitted to acquire an easement over private property for the installation of a substation, without paying any compensation to the landowner."

The Council submitted that such acquisitions by Ausgrid fall outside the scope of the Land Acquisition Act, and that private landowners are forced to incur significant financial losses and unfairly bear the financial burden for the accommodation of public infrastructure. It gives the example of the erection of a substation on land owned by a member of the Council which resulted in an ongoing loss of approximately $40,000 per annum in nett rent and an $800,000 loss on the capital value of the property. The Council suggests that the Government has failed to compensate the landowner for the acquisition of easements in these circumstances and that this is an unreasonable infringement of private property rights. If that is correct then a basic aim of the Land Acquisition Act is being circumvented.

The Australian Property Institute[103] submitted that the acquisition of high tension transmission line easements for surface works is not adequately addressed in the Land Acquisition Act. It referred to the construction of:

"what is commonly known as 'off easement access' to service easements for construction and maintenance purposes. The Institute suggests that 'off easement access' is invariably acquired by means of an agreement which is not part of the formal acquisition of the easement for high tension transmission line purposes, and may or may not be uncovered through a search of the landowner's title. Further, such access is usually not defined by survey. The Institute asserts that there is great reluctance by electricity transmission corporations to either accurately survey the routes of the 'off easement access' or alternatively formally acquire the 'off easement access' by means of an adjunct easement to the primary easement for high tension transmission line purposes".

Dr Nicholas Brunton[104] submitted in relation to electricity transmission issues that:

1. The current definition of interest in land is *"overly legalistic and could be improved"*. He suggested that it should specify the types of interest in land that can be acquired, such as licenses, easements and profits a prendre;
2. He supported the argument that the Land Acquisition Act should be amended to specifically enable the acquisition or imposition of positive or negative covenants on land, as there is doubt as to whether this is currently available to acquiring authorities.

The Law Society of NSW Environmental Planning and Development Committee[105] made the following submissions in relation to electricity transmission issues:

---

[103] JT 27

[104] JT 15

[105] JT 23

1. There should be clarification of the meaning of 'right power or privilege';
2. The operation of the Land Acquisition Act should not be restricted to owners who have a discoverable legal or equitable interest.

Discussion

Some of the problems and suggestions raised by TransGrid and Essential Energy have been dealt with by Recommendations made above. In particular, the Recommendation that there be a fixed period for negotiation would ease the *"time and cost impacts"* involved in prolonged negotiations for the acquisition of land for electricity transmission purposes. The submission that there should be compulsory provision of information about the negotiation and acquisition processes has been taken up in the recommendation that all acquiring authorities should have to provide *"plain English"* written information to landowners. The recommendation for more information to be given to the Valuer General has also been covered by a previous Recommendation.

Almost uniquely in the submissions made to the Review, electricity transmission issues throw up problems about what is a *"right power or privilege"* over the land. Clearly TransGrid and Essential Energy have unique and extensive knowledge of this problem. On the limited information provided to the Review it is not possible to come to a concluded view what, if anything, should be done about the perceived problem. However, it would be worthwhile to obtain further information from TransGrid and Essential Energy, and any other interested parties, with a view to possibly limiting the categories of *"right power or privilege"* over land which entitles the landowner to compensation.

Recommendation 18

That further consultation be held with TransGrid, Essential Energy and other electricity transmission authorities, together with any other interested parties:

(a) to ascertain whether a limitation should be placed upon the categories of *"right, power or privilege"* over the land which should be the subject of compensation for compulsory acquisition;

(b) to ascertain whether the perceived granting of easements for electricity substations without compensation requires attention.

Aboriginal Land Claims – Interest In Land

While a direction was received from the Government that aboriginal land claims were not within the Terms of Reference, in the course of consideration of submissions, one unforeseen issue has emerged which is arguably within those Terms.

The issue is whether an undetermined aboriginal land claim constitutes an "interest in land".

Submissions relevant to this issue

The New South Wales Aboriginal Land Council ("the Land Council") made an initial submission prior to release of the consultation paper. It pointed out that Section 42B of the *Aboriginal Land Rights Act 1983* (NSW) provides that:'

> *"Despite anything in any Act, land vested in an Aboriginal Land Council must be not be appropriated or resumed except by an Act of Parliament"*.

Pursuant to Section 36 of the *Aboriginal Land Rights Act 1983* (NSW), any Aboriginal Land Council can make a claim upon land in New South Wales. If the claim land meets, in whole or in part, the definition of *'claimable Crown land'* contained in Section 36(1) of the *Aboriginal Land Rights Act 1983*, the Crown Lands Minister must transfer that land (or part of that land) to the claimant Aboriginal Land Council.

The Land Council submission pointed out that as at 1 June 2012 there were 25,975 undetermined land claims on land in New South Wales awaiting determination by the Crown Lands Minister. There is currently an informal practice between Crown Lands and the Land Council Network whereby before Crown Lands will consent to an acquiring authority issuing a PAN over land that is the subject of an undetermined aboriginal land claim, the acquiring authority is instructed to seek the consent of the claimant Aboriginal Land Council. The Land Council submission suggests that this informal practice should be formalised so that no PAN can be issued by an acquiring authority over land that is the subject of an undetermined aboriginal land claim. The Land Council submitted that legislation should be implemented to ensure that the Registrar General puts a notice of an aboriginal land claim on the folio of all land that is the subject of an undetermined aboriginal land claim. It was said that in this way all acquiring authorities, and the public at large, will be able to identify land that is the subject of a land claim.

If the informal practice were not followed, then it would be possible for an acquiring authority to compulsorily acquire land the subject of an aboriginal land claim before such claim was determined.

Submissions received after publication of the Consultation Paper also touch upon this issue. The Law Society of NSW[106] submitted that it would be subversive of the Aboriginal Land

[106] JT 23

Council scheme, if land claims were left undetermined by the Minister and as a result land, which would otherwise be vested in a Land Council and protected from acquisition, is able to be acquired. The Society gave examples of aboriginal land claims which had taken 20 years to determine. It suggested that where an acquiring authority is interested in acquiring land which is the subject of an aboriginal land claim, that authority should request the Minister to determine the claim and to allow for any appeal process to be completed. Alternatively, the acquiring authority should obtain the consent of the Land Council that lodged the claim.

The submission of the Division of Local Government, Department of Premier and Cabinet[107] pointed to particular problems where Local Councils wanted to acquire Crown land which was the subject of an aboriginal land claim.

Discussion

It seems extraordinary that there are over 25,000 undetermined Aboriginal land claims awaiting determination by the Crown Lands Minister. The reason for such a large number of undetermined claims is not known. However, the possibility of a claim remaining undetermined, and an acquiring authority taking Crown land, would subvert the intent of the Aboriginal Land Rights Act 1983.

The submission of the New South Wales Aboriginal Land Council referred to the informal practice between Crown Lands and the Land Council Network whereby, before Crown Lands will consent to an acquiring authority issuing a PAN over land which is the subject of an undetermined aboriginal land claim, the acquiring authority is instructed to seek the consent of the claimant Aboriginal Land Council.

There was no suggestion in any submission made to the Review that any undetermined land claims have slipped through the net. Presumably this means that accurate and up-to-date records of undetermined aboriginal land claims are being kept. While that system is working, there seems no need for an amendment to oblige the Registrar General to record undetermined aboriginal land claims on the Certificate of Title.

It is not known whether all acquiring authorities know of this practice, or whether they only become aware of it once they approach the Crown Lands Minister.

Recommendation 19

That the record of undetermined Aboriginal land claims kept by Crown Lands be made available to all potential acquiring authorities, and that all such authorities be informed in writing of the practice which has developed to protect undetermined claims. Further, Crown Lands should be obliged to advise all local Councils in writing, on a regular basis, of the existence and particulars of all undetermined Aboriginal land claims in the particular area relevant to each local Council.

[107] JT 32

Future legislation

The Review is required to recommend a process for considering the principles which guide the process of how acquisitions of real property should be dealt with by Government in future legislation. Whether or not any changes recommended by this Review are adopted is up to the Government. Whether any legislative alterations to the current regime are made is ultimately up to Parliament.

If changes are made, then any one of the following processes could be adopted for considering these principles in future legislation:

- Conducting another Review, some years after any amendments have been in operation for a sufficient length of time to enable their effect to be properly assessed;
- Conducting such a Review, not just by asking for written submissions, but by the holding of public hearings and the taking of evidence;
- Referring assessment of the worth of any changes made to a Parliamentary committee for inquiry and report;
- Putting together an expert panel comprising representatives of Government authorities, user groups, industry groups and academics to report upon the effect of any amendments.

Discussion

This Review has been conducted by calling for written submissions. If a subsequent review is going to be conducted, it is recommended that interested parties have the opportunity to put their case orally, and for the review to question people or bodies who put forward submissions. Further, there should be a working party established, to represent the various disparate interests in the field, to gauge the effect of any amendments to the legislation and to recommend any future changes.

The recommendation of the Review is:

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 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.

Appendix A: List of persons, organisations and government bodies who responded to the request for submission of issues for consideration

1. Anonymous, 16 May 2012
2. Professor George Williams and Ms Nicole Garrity, University of New South Wales, 16 May 2012
3. Mr Marcus McClintock, 17 May 2012
4. Ms Jesie Chang, 18 May 2012
5. Anonymous, 18 May 2012
6. Mr Greg Bennett, Ratepayers Association of Lismore Incorporated, 22 May 2012
7. Mr Trevor Kirk, 28 May 2012
8. Mr Bernard Grinberg, Ballina Ratepayers Association, 7 June 2012
9. Ms Venecia Wilson, 7 June 2012
10. Gosford City Council, 12 June 2012
11. Mr James Neale, 13 June 2012
12. NSW Bar Association, 13 June 2012
13. Ms Sheryll Young, 13 June 2012
14. Australian Property Institute, 14 June 2012
15. Ms Donna Barter-Scott, Save Leamington Avenue Inc, 14 June 2012
16. Division of Local Government, Department of Premier and Cabinet,14 June 2012
17. Roads and Maritime Services, 14 June 2012
18. Mr George Andrean, 15 June 2012
19. Australian Forest Growers and NSW Forest Products Association,15 June 2012
20. Mr Sahil Prasad, Cotton Australia Limited, 15 June 2012
21. Mr Paul Dewar, 15 June 2012
22. Ms Jeannie Hughes, 15 June 2012
23. Mr Owen Johns, 15 June 2012
24. Lake Macquarie City Council, 15 June 2012
25. Law Society of NSW, 15 June 2012
26. Local Government and Shires Association of NSW, 15 June 2012
27. Mr Karl Novak and Ms Margaret Novak, 15 June 2012
28. Mr David Riddel and Ms Janice Riddel, 15 June 2012
29. Ms Colleen Abela, Rouse Hill Heights Action Group Inc, 15 June 2012
30. South Ballina Partnership, 15 June 2012

31. Taylor Byrne Pty Ltd, Valuers and Property Consultants, 15 June 2012
32. TransGrid, 15 June 2012
33. Urban Taskforce Australia, 15 June 2012
34. Ageing, Disability and Home Care, NSW Department of Family and Community Services, 18 June 2012 (data only provided)
35. Essential Energy, 18 June 2012
36. Sydney Water Corporation, 18 June 2012 (data only provided)
37. Department of Education & Communities, 19 June 2012 (data only provided)
38. NSW Minerals Council, 19 June 2012
39. NSW Department of Attorney General & Justice, 20 June 2012 (data only provided)
40. NSW Farmers' Association, 20 June 2012
41. Anonymous, 20 June 2012
42. Landcom, 20 June 2012
43. Anonymous, 21 June 2012
44. Land and Property Information, 21 June 2012
45. NSW Irrigators' Council, 21 June 2012
46. Valuer General, 21 June 2012
47. Mr Vince Mangioni, 22 June 2012
48. Mr Doug Menzies, 22 June 2012
49. Australian Petroleum Production & Exploration Association Limited, 25 June 2012
50. Department of Family and Community Services, 26 June 2012 (data only provided)
51. Department of Planning & Infrastructure, 27 June 2012
52. Department of Trade & Investment, Regional Infrastructure and Services, 28 June 2012
53. NSW Regional Community Survival Group, 28 June 2012
54. NSW Aboriginal Land Council, 29 June 2012
55. Office of Environment and Heritage, Department of Premier and Cabinet, 3 July 2012
56. Transport for NSW, 6 July 2012
57. Ministry of Health, 9 July 2012

Appendix B: Preliminary consultation

1. Professor John Sheehan, Australian Property Institute and Mr Shaun Hendy, CBRE, meeting 28 May 2012
2. Mr John Miller and Mr Michael Parker, Land and Property Information, meeting 1 June 2012
3. Mr Ian Hunter, Mr Tim Hurst and Ms Soraia Sousa, Department of Premier & Cabinet, meeting 17 July 2012

Appendix C: List of persons, organisations and government bodies who responded to the request for submissions after release of the Consultation Paper – published on the Have Your Say website

JT1 Cr Greg Bennett
JT2 Boral Property Group
JT3 Terry Dundas
JT4 Kevin Conolly MP
JT5 Marcus Ritchie
JT6 Jonathan O'Dea MP
JT7 Hunter Water Corporation
JT8 Owen Coleman
JT9 Don Pye
JT10 John Bracey
JT11 Frances Vumbaca
JT12 Marcus Ritchie
JT13 Anon
JT14 Urban Taskforce Australia
JT15 Dr Nicholas Brunton
JT16 Rouse Hill Heights Action Group Inc
JT17 TransGrid
JT18 Sheryll Young
JT19 Property Council of Australia
JT20 NSW Young Lawyers
JT21 Fairfield City Council
JT22 Henroth Investments Pty Ltd
JT23 Law Society of NSW
JT24 Randwick City Council
JT25 Local Government NSW
JT26 The Hills Shire Council
JT27 Australian Property Institute Inc
JT28 NSW Ministry of Health (not published on website)
JT29 Valuer General
JT30 Dr Vince Mangioni
JT31 Transport for NSW
JT32 Division of Local Government, Dept of Premier and Cabinet
JT33 NSW Bar Association

Appendix D: NSW legislation containing acquisition powers

Aboriginal Housing Act 1998 No 47

Aboriginal Land Rights Act 1983 No 42

Barangaroo Delivery Authority Act 2009 No 2

Cancer Institute (NSW) Act 2003 No 14

Catchment Management Authorities Act 2003 No 104

Charles Sturt University Act 1989 No 76

Chipping Norton Lake Authority Act 1977 No 38

Community Welfare Act 1987 No 52

Crown Lands Act 1989 No 6

Crown Lands Regulation 2006

Destination NSW Act 2011 No 21

Education Act 1990 No 8

Electricity Supply Act 1995 No 94

Energy and Utilities Administration Act 1987 No 103

Environmental Planning and Assessment Act 1979 No 203

Fisheries Management Act 1994 No 38

Forestry Act 1916 No 55

Government Telecommunications Act 1991 No 77

Health Administration Act 1982 No 135

Heritage Act 1977 No 136

Historic Houses Act 1980 No 94

Housing Act 2001 No 52

Hunter Water Act 1991 No 53

Infrastructure NSW Act 2011 No 23

Lake Illawarra Authority Act 1987 No 285

Land Acquisition (Charitable Institutions) Act 1946 No 55

Land and Environment Court Act 1979 No 204

Local Government Act 1993 No 30

Macquarie University Act 1989 No 126

Marine Parks Act 1997 No 64

Mine Subsidence Compensation Act 1961 No 22

Nation Building and Jobs Plan (State Infrastructure Delivery) Act 2009 No 1

National Parks and Wildlife Act 1974 No 80
Native Title (New South Wales) Act 1994 No 45
Parramatta Park Trust Act 2001 No 17
Pipelines Act 1967 No 90
Pipelines Regulation 2005
Ports and Maritime Administration Act 1995 No 13
Public Works Act 1912 No 45
Roads Act 1993 No 33
Soil Conservation Act 1938 No 10
Southern Cross University Act 1993 No 69
Sporting Venues Authorities Act 2008 No 65
State Development and Industries Assistance Act 1966 No 10
State Water Corporation Act 2004 No 40
Strata Schemes (Freehold Development Act 1973 No 68
Sydney Harbour Foreshore Authority Act 1998 No 170
Sydney Olympic Park Authority Act 2001 No 57
Sydney Water Act 1994 No 88
Sydney Water Catchment Management Act 1998 No 171
Teacher Housing Authority Act 1975 No 27
Technical and Further Education Commission Act 1990 No 118
Threatened Species Conservation Act 1995 No 101
Transport Administration Act 1988 No 109
Tweed River Entrance Sand Bypassing Act 1995 No 55
University of New England Act 1993 No 68
University of New South Wales Act 1989 No 125
University of New South Wales (St George Campus) Act 1999 No 45
University of Newcastle Act 1989 No 68
University of Sydney Act 1989 No 124
University of Technology, Sydney, Act 1989 No 69
University of Western Sydney Act 1997 No 116
University of Wollongong Act 1989 No 127
Valuation of Land Act 1916 No 2
Water Management Act 2000 No 92
Western Lands Act 1901 No 70
Western Sydney Parklands Act 2006 No 92

Appendix E: List of Recommendations

Recommendation 1

That there be a compulsory negotiation period of 6 months, before any step can be taken to compulsorily acquire land under the Land Acquisition Act, or under any other cognate legislation.

Recommendation 2

That prior to commencement of the negotiation period, the acquiring authority is obliged to provide a detailed written explanation to the landowner, written in "plain English", setting out an explanation of the land acquisition process and setting out the rights and responsibilities of both the landowner and the acquiring authority.

Recommendation 3

That the landowner and the acquiring authority, during the fixed negotiation period, conduct at least one face-to-face meeting, with a view to negotiation of an appropriate acquisition price, unless both parties agree that such meeting is not necessary or can be conducted by a different means e.g. telephone conference.

Recommendation 4

That a new compulsory acquisition process be adopted, so as to afford procedural fairness. That process should be in accordance with Recommendation 11 made in the JSC Report.

Recommendation 5

That Section 55(c) of the Land Acquisition Act be retained in its current form.

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.

Recommendation 7

That Section 60(2) of the Land Acquisition Act be amended to provide that the maximum amount of compensation in respect of solatium is $50,000, and that such amount be indexed yearly to the CPI.

Recommendation 8

That formal arrangements be set out in the Land Acquisition Act to require acquiring authorities to pay the reasonable costs of the Valuer General for providing a compulsory compensation valuation.

Recommendation 9

That the Land Acquisition Act be amended to require both the acquiring authority and the landowner to notify the Valuer General of any issues that may affect the determination of compensation, within 7 days of the acquisition being gazetted.

Recommendation 10

That the Act be amended so that the 30 day timeframe for the issue of notices by acquiring authorities be amended to 45 days.

Recommendation 11

That the Land Acquisition Act be amended to give the Valuer General authority to extend the time period for which a compensation notice is to be given to 90 days, if in the opinion of the Valuer General such additional time is required.

Recommendation 12

The Review does not support extension of a merits appeals against a compulsory acquisition valuation, to acquiring authorities. The Act should remain as it is.

Recommendation 13

That the Land Acquisition Act be amended to remove the requirement for a landowner to establish hardship, and that a landowner have a right to give a notice, without asserting or needing to establish hardship, which obliges the acquiring authority to either acquire the land within 90 days or abandon the proposal to acquire the land.

Recommendation 14

If the Recommendation to abolish the hardship provisions of the Land Acquisition Act is not adopted, then the Review recommends that the Land Acquisition Act be amended to introduce a merits review for landowners whose hardship acquisition application is rejected by an acquiring authority.

Recommendation 15

That the Land Acquisition Act be amended to require acquiring authorities to give landowners a first right of refusal to repurchase land, where a project does not proceed at all, or where not all of the acquired land is ultimately needed by the acquiring authority.

Recommendation 16

That the Land Acquisition Act be amended so that if a dispossessed landowner reacquires part or all of their land (pursuant to a first right of refusal clause) then such reacquisition be at the market price paid by the acquiring authority, so that any uplift in value accrues

to the benefit of the dispossessed landowner. Further, such amendment should also operate where it is the acquiring authority which resells the land to a third party, to the intent that the acquiring authority ought to account to the dispossessed landowner for any uplift in value.

Recommendation 17

That the Land Acquisition Act be amended so as to provide for compensation on a reinstatement basis, in relation to a dwelling house, in terms similar to those of Section 61(2)(b) of the equivalent Commonwealth legislation.

Recommendation 18

That further consultation be held with TransGrid, Essential Energy and other electricity transmission authorities, together with any other interested parties:

- **(a) to ascertain whether a limitation should be placed upon the categories of *"right, power or privilege"* over the land which should be the subject of compensation for compulsory acquisition;**
- **(b) to ascertain whether the perceived granting of easements for electricity substations without compensation requires attention.**

Recommendation 19

That the record of undetermined Aboriginal land claims kept by Crown Lands be made available to all potential acquiring authorities, and that all such authorities be informed in writing of the practice which has developed to protect undetermined claims. Further, Crown Lands should be obliged to advise all local Councils in writing, on a regular basis, of the existence and particulars of all undetermined Aboriginal land claims in the particular area relevant to each local Council.

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 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.