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Australian Property Institute Limited

SUBMISSION

RESPONSE TO PROPOSED AMENDMENTS TO LAND ACQUISITION ACT 1993 (TASMANIA)

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Introduction

About the API

The Australian Property Institute (API) is the leading membership organisation for property professionals. It is impartial, objective and independent. With more than 8,000 members, API represents a wide range of property professionals who have a significant impact on the wider property industry.

API sets and maintains the highest standards of professional practice, education, ethics and professional conduct for our members. In turn, the work of the Institute raises the bar for the entire property profession.

API membership requires minimum qualifications and experience and ongoing professional development and education, ensuring a highly qualified, highly skilled profession.

API members can be found across all sectors of the property profession, including private practice, public sector and academia. This broad base of qualified and skilled professionals is unique to the Australian Property Institute. The Institute is committed to building and maintaining a strong base for the future of the property profession through broadening the expertise and knowledge of membership.

Proposed Amendment 1: Section 11(2)(e)

Amend section 11(2)(e) to indicate that the acquiring authority 'may negotiate' in place of 'is willing to negotiate' for the purpose of acquiring the land.

Section 11(2)(e) requires a Notice to Treat to '*specify that the acquiring authority is willing to negotiate for the purchase of the land but, if agreement for the purchase of the land is not reached within 30 days after the service of the notice, the authority may take the land compulsorily'.*

It has been suggested that the requirement '*is willing to negotiate'* requires clarity as it is open to interpretation to mean that an acquiring authority must attempt to reach agreement before exercising the power to compulsorily acquire land. Logistically, it is almost impossible for both an acquiring authority and a property owner to have valuation reports prepared, meet to negotiate and then reach an agreement within a 30 day period.

The intention is that an acquiring authority may either (1) attempt to negotiate in good faith for the purchase of the land and if they cannot reach agreement then proceed to compulsory acquisition, or (2) proceed straight to compulsory acquisition following receipt of Ministerial approval without having to attempt to negotiate an outcome with the property owner.

Recommendation:

The API supports the proposed amendment.

Proposed Amendment 2: Sections 17 and 46

Replace all references to '*Special Deposits and Trust Fund*' with '*Public Account*'.

Sections 17 and 46 refer to an account in the Special Deposits and Trust Fund. This reference needs updating to the '*Public Account*' to align with the *Financial Management Act 2016*. Although references such as these will be fixed in consequential amendments to the Financial Management Act, it is tidier to do them now as part of this review

Recommendation:

The API supports the proposed amendment.

Proposed Amendment 3: Section 18

Amend section 18 to permit a *Notice of Acquisition* to be issued where the land area is less than, and within the boundaries of, the area of land initially identified in the *Notice to Treat*.

Section 11 deals with the issue of a *Notice to Treat*. Occasionally, a *Notice to Treat* is issued with only an estimated area of land being required based on a conceptual plan. After the formal survey plan is prepared, the area indicated on the conceptual plan may differ to that indicated on the survey plan.

The Governments view is that there is no mechanism in the Act to accommodate a change in the area of land acquired under a *Notice of Acquisition* from that initially described in a *Notice to Treat*. The proposed change is a sensible approach to addressing the issue and assists all parties in streamlining the acquisition process.

Recommendation:

The API supports the proposed amendment.

Proposed Amendment 4: Section 27

Amend section 27 to replace all references to the words '*other land*' with '*other adjoining land*' and include a definition in section 3 of '*other adjoining land*'.

S27(1)(c), (d) and (e) and 27(2) & (3) deal with heads of compensation known as severance, betterment and injurious affection. These sections all make reference to 'other land' but there is no definition of 'other land' in the Act. This requires clarity because the interpretation is too broad in relation to the various options for compensation.

It is suggested that the definition should be as follows:

'other adjoining land' means land that is held in the same ownership as the subject land, is either adjoining or is only separated by a road but where the boundaries would otherwise abut if the road was not there and used in conjunction with the subject land.'

Recommendation:

The API submits that the proposed amendment may adversely impact fair and just compensation for other land adversely impacted by an acquisition, which has previously been acknowledged as being entitled to compensation, such as the Cowper Essex V's Local Board for Acton (14 A.C. at p. 167).

Land may be adversely impacted by an acquisition which does not immediately adjoin the land being acquired. An example may include where there is a reserved road or other small title between the land of the dispossessed owner and the land being acquired. The API suggests that further information regarding the governments' intent is needed to provide a definitive response.

Proposed Amendment 5: Section 27(1)(b)

Amend section 27(1)(b) to clarify that 'special value' is to be interpreted in relation to a person's use of the land as is the case with most other Australian jurisdictions.

Section 27(1)(b) deals with Special Value. The current definition of 'special value' is open for interpretation to include personal taxation implications associated with a person's ownership of the acquired land. Numerous Courts have stipulated that 'Special Value' is tied to the 'use of the land' and not to the 'ownership of the land'.

The primary purpose here is to remove any consideration for a claimant's personal taxation implications from being factored into the assessment of compensation. Special value has historically been associated with the claimant's use of the land and Courts have consistently ruled that personal taxation implications are not considered to be part of special value.

A claimant is otherwise protected by roll-over benefits available under taxation law.

It is suggested that the wording of the amendment mirror the NSW legislation, i.e.

'Special value' of land means the financial value of any advantage, in addition to market value, to the person entitled to compensation which is incidental to the person's use of the land.'

Recommendation:

The API encourages government to consider the principles of fair and just compensation to dispossessed owners from the following perspectives:

1. The current use of the property may not represent the highest and best use of land and the owner may have plans for alternative uses or development of the land for which the dispossessed owner should be entitled to have considered as part of any claim for compensation.
2. Taxation implications of the acquisition is a legitimate expense to the dispossessed owner and may need to be considered. For example, some property may be subject to capital gains tax, which would not have been incurred other than for the acquisition. The assertion that rollover benefits are available under taxation law is erroneous as roll over relief provisions must meet predefined conditions and are not available to all dispossessed owners.

Proposed Amendment 6: Section 27(1)(f)

Amend section 27(1)(f) to allow compensation to be granted for disturbance to the operation of the property arising from the impact of the works.

Section 27(1) sub-paragraphs (a) to (g) sets out a range of matters that must be considered in determining compensation, including (f) *any disturbance relating to any loss or damage suffered, or cost reasonably incurred, by the claimant as a consequence of the taking of the subject land.*

The Governments view is that 'disturbance' is limited to disturbance arising from the taking of the land and not arising from the authorised purpose as is the case with betterment and injurious affection. This means that no compensation is payable under section 27(1)(f) for disturbance caused to the operation of a business (eg grazing/farming/manufacturing property) arising temporarily from the works or long term from the authorised purpose.

It is suggested that the additional words (in line with New South Wales' definition for disturbance) are added to the current s27(1)(f) - *'and any other financial cost reasonably incurred (or that might reasonably be incurred) relating to the actual use of the land, as a direct and natural consequence of the authorised purpose.'*

Recommendation:

The API submits that the intent of the proposed amendment is appropriate and encourages further legal consideration of the wording of the proposed amendment. In particular, the use of the term "actual use of the land" may disadvantage just and fair compensation where the actual use is not the highest and best use.

Proposed Amendment 7: Section 27(1)(g)

It is proposed to remove section 27(1)(g).

Section 27(1)(g) provides that compensation can be paid for *'such other matters as the acquiring authority, the Court or an arbitrator may consider to be relevant.'* No other Australian jurisdiction contains a clause of this nature.

Due to the limitation of section 27(1)(f) (see proposed amendment 6 above) an acquiring authority has had recourse to section 27(1)(g) to ensure a claimant can legally and justly be paid compensation for disturbance arising from the authorised purpose.

Section 27(1)(g) is considered redundant because all the heads of compensation are adequately covered elsewhere under s27(1) once sub-paragraph (f) is corrected (see *proposed Amendment 6*).

Recommendation:

The API Supports the proposed amendment.

Proposed Amendment 8: New Section 27(1)(g)

It is proposed to insert a new sub-paragraph (g) in section 27(1) to clarify that compensation is not paid for existing infrastructure on a property where the infrastructure was previously constructed and paid for by an acquiring authority.

Part 3, Compensation Entitlement, Division 2 deals with the amount of compensation paid to a claimant. This Division needs clarification to ensure that compensation is not paid for existing infrastructure on a property which was previously constructed and paid for by an acquiring authority.

Public infrastructure may have previously been constructed over private land under powers provided to the acquiring authority by other legislation. In such instances the infrastructure generally clearly belongs to the acquiring authority. However, instances can occur when infrastructure is constructed over private land by mistake or oversight and, subsequent to that land being acquired, the possibility could arise that the acquiring authority is required to pay for that infrastructure a second time in the compensation assessment.

The Government's position is not to have to pay twice for its own infrastructure.

Recommendation:

The API supports the proposed amendment.

Proposed Amendment 9: Section 37

Amend section 37 to extend the time to lodge a claim for compensation from 60 days to 6 months.

Section 37 currently provides 60 days for a claim for compensation to be lodged by a claimant. There is an extension provision in section 37, however if a claim is not lodged and a claimant whose land has been taken fails to make a claim then the acquiring authority must apply to the Court to finalise compensation.

From a practical perspective, nearly 99% of all claims are not made within the initial 60 day period. It is just not logistically possible for land owners to gather the information required and prepare a claim within 60 days. Most land owners lodge their claims within 4 to 6 months.

The time to lodge a claim for compensation varies widely in other Australian jurisdictions and generally ranges from about 3 months to 3 years. The amendment provides a fairer timeframe for claimants and will contribute to reducing red tape with time extensions.

Recommendation:

The API supports the proposed amendment.

Proposed Amendment 10: Section 48

Correct all references to Rules of Court in line with the current Rules.

Section 48(2) refers to the method of payment of a claimant's legal fees. The Land Acquisition Act 1993 references Rules of Court 1965 which has been superseded. The references to Court rules in section 48 should be updated accordingly.

Recommendation:

The API supports the proposed amendment.

Proposed Amendment 11: Section 54

Redraft section 54 to require authorised persons to comply with biosecurity best practice and to remediate any sink pits or damage done to land during investigations to determine whether the land was suitable for the authorised purpose.

Whilst the intention of the Act is focused on compensation issues, section 54 permits acquiring authorities to access land to assess the suitability of that land for the authorised purpose. An acquiring authority should take reasonable care to comply with Biosecurity best practice and to remediate any damage done to land that was not eventually part of a compensation claim. It is preferable that the LAA contains relevant requirements for remediation on the acquiring authority

Recommendation:

The API supports the proposed amendment.

Proposed Amendment 12: Section 78

Amend section 78 to include the capacity for an acquiring authority to extend time, as well as a claimant, subject to the acquiring authority advising the claimant of the extension.

Section 78 is a general extension of time provision. It allows an owner of land, a claimant or a former owner of land to seek an extension of time within 14 days of the end of any stated time period in the Act. An extension must be with the agreement of the acquiring authority or, in default of the agreement, made by the Court. In fact, the Office of the Valuer-General proactively follows up with land owners to ensure they request an extension of time where necessary so that the matter does not have to proceed to Court. This is administratively burdensome.

The preferred option is to allow the acquiring authority to also extend the time period in the event the property owner (i) cannot be contacted, or (ii) the property owner is unable to request an extension of time. In the event the acquiring authority extends time then it will be required to advise the claimant of the time extension.

Recommendation:

The API supports the proposed amendment.

Proposed Amendment 13: Numerous Sections

Correct a range of minor anomalies in the Act. A range of minor anomalies exist in the legislation which need to be corrected. The anomalies are either drafting errors or spelling errors. They are:

1. S38(3) change *"Where a person who is entitled to make a claim for …"* to "*Where a person who is entitled to make a claim for…"*

2. S40(8) change "*An acquiring authority must obtain …*" to "*An acquiring authority must obtain …"*

3. Correct the spelling of "*authorize*" or "*authorized*" throughout the legislation as "*authorise"* or "*authorised*".

4. S68(4) change "*After the settlement of an apportionment-*" to "*After the settlement of an apportionment"*

Recommendation:

The API supports the proposed amendments.

Additional Information/Recommendations

The API submits that in most instances, the only active processes afforded to dispossessed owners for resolving a disputed claim for compensation are:

1. Agreement between the dispossessed owner and the acquiring authority (typically represented by the Office of the Valuer-General).
2. Referring the matter for determination by the court.

The API submits that in the event of being unable to agree with the acquiring authority/Office of the Valuer-General, the dispossessed owner is in an unreasonable position of needing to refer the matter to the Court.

The API submits the Office of the Valuer-General in most cases represents the Crown in the Land Acquisition process and accordingly the Office of the Valuer-General has a conflict of interest in acting as an independent umpire to resolve fair and just compensation. In the event a claim for compensation is unable to be agreed with the Office of the Valuer-General, an alternative independent/impartial dispute resolution process (other than referring the matter to Court) is required.

The API notes by virtue section 42 (1) (b) and (c) there are existing provisions for disputed claims to be determined by arbitration, however to the best of our knowledge arbitration has not been used. The API encourage arbitration to be used to resolve disputed claims because:

1. Most claims should be able to be resolved by suitably qualified, independent professionals/arbitrators with specialised expertise in relation to the disputed matters;
2. Arbitration is less intimidating, expensive and onerous (particularly for private landowners) than pursuing fair and just compensation through the Court process;
3. Arbitration can resolve disputed claims more quickly than the Court process, mitigating risks for increases in compensation payable by the acquiring authority due to increased (legal) costs or the passage of time and interest payable under section 47;

Given the existing provisions of section 42, there would not appear to be any need for change to the legislation, however the API would encourage the management of disputed claims to be resolved by way of arbitration rather than court.

The API can assist in making appointments of independent valuation arbitrators by way of a State/Territory Chair Nomination for resolving matters related to the quantum of compensation or valuation matters, or recommend a “panel of expert valuers” to assist a lawyer, arbitrator or Judge in reviewing valuations, cross examining valuers, or advice on valuation matters. This is a process which has been used with success in other State jurisdictions to resolve technical valuation matters.