



Law Council
OF AUSTRALIA

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

Department of Finance

22 October 2020

Table of Contents

About the Law Council of Australia	3
Acknowledgement	4
Introduction	5
Responses to questions raised in Discussion Paper	5
Discussion Question 1.....	5
Discussion Question 2.....	5
Compensation for acquisitions by agreement	5
Negotiation process for acquisitions by agreement	6
Discussion Question 3.....	8
Starting the process: compensation claims for compulsory acquisitions	8
Advance payment.....	8
Discussion Question 4.....	8
Compensation generally	8
Professional costs and interests	9
Discussion Question 5.....	10
Process for resolving disputes over compensation amount.....	10
Review under section 22.....	11
Discussion Question 7.....	11
Discussion Question 11	11
Discussion Question 12.....	12

About the Law Council of Australia

The Law Council of Australia exists to represent the legal profession at the national level, to speak on behalf of its Constituent Bodies on national issues, and to promote the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world.

The Law Council was established in 1933, and represents 16 Australian State and Territory law societies and bar associations and the Law Firms Australia, which are known collectively as the Council's Constituent Bodies. The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar
- Law Firms Australia
- The Victorian Bar Inc
- Western Australian Bar Association

Through this representation, the Law Council effectively acts on behalf of more than 60,000 lawyers across Australia.

The Law Council is governed by a board of 23 Directors – one from each of the constituent bodies and six elected Executive members. The Directors meet quarterly to set objectives, policy and priorities for the Law Council. Between the meetings of Directors, policies and governance responsibility for the Law Council is exercised by the elected Executive members, led by the President who normally serves a 12 month term. The Council's six Executive members are nominated and elected by the board of Directors.

Members of the 2020 Executive as at 1 January 2020 are:

- Ms Pauline Wright, President
- Dr Jacoba Brasch QC, President-elect
- Mr Tass Liveris, Treasurer
- Mr Ross Drinnan, Executive Member
- Mr Greg McIntyre SC, Executive Member
- Ms Caroline Counsel, Executive Member

The Secretariat serves the Law Council nationally and is based in Canberra.

Acknowledgement

The Law Council acknowledges the assistance of the Australian Environment and Planning Law Group and Property Law Committee of its Legal Practice Section in the preparation of this submission.

The Law Council is also grateful for the contribution of the following Constituent Bodies:

- the Law Society of New South Wales; and
- Queensland Law Society.

Introduction

1. The Law Council of Australia (**Law Council**) welcomes the opportunity to provide a submission to the review of the *Lands Acquisition Act 1989* (Cth) (**LAA**) being conducted by the Department of Finance (**the Department**) and overseen by a Steering Committee comprising representatives of various Government departments.
2. On 3 September 2020, the Department called for submissions on the LAA review from interested parties, with reference to its [Discussion Paper](#) on the subject. The Discussion Paper prompts discussion on possible areas of reform of the LAA, noting that for the purposes of ensuring certainty for parties to an acquisition process, legislative changes will not be retrospective.
3. The stated purpose of the review is to ensure the LAA:
 - reflects community expectations around public sector responsiveness and timeliness;
 - minimises delay and uncertainty in finalising compensation claims with affected parties; and
 - minimises administrative costs and provides value for money.
4. The Law Council commends the Department for seeking stakeholder views on the substance and administration of the LAA, and on what changes could be made to improve the LAA (particularly around the [‘guiding principles’](#) of the review, being equity and fairness, timeliness, transparency and value for money).
5. Indeed, the Law Council notes that the LAA has been in operation for thirty years without substantial amendment. As a preliminary point, the Law Council is supportive of measures that would allow for more frequent reviews of the LAA in order to give effect to the aims of the current review and to reflect the guiding principles set out in the Discussion Paper.

Responses to questions raised in Discussion Paper

Discussion Question 1

6. The Law Council considers the definition of ‘interest’ in land as covered by the LAA to be all-encompassing and sufficiently comprehensive.

Discussion Question 2

Compensation for acquisitions by agreement

7. The Law Council submits that to encourage acquisition by agreement, consideration should be given to offering some of the broader categories of compensation which are currently only available if land is acquired compulsorily, at the discretion of the acquiring authority. This may include, for example, transfer duty on a replacement acquisition.
8. This approach may assist in filling the gap between the landowner’s and acquiring authority’s respective assessments of market value and may encourage the landowner to agree to an acquisition at an earlier stage rather than waiting for a compulsory acquisition.

9. It is noted that some authorities use financial payments as incentives to agree on an acquisition. The Law Council does not endorse this practice. The prospect of the additional payment being withdrawn if no agreement is reached within a certain timeframe can serve to exert undue pressure on a landowner.

Negotiation process for acquisitions by agreement

10. As well as offering broader categories of compensation for acquisition by agreement, consideration should be given to amending the LAA to provide for a more comprehensive negotiation process which would require an acquiring authority to take the following steps:
- identify the land it wishes to purchase;
 - identify the public purpose;
 - identify the 'interests' in the land; and
 - commence negotiations with those having an interest in the land, in accordance with the proposed section 18A at paragraph 15 below.
11. This procedure would simplify possible agreed acquisitions by removing the need to observe the processes set out at Parts V and VI of the LAA.
12. As set out in the proposed section 18A below, the LAA could mandate a time period of at least six months for a landowner to consider an offer by the acquiring authority for acquisition by agreement. This would ensure that if it is possible to purchase without compulsory acquisition, it can be done.
13. However, if the landowner simply refuses to negotiate, the Minister could be able to shorten the six-month negotiation period. The Minister could also be given the power to reduce the six-month negotiation period if the acquisition is urgent.
14. Under this model, mediation and/or conciliation could also be required to take place, in accordance with appropriate regulations, during the six-month negotiation period and prior to the compulsory acquisition process beginning.
15. To give effect to this arrangement, the following could be inserted as section 18A of the LAA under *Part IV – Acquisition of interests in land*:

S 18A Minimum period of negotiation for acquisition by agreement before initiation of the acquisition or compulsory acquisition (Parts V and VI) process

(1) This section applies to land that is affected by a proposal for acquisition by a Commonwealth authority, other than a proposal to acquire:

- (a) Crown land,*
- (b) an easement, or right to use land, under the surface for the construction or maintenance of works, or*
- (c) a stratum under the surface for the construction of a tunnel.*

(2) The Commonwealth authority is to make a genuine attempt to acquire the land by agreement for at least 6 months before making a pre-acquisition declaration under Part V or the giving of a section 24 certificate by the Minister.

(3) *The owner of the land and Commonwealth authority may agree to a shorter or longer period of negotiation for the acquisition of land by agreement.*

(4) *The Minister responsible for the Commonwealth authority may approve a shorter period of negotiation, but only if the Minister is satisfied that the urgency of the matter or other circumstances of the case make it impracticable to have any longer period of negotiation. Any such approval requires the concurrence of the Minister administering this Act (being concurrence given for the particular approval or given generally for an approval of that kind).*

(5) *This section does not prevent a continuation of negotiation after the making of a pre-acquisition declaration or Minister's section 24 Certificate under Part V.*

(6) *The Commonwealth authority is not required to comply with this section if:*

(a) *the owner of the land notified the authority that the owner is not prepared to negotiate with the Commonwealth authority for the acquisition of the land by agreement, or*

(b) *the owner of the land cannot be located after the making of reasonable enquiries.*

(7) *Prior to the making of a pre-acquisition declaration or Minister's section 24 under Part V, the parties are required to attend mediation/conciliation in good faith and paid for by the Commonwealth authority. The procedure for mediation/conciliation will be set out in the regulations.*

(8) *Nothing in this section gives rise to, or can be taken into account in, any civil cause of action.*

Inaction following Pre-Acquisition Declaration

16. Unlike some of its legislative counterparts, the LAA appears to offer no mechanism for an absolute Pre-Acquisition Declaration (**PAD**) to automatically cease to have effect after a particular period of time has expired and the acquiring authority has failed to acquire the relevant interest in land.¹

17. Section 44 of the LAA only operates to stop a PAD having effect if the interest in land has not been acquired at least 28 days after the PAD became absolute, the recipient of the PAD gives the acquiring authority a notice requiring them to acquire, and the acquiring authority does not acquire the interest within 3 months after the giving of that notice (provided no extension is agreed to).

18. The Law Council considers that inserting a mechanism for an absolute PAD to lapse automatically after an appropriate period, such as 12 or 18 months (without a landowner being required to apply for acquisition) would promote certainty and fairness. It would also better reflect community expectations around public sector responsiveness and timeliness.

¹ See, for example, the *Acquisition of Land Act 1967* (Qld) at sub-ss 7(4B), s 9; which state an application for the land to be taken must be made within 12 months after the date of the notice of intention to resume and that if such application is not made within the time prescribed, the authority shall be deemed to discontinue the resumption.

Discussion Question 3

Starting the process: compensation claims for compulsory acquisitions

19. The Law Council does not have an agreed position on the question of which party should start the process to resolve a compensation claim, however acknowledges that there is merit to providing for flexibility as to whether the claimant or the acquiring authority should start the process.
20. On another view, however, it may be considered appropriate that the acquiring authority should always properly make the first offer of compensation. This is because in the great majority of cases, it was not the vendor's decision to sell the land. Although market value is explained (as opposed to being defined) by valuers as the price negotiated between a 'willing but not anxious vendor sale to a willing but not anxious purchaser', ultimately the vendor's land is being taken against his or her will.
21. On this argument, it would be incumbent on the acquiring authority to commission an independent registered land valuer to carry out a statutory valuation, and the acquiring authority should make the initial offer based upon this valuation.²
22. The Law Council notes that in New South Wales (**NSW**), the requirement for a statutory valuation occurs after the expiration of the notice of a proposed compulsory acquisition.³ However, in practice an acquiring authority will attempt to purchase the land during this period and the offers it makes are based upon valuation evidence by independent valuers. The same approach could occur for acquisitions under the LAA.

Advance payment

23. As a gesture of goodwill, consideration should be given to requiring an acquiring authority to make an advance payment of 90 per cent of the compensation they offer for a compulsory acquisition (as assessed by an independent registered land value), within 30 days of making the offer.⁴ Provision should be kept in the LAA to enable the recovery of those monies if the compulsory acquisition does not proceed.⁵
24. Advance payments of valuation and legal fees should also be made available by the Commonwealth to enable the landowner to consider the offer. These fees could be reimbursed upon production of a report and attendance at a face to face meeting.

Discussion Question 4

Compensation generally

Format of the LAA

25. In terms of making provision for compensation, Part VII of the LAA is currently complex and confusingly set out. The succinctness of the *Land Acquisition (Just*

² Note, this process should be modelled upon the similar process set out at section 41 of the *Land Acquisition (Just Terms Compensation) Act 1991* (NSW).

³ See, *Land Acquisition (Just Terms Compensation) Act 1991* (NSW) at ss 14 and 41.

⁴ Note, such a requirement currently exists with respect to the Minister under section 110 of the LAA, though there is currently no stated deadline by which an advance payment must be made. Also note that in Queensland, a landowner may apply for an advance payment not exceeding the amount of compensation claimed/offered, and this advance must be made within 90 days of the application (less any taxes, rates, mortgages which may be owing). See, *Acquisition of Land Act 1967* (Qld) at s 23.

⁵ See, LAA at s 113.

Terms Compensation) Act 1991 (NSW) (**NSW Act**) provides a model for how this can be rectified.

26. The NSW Act succinctly states the relevant matters to be considered in determining amount of compensation, in particular, section 55 and the expansion on those heads of compensation at sections 56 – 62.
27. The *Acquisition of Land Act 1967* (Qld) is another example. The provision for assessment of compensation at section 20 offers a further possible model for clearly presenting the various costs and expenses for which compensation may be owing.

Coverage

28. See the response at paragraph 23 above.

Quantum

29. In terms of the maximum possible quantum of the disadvantage resulting from relocation where land is compulsorily acquired, which is a key head of compensation under the LAA, the Law Council considers the current upper limit to be too low.
30. The Law Council's members report that compulsory acquisitions are, unsurprisingly, the most upsetting kind of acquisition for landowners. Even if the dispossessed owner can relocate to a comparable dwelling, there are invariably works, such as internal painting or floor coverings, which are necessary to make it their own.
31. Recognising this, the current maximum compensation of \$23,697.45 under the LAA for disadvantage resulting from relocation is, in the view of the Law Council, too low. The Law Council's members have also provided feedback that the amount of \$75,000 offered under the NSW Act is insufficient and have suggested an amount around \$150,000 would be more appropriate.
32. In terms of land which is acquired by agreement, the Law Council recognises that in exceptional cases it is open to an acquiring authority to enter into a voluntary acquisition by paying a premium. Usually this occurs if the land to be acquired is adjacent to, or in the vicinity of, other land acquired by the Commonwealth authority, in which case the independent valuer will add a premium in accordance with valuation practice. The Law Council has received feedback that these processes have not always been transparent. Accordingly, the LAA should clarify that purchases are based on valuation evidence and comparable sales so that all dispossessed owners are treated as equally as possible.⁶

Professional costs and interests

33. The Law Council notes the comments in paragraphs 13 and 14 on page 8 of the Discussion Paper relating to the currently protracted processes for reimbursing claimants' legal and professional costs. These often have the effect of increasing the costs ultimately claimed.

⁶ Note, in the case of New South Wales, that there is a body of law in the decisions by the Land and Environment Court of NSW and the NSW Court of Appeal as to the manner of quantifying the potential for upzoning. The timing of the proposed upzoning is critical. See, for example, *El Boustani v Minister Administering the Environmental Planning and Assessment Act 1979* [2014] NSW CA 33, (2014) 199 LGERA 198; and *Attard & Ors v Transport for NSW* [2014] NSWLEC 44, (2014) LGERA 396.

34. The Law Council considers that the process for costs reimbursement should be reviewed, with a focus on efficiency.
35. In respect to the possibility of caps on costs, the Law Council considers it would be inappropriate to place restrictions on the legal or valuation fees claimable by a landowner under the LAA, as this has the potential to operate unfairly on landowners. Further, there are already existing channels which adequately deal with disputes in relation to costs.

Discussion Question 5

36. Broadly speaking, amendments to the LAA to encourage early resolution will best be achieved by engaging in a balancing exercise between the current Commonwealth and State review processes, reconsideration avenues and negotiation periods. The State regimes typically involve fewer steps and so may appear to offer an attractive option for this reason.
37. However, the Law Council suggests that caution be exercised in this regard. If the only appeal process is to the Court where the parties fail to reach agreement, this will likely add substantial cost and time to the process, whichever regime is considered.

Process for resolving disputes over compensation amount

38. In the experience of the Law Council's members, the most common disputes that arise in relation to compulsory acquisition relate to the compensation offered by the acquiring authority.
39. To improve the process and reduce the time for resolving such disputes, the Law Council suggests that consideration be given to adopting the provisions of the NSW Act as follows (substituting the language appropriate to the LAA):
- the Valuer General has 45 days to prepare and serve an independent valuation (Notice of Determination) (NSW Act, ss 41 and 42);
 - the landowner has 90 days from receipt of the Notice of Determination to lodge an appeal in the Federal Court of Australia (**Federal Court**) or he/she is deemed to have accepted the compensation (NSW Act, s 45);
 - if the amount of 90 per cent of the compensation is not paid on or within 30 days of the first offer of compensation then it must be paid within 28 days of notice of proceedings being instituted at the Federal Court against the determination of compensation by the independent valuer, with the claim to be determined by agreement between the parties or, failing that, decision of the Court (NSW Act, s 68); and
 - parties must attend a conciliation conference presided over by a Commissioner having valuation expertise, as a first step in the Court process.⁷ In NSW, most valuation matters are settled at this conciliation stage.

⁷ See, the Land and Environment Court of NSW *Practice Note: Class 3 Compensation Claims*.

Review under section 22

40. A PAD made under section 22 of the LAA is currently open to review at the Administrative Appeals Tribunal. This creates an unnecessarily drawn-out procedure by offering an additional possible avenue for litigation which is not required.
41. Section 22 requires the Minister to declare an acquisition to be for a 'public purpose'. Any authority purporting to compulsorily acquire land for a purpose that is not a public purpose will find its decision challenged, and there is already a body of case law on what constitutes a public purpose (see paragraphs 42 to 44 below). Therefore, the right to a review of the PAD does not need to be cited as a separate head in the LAA.

Discussion Question 7

42. Subject to the following paragraph, the Law Council considers that the concept of 'public purpose' as articulated in the LAA and explained in the case law is, broadly speaking, sufficiently clear.⁸ Clarity about the term is important, as it ensures that land is only resumed for the greater good and for a specific purpose. That purpose needs to be clear because it has implications for the claim for compensation – in particular, injurious affection.
43. The LAA defines public purpose to mean a 'purpose in respect of which the Parliament has power to make laws and includes, in relation to land in a Territory, any purpose in relation to the Territory'.⁹ To improve clarity, it may assist if the word 'public' is be inserted before 'purpose' in the last phrase.
44. The requirement for 'public purpose' is an important safeguard for landowners. Concerns might otherwise arise where a third party entity with the future benefit of the land, and responsibility for carrying out the project for which the land was acquired, is a private entity. For example, there could be a risk that the acquiring authority makes commitments to landowners as part of the acquisition which may not be reflected in the sale contract or any offer of compensation, in respect to issues such as noise predictions, landscaping and access being maintained. The case law on 'public purpose' would mitigate this risk: if the land is acquired for the purpose of resale to make money for the Commonwealth, that is not a public purpose; similarly, land which is acquired by compulsory acquisition then leased to a third party to operate infrastructure must be for a public purpose.¹⁰

Discussion Question 11

45. As set out above, the LAA makes clear that land compulsorily acquired can only be used for a public purpose. The Law Council submits that the LAA should also explicitly provide that if the land is no longer required by the Commonwealth, it should be first offered to the former owner, in line with the provisions (including the time limits) as set out in the NSW Act at section 71A. This is to be preferred to the provisions to this effect currently set out in the LAA, which are unnecessarily complex.
46. As to flexibility, the LAA can only compulsorily acquire land for a public purpose. Provided the public purpose is enlivened, further flexibility should not be necessary.

⁸ See, for example, the High Court of Australia's consideration of whether an acquisition was lawfully made for a public purpose in *R & R Fazzaroli Pty Ltd and Mac's Pty Ltd v Parramatta City Council* 2009 HCA 12, and the statutory interpretation approach by French CJ at [40]-[57].

⁹ See, s 6.

¹⁰ On this subject, see *R & R Fazzaroli Pty Ltd and Mac's Pty Ltd v Parramatta City Council* 2009 HCA 12.

Discussion Question 12

47. The Law Council considers that harmonisation of the compulsory acquisition laws across the Commonwealth, States and Territories is desirable. Land used for the purpose of inland rail and electricity transmission lines aptly illustrates where an acquisition may be of national importance, but the approach may be different within each State if the State resumes the land as opposed to the Commonwealth.