

10 June 2020

Our ref: WD P&E

LAA Review Project Team
Property and Construction Division, Department of Finance
One Canberra Avenue
FORREST ACT 2603

By email: LAAreview@finance.gov.au

Dear Review Team

Lands Acquisition Act 1989 (Cth) – Discussion Paper

Thank you for the opportunity to provide comments on the Discussion Paper on the review of the *Lands Acquisition Act 1989 (Cth)*.

The Queensland Law Society (QLS) also appreciates the extension of time to deliver our submission.

QLS is the peak professional body for the State's legal practitioners. We represent and promote over 13,000 legal professionals, increase community understanding of the law, help protect the rights of individuals and advise the community about the many benefits solicitors can provide. QLS also assists the public by advising government on improvements to laws affecting Queenslanders and working to improve their access to the law.

This response has been compiled by the QLS Planning and Environmental Law Committee.

The comments have been provided by legal practitioners who have experience with the equivalent Queensland legislation, the *Acquisition of Land Act 1967 (Qld)*. This different perspective may offer other approaches and examples to identify potential changes to the Commonwealth legislation, with a view to potentially harmonising appropriate aspects of these processes across jurisdictions.

Section 3: Acquisitions

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

Our members have suggested the following process for an acquisition by agreement:

If the affected party is agreeable to the notice of intention to acquire (PAD) then it should trigger the below process:

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1. The Commonwealth undertakes a valuation of the land and makes an offer to the affected landowner. The landowner has 28 days to accept or reject the offer.
2. If not accepted, then the Commonwealth pays for the reasonable costs of the affected landowner to have their own valuation completed and propose an alternative offer.
3. A compulsory mediation between the parties to resolve the final valuation amount and if agreeable the offer is either upheld or amended by the claimant. The mediation is to occur within 90 days after the affected landowner rejects the Commonwealth's valuation amount and proposes an alternative offer.
4. If the parties do not agree after the compulsory mediation process, then the Commonwealth withdraws the offer (PAD) and proceeds to a formal notice of intention to resume the land.

Section 4: Compensation for Compulsory Acquisition

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

In terms of changes to reduce the time to resolve compensation claims, the Act could make provision for the Commonwealth to offer an amount of compensation at the beginning of the process or as a minimum, provide its offer of compensation within 3 months' of the acquisition taking effect. The Commonwealth should commence the process.

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

In terms of changes to be made to the types of compensation to ensure value for money, this would be a difficult target to define, as each acquisition is unique.

The categories of compensation reflect those available in the Queensland process, except that solatium is not available in Queensland.

QLS does not support implementing 'caps'. Every acquisition and parcel of land (or interest in land) is unique and the compensation payable for each acquisition must be considered on its own merits, taking into account all relevant factors. Caps create the inherent risk of removing discretion from the Court (or initially, the Commonwealth) to assess the proper amount of compensation payable in each case.

A further concern is that implementing a cap on legal fees could lead to affected owners not seeking compensation or curtailing their capacity to seek compensation. Ensuring that landowners are free to seek and obtain appropriate and effective legal advice is an important access to justice issue.

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The legal profession is carefully regulated across Australia and legal practitioners are only able to charge what is fair and reasonable (for Queensland, see Part 3.4 of the *Legal Profession Act 2007* and particularly section 319 “On what basis are legal costs recoverable”.)

There are a number of checks and balances already in place to ensure that legal fees charged are fair and reasonable. Clients have the option of complaining to the Legal Services Commission in Queensland and the Supreme Court has the jurisdiction to set aside a costs agreement and decide the “fair and reasonable legal costs” in relation to the work to which the agreement related (section 328 of the *Legal Profession Act 2007*).

The value of a claim for compensation does not necessarily equate to the legal fees incurred being more or less. Similar legal steps often need to be taken to assess a claim, regardless of the value of the land. Complex claims can arise in relation to relatively small value acquisitions and large acquisitions can potentially be quite straightforward. It is essential the legal advisor can take all reasonable steps to provide appropriate advice to their client, in accordance with their professional and ethical obligations. Imposing an artificial arbitrary cap on fees could potentially discourage practitioners from accepting complex claims, which could potentially compromise the capacity of an owner to obtain appropriate and adequate advice.

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

QLS recommends consideration be given to creating greater opportunities for mediation by a mediator throughout the process.

General comments

Our members have recommended that the compulsory acquisition process should broadly reflect the process under the *Acquisition of Land Act (Qld) 1967*, in particular Division 2 of the Act. The Queensland legislation provides for the issuing of a notice of intention to resume and then gives the affected landowner the right to object to the proposed acquisition.

It is suggested that the landowner should have 3 months to respond and be heard, with the ability for the affected landowner to make an application for extension of the timeframe for valid reasons, such as to gather further evidence to support their argument.

The Queensland process then provides for an application to be made to the relevant Minister that the land be taken. The land is formally acquired on the publication of a gazette notice.

It is suggested that after the gazette notice is published, the next step should be a compulsory mediation prior to either party being able to refer the matter to the relevant Court to be heard.

As proposed in relation to the ‘acquisition by agreement’ process, the Commonwealth should pay for the reasonable costs of the affected landowner to have their own valuation completed and for legal representation during the process.

Section 6: Other Matters

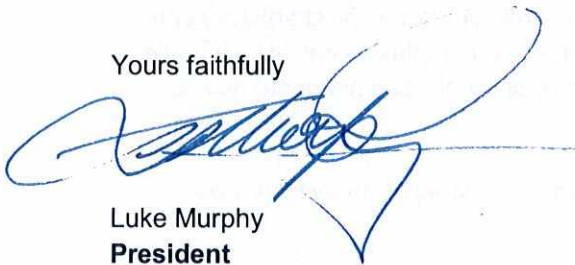
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Question 12 - Should amendments be made to the LAA to support future joint projects between the Commonwealth and states and territories?

Given the age of Queensland's *Acquisition of Land Act 1967* and the anticipated increase in cross-jurisdictional infrastructure projects, QLS acknowledges there may be benefit in pursuing a level of cross jurisdictional harmonisation of the principles of governing the assessment of compensation, as suggested by the Australian Property Institute in their submission to the NSW *Review of the Land Acquisition (Just Terms Compensation) Act 1991* (as referenced in the Discussion Paper). Harmonisation should lead to a simpler and fairer process for all parties.

If you have any queries regarding the contents of this letter, please do not hesitate to contact our Legal Policy team via policy@qls.com.au or by phone on (07) 3842 5930.

Yours faithfully

A handwritten signature in blue ink, appearing to read 'Luke Murphy', is written over a horizontal line. The signature is stylized and cursive.

Luke Murphy
President