Urban Taskforce
AUSTRALIA

The Urban Taskforce represents Australia's most prominent property developers and equity financiers. We provide a forum for people involved in the development and planning of the urban environments to engage in constructive dialogue with government and the community.

8 August 2013

David Russell SC
Just Terms Coordinator
Level 15, McKell Building
2-24 Rawson Place
Sydney NSW 2000

By email: justterms@services.nsw.gov.au

Dear Mr Russell,

Re: Land Acquisition (Just Terms Compensation) Act 1991

The Urban Taskforce welcomes the Government's continued review of the *Land Acquisition (Just Terms Compensation) Act 1991 ("the Act")*. It is encouraging to note that the recently released *Just Terms Compensation Legislation Consultation Paper* ("the consultation paper") acknowledges that there is general concern with the impacts of compulsory acquisition of private land and notes the previous comments from the Urban Taskforce provided via correspondence dated 15th June 2012.

We understand that the consultation paper does not confirm any findings or offer any recommendations to Government at this stage, but merely reports on the previous round of consultation and provides focus to the further round of consultation.

While the Urban Taskforce has already provided comment to the review, to further clarify our position we have been guided by the key questions provided in the consultation paper as they relate to ***hardship provisions*** and ***uplift in value***. Furthermore, we take this opportunity to raise further issues of concern brought to our attention by members of the Urban Taskforce.

1. **Where land is required for a public purpose the owner must be entitled to have the authority either acquire the land or remove the reservation**

   The Urban Taskforce has been particularly concerned with the use of town planning laws as a mechanism for seizing private property rights and using the rights for public purposes, without compensation. We argue that the system is unjust as is evident when considering section 26 of the *Environmental Planning and Assessment Act 1979* and the way that this section of the Act relates to Part 2, Division 3 *Land Acquisition (Just Terms Compensation) Act 1991*.

   As the consultation paper notes, s. 269(1)(c) of the *Environment Planning and Assessment 1979* enables the authority to draft an environmental planning instrument to reserve land for use exclusively for a public purpose. Furthermore the environmental planning instrument must make provision for the acquisition of that land by a public authority.

   The policy basis for these provisions of the Act is obvious. There are circumstances where private land may need for the greater good of the community. We have no issue with the policy basis and the ability of a public authority to reserve and acquire land, provided that the financial burden of fulfilling that public purpose falls on a public authority rather than the private land owner who happens to own the land at the time.

   Our major issue of concern is that the requirements for the authority to acquire land once reserved for a public purpose is limited by Part 2, Division 3 of the *Land Acquisition (Just Terms Compensation) Act 1991*. While Part 2, Division 3 allows the owner of the land to serve notice on the authority who reserved the land to acquire the land, the authority is only compelled to acquire the land in cases where the owner of the land is able to demonstrate that they will suffer hardship if the land is not acquired. That is, the authority is not required to acquire land unless it is of the opinion that the owner will suffer hardship (within the meaning of the Act) if there is any delay in the acquisition of the land.

As the consultation paper states, 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.

We argue that the terms of the Act unfairly favour the authority and burdens the owner of land with requirements to demonstrate hardship for just compensation. Under these rules an owner can only require the government to acquire (and therefore pay for land rendered useless by government decree) if the owner is able to establish that they would suffer hardship if it was not acquired.

The net result is that the underlying policy rationale for the original law is set aside, unless the owner can establish "actual hardship". Furthermore, 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 will be respected.

If the hardship provisions are to be retained there must, at the very least, be improved access to the hardship provisions under the *Land Acquisition (Just Terms Compensation) Act*.

As noted above, under section 24 of the Act a public authority is not required to acquire land under the owner-initiated provisions of the Act unless it is of the opinion that the owner will suffer if there is any delay in the acquisition of the land under this Act.

No right of appeal is conferred by the legislation against adverse decisions, or non-decisions. Furthermore in any judicial review proceedings, the subjective nature of the decision means that public authorities are given a very wide ambit to make a far-reaching decisions that can seriously impact on public confidence in property rights.

The formation of an opinion under section 24 should be subject to a merits appeal (preferably in the Land and Environment Court, but the Administrative Decisions Tribunal/Supreme Court is an alternative forum). If this is not acceptable, the requirement should be objectively phrased, rather than subjective, so as to ensure that aggrieved persons have access to meaningful judicial review.

Furthermore the current, very limited, definition of hardship should be broadened. For example, any individual or corporation that acquires land with the intention of putting it to a particular use should be able to claim hardship if:

- the envisaged use is no longer practicable; and
- the land is substantially devalued,

as a result of a reservation for a public purpose.

Prior to the 2006 amendment of the Environmental Planning and Assessment Act 1979 the acquisition provisions provided for acquisition on demand. We say that the linking of the hardship provisions in the *Land Acquisition Act* to the *Environmental Planning and Assessment Act* should be reversed so that land owners whose land is affected by a planning instrument that reserved their land for use exclusively for a purpose, could compel the acquiring authority to acquire their land without having to demonstrate hardship.

The Victorian *Land Acquisition and Compensation Act 1986* seems to properly address acquisition and hardship. As stated in the consultation paper

> 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

Therefore, the Urban Taskforce urges that the review of the *Land Acquisition (Just Terms Compensation) Act 1991* consider the removal of 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. 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.

With reference to focus questions provided in the consultation paper the Urban Taskforce confirms that:

- the present hardship test makes it too difficult for an owner to initiate compulsory acquisition;
- the hardship test should be amended;
- the hardship test should revert to the test contained in the then s27 of the Environmental Planning and Assessment Act 1979 prior to the 2006 amendments; and,
- the hardship test should be framed more along the Victorian lines.

2. Where land has been reserved or acquired by an authority any uplift in value must be enjoyed by the original owner and authority

Where an authority reserves and acquires land, the level of compensation is dependent on the land value prior to reservation and acquisition. It must be acknowledged that land valuation is greatly influenced by the development potential of the land. Therefore, if an authority was to acquire land and then cause the development potential of the land to be increased, due to the provision of new enabling infrastructure for example, the uplift in value caused by the increased development potential must be to the original owner of the land, particularly if the land is no longer required for a public purpose and is to be sold by the authority. Furthermore, if land is acquired but is then rezoned to give greater development potential the uplift in value should be distributed evenly between authority and original owner. For instance, if prior to acquisition, land originally enjoyed a residential zoning with a floor space ratio of say 0.8:1, but after acquisition the land was rezoned to say a mixed use zoning which provided greater flexibility in land use and increased development density of say 3.5:1, then the value of the land would be greatly increased. It would be unfair if the original owner was denied a proportion of the increased land value.

The consultation paper summarises the issue well. It asks:

> 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?

We would clearly say that it is just and proper that the original owner receive any profits made. Furthermore we support the suggestion that 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.

With reference to focus questions provided in the consultation paper the Urban Taskforce confirms that:

- the acquisition process should respond if more land is required than is necessary; and,
- previous owners be should be given a first right to re-purchase land which is found to be excess to requirements?

3. General issues of concern with the land valuation system and just terms compensation

We are advised that where land is to be acquired, it is the practice of the acquiring authority to make an offer based on a valuation usually obtained from the Valuer General. However, in the event of a dispute, the authority usually obtains a further expert valuation which invariably values the subject land at a significantly lower amount. This approach to negotiation on land value demonstrated in many instances is considered to be conduct that is not in the spirit of determining just terms. The acquiring authority should be required to stand by their original offer. The authority should be encouraged to deal fairly with the property owner and not take a "win at all cost" approach to negotiation.

Legal costs associated with land acquisition and just terms disputes can be significant. However, while s.59 of the Act allows for costs associated with the acquisition to be claimed, legal costs and other costs incurred by the landowner are not recoverable under the provisions of s.59. ***The review should consider the full extent of costs imposed on the landowner and make proper provisions for these costs to be recovered.***

We are advised that there is inconsistency between Commonwealth legislation and NSW State legislation in relation to "Special Value" compensation. Commonwealth legislation allows Special Value compensation rising from Special Value to the owner. However, NSW legislation limits compensation to Special Value arising from the use of the land. This means that there are areas of loss not available under the Just Terms Act which is available under Commonwealth legislation. ***The review should consider an amendment of the Act to ensure consistency with Commonwealth legislation.***

Furthermore, there are certain areas of loss that are currently not allowed. For instance, the taxation circumstances of the owner cannot be taken into account. In this regard we suggest that the review consider the widening of the areas of Special Value to allow areas of loss not currently available but nonetheless real areas of loss.

We understand that the determination of compensation for easements is rather subjective and in this regard we recommend that the review consider the merit of introducing a rule or guideline to reduce the subjectivity of easement compensation while still allowing an argument on the merits for greater compensation.

It has also been brought to our attention that the operation of the "before and after" method has the potential and in many cases results in nil or trivial compensation sums being offered to the landowner. For example, in cases where there is a large parcel of land and a small portion of the land is to be acquired, there is no loss in value when strictly applying the before and after method. This is clearly unfair and can result in trivial or no compensation being offered. ***The review should consider limiting the operation of the before and after method to limit the offering of nil or trivial compensation sums.***

I trust that our comments will be further considered and should you require any further clarification of the content of this correspondence, please feel free to contact me.

Yours sincerely

Urban Taskforce Australia

Chris Johnson AM
Chief Executive Officer