Acquiring land for transport projects – The gap between law and government policy

Authors: Dennis Loether & Laura Raffaele

When acquiring land for major transport projects, authorities must make "genuine attempts" to acquire the land by agreement with its owner. We explore below what this means and how councils should define a genuine attempt.

A series of media-labelled "controversial" acquisitions (Grand Avenue at Camellia, Jannali Commuter Carpark and Orchard Hills) has brought into question whether the law has been followed recently. In 2021, a parliamentary inquiry was launched to consider this.

The inquiry hearings have highlighted the difficulty acquiring authorities face when commencing land acquisition. One of the major challenges is inconsistency between legislation and government policy regarding what constitutes a "genuine attempt" with the initial offer.

WHAT THE LAW SAYS

The relevant legislation comes from section 10A(2) of the *Land Acquisition (Just Terms Compensation) Act 1991* (the *Just Terms Act*), which states:

(2) *The authority of the State is to make a genuine attempt to acquire the land by agreement for at least 6 months before giving a proposed acquisition notice.*

Many would assume from this that, when making an initial offer, an acquiring authority would provide its valuation report for the property at the same time. Doing so would be consistent with the Just Terms Act, surely?

WHAT GOVERNMENT POLICY SAYS

Not according to government policy, which stipulates that the landowner should only receive the acquiring authority's valuation once they have themselves provided an independent valuation report.

On the face of it, this is a glaring inconsistency between legislation and policy.

In fact, many of the submissions to the parliamentary inquiry (from both landowners and interested parties and the Law Society) made this very point.

While we wait for the final report to be published, we explore from case law what authority may guide acquiring authorities in what is meant by making a genuine attempt at negotiations.

WHAT CASE LAW TELLS US

Elmasri v Transport for NSW [2021] NSWSC 929 sheds light on what may be interpreted as a genuine attempt.

The first question considered was when the six-month period required under section 10A(2) of the *Just Terms Act* begins – curiously, the legislation is silent on this point. The defendant argued that it was only necessary to identify a starting date. A variation of their argument was that it was only necessary to identify *any* six-month period before the proposed acquisition notice (PAN) was served and to show, within that period, there was a genuine attempt.

The Court rejected this argument because it would imply that any six-month period (no matter how long before the PAN was issued) could be relied on. His Honour said this would be inconsistent with *"encourage[ing] the acquisition of land by agreement"* (as required under section 3(1)(e) of the *Just Terms Act*), as it would mean that acquiring authorities could make a genuine attempt for six months, unreasonably refuse to negotiate for months thereafter, and still be able to issue a PAN.

His Honour held that the entire period was relevant, from the start of negotiation until the issue of the PAN. This would increase the acquiring authority's accountability to genuinely seek an agreement.

There have since been further arguments that the six-month period should only begin once a letter of offer has been issued, rather than the letter acknowledging the plan to acquire the land. As the *Just Terms Act* is – once again – silent on this issue, this becomes a matter for the Court to determine.

Roads and Maritime Services v Desane Properties Pty Ltd [2018] NSWCA 196 provides further insight. Here the Court held that a genuine attempt at negotiations means an obligation to negotiate in good faith. The Court stated that good faith *"includes the requirement upon an acquiring authority, if asked, to provide such information about an acquisition so as to permit a landowner to negotiate about*

sale price." It also means acquiring authorities must respond to reasonable requests for information (*Strickland v Minister of Lands for Western Australia* (1998) 85 FCR 303).

WHO WILL CUT THE GORDIAN KNOT?

Acquiring authorities may, with some justification, feel they are facing an unsolvable problem. On the one hand, they are required to satisfy common law precedent. On the other, they are expected to follow internal policies that are – or appear to be – inconsistent with the law.

Frustration at the actions of acquiring authorities might therefore be best directed to these deep-rooted inconsistencies between the legislative framework and internal policies.

We expect the parliamentary inquiry will consider how to bridge the gap between the expectations of landowners/interested parties and the requirements of acquiring authorities. That should include commentary on how to promote fairness and transparency on the part of acquiring authorities.

This is the first substantial look into acquisitions since the reforms of 2016. Given the changing environmental landscape, it is timely.

Until the inquiry is finalised, the message for councils, as acquiring authorities, is to make ***genuine attempts*** at negotiating in ***good faith*** for a ***minimum*** six-month period. Whether a government agency has acted and negotiated in good faith is a frequent issue raised by landowners against an acquiring authority. To avoid such an accusation, acquiring authorities should keep open lines of communication with landowners/interested parties, respond to all reasonable requests and genuinely consider any counter offers.

For any queries, contact the Bartier Perry acquisition team – Dennis Loether, Steven Griffiths and Laura Raffaele and from property Melissa Potter and Irene Horan.