

SUBMISSION OF THE NEW SOUTH WALES BAR ASSOCIATION TO THE JUST TERMS COMPENSATION LEGISLATION REVIEW

1. The New South Wales Bar Association is pleased to provide the following short submission to the Just Terms Compensation Legislation Review (**Review**). As noted in the Just Terms Compensation Legislation Review Consultation Paper, June 2013 (**Consultation Paper**), the Review '*is concerned with the adequacy of NSW just terms compensation as it applies to real property rights*'.¹
2. This submission advances three general propositions to be taken into account in the consideration of reforms to just terms compensation legislation for the compulsory acquisition of property:
 - a) *First*, the reform of Just Terms Compensation Legislation should acknowledge and reflect that property rights are human rights. This is relevant to the Review's terms of reference because it provides important context for the formulation of a set of principles to guide the process for how the acquisition of real property should be dealt with by government.
 - b) *Secondly*, Just Terms Compensation Legislation should provide for compensation for the compulsory acquisition by the State of New South Wales (or by any State agency, authority or statutory corporation) of all species of property, and not just the acquisition of real property rights or interests. It is acknowledged that the Review's terms of reference are limited to identifying real property rights or interests and making recommendations for the process to be adopted in the acquisition of those rights or interests. However, given the substantial merit of a future course of harmonisation of just terms compensation legislation among the States and the Commonwealth in respect of all species of property, reforms pursued now in New South Wales should not be inconsistent with that harmonisation.
 - c) *Thirdly*, by way of development of a particular aspect of the second proposition above, there is a strong case for amending the State's Constitution so as to include an appropriate guarantee that private property rights or interests will only be acquired on just terms.

Property rights are human rights

3. The right to own property, and the right not to be arbitrarily deprived of property, are human rights. Article 17 of the Universal Declaration of Human Rights (UDHR) provides:
 - (1) *Everyone has the right to own property alone as well as in association with others.*
 - (2) *No one shall be arbitrarily deprived of his property.*
4. Nations may regulate the property rights of individuals, but must do so according to the rule of law and in accordance with international obligations.
5. An acknowledgment of the human rights stated in Article 17 of the UDHR provides important context for the formulation of a set of principles to guide the process for how the acquisition of real property should be dealt with by government.

¹ Consultation Paper, p 8 and the terms of reference reproduced on p 7.

6. The compulsory acquisition of real property rights and interests by the State government frequently occurs as a consequence of government decisions about planning. Most often, it is in the context of planning and developing the State's road network or other public infrastructure or utilities.² In a recent extra-judicial address titled "Property, Planning and Human Rights", Chief Justice French noted that planning law and practice are "*located in a much larger framework of law and public policy than is discerned by simply knowing the relevant planning Acts, legislative instruments, the decision-making authorities and their current policies and practices*".³ The Chief Justice identified the concept of administrative justice as providing a framework within which official decisions that affect property rights and interests should be made and assessed.⁴ As the title to Chief Justice French's paper shows, human rights are a basic component of that larger framework of law and public policy that applies to legislation that provides for the acquisition of private property and compensation for such acquisition.
7. When considered against that background, legislation and regulations that permit the compulsory acquisition or expropriation of property should acknowledge and reflect the human rights at stake, including by ensuring administrative justice to affected property owners by enactment of provisions that:
 - a) operate fairly (such as by affording procedural fairness to affected persons, and applying consistent rules to similar cases). This must include timely notice of the proposed acquisition; accurate and specific notice of the property rights or interests that are proposed to be acquired; allowing affected persons an opportunity to take advice from or consult with others and to make submissions about the proposed acquisition; and a duty on the decision-maker to consider any submissions received. The *Land Acquisition (Just Terms Compensation) Act 1991* presently contains some of those features, but the New South Wales Bar Association encourages a careful review of those provisions with the stipulations of administrative justice in mind.
 - b) be capable of rational application (such as by containing clearly defined matters which have to be taken into account, or disregarded, when a decision is made to acquire property rights or interests). The conferral of statutory power to acquire property rights or interests should be confined to particular purposes and the exercise of such power could be regulated and confined by an explicit statement in legislation of the purpose of the exercise of power and the relevant and irrelevant considerations to be taken into account by the decision-maker; and
 - c) produce outcomes that can be explained intelligibly (such as by the provision of written reasons so that persons affected by decisions, and perhaps the wider community, will know why they have been made).

Extension of Just Terms Compensation Legislation to other species of property

8. Just Terms Compensation Legislation should provide for compensation for the compulsory acquisition by the State of New South Wales (or by any State agency,

² Consultation Paper, p 21.

³ Chief Justice Robert French AC, "*Property, Planning and Human Rights*", speech delivered at the Planning Institute of Australia, National Congress, Canberra, 25 March 2013, p 6.

⁴ Chief Justice French, "*Property, Planning and Human Rights*", pp 7-9.

authority or statutory corporation) of all species of property, and not just the acquisition of real property rights or interests.

9. It is acknowledged that the terms of reference for the Review are limited to the consideration of ‘*acquisitions of real property*’ rights or interests.⁵ However, the obligations and principles that operate in respect of such acquisitions, in particular the provision of just terms compensation, should also apply to the acquisitions of other species of private property by the State or its agencies, authorities or statutory corporations. That position would better reflect the human right to property described above. It would also better accord with the protection of property rights under the Constitution, which requires that any acquisition of (any species of) property by the Commonwealth can only occur on just terms.
10. Given the substantial merit of a future course of harmonisation of just terms compensation legislation among the States and the Commonwealth in respect of all species of property,⁶ reforms pursued now in New South Wales should not be inconsistent with that harmonisation. One straightforward technique for allowing for future development of State law in this regard may be to adopt legislative drafting that applies generally to acquisition of “property” and compensation for it, and then make appropriate provision for the width of application of the legislation by adjustment of the definition of property for the purposes of that acquisition / compensation legislation.
11. The species of property subject to compensation legislation for their compulsory acquisition by or for the State could include:
 - a) statutory licences for fishing;⁷
 - b) statutory permits for mineral exploration;⁸
 - c) copyright;⁹
 - d) money and the right to receive a payment of money;¹⁰ and
 - e) vested causes of action.¹¹
12. The Association submits the development of a set of principles to guide the process for how acquisitions of real property should be dealt with by Government (term of reference 2) and a process for considering these principles in future legislation (term of reference 3) could be usefully informed by consideration of how acquisitions of such other property may be dealt with by Government. In other words, the processes and protections that are continued and developed for the acquisition of real property should be capable of application to the acquisition of other species of property.

Constitutional protection – acquisition of property to be on just terms

13. As noted in the Consultation Paper, property rights are protected by the Constitution to the extent that acquisition of property by the Commonwealth must be on just terms. There is no such constitutional protection in respect of the acquisition of property by the New South Wales government or authorities under New South Wales law.¹² A

⁵ Consultation Paper, p 7.

⁶ The future “*harmonisation of acquisition laws*” is referred to in neutral terms in the Consultation Paper, p 19.

⁷ *Fitti v Minister for Primary Industries & Energy* (1993) 40 FCR 286.

⁸ *Commonwealth v Western Mining Corp Ltd* (1996) 67 FCR 153.

⁹ *Australian Tape Manufacturers Association Ltd v Commonwealth* (1993) 176 CLR 480.

¹⁰ *Australian Tape Manufacturers Association Ltd v Commonwealth* (1993) 176 CLR 480.

¹¹ *Georgiadis v Australian & Overseas Telecommunications Corp* (1994) 179 CLR 297.

¹² *Durham Holdings v New South Wales* (2000) 205 CLR 399.

recent example of such legislation was the *Mining and Petroleum Legislation Amendment (Land Access) Act 2010* which retrospectively extinguished important property rights of farmers, notwithstanding those rights had been earlier recognised by the Supreme Court.¹³

14. The Consultation Paper also observes that, while there are many aspects of government conduct that may adversely affect the use and enjoyment of privately owned land, these activities do not form part of ‘*acquisition law*’.¹⁴ The right to compensation in respect of these activities is a complicated question and, of course, would depend on the enactment of legislation to provide a mechanism for the identification of compensable interests and the process for obtaining compensation. For example, at present the Parliament of New South Wales has provided for compensation for acquired interests in land and also for ‘injuriously affection’ of other land of the person who has had land acquired,¹⁵ but not for adjacent or nearby landowners (whose property rights or interests may have been affected significantly by the acquisition).
15. The Association considers that there is a strong case for amending the State’s Constitution so as to include an appropriate guarantee that private property rights or interests will only be acquired on just terms.

8 October 2013



Phillip Boulten SC
President

¹³ *Brown v Coal Mine Australia; Alcorn v Coal Mine Australia Pty Ltd* (2010) 76 NSWLR 473.

¹⁴ Consultation Paper, p 14.

¹⁵ See ss 55-59 of the *Land Acquisition (Just Terms Compensation) Act 1991*. See also Chief Justice French, “*Property, Planning and Human Rights*”, p 10.