"REASONABLE" COMPENSATION

Legislation vs. expectation

BY TOM EVERITT

The notion of compensation has, in recent times, worked its way more and more into our everyday vocabulary and become — in an increasingly litigious society — a default expectation, regardless of the magnitude of inconvenience.

In Australia, Victoria's state government is spending record amounts of money on public infrastructure projects and is proposing to lift the state's moratorium for onshore gas exploration this year. The latter possibility opens the door for more linear infrastructure projects traversing private property, with the focus on offering "fair and reasonable" compensation only becoming more prominent. This is particularly true for the gas industry, where proponents can not only face controversy with inadequate compensation offers to landholders — who now also have social media availability, which broadens their conversation circle from traditionally a chat over the fence with the neighbour — they also face broader community opposition to their fossil fuel projects.

The ambiguity in the current legislation allows proponents to define their own reasonable approach to compensating landowners and occupiers when seeking voluntary landholder agreement. However, this also leaves proponents looking to open the compensation door facing critical questions such as: "What is reasonable?",

"What is equitable?" and more generally, "Who is eligible to receive what compensation?". Another important question asked of land access experts is "How much compensation will secure land tenure?"; on one hand, principles offering too little compensation can cause delays to sign up landholders and in-turn project delays, yet offering too much compensation can make projects unviable, unappealing to shareholders who expect value for money and potentially create unachievable precedents for future projects.

Usually in a linear infrastructure scenario, the industry has largely held the line and interpreted the state's legislation in a very black-and-white manner. Whilst our increasingly complex and sophisticated community is pushing the need to attend to more of the "grey," it is interpreted as follows: individuals who have a stake in land "directly affected" by the footprint of works are typically entitled to compensation; those who aren't associated with such land are not. But even the term "directly affected" is now brought into question; is a resident in a house adjacent to a construction site who bears the noise and dust caused by months of construction works any more entitled to compensation than the overseas property owner?

Landholders affected by linear infrastructure easements use many different approaches to maximize their compensation during negotiations; a common strategy being they'll "wait 'til the last minute to agree," as traditionally they've seen or heard that this is when the compensation is maximized. Whether this does or doesn't happen, many proponents are mitigating this perception by retrospectively back paying landholders, should higher principles of compensation be adopted later in the project — hence, avoiding any need for landholders to hold out.

Recently through other major infrastructure projects, some contractors have also found themselves in the same spotlight. Not having clear legislation to lean on regarding compensating residents for construction impacts, they inadvertently reach new respite measure benchmarks defined not just by "best practice," but also financial or social factors. These lead to "per-project" principles that recognize — to varying degrees — inconveniences to neighbours and the broader community caused by construction. The typical impacts that residents (and businesses) face, are out of hours and general work noise, dust and workforce impacting local parking and traffic delays. How much — or even if — people are offered respite from such inconveniences is yet to be consistently adopted. And while defined with good intentions, these per-project principles are carried to the next project, but once again drastically evolve in all directions due to a number of respective interests.

The line which defines "needing" to compensate and compensating because it's "the right thing to do" is becoming blurred. There is no question that land being permanently encumbered should attract compensation but having occupants of such land eligible to receive solatium (inconvenience compensation) for impacts that many other surrounding properties also often face for "free," makes for some hard lines to be drawn by proponents who ultimately seek a social licence from a wider community comprising both landowners and adjoining neighbors.

Proponents, communities and contractors would all look to benefit from more encompassing legislation regarding compensation. There is a real opportunity for industry leaders to collaborate and consider their previous experiences to propose legislative changes that define the line for the nuances of such scenarios, and lead to the betterment of our industry and better community outcome. If not legislative changes, at least definitive guidelines noting explicit qualifications for compensation eligibility for nearby neighbors of such works, would also avoid unfair precedents. Too many times have we walked away from projects which see customers getting the gas, but squeaky wheels getting the oil. ✪

Tom Everitt has worked on some of Australia's largest infrastructure projects since 2009, which has seen him in various roles in the fields of land access, stakeholder engagement and project management. As the Director of TDC Services, Tom is currently contracted to oversee securing land tenure for a proposed major pipeline in the country's south east.