Submission No 35

INQUIRY INTO ACQUISITION OF LAND IN RELATION TO MAJOR TRANSPORT PROJECTS

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Parliamentary Inquiry into the Acquisition of Land in Relation to Major Transport Projects

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Executive summary

On 17 March 2021 a parliamentary inquiry was established to inquire into the acquisition of land by Transport for NSW ("**TfNSW**") and related agencies in relation to major transport projects. Amongst other things, the intention of the inquiry is to examine:

- whether all processes in place during direct negotiations with landholders are fair, unbiased and equitable; and

- the response of agencies to the Russell and Pratt Reviews into the *Land Acquisition (Just Terms Compensation) Act 1991* (**"Acquisition Act"**).

The terms of reference for this inquiry cover a number of areas, of which this submission will be confined to:

- the response of agencies to the Russell and Pratt Reviews - Terms of Reference - 1.(a);

- the conduct of agencies in acquiring specific land acquisitions that may give rise to community concerns about current government process - Terms of Reference - 1.(b)(vii);

- how government agencies conduct direct negotiations with landholders in relation to purchasing land/properties prior to, or in parallel with, the compulsory acquisition process, and the extent to which such process is fair, unbiased and equitable -Terms of Reference - 1.(d); and

- Other related matters - Terms of Reference - 1.(i).

My wife and I are landowners that have been severely financially impacted for over a decade by the TfNSW processes adopted in the full acquisition of our land at Coffs Harbour. Our land is required for the Coffs Harbour Bypass, a project that involves the full or partial acquisition of about 151 properties. This project has been in acquisition phase for almost 20 years and has caused immeasurable detriment to many landowners and stifled the planning and development of the regions in Coffs Harbour affected by it.

This submission is made on the basis of extensive discussions with landowners subject to past and present acquisitions by TfNSW, law firms, valuers, town planners, and academics. It has taken me considerable time in having these discussions and in embarking into detailed research relating to land acquisition legislation, obligations of acquiring authorities, valuation and town planning principles, acquisition processes in other jurisdictions, and the escalation, review, or appeal recourse available to aggrieved landowners regarding procedural defects by TfNSW in administering the acquisition process.

The submission presents a highly critical assessment of the procedures TfNSW has in place for dealing with compulsory land acquisitions as well as the lack of governance for ensuring that acquisition standards and processes result in fair, unbiased and equitable outcomes for the dispossessed landowners.

The submission also addresses in detail the ultimate issue that burdens the absolute majority of aggrieved landowners, that being unjust compensation predominantly as the result of a flawed and partial valuation process adopted by TfNSW.

The submission also highlights the complete lack of accountability by TfNSW in administering the acquisition process and the glaring absence of any recourse by landowners for improper conduct by TfNSW acquisition officers in the pre-acquisition and the 'acquisition by agreement' phases of the acquisition process.

The current state of the acquisition process is one in which landowners have little or no control over and for many the associated trauma and coerciveness renders them incapable of asserting their rights and pursuing their best interests in any meaningful way.[1] The current procedures are non-transparent, inconsistent, irrational, ineffectively managed and establishes an environment for corruption and gross injustice.

[1] The incidence of landowners accepting the TfNSW valuation without engaging their own valuer is a vital statistic that should be disclosed by TfNSW.

Introduction

There are always costs and victims of government action. George Washington is attributed in having said:

> *"Government is not reason and it is not eloquence. It is force! Like fire it is a dangerous servant and a fearful master. Never for a moment should it be left to irresponsible action."*

Compulsory land acquisition represents a powerful example of government force. Proponents of acquisition are of course the acquirers who take the view that the ends justify the means on the basis of the greater good. Some would believe that the forced taking of land trumps whatever detriment landowners suffer as a result; whereas others might simply by void of any empathy and, accordingly, completely oblivious to, or unconcerned about, the plight of dispossessed landowners.

There should be no illusion that the predominant purpose of the Acquisition Act is about NSW Government not having to pay a 'ransom' value to landowners, as it is about ensuring landowners are justly compensated.

The need for government to compulsorily acquire land is patently obvious, and words will not be wasted in needlessly justifying such need. However, the power conferred upon government and its agencies to administer land acquisition processes can be and is abused. Unfair procedures and inequitable compensation undermines land tenure security, increases tensions between the government and its citizens, and reduces public confidence in the rule of law.

Compulsory acquisition is an unfamiliar and significant event for landowners and it is generally regarded as being as traumatic as dealing with death, divorce or the unexpected loss of employment. Citizens generally hold no opinion on this issue unless they, or someone close to them, have in some way been affected by it. This is a problem that opportunistic senior government executives may well rely upon, as legislative and policy changes to correct unfair and unethical practices are generally driven by a groundswell of community outrage. One must wonder how often the implementation of matters that ethically require change are contingent on whether or not community outrage blows over.

This submission specifically focuses on TfNSW in its administration of the acquisition process. It takes into account the perception of past and present landowners I have spoken with that have been dispossessed, or are facing dispossession, of their properties, which is that TfNSW projects itself as holding the ultimate power and authority for determining when and how much it will pay in compensation for taking their land. This perception is primarily driven by the observation by many landowners that TfNSW acquisition officers conduct themselves and make determinations arbitrarily as well as display arrogance and smugness by not having serious regard to landowner input.

I agree with this widespread perception and add that TfNSW tightly controls and arbitrarily determines the amount of compensation for properties being acquired through the so-called ‘acquisition by agreement’ process, which represent about 86% of total acquisitions. This is akin to an unsolicited buyer imposing a forced purchase upon an often unwilling seller, with the buyer dictating the sale price. This is a phenomenon not observable elsewhere in our democratic and capitalist society.

The ultimate grievance of landowners dispossessed of their properties by acquisition is having to accept a compensation amount that is not based on just terms. Such grievance stems from the valuation process, specifically those procured by TfNSW on the properties being acquired. There is no doubt that this is far and away the core issue and the greatest cause for concern and resentment by landowners facing the acquisition of their properties.

TfNSW would surely maintain that it does not arbitrarily dictate compensation amounts as it allows for landowners to engage their own solicitors, valuers and even town planners, so their interests are well protected. The purpose of this submission is to critically comment on these so-called support structures that have been put in place for the acquisition process and lay bare the harsh reality of what landowners about to be dispossessed of their properties actually face.

Transparency is a term that is often referred to in the acquisition process administered by TfNSW, and though it will be specifically addressed later in this submission, it is at this point suffice to say that transparency of any meaningful information is literally non-existent. This is a vital point to raise as it is quite apparent that TfNSW has adopted a ‘cloak of secrecy’ approach to the highly opaque acquisition process. Hence, with relevant data either tightly held by TfNSW, or non-existent, there is no practical way of determining the extent of landowner grievances in relation to the current processes.

There is certainly enough anecdotal evidence via media reporting and online forums to indicate that landowner grievances is a perennial problem with a deep timeline and broad geographical reach and not just confined to isolated incidents. The Russell and Pratt Reviews were also a consequence of this entrenched problem. The absence of relevant data on acquisitions by TfNSW is unfortunate not only for the disaffected landowners, but also for the acquisition officers of TfNSW and their service providers that may indeed be performing their duties morally, ethically and diligently.

The public relations propaganda that attempts to soften the harshness and reality of the acquisition process implies that ‘acquisition by agreement’ is a more palatable, civilised and less stressful process than the stark and abhorrent ‘compulsory acquisition’ process. The former would certainly be a better option if it was only true. However, I propose that the illusionary virtues of the ‘acquisition by agreement’ process is an utter fallacy for which this submission will seek to debunk. In particular, this submission will present matter-of-fact considerations for the Committee to consider in determining whether TfNSW is indeed geared to conduct itself in a manner in which it genuinely and exhaustively attempts to buy the land it requires in good faith before it uses its power of compulsory acquisition.

In our dealings with TfNSW in this ‘acquisition by agreement’ process, almost all of the communications have been in writing, hence there is no spin, distortion, bias or exaggeration, just self-evident facts for this Committee to consider. The attachments to this submission provides this Committee with our own matter (still on foot) as a case study.

Establishing the existence of problems in one matter does not necessarily mean that such problems are endemic. That may be true, although a telling consideration of the prevalence of such problems is that our grievances have been escalated to the senior management of TfNSW, Services NSW, the Centre for Property Acquisition **(“CPA”),** the Independent Commission Against Corruption (**“ICAC”**), the NSW Ombudsman, TfNSW Information Access and at ministerial levels, all of which have been met by silence, stonewalling or side-stepping. Logically, any frivolous, unmeritorious or isolated grievance made against TfNSW would be expected to be acted upon swiftly and decisively. However, if the grievance is indicative of being a widespread issue, then it should be quite apparent that it is a ‘pandora’s box’ that TfNSW would want to be kept closed.

There is also of course the all too familiar consistent stream of media reporting that provides an insight into the plight of dispossessed land owners being unable to buy back into the suburb they lived in or having to downgrade in housing standard, which could only mean they were shafted by TfNSW. Similar stories of dispossessed land owner grievances are routinely removed from online search engines by PR entities to avoid growing public perception of an endemic problem and a widespread discontent of landowner grievances.

About The Russell & Pratt Reviews

The Russell & Pratt Reviews failed to address in any practical sense the perennial problem of landowners being forced to accept compensation on unjust terms. The reviews merely emphasised the need for landowners to be treated with respect, courtesy, empathy and efficiency. Whilst these are all desirable objectives, they nonetheless should already be expected from all NSW public servants when dealing with its citizens.

The terms of reference for the Russell Review, which took almost two years to complete, were confined to recommending a set of principles to guide the process for how acquisitions should be dealt with by Government and having them incorporated into current and future legislation. However, the issue of the level of compensation payable for acquisitions was specifically excluded from the terms of reference, which is remarkable given that the overriding grievance of dispossessed landowners is that of being compensated on unjust terms.

The Pratt Review was conducted over five weeks at a high level of generality and focused only on how landowners facing dispossession of their properties should be treated by the acquiring authorities. Despite the Review finding that common concerns of landowners across all categories of acquisitions were that they:

- did not believe they received a fair market value; and
- believed that valuations were inconsistent in approach[2]

the Review failed to consider any measures for resolving these issues.

Commissioner Pratt observed in the Forward of his Review that TfNSW had achieved an 86% rate of sale by agreement without the need to use acquisition notices and from this assumed that:

> *TfNSW was doing something right in the way that it conducted its negotiations*.

With respect, such inference by Commissioner Pratt is in utter conflict with the sad reality, which is that in many cases landowners actually settle 'with a gun to their head'. A more accurate conclusion, as opposed to inference, is that 86% of TfNSW acquisitions have not been subjected to any external or independent review or scrutiny to determine whether compensation has been made on just terms.

[2] Customer Service Commissioner: Housing Acquisition Review: September 2016, pain points 27 & 28, at p. 12.

It is asserted that both reviews were constrained and sterile in failing to address the dominant issue of landowners not being compensated on just terms. By and large it is suggested that these reviews present as no more than window dressing of a process that is unfairly skewed in favour of the interests of TfNSW (and other acquiring agencies although predominantly TfNSW). It seems apparent that the fault for this comes down the constrained terms of reference for these reviews.

Nonetheless, a set of 'motherhood' standards/principles were formulated and espoused as being the beginning of a new era for a fairer and more transparent property acquisition process. These standards, and the glossy guides accompanying them, have anecdotally, and through research, been found to be generally ignored, thereby causing landowners to become cynical and government credibility to be undermined. Contrary to what TfNSW might espouse, there is plainly no oversight for monitoring adherence of these standards.

It is noteworthy that Recommendation 20 of the Russell Review States:

> *"That the next review of the Just Terms Compensation legislation be conducted by a reviewer who is obliged to hold public hearings and take evidence from interested parties. Further, such reviewer should be assisted by an expert panel comprising representatives of government authorities, user groups, industry groups, academics and dispossessed landowners, to report upon the effect of any amendments to the Act adopted as a result of this review, and of the Just Terms Compensation legislation generally."*

Acquisition officers of TfNSW are already bound by a Code of Ethics and Conduct for NSW government sector employees. Despite this and the introduction of acquisition standards, what appears not to have been adequately considered is the conduct of long term officers (predating the introduction of the standards) that are set in their ways and that just seemingly give lip service to these standards (commented on further under 'conduct of public servants' heading).

Direct Negotiations with Landowners by TfNSW

A landowner should reasonably expect for TfNSW to devote considerable time, effort, human skills, and a high degree of goodwill and decency in order to facilitate a voluntary agreement on just terms. However, from what I encountered in the lead up to a hastily and dishonestly attempted negotiation meeting suggests that TfNSW undertakes negotiations that merely rely upon 'price only' negotiators who may lack any depth of competency in broad technical aspects (such as valuation & town planning principles, legislation, case law etc) and that operate outside of any rational and accountable framework and policy guidelines. In other words, "horse traders".

Negotiations are meant to be about discussing common ground for the purpose of coming to an agreement within a conciliatory tone so that a compromise may be reached, and each party obtains a degree of satisfaction in the absence of ridicule or coercion. In acquisition matters, this can only feasibly occur after the integrity of reports and other relevant considerations relied upon have been established. In our matter there was a complete absence of integrity on everything TfNSW could potentially have relied upon, so a negotiation meeting would have been a farce.

It became patently obvious that had we succumbed to such a meeting, it would have more appropriately been termed a 'manipulation' meeting, in which TfNSW would have attempted to seek control over us by using fear and coercion in the form of compulsory acquisition, continued delay in getting to a resolution, exposure to legal costs and the risk of a smaller compensation amount if we did not settle.

Clever negotiators are often the masters of the art of deceit utilising lies bluff and puff to achieve their desired goal. I had a one-time comprehensive discussion with a TfNSW senior acquisition officer who would likely have been the negotiator in our matter and certainly did not come across as clever, but rather as a self-promoting, spare-me-the-details type of person that was big on talk and generalities but avoided specifics and technicalities.

The Conduct of Public Servants

As I had 'called out' breaches of procedural matters to TfNSW officers dealing with our matter, the consequence was us then having to endure from these officers defensiveness, egotism and bad faith conduct as a retaliation with the intention of causing us detriment, an all too familiar happening when dealing with errant public servants.

There are about 330,000 public servants in NSW that keep the wheels of government administration in motion. They perform vital services that are often under-appreciated but quickly recognised if withdrawn due to strikes or shutdowns.

It is certainly not the intention of this submission to cast dispersions on NSW public servants *per se*. They have their assigned duties and responsibilities to perform and most would surely meet their obligations sufficiently or exceptionally. Some don't. There is nothing controversial about the fact that public servants endure a working structure and environment that has its own unique characteristics and challenges. Many of us work in or have family members or friends that work in public service from which we develop some insight into the environmental dynamics.

In making this submission, I have referred to a PhD thesis entitled: *Disenfranchised Workers: A view from within the Public Service*,[3] prepared by Tanya Paterson. It is an extensive, well researched and informative document that examines the experiences of disenfranchised workers in the public service. It is a study only about unhappy, abused and disgruntled public servants. The author refers to a term called 'bureaupathologies',[4] which she explains as being:

> *a broad range the vices, maladies and sickness of bureaucracies that infect identity, mentality and professionalism. It results from insecure people abusing authority to dominate and control others, directly through unfortunate personality traits or through a misuse of procedures, polices, rules and standards* (references omitted).

The research also notes that the pervasive and widespread culture of non-compliance with legal obligations and a less-than-enthusiastic supervisory system permits corrupt activities to continue over many years undetected and unchecked and that when there are no consequences for people's behaviour and no-one ends wrong doing then there are enormous social repercussions. This was all considered and confirmed in the Coombs Royal Commission Report 45 years ago.

[3] https://vuir.vu.edu.au/21317/1/Tanya_Jane_Paterson.pdf
[4] 116 common bureaupathologies are listed at pp. 114-16 of the thesis.

Online searches readily point to the prevalence of these pathologies reflected in some public servants. It is beyond the scope of this submission to comment extensively on this issue other than to establish its existence. What is important to note is the sheer and utter devastation and detriment that could fall upon a landowner if their acquisition matter is being handled by TfNSW officers that demonstrate some or many of such pathologies.

Many acquisition matters have disparities in compensation amounts to the tune of hundreds of thousands and even millions of dollars. In other areas of financial and asset assessments where such large amounts are at stake, they are dealt with by accredited professionals bound by stringent standards and subject to liability for professional negligence.

Property acquisition processes should not be treated as a clerical function. It is very technical and requires a high level of research, investigation, analysis and assessment. To conclude that such expertise is the province of valuers, town planners and lawyers is short-sighted and plainly wrong. If that was the case then one should consider why then is it that almost always there are major disparities amongst these professionals. It is critical that the acquirer has the knowledge and competence to properly analyse and critique the integrity of information coming from these professionals. Hence, the acquirer needs to be a multi-disciplined qualified professional or a team of professionals in the current structure adopted by TfNSW. The acquirers should be as qualified and knowledgeable or better than the service providers that TfNSW and the landowners engage.

To quote the words of Thomas Sowell, an economist, social theorist and senior fellow at the Hoover Institution at Stanford University:

> *“It is hard to imagine a more stupid or more dangerous way of making decisions than by putting those decisions in the hands of people who pay no price for being wrong.”*

Valuations obtained by TfNSW

Valuations obtained by TfNSW are the bane of the acquisition process and the ultimate area for despair and criticism by landowners. From personal experience and discussions with affected landowners, the presumption should be that these valuations are undertaken to procure a value in favour of TfNSW at the expense of the landowner. For the presumption to be rebutted would depend on the extent in which the valuation reports accord with the valuation profession's standards for valuing properties being acquired.[5]

Valuers must earn a living, and for many their core stream of work comes from repeat work with private institutions such as banks and government agencies. This means that valuers often compete with one another to win favour with government agencies as preferred valuers, so when they are engaged by TfNSW there is the real risk of completing the report on a basis favourable to TfNSW.[6] Also, due to the competitive nature of the profession, the likes of banks and government agencies have the bargaining power to put downward pressure on valuation fees, which in turn risks valuers minimising or avoiding necessary research and analysis for compiling their reports.[7]

Valuers that are required to adopt special valuation methods such as hypothetical development, piece meal and capitalisation methods, or methodologies for determining the positive or negative impacts caused to property values from the carrying out, or proposal to carry out the purpose for the acquisition, need extensive time to prepare such reports, which are expensive if done correctly. TfNSW simply does not consider this when it arranges its valuations. A review of a number of independently and randomly selected valuations may be all that is required to show how, cheap, quick and non-compliant TfNSW procured valuations can be.

As seems that TfNSW valuations are just really intended to serve the purpose of establishing a floor price to purchase the properties. The valuations obtained on behalf of landowners are assumed to establish the maximum value for the property. From first hand observation it is clear that TfNSW acquisition officers either have little idea about valuation principles and legislative requirements, or simply choose to disregard them, as they seem oblivious to the degree of reasoning, rationale and supporting evidence within the competing valuation reports. It is clear that the ulterior intent is to just have a TfNSW negotiator engage in a horse-trading exercise between the two valuations in the absence of any analytical debate of the relevant factors for properly determining the most reasonable estimate of value for the property being acquired.

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[5] Including, but not limited to - ANZVTIP 13 Valuations for Compensation and Compulsory Acquisition.
[6] See *How Can Valuers Provide Reports That Meet the Needs of the Court in Compulsory Acquisition Compensation Cases?* by Justice Peter Biscoe, at p.5, para 12. "The opinion of valuers may be due to selection bias by which a valuer might be selected based on known views that suit a party's case, the valuer's unconscious partisanship or the valuer's deliberate partisanship."
[7] Peter Elliott Clive & M J Warren 'The Valuation Profession in Australia: Profile, Analysis and Future Directions', at p. 1.

Judicial opinion often states that the process in compiling valuations is not a science, although a high level of skill and care must nonetheless still apply. TfNSW cannot assume, nor can the valuers that valuation opinions are sacrosanct, as opinions mean nothing if they are not supported by relevant, rational, and verifiable information. TfNSW has justified opinions solely on the basis of tenure or standing of its valuers (and town planners).

In a paper presented at an Australian Property Institute Seminar,[8] Justice Biscoe of the LEC spoke of the disparity between valuation reports of each party. This was in the context of valuations commissioned by the VG, compared to those obtained on behalf of the landowners. The general disparity between these valuations is substantially less than that of TfNSW instructed valuations and those obtained on behalf of the landowners, which can differ by 400% or more. Justice Biscoe attributed the disparity between the VG v landowner valuations as being due to different assumptions based on highest and best use, differences in comparable sales, inadequate briefs given to the valuers, and valuer bias. These are of course valuation reports that can potentially be fully scrutinised by the LEC. Yet the TfNSW instructed valuations are not subject to any scrutiny or accountability whatsoever.

Valuers are not held to account for professional negligence in providing valuation opinions in these matters. An underlying reason for this is that properties being acquired have no future opportunity to go to market that would ultimately test the valuers opinion. This is unlike, for example, a bank obtaining and relying on a property valuation for securing a loan and then encountering a significant loss if the property is foreclosed and sold well below the valuation amount. Another reason is because TfNSW instructs its valuers, not the landowners and the reports typically include the following type of disclaimer:

> '*The report is for the use only of TfNSW … and no responsibility is accepted to any third party.'*

Yet, the TfNSW valuation reports are created exclusively as a basis for determining a price to offer a landowner in a coercive environment. This is well beyond landowners just 'relying' on these reports as they are actually 'imposed' upon them by TfNSW. It is the landowner who suffers the consequence of a negligent valuation of their property and not TfNSW.

It must be acknowledged that some landowners, particularly the elderly, might indeed place blind trust in the government acting in their best interest and simply accept the TfNSW valuation without question or pause due to ignorance, or because of concern of perceived consequences if they were to take issue with it.

[8] Justice Peter Briscoe, 'How Can Valuers Provide Reports That Meet The Needs Of The Court In Compulsory Acquisition Cases', 18/04/2013.

If a matter progresses from the ‘acquisition by agreement’ phase to the ‘compulsory acquisition’ phase, then any transgressions by TfNSW, and/or the valuers it engaged, fall by the wayside, meaning that neither are brought to account. If a matter progresses to the LEC, then it is as an appeal only on the VG commissioned valuation.

Almost all valuations commissioned by the VG are for compensation amounts that are higher compared to the valuation procured by TfNSW. The more generic properties such as suburban residential homes, whose highest and best use is the current use, generally have the lowest variations; whereas greenfield properties and existing properties with a better higher and best use than the present use usually have the highest variation.

This issue of TfNSW instructed valuations is an immensely blatant, serious and embarrassing issue and any attempts by TfNSW to deflect this issue should not be tolerated. It would be invaluable for this Committee to procure a number of TfNSW valuation reports that are independently selected for evaluation by a panel of nonaligned valuers or an LEC judge to better understand the general level of competence with these reports.

About the Role of Law Firms

There are law firms that provide exceptional advocacy to procure just compensation for their clients. However, how would a landowner know where to even start in finding such a firm? There is no independent data available for a landowner to make an informed decision on which law firm to use, and it is quite obvious that not all law firms are equal.

Property acquisition presents as a lucrative area for law firms because many seem to undertake this area of law essentially as a routine administrative function with the sole emphasis being on resolution through mediation. Their reasonable fees that must initially be paid for by the landowner are expected to be reimbursed by TfNSW on settlement. The charge out rates to landowners by law firms could be over $700 per hour for senior lawyers, although often most the procedural work might be dealt with by associates and paralegals as is the case with conveyancing matters.

Affluent landowners have the opportunity to engage top tier firms, whereas poorer or impecunious landowners have no such opportunity and might be unable to afford any upfront or PAYG legal fees. The latter would have no option but to enter into deferred payment costs agreements that typically include an essential term that requires them to accept an offer of settlement that the law firm recommends as being reasonable, failing which the agreement would be terminated and all costs incurred up to the termination would become due and payable. This is really happening!

The value of the quality of the work and the uncompromising advocacy by law firms is rarely tested, as less than two percent of matters are judicially determined in the LEC. Indeed, law firms generally stress firmly to landowners that they should avoid at all costs for their matter to proceed to the LEC.

As about 86% of acquisition matters are finalised by way of agreement, landowners could become constrained from airing any grievances in the determination of their matter due to confidentiality clauses in the settlement agreements, notwithstanding that, in any event, there is no agency or independent authority to which landowners can direct their grievances to.

Law firms are fully aware of the propensity for TfNSW to procure valuations below true value and there are certainly cases where, rather than pursuing all that can be done to hold TfNSW to account, the law firm would just work towards facilitating an uplift in the settlement amount by having TfNSW increase its offer by up to an approximate $35,000, which is a figure that TfNSW would otherwise be required to pay the VG if the matter were to escalate to the compulsory acquisition phase.

A consequence of this kind of approach is that about 86% of acquisitions become confidential transactions not subject to any independent review, and only a small fraction of the remaining 14% end up being determined by the LEC resulting in inadequate development of case law relating to acquisitions.

Also, as a matter of course, law firms advise their clients that if they let their matter be one of the 14% that goes to compulsory acquisition, then they face the risk having it determined by the LEC along with about $200,000 or more in legal costs, despite only a small fraction ending up for judicial determination. This represents a big stick in 'encouraging' clients to settle during the 'acquisition by agreement' phase, which is akin to settling with 'a gun to their head'. A law firm can be justified in doing this on the premise that is it dutybound to properly inform its client of the associated risks in pursuing a course of action. TfNSW is the beneficiary of law firms doing this as it would otherwise be highly problematic for it to personally convey the same message without risking the appearance that it is threatening or holding landowners to ransom.

The unfortunate consequence of this high priority of avoiding compulsory acquisition and the potential for matters to be determined by the LEC, is that whilst the Acquisition Act is specific enough in providing clear guidelines for determining compensation and is flexible enough to allow for the determination of appropriate equivalent compensation in special cases, the latter generally only occurs with a compulsory acquisition that finds its way to the LEC for judicial determination.

As the legislators of the Acquisition Act could not possibly foresee all possible acquisition scenarios, the unique scenarios can only be addressed by the judges of the LEC or higher on appeal, so the ongoing development of the acquisition law becomes stifled by the low incidence of cases that present for judicial determination.

Comparison with Valuations obtained by the Valuer General

A failed 'acquisition by agreement' process will result in a compulsory acquisition and the engagement of the VG for determining the amount of compensation. As already mentioned, the unfortunate dilemma for landowners is that any adverse experience relating to the conduct by TfNSW (on what could be over many years) without oversight or intervention by the NSW Government, only serves to undermine trust and confidence in the Government. The VG stands independent of TfNSW, although it must be reasonably considered that landowners having endured a failed 'acquisition by agreement' process would likely be hesitant in their matter then being dealt with by another agency that is under the control of the NSW Government that has allowed the state of affairs caused by TfNSW to occur and continue.

Despite fears by landowners of continuing partiality by the VG, unlike the valuations procured by TfNSW for the 86% of properties it acquires by agreement, not being regulated or potentially subject to judicially scrutiny, the same at least cannot be said for valuations instructed by the VG following compulsory acquisition.

The VG undertakes the valuation process within a raft of publicly disclosed policies, including policy documents titled:

- Compensation following compulsory acquisition;
- Compensation following compulsory acquisition involving possible conflicts of interest;
- Compulsory acquisition advice;
- Valuer General's brochure on Compulsory acquisition; and
- Determination of compensation following the acquisition of a business.

Under these policies the landowner is provided with the opportunity to:

- offer pre-valuation input to the VG on relevant factors for determining value;
- obtain copies of information held by the VG relevant for determining value;
- attend conferences to resolve issues and concerns before the VG finally determines compensation;
- rely on the valuation being undertaken by a qualified, experienced and independent valuer with no conflict of interest;
- engage with the valuer to ask questions, raise issues and provide further information;
- review the valuation draft before it is finalised and provide input on issues or concerns; and

- lodge an objection with the Land and Environment Court if dissatisfied with the finalised valuation.

Most importantly, the VG policies provide guidance to valuers on the methods to use, and factors to consider, when determining compensation for the compulsory acquisition of land.

The valuer must provide proof of having relevant expertise, identification of the facts and assumptions upon which the evidence is based and exposure of reasoning.[9] The valuers report must comply with the Code of Conduct set out in Schedule 7 of the UCPR and demonstrate impartiality and common-sense.[10] If a matter progresses to a LEC hearing then the valuations are subjected to judicial scrutiny in relation to their competency in complying with the applicable legislative provisions

So it begs the question as to why the 86% of landowners that have their properties acquired by agreement with TfNSW are not presented with the same safeguards as those provided by the VG. TfNSW could claim that some or most of such opportunities afforded to landowners by the VG are also available to them during the acquisition by agreement phase, but that is just not true in practice.

Despite the aforesaid, it is noteworthy that whilst the majority VG commissioned valuations exceed TFNSW procured valuation amounts, literally all LEC determinations of rural residential land resulted in an uplift of the VG valuation at an average 42%.[11]

[9] cf *Dasreef Pty Ltd v. Hawchar* (2011) 243 CLR 588.
[10] See *How Can Valuers Provide Reports That Meet the Needs of the Court in Compulsory Acquisition Compensation Cases?* by Justice Peter Biscoe, at p.4, para 10.
[11] See: NSW Parliamentary Research Service September 2016, at p.p. 6-8.

Landowner Considerations

Media coverage of acquisition controversies often portray landowners as vulnerable, minding-their- own-business battlers that have been devastated by losing their land that they had immerse family, community and emotional attachment to. This is probably true for the majority of dispossessed landowners, though not in our case. It is also probably not always the case for elderly landowners contemplating moving into aged care, or those that are dealing with Family Court related property distribution, or those looking to downsize or upsize, or those that were contemplating selling anyway, etc. That said, for most it truly is an unexpected, traumatic and life-changing event.

Since affected landowners are involuntarily involved in dealing with the dispossession of their property, many are oblivious to what their properties are worth as they weren't contemplating selling. Some may have only ever used a lawyer for property conveyance and might never have used a valuer. They might not have had any prior significant dealings with a government agency or ever been involved in court proceedings. They probably knew nothing at all about compulsory acquisitions prior to being involuntarily dragged into this area. It is also probable that they might not have had a higher education or possess any significant financial, commercial or business sophistication.

An issue that largely relates to regional areas is that often valuers engaged by the landowners or their representatives have worked, or concurrently work, for TfNSW. The 'acquisitions by agreement' phase is in reality a highly adversarial process and in such circumstances the potential for a conflict of interest is unacceptable and, if known, is likely to result in landowner uneasiness or apprehension of bias about their valuer. Valuers that undertake acquisition valuations on behalf of landowners do not generally expect routine future business from them and they are mindful that their reasonable fees paid for by landowners are ultimately reimbursed to the landowner by TfNSW on settlement.

As already mentioned, there are likely landowners that are either intimidated in 'opposing' the government on a matter, or simply place complete faith in the government dealing with their matter honestly and fairly. After all, it is the government, and the government is obliged to do the right thing; it makes laws and enforces them. So what it says must be right. Obviously not a safe conclusion. It is not a mandatory requirement for a landowner to engage a law firm and/or a valuer. In this respect, the opportunity for TfNSW relationship managers to create with landowners a false sense of security by implying that they are primarily working in their best interests cannot be ignored.

The average landowner is also quite fearful about challenging or criticising a government agency either because of lack of assertiveness or for fear of reprisals one way or another. I spoke with several former and current landowners, all of which of course were involuntarily dragged into the acquisition process. A couple that had their properties resumed 10 years earlier were too traumatised to even re-visit what they experienced. Landowners that I spoke with that are currently dealing with the acquisition of their properties were initially hesitant to discuss their experience, though once they were satisfied that I too was going through this process, they opened up about their grievances with TfNSW on condition of complete anonymity, for which they were all paranoid about for fear of reprisals.

The Transparency Myth

Transparency is a term promoted in much of the TfNSW literature regarding acquisition standards as well as in the outcomes of recent government enquiries. However, it seems apparent that the only transparency is for information that is of such a high level of generality that it is completely useless to landowners in helping them determine whether their matter is being dealt with fairly. Any statistical information on behalf of TfNSW regarding acquisitions should be treated with utmost caution because they are probably collated and presented in a manner that supports a perception that the system is working, which is not the case. The 86% rate of acquisitions by agreement data that was referred to by Commissioner Pratt is indicative of statistical information that is used to infer a completely deceptive conclusion. There is simply no transparency by TfNSW in relation to any information that may trigger landowner concerns and enquiries.

Compensation amount is the ultimate issue regarding acquisitions, and valuation reports are the ultimate driver for determining compensation. Yet, valuation information is very tightly held by TfNSW, not only for adjoining properties being resumed but also for the landowner's own property. Following, is an insight into the latter as it applied to us:

- On 8 May 2019, TfNSW instructed a valuer to undertake a valuation, the very day that it sent us its 'Opening Letter' that commenced the acquisition process, though we knew nothing of this at the time.

- On 5 June 2019, the valuation was undertaken in the absence of any contact with us by the valuer.

- On 19 July 2019, we were presented with a 'Letter of Offer', which was in effect a 'bare offer' in that it just offered an amount in compensation with absolutely no explanation on what it was based on. When I phoned TfNSW to enquire, I was advised it was based on a valuation report but it refused to divulge anything at all about the report and said it would only disclose the report once it received a valuation report from us.

- On 10 July 2020, we received copy of the TfNSW instructed valuation report, 13 months after it was prepared.

Notwithstanding that there were many alleged acquisition standards breached in relation to the above, there is no rational explanation for TfNSW refusing to disclose the valuation report at the time it was undertaken. It must be remembered that it was not mandatory for us to obtain a valuation report. Whilst this emphasises how adversarial the acquisition process is, it is actually much harsher than if we were actually going through a litigation process as the report would have been required to be made available through discovery obligations. This is a real contrast to what the VG provides, which is disclosure of the draft report before it is finalised so landowner queries can be considered.

The disclosure of valuation reports of adjoining properties is certain to be forcefully resisted by TfNSW, even though these reports are critical for determining the consistency by TfNSW in the instructions it provides to its valuers particularly in relation to zoning and in ensuring that the valuations are using the same relevant considerations and rationale on properties in the same area. Disclosure of the valuation reports of clusters of properties in the one area will clearly determine the extent of integrity, if any, in the valuations that TfNSW obtains.

There are no privacy or confidentiality issues for releasing these reports as:

- disclosure of property values are routinely available to the public via weekend papers, the internet, the VG database, RP Data, the LEC etc;

- the valuation reports for acquisitions are not commercially sensitive to TfNSW as it has no competitor in relation to these acquisitions, and the valuations merely provide justification as to how the property values are decided because those values are not determined by the market;

- the properties are, or will be, owned by TfNSW so all features and attributes of those properties are not sensitive to disclosure. Any information relating to current or former landowners and any other heads of compensation to the landowners, other than market value, can readily be redacted if considered necessary;

- in our particular case for example, there are no comparable market sales to rely upon as the values of surrounding properties have been negatively impacted over the past 20 years by the proposed Bypass, and they are also tightly held because of the moratorium placed by the Council for lifting the zoning until the Bypass is completed; and

- LEC decisions confirm that acquisition of surrounding land are relevant for determining property value when market sales are unavailable.

On 29 April 2021, I lodged an Access Application with TfNSW for the valuation reports of 6 surrounding properties that have been, or are being, resumed. The initial barrier it raised was that I had to pay $900 (that being only an initial estimate). So I revised the application to just obtain reports on 2 properties presently being resumed. The next barrier it raised was that third parties had to be engaged so the application decision was then extended to 24 June 2021. It is expected that there will be further barriers in disclosing these reports. Details of the reports of the 6 properties would have provided this Committee with a valuable insight into the level of integrity of valuation reports obtained by TfNSW. The same applies with town planning reports.

For there to be true transparency, every piece of document that is relevant to the acquisition process should be available to affected landowners if requested, and they must have a genuine opportunity to access such documents. If information is being withheld in this non-commercial, non-competitor acquisition process, it can only be because of wanting to avoid disclosure of probity issues.

Other important information that this Committee might find useful for disclosure are:

- the number of landowners having accepted a TfNSW valuation without obtaining their own valuation over the past 2 years state-wide;

- the number of landowners that accepted a TfNSW valuation and did not obtain legal representation over the past 2 years state-wide; and

- valuation amounts determined from the original (first) valuation reports ordered by TfNSW and by the landowners on all properties being acquired for the Coffs Harbour Bypass, and the final compensation amount paid (property value component only) on the properties already settled.

It must be emphasised that there is nothing sensitive about obtaining values of TfNSW acquired properties. The property market would be in disarray if sale prices were not released as establishing market values would become next to impossible. TfNSW could retort that properties it acquires are not market transactions. However, it is legislatively required that TfNSW bases the compensation it pays on current market value, so the valuations it relies on and the amount it pays should logically reflect market value.

No Adequate Governance of Current Process

Good governance is essential in providing a balance between the need of the NSW Government to acquire land and the need to protect the rights of citizens whose lands are to be acquired. Conflict is reduced when there are transparent and fair procedures for acquiring land and ensuring equitable compensation. This means that TfNSW must be held to account for its good faith implementation of the legislative requirements for acquiring land. If its officers fail to adhere to the quality delivery of standards and procedures then it simply undermines the legitimacy of the acquisition process. Good governance reduces the opportunity for abuse of power, whereas an absence of it opens the door to TfNSW officers using inappropriate discretion to provide favourable compensation to some landowners and less favourable to others, for whatever motive there may be (this issue is further raised under the heading of the NSW Auditor-General, below).

Despite this critical need for good governance in such an important area, there is a glaring and unfathomable absence of a right to review or appeal process to an independent court or tribunal by aggrieved landowners on procedural issues such as: unreasonable delays or haste in pursuing acquisitions, incompetence in instructing, overseeing and holding to account service providers engaged for determining compensation amounts, incorrect application of legislative requirements, failure to comply with service standards and bad faith conduct.

Aggrieved landowners presently have no opportunity at all to protect their rights against incompetent and/or corrupt behaviour by TfNSW officers. There is not even an autonomous body of competent professionals within TfNSW for which grievances can be escalated to and impartially reviewed.

Standards and required processes not being adhered to by TfNSW results in landowners becoming cynical and in the government's credibility being undermined. Contrary to whatever quality control and probity measures TfNSW claim to have in place, if it cannot be observed or relied upon by landowners, then it does not exist.

The absence of a right to appeal against matters relating to the erroneous application of acquisition standards and procedures is not an oversight by the NSW Government judging by the effect of subsections 3(2) & 10A(7) of the *Acquisition Act*, which serve as a barrier against aggrieved landowners agitating against unfair or unethical conduct by TfNSW. These subsections quell the provisions under 'Objects of the Act' and 'Negotiation Periods for Acquisition by Agreement' by stating:

> *'Nothing in this section gives rise to, or can be taken into account in, any civil cause of action.'*

There may be an assumption or belief that there is surely some entity or agency that can hold TfNSW to account with the manner in which it undertakes the acquisition process. So, in this respect, the most likely options will now be reviewed.

Service NSW

Service NSW is part of the Department of Customer Service and its function is to simplify the process for citizens to access support and services that they may need. It has is no established process for taking and responding to landowner grievances against TfNSW and would merely refer any grievance enquiry back to the TfNSW section that is the subject of the grievance to deal with.

The Centre for Property Acquisition

The CPA (created as a consequence of the Russell & Pratt reviews) presents more as a public relations department than as a compliance and monitoring department. There is no established process for taking and responding to landowner grievances against TfNSW. In the unlikely event that an acquisition grievance is referred to the CPA, it is impotent in being able to meaningfully intervene and can only offer counselling telephone support for the mental health and well-being of the landowner being dispossessed. Had the intention been for the CPA to be serious about oversight and accountability then surely it would have been staffed by professional officers with technical competence and experience in acquisitions, particularly to do with valuations, town planning and legal principles, which is not the case.

The NSW Civil & Administrative Tribunal

The NCAT can only review decisions which are specified in the legislation under which the decision is made. There are no Acts or subordinate legislation for which TfNSW operate under that confer jurisdiction on NCAT's Administrative and Equal Opportunity Division.

The NSW Ombudsman

The function of the Ombudsman is to investigate complaints by the public concerning performance issues of government agencies. However, its powers are limited to just recommending to the agency complained of that it should reconsider or change its action or decision, or change a law, rule or procedure. It has no power to compel an agency to comply with its recommendations.

The Office of the NSW Ombudsman was established in 1974 and, despite the obvious existence of problems in the administration of land acquisition processes since that time, there does not appear to be any indication that the Ombudsman has had any impact on the administrative functions of TfNSW or its predecessors during its existence.

Land & Environment Court

As previously stated, when a matter moves to compulsory acquisition, and determination of values fall upon the VG, the conduct of the acquiring authority in relation to all its activities in facilitating an acquisition value prior to the issuance of the PAN effectively become redundant. A claim in the Land and Environment Court is restricted to only an appeal against a valuation arranged by the VG. The LEC does not have jurisdiction to deal with breaches of standards and processes by TfNSW during the 'acquisition by agreement' process.

The Independent Commission Against Corruption

The Independent Commission Against Corruption ("ICAC") was established in response to community concern about the integrity of public administration in NSW, with its principal functions being:

- to investigate and expose corrupt conduct in the NSW public sector;
- to actively prevent corruption through advice and assistance, and
- to educate the NSW community and public sector about corruption and its effects.

Section 8(1) of the *ICAC Act 1988* defines 'corrupt conduct' as:

> (a) any conduct of any person (whether or not a public official) that adversely affects, or that could adversely affect, either directly or indirectly, the honest or impartial exercise of official functions by any public official, any group or body of public officials or any public authority, or
>
> (b) any conduct of a public official that constitutes or involves the dishonest or partial exercise of any of his or her official functions, or
>
> (c) any conduct of a public official or former public official that constitutes or involves a breach of public trust, or
>
> (d) any conduct of a public official or former public official that involves the misuse of information or material that he or she has acquired in the course of his or her official functions, whether or not for his or her benefit or for the benefit of any other person.

We referred our matter with detailed information to ICAC on the basis that our complaint was about public officers dishonestly exercising their official functions, or at least improperly exercising their official functions in a partial manner, resulting in a breach of public trust. The response received was:

> *"For allegations of TFNSW officials failing to act in accordance with applicable standards, policies, and codes of conduct and ethics, if there is there is no specific information to indicate that any purported breaches are due to corrupt conduct in that TfNSW officials conduct themselves in a way to derive personal benefit, then it is not the role of ICAC to review the decisions of or processes followed by TfNSW where corrupt conduct is not otherwise evident."*[12]

The catch 22 here is that a landowner does not have the investigative powers to conclusively establish corrupt conduct so as to have ICAC investigate corrupt conduct that the landowner would have had to already establish.

Superior Courts

There is technically potential for redress in the superior courts in an action for judicial review or misfeasance, though it would certainly be a daunting and generally unviable process given that TfNSW is an entity, not a person, and has ample taxpayer-funded resources at its disposal to undertake extensive stone-walling and delaying tactics to frustrate litigant landowners into submission, whilst the landowner could be exposed to costs $500,000 or more. So it is not really a viable option for the absolute majority of aggrieved landowners.

NSW Auditor-General

This is a resource that is only available to the NSW Government. However, this Agency and the following audit by the Auditor-General is being referred to for 2 reasons.

The first reason is to highlight the recourse that the Government has when it suspects that the acquisition procedures adopted by TfNSW were inappropriate and caused it to suffer financial loss. Although government loss indirectly equates to citizens loss, it is nonetheless a loss that can be carried without detriment to any individual. In contrast, landowners that suffer loss due to inappropriate acquisition procedures adopted by TfNSW carry the loss individually with detriment that can be significant to catastrophic. Yet, landowners have no such recourse for a review, an audit or an appeal, which is difficult to comprehend given that the Government is better able to carry a loss than an individual. Citizens would be truly outraged if they were aware of this, which most aren't because acquisition matters ultimately are only of interest to those that are affected.

[12] ICAC Letter, Ref E21/0455, dated 20 April 2021.

The second reason is to demonstrate that the findings made against TfNSW are findings on its practices and, by inference, its culture. It is the very point this submission is seeking to make. TfNSW operates without transparency or accountability. It has poor processes, officers are not adequately qualified to perform this important process professionally, there no effective management and supervision and so on. The Auditor-General has the investigative powers to unravel the true state of affairs within TfNSW. It is a power that ICAC also possess.

The Camellia Acquisition Audit

In November 2020 the government referred the acquisition of 4-6 Grand Avenue Camellia by TfNSW to the Auditor-General of NSW for audit. The property was acquired by agreement in June 2016 for $53.5 million from owners that purchased property 7 months earlier for $38.15 million, despite TfNSW subsequently having to spend a further $107 million for the environmental remediation of the property. The Auditor-Generals main findings against TfNSW were:

- No sound probity management controls in place;
- Decision-making was rushed and poorly informed;
- Lack of analysis and due diligence;
- Poor governance and ineffective administration;
- Probity practices were insufficient;
- Internal policies and procedures were and continue to be insufficient;
- No complete or comprehensive records of negotiations or decisions reducing transparency of the process and outcomes;
- No appropriate response to risks of corruption, misconduct or maladministration when brought to its attention;
- Policies and procedures are primarily focused on acquiring land to meet project needs and timeframes;
- Reliance on informal and internal advice on the land's value being neither robust nor appropriate;
- Current acquisition policies and procedures unstructured and largely unchanged from 2016; and
- No current consolidated guidance for property acquisition.

A Proposed Alternative Acquisition Process Framework

Since affected landowners are involuntarily involved in dealing with the dispossession of their property, and given the economic, social and political importance of land rights issues, as well as the often large amounts of compensation involved, the entity conducting the acquisition process should be independent and impartial and have no affiliation with TfNSW or indeed the NSW Government. The entity should be subject to public scrutiny and to wider democratic and professional accountability for its performance.

The entity should work exclusively within the legislation and internationally recognised best practice. It should be staffed with a team of professional and technically competent personnel that might include valuers, town planners, surveyors, engineers, lawyers, accountants and, not least, highly skilled interviewers. Such an entity could potentially be a mobile unit so that the team could locate itself in the area where the public purpose is proposed after determining the scope for the public project and the land that will need to be acquired.

It is proposed that the first and most important step for the interviewers to conduct one-on-one at home interviews with affected landowners, not group meetings. The objective of these meetings should include obtaining a good understanding of all relevant considerations that connects the landowners with their property, such as their social and lifestyle needs within their immediate neighbourhood and the broader community, their future plans, and any special value their properties hold to them. This is a critical aspect that needs to be given personal and generous time. This process could uncover matters that could be essential for genuinely minimising any detriment the landowner would otherwise suffer. This process would help ensure thorough identification of the extent of rights and financial opportunities that the acquisition would take away from landowners.

The second step might involve the town planners, engineers and surveyors undertaking an in-depth analysis of the property development needs and plans for the area, particularly greenfield areas. This would be undertaken in consultation with Council, NSW Planning, local town planners and key local businesses to form a clear understanding of current and imminent zoning, as well as any re-zoning that would have naturally occurred but for the proposed public purpose. The conclusions made would then be used to determine how they will affect each property in respect to highest and best use.

The third step would then have the valuers undertaking a detailed analysis of the property market, including identifying the positive and negative impacts of value due the proposed public works and, with the information obtained from the first two steps, prepare a detailed valuation report in accordance with accepted valuation standards and principles and the specific requirements for acquisition valuations as outlined by the guidelines published by the VG.

The role of the lawyers is to ensure that the interviewers, the town planners and the valuers have properly considered all relevant aspects of the Acquisition Act.

This is of course a simple outline of an alternative process that obviously needs more considerations and detail to fully develop, which should include such things as the right for landowners to engage and object, and the kind of independent oversight required to ensure the probity of the entire process.

The key objectives with this proposal are:

1. Fully understanding each landowner's unique circumstances and providing special assistance as common decency would require;

2. Making a thorough and impartial assessment on existing and future zoning that is supported by relevant and verifiable research and data, which is applied in a consistent and logical manner to each of the properties;

3. Undertaking valuations on each property using consistent assumptions, approaches, application of the same underlying research and considerations to produce values that not only reflect the current market for the area but also have logical relativity when compared to all the properties being acquired; and

4. It assures a uniform application of the acquisition procedure.

Every aspect of the process should be transparent and landowners should be given the opportunity to review a draft of the compensation calculations before finalisation to have the opportunity to query or provide relevant information that may not have been considered. There should not necessarily be a need for landowners to engage their own law firm, valuer or town planner. Also, the entirety of the assessment process should be undertaken with ample goodwill and generosity, and any areas of doubt or uncertainty should be determined in favour of the landowner.

Landowners should have the right to appeal the compensation calculation with the LEC with the assistance of a lawyer, with fees reimbursed on the same basis as the present. However, the engagement of the VG to obtain another valuation would seem superfluous as it would be doubtful another valuation could be compiled that would compare to the depth and consistent application of the resources used to compile the original valuation. The appeal would refer to all the relevant material generated and relied upon by the acquisition team and the integrity of the material can be tested as well as the correct application of the Acquisition Act.

The State's need for acquisitions will always exist and may even exponentially increase. An alternative such as the above may well prove to be cost effective, as deficiencies in the current system might be generating substantial, unnecessary and unmeasured costs. If an impartial, fairer and more transparent system results in higher levels of compensation, then that is a good thing for the dispossessed landowners and also improves trust and confidence in the NSW Government. It also means that problematic compensation amounts paid for the likes of the 'Leppington Triangle', the 'Camellia Property', and probably similar other matters that have not come to light, would come to a grinding halt.

Recommended Changes to Existing Acquisition Process

If the NSW Government does not have the will or political valour to embark on a course of action that would ultimately remove the power from TfNSW to undertake acquisition processes, then it might consider improving the existing procedures of compulsory acquisition to at least make it more efficient, fairer and legitimate by examining the utility of the following:

- Valuers should be required to only operate within the limits of their qualifications and experience and only accept instructions to undertake acquisition valuations if they possess sufficient knowledge and skill. The valuation reports for acquisitions are meant to be prepared impartially and so should comply with valuation standards and principles, the requirements of the Land Acquisition Act, court rules, practice directions, codes of conduct, guidelines such as those laid out by the VG and contemporary court decisions.

- There should be additional requirements for the qualifications, experience and report preparation for valuers that are required to provide valuations on properties that are greenfield sites, that are unique, that have a potential best use other than the existing use, and that have been materially impacted (positively or negatively) by the carrying out, or proposal to carry out the purpose for the acquisition.

- Valuers should discuss the details of properties being acquired with the landowners to ensure that all relevant particulars of the properties and the owners legal current and future use is understood and this should be detailed in the Valuation Report.

- Where the current or proposed zoning affecting a property is, or will be, a step in the acquisition process, then the Valuation should be supported by a town planning report.

- Landowners should be given a copy of the valuation report as soon as it is completed.

- Landowners should have the right to be heard throughout the acquisition process and all comments, statements and views including expectation values need to be recorded and taken into account.

- Valuation Reports should acknowledge that the reports are capable of being relied upon by the landowners for determining whether to accept a compensation offer and so should not contain disclaimers that have the intention of preventing landowners from potentially making claims for professional negligence against them.

- Negotiation meetings should be replaced with conciliation meetings, paid for by TfNSW, in which the conciliator is a lawyer that specialises in land acquisition matters, though a protocol would need to be established for the selection of conciliators.

- Aggrieved landowners should be afforded a right of review or appeal on acquisition procedural matters to an independent court or tribunal. Such a right should be made available and heard before an acquisition moves to the compulsory phase so that if the review or appeal is upheld then TfNSW would be required to recommence the acquisition by agreement process. This could severely impede the project implementation timetable, though is the price to pay for a quality control measure that should elevate the emphasis, impetus and determination by TfNSW to conduct the 'acquisition by agreement' process in a fair and transparent manner, and in accordance with the Acquisition Act and the guidance of the prevailing case law.

- As TfNSW is in a superior bargaining position to landowners on a process that is imposed upon the landowners against their will, and also has at its disposal unconstrained access to resources and information, it should carry the burden of demonstrating 'without reasonable doubt' the justification for its conduct in the acquisition process; whereas the landowners should only be required to only generally meet the threshold burden of 'equal probability'.

Potential Areas for Legislative Review

During the research undertaken in the preparation of this submission, several issues were identified that would benefit from a robust analysis and debate to determine whether they should be in some form incorporated into the Acquisition Act. Such issues include:

- Just compensation should ensure that all items of loss which flow naturally and reasonably from the process and outcome of acquisition are compensated, including that for economic detriment. The compensation amount should be sufficient for a replacement property that corresponds to the property being acquired in physical conditions as well as economic and location attributes.

- If zoning constraints are placed on land for the purpose of signalling its potential future acquisition then the proposed acquisition is to be regarded as abandoned if the process is not completed within a specified period as a result of delays in inaction by TfNSW.

- If the zoning constraints have the effect of putting otherwise developable land 'on ice' so as to prevent the land owner from developing the property in the manner intended, then the land owner should be compensated for losses that flow naturally and reasonably for the interference caused.

- As TfNSW is in a superior bargaining position to landowners on a process that is imposed upon the landowners against their will, and also has at its disposal unconstrained access to resources and information, it should carry the burden of demonstrating 'without reasonable doubt' the sufficiency of the compensation amount it proposes to give the landowners; whereas the landowners should only be required to proximately meet the threshold of 'equal probability'

- The assessment of compensation should recognise the taxation impacts and the taxation treatment by the ATO of any compensation payments, and adjustments should be made that recognises the opportunity foregone for landowners to best tax manage the disposal of their property based on timing of the disposal that they would have otherwise had control over.

Conclusion

In 2020, TfNSW was responsible for 80% of all land acquisition in NSW, so is the predominant acquisition agency in NSW. Land acquisitions by TfNSW is not a fair and transparent process. It is riddled with inefficiencies, inconsistencies and a lack of governance that has long resulted in financial loss, despair and distrust in the NSW Government by citizens involuntarily roped into the process, whilst providing windfall gains to a minority of citizens or entities that have the financial means and/or connections for securing compensation amounts well beyond the concept of just terms.

This controversy plays out within the environment of the 'acquisition by agreement' process, which now represents almost 90% of all acquisitions by TfNSW. The theoretical support measures for this process are heavily promoted by TfNSW through its various communication avenues, whilst the details and extent of controversies and landowner dissention on the failure of these measures is tightly guarded by it. Nobody can determine the extent of rot that is occurring within this process other than TfNSW, although it may not even know or want to know, as such information could become discoverable in the event of an enquiry.

The doom and gloom is not 100% as the small percentage of landowners (now almost down to 10%) push through the coercion and threats and ultimately reject the 'acquisition by agreement' process and submit to the 'compulsory acquisition' process. They at least endure a fairer and more transparent process in the hands of the VG, albeit often with an acquired distrust in agencies controlled by the NSW Government. For the less than 2% of landowners that have the determination and courage to test their assessment of just terms with the LEC, they often achieve the best outcome and if not at least they have the assessment of their compensation affirmed by judicial determination.

TfNSW cannot seek comfort in comparing itself to other NSW agencies, nor can the NSW Government seek comfort in comparing itself to other states or international jurisdictions. This is not an issue in which poor conduct can be justified on the basis of any hollow and unfounded assertion that such conduct is at least better than elsewhere.

This Parliamentary Inquiry is a step in the right direction for making a preliminary finding on the state of affairs in how TfNSW conducts its acquisition process. It is hoped that from the findings that emerge, a motion to pursue a Royal Commission into the conduct of government agencies in dealing with land acquisition might eventuate.

Signed:

Ray Dibb
B.Comm/LLB. (HONS)

Date: 14 June 2021