Submission No 75

INQUIRY INTO ACQUISITION OF LAND IN RELATION TO MAJOR TRANSPORT PROJECTS

Organisation: FM Legal Pty Ltd

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SUBMISSION TO THE PARLIAMENTARY INQUIRY INTO ACQUISITION OF LAND IN RELATION TO MAJOR TRANSPORT PROJECTS

Dear Committee,

I am a solicitor and former barrister practising in compulsory acquisition law. In January 2017 I opened my firm as by then I had a strong practice in compulsory acquisition law and decided to specialise in this area. I personally oversea every case and have 5 staff in support including a property lawyer and a taxation lawyer that also advises on acquisition law. Since launching in 2017, around 75% of our cases are compulsory acquisition matters.

We have had the opportunity of reading most of the submissions lodged by 1 July and, we endorse submissions No 36 of David Newhouse, Newhouse & Arnold dated 31 May 2021, although make some different observations in certain instances.

We respond to your following Clauses in the Terms of Reference:

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

1. The Committee needs to make a recommendation for urgent change on the costs associated with the purchase of replacement property to be allowed to all disposed owners. This is mainly stamp duty but also costs such as obtaining a new loan, building and pest reports and conveyancing arise and generally this can be around 5% of the property price.

2. The Russell Response[1] commissioned in 2014 said briefly that stamp duty was payable. The Government response to the Russell review stated "Where *an acquired property is held as an*

[1] David Russell SC Review of the Land Acquisition Just Terms Act 2014 top of page 40.

investment, legal and stamp duty replacement costs will still apply"[2]. In our view this was potentially incorrect at that time as by 2014, several Court decisions had started to emerge that were curtailing the rights to stamp duty* FN. However, it was not until 2016 that a new Court decision was delivered that brought an end to stamp duty and associated costs being paid to many owners. This decision was of course informed by the submissions of the RMS in seeking to pay less compensation to the dispossessed owner.

3. Presently, it is only those owners of the land that literally occupy the land themselves that are being offered and awarded stamp duty, although even an owner-occupier has no guarantee to stamp duty. Where land has another higher and better use, such as a family home that has the potential to be valued based on land that is developable, then stamp duty may also be refused. Owners who rent the premises to a company are not entitled to stamp duty. It is good accounting practice for owners of the land where business is conducted to have a different entity for the business than the landowner, yet this is the very practice that disentitles then the owner to the stamp duty. Owners who rent the premises to anyone – whether it is a related entity that they control, or a third party are generally not entitled to stamp duty. Owners who own the land in their superannuation fund are in the same position where they lose the ownership of the land, and then must bear the replacement costs in full. This is due to the wording of the Act requiring 'actual use of the land' which criteria is not met where anyone other than the owner on title uses the land and to s61 which separately also can be used to deny stamp duty where there is a higher and better use of the land. Thus, the small property investor loses out, as does a family business the owns the land in their name or their superannuation and rents it to their company.

4. To illustrate how unfair the Act is, we have currently two adjoining neighbours whom we act for who have a commercial warehouse-style property. One of them had the expected structure of the land is in their names and then a company renting the land from them. The one next store had the land in the company name and the company used the land. That client was awarded stamp duty and all associated costs with the repurchase, their neighbour was not given one cent above the market value.

5. My colleagues suggest that the law should further be varied to not make the direct payment of stamp duty to the owner, but rather allow for a period of 1 to 2 years to buy replacement property, with a stamp duty exemption. I endorse that position but expect that it would have the result of some complicated interests with the Treasury and acquiring authorities as it would relieve all acquiring authorities of the burden of paying stamp duty. It would instead mean that those funds from stamp duty are lost to Revenue NSW.

6. If stamp duty is to be given as a credit for future repurchase it would also be reasonable to allow for it to be covered up to at least another 10% to20% on top of the market value, due to the owners frequently finding themselves forced to pay more to find a replacement property. This can occur due to the lack of stock and a strong market.

[2] NSW Government Response to the Russell Review see top of page 5.

7. **Annexure A enclosed** with this submission details the case law that further goes into how this came about and a simple change of wording in the Act could be introduced to allow for clear payment of stamp duty and related costs to all owners who have land acquired.

1(d): 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.

8. Once a project is funded and an opening letter is sent to the interest holder, it is then under the compulsory acquisition process, not running in parallel with it.

9. The only conduct that falls outside what could classically be said not to be at the start of the compulsory acquisition process is land that has been zoned for a future acquisition, but which the acquiring authority has not formally sent an opening letter advising of their intention to acquire the land. Owners sometimes approach Councils to start the acquisition early, sometimes Councils will write to owners to advise of the rezoning and to ask them to express their interest in selling to Council. We have seen firsthand the tactics of one Council in doing this and in then avoiding paying fair compensation under the Just Terms Act by saying the Act did not apply as the owner replied to say they wished to sell to Council.

10. We note several submissions made to this committee including submission No 26 by the Appin Orbital Corridor Group are the types of owners who genuinely need significant reform as they are dealing with future acquisitions of unknown timeframes. We have many instances of the same problems arising with land zoned by Councils as RE1 for Public parks and land such as the Orbital. The challenge is that for future planning, the land may not be required for 5 to 50 years and yet the owner has this impact on their land whereby it is difficult to sell if they wish to on the open market. The hardship provisions of the Just Terms Act are available but are extremely difficult to have accepted. For instance, we have one matter with an owner who cannot sell their land on the open market due to RE1 zoning, who is suffering from significant medical problems, has no income and is in default of his mortgage, yet Council has for months now asked for more and more information to delay making a decision. It would be likely that Council has a funding problem so may not be able to acquire the land even though they want to do so, and indeed so the owner wants to sell to them. Council has the power to then remove the zoning instead. However, there is no compensation paid to the owner and the owner must bear their legal costs and undergo the stress of dealing with the Council for months and even years even if the council do this.

11. We also have had Councils delay to such an extent by refusing to give a timeline to the point where owners become frustrated and give in to accepting amounts that are significantly below what their legal and expert valuation advice was under the Act. Because many owners would not fall into hardship as they cannot meet the criteria, they are left at the mercy of the Council in terms of either accepting the offer or sitting in limbo for years. In one recent matter, this has occurred to 6 adjoining owners, 5 of whom we acted for, and for which the system failed them without a doubt. They gave in after 4 years and accepted what was likely to be under market value, as there was no adjustment for the significant market movement that has occurred in the last few months.

12. Councils also will have different views on what should be paid for reasonable legal fees and valuation fees for acting on an acquisition, as well as other costs associated with a move. We have had Councils refuse to pay more than $2,750 for the legal advice on an acquisition that ran over 2 years including the conveyance costs, which alone would be around $2,750. With one Council we had them say "their policy was not to pay more than $7,500" and when the matter went to the Valuer-General the actual costs we incurred and that were allowed as reasonable was around $25,000.

13. A similar outcome arose concerning the market value in that matter with Council refusing to negotiate, but fortunately, we had a fair outcome determined eventually by the Valuer-General. This matter meant that the owners had around 18 months to wait for that outcome and in the meantime, their property was costing them a significant loss as the tenants moved out due to the Council advising of the acquisition. Whilst we did recover that loss of rent, the owners had to pay their mortgage without income for 18 months.

14. A recommended change would be for all Council acquisitions to be given to one central body to have a consistent fair approach.

Sydney Metro/RMS acquisitions

15. Contrary to the above with local Councils, my experience with Sydney Metro in how they conduct themselves was, until very recently, excellent. Up until 2020, 100% of my matters with Sydney Metro resolved by agreement. That was due to them taking an approach where their experts and acquisition managers were willing to listen to our experts and compromise, that is, both sides moved in their offers, meetings were held and extensive discussions over 6 to 12 months resulted in agreements being reached.

16. In however the October 2019 Sydney Metro West project which is still underway, there was a different approach taken and my perception was that they were concerned, too much so, about the fear of an Audit finding that they had been too generous and should not have compromised. The Audit fear or cultural change perhaps has led to their acquisition managers and experts being unwilling to move on their opinions regardless of what evidence we have served from our experts. The degree of movement eventually occurred in the range of perhaps 5 to 15% above initial offers. We accept that an expert must endorse the total compensation payment being made to the owner, but we suggest that those experts also need to listen much more to the experts on behalf of the owners and leasehold interests. It seems to be that they are too worried about there being some finding against them and the suggestion that the valuers be later held to account for an incorrect valuation will only in my opinion make things worse. Many valuers may simply turn down working in this field if they fear there will be some scrutiny. What they do need is a willingness to be mindful of there being a sensible resolution that is within the boundaries of the Act, that everyone can live with. Otherwise, the only winners are the lawyers and experts who will continue to be paid for their services by the public purse until the end of the Court Proceedings. Rarely, costs are not awarded in favour of the former owner, and the costs on both sides can be significant.

17. In 2019-2021 on this Sydney Metro West project, I acted for 50 interests of which 35 settled and 15 went to the Valuer-General. The 35 that settled nearly all settled just before the March 2021 gazettal. Concerning land, that is understandable and common practice as land generally goes up in value so usually, people wait to get the most given that the acquiring authority is only bound to pay the market value at the date of agreement or gazettal. For those who were classic investors, as they were not obtaining stamp duty, they were of course keen to ensure every cent of return to them. In one instance we had a family who had bought their first investment unit in 2016 when the market was strong and Metro told them they had overpaid and offered less to what they had paid, and with no stamp duty, leaving them at a significant loss. They however were able to negotiate upwards but only due to the market starting to show stronger sales in February 2021. In most of the residential matters, Metros valuers did a reasonable job of resolving things in their favour.
18. However, in the matters that we did not resolve with Sydney Metro, I was dismayed to see how they then conducted themselves when the matters went to the Valuer-General. Their valuations to start with were, generally in the commercial properties anyway, very conservative. In most instances, Metro did not update their valuation reports so that the valuation was out of date by around one year when the matter went to the Valuer-General. In some instances, increased offers were made by Metro but not in all instances. Where increased offers were made, Metros valuers despite accepting there was a change in value, did nothing to put any increased offer in their submissions. This has led to grossly unfair determinations as the goal posts were simply too far apart with the valuation figures on each side.

19. To illustrate the differences, we had one owner of commercial land offered total compensation of $2.715m for market value (around March 2020) and $15,000 for legal and valuation fees. We tried to negotiate with Metro, but they never came back to us regarding an increased offer even though there had been over a year since their valuation and ample evidence from new sales. We had no choice but to let the matter be determined by the Valuer-General in March 2021. The decision came in last week with the market value determined at $4.431m and legal costs of $37,000 and valuation fees of $15,000. Our client will have the funds in around late August; however, it is only now that they have the outcome can they commit to buying another property. They will not be able to buy the same size property as they have lost out by the time delay of now having an outcome and a budget and given the difference in value, this cannot be just down to growth. The constant low valuations is the real problem.

20. In another matter, Metro made technical legal submissions for the first time when a matter went to the Valuer-General, to disallow certain compensation to a property owner. This point was never raised until the case was heard by the Valuer-General and we have never encountered such unfair conduct before. If Metro intends to make legal submissions on any matter, that is their right but it should be done before the matter is being determined and raised any time before this given that they have usually 12 months as they did in this instance.

RMS Conduct

21. Sydney metro and RMS are now part of TfNSW. Their practices and culture are different though with RMS being much more likely to argue everything, to take every point, and to sometimes cause problems where problems could be avoided. The best example of this was an acquisition for the F6 Motorway extension that we acted on in Kogarah that involved one client who had both a freehold and leasehold interest in the land. After many discussions, an agreement was reached for both the freehold and leasehold matters at a lump sum for both interests that included expert costs plus GST. The agreement was reached around 1 week before the proposed gazettal. When the contract was submitted, the authority put the entire figure as the market value to the owner for this property. It had a special condition acknowledging there were no other interest holders, i.e. no lease or business interest. The contract was contrary to the facts, contrary to the open offers to the leasehold interests and put our client in a position of conflict regarding the duty as a director of those companies. It also was relevant to taxation where our client would have to potentially deceive the ATO in showing that the compensation was for their market value, which you get rollover relief from, where it was not so. We asked RMS (Now Transport for NSW) to break down the offer and ensure that the business claim and the expert costs were separated, but they failed to agree to do so, only that they needed further time to adhere to our request. In the absence of any agreement by RMS that they would allocate anything to the leasehold interests, our client did not consent to the extension of time on the PAN. This left our client in a position where he could not accept the offer and it had to go to the Valuer-General.

22. Another client in this project felt bullied by the RMS – the RMS manager would turn up at the premises and try to cut a deal without me. They did this on more than one occasion.

23. RMS also have in one case given me misleading evidence about the market value paid for a neighbouring land that was relevant to my clients land, by saying the amount agreed that was reported on RP Data was the market value plus the stamp duty, and solatium and legal fees resulting it the actual price being around $200,000 less to RP Data. They fought an FOI application that I filed to get the original valuation reports. Eventually I was able to obtain other evidence that proved the RMS did not include the $200,000 in the market value. However there was no recourse as the clients had signed a contract for sale with an indemnity and to set that aside we would have had to prove fraud.

24. RMS do have some good processes in place and are always willing to listen and have meetings with impacted owners, and despite the above, I usually find we resolve our matters by agreement. However, the route to that resolution is not always smooth.

1(i): any other related issues

Delays

25. The Valuer Generals decision for Metro West matters are currently late, and the market growth since March 2021 is huge so that former owners will still not be able to find a replacement property. Further, they were not allowed stamp duty so to have to work

backwards from that price. The lateness of the determinations has caused a significant injustice and there is no legal recourse here. The only significance of it being late is the payment at an interest rate of 2.68%. A simple amendment to the interest rate like the Court rules for unpaid judgments would go a long way to assisting e.g. 6% above the cash rate.

The advance of Funds before a final determination

26. Acquiring authorities should be obliged under the Just Terms Act to give an advance to the owners and tenants of a % of the offer made. This allows for the funding of new land or business premises. However we have had success with acquiring authorities in giving clients an advance usually in the range of 80% of the offer for freehold matters (not for leasehold matters) where there is evidence that it is required. The issue is that usually, they will want to see an exchanged contract for a replacement property, and then funds will be advanced. We had to push hard for this to be given in around 2018 when we had matters with the Parramatta light rail and one case in particular where we were finally able to secure it. We were in 2020 and 2021 then able to use this to assist in Sydney Metro doing the same thing. This has worked well for freehold owners and should be a legal right rather than at the discretion of the acquiring authority. We also say that currently due to the delays with the VG decisions Metro have agreed to give advances whilst clients await final payments, although they have not agreed to give the extra costs for this work and the VG has declined to allow for the extra costs.

Exchange of evidence

27. A simple change we ask for in the process is that the owner /tenant is given the valuation report at the time of their offer.

28. The current practice is that one figure is given, which is a combination of market value, disturbance legal and valuation fees – everything is given as a lump sum. This is particularly difficult with business valuations as it is not at all clear what has been offered.

29. There is little justifiably reason to hold back on those reports and we ask for the process to be changed to give those reports with the offer. In many instances of smaller business claims where the amounts are less than $150,000, it would well potentially save in the tenants even obtaining any expert evidence or legal advice at all if they knew what they were really being offered.

Perception of Bias of the Valuer-General

30. A number of the persons on the Valuer Generals panel do a significant amount of work for Government and in particular for TfNSW.

31. We had a recent matter where we raised a concern and asked for further information on the number of cases that the appointed VG valuer had at that time for TfNSW and were refused answers. We were just told they all comply with the code of conduct but this is simply naïve to think that a valuer who works virtually exclusively for TfNSW would be genuinely independent despite the best will in the world. More investigation is warranted on who is on

the panel and owners if given some input could select from a panel from the VG to avoid this and to feel control over the process.

Reimbursement of Expert costs

32. Our submissions on this point are centred on the reimbursement of expert costs to someone who has had their interest acquired. In every case we act in, we supply the authority with an itemised account of all fees incurred which are generally not conceded in full. Usually, the reason provided for the denial is that the authority says the fees are too high because of comparison to other fees they have agreed to pay in similar matters. Sometimes lawyers with no experience at all work in this field, do not do in our view sufficient work and their fees are then used as a bench mark.

33. We have had situations where we worked on matters to get an excellent outcome, only to be offered a low amount of fees by the acquiring authority with a 'take it or leave it' attitude regardless of the length of time we have worked on a case. This mainly occurs with Councils.

34. Some cases are extremely complex with multiple experts and a solicitor facilitates this all, incurring costs in doing so. It is unfair that a client would be incurring those costs when they arise directly out of the acquisition and is incurred to ensure their case is properly argued and researched.

Taxation Advice

35. In providing legal work, FM Legal provide advice on taxation law implications arising out of the compulsory acquisition. These costs have been repeatedly denied by the acquiring authority and by the Valuer General. Compulsory acquisitions bring about significant tax implications for many freehold and tenancy interest holders. Sometimes it is a simply rollover advice but many times it is not and we have in the past shown the acquiring authority and the VG the actual extensive written advice given. Each time this advice is given by our firm, it is strictly limited to advising on tax law consequences directly arising from the compulsory acquisition. Any prudent solicitor would advise their client on such issues or advise them to seek their own advice in this respect. However clients are not being given this allowance anymore (historically we have had some matters where it was allowed) . Reasonable costs for taxation consequence should be allowed to all (it is only owner occupied residential land that does not require it).

Recommendations

36. We propose that
    (a) Stamp duty or a stamp duty credit for up to 2 years is given to all owners of land acquired
    (b) Costs associated with the repurchase of land is allowed to all owners (new finance, future conveyancing costs, building/pest/surveys)
    (c) Tax advice arising out of the acquisition is allowed
    (d) Consideration be given to the owners of land having an input into the selection of the valuer to be appointed by the Valuer General
    (e) All offers made to enclose the valuation report upon which the offer is made
    (f) Revisit the law on allowing a % of the market value as compensation in lieu of the current sum of up to $81,003 that is allowed, and for that to be on all freehold claims including commercial land

(g) A new system for Council acquisitions to be done by a central body
(h) Requirement that the acquiring authority must put a valuation valid at the date of Gazettal to the Valuer General
(i) Requirement that the acquiring authority cannot raise new legal points in the Valuer General Determination if not raised prior to the Gazettal

We love the work that we do, and we have many cases with happy clients and good outcomes, but unfortunately we have clients with outcomes that are poor due to the Act being unjust and sometimes due to the process being unfair.

We would like nothing better than for our roles as lawyers to be much less daunting as it is right now, there is an immense weight on us as lawyers and on the valuers and experts we retain, dealing with peoples lives – their homes and their livelihoods. We would implore the changes above as we should be able to always secure the best outcome without the worry that we currently have in many instances. There are simple solutions suggested above. Please make them happen. Thank you for the Committees time in considering this and indeed for its establishment.

Yours faithfully

FM Legal Pty Ltd

Flo Mitchell

Partner