

27 April 2016

Committee Secretariat
Government Administration
Parliament Buildings
Wellington

Dear Sir or Madam

LAND TRANSFER BILL COMPENSATION CALCULATION (VALUATION) PROVISIONS

1. The New Zealand Institute of Valuers (the '**Valuers Institute**') welcomes the opportunity to highlight concerns and recommendations regarding the compensation valuation provisions of the Land Transfer Bill (the '**Bill**'). The Valuers Act 1948, s10 (d) provides that the general functions of the Valuers Institute include "*to consider and suggest amendments to the law relating to the valuing of land and related subjects*". We are pleased to contribute on the compensation issues.
2. In 2016, the Bill's compensation valuation provisions were raised at the AGM of the Valuers Institute's Auckland Branch. Many members indicated their shared concerns (by hands raised). The concerned members included senior and experienced valuers including members of the Valuers Registration Board and Valuers Institute's Council.
3. The Valuers Institute's President appointed Mr Peter Bates as a liaison on this matter. Mr Bates is a Registered Valuer and a lawyer with membership of the Valuers Institute, the Auckland District Law Society Inc ('**ADLSI**') and the New Zealand Law Society ('**NZLS**'). He initiated dialogue with ADLSI and NZLS and has worked in with their respective law reform committees in preparing these submissions.
4. Mr Bates has also engaged in further consultation. This included conferring with senior law and valuation practitioners around New Zealand and law and valuation academic faculty from Massey University, Auckland University of Technology and the University of Canterbury.
5. The Valuers Institute would like to acknowledge the assistance of Messers Ben Thomson and Bryce Town of ADLSI and Ian Haynes of NZLS, in welcoming engagement with us. In particular, we are grateful to Professor Elizabeth Toomey, of the NZLS Property Law Section Law Reform Committee, for her assistance and time regarding valuation compensation issues in the Bill.
6. The Valuers Institute believes that there are serious problems with the compensation provisions under the Bill and its further submissions are **enclosed**. Please contact Peter Bates, if you have any questions. Mr Bates may be contacted at 09 482 0209 or peter@bates.net.nz. The Valuers Institute hopes these submissions will be of assistance. Thank you for your consideration.

Yours faithfully

The New Zealand Institute of Valuers



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NEW ZEALAND INSTITUTE OF VALUERS SUBMISSION TO SELECT COMMITTEE: LAND TRANSFER BILL COMPENSATION CALCULATION (VALUATION) PROVISIONS

1. Calculation of compensation for deprivation of estate or interest in land

1.1 Clause 3 (b) of the Bill records the purpose as including to:

*“(iii) provide **compensation** for loss arising from the operation of the system...
[emphasis added]”*

1.2 Indeed, **compensation** is one of the few key purposes of the Bill. The fundamental point of the Torrens land registration system is to guarantee title. It is that State guarantee which underpins the whole system. If the State guarantee provides less than compensation, it is an inadequate indemnity and brings into question the New Zealand Torrens system.

1.3 Accordingly, the purpose of the compensation calculation clauses of the Bill should be focused on provision of proper compensation. Yet, there are serious deficiencies in the compensation calculation provisions.

1.4 There are three key compensation valuation issues, being:

- a) The basis for compensation for land lost under the Bill is “market value” (cl 65(1)). That basis is certain to be inadequate and unjust in foreseeable situations of loss of title. Rather, the basis for compensation should be as if the land were taken under the Public Works Act 1981 (**PWA**). That is, compensation is the monetary equivalent of what has been lost, from the perspective of the person to be compensated.
- b) The Bill proposes creating regulations under cl 68 and cl 226(q) “prescribing the manner in which movements in land value are to be calculated...”. This is an impractical proposal in that regulations could not provide a workable prescription for the calculation of land value movements over time. Rather, valuation evidence from Registered Valuers should be called to assess the compensation value of the relevant estate or interest at the relevant date (consistent with other legislation).
- c) The ‘baseline’ date set (at cl 65(1)) for assessing compensation, being the date of discovery, should be the date of claim. Although the Consultation Draft adopted the Law Commission’s suggestion that the date be based on the date of claim, the Bill has changed this and adopted the date of discovery. Yet, the Explanatory Note gives no explanation for this change. Furthermore, judicial discretion should be allowed to provide justice where compensation should fairly be set at a different date than the ‘baseline’ date set under the Bill. Over a longer term values are generally likely to rise. However, values could also rise or fall significantly in the interval between loss of title and award. In some circumstances it might be more appropriate to adopt the date of award and it might be unjust to adopt the date of claim or discovery.

2. Market value versus compensation

2.1 Market value has a clear and established definition within the legal and valuation context. However, market value would be inadequate in many situations to compensate a party who has lost their interest in land. The term ‘compensation’ in the land context, has a well-established set of principles both in terms of valuation and case law and in particular under the framework of the public works compensation legislation.

NEW ZEALAND INSTITUTE OF VALUERS SUBMISSION TO SELECT COMMITTEE: LAND TRANSFER BILL COMPENSATION CALCULATION (VALUATION) PROVISIONS

- 2.2 In some cases (perhaps many) market value is adequate and appropriate compensation for loss of land. However, there are many circumstances where market value would not equate to compensation. Compensation is the monetary equivalent of what has been lost. Compensation must represent the loss from the perspective of the party who has lost the land. The focus of compensation is the value of the land to the party who has lost the land, not the value of the land on the open market and not the value to the acquirer. Compensation must be 'full' and 'fair'.
- 2.3 Examples where market value would be inadequate and thus fall short of compensation include (but are not limited to):
- a) Where two adjoining lots provide greater value if held together such that the loss of one lot reduces the value of the owner's interests at an amount greater than the market value of the individual lot loss. This could be where a small lot gives access to a large adjoining block of land and each is on a separate title. Where the two are held by the same owner, the large block of land may be subdivided and has a value accordingly. The loss of the access lot may mean that the large block would no longer be subdivisible on its own. Thus, compensation based on the market value of the access block would be inadequate and unjust. It would not allow for the synergy value to the owner.
 - b) Where the value of improvements are of much greater value to the owner who lost the land than to the market. For example, where the property has been put to a particular use or purpose. This could be as with a church, or a unique processing plant, for which market value would not be adequate compensation to put the former land owner in the equivalent position by monetary compensation.
- 2.4 PWA compensations can exceed market value in appropriate circumstances. Logically, the public interest in taking land for roading projects, and the like, should not provide different compensation from taking title to protect the integrity of the Torrens land register system.
- 2.5 The PWA provides reasonable limits to ensure that there is not over compensation. Furthermore, the PWA also provides some practical protection to requiring authorities which could also protect the Crown in the Land Transfer legislation compensation context. The PWA compensation system has established and balanced principles which would provide adequate compensation and also has mechanisms to avoid excessive compensation.
- 2.6 Reference to the PWA would serve to direct parties, their lawyers and the courts to the well-established public works compensation legal and valuation principles. In doing so it would guide the reader of the legislation, take advantage of tested analysis and provide some degree of predictability for the outcome of any claim.
- 2.7 The PWA compensation framework is already directly referred to by other legislation. For example, the Resource Management Act 1991 and the Local Government Act 2002. The PWA could also readily be referred to by the Bill.
- 2.8 There are very few incidences of claims and compensation awarded. There does not appear to be a principled reason to provide compensation that is less than full and fair in the circumstances where market value is not the applicable measure. To provide compensation based on the PWA would not open a 'flood gate' of liability for the Crown.

NEW ZEALAND INSTITUTE OF VALUERS SUBMISSION TO SELECT COMMITTEE: LAND TRANSFER BILL COMPENSATION CALCULATION (VALUATION) PROVISIONS

3. Regulations to prescribe movements in land values

- 3.1 Clause 68 generally fulfils a useful purpose in allowing the court to determine compensation with regard to values at different dates. However, the mechanism under cls 68(1)(b) and 226(q) is unworkable.
- 3.2 The sheer cost and complexity of endeavouring to prescribe market movement by regulation would serve no useful purpose and, in any event, would be ineffective.
- 3.3 The few compensation awards would not warrant the cost of establishing and maintaining such a system, even if it were to be workable.
- 3.4 As with other legislation such as the PWA, Unit Titles Act 2010 and Property Law Act 2007, Registered Valuers would be best placed to provide such valuation evidence on a case by case basis.
- 3.5 It is appreciated that interest rate tables calculating interest on damages over time are practical. However, land values move differently in different locations and for different real estate types. The highest and best use of a site might also change over time. Such analysis is best conducted by an independent Registered Valuer/s.
- 3.6 Judicial discretion could also have regard to a Registered Valuer's evidence when considering the most appropriate date at which to assess compensation.

4. Date of Compensation

- 4.1 The NZLS have kindly made available, to the Valuers Institute, extracts of the draft of their submissions on the compensation provisions as they stand at 26 April 2016.
- 4.2 Professor Toomey of the NZLS Committee also provided the Valuers Institute's Mr Bates with very useful analysis of the valuation and law interplay in this context.
- 4.3 Although we appreciate the potential for some variation of the NZLS paper prior to submission, we concur with many of the concerns addressed by the NZLS Property Law Section Law Reform Committee in respect of the compensation provisions. In particular, we emphasise the following issues regarding the date of assessment:
- 4.4 The Valuers Institute notes the change of date for ascertaining the value of the estate or interest in land. In the Consultation Draft (at cl 60) this date was the date at which the claim was made. In cl 64 of the Bill, it is the date of discovery, which is a significant change.
- 4.5 The Law Commission's report, "*A New Land Transfer Act*" Report 116, June 2010, at 4.4.16, looked at various options as to the date upon which to determine the value of the land (including the date of discovery). It concluded that the best option was to adopt the date when the claim is made, with discretion to alter the date if the court considers it appropriate:

"This provides a clear date on which to base the claim that will be closer to the land's current value. Allowing the court to alter the date where appropriate can address the situation where a person delays making a claim in order to get more compensation."

NEW ZEALAND INSTITUTE OF VALUERS SUBMISSION TO SELECT COMMITTEE: LAND TRANSFER BILL COMPENSATION CALCULATION (VALUATION) PROVISIONS

- 4.6 The Bill shows a 'baseline' date at the date of discovery, without explanation. The Valuers Institute recommends that the date should be re-set as at the date of making the claim (or if not, then the more recent date, being the date of award).
- 4.7 The Process of calculating compensation should reflect the property rights of the owner who has lost the land. The owner's right to have disposed of that land at an opportune time since the discovering of the loss of title should be allowed for.
- 4.8 Likewise, the initial basis date, if there is to be one, should be set at the date of claim (if not the date of award). The land owner has been deprived of the use of the land and the value of that land during the course of proceedings. Therefore, there are foreseeable circumstances where the deprived land owner should enjoy any capital gain / value growth which would have eventuated whilst the right to use of the funds was outside the control of that owner.
- 4.9 Such a land owner might have otherwise purchased similar land, but might be unable to do so if only in receipt of a dated claim based sum. This would foreseeably occur where land values increased significantly during the course of proceedings. Therefore, full and fair compensation would not have occurred.
- 4.10 As the court's discretion to alter the date appears, in practice, much more likely to be an adjustment *down* rather than an adjustment *up*, the Valuers Institute suggests that the 'baseline' date on which compensation value is to be assessed should be as close as possible to the land's current compensation value.
- 4.11 Furthermore, the date of award should be adjusted from the baseline date where the circumstances require that a different date be adopted to reflect the loss from the perspective of the party who has lost the land.
- 4.12 For example, consider a land owner returned to New Zealand to sell land in a buoyant market. Upon return that land owner discovers the loss of title and seeks advice. A claim is made. The process takes one to two years. The values have fallen 35%. The compensation should be based on the date at which the land owner might reasonably have sold the land upon return to New Zealand for that purpose.
- 4.13 Values rise and fall over time, for different property types and in different locations. Judicial discretion would be necessary to ensure full and fair compensation to meet cl 3(b)iii of the Bill.
- 4.14 Accordingly, the Bill should give significant emphasis to the need for judicial discretion to adjust the date to meet the justice required of the circumstances and for the assessment to reflect the loss suffered from the perspective of the deprived land owner in assessing that date.

5. **Special note regarding cl 66 – improvements**

- 5.1 Clause 66 (1) and (2) refer to compensation for improvements. There are two separate issues here. One issue is the change in value of pre-existing improvements. The other is any new improvement made to the land after the discovery of loss in title.
- 5.2 If improvements are made by any party after the date that the claimant discovers the loss of title, it appears appropriate that there should not be any compensation for such improvements.

**NEW ZEALAND INSTITUTE OF VALUERS SUBMISSION TO SELECT COMMITTEE:
LAND TRANSFER BILL COMPENSATION CALCULATION (VALUATION) PROVISIONS**

- 5.3 It is understood that, this would still mean compensation would be paid on improvements to the land which predated that discovery and the compensation paid should reflect the value change on those improvements. Therefore, the Valuers Institute considers these provisions are appropriate and consistent with the balance of these submissions.

6. Recommendations

- 6.1 Clause 65(1) should be changed to omit “market value” and substitute in: “compensation assessed as if the land were taken under the Public Works Act 1981” (or similar wording). This has the effect of changing the surrounding provisions and is efficient in adjustment.
- 6.2 Clause 65(1), regarding the “date” should omit: “on which the claimant gained (or ought reasonably to have gained) knowledge that the loss had occurred.” The words “of claim” (or similar) should be substituted in.
- 6.3 Consequent to the above substitution, cl 65(2), should be relocated to become cl 66(3). This would therefore address the onus of proof in respect of the improvement values dealt with by cl 66.
- 6.4 Clause 67 could remain. Although the PWA would also allow for benefits to be accounted for, for the primary estate holder, other classes of claimants in the Land Transfer context, such as mortgagees, may mean that this clause remains applicable and appropriate.
- 6.5 Clause 68(1)(a) appears reasonable and appropriate in setting a different date of valuation and should be retained.
- 6.6 To ensure full and fair compensation to meet cl 3(b)iii of the Bill, the Bill should give significant emphasis to the need for judicial discretion to adjust the date to meet the justice required of the circumstances and for the assessment date to reflect the loss suffered from the perspective of the deprived land owner.
- 6.7 Clause 68(1)(b) should be substituted to remove reference to section 226(q).
- 6.8 Clause 68(1)(b) should provide that evidence from a Registered Valuer or Registered Valuers may be called to assess the compensation value at the relevant date. Please note that the term “registered valuation” is inappropriate and should not be adopted as the valuations are not registered, the valuers are.
- 6.9 Sub-clause 226(q) should be removed.
- 6.10 Just a grammatical observation on this part of the Bill: At 64(2) the wording “...that the mortgagee has been deprived of.” would better read “...of which the mortgagee has been deprived”.

**NEW ZEALAND INSTITUTE OF VALUERS SUBMISSION TO SELECT COMMITTEE:
LAND TRANSFER BILL COMPENSATION CALCULATION (VALUATION) PROVISIONS**

7. Conclusion

- 7.1 These factors appear to have been missed in the legislative drafting to date. If left without amendment for these issues, the effect of the Bill will be that it does not provide justice to those who have suffered loss of title. The Bill, in its current form, also creates mandate for unnecessary and unworkable regulations which would appear infeasible to establish and maintain.
- 7.2 Certainly, it is clear to the Valuers Institute that the “compensation” purpose specified at cl 3(b)iii of the Bill would not be realised if the Bill is passed in its present form.
- 7.3 With reference to the statutory functions of the Valuers Institute under the Valuers Act 1948, we strongly recommend that these issues be resolved prior to the passing into legislation.
- 7.4 The Valuers Institute would be happy to provide more in depth authority or valuation context if that would assist. Furthermore, a representative would be available to assist the Government Administration Select Committee, by attendance in person.