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Committee Secretariat  
Government Administration  
Parliament Buildings  
Wellington

[with type corrected]

Dear Sir or Madam

## **LAND TRANSFER BILL COMPENSATION CALCULATION (VALUATION) PROVISIONS**

Late yesterday we received a brief update by phone on the position of LINZ with regard to the Land Transfer Bill ('LTB') compensation valuation provisions. Under the circumstances, and in light of our statutory function to contribute to law reform, the New Zealand Institute of Valuers ('NZIV') considers it necessary that we provide further comment.

The key issues can be divided into four sections:

- 1. Points of concurrence between LINZ and the NZIV.**
- 2. Recent suggestions by LINZ – with which we cannot agree.**
- 3. The received position**
- 4. Options and outcome of the LTB**

### **1. Points of concurrence between LINZ and the NZIV.**

1.1 We understand that LINZ concurs with, and has adopted, our recommendation that endeavouring to create regulations providing values and value change over time would not be workable.

1.2 We understand that LINZ concurs with, and has adopted, our recommendation that there should be greater judicial discretion to ensure that the date and valuation process can provide justice to meet the circumstances of the case.

1.3 The judicial discretion would take the form of statutory provision to allow the court to obtain a valuation directly, which might involve the judge instructing valuation assessments as at a particular date or dates (including an updated value). This point was raised further to our meeting with LINZ and further detailed in the **attached** letter to LINZ. We observed the existing statutory example of s339(3) of the Property Law Act 2007, and recommended adoption of a similar provision.

1.4 We further concur with LINZ that the jurisdiction under the LTB may refer to the PWA without engaging the jurisdictional process of the PWA. Specialist land valuation tribunals (such as the Land Valuation Tribunal under the PWA) can provide invaluable judicial insight. This is not to say that the existing legal processes and jurisdiction associated with such tribunals are ideal or would assist in the LTB context.

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- 1.5 As has been common ground throughout the process, we concur with LINZ that the ‘mode’ (most common) basis for compensation under the Public Works Act 1981 (**‘PWA’**) is “market value”, although we understand that neither LINZ nor the NZIV have current statistics on this point.
- 2. Recent suggestions by LINZ – with which we cannot agree**
- 2.1 We understand from the phone briefing we have received from LINZ, late yesterday, that there have been some suggestions from within LINZ. We have necessarily paraphrased these recent LINZ suggestions and our responses as follows:
- 2.2 **LINZ suggest:** Compensation under the PWA is not “the monetary equivalent of what has been lost from the perspective of the person to be compensated”. It is not a guiding principle of the PWA. None of the PWA’s provisions can be interpreted in such a way as to reasonably infer this intent.
- 2.3 **NZIV response:** The LINZ suggestion is inconsistent with the received position as illustrated in numerous judgments and texts on the field. We have not been provided with any cited authority in support of this suggestion and we have not been able to find any authority which supports this suggestion. We cite examples of authority on which our opinion is based in the **“3. Received position”** section below.
- 2.4 **LINZ suggest:** Under section 62(1) of the PWA, the value of land is based upon a notional transaction being the amount the land would be expected to sell for if sold on the open market by a willing seller to a willing buyer on a specified date. This is the same as the meaning of “market value” under the LTB.
- 2.5 **NZIV response:** We concur with the LINZ suggestion at 2.4 above. However, NZIV do not accept that: that one provision represents the scope of the PWA or the rule for land compensation.
- 2.6 **LINZ suggest:** There are some exceptions under the PWA to the general rule above. These are set out in section 62(1)(b). The NZIV submissions about how compensation is assessed under the PWA, and subsequent representations from NZIV to LINZ, appear to treat these exceptions as the norm. This is potentially misleading so LINZ will be clarifying this for the Committee.
- 2.7 **NZIV response:** To suggest that only “market value” is applicable and is thus the “rule” would be highly misleading. Yes, as we have stated, “market value” is the mode. But there are exceptions to market value as the basis for compensation. These exceptions are indisputable. They are clear from the text of the PWA and include, but are not limited to, the reinstatement by equivalence PWA provisions.
- 2.8 The ‘mode’ is merely that – the most common application of compensation under the PWA. We have, as the statutory body (mandated under the Valuers Act 1948, to contribute to law reform and to protect the public interest), highlighted the exceptions to the mode. If we were to overlook these other compensation bases, as the LTB appears to have done, we would be remiss in our duties. For this reason we have drawn attention to the other types of circumstances where market value will not provide full and fair compensation. In our discussions this morning a key issue was explained by the NZIV President thus:
- 2.9 With regard to the exceptions to the market value basis:

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*“It is only by illustrating the varied circumstances of property that give you an appreciation of the width of application of the proposed Act.”*

– Roger Gordon, Director TelferYoung (Waikato) Limited and President of the NZIV

2.10 Our position is consistent with the vast wealth of authorities on the matter, with the provisions of the PWA and with common practice in New Zealand. Although these bases of compensation are applied less frequently than market value, they are very important to the proper functioning of compensation law and valuation principles.

2.11 **LINZ suggest:** In the situation where a claimant has lost one of two adjoining lots owned by him or her, market valuation under the Land Transfer Bill can take account of any reduction in value of the remaining lot caused by the loss of the other lot. Registered valuers are required to follow international valuation standards, which provide for synergistic valuation. There is nothing in the Bill that prevents this. NZIV is incorrect in its statement to the effect that compensation under the Bill “would not allow for the synergy value to the owner”.

2.12 **NZIV response:** It would be correct to say “Registered Valuers can follow international valuation standards, which provide for synergistic valuation”. However, those principles are an example to which *we* have referred. Whereas, the LTB, in its present state would not appear to allow for the synergy value to the owner, where one title is retained and another is lost. This is because of the wording of the draft Bill.

2.13 Specifically, NZIV refer to LTB clause 64 (our emphasis added):

*“Calculation of **compensation for deprivation of estate or interest in land***

*Clause 64 specifies **the maximum amount of compensation** for deprivation of an estate or interest in land as follows:*

*the maximum amount of compensation payable where a claimant has been deprived of an estate or interest in land is **the value of the lost estate or interest in land: ...**”*

2.14 As we know, the LTB goes on, at clause 65(1) to restrict compensation to one basis, which is “market value”, not equivalent reinstatement or facilitating any of the other long established bases on which compensation may be assessed.

2.15 When read together, therefore, clauses 64 and 65 limit the ‘compensation’ to the “maximum” of the “market value” of the “lost” estate or interest. Thereby, excluding loss in value suffered in relation to land retained (as although the value is lost, the balance of the land is not).

2.16 For these reasons it appears the LINZ position does not reflect a reasonably anticipated outcome of the LTB, from a plain reading of it. It does not, in fact, allow for synergy value, whether we valuers consider it should apply or not.

2.17 **LINZ suggestion:** the PWA is a code and so if every type of allowance and aspect of cost recovery isn’t spelt out there, the landowner has no other means of claiming this from the Crown. The LT Bill isn’t a code and landowners can in some circumstances seek damages against the party that deprived them of the loss as well as claiming against the Crown.

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- 2.18 **NZIV response:** the vast wealth of authority which addresses equivalence (no more no less) is a useful principle. One would anticipate the overpayment must be refunded to the Crown (in the event there is any additional recovery). It should be clear that a party could not claim loss twice. If loss were to be compensated for by a third party, that should be off-set. That could be included in the LTB, for completeness.
- 2.19 The Local Government and the Resource Management Acts are not codes. They refer to the PWA. There is no reason in principle why the LTB could not refer to the PWA, consistent with the wider legislative framework.

### 3. The received position

- 3.1 We have referred, at 2.3 above, to the received position. By this we point out that what is contained in our submissions (and those of the New Zealand Law Society ('**NZLS**') and Auckland District Law Society Inc ('**ADLSI**') in relation to land compensation is based on the established authorities. Whilst our advice is at contrast to the novel suggestion of LINZ on these aspects, the NZIV opinion is based on, and thus naturally supported by, the authorities.
- 3.2 Indeed with only this morning to respond, our concern was not for finding authority to warrant our position, but rather to find the most concise statement of authority to inform the Select Committee. The difficulty is that there is such a vast wealth of authority on which the professional body submissions are based. Given more time, no doubt, the ADLSI, NZLS and NZIV could cite further and better particulars.
- 3.3 The key contrast between the suggestions of LINZ and the submissions of NZIV (as well as ADLSI and NZLS) is whether compensation for land lost (under the PWA and in other contexts) is "the monetary equivalent of what has been lost from the perspective of the person to be compensated".
- 3.4 The LINZ interpretation does not appear to align with the cases on this point, or the full PWA. NZIV had pointed out that 'step one' under the PWA was to consider if the market value basis applied. In that respect the LINZ comments are correct.
- 3.5 The difficulty is that the function and principles which are embodied in the balance of the PWA appear to have been rather down played within the recent LINZ suggestions, to the extent that their effect (and the case law) appears to have been disregarded.
- 3.6 We now simply refer the Committee to a sample of the authorities:
- 3.7 PWA s60: "...entitled to full compensation..."
- 3.8 PWA s62(1)(b) "open market"... – "unless"...
- 3.9 It is acknowledged that further bases for compensation include: "**equivalent reinstatement**" under s65 PWA or assistance to purchase a farm or industrial property under s74 where the authority has discretion where:

"... the **market value of the owner's interest is insufficient** to enable the owner to acquire a similar interest in a farm or commercial or industrial property, as the case may be, **of a standard reasonably equivalent** to that so taken or acquired on which to continue to carry on farming or the commercial or industrial undertaking, as the case may be, there may, in the discretion of the notifying

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authority, be advanced to the owner, **in addition to the compensation otherwise payable under this Act**, such amount of money as the authority considers reasonable to assist him to acquire other land **reasonably equivalent** to that so acquired on which to continue to carry on farming or the commercial or industrial undertaking...[emphasis added]”

3.10 Furthermore, whereas the LTB does not provide for synergy value (refer 2.12 to 2.16 above), the PWA specifically allows for the owners’ other land [emphasis added]:

**“s62 Assessment of compensation**

(1)The amount of compensation payable under this Act, whether for land taken, land injuriously affected, or otherwise, shall be assessed in accordance with the following provisions:

- (a) subject to the provisions of sections 72 to 76, no allowance shall be made on account of the taking of any land being compulsory:
- (b) the value of land shall, except as otherwise provided, be taken to be that amount which the land if sold in the **open market by a willing seller to a willing buyer on the specified date might be expected to realise, unless—**

(i)the assessment of compensation relates to any matter which is not directly based on the **value of land and in respect of which a right to compensation is conferred under this or any other Act; or**

**(ii)only part of the land of an owner is taken or acquired under this Act and that part is of a size, shape, or nature for which there is no general demand or market, in which case the compensation for such land and the injurious affection caused by such taking or acquisition may be assessed by determining the market value of the whole of the owner's land and deducting from it the market value of the balance of the owner's land after the taking or acquisition:”**

3.11 With regard to the above, it is also important to note the general guiding provision of the PWA, as follows:

*“Entitlement*

**60Basic entitlement to compensation**

(1)Where under this Act any land—

- (a) is acquired or taken for any public work; or
- (b) suffers any injurious affection resulting from the acquisition or taking of any other land of the owner for any public work; or
- (c) suffers any damage from the exercise (whether proper or improper and whether normal or excessive) of—
  - (i) any power under this Act; or

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(ii) any power which relates to a public work and is contained in any other Act—

**and no other provision is made under this or any other Act for compensation for that acquisition, taking, injurious affection, or damage, the owner of that land shall be entitled to full compensation from the Crown (acting through the Minister) or local authority, as the case may be, for such acquisition, taking, injurious affection, or damage [emphasis added].**

- 3.12 The above examples of where the PWA provides for other bases of compensation represent a statutory embodiment of valuation principles and these principles are consistent with those applied in other common law jurisdictions.
- 3.13 There are many other relevant PWA sections which embody the valuation principles. The above does not limit the scope of compensation bases or circumstances under the PWA. The way the compensation mechanisms operate has been traversed in the **attached** extracts of ***Compensation for Land Taken and Severed***, by the eminent New Zealand Valuer Squire L Speedy. Given the limited time we have to respond, we consider that this concise version of the Speedy text may help explain the issues for LINZ and the Select Committee.
- 3.14 It is also clear from the judgments that the received position is what has been presented by NZIV, ADLSI and NZLS. Below we provide two examples. One of the below is a direct PWA matter, the other is vesting of reserve lands which triggers compensation. These two contexts have been purposefully selected. Prof. Toomey for the NZLS commented, when discussing the judgements with us this morning, that the common language of these two judgements, both in the context of land compensation in New Zealand, shows the true position.
- 3.15 We refer to *Green & McCahill Holdings Limited v Auckland Council* (as Successor to Rodney District Council) HC AK CIV 2011-404-007233 [26 March 2013], in particular paragraph 55 which states:

“The expression **“full compensation” means such sum of money as will place the dispossessed owner in a position as similar as possible to that which the owner was in before the land was taken.**<sup>25</sup> **The governing principle of compensation is the award of a monetary equivalent for that which has been lost.** The word “full” can probably be equated with the word “fair”.<sup>26</sup> A claimant is entitled to receive the full money equivalent of what he has lost and in respect of each category of compensatable loss. Use of the word “full” implies a direction that his or her entitlement must not be whittled down in any respect.<sup>27</sup>”

[Footnotes were:]

“25. *Russell v Minister of Lands* (1898) 17 NZLR 241 (SC) at 253; and see Peter Salmon, *The Compulsory Acquisition of Land in New Zealand* (Butterworths, Wellington, 1982) at [11.1].

26. *Riddiford v Attorney-General* [2009] NZCA 603 at [24].

27. *Drower v Minister of Works and Development* [1984] 1 NZLR 26 (CA) at 29; *Laws of New Zealand Compulsory Acquisition and Compensation* at [66]; and see *Te Marua Ltd v Wellington Regional Water Board* [1983] NZLR 694 (CA) at 697.”

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- 3.16 The above reasoning was not overturned by the subsequent decisions and gives a concise explanation of the compensation principles.
- 3.17 Also see discussion of both PWA and non-PWA land compensation legal application from para [80] – [82] of *Zyxcba Developments Limited v Auckland Council* [2015] NZHC 1412 [23 June 2015] (our emphasis added):

“[80] **The context in which the valuation is to occur is also, in my view, relevant.** This is not a valuation for rating purposes<sup>27</sup> **but for compensation purposes.** Such is the direction in Rule 17.10.11.9. **The usual meaning of compensation is to award someone with something in recognition of loss, suffering or injury.**<sup>28</sup> Likewise within the laws of contract<sup>29</sup> and in tort, compensatory damages are designed to restore the innocent party to the position he or she would have occupied had the contract not been made or the tort not been committed.<sup>30</sup> Within the compulsory acquisition of land context, such principles may, of course, result in compensation for any special value that the land may have in the hands of the party dispossessed. **However, “full compensation” within the terms of s 60(1) of the PWA is focused on the value of the land to the landowner, not the value to the acquiring authority.**<sup>31</sup> As observed in Salmon: *The Compulsory Acquisition of Land in New Zealand*: **32 The purpose of compensation under the Public Works Act is to restore the person whose land or whose interest in land is taken as far as is possible to the position in monetary terms, or sometimes in a combination of land and money, that he would have been in had his land or interest in it not been taken.**

[81] I accept that the land was not being acquired under the Public Works Act in this case but the circumstances of acquisition were effectively compulsory at the point ZYXCBA decided to seek a subdivisional consent.

[82] In *Hardiway Enterprises Ltd*, the Court of Appeal observed that there was no market for the purpose of using the land in the way intended by the Council and that the rationale behind s 62(1) (d) of the PWA was to:<sup>33</sup> overcome factors which might inflate compensation beyond a level which is considered reasonable in the public interest. Landowners should not receive a windfall at the expense of the community.”

Footnotes cited were:

27. As in *Valuer General v Wellington City Corporation*, above n 10.

28. Online Oxford Dictionary definition of ‘compensation’.

29. Where the plaintiff argues a reliance interest. See *Laws of New Zealand Contract* (online ed) at [426]; *Newmans Tours Ltd v Rania Investments Ltd* [1992] 2 NZLR 68 (HC).

30. Stephen Todd (ed) *The Law of Torts in New Zealand* (6th ed, Brookers, Wellington, 2013) at [20.2.01].

31. *Russell v Minister of Lands* (1898) 17 NZLR 241 (HC) at 255.

32. Peter Salmon *The Compulsory Acquisition of Land in New Zealand* (Butterworths, Wellington, 1982) at [ 11.1 ] ; see also *Te Marva Ltd v Wellington Regional Water*

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Board [ 1983] NZL R 694 (CA) at 697 per Richardson J: **“The governing principle of compensation is the award of a monetary equivalent for what has been lost”**.

33. Palmerston North City Council v Hardiway Enterprises Ltd, above n 13, at [30].

3.18 The above is a very limited, yet contemporary sample. This can be read together with the test of the PWA and the Speedy text, as attached. Indeed, substantially more authority is readily available.

#### 4. Options and outcome of the TLB

4.1 If the matter of compensation were left unaddressed under the LTB, with only ‘market value’ provided for, one consideration is whether the manifest injustice provisions would apply. If it were contemplated that the claimants were to be forced to be put to the cost and processes of the manifest injustice provisions, this may not be realised in process in any event.

4.2 Claimants might have otherwise legitimately and expediently received compensation (which might be above or below market value). Yet, the effect of the LTB as drafted is that both valuers and lawyers will pick up on the “compensation” purpose required of the valuation process and the proposed Act.

4.3 Indeed, it is a matter of common discussion among property lawyers. We observe the comments about the LTB and noted issues referring to full and fair compensation on page 5 of the Property Lawyer, June 2016, Vol 16, Issue 4, in an article from the editor John Greenwood.

4.4 The current LTB clause 65(1) by reference to the “market value” basis without a stated purpose, in that clause, may lead to compensation being adopted in any event. As discussed in our meeting with LINZ, the purpose of valuation should dictate the basis of valuation (not the other way around). The purpose can influence the way the basis value can be treated. We discussed the way a ‘mortgage security purpose’ can change the way a ‘market value’ assessment of a previously unoccupied house is treated: by not supporting mortgage security based on a premium value associated with the house being new and previously unoccupied – given that the mortgagee will only realistically have security over a previously occupied house without the benefit of that premium.

4.5 Likewise, a Registered Valuer should interpret clause 65(1) as to be qualified by an appropriate purpose. Compensation appears the only reasonable purpose. For example, consider the Explanatory Notes and the LTB, which collectively contains the term “compensation” 85 times, for example:

- *“There should be adequate compensation where an innocent owner has suffered loss due to the operation of the system”*
- *“Subpart 3—Compensation”*
- *“Grounds for compensation”*
- *“Notice of claim Clause 62 provides that, before commencing a proceeding to recover compensation...”*
- *“Calculation of compensation for deprivation of estate or interest in land”*

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- 4.6 Accordingly, a Registered Valuer may well import the purpose of assessing compensation and interpret the market value in accordance with that purpose (and in view of clause 3(b)(iii) as referred to in our submissions).
- 4.7 We observe the support we have received from the New Zealand Law Society and the Auckland District Law Society in common positions reflecting the authorities on compensation law and valuation principles. If considering the LTB usage of “compensation” throughout, legal advisors may well interpret clause 65(1) consistently with the Interpretation Act 1999 s5(1-3). Especially when considering LTB clause 3(b)(iii) which states the purpose as including to:
- “provide compensation for loss arising from the operation of the system”*
- 4.8 To resolve this there would have to either be consistent terminology, as we have proposed, or an express provision stating that the government indemnity of title was not to be met with compensation. We suggest that such a provision should not be entertained and would require a substantial redraft of the principles and wording of the LTB.
- 4.9 If the matter were left unresolved, there would appear to be ambiguity that may lead to costly litigation and uncertainty of interpretation by advisors. This is exemplified by the fundamental problems evident in the *Zyxcba Developments Limited v Auckland Council* [2015] NZHC 1412 [23 June 2015] case, where the wording of the relevant planning rules used inconsistent valuation terminology (which, at [35], the judge described as sloppy drafting). The terminology was not guided, as it should have been, by the compensation purpose. It should be noted that the *Zyxcba* case is understood to remain unresolved after great time and expense. We caution that this type of difficulty should not be permitted to arise in the legislation resulting from the LTB.
- 4.10 We trust the above is of some assistance and we would be available to consider any revised draft of clause 65(1) or related provisions in relation to the substitution of market value for compensation.

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Thank you for welcoming the NZIV input. Our personnel involved with these submissions have attended on a voluntary basis throughout this process. We trust that our endeavours have provided some useful valuation perspective in the legislative policy and drafting context.

In closing, we advise the Government Administration Select Committee that following the recent NZIV AGM, the NZIV Council has some new members and a new President, as indicated below. The NZIV continues its support for this law reform project and for Peter Bates as the NZIV's representative on this matter.

Please feel welcome to contact us if we can be of any further assistance on this, or any other, matter.

Yours faithfully

**The New Zealand Institute of Valuers**



**Peter Bates**

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**Roger Gordon**

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