

BEFORE THE BOARD OF INQUIRY

IN THE MATTER of the Resource Management Act 1991

AND

IN THE MATTER of applications by Transpower New Zealand Limited for resource consents and notices of requirement for the North Island Grid Upgrade Project

MEMORANDUM

**FEDERATED FARMERS OF NEW ZEALAND
FEDERATED FARMERS OF NEW ZEALAND (AUCKLAND PROVINCE) INCORPORATED
FEDERATED FARMERS OF NEW ZEALAND (WAIKATO REGION) 1999 INCORPORATED**

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INTRODUCTION

1. This Memorandum is filed on behalf of Federated Farmers of New Zealand, Federated Farmers of New Zealand (Auckland Province Incorporated) and Federated Farmers of New Zealand (Waikato Region) 1999 Incorporated (collectively, “Federated Farmers” or “the Federation”).
2. The Board has invited Federated Farmers to bring it to the Board’s attention if the Federation found “... that there’s something in Part V of the Public Works Act that would authorise the Land Valuation Tribunal to grant compensation by way of annual payments rather than one-off payments ...”.¹
3. This Memorandum reviews the relevant law that lies behind the role of the Land Valuation Tribunal in awarding compensation under the Public Works Act. The conclusion is reached that the Tribunal is empowered to award compensation on an annual payments basis.
4. In the light of this, the Memorandum then expands on Federated Farmers’ submissions² in opposition to Transpower’s Notice of Requirement (“the NoR”), that matters concerning the Public Works Act are relevant to the Board’s consideration, and in particular that matters of indemnity, liability and compensation are not adequately addressed in the easement agreements offered to land owners by Transpower.
5. The Memorandum concludes with a brief submission drawing the Board’s attention to a case which supports the proposition alluded to in Federated Farmers’ submissions,³ that a requiring authority cannot couch its objectives in such terms as to exclude consideration of alternatives.

THE ROLE OF THE LAND VALUATION TRIBUNAL

6. Section 59 of the Public Works Act describes the legal basis of the Land Valuation Tribunal:

Land Valuation Tribunal or Tribunal means a Land Valuation Tribunal established under the Land Valuation Proceedings Act 1948; and the expression Land Valuation Tribunal or Tribunal, when used in relation to any land transaction,

¹ Chairperson, Transcript, Day 60, p 23.

² Submissions, Federated Farmers of New Zealand & Others, para 114.

³ Submissions, Federated Farmers of New Zealand & Others, para 51.

means the particular Land Valuation Tribunal to which any application or matter arising under this Act and relating to that land or transaction has been made or referred.

7. Section 60 of the Public Works Act describes the basic entitlement to compensation in cases where land is compulsorily acquired under the Public Works Act:

60 Basic 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
 - (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.

(2) Where any compensation is payable under subsection (1) of this section to any person who is the lessee under any lease granted by the Crown or the local authority that acquired or took any land that is subject to the lease, that person shall not be entitled to any damages arising from the breach of any express or implied—

- (a) Covenant for quiet enjoyment; or
- (b) Covenant not to derogate from the grant contained in that lease.

8. Section 61 of the Public Works Act describes some exceptions to right to compensation, none of which appear to be relevant to the NoR application that is before the Board.

Section 62 of the Act sets out the “rules” or “guidelines” that apply in the assessment of compensation under the Act,⁴ and alludes to the Tribunal’s role in assessing that compensation:

60 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 of this Act, no allowance shall be made on account of the taking of any land being compulsory:

⁴ Mulholland states that “Definitive works dealing with compensation for land are: P Salmon *The Compulsory Acquisition of Land in New Zealand*, Butterworths, 1982 and S L Speedy *Land Compensation*, New Zealand Institute of Valuers, 1985” (Mulholland, p303). Salmon states that “... s 60 entitles the owner of the land to full compensation for land acquired or taken for essential work. Such compensation is to be assessed in accordance with the rules [in section 62]” (Salmon, Section 14.1 p 91). Fogarty states that “The rules governing the assessment of compensation are to be found in section 29 of the Finance Act (No 3) 1944 [now s 62 of the Public Works Act] (Fogarty, p 7). Speedy states that “The key section of the PWA which sets out the valuation rules relating to the assessment of compensation for land compulsorily acquired for essential public works, is s.62” (Speedy, p 21). Brookers states that “The quantum of ‘compensation’ recoverable is regulated by guidelines under the Public Works Act 1981” (Brookers, LG190.02). Land Information New Zealand states that “Compensation is to be assessed in terms of Part V of the PW Act” (Land Information New Zealand (1), Section 10.2.1(c) p 14).

- (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:
 - (c) Where the value of the land taken for any public work has, on or before the specified date, been increased or reduced by the work or the prospect of the work, the amount of that increase or reduction shall not be taken into account:
 - (d) The special suitability or adaptability of the land, or of any natural material acquired or taken under section 27 of this Act, for any purpose shall not be taken into account if that purpose is a purpose to which it could be applied only pursuant to statutory powers, or a purpose for which there is no market apart from the special needs of a particular purchaser or the requirements of any Government department or of any local authority:
 - (e) The Tribunal shall take into account by way of deduction from that part of the total amount of compensation that would otherwise be awarded on any claim in respect of a public work that comprises the market value of the land taken and any injurious affection to land arising out of the taking, any increase in the value of any land of the claimant that is injuriously affected, or in the value of any other land in which the claimant has an interest, caused before the specified date or likely to be caused after that date by the work or the prospect of the work:
 - (f) The Tribunal shall take into account, by way of deduction from the total amount of compensation that would otherwise be awarded, any increase in the value of the parcel of land in respect of which compensation is claimed that has occurred as a result of the exercise by the New Zealand Transport Agency of any power under section 91 of the Government Roading Powers Act 1989.
- (2) In this section, the term **specified date** means—
- (a) In the case of any claim in respect of land of the claimant which has been taken pursuant to section 26 of this Act, the date on which the land became vested in the Crown or in the local authority, as the case may be:
 - (b) Where compensation is claimed under section 80 of this Act and the Minister or the local authority has (before the issue of the Proclamation) notified the Tribunal what land he or it proposes to take—
 - (i) The date of that notification; or
 - (ii) The date of the first entry upon the land for construction purposes; or
 - (iii) The date on which the land is first injuriously affected by the work; or
 - (iv) The date of any agreement made under section 80(1)(c) of this Act or any date specified in such an agreement—whichever is the earliest:

- (c) In the case of any other claim in respect of land of the claimant which has been or is proposed to be taken for any work, the date on which the land became by Proclamation or declaration vested in the Crown or in the local authority, as the case may be, or the date on which the land was first entered upon for the purpose of the construction or the carrying out of the work, whichever is the earliest:
 - (d) In the case of any claim in respect of any work for which no land of the claimant has been taken and no land of the claimant is proposed to be taken, the date of the commencement of the execution of the portion of the work that causes damage to or injuriously affects the land of the claimant:
- (3) Where any lessor's or lessee's estate or interest in any land is taken or acquired under this Act, such estate or interest may, if required by its owner, for the purpose of assessing compensation under this Act, be valued separately from the freehold.

9. In s 2 of the Public Works Act it is stated by way of definition that:

Land includes any estate or interest in land.

In the context of the NoR, it is noted that few if any of the leading authorities make specific reference to the taking of an interest in land, as opposed to the taking of the land as a whole. Further, it is particularly noted that prior to 1939 there was no provision for the compulsory acquisition of an interest in land. Many of the leading authorities on the interpretation being given currently to the relevant provisions in the Public Works Act have their origins prior to this date.⁵

10. The role of the Land Valuation Tribunal in determining compensation under the Public Works Act has been described by the High Court as follows:⁶

There is a clearcut division in the Public Works Act between the role of the Environment Court and the role of the Land Valuation Tribunal. Disputes concerning the taking or use of land are dealt with by the Environment Court under ss24 or 71(9). On the other hand, disputes concerning compensation are dealt with by the Land Valuation Tribunal under Part V of the Act.

11. The function and jurisdiction of the Land Valuation Tribunal has recently been described as follows:⁷

⁵ Nevertheless, it is acknowledged that there are some authorities which appear to support the payment of a lump sum as being appropriate for the compulsory acquisition of easements. This is discussed later. At this stage it is pertinent to note that the power to compulsorily acquire an interest in land was first introduced into the Public Works Act 1928 in 1939 by s 62 of the Statutes Amendment Act 1939. Brown states that "There are nearly 150 years of case law on valuation, which has developed around the compulsory governmental acquisitions which have occurred since the first series of cases followed the great railway acquisitions in England in the 1840s and thereafter" (Brown, section 3.1 p 81). Fogarty notes that "The first comprehensive Act [in New Zealand] dealing with both the acquisition of land for public works and the assessment of compensation was the Public Works Act 1876" (Fogarty, p 1). McVeagh & Fleming cite the 19th century case *Russell v Minister of Lands* (1898) 17 NZLR 241 as authority for the proposition that "When assessing compensation, all circumstances must be taken into consideration in order to ascertain what sum of money will place the dispossessed owner in a position as close as possible to the position that he or she was in before".

⁶ *Queenstown Airport Corporation Limited v Skipworth*, Decision AP19/99, High Court, Dunedin, 8 November 1999, per Chisholm J, para 55.

[22] The function of a Land Valuation Tribunal is to value land and that is the extent of its jurisdiction: *Telecom NZ Ltd v Christchurch City Council* (CA 25/04, 7 March 2005). There the Court held that a Land Valuation Tribunal cannot inquire into the validity of a valuation objected to. The Court said at para [39]:

The tribunal is a judicial body with limited jurisdiction. As befits a body the majority of whom are valuers, the tribunal's jurisdiction under the Rating Valuations Act is limited to valuing land.

[23] The Tribunal, the Court went on to say, is not clothed with the ability to undertake judicial review, nor does it sit in an appellate role. Its function is to assess land value on an objection at a hearing de novo. That is all. The statutory inquiry the Tribunal must make may be intense and detailed. Its focus remains narrow.

[24] The land value that the Tribunal is empowered to fix assumes an arm's length transaction at a date. The date is that fixed for general revaluation within the district: [Rating Valuations Act] s 9(2). The value, as it is defined in s 2, is:

... the sum that the owner's estate or interest in the land, if unencumbered by any mortgage or other charge, might be expected to realise at the time of valuation if –

(a) offered for sale on such reasonable terms and conditions as a bona fide seller might be expected to impose; and

(b) no improvements have been made on the land.

[25] The several elements in this concept are captured more naturally and succinctly in s 62(1)(b), of the Public Works Act 1981, which serves an indistinguishable purpose. It defines land value in this way:

The value of the 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.

[26] The New Zealand Institute of Valuers valuation standard takes the definition of 'market value' one step further. It assumes that vendor and purchaser each act 'knowledgeably, prudently and without compulsion'; a definition endorsed in *Boatpark Ltd v Hutchinson* [1999] 2 NZLR 74, CA, 83 – 4.

12. The limited jurisdiction of the Land Valuation Tribunal has been emphasised in some recent High Court and Court of Appeal cases. In *Blair v Upper Hutt City Council*,⁸ the High Court summarised the findings of the Court of Appeal in *Telecom NZ Ltd v Christchurch City Council*,⁹ stating:

⁷ *Waitakere City Council v Auckland Land Valuation Tribunal*, CIV-2007-404-3843, High Court, Auckland, 12 December 2007, per Keane J.

⁸ CIV-2005-485-1961, High Court, Wellington, 21 June 2006, per Clifford J.

⁹ Decision 25/04, Court of Appeal, 7 March 2005, per Chambers J, para 8. See above, para 11.

The recent Court of Appeal decision in *Telecom NZ Ltd v Christchurch City Council* CA25/04 7 March 2005 provides the immediate context. In that decision, the Court of Appeal held that the jurisdiction of the Land Valuation Tribunal was limited to forming a view as to the correct valuation of the land in question in any proceedings before it. The Tribunal was not competent to undertake the sort of analysis which a High Court Judge would undertake on an application for review under the Judicature Amendment Act 1972. The Tribunal's function is simply to assess the rating value of the relevant property, when objections to a Rating Authority's decision on that point are referred to it.

There does not seem to be any reason to suggest that the jurisdiction of the Land Valuation Tribunal in assessing compensation under the Public Works Act would be any different.

13. The main legal principles that are relevant in a claim for compensation under the Public Works Act are set out in *Tauhara Properties v Minister of Works and Development*.¹⁰

1. The claimant is entitled to "full compensation". See s 42(1) of the Public Works Act 1928.¹¹

"Every person having an estate or interest in any lands taken under this Act for any public works ... shall be entitled to full compensation for the same."

2. "Full compensation" is to be assessed on the basis of "a full money equivalent of the loss". See *Commissioner of Succession Duties v Executor Trustee and Agency Co of South Australia Ltd* (1947) 74 CLR 358 per Dixon J at p 373.

3. The value of the land is to be the "amount which the land if sold in the open market by a willing seller on the specified date might be expected to realise". See s 29(1)(b) of the Finance Act (No 3) 1944.¹²

4. When the value of the land taken for any public work has on or before the specified date been increased or reduced *by the prospect of the work* the amount of that increase or reduction shall not be taken into account. See s 29(1)(d) of the Finance Act (No 3) 1944.¹³

14. In a later case, the High Court stated that:¹⁴

As good a general statement of principle as any is that of Dixon J in *Commissioner of Succession Duties v Executor Trustee and Agency Co of South Australia Ltd* (1947) 74 CLR 358, 373: "... the purpose is to ensure that the person to be compensated is given a full money equivalent of his loss ...".

15. In the same case the High Court continued with a citation from *Drower v Minister of Works and Development*,¹⁵ in which the Court of Appeal said that:

¹⁰ [1980] 2 NZLR 673 at p 676.

¹¹ Now s 60(1) of the Public Works Act 1981.

¹² Now s 62(1)(b) of the Public Works Act 1981.

¹³ Now s 62(1)(c) of the Public Works Act 1981.

¹⁴ *Ministry of Works v David Reid Electronics*, Decision M91/89, High Court, Dunedin, 18 December 1989, per Eichelbaum J, p 2.

In the ordinary use of language the nature of compensation involves rendering something equal to what is lost. It is the provision of recompense. And the word “full” has the added purpose of emphasising that a claimant is entitled to receive the complete equivalent of that which has been taken away from him. It implies a direction that the entitlement must not be whittled down in any respect.

16. In *Tawharanui Farms Ltd v Auckland Regional Authority*,¹⁶ the High Court drew from *Commissioner of Succession Duties v Executor Trustee and Agency Co of South Australia Ltd* and said:¹⁷

In a case of compensation, doubts are resolved in favour of a more liberal estimate ...;

although this is tempered by the statement, in *Poverty Bay Catchment Board v Forge*,¹⁸ that:

Whilst we are not entitled to be over-generous in the assessment of compensation to the claimant, it is nevertheless our duty to award a sum which will fairly and adequately compensate him for the loss of the land of which he has had to be dispossessed in the public interest.

17. It is apparent from the authorities and writers on the subject of the compulsory acquisition of land that various principles have been developed by the Courts to assist in the determination of fair compensation. Some of these principles are summarised in the citation from *Tauhara* above.¹⁹ While acknowledging the existence of the principles, it is not generally necessary for the purposes of this Memorandum to discuss most of them at any length.
18. Nevertheless, in the context of this discussion it is considered useful to look in more detail at what Speedy calls the “Before and After Principle”. It appears that this is the valuation method that Transpower is proposing should be used in the assessment of compensation in relation to its proposed Whakamaru to Auckland transmission line.²⁰
19. Speedy writes:²¹

The before-and-after principle in valuations is the prime approach used in assessing the loss in value to a property by injurious affection. It is used in virtually all valuations where the essential issues are: what was the value before

¹⁵ [1984] 1 NZLR 26, p 29.

¹⁶ [1976] 2 NZLR 230 at p 234.

¹⁷ (1947) 74 CLR 358 at p 373.

¹⁸ [1956] NZLR 811 at p 814.

¹⁹ Others are described in Speedy, Ch 3; Land Information New Zealand (1), Section 8;

²⁰ Statement of Evidence of John Craig Miles, para 72.

²¹ Speedy, Ch 10, p 31.

interference? And what is the value afterwards? The difference represents the net loss in value.

This method of approach is now specifically authorised by s.62(1)(b)(ii); which permits it to be used when only part of an owner's land is involved which is of such a size, shape, or nature for which there is no general demand. In such circumstances the compensation for the land and the injurious affection may be assessed by determining the market value of:

- a) The whole of the land; and
- b) The balance of the land after the taking or acquisition.

The before-and-after method of assessing loss by injurious affection by whatever name it may be called, is well established and approved by the valuing and appraisal professions and by courts in various states and countries. *But it must be recognised that it is not the only method by which injurious affection may be valued, and is not invariably accepted in such claims.*

...

The before-and-after method is prima facie the measure of compensation for injurious affection, but there may be other factors. ...

...

The before-and-after method of valuation is merely a method of approach to assess the net loss in value. It is not a valuation technique as such. Each valuation made for respectively the before situation and then the after situation should be made by the most appropriate method or methods that suit the circumstances. Although it is useful for the purposes of comparison to use the same method for each such valuation, it is not necessary if the circumstances indicate another approach.

(Emphasis added)

20. Fogarty describes the before and after method as being no more than a "convenient and acceptable method".²²

METHOD OF VALUATION

The difference between then value of land and buildings before the injurious affection occurred and the value of the land and buildings after the injurious affection occurred is a convenient and acceptable method of ascertaining the value of land together with the injurious affection. As was stated by the Court in the case of Fitzgerald v Kelburne Tramway Company Limited (20 NZLR Page 406):

"The principle upon which the Court must assess compensation in this case is plain and simple. They must first find what was the full value of the claimant's property at the time the respondent first commenced the works. They must next find how much it has been depreciated in value by the construction of the respondent's works."

²² Fogarty, p 16.

This method of determining compensation was adopted by the Land Valuation Court in its judgment in the unreported case of Prestige Homes Corporation Limited v Minister of Works (May 1968) ...

21. Fogarty also describes “injurious affection”:²³

Injurious affection arises not only from the taking of land, and the consequent severance of the property by roads, railways etc, but also from the use to which the land is put by the taking authority. This use is termed the “user” of the land taken.

22. Speedy describes the application of the Public Works Act as it applies to the compulsory acquisition of partial interests in land, including that of easements.²⁴ He states that:²⁵

What has to be found is the value of any such partial interest taken and any injurious affection to the residue estate or interest.

He goes on to state that:²⁶

... the same valuation rules of the PWA apply as for the taking of the full fee simple.

...

Once construction of the public work has been completed and any ground disturbance reinstated, what is left to be valued or determined is the loss in value to the residue land of the physical existence of the work; the potentiality for subsequent inconvenience from repairs, maintenance or operation; the legal blot on the title; and the detrimental effect on the owner’s interest in the land. In assessing the value of the easement (that is the “land” taken from the owner), due regard should be made for the practical and legal consequences of the easement and its effect on the open market value of the property.

...

Each easement loss must be assessed taking all the circumstances of the easement and its injurious affection to the property into consideration. The task was appropriately described as ‘difficult and troublesome’ by Hardie J in *Brancaisano v The Minister* (1967) 19 Val 8, 719. The actual valuation of the loss in value of an owner’s land will vary with the nature and circumstances of the particular easement and land ...

In a section entitled “Easements for Electrical Transmission Lines and Pylons”,²⁷ Speedy distils a set of what he describes as “general principles that may be considered when detrimental affection is caused by transmission lines and pylons falls to be considered”.²⁸ Included in these principles are that:

²³ Fogarty, p 15.

²⁴ Speedy, Ch 22 & 23.

²⁵ Speedy, Ch 22, p 90.

²⁶ Speedy, Ch 23, p 92.

²⁷ Speedy, Chapter 23, Section 2, p 96

²⁸ Ibid p 98.

- h) Where the value of a property stems mainly from its production or development, the loss in value will be related to any detrimental affection on such future loss of production or other potentiality.
- i) The area taken up by the pylon and the reasonable distance in its vicinity which cause a direct loss of production will be equivalent to the loss of an equivalent area of land, plus any other detrimental or injurious affection.
- ...
- l) Finally, when all is said and done the Committee's comments should be borne in mind in *Sinclair v Hawkes Bay Electricity Power Board* (1953) Land valuation Committee; that although transmission lines are now a regular feature of the countryside the wires and supporting pylons are generally regarded as a nuisance and an impediment in the ways of the complete utilisation of the land affected.

23. It is pertinent to recall at this stage that what is proposed to be taken by way of compulsory acquisition in the case of Transpower's proposed Whakamaru to Auckland transmission line is an interest in the land in the form of an easement, not the land as a whole. In this context, it is particularly noted that nowhere in the Public Works Act is it stated that compensation must be made by way of a lump sum payment, as opposed to the award being by way of provision for a regularly reviewable annual sum payment. Nevertheless, it is acknowledged that in various parts of the Public Works Act mention is made of the payment of a "sum". For example, s 89 states that:

89 Separate sums to be awarded for items of claim

The Land Valuation Tribunal may not award a gross sum in respect of 2 or more items of any claim for compensation, but the Tribunal shall in respect of each item of the claim award a particular sum as compensation to be paid to the claimant, subject to such conditions as it may think equitable, or determine that no compensation is payable in respect of it.

However, there does not appear to be any impediment on a claim being made in terms of ongoing losses couched in recurring annual terms, rather than in terms of the aggregate of all losses. The provision for the award to be made "subject to such conditions as [the Tribunal] may think equitable" would seem to provide scope for the regular review of the amount of the annual sum payment.

24. In the context of the powers of the Land Valuation Tribunal, Brown notes that, in the South Australian jurisdiction at least:²⁹

It is a principle of land acquisition proceedings that a Court makes 'a determination once and for all': *Commissioner of Highways v George Eblen Pty Ltd* (1975) 10 SASR 384 at 391. In the absence of statutory provision there is no opportunity for the court to reconsider its determination even if additional evidence of loss incurred by the dispossessed owner becomes available to the parties.

²⁹ Brown, Section 3.2, p 82.

25. In *Whangarei District Council v Valuer-General*,³⁰ the High Court reviewed a decision in which the Land Valuation Tribunal was called upon to assess the compensation payable for an esplanade strip as prescribed by s 237H of the Resource Management Act. The Court acknowledged that the principles developed for the assessment of compensation pursuant to the Public Works Act were inappropriate for application in situations involving s 237H, and said:³¹

The interest acquired and the interest retained by the landowner in fact bear little relevance to the underlying value of the land. It is therefore our view that any approach to valuing the interest acquired, which has as its starting point the value of the land upon which the esplanade strip is created, is erroneous. We take the view that the correct approach is:

- (a) The interest should be identified and assessed in the context of the 'parent' property.
- (b) The interest to be taken must be valued independently of the balance interest or interests in the land. (See *In re Jackson* [1961] NZLR 50, 57 per Archer J).

In order to assess the value the first and most important matter to be borne in mind is that it is an interest only that is being taken, not the land itself with all its attaching rights and interests. The valuer must assess:

- (i) **What will the appellant gain? ...**
- (ii) **What has the owner lost? ...**

26. It is acknowledged that the "gain" stood to be made by requiring authorities is of limited relevance in assessing compensation under the Public Works Act. Nevertheless, as Fogarty states,³² some account needs to be taken of the injurious affection arising from the on-going use of the land by the requiring authority, in cases where it is only an interest in the land that is taken. The fact that the owners' losses are on-going suggests that provision for on-going compensation is likely to be the best way the "full compensation" required by s 60 of the Public Works Act and all the relevant authorities can be awarded. It is also suggests that provision for on-going compensation would be the best way to "place the dispossessed owner in a position as close as possible to the position that he or she was in before".³³

27. It is submitted that an approach to the valuation of the compensation for the interest in land that is proposed to be compulsorily acquired in the case of Transpower's NoR that is along the lines suggested in the *Whangarei* case, suitably modified to discount the "gain" stood to be made by Transpower and suitably modified to provide for annual compensation would lead to the assessment of compensation that is more equitable to all parties.

³⁰ (1998) 4 ELRNZ 285.

³¹ *Ibid* p 293.

³² Para 11 above.

³³ See n 5 above.

28. Further, it is submitted that valuers are well versed in assessing compensation payments on an annual basis with appropriate review provisions,³⁴ so any assessment of compensation on an annual basis would not conflict with the principles concerning the role of the Land Valuation Tribunal that are described in the *Telecom* and *Blair* cases.
29. Noting Federated Farmers' submissions to the Board that:³⁵
- the Resource Management Act directs that matters to do with the easement and the compensation offered to land owners are relevant to the Board's consideration; and
 - that the circumstances of Transpower's proposed transmission line are such that the lack of provision for ongoing compensation by way of a periodically reviewable annual payment for the ongoing production losses of farmers brought about by its transmission lines is not sustainable, and does not achieve the purposes of the Resource Management Act:

it is respectfully submitted that there is nothing in the Public Works Act that prevents the Land Valuation Tribunal from granting compensation by way of annual payments rather than one-off payments. From this it follows, it is submitted, that the Tribunal is accordingly authorised to grant compensation by way of annual payments.

30. Nevertheless, Federated Farmers accepts that the Board may come to a different view on the matter of whether the Land Valuation Tribunal is accordingly authorised to grant compensation by way of annual payments. Notwithstanding whatever the Board's view on the matter may be, it is respectfully submitted that, irrespective of whether or not the Land Valuation Tribunal is authorised to grant compensation by way of annual payments, the Board is entitled to determine (and in Federated Farmers submission, should determine) that the circumstances of Transpower's proposed transmission line are such that the lack of provision by Transpower for ongoing compensation by way of a periodically reviewable annual payment for the ongoing production losses of farmers brought about by its transmission lines is not sustainable, and does not achieve the purposes of the Resource Management Act.
31. Noting that it is Federated Farmers' submission that the application of the Public Works Act in the circumstances of Transpower's NoR is subject to the purpose of the Resource

³⁴ For example in cases of the lease of land.

³⁵ Submissions, Federated Farmers of New Zealand & Others, para 104 - 115.

Management Act,³⁶ it is therefore respectfully submitted that the determination of whether or not this application of the Public Works Act to the matter of compensation promotes the sustainable management of natural and physical resources should, for the Board's purposes, be determined in accordance with normal statutory interpretation procedures.

32. It is submitted that the law on the approach to be taken to the interpretation of Part 2, the "purpose and principles" part of the Resource Management Act is well known, and is summed up in the oft-repeated statement by Justice Greig in the *NZ Rail "Shakespeare Bay"* case.³⁷

This part of the Act describes in ordinary words of wide meaning the overall purpose and principles of the Act. It is not, I think, a part of the Act which should be subjected to strict rules and principles of statutory construction which aim to extract a precise and unique meaning from the words used. There is a deliberate openness about the language, its meanings, and its connotations which I think is intended to allow the application of policy in a general and broad way.

And that of Judge Sheppard in the *North Shore "Okura"* case:³⁸

We have considered in the light of those remarks the method to be used in applying section 5 to a case where on some issues a proposal is found to promote one or more of the aspects of sustainable management, and on others is found not to attain, or to attain fully, one or more of the aspects described in paragraphs (a), (b) and (c). To conclude that the latter necessarily overrides the former, with no judgment of scale or proportion, would be to subject section 5(2) to the strict rules and proposal [sic] of statutory construction which are not applicable to the broad description of the statutory purpose. To do so would not allow room for exercise of the kind of judgment by decision-makers (including this Court — formerly the Planning Tribunal) alluded to in the *NZ Rail* case.

Having stated that, His Honour went on to state that:³⁹

The method of applying section 5 then involves an overall broad judgment of whether a proposal would promote the sustainable management of natural and physical resources. That recognises that the Act has a single purpose. Such a judgment allows for the comparison of conflicting considerations and the degree or scale of them, and their relative significance or proportion in the final outcome.

33. To put it simply, the submission is that, in determining whether Transpower's proposal promotes the purpose of the Resource Management Act, it is the fact of what Transpower is offering by way of compensation that should be taken into consideration

³⁶ Submissions, Federated Farmers of New Zealand & Others, para 110.

³⁷ *NZ Rail Ltd v Marlborough District Council* [1994] NZRMA 70, p 86.

³⁸ *North Shore City Council v Auckland Regional Council* (1996) 2 ELRNZ 305, p 346.

³⁹ *Ibid* p 347.

by the Board, and it is submitted that the detail of how that compensation might be arrived at is not relevant to the Board's consideration.

34. Thus, Federated Farmers continues to contend that matters to do with the easement and the compensation on offer by Transpower are relevant to the Board's determination, and these are considered further in the section of this Memorandum that immediately follows.
35. In concluding this section of the Memorandum, the opportunity is taken to reiterate Federated Farmers' submissions concerning the effects of constraints put on property use by Transpower's proposal:⁴⁰

Federated Farmers considers that matters of indemnity, liability and compensation are not adequately addressed in the easement agreements offered to land owners by Transpower. It is submitted that, in respect of matters concerning indemnity and liability, the purpose of the RMA is not promoted for so long as inadequate provision is made by Transpower to provide indemnity to landowners for losses suffered as a result of the transmission lines or liabilities that might arise from the transmission lines, and for so long as inadequate provision is made by Transpower to limit the liability potentially faced by land owners for disruption to the electricity network as a result of some action or negligence on the part of the land owners.

In respect of compensation, it is submitted that the circumstances of Transpower's proposed transmission line are such that the lack of provision by Transpower for ongoing compensation by way of a periodically reviewable annual payment for the ongoing production losses of farmers brought about by its transmission lines is not sustainable, and does not achieve the purposes of the RMA.

THE RELEVANCE OF MATTERS CONCERNING THE EASEMENT AND COMPENSATION

36. It is Federated Farmers submission that any application of the Public Works Act at the behest of a network utility operator is subject to the purpose of the RMA. In support of that proposition it was contended that:⁴¹
- Resource Management Act 171(1)(b)(i) is a direction that consenting authorities are to consider how the requiring authority proposes to gain an interest in the land that is sufficient to enable it to undertake the work;
 - the compulsory acquisition power to which Transpower has ultimate recourse is provided through the Resource Management Act, so that power is subject to Part 2 of the Act;
 - Parliament must have intended that application of the Public Works Act was to be subject to the purpose of the Resource Management Act.

⁴⁰ Submissions, Federated Farmers of New Zealand & Others, para 114 – 115.

⁴¹ Submissions, Federated Farmers of New Zealand & Others, para 107 – 110.

37. In addition, it is submitted that, because Transpower is relying on matters provided for in the Memorandum of Easement⁴² and on matters provided for by way of the compulsory acquisition provisions (particularly the compensation provisions) of the Public Works Act to avoid, remedy or mitigate the adverse effects of its proposal in resource management terms, those matters must be matters that are of direct relevance to the consideration by the Board of the proposal before it. As is discussed at length in the preceding section of this Memorandum, while it is the Public Works Act that describes the process for determining the circumstances under which compensation should be paid and the quantum of that compensation, it is a Resource Management Act process that determines whether that compensation will adequately avoid, remedy or mitigate the adverse effects the proposal will have on the environment.
38. Likewise, matters concerning the easement are provided for by way of the Public Works Act, while it is by way of a Resource Management Act process that it is to be determined whether or not provisions in the Easement Memorandum will adequately avoid, remedy or mitigate the adverse effects the proposal will have on the environment.
39. In the case *Wymondley Against the Motorway v Transit New Zealand*,⁴³ the Environment Court, in assessing a motorway proposal in terms of Part 2 of the Resource Management Act, saw that compensation under the Public Works Act did not mean the effects on those whose land was to be compulsorily acquired would be adequately avoided, remedied or mitigated. The Court said:⁴⁴

It is not for this Court to enter into the realms of compensation, but we cannot help but comment that the method of assessing compensation in a situation such as this is woefully inadequate. Because these people have expended more money than could ever be recovered on establishing a community for families, the valuation of their property would never compensate for what they have spent, let alone compensate for the tearing apart of the community structure.

40. In the case *Takamore Trustees v Kapiti Coast District Council*,⁴⁵ the High Court indicated that compensation has some relevance in the consideration of Resource Management Act s 5 matters when it made the statement that:⁴⁶

The decision maker must first consider whether balancing all the relevant material and the predominant s5 the NOR should be confirmed. It will need to consider avoidance, mitigation of affect and other matters set out in paragraph 5. If

⁴² Common Bundle of Exhibits, Volume 1, Item 4.

⁴³ Environment Court Decision A022/03, 24 February 2003, Judge Treadwell.

⁴⁴ *Ibid* para 35.

⁴⁵ [2003] NZRMA 433.

⁴⁶ *Ibid* para 110.

mitigation, then it will be implicit that some effect remains, and in all probability compensation will be all that will be left to an affected party. *Compensation will be considered only after it is concluded (if it is) that the balance lies in confirming the NOR and all effort to avoid or mitigate has been undertaken (emphasis added).*

41. Federated Farmers stands by its submission that matters to do with the terms of the easement and the compensation offered to land owners are relevant to the consideration by the Board of the proposal before it.

A REQUIRING AUTHORITY CANNOT COUCH ITS OBJECTIVES IN SUCH TERMS SO AS TO EXCLUDE THE CONSIDERATION OF ALTERNATIVES

42. Transpower's objective is described in the NoR as being:⁴⁷

To ensure the continued security and certainty of electricity supply to Auckland, Northland and parts of the Coromandel and Waikato, by constructing and operating an new transmission link (including substations and ancillary facilities) and to upgrade existing assets, in a manner that is safe, efficient, and consistent with maintaining current grid reliability standards and which provide flexibility to address future changes in supply.

43. In its submissions, Federated Farmers described the objective as being:⁴⁸

To ensure the continued security and certainty of electricity supply to Auckland, Northland and parts of the Coromandel and Waikato

And the submission went on to state that:⁴⁹

The objective continues on to describe a method by which Transpower seeks to achieve this objective, which of itself suggests that inadequate consideration may have been given to alternative methods of achieving the objective.

44. No authority was cited by Federated Farmers for the implicit proposition that an objective should not specify the method by which the objective is to be achieved.
45. Federated Farmers takes the opportunity to draw the Board's attention to a statement by the Environment Court, apparently unchallenged on a subsequent appeal by the relevant requiring authority to the High Court, that:⁵⁰

⁴⁷ Notices of Requirement Documentation, Part II, Section 4 p 12; Opening Submissions on behalf of Transpower New Zealand Limited, para 261.

⁴⁸ Submissions, Federated Farmers of New Zealand & Others, para 51.

⁴⁹ Ibid.

⁵⁰ *Wymondley Against the Motorway v Transit New Zealand*, Environment Court Decision A022/03, 24 February 2003, Judge Treadwell, para 28.

In relation to objectives, this Court has no jurisdiction to amend the objectives of the requiring authority, but is entitled to consider alternative sites, routes or methods etc for achieving the stated objective. That is subject to the caveat that *a requiring authority cannot couch its objectives in such terms as to exclude consideration of alternatives*, but rather that the enquiry of this Court must be limited to considering alternatives etc against the objectives which the requiring authority has specified (*emphasis added*).

CONCLUSIONS

46. A Federated Farmers representative is available to speak to this Memorandum, should the Board wish that. Mr Rice has the contact details.

Dated at Auckland this 25th day of September 2008

Richard Gardner
Senior Policy Advisor

EPILOGUE

The following is reproduced from the frontispiece of Speedy:

"So you want to buy my farm" he said
"You'd buy my farm" said he
Well, how do you value the light and shade?
What is your price for the dream I've made?
And how would you buy on size or grade —
The children whose shouts you hear?
"You haven't the money to buy" he said
"This bit of a farm" said he
You haven't the money to buy the worth
of the joy and prayer, of the death and birth,
The power that blessed this fruitful earth,
And the love that made it dear."

From "No Sale" by an old-time high-country shepherd known only as "Jeff", presented to Mrs Winefred Roberts of the Ngamatea Station in the central North Island.

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