16 March 2018

FANDS (ACT) PTY LTD
C/- Steven Flannery
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Members of the Legislative Assembly
and Chairman of the Public Accounts Committee
GPO Box 1020
Canberra ACT 2601

Dear Sir/Madam

RETROSPECTIVE APPLICATION OF RATES LIABILITIES

General introduction

Between 2012 and 2017 FANDS (ACT) Pty Limited was the owner of a lease of a two-storey building on the western side of Lonsdale Street in Braddon. The building was identifiable by the signage of Paddy Pallin, one of the tenants.

As is well known, over the last 10 years, Braddon has undergone a profound transformation from an area of old service trades buildings and used car yards to a focal point of restaurants, entertainment and new inner-city residential development. Its skyline has also been radically transformed. Not surprisingly, the redevelopment of Braddon has changed property values in the area.

The Commissioner is obliged by the Rates Act to determine the unimproved value of leases. This means that if a lessee varies his lease purpose clause, the Commissioner has to value it according to its new terms, not its old terms. It will therefore be a significant surprise to readers that the Commissioner for ACT Revenue has not taken any review in Braddon in the last 10 years to determine which leases have changed their purpose clauses or to re-value property in Braddon according to current circumstances. He only commenced doing so in 2017.

Even more surprising will be that, having failed to discharge his statutory obligation to re-value for both changes in leases and according to market movements, the Commissioner proposes to recover any lost revenue by issuing retrospective rates notices to landholders, going back many years. He issued a five-year retrospective rates notice to FANDS which exceeded $600,000.

On 6 July 2017 the Commissioner issued a letter in the following terms to rate payers in Braddon.

> Over the past ten years the commercially-zoned precinct of Braddon has transformed from generally low-value permitted uses of trade and services to high-value uses of commercial retail, residential and mixed-use developments.
>
> This has significantly increased the market value for the properties in Braddon, but in some cases has not yet been factored into the values to determine ACT property charges.

It seems that there will be more retrospective rates notices to come.

Retrospective rates should not be imposed to make up for ACT Revenue's administrative inertia. Retrospective rates: -

- Catch businesses by surprise.
- Make budgeting with confidence impossible.
- May mean that it is impossible to recover under rates recovery clauses in a sublease – the lease may have expired and the tenant may have left.
- Mean that purchasers can have no confidence in rates searches. A search which shows no rates owing on a property may later be changed by the Commissioner with the purchaser being met with years of retrospective rates debt.
- Destroy business confidence.

Brief Background

FANDS changed it purpose clause in 2011. Five years later, on 6 September 2016, the Commissioner wrote to FANDS advising that as FANDS "had a recent change in purpose clause" he was issuing a retrospective rates notice for $613,614.53 for rates back to 2011. When FANDS requested an extension of time to pay such a huge and unexpected impost, the Commissioner's office said that it would have to pay interest on the outstanding balance of the account.

As a result of this impost, FANDS' owners had to find $613,614.53 for back rates plus $265,907.60 for the next 12 months from October 2016. Based on its rates notices for the previous five years, FANDS had budgeted to pay approximately $90,000 in rates. The consequence was that FANDS had to sell the property in order to meet the rates debt. Had the Commissioner fulfilled his statutory responsibility of valuing FANDS' varied lease when the variation occurred and adjusted the rates in a timely fashion, these higher costs could have been factored into FANDS ordinary budgeting.

As with many small investment companies, the majority of FANDS shareholders were trustees of superannuation funds. These funds are subject to strict rules and are not readily able to borrow funds simply to pay over $800,000 in a year. The Commissioner's "blind-siding" of FANDS created such difficulty for the company that it ultimately had to sell the asset – something that was not previously contemplated. The cost of defending FANDS' position now approached $100,000 with further costs expected.

FANDS is not the only one the Commissioner intends to treat in this way, as will be demonstrated over the coming months. The retrospective imposition of rates will have a considerable impact on investment going forward.

Purpose of this Letter

The purpose of writing to you and other members of the Legislative Assembly is to seek the intervention both of the *Executive Government* to remedy the injustice caused to FANDS Pty Limited by waiving the debt created by the retrospective imposition of rates. It is also to request that *members of the Legislative Assembly* rectify the legislation which permits such injustice so that it does not occur again – for anyone. For those members of the *Public Accounts Committee*, we would respectfully request that you conduct an inquiry into the administration of the rates legislation to determine how this situation has arisen and what can be done to alleviate those caught up in it.

Detailed Factual History

On 28 March 2008, FANDS applied to the ACT Planning & Land Authority ("ACTPLA") to vary the Crown lease over the land it owned in Braddon to add "residential uses" and "restaurant" to the purpose clause. ACTPLA approved this variation on 22 September 2008.[1]

The variation to the Crown lease could not be registered until "Change of Use Charge" was paid. There was a dispute between the parties about the amount of change of use charge. This was settled by consent. The parties agreed that the variation increased the value of the lease by $67,000.00. On 2 November 2011, the Registrar-General notified the registration of the variation of the lease.[2]

FANDS understood that valuation reviews were being undertaken. After the variation, in each of the years from 2009 until 2016, the Commissioner issued valuation notices to FANDS setting out the unimproved value of the property. The valuations he issued actually went down. These notices are summarised below.[3]

TABLE 1 – ORIGINAL UNIMPROVED VALUES

Date of notice	Date of redetermination	Unimproved value
	1 January 2009	$2,175,000
	1 January 2010	$2, 066,000
15 August 2011	1 January 2011	$1,859,000
15 August 2012	1 January 2012	$1,766,000
15 August 2013	1 January 2013	$1,678,000
18 August 2014	1 January 2014	$1,678,000
17 August 2015	1 January 2015	$1,678,000

On 16 August 2016, the Commissioner issued a rates assessment for 1 July 2016 to 30 June 2017 based on a land value of $1,678,000.00. Less than three weeks later, on 6 September 2016, an officer of the ACT Revenue Office advised FANDS that the land "had a recent change in purpose clause". FANDS was advised of the following changes in unimproved value.

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1 ACAT Decision *FANDS (ACT) Pty Ltd v Commissioner for ACT Revenue (No. 2)* [2017] ACAT 112 at pars. [16]-[17].

2 ACAT Decision par. [24].

3 ACAT Decision par. [26].

TABLE 2 - RETROSPECTIVE UNIMPROVED VALUES

Date of redetermination	Previous unimproved value	Increased unimproved value
1 January 2009	$2,175,000	$4,320,000
1 January 2010	$2,066,000	$4,800,000
1 January 2011	$1,859,000	$4,800,000
1 January 2012	$1,766,000	$4,800,000
1 January 2013	$1,678,000	$4,800,000
1 January 2014	$1,678,000	$4,800,000
1 January 2015	$1,678,000	$4,800,000
1 January 2016	$1,678,000	$4,800,000

The Commissioner issued FANDS retrospective rates assessments as follows.

TABLE 3 – RETROSPECTIVE RATES ADJUSTMENTS

Financial year	Original assessment	Adjusted assessment in 2016
2011-12	$23,948.89	$22,258.92
2012-13	$55,248.50	$87,563.19
2013-14	$67,965.85	$122,536.62
2014-15	$76,212.63	$149,543.03
2015-16	$85,129.21	$164,107.54
2016-17	$90,517.64	$175,389.96

The increased assessments resulted in an increase in rates of $546,009.30, payable by 15 December 2016, an increase in land tax of $30,462.19, payable by 15 October 2016, and an increase in City Centre Marketing and Improvement Levy of $37,143.04, payable by 15 October 2016 giving rise to a total of $613,614.53.[4]

FANDS requested an extension of time to pay. On 21 October 2016, the Commissioner wrote to FANDS agreeing to interim payment arrangements for six months, pending the outcome of objection, but noting that interest would continue to accrue on the outstanding balance.

FANDS objected against the Commissioner's retrospective assessment of rates and appealed to the ACT Civil & Administrative Tribunal. We need to make it very plain at the outset. We are not intending to dispute the ACAT decision with you. To the extent that that FANDS challenges the ACAT decision, it will follow the normal administrative review and judicial review procedures set out for that purpose.

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4 ACAT Decision par. [32].

We are raising those matters for the Executive Government being the extraordinary administrative failings which have given rise to a situation of great injustice and requesting that the Treasurer exercise his discretion to waive the debt which has been imposed. This is a clear Executive government responsibility.

We are also raising the draconian legislation which enables the Commissioner to issue retrospective rating assessments to overcome his administrative failings for consideration by members of the Legislative Assembly. This is a clear legislative responsibility. We will, however, make some reference to the evidence before ACAT so that readers of this letter may independently verify the statements we make, if they wish.

The Statutory Obligation

Section 10 of the *Rates Act 2004* imposes a legal obligation on the Commissioner to re-determine the unimproved value of parcels of land as soon as practicable after 1 January each year. Section 6 provides that this is to be done by the Commissioner determining the capital amount that might be expected to have been offered for *the lease of the parcel.*

The Commissioner is therefore required to re-determine the value of the lease of land each year. If a lease is varied, he is required to re-determine the current not the outdated form of the lease. In the case of FANDS, he failed to do this for five years. There was evidence that the Commissioner failed to re-determine leases which have been subject to lease purpose clause changes in Braddon, possibly for as long as ten years. Are they to receive retrospective rates notices too?

In the ACAT case, the Commissioner stated that he used a process of "standard mass appraisal" to re-determine the values of leases across the whole of the ACT. This is a perfectly reasonable approach for most of Canberra where leases remain static – but Braddon?!

The Commissioner stated that once the subject block was assessed in 2009, it would have been subject to this mass appraisal process which gave some consideration to "general trends" for the data set of commercial properties in commercial zones across the ACT.[5] A review of an area would relate to an issue identified in the Braddon values in that area where the area seemed to be "out of line".

It was put as part of the Commissioner's case that there was "no specific programme set for re-grading and it is often associated with a specific issue identified in the area". No re-grading of Braddon specifically had been done before 2017.[6]

According to Mr King, the chief valuer with the ACT Valuation Office, the first lease in Braddon to be varied to include residential use would have been in at least 2010, if not earlier.[7] The Tribunal found:

> "During the period under consideration in this case, the value of commercial properties in the Braddon area moved differently from other commercial areas of the ACT. That difference was not identified [by the Commissioner] until the 2016 case involving Hosma Holdings Pty Limited and the Commissioner".[8]
>
> Despite the lapse of time and the evident changes in Braddon, the Commissioner undertook no review of the land values in the suburb. According to the ACAT findings, the Commissioner did not even "identify" that changes had taken place in Braddon until 2016. He must have been the only person in Canberra who had not noticed.

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5 ACAT Case par. [191].

6 ACAT Case pars. [224] & [225].

7 ACAT Case par. [194].

8 ACAT Case par. [196].

This is doubly surprising. ACTPLA who approved the variation of FANDS' lease. It was the Commissioner's case that he was not informed by ACTPLA of lease variations and that FANDS was not entitled to expect that he would be. The Commissioner actually became legally responsible for levying charges for lease variations in July 2011. From that date he actually had responsibility for overseeing events taking place in Braddon.

In the ACAT case, it was the Commissioner's case that the obligation was on the ratepayer to notify the Commissioner that there had been a change in lease purpose clause so that the Commissioner might then adjust the ratepayer's rates. No such practice exists in the ACT. We have consulted the Property Council of Australia, the Australian Property Institute and various property experts including a highly experienced conveyancing solicitor. We have repeatedly been informed that there is no conveyancing practice associated with the change of lease purpose clause which sees ratepayers notify the Commissioner of a change in lease purpose clause.

It should be noted that in the ACAT case the Commissioner and his officers declined to give evidence and be cross-examined about this alleged practice or of any ACT Revenue internal processes to deal with it. A review of Revenue Office found no forms or practice about notifying the Revenue office of changes of lease purpose clauses and there is no evidence that people do notify them. We repeat, the Commissioner did not call any officer to swear to any such practice. He could not have. It does not exist.

These facts give rise to the following questions.

1. If the Commissioner maintains that there is a practice of people notifying him of changes of lease purpose clause, what are the standing procedures for that notification to take place? Has it been publicised? What forms are required? What type and standard of information does the Commissioner require a leaseholder to notify him of? How long has any of this practice been in place? What examples can the Commissioner provide of where notification of this kind has taken place?

2. If there are no such procedures in place, how does the Commissioner ordinarily become aware of changes in lease purpose clause affect re-determinations of unimproved value to take those changes into account? When were these procedures first put in place?

3. Were any of the procedures in answer to question 2 in place and used in relation to Braddon? If those procedures were not used in relation to Braddon over the last ten years, why not?

4. If there were procedures in place to detect changes in lease purpose clauses, why did the Commissioner issue a letter dated 6 July 2017 mentioned above?

5. Does the Commissioner intend to issue further retrospective notices for rates in Braddon? For what lengths of time are any such notice retrospective? How many are to be issued? Are they only in Braddon?

6. What reviews of valuations consequent upon changes to lease purposes clauses and development generally occurred in Braddon over the last 10 years?

I look forward to discussing any aspect of this with you at your convenience.

Yours sincerely

STEVEN FLANNERY

On behalf of FANDS (ACT) PTY LTD