

1916

THE MELBOURNE TRAMWAY & OMNIBUS
COMPANY LIMITED

AND

TRAMWAY BOARD
ARBITRATION

REPORT OF PROCEEDINGS

Before His Honor MR. JUSTICE GUSSEN

In Arbitration.

IN THE MATTER OF THE ARBITRATION

Between

THE MELBOURNE TRAMWAY AND OMNIBUS
COMPANY LIMITED

CLAIMANTS

AND

THE TRAMWAY BOARD

RESPONDENTS.

BEFORE HIS HONOR MR. JUSTICE CUSSEN,

The Arbitrator appointed under Act No. 2818 of the Parliament of
Victoria, intituled the "Tramway Board Act 1915."

SIR WILLIAM IRVINE, K.C., AND MR. H. E. STARKE,
instructed by Mr. J. V. McEACHARN (MESSIEURS F. G.
SMITH and McEACHARN), appeared for the Melbourne
Tramway and Omnibus Company Limited.

MR. F. W. MANN AND MR. OWEN DIXON, instructed
by Mr. W. B. M'CUTCHEON (MESSIEURS W. B. and
O. M'CUTCHEON), appeared for the Tramway Board.

PREFACE.

In the year 1883, an Act of the Parliament of Victoria sanctioned the construction of a cable tramway system for the metropolis of Melbourne; and, pursuant to the enabling powers of the Act, a corporate body, The Melbourne Tramways Trust, was created to represent the City of Melbourne and nine contiguous municipalities in the inauguration of the cable tramway undertaking.

This body borrowed the necessary moneys, and constructed in the principal streets of Melbourne and suburbs, at a cost of about £1,650,000, a cable tramway system, comprising 43 miles of double track, with the necessary power houses, engines, wire cables, and plant. The tramway undertaking so installed was then leased to a corporation known as the Melbourne Tramway and Omnibus Company Limited, upon specific terms and conditions, for a term of years expiring on 30th June, 1916, the Company paying to the Trust annually the interest on the cost of construction, and also into a sinking fund such annual amounts as would at the end of the Lease extinguish the whole cost of construction, together with interest.

Towards the termination of the Lease, the Parliament of Victoria in 1915 passed an Act (No. 2818), intituled the "Tramway Board Act 1915," which provided for the appointment of a Tramway Board to act as successor to and in the place of the Melbourne Tramways Trust, and to carry on the cable tramway system on and after the termination of the Lease. And as no provision had been made in former Acts for the payment of compensation to the Lessee Company on the termination of its Lease for any tramway property of the Company which did not pass to the Lessors, and no basis had been laid down for the continuance of the tramways, the Act provided that, in order that there might be no interruption of traffic on the tramways, the Board might acquire by notice such tramway property not the subject of the Leases as it might require, and that compensation for such property, and any other tramway property the Company did not desire to retain, should be determined by arbitration, the arbitrator to be a Judge of the Supreme Court of Victoria, and the powers and duties of the Arbitrator were defined in the Act.

In furtherance of the scheme of the Act, the Governor of Victoria in Council appointed a representative Board of five members—

CHAIRMAN: Colin Templeton, Esq.

MEMBERS:

Alderman Sir David Hennessy, Knt.

Alderman Sir Henry Weedon, Knt. | Cr. Frederick Thomas Hickford.

Cr. Alexander Renfrew.

The Board assumed office in January, 1916, and appointed Mr. West Outtrim Strangward Secretary, Mr. Walter Bothwell McCutcheon Solicitor, and Mr. Percival John Pringle, M.I.E.E., M.I.M.E., Consulting Engineer.

Upon the expiry of the Leases on 30th June, 1916, the Board took over the cable tramway system, and has since operated the undertaking, pursuant to the enabling powers of its Act.

Mr. Justice Cussen was appointed by the Governor-in-Council as Arbitrator, and undertook the burden of determining the amount of compensation to which the Company was entitled under the provisions of the Act No. 2818, the amount claimed being £469,218 19s. 2d., afterwards revised to £442,254 17s. 6d.

The proceedings in the Arbitration commenced on the 21st August, 1916, and continued at intervals, lasting altogether 24 days. The concluding sitting was held on 15th December, 1916.

In January, 1917, Mr. Justice Cussen pronounced his award, and fixed the compensation payable to the Company at the sum of £335,000, at the same time setting forth the principles upon which he had framed his award.

These principles were reviewed by the Full Court of Victoria, which found in favor of the Board (by a majority judgment) on the matters (1) of compensation having been awarded on the basis of structural cost less depreciation, in lieu of market prices, and (2) of the Arbitrator not having had regard, when fixing values, to the probability of the cable tramway system being converted into an electrical tramway system, but otherwise found in favor of the Company.

These findings of the Full Court of Victoria are now the subject of appeal to His Majesty's Privy Council.

The proceedings before the Arbitrator raised many important questions of law and of fact, and the comprehensive and varied nature of the assets taken over involved a considerable amount of controversy on questions of compensation and methods of value, obsolescence of chattels, obsolescence of a tramway system, methods of assessing depreciation, and other interesting issues.

This report of the Arguments and Evidence before the Judge Arbitrator is published for the information and assistance of those concerned in similar undertakings.

THE MELBOURNE TRAMWAY AND OMNIBUS
COMPANY LIMITED

CLAIMANTS

AND

THE TRAMWAY BOARD

RESPONDENTS.

FIRST DAY, 21st AUGUST, 1916.

HIS HONOR read the Order-in-Council under which he was appointed Arbitrator.

SIR WILLIAM IRVINE, K.C.: Your Honor has invited counsel on both sides to discuss the best way of handling this large and difficult matter with which Your Honor is entrusted, and my learned friend, Mr. Starke, and I have already been giving some consideration to that question. What I suggest is that to-day I should commence to open the case very shortly, so as to place Your Honor and my learned friends on the other side in possession as much as possible of the leading principles on which we have based our claim, without in any way going into detail with regard to the evidence to be called, or the nature of that evidence, except in so far as it is directly necessary to state to Your Honor the principles which we have adopted. Your Honor will see that the matters differ very largely—from lands, including land in some cases which is vacant, down to the odds and ends of plant and machinery, and the structures erected on the land, car sheds, and so forth, and the erected and working plant, of course. First of all I suggest that I should be permitted to draw Your Honor's attention to the Act itself, to what has been done under that Act, and the position of the parties under the various leases which were expired, and what we put forward as the rights of the parties under the Act of 1915; then to place before Your Honor, from our point of view, what we say are the methods, or, indeed, as we put it, the method of the various applications of valuation which we think Your Honor ought to adopt. The Letter of Claim is dated July 5th, 1916, and is signed by Mr. Wilcox. I put it in. I think Your Honor has had the opportunity of looking at the claim, but you have not had the opportunity of looking at this set of documents, which I hand to Your Honor, as the claim, subject, of course, to any corrections mentioned in Mr. Wilcox's letter.

[EXHIBIT "A"—Notice of Claim dated July 5th, 1916, referring to Inventory.]

[EXHIBIT "B"—Inventory of Claim. Ten volumes.]

HIS HONOR: Is it divided into categories of any kind?

SIR WILLIAM IRVINE: Yes, I am going to explain that. I may say to start with that we have adopted the practice here, for the convenience both of Your Honor and the other side, of setting out the amounts of our claim. We do not admit that this is necessary in the statement required by the Act, and it does not finally bind us in detail to anything. They are set out for what they are worth.

MR. MANN: I understand the Statement of Assets is subject to correction, as well as the figures.

SIR WILLIAM IRVINE: Yes. I can give Your Honor a very rough view of this to start with, because I shall have to ask you later on to go into detail. I will ask you at present to look at Volume 1, in which you will find an index showing the contents of the inventory books. If Your Honor will look at the general index of the whole claim, which you will find on the third sheet in Book No. 1, that will give you a perspective idea of the amounts that are claimed. You will find the total amount comes to £469,218 19s. 2d. That is made up, as Your Honor will see, very much—the chief part of it is contained in Book 1—of the items of real property, wire ropes, extra machinery in engine-houses, rolling-stock, horses, and contents of Head Office. The Head Office is a property in Bourke-street with a building upon it. The whole of the first six heads are included in Book 1, and if you will turn to any one of those—for instance, "Freehold Properties"—you will see freehold properties are set out at certain amounts "as per valuation." That means they have been valued, and evidence will be given of their valuation as freehold properties. Turning over a little further to wire ropes, I shall have to give a more full explanation of those wire ropes to Your Honor presently. I will pass them by for the present. A difficulty arises here in connection with certain of the wire ropes belonging to the Board and certain belonging to the Company, and there may be a dispute as to which belong to the Company and which to the Board. We say it will be for Your Honor to decide that fact, as well as to decide the value of those which belong to the Company.

With regard to the rolling-stock, I cannot go into that particularly at present; but you will see that the Inventory takes each separate car and values it as a particular chattel, gives its origin, whether it was made by the Company or not, its class, its age, and so on, the present value, and certain deductions for repairs. That will require a much more detailed examination before the evidence is called. But I mention this in order to give Your Honor a general indication of how these books are made up physically, and how they are put together.

A question arises under the *Tramway Board Act of 1915*. Under that Act, Your Honor has to value a very large quantity of things which are handed over by us to the Board. There are two points that arise at once for discussion—one is the point of time, and the second is the method or principle of valuation to be adopted. With regard to the time, I think that may be disposed of fairly easily, because I do not really think in regard to the two, or at most three, points of time that could be taken under this Act, Your Honor will find much difficulty in them. We submit the point of time is the 30th of June, 1916. It may be suggested as an alternative that it may be the time, so far as the goods and articles contained in it are concerned, of the Notice of Acquisition, like a Notice of Claim under Compensation Law. The third possible contention might be that the time was the passing of the Act—that the Act itself operated to create a kind of statutory right binding on the property existing. I submit, although I do not think it will really make very much difference, that the first date I mentioned is the time that should be taken—namely, the date on which the property is to vest under the Act. With regard to that, you will see that there is no direct indication given. The Act, after creating the Tramway Board, and dealing with its power of entering into contracts, its incorporation and financial provisions, the establishment of a Tramway Fund and so forth, by Section 30 proceeds to operate upon the tramways which are now existing, and it provides—(reads Section). Leaving out for the moment a secondary business—the Royal Park line, which I shall deal with separately—the Act goes on to provide for the officers and servants of the Company being transferred to the Board. Then comes Section 34. (Reads Section.) The date of the Notice of Acquisition under that clause is March the 31st of this year. I may as well put it in now.

[EXHIBIT “C”—Notice of Acquisition.]

I did not mention the number of books that were put in. There are nine books.

I will draw Your Honor’s attention to a matter that may be of some importance, and will perhaps be a matter of difficulty. It is not quite correct to say that those books are in fact the Inventory, because those books were not in fact got together in the full form that they now are until later than March. The Inventory was given, which practically comprised all the items in those books as they stand about the 1st of March. The other side have the originals, and if they desire they can put them in. I do not know that much turns upon that now. This Notice of Acquisition sets out that the Board claim all the things set out in the Schedule, which sets out, for instance, the following chattel properties wheresoever situated, excepting “All Omnibus Vehicles,” and so on. Then they set out in those general terms what they want, and they say, “Save and except such as are already or shall have become the property of the Board.” I do not think it is probable they could have done it in any other way. I am not complaining about that. But I want to point out one of the duties of the Arbitrator will be, in certain cases of dispute, to determine not merely the value of certain properties, but what properties are subject to the arbitration.

MR. MANN: It will go very far beyond wire ropes.

SIR WILLIAM IRVINE: I daresay there will be many things. I do not know what the extent of it will be. Have you got the Inventory?

MR. MANN: We have not got it in Court.

SIR WILLIAM IRVINE: The third step is that the Company shall not later than one month give Notice of Retention of things set forth in the Inventory, but not included in the Notice of Acquisition of the 31st of March, 1916. We sent in a notice of retention.

[EXHIBIT “D”—Notice of Retention.]

Next there is the fourth step. The Act itself provides that the things which are not specified in the Notice of Acquisition, and not specified in the Notice of Retention, form a class by themselves, which are to be taken by the Board; but seeing that they do not want them, and we say we do not want them, we are only to be enabled to charge them with the value of those goods at their utility value. See Sub-clause 5 of Section 34. (Reads clause.) I am not sure yet to what extent that will apply to many of the articles, but it will apply, I think, to one very large property—namely, the Head Office, Bourke-street. This would probably come under that head.

HIS HONOR: Do they say they do not want that?

SIR WILLIAM IRVINE: Yes; but I think we shall be able to show that they have used it, and practically to its full extent. That is the general way in which the thing stands as a matter of form at present. I have indicated to Your Honor the general view which we hold with regard to the question of time. Now we come to what is, of course, a far more important question, the law, which Your Honor has to determine upon—the consideration of this Act, and what is the governing or guiding principle to guide the Arbitrator in determining what is the compensation under this Act. The Act first of all provides that at a certain time the Company, which has up to that moment been engaged in carrying on a business, and is in possession of a large quantity of plant and assets used in its business, shall cease to have the power to carry on that business, and would cease, apart from this Act, to have the power to carry on this business, except by contract or an arrangement of that kind. It is in possession of a large quantity of plant all in situ, and of car-sheds and of properties, all previously chosen for the purposes of