Submission to the enquiry into
the future and continued relevance of
Government Land Tenure
across Queensland

The Electorate of Hervey Bay

"In confidence"

Forward

Land Tenure across Queensland encompasses a range of leases including leases to the Dept of Transport and Main Roads (TMR) and to the Dept of Natural Resources (DERM). These leases may include either Wet or Dry leases to TMR in boat harbours or commercial or agricultural leases among others.
Statistics show that the value of lease to the Queensland Government at present is over $6billion plus over $89million in freeholding leases.
In the Hervey Bay electorate, this submission will demonstrate various leases with TMR and DERM highlighting various anomalies.

Background

Hervey Bay has various leases to predominantly Tourist based businesses along the esplanade, foreshore and the Urangan Boat Harbour. The leases are either by TMR or DERM. The irony is that TMR appear to be charging a "premium" of up to 3% to leases charged by DERM in an adjacent situation – this will be demonstrated in case studies below.

There are also leases on Fraser Island.

The disparity in rents and the questionable valuation methodology used will show in the case studies below the affect that this may have on a business' wellbeing.

Leases are for varying terms.

Hervey Bay has several leases by TMR at the Urangan Boat Harbour as below

Dry Rent

• *Commercial Enterprise or Club*	*9%*	*of unimproved value*
• *Semi Commercial/Community*	*4.5-6%*	" " "
• *Voluntary/Emergency Services*	*Peppercorn*	

There are also WET leases at varying rates.

In accordance with Government changes in 2010, the calculation is based on site valuation but the rate has generally been reduced for new leases as below:

Dry Rent

• *Commercial Enterprise or Club*	*7%*	*of Site value*
• *Community Club*	*5%*	" "
• *Amateur Club*	*3%*	" "
• *Voluntary/Emergency Services*	*Peppercorn*	

Leases from DERM appear to be less at 6% of the Unimproved value. Ironically in the Urangan Boat Harbour the prominent rent is to TMR at 9% of the unimproved value, but there are leases to DERM at 6% - and extra 3% or in real terms 50% more in rent!

Valuation Methodology

The unimproved valuation was used as a basis for many years and the subject of debate in 2010 with the Valuation of Land and Other Legislation Amendment Bill (*Pacific Fair etc.)*
Site valuation is now used as a basis for calculating rents, Council rates, land tax and the like. This may have been at a detriment to various business and ratepayers due to the shift of calculation base.
Consideration that improvements made to a site to, in effect make it usable, would usually be paid for by the developer or lessee in most cases. The question to ask here is should the lessee be paying for a lease calculated on a site value when they have actually paid for the improvement - otherwise the land would be useless for the purpose and un-tenable?
Whilst it is not the intention here to debate the rights and wrongs of this methodology of calculation, it must be recognised in that as the basis of new lease calculations, site improvement may have an effect in the rent paid and may have little bearing on the value. Similarly, unimproved value may lose its real identity in built up areas for example where there is no basis for vacant land sales. Valuation is not an exact science and other methods must be used in this case to determine a so called "unimproved value".
To use a real estate adage, "a property is worth what someone is willing to pay on the day."
Case study 5 below shows what can happen when a "questionable" valuation is thrown into the 3 year averaging mix.
Notwithstanding the above, should there be a drop in valuation, then there is no immediate benefit to the lessee, in some cases not at all.(refer case studies 2,3, 4 below)
Generally, if there is a decrease in valuations, business is suffering and this is supported by the correlation between the GFC, business "health" and valuation falls. This is the time when business can ill afford another rate rise or not benefit from a fall.

Case Studies

1. Great Sandy Straits Marina and Resort, Mantra

This encompasses a lease and various sub leases including residential units, holiday units and a marina building and shops.
We are advised that on Perpetual Lease: 209524

- The State lease is subject to about 300 mostly residential 999 year sub-leases (about 44 are 75 year sub-leases).
- State's Lessor: Agreedto Pty Ltd - hold the lease and controlled by the Mantra Group and covers:
    - Sub-Lessees:
        - Mantra Precinct. 109 accommodation units.
        - "Residential Precinct' labelled Breakfree, 183 units (about 60 in holiday pool).
        - Harbour Terminal (marine) sub-lease controlled by the Seymour Group containing a ferry terminal and about 10 shops.

The lessees and sub-lessees have presently sought to freehold the land it is presently before the court on appeal, so it will not be appropriate to discuss this matter.

Transcripts from the case are attached along with a transcript of a similar case in NSW with a different outcome.

2. Whale Bay Marina Complex

TMR lease to 2022

This covers both below and above high water mark rentals for a marina, shops, restaurant and car park situated at the Urangan Marina.

We are advised current annual rental is calculated at 9% of the unimproved value of the land for the Above High Water Mark and a set fee for the Below High Water Mark rental. Valuations are done every 3 years and CPI indexed every year.

Figures below supplied by the lessor show
currently paying approximately 12.5% for the AHWM land rental as the value of the land has crashed considerably since the onset of the GFC.

Valuations for Financial Year End			*QT Lease fees*			
				AHWM		*BHWM*
2007	-	*$1,050,000*	*$ 70,106*	*$5,287*	=	*$ 75,393*
2008	-	*$1,850,000*	*$ 72,316*	*$5,287*	=	*$ 77,603*
2009	-	*$1,850,000*	*$132,413*	*$3,820*	=	*$136,233*
2010	-	*$1,850,000*	*$136,571*	*$3,941*	=	*$140,512*
2011	-	*$1,200,000*	*$140,728*	*$4,061*	=	*$144,789*
2012	-	*$1,100,000*	*$140,728*	*$4,207*	=	*$144,935*
2013	-	*$1,100,000*				

From 2007 to 2012 there has been an increase of approx 92.5% in lease fees.

They would like freeholding as the short lease is not conducive to their future development plans.

3. Fisherman's Wharf Marina and slipway - lessee Watpac

TMR lease to 30 June 2032

This covers both below and above high water mark rentals for a 130 berth marina, slipway facility, lift out facility and commercial premises situated at the Urangan Marina.

We are advised that there is a "ratchet" clause whereby rent does not go down if valuations fall. Current annual rental is calculated at 9% of the unimproved value of the land for the Above High Water Mark and a set fee for the Below High Water Mark rental. Valuations are done every 3 years and CPI indexed every year.

The DERM valuation report of 1/7/11. it said that in determining the unimproved value of the subject property, the direct comparison basis was used. However it also stated that they were unable to locate directly comparable sales evidence so they used the " most" comparable - none were on water and two were in an industrial estate over 15 km away and the other was for a double residential block on a main road.

The lessee has advised that:
The AHWM rental for this six month period is $143,478 or $286,956 for the full year.
The current valuation undertaken by DERM which values our site at $1.90m.
Therefore the percentage of the valuation being paid as a rental for the AHWM to DTMR is 15%.
Every 3% or CPI increase in the AHWM rental increases this percentage by 0.5%, which illustrates we are chasing our tail and the gap will continue to increase over time (or until site values increase again - which is a long way away).

The lessee has proposals to further develop but are not happy with existing rentals.

4. Boat Club

Lease with TMR to 2024.

This covers both below and above high water mark rentals for a marina, fuel wharf, Club and ramp, Pontoons and car park situated at the Urangan Marina.

We are advised current annual rental is calculated at 9% of the unimproved value of the land for the Above High Water Mark and a set fee for the Below High Water Mark rental. Information is supplied as below showing an effective rate of around 15%:

We are advised that there is a "ratchet" clause whereby rent does not go down if valuations fall. Current rental is based on 3 yearly valuation review that is current to June 2013 and CPI increases in between on the figures supplied below. Valuations are done every 3 years and CPI indexed every year.

AKA	Current @ 30/06/2011	Presumed @ 1/07/2011	Variance (downward)	
Carpark	74698	51768	22,930	31%
Club + Ramp	269676	162015	107,661	40%
Fuel Wharf/Marina carpark	116998	68147	48,851	41.7 %
Boat Storage	36449	25207	1,242	30.8 %
Pontoon (sth)	2848	2848	$ -	
Pontoon (nth)	2424	2424	$ -	
Marina	36698	36698	$ -	

$ 539,791	$ 349,107	$ 190,684	35.3 %

Note 1: All fees above are Plus GST
Note 2: Fee adjustment is based on the revaluation of the lease above high tide water mark (AHWM) which is $3,412,650
Note 3: QT have advised that even though the 2011 unimproved land valuations had gone down significantly QT would be maintaining the previous rental calculation of 2007
Note 4: The 'Presumed Rental estimate is what the Club has calculated as the rent payable given the new valuations

They would like freeholding.

5. Neptunes Reefworld Aquarium

Lease to Natural Resources

The business has been operating for around 33 years and the present lessees have been the proprietors for around 23 of those years. The business has an aquarium that is popular with tourists and also a restaurant.

We are advised that rent is based on 6% of the unimproved value, a value that was convoluted by a "questionable" high valuation in 2009/2010 of $520,000, boosting the average over the past 3 years. The proprietor sought a re-valuation by lodging an objection and the value was subsequently reduced to $255,000 effective 30 June 2011, reducing the 3 year average on which rent is payable.

This business has suffered from the floods. Stocks for the aquarium and water is obtained from the sea and following the floods the business lost amounts of coral and fish because the normally pristine waters of Hervey Bay were polluted with flood waters. The business was forced to close for a period and this cost the proprietors dearly. In 2011 the proprietors sought flood relief but were denied.

The proprietor also questions the methodology of the valuation, particularly given that most of the "land" is below high water mark, certainly coastal.

Rental Calculation Details as at 01/05/2012

Capped Annual Rent for 2010/2011 (based on actual 2009/2010 rent payable + 50.00%): $ 40,500.00
Averaged Annual Rent for 2010/2011 (based on 3 year Average Rental Value @ 6.00%): $ 21,900.00

Your rent is the lower value of the Capped Annual Rent and the Averaged Annual Rent

Calculation of Averaged Rental Value

$255,000?

Year	Rental Value	Notes
2011/2012	$ 265,000.00	
2010/2011	$ 310,000.00	
2009/2010	$ 520,000.00	
Average Rental Value	$ 365,000.00	Averaged over 3 years

Explanation:
The Queensland Government has [illegible] a cap on annual rental increases at 50 per cent for Category 13 tenures.

6. The Cathedrals

Lease to Natural Resources to 2/10/2033

Operating for around 30 years as a camping and backpacker park with retail outlet.

We are advised that rent is based on 6% of the site value. Reduction in recent valuation has reduced the 3 year average on which rent is payable.

Owners have sought a revaluation. The lease says that under provision A69, that the lessee must remove all improvements and rehabilitate the area to the satisfaction of the Minister - in fact returning it to bushland.

Recent valuations of 3 bushland blocks on Fraser Island show a Govt valuation of $3913 to $6708 per hectare. This has a valuation of $100,000 per hectare.
This raises questions as to the "unimproved" value and as to the "site value" used.

Conclusion

Hervey Bay is a city dependant on Tourism, purportedly worth over $600m annually to the Fraser Coast. Industries reliant on this industry include retail with some 13.8%* of the workforce and accommodation and food services with some 10.7%* of the workforce heavily reliant on this market.

Times have been tough and Tourist numbers are down. The Whale Watch industry attracts many visitors from throughout Australia and overseas who travel to the pristine waters of Hervey Bay, "the whale watch capital". The season runs from July to October and this is a small window of opportunity in business may "make hay."

Whilst the Tourism Industry is looking at various ways in which to "re-invent" itself and create further visitor experiences, the road blocks are the same we are continually told – Government fees and red tape.

As can be demonstrated in the above Case Studies, operators have been "penalised further" by rents not reflecting the status quo – the downturn in the property markets.

Kingfisher Bay resort used to operate their catamaran transfer ferries from the Urangan Boat Harbour until early 2010 and have since moved to River Heads. They made a commercial decision but it is understood that the high rental was also a contributing factor.
The majority of businesses in the terminal building and adjacent have now closed and the area can look akin to a ghost village when it is not the whale watch season. All credit is due to the remaining businesses, around two food and restaurant businesses, in surviving throughout these times.

There were plans to develop the Urangan Boat Harbour touted by the previous Government but like many projects they failed to deliver and Hervey Bay is left with the fragmented leftovers of what "once could have been." The project was cancelled in 2010.

** Source: Australian Bureau of Statistics, Census of Population and Housing, 2006, Basic Community Profile - B42*

The lessees at the Urangan Harbour have met with the Transport Minister in June regarding future development prospects and a way forward following similar meetings with the previous Government who failed to deliver.

In relation to the Urangan Boat harbour one has to ask how many times was the harbour dredged and at what cost over the last 10 years?
We are advised that the Harbour may have only been dredged on 2 occasions in 11 years with other expenses including one employee and admin.

It has been further suggested that "the previous Labor Government when in power publicised that the income from recreational boat registrations was utilised for public boat ramps etc and that was their justification to push the rego up in 2006-2007 (approx)." Consequently it was further questioned that "as larger boats that don't use boat ramps also had their registrations pushed up as well, what was the extra revenue used for?????"

Summary

The new, pro-active CanDo LNP State Government needs to nurture and support business. Small business is the backbone of employment in Queensland and the LNP under its plan to grow a four pillar economy has said it "will act to support our almost 400,000 small businesses employing less than 20 people as they make up over 95% of all Queensland businesses."

The Destination Q strategy for Tourism in Queensland must be supported by a review of all leases that are connected in any way with Tourism in this State to get Queensland back on track.

A relaxation of rent increases, a review of rates charged and a review of the basis in which rents are calculated (i.e. realistic valuations) are suggestions in assisting a Tourism recovery. A further suggestion is to fix rents to CPI increases only once a fair and equitable base is determined. It will give these businesses certainty in moving forward.

- What can the State of Queensland afford?
- Can the State afford to see Tourism stifled and development shut down?
- What is the true cost to the State if these businesses cannot flourish?

Consideration must be given to these points in any review.

Ted Sorensen MP
State Member for Hervey Bay
3/8/12

Attachments:

- *Transcript of GSSMR land case*
- *Transcript of land case NSW*
- *Media article – announcement of Boat Harbour redevelopment*
- *Media article – announcement of Boat Harbour redevelopment stopped*

LAND COURT OF QUEENSLAND

CITATION:	*Agreedto Pty Ltd v Chief Executive, Department of Natural Resources and Mines* [2012] QLC 0022
PARTIES:	Agreedto Pty Ltd (appellant) v. Chief Executive, Department of Natural Resources and Mines (respondent)
FILE NO:	LAA951-10
DIVISION:	Land Court of Queensland - General Division
PROCEEDING:	Appeal against review decision regarding the purchase price for conversion of tenure under the *Land Act 1994*
DELIVERED ON:	23 May 2012
DELIVERED AT:	Brisbane
HEARD AT:	Brisbane
MEMBER:	Mr PA Smith
ORDER:	**1. The appeal is dismissed.**
CATCHWORDS:	Valuation unimproved value for conversion of tenure improved site subject to registered subleases and easements – method of valuation principles to be applied – "as if it were fee simple", meaning of – *Land Act 1994*, ss170, 172, 422-430
APPEARANCES:	CL Hughes SC and S Holland, for the appellant PJ Flanagan SC and SP Fynes-Clinton, for the respondent
SOLICITORS:	Holman Webb, Lawyers for the appellant Director, Legal Services, Department of Natural Resources and Mines, for the respondent

Background

[1] This matter comes before the Land Court by way of an appeal by the landholder, Agreedto Pty Ltd, against an internal review decision of the Minister for Natural Resources and Mines[1] (the Minister) as to the purchase price of land for conversion of tenure purposes pursuant to the *Land Act 1994* (the Act).

[2] The parties have assisted the Court by providing a statement of facts not in contention[2] in the following terms:

> "**1.** On 31 October, 1991, the State issued a 'Harbour Lease' to Great Sandy Straits Marina Pty Ltd ('**GSSM**') over land then described as Lots 7 to 10 on Plan 801116 for a term of 75 years.
>
> **2.** The purpose of that lease was for the construction of a resort and marina at the Urangan boat harbour.
>
> **3.** Pursuant to that lease, GSSM undertook development of:-
>
> (a) Dredging of the harbour's northern section and associated facilities
> (b) Construction of thirty (30) residential units
>
> **4.** On 22 January 1998, the Harbour Lease was surrendered by GSSM, and replaced with Perpetual Lease 209524 ('**PPL 209524**') issued 26 January 1998, over land then described as Lots 7 to 10 on SP105258, containing 7.265 ha. The date of effect of the lease was 18 December 1997.
>
> **5.** The leased land was to be used for commercial business and tourism purposes.
>
> **6.** All encumbrances, subleases, mortgages and easements, registered on the Harbours Act Lease were carried forward onto PPL 209542.
>
> **7.** The offer of a perpetual lease was conditional upon the completion of ;-
>
> (a) A new public pontoon landing and associated car parking bays
> (b) Two 4 lane public boat ramps
> (c) A barge ramp
> (d) Car trailer parks and amenities block
> (e) Necessary services as required.
> (f) Public open space areas access around the boundary
> (g) Upgraded roadways.
>
> **8.** Pursuant to that lease, GSSM undertook the development of:-
>
> (a) 11 blocks of residential units
> (b) Air-sea Rescue Tower
> (c) Tourist terminal and Retail Centre and Tavern
> (d) Resort hotel
> (e) Boat and barge ramps
> (f) Carparking and landscaping
> (g) Upgraded roadways
>
> **9.** That development was completed, leaving no material part of the leased land undeveloped, by 2003.

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1 The Minister's title is as at the date of delivery of this decision. At all material times, the Minister is the Minister responsible for the relevant conversion provisions of the *Land Act 1994*.

2 Exhibit 21.

10. The developed residential units and commercial premises were 'sold' to end user purchasers by way of the grant to those purchasers of long term subleases under PPL 209542, some for a term of 75 years, and most for a term for 999 years.

11. The subleases were granted after construction of the buildings or parts of buildings to which they relate, and each describes the leased premises as '*part of the building*' identified in the lease document, or as an area an area '*bounded by*' walls of a building identified in the lease document.

12. Each sublease therefore identifies the leased premises by reference to a plan which depicts a volumetric space bounded by physical elements of a building.

13. Under each such sublease, there is no outgoing rental payable by the sublessee. The sublessee paid a lump sum consideration at the time of the grant of the lease, which was equivalent to the purchase price which would have been paid if the purchasers were acquiring a strata titled freehold unit. In each case, the sub-lessee's only ongoing obligation under the lease to pay moneys to the sub-lessor in an obligation to pay a proportion of outgoings including cleaning, insurance and repairs, incurred by the sub-lessor, including rent payable to the State under PPL 209524.

14. On 21 December 2006, PPL 209254 was transferred to Agreedto Pty Ltd ('**Agreedto**') for a consideration of $660,000.

15. On 4 February 2008, Agreedto first applied under s 166 of the *Land Act 1994* to convert an area of 5.4075 of the land comprised in PPL 209524 to freehold. That application was approved.

16. On 1 April 2010, Agreedto withdrew its first application for freehold and reapplied under s 166 of the *Land Act 1994* to convert an area of 5.4075 of the land comprised in PPL 209524 described as part of Lots 8 on SP171735, part of Lot 9 on SP129067, and Lot 13 on SP171735, to freehold.

17. On 11 June 2010, the Minister approved the making of an offer of conversion of that 5.40754 ha at a price of $11,500,000 (excluding GST), based on a date of valuation of 6 April 2010.

18. On the valuation date, the annual rental payable under PPL 209254 was $770,000 (excluding GST).

19. On 21 July 2010, Agreedto requested an internal review of the decision about the purchase price under Chapter 7, Part 3, Division 2 of the *Land Act 1994*.

20. On 28 October 2010, the Minister, after considering the outcomes of the internal review, approved the offer of a revised purchase price of $10,000,000 (excluding GST).

21. On 8 December 2010, Agreedto appealed to this Court against the decision on the purchase price under s 427 of the *Land Act 1994*."

[3] Pursuant to its appeal, Agreedto contends for a purchase price of $Nil.

The relevant legislation

[4] Under s.170 of the Act, the Chief Executive initially decides the purchase price for the conversion of a lease to a deed of grant following application for conversion by the landholder. The purchase price is to be the unimproved value of the land being offered as if it were in fee simple.

[5] The meaning of "unimproved value" is contained in s.434 of the Act as follows:

> "(1) In this Act, the ***unimproved value*** of land is the amount an estate in fee simple in the land in an unimproved state would be worth if there were an exchange between a willing buyer and a

willing seller in an arms-length transaction after proper marketing, if the parties had acted knowledgably, prudently and without compulsion.

(2) The unimproved value must be decided without regard to the commercial value of the timber.

(3) To remove any doubt, it is declared that the Land Valuation Act does not apply to the meaning of unimproved value in this section.

(4) In this section—

paid to the State does not include rent paid to the State.

unimproved state includes, if the value of improvements and development work to the land performed by the State has not been paid to the State, the improvements and development work finished before the lease started or the deed of grant was issued."

[6] As can be seen, there is a right of appeal against the Chief Executive's decision as to the purchase price.[3] In the first instance, an appeal against a decision is by way of an application for internal review.[4] The Minister then reviews the original decision and must make a further decision, known as the review decision. The review decision must be to either confirm the original decision; amend the original decision; or substitute a new decision.[5] A person who is not satisfied with the review decision may appeal to the Land Court against the decision.[6] On hearing the appeal against the review decision, the Court has the same powers as the decision maker.[7] The appeal is by way of a rehearing.[8] In deciding the appeal, the Court may either confirm the review decision; set aside the review decision and substitute another decision; or set aside the review decision and return the issue to the Minister with such directions that the Court considers appropriate.[9]

The hearing

[7] Both the appellant and the respondent relied on expert valuation evidence at the hearing. The appellant relied on the expert valuation evidence of Mr Michael Slater, while the respondent relied on the expert evidence of Mr Anthony Hoffmann.

Issues in the appeal

[8] The heart of the dispute between the parties has been succinctly summarised by Counsel for the appellant in their written submission as follows:[10]

> "The principal issue in dispute is whether or not the burden of the easements and sub-leases to which the Perpetual Lease 209524 is presently subject, and to which the proposed new freehold tenure will be subject, are to be taken into account in assessing the unimproved value of the leasehold land at the date of valuation."

[9] There is also dispute between the parties as to how the respective valuation evidence should be dealt with. As Counsel for the respondent put it "the respective valuation reports pass like

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3 See s.170(2).
4 See s.422.
5 See s.426(1).
6 See s.427.
7 See s.429(1).
8 See s.429(2)
9 See s.429(3).
10 Paragraph 1.20 of appellant's written submissions.

ships in the night, and there is almost nothing upon which the expert valuers directly engage".[11]

[10] The appellant contends that, in the event that the valuation evidence of $Nil is not accepted, the Court should make findings of serious shortcomings as regards the valuation evidence of Mr Hoffmann.

Contentions of the appellant

[11] A fundamental aspect of the appellant's case is that the Act must be construed as a whole. Specifically, the appellant asserts that it is not possible to properly construe the provisions of s.170 of the Act without reference to s.172(5) of the Act. As Counsel for the appellant put it, "section 170 provides the mechanism for determination of the purchase price to be paid. Section 172, including s172(5), describes what is to be purchased".[12]

[12] Due to the importance that the appellant places on sections 170 and 172 of the Act, it is appropriate to set out those provisions in full. Section 170 of the Act provides as follows:

> "**170 Purchase price if deed of grant offered**
> (1) Unless a price or formula has already been stated in the lease to be converted, the chief executive decides the purchase price for the conversion of a lease to a deed of grant.
> (2) The lessee may appeal against the chief executive's decision on the purchase price.
> (3) The purchase price is an amount equal to the total of—
> (a) the unimproved value of the land being offered, as if it were fee simple; and
> (b) the market value of any commercial timber that is the property of the State on the land.
> (4) The unimproved value of the land is calculated at the day the chief executive receives the conversion application.
> (5) The market value of the commercial timber is calculated at—
> (a) if the value is not appealed—the day the conversion application was received; or
> (b) if the value is appealed—the day the appeal is decided."

Section 172 of the Act is in the following terms:

> "**172 Issuing of new tenure**
> (1) On acceptance of the offer a tenure (the ***new tenure***) may be issued by—
> (a) if the new tenure is a deed of grant or freeholding lease—the Governor in Council; or
> (b) if the new tenure is a term or perpetual lease—the Minister.
> *Note—*
> See also section 153 (Lease must state its purpose).
> (2) The new tenure must be issued in accordance with the terms of the accepted offer.
> (3) Additional unallocated State land may be included in the new lease, if chapter 4, part 1, division 2 is complied with.
> *Editor's note—*
> Chapter 4, part 1, division 2 is about interests available in land without competition.
> (4) If the new tenure is a lease, it must be issued for the same purpose as the lease (the ***old lease***) the subject of the conversion application.
> (5) The new tenure is issued subject to all relevant registered interests to which the old lease was subject, and in the same priorities.
> (6) On the registration of the new tenure, the old lease is taken to have been wholly surrendered.
> (7) The surrender must be registered."

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11 See respondent's submissions paragraph 91.
12 See appellant's submissions paragraph 1.31.

[13] Relying on the High Court decision of *Project Blue Sky v Australian Broadcasting Authority,*[13] the appellant contends that the proper construction of the above legislative provisions involves seeking out their purpose. The appellant then contends that the purpose of s.170 as part of chapter 4 division 3 of the Act is "to facilitate creation of freehold tenure in respect of Crown leasehold land and, as part of that exercise, to determine a fair consideration (ie the "*purchase price*") to support the creation and transfer of the fee simple".[14]

[14] The appellant then goes on to contend that it is "illogical, if not absurd, to set about the valuation exercise in determining the unimproved value "*as if it were fee simple*" without considering that this unimproved value will become the purchase price in respect of which a successful applicant will take a deed of grant, in circumstances where such fee simple will be subject to the numerous registered interests to which the Perpetual Lease is presently subject".[15]

[15] The appellant then goes on to specifically consider the definition of unimproved value as set out in s.434 of the Act. Relying on the body of common law with respect to market value starting with *Spencer's* case,[16] the appellant contends that it is necessary to understand the concept of "unimproved value" in the Act as requiring practical considerations, such as that the property be properly marketed and that there be a willing buyer and seller who act at arms length, knowledgeably, prudently, and without compulsion.

[16] Counsel for the appellant then goes on to assert as follows:[17]

> "1.36 Reference to such specific matters, particularly the knowledge and prudence of a prospective vendor and purchaser, makes it absurd to ignore the fact that by virtue of **s 172(5)** the estate in fee simple purchased (for a price determined by this legislation) will come subject to all of the existing registered interests on the Perpetual Lease which, in this case, includes hundreds of registered sub-leases and numerous easements.
>
> 1.37 It is illogical, if not absurd, to set about the valuation exercise in determining the unimproved value '*as if it were fee simple*' without considering that the amount of this unimproved value will become the purchase price for which a successful applicant will take '*fee simple*' by a deed of grant, in circumstances where such '*fee simple*' will be subject to the numerous registered interests to which the Perpetual lease is presently subject."

[17] As regards the statutory concept of "unimproved value" in the Act, the appellant notes in particular that, pursuant to s.434(3) of the Act, the *Land Valuation Act* "does not apply to the meaning of unimproved value in this section". In particular, Counsel for the appellant assert as follows:[18]

> "1.43 With respect to the provisions presently under consideration in the Land Act, while valuation of the land is required '*in an unimproved state*', there is no express requirement in

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13 (1998) 194 CLR 355 at 381-382,
14 See appellant's submissions paragraph 1.32.
15 See appellant's submissions paragraph 1.33.
16 *Spencer v The Commonwealth of Australia* [1908] 5 CLR 418.
17 At paragraphs 1.36 and 1.37 of their submissions.
18 At paragraphs 1.43-1.46 of their submissions

any such exercise to ignore the existence of improvements. Rather, what is ultimately required is that the value of such improvements be ignored.

1.44 The distinction may be subtle, but it is real. While, obviously, the exercise does not involve valuing any improvements, it is not necessary to assume that '*the improvements did not exist*'. The fact is, while the physical improvements may well facilitate the existence of the sub-leases, it is the value of those physical improvements or buildings, and not the existence of the sub-leases relevant to them, that is to be ignored.

1.45 As state above, **s 434(3)** of the Land Act expressly excludes any reliance on the Land Valuation Act for the purpose of determining the '*unimproved value*' of the subject land. Accordingly, the '*unimproved value*' (and thus the purchase price for the conversion application) may only be determined in accordance with the provisions of the Land Act. The definition in the Land Act does not require an assumption to be made that improvements on the land '*had not been made*'.

1.46 In light of the clear differences between the definitions of the '*unimproved value*' for the purpose of each act, together with the proscription within **s 434(3)** of the Land Act, there is simply no basis for excluding the impact on the value of the subject land of the numerous registered interests (including registered subleases and easements) from the determination of the '*unimproved value*' of the subject land."

The respondent's response

[18] The respondent submits that the Court should take an essentially conservative approach to the construction of the relevant provisions of the Act. In proposing such approach, the respondent has relied upon a number of Court precedents. The respondent also makes the important point that what is sought to be converted by the appellant is currently of considerable value to the respondent. Specifically, I note that the yearly rental payable as at the valuation date under PL209245 was $770,000 (excluding GST).

[19] As I am largely in agreement with the submissions of Counsel for the respondent, I will leave the discussion of the relevant authorities relied upon by the respondent to my conclusions as to the appropriate interpretation of the relevant provisions of the Act.

Findings as to the proper construction of the Act

[20] A key aspect of the appellant's case is that s.170 of the Act needs to be read in conjunction with s.172 of the Act. In my view, the link between ss 170 and 172 does not exist in the manner contended for by the appellant.

[21] When one reads chapter 4, part 3, division 3 of the Act as a whole, one can easily be lead into error in thinking that the decision of the Chief Executive, which includes, pursuant to s.168(2), reference to conditions, is all subject to a review decision undertaken by the Minister and, if an appellant is dissatisfied with the review decision, determined by way of appeal to this Court. However, s.423 of the Act provides that "a person who has a right to appeal against a decision mentioned in schedule 2 may apply to the Minister for a review of the decision". Specifically, schedule 2 makes specific reference to s.170(3) of the Act, but crucially does not make reference to s.168(2) or s.172 of the Act.[19] Importantly, this means

[19] See schedule 2.

that a review decision is available with respect to a decision "about the unimproved value or the timber value for the conversion to a deed of grant". Had the legislature intended that a review decision, and consequently an appeal to this Court, be about the unimproved value of the land and the conditions of an offer to the appellant, it could have very easily legislated same.

[22] Further, I see nothing which links s.172 to the task of the Chief Executive in valuing the unimproved value of the land pursuant to s.170. The purpose of s.172 is clearly set out in its heading "**Issuing of new tenure**". The section then goes on to set out the procedure which applies once an offer is accepted. Put simply, the nexus between s.172 and s.170 as contended for by the appellant does not exist.

[23] As the respondent contends,[20] three concepts require consideration in order to properly determine the correct construction of the Act: "unimproved state"; "as if" and "estate in fee simple".[21]

Unimproved state

[24] In *Seafarm Pty Ltd v Minister for Natural Resources and Water*,[22] Member Scott considered the relationship between statutory unimproved value under the *Valuation of Land Act 1944* ("VLA") and "*unimproved value*" in the Act. *Seafarm*, like this case, concerned a review decision as to the purchase price for conversion of a lease. Member Scott had this to say:

> "[12] Both parties approached the valuation on the basis that to value the land in its 'unimproved state' the land should be valued as if any improvements on it did not exist. As I appreciate the submissions, each proceeded on the basis that the notion of what constituted an improvement for the purpose of identifying the unimproved state should be approached according to general valuation principle not constrained by the definition of 'improvements' supplied by the Act....
>
> [13] I accept that approach as being correct. It is consistent with the conclusions of this Court in Re PCL 1035 (1966) 33 CLLR 206 in the context of the legislation there under consideration.
>
> ...
>
> [20] Whilst different language is employed in s.3(1)(b) in comparison to s.434(1) of the Land Act I do not understand that difference to be fundamental to the mental process involved in identifying whether the land is improved under either statute. Both require the question of whether the operations of man on the land are improvements being dealt with before the valuation process is undertaken. The use of the term 'unimproved state' in s.434(1) rather than 'natural state' indicates that consideration of improvements on the land, if any, needs to be undertaken. That view is reinforced by the language of s.434(4) which requires that certain improvements, in the general sense, be treated as part of the unimproved state rather than be assumed to not exist. My approach to this issue does not disregard s.434(3).
>
> [21] In the present case it is quite clear that at the relevant date the subject land was in an improved state. Accordingly, the operations of man upon it need to be disregarded for the purpose of identifying the 'unimproved state', then the valuation carried out, on the basis of its highest and best use in that state. It is important that I make clear that in the valuation phase of this matter I proceed as if the aquaculture improvements in their totality do not exist. The ponds will not

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20 See submission of respondent, paragraph 31.

21 I am indebted to Counsel for the respondent for their analysis of the relevant case law, which I have heavily relied upon in the following observations.

22 [2008] QLC 0068.

> therefore be assumed to fall into decay (Seafarm submission) or are they a sort of fill (from the Minister). The land is viewed in its unimproved state."

[25] Member Scott's observations are consistent with earlier decisions of the Court, such as *Jewells (Properties) Pty Ltd v Minister for Natural Resources and Minister for Mines,*[23] and the cases cited therein.

[26] It follows that, although the subject land has extensive "operations of man" constructed on it, all of those buildings, structures and works should be taken to not exist, and the land must then be valued on the basis of its highest and best use in that undeveloped state.

As if

[27] I agree with the respondent's contention that the expression "*as if*" is language of deeming which conveys a legislative direction to proceed on a premise of fact or law which may be one quite different from any facts which actually exist, or the law which would otherwise apply. The land to be valued is, as at the date of valuation, State land subject to a Perpetual Lease and a range of subleases and other registered interests which derive from the Perpetual Lease.

[28] What is to be valued is land based on a statutory assumption that it is what in fact it is not. This Court is required to adopt the directed statutory fiction, and start the valuation process from that point. This is hardly a novel exercise, as all valuations of improved land under the VLA or *Land Valuation Act 2010* start with the fiction that some or all of the improvements do not exist. In this case, there is a similar assumption for the improvements, but there is also the additional assumption that the land is to be valued on the assumption or assumed starting fact that it is land which has been granted in fee simple, not State land which is not so granted.

[29] The actual tenure of the land, and any interests derived from or affecting that non-fee simple tenure, are irrelevant to the required statutory exercise. I note with approval what Member Scott said in *Moar v Minister for Natural Resources and Minister for Mines and Energy*,[24] when identifying the approach to be taken under s.170(3), and rejecting the contention that potential native title interests which might affect the existing leasehold were a relevant issue for the valuation. As Member Scott put it:[25]

> "I need to make it clear that the task which I need to undertake pursuant to the provisions of the Land Act is to ascertain the value of the subject land as if it were freehold not leasehold."

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23 [2002] QLC 69 at [12] and [13].
24 [2004] QLC 0067.
25 At [27].

"Fee simple"

[30] Much assistance in determining the meaning of "*fee simple*", is obtained by considering the decision of Debelle J in *Perpetual Trustee Co Ltd v Valuer-General (No 2)*.[26] In that case, Justice Debelle was considering South Australian valuation legislation, which required the ascertainment of "capital" value on certain statutory assumptions, most of which are not relevant in this matter. However, as part of that analysis, His Honour was required to consider the meaning of *"fee simple"*, and did so by reference to a series of authorities dealing with the meaning of that term in different, but broadly comparable, statutory valuation contexts.

[31] The first case considered by Debelle J was *Royal Sydney Golf Club v Federal Commissioner of Taxation*.[27] In that case, the High Court had to determine whether zoning restrictions were a factor to which regard should be had when valuing unimproved land. In the course of its reasoning, the Court examined what was meant by the expression *"fee simple"* when used in the definition of *"unimproved value"* in s 3 of the *Land Tax Assessment Act 1910* (Cth). That definition was in these terms:

> " 'Unimproved value', in relation to land, means the capital sum which the fee simple of the land might be expected to realize if offered for sale on such reasonable terms and conditions as a bona fide seller would require, assuming that the improvements (if any) thereon or appertaining thereto and made or acquired by the owner or his predecessor in title had not been made."

[32] The High Court held that the expression "*fee simple*" meant an unencumbered estate in fee simple. It said:[28]

> "By s 3 'unimproved value' is defined in relation to improved land to mean the capital sum which the fee simple of the land might be expected to realize if offered for sale on such reasonable terms and conditions as a bona fide seller would require, assuming at the time as at which the value is required to be ascertained for the purposes of the Act, the improvements did not exist. There is a long definition of 'improvements' which it is unnecessary to consider. 'Unimproved value' in relation to unimproved land is defined to mean the capital sum which the fee simple of the land might be expected to realize if offered for sale on such reasonable terms and conditions as a bona fide seller would require.
>
> It seems clear enough that the fee simple here means an unencumbered fee simple. Encumbrances upon land or estates in reversion appear to have been regarded as giving to reversioners or encumbrancers beneficial interests to be enjoyed by them. But the owner of the first estate of freehold was selected as the taxpayer who was to represent all persons beneficially entitled to the land. The value upon which he was to be taxed was the unimproved value of the fee simple, that is to say the capital sum which the fee simple might be expected to realize. It seems evident that the fee simple mentioned must be taken as free from encumbrances which, if they impaired the value of his estate, nevertheless operated to confer upon some other person or persons an estate or interest in the land. Were it otherwise the taxable value of the land would be diminished but the correlative estate or interest would not come into tax, unless by some chance it were an interest falling under some specific provision imposing liability…The expression "the fee simple of the land" naturally means the fee simple as the highest estate unencumbered and subject to no conditions. Doubtless estates in fee simple may be granted by the Crown subject to conditions or reservations which operate only in the public interest. The corresponding advantages which ensue may be enjoyed only as of public right: they are not an interest in land enjoyed by a specific person or persons. But the Act does not draw any distinction based upon this possibility. The general policy was reflected in a general rule. The interpretation of the Act which seems best to

[26] [2007] SASC 340.
[27] (1955) 91 CLR 610.
[28] At 622 to 623.

> accord with the policy appearing from its provisions and also to flow from its language is that in assessing the unimproved value an estate in fee simple must be taken as the hypothesis unencumbered and subject to no condition restricting the use or enjoyment of the land. (underlining added)."

[33] Debelle J also referred to the case of *AG Robertson Ltd v Valuer-General*.[29] In that case Sugerman J had to consider the meaning of the expression "*fee simple of the land"* when used in the definitions of "*improved value"* and "*unimproved value"* in ss 5 and 6 of the *Valuation of Land Act 1916* (NSW). In that case, one question was how to determine the improved value of land subject to leases. The leases were an encumbrance in that they were subject to restrictions under the *Landlord and Tenant (Amendment) Act 1948* (NSW) which diminished value.

[34] In particular, Sugerman J said:[30]

> "First, I should indicate that I am in agreement with Mr Hooke's submissions with respect to the definitions of "the improved value of land" and "the unimproved value of land" in ss 5 and 6 of the Act. The "fee simple of the land" referred to in those sections is, in my opinion, the fee simple in possession. It is not the fee simple in reversion or remainder expectant upon the determination of some prior estate. No more is it the fee simple subject to the rights or immunities conferred upon a tenant or tenant holding over by the legislation already referred to, whether by way of prolonging the contractual tenancy or by way of creating some new estate or interest in the land."

[35] Debelle J next made reference to *Gollan v Randwick Municipal Council*,[31] in which *Royal Sydney Golf Club* was approved and applied by the Privy Council. That decision concerned the proper means by which to value land held in fee simple, the grant of which was subject to a condition or other restriction requiring the land to be used for a public purpose such as park lands, a racecourse, or for some other recreational or public purpose. In the course of deciding that question in the negative, the Privy Council held that *"the fee simple of the land"* as used in s 6 of the *Valuation of Land Act 1916* (NSW) which relevantly provided that "*the unimproved value of land is the capital sum which the fee-simple of the land might be expected to realise if offered for sale on such reasonable terms and conditions as a bona-fide seller would require, assuming that the improvement, if any, thereon or appertaining thereto, and made or acquired by the owner or his predecessor in title had not been made*", does not refer to the actual title vested in the owner at the relevant date but to an absolute or pure title such as constitutes full ownership in the eyes of the law. It was held that restrictions requiring the land to be held for a public purpose were to be ignored when valuing the land. In the result, the value is the value of the absolute estate in fee simple. After referring to the definition in s 6, their Lordships said:

> "It is not in dispute that a formula of this kind requires the making of certain hypotheses. A sale of the fee simple has to be assumed whether or not the land in question can legally be sold, and the fact that there is some lawful impediment to sale- cannot be allowed to enter into the assessment

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29 (1952) 18 LGR (NSW) 261.
30 At 263.
31 [1961] AC 82.

of value. Similarly, it is irrelevant that the land may be so settled or encumbered that there is no single person or even combination of persons who can at the relevant date effectively transfer the fee simple. All this follows from the fact that a sale of such an estate has to be assumed. Again. the valuer must not merely treat any improvements as not being there, he must proceed on the basis that they have never been there at all (see *Tooheys v. Valuer General* 1925 AC 439).

These considerations do not however go far enough to supply the answer to the question upon which this appeal turns and which can be expressed as follows :- 1s the fee simple assumed to be sold a .. pure" estate in the land without reference to the actual title under which it is held or is it that actual title, with the consequence that there enters into the valuation notice of any restrictions on user and enjoyment by which the title is affected? Either construction would be consistent with the mere words 'fee simple' in the statutory formula, for grantees holding title under a conditional grant subject to forfeiture or under restrictive covenants or conditions or, a fortiori, under trusts that limit their powers are none the less owners in fee simple. It does not follow from this that a sale of such a fee simple would be a sale of 'the' fee simple of the land within the meaning of the formula: but even if the use of the definite article in this connection has any pregnant significance it is better to defer dealing with that until it has been possible to give a rather fuller account of the scope and purpose of the Valuation of Land Act.

.....

In their Lordships' opinion, the considerations that led the High Court in the Royal Sydney Golf Club case to treat unimproved value under s. 3 of the Land Tax Assessment Act as involving the hypothesis of .. a fee simple unencumbered and subject to no conditions" can be applied to unimproved value under s. 6 of the Valuation of Land Act. and they agree with the conclusion to which those considerations led them. Prima facie, it appears to their Lordships ... the fee simple of the land" as used in s. 6 does not refer to the actual title vested in the owner at the relevant date but to an absolute or pure title such as constitutes full ownership in the eyes of the law."

[36] Debelle J's decision was appealed to the Full Court of the Supreme Court of South Australia,[32] which dismissed the appeal. In discussing the general concept of "fee simple" Bleby J, who gave the leading judgment,[33] said:[34]

"There can be no doubt that an estate of fee simple in land is the highest and most comprehensive estate in land recognised by the law. In Commonwealth v New South Wales Isaacs J quoted with approval a passage from Challis's Law of Real Property as follows:

> *A fee simple is the most extensive in quantum, and the most absolute in respect to the rights which it confers, of all estates known to the law. It confers, and since the beginning of legal history it always has conferred, the lawful right to exercise over, upon, and in respect to, the land, every act of ownership which can enter into the imagination, including the right to commit unlimited waste; and, for all practical purposes of ownership, it differs from the absolute dominion of a chattel, in nothing except the physical indestructibility of its subject. Besides these rights of ownership, a fee simple at the present day confers an absolute right, both of alienation inter vivos and of devise by will.*

In similar vein, Deane, Dawson and Gaudron JJ observed in Nullagine Investments Pty Ltd v Western Australian Club Inc:

> *While the theory of our land law is that the radical title of the Crown lies between the physical land and a freehold estate in it, the ownership of the freehold estate has long been, for almost all practical purposes, the equivalent of full ownership of the land. As a result, the freehold estate is, as a matter of legal and popular language, commonly treated as the land itself.*

In the context of the Valuation of Land Act I respectfully adopt what Wells J said on this topic in Harry v Valuer-General:

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32 *Trust Company of Australia Ltd v Valuer-General (SA)* 160 LGERA 314.
33 Duggan and Anderson JJ concurring.
34 At 323-324, citations omitted.

> *One starts with this: that what is to be valued is not the inanimate, tangible thing, land, but rights in land. The Act directs the Valuer-General to value an estate in fee simple in the land, but the purpose of a direction in that esoteric form is, in my view, to ensure that what the Valuer-General values is a congeries of the most ample proprietary rights recognized by law "projected along the plane of time" (Pollock and Maitland, History of English Law (2nd ed.) vol. 2, p. 10); one must still ask, "What is the full range of proprietary rights in land, and what makes them valuable?" Traditionally, the amplitude of rights vested in the tenant in fee simple has been equated with the fullest ultimate rights, subject to any restrictions imposed ab extra, of use, enjoyment, destruction and alienation known to the common law. (Compare the dominium of the civilians – see Buckland, Textbook of Roman Law, p. 187).*
>
> *Putting aside, then, the niceties of the theory of estates, what the Valuer-General is to value (to use Pollock's definition of "ownership" – see Jurisprudence and Legal Essays, p. 97) is the entirety of powers, allowed by law, of the use and disposal of a given parcel of land.*
>
> *What is presented to the Valuer-General in the first place, therefore, is a parcel of land, and certain given rights over it of use and disposal. What yields a value under the Act is the value in the market place of those rights of use and disposal.*

[37] It is to be noted that Bleby J identified that the statutory provision considered by the High Court in *Royal Sydney Golf Club* referred to "*the fee simple of the land"* whereas the statutory provision being considered in *Perpetual Trustee Co Limited* referred to an "*unencumbered estate of fee simple in the land"*. His Honour expressed the view that the use of the word "*unencumbered"* made little difference:

> "Apart from the use of the word 'unencumbered' in the definition of 'capital value' in the Act, those definitions bear a striking similarity to the definition of 'capital value' with which we are concerned. However, in the light of the observations of the court, the emission in the Land Tax Assessment Act definitions of any reference to an unencumbered estate would appear to make little difference."[35]

[38] After considering the above authorities, Counsel for the respondent then had this to say:[36]

> "**52.** The consistent thread in these decisions is that a reference to '*fee simple'* is, in the absence of clear statutory text or context indicating a different meaning, to be read as a reference to a fee simple in respect of which the full rights of ownership comprehended by the notion of an estate in fee simple may be exercised. It is not to be read as a fee simple qualified and diminished by the rights of tenants or others.
>
> **53.** It is acknowledged that these conclusions were reached in the context of valuations made for rating purposes, and at least partly reflected a consideration that valuations forming part of a scheme for general taxation should not be construed as being required to be based on the idiosyncratic circumstances of individual properties, in the absence of statutory language clearly indicating such an intent. The valuation to be made for the purposes of s 170 of the Land Act is being made for a specific purpose affecting only the State and the prospective purchaser.
>
> **54.** However, what is being valued under s 170 and 434 is not an actual fee simple which may or may not be subject to encumbrances or restrictions. It is land which is not in fact fee simple, but is to be <u>taken to be</u> fee simple for the purpose of the valuation.
>
> **55.** Moreover, the fact that it is required to be valued unimproved is an indication that what is required to be valued is something which is abstracted from things potentially affecting its value otherwise which have been done (or not done) by a particular owner or occupier of the <u>leasehold</u>. Although s 170 valuations are only done for the purpose of a specific

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35 *Trust Company of Australia Ltd v Valuer-General* (SA) 160 LGERA 314 at 325.

36 See respondent's submissions paragraphs 52-57.

transaction, they are nevertheless to be done on a common and 'de-personalised' basis, under a single set of rules applying to all applicants, so that no individual applicant gets an advantage or suffers a disadvantage based on the particular way in which it has exploited the economic value of the land prior to the conversion occurring.

56. Therefore, the authorities cited are submitted to provide strong support for the view that what one must hypothecate under s 170 is what the section says, a *'fee simple'* (simpliciter), not a fee simple assumed to be encumbered by restrictions or lesser interests created by a particular manner of use or development of the leasehold, which do not in fact exist as fee simple interests.

57. That approach to construction of s 434(1) is one reason why the Appellant's contention that the land ought to be valued free of its physical improvements, but nevertheless encumbered by the multitude of subleases which no longer generate any ongoing economic return, should be rejected. The land is to be valued not as it actually is (an encumbered leasehold), but rather 'as if' it were fee simple meaning, for the reasons given, on the assumption that it is a grant in fee simple undiminished by interests carved out of it for the benefit of others."

[39] I agree with the respondent's contentions.

Treatment of Sub-Leases when improvement notionally removed.

[40] I accept the contentions of the appellant that, consistent with the specific statutory requirements of the *Act*, the definitions applicable under the *LVA* and the *VLA* are not applicable. However, it does not follow that all decisions that relate purely to the *VLA* or *LVA* must necessarily be disregarded. In my view, this proposition is particularly relevant when one considers the recent Court of Appeal decision in *Chief Executive, Department of Natural Resources and Mines v Kent Street Pty Ltd*.[37] As Counsel for the respondent put it:[38]

> "The Court of Appeal's approach was one concerning general concepts and principles as to the relationship between improvements and leases of those improvements, rather than one by which the particular outcome depended on any specific wording in the VOLA about the treatment of leases (of which there was none). The proposition that removal of improvement carries with it removal of subleases which depend for their existence and utility on the existence of those improvements, and are created solely to permit a particular form of use and enjoyment of those improvements, is hardly surprising or illogical."

[41] It is appropriate to consider precisely what the Court of Appeal had to say regarding the notional removal of leases in *Kent Street*. At paragraph 115 of the decision, Justice P Lyons (with whom McMurdo P and Keane JA agreed) had this to say:

> "Leases of tenancies of a shopping centre are not simply leases of defined volumes of space. They are leases of parts of a building. Without the building itself, it is extremely difficult to conceive of leases of shopping centre tenancies. The right of exclusive possession of a volume of space, absent a building, is virtually meaningless. Shopping centre leases commonly regulate the use to be made of the leased space, which are nonsensical in the absence of a building. The whole purpose of the lease is to provide a right of occupation in a structure, related to other parts of the structure including carparking, malls and access ways, stairwells and lifts, and, significantly, other occupied parts of the building. Even in the hypothetical context created by s 3(1)(b) and the balance of s 3, it would be extremely artificial to associate leases of tenancies in a shopping centre with land where the improvements do not exist."

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37 [2009] 171 LGERA 365.

38 At paragraph 64 of their submissions.

[42] I agree with the submissions by Counsel for the respondent that the Court of Appeal's reasoning set out in the preceding paragraph is a general statement of law equally applicable to the *VLA* or the *Act*.

Valuation Evidence

[43] As already indicated, expert valuation evidence was provided to the Court by two registered valuers, Mr Slater and Mr Hoffmann.

[44] This matter is somewhat unusual due to the completely different methodologies adopted by the two valuers.

[45] As is obvious from my preceding findings regarding the correct statutory interpretation of the *Act*, in my view Mr Slater's valuation is founded on an incorrect understanding of the relevant provisions of the *Act*. It follows that Mr Slater's valuation evidence is of little assistance in this matter. That then leaves the evidence of Mr Hoffmann, which was tested on a number of fronts by Mr Hughes SC during cross-examination.

[46] In his valuation report,[39] Mr Hoffmann used the following calculations to arrive at his figure of $10,000,000:

"**21. Valuation Calculation:** **The valuation has been calculated as follows:**

SITE VALUE

53,120m²	(H/D Res zoned areas – Pt Lot 8 + Lot 13)	@	$300/m²	=	$15,935,000
1,555m²	(Commercial terminal site – Pt Lot 9)	@	$450/m²	=	$ 700,000
54,675m²				=	$16,635,000 ($304/m²)

LESS Rock Wall including Wave Walls (adopt 1,000m @ $6,080/m) including:

Imported Rock 1,000m @ $5,000/m	=	$ 5,000,000	
Rates & Contingency Fees calculated @ 20%	=	$ 1,000,000	
Interest calculated @ 8.45% for 3 months	=	$ 127,000	
		$ 6,127,000	
Lessee component is 50%	=	$ 3,063,500	
Assume 50% Share with Perp. Lease Component	=	$ 1,532,000	$ 1,532,000

LESS Earthworks done by Lessee (adopt 100,000/m³ of fill @ $43/m³) including:

Imported Fill	100,000/m³ @ $25/m³	=	$ 2,500,000	
Compact/Drainage	100,000/m³ @ $10/m³	=	$ 1,000,000	
Rates & Contingency Fees calculated 20%		=	$ 700,000	
Interest calculated @ 8.45% for 3 months		=	$ 89,000	$ 4,289,000

TOTAL				$10,814,000 ($198/m²)
LESS	Rates/Charges calc @ 3% for 6 months	=	$ 162,000	
	Interest on Land @ 8.45% for 6 months	=	$ 457,000	$ 619,000
UNIMPROVED VALUE				$10,195,000 ($186/m²)
ADOPT				**$10,000,000 ($183/m²)**"

[39] Exhibit 6.

[47] In his report, Mr Hoffmann made reference to four sales. I have summarised extracts of Mr Hoffmann's sales as follows:

SALE NO	Street, Road or Parish	Property Area, Zoning	Date of Sale	Sale Price	Improvements		Analysed Site Value
Sale No 1	7-19 Hillyard Street, Pialba	9,972 square metres High Density Residential	20/11/2009	$3,300,000 ($3,000,000 or $300/m² ex GST)	Added Value of existing basic improvements	$100,000	$2,900,000 ($291/m²)

Overall Comparison: Mortgagee in Possession sale of the old Pialba hotel site. Sold prior to date of valuation. Site is located west of subject along northern fringe of Pialba commercial precinct. Elevated but not located on Esplanade though potential for good ocean views. Sold with approvals for mixed use development though used as holding proposition at present due to the state of the market. Inferior location and size. Similar potential for a mixed use development. Inferior overall to subject.

Sale No 2	513 Esplanade, Urangan	2,124 square metres Medium Density Residential	16/01/2009	$975,000 ($460/m² ex GST)	Clearing	$5,000	$975,000 ($459/m²)

Overall Comparison: Sold well prior to date of valuation but sale price considered indicative of values as at date. Located west of the subject on the Esplanade. Inferior in size, locality and surrounding amenity. Potential for multiple unit development or residential dwellings. Inferior overall to subject.

Sale No 3	14 Liuzzi Street, Pialba	1,250 square metres Business	04/09/2009	$682,000 ($620,000 or $496/m² ex GST)	Clearing Filling	$5,000 $50,000	$620,000 ($496/m²)

Overall Comparison: Located within fringe commercial and industrial area of Pialba. Sold prior to date of valuation but considered indicative of values as at date of valuation. Now developed into medical precinct incorporating group titled office suites. Situated within lakefront development and has been extensively filled. Inferior location to subject. Commercial potential only. Inferior overall to subject.

Sale No 4	552 Esplanade, Urangan	736 square metres Medium Density Residential	12/02/2010	$742,500 ($675,000 or $917/m² ex GST)	Cleaning + Ancillaries	$5,000	$675,000 ($917/m²)

Overall Comparison: Small corner level site located along the Esplanade at Urangan. Originally proposed for mixed use retail and multiple unit development over 3 levels. Indicative of market for smaller lots along the Esplanade as at date of valuation. Good corner position and views over Hervey Bay. Inferior size. Inferior overall to subject.

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[48] It is noteworthy that Mr Hoffmann did not attempt to gild the lily with respect to his sales. He freely admitted the difficulties that arose as a result of these sales being significantly smaller

than the subject land. Such is evident from his evidence while under cross-examination by Mr Hughes, SC[40]

> "The reality is, you couldn't find a comparable sale of any large allotment. The allotments you looked at were tiny, 10 percent of the size of this land; correct?-- Yes. I mean what - what you've got to remember though, this is a very large property by comparable standards of other similar type use properties in the area, it's - it's the prime site.
>
> Mmm?-- It's - it's the best site in Hervey Bay.
>
> Mmm?-- And as such, there are very few sites that compare in area or potential.
>
> Mmm?-- So as such, you're always going to - even in peak times, you're always going to struggle to have some directly comparable sales of that nature in that size in that - in that market. …
>
> You accepted there were no comparable sales at the time?-- Mmm-hmm.
>
> Correct?-- Yes, yes.
>
> And indeed, you said so much in your report. You'd also accept that the sales that you were forced to look at, those non-comparable sales, but once you were forced to look at, were much smaller in size, weren't they?-- Sale 1 was about one hectare from memory, and the balance of the sales were said inevitably smaller, yes."

[49] It is often said that expert valuation evidence 'is not an exact science'. I can but agree. This case well illustrates the point. The value to be applied to the subject property in accordance with the provisions of the *Act* is a statutory fiction. It is the expert valuers task to put meat and bones onto that statutory fiction. The task is not an easy one. Mr Hoffmann has conceded that his sales are small in area when compared to the subject; that the subject is a unique lot; and that the property market in Hervey Bay was distressed as a result of the impacts of the global financial crisis. However, it is not the case that Mr Hoffmann failed to take these points into account with respect to his valuation. Indeed, in my view, his answers during cross-examination generally confirm that he was not only aware of these difficulties, but he used his valuation expertise to take them into account in arriving at a value for the subject land. I have little doubt that another valuer, adopting the same methodology as Mr Hoffmann, may have indeed arrived at a different figure. However, I can only decide this matter on the evidence put before me at the hearing.

[50] As Mr Flanagan SC strongly put it during oral submissions:[41]

> "The difficulty, as I've said, in Mr Slater not doing his own report on the different legal assumption, is that the only evidence your Honour has before you of whether the - of the true value of the fee simple is Mr Hoffman's evidence of $10 million. My learned friend, as is his right, sought to cross-examine Mr Hoffman to cast doubt on that valuation.
>
> He is, however, stuck with the answers given by Mr Hoffman. So to the extent that Mr Hoffman did not agree with any of his propositions, he is stuck with that answer, and that constitutes the best evidence before your Honour in relation to valuation evidence based on our legal assumption. …

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40 See T. 2-29 and 30.
41 See T. 2-66, 67.

> It follows that there was nothing, we say, flowing from the cross-examination, nor anything flowing from the evidence of Mr Slater, nor from Exhibit 20 that would cause this Court to look again at the valuation of $10 million. It's really an all or nothing situation. And the parties have really conducted it as an all or nothing situation.
>
> If our interpretation of the Act is correct then it's $10 million. If my learned friend's correct - estimation of the Act is correct then they say it's nil."

[51] I agree with Mr Flanagan's submissions. Despite the best endeavours of Mr Hughes SC, Mr Hoffmann's expert evidence is the only evidence before the Court which undertakes a proper valuation exercise in accordance with the correct interpretation of the *Act*.

Disposition of Appeal

[52] In light of my various findings and conclusions set out above, I am left with no option but to dismiss the appellant's appeal.

Order

1. The appeal is dismissed.

PA SMITH
MEMBER OF THE LAND COURT

Judgment

1The New South Wales Golf Club occupies an area of 58.85 hectares on the northern headland of Botany Bay. It is surrounded on three sides by the ocean and Botany Bay and on the northern side by St Michael's Golf Club. The course at present ranks as the No 34 golf course in the world and is, I understand, the second ranking course in Australia.

2The question for determination is: what is the value of the land for the purpose of the *Valuation of Land Act 1916*?

3A valuation under that Act is an artificial value. Although it is the unimproved value, it must include "land improvements" and, in the present case, take into account the restrictions on the disposition and manner of use under the lease by which the Club holds the land. In the latter respect, the land is owned by the State of New South Wales but is "Crown lease restricted" - the lease to the Club is for a term of 40 years from 25 July 1996 and expiring on 26 July 2036, the use is restricted to a golf course and there are other restrictions, including that the lessee cannot part with possession without the relevant minister's consent.

4The highly artificial nature of the exercise is shown by the following provisions of the Act. Section 6A(1) states:

(1) The land value of land is the capital sum which the fee-simple of the land might be expected to realise if offered for sale on such reasonable terms and conditions as a bona-fide seller would require, assuming that the improvements, if any, thereon or appertaining thereto, other than land improvements, and made or acquired by the owner or the owner's predecessor in title had not been made.

5The reference to "land improvements" requires recourse to the definition of that term in s 4:

Land improvements means:
(a) the clearing of land by the removal or thinning out of timber, scrub or other vegetable growths,
(b) the picking up and removal of stone,
(c) the improvement of soil fertility or the structure of soil,
(d) the restoration or improvement of land surface by excavation, filling, grading or levelling, not being works of irrigation or conservation,
(d1) without limiting paragraph (d), any excavation, filling, grading or levelling of land (otherwise than for the purpose of irrigation or conservation) that is associated with:
(i) the erection of any building or structure, or
(ii) the carrying out of any work, or
(iii) the operations of any mine or extractive industry,
(e) the reclamation of land by draining or filling together with any retaining walls or other works appurtenant to the reclamation, and
(f) underground drains.

6Section 14I states:

(1) Land that is ***Crown lease restricted*** is to have its land value determined taking into account the restrictions on the disposition or manner of use that apply to the land by reason of its being the subject of the lease concerned.

(2) Land is ***Crown lease restricted*** if it is subject to any of the following:
(a) a lease or licence, or a permit to enclose a road or watercourse, granted under Part 4 of the *Crown Lands Act 1989*,
(b) an incomplete purchase or permissive occupancy, or a special lease or term lease, within the meaning of the *Crown Lands (Continued Tenures) Act 1989*,
(c) a lease under the *Forestry Act 1916*,
(d) in the case of lands of the Crown, a lease of a class or description prescribed by the regulations.

7The relevant restrictions under the lease are as follows:

Clause 12 -	Minister's approval required for "doing or executing any act, manner or thing".
Clause 30 -	Use restricted to a golf course.
Clause 38 -	Lessee cannot part with possession without Minister's consent.
Clause 54 -	If improvements are totally destroyed, lessee can rebuild to original design, or to an approved design, or surrender lease.
Clauses 58, 59 -	Lessee cannot erect or demolish improvements without consent.
Clauses 82. 83 -	Lessee cannot "harm, kill or destroy any of the trees or vegetation on the land except weeds".
Clause 87 -	The lessor does not have to provide access "over other land held by the lessor or any other land". (As all adjoining land is owned by the lessor, some doubts must arise as to the ongoing use of the existing access; otherwise the subject land is landlocked.)
Clause 89 -	Lessor covenants to provide quiet enjoyment. However, a helicopter base with a large hangar has been established on adjacent land with flights occurring over the subject land.
Clause 90 -	Upon three (3) months notice the Minister may withdraw any part of the subject land "and no compensation shall be payable for such withdrawal". (Such a restriction would have obvious impacts in relation to securing finance to develop the land.)
Clause 105 -	Lessee to maintain footbridge adjacent to the sixth tee for public access.
Clause 109 -	Lessee to allow various government offices vehicular access across the land to Henry Head.
Clause 112 -	The Minister's consent is required to alter playing areas of the golf course.

8Mr T Dundas, the Club's valuer, is of the opinion that all of these terms of the lease must be taken into account under s 14I, most notably the clauses regarding threatened species and lease withdrawal. Mr RR Dupont, the Valuer-General's valuer, contends that the land is to be valued as fee simple in possession and the only conditions of the lease to be considered are restrictions on disposition and the manner of use. In my view all of the above terms are relevant as they all relate to either the disposition or the manner of use, as further explained at [55] - [57] below.

9The current annual "market rent", which was fixed by the Department of Land and Water Conservation in 1999, is $40,000.00.

10In 1991 the Valuer-General placed a valuation on the Club's land of $4.4 million. This was reduced by the Court to $2.236 million: *New South Wales Golf Club Ltd v Valuer-General* (1993) 81 LGERA 438. In 2003 the Valuer-General placed a value on the land of $3.75 million. This was reduced by the Court to $2.5 million: *New South Wales Golf Club v Valuer-General* [2007] NSWLEC 40.

11The Valuer-General has placed a value on the land, as at the valuation date, 1 July 2009, of $6.01 million. The Club contends that the value should remain unaltered since the previous determination by the Court of $2.5 million in 2007, particularly since the value of golf courses has fallen in the interim. Moreover, the Club's valuer contended in the course of giving his evidence that the value should be nil.

A question of onus

12Mr JB Maston, appearing for the Valuer-General, submitted at the outset of the hearing that the objection to the valuation must be dismissed without the matter proceeding any further. As I understand it, he sought, in effect, summary judgment on the ground that the Clubs' evidence as filed did not give rise to any case to answer having regard to its onus under sub-s 40(2) of the *Valuation of Land Act.* That sub-section states:

> On an appeal, the appellant has the onus of proving the appellant's case.

13The report of the Club's valuer which was filed relies principally upon the provisions of the lease referred to at [3] and [7] above, the absence of any truly comparable sales of other golf courses, that the value of golf courses is falling, that a hypothetical purchaser would have to meet the cost of constructing a golf course on the vacant land, and on the fact that the market rent for the subject land has not altered since the previous hearing.

14According to Mr Maston's submission, as I understand it, the lease is the same lease that was in existence at the time of the previous hearing; the land itself would be notionally considered to be in the same unimproved state as at the previous hearing; the market rent is unaltered; and all that the Club's valuer has done is simply adopt the findings and conclusion in the previous judgment. Moreover, this is a fresh appeal about a valuation made as at a different base date, which calls for a fresh assessment, which has not been done by the Club's valuer. The previous judgment of the Court is not *res judicata* and the Club's valuer cannot simply say, in effect, "I rely on the previous judgment". According to the submission, the onus is on the appellant to prove that the Valuer-General's valuation is wrong and the evidence which has been filed does not discharge that onus.

15Mr PJ McEwen SC, appearing for the Club, submits that there is nothing wrong with this approach, particularly since there are no changed circumstances since the previous hearing (other than the fact that the market for golf clubs is falling). In the previous case the Court adopted its valuation by capitalisation of the market rent to achieve the result. Mr McEwen submits that there should be consistency in this as

well as in other areas of litigation. He referred to *Graham Trilby Pty Ltd v Valuer-General* [2011] NSWLEC 68, in which Biscoe J said, at [32]:

> As a general principle, the Court should not make conflicting findings of fact in consecutive valuation appeals relating to the same land where there is no significant difference in the evidence, unless it is convinced that the earlier finding is wrong. Courts should strive to be consistent.

16Mr Maston relied upon a number of authorities in support of his submission. In *Broken Hill Proprietary Company Ltd v Broken Hill Municipal Council* [1926] AC 94; 37 CLR 284, it was held that a judicial decision as to a valuation of a mine under s 153(3) of the *Local Government Act* 1919 (NSW) for a particular year is not *res judicata* in respect of a valuation and a liability for a subsequent year between the same parties. A previous decision in that case related to a valuation and a liability to tax in a previous year: The Privy Council held (at 100):

> The present case related to a new question - namely, the valuation for a different year and the liability for that year. It is not *eadem questio*, and therefore the principle of *res judicata* cannot apply.

17*Flack v Valuer-General* (1952) 18 LGR (NSW) 157, was the hearing of objections to valuations made by the Valuer-General in 1949. The objector tendered in evidence the valuations made in 1946 and 1947 and gave evidence that there had not been any materially changed circumstances since then. The subject valuations were very substantially in excess of the prior valuations. Sugerman J expressly left open the question, deciding it neither one way nor the other, whether there may not be some cases in which it is sufficient to point to an earlier valuation standing alone. His Honour went on to note that in the present case the period between the prior valuations and the dates of the valuations objected to was considerable, there had been a decline in the purchasing power of money, a considerably accentuated demand for land and a considerable degree of development or of prospect of development. His Honour then continued (at 159):

> Even if it be correct to assume as a starting point the correctness of the prior valuation, which as a matter of general principle I have left open, it appears to me to be impossible for the Court to speculate, in the absence of any evidence or admission on the question, whether in any given area there has or has not been an increase in values in the interim, or what percentage that increase may be.

18In *Society of Medical Officers of Health v Hope (Valuation Officer)* [1960] AC 551, Lord Radcliff (Simonds LJ, Cohen LJ and Jenkins LJ concurring) drew an analogy between the system of rating and the system of personal taxation, holding (at 562):

> "... that it is not in the nature of a decision given on one rate or tax that it should settle anything more than the base issue of that one liability and that, consequently, it cannot constitute an estoppel when a new issue of liability to a succeeding year's rate or tax comes up for adjudication.

His Lordship continued:

> The question of this liability is a 'new question'. It is not '*eadem quaestio'*.

His Lordship referred to several authorities in support, including *Broken Hill Proprietary Co Ltd v Broken Hill Municipal Council.* Lord Keith of Avonholm, after

noting that a valuation officer has a public duty to perform by making periodically a valuation list of all hereditaments, said (at 568):

> He must necessarily reconsider and revise the previous valuation list.

19These principles have been accepted in this Court. Thus, in *Commonwealth Custodial Service Ltd v Valuer-General* [2008] NSWLEC 310, Biscoe J said, at [7]:

> The valuation by this Court in relation to preceding years does not attract the principle of *res judicata*: *Broken Hill Pty Co Ltd v Municipal Council of Broken Hill* (1925) 37 CLR 284 at 289 (PC)

His Honour then noted that the parties and their valuation witnesses gave no weight to the Court's valuation, in an appeal in relation to preceding years.

20Whilst accepting, as I must, the principles described in these authorities, I ruled against Mr Maston's application and proceeded to hear the evidence. I did so because a fair reading of the valuation report upon which the Club relies shows that the valuer did in fact consider the circumstances existing at the relevant base date, being 1 July 2009. In particular his evidence is that the market for golf courses, rather than going up as reflected in the Valuer-General's valuation, has gone down since the previous hearing. That is enough, I think, to discharge the onus, at least on a *prima facie* basis. Moreover, he contended during the hearing that, for reasons which appear below, the land should be given a nil valuation.

Land improvements

21Valuation evidence was given by Mr T Dundas for the Club and by Mr RR Dupont for the Valuer-General. Their first area of disagreement is what should be included as land improvements. Mr Dundas considers the following should be taken into account as land improvements:

(a) clearing of the areas now consisting of fairways, tees, greens and buildings;

(b) removal of stones (although none of this would appear to be necessary);

(c) some grading, although overall the course follows the natural topography;

(d) a small area of filling near the car park; and

(e) several underground drains.

22Mr Dundas is of the opinion that the definition of land improvements does not allow for the planting of vegetation (including grasses) or for raising the level of land. Mr Dundas also states that, whilst the ongoing fertilisation of planted grasses may have resulted in some improvement in soil fertility, as the grasses are considered to be an improvement and so are taken to have never existed, they would not be fertilised.

23Mr Dupont includes as land improvement, fertilising, excavation, grading, levelling, remediation and drainage, as well as fairway planting, bunkers, greens, tees etc.

24I generally agree with Mr Dupont. Raising the level of the land, whether for tees or for greens, utilises fill and is clearly filling: *Maurici v Chief Commissioner of State Revenue* [2001] NSWCA 78 (2001) 51 NSWLR 673; 114 LGERA 376 (reversed on appeal on other grounds); *Maurici v Chief Commissioner of State Revenue* [2003] HCA 8; 212 CLR 111. The evidence of Mr JT Woodcock, an experienced ground curator and greenkeeper, confirms the fact that the introduced grasses on the fairways, roughs, tees and greens improve the structure and quality of the soil by retaining the landform, eliminating soil erosion and creating organic matter that filters into the soil profile and improves the growing medium. The planting of grasses would thus also be a land improvement. Moreover, any shaping of the land (including the planting of grasses) amounts to the carrying out of a work. In this respect the reference in paragraph (d1)(ii) of the definition to "any work" is a reference to the word "work" as a noun - that is, a thing upon which labour is bestowed: *Atkinson v Lumb* [1903] 1KB 861, *Bromley Rural District Council v Croydon Corporation* [1909] 1 KB 353.

25I thus disagree with the opinion of Mr Dundas that the land is to be regarded only as a site upon which a golf course could be constructed, that the land is otherwise vacant and one would then need to construct the course. The land improvements mean that the course is largely already constructed - and constructed to a level of championship standard. That is, it must be regarded as having its present form, complete with tees, fairways, roughs, bunkers and greens, all in their present condition.

26Mr Dupont states that the cost of constructing a championship course is in the vicinity of $10 million to $14 million based upon Rawlinson's Australian Construction Handbook (2009 edition). Mr Dundas has made an estimate of the cost of constructing a golf course from scratch as at 1 July 2009 as being $32 million, but as I have noted above, it must be assumed that the course layout largely exists as it is today, with its tees, fairways, roughs and greens, all duly turfed, fertilised and top-dressed, together with the underground drains and the excavated and levelled areas for the workshop building and the car park. Accordingly, relatively little additional expenditure would be required to establish a working golf course, although, as appears at [45] to [46] below, a hypothetical purchaser could not expect to operate a successful golf course without some sort of a clubhouse, car parking and a workshop/ buggy store.

27According to Mr GM Dempsey, the Club's course superintendent, the greens and tees are fertilised approximately every month, mainly during the growing season between September and April and the fairways are fertilised every two or three months during the growing season, at a cost of about $40,000.00 a year. The greens are top-dressed every fortnight and the tees and fairways are top-dressed annually, by applying sand. Sand is purchased for the greens at an annual cost of about $6,000.00, but the tees and fairways are top-dressed with sand from the Club's land.

28In 1987 the practice range was reconstructed, which included filling and drainage, at a cost of $43,604.00. In 1988 the car park was rebuilt at a cost of $202,352.00,

which included removing a significant amount of material and reconstructing the surrounds and surface. In 2006/ 2007 the area of the works depot was excavated and the excavated material used as fill in another part of the land at an estimated costs of $21,600.00. In 2011 the fourth hole was redesigned which required some cutting and filling at a costs of about $9,000.00, but since this work was done after the relevant valuation date, it must be ignored. Apart from this final item, a hypothetical purchaser would obtain the benefit of most of the above-mentioned expenditure.

29Although Mr Dupont has estimated a cost of constructing a championship course at $10 - $14 million based on Rawlinson's Australian Construction Handbook (2009 edition) and Mr Dundas has estimated the cost at $32 million, both valuers agree that cost does not equal value when it come to golf courses. This, they agree, is because most recently constructed golf courses have been constructed in conjunction with housing estates or tourist resorts where the presence of a golf course is reflected in the uplift in values of the surrounding land and buildings. The relevance of all this in the present case is that a hypothetical purchaser of the land intending to use it as a stand-alone golf course would not have the benefit of any flow-on effect upon adjoining residential or tourist development, but would also not have to face the prospect of meeting the vast bulk of the costs of constructing it as that must be notionally regarded as having been already done.

30Of course, one must disregard all improvements which are not "land improvements", such as the elegant and spacious clubhouse with its various facilities, the surfacing of the car park, the workshop/ maintenance building and buggy store, the earth-walled dam, the surfacing on pathways and the bridge to the sixth tee. Nevertheless, the hypothetical purchaser in the hypothetical transaction, purchasing the land with the intention of using it as a golf course - the only permitted use - would be obtaining the benefit of expenditure on a property where the course itself is ready to be played.

Valuation methodology

31I now turn to the question of valuation methodology. Mr Dupont used four methods of valuation, each of which was said to be a check on the others:

(i) direct comparison with sales of vacant and similarly zoned open-space land;

(ii) analysis of rents for golf courses and capitalisation of the expected market rent for the subject land;

(iii) analysis of sales of existing golf courses; and

(iv) valuation based upon potential income.

32Mr Dundas adopted the third method and, after analysing it, he rejected it and then adopted and applied the second method. Mr Dundas dismissed the first method as being entirely inappropriate and unhelpful in the present case. However, in the course of giving his evidence concurrently with Mr Dupont, he accepted the fourth method as

being the most reliable, but that one must then also consider the restrictions on disposition and manner of use under the lease (as required by s 14I).

Direct Comparison

33Mr Dupont utilised sales of similarly zoned and vacant open space land to establish a base value for "raw" land, by direct comparison. Some of these sales were of land acquired for the purpose of open space and some for other purposes, two of which were for golf courses associated with adjoining residential or tourist developments.

34As noted at [32] above, Mr Dundas disregarded this method. In his opinion none of the sales utilised by Mr Dupont are of relevance to the subject land, being land acquired either by acquisition for open space or for other purposes. In two cases (Hammondville and Magenta) the land was purchased for golf course development in conjunction with adjoining residential development (Hammondville) or in conjunction with a tourist development (Magenta).

35I find that none of these sales provide reliable indications of the purchase price of "raw" land for development as a stand-alone golf course. Mr Dupont conceded in the course of giving his evidence that "these sales comparisons are not the most reliable". I gain no assistance from them.

Analysis of rents

36Mr Dundas compared the rents charged by the Department of Land and Water Conservation for a number of golf courses on land which is leased from the Crown. He placed the greatest reliance on The Coast Golf Course, The Lakes, Long Reef and St Michael's as well as the subject course. Mr Dundas noted that rentals of fully functioning golf courses are either falling or stabilising. His analysis of rents is flawed, however, because he assumed that a hypothetical purchaser would not pay any rent when faced with the cost of constructing a course of similar quality to the course that now exists. I have noted however, that the presence of the land improvement means that the course must be regarded as being already in place and ready to be played.

37Mr Dupont thought that the market rent determined for the adjoining St Michael's Golf Course was the most apposite. He said that the current rent for the subject land of $40,000.00 was well below the market and has little connection to general market levels, but agreed that the rents paid for other courses were "all over the place" - a comment with which Mr Dundas agreed. Mr Dupont said that reliance on rents has to be treated with caution: "My conclusion out of looking at all the rents is they're all over the place ..." and further, "this is not the most reliable method". He also said that "... it is evident from the leases we have that it's a little bit difficult to get any consistency from it".

38It is clear that the rents charged for other courses are wildly different from each other and from the subject land and do not show a consistent pattern. As Mr Dupont stated, this is not the most reliable method of determining value, and I agree. I thus do not place any real weight on this evidence.

Sales of existing (improved) golf courses

39Apart from the sale of The Springs Golf and Country Club at Peats Ridge, all of the sales which were examined are of existing golf courses that have been developed in conjunction with other developments, generally accommodation for tourists or resorts, conference facilities, function centres or housing estates. In these circumstances it seems that the courses have been primarily used as a marketing tool to promote and add value to the associated development.

40The only sale of a stand-alone golf course was that of The Springs Golf and Country Club, which was sold in September 2008 for $2.35 million. This property is on the western perimeter of the Central Coast urban area. It had previously sold in March 2006 for $10 million with proposals for 33 apartments and a resort development. A development application for the apartments and resort was refused in 2007. This would explain the somewhat dramatic fall in the sale price and demonstrates the reliance of new golf courses on associated tourist or residential accommodation, or conference facilities or the like. Mr Dupont noted that this course is unlikely to make a profit based on current patronage.

41I do not regard the sale of The Springs Golf Club as a reliable indicator of value. This sale bears no relationship to any of the other improved sales, which themselves do not show any consistent pattern, and the fact that The Springs is unlikely to make a profit suggests that the sale price was at an over value. As Mr Dupont states in his evidence: "The problem with the sales and evidence in golf courses is they're all over the place, there's a wide disparity between them, we have limited sales over a wide geographical area". Moreover, as Mr Dupont further observed, the analysis of the sales is difficult, not only because they are so disparate, but there are so many different parts to each sale, such as the clubhouse and bar, accommodation and the like, which must, of course, be ignored for purpose of the hypothetical valuation exercise that must now be performed. I gain no assistance from these sales. Neither do I gain any assistance from the sales of the other existing golf courses that are in evidence for the reason identified in [39] above. They bear no relationship to a stand-alone golf course.

Valuations based on potential income

42Both valuers agreed that this is probably how a potential or hypothetical purchaser would look at this property, particularly in view of the demonstrated unreliability of the preceding methods.

43Mr Dupont analysed the income and expenditure of six golf courses (including the New South Wales Golf Club) from their annual reports. From this information he calculated their earnings before interest, taxation, depreciation and amortisation, in order to determine what they achieved by way of net profits on income, expressed as a percentage. Although his report is not very clear, as I understand it he then made an adjustment for the subject course noting that it was located on a pristine site in a desirable eastern suburbs location. He then averaged the annual income over three years trading, to which he applied what he called a conservative two-years purchase,

less an allowance for course improvements (20 per cent) and the business component (30 per cent) to arrive at a land value.

44The problem with this approach is that the subject course is not like other golf courses. *Firstly*, it is in a unique location, on the northern headland of Botany Bay, surrounded on three sides by the ocean and the Bay and on its northern side by St Michael's Golf Course. *Secondly*, it is located in the eastern suburbs of Sydney and thus more likely to attract the well-heeled. *Thirdly*, it must be assumed that the course is not only ready to play but it is constructed to a championship standard so as to be ranked amongst the best in the world. *Fourthly*, in these circumstances the hypothetical purchaser is more likely to consider the potential financial performance of *this* course, rather than the other courses analysed by Mr Dupont.

45The focus then must be on the trading figures for the subject course. These figures must include the trading figures of a clubhouse, since no golf course - and particularly a high-end championship layout such as this - can operate successfully without one. That is, it must be assumed that the hypothetical purchaser would construct a clubhouse together with its usual facilities and include its projected trading figures into the equation. The need to include a clubhouse is self-evident, as explained by Mr Dundas in his evidence:

> ... you need somewhere for people to change, you need somewhere for the admin to take place. Someone's got to have a cup of coffee, you can't expect people to pay golf and then just - I don't know, go down to the Matraville Hotel to entertain themselves.
> ...
> But to get people to go out there and play golf and have nowhere to get changed, to go and have a meal, to have a cup of coffee or even have a beer after playing the game, it seems to be - as far as I know there's no golf course I've ever been to which doesn't have a clubhouse.

46Mr Dundas said that the exercise is: what would someone pay for the unimproved land in order to build these things, including the maintenance shed, the dam, the cart paths, the bridge, the irrigation system and the car park? I observed that the cart paths are assumed to be already in place, being land improvement, but not the surfacing of them.

47In estimating the potential income for this golf course, bearing in mind that it is constructed to a championship standard, the hypothetical purchaser would probably arrive at a figure close to its actual income. According to the Club's annual reports obtained by Mr Dupont, the total course gross income for each of the years 2008, 2009 and 2010 is just over $4 million. Expenses for the same period, such as course maintenance and wages, came to an average of $2,421,260, resulting in a net profit of about $1,579,000.

48Mr David Burton, the General Manager of the Club, provided evidence of additional costs which were not taken into account by Mr Dupont. The Club is liable to contribute towards the cost of maintaining the access road, which is on Crown land, which cost is shared with the only two other users of the road, namely, the National Parks and Wildlife Service and the Pistol Club. These users including the Club have, over the last 15 years, spent many thousands of dollars on its maintenance. The road is the only access to the Club. The works depot cost approximately $2 million (not $700,000 as estimated by Mr Dupont). Another $1 million has been spent on cart

paths - which I presume includes both levelling or grading and surfacing. Mr Dupont has not considered the cost of other items - the dam, the halfway house, the bridge to the sixth tee.

49Mr Burton also attests to the importance of a clubhouse. The membership income which Mr Dupont had included as course income has little to do with the course work as such and more to do with the strategic direction of the Club. Entrance fees ($282,000) and corporate membership fees ($429,000) are composites of all the services which the Club provides for its members. Absent a clubhouse they could not be charged at those levels, or at all.

50Moreover, Mr Burton says that Mr Dupont's analysis for the clubhouse trading in 2010 ignores costs of $416,059 and when that further cost is taken into account it leaves a consolidated net profit of $331,786 when one includes all the figures for the clubhouse trading. Moreover this amount reverted to a loss when funds were allocated to a reserve for future course maintenance, which has been omitted by Mr Dupont. Absent the allocation to reserves of the consolidated net profit of both the course and the clubhouse, namely, $331,786, and applying Mr Dupont's capitalisation rate of 14 per cent - which was not disputed by Mr Dundas - results in a figure of $2,369,000 as the value.

51Mr Burton's evidence was not subject to cross-examination. Although Mr Burton's analysis applies to the year 2010, the same analysis applied to the 2008 and 2009 trading years leaves a similar result.

52As I understand it, Mr Dupont would not include an allowance from the net profits of an allocation to a reserve for future course work, and it is his view that one looks to the actual net profit - that is, to earnings before interest, taxation, depreciation and amortisation. Mr Dundas concurred that this is standard valuation practice.

53I accept the evidence of Mr Dundas noted at [45] above, which I would have thought to be self-evident, that one cannot expect to successfully operate a golf course, particularly a championship layout such as this, without the facilities of a clubhouse. Any hypothetical purchaser of a "bare" golf course would thus have to include the trading figures of a clubhouse which would have to be provided. This is what Mr Burton has done. Although his are the actual figures, they are likely to be close to the actual estimates which a prudent hypothetical purchaser would adopt.

54Valuation under the terms of the Act is not a precise science. As noted at para [3] above, this is an artificial exercise. A value of about $2.37 million is consistent with the evidence of the overall fall in the value of golf courses generally.

55However, it is highly unlikely that a hypothetical purchaser would pay anything like this having regard to the requirement under s 14I of the Act to take into account the restrictions on the disposition or manner of use that apply to the land by reason of its being the subject of the Crown lease. Mr JB Maston, appearing for the Valuer-General, submitted that "disposition" in the section refers to the "arrangement" or "the action of setting in order" of the land, or the "arrangement ... for the accomplishment of a purpose", or "plan" by reference to dictionary definitions of that word: The Shorter Oxford Dictionary, 3rd edition, The Macquarie Dictionary, 2nd revision.

However, Mr PJ McEwen SC, appearing for the Club, points out that the same dictionaries also define the word as "the action of disponing" and "power to dispose of a thing". The word "dispone" is defined as including "to dispose", and "to dispose of" is defined as "to deal with definitely; get rid of", or "to make over or part with". It is in this latter sense that the section uses the word "disposition". I have come to this view for two reasons. Firstly, if Mr Maston's submission as to the meaning of the word as used in the section were correct, then there would be no reason to include the word "disposition" in the phrase "disposition or manner of use" at all. The additional word in the phrase - "disposition" - must be given some work to do if all that it meant was "manner of use". Secondly, I respectfully adopt what was said by Jacobs J in *Roache v Australian Mercantile Land & Finance Company Ltd (No 2)* [1966] 1 NSWR 384 at 386:

> In a legal context, disposition means the act of disponing or disposing (see Shorter Oxford Dictionary). Disponing of, in this sense, means dealing with definitely or getting rid of or getting done with a particular item.

56Clause 90 of the lease, noted at para [7] above, states that the Minister may on three months' notice withdraw any part of the land and "no compensation shall be payable for such withdrawal". Mr Maston submits that the utilisation of cl 90 is highly unlikely and that there would be a reasonable expectation on the part of the Club that its tenure was secure. I pointed out during the hearing, however, that I was personally aware of - and thus had judicial notice of - an instance where the Crown had done just that, in giving the lessee three months' notice of termination notwithstanding a reasonable expectation that its tenure would continue.

57As also noted at para [7] above, this restriction would have an obvious impact upon the ability to secure finance to either purchase or develop the land with such facilities as a clubhouse, car park, irrigation system, dam, the paving of cart paths and the like. It would also limit the field of potential purchasers, who would hesitate before acquiring an interest in land which can be unilaterally terminated on three months' notice. It would clearly have a depreciating effect on the price that a hypothetical purchaser would be prepared to pay. Mr Dupont did not think that this was material to the value of the land. Mr Dundas, however, was of the opinion that it was an overriding risk:

> ... the Crown could given them a letter, when they get back to the office today, there could be a letter from the Crown saying you have to vacate in three months and you don't get anything for anything you've built there. The letter might arrive next week or next year, no one knows, but it could happen and someone would take that into account in assessing their risk, that's what I think.

58It is for this reason that Mr Dundas contended that the price which the hypothetical purchaser would be prepared to pay would be nil. I concur. This must be particularly so when it is appreciated that the hypothetical purchaser would have to expend a substantial sum of money in providing the facilities which would be necessary to enable the land to be used as a functioning golf course, as described by Mr Dundas - in particular the provision of some sort of clubhouse. For the same reason, a nil valuation would also apply if one were to adopt the capitalisation of rents method of assessment.

59I conclude, therefore, that the appeal should be allowed and the value be determined at nil.

Orders

1. The appeal is allowed.

2. The Valuer-General's determination of the value of the applicant's land as at 1 July 2009 of $6.01 million is revoked.

3. The Court determines the value of the land as at 1 July 2009 as nil.

4. The exhibits may be returned.

****

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Marina to double in size

22nd May 2008

With just eight words Andrew McNamara captured it perfectly. "An extraordinary day for infrastructure in Hervey Bay," said the local MP as he primed Deputy Premier Paul Lucas to reveal that Seymour Group/Watpac had won the right to give the Urangan Boat Harbour and Marina an $800 million facelift.

The marina will effectively double its size over the next five years to incorporate 235 extra marina berths and a secure dry storage area for up to 200 boats.

Fraser Coast Chronicle

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$800m project stalled

BETTER DAYS: Councillor Belinda McNeven, mayor Mick Kruger, ex-Hervey Bay MP Andrew McNamara and Premier Anna Bligh at the launch of marina plans. File photo

TRACEY JOYNSON
tracey.joynson@frasercoastchronicle.com.au

Hundreds of jobs down the drain

IN A CRUSHING blow to the Fraser Coast, plans for an $800 million redevelopment of Urangan Harbour have been shelved due to current economic conditions.

The State Government has pulled the rug out from under preferred joint venture developers Watpac and the Seymour Group, which said last August it would not walk away from the project.

Primary Industries, Fisheries and Rural and Regional Queensland Minister Tim Mulherin said the decision to put aside the redevelopment was not taken lightly.

He said existing economic conditions meant the proposed development was unlikely to deliver an outcome that met both the economic development objectives of the government and Watpac Seymour in terms of its scale, scope or timeframes.

In August last year, the Seymour Group revealed it had spent $30 million buying leases ahead of the planned redevelopment of more than 10 hectares of wharves, car parks, berths, tourist terminal and caravan park.

Seymour Group also admitted it had been losing $200,000 a year on the terminal itself for almost three years. The project was to have created 650 direct jobs and 480 indirect jobs during the five-to-seven year development phase, and to have included a $60 million exterior wall, 235 new marina berths, 200 dry storage spaces, 50 per cent more trailer parks and six boat ramps.

Mr Mulherin said the government remained committed to upgrading the recreational boating facilities at the harbour and funding had been allocated to install a T-shaped pontoon.

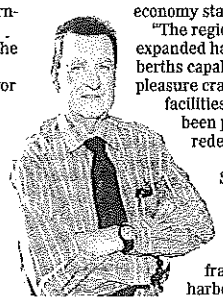
"Planning is under way for design and development of a pontoon to ensure safer access to trailer boats and improve the efficiency of access for boats to enter and leave the water.

"Our vision is to deliver an outcome that protects the natural values and which will improve the character of the harbour by providing a high level of amenity to visitors, key local stakeholders and the local community.

"I want to thank Watpac Seymour for its continued efforts and contribution throughout the process."

Council disappointed at harbour decision

THE FRASER Coast Regional Council is disappointed that the State Government has set aside plans to redevelop the Urangan Harbour.

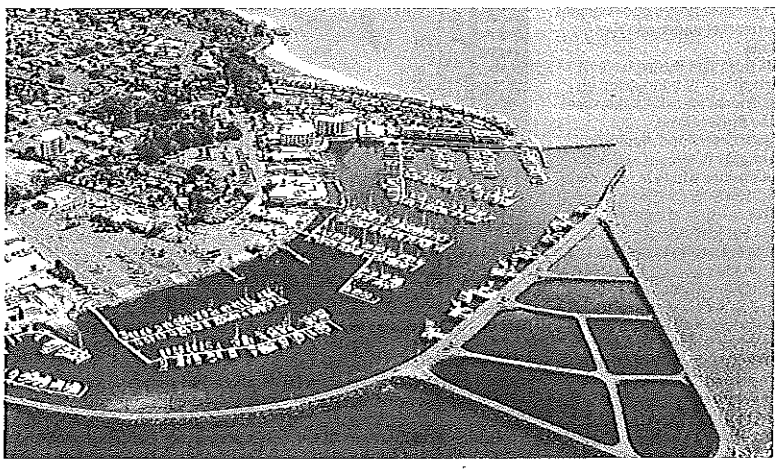


Fraser Coast mayor Mick Kruger (pictured) said the multi-million dollar project would have provided a much-needed boost for the region.

"While we are disappointed, council remains positive that the State Government will reconsider the project once the economy starts to move again.

"The region still needs the expanded harbour with more berths capable of taking larger pleasure craft and the other facilities that would have been provided by the redevelopment.

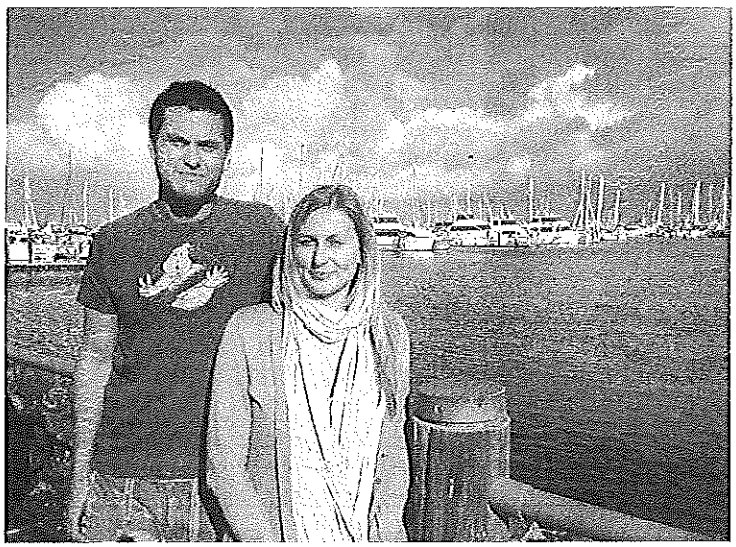
"While we wait, the State Government has committed to improving facilities for the boating and fishing fraternity using the harbour now."



Whale town suffers

Businesses battling to survive

RHIANNA BLACKER



BEAUTIFUL BUT EMPTY: The scenic Hervey Bay Marina, where Daniel Clark and Amy Strudwick enjoy the scenery. PHOTO: RHIANNA BLACKER

WHALE season has not been the financial life saver that Hervey Bay Marina businesses were praying for.

English tourists Amy Strudwick and Daniel Clark said they loved the atmosphere and scenery of the marina, but it was a ghost town.

"I just don't understand, it is such a beautiful place with restaurants, cafes and shopping, yet there are about 10 people enjoying it," Mr Clark said.

"People would kill for this kind of thing in England or even in Brisbane, it is so relaxing."

The tourist dollar has not trickled down into the coffers of marina businesses battling to survive since Kingfisher Bay Resort took its Fraser Island run to River Heads.

Owner of marina business the Gift Emporium, Janice Jenner, said once Kingfisher had gone not even the whale season could improve the bottom line significantly.

"On some Sundays we can go half an hour before a single person walks into the store," Ms Jenner said.

The route from Fraser Island to the Hervey Bay Marina at Urangan was abandoned by Kingfisher less than 18 months ago.

The loss of pedestrian traffic has proved fatal to several businesses there while others continue to just make ends meet.

While more than 10 stores currently trade successfully, none were prepared to comment on their daily takings.

"It can be extremely hard, especially when we are in the middle of the whale season and we aren't bringing in anything close to what we used to when the barges came here," Ms Jenner said.

"It's not hard to understand why so many businesses have left."

Indulgence Hair and Beauty will vacate the marina in less than two weeks.

This will leave four stores in the complex up for lease.

FROM THE WEB: PRAISE FOR WOMAN WHO SOLD HOME TO SAVE DOG

■ Hello Tanya, I am sending you warm wishes and a hug from San Diego, California. What you did was a wonderful thing for your companion Pepsy. – ReneRescues from USA

■ What a woman! If only every human had the same dedication as Tanya. – wake_up from Maryborough

■ Our kitten became ill at the age of 6 months. It cost a total of $5000 Canadian.Money is nothing. This little fur ball is our happiness. – suzannedumais from Canada Bay

■ Tanya, you have a heart of gold. I would do the same for my little dogs, just like you did for Pepsy. – Julitza from Cooloola Cove

■ How beautiful. Your webpage is an inspiration for animal lovers. – sunnyteen from Bli Bli

■ You're a very kind and compassionate lady Tanya. Much love to you and Pepsy, may you have a long and blissful life together. – india from Australia

■ I love to read articles like this. I know she is a happy woman. – MichelleB27953149 from Australia

■ MORE AT www.fraser coastchronicle.com.au

Sweep Dad Off His Feet

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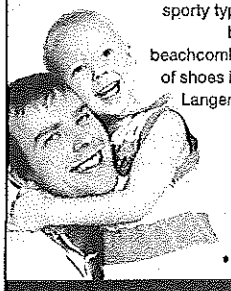

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