REVIEW OF VALUATION CASES

2014

Australian Property Institute/University of Qld. Seminar

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Brisbane

BR O'Connor,
Judicial Registrar
Land Court.

This year's review includes the following cases:

1. **Mahoney – Land Appeal Court**

   The key issue was whether a Local Authority down-zoning of the acquired land made many years before the resumption (by Main Roads) was a step in the process of resumption (*Pointe Gourde/San Sebastian* principle).

2. **Glencore (formerly Xstrata) – Land Appeal Court**

   A range of compensation claims by landowners affected by the proposed Wandoan Coal Mining Lease to Glencore, was considered on appeal.

3. **Ostroco – Land Appeal Court**

   - What relocation expenses are claimable by a resumee (a business lessee)?
   - Are loss of profits prior and post-resumption claimable?
   - Is loss of rental income from new premises claimable?

4. **Musumeci**

   In using sales evidence to make a comparative valuation for a subject property, what figure should be used – the analysed unimproved value derived from the sale or the figure actually applied by the Valuer-General to the sale land.

5. **Steinberger**

   Could the Land Court compel the Valuer-General to provide more detailed reasons for an objection decision – so that the landowner can decide whether to appeal.

6. **Cupo**

   The Court examined the limitations of a very substantial claim for compensation for professional fees (including legal and valuation fees) allegedly incurred prior to the lodgement of the claim in Court.

7. **Hancock Coal – Mining Lease Recommendations**

   The Land Court, after a lengthy hearing, was required to make recommendations to the Minister as to whether the mining lease should be granted and, if so, under what conditions.

8. **APT Petroleum – Rating Categorisation**

   What category should the Western Downs Local Authority have placed "compressor" sites , part of the Roma/Brisbane Gas Pipeline

The appellant constructing authority appealed a decision of the Land Court which determined the value of resumed land at $1,707,500. The appellant contended the appropriate value was $275,000, based on a proper application of the "San Sebastian" principle.

Background:

In 1982 the respondents purchased land located on Ipswich-Boonah Road, Yamanto, at the intersection with the Cunningham Highway. At that time the land was zoned Future Urban. In 1999, it was rezoned to Rural under the Ipswich City Council Planning Scheme.

In 2006 over half of the land was resumed by the appellant for future transport purposes, specifically for the South-West Transport Corridor (SWTC).

The parties agreed that the value of the land taken was either $275,000 if it was to be valued as zoned rural or $1,707,500 if it should be valued as zoned future urban and had the development potential associated with that.

The central issue was whether the "San Sebastian" principle (restrictions on land use made as a step in the process of resumption should be ignored in assessing compensation), applied to the facts.

The respondent claimed that the Ipswich City Council's (ICC) change to the zoning of the land in 1999 was a step in the process to resume the land in 2006 for the purposes of the SWTC.

The appellant led evidence that it does not require local governments to down-zone land to accommodate transport projects and that there is "no implied understanding that local governments will down-zone land to accommodate transport projects".

The appellant claimed that there would be no reason to down-zone the respondents' land in 1999 as no need to resume it was apparent at the time that it was down-zoned.

The respondents claimed that the ICC knew the end point of the corridor when it down-zoned the land. By contrast, the appellant claimed that the end point, the point at which the SWTC corridor would join the Cunningham Highway, was not known to anyone until years after the down-zoning.

The map dated November 2003 of the Preferred Corridor Investigation Area clearly included the respondents' land and the precise alignment of the corridor was shown in the map dated June 2005. The appellant said that this was the time when it became known that the land would be resumed and that the map published in November 2003 showed that from then it could be said to be likely that the land would be resumed.

The 1998 Regional Framework for Growth Management (RFGM) contained a principle that early provision should be made to protect the routes of high capacity corridors such as the Springfield-Ripley-Ipswich corridor. Local governments had a lead agency role for integrated transport and land use planning in their geographic areas.

The appellant claimed that this high-level direction was "broad-scaled" and that the corridor could not be protected until at the earliest 2003 when it became clear where it would be. The evidence was that the appellant would not have sought down-zoning and ICC would not have down-zoned the land to protect the future corridor. By contrast, the respondents claimed that the high level planning decisions actually had a real and early influence and it is clear that such was intended.

Further evidence from the appellant was that it would not be suitable to make zoning changes to land unless and until there was "absolute clarity" where the transport corridor would be "by reference to metes and bounds". The "metes and bounds" of the corridor were not known until much later, in June 2005.

Land Court Decision

The Court held that the effect of various high level planning instruments was that local authorities were directed to protect transport corridors. In particular, the Ipswich City Council was required to preserve the SWTC. Thereafter the Council rezoned the subject land. The Court concluded, in the light of this evidence, that it was more likely than not that the downzoning was done in pursuit of the scheme.

Appeal Issues

The three principal issues on appeal were:

- Was it necessary to prove involvement by the appellant in the downzoning decision by the Ipswich City Council (ICC)?

- Were there sufficient reasons before the Court for explaining the downzoning decision?

- Was the downzoning done as part of the present scheme of resumption; was there a relevant connection between the down-zoning in 1999 and the resumption in 2006.

The Land Appeal Court held:

1. The decisions in *Pointe Gourde* and *San Sebastian* were relevant in interpreting various Queensland statutory provisions concerning the assessment of the value of land compulsorily acquired. This was so even though the "principles" were not specifically enshrined in legislation.

2. The *Pointe Gourde* principle continued to apply in Queensland:

> "… because, as a matter of statutory construction, the courts have concluded that the legislature may be assumed to be aware of this long-held and widely accepted construction of what is meant by 'value' at the time of acquisition."

3. In determining the "value of land" in accordance with s20(1) and s 20(2) of the Act, the Court should ignore any diminution in value to the land caused by planning restrictions where there is a <u>direct</u> relationship between the planning restriction and the scheme of resumption or, if there is merely an <u>indirect</u>

relationship, where the restrictions can properly be regarded as a step in the process of resumption.

Involvement of the appellant in the down-zoning decision

4. There are no authorities in relation to the application of the *San Sebastian* decision in Queensland that mandate that the resuming authority must be involved in the decision that affects, whether positively or negatively, the value of the resumed land.

5. There were two alternatives identified by Jacobs J in *San Sebastian* in discussing the necessary connexion between the rezoning and the proposed public works:

   (i) if the zoning was done with the intent or in anticipation that the land should be resumed for a purpose such as a public reserve,

   or

   (ii) if the zoning was proposed or dictated by the resuming authority,

   then the zoning is to be ignored.

   The first alternative does not require the resuming authority to be involved in the re-zoning.

6. Where, as here, there is an unchallenged finding that the resuming authority was not involved in the decision to rezone the land, the question to be answered remains the same: was the decision to rezone nevertheless a step in the scheme of resumption; was that decision made with the intent or in anticipation that the land should be resumed for the SWTC.

7. The evidence before the Land Court did not support an affirmative answer to either question. To the contrary, such evidence supported the conclusion that the rezoning of the land was independent of the resumption process.

Reasons for the downzoning

8. The ICC Town Planner gave oral evidence as to the reasons for the change in zoning of the subject land effected by the 1999 Planning Scheme. He also said that he was involved in the 1999 zoning, the clear implication being that he was able to and did state, from his own knowledge, the reasons for the rezoning. (This evidence was not referred to by the Land Court in the reasons for judgment).

9. The Land Court correctly noted that there were no contemporary written reasons for the rezoning. However, the lack of a written record as to the reasons does not lead to the conclusion that Town Planner's reasons in his oral evidence were incorrect.

10. Further external town planning evidence was that the subject land was rezoned for planning reasons and that the rezoning was not connected with the resumption.

11. There was also external engineering evidence to support the re-zoning independent of resumption need.

The findings as to the scheme

12. There were no documents dated before the rezoning which showed the SWTC impinging on the respondents' land.

13. There was no specific finding by the Land Court as to when the resumption scheme commenced.

14. Even if there were sufficient evidence to establish the existence of the resumption scheme before the rezoning, such evidence as there was pointed to a route well south of the subject land.

15. There was nothing in the evidence that pointed to an inference that the ICC was responding to a directive from the higher planning authorities to protect the proposed SWTC in downzoning the subject land. Further, there appear to have been sound planning reasons for the decision.

16. The appeal should be allowed. Compensation should be assessed on the basis that the land was zoned Rural and that zoning was independent of the scheme of resumption.

The appellant Glencore Coal (formerly Xstrata) appealed to the Land Appeal Court against a compensation decision of the Land Court under s 281 of the *Mineral Resources Act* 1989 (MRA). The compensation was payable to four landowners upon the grant of mining leases to the appellant.

It was common ground between the parties that the appropriate valuation methodology for the determination of compensation was the "before and after" approach. It was also common ground that compensation should be assessed on the basis that the land which is to be the subject of the leases is lost in perpetuity.

Issues

(a) The nature of the appeal and the circumstances in which the Land Appeal Court could interfere with the findings made by the Land Court.

(b) Whether it was appropriate to use as sales evidence a sale to a resources company – it was suggested by the appellant a premium may have been paid by the purchaser.

(c) Should sales evidence be approached in a “generous and not niggardly spirit” as previously done in the *Wills v Minerva Coal* case.

(d) The correct approach to the valuation of the balance lands where restrictions were placed on such balance – including the fact that no separate title was available and that they were surrounded by lands intended to be the subject of the mining leases.

Nature of appeal

The appellants submitted that the Court must give the judgment which ought to have been given at first instance, after making its own assessment of the evidence and giving its own conclusions as to law and facts, with due deference to the advantages enjoyed by the Land Court.

The respondents submitted that a determination of valuation was in the nature of a discretionary judgment, which would only be overturned on the basis of the principles relating to an appeal against such a judgment.

The Court stated that, while there will be cases where this Court may be in as good a position as the Land Court to reach conclusions about matters of fact, including the value of land, there will inevitably be other cases where the Land Court, having observed the valuers giving evidence, will enjoy advantages not available to this Court. Thus, whether or not a sale is sufficiently comparable to the property to be valued, to provide useful evidence, is a matter of expert opinion, which may not be capable of an exact "exposition of reasoning". The adjustments which may have to be made to the value of a property as shown by its sale, in order to reach a conclusion about the value of another property, will involve judgments, which sometimes can be "nothing more than the best guess that can be made".

There will inevitably be cases where a court at first instance, in choosing between the conflicting evidence of experts, is influenced by matters of impression. In such cases it is still necessary to recognise the advantages enjoyed by the Land Court.

Sale to resources company

In dealing with this sale, the starting position adopted in the Land Court was that a sale should not be disregarded simply because it was a sale to a resource company; and accordingly it did not automatically follow that the sale price exceeded the market value of the property. However, it was recognised that the sale might not reflect market value, and accordingly should be treated with some care. The Land Appeal Court held there was no error in this approach.

The fact that Mr Jinks (respondents' valuer) did not make enquiries of QGC (the resources company) does not provide a substantial basis for rejecting his evidence in relation to the sale.

The "generous" approach

The obvious justification for the approach is the potential movement in market prices before compensation is paid (compensation is only payable once the mining lease is granted – which could be years after determination of compensation). That justification does not depend upon the existence of a depressed market at the time of valuation. Moreover, the approach is consistent with the "liberal estimate" approach referred to by Dixon J in *Commissioner of Succession Duties (SA) v Executor Trustee and Agency Co of South Australia Ltd.* In principle, and subject to a consideration of the effect of s 283B of the MR Act, the approach might be adopted without error.

The explanatory memorandum for the amending legislation which introduced s 283B identified "operational change" as the circumstance of which would make an adjustment to compensation appropriate. These considerations suggest the section is not made applicable simply because of a change in market value over time. Once the "operational change" condition is satisfied, questions of then current market value become relevant.

There is real reason to doubt that s 283B would become available, simply because of a movement in the market for land between the date of the determination, and the date when compensation is paid.

The Land Appeal Court concluded that the Land Court member did not err by taking the approach identified in *Wills*.

Balance lands

The balance lands are a series of somewhat irregular corridors of land, together with occasional isolated parcels of land. They are generally to be surrounded by lands intended to be the subject of mining leases.

The Land Court concluded that the only way the balance lands could be offered for sale was by offering the <u>whole</u> of the land for sale, subject to the mining leases. The balance lands were likely to retain some nominal value, assessed at $20,000 for each of the five properties.

The Land Appeal Court held that it was not demonstrated that the Land Court erred in determining the value of the balance lands.

Conclusion

The appeal to the Land Appeal Court was dismissed on all grounds.

Ostroco appealed to the Land Appeal Court against a decision of the Land Court reducing or disallowing various claims for expenses and losses allegedly incurred as a result of the resumption of its lease (of a real estate business) in July 2009. Ostroco held a lease which was to expire (after the exercise of a second option) in January 2012. Ostroco had been permitted to remain in the resumed premises on a monthly tenancy after resumption.

The claim for compensation comprised four elements:

1. Relocation costs ($658,728). Such costs related to the make over of replacement premises for an LJ Hooker Real Estate agency.

2. Loss of profits for the business. This related in part to the period prior to resumption ($102,486) and part to the period after resumption ($74,303).

3. Loss of income. Pending relocation of its business to replacement premises acquired in July 2007, Ostroco attempted to sub-let such premises. It was unsuccessful in so doing due to the uncertainty about the date of relocation of the real estate business. The claim for loss of rental income ($309,037) was for the period from July 2007 to 30 June 2012.

4. Professional costs.

The Land Court had allowed relocation costs but only to the extent that such would be reasonably incurred by Ostroco as a tenant. Costs claimed that should properly have been borne by a landlord were rejected.

The Land Court also held that it did not have jurisdiction in respect of economic loss prior to the resumption of the lease. Economic loss after resumption was held not to have been caused by the resumption. The Land Court further held that it did not have jurisdiction to determine the loss of rental income as the purchase of the rental property occurred prior to the resumption.

The Land Appeal Court held:

Relocation costs

1. Prima facie, in a case where a lessor is not obliged by its agreement with a lessee (Ostroco) to provide works, and the works are reasonably required for the operation of the lessee's business, then the expense of providing those works is reasonably incurred.

2. The fact that the lessee may (perhaps) have been able to make a different arrangement with a lessor, under which, in return for a higher rent, the lessor would meet the cost of the works, does not mean that the lessee was not acting reasonably when it entered into the lease.

3. Had the evidence demonstrated that a tenant in Ostroco's position could have obtained a lease of premises suitable for its business, at the same rent, and under which the landlord was prepared to pay for the works described as landlord’s works, there would have been a basis for a finding that Ostroco

would not reasonably incur the cost of those works. The evidence did not do this.

4. The evidence did not provide a basis for displacing the prima facie position that the costs would be reasonably incurred by Ostroco, given the terms of its lease.

5. The state of the evidence favoured the view that these costs are costs of the relocation of the real estate agency to the proposed new premises, incurred to adapt it to the business of the real estate agency.

6. Compensation in respect of relocation costs was assessed at $553,043.

Economic loss

7. When s 20 of the Acquisition of Land Act (ALA) was in somewhat different form to the present (it was amended in 2009), the Land Appeal Court had previously allowed compensation for pre-resumption losses, adopting the principles outlined by the Privy Council in the Shun Fung Ironworks case.

8. While paragraphs (f) and (g) of s 20(5) ALA are differently expressed from the legislation considered in Shun Fung, there is nothing in them which would preclude the awarding of compensation for a loss suffered prior to resumption. Section 20(5)(g) provides a relevant example of costs in respect of which compensation might be awarded, that is, the cost of school uniforms for children enrolled in a new school because of relocation from the land taken. Such costs could be incurred prior to resumption.

9. The fundamental problem with the claim for business losses, or lost profits, was that the evidence did not seek to demonstrate that any loss suffered by the appellant was a “direct and natural consequence” of the taking of the resumed lease premises.

10. Ostroco's evidence was premised on the effect of the announcements of the resumption (Busway Project); and, to a significantly lesser extent, the closure of nearby businesses, as a consequence of the taking, or the proposed taking, of the land on which they were conducted.

11. Any loss suffered by the appellant was not shown to be a kind for which compensation is available, by reference to s 20(5) ALA.

12. The evidence also did not provide a basis for awarding compensation for losses suffered by the appellant’s business after the land was resumed.

13. Ostroco’s claim for loss of income, both before and after the resumption, was therefore rejected.

Loss of Rental Income

14. What a court was required to do was simply to apply the language found in s 20(5)(g) ALA. However, the application of similarly worded statutory provisions has been determined in other jurisdictions by reference to the tests

formulated in the Shun Fung Ironworks case (casual connection, not too remote, reasonable person would not have avoided).

15. The language used by s 20(5)(g) requires the making of a judgment whether the connection was sufficient to enable the cost or loss to be described as a "direct and natural consequence of the taking of the land".

16. A judgment must be made, where no point of demarcation is clearly identified, for determining whether a cost or loss is the subject of compensation.

17. In the present case, the loss was not an immediate consequence of the taking of the resumed lease. A number of intervening events occurred before Ostroco suffered the loss for which it claims compensation.

18. Whether one asks if the loss is too remote, or if the loss is a direct and natural consequence of the taking of the land, the exercise of the judgment required by s 20(5)(g) leads to the conclusion that the loss is not compensable.

19. In respect the loss of rental claim, Ostroco's appeal was unsuccessful.

20. Given the way Ostroco had generally framed its case both in the Land Court and on appeal, an oral submission at the hearing should not be understood as raising a new basis for its claim (founded on "costs" rather than "loss"). Alternatively, it should not be permitted to do so at such a late stage in the proceedings.

An important issue of valuation methodology was considered in *Musumeci*: in using of sales evidence to make a comparative valuation for a subject property, what figure should be used – the analysed unimproved value derived from the sale or the figure actually applied by the Valuer-General to the sale land.

Conventionally, the valuation process adopted under both the VLA and the LVA is that, having determined the analyzed sale price of each sale property, the valuer "applies" an unimproved or site value to each of those properties. The "applied" value is then used as part of the process of determining the unimproved value of the subject land.

In *Musumeci*, the Valuer-Generals' valuer did not use the applied values of the sale properties in determining the subject values. Rather, he used the analyzed sales prices.

This issue was considered by the Land Appeal Court (in 1998) in *Chief Executive, Department of Natural Resources v Radlett Enterprises Pty Ltd*. In that matter the respondent had challenged the valuation methodology adopted by the department. The evidence was that it was the value "applied" to the sale lands rather than the unimproved value analyzed from the individual sales which had been adopted as the basis of comparison for the valuation of the subject land. The chief executive had identified the sales which were considered to be comparable with the subject land and thereafter had considered details of other sales before values were applied to the sale lands. The Land Appeal Court interpreted the relevant evidence to suggest that the totality of vacant or lightly improved sales evidence in the local government area had been considered in deciding the range of values indicated for the various classes of land in that area. Ten "out of line" sales were identified and discarded, narrowing the range suggested by the market for those various classes of land. The values applied were conservative as compared with the analyzed values shown by the sales.

The Land Appeal Court held that such an approach was desirable when all land within a particular Local Government Area is to be valued. It would be a different matter, said the Court, if the overall sales evidence had been disregarded and supplanted by unsupported valuation opinion.

The effect of the *Radlett* decision is that the Land Appeal Court has said that it is desirable, when valuing all land within a particular local government area, that the valuations should proceed on the basis of the values applied to the sales properties. The advantage of that approach is that it should ensure that valuations of comparable lands, made for the purposes of the legislation, bear proper relativity to one another. It has long been recognised that it is desirable that valuations of comparable lands made for the purposes of the Act should bear proper relativity to one another, provided the valuations are soundly based.

Following *Radlett*, the Court in *Musumeci* held that the valuer has been in error in using the analyzed sales prices, rather than the applied values of the sales, in valuing the subject land.

On a related issue, the Court had some doubt about whether certain sales should be used at all because of the difference between the analyzed sale prices and the applied sale prices. Sale 1 had been applied at 64% of the analyzed price and Sale 3 at 73%.

The large reductions made to reach the applied values tend to point to the fact that both sales were made at above market value. If that is the case it is difficult to see how they can be applied appropriately in the subject valuation. In the absence of any other sales evidence, however, the Court considered it had no alternative but to use these sales.

The appellant who appealed an objection decision of the Valuer-General claimed that the respondent had failed to provide adequate reasons for the decision on objection and sought relief in that respect. The respondent submitted the application should be dismissed.

Section 151 of the *Land Valuation Act* required the Valuer-General to provide reasons for decision. The appellant alleged the reasons provided were inadequate and did not give sufficient explanation of the actual path of reasoning.

The first issue to be determined is whether the Court had power to order the respondent to provide additional and more detailed reasons for the decision on objection, on the assumption the reasons provided were insufficient.

The Court held:

1. It did not have the power to direct the respondent to provide an additional written statement of reasons under the *Judicial Review Act*.

2. Although s 151(2)(b) may impose a duty on the Valuer-General to state the reasons for the objection decision, the section does not provide that the Land Court can enforce any such duty.

3. There is no general power given to the Court under the Act to enforce any duties imposed by the Act on the Valuer-General.

4. Nor can such a power be inferred from the Court's general power to make declarations granted under s 33 of the *Land Court Act*.

5. If there are in existence documents directly relevant to the matters in issue in the appeal, the respondent would appear to be under a duty to disclose those documents to the appellant pursuant to rule 211 of the *Uniform Civil Procedure Rules 1999* (UCPR). The appellant has not applied for an order for disclosure.

6. The appellant will not be left in ignorance as to the evidence which the respondent intends to call to support the valuation amount. Before the substantive appeal proceeds, both parties will be ordered to exchange statements setting out the evidence on which they intend to rely at the hearing of the appeal

7. The appellant will be fully informed as to the respondent's case when the statements of evidence are exchanged, and the appellant can decide then whether to continue with the appeal.

8. The evidence is not confined to the evidence available to the Valuer-General at the time of the objection decision. It follows that the appellant will only be in a position to make an informed decision as to whether to continue with the appeal when he has had the opportunity to read the respondent's statement of evidence.

9. The application was dismissed.

Disturbance costs in relation to a compensation claim are now specifically provided for in s 20(1)(b) of the *Acquisition of Land Act* 1967 by virtue of the 2008 amendments. In particular, s 20(5)(a) provides that legal, valuation and other professional fees reasonably incurred in the preparation of a claim are compensable.

The key limitations are that such costs must be reasonable, must be proved by the client and must not be costs in relation to preparation for trial.

It is quite permissible to claim for reports from, for example, valuers and town planners obtained before lodging a claim even if the reports later form the key part of material submitted at the hearing.

In *Cupo*, the level of disturbance items submitted by the claimant was challenged by the respondent constructing authority. Items claimed were:

(a) Solicitor's fees	$159,354.83
(b) Counsel's fees	$129,970.50
(c) Town Planner's fees	$ 45,498.01
(d) KPMG Tax Lawyers	$ 7,227.00
(e) Valuer's fees	$ 25,300.00
Total	**$ 367,350.34**

The constructing authority had argued for a figure of $22,000 (approx).

The applicant sought to provide evidence of the reasonableness of the costs incurred by way of an affidavit from a cost assessor, Mr Bloom. The respondent objected, seeking disclosure of six specified things. Among these things were Mr Bloom's file and working notes and a "detailed and complex" advice from counsel. The respondent's objection was allowed so that Mr Bloom's affidavit would not be admitted until the six items of disclosure were made. In view of the ruling, the applicant's withdrew the affidavit.

In disallowing the claimant's sought amount and awarding disturbance costs as sought by the constructing authority, the Court made some pertinent observations:

- A claimant can recover for work of a nature and within the scope of that which a reasonable person in the position of the claimant would have done or caused to be done. The fees and charges for the work must also be reasonable.

- The date on which the claim is last served on the Constructing Authority is the cut-off date for this head of compensation.

- However, it seems both allowable and of practical benefit that a dispossessed owner have the opportunity to replace a claim for compensation by a later document which also satisfies s.19 in circumstances, for example, where the claimant receives improved advice.

- The applicants must show how it is that the steps and their costs were reasonable in the context of making a claim for compensation, as distinct from preparing for trial.

- The applicants have chosen not to produce counsel's advice and advices from their valuer and town planner, making it impossible for the respondent to exercise the right to test the reasonableness of obtaining them and the costs incurred. A consequence is that the Court is not able to be satisfied of those things so that it could form a view favourable to the applicants in respect of those items claimed as disturbance costs.

- The asserted claims for disturbance do not amount to uncontradicted evidence and are simply not adequate evidence where the need for improved advice was in issue and the advice was not produced.

- The respondent directs attention to the quantum of disturbance items allowed in other cases, which will be referable to the facts of these cases. The Court does not draw comparisons between the amounts awarded in other cases and the amount claimed in this case.

- The applicants have not discharged the onus of proof in relation to the disturbance items and amount claimed.

- The liberal estimate principle that requires doubts to be resolved in favour of a more liberal estimate will not operate to free the Court of its duty to determine the disturbance claim on the basis of the evidence. It does not improve the evidence presented.

- The "Model Litigant" principles, issued at the direction of Cabinet, do not appear to restrict a litigant in the position of the respondent from appropriately testing all claims.

It is of interest that in an earlier decision of *Inglis v State of Queensland* the Court had allowed a disturbance claim of some $190,000 for legal, valuation and other professional fees. However, such amount was sworn in evidence by the claimant's instructing solicitor but not challenged by the respondent to the same extent that it was in *Cupo*.

Hancock Coal (the applicant) applied for a mining lease and an associated environmental authority in respect of a proposed open cut coal mine near the township of Alpha. The applications were made under the *Mineral Resources Act 1989* (MRA) and the *Environmental Protection Act 1994* (EPA) respectively.

Background

The Alpha Mine proposed by Hancock is located approximately 130 km south-west of Clermont and lies wholly within the area of the Barcaldine Regional Council. The predominant current land use in the general vicinity of the proposed mine is pastoral purposes, with an emphasis on grazing of cattle.

Hancock proposes a huge mining operation for the Alpha Mine. The projected mine life is 30 years, with the term applied for being 40 years to allow for construction, decommissioning and rehabilitation. At its peak, it is proposed that the mine will produce 30 Mtpa of thermal coal. The estimated capital cost of the mine is $3.4 B. The Alpha Mine is a component part of the broader Alpha Coal project which includes the mine, together with rail and port facilities. It is proposed that coal mined from the Alpha Mine will be processed on site and then transported 495 km by rail to the Abbot Point Coal Terminal just north of Bowen in Central Queensland, from where it will be exported to overseas markets, primarily in Asia.

If the Alpha Mine is approved and goes into production, what will flow with it is significant infrastructure which will enable the development of additional coal mines in the Galilee Basin. On the other hand, if the mine is not approved, the development of the Galilee Basin may be somewhat more problematic.

The approval of the mine is a watershed issue for the Galilee Basin. This explains why the various parties, representing some highly conflicting interests, have put such time, effort and finance into this matter, culminating in a three week hearing.

Application process

Under the *State Development and Public Works Organisation Act 1971* (*State Development Act*), the project was declared by the Coordinator-General to be a significant project for which an Environmental Impact Statement (EIS) was required. Following submissions received from members of the public and advisory agencies, the Coordinator-General requested a supplementary EIS.

The project was determined to be a "controlled action" under the *Environment Protection and Biodiversity Conservation Act 1990* (Cth) and was approved by the Commonwealth Environment Minister under that Act.

After the issue of certificates of public notice for the mining lease applications, objections to the applications were lodged with the mining registrar under the MRA. The mining register then referred the applications and objections to the Land Court for hearing.

A draft environmental authority (EA) was issued under the EPA. The draft EA incorporated the conditions stated for it in the Coordinator-General's report. Following public notification, objections were made to the application for the EA, the

draft EA and conditions included in the draft EA. Those objections were referred to the Land Court for hearing.

The Land Court conducted a combined hearing of the applications and objections under the MRA and EPA. The Department of Environment and Resource Management was included as a statutory party to the proceedings.

There were 9 respondent objectors, 6 of whom were landowners of property in or near the proposed mining lease areas. The other objectors included an environmental group, Coast and Country Association of Queensland Inc.

The objections fell under one or more of 6 topics:

- Groundwater
- Climate change
- Economics
- Ecology
- Surface water
- Miscellaneous

The Court held:

Courts function

- The function of the Land Court was to conduct a hearing into the application for the grant of the mining lease and objections, to make recommendations to the relevant Minister about whether to grant the mining leases and, if so, to recommend any relevant conditions to which the mining lease should be subject. The Land Court must also make an objections decision in relation to any objections made to the application for an EA, the draft EA and the conditions included in the draft EA.

- The Coordinator-General's conditions limit the extent to which the Court may consider certain objections and make recommendations about conditions for the proposed mining leases and the draft EA that relate to the same subject matter as the Coordinator-General's conditions.

Water considerations – Interaction between Legislation

- There is a rather complex statutory framework underpinning water issues, which involves the MRA, the EPA, the *State Development Act* and the *Water Act 2000* (Water Act).

- Depending upon the manner in which any interaction between the Water Act and the MRA, EPA and SDPWOA is viewed, consideration of water issues is either irrelevant to the present proceedings (the view expressed by Hancock) or is fundamental to the proceedings and a matter which can properly be addressed in the current proceedings (the view expressed by the objectors).

- Under the *Water Act* 2000, s 206(1)(a) and (b) an applicant for, or the holder of, a mining lease, may apply for water licences to take and use water, or

interfere with water. Persons who disagree with any approval granted may, ultimately, appeal such approval to this Court.

- Section 235(3) of the MRA applies to circumstances where mining involves the taking and using of water, including the diversion of a watercourse, and arguably, the diversion of underground water; but it does not cover the interference with the flow of underground water under s 206(1)(b) of the Water Act.

- It is at least arguable that Hancock, as part of its authorised mining activities, could interfere with water, as an activity associated with or arising from the mining, without an authority under the Water Act; the interference with water is a necessary consequence of the mining activities authorised under s 235(1) of the MRA, and such interference is not of the nature of those to which s 235(3) of the MRA applies.

Joint hearing

- If there were appeals to this Court under the Water Act, as well as objections to be heard by this Court for the same project under the MRA and/or the EPA, there would appear to be nothing preventing this Court from ordering that the appeals and objections hearings be heard together. That would certainly aid in the timely, cost effective determination of the question of water.

Conclusion on groundwater

- In contrast to the Xstrata case finding, the Court did have the ability to consider groundwater impacts in spite of statutory processes yet to be undertaken under the *Water Act 2000*. The decision noted in particular the mining project's interference with groundwater, not only during the life of the mine and while Water Act permits may be in existence, but in perpetuity.

- The Court was not satisfied that the evidence relating to groundwater was of such a nature so as to preclude the operation of the "precautionary" principle. On the evidence available to the Court, it could not be satisfied as to the impact of the mining project on groundwater in the surrounding area.

- Due to the close interaction in the evidence between groundwater and ecology, the Court could also not be satisfied as to the possible impacts of the mining operation on ecology.

- The activity of Hancock in digging six deep pits will cause an interference with groundwater in perpetuity over a land area which certainly exceeds that of the MLA. Just how far that interference with groundwater in perpetuity will extend was presently uncertain. There was also doubt what the environmental and agricultural consequences of such impact will be.

Climate Change

- The decision effectively mirrored the decision in Xstrata (the proposed Wandoan coal mine) on the issue of climate change in relation to Scope 1 and

2 emissions although it did consider that Scope 3 emissions could be considered under the 'public interest' aspect of s 269(4) of the MRA.

- Scope 3 is an optional reporting category that allows for the treatment of all other indirect emissions. Scope 3 emissions are a consequence of the activities of the company, but occur from sources not owned or controlled by the company. Some examples of scope 3 activities are extraction and production of purchased materials; transportation of purchased fuels; and use of sold products and services.

- Even if this decision and Xstrata are wrong in the assessment of the proper methods for dealing with climate change under the MRA and the EPA, the evidence here leads to the conclusion that global Scope 3 emissions will not fall if this Alpha project does not proceed; the coal will simply be sourced from somewhere else.

- On the evidence of this case, it is the demand for coal-fired electricity, and not the supply of coal from coal mines, which is at the heart of the problem of GHG emissions rising.

Economics

- In considering economics, there were three specific aspects to evaluate:

  - ❖ The social costs of carbon;

  - ❖ Economic impacts, including environmental, ecological and social costs; and

  - ❖ Projections as to the future use of coal.

- The question of the social impact of carbon was moot if there was a finding that Alpha will have no net impact on carbon levels.

- Given a stable world economic situation, and taking into account new policy scenarios with respect to GHG (at a national and international level), thermal coal will still be a significant (even if no longer major) component of world energy production 30 years hence.

Other issues – Base-line monitoring; "make-good" agreements

- Some of the miscellaneous objections warranted the inclusion of special conditions relating to "baseline monitoring" and "make-good agreements" with landholders.

- Adopting a precautionary approach, and in order to ensure baseline monitoring, it was appropriate to amend the draft EA to provide for monitoring locations on the properties owned by the objectors.

- There was sufficient doubt as to the overall impact on groundwater under three of the objectors' properties to warrant conditions being imposed in the ML to compel Hancock entering into make-good agreement with owners of the

properties: within either 12 months after the grant of ML or before the commencement of extraction activities under the ML, which ever is the earlier.

- If, following full statutory processes, Hancock is granted all necessary water licences to take and interfere with water, and on the basis that conditions as proposed by the Court relating to "baseline monitoring" and "make good" agreements are made, then the Court would be satisfied that the criterion of "no adverse environmental impacts" has been met.

Orders and Concerns

- The order of the Court was to recommend in the alternative that (a) neither the Mining Lease or Environmental Authority be granted, or (b) that, if they be granted, they be subject to first having successful applications determined for water licences (including licence to interfere) under the Water Act.

- It was concerned as to its ability to make recommendations in the alternative. If the Minister considered, or it was subsequently found, that it could not make such alternate recommendations, then the decision of the Court was to recommend that neither the Mining Lease nor the Environmental Authority be granted.

- As regards any appeal, the Land Appeal Court decision in *Dunn v Burtenshaw* (2010) QLCR 156 was to the effect that appeals did not lie in matters where the Land Court is required by legislation to make a "recommendation".

APT operate the Roma/Brisbane Gas Pipeline which transports gas between the two centres. Part of this operation includes three large compressors situated at different locations within the Western Downs Shire and which facilitate the flow of the gas.

The issue before the Court on appeal was the appropriate rating "categorisation" of the compressor sites.

The local authority had placed them in a category "Petroleum under 400 ha" in its Revenue Statement. Within this category is placed land intended to be used primarily for gas extraction or processing (or for purposes ancillary or associated with gas extraction or processing, such as water storage, pipelines etc).

The appellant landowner argued that the compressor sites should be properly placed in industrial/transport/storage category, which attracted a lesser rate in the dollar.

The appellant argued:

- Processing gas involves changing the composition of the gas by removing impurities which exist in the gas when it is removed from the earth. The appellant does not conduct any gas processing activities at the sites or as part of the RBP operations.
- The activities at the sites do not involve any refining or purifying of the gas that was supplied for transport by the pipeline. The gas is pressurised by the compressors so as to facilitate its transportation along the pipeline.

The respondent argued:

- The respondent agreed that each of the sites are used for the transportation of gas by a pipeline. It contended that Using the sites for a pipeline that transported gas was a use associated with gas extraction and/or processing because the pipeline provided the means of transport of the gas from the extraction and processing locations to the distributors and users.
- Alternatively, the use of the sites is ancillary to gas extraction and/or processing as its use is incidental to and necessarily associated with gas extraction and/or processing. The fact that the appellant does not itself extract and/or process the gas is not a relevant consideration.

The Court held:

1. It is not disputed that these sites are used for the transportation of gas which is not extracting or processing gas. So attention must be directed to whether this transportation is ancillary or associated with gas extraction or processing. This will be a question of fact and degree.

2. The word "ancillary" is defined in the *Macquarie Dictionary* as something which is accessory or auxiliary, a subsidiary or helping thing. It defines "associate" as, inter alia, to connect by some relation, as in thought and to join as a companion, partner or ally.

3. The word “transport” as used in category 2-22 is not defined in the Revenue Statement so will have its ordinary meaning, being the act of carrying or conveying something from one place to another.

4. The activities which are designed to be carried out on the subject land are not things which are “ancillary” to the extraction of processing of gas as these things are not subordinate or subservient to either of those things. The activities on the subject land do not serve the purpose of extraction or processing of gas.

5. In relation to the concept of “associated”, the requirement that there be a joining as a companion, partner or ally in a common purpose or action is not satisfied. The appellant’s purpose of providing a transportation service is not the purpose of those who extract and/or process the gas.

6. The “Description” in 4-30, read so as to ascertain the ordinary, natural meaning of the words, uses “pipelines” in the context of the remaining relevant words of the “Description” after the reference to gas extraction or processing, namely purposes “ancillary or associated with” gas extraction/processing “such as … pipelines”.

7. The pipeline, of which the appeal properties are parts, is itself a large structure and, as a matter of scale, not something readily thought of as ancillary or associated with gas extraction or processing.

8. The category into which the compressors must be placed for the purposes of the Revenue Statement 2012-2013 are the categories contended for by the appellant.