REVIEW OF VALUATION CASES

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INTRODUCTION

Cases selected for this year's review fall within four broad categories. First, two that received fairly extensive media attention because of their likely wider implications on statutory valuations - the High Court decision on proper use of scarce unimproved sales and the issue of what "improvements" should be deducted in valuing major shopping centres. Second, resumption matters ranging from Wet Tropics and mahogany glider cases in Far North Queensland to a transport corridor case on the Gold Coast. Third, a diverse range of statutory valuations - a high-rise commercial Brisbane CBD property, the initial valuation of the University of Queensland and an inner-city viaduct. Fourth, those deciding some discrete procedural or evidentiary legal points that should be of wider interest to valuers.

The cases discussed are:

1.	*Maurici*	-	Use of scarce unimproved sales in statutory valuations.
2.	*Spender*	-	Application of *Maurici* in Queensland.
3.	*AMP*	-	Shopping centre valuations - allowance for benefit of existing leases; Legislative amendment.
4.	*Pajares*	-	National Park resumption (mahogany glider habitat).
5.	*Short*	-	Wet Tropics listing - Additional injurious affection caused by State limitations.
6.	*Hammercall*	-	What amounts to the "scheme" of resumption.
7.	*University of Queensland*	-	Statutory valuation of a large educational site without a suitable basis.
8.	*Emergency Services*	-	Statutory valuation of a CBD commercial high-rise; Commonwealth Bank.
9.	*Astor Terrace*	-	Statutory valuation of a viaduct, connecting two private buildings.
10.	*Trexmist*	-	Categorisation for rating - Residential or commercial.
11.	*Lucke*	-	Non-party subpoena; costs.
12.	*Anchorage*	-	Disclosure of Cabinet documents - public interest privilege.

1. MAURICI

The question in this appeal to the High Court was whether, in fixing the unimproved value of an improved parcel of land in accordance with the *Valuation of Land Act 1916* (NSW), it is right to have regard exclusively or virtually exclusively to sales of scarce unimproved parcels of land in the same locality as the relevant land.

The landowner argued that, if a vacant land sale was used to derive the land value, then an (unspecified) deduction should be made from the land value because of the general scarcity of vacant land in the general area. It was further submitted that such a deduction would not have to be made if sales of improved properties were used, as the improved sales (of which there were many) would not include a premium for scarcity.

The relevant section of the New South Wales *Valuation of Land Act* (s.6A) provided the basic definition of unimproved land:

> "(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."

In the New South Wales definition, "land improvements" - including fill, clearing etc - are included in the unimproved value; this is, site value applies. While Queensland does not have site value, the principle at issue in *Maurici* is equally applicable in this State.

The High Court posed the initial question:

> "How is the land in its notionally unimproved state to be valued? The traditional, and usually unexceptionable method is to seek out relatively contemporaneous sales of comparable properties between parties at arm's length, unaffected by special circumstances, such as, for example, a strong desire by a purchaser to buy an adjoining property, and to use those sales as a yardstick for the valuation of the relevant land.?"

It then pointed to what it saw as defects in the Commissioner's (for State Revenue) approach:

> "It was unduly selective. It looked, effectively exclusively, to four sales (including a resale) only. Those were sales of vacant or substantially vacant land. They were not representative of sales in Hunters Hill. That must be so, because, as both sides accept, vacant land in Hunters Hill is scarce, if not to say, very scarce."

The (Commissioner) respondent accepted that the valuer called on his side not only valued the subject land as if its improvements had been shorn from it, but also as if it, now, a notionally unimproved, and therefore vacant site, was as scarce as the vacant sites the subject of the sales to which he said he had primary, but to which he effectively had exclusive regard.

The Court concluded:

1. In valuing the land, the respondent's valuer ignored a principle of assessment of value that sales to be treated as comparable sales need to be truly comparable;

or, to put it another way, in valuing the land that valuer did not proceed rationally, in that he was unreasonably selective in ultimately confining himself to two sales of scarce vacant land for the purposes of the comparison.

2. A fair estimate could only be made here on the basis of a reasonably representative group of comparable sales. A group of comparable sales cannot be representative if it does not go beyond sales of scarce vacant land. That was not to say that sales of comparable vacant land may not provide useful evidence of value.

3. Sale evidence must be relevant and sufficient in volume. Sales relied on, such as of scarce vacant land, are likely to be to a special and different class of buyer from buyers of improved land. Sales of properties of a different character are likely to attract a different class of buyer and are unlikely to provide a reliable indication of value.

4. Improved sales are used daily for the purposes of statutory valuations by subtracting the added value of the improvements to them from their sale prices to derive unimproved values. It may be that in such a desirable area as Hunters Hill where there are apparently many mansions, their presence and the presence of lesser houses may add little, or much less than replacement value to the sale prices of the land on which they stand. But that does not mean that the respondent is entitled to ignore reasonably contemporaneous sales of comparable improved land. Such sales, particularly in the case of a scarcity of vacant land cannot be disregarded. The contrary approach is required by the Act.

5. Nothing that was said in *Tetzner* bears upon the way in which a valuer should go about the task of selecting and applying comparable sales under the applicable legislation. He should have had regard to all of the relevant facts including the scarcity of vacant land, the possibility of a particular and limited class of persons in the market for it, the scarcity or otherwise of improved land, the added value of the improvements to comparable lands, and in particular, truly comparable sales, which ideally would include like land similarly improved to the subject land. A scarcity of vacant sites should not be the determining factor in valuations made under the Act.

2. SPENDER

Spender saw the first application of the *Maurici* decision by the Land Court in Queensland. The case involved the determination of the unimproved capital value of a large residential property with an historic home situated at Hill End, Brisbane.

While the case was heard after the *Maurici* decision, the valuation issued by the Chief Executive was made at a much earlier time. It was essentially founded on three vacant sales of much smaller lots in the surrounding West End area. At the hearing, the Crown sought to complement its valuation with additional evidence of improved sales. This evidence was ultimately allowed, not as forming additional primary evidence, but in response to evidence of the appellants of wider changes in the property market in the area.

The Court, applying *Maurici*, found a scarcity factor applicable to the three unimproved sales and rejected their use without cogent supporting evidence. (No attempt had been made by the Crown valuer to quantify the scarcity factor). The Court also found the improved sales of little assistance, principally due to the improvements not having been inspected and analysed in sufficient detail. There was no in-depth explanation of the size and quality of each dwelling on the sale lands or the level of depreciation, if any, that had been applied to such improvements.

Having found the Chief Executive had approached the valuation on a wrong principle, that is applying principally scarce vacant sales, the Court held the onus of proof (s.45(4) of the Act) normally on the appellant had been removed.

In the absence of other substantial evidence from either side, the Court applied a percentage increase from a preceding valuation period that pertained to two other nearby much smaller, but otherwise generally comparable, lots. After a further deduction for heritage factors, the final determination was the figure submitted by the appellants ($350,000).

The heritage allowance (7.5%) is of interest. The house was not listed on a State or Council heritage register, but would almost certainly not have been given any redevelopment approval because of its inherent heritage qualities. The Court saw it in between one with a "Council character housing" listing where 5% discount had previously been applied in other cases and a "State heritage" listing where a 10% factor had been applied.

3. AMP LIFE

The valuation of major shopping sites in South-east Queensland (including such centres as Garden City and Pacific Fair) for rating and taxing purposes attracted considerable media attention earlier this year. Wider industry groups, such as the Property Council of Australia, expressed concern at the changed approach by the State to such valuations. Essentially the State invoked s.3(2) of the *Valuation of Land Act* which stated that the unimproved capital value should not be less than the improved value minus the value of the improvements. This approach included intangibles such as goodwill in the unimproved capital value and greatly increased the previous valuations. Implications were most pronounced at a land tax level.

This note covers two aspects of the ongoing saga. First, whether it was legally permissible for the State to lead evidence of a higher value (now based on s.(3.2)) to the Court hearing, or whether it was bound by its initially issued valuation based on the traditional valuation approach. The Land Court ruled on this aspect in a preliminary application, holding that it was legally permissible for the State to lead evidence of the higher figure without first seeking to correct the issued valuations.

The Court held that its jurisdiction under s.66 of the *Valuation of Land Act* was to assess all the evidence and make a determination. It had an unlimited jurisdiction as to quantum, able to determine a figure higher than the original valuation of the Chief Executive. There was nothing in the scheme of the legislation or in wider law preventing the higher valuation being led in evidence by the Chief Executive. The action to increase the valuation proposed by the Chief Executive was to be distinguished from amending a valuation under s.28 and S.29 of the Act or deviating from appeal grounds under s.45(4). Express legislative limitations applied in both such cases.

Amending Legislation

Second, recent legislation has been introduced to moderate the effect of s.3.2 so that intangibles must now be deducted from the improved value in determining unimproved capital value. This legislation is outlined hereunder and the note is sourced from the explanatory notes to the Bill.

The legislative amendments seek to recognise that "intangible improvements", in particular those pertaining to developing a major commercial property into a profitable going concern, are recognised as real improvements where the statutory valuations are assessed using the improved value of the property.

Intangible improvements are defined as:

> *in relation to land, include the benefit of non-physical improvements to the land including a lease licence or other right and the goodwill associated with the purpose for which the land is being used*

Thus, in undertaking valuations under section 3(2) of the Act, such improvements would then be included along with visible and invisible improvements, as deductions from the improved value.

The current Act implied a situation of vacant possession in the definition of improved land – basically land without encumbrances. However, when considering major commercial developments, the presence of tenants was in fact likely to be an advantage. This amendment provides a clear statement that the improved value will be taken to include the going concern value of the property.

Section 6 of the Act refers to improvements, whether visible or invisible – where this refers to either the physical above ground improvements, or, for much developed urban property, the development of the land required to allow buildings. However, it is silent on the non-physical improvements that recently have been attributed to such major commercial developments as shopping centres. This amendment extends what is formally recognised as improvements to include the non-physical improvements of such major commercial businesses.

While this amendment is open to all land, its actual operation is likely to be far more limited, being applied principally in major commercial properties with clear levels of intangible improvements, where the final valuation using the deduction method is higher than when valued though a comparison of comparable sales in the area.

This amendment does set, in regulation, an initial cap on the level of intangibles at 20% of the improved value of the property. If information provided by industry demonstrates this level is below industry standards it will be increased. The amendment also requires that owners provide information on the intangibles they are claiming as a deduction under a valuation undertaken under s.3(2).

4. PAJARES

In November 1999, an area of some 1,240 ha was resumed from the Pajares' property, south of Tully in North Queensland, for national park purposes. The more particular objective of the resumption was to preserve the habitat of the endangered mahogany glider and southern cassowary; preservation of certain wetland ecosystems was also an incidental purpose.

The unresumed balance of the Pajares' property had been progressively developed for cane and cattle grazing. Much of the resumed land, while mainly still timbered, had potential for similar development with planned initial development to grazing pasture only. Some of the resumed land was low-lying swampy land with mangrove areas with little or no development potential.

While the land had not been formally resumed until 1999, development work had been effectively prohibited since 1995 by a series of interim conservation orders (ICOs) issued by the Minister for Environment and Heritage under the *Nature Conservation Act 1992*. Separate claims were made for damage suffered by having these ICOs in place.

Town Planning Restrictions

The major part of the resumed area had been zoned "Nature Resource Protection Zone" under the 1997 Cardwell Shire Council Plan. Under that zone, agriculture and animal husbandry were permitted, subject to conditions. The prior Plan, gazetted in 1983, permitted such uses without consent. The Crown argued that the development of the resumed land would have been severely restricted under the provisions of the 1997 Plan. The Court had to consider competing valuation law principles, namely the *San Sebastian* principle as against the *Murphy* (*Mon Repos*) approach in assessing the Crown contention.

In *San Sebastian*, the High Court found that, where zoning or planning restrictions on the use of the resumed land was simply a step in the process leading to the resumption of that land, those restrictions on use should be ignored in valuing the land for purposes of assessing compensation.

There was no doubt in the instant case that the 1997 zoning was imposed "as a result of consultation with ... the public authority concerned with the carrying out of the particular public purpose." Therefore, in accordance with the *San Sebastian* principle, the effect of the change of zoning from "Agriculture" to "Natural Resource Protection" on the value of the resumed land should be ignored.

The respondent argued that there was no *San Sebastian* issue in this case, as it was analogous to the *Mon Repos* turtle rookery case. In that case, after discussing the principle in *San Sebastian*, the High Court stated:

> "a characteristic or attribute of the land which affects its value must be taken into account in the assessment of compensation even if the planning restriction which is a step in the process of resumption is dependent upon or directed to that characteristic or attribute."

However, the Court held it was not valid to compare the possibility that the subject land was habitat for the mahogany glider, with a world recognised turtle rookery confined to a specific part of the Queensland coast. The presence of the mahogany glider on the subject land was far from proven. There had been no sightings of the mahogany glider on the subject land, but its cry was heard in November 1995. If the attribute did exist in the *Mon Repos* sense, it would

have been limited to the relatively narrow corridors along the Murray River and Bedford Creek. The Court thus ignored the restrictions in the 1997 plan in assessing compensation.

Legislative Restrictions on Clearing

The Crown also claimed certain legislation, namely the Commonwealth *Conservation and Biodiversity Act 1999* and the State *Vegetation Management Act 1999* would have restricted clearing of the timbered land and thus affected its potential for development to cultivation.

The Court rejected this contention with the following reasoning:

- It ignored the fact that Mr Pajares' development plans were curtailed from mid-1995 by the interim conservation orders. At that time, the Pajares' family was in the process of crashing a number of areas. They did not recommence until 2 November 1998, when they crashed for about five days, before being stopped by the interim conservation order dated 9 November 1998. The issue of further interim conservation orders prevented any additional clearing up to the date of resumption.

- If Pajares had not been prevented by the series of interim conservation orders from clearing the vegetation, it would have been possible for him to have cleared all the developable areas on the subject land to improved pasture grazing standard before being prevented from doing so by the relevant legislation. Those areas would then be available for later development for sugar cane.

- It would be contrary to the *Pointe Gourde* principle for the Crown to claim that a step in the process of resumption devalued the resumed land by prohibiting clearing until such time when clearing would have been impossible or illegal. It is well settled that compensation for compulsory acquisition must exclude any advantage or disadvantage due to the carrying out of the scheme for which the property is resumed.

- The interim conservation orders were part of the scheme of resumption in this case. Thus, any disadvantage to the subject land from the issuing of those orders must be excluded from consideration.

The Court determined that a prudent purchaser of the subject land at the date of resumption would have concluded that a substantial area of that land would have been suitable for development for sugar cane production; and that such a purchaser would have concluded that there would have been no legal obstacles to that development.

Information not available at Relevant Date

In presenting their respective cases, certain technical experts relied on information which could not have been available to a prudent purchaser at the date of resumption. Of critical importance was the information with regard to mapping and contour levels that was available to such a prudent purchaser as at 19 November 1999. Any proper inquiry by a prudent purchaser at the date of resumption would not have yielded that information. (It only became available several months later.) The Court thus rejected any evidence that was led relying on such later information.

Special Value

The resumed land had been of significant economic advantage to the claimant, as it had been part of a large area which the claimant and his family had been progressively developing. Mr Pajares had purchased a large amount of machinery for the purpose of developing the whole of the parent parcel. That machinery, together with harvesting machinery, was housed in a large machinery shed with a fully equipped workshop on the retained land. He had planned for the family enterprise to grow to 100,000 tonnes of sugar cane when the property was fully developed.

With the resumption, the economic advantage of the resumed land had been lost. To achieve a larger tonnage of sugar cane, the claimant would have to purchase other land. Similar undeveloped land was simply unavailable, which would mean that much of the development machinery would be redundant.

The Court concluded that the expense and inconvenience associated with the acquisition of a replacement property in order to achieve a greater tonnage of sugar cane is something that a prudent purchaser in the position of the claimant would have to consider in deciding what to pay sooner than fail to obtain the subject land: *Pastoral* Finance.

Because of the special advantages the resumed land had to the owner of the retained land, the Court concluded that the claimant would pay some premium to obtain it, if he had been temporarily deprived of it. A special value premium of 7.5% on the determined value of the resumed land was allowed by the Court.

Re-Purchase Costs of Replacement Property not Allowed

The subject land was not an investment property, but was part of the claimant's property which was to be developed for future use in the expansion of the business. However, it was not being used at the date of resumption. It was therefore not analogous to an owner occupied premises or to part of the claimant's business at the relevant date, (where re-purchase costs are traditionally allowed). The claimant's farming enterprise could continue to operate without the resumed land, although there would be only limited scope for expansion. In such circumstances, as the claimant has not purchased replacement land, it was open to him to invest his money elsewhere. The Court thus concluded that stamp duties and professional fees that may in the future be incurred in purchasing a replacement property cannot be allowed as a head of disturbance.

Costs for Legal and Professional Fees

After the compensation claim had been lodged with the constructing authority, the claimant engaged new solicitors. The latter incurred very extensive costs both in legal fees and in engaging professional experts for the alleged purpose of checking the claim before lodging in the Court. These fees were not allowed as disturbance items as the *Acquisition of Land Act* s.24(2A) required the claim lodged in Court to be the same claim as that lodged with the constructing authority (any amendment thereafter could only be made with Court leave). Thus costs for preparation and lodgment of the claim could not include checking a claim after it had been served on the constructing authority prior to Court lodgment.

5. SHORT

Short involved a claim for compensation for injurious affection to timbered land (and some cleared land) in the Wet Tropics World Heritage Area. Commonwealth legislation in 1983 had placed certain restrictions on the subject land, but no compensation was provided for. A subsequent Queensland Act (1993) and related Management Plan came into effect in 1998.

The Queensland scheme introduced further restrictions and prohibitions on the use of land in the this World Heritage Area and provided for the payment of compensation for injurious affection to such land, but only to the extent that the land was not already affected.

The key issue before the Court was the extent of the restriction on "forestry operations" applying to the subject land by the Commonwealth Act. This revolved around the meaning of the term "commercial exploitation of forestry resources" which was prohibited under the Commonwealth Act (s.9).

Counsel for the claimant argued that the phrase was limited to the killing, cutting down, etc of trees for purposes of subsequent sale to an external commercial source, such as a timber mill. The destruction of timber for the purposes of clearing for grazing would not be within the scope of the provision. Further, the provision did not prevent destruction of trees for purposes of use in property operations, such as for fence posts, yards, sheds, perhaps even for construction of a house.

Counsel for the respondent argued that the Commonwealth prohibition was much wider; it prevented destruction of trees where the purpose was essentially commercial, including clearing for grazing.

There was no dispute that clearing for grazing was now prohibited under the Queensland scheme.

If the Commonwealth scheme prevented such clearing for grazing prior to the enactment of the Queensland legislation, no compensation would be claimable under the Queensland Act.

Alternatively, if the Commonwealth scheme merely prevented the destruction of trees for the purpose of selling them commercially, for example to a sawmill, compensation would be payable under the Queensland Act. The measure would be the difference between the value of the timbered land with the Commonwealth restriction in place and the value of that land with the later restriction under the Queensland scheme. In the present case, the actual amount of compensation would be the difference between the potential value of the timbered land as cleared grazing land (after allowance is made for clearing costs) and the value of uncleared land (without any commercial timber value).

In the construction of the phrase "commercial exploitation of forestry resources", the Court held the following factors to be relevant:

(1) As the words "commercial", "exploitation" and "resources" were not defined in the Commonwealth Act or Regulations, or in the *Commonwealth Acts Interpretation Act 1901*, it was necessary to have regard to the ordinary dictionary meaning of such words. The Macquarie Dictionary defined the terms as follows:

"commercial" – capable of returning a profit – preoccupied with profits or immediate gains.

"exploitation" – utilisaton for profit.

"resources" – a source of supply, support, or aid.

These definitions, in combination, pointed to a wider pecuniary benefit obtained by use of the source of supply. The mere destruction of trees for purposes of clearing for grazing and subsequent burning of the destroyed timber, would not seem to be within the phrase. "Source of supply" connotes a further value-adding of the material, not merely to the land on which the source was grown.

(2) The provision was probably sufficiently unclear or ambiguous to permit reference to the Minister's Second Reading Speech as an aid to interpretation. However, no assistance as to the meaning of the relevant phrase was evident from that source. Further, the phrase in question was only introduced as such in the Regulations in 1988, not being part of the original Act.

(3) Counsel for the claimant referred to the general rule of statutory construction requiring a penal statute to be construed strictly in favour of the person affected. Presumably this argument would suggest that a stricter interpretation of s.9 would apply, rather than the more liberal one proposed by the respondent. However, a reading of s.9 in conjunction with s.14 of the Act indicated that the section is not an offence provision as such. Remedies for non-compliance are through injunctive relief procedures rather than through criminal sanction.

(4) However, a further rule of construction that would seem to assist the claimant was employed by the High Court in the recent case of *Marshall v Department of Transport*. There the Court held that legislation dealing with compensation for compulsory acquisition of land should be construed with the presumption that the legislature intended the claimant to be liberally compensated, complementing the liberal estimate principle stated by Dixon J in *Commissioner of Succession Duties (SA) v Executor Trustee and Agency Co of South Australia Ltd.* While the present case was not one of compulsory acquisition as such, the principle would seem to be equally applicable.

(5) There was nothing apparent in the wider scheme of the Commonwealth Act or Regulations which assisted in the interpretation of the current issue. However, one anomaly which could result from the claimants' suggested interpretation was this: if a landholder cleared property bona fide for grazing this could result in destroying rainforest. It would only be if the purpose for destruction was for subsequent sale of the timber that there would be a breach of the Act. However, it seems that the Commonwealth scheme at the time was limited to preventing commercial logging; the later Queensland legislation prohibited the destruction of forest products for any purpose and provides for compensation for all prohibited activities, except forestry operations.

The Court concluded, that having considered the above factors, particularly the definition of "resources" and the principle of interpretation outlined in *Marshall*, the stricter interpretation of the phrase "commercial exploitation of forest operations" should prevail. That is, the restriction under the Commonwealth scheme was limited to destruction for sale to timber mills

or similar markets. It did not prohibit the claimants from clearing land for grazing purposes, or from utilising the timber for their own purposes.

This finding had a significant effect on the amount of compensation payable for the injurious affection to the timbered land.

The claimants were also successful in a claim for injurious affection for cleared land, currently used for grazing, on the property.

The Court held that, because of the Queensland legislation and the uncertainty in its interpretation, a prudent purchaser would discount the purchase price for any such land held in the Wet Tropics. The analogy of a blot on title was used. Such a purchaser would prefer to buy land that was not subject to such restrictions.

While grazing could continue on the subject cleared land in present circumstances, doubt existed as to whether the destruction of regrowth was permissible, particularly if growth had progressed beyond a certain level.

A discount of 25% was allowed.

6. HAMMERCALL

The key issue before Land Appeal Court in this case was what future proposals should be included in the scheme of the resumption. To what extent, if any, could possible or likely future works on the balance land of the claimant be considered as part of the scheme and thus relevant to claims for injurious affection in the present resumption.

Part of the claimant's land (Lot 177) was resumed by the Department of Main Roads for an interchange and roundabout abutting the Pacific Highway (the Andrews Interchange). The design and construction of this interchange made it apparent that further land would be required from the claimant's balance land to provide a wider road, possibly a sub-arterial road (the Bermuda Street extension) to lead to the roundabout. Such further road may become the responsibility of Council or the Main Roads Department. However, at the time of resumption this Bermuda Street extension formed no part of the resumed land and there had been no actual severance in respect of such proposed road.

The appellant (Main Roads)argued that such Bermuda Street extension was not part of the scheme; and that the learned member erred in law in finding that the scheme included such extension. This was because, at the date of the resumption for the Andrews Interchange, the appellant was unable to exercise any statutory powers with respect to the proposed Bermuda Street extension, as such was not a State-controlled road and it was contemplated that any development of the extension would be likely to be under the control of the Council.

The claimant argued for a claim for diminution in value of the balance land (Lot 176) due to the hypothetical prudent purchaser foreseeing the additional land required for the Bermuda Street extension road above that which could have reasonably or relevantly been required by the Council to be dedicated by the claimant for the purpose of a road, as a condition of development of Lot 176.

The Court held:

1. The extent of the scheme underlying the resumption was a question of fact.

2. The 'scheme' of resumption can involve future works on the balance land. There is no requirement that the constructing authority or Council be legally entitled to carry out such works at the date of resumption (it not being a State-controlled road). It is sufficient that relevant statutory power is available to be exercised.

3. There was a physical relationship between the resumption of Lot 177 for the Andrews interchange and the Bermuda Street extension, as the Andrews interchange was intended, designed and constructed to accommodate that extension.

4. It was clearly open to the learned Member to conclude that, as a matter of fact, the scheme underlying the resumption of Lot 177 did not stop at the Andrews interchange but included the Bermuda Street extension; this was so even though it was contemplated that the road would not be constructed until some future time and that it may not necessarily proceed with an acquisition of land from Lot 176, but instead with dedication of the requisite land by the owner of Lot 176 as a condition of development approval imposed by the Council or required by the respondent under the *Transport Infrastructure Act*.

5. While part of the scheme may consist of future projected roadworks on the balance land, some such future works were always likely even without the subject resumption scheme. Such future works are more apparent with the scheme activated, but there is now uncertainty as to how such future works will be achieved. Various factors which may be considered in assessing whether such scheme results in injurious affection were provided by the Court.

6. One important such factor was: to the extent that the appellant is forced to resume some part of the land required from Lot 176 for the Bermuda Street southern extension, compensation may be payable to the owner of Lot 176 under the Act in respect of that resumption.

7. Having nominated factors which could be relevant in assessing whether the scheme founded injurious affection, the Court asked the parties to make further submissions on the facts of the case.

   However, such were not forthcoming as the case was settled between the parties. There was thus no decision on injurious affection on the facts of this case.

7. UNIVERSITY OF QUEENSLAND

As part of a legislative strategy to broaden the rating base, exemption for certain lands used for religious, charitable, educational or public purposes have been removed. Under such a scheme, universities now have their land rateable. The University of Queensland considered it appropriate to challenge the initial unimproved capital value applied by the Chief Executive (NRM) with an appeal to the Land Court.

Both the St Lucia site (excluding the residential colleges) and the Moggill Veterinary Farm site were before the Court. The St Lucia site is the only one subject of this note. The Chief Executive sought a value of $34,500,000 for the St Lucia site. The appellant contended a value of $21,000,000.

The Court was required to address a diverse range of issues in valuing the St Lucia Campus, a well-known and unique landmark in Brisbane. Many unusual attributes of the 76.75 ha site included:

- The very large area in an attractive riverfront setting;
- close to city and amenities;
- heritage listed buildings and surrounds;
- a large area of green space complementing the latter;
- all designated as educational purposes under the relevant Town Plan.

Key findings of the Court included:

(1) **Highest and Best Use**

This was held to be for educational, research/public institution purposes, principally based on the designation in the 1987 Town Plan and the new City Plan 2000. The latter, although not operational at the relevant date for valuation, was given considerable weight due to its advanced stage of preparation and its having been on public display at the time. In lieu of zoning, the City Plan provided for the site to be included in an area designated as Special Purpose Centre - SP2 – Major Educational and Research Facility. The City Plan made no provision for alternative uses because it did not envisage that Centre uses will cease, but planned for their ongoing use and expansion. The clear intent of these planning instruments was to recognize the St Lucia Campus for its University function, to maintain the use of the site for those purposes and to recognize the facility as an important component of the make-up of Brisbane City.

Any proposal for alternative development would also be constrained by the Green Space provisions of both Plans, the heritage listing of the Great Court complex and the flooding which affected a large area of the site. The possibility that the site could be used for other purposes (e.g. residential, commercial) found no support in the relevant planning documents and was regarded as speculative.

(2) **Use of Sales**

Both valuers acknowledged that the site was unique and therefore difficult to value. Mr Rabbitt (for the appellant) relied on sales of sites used for educational purposes in support of his valuation of the elevated land. Mr Singh (for the respondent) selected

sales of land purchased for redevelopment purposes, particularly residential or residential mixed with other types of development.

The Court rejected the sales of the Crown valuer holding that, in principle, sales properties selected for comparison with the subject should be similar in all respects to the subject. It acknowledged in this case that there were no similar properties to the St Lucia site. The valuers had to do their best to find comparative sales. However, the Court did not consider that sales of properties which were used for purposes for which the subject could not be used provided any comparison with the subject, even though the sales may be located in a similar area to the subject.

In regard to sales of educational or other public purpose institutions used by the appellant's valuer, the Court found the most comparable of these to be the former Kedron Park Teachers' College site.

It was sold by open tender to Queensland Emergency Services on 10 April 1997 for $4,875,000. The property was 7.15 hectares in area and at the time of the sale was improved with substantial educational buildings and sporting facilities. The sale was not ideal as a basis for determining unimproved value, given the extensive improvements to the property. In the absence of sufficient comparable sales of unimproved land, however, it was well recognized that it is legitimate to use sales of improved land, and to determine the unimproved value by deducting the value of the improvements (*Maurici*). It was accepted that there is room for error in such an approach, but in the absence of a sufficient number of comparable sales of unimproved land, this sale should be taken into account.

Overall, the Court accepted that the St Lucia site was located in an area which was superior to that of any of Mr Rabbitt's sales because St Lucia is closer to the CBD, the general amenity of the surrounding area is superior and the subject has the advantage of a lengthy river frontage. In addition, the subject has specific advantages for use as a university site because it is well served by public transport, and has the benefit of the surrounding university infrastructure. Obviously these factors should be taken into account in determining the value of the subject as compared with the sales. However it was not considered to be a correct valuation approach to attribute a higher value to a site such as the subject, where the highest and best use is education/research/public institution purposes, simply because the residential properties in the vicinity sold at a higher price than those surrounding a sale property.

(3) **Discount for Size**

The subject was some ten times larger than the sale and there was a suggestion that the value per square metre of land diminishes as the size of the property increases. The Court stated that while, there are many cases where that may be correct, there was no evidence supporting that proposition in relation to a university site. Given the infrastructure needed to support a large modern university (particularly one of the style of the St Lucia campus), the availability of land for sporting and other purposes ancillary to the University's educational and research role could well be said to be an important attribute of a site. In the absence of any convincing evidence to the contrary, no discount was applied simply because the subject site was larger than the sale.

(4) **Heritage Listing**

An area of some 11.3 ha of the overall site was listed as heritage - 6.93 ha was improved with heritage listed buildings and 4.4 ha, an area to the north of the Forgan Smith building, was largely maintained as green space for vista purposes.

Mr Singh valued the 4.4 ha site at twice the rate of the 6.93 ha; however, the Court held that it was not appropriate to draw a distinction between the two sections of the 11.33 hectare area listed on the heritage register. The 11.33 hectares is listed as one site and the whole of the site is subject to the same restrictions, with the effect that any development requires the approval of the Heritage Council.

Also, the Court did not apply any discount to compensate for any adverse effect on the value of the subject caused by the listing of the Great Court Complex on the Queensland Heritage Register. It considered that the listing did not impact adversely on the value of the site while it was used for its current activities of education and research.

(5) **Allowance for Fill**

It appeared from the University Site Plan and other evidence before the Court that the top of the knoll (where the Great Court is now located) was removed in order to level that part of the site, and that the spoil may have been used to fill low lying areas of the site. There was no evidence as to where the spoil may have placed.

Since there was no evidence as to the quantity or possible location of this fill, the Court could not see any way in which an allowance can be made for it. It was not clear whether it remained on the site, and if it did, what value (as an improvement) it might add to the site.

(6) **Value of Green Space**

The Court considered a certain premium should be added to the value of the "green space" designated area because the importance of the land as a buffer zone and recreation area within the site as a whole. As well as increasing the amenity of the site, retention of the area as open space increased the intensity of development possible on the built up part of the site. While the value of increased development intensity should be attributed to the built up area itself, there was also an increased value to be attributed to the 11 hectares of green space because of its function in allowing that increased density.

Conclusion

The overall determination for an amount of $23,500,000 for the St Lucia site was made by the Court.

8. EMERGENCY SERVICES

The Court was required to determine the unimproved capital value at 1.10.2000 of the subject land located at 240 Queen Street (on the corner of Queen and Edward Streets). The site was developed with a major commercial office building of some 30 storeys with the ground floor occupied as retail space for the Queensland head office of the Commonwealth Bank of Australia.

The Chief Executive valued the site at $16,000,000 while the appellants placed a value of $10,000,000 on the site. The land was designated "multi purpose (City centre)" under the City Plan 2000. The key issues before the Court were the highest and best use of the land, comparison of sales, changes in the market and heritage impacts (of a basic sale).

The appellant's valuer saw the highest and best of the land as its current use and valued it accordingly. The Chief Executive's valuer saw the subject land as retailing plus as a commercial site with excellent exposure and location. He relied on a recent expansion of the CBD "retail heart" in the Town Plan 2000.

A key basic sale used by both parties was the MacArthur Chambers site opposite, which sale included as components, the heritage listed MacArthur Chambers building and a larger adjoining retail lot. Separate values were placed on each of the components.

The Court held:

1. The subject land should be valued on the basis of its commercial office use, with ground floor retailing activity at a level consistent with that proposed on the MacArthur Chambers sale, but without the benefit of a major anchor tenant such as a discounted supermarket store.

2. It is market place forces which will drive the development of a site in the "Retail Heart", just as it does elsewhere in the CBD. The expression of an intention by the planning authority is merely a guide to owners as to what might be anticipated on any site.

3. There were considerable difficulties in using predominantly retail sales (e.g. the Mimi sale) in valuing predominantly commercial premises. Different market sectors were involved.

4. With heritage listed properties such as MacArthur Chambers, reductions, if any, would be related to the specific nature of the building; also, the historical significance of a building such as the MacArthur Chambers may hold a value in itself. No common percentage reduction should be applied for heritage listing.

5. A discount for size is not appropriate where the highest and best use of comparable lots is different – where the larger one was a large retail site as against a smaller commercial comparison.

6. In apportioning values to separate areas of a sale lot (for example MacArthur Chambers heritage and non-heritage) allowance must be made for the benefit that the apportioned areas gain from the other components. For example, additional street access via the other part of the sale.

7. In comparing access of the subject to the non-heritage component of MacArthur Chambers sale, regard needs to be had to the prime central corner location of the subject in contrast with the more restricted access of the sale via an integrated ground floor access of a heritage building.

8. Where sales had delayed settlement dates, adjustment to sale price was necessary in any analysis. The discount rate should relate to market rates (specifically the long term bond rate) at the date of sale.

9. The final determination by the Court was $12,860,000.

9. ASTOR TERRACE

Viaducts over public areas (generally roads) linking two lots of private land are becoming increasingly common in major areas of development throughout the State. The legal status of such structure is normally governed by the grant of a road licence in stratum under the *Land Act 1994*.

A number of related issues arose in the Astor Terrace viaduct case, a structure linking the fourth floor of the Astor Terrace Car Park with the Astor Centre office block. The viaduct was used as a pedestrian overpass between the two buildings in Portman Lane, Spring Hill, the area of the stratum being 19 m^2.

The issues raised were:

1. Was the land rateable being in stratum?
2. Was it liable for rent (as a lease) under the combined operation of the *Land Act* and *Valuation of Land Act*?
3. What was the proper approach to valuation of such stratum?

Each of the benefited landowners held a separate road licence in respect of the stratum. Such licence contemplated that the viaduct would be used as a pedestrian overpass by both parties.

1. Was the Strata Area Rateable?

Having considered the terms "land" and "interest" in the *Acts Interpretation Act 1954*, the Court held that the interest of each respondent in the road licence was land for the purpose of the *City of Brisbane Act 1924*. Under s 47(1) of that Act all land is rateable, unless it falls within one of the exemptions which are specified in the provision. None of these exemptions applied to the interest of each respondent in the stratum.

It was therefore contemplated by the *City of Brisbane Act* that a licensee of land under the *Land Act* would be liable for the rates. The licensee's interest in the land has the consequence of making the land rateable. The subject stratum was no different to any other land. The requirement under s 23(5) of the *VLA* is satisfied if the stratum is rateable.

2. Was the Strata Liable for Rental?

It followed that, as the stratum was rateable (for purposes of s.23 of the *VLA*), it could be valued as land under the *VLA* for rental purposes also.

The *Land Act* required the rent for a licence to be amount calculated by multiplying the most recently made valuation for rental purposes by the rate prescribed under the regulations. The valuation for rental purposes under s.15 of the *VLA* required the determination of the unimproved capital value as if it were fee simple under the Act but with any restrictions in the lease or licence to be taken into account (s.14).

3. Valuation Approach

The Land Appeal Court endorsed the initial Land Court's approach to the valuation. This was to value the stratum parcel consistent with the rate of $2,089 per square metre which was the market value of the Astor Centre. The reasoning was that the value of the actual stratum should be seen in the context of the market value of the parcels to which it is attached. As that rate of $2,089 per square metre reflected a freehold title land parcel, a rate of 40% of that value was accepted as reflecting the value of the stratum. The value of the stratum was therefore determined at $16,000. Then, having regard to the non exclusive use of the stratum consequent upon the purpose and conditions to which each licence was subject, the value to each of the licences was apportioned at 50% of the total value of the stratum parcel. Unimproved rental values of $8,000 were applied to each of the two licences.

Features, such as size, dimensions, shape, location and, in terms of stratum, relationship to ground level and the surrounding environment are relevant to the worth of a stratum. The Court stressed that it was the UCV of the stratum that had to be found, not the value which the licence added to the parent parcel. If the parent parcel's unimproved valuation is enhanced by some positive feature, then that is something which should be identified in the unimproved valuation of the parent parcel

10. TREXMIST

Trexmist appealed against the categorization of the subject land (for differential rating purposes) by the Brisbane City Council. The latter assigned the land to Category 5 Commercial rather than Category 1 Residential; varying differential general rates applied to each category.

The subject land was situated on the corner of Edward and Margaret Streets in the Brisbane CBD. It contained an historical building constructed in 1887 which was listed for preservation on both the State and Brisbane City Council heritage registers. Recently extensively refurbished, it was partly used as a private residence (Levels 1 and 2 and Basement) and commercial. The ground level was used as a coffee shop.

The relevant Council resolution provided criteria for determining categorization. When land was partly used for two purposes, it was necessary to determine the dominant purpose. Such purpose was to be arrived at by reference to visual, economic and spatial aspects of the relevant uses.

As regards spatial aspects there was agreement between the parties that the areas for residential purposes (83.5%) was dominant compared to the area for commercial purposes (16.5%).

However visual and economic aspects required the Court's consideration.

The Court held:

1. There was nothing in the visual appearance of the subject land which denoted its use as a private residence. However, it was not appropriate to consider the visual aspect only from the perspective of a casual passer-by. The visual aspects must also be considered from the perspective of a prudent ratepayer who is conscious of changes in the social fabric of the community. Such person would be conscious of the trend towards inner city living at 1 January 2000, and was likely to not have closed his mind to the possibility that uses other than the physically obvious might exist in the building.

   The special nature of the heritage building was also a matter that would further attract the attention of such an informed passer-by. By its very nature the restored building would not exhibit incompatible physical notices which would tend to broadcast the internal uses of the building. Any visual appreciation was then likely to demand a closer appraisal.

   It would then be necessary to seek further evidence of the internal use of the building, hidden by the building itself. Intensity of use was also a consideration.

   The visual aspect of the subject building could be either as a "commercial" use or as a "residential" use. In view of the nature of the uses, any conclusion about the dominant purpose should be considered by the other variables.

2. As regards the "economic aspects" of the property, the capital worth of the respective component uses of the building weighed heavily in favour of the residential use, while the rental equivalent rests with the commercial use. On balance, the primary economic aspect of the subject property was for residential use.

3. The dominant purpose of the building was for residential use. Its location in the CBD, and its zoning, did not impair that purpose.

11. LUCKE

Queensland Cement Limited (QCL) sought costs incurred in setting aside a subpoena issued to it as a third party to a *Valuation of Land Act* appeal by Lucke.

The subpoena had been earlier set aside by the court on the grounds of lack of relevance to the valuation appeal and being oppressive – it would have required QCL to go to a great deal of time and trouble to assemble the requested material. In addition, it would have required QCL to make assumptions and judgments as to exactly what documents or class of documents were sought.

There had been a long standing dispute between QCL and Lucke (and other landholders) as to the effect that dewatering action in the QCL mine near Gladstone had on the depletion of water levels on surrounding land. Lucke was under the false impression that, in a *Valuation of Land Act* appeal, he had to prove the cause of such depletion rather than the effect. Hence his subpoena.

The Court held:

1. The general rule in *Valuation of Land Act* appeals is that access to the Court should be available without fear of costs being awarded against either party.

2. The current case was not a *Valuation of Land Act* appeal, rather a third party subpoena application under Rule 412 of the *Uniform Civil Procedure Rules*. Under that provision, the Court had discretion to award costs, but costs should follow the event unless an alternative award was considered appropriate. Where an issue has been tried and decided, there is an "event" upon which the successful party is entitled to have his costs as following that "event".

3. In the current case, relevant circumstances included:

   - the respondent Lucke was unrepresented and there was a disparity of power between the parties;
   - Lucke was under the wrong impression that he had to prove the cause of the water depletion in the valuation appeal rather than merely the effect;
   - there was a history of ongoing conflict between the parties;
   - the parties would have to continue to live in the same surrounding community;
   - the subpoena was not considered frivolous or vexatious;
   - there was no evidence that the subpoenaed material was sought other than for valuation purposes;
   - the respondent had not been put on notice by the applicant QCL as to the likely failure of the subpoena and the costs that may result from such.

4. In the exercise of the Court's discretion, costs were not awarded in the instant case.

12. ANCHORAGE FARMING

An important evidentiary issue arose in a preliminary application in this case. Anchorage had sought to obtain access to certain Cabinet documents under the disclosure (formerly discovery) provisions of the *Land Court Act* and *Rules* (such documents would be exempt from production proclamation under a *Freedom of Information* request).

The key issue was whether the defence of public interest privilege could be sustained by the State.

The respondent (State) sought to resist disclosure of the Cabinet submissions and related documentation in respect of a Water Allocation Management Plan (WAMP).

It was claimed that such were part of the deliberative process of Cabinet, the decision was not yet finalised and, being controversial, should remain confidential.

The appellants claimed the draft WAMP formed the basis for refusal by the Chief Executive's delegate of their application for amalgamation of certain water licences; and that it was necessary for the Court to understand the validity of the reasoning behind the WAMP to properly determine the issue before it.

The Court held:

1. The principles enunciated in the High Court decision of *Sankey v Whitlam*(1978) governed the present case. It was necessary to balance the public interest that harm should not be done to the State by disclosure, against not frustrating proper administration of justice in withholding documents.

   It was the duty of the court, not the Executive Government, to decide if the documents should be produced or may be withheld.

2. For the balance to move in favour of disclosure, it was necessary to consider whether justice would in fact be frustrated by the documents within the class described by the State being withheld from production.

3. The decision-maker for the State would be a witness for the respondent in the proceedings. If the rationale behind the decision was then not fully exposed, but should have been, that will more likely disadvantage the respondent rather than the appellants.

   Further, the weight which should be placed on the rationale underlying the policies contained in the draft WAMP as released will need to be decided by the Court on relevant expert evidence and submissions.

4. The Court was not persuaded that the need to produce the documents in the interests of justice outweighed the general desirability that documents of that kind should not be disclosed in the public interest.

TABLE OF CASES

1. *Maurici v Chief Commissioner of State Revenue* [2003] HCA 8
2. *Spender v Department of Natural Resources and Mines* [2003] QLC 0043
3. *AMP Life Ltd & Ors v Department of Natural Resources and Mines* [2002] QLC 099
4. *Pajares v State of Queensland* [2003] QLC 0044 and *Pajares v State of Queensland* [2003] QLC 45
5. *Short v Wet Tropics Management Authority* [2003] QLC 0001
6. *Department of Main Roads v Hammercall* [2002] QLC 42 and *Department of Main Roads v Hammercall* [2002] QLAC 43
7. *University of Queensland v Department of Natural Resources and Mines* [2003] QLC 0022
8. *Emergency Services Anor v Department of Natural Resources and Mines* [2002] QLC 57
9. *Astor Terrace Car Park & Anor v Department of Natural Resources and Mines* [2003] QLC 0019
10. *Trexmist Pty Ltd v Brisbane City Council*, Land Court, 18 July 2001
11. *Lucke & Ors v Department of Natural Resources and Mines* [2002] QLC 11
12. *Anchorage Farming Pty Ltd & Ors v Department of Natural Resources and Mines*, 13 June 2001