

JURISDICTION : STATE ADMINISTRATIVE TRIBUNAL

STREAM : DEVELOPMENT & RESOURCES

ACT : VALUATION OF LAND ACT 1978 (WA)

CITATION : BROADCAST AUSTRALIA PTY LTD and
VALUER GENERAL [2011] WASAT 58

MEMBER : MR D R PARRY (SENIOR MEMBER)
MS M CONNOR (MEMBER)
MR R J PRIEST (SENIOR SESSIONAL MEMBER)

HEARD : 21, 22, 23 AND 24 FEBRUARY 2011 - FURTHER
CALCULATIONS FILED ON 1 MARCH 2011
(APPLICANT), 25 MARCH 2011 (APPLICANT)
AND 1 APRIL 2011 (RESPONDENT) AND
COMMENTS ON FURTHER CALCULATIONS
FILED ON 4 MARCH 2011 AND 8 APRIL 2011

DELIVERED : 13 APRIL 2011

FILE NO/S : DR 67 of 2010
DR 68 of 2010

BETWEEN : BROADCAST AUSTRALIA PTY LTD
Applicant

AND

VALUER GENERAL
Respondent

Catchwords:

Valuation of land - Unimproved value - Gross rental value - Land used for broadcasting AM services for the ABC - Land uniquely suited for this purpose and will be required for this purpose for at least 20 years - *National*

Transmission Network Sale Act 1998 (Cth) requires Minister's approval for transfer of land and the Minister may refuse to approve a transfer if the Minister has reason to believe that the transfer might jeopardise continued access by the ABC to the carriage of broadcasting services - Whether terms of *National Transmission Network Sale Act 1998 (Cth)* are relevant to valuations - Environmental constraints - Approximately 62% of land is foraging habitat for endangered Carnaby's Black Cockatoo - Proportion of land that hypothetical vendor and purchaser would consider would be likely to be required to be set aside for conservation - Planning lead-in time - Preferable method of valuation - Whether comparable sales method or hypothetical development method is preferable

Legislation:

City of Stirling Local Planning Scheme No 3

County of Cumberland Planning Scheme Ordinance

Environment Protection and Biodiversity Conservation Act 1999 (Cth)

Land Tax Assessment Act 1910 (Cth)

Local Government Amendment Act 1951 (NSW)

National Transmission Network Sale Act 1999 (Cth), s 3, s 9(1), s 14(1), s 15(2), s 18, s 20, s 22(1)

Telecommunications Act 1997 (Cth), Sch 3, Pt 1, cl 7

Valuation of Land Act 1916 (NSW), s 6

Valuation of Land Act 1978 (WA), s 3, s 4(1), s 9, s 18, s 22(1), s 33

Valuation of Land Regulations 1979 (WA), reg 5

Wildlife Conservation Act 1950 (WA), Sch 1

Result:

Applications for review allowed

Valuer General's assessment of unimproved value as at 1 August 2007 set aside and an assessment of \$24,100,000 substituted

Valuer General's assessment of gross rental value as at 1 August 2006 set aside and an assessment of \$1,050,000 substituted

Category: B

Representation:

Counsel:

Applicant : Mr PD Evans with Ms TJ DiCicco

Respondent : Ms CA Ide

Solicitors:

Applicant : Freehills
Respondent : State Solicitor's Office

Case(s) referred to in decision(s):

Best v Housing Commission of New South Wales (1949) 17 LGR (NSW) 129
CSR Limited v Valuer-General (1977) 17 SASR 446; (1977) 42 LGRA 52
Gollan & Anor v Randwick Municipal Council [1961] AC 82;
(1960) 6 LGRA 275; (1960) 34 ALJR 283; (1960) 3 All ER 449
ISPT Pty Ltd and Valuer General [2007] WASAT 276; (2007) 59 SR (WA) 9
ISPT Pty Ltd v City of Melbourne [2007] VCAT 652
Perpetual Trustee Co Ltd & Anor v Valuer-General; Trust Co of Australia Ltd &
Anor v Valuer-General [2008] SASC 169; (2008) 101 SASR 110
Redeam Pty Ltd v South Australian Land Commission (1977) 40 LGRA 151
Riverbank Pty Ltd v Commonwealth (1974) 48 ALJR 483 at 484;
(1974) 31 LGRA 244
Royal Sydney Golf Club v Federal Commissioner of Taxation
(1955) 91 CLR 610
Spencer v Commonwealth (1907) 5 CLR 418
St Martins' Centre Pty Ltd v Valuer General (WA) (2003) 30 SR (WA) 218
Sydney City Council v Valuer-General (1956) 1 LGRA 229
Turner v Minister of Public Instruction (1956) 95 CLR 245

REASONS FOR DECISION OF THE TRIBUNAL:

Summary of Tribunal's decision

- 1 Broadcast Australia Pty Ltd sought a review by the Tribunal of the Valuer General's assessments of the unimproved value as at 1 August 2007 of \$43,000,000 and the gross rental value as at 1 August 2006 of \$1,800,000 in relation to a 44.7 hectare property which contains the Hamersley Transmission Facility. The Hamersley Transmission Facility broadcasts Australian Broadcasting Corporation (ABC) News Radio, Local Radio and Radio National services to the Perth metropolitan area and regional areas. The property is uniquely suited for this purpose and it would not be possible to find an alternative site which would replicate the existing service coverage.

- 2 The Hamersley Transmission Facility was originally established by the Commonwealth Government and formed part of its National Transmission Network. The property, together with 577 other sites, as well as physical objects, intangible assets and financial assets, that comprised the National Transmission Network, were vested pursuant to s 9(1) of the *National Transmission Network Sale Act 1999* (Cth) in Broadcast Australia Pty Ltd on 29 April 1999 to effect the privatisation of the National Transmission Network. Under s 18 of the *National Transmission Network Sale Act*, an asset vested pursuant to s 9 or a replacement asset for such an asset may not be transferred without the prior written approval of the Minister administering the Act. The Minister may relevantly refuse to approve the transfer of the subject property by Broadcast Australia Pty Ltd to another person if the Minister has reason to believe that the transfer might jeopardise the continued access by the ABC to the carriage of broadcasting services.

- 3 The *Valuation of Land Act 1978* (WA) requires the determination of '... the capital amount that an estate of fee simple in the land might reasonably be expected to realize upon sale ...' for the purposes of both the unimproved value and the gross rental value of land. The expression 'an estate of fee simple in the land' does not refer to the actual title vested in the owner, but rather, to an absolute or pure title such as constitutes full ownership in the eyes of the law. An encumbrance, condition or restrictive obligation affecting a specific title is a restriction on the actual title vested in the owner, rather than on 'an estate of fee simple in the land', and is, therefore, not relevant for valuation purposes. In contrast, a restriction on the use or alienability of land that is imposed by a law of

general application and nature is a restriction on 'an estate of fee simple in the land' and is, therefore, relevant for valuation purposes.

4 This case raised a novel, threshold issue as to whether the restriction on transfer imposed by the terms of the National Transmission Network Sale Act is a restriction on the actual title vested in the owner (and therefore irrelevant to the valuations) or a restriction on an estate of fee simple in the land (and therefore relevant to the valuations). The Tribunal determined that, although imposed by a Commonwealth statute, the burden affecting the land is akin to a restriction of title or a restrictive obligation affecting the titles to specific parcels of land, rather than a restriction imposed by a law of general application and nature. The restriction on transfer was imposed on specified properties and on any replacement asset for any of those specified properties, precisely and only because each property was sold as part of the privatisation of the Commonwealth's broadcasting infrastructure or is a replacement asset for a property sold in that process. The restriction in s 18 of the National Transmission Network Sale Act is an incident of Broadcast Australia's estate or interest in the land, not an incident of the absolute or pure title.

5 The Tribunal contrasted the restriction on transfer under the National Transmission Network Sale Act with a restriction imposed by a planning scheme. While a planning scheme can impose a burden or restriction on a particular property by zoning it in a particular way, the scheme is nevertheless a law of general application and nature. A planning scheme will apply to all land in the scheme area, generally all land in a local government district or in a region. The scheme will affect different properties in different ways, depending on the zoning and other provisions. In contrast, the National Transmission Network Sale Act only applies to specific original assets or replacement assets for any of those original assets.

6 In consequence of the Tribunal's decision in relation to the threshold issue, the valuations were reviewed on the joint position of the valuation expert witnesses and the parties that the highest and best use of the land was Residential R20. The Tribunal was called upon to resolve the following three further principal issues in order to review the valuations:

- 1) What proportion of the land would a hypothetical vendor and purchaser as at the valuation dates consider likely to be required to be set aside for conservation (not public open space) (and for firebreaks)?

- 2) What planning lead-in time would a hypothetical vendor and purchaser consider likely?
- 3) Is the preferable method of valuation the comparable sales method used by the Valuer General's valuation expert witness or the hypothetical development method used by Broadcast Australia Pty Ltd's valuation expert witness?

7 The Tribunal found, on the evidence of Ms Barbara Pedersen, an environmental planner with considerable relevant experience, that a hypothetical vendor and purchaser would consider that approximately 55.44% of the land would be likely to be required to be set aside for conservation (not public open space), because of its quality and because it is foraging habitat for the endangered Carnaby's Black Cockatoo, and that approximately 1.99% of the land would be required as firebreaks. The Valuer General did not call any witness with qualifications or experience in relation to conservation. The Valuer General relied solely on what Mr Richard Ronchi, its valuation expert witness, was told by other people and Mr Ronchi's interpretation of the effect of a subdivision approval for a different property. The Tribunal preferred Mr Pedersen's evidence, because of her qualifications and experience, the fact that the people who gave information and opinions to Mr Ronchi were not called to give evidence, and the fact that, while the Tribunal was not aware of all of the circumstances of the other subdivision approval, there was a significant difference between the sites in that the subject property is not proximate to other comparable habitat areas.

8 The key difference between the parties in relation to planning lead-in time was whether the Department of Water would require groundwater monitoring for a period of up to two years prior to the lodgement of a rezoning application. The Tribunal found, based on the most recent advice of the Department of Water, that pre-development water monitoring is not likely to be required and that, in any case, it could occur in parallel with the rezoning process. The planning lead-in time would therefore be four years (48 months), as contended by the Valuer General, rather than five and a half years (66 months), as contended by Broadcast Australia Pty Ltd.

9 In relation to valuation methodology, the Tribunal preferred the comparable sales method, variously referred to by judges as the 'conventional', 'widely accepted', 'traditional' and 'principal method of valuing land', over the hypothetical development or *Turner* approach,

which has been the subject of an extraordinary amount of judicial criticism because its accuracy is dependent on the correctness of multiple variables. The unreliability of the hypothetical development method was demonstrated in this case by the successful challenge to key variables. When those variables were corrected to more realistic assumptions, the results changed significantly, greatly exceeding the valuations determined in accordance with the comparable sales approach.

10 Applying the comparable sales approach and its determinations in relation to the conservation and planning lead-in time issues, the Tribunal found that the unimproved value as at 1 August 2007 was \$24,100,000 and that the gross rental value as at 1 August 2006 was \$1,050,000. The Tribunal allowed the application for review and substituted these valuations.

Introduction

11 These proceedings involve the review, pursuant to s 33 of the *Valuation of Land Act 1978* (WA) (VL Act), of the valuations of the unimproved value as at 1 August 2007 and the gross rental value as at 1 August 2006 of Lot 101 on Plan 55206 (Certificate of Title Volume 2671 Folio 271) (Lot 101), Lot 102 on Plan 55206 (Certificate of Title Volume 2671 Folio 272) (Lot 102) and Lot 1 on Diagram 9162 (Certificate of Title Volume 2624 Folio 437) (Lot 1), which are owned by Broadcast Australia Pty Ltd (Broadcast Australia) and have the street address of No 601 Wanneroo Road, Hamersley (the land). While these title descriptions were only applicable following the resubdivision of the lots comprising the land in September 2007, the matter has proceeded on the joint position of the parties that it is most useful to refer to these title descriptions in assessing the value of the land in these proceedings.

12 Unimproved value is used for land tax purposes and gross rental value is used for rating purposes.

13 In the valuations the subject of these reviews, the Valuer General assessed the unimproved value of the land as at 1 August 2007 at \$43,000,000 and the gross rental value of the land as at 1 August 2006 at \$1,800,000 (being 5% of the capital value of \$36,000,000). During the course of the hearing, the Valuer General reduced its assessment of the unimproved value of the land as at 1 August 2007 to \$38,500,000 and reduced its assessment of the gross rental value of the land as at 1 August 2006 to \$1,680,000. The reason for these reductions in value was because Mr Richard Ronchi, the Valuer General's valuation expert witness, increased his assumption as to the proportion of the land

that a hypothetical vendor and purchaser as at the valuation dates in question would consider likely to be required to be set aside for conservation.

- 14 Broadcast Australia ultimately contended, based on the valuation expert evidence of Mr Andrew Kinnaird, that the unimproved value of the land as at 1 August 2007 was either \$20,900,000 or \$24,070,000 (assuming that a hypothetical vendor and purchaser as at the valuation date would consider that 57% of the land would be likely to be required to be set aside for conservation) or \$20,240,000 or \$22,030,000 (assuming that a hypothetical vendor and purchaser as at the valuation date would consider that 62% of the land would be likely to be required to be set aside for conservation). The difference in value under each assumption as to conservation depends on the Tribunal's answer to issue 1 for determination referred to below. Broadcast Australia ultimately contended, again based on the evidence of Mr Kinnaird, that the gross rental value of the land as at 1 August 2006 was either \$1,049,863 or \$1,095,000 (assuming that a hypothetical vendor and purchaser as at the valuation date would consider that 57% of the land would be likely to be required to be set aside for conservation) or \$977,500 or \$1,019,363 (assuming that a hypothetical vendor and purchaser as at the valuation date would consider that 62% of the land would be likely to be required to be set aside for conservation). Again, the difference in value under each assumption depends on the Tribunal's answer to issue 1 below.

Background

The land

- 15 The land is located to the north of Reid Highway and to the west of Wanneroo Road, in the south-eastern part of the suburb of Hamersley within the City of Stirling, approximately 12 kilometres north of the Perth Central Business District. The land has a roughly rectangular shape, an area of approximately 44.7 hectares and road frontages to Wanneroo Road to the east, Erindale Road to the west, Blissett Way to the north-east and Lennox Place to the north-west.
- 16 Lot 101 has an area of approximately 18.1 hectares and occupies the western part of the land with road frontages to Erindale Road and Lennox Place. The eastern boundary of Lot 101 generally has an unusual, semicircular shape, so as to exclude from that lot an extensive buried earth radial system consisting of 120 copper earth wires buried approximately 300 millimetres underground, which extend out radially from the base of a 180 metre high broadcasting mast located on Lot 102 to the east.

Lot 102 has an area of approximately 21.6 hectares and occupies the central and north-eastern part of the land with road frontages to Wanneroo Road and Blissett Way. Lot 1 has an area of approximately 5 hectares and is located in the south-eastern part of the land with a road frontage to Wanneroo Road.

17 The land is zoned Urban under the *Metropolitan Region Scheme* (MRS) and Public Purpose Commonwealth under the *City of Stirling Local Planning Scheme No 3* (LPS 3). Land in the locality of the site is generally zoned Urban under the MRS and Residential under LPS 3. The surrounding area principally comprises low density residential development.

18 In the 1930s, the Commonwealth Government established the Hamersley Transmission Facility on the land for the broadcasting of medium frequency (MF) radio signals employing amplitude modulation (AM). In 1955, the existing 180 metre high broadcasting mast was constructed centrally on the land and, later, a 10 metre high 'top hat', in the form of a 'wagon wheel' type structure, was installed at the top of the mast. Subsequently, a flat top antenna with two 55 metre masts was constructed in the south-eastern corner of the land as well as two stand-by antennas in the north-eastern corner and eastern part of the land. There is a buried earth radial system consisting of copper wires around each antenna running from the antenna for a distance of up to 170 metres. Small buildings are located at the base of each antenna which house the networks required to efficiently combine transmitters and couple the transmitter power into the antenna. The transmitters are housed in the transmitter building located close to the eastern boundary of the land. This building also serves as Broadcast Australia's district maintenance base for Western Australia and has significant electronic workshop facilities. Adjacent to the transmitter building is the generator room which houses a generator that can run the whole transmission facility for several days without the need to obtain additional fuel. There are also a number of smaller buildings on the land used for miscellaneous purposes including equipment storage and vehicle parking.

19 The Hamersley Transmission Facility broadcasts the Australian Broadcasting Corporation (ABC) AM radio services 6PB (585 kHz ABC News Radio), 6WF (720 kHz ABC Local Radio) and 6RN (810 kHz ABC Radio National) to both the Perth metropolitan area and regional areas to the north, east and south, serving a population of 1,532,000 (585 kHz ABC News Radio and 810 kHz ABC Radio National) and 1, 660,000 (720 kHz ABC Local Radio).

20 The Hamersley Transmission Facility formed part of the Commonwealth Government's National Transmission Network (NTN). Until 1999, the NTN was operated by the National Transmission Agency (NTA) which was a Commonwealth authority. In 1999, the NTN was privatised and was sold by the Australian Government, pursuant to the *National Transmission Network Sale Act 1999 (Cth)* (NTNS Act), to the National Transmission Company Pty Ltd which was subsequently renamed NTL Australia Pty Ltd and then Broadcast Australia.

21 The NTN is Broadcast Australia's primary physical asset. Broadcast Australia provides fully-managed transmission services for both analogue and digital television and analogue and digital radio (including AM, Frequency Modulation (FM) and High Frequency (HF) radio services) to its major customers, the ABC and the Special Broadcasting Service Corporation (SBS). Broadcast Australia also provides portal services and site sharing arrangements for community and commercial television and radio broadcasters and co-hosting at Broadcast Australia sites for telecommunications and emergency service providers. Broadcast Australia is the sole provider of analogue radio and television services for the ABC and the SBS.

22 The Broadcast Australia network covers approximately 600 transmission sites located throughout the metropolitan, regional and rural areas of Australia. Of these, approximately 240 sites, including the land the subject of these proceedings, are owned by Broadcast Australia. The remainder of the transmission sites are either leased and controlled by Broadcast Australia or general infrastructure leased for a portal service where Broadcast Australia operates and maintains only service-specific equipment. Within the Perth metropolitan area, in addition to the Hamersley Transmission Facility on the land, Broadcast Australia owns part of the Belmont Transmission Facility from which AM radio services are broadcast (the balance of that property was sold by Broadcast Australia to the Western Australian Planning Commission and was leased back by Broadcast Australia) and the Bickley Transmission Facility which is the main site in Perth from which FM and television services are broadcast by the ABC and the SBS, along with a number of repeater sites.

23 Broadcast Australia called Mr Steven White, a radio and electrical services technician and Radio Transmission Engineer with Radio New Zealand, to give evidence. Mr White's evidence was not seriously challenged or contradicted and is accepted by the Tribunal. Mr White helpfully summarised his evidence as follows:

... I do not believe it would be possible to find an alternative site to relocate the Hamersley Transmission Facility to which would replicate the existing service coverage.

In my opinion[,] the MF services transmitted from the Hamersley Transmission Facility will be required for at least another 20 years in their current format. Conversion to a digital transmission format is possible, but unlikely in the near future due to lack of spectrum and suitable receivers. Supply of suitable receivers will be driven to a large degree by international trends relating to digital MF broadcasting and this will inevitably take some time to flow on into Australia. Hamersley would remain a key site for the implementation of digital MF broadcasting, as would the high power frequencies currently operated from the site.

Lots 1 and 102 are required for the transmission infrastructure. While part of Lot 101 (from the western boundary to approximately 250 metres from the 180 metre mast/300 metres east from the western boundary) is surplus to the land area required for the infrastructure and could be considered for sale, in my opinion[,] there are a number of factors that may adversely affect the suitability of this land for redevelopment, particularly for residential purposes.

24 The 'factors that may adversely affect the suitability of this land for redevelopment, particularly for residential purposes' identified by Mr White included the following:

Currently there is no housing within 250 [metres] of the 180 [metre] mast. This should therefore be considered as the minimum distance required as it would appear that there are currently no issues with the existing housing. As such[,] only the area extending 300 [metres] east from the western boundary of the site could be considered for sale. ...

Any buildings/structures built on this land would have to be low or single level to avoid becoming subject to elevated radio frequency fields exceeding the general public limits set out in the [Australian Radiation Protection and Nuclear Safety Agency (ARPANSA)] standard resulting from high induced radio frequency currents in metal components of the buildings/structures. Any proposed buildings of significant height would have to be evaluated in terms of this risk. [Elsewhere in his evidence, Mr White referred to this potential phenomenon as 'parasitic re-radiation' - 'in simple terms a structure of this height will become an effective receiver antenna'].

There may be issues encountered while building adjacent to the site. For example, the operational cranes on this land would have to be carefully managed to avoid problems associated with height-induced [radio frequency] currents. [Elsewhere in his evidence, Mr White specifically referred to the risk of radio frequency burns to crane operators].

NTNS Act

25 Section 9(1) of the NTNS Act states, in part, as follows:

The Minister for Finance and Administration may, by notice in the *Gazette*, declare all or any of the following, in relation to a company specified in the notice:

- (a) a specified Commonwealth asset vests in the company at a time specified in the notice (the **transfer time**), without any conveyance, transfer or assignment;
- (b) at the transfer time, the company becomes the Commonwealth's successor in law in relation to the transferred asset;

...

26 Pursuant to s 9(1) of the NTNS Act, by cl 2 of the *Commonwealth of Australia Gazette No S179* dated Thursday, 29 April 1999 (*Gazette*), the Hon John Joseph Fahey MP, Minister for Finance and Administration (Minister), declared that, at noon on 30 April 1999, each 'Specified Asset' vested in the company now known as Broadcast Australia, without any conveyance, transfer or assignment, and that the company became the Commonwealth's successor in law in relation to each such asset. The term 'Specified Asset' was defined in cl 1.1 of the *Gazette* to mean an asset specified in Part 1 of Schedule A. Part 1 of Schedule A of the *Gazette* separately specified 'physical objects', 'intangible assets', 'financial assets' and 'properties'. Part 1 of Schedule A of the *Gazette* described the assets which were 'physical objects' as follows:

Any legal or equitable estate or interest of the Commonwealth in any physical object which is used by the National Transmission Agency in the operation of the National Transmission Network.

27 Part 1 of Schedule A of the *Gazette* identified the assets which were 'properties' as follows:

Subject to the limitations described at the end of this Part 1 of Schedule A, any legal or equitable estate or interest or right or entitlement which the Commonwealth has in, or in relation to, the following sites:

Sites Classified as Available

Site Number	Site Name	Title Description
[578 properties are then identified including -]		
6028	Hamersley	Vol 1362 Fol 198 & Vol 1891 Fol 449

28 Site Number 6028 with Site Name 'Hamersley' is the land the subject of these proceedings. The 'Title Description' Volume 1362 Folio 198 and Volume 1891 Folio 449 reflected the title particulars in relation to the land in April 1999.

29 Thus, by s 9(1) of the NTNS Act and the Gazette, the Commonwealth separately transferred the physical objects on the land which were used by the NTA in the operation of the NTN and the land itself to Broadcast Australia.

30 Section 18 of the NTNS Act states, in part, as follows:

- (1) A transfer of an original asset or a replacement asset by any person is of no effect unless approved in writing by the Minister before the time of transfer.
- (2) If a person makes a written application to the Minister for approval of a proposed transfer, the Minister must approve the transfer, unless the Minister refuses under subsection (3).
- (3) The Minister may refuse to approve a transfer on any of the following grounds:
 - (a) the Minister has reason to believe that the transfer might jeopardise continued access by a nominated customer to a nominated service for a nominated purpose;
 - (b) any other prescribed ground that relates to matters covered by paragraph 51(v) of the Constitution.

...

31 The terms 'original asset' and 'replacement asset' are defined in s 3 of the NTNS Act as follows:

original asset means an asset transferred from the Commonwealth under section 9.

replacement asset means an asset that is a replacement for:

- (a) an original asset; or
- (b) an asset that is a replacement asset because of a previous application of this definition.

32 Both the broadcasting infrastructure on the land and the land itself are an 'original asset' for the purposes of the NTNS Act. Consequently, neither the infrastructure nor the land may be sold by Broadcast Australia without the approval in writing of the Minister administering the NTNS Act.

33 Section 15(2) of the NTNS Act states as follows:

The ABC and SBS are nominated customers for the purposes of:

- (a) the carriage of national broadcasting services or ancillary services; and
- (b) access to sites or telecommunications transmission towers for purposes connected with national broadcasting services or ancillary services.

34 The terms 'nominated purpose' and 'nominated service' are defined in s 3 of the NTNS Act as follows:

nominated purpose, in relation to a person who is a nominated customer, means a purpose specified in section 15 as a purpose for which the person is a nominated customer.

nominated service has the meaning given to it by section 14.

35 Under s 14(1) of the NTNS Act, a 'nominated service' includes 'the carriage of broadcasting services, where ... the provider of the carriage service is [Broadcast Australia] or a declared successor ... '.

36 Therefore, the Minister administering the NTNS Act may refuse to approve a transfer of the land the subject of these proceedings if the Minister has reason to believe that the transfer might jeopardise continued access by the ABC to the carriage of broadcasting services.

37 Section 22(1) of the NTNS Act authorises the Minister administering the NTNS Act to declare a person to be a 'declared successor' for the purposes of the Act by notice in the Gazette.

38 Section 20 of the NTNS Act states as follows:

(1) The telecommunications carrier rules have effect in accordance with this Part, in relation to an NTC or declared successor, in relation to any telecommunications facility that satisfies the following conditions:

(a) the facility is owned by the NTC or a declared successor;

(b) the facility:

(i) is an original asset consisting of land; or

(ii) is an original asset and is located on land on which there is located a telecommunications transmission tower that is either an original asset or a replacement asset; or

(iii) is a replacement asset and is located on land on which there is located a telecommunications transmission tower that is either an original asset or a replacement asset.

(2) The telecommunications carrier rules have effect as if the NTC or declared successor were:

(a) a carrier (within the meaning of the Telecommunications Act); and

(b) the holder of a carrier licence.

(3) This Part does not apply to an NTC or declared successor at any time when the NTC or declared successor is actually the holder of a carrier licence.

39 The term 'NTC' is defined in s 3 of the NTNS Act to mean 'a company to which assets or liabilities are transferred under section 9' and, thus, refers to Broadcast Australia. The term 'telecommunications carrier rules' is defined in s 3 of the NTNS Act to include 'Part 1 of Sch 3 to the [*Telecommunications Act 1997* (Cth) (*Telecommunications Act*)]'. Part 1 of Sch 3 to the Telecommunications Act, therefore, applies in relation to Broadcast Australia or a declared successor and would continue to apply to Broadcast Australia in relation to broadcasting transmission facilities on the land even if the land itself were sold

by Broadcast Australia to another person. In particular, cl 7, which forms part of Pt 1 of Sch 3 to the Telecommunications Act, states as follows:

Maintenance of facilities

- (1) A carrier may, at any time, maintain a facility.
- (2) A carrier may do anything necessary or desirable for the purpose of exercising powers under subclause (1), including (but not limited to):
 - (a) entering on, and occupying, land; and
 - (b) removing, or erecting a gate in, any fence.
- (3) A reference in this clause to the *maintenance* of a facility (the *original facility*) includes a reference to:
 - (a) the alteration, removal or repair of the original facility; and
 - (b) the provisioning of the original facility with material or with information (whether in electronic form or otherwise); and
 - (c) ensuring the proper functioning of the original facility; and
 - (d) the replacement of the whole or a part of the original facility in its original location, where the conditions specified in subclause (5) are satisfied; and
 - (e) the installation of an additional facility in the same location as the original facility, where the conditions specified in subclause (6) are satisfied; and
 - (f) in a case where any tree, undergrowth or vegetation obstructs, or is likely to obstruct, the operation of the original facility--the cutting down or lopping of the tree, or the clearing or removal of the undergrowth or vegetation, as the case requires.
- (4) A reference in this clause to the *maintenance* of a facility does not include a reference to the extension of a tower. For this purpose, *tower* has the same meaning as in clause 4.
- (5) For the purposes of paragraph (3)(d), the following conditions are specified:
 - (a) the levels of noise that are likely to result from the operation of the replacement facility are less than or equal

to the levels of noise that resulted from the operation of the original facility;

- (b) in a case where the original facility is a tower:
 - (i) the height of the replacement facility does not exceed the height of the original facility; and
 - (ii) the volume of the replacement facility does not exceed the volume of the original facility;
 - (c) in a case where the facility is not a tower:
 - (i) the volume of the replacement facility does not exceed the volume of the original facility; or
 - (ii) the replacement facility is located inside a fully-enclosed building, the original facility was located inside the building and the building is not modified externally as a result of the replacement of the original facility; or
 - (iii) the replacement facility is located inside a duct, pit, hole, tunnel or underground conduit;
 - (d) such other conditions (if any) as are specified in the regulations.
- (6) For the purposes of paragraph (3)(e), the following conditions are specified:
- (a) the combined levels of noise that are likely to result from the operation of the additional facility and the original facility are less than or equal to the levels of noise that resulted from the operation of the original facility;
 - (b) either:
 - (i) the additional facility is located inside a fully-enclosed building, the original facility is located inside the building and the building is not modified externally as a result of the installation of the additional facility; or
 - (ii) the additional facility is located inside a duct, pit, hole, tunnel or underground conduit;
 - (c) such other conditions (if any) as are specified in the regulations.

- (7) For the purposes of paragraphs (5)(a), (b) and (c) and (6)(a), (b) and (c), trivial variations are to be disregarded.
- (8) For the purposes of subclauses (5) and (6):
- (a) the measurement of the height of a tower is not to include any antenna extending from the top of the tower; and
 - (b) the volume of a facility is the apparent volume of the materials that:
 - (i) constitute the facility; and
 - (ii) are visible from a point outside the facility; and
 - (c) a structure that makes a facility inside the structure unable to be seen from any point outside the structure is to be treated as if it were a fully-enclosed building.
- (9) A reference in this Part to engaging in activities under this Division includes a reference to exercising powers under this Division.
- (10) In this clause (other than subclause (4)):
- "tower"* means a tower, pole or mast.

VL Act

40 Section 18 of the VL Act states as follows:

For the purpose of a general valuation, the Valuer-General shall determine, or cause to be determined, with respect to rateable land, the gross rental value or the unimproved value, as the case may be, so far as that value is required by a rating or taxing authority for the purpose of assessing any rate or tax or is, in the opinion of the Valuer-General, reasonably likely to be so required before the next general valuation of the land is made.

41 The term 'unimproved value' is relevantly defined in s 4(1) of the VL Act to mean the 'site value'. The term 'site value' is defined in s 4(1) of the VL Act as follows:

site value of land means the capital amount that an estate of fee simple in the land might reasonably be expected to realize upon sale assuming that any improvements to the land, other than merged improvements, had not been made and, in the case of land that is reserved for a public purpose, assuming the land may continue to be used for any purpose for which it is being used or could be used at the date of valuation;

42 The term 'gross rental value' is relevantly defined in s 4(1) of the VL Act as follows:

gross rental value of land means the gross annual rental that the land might reasonably be expected to realize if let on a tenancy from year to year upon condition that the landlord were liable for all rates, taxes and other charges thereon and the insurance and other outgoings necessary to maintain the value of the land, provided that -

- (a) where the gross rental value of land cannot reasonably be determined on such basis, the gross rental value shall be the assessed value;

...

43 It is common ground between the parties that the gross rental value cannot reasonably be determined on the basis stated in the introductory part of the definition of 'gross rental value' and that, consequently, the gross rental value of the land as at 1 August 2006 is the 'assessed value'. The term 'assessed value' is defined in s 4(1) of the VL Act as follows:

assessed value of land means such percentage of the capital value of the land as may from time to time be prescribed either -

- (a) in respect of land generally; or
- (b) in respect of any class of land which includes the land.

44 The term 'capital value' is relevantly defined in s 4(1) of the VL Act as follows:

capital value of land means the capital amount which an estate of fee simple in the land might reasonably be expected to realize upon sale ...

45 The percentage of the capital value which was prescribed for the purpose of the definition of 'assessed value' in s 4(1) of the VL Act as at 1 August 2006 was 5%: *Valuation of Land Regulations 1979* (WA) reg 5.

46 The accepted foundation test for valuation purposes under the VL Act has been found, for over a century, in the following classic statement by Isaacs J in the High Court of Australia in *Spencer v Commonwealth* (1907) 5 CLR 418 at 441 (a case concerning a claim for compensation for the compulsory acquisition of land at North Fremantle):

To arrive at the value of the land at that date, we have, as I conceive, to suppose it is sold then, not by means of a forced sale, but by voluntary bargaining between the plaintiff and a purchaser, willing to trade, but neither of them so anxious to do so that he would overlook any ordinary business consideration. We must further suppose both to be perfectly acquainted with the land, and cognizant of all circumstances which might affect its value, either advantageously or prejudicially,

including its situation, character, quality, proximity to conveniences or inconveniences, its surrounding features, the then present demand for land, and the likelihood, as then appearing to persons best capable of forming an opinion, of a rise or fall for what reason soever in the amount which one would otherwise be willing to fix as the value of the property.

Issues

47 The parties agreed that the principal issues in these proceedings are as follows:

- 1) Are the terms of the NTNS Act relevant to the valuations the subject of these proceedings in relation to Lots 102 and 1 such that the highest and best use of that land is Broadcasting?
- 2) If the answer to 1 is 'yes', what is the:
 - a) unimproved value as at 1 August 2007; and
 - b) gross rental value as at 1 August 2006of Lots 102 and 1?
- 3) If the answer to 1 is 'yes', what effect, if any, would the use of Lots 102 and 1 for Broadcasting have on the:
 - a) unimproved value as at 1 August 2007; and
 - b) gross rental value as at 1 August 2006of Lot 101?
- 4) What proportion of the land in respect of which the highest and best use is Residential R20 would a hypothetical vendor and purchaser as at the valuation dates in question consider would be likely to be required to be set aside for conservation (not public open space) or would be likely to be required to have on-site or off-site offsets to enable development, and what form and value any such offsets would be likely to take?
- 5) What planning lead-in time would a hypothetical vendor and purchaser as at the valuation dates in question consider would be likely for Residential R20

development of the part of the land in respect to which Residential R20 development is the highest and best use?

- 6) Is the preferable method of valuation of the land in respect of which the highest and best use is Residential R20 in the circumstances of this case the comparable sales method employed by Mr Ronchi or the hypothetical development method employed by Mr Kinnaird?
- 7) What is the:
- a) unimproved value as at 1 August 2007; and
 - b) gross rental value as at 1 August 2006

of the land in respect of which the highest and best use is Residential R20?

48 The Tribunal will address each of these issues in turn.

Issue 1 - Are the terms of the NTNS Act relevant to the valuations?

49 The review proceeded on the basis of the joint position of the valuation expert witnesses and the parties that:

- a) if the terms of the NTNS Act are relevant to the valuations of Lots 102 and 1, then the highest and best use of that land is Broadcasting;
- b) if the terms of the NTNS Act are not relevant to the valuations of Lots 102 and 1, then the highest and best use of that land is Residential R20; and
- c) the highest and best use of Lot 101 is Residential R20.

50 As noted earlier, both the definition of 'site value' (relevantly used to determine 'unimproved value') and the definition of 'capital value' (relevantly used to determine gross rental value through the definition of 'assessed value' as the prescribed percentage of the capital value) refer to:

... the capital amount that an estate of fee simple in the land might reasonably be expected to realize upon sale ...

51 In *Gollan & Anor v Randwick Municipal Council* [1961] AC 82; (1960) 6 LGRA 275; (1960) 34 ALJR 283; (1960) 3 All ER 449,

the Privy Council was called upon to determine whether, in ascertaining the 'unimproved value' of land comprising Randwick Racecourse in Sydney under the *Valuation of Land Act 1916* (NSW) (NSW Act), the valuation should or should not take into account the existence of restrictions that arose from the Crown grant. Section 6 of the NSW Act, which was expressed in relevantly similar terms to the definitions of 'site value' and 'capital value' in s 4(1) of the VL Act, stated as follows:

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

52 The judgment of the Privy Council was delivered by Lord Radcliffe. Having observed, at 100; 282; 454 - 455, that "'unimproved value" as a basis for taxation is essentially a rating conception in New South Wales', the Privy Council held, at 101; 282 and 455, as follows:

Prima facie, it appears to their Lordships, 'the fee simple of the land' as used in s 6 does not refer to the actual title vested in the owner at the relevant date but to an absolute or pure title such as constitutes full ownership in the eyes of the law.

53 ***Royal Sydney Golf Club v Federal Commissioner of Taxation*** (1955) 91 CLR 610 (***Royal Sydney Golf Club***) was an appeal to the High Court of Australia against the assessment by the Federal Commissioner of Taxation under the *Land Tax Assessment Act 1910* (Cth) of the unimproved value of the taxable portion of the club's land at Rose Bay in the eastern suburbs of Sydney for the year ended 30 June 1951. As at 30 June 1951, the whole of the assessed land was affected by the operation of the *County of Cumberland Planning Scheme Ordinance* (Ordinance) which formed the Schedule to the *Local Government Amendment Act 1951* (NSW). In particular, the land was zoned Parks and Recreation under the Ordinance (coloured dark green on the map). In assessing unimproved value, the Commissioner of Taxation ignored the provisions of the Ordinance and their actual or potential effect on the value of the land. Justice Kitto stated two questions of law for the opinion of the Full Court, the first of which was as follows:

In arriving at the unimproved value under the *Land Tax Assessment Act* of the land the subject of the appeal, should the land be valued without regard to the provisions and effect of the *County of Cumberland Planning Scheme Ordinance*?

54 The High Court answered this question as follows at 624 - 625:

There remains the question how the distinction which is drawn above applies in this case to the County of Cumberland Scheme. Do the restrictions which it imposes upon, threatens to or suspends over land within the areas in the scheme, particularly that coloured dark green, amount to nothing but an encumbrance or condition or restrictive obligation affecting the titles to specific parcels of land? Is it not rather a law operating over an area of country within the State which, though not large, is chosen independently of all questions of title or ownership and controlling the use to which owners in fee simple or for any less estate or interest occupiers, licensees and indeed even trespassers may put the land? Its nature and purpose seem to bring the restriction flowing from the scheme under the second description. However the title may be derived and whatever may be the form of ownership, occupation or enjoyment, the use of all land within the scheme is affected actually or contingently, presently or in the future but in varying degrees and subject to varying conditions. In the case of land within the area coloured dark green the restriction, if not more proximate, is at all events more stringent. But it is nevertheless a restriction which arises from the law affecting an area in which the land lies, and not something altering the hypothesis upon which the Federal statute requires the land to be assessed. It must be taken into account in ascertaining the unimproved value of the land.

55 *Sydney City Council v Valuer-General* (1956) 1 LGRA 229 (*Sydney City Council*) involved an objection by the Council to the valuation under the NSW Act of a portion of a park vested in the City. In determining that the value of the fee simple in the land for the purposes of the NSW Act should be ascertained taking into consideration restrictions on use imposed by the Ordinance, but not restrictions on use, enjoyment and alienation which resulted from the dedication of the land by the Crown for public recreation, Sugerman J said the following, at 234 - 235:

Sections 5 and 6 of the *Valuation of Land Act* are thus an integral part of the system of rating, whose character, in my opinion, postulates a uniform basis of assessment of rates which are payable by a class of ratepayers whose estates or interests permit of considerable variation *inter se*, that is to say, a basis which has no regard to the quantum or incidence of any particular ratepayer's estate or interest. The system is a system of rating, not upon the value of the ratepayer's estate or interest, but upon the value of the 'fee simple of the land', ascertained by reference to a hypothetical sale thereof defined in terms which make it independent of the personality of any actual owner for the time being. ... the sum to be ascertained under ss. 5 and 6 is what this aggregation could be expected to realise if offered for sale by a person having the capacity to dispose of it. Exemptions are expressly provided for, and in my opinion it is not intended that a total or partial exemption should be secured by indirection through the effect

upon value of restrictions on use and enjoyment in cases other than those expressly provided for.

56 Finally, in *CSR Limited v Valuer-General* (1977) 17 SASR 446; (1977) 42 LGRA 52, Wells J stated the principles derived from the leading decisions discussed earlier, at 450; 55, as follows:

In my opinion, these words ['an unencumbered estate of fee simple in the land'] denote an absolute or pure estate in fee simple in the subject land, free of any private conditions, limitations, restrictive covenants, or other inherent restrictions affecting the estate or the land, but subject, of course, to any laws of a general nature that affect the use or alienability of the land. [Although the South Australian provision considered in this case included the word 'unencumbered' before the words 'estate of fee simple in the land', as Bleby J observed in *Perpetual Trustee Co Ltd & Anor v Valuer-General; Trust Co of Australia Ltd & Anor v Valuer-General* [2008] SASC 169; (2008) 101 SASR 110 at 38, 'in light of the observations of the [High Court in *Royal Sydney Golf Club*], the omission in the ... definitions of any reference to an unencumbered estate would appear to make little difference'].

57 The parties disagreed as to how the NTNS Act should be characterised in light of the principles discussed in these authorities.

58 Broadcast Australia argued that the NTNS Act is a 'general law of general application' imposing a restriction on the use of the land, which was historically used for and is suited to the provision of broadcasting services, for the continued provision of those services from the land, by restricting its transfer. Broadcast Australia submitted that the NTNS Act does not impose a restriction or limitation on title. Rather, it imposes a regulatory regime 'that is ultimately independent of the assets that were transferred by the Commonwealth if for no other reason than that regime includes the replacement assets'. The regime achieves the Commonwealth's objective of ensuring the continued use of land historically used and suitable for broadcasting services for the continued provision of those services.

59 Mr PD Evans, who appeared with Ms TJ DiCicco on behalf of Broadcast Australia, submitted that:

This is indistinguishable in substance from a zoning law. A zoning law prevents someone who uses land from using it for purposes other than broadcasting. The legislature here, in effect, has done the same thing.

[The NTNS Act] precludes the use of the land for any purpose other than broadcasting. The structure is not conventional, but that is the effect of it.

60 Broadcast Australia submitted, therefore, that the terms of the NTNS Act are relevant to the determination of 'the capital amount that an estate of fee simple in the land might reasonably be expected to realize upon sale ... ' and consequently relevant to the valuations that are the subject of these proceedings.

61 In contrast, the Valuer General argued that the NTNS Act imposes, in substance, a restriction on title and is, therefore, not relevant to the valuations in question. Ms CA Ide, counsel for the Valuer General, submitted that the NTNS Act is 'predicated on a particular historical occupation and historical use of land'. Ms Ide submitted:

The NTNS Act, although it may apply to land throughout Australia, is not an Act of general application. The applicability of the NTNS Act in these circumstances (that is, an original asset) is contingent on a parcel of land being owned historically by the Commonwealth, and subsequently being transferred by the Commonwealth to another entity, subject to a series of restrictions. In that sense[,] the application of the case relies on who the particular owner of the land is, or was, rather than a 'hypothetical' owner. It is also contingent on the land having been used for broadcasting or carriage services. It is not the case, for example, that the NTNS Act applies to all land reserved for Commonwealth public purposes throughout Australia. ...

The obligations under the NTNS Act on the subject land are best characterised as restrictive obligations applying to specific parcels of land. That being the case, no regard must be had to the operation of the NTNS Act.

62 This case raises a novel application of the principles discussed in the authorities referred to earlier. In our view, although the NTNS Act is a Commonwealth statute, the burden that it imposes in respect of the land is akin to a restriction affecting the titles to specific parcels of land, rather than a restriction imposed by a law of general application and nature. Section 18 of the NTNS Act applies to the transfer of 'an original asset or a replacement asset'. The term 'original asset' is defined in s 3 of the NTNS Act to mean an asset transferred from the Commonwealth under s 9 and the term 'replacement asset' is defined in the same section to mean an asset that is a replacement for an original asset or for an earlier replacement asset. As noted earlier, on 30 April 1999, 578 properties, each identified by reference to site number, site name and title description, were vested by the Commonwealth in Broadcast Australia. The NTNS Act imposes restrictions solely on those specified properties

and on any replacement land asset for any of those specific properties. The NTNS Act is not, therefore, a law of general application and nature, but rather a law of very specific application and nature.

63 In terms of the language used by the High Court in *Royal Sydney Golf Club* at 624, the restrictions imposed by the NTNS Act amount, in substance, 'to nothing more than an encumbrance or condition or restrictive obligation affecting the titles to specific parcels of land'. The area of operation of the NTNS Act is not 'chosen independently of all questions of title or ownership'. Quite to the contrary, the restriction on transfer in the NTNS Act is applicable to land precisely and only because it was sold as part of the privatisation of the Commonwealth's broadcasting infrastructure or is a replacement land asset for a property sold in that process.

64 Moreover, the burden created by s 18 of the NTNS Act is not 'a restriction which arises from the law affecting an area in which the land lies'. Rather, the NTNS Act is a law affecting the land itself together with, initially, 577 other specifically identified properties around Australia. Contrary to Broadcast Australia's submission that the NTNS Act is 'indistinguishable in substance from a zoning law', there is a fundamental difference between a zoning law, such as the Ordinance considered by the High Court in *Royal Sydney Golf Club*, and the NTNS Act. While a planning scheme can impose a burden or restriction on a particular property by zoning it in a particular way, the law is nevertheless a law of general application and nature. A planning scheme will apply to all land in the scheme area, generally all land in a local government district or in a region. As the High Court said in *Royal Sydney Golf Club*, 'the use of all land within the scheme is affected actually or contingently, presently or in the future, but in varying degrees and subject to varying conditions', although the restriction '[i]n the case of land within the area coloured dark green ... [was] more stringent'. In contrast, the NTNS Act only applies to specific original assets or replacement assets for any of those original assets. The NTNS Act does not apply to any other land.

65 In terms of the principles referred to by Sugerman J in *Sydney City Council*, 'unimproved value'/'capital value' in the VL Act are an:

... integral part of the system of rating [and land tax], whose character ... postulates a uniform basis for assessment of rates [and land tax] which are payable by a class of ratepayers [and taxpayers] whose estate or interests permit of considerable variation *inter se*, that is to say, a basis which has no regard to the quantum or incidence of any particular ratepayer's [or taxpayer's] estate or interest.

66 The restriction in s 18 of the NTNS Act is an incident of Broadcast Australia's estate or interest in the land, not an incident of the absolute or pure title. It would be contrary to the 'uniform basis for assessment of rates [and land tax]' for the restriction on transfer under s 18 of the NTNS Act to be taken into account. Moreover:

[t]he system is a system of rating [and tax], not upon the value of the raterpayer's [or taxpayer's] estate or interest, but upon the value of ['an estate of fee simple in the land'], ascertained by reference to a hypothetical sale thereof defined in terms which make it independent of the personality of any actual owner for the time being.

67 The restriction under s 18 of the NTNS Act on the sale of an original or replacement land asset is a restriction on Broadcast Australia's estate or interest in the land that is not independent of its personality as the successor of the Commonwealth to the land used historically by or on behalf of the Commonwealth for the provision of broadcasting services. The restriction under s 18 of the NTNS Act is not related to 'an estate of fee simple in the land', but rather to Broadcast Australia's estate or interest in the land.

68 Finally, the fact that the restriction in s 18 of the NTNS Act applies not only to an original asset, but also to a replacement asset, and the fact that the Minister is authorised by s 22(1) of the NTNS Act to declare a person to be 'a declared successor' for the purposes of the Act, do not alter the characterisation of the NTNS Act as akin to a restriction of title or a restrictive obligation affecting the titles to specific parcels of land. As noted earlier, a replacement asset only comes into being for the purposes of the NTNS Act where it is a replacement for an original asset or an earlier replacement of an original asset. When an original land asset is replaced by a replacement asset, the NTNS Act imposes the same restriction of title on the replacement asset as it imposed on the original asset. This restriction only arises because the replacement land asset is a replacement for an original land asset. The legislation is, as Ms Ide submitted, 'predicated on a particular historical ownership and historical use of the land'. The restriction on a replacement asset is similarly predicated on the asset being a replacement for an original asset that was owned by the Commonwealth and used for the provision of broadcasting services. Similarly, the fact that the Minister may declare a person to be a declared successor for the purposes of the NTNS Act does not alter the characterisation of the NTNS Act. The status of a declared successor is also predicated on being the heir to a particular historical ownership and use of the land.

69 It follows that the terms of the NTNS Act are not relevant to the valuations the subject of these proceedings in relation to Lots 102 and 1. The highest and best use of that land is therefore not Broadcasting, but rather, is Residential R20. The review of the valuations is to proceed on the basis that the highest and best use of the whole of the land is Residential R20.

Issue 2 - What are the valuations of Lots 102 and 1 if the highest and best use of that land is Broadcasting?

70 Mr Ronchi and Mr Kinnaird agreed that, if the terms of the NTNS Act were relevant and therefore that the highest and best use of Lots 102 and 1 would be Broadcasting, then the appropriate valuation methodology to determine the site value and hence unimproved value, and the capital value and hence gross rental value, of that land, is to assess the present value of rental income over a 20 year lease and add revisionary land value. The principal difference between Mr Ronchi's and Mr Kinnaird's assessments was due to different assumptions about rental. Mr Ronchi adopted a ground rental of approximately \$2,000,000 per annum based on a rate per square metre derived from the leases of the Kewdale Marshalling Yard and two sites at Fremantle Port. In contrast, Mr Kinnaird assumed a rental of \$80,000 per annum based on the evidence of Mr Gary Chao, Broadcast Australia's Property Portfolio Manager, that, had Broadcast Australia sold Lots 102 and 1 to a third party in 2006 or 2007 and leased that land back for use as a broadcasting site, he would have been prepared to negotiate a rent of \$80,000 per annum for a term of 20 years.

71 In consequence of our answer to issue 1, issue 2 does not require determination. However, for completeness, we note that, had issue 2 required resolution, we would have preferred Mr Kinnaird's evidence over Mr Ronchi's evidence in relation to the rental of Lots 102 and 1. We would not have considered rentals in respect of the three sites relied on by Mr Ronchi to be of any assistance in determining rental of Lots 102 and 1 for broadcasting, for three reasons. Firstly, in contrast to the land being valued, each of the sites relied upon by Mr Ronchi are fully developed with physical structures. Secondly, the circumstances of those leases are significantly different, because, as Mr Evans submitted, the owners of the marshalling yards and port facilities have the capacity to obtain 'monopoly rents' as the tenants of those facilities must operate from that land. Thirdly, and most significantly, as noted earlier, Broadcast Australia has a legal right under cl 7 of Sch 3 to the Telecommunications Act to 'maintain' a facility, authorising it to enter

on and occupy land and to carry out any of the activities described in cl 7(3). Even if Broadcast Australia sold the land to a third party, the telecommunications carrier rules would continue to be deemed to apply to it in relation to the facilities on the land, because it would retain ownership of those facilities. While Mr Chao gave evidence that Broadcast Australia would prefer, for reasons of its relationship with landowners and corporate image, to obtain a lease rather than exercise its right to 'maintain' the facility on the land under the telecommunications carrier rules, its right to 'maintain' the facility on the land without any lease fundamentally distinguishes it from the tenants under the leases relied on by Mr Ronchi.

72 Had issue 2 arisen for determination, the Tribunal would have found that Mr Kinnaird's assumption of a lease at a rental of \$80,000 was a reasonable assumption to make for two reasons. Firstly, a rental of \$80,000 per annum is broadly consistent with rentals that were being paid by Broadcast Australia for comparable sites at the relevant time. Secondly, Broadcast Australia's right to 'maintain' the facilities on the land without a lease supports the assumption that the amount that Broadcast Australia would have been prepared to pay as rent is likely to have been the market rental for the land.

Issue 3 - What effect would the use of Lots 102 and 1 for Broadcasting have on the value of Lot 101?

73 In light of the answer to issue 1, issue 3 does not require determination. However, for completeness and as there was ultimately only one matter in dispute between the parties in relation to this issue, the Tribunal will address it.

74 The parties agreed, based on the evidence of Mr White, that if the NTNS Act were relevant to the valuations and, therefore, the highest and best use of Lots 102 and 1 were Broadcasting, then a buffer area of 250 metres from the 180 metre high mast on Lot 102 would be required. This would preclude a small part of Lot 101 from being developed for residential purposes. However, the parties disagreed in relation to whether residential development on the remainder of Lot 101 would be restricted to single storey and whether, in consequence, the average lot size for residential development on Lot 101 would be 667 square metres (as contended by Broadcast Australia) or 500 square metres (as contended by the Valuer General).

75 As noted earlier, Mr White gave evidence that 'any buildings/structures built on [Lot 101] would have to be low or single

level to avoid becoming subject to elevated radio frequency fields exceeding the general public limits ... ' Based on Mr White's evidence, Mr Robert Sklarski, a consultant town planner called on behalf of Broadcast Australia, considered that development of Lot 101 would be restricted to single storey and that, consequently, the average lot size would be 667 square metres, rather than 500 square metres (which is the typical average lot size for Residential R20 development).

76 Mr Bruce Gardner, who is a Senior Strategic Town Planning Officer at the City of Stirling and who was called on behalf of the Valuer General, expressed the opinion that there are no planning constraints which would restrict the height of development to single storey, given that there is two storey development in existing residential areas to the north and south of the land within the same distance of the 180 metre high mast, and there are no statutory or policy provisions requiring a single storey limitation in the circumstances.

77 Mr Sklarski acknowledged that there are two storey houses in the residential areas to the north and south of the land located within the same distance of the 180 metre high mast as would be the residential development outside the buffer area on Lot 101, if that land were developed for residential purposes.

78 Had issue 3 arisen for determination, the Tribunal would have preferred Mr Gardner's opinion over Mr Sklarski's, because two storey development has been permitted within the same distance of the mast and there are no statutory or policy restrictions on such development.

79 Furthermore, and in any case, even if residential development would be restricted to single storey on Lot 101, the Tribunal would have found that this restriction would not require an increase in the average lot size above 500 square metres. This is because Mr Sklarski and Mr Gardner agreed that single storey dwellings can be reasonably accommodated on typically sized lots on R20 coded land and, indeed, even on typically sized lots on R30 coded land.

80 Therefore, had issue 3 required determination, the Tribunal would have found that the use of Lots 102 and 1 for Broadcasting would have had no effect on the value of Lot 101 other than precluding the development of the buffer area located within 250 metres of the tower on Lot 102.

Issue 4 - What proportion of the land in respect of which the highest and best use is Residential R20 would a hypothetical vendor and purchaser consider likely to be required to be set aside for conservation?

81 In consequence of the Tribunal's decision in relation to issue 1 above, the highest and best use of the whole of Lots 101, 102 and 1 is Residential R20.

82 Broadcast Australia called Ms Barbara Pedersen to give evidence in relation to this issue. Ms Pedersen is an experienced environmental planner who holds Bachelor of Science (Honours, Geography) and Master of Science (Research, Geography) degrees. Amongst other positions that Ms Pedersen has held, she was, from 2000 to 2008, Manager, Coastal and Natural Resource Management, at the Department of Planning and Infrastructure, and was, at various times, Acting Director, Environment and Sustainability Directorate in that Department. Ms Pedersen is currently Section Leader Environmental Planning with Cardno (WA) Pty Ltd (Cardno).

83 Ms Pedersen referred to a comprehensive Environmental Assessment Report prepared by Cardno in relation to the land in December 2008 (Environmental Assessment Report). The Environmental Assessment Report found evidence of the use of the land for foraging by the bird species *Calyptrorhynchus latirostris*, which is commonly known as Carnaby's Black Cockatoo. Carnaby's Black Cockatoo is listed as 'endangered' under the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (EPBC Act) and in Sch 1 to the *Wildlife Conservation Act 1950* (WA). The Environmental Assessment Report found that approximately 62% of the land comprises foraging habitat for the Carnaby's Black Cockatoo.

84 The Environmental Assessment Report also identified specific plant communities and classified the vegetation condition across the land into categories of 'excellent', 'very good', 'good', 'degraded' and 'completely degraded'. The Environmental Assessment Report found that one of the plant communities comprises *Banksia attenuata* woodland, which is an 'endangered' Threatened Ecological Community. This plant community has an area of approximately 3,500 square metres and is in 'excellent' condition. The Environmental Assessment Report found that approximately 66% of the area of Lots 101, 102 and 1 comprise 'good' to 'excellent' vegetation condition. The Carnaby's Black Cockatoo foraging habitat largely overlaps, but is not entirely congruent, with the 'good' to 'excellent' condition vegetation.

85 Ms Pedersen explained that the land has significant value for conservation because it comprises a relatively large area of mature woodland sufficient in size for the Carnaby's Black Cockatoo to find food and because there is no habitat of comparable size for a distance of 10 kilometres to the south, south-east and south-west. Ms Pedersen said that, because of the significance of the land for the Carnaby's Black Cockatoo, referral of any residential development proposal is likely to be required under the EPBC Act.

86 Ms Pedersen gave the following evidence:

The base position is that 62% of the site is significantly constrained in environmental terms. You may get a negotiated reduction from 62% [in discussions with federal and State regulatory authorities], but the cost of the negotiated reduction will be significant.

87 At the Tribunal's request, Ms Pedersen gave specific evidence in relation to each of eight 'attribute classes' listed in Table 1 below into which the land can be divided based on vegetation condition and the location of foraging habitat for the Carnaby's Black Cockatoo. Table 1 contains a summary of Ms Pedersen's evidence in relation to each attribute class and sets out the Tribunal's findings in relation to the parts of the land that a hypothetical vendor and purchaser as at the valuation dates in question would consider likely to be required to be set aside for conservation (not public open space) and for firebreaks. Ms Pedersen was cross-examined at some length by Ms Ide. Ms Pedersen generally maintained her position, giving logical justifications for it. In response to questions put by Ms Ide, Ms Pedersen accepted that there are pockets within attribute classes that she generally considered should be set aside for conservation where it would be 'logical and appropriate' to 'round out' development, principally because these areas adjoin land that is likely to be developed on at least three sides. Table 1 refers to these areas.

Table 1 - Summary of Ms Pedersen's evidence and the Tribunal's findings in relation to the parts of the land that a hypothetical vendor and purchaser would consider likely to be required to be set aside for conservation (not public open space) and for firebreaks

Attribute class	Area (% of total area)	Ms Pedersen's evidence	Tribunal's findings
1. Excellent vegetation condition with habitat	55,674 square metres (12.5%)	Should be set aside for conservation	Likely to be set aside for conservation

2. Very good vegetation condition with habitat	118,241 square metres (26.4%)	Likely to be set aside for conservation other than a 5,081.9 square metre pocket in north-east surrounded by attribute class 8 (development of which would require offset)	Likely to be set aside for conservation other than a 5,081.9 square metre pocket in north-east surrounded by attribute class 8 (development of which would require offset – see attribute class 7 below)
3. Good vegetation condition with habitat	69,201 square metres (15.5%)	Likely to be set aside for conservation other than four pockets with total area of 11,717.3 square metres that adjoin land likely to be developed on three or four sides (development of which would require offset)	Likely to be set aside for conservation other than four pockets with total area of 11,717.3 square metres that adjoin land likely to be developed on three or four sides (development of which would require offset – see attribute class 7 below) – While Valuer General contended that the area of one of the pockets acknowledged by Ms Pedersen as likely to be developed is 541.1 square metres greater than stated by Ms Pedersen, the Tribunal prefers Ms Pedersen's calculation as it was determined by a cartographer in her office
4. Excellent vegetation condition without habitat	383 square metres (0.1%)	Should be set aside for conservation	Likely to be set aside for conservation
5. Very good vegetation condition without habitat	12,287 square metres (2.7%)	State would want to have significant parts set aside for conservation – some development likely to be acceptable but this would likely trigger need for offset	Likely to be developed and not set aside for conservation, as it does not contain habitat, is a relatively small area and can be adequately offset by improving attribute class 7
6. Good vegetation condition without habitat	25,171 square metres (5.6%)	State would prefer some of this area to be set aside for conservation, but would be more willing to allow development here	Likely to be developed and not set aside for conservation, as it does not contain habitat, significant areas of habitat would be set aside for conservation and attribute class 7 will be improved by offset work
7. Degraded and completely degraded vegetation	35,883 square metres (8%)	Likely to be sets aside for conservation and improved by means of onsite offset work except for 8,909.9 square metres likely to be required for	Likely to be set aside for conservation and required to be improved by way of onsite offset for development in attribute classes 2, 3, 5 and 6

condition with habitat		firebreaks along boundaries and two small areas (3,195.3 square metres and 2,615 square metres) where development is likely to be 'rounded out' as these are surrounded by land likely to be developed	in the form (as explained by Ms Pedersen) of weed removal, pest management and planting of appropriate vegetation, and monitoring, weed removal and replacement of failed vegetation for up to five years, at a total cost of up to \$350,000 - other than 8,909.9 square metres likely to be required for firebreaks along boundaries and two small areas (3,195.3 square metres and 2,615 square metres) where development is likely to be 'rounded out' as these are surrounded by land likely to be developed – While Valuer General contended that the area of one of the areas acknowledged by Ms Pedersen as likely to be developed is 1,030.56 square metres greater than stated by Ms Pedersen, the Tribunal prefers Ms Pedersen's calculation as it was determined by a cartographer in her office
8. Degraded and completely degraded vegetation condition without habitat	130,256 square metres (29.1%)	May be developed	Likely to be developed and not set aside for conservation
Total	447,096 square metres (100%)		247,862.6 square metres (55.44%) likely to be required to be set aside for conservation and 8,909.9 square metres (1.99%) likely to be required for firebreaks

88 In contrast to Broadcast Australia, the Valuer General did not call any witness with qualifications or experience in relation to conservation to give evidence. Rather, the Valuer General sought to rely solely on the evidence of Mr Ronchi as to what he was told by staff of various government departments who did not give evidence and were not available to be tested. Based on advice from these other people,

Mr Ronchi initially assumed that a hypothetical vendor and purchaser as at the valuation dates in question would consider that 20% of the land would be likely to be required to be set aside for conservation (not public open space). Towards the end of the hearing, Mr Ronchi doubled this assumption to 40% and revised his valuations accordingly. Mr Ronchi changed his evidence in this regard because Ms Pedersen referred to a subdivision approval in relation to a site in Shenton Park which required that 41% of that land be set aside for conservation. Mr Ronchi noted that the Shenton Park site comprised not only foraging habitat, but also the roosting habitat of a colony of Carnaby's Black Cockatoo. However, Ms Pedersen maintained her evidence in relation to the parts of the subject land that are likely to be required to be set aside for conservation, notwithstanding the Shenton Park approval, because of the particular qualities and attributes of the land in question.

89 The Tribunal prefers Ms Pedersen's evidence over Mr Ronchi's evidence in relation to the proportion of the land that a hypothetical vendor and purchaser as at the valuation dates in question would consider likely to be required to be set aside for conservation (not public open space) for the following three reasons. Firstly, Ms Pedersen has relevant qualifications and experience in relation to conservation, whereas Mr Ronchi does not. Secondly, Mr Ronchi based his initial evidence on information supplied by people who did not give evidence and who were not able to be tested. Thirdly, the Tribunal is not aware of all of the facts and circumstances concerning the Shenton Park site. However, it is apparent from Ms Pedersen's evidence that there are significant differences, most notably that that site is located proximate to two other substantial areas of habitat in Bold Park and Kings Park, whereas the subject land is of particular significance as there is no habitat of comparable size for a distance of 10 kilometres to the south, south-east and south-west.

90 As is apparent from Table 1, with some minor variations, the Tribunal accepts Ms Pedersen's evidence. The reasons for the minor variations are explained in Table 1. It follows from the analysis in Table 1, that the area of Lots 101, 102 and 1 that a hypothetical vendor and purchaser as at the valuation dates in question would consider would be likely to be required to be set aside for conservation (not public open space) is 247,862.6 square metres or approximately 55.44% of the land. In addition, the Tribunal finds, based on Ms Pedersen's evidence, that a hypothetical vendor and purchaser as at the valuation dates in question would consider it likely that an area of 8,909.9 square metres or approximately 1.99% of the land would be required as firebreaks along

the north-western, western and south-western boundaries of the land. The Tribunal finds that the total area of the land that a hypothetical vendor and purchaser as at the valuation dates in question would consider would not be capable of development for residential purposes, due to conservation and firebreaks, is 256,772.5 square metres or approximately 57.43% of the total area of the land.

91 Finally, in relation to this issue, the Tribunal accepts Ms Pedersen's evidence, which was not seriously questioned or contracted, that an appropriate offset for development on part of the Carnaby's Black Cockatoo foraging habitat area is to improve the vegetation condition and quality of the attribute class comprising 'habitat within degraded and completely degraded vegetation condition' (attribute class 7). Ms Pedersen said that the offset work would require initial weed removal, pest management and planting of appropriate vegetation and ongoing monitoring, weed removal and replacement of failed vegetation over a three to five year period. Ms Pedersen estimated that the cost of this work would be approximately \$150,000 to \$200,000 in the first year, \$10,000 per year thereafter for monitoring and the cost of ongoing weed removal and replanting failed vegetation. Ms Pedersen estimated that the total cost would be up to approximately \$350,000. In light of Ms Pedersen's relevant experience, the Tribunal accepts her evidence in this regard.

92 There was also discussion between the parties in relation to whether offsite offsets would be appropriate or feasible and, if so, what the cost of purchasing land elsewhere would be. In light of the Tribunal's decision that adequate and appropriate onsite offset for development on part of the habitat area is available by improving the quality of the habitat with degraded and completely degraded vegetation condition, it is unnecessary to explore the question of offsite offsets.

Issue 5 - What planning lead-in time would a hypothetical vendor and purchaser consider likely?

93 Mr Sklarski and Mr Gardner agreed that, in order to facilitate residential development of the land, it is likely that rezoning of the land from Public Purpose Commonwealth to Residential under LPS 3 would be required, together with the preparation and adoption of an Outline Development Plan. However, the planning expert witnesses disagreed in relation to the overall 'planning lead-in time' that would be required for residential development. Mr Sklarski considered that a planning lead-in time of 5.5 years (66 months) would be required whereas Mr Gardner

considered that a planning lead-in time of only four years (48 months) would be required.

94 The principal reason for the planning experts' disagreement in relation to the length of the planning lead-in time was whether the Department of Water would require groundwater monitoring as a precursor to the preparation of a local water management strategy. Based principally on advice previously provided by the Department of Water to Broadcast Australia, Mr Sklarski considered that a local water management strategy would be required and would take two years to prepare before a rezoning application could be made.

95 However, it appears that the advice given to Broadcast Australia was subsequently revised by the Department of Water. On 4 January 2010, Mr James Yuen, Acting Program Manager, Water and Land Use Coordination Section of the Department of Water, informed Mr Ronchi that, because the area is sandy and can accommodate the infiltration of stormwater onsite, two years' monitoring would not be required and that, in any case, any monitoring process can run concurrently with the processes of other regulatory agencies. Similarly, on 3 February 2011, Mr Gardner received advice from the Department of Water that pre-development water monitoring is not likely to be required and that the local water management strategy can be undertaken in parallel with the rezoning process.

96 Neither party presented any direct evidence from the Department of Water or from a hydrologist. As the most recent advice of the Department of Water related by the expert witnesses is that pre-development water quality monitoring is not likely to be required and that the local water management strategy can be undertaken in parallel with the rezoning process, the Tribunal finds that the planning lead-in time that a hypothetical vendor and purchaser as at the valuation dates in question would consider likely for residential development is four years (48 months) and not 5.5 years (66 months).

Issue 6 - Is the preferable method of valuation the comparable sales or the hypothetical development method?

97 Mr Ronchi adopted the comparable sales approach for the valuation of the land whereas Mr Kinnaird adopted the hypothetical development method, also known as the *Turner* approach after *Turner v Minister of Public Instruction* (1956) 95 CLR 245.

98 The comparable sales method of valuation has been described as:

- 'the conventional valuation technique' (*Riverbank Pty Ltd v Commonwealth* (1974) 48 ALJR 483 at 484; (1974) 31 LGRA 244 at 246 *per* Stephen J);
- 'widely accepted' (*Redeam Pty Ltd v South Australian Land Commission* (1977) 40 LGRA 151 at 156 *per* Jacobs J);
- '[t]he traditional and usually unexceptional method' (*Maurici v Chief Commissioner of State Revenue* (2003) 212 CLR 111 (*Maurici*) at 120 [16] *per* McHugh, Gummow, Kirby, Hayne and Callinan JJ); and
- 'the principal method of valuing land' (*ISPT Pty Ltd v City of Melbourne* [2007] VCAT 652 *per* Morris J).

99 In *Maurici*, the High Court of Australia said, at 120 [16]:

The traditional, and usually unexceptional 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.

100 In *St Martins' Centre Pty Ltd v Valuer General* (WA) (2003) 30 SR (WA) 218, the Land Valuation Tribunal made the following observations at 224 in relation to the comparable sales method:

The direct comparison method of valuation, sometimes referred to as 'the market comparison', is applicable in cases where sales evidence of other properties directly comparable to the subject are available, or where minor adjustments can be made when applying the evidence to take into account points of difference between the evidence and the subject properties. The method rests on the principle that evidence of market price is the best indicator of value. If acceptable evidence exists, direct comparison of comparable sales of other land provides the most straightforward and reliable guide to market values [citations omitted].

101 Mr Ronchi identified and analysed six sales of englobo parcels of land, ranging from 5.5226 hectares to 243.5499 hectares, sold in 2006 and 2007, and compared relevant attributes and characteristics of those properties with the land the subject of these proceedings. The sales evidence disclosed a range of values of between \$74.14 and \$248.97 per square metre, with the lower end of the range being sites at the periphery of the Perth metropolitan area. Mr Ronchi expressed the opinion that sales 5 and 6, being land in Alkimos and Dianella,

respectively, were most relevant to the subject land. Sale 5 disclosed an analysis rate of \$135.49 per square metre, whereas sale 6 disclosed an analysis rate of \$248.97 per square metre. Mr Ronchi considered that sale 6 'is the most comparable in location and attributes to the subject [land]'. He also expressed the opinion that 'the subject site's strategic inner city location, its proximity to major retail developments, infrastructure and services ... make this site a "prime" englobo residential site sought after by developers'. Mr Ronchi ultimately expressed the opinion, 'based on the most relevant sale no 6', and the 'valuer's art', that the value per square metre of the developable part of the subject land was \$150 per square metre as at 1 August 2006 and \$175 per square metre as at 1 August 2007.

102 The Tribunal considers that Mr Ronchi correctly applied the 'conventional', 'widely accepted', 'traditional' and 'principal method of valuing land'. As stated in the classic formulation of Sugerman J in *Best v Housing Commission of New South Wales* (1949) 17 LGR (NSW) 129 at 130, Mr Ronchi adopted:

[t]he correct approach ... to assign the subject land by comparison to its proper place in the scale of values disclosed by the sales proved.

103 Mr Ronchi was challenged by Mr Evans in relation to his assessment and adjustments for comparability purposes in relation to three of the englobo sales in terms of the size of the properties, their relative distance from the Perth central business district and the stage of the planning process for development that had been reached at the relevant point in time. Mr Ronchi was able to generally respond to each challenge and provide an adequate explanation for his analysis.

104 However, one aspect of Mr Ronchi's approach that was successfully challenged by Mr Evans was the discount rate which Mr Ronchi applied to reflect the holding cost for a developer while the developer obtained all necessary approvals to facilitate development over the four year planning lead-in time. Mr Ronchi adopted the 10 year bond rate applicable at the relevant date, namely, 5.67% on 1 August 2006 and 6.03% on 1 August 2007.

105 However, as Mr Kinnaird said, the holding cost for a developer should reflect the opportunity cost of a developer's money being tied up in a property for the relevant period. Mr Kinnaird explained that, for a developer, the opportunity cost is greater than the bond rate. Mr Kinnaird estimated that the 'real opportunity cost' for a developer is 2% - 3% higher

than the bond rate. Mr Ronchi agreed that 'the real cost to a developer is more than the bond rate, but it should be 2% more, not 3% more'.

106 The Tribunal finds, on the consensus in the valuation expert witness' evidence, that the real opportunity cost for a developer, and therefore the appropriate discount rate, is the 10 year bond rate plus 2%, that is, 7.67% as at 1 August 2006 and 8.03% as at 1 August 2007.

107 While the hypothetical development or *Turner* approach is also a recognised method of valuation, it has been the subject of an extraordinary amount of judicial criticism. In *ISPT Pty Ltd and Valuer General* [2007] WASAT 276; (2007) 59 SR (WA) 9, the Tribunal observed at [89] - [90] as follows:

In dealing with the hypothetical development approach, relied upon by Mr Collins, we consider it is not the correct and preferable approach to the valuation of the subject land for a range of reasons well known to valuers and dealt with in the authorities over a good period of time. As Cripps J said in the New South Wales Land and Environment Court in *Co-ordinated Resources Pty Ltd v Valuer-General* (1983) 27 The Valuer 779 at 780;

"Although this is a recognised method of valuation, its use, otherwise than for the purpose of valuing land suitable for subdivision which has to be valued in its unsubdivided state, has always been regarded as suspect. If the estimate of assumed improvement costs, gross rentals and outgoings are not accurate, the whole exercise leads to an unreliable result. A small difference in the rate of capitalisation from that assumed has significant consequences."

To a similar effect Byrne J in the Supreme Court of Victoria in *15 Lorimer Street Pty Ltd v Secretary of the Department of Infrastructure* (1997) 97 LGERA 239 at 252 observed:

"The weakness of the *Turner* approach is that it applies an apparently scientific formula to a great number of subjectively established variables. The operation of the formula is such that small variations to these variables can have a great impact upon the result: see *Turner v Minister of Public [Instruction]* [(1956) 95 CLR 245] (at 268) per Dixon CJ. This has caused valuation judges of great eminence and experience to warn against a too ready reliance upon this approach."

108 The unreliability of the hypothetical development or *Turner* method was demonstrated in this case by Ms Ide's challenge to key variables employed by Mr Kinnaird. Firstly, Mr Kinnaird assumed that only five lots would be sold in the hypothetical subdivision per month. However, it emerged during questioning by Ms Ide that research carried out by

Mr Kinnaird's firm in 2007 showed the typical rates of sale of lots per month range from five to 20 lots per month. Mr Ronchi referred to very strong sales at the Princeton Estate, elsewhere in the City of Stirling, of 3.25 lots per week in 2007. Given the evidence that emerged and the location of the subject land, the assumed variable of five lots per month is unrealistic. It would appear that a more realistic rate of sale per lot for the purposes of the hypothetical development method would be 12.5 lots per month.

109 Secondly, Mr Kinnaird said that an allowance of 25% should be made for Profit & Risk on the basis that 'the site has unique risks because of the need to rezone and because of the conservation issue'. However, the planning expert witnesses agreed that a rezoning and all other relevant approvals are likely to be obtained within the planning lead-in period. Furthermore, if, as found in relation to issue 4 above, a hypothetical vendor and purchaser as at the valuation dates in question would consider it likely that 55.44% of the site would be required to be set aside for conservation, the 'unique risks' identified by Mr Kinnaird would not be unique risks at all. A more realistic Profit & Risk allowance would be, as Mr Ronchi suggested, 20%.

110 RO Rost and HG Collins note in *Land Valuation and Compensation in Australia* (Australian Institute of Valuers Incorporated, 1981), at 139, that the hypothetical development method can 'serve as a check on values determined by direct comparison'. At the Tribunal's request, Mr Kinnaird revised his valuations based on the hypothetical development method with the following changes to variables:

- a) Planning lead-in time is 48 months, rather than 66 months) as found in relation to issue 5 above.
- b) Profit & Risk allowance is a more realistic 20% (rather than 25%).
- c) Rate of sale per lot is a more realistic 12.5 lots per month (rather than five lots per month).
- d) The area likely to be required to be set aside for conservation (not public open space) is 247,862.6 square metres or approximately 55.44% of the land as found in relation to issue 4 above.

- e) Area likely to be required to be reserved as firebreaks is 8,909.9 square metres or approximately 1.99% of the land as found in relation to issue 4 above.
- f) Total cost of offsets likely to be required is \$350,000 as found in relation to issue 4 above.

111 Mr Kinnaird's original valuations (on the basis of the Tribunal's answer in relation to issue 1 and assuming that a hypothetical vendor and purchaser as at the valuation dates would consider that 57% of the land would be required to be set aside for conservation) were relatively similar to the Tribunal's valuations based on the comparable sales method as determined in issue 7 below – unimproved value as at 1 August 2007 of \$24,070,000 (Mr Kinnaird)/\$24,100,000 (Tribunal) and gross rental value as at 1 August 2006 of \$1,095,000 (Mr Kinnaird)/\$1,050,000 (Tribunal). However, after substituting the changes to variables to reflect more realistic assumptions, Mr Kinnaird's valuations - unimproved value as at 1 August 2007 of \$33,190,000 and gross rental value as at 1 August 2006 of \$1,477,000 - were significantly greater than valuations based on the comparable sales method. This exercise has only served to highlight the unreliability and weakness of the hypothetical development approach.

112 The Tribunal, therefore, prefers the comparable sales or market comparison method over the hypothetical sales or *Turner* method of valuation in the circumstances of this case.

Issue 7 - What was the unimproved value as at 1 August 2007 and the gross rental value as at 1 August 2006 of the land?

113 Having regard to the Tribunal's findings in relation to issues 1, 4, 5 and 6 above, the correct and preferable decision in this case involves the determination of unimproved value as at 1 August 2007 and gross rental value as at 1 August 2006:

- a) on the basis that the highest and best use of the land is Residential R20; and
- b) applying the comparable sales approach employed by Mr Ronchi, but adjusted:
 - i) to increase the proportion of the land that a hypothetical vendor and purchaser would consider as likely to be set aside for conservation

(not public open space) and firebreaks to 57.43%;
and

- ii) to increase the discount rate to 2% over the 10 year bond rate to reflect the real opportunity cost of tying money up in development.

114 At the Tribunal's direction, Mr Ronchi carried out these valuations with these adjustments and arrived at the following values:

Unimproved value as at 1 August 2007

Value derived from sales evidence

(190,327.5 square metres @ \$175 per square metre) \$33,289,812

less onsite offset cost \$350,000

\$32,939,812

Defer \$32,939,812 for four years @ 8.06% \$24,158,025

Rounded to **\$24,100,000**

Gross rental value as at 1 August 2006

Value derived from sales evidence

(190,327.5 square metres @ \$150 per square metre) \$28,534,125

less onsite offset cost \$350,000

\$28,184,125

Defer \$28,184,125 for four years @ 7.67% \$21,025,949

Rounded to \$21,000,000

5% of the capital value discloses a gross rental value of **\$1,050,000**

Conclusion

115 It follows that the application for review should be allowed, the aluer General's determination of unimproved value of \$43,000,000 as at 1 August 2007 and gross rental value of \$1,800,000 as at August 2006 in respect of Lots 101, 102 and 1 should be set aside and the following valuations should be substituted:

- a) Unimproved value as at 1 August 2007 - \$24,100,000.
- b) Gross rental value as at 1 August 2006 - \$1,050,000.

Orders

116

The Tribunal makes the following orders:

1. The application for review is allowed.
2. The valuations by the respondent of unimproved value as at 1 August 2007 and gross rental value as at 1 August 2006 in respect of Lot 101 on Plan 55206 (Certificate of Title Volume 2671 Folio 271), Lot 102 on Plan 55206 (Certificate of Title Volume 2671 Folio 272) and Lot 1 on Diagram 9162 (Certificate of Title Volume 2624 Folio 437) are set aside and the following valuations are substituted in their place:
 - a) Unimproved value as at 1 August 2007
- \$24,100,000.
 - b) Gross rental value as at 1 August 2006
- \$1,050,000.

I certify that this and the preceding [116] paragraphs comprise the reasons for decision of the State Administrative Tribunal.

MR D R PARRY, SENIOR MEMBER