Land and Environment Court

New South Wales

Medium Neutral Citation:	**Tempe Recreation (D.500215 & D.1000502) Reserve Trust v Sydney Water Corporation [2013] NSWLEC 221**
Hearing dates:	9, 10, 11, 12, 13, 16 December 2013
Decision date:	24 December 2013
Jurisdiction:	Class 3
Before:	Biscoe J
Decision:	(1) Determination that the compensation payable to the applicant in respect of the compulsory acquisition on 2 December 2011 by the respondent of easements over the Tempe Reserve is $106,000. (2) The respondent is to pay the applicant's costs. (3) The exhibits may be returned.
Catchwords:	COMPULSORY ACQUISITION - determination of amount of compensation payable to a reserve trust having regard only to the matters in s 106A(3) of Crown Lands Act 1989 in respect of compulsory acquisition of easements over a reserve for purposes of Sydney Water Act 1994 - easements utilised for a water pipeline from Kurnell desalination plant - interpretation of easements - construction and application of s 106A.
Legislation Cited:	Crown Lands Act 1989 ss s 92(1), s 92(2)(5), 106A Crown Lands Amendment (Compensation) Act 2001 Land Acquisition (Just Terms Compensation) Act 1991 ss 3(1)(b), 4, 54(1), 55, 59(f), 66 Land and Environment Court Act 1979 s 37(1) Sydney Water Act 1994 Draft Marrickville Local Environmental Plan 2011 New South Wales Legislative Assembly, Parliamentary Debates (Hansard), 17 November 2000 at 10275 New South Wales Legislative Council, Parliamentary

	Debates (Hansard), 27 March 2001 at 12581
Cases Cited:	Ashfield Municipal Council v Roads and Traffic Authority of New South Wales [2001] NSWCA 370, (2001) 117 LGERA 203 Besmaw Pty Ltd v Sydney Water Corporation [2001] NSWLEC 15, (2001) 113 LGERA 246 Castle Constructions Pty Ltd v Sahab Holdings Pty Ltd [2013] HCA 11, (2013) 247 CLR 149 George D Angus Pty Limited v Health Administration Corporation [2013] NSWLEC 212. Marrickville Council v Sydney Water Corporation [2013] NSWLEC 222 Marshall v Director-General Department of Transport [2001] HCA 37, (2001) 205 CLR 603 Mir Bros Unit Constructions Pty Ltd v Roads and Traffic Authority of New South Wales [2006] NSWCA 314 Monis v The Queen [2013] HCA 4, (2013) 295 ALR 259 Prince Alfred Park Reserve Trust as Trustee of the Prince Alfred Park v State Rail Authority of New South Wales (1997) 96 LGERA 75 Project Blue Sky Inc v Australian Broadcasting Authority [1998] HCA 28, (1998) 194 CLR 355 Queensland Premier Mines v French Pty Ltd [2007] HCA 53, (2007) 235 CLR 81 Roads and Traffic Authority of New South Wales v Heywood [2002] NSWCA 99, (2002) 54 NSWLR 289 Roads and Traffic Authority of New South Wales v Peak [2007] NSWCA 66 Sertari Pty Ltd v Nirimba Developments Pty Ltd [2007] NSWCA 324 Vilro Pty Ltd v Roads and Traffic Authority (NSW) [2010] NSWLEC 234, (2010) 179 LGERA 47 Westfield Management Ltd v Perpetual Trustee Co Ltd [2007] HCA 45, (2007) 233 CLR 528
Category:	Principal judgment
Parties:	Tempe Recreation (D.500215 & D.1000502) Reserve Trust (Applicant) Sydney Water Corporation (Respondent)
Representation:	COUNSEL: A Galasso SC and M Seymour (Applicant) R P L Lancaster SC and N Zerial (Respondent) SOLICITORS: Marrickville Council (Applicant) King & Wood Mallesons (Respondent)

File Number(s): 30915/12

JUDGMENT

INTRODUCTION

1 This is a claim for determination of the amount of compensation payable to a reserve trust under s 106A of the *Crown Lands Act* 1989 in respect of the compulsory acquisition of easements over a reserve. There has been no previous judicial consideration of s 106A since it was introduced in 2001.

2 The applicant, Tempe Recreation (D.500215 & D.1000502) Reserve Trust (**the Trust**), claims about $5 million, including $6,000 for disturbance. The claim is under s 106A(3)(b) or alternatively (in relation to improvements) under s 106A(3)(a) or (c). The acquiring authority, Sydney Water Corporation (**SW**), contends that only the $6,000 for disturbance is payable. SW has utilised the acquired easements, which traverse Tempe Reserve, to construct a 1.8 metre diameter water supply pipeline. However, the gazetted purpose of the acquisition was not so limited, being "for the purpose of the *Sydney Water Act*

1994".

3 I determine, for the reasons set out below, that the amount of compensation payable to the Trust is $106,000.

4 Annexed hereto is an aerial photograph showing Tempe Reserve marked with the four acquired easements, designated A, B, C and D. They run the north-south length of Tempe Reserve and are mostly roughly parallel with and about 30 to 40 metres west of the Alexandra Canal. Four soccer and two rugby fields and cricket pitches are on the western side of Easements B and C. The building to the east of Easement B (just before its junction with Easement C) is a public amenities block. Further south, Easement B bisects a childrens' playground, a gazebo picnic area, a road accessing a public carpark and paths, and cuts across a small corner of the nearest playing field. The road leads to the east of those easements and thence north before crossing Easement C close to the north-east corner of Tempe Reserve. The building to the south-west below the carpark is an indoor recreation area, on one side of which are netball courts. The white line circling Tempe Reserve is a cycling/pedestrian path, which connects to the Cooks River cycle/pedestrian network. There was, and remains, capacity to extend the cycleway along the Alexandra Canal to connect to pathways leading to the inner city. To the north of Tempe Reserve in the photograph is adjoining open space land owned by Marrickville Council showing further easements designated A, E and D, that SW also compulsorily acquired and which the pipeline traverses. Marrickville Council's claim for compensation for the latter acquisition is the subject of separate proceedings brought by it against SW heard with these proceedings, which is the subject of a separate judgment: *Marrickville Council v Sydney Water Corporation* [2013] NSWLEC 222.

5 Memorandum AG 277407S (**the Memorandum**) contains the terms of Easements A, B, C and D. For convenience, in this judgment when referring to the rights and powers of the beneficiaries of the easements I will simply refer to SW. The proper interpretation of Easements B and C is contested and is critical to the Trust's claims. The Trust submits, and SW disputes, that on their proper interpretation Easements B and C permit SW (and successors) to construct *above* ground along their whole length a large, permanent barrier, such as a pipeline of the 1.8 metre diameter type currently below ground, thus disrupting the use of and severing Tempe Reserve.

6 If the Trust's interpretation is incorrect, that is if the works SW is entitled to construct cannot substantially project above ground, then the quantum of the Trust's claim is modest, for there can be no permanent above ground works nor can any improvements be affected, and the claim is based only on s 106A(3)(b). It is reduced to taking into account things like the existing and potential future concrete lids of maintenance and access pits at ground level;

potential future works at, on or below ground for the purpose of the *Sydney Water Act* involving temporary loss of public open space above ground while they are carried out; and the fact that Easement B cuts across a small corner of a playing field. If the Trust's interpretation is incorrect, then although that is destructive of the great bulk of its claim to compensation, it will be because the Court has decided that SW cannot do the disruptive above ground things that the Trust contends SW can do.

7 In hearing these proceedings, I have been assisted by Acting Commissioner Cowell under s 37(1) of the *Land and Environment Court Act* 1979.

SECTION 106A CROWN LANDS ACT 1989

4. Although the acquisition occurred under the *Land Acquisition (Just Terms Compensation) Act* 1991 (**Just Terms Act**), and hence the Court would ordinarily determine the compensation payable having regard only to the matters in s 55 of that Act, compensation in the case of a reserve trust is instead required to be determined having regard only to the very different matters in s 106A of the *Crown Lands Act* 1989. Section 106A relevantly provides:

> **106A Limits on compensation payable to reserve trusts**
>
> (1) This section applies:
>
> (a) to the determination of the amount of compensation payable under Part 3 of the *Land Acquisition (Just Terms Compensation) Act 1991* in respect of the compulsory acquisition of the whole or part of a reserve described in subsection (2), and
>
> ...
>
> (2) The following reserves are described by this subsection:
>
> (a) a reserve in respect of which a reserve trust has been constituted, whether under this Part or by operation of Schedule 8,
>
> ...
>
> other than a reserve that comprises dedicated land for which a Crown grant was granted to the reserve trust or a predecessor in title before the commencement of the *Crown Lands (Land Titles) Amendment Act 1980*.
>
> (3) Despite section 55 of the *Land Acquisition (Just Terms Compensation) Act 1991*, in determining the amount of compensation, if any, payable to a reserve trust, regard is to be had to the following matters only (as assessed in accordance with this section):
>
> (a) the value to the reserve trust of any **improvements** (including structures) **erected or carried out by the trust on the land** being acquired or vested, or over which the easement is vested, on the date the land is acquired,
>
> (b) **the amount of any loss attributable to the reduction in public benefit from any loss of public open space that arises from the acquisition or vesting of the land**,
>
> (c) the amount of any reduction in the value to the trust, as at the date the land is acquired or vests, or the easement vests, of any other **improvements** (including structures) **erected or carried out by the trust on other land** that is caused by the land acquired being **severed** from other land of the trust,
>
> (d) the cost to the trust of acquiring additional land having environmental benefits that are comparable to the land being acquired or vested,

(e) any loss attributable to disturbance (within the meaning of section 59 of that Act), other than loss arising from the termination of a lease or licence over the whole or part of the land being acquired.

(4) For the purposes of a determination of an amount of compensation:

(a) the Crown is taken to be the holder in fee simple of the land being acquired or vested, or over which the easement is vested, and

(b) section 56 (2) of the *Land Acquisition (Just Terms Compensation) Act 1991* applies as if the value of improvements (including structures) erected or carried out by the trust on the land is the market value of the trust's interest in the land.

...

(emphasis added)

8 Section 106A(2)(a) applies to the Trust and the exception thereto is inapplicable. Consequently, s 106A(3) applies to the determination of the Trust's compensation claim. By s 106A(4)(a), the Crown is taken to be the holder in fee simple of the land being acquired, or over which the easements are vested. The Crown (the State of New South Wales) has already been compensated for the acquisition of its fee simple interest.

ISSUES

9 The main issues are:

(1) What is the correct interpretation of Easements B and C? In particular, do they, as the Trust contends, allow permanent works to be built above ground which could result in a substantial physical and visual barrier between the eastern (Canal) side and the much larger western (playing fields) side of Tempe Reserve, such as a pipeline of the 1.8 metre diameter type presently below the surface, so as to disrupt the use of and sever Tempe Reserve?

(2) What is the proper construction and application of s 106A(3)(b)? Sub-issues include:

(a) Does it apply to the acquisition of an easement?

(b) Is there "any loss attributable to the reduction in public benefit from any loss of public open space"?

(c) If so, how should compensation be assessed for that loss, and in what amount?

(d) What application (if any) do the principles stated in *Besmaw Pty Ltd v Sydney Water Corporation* [2001] NSWLEC 15, (2001) 113 LGERA 246 have to compensation under s 106A? In particular, do they require compensation for fanciful or improbable uses of compulsorily acquired easements (SW would so describe the potential future uses on which the Trust relies)?

(e) If a market value approach to compensation should be (as the Trust contends) adopted:

(i) should a piecemeal approach be adopted?

(ii) what comparable sales should be taken into account?

(iii) what are the appropriate adjustments that should be made to those sales?

(iv) should market value be determined on the basis that the acquisitions were of easements directly traversing a small parcel of land but affecting a larger parcel of land?

(f) Were any of the improvements for which the Trust claims not erected by the Trust and, if so, can the amount of any loss attributable to the reduction in public benefit include compensation therefor?

(3) What is the correct interpretation and application of s 106A(3)(a) and (c), on which the Trust relies for its alternative claim in relation to improvements? Sub-issues include:

(a) ascertainment of whether any of the improvements were "erected or carried out by the trust";

(b) in relation to s 106A(3)(c), whether on the Trust's interpretation of Easements B and C, the land acquired could be severed from other land of the Trust.

10 If the Trust's construction of the easements is not accepted, then most of the other issues or sub-issues listed above do not arise in its modest residual claim.

BACKGROUND

11 The proceedings are an appeal by the Trust against rejection by SW of a claim for compensation under the *Land Acquisition (Just Terms Compensation) Act* 1991 (**Just Terms Act**) and are brought pursuant to s 66.

12 The Trust is a reserve trust established under s 92(1) of the *Crown Lands Act*. A statutory corporation, it is charged with the care, control and management of the lands identified in notices published in the Gazette on 18 December 1907 and 21 August 1931, known as "Tempe Reserve": s 92(2), (5). Marrickville Council is the reserve trust manager of the Trust: s 92(6A).

13 A reserve trust has an interest in acquired land for the purposes of s 4 of the *Just Terms Act*: *Prince Alfred Park Reserve Trust as Trustee of the Prince Alfred Park v State Rail Authority of New South Wales* (1997) 96 LGERA 75 at 81; *Ashfield Municipal Council v Roads and Traffic Authority of New South Wales*

[2001] NSWCA 370, (2001) 117 LGERA 203 at [90].

14 In 2008 SW constructed a 17 km desalination water supply pipeline from the desalination plant at Kurnell across Botany Bay to connect to Sydney's water supply at Erskineville. The pipeline, 1.8 metres in diameter, in part traverses Tempe Reserve and the adjoining Marrickville Council land to the north.

15 On 11 November 2011 SW compulsorily acquired easements over the Marrickville Council land adjoining Tempe Reserve.

16 On 2 December 2011 (date of acquisition), after pipeline construction had been completed, SW compulsorily acquired four different types of easements, designated A, B, C and D, "for the purpose of the Sydney Water Act 1994" over the eastern part of Tempe Reserve, approximately 30 to 40 metres from, and mostly approximately parallel with, Alexandra Canal. The terms of each easement differ and are in schedules to the Memorandum. Easement A is a "Land in Stratum", "Water Supply Works" below ground easement 6 metres wide with an area of 35.2 square metres, whose terms are in Schedule 3 of the Memorandum. Easement B is a "Trenched Works" easement 8 metres wide with an area 2,143 square metres, whose terms are in Schedule 4. Easement C is a "Works Mounded" easement 9 metres wide with an area of 610 square metres, whose terms are in Schedule 2. Easement D is a "Works" easement 8 metres wide with an area of 288.7 square metres whose terms are in Schedule 1.

17 The pipeline has since been transferred by SW to a third party.

18 Tempe Reserve is the southern portion of a large area of public open space adjacent to the confluence of Cooks River and the Alexandra Canal. The parts of the Tempe Reserve over which the easements were acquired are Lots 7021 and 7022 in DP 1059864. Together they form the substantial proportion of the Tempe Reserve.

19 At the date of acquisition, Tempe Reserve was developed and used, as it still is, for active and passive recreation, as described above at [4].

20 In order to construct the pipeline, SW dismantled the childrens' playground and, once construction was completed, reinstalled and restored it to its original condition.

21 The surrounding area is characterized by a mix of open space, industrial and residential land uses. To the north east is an off-leash dog park, a golfing range and, further north, an industrial container park. To the south and south-west is the Cooks River. To the south-east is Alexandra Canal, which is contaminated. Across the Canal is Sydney Airport.

22 At the date of acquisition:

(a) the pipeline had been constructed entirely below ground, except that the part of the pipeline traversing Easement C was entirely below a landscaped mound, and the part traversing Easement D was entirely below a backfilled area behind a retaining wall on sloping ground in the north-east corner of Tempe Reserve and separated from the rest of Tempe Reserve by the road to which I have referred.

(b) the pipeline entered Tempe Reserve at the southern end from under the Cooks River, and exited onto the neighbouring land to the north owned by Marrickville Council, which it traversed above ground mostly parallel with and close to the Canal;

(c) the only visible evidence of the pipeline on Tempe Reserve are a cluster of concrete slabs on or adjacent to Easement B and just north-east of the public carpark. They comprise three concrete slabs, about 2.5 square metres, with some valves, a scour and some smaller slabs nearby, and a small box at ground level.

23 As for zoning, at the date of acquisition:

(a) Tempe Reserve was zoned in part Open Space 6(a) and partly reserved for Arterial Road 9(c) under the Marrickville Local Environmental Plan 2001;

(b) the site of the Acquired Easements was zoned Open Space 6(a);

(c) the draft Marrickville Local Environmental Plan 2011 was certain and imminent, which would rezone Tempe Reserve (and the site of the Acquired Easements) as RE1 Public Recreation. That part of Tempe Reserve previously zoned Arterial Road was to be reserved as a Classified road.

INTERPRETATION OF THE TERMS OF THE EASEMENTS

24 As noted earlier, the Trust's claim largely collapses unless the Court upholds its proposed interpretation of the terms of Easements B and C in, respectively, Schedules 4 and 2 of the Memorandum.

25 The Trust's proposed interpretation of the terms of Easements B and C is that they allow permanent works, such as a large pipeline, to be built above the surface, which could result in a substantial physical and visual barrier between the eastern (Canal) side and the much larger western (playing fields) side of Tempe Reserve. SW's proposed interpretation of Easements B and C is that nothing can be built above the surface.

26 Easements A and D have no significant implications for the likely future use of their small areas of land or the public benefit. There is no dispute about the terms of Easement A, under Schedule 3 of the Memorandum. They only permit works in stratum below ground level. Access over the small surface area traversed by Easement A remains unchanged. Easement D, under Schedule 1 of the Memorandum, expressly permits works above ground. It only relates to the small north-eastern corner of Tempe Reserve, which is cut off by the road from the rest of Tempe Reserve. There the elevated pipeline has been buried by backfilling behind a retaining wall.

27 On the Trust's interpretation of Easements B and C, the reduction in public benefit arising from a potential permanent physical and visual barrier between the eastern and western sides, includes: (a) loss in visual amenity across Tempe Reserve; (b) loss of public access between the western side and the eastern side, other than a circuitous one over Easement A in the far south of Tempe Reserve (since Easement A is a stratum easement below ground); and (c) bisection of the childrens' playground, picnic gazebo area, road accessing the public carpark, and other pathways. On SW's proposed interpretation of Easements B and C, none of this can eventuate.

28 If one looks at Tempe Reserve today, the pipeline in all the easements is underground and no significant reduction in public benefit is discernible. Apart from Easement D where there is a concrete retaining wall in front of the buried pipeline, only two things have changed. First, there is a cluster of concrete slabs at ground level over maintenance and repair pits on (or adjacent to) Easement B. Secondly , there is a grassed and not unattractive mound on Easement C, which covers the pipeline in that location. However, SW has rights under the easements to enter and carry out works, maintenance and repairs in the future. SW submits that the present appearance substantially reflects the extent of its realistic above ground rights except for access for maintenance or repair purposes, which will be limited.

29 The Trust's interpretation of the terms of Easements B and C is the basis of the conclusions of its town planner Mr Paul Grech and its valuer Mr Terry Dundas, and the fundamental reason for their respective disagreements with SW's town planner Mr Harvey Sanders and valuer Mr David Lunney.

30 It is on the basis of the Trust's interpretation of the terms of Easements B and C that Mr Grech concludes in his statement of evidence, at 15.9 and 15.10:

> Consequently, in my view, the subject easements would have significant adverse impacts on the public benefits associated with the existing open space and recreational facilities within Tempe Reserve as follows:
>
> a. A reduction in accessibility within and through the reserve.

b. Substantial impacts on visual amenity, particularly due to the loss of views across the reserve to and from Alexandra Canal and the land on the opposite side of the Canal.

c. An impact on existing recreational facilities and associated infrastructure in particular, picnic facilities, regional scale playground, vehicular access road and shared cycleway/pedestrian path, and depletion of usability of the areas that they currently occupy. The impact would necessitate the relocation, significant down-sizing, or loss of these facilities.

d. A reduction in the potential and incentive to use the land for associated facilities such as the ecological enhancement of the corridor adjacent the Alexandra Canal waterway.

e. Potential impact on the heritage significance of Alexandra Canal due to a change to the visual context of the canal and a loss of views to the canal from across the reserve.

f. A loss of indirect public benefits associated with open space including improved health of the community, environmental benefits associated with providing large 'green space' and educational benefits associated with accessibility to the historic Alexandra Canal.

A loss of the available open space land, together with a substantial reduction in its usability, could not be readily replaced within other parts of Tempe Reserve without a further loss of existing recreational opportunities and facilities.

31 In contrast, on the basis of the SW interpretation of the terms of Easements B and C, and the evidence that there is limited need for further operational and maintenance work from an engineer Mr Marc Roberts, (admitted subject to relevance), SW's town planner Mr Sanders concludes in his statement of evidence, at [6.1]:

> There has been no physical loss of land in or apparent restriction on the use of the site of the acquired easements or the subject Lots as a result of the construction of the pipeline within the acquired easements (apart from where the cluster of concrete slabs are situated near the north-eastern corner of the carpark).

32 In his joint Town Planning report with Mr Sanders, Mr Grech says that if the Trust's interpretation of the terms of easements and the consequent effect of creating a permanent and physical barrier only applied to Easement D, then he would agree with the opinion and conclusions of Mr Sanders in his statement of evidence. Their joint report states, at [2.6] - [2.9]:

> 2.6 The experts note that their disagreements arise in the context of the assumptions that Mr Grech notes in paragraph 5.3 of his Statement of Evidence that he has been instructed to make in relation to the effect of the terms of the easements. As Mr Grech further explained and clarified during the course of the Joint Conference, he has been asked to assess the implications of easements "B", "C" and "D" on the basis of Council's legal interpretation of the restrictions of the easements and not what the easements have been used for to date. Mr Grech is advised that this follows the authority established in *Besmaw Pty Ltd v Sydney Water Corporation* [2001] NSWLEC 15....

2.7 While Mr Grech does not understand it is necessary, he discussed what could physically occur that would reflect the assumption he was required to make, to assist in understanding how Sydney Water or any future benefactor of the easements might exercise the rights compulsorily acquired. Consequently, Mr Grech gave as an example that the easements could allow for the installation of one or an unlimited number of pipelines, one above the other, upon the ground along the alignment of those three easements such that these structures would form a permanent and substantial physical and visual barrier between that part of the Tempe Reserve that lies to the west of those easements and that part of the Tempe Reserve that lies to their east. Mr Grech acknowledges that access between the western and eastern parts of the Reserve would be available over the land traversed by easement "A".

2.8 Mr Grech acknowledges that if Council's interpretation of the terms of the easements and the consequent effect of creating a permanent and physical barrier as described above only applied to easement "D" then this would have a very minor effect on the Tempe Reserve. Mr Sanders agrees.

2.9. Mr Sanders' understanding of the terms of easements "A", "B", and "C" are such that they would not allow for the construction of structures above the ground and that they would not place any restrictions at all on movement between that part of the Reserve that lies to their west and that part that lies to their east. If this understanding of the effect of the terms of the easements of Mr Sanders' is correct, then Mr Grech would agree with the opinions expressed and the conclusions drawn by Mr Sanders in his Statement of Evidence.

33 On the assumption that the Trust's construction is correct, its valuer Mr Dundas calculates the depreciating effect of the easements. As to the land within the easements, he assumes that SW's permitted activities under the terms of Easements B and C would wholly frustrate the public benefit facilitated by those lands, and therefore he regards those lands as sterilised. As to the land outside the easements, he regards it as injuriously affected in terms of public benefit. Based on two nearby residential sales, he derives a rate of $800 per square metre for the unencumbered value of Tempe Reserve, and adopts it as reflecting the sterilising effect of the terms of the easements. As to the land beyond the easements, he reduces that rate (determined at $600 per square metre) by 25 per cent. In the result, he estimates those two components of compensation as follows:

Area within Easements B and C 2,854.6 m2 x $800 =	$2,283,680
Say	$2,280,000
Area between Easements B and C and the Canal 12,000 m2 x $600/m2 @ 25 %	$1,800,000

34 To this, again on the basis of the Trust's interpretation, the Trust adds under s 106A3(b) or alternatively (a) or (c), a claim in respect of improvements. They comprise the amenities building located between Easement B and the Canal; the road located between Easements B and C and the Canal; and the childrens' playground, gazebo picnic facilities, road, paths, turf and shrubs

bisected by Easement B. The claim in respect of improvements is pleaded in a complicated way, reflecting some modification of evidence by quantity surveyors, and on alternative bases depending on whether full replacement would be required or something minimal. At this point, it is sufficient to say that the pleaded claim in respect of improvements is for alternative amounts varying between $422,877 and $1,061,276. As noted earlier, there is also an agreed claim for disturbance of $6,000.

35 In his joint report with Mr Lunney, Mr Dundas acknowledges the critical importance to assessment of compensation of the Trust's interpretation of the terms of the easement as follows, at [9] - [10]:

> Mr Lunney has expressed the opinion in his Statement of Evidence, that no compensation is payable to the Reserve Trustee. Mr Dundas would be in general agreement with the conclusions reached by Mr Lunney if and only if, the Court was to make the finding that the easement terms did not permit the construction of any pipes or other infrastructure *on or upon* the surface of the land such that the infrastructure would render the land incapable or less suitable for its current use as public open space. In this situation Mr Dundas considers that there may be a small amount of compensation payable to the Reserve Trust, perhaps $100,000 or so, to reflect the fact that there now is a "*blot on title"* which is a disadvantage
>
> Mr Lunney has some difficulty understanding how the market value of the Reserve Trustee's interest could be significantly diminished by reason of a "*blot*" on the title of the land. The "*blot on title*' affects the owner of the fee simple interest more so than the owner of the limited and weak trustee's interest.

36 Mr Dundas' "blot on title" is not an appropriate description to employ under s 106A(3) since the Crown, not the Trust, is the owner of Tempe Reserve. However, putting aside that label, his evaluation is in point.

37 Mr Lunney did not carry out a valuation based on the Trust's interpretation. Nor did he assess compensation under s 106A(3). On the basis of SW's interpretation of the terms of Easements B and C, Mr Lunney assessed compensation only under the *Just Terms Act*. That is because until the trial, when it abandoned the contention, SW contended that compensation should be assessed under the *Just Terms* Act, not under s 106A(3) of the *Crown Lands Act*. Mr Lunney concludes that the market value of the Trust's interest is identical in the before and after valuation scenarios. Accordingly, he opines that no compensation is payable to the Trust, other than for the agreed disturbance costs of $6,000. In reaching that conclusion, he accepts the evidence of Mr Roberts that any localised repair (whilst unlikely to be needed in the short to medium term) would not require restriction of the entire length of the easements but would be local to the location of a leak or known defect.

38 Mr Dundas considers that the market rate for Tempe Reserve as a whole (Lots 7021 and 7022) is $390 per square metre. Mr Lunney accepts $375 per square metre.

39 On the Trust's interpretation of Easements B and C, Mr Dundas assesses compensation for loss of public benefit under s 106A(3)(b) by analogy with

compensation for the market value of the fee simple land. That is because he can find nothing that would otherwise give him any guidance as to assessing the value of the public benefit, it never having been done before. The only alternative he can think of is to assess the cost of buying equivalent land in the immediate area. If Mr Dundas' market value analogy is appropriate, then there is disagreement between the valuers as to what sales are comparable and what adjustments should be made to comparable sales and as to Mr Dundas' piecemeal approach to valuation. This is all irrelevant if the Trust's interpretation of Easements B and C is incorrect.

40 Mr Dundas accepts, and I agree, that to date there has been no loss of public open space on Tempe Reserve and, therefore, no reduction to date in public benefit within the terms of s 106A(3)(b). However, as to the future he takes into account the rights acquired under the easements (on the Trust's interpretation) whenever they might be exercised.

41 In my opinion, a registered easement is construed by reference to its registered terms and not by reference to extrinsic material, except (it seems) for the physical characteristics of the dominant and servient tenements at the time of creation of the easements (or to make sense of that which the Register identifies eg surveying terms and abbreviations): *Westfield Management Ltd v Perpetual Trustee Co Ltd* [2007] HCA 45, (2007) 233 CLR 528 at [5], [37] - [41]; *Sertari Pty Ltd v Nirimba Developments Pty Ltd* [2007] NSWCA 324 at [15] - [16]; *Hare v Van Brugge* [2013] NSWCA 74, (2013) 16 BPR 31,655 at [15] - [18] *Queensland Premier Mines v French Pty Ltd* [2007] HCA 53, (2007) 235 CLR 81 at [14]; *Castle Constructions Pty Ltd v Sahab Holdings Pty Ltd* [2013] HCA 11, (2013) 247 CLR 149 at [20].

42 The construction inquiry as to the terms of an easement is as to what the dominant owner could possibly do in the exercise of its rights: *Besmaw Pty Ltd v Sydney Water Corporation* [2001] NSWLEC 15, (2001) 113 LGERA 246 at [22], [56] - [57], [65] - [67], [77] - [78]; upheld on appeal *Sydney Water Corporation v Besmaw Pty Ltd* [2002] NSWCA 147; cited without disapproval in *Roads and Traffic Authority of New South Wales v Peak* [2007] NSWCA 66 at [63] - [65]; applied in *Chino Pty Ltd v Transport Infrastructure Development Corporation* [2006] NSWLEC 768, (2006) 153 LGERA 136 at [74] - [85] and *Vilro Pty Ltd v Roads and Traffic Authority (NSW)* [2010] NSWLEC 234, (2010) 179 LGERA 47 at [208] - [211]. *Besmaw* bears some comparison with the present case. In *Besmaw*, SW compulsorily acquired an easement for sewage purposes and this Court determined the compensation. The evidence suggested that the pipeline had already been laid within the easement and that the pipeline had a life expectancy of 50 years without serious failure requiring maintenance: at [14]. Besmaw complained that SW's rights enabled it in the future to deny Besmaw physical access across the land affected by

the easement. Besmaw therefore claimed compensation comprising disturbance costs under s 59(f) of the *Just Terms Act* for the cost to which it would be put in the event that the full entitlements acquired pursuant to the easement were ever exercised. SW unsuccessfully contended that it was unlikely to act in accordance with the rights asserted by Besmaw to have been acquired, other than in the most temporary of situations during maintenance etc; that the Court should conclude that the access difficulty anticipated by Besmaw would not eventuate; and therefore no compensation was payable for new access: at [20]. Sheahan J awarded compensation of over $1.5 million for access costs under s 59(f), holding at [56] - [57]:

> The rights taken away from the landowner must be measured, not by what the acquiring authority at any given time might plan to do, or what its policies are, or what assurances or understandings may be given or communicated about the way its rights may be exercised, but by what its enabling instrument allows it to do.
>
> Easements acquired compulsorily must be construed in the same manner as those which have been freely granted, and the courts will infer such ancillary rights as are reasonably necessary to the reasonable exercise and enjoyment of the rights expressly granted.

43 SW's appeal to the Court of Appeal was dismissed: *Sydney Water Corporation v Besmaw Pty Ltd* [2002] NSWCA 147. Meagher JA (Hodgson and Ipp JJA agreeing) said at [5] and [7]:

> However, what does upset Besmaw is that Sydney Water has the right to deny Besmaw access to Captain Cook Drive. If it exercised some of the powers contained in Memorandum 053501, it could undoubtedly do so. ...it ill behoves Sydney Water to keep repeating that the rights to block Besmaw's access which it refuses to disclaim are merely theoretical. In argument, ...senior counsel for Besmaw, pointed to the example of constructing and laying a new sewage line above ground along the length of the easement, as a possible peril for his client.
>
> ...
>
> It follows, in my view, that the threat feared by Besmaw does exist; and that, although it may be remote, it is neither theoretical nor hypothetical.

44 Accordingly, in my opinion, SW's evidence of the actions, intentions and expectations of SW (and successors) since or before the acquisition is irrelevant to the construction issue. Whether any of such evidence is relevant to whether the risk of a particular future exercise of a right is "remote" (referred to in *Besmaw* on appeal), and whether remoteness bears on the quantum of compensation under s 106A(3), are different issues. But even those different issues have to be considered in the context that SW has transferred the pipeline, and that the easements were acquired for the wider purpose of the *Sydney Water Act*, which may call up different requirements over time. Such evidence, which (if relevant) I accept, includes the following:

(a) Mr Marc Roberts, an engineer, says that the pipeline has been designed to minimise the potential need for maintenance such that, when it is damaged by a third party, it is not expected that pipeline repair will be required in the short to medium term, and localised

repairs would not require restrictions to the entire length of the easements on Tempe Reserve.

(b) Ms Susan Trousdale, an SW officer, says that the Kurnell desalination plant's current capacity is 250 megalitres per day which is around 15 per cent of Sydney's water demand and the pipeline has been signed to take 500 megalitres per day. The purpose of this evidence is to show that there will never be a need to install more or larger pipes in Tempe Reserve. I observe, however, that it does not take account of the possible expansion of the Kurnell plant through the acquisition of land adjoining it, nor the possible establishment of another desalination plant or plants, nor that the subject easements were legally acquired not merely for the purpose of the existing desalination plant but for the wider purposes of the *Sydney Water Act*, in perpetuity.

(c) Mr Frank Kanak, an SW officer, says that the desalination pipeline has been constructed using superior technology, and is likely to require far less maintenance and less frequent maintenance and inspection than other pipelines; and that repairs or maintenance would not require construction of any permanent physical structures or above-ground barriers.

45 The Memorandum contains the terms of Easements A, B, C and D. In interpreting the terms of the controversial Easements B and C, the different terms of Easements D and A provide context and cast light.

46 The Memorandum includes definitions of "Land in Stratum", "Water Supply Works", "Works", "Works (Mounded)" and "Works (Trenched)". The Memorandum contains four schedules. The scheme of each schedule is that cl 1 provides for what SW may do, cl 2 provides for what SW must do, and cl 3 provides for what the registered proprietor must not do. Easement A is a "Land in Stratum", "Water Supply Works" easement and has the terms in Schedule 3. Easement B is a "Works (Trenched)" easement and has the terms in Schedule 4. Easement C is a "Works (Mounded)" easement and has the terms in Schedule 2. Easement D is a "Works" easement and has the terms in Schedule 1.

47 Easement D is an above-ground easement in the north-eastern corner of Tempe Reserve. Schedule 1 of the Memorandum containing its terms is titled "Provisions of Easement for Water Supply Purposes (Aqueducts, Inverted Syphons and other *aboveground* structures)" (emphasis added). Clause 1 of Schedule 1 provides that SW may construct, operate or carry out any "Works". Significantly, "Works" are defined to mean works "situated upon, *above* or below *the surface* of the Land" (emphasis added).

48 In contrast:

(a) Under Easement B, Schedule 4 permits "Works (Trenched)", which are defined to mean "infrastructure works used for water supply purposes situated at, upon, on or below *but not above the surface of* the Land" (emphasis added).

(b) Under Easement C, Schedule 2 permits "Works (Mounded)", which are defined to mean "the water supply pipeline used for water supply purposes situated within the mound which together are at, upon, above or below the surface of the Land, provided however the water supply pipeline *is not above the surface* of the mound" (emphasis added). Hence, "Works (Mounded)" include both the pipeline and the mound in which the pipeline is located, and the mound itself is the only aspect of such works that is "above" ground or visible. The pipeline itself may not protrude above the surface of the mound.

49 Thus, Easement D expressly permits SW to do works above the surface, whereas Easements B and C expressly prohibit SW from doing works above the surface.

50 "The mound" referred to in the definition of "Works (Mounded)" in Easement C is undefined. There was some argument as to whether it means the specific identifiable mound that existed at the date of acquisition, or a mound that SW (or successors) may change. For present purposes, the issue is of no real significance. If it has to be decided, then I would decide that it is the former because that is what the use of the definite article in the reference to "the mound" in the definition indicates. There is a reference in Schedule 2 cl 3.1.4 to the surface level of "the Land as it exists from time to time" which arguably suggests the latter, but in my view it is preferable to construe those words as referable to natural processes such as erosion. Clause 3 of Schedule 2 specifies what the registered proprietor must not do and is an unlikely source of SW's rights, which are specified in cl 1.

51 The Trust's construction of Easements B and C is essentially based upon the words "upon" or "on" in the definition of "Works (Trenched)" and the word "upon" in the definition of "Works (Mounded)". The Trust argues that if nothing is permitted to project above the surface, the definitions could have simply referred to works "at but not above" the surface, but the addition of the words "on" or "upon" suggest otherwise. I disagree. In context, the addition of those words are indicative of no more than the familiar technique of draftspersons to try and cover the field by stringing together a number of words which, if they are not synonyms, have fine shades of meaning that are of no consequence for many purposes. In my opinion, in context, the words "at", "on" or "upon" are substantially interchangeable and are reinforced by the words "but not

above" to indicate that there is to be no substantial projection above the surface.

52 The Trust submits that SW's right to place infrastructure works "on" or "upon" the land but "not above the surface" means that, for example, a large pipe could be placed "on" or "upon" the land and that the prohibition "not above the surface" would not apply because that prohibition is limited (in the example) to a pipe *suspended* above the land by supports in the ground. The Trust points to the example of the pipe on the next door Council land which is suspended above the ground by supports in the ground. I can see nothing to support the Trust's interpretation. If it had been intended, the word "above" could have been altered in the definitions to "suspended above". The practicality of the interpretation that only works that do not protrude substantially above the surface can be constructed is illustrated by the existing concrete slabs over test and access points, which demonstrate the utility of having works at, on or upon but not above the surface to ensure that (among other things) maintenance can be carried out.

53 My interpretation is supported by the similar provisions of cl 3 of Schedule 4 relating to Easement B and cl 3 of Schedule 2 relating to Easement C. They permit the registered proprietor to use the land "for pedestrian and vehicular access" and to construct and maintain "roads and footpaths" over the land. Such rights are inconsistent with the Trust's construction that SW is entitled to place, for example, a large pipe "upon" the land, for this would negate the registered proprietor's rights to pedestrian and vehicular access and to construct and maintain roads and footpaths. The Trust's answer to this is to submit that those cl 3 rights of the registered proprietor are subordinate to SW's cl 1 right to place a large pipe "upon" the land. I am unable to accept the submission. The provisions of the Memorandum are harmonised by construing, as I have suggested, the references to "above" surface works in the definitions as meaning any works that in fact are above the surface, not limited to works suspended above the surface.

54 Consistently with my interpretation, in fact at the date of acquisition the pipeline in Easement D had been constructed above the surface of the land behind a retaining wall (and then backfilled), unlike the pipeline in Easements A and B, which had been constructed below the surface of the land, and the pipeline in Easement C, which had been constructed below the surface of the mound. It is unnecessary to decide, but arguably this can be invoked as an aid to interpretation of the terms of the Easement D as a physical characteristic of the tenements at the date of acquisition: see [41] above.

INTERPRETATION AND APPLICATION OF S

106A(3)(B)

55 As I have not accepted the Trust's interpretation of Easements B and C, its claim largely collapses. Its residual claim is limited to one under s 106A(3)(b) for loss of public open space due to the existing maintenance and access concrete pads, the shaving of a small corner of one playing field which may require the field to be truncated if not relocated, the future possibility of more concrete maintenance and access pads, and future potential temporary disruption while works are constructed or maintenance or repairs carried out. I do not limit future works and maintenance to a pipeline servicing the existing Kurnell desalination plant for two reasons. First, that plant could be expanded or supplemented by the acquisition of more land, thus exceeding the capacity of the existing desalination pipes. Secondly, the easements were acquired for the wider purposes of the *Sydney Water Act*. However, future constructed works must not substantially project above ground. Therefore, above ground disruption would be temporary, although it could be for a relatively long time depending on the nature of the works.

56 SW submits that in determining whether there is any loss under s 106A(3)(b), there should be taken into account, first, that there has been no such loss to date; secondly, as to the future there should be taken into account the proper construction of s 106A(3)(b), evidence as to what can be done under the easements, and objective circumstances at the date of creation of the easements.

57 I think there can be taken into account when determining the quantum of "loss" under s 106A(3)(b) (as distinct from when one construes the easements) the evidence summarised earlier at [44], insofar as it may bear on the remoteness of the risk of future eventualities. However, that evidence focuses on the existing pipelines and Kurnell desalination plant. As I have pointed out, the easements were acquired for the wider purposes of the *Sydney Water Act*, and the easements could be used in future for works unrelated to, or designed to exceed, the potential capacity of the Kurnell plant and the existing state of the art pipelines. The Sydney Harbour Bridge had adequate capacity and was state of the art when constructed, but in less than a century had to be supplemented by a tunnel, the capacity of which is arguably already inadequate.

58 The question then is whether the Trust's limited residual claim falls within s 106A(3)(b) and, if so, what the quantum should be. It is convenient to repeat s 106A(3):

> (3) Despite section 55 of the *Land Acquisition (Just Terms Compensation) Act 1991*, in determining the amount of compensation, if any, payable to a reserve trust, regard is to be had to the following matters only (as assessed in accordance with this section):

(a) the value to the reserve trust of any improvements (including structures) erected or carried out by the trust on the land being acquired or vested, or over which the easement is vested, on the date the land is acquired,

(b) the amount of any loss attributable to the reduction in public benefit from any loss of public open space that arises from the acquisition or vesting of the land,

(c) the amount of any reduction in the value to the trust, as at the date the land is acquired or vests, or the easement vests, of any other improvements (including structures) erected or carried out by the trust on other land that is caused by the land acquired being severed from other land of the trust,

(d) the cost to the trust of acquiring additional land having environmental benefits that are comparable to the land being acquired or vested,

(e) any loss attributable to disturbance (within the meaning of section 59 of that Act), other than loss arising from the termination of a lease or licence over the whole or part of the land being acquired.

59 The entitlement to compensation for compulsory acquisition of property is an important right and hence provisions such as s 106A(3) are to be construed with all the generality that their words permit: *Marshall v Director- General Department of Transport* [2001] HCA 37, (2001) 205 CLR 603 at [38]; *Roads and Traffic Authority of New South Wales v Heywood* [2002] NSWCA 99, (2002) 54 NSWLR 289 at [20], [21]; *George D Angus Pty Limited v Health Administration Corporation* [2013] NSWLEC 212 at [100] per Preston CJ of LEC. Compensation determined with regard to the matters in s 106A(3) is subject to the just terms override required by ss 3(1)(b) and 54(1) of the *Just Terms Act*, for it is only s 55 of the *Just Terms Act* that has been ousted by s 106A of the *Crown Lands Act*.

60 Under s 106A(3)(b), what a "loss" that is "attributable" to a "reduction" in a "public benefit" is in terms of a monetary amount is not easily discerned from the text. It has to be kept in mind that it is the Crown, not a reserve trust, that owns the fee simple and is compensated for the acquisition of the market value of the fee simple: s 106A(4).

61 The task of statutory construction involves reading an Act as a whole, putting the relevant provision into its proper context: *Project Blue Sky Inc v Australian Broadcasting Authority* [1998] HCA 28, (1998) 194 CLR 355 at [69]; *Monis v The Queen* [2013] HCA 4, (2013) 295 ALR 259 at [309]. Understanding the context and any lack of clarity in the provision may be assisted by analysis of the mischief the provision was intended to remedy. The preamble to the *Crown Lands Amendment (Compensation) Act* 2001, which introduced s 106A into the *Crown Lands Act*, states that it is: "An Act to amend the Crown Lands Act 1989 to clarify the compensation payable when certain reserve lands are compulsorily acquired or vested; and for other purposes". Section 106A is titled "Limits on compensation payable to reserve trusts". The mischief that s 106A was intended to address and how it was intended to address it, is illuminated by reference to the legislative history.

62 The second reading speech of the initial draft of the Bill for the 2001 Act states that its purpose was to "make it certain that the Crown, as owner of the land, and not the reserve trust is entitled to compensation for the market value of the land acquired". The amendments were "required as a consequence of a decision of the Land and Environment Court in 1997 involving Prince Alfred Park which resulted in a considerable amount of legal uncertainty as to the nature of a reserve trust's entitlement to compensation and the correct valuation approach to be adopted": New South Wales Legislative Assembly, *Parliamentary Debates* (Hansard), 17 November 2000 at 10275.

63 The initial draft of the Bill did not include paragraphs (b) and (d) of s 106A(3). Thus, at the second reading speech of the initial draft of the Bill, it was said that the Bill would (New South Wales Legislative Assembly, *Parliamentary Debates* (Hansard), 17 November 2000 at 1075):

> ...limit the amount of compensation payable to a trust to compensate for improvements erected on the land and any reduction in value caused by severance and disturbance.

And that the Bill would:

> ...make it certain that the Crown, as owner of the land, and not the reserve trust is entitled to compensation for the market value of the land acquired.

64 It was later in the process of the drafting of the Bill that the Greens proposed amendments to introduce paragraphs (b) and (d) of s 106A(3). This was required so that (New South Wales Legislative Council, *Parliamentary Debates* (Hansard), 27 March 2001 at 12581):

> ...compensation should be assessed in terms of the value of the land for public recreation.

65 The Greens had identified that the then text of the Bill would limit compensation to the "value of buildings and the physical disturbance of the land". The proposed amendments would enable trusts to "apply for compensation for the cost of rehabilitating trust land or for acquiring replacement land". The government adopted the amendments, identifying that (ibid):

> ...The purpose of the amendments is to make the acquiring authority aware that if it takes away that community asset the community will need to be compensated for the loss of that land... The amendments will reflect the true cost to the trust of restoring the status quo.

66 The legislative history shows that whilst there was a Parliamentary desire in the introduction of the Bill to limit the compensation paid to reserve trusts to the actual cost of improvements that were taken or affected, this desire was not continued in the legislation as ultimately made. Rather, the legislation was expanded to allow claims for compensation attributable to the loss of beneficial open space and the cost of acquiring additional land having comparable environmental benefits, that reflected what it would take to

"restore the status quo".

67 SW submits that s 106A(3)(b) does not apply to an easement because it does not expressly refer to an easement and should be construed contextually by contrasting it with s 106A(3)(a) and (c), which do expressly refer to an easement. I do not accept the submission. It calls up the weak expressio unius est exclusio alterius principle of construction (the express mention of one thing implies the exclusion of the other), or similar. This principle of construction should be treated with great caution. It is not of general application, but depends upon the intention as discoverable upon construing the legislation. Where general words are used, it is necessary to determine whether the general words are intended to include matters not specifically mentioned. In my opinion, the general words at the end of s 106A(3)(b), "that arises from the acquisition…of the land", are intended to include an easement, since s 4 of the *Just Terms Act* defines "interest in land" to include an easement, "land" to include "any interest in land", and "acquisition of land" to include "an acquisition of land or of any interest in land". The *Just Terms Act* applies in the present case except for the substitution of s 55 by s 106A of the *Crown Lands Act*, and hence the definitions in s 4 of the *Just Terms Act* apply to s 106A. In closing oral submissions, SW disclaimed any proposition that the definition of "interest" in s 4 has been ousted.

68 SW next submits that s 106A(3)(b) does not apply because (a) there is no "loss of public open space". This is said to be because (a) Easement A is entirely a below ground stratum easement; (b) the terms of Easement B do not permit the erection of works that project above the surface level; (c) the erection of concrete slabs or similar structures does not result in any loss of public open space; (d) the terms of Easement C, while permitting the land to be mounded, do not permit the projection of structures above the mounded land and as such do not result in the loss of open space; and (e) the terms of Easement D do permit above ground structures but the location of that portion of the pipeline is on a small piece of landscaped land that would not otherwise be of any utility. I do not accept the submission. As discussed earlier, the limited permanent works (concrete pads) currently at or on the surface of Easement B and the possibility of similar permanent works elsewhere at or on Easements B and C at some indefinite time in the future, including where Easement B cuts off a corner of a playing field, constitute permanent public loss of open space. The playing field may have to be truncated or relocated. Underground constructed works and maintenance and repairs in the future could cause temporary loss of public open space above ground while they are carried out, perhaps for substantial periods of time.

69 In my view, there is or will potentially be a realistic reduction in public benefit from all such works. Assessing the extent of the reduction in public benefit or the attributable loss in this scenario is incapable of mathematical precision.

No particular approach has been suggested by either party. Mr Dundas suggested $100,000 for a "blot on title". I have observed earlier at [36] that that is an inappropriate description to apply to a reserve trust's loss under s 106A(3)(b) because the Crown owns the land. However, putting aside that label, his evaluation is in point. The best analogy may be general damages in other areas of the law. Approaching it in that way, bearing in mind that the easements are in perpetuity, and doing the best I can, I assess the loss at $100,000 under s 106A(3)(b). To this should be added the parties' agreed disturbance loss of $6,000 under s 106A(3)(e). Therefore, total compensation is $106,000.

70 I would mention one further matter. The Trust's severance claim in relation to improvements under s 106A(3)(c) does not arise because I have not accepted the Trust's interpretation of Easements B and C. However, in passing I would record, for the purpose of rejecting, SW's submission that, on the Trust's interpretation of the easements, s 106A(3)(c) does not apply because there has been no severance of the Trust's remaining land. SW's primary contention is that severance means that a different legal title intervenes in the area that used to be held by the Trust, and that has not occurred because the same legal title remains. SW's alternative contention is that severance means physical separation of one area from another, and that has not occurred because the eastern side is still accessible from the western side of Easements B and C via the surface of the small Easement A in the far south-eastern part of Tempe Reserve, even though it may involve a deviation of hundreds of metres on foot for the public. SW cites dictum in *Mir Bros Unit Constructions Pty Ltd v Roads and Traffic Authority of New South Wales* [2006] NSWCA 314 that there was no "severance" in that case within the meaning of s 55(c) of the *Just Terms* Act because the resumption "did not divide the owner's remaining land into separate parcels": at [48], [106].

71 I do not accept SW's contentions. The term "severance" relates to disuniting of the land taken by compulsory process from the owner's remaining land, which may adversely affect the remaining land. "Separate parcels" was the expression used in *Mir*, not "separate titles". Whether land has been divided into separate parcels is a question of fact and degree. Suppose a two kilometre long pastoral property, or the large Sydney Botanical Gardens, over the middle of which an easement is acquired except for five metres at one end, pursuant to which a barrier is constructed. In order to get from one side to the other, grazing livestock in the case of the property, or the perambulating public in the case of the Botanical Gardens, must travel relatively great distances. In substance, the property and the Botanical Gardens is each no longer one parcel but has been divided into separate parcels. The present case would be comparable if the Trust's interpretation of Easements B and C had been accepted, for then a permanent, impassable

barrier could be erected along their length - over which the public had previously wandered at will. To reach the amenities block or the Canal or other parts of the eastern side, the perambulating public would have to detour hundreds of metres on foot via Easement A. In substance, Tempe Reserve would be no longer one parcel but would be divided into separate parcels. It would be like a block of wood chopped through except for a sliver at the bottom: in substance, it would no longer be a single block.

ORDERS

72 The orders of the Court are as follows:

(1) Determination that the compensation payable to the applicant in respect of the compulsory acquisition on 2 December 2011 by the respondent of easements over the Tempe Reserve is $106,000.

(2) The respondent is to pay the applicant's costs.

(3) The exhibits may be returned.

ANNEXURE

Decision last updated: 16 January 2014