Reported Decision :	169 LGERA 352 [2010] ALMD 462 [2010] ALMD 460 [2010] NSWCA 236 [2010] ALMD 461

Land and Environment Court of New South Wales

CITATION :	**McDonald v Roads & Traffic Authority of NSW [2009] NSWLEC 105** **This decision has been amended. Please see the end of the judgment for a list of the amendments.**
PARTIES :	APPLICANT: Karen Denise McDonald RESPONDENT: Roads & Traffic Authority of New South Wales
FILE NUMBER(S) :	30033 of 2008
CORAM:	Biscoe J

KEY ISSUES:	COMPULSORY ACQUISITION OF LAND :- of part of rural land - market value - valued on basis of residential subdivision potential - before and after valuation method - direct sales comparison method - hypothetical development check method - disturbance costs - whether within s 59(c) or (f) Land Acquisition (Just Terms Compensation) Act 1991 - whether excluded by s 61(b) as financial loss that would necessarily have been incurred in realising the potential on which market value assessed - whether double-dipping because captured by before and after valuation method
LEGISLATION CITED:	Aboriginal Land Rights Act 1983, s 42 Land Acquisition (Just Terms Compensation) Act 1991, ss 3, 10(1)(a), 34, 42(1), 54, 55, 56, 59, 61 Land Tax Management Act 1956, s 10AA
CASES CITED:	A Woodbury v Wyong Shire Council [2006] NSWLEC 48 Almona Pty Ltd v Roads and Traffic Authority (NSW) [2008] NSWLEC 112, (2008) 160 LGERA 375 AMP Capital Investors Ltd v Transport Infrastructure Development Corporation [2008] NSWCA 325, (2008) 163 LGERA 245 Brewarrana Pty Ltd v Commissioner of Highways (No 2) (1973) 32 LGRA 170 Carson v Minister for Environment and Planning (1990) 70 LGRA 215 Closer Settlement Ltd v The Minister (1942) 17 LGR (NSW) 62 Coastal Estates Pty Ltd v Bass Shire Council (1993) 79 LGERA 188 Commonwealth v Milledge (1952-1953) 90 CLR 156 Costantino v RTA [2006] NSWLEC 248 Crisp & Gunn Co-operative Ltd v Hobart Corporation [1963] HCA 55, 110 CLR 538 Damjanovic v Roads and Traffic Authority of NSW (No 2) [2005] NSWLEC 371 Fitzpatrick Investments Pty Ltd v Blacktown City Council (No 2) [2000] NSWLEC 139, (2000) 108

LGERA 417
Gosford Shire Council v Green (1980) 48 LGRA 201
Home Care Services (NSW) v Albury City Council [2003] NSWLEC 214, (2003) 136 LGERA 117
Horn v Sunderland Corporation [1941] 2 KB 26
Horton v Wyong Shire Council (No 2) [2005] NSWLEC 45
Housing Commission of New South Wales v Falconer (1981) 1 NSWLR 547
ISPT Pty Ltd v Valuer General [2009] NSWCA 31
Leichhardt Council v Roads and Traffic Authority (NSW) [2006] NSWCA 353, (2006) 149 LGERA 439
Malec v JC Hutton Pty Ltd [1990] HCA 20, (1990) 169 CLR 638
Matcam Pty Ltd v Kogarah Municipal Council [1999] NSWLEC 181, (1999) 105 LGERA 266
Maurici v Chief Commissioner of State Revenue [2003] HCA 8, (2003) 212 CLR 111
McBaron v Roads and Traffic Authority of New South Wales (1995) 87 LGERA 238
Minister Administering the Crown Lands Act v Deerubbin Local Aboriginal Land Council (No 2) [2001] NSWCA 28, (2001) 50 NSWLR 665
Minister for Army v Parbury Henty & Co (1945) 70 CLR 459
MIR Bros Unit Constructions Pty Ltd v Roads & Traffic Authority of New South Wales [2006] NSWCA 314
MIR Bros Unit Constructions Pty Ltd v Roads & Traffic Authority of New South Wales [2005] NSWLEC 467
Nasser v Roads and Traffic Authority (NSW) (No 3) [2006] NSWLEC 562, (2006) 149 LGERA 289
Para Vale Estates Pty Ltd v Minister of Works (1964) 12 LGRA 19
Penrith City Council v Sydney Water Corporation [2009] NSWLEC 2
Perry v Roads and Traffic Authority of New South Wales [1999] NSWLEC 109
Peter Croke Holdings Pty Ltd v Roads and Traffic Authority of NSW (1998) 101 LGERA 30
Richardson v Roads and Traffic Authority of New South Wales (1996) 90 LGERA 294
Roads and Traffic Authority of New South Wales v Peak [2007] NSWCA 66
Roads and Traffic Authority of New South Wales v

	Perry [2001] NSWCA 251, (2001) 52 NSWLR 222 Roads and Traffic Authority (NSW) v Collex Pty Ltd [2009] NSWCA 101, (2009) 165 LGERA 419 Roads and Traffic Authority (NSW) v Damjanovic [2006] NSWCA 166, (2006) 146 LGERA 403 Roads and Traffic Authority (NSW) v Muir Properties Pty Ltd [2005] NSWCA 460, (2005) 143 LGERA 192 Serbian Cultural Club v Roads & Traffic Authority of New South Wales [2007] NSWLEC 673 Smith v Roads and Traffic Authority of New South Wales [2005] NSWLEC 438 Spencer v The Commonwealth (1907) 5 CLR 418 Turner v Minister of Public Instruction (1955-1956) 95 CLR 245 Walker Corporation Pty Ltd v Sydney Harbour Foreshore Authority [2008] HCA 5, (2008) 233 CLR 259
DATES OF HEARING:	23 - 26 March 2009 30 March - 2 April 2009 12 - 13 May 2009
DATE OF JUDGMENT:	8 July 2009
LEGAL REPRESENTATIVES:	APPLICANT: Mr J Webster SC with Mr M Seymour SOLICITORS Barraclough Jones & Associates RESPONDENT: Mr P Tomasetti SC SOLICITORS Henry Davis York

JUDGMENT:

**THE LAND AND
ENVIRONMENT COURT
OF NEW SOUTH WALES**

BISCOE J

8 July 2009

30033 of 2008

KAREN DENISE MCDONALD v ROADS & TRAFFIC AUTHORITY OF NEW SOUTH WALES

JUDGMENT

TABLE OF CONTENTS

1 **HIS HONOUR**: On 31 August 2007 the respondent, the Roads & Traffic Authority of New South Wales (**RTA**), compulsorily acquired part of rural land between Taree and Port Macquarie owned by the applicant, Ms Karen Denise McDonald, for the purpose of an upgrade to the Pacific Highway. This is her claim for determination of compensation payable for the compulsory acquisition of the land under the Land Acquisition (Just Terms Compensation) Act 1991 (**Just Terms Act**).

2 The applicant's claim under the Just Terms Act and the RTA's competing contentions are as follows:

	Applicant	RTA
	$	$
Market value: s 55(a)	687,000	200,000
Disturbance costs: ss 55(d) and 59(c) or (f)	426,295	22,058
Solatium: s 59(e)	21,823	21,823
TOTAL	1,135,118	243,881

3 The principal reasons for these differences are the polarised views of the parties' valuers concerning the approach to market value and the RTA's contention that most of the disturbance claims items are not legally recoverable.

THE LAND

4 The land is located approximately 1.5 kms south of the village of Kew, between Taree and Port Macquarie, on the eastern side of the Pacific Highway and approximately 10 kilometres from the coast. Areas and title particulars are as follows:

· Parent land Lot 1 DP 733145, 6.608 hectares
· Acquired land (western portion of parent) 1.614 hectares Lot 19 DP 1106207
· Residue land, Lot 10 DP 11067207 4.994 hectares

5 The acquired land has a frontage on the west of about 260 metres to Bethesda Road. The residue land on the north-east corner has access to Glenhaven Drive, although about 200 metres of that street from the property boundary was constructed after the acquisition date. The residue land falls in a general easterly and south-easterly direction. The southern and south-eastern parts are quite steep. Parts of the land have native trees and regrowth.

6 At the acquisition date the main improvements were on the acquired land, of which the most significant were the applicant's residence and a large shed predominantly used in connection with a landscaping supply business conducted by her partner.

7 Prior to acquisition, the acquired land was serviced by electricity, water and telephone. Since acquisition, electricity, water and telephone services and road access have been provided to the residue land boundary.

8 An easement for an electricity transmission line 40.235 metres wide

affects approximately 4,800 m2 or 29 per cent of the acquired land.

RELOCATION

9 The applicant vacated the acquired land on 31 January 2008 and moved to a rented residence elsewhere, pending construction of a replacement residence on the residue land. The house and shed on the acquired land have since been demolished. The RTA charged her rent from the acquisition date to the day she vacated, as permitted under s 34(3) of the Just Terms Act. The applicant proposes to build a replacement residence and shed on the residue land subject to council approval. The cost of connecting services (water, power and telephone), and road access from the boundary of the residue land and rental costs since the applicant vacated the acquired land form the bulk of the applicant's disturbance claim.

JUST TERMS ACT

10 The following provisions of the Just TermsActare relevant:

> " **3 Objects of Act**
>
> (1) The objects of this Act are:
>
> (a) to guarantee that, when land affected by a proposal for acquisition by an authority of the State is eventually acquired, the amount of compensation will be not less than the market value of the land (unaffected by the proposal) at the date of acquisition
> (b) to ensure compensation on just terms for the owners of land that is acquired by an authority of the State when the land is not available for public sale…
>
> **34 Former owner's right to occupy land until compensation paid etc**
>
> (1) A person who was in lawful occupation of land immediately before it was compulsorily acquired under this Act and to whom compensation is payable under this Act is entitled to remain in occupation until:
>
> (a) the compensation is duly paid to the person, or
> (b) the authority of the State makes (in accordance with any other provision of this Act) an advance payment of not less than 90

per cent of the amount of compensation offered by the authority, or

(c) the authority of the State makes (in accordance with any other provision of this Act) a payment into the trust account kept under Part 3 of not less than 90 per cent of the amount of compensation offered by the authority,

whichever first occurs.

(2) Any such person is entitled to remain in occupation of any building that is the person's principal place of residence, or the person's place of business, for 3 months after it is compulsorily acquired, even though the person has ceased to be entitled to remain in occupation under subsection (1). However, if the Minister responsible for the authority of the State is satisfied that the authority requires immediate vacant possession of land, the authority is entitled to immediate vacant possession even though the 3-month period has not expired.

(3) The terms on which a person remains in occupation of land that has been compulsorily acquired under this Act are, in the absence of agreement, such reasonable terms as are determined by the authority of the State (including terms as to the rental to be paid and the restrictions on the use of the land). The Residential Tenancies Act 1987 does not apply to that continued occupation.

(4) Any such unpaid rent or other money due to the authority of the State may be set off against the compensation payable under this Act.

54 Entitlement to just compensation

(1) The amount of compensation to which a person is entitled under this Part is such amount as, having regard to all relevant matters under this Part, will justly

compensate the person for the acquisition of the land.

55 Relevant matters to be considered in determining amount of compensation

In determining the amount of compensation to which a person is entitled, regard must be had to the following matters only (as assessed in accordance with this Division):

(a) the market value of the land on the date of its acquisition,
(b) any special value of the land to the person on the date of its acquisition,
(c) any loss attributable to severance,
(d) any loss attributable to disturbance,
(e) solatium,
(f) any increase or decrease in the value of any other land of the person at the date of acquisition which adjoins or is severed from the acquired land by reason of the carrying out of, or the proposal to carry out, the public purpose for which the land was acquired.

56 Market value

(1) In this Act:

market value of land at any time means the amount that would have been paid for the land if it had been sold at that time by a willing but not anxious seller to a willing but not anxious buyer, disregarding (for the purpose of determining the amount that would have been paid):
(a) any increase or decrease in the value of the land caused by the carrying out of, or the proposal to carry out, the public purpose for which the land

was acquired…

59 Loss attributable to disturbance

In this Act:

loss attributable to disturbance of land means any of the following:

(a) legal costs reasonably incurred by the persons entitled to compensation in connection with the compulsory acquisition of the land,
(b) valuation fees reasonably incurred by those persons in connection with the compulsory acquisition of the land,
(c) financial costs reasonably incurred in connection with the relocation of those persons (including legal costs but not including stamp duty or mortgage costs),
(d) stamp duty costs reasonably incurred (or that might reasonably be incurred) by those persons in connection with the purchase of land for relocation (but not exceeding the amount that would be incurred for the purchase of land of equivalent value to the land compulsorily acquired),
(e) financial costs reasonably incurred (or that might reasonably be incurred) by those persons in connection with the discharge of a mortgage and the execution of a new mortgage resulting from the relocation (but not exceeding the amount that would be incurred if the new mortgage secured the repayment of the balance owing in respect of the discharged mortgage),
(f) any other financial costs reasonably incurred (or that might reasonably be incurred), relating to the actual use of the land, as a direct and natural consequence of the acquisition.

61 Special provision relating to market value assessed on potential of land

If the market value of land is assessed on the basis that the land had potential to be

used for a purpose other than that for which it is currently used, compensation is not payable in respect of:
(a) any financial advantage that would necessarily have been forgone in realising that potential, and
(b) any financial loss that would necessarily have been incurred in realising that potential."

11 It is the terms of this legislation that are determinative and it is not to be assumed that they reproduce principles derived by way of judicial gloss from the spare terms of earlier resumption legislation: Walker Corporation Pty Ltd v Sydney Harbour Foreshore Authority [2008] HCA 5, 233 CLR 259 at [47] see also at [31] and [35].

12 In general terms, s 55(a) – (e) might be characterised as collectively answering the unifying description "value to the owner", which was a judicial gloss on the words "value of land" or equivalent in earlier resumption legislation. However, the characterisation "value to the owner" is not found in this Act, there is no warrant to refer to it and the earlier case law must be treated with care. This Act adopts the different and exhaustive components of market value and the other matters prescribed in s 55: Leichhardt Council v Roads and Traffic Authority (NSW) [2006] NSWCA 353, 149 LGERA 439 at [27] - [30] and [91].

13 The list of matters in s 55 to which regard must be had when assessing the amount of compensation is subject to the "just compensation override" in s 54: Leichhardt Council v Roads and Traffic Authority (NSW) [2006] NSWCA 353, 149 LGERA 439 at [28]; Smith v Roads and Traffic Authority of New South Wales [2005] NSWLEC 438 at [66].

14 Because of the guarantee in s 3(1)(a), which is re-iterated in s 10(1)(a), the acquiring authority must pay at least the market value of the acquired land unaffected by the proposal: AMP Capital Investors Ltd v Transport Infrastructure Development Corporation [2008] NSWCA 325, 163 LGERA 245 at [63], [72] per Hodgson JA; Leichhardt Council v Roads and Traffic Authority (NSW) [2006] NSWCA 353, 149 LGERA 439 at [41] per Spigelman CJ; Smith v Roads and Traffic Authority of New South Wales [2005] NSWLEC 438 at [65] per McClellan J.

PLANNING

15 Expert planning evidence was given by Mr Peter Chapman for the applicant and Mr Anthony Rowan for the RTA.

16 At the acquisition date, the parent parcel was zoned "1(a1) Rural" under the provisions of Hastings Local Environmental Plan 2001 (**LEP**). The minimum lot size upon which a dwelling house can be erected in that zone is 40 hectares (cl 18(1)(a)) and land so zoned has limited uses (cl 9).

17 In 1992, the local council granted development consent to a three lot

subdivision on the parent land. The 1992 consent included land just to the north of the parent land called the Glenhaven Estate, which has since been attractively constructed. It seems that at the time of the 1992 consent the parent land formed part of the proposed Glenhaven Estate.

18 On 29 June 2007, after the RTA had approached the applicant regarding the proposed acquisition of the acquired land, an application to modify the 1992 consent was lodged with the local council by the applicant's agent. It proposed a realignment of the boundaries of the subdivision approved by the 1992 consent such that a four lot subdivision was proposed, one of which was the acquired land. The enclosed plan bore a date in May 2007. The application referred to the anticipated RTA acquisition and to the rationalisation of the final stage of the development because setbacks were no longer required from the previous quarry site.

19 On 9 July 2007, the modification application was amended. A new July 2007 plan, to replace the May 2007 plan, was proposed showing a three lot subdivision which included the acquired land.

20 On 18 September 2007, the council consented to the modification application. The May 2007 plan was adopted by the conditions of consent. The modification consent included a condition requiring completion of the modified subdivision within two years.

21 Meanwhile, in 2006, an amendment to the LEP rezoned the adjoining land owned by the Bunyah Local Aboriginal Land Council (**Bunyah land**) and land comprising the Glenhaven Estate as "1(r1) Rural Residential". The rezoning permitted subdivision into lot sizes greater than 8,000 m2. Apparently in error, the rezoning omitted the subject land, which remains zoned 1(a1) Rural.

22 In 2006 the applicant and the Bunyah Local Aboriginal Land Council agreed to share the cost of developing their respective lands and retained surveyors who prepared a report on the cost of subdivision of both.

23 On 6 July 2007, the applicant submitted a rezoning application to council requesting that the parent land be rezoned to 1(r1) Rural Residential in line with the zoning of the Glenhaven Estate. The application recounted the rezoning of the Glenhaven Estate and the omission of the parent land from the rezoning contrary to the indication that had been given by the council in earlier correspondence. As part of the rezoning application, the applicant submitted an indicative seven lot subdivision plan that would be possible if the rezoning were approved.

24 On 4 September 2007, four days after the acquisition date, the council wrote a letter of reply in which it said that the 1992 consent was still operative and that:

> “In relation to the proposed rezoning, council is prepared to extend the adjoining zone to include Lot 1 as proposed because of the validity of the 1992 subdivision proposal. This will be undertaken as part of implementing the new Standard LEP.”

25 On 6 September 2007, the council wrote a similar letter to the local member of Parliament, in response to his letter regarding rezoning of the subject land, which included the following:

> “For your information and by way of background, Murray Dalton and Associates lodged a rezoning application with Council in July 2007 on behalf of the landowner, Ms McDonald.
>
> The application seeks to extend the adjoining 1(r1) Rural Residential zone in Glen Haven Drive, to include Lot 1 DP733145, the purpose being to enable future subdivision of Lot 1 into possibly 4 lots, exclusive of land currently being acquired by the RTA for highway deviation.
>
> You will be aware that Council is currently preparing a Council wide Standard Local Environmental Plan and in so doing, Council has the ability to correct any existing LEP anomalies. It is proposed to include Lot 1 in the adjoining zone as requested by the proponent on the basis that development approval for the Glen Haven Drive subdivision issued in 1992 is deemed not to have lapsed, therefore the landowner has the ability to complete the subdivision. This creates an existing zone anomaly that may be corrected by including Lot 1 in the Standard Local Environmental Plan and Council proposes to deal with the proponent’s request through implementing the new Standard LEP.
>
> Council Planning Staff have recently met with the consultant in relation to this matter.
>
> Please be advised that the landowner and their consultant have been advised

accordingly."

26 The RTA accepts, as do I, that:

> (a) the 1992 consent was a valid subdivision approval that applied to this site at the date of acquisition; and
> (b) a prudent purchaser, upon enquiry of council at the acquisition date, would have been given the advice contained in the 4 September 2007 letter in relation to rezoning potential.

27 The RTA submits that the applicant, knowing her land was about to be acquired by the RTA, made the modification application in order to enhance the development potential of the parent land, and therefore increase its market value; and that it is therefore a step to be ignored in the assessment of compensation: *Just Terms Act* s 56(1)(a). It is unclear on the evidence whether that was the purpose. Even if it were, I do not accept that it engages the terms of s 56(1)(a).

28 The RTA submits that a prudent hypothetical purchaser at the acquisition date would not assume that the rezoning of the subject land would happen before March 2011 because that is the State-wide deadline, fixed in 2006 by the NSW government, for the implementation of an LEP in the standard format prescribed by the government. The RTA draws attention to the evidence of its town planner, Mr Rowan, that the Department of Planning, in designating the council as a "five year" council, considered the complexity of the task and resource limitations within both the council and the Department.

29 The RTA submits that the fact that the subject land had still not been rezoned by the time of the trial, 18 months post-acquisition, confirms the hypothetical purchaser's foresight that there would be a significant delay in the rezoning of the land, a foreseeable delay of some four years according to the RTA's contention: *Housing Commission of New South Wales v Falconer* (1981) 1 NSWLR 547. Hindsight is impermissible. However, in *Falconer* it was held that "evidence of future events is admissible not to prove a hindsight, but to confirm a foresight": at 558B per Hope JA, approved in *Minister Administering the Crown Lands Act v Deerubbin Local Aboriginal Land Council (No 2)* [2001] NSWCA 28, 50 NSWLR 665 at [69] – [74] per Spigelman CJ. This principle is quite often invoked in resumption compensation cases in this Court. To my mind, a danger with the principle is the bootstraps argument that it was foreseeable at an acquisition date that something would (or would not) happen because that thing did (or did not) happen after the acquisition date. Two other dangers with the principle were noted in *Minister Administering the Crown Lands Act v New South Wales Aboriginal land Council* [2009] NSWCA 151 at [68] per Basten JA (Beazley and Tobias JJA agreeing):

> "Falconer was a valuation case, and the comments made were specific to the

> circumstances with respect to the valuation of land. The basic principle does not involve exclusion of reference to later events as evidence to establish a situation at an earlier point in time. Numerous examples may be identified in different situations where that can legitimately occur. Two points of practical importance are to borne in mind. The first is that reliance on later evidence may distract attention from the point in time at which the relevant assessment must be made. Secondly, there are dangers in drawing inferences from later evidence, without close attention to the circumstances in which it arose."

30 The evidence of the applicant's valuer, Mr Owen Allsopp, which I accept, is that the council's strategic planning manager, Mr Peter Cameron, told him that as at August 2007 he would have advised a buyer that the new LEP would have been completed in two years, as council was "well advanced" at that time.

31 Having regard to the rezoning of the adjacent Bunyah land and Glenhaven Estate, the council's September 2007 letters evidencing that the subject land was omitted from the rezoning by a mistake that would be rectified, and the evidence that the council would have advised a buyer at the acquisition date that a new LEP would be completed in two years, I am prepared to conclude that, at the acquisition date, the hypothetical buyer and seller would have been confident that there would be a rezoning in two years so as to permit a seven lot subdivision. That would be my conclusion even if I were to take account of the fact that no rezoning has yet occurred. However, in my view, they would not have thought it was certain, that is, as good as if the land had already been rezoned by the acquisition date. I am also prepared to conclude, as propounded by Mr Allsopp, that the hypothetical buyer, at the acquisition date, would have intended to prepare a subdivision development application so that it could be decided promptly by the council as soon as the rezoning occurred and that have been similarly confident that it would be granted.

MARKET VALUE

32 Market valuation evidence was given by two valuers, Mr Owen Allsopp for the applicant and Mr David Lunney for the RTA. As is common in resumption cases in this jurisdiction, the valuers are poles apart in their valuations. Lloyd J has described this phenomenon as notorious and has attributed it to inevitable, even if subconscious, bias: Penrith City Council v Sydney Water Corporation [2009] NSWLEC 2 at [5].

33 The Court, accompanied by the parties' legal representatives, undertook a view of the subject land and the comparable sales lands utilised by the

valuers in support of their valuation assessments.

34 The valuers had to determine the market value of the acquired land as defined in s 56(1) of the *Just Terms Act* (set out at [10] above). The definition reflects the classic test in *Spencer v The Commonwealth* (1907) 5 CLR 418, as the High Court confirmed in *Walker Corporation Pty Ltd v Sydney Harbour Foreshore Authority* [2008] HCA 5, 233 CLR 259 at [51]:

> "The opening words of the definition in s 56(1) (means the amount that would have been paid for the land if it had been sold at that time by a willing but not anxious seller to a willing but not anxious buyer) reflect what for a century has been taken from *Spencer v The Commonwealth* (1907) 5 CLR 418. That case arose under the tersely expressed provisions of the first federal legislation in the field, the *Property for Public Purposes Acquisition Act 1901* (Cth). Section 19(1) thereof spoke merely of 'the value of the land taken'. The result of the judicial exegesis in Spencer was summed up by McHugh J in *Kenny & Good Pty Ltd v MGICA (1992) Ltd* (1999) 199 CLR 413 at 436 [49]-[50] as follows:
>
> > 'Value is determined by forming an opinion as to what a willing purchaser will pay and a not unwilling vendor will receive for the property [*Spencer v The Commonwealth* (1907) 5 CLR 418]. In determining that value, there must be attributed to the parties a knowledge of all matters that affect its value. Those matters will include the predicted impact of future events as well as the experience of the past and the rates of return on other investments. As Isaacs J pointed out in *Spencer v The Commonwealth* [(1907) 5 CLR 418 at 441]:
> >
> > 'We must further suppose both to be perfectly

> acquainted with the land, and cognisant 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.(emphasis added.)'"

35 Thus, the hypothetical parties must be supposed to have "a knowledge of all matters that affect its [the land's] value" and, further, to be "perfectly" acquainted with the land itself. As to the former, the High Court in *Walker* did not say that the attributed knowledge of all matters is perfect. The question of whether it is apt to say that it is perfect was reserved in *ISPT Pty Ltd v Valuer General* [2009] NSWCA 31 at [4] by Allsop P.

36 The definition of market value in s 56(1) continues to be illuminated by the judgment of Dixon CJ in *Turner v Minister of Public Instruction* (1955-1956) 95 CLR 245 at 268 (notwithstanding that the case was decided under the sparser terms of a different resumption statute):

> "That value was necessarily affected by all the advantages which the land possessed and these might be a matter of future or even contingent enjoyment. Future advantages or potentialities must not be excluded. At the same time the value of these things must be assessed according to the condition of the land as it stood at the time of resumption: 'it is the present value alone of such advantages that falls to be determined'…"

37 The parties' valuers adopted the before and after valuation method whereby the market value of the acquired land is calculated by determining the market value of the parent land immediately before acquisition and

subtracting the market value of the residue land immediately after acquisition. The before and after method is often adopted when only part of land is resumed. The NSW Court of Appeal approved the before and after method, without suggesting that it had to be adopted in all cases, in MIR Bros Unit Constructions Pty Ltd v Roads & Traffic Authority of New South Wales [2006] NSWCA 314; Roads and Traffic Authority (NSW) v Muir Properties Pty Ltd [2005] NSWCA 460, 143 LGERA 192; Roads and Traffic Authority (NSW) v Damjanovic [2006] NSWCA 166, 146 LGERA 403; and Roads and Traffic Authority (NSW) v Collex Pty Ltd [2009] NSWCA 101, 165 LGERA 419 at [101] – [103], [173].

38 The before and after valuations were as follows:

	Allsopp	**Lunney**
Market value of parent land before acquisition	$987,000	$500,000
Less agreed market value of residue land after acquisition	$300,000	$300,000
Market value of acquired land	$687,000	$200,000

39 The valuers agreed, and I accept, that:

> (a) the primary method of valuing the parent land before acquisition should be on the basis of direct comparable sales evidence;
> (b) a hypothetical subdivision development should be adopted as a check valuation;
> (c) under both methods, allowance had to be made for delays to obtain development consent and to obtain rezoning to permit minimum residential lots of 8,000 m2 in a seven lot subdivision, as agreed by the planning experts;
> (d) it was virtually certain that the residue land would have the benefit of an entitlement to erect a replacement dwelling;
> (e) the value of the improvements on the acquired land was $160,000. Mr Lunney attributed $30,000 of this to services.

40 Thus, the unimproved value of the acquired land of 1.614 ha at the acquisition date was $527,000 according to Mr Allsopp ($687,000 less improvements $160,000) but only $40,000 according to Mr Lunney ($200,000 less improvements $160,000).

41 Where there are comparable en globo sales, it is preferable to use the comparable sales method rather than the hypothetical development method because many factors in the latter involve a speculative element, such as the expected realisable prices and the time to realise subdivision. As

Roper J said in Closer Settlement Ltd v The Minister (1942) 17 LGR (NSW) 62 at 65:

> "In arriving at the value of land which is suitable for subdivision a familiar and appropriate method … is to estimate from whatever comparable sales of land in subdivision are available the price which would be realized by the land when sold; then to estimate the costs involved in the subdivision and the length of time that the realization would take, making provision for the payment of rates and taxes and for interest on money outstanding; and an estimated net return on the subdivision is obtained. It is of course clear that a person purchasing land in globo for the purpose of subdividing it would not pay the sum of money which is the present equivalent of that estimated return. Many factors in the calculation are speculative: the land in subdivision may not realize the prices which are at present expected, and the subdivision may take longer to realize than is at present anticipated. To compensate for the risk involved in the venture the purchaser would certainly discount the estimated returns."

42 Similarly, in Para Vale Estates Pty Ltd v Minister of Works (1964) 12 LGRA 19 Napier CJ said, at 23:

> "…but I think that it introduces an additional element of speculation and uncertainty, namely, what profit would the subdivider look for and expect. This must necessarily vary, according to the circumstances and the risks inherent in the particular case. In the result the method is, at best, no more than an indirect way of reaching a conclusion, which can, in the ordinary course of things, be reached more directly and satisfactorily by a consideration of comparable sales."

43 The limitations of a hypothetical subdivision analysis were noted in Carson v Minister for Environment and Planning (1990) 70 LGRA 215 at 231:

> "The numerous hypothetical subdivision exercises were helpful as check valuations, but the inevitably wide range of net land

> value derived by variation of assumptions emphasised the hazards of relying too much on the hypothetical approach. In any event, values should not necessarily be applied directly to the subject land from detailed analyses of comparable sales or valuation exercises with mathematical precision. Hypothetical valuation exercises are not as helpful as comparable sales evidence, and are best used as tools to assist the Court to determine the price at which the parties would also come together in the 'selling approach' explained in Spencer v Commonwealth of Australia (1907) 5 CLR 418."

44 The larger the delay in realising the expected subdivision, the greater the element of speculation in the hypothetical development method. In Brewarrana Pty Ltd v Commissioner of Highways (No. 2) (1973) 32 LGRA 170 Wells J said, at 181:

> "Plainly, a calculation based on a hypothetical subdivision will not be vitiated simply because some very slight delay might be experienced before realization could begin, but an inordinate delay of, say, several years could, equally plainly, render the whole undertaking so speculative that a conclusion as to value would be wholly unreliable. In between those two extremes, the skilled valuer will have to decide at what stage the speculative element looms so large that the method becomes unsafe. His decision will depend on all the circumstances of each particular case."

45 In Coastal Estates Pty Ltd v Bass Shire Council (1993) 79 LGERA 188 at 196 Gobbo J thought that a realisation delay of three years raised a very real doubt as to the hypothetical development method, which his Honour called the "analysis" method:

> "In my view the passage of time is not always decisive and the analysis method may be inappropriate even in cases where the time delay is less than three years.
>
> It is a question of fact in each case as to what is the appropriate method and it is unwise to seek to lay down prescriptive

> rules in this matter. At the same time, it is reasonable to regard a period of three years before any significant development and sale as raising a very real doubt as to this method because of the uncertainties involved in use of current estimates of sale prices and costs.
> In my view the starting point is that the valuation should, if possible, be founded on sales of comparable land. This is subject to the following qualifications and the particular circumstances of the case:
> (a) Where there are no comparable sales then the use of the analysis method is necessary;
> (b) Where there is little evidence by way of comparable sales, then use of the analysis method as a check is appropriate;
> (c) Where the subject land that has been acquired is part of a larger parcel and issues of severance and injurious affection and enhancement arise, it will be necessary that an analysis exercise be carried out if there are grounds for believing that a before and after valuation will not meet these issues.
>
> Thus, if there are significant differences in lot yield or in development costs between the before and after parcels then usually a full analysis should be carried out as a check. I say 'usually' because sometimes the matter can be satisfactorily dealt with by an allowance that reflects differences of cost."

Highest and Best use

46 The views of the experts as to the highest and best use of the parent land before acquisition differed:

> (a) the applicant's valuer, Mr Allsopp, and planner, Mr Chapman, considered that the highest and best use was as a seven lot rural residential subdivision with a minimum lot size of 8,000 m2 (and an average size of approximately 9,000 m2). That minimum lot size was permissible in the 1(r1) Rural Residential zone, which, at the acquisition date, was the zoning of the adjoining Bunyah land and Glenhaven

Estate and the council's intended rezoning of the subject land. One lot would contain the existing dwelling, a second lot would contain the landscape supply business, while the remaining five lots would be vacant rural residential homesites. The value would be deferred for two years to allow for rezoning to 1(r1) Rural Residential to permit that subdivision and development consent. Mr Allsopp envisaged it would be well presented and similar to the nearby attractive Glenhaven Estate, that is, cleared except for specimen trees; not poorly presented like parts of the Lake Ridge Estate, which is a rural residential subdivision north-east of Kew. The electrical transmission easement and power line significantly affects four of the seven potential lots and slightly affects a fifth lot;

(b) the RTA's planner Mr Rowan considered that the highest and best use of the parent land was as a three, four or five lot subdivision;

(c) the RTA's valuer Mr Lunney considered that the highest and best use of the parent land was its existing use as a single rural residential homesite, although he would allow a small premium of 15 per cent for uncertain future subdivision potential Mr Lunney considered that a seven lot subdivision did not adequately reflect the fact that the land was zoned rural 1(a1) and that the potential for rezoning carried a high level of risk regarding its likelihood, the resulting lot sizes that could be achieved and the timing of the process. He thought that the rural residential housing market in the Kew area was very soft at, and for a considerable period prior to, the acquisition date and that, having regard to development costs, a rural residential subdivision was not then viable. Mr Lunney examined hypothetical three, four, five and seven lot subdivisions of the parent land, adopting cost estimates provided by the RTA's engineering expert, Mr Parker, and agreed development costs in the joint report of the engineering experts, Mr Mowle and Mr Parker. He thought that the market was weak. He took into account what he regarded as an oversupply of slow selling rural residential lots at the Lake Ridge Estate. His highest calculation, for a seven lot subdivision, produced an en globo value for the parent land of $350,000. He concluded that the value of the parent land as a subdivision proposition was less than as a single dwelling rural residential site for which he calculated a value of $500,000.

47 Having regard to the hypothetical subdivision analysis at [70] ff below, I accept that the highest and best use of the parent land was as a seven lot rural residential subdivision subject to rezoning and development consent

before acquisition.

Residue Land

48 The views of the experts as to the highest and best use of the residue land after acquisition were as follows:

> (a) Mr Allsopp and Mr Chapman considered that it was as a four lot residential subdivision with a minimum lot size of 8,000 m2 subject to rezoning and development consent. One of the lots would be used for the applicant's future dwelling and another for the landscape supply business. Mr Allsopp acknowledged that it was almost not economically viable;
> (b) Mr Rowan considered that it was as a three lot subdivision.
> (c) Mr Lunney considered that subdivision of the residue land into three or four lots was not economically viable and that its highest and best use was as a rural residential homesite.

49 Notwithstanding their different views as to the highest and best use of the residue land, during the hearing the valuers reached an agreement, which I accept, that the value of the residue land after acquisition was $300,000. However, Mr Allsopp substantially qualified his agreement by saying that this after value must be discounted if the Court rejected disturbance items, in the nature of onsite infrastructure costs to the residue land amounting to some $363,000 (connection of services, access tracks, vegetation removal and wastewater facilities on the residue land). The weight of expert evidence favours, and I accept, that the highest and best use of the residue land was as a four lot subdivision subject to rezoning and development consent.

Direct Sales Comparison

50 "Comparability and concomitant adjustment involve matters of degree and judgment": ISPT Pty Ltd v Valuer General [2009] NSWCA 31 at [23] per Giles JA (Allsop P and Campbell JA agreeing).

51 Mr Allsopp's direct en globo sales comparison looked to the sale of adjacent land at lot 327 Bethesda Road, Kew, by the Bunyah Local Aboriginal Land Council to the RTA (**Bunyah land**) and the sale of land at 1107 Hannam Vale Road, Hannam Vale. Both had subdivision potential. After adjusting for the differences, Mr Allsopp concluded that the Bunyah sale showed that the subject land with seven lot subdivision potential had a value of $990,000 and the Hannam Vale sale showed that the subject land with seven lot subdivision potential had a value of $954,000.

Bunyah Sale

52 The adjacent Bunyah land comprised 3.234 hectares of vacant rural

residential land formerly forming part of the Glenhaven Estate. It was sold for $425,000 to the RTA by the Bunyah Local Aboriginal Land Council for the same upgrade to the Pacific Highway. The sale agreement was entered into in 2007 prior to the acquisition date of the subject land. It was zoned Rural residential 1(r1) under the LEP and was therefore capable of subdivision into four rural residential lots. The sale price represented $106,250 per lot en globo.

53 The RTA submits, based on the evidence of its valuer Mr Lunney, that the Bunyah sale is not comparable because it was not an advertised sale to the open market and does not satisfy the s 56(1) *Just Terms Act* requirement of a not anxious buyer; alternatively, that it is of so little assistance, that it should be ignored or given little weight. In closing oral addresses, the RTA appeared to limit its submission to the alternative. I do not accept the submission in either form.

54 Mr Lunney accepted that prima facie the Bunyah sale appeared to represent the best evidence of value. Nevertheless, he considered it needed to be treated with caution because of his enquiries of the RTA as to the background of the sale. The *Aboriginal Land Rights Act* 1983, s 42 precluded the RTA from acquiring the Bunyah land by compulsory process. According to Mr Lunney's enquiries, a valuation of $380,000 was provided to the RTA by the RTA's consultant valuer, the RTA did not accept a higher valuation of $427,500 provided by Mr Allsopp to the Bunyah Local Aboriginal Land Council, but because the RTA needed the land they paid $425,000 for it. In these circumstances Mr Lunney thought that a significant part of the RTA's rationale in paying an amount in excess of the value determined by its consultant valuer was due to anxiety. He concluded that the RTA could not be seen as a not anxious purchaser and that the sale therefore failed the test prescribed in s 56(1) of the *Just Terms Act* Nevertheless he considered it, although he placed little weight upon it and discounted it by 57 per cent: see [57] below. .

55 In the context of the Bunyah sale negotiations, the RTA obtained a valuation report which assessed the market value in the before situation of the Bunyah land at $380,000, ie $95,000 per lot for its potential four rural residential lots. In the same context, Mr Allsopp provided the Bunyah Local Aboriginal Land Council with his report which assessed the market value at $427,500, ie $106,875 per lot for its potential four rural residential lots.

56 Thus, the RTA had two valuations before it and bought the land for less than one valuation and 12 per cent above the other. The difference between the two valuations was relatively modest, particularly when compared with competing valuations with which this Court is regularly confronted in resumption compensation cases, including in the present case. The RTA's possession of two valuations, the modest difference between them and the fact that a price was negotiated which lay between them, tend to support the conclusion that the RTA was not an anxious buyer. No RTA witness was

called by the RTA to establish that it was an anxious buyer. Overall, I am not satisfied that the RTA was an anxious buyer such as to negate or diminish the usefulness of the comparison with the Bunyah sale.

57 The RTA submits, and it was the opinion of Mr Lunney, that a discount of 57 per cent is required when applying the Bunyah sale, broken down as follows: purchaser anxiety 12 per cent, being the percentage difference between the Bunyah sale price of $425,000 and the RTA consultant's valuation of $380,000; time (interest costs) 25 per cent (for a three year rezoning period at 8.5 per cent per annum); risk of rezoning (time and development standards) 10 per cent; electricity transmission lines easement 10 per cent (actually, Mr Lunney's adjustment for the last item included for lot shapes but in cross-examination he did not adhere to the proposition that the lot shapes were inferior. In addition, the RTA submits that, based on Mr Lunney's evidence, there should be a discount of $10,000 per lot because the Bunyah land will only accommodate four lots compared with the subject land's seven lots (Mr Allsopp agreed with that $10,000 discount); and an addition of $15,000 per lot for the difference in development costs($95,000 versus $80,142 per lot). These adjustments would result in a valuation of $50,687 per lot for the subject land, which generally supports Mr Lunney's valuation of $500,000 (7 lots x $50,687 = $354,809 + improvements $160,000 = $514,809).

58 In 2006 the applicant and the Bunyah Local Aboriginal Land Council agreed to share the cost of developing their respective properties, thus reducing the cost for the owner of each property. They retained surveyors who prepared a report on the cost of subdivision of each. On a shared costs basis, I accept (a) that the development cost of a seven lot subdivision of the subject land would be $560,996 ie $80,142 per lot as agreed by the parties' valuers, based on the agreement of the parties' engineers, Mr Michael Mowle for the applicant and Mr Paul Parker for the RTA; and (b) that the development cost of a four lot subdivision on the Bunyah land was $115,000 per lot based on evidence obtained in 2006 from the surveyors retained by the applicant and the Bunyah Local Aboriginal Land Council.

59 The applicant submits, based on the evidence of its valuer Mr Allsopp, that the direct comparison with the Bunyah land should proceed as follows:

> (i) the sale price of the Bunyah land was $425,000 or $106,250 per lot for its four lot subdivision potential;
> (ii) development costs per lot for the subject land were assessed by Mr Allsopp at $34,477 per lot lower than for the Bunyah lots on a shared costs basis (the evidence supports the conclusion that costs would have been shared). That amount is the difference between development costs of $114,619 per lot for the Bunyah land compared with $80,142 per lot for the subject. The latter was agreed between the engineering experts and was adopted by the valuers. The former was an estimate provided by a surveyor

to the Bunyah Aboriginal Land Council and the applicant in 2006 . In oral evidence Mr Lunney indicated rather briefly, that applying the composite rates agreed by the parties' engineering experts the four lot subdivision development costs of the Bunyah land was $95,000 per lot. I accept the evidence from Mr Allsopp that the development costs of the Bunyah land was achieved on the basis of the surveyor's estimate. I am prepared to accept the surveyor's estimate having regard to its provenance and the basis on which the Bunyah sale proceeded. I am fortified in that conclusion by the fact that the parties' engineering experts arrived at a figure of $121,100 per lot for a four lot development on the subject parent land on a shared costs basis ($513,644 – GST $29,243 = $484,401 4 = $121,100 per lot). If a hypothetical purchaser would pay $106,250 per lot for the Bunyah land, they would pay an extra $34,477 per lot for the subject land. Therefore, the two sums should be added to arrive at a figure of $140,727 per lot for the subject land;
(iii) there should then be a deduction because the four lot Bunyah sale profit and risk was assessed at 15 per cent per lot. The subject proposal is for seven lots for which the profit and risk is assessed at 20 per cent. That results in a reduction of $10,000 per lot (with which Mr Lunney agreed) to arrive at $130,727 per lot for the subject land;
(iv) there should then be a deduction to reflect the fact that the Bunyah land was already zoned to permit an immediate subdivision application, whereas rezoning and development approval for the subject land would take two years from the acquisition date on Mr Allsopp's assessment. I accept his time assessment having regard to the council correspondence in September 2007 and the evidence as to timing that the council would have given a prospective buyer at the acquisition date, in preference to Mr Lunney's view that it would take longer. The commercial interest rate during that period would be 8.5 per cent per annum, a rate which Mr Lunney considered would be applicable. Mr Allsopp adopted a 5 per cent interest rate on the reasoning that, in his experience, developers would adopt a lower rate than the commercial rate in anticipation of offsetting capital gains during the holding period. Discounted at 5 per cent for two years, the result is $118,573 per lot. I am persuaded, based on Mr Allsopp's evidence as to his experience, that the assumption of a capital gain should be attributed to a hypothetical developer at the relevant time. I therefore think it is appropriate to adopt the 5.0 per cent interest rate;
(v) seven lots at $118,573 per lot equals $830,000.

(vi) to that sum must be added $160,000 for the agreed value of the improvements on the acquired land. The resultant value of the subject parent land is $990,000.

60 In the RTA's submission, a reality check suggests that the value per lot of the subject should only be about half of the value per lot of the Bunyah land due to the rezoning requirements, size, transmission line and sale circumstances, and that Mr Allsopp's value of $118,573 per lot for the subject land is therefore grossly overstated at more than 10 per cent in excess of the Bunyah sale.

61 In my view, (a) there should be no adjustment for sale circumstances (ie the alleged buyer anxiety) for the reasons discussed at [56] above; (b) there should be adjustments for time (interest) for the rezoning period, for the risk of rezoning and for the electricity transmission lines, but these adjustments should be much more modest than those submitted by the RTA; and (c) the substantial reason for the value of the subject lots comparing favourably with the value of the Bunyah lots is that shared development costs are about 30 per cent less per lot for a seven lot subdivision on the subject land than for the Bunyah four lot subdivision.

62 I accept the applicant's analysis as generally sound. However, in my opinion, there should be a further discount of 20 percent for (a) the hypothetical purchaser's perception that, at the acquisition date, there was a risk (albeit low) that rezoning and subdivision consent would not eventuate or that rezoning would eventuate on materially different terms, and (b) for the transmission line easement. The resultant value of the subject land on the Bunyah land comparison is $791,988, which may be rounded to $792,000.

Hannam Vale Sale

63 1107 Hannam Vale Road, Hannam Vale is a 16.48 hectare rural residential development site sold in August 2006 for $770,000. Hannam Vale is a small village west of the Johns River. This land had an existing development consent for a nine lot subdivision, reflecting a value of $85,555 per lot en globo. All the potential lots were affected by a power line easement and lacked town water. The RTA concedes that the Hannam Vale sale is of some assistance. However, on the basis of Mr Lunney's evidence, the RTA submits that the Hannam Vale sale price per lot of $85,555 should be significantly discounted when applying this property to the subject property because it was appropriately zoned, enjoyed an existing subdivision development consent and had lower development costs whereas the subject land did not enjoy these advantages. Mr Lunney adjusted this sale to reflect a value of $35,000 per lot for the subject land. However, as the applicant submits, (a) Mr Lunney adjusted for three years interest at 8.5 per cent per annum pending rezoning whereas, in my view, the adjustment should be for two years interest at 5 per cent per annum for the reasons explained at [59(v)] above; and (b) Mr Lunney said that it would cost $30,000 per lot more than to develop the subject land whereas the true

differential appears to be $24,587 per lot because the development costs for the subject are agreed at $80,142 per lot and he accepted that the development costs of Hannam Vale were $55,555 per lot ($500,000 9).

64 Mr Allsopp carried out a similar subdivision analysis for this sale as he had done for the Bunyah sale. He made adjustments for projected higher development costs on the subject land ($80,142 per lot compared with $55,555 per lot for Hannam Vale); projected higher sale lot prices on the subject land ($300,000 compared with $215,000 per lot for Hannam Vale based on information obtained from the selling agent); and an adjustment for time for two years at five per cent per annum. After adjustments, he assessed the value per lot at $113,378 x 7 lots equals $793,646 plus improvements of $160,000 to arrive at a value of $954,000 for the parent land. I accept this analysis subject to discounting this value by 15 per cent for Hannam Vale's existing zoning and subdivision development approval and gentler contours, to arrive at a rounded figure of $811,000.

Mr Lunney's comparable sales

65 Mr Lunney valued the parent land before acquisition at $500,000 as a single rural residential site, relying upon the following sales as direct comparisons. He considered that sale 1 was the best evidence of value and relied on sales 1 and 2 more heavily than the others:

(1) 22 Weeroona Place, Kew: 17.11 hectares of land with improvements, sold in March 2007 for $430,000. Mr Lunney considered this to be the best evidence of value of a comparable single rural residential home site. It is very close to Lake Ridge Estate. Mr Lunney allowed $130,000 for the existing improvements to deduce a land value of $300,000. This sale land also had a power line easement across it. It emerged in Mr Lunney's cross-examination that it backed onto a railway line, had a watercourse running through it and its only access was shared by another property. Those matters, I think, diminish its comparability to some extent;

(2) Lot 19 Possum Way, Kew: 3.265 hectares of vacant land, sold in July 2007 for $290,000. It is a single rural residential lot located within Lake Ridge Estate at Kew. The rear boundary adjoins the Pacific Highway. It is generally uncleared bushland. It is quite close to sale 1 above and reflected a nearly identical land value despite sale 1 being over five times larger.

(3) 163 Stewarts Road, Johns River: 4.812 hectares with improvements, sold in January 2008 for $330,000. Mr Lunney attributed a value of $100,000 to the existing improvements to deduce a land value of $230,000. He considered that significant adjustment would be required to reflect the inferior Johns River location compared with Kew. Johns River is approximately 15 kilometres south of Kew, located within the Greater Taree local government area and

further removed from Port Macquarie and shopping facilities.
(4) 159 Stewarts River Road, Johns River: 9.129 hectares with improvements, sold in September 2008 for $385,000. Mr Lunney attributed a value of $135,000 to the improvements to derive a land value of $250,000. Approximately 55 per cent of the land had been cleared and divided into paddocks. The sale was by a mortgagee in possession. Mr Lunney thought that the seller may not have been a not anxious seller and accordingly placed little weight on the sale. Again, he considered that significant adjustment was required to reflect the fact that Johns River is an inferior locality. This property had been on the market since 2006 for $525,000. Mr Allsopp considered that it should be looked at with great caution because (inter alia) it was sold by a mortgagee in possession. Mr Lunney said in cross-examination his enquiries indicated that the mortgagee had obtained a valuation and he acknowledged that a valuation for a mortgagee sale may be lower than for a non-mortgagee sale depending upon the strength of the market;
(5) the Bunyah sale, which has been analysed above at [52] – [62];
(6) the Hannam Vale sale, which has been analysed above at [63] – [64].

66 I attach little weight to the sales of the two Johns River properties given their inferior location, the fact that one was a mortgagee sale, and the fact that they occurred in 2008. During oral evidence Mr Allsopp indicated that the market was rising whereas Mr Lunney indicated it was declining between the acquisition date in August 2007 and about September 2008. Counsel for both parties indicated that this issue did not affect their respective cases and pragmatically agreed to move on without canvassing the issue further.

67 Having regard to the above sales evidence, Mr Lunney formed the opinion that the unimproved value of the parent land before acquisition, on the basis of a single rural residential home site and disregarding any potentiality, was $300,000. He attributed a value to the improvements on the acquired land of $130,000, comprising $100,000 for the house, $15,000 for the shed and $15,000 for the roads and landscape pit. To the total of $430,000 he applied a premium of 15 per cent for the possibility of subdivision potential in the future to arrive at a total market value (after rounding up) of $500,000 for the parent land before acquisition. Since he later agreed with Mr Allsopp that the value of the improvements was $160,000, it would appear that his valuation should increase to $530,000.

68 “It is generally desirable, where possible, to engage in commonsense

reality checks on what experts are saying": Roads and Traffic Authority (NSW) v Collex [2009] NSWCA 101, 165 LGERA 419 at [231] per Hodgson JA. A reality check produces a difficulty with Mr Lunney's conclusion that the before value of the parent land is $500,000. The unimproved Bunyah land of 3.234 hectares with a four lot subdivision potential sold shortly before the acquisition date for $425,000. On Mr Lunney's figures, the unimproved value of the subject parent land of 6.068 hectares at the acquisition date was $345,000 (ie his $300,000 plus his 15 per cent or $45,000 for development potential). It is difficult to accept that the subject parent land should have had a value so much less than the next door Bunyah sale price when the parent land was more than double its size and, as I have found, had subdivision development potential for seven lots compared with four on the Bunyah land. This is so, I think, even allowing for the advantages of the Bunyah land in terms of its zoning to permit an immediate subdivision development application and absence of an electricity transmission easement and power line. In addition, Mr Lunney's before and after valuation produces an unimproved value of only $40,000 for the acquired land of 1.614 hectares: see [40] above. That is difficult to reconcile with the unimproved value of $425,000 for the Bunyah land of about double the size of the acquired land.

Conclusion

69 In my opinion, the Bunyah sale is the most comparable sale. The Bunyah land is adjacent to and very similar to the subject land; a price was agreed shortly before the acquisition date for a little less than one of the two market value valuations provided to the RTA and only 12 per cent above the other valuation; and it had the potential to be developed with the same minimum sized lots as those proposed for the subject land. The next most comparable sale, in my opinion, is the Hannam Vale sale. As discussed, after adjustments, the Bunyah sale indicates a value for the subject parent land of $792,000 and the Hannam Vale sale indicates a value for the subject parent land of $811,000. Giving greater weight to the Bunyah sale, I propose to adopt a valuation of $790,000 for the subject parent land based on the direct comparison method.

Hypothetical Development Check

70 As a check, the valuers employed the hypothetical development valuation method to a seven lot subdivision on the subject parent land before acquisition. The hypothetical development method and its speculative nature were described in the cases discussed at [41] – [45] above.

71 The valuers deducted from the aggregate of gross estimated realisations of the potential seven lots and the value of existing improvements, items consisting of estimated GST (agreed), agents fees and legal costs on the sale of each lot, developer's profit and risk margin, development costs (agreed) and interest on development costs (agreed). From the balance remaining they then deducted acquisition and holding costs, which comprised interest and agreed percentages for legal costs on acquisition,

stamp duty, land tax and council rates. There was a dispute as to the period for council rates. The balance represented the value of the parent land, which Mr Allsopp assessed at $933,050 and Mr Lunney at $357,165. Mr Allsopp made an alternative valuation of $583,690 assuming Mr Lunney's gross realisation value per lot of $210,000.

72 The valuers agreed that there should be added to their valuations the present value of rental income from the house and shed for three years amounting to $46,486. That increased Mr Allsopp's primary valuation to $979,536 and his alternative valuation to $630,176; and increased Mr Lunney's valuation to $403,651.

73 I accept the quantum of the constituent items on which the valuers agreed.

74 The valuers differed on the quantum of seven of the constituent items:

(a) the gross realisation value of each of the seven hypothetical lots, which Mr Allsopp assessed at $300,000 and Mr Lunney assessed at $210,000. This depended on an analysis of comparable sales;
(b) agents fees and legal costs on the sale of each lot, which Mr Allsopp assessed at 2.5 per cent and Mr Lunney at 3 per cent;
(c) the profit and risk margin, which Mr Allsopp assessed at 20 per cent and Mr Lunney at 30 per cent;
(d) the holding costs period before realisation which Mr Allsopp took as three years from the acquisition date and Mr Lunney as more than four years and up to six years;
(e) the interest rate during the holding costs period which Mr Allsopp took at 5 per cent per annum and Mr Lunney at 8.5 per cent per annum;
(f) the holding period in which land tax would be payable, which Mr Allsopp took at one year and Mr Lunney took at five years;
(g) the holding period in which council rates would be payable, which Mr Allsopp took at three years and Mr Allsopp took at five years.

75 A threshold difficulty, particularly in the case of Mr Lunney's assessment, is that the time for realisation is so long as to magnify the speculative element of the exercise and to diminish the reliability of its conclusion as to value: see [44] – [45] above.

Gross Realisations

76 In arriving at his gross realisation value of $300,000 per lot based on comparable sales, Mr Allsopp said that he made an allowance for the electricity transmission easement and power line with the result that he applied a different value for each of the lots in the seven lot subdivision to reflect the effect of the easement and power line. Some were above and

some were below $300,000 but they averaged $300,000 per lot.

77 The applicant submits that Mr Allsopp's gross realisation value of $300,000 per lot for the potential seven lots on the parent land is principally supported by the sale of land with few improvements at 23 Lake Ridge Drive, Kew for $310,000, supported by two sales of improved land at 8 Lake Ridge Drive and 3 Bellbird Close, Kew (mainly because they were around the acquisition date), and three sales of unimproved land at Hannam Vale for an average price of $253,333 also around the acquisition date. Details are as follows:

> (a) 23 Lake Ridge Drive: an area of 1.257 hectares, sold in April 2006 for $310,000. The property was unimproved except for a shed, carport, a small dam and fencing, which Mr Allsopp valued at $10,000. Mr Lunney said he made adjustments to make it comparable with the subject land including for the sale land's larger size, superior topography and nature and absence of the transmission line easement. Mr Allsopp said he took all those factors into account when he individually valued each block on the subject land but did not attribute a percentage adjustment to them. He then balanced this against the better location of the subject land. Mr Lunney valued the improvements at $20,000, that apparently being based on inquiries of the purchaser. Mr Lunney considered that a minimum discount of 25 per cent was required from his unimproved value of $290,000, to bring it down to $217,500. Mr Lunney said that his enquiries of the purchaser indicated he was prepared to pay a premium price due to the gentle topography, the fact that it was predominantly cleared of vegetation and had a dam. I do not think that this reference to a "premium" price should be regarded as anything other than the market price. I accept that the value of improvements should be assessed at $20,000 to derive an unimproved value of $290,000 before adjustments. I accept the adjusting factors that Mr Allsopp identified, but I consider that they should result in a reduction of $10,000 to $280,000.
>
> (b) 8 Lake Ridge Drive, Kew: 1.348 hectares with a four bedroom house with a pool in a landscaped garden setting, sold for $630,000 in July 2007. The lot is elevated, has attractive views, and has few trees. However, it is larger, was sold 16 months before the acquisition date and is not in as attractive a location as the subject land. Mr Allsopp determined the value of the improvements at $310,000 to derive a land value of $320,000. He had to value the improvements on the basis of a colour photo and an external inspection because the occupier would not agree to

him entering the property.

In cross-examination it was put to Mr Allsopp that he should have “paired” 8 Lake Ridge Drive with Lot 48 Possum Way, Kew, a similarly sized unimproved property of 1.46 hectares about 400 metres away which sold for $225,000 in March 2006, almost 15 months before the 8 Lake Ridge Drive sale. In a paired sales analysis the value of improved land is compared with the value of vacant comparable land in order to determine the value of improvements. It was put to Mr Allsopp that pairing would suggest that the value of the improvements on 8 Lake Ridge Way is $405,000. Mr Allsopp distinguished the sale of Lot 48 Possum Way on the basis that Possum Way and Glider Spur were very different areas compared with most sections of Lake Ridge Drive because they were heavily timbered and had very poorly presented blocks denuded of topsoil whereas Lake Ridge Drive has good grassland and good topsoil. He thought there were two different markets notwithstanding their proximity. As they sold at similar dates but for very different prices, he considered that that demonstrated the better Lake Ridge Drive properties. Mr Lunney thought the two properties could be paired, contending that Lot 48 Possum Way was largely cleared of existing vegetation and therefore differed from other heavily vegetated lots in that area. Having viewed the locations of these properties, which seemed to me to be quite different, I am not persuaded that it was appropriate to pair them.

The RTA criticises Mr Allsopp’s evidence in relation to the house on this land. Mr Allsopp’s said in his initial written report that the house on the land was built in 1994, yet apparently relied in support of his analysis on a 1999 sale of this land as vacant land. When this arose in oral evidence he said that the house was built in

2004. Evidence tendered later by the RTA indicates reliably that the house was built in 1995 and that after it was sold in 1999 it was renovated, a double garage erected and significant landscaping occurred by the time of its resale in 2007. The RTA's criticism of Mr Allsopp over these errors in his evidence is justified.

(c) A sale of 1.007 hectares of improved land at 3 Bellbird Close, Kew, in the nearby Glenhaven Estate in May 2007 for $575,000. Mr Allsopp applied sales based on his experience to the built areas to determine the value of the improvements as $260,000 and the unimproved value of the land as $315,000. Mr Allsopp said this sale was very comparable because the sale date was close to the acquisition date of the subject land, the subject land can be viewed as an extension of the nearby Glenhaven Estate, its highest and best use is as a single homesite (like six of the seven proposed lots on the subject land), and it has very similar attributes, location, services and facilities.

The RTA submits that no reliance can be placed on Mr Allsopp's analysis of this sale because his valuation of the improvements was inadequate in two respects. First, he did not inspect the inside of the house. Mr Allsopp explained that that was because no one was there when he knocked on the door, so he had to content himself with walking around the house and looking in the windows. While this limitation on his inspection was unavoidable, I think it should be reflected in an adjustment. The RTA's second criticism focuses on Mr Allsopp's valuation of the verandah of the house at 3 Bellbird Close, which is on all four sides of the house and is five times the area of the verandah of the house on the subject acquired land. He valued the latter at $10,000 and the former at $20,000. The criticism is that he should have valued the 3 Bellbird Close verandah at much more than $20,000 because it is five times the area of the verandah on the subject land. When this was put to him in cross- examination, Mr Allsopp said he considered it was right to value it at only twice the value of the

verandah on the subject land because although purchasers want utilisable outside area, verandahs all the way around a house do not usually attract a significant amount more. While I am prepared to accept that there is some substance in this evidence, it seems to me that there should be some adjustment for the very much larger area of the verandah on the sale land.

In my opinion, 3 Bellbird Close is a good comparative sale for the reasons identified by Mr Allsopp and because the potential seven lot subdivision on the subject land is proposed to be developed in the same attractive way as Glenhaven Estate, through which potential purchasers would pass to inspect the subject land. However, I think that Mr Allsopp's valuation of the improvements should be increased by $30,000 to $290,000 because of the matters raised by the RTA discussed above. That results in an unimproved value of $285,000.

(d) Mr Allsopp said he derived great comfort from the sale prices of lots at the Hannam Vale sale site (discussed at [63] above). The Hannam Vale site went on the market in March 2007 and in the two years thereafter there were three sales of lots at $230,000, $250,000 and $295,000. These lots are in a new small estate (similar to the subject land) but are located 20 kilometres from Kew, the closest town. They are impacted by power line easements and lack town water. Mr Allsopp considered that they needed an adjustment for the significant relative advantages of the subject lots and that $300,000 per lot for the subject land was conservative by comparison. Mr Lunney took an entirely different view of the Hannam Vale sales. He thought that they were far less comparable than the Lake Ridge Estate sales on which he relied; that the Hannam Vale subdivision was very different from both the subject land and the Lake Ridge Estate; and that Hannam Vale and the subject land would appeal to different markets.

78 In determining his gross realisation value of $210,000 per lot for the potential seven lot subdivision on the subject land, Mr Lunney relied on sales at the Lake Ridge Estate. Prior to the acquisition date, sales at the Lake Ridge Estate had been slow and 14 lots were available for sale. Mr Lunney thought this number represented an adequate supply of rural

residential land in the locality for a number of years. The lots in Lake Ridge Estate are substantially larger than the potential lots in the seven lot subdivision on the subject land. Mr Lunney gave them adjusted values ranging from $176,000 to $217,500 per lot and the figure that he adopted and applied to the subject land lots was $210,000 per lot. The Lake Ridge Estate sales on which he ultimately relied were as follows:

> (a) 93 Possum Way: 3.265 hectares sold for $290,000 in July 2007 as a vacant single rural-residential lot. The rear boundary adjoins the Pacific Highway but the preferred building envelope is a similar distance as the building envelope on some potential lots on the subject land. He thought a discount of 25 per cent to $217,500 was required to make it comparable with the subject land because this sale land was substantially larger than all of the lots on the seven lot subdivision on the subject land and the fact that it was not burdened by an electrical transmission line easement;
> (b) Lot 53 Glider Spur: 2.8 hectares sold for $265,000 in October 2007 as a vacant single rural-residential lot. Mr Lunney considered it should be discounted by 20 per cent to $212,000 for the fact that it was substantially larger than all of the lots on the seven lot subdivision on the subject land and the fact that it was not burdened by an electricity transmission easement;
> (c) 8 Glider Spur: 2.146 hectares sold for $245,400 in August 2008 as a vacant single rural residential lot. The rear boundary adjoins the Pacific Highway, however the preferred building envelope is a similar distance as the building envelope on some of the potential lots on the subject land. He thought a discount of 20 per cent to $197,000 was required for the facts that it was substantially larger than all the lots on the seven lot subdivision on the subject land and that it was not burdened by an electricity transmission easement;
> (d) Lot 48 Possum Way: 1.46 hectares sold for $225,000 in March 2006 as a vacant single rural-residential lot. He thought a discount of 15 per cent to $191,000 was required for the fact that it was substantially larger than the seven lot subdivision on the subject land and the fact that it was not burdened by an electrical transmission line easement. Mr Allsopp regarded this sale with some caution because it was a sale by the selling agent’s daughter to a family friend and information he received from the agent indicated that, in consequence, there had been a discount of $10,000;
> (e) 76 Possum Way: 2.1 hectares sold for $260,000 in June 2006 as vacant battleaxe shaped rural-residential lot. It

includes a substantial amount of cleared and arable land which is considered to be an advantage. He thought discount of 25 per cent to $195,000 was required to reflect its battleaxe shape, size, the superior nature of the sale property (cleared land of gentle contour) and the fact that it was not affected by an electricity transmission line easement;

(f) 23 Lake Ridge Drive, to which Mr Allsopp also had regard as discussed at [77(a)] above.

(g) 78 Possum Way: 1.5 hectares of vacant battleaxe shaped rural-residential land which sold in November 2006 for $220,000. It is substantially larger than all of the potential lots in a seven lot subdivision of the subject land. It includes a substantially amount of cleared and arable land, which he considered an advantage. Mr Lunney considered that a discount of 20 per cent to $176,000 was required in applying this sale to the subject property to reflect its battleaxe shape, size, the superior nature of the sale property (cleared land of gentle contour), and the fact that it is not burdened by an electrical transmission line easement.

79 Mr Allsopp considered that the Lake Ridge Estate sales on which Mr Lunney relied were a poor comparison for the following reasons:

(a) the Lake Ridge Estate was poorly presented land with lots of old timber growth and in a wildlife corridor which would require flora/fauna studies, bushfire and koala reports;

(b) many of the Lake Ridge Estate lots are risk purchases. His enquiries of the marketing agent indicated that the cost to clear and bench sites would exceed $25,000 and that the agent would like his client to clear the site to enable the sale of more lots;

(c) Lake Ridge Estate in the period from February 2007 to May 2008 was blighted by a proposed diesel fired power plant to be located to its north. A real estate agent who owned a block on the estate told him he had halted his plans to build when he heard of the power plant proposal and he had also lost a sale there due to that issue. In oral evidence he indicated that it had the effect of deterring sales in the above mentioned period or at least until early 2008;

(d) Lake Ridge Estate was impacted by a proposed waste transfer station and industrial estate located about mid-way between Lake Ridge Estate and the subject land. In cross-examination Mr Allsopp agreed that the waste transfer station and industrial estate could not be seen from any of the vacant land parcels in the Lake Ridge Estate.

> Nevertheless, he thought that the proximity was a relevant consideration. He conceded in cross-examination that any adverse effect on the value of the Lake Ridge Estate lots would apply more or less to the subject land. Given that concession and the evidence overall, I do not think that the impact of the proposed waste transfer station and industrial estate is a significant point;
> (e) the subject land is superior to Lake Ridge Estate because it is more proximate to the Kew shops and hotel. Mr Allsopp calculated that the distance is one kilometre and a pedestrian trial is available, whereas 23 Lake Ridge Drive is 2.4 kilometres. Mr Lunney disagreed. He said that proximity to the Kew shops and hotel was not a “primary” consideration of purchasers contemplating a rural residential use. Further, he said that the distance from the subject land to the Kew hotel along the pedestrian trail was over one kilometre and that the vehicular distance was virtually identical. They each quoted local managing agents (presumably different ones) of whom they had made enquiries in support of their competing positions as to whether or not proximity to the Kew shops and hotel would add value. In this remarkably contradictory state of the evidence on an aspect, which one would have thought would defy controversy between experts, I have to do the best I can. From my view of the location and as far as I can deduce from a map in evidence, the walking distance from the subject land to the Kew hotel and shop is roughly one kilometre. I am prepared to accept that this makes the subject land significantly more proximate than the Lake Ridge Estate to the Kew hotel and shops, and that this was likely to be appealing to purchasers for whom it would be likely to add value.

80 I generally accept Mr Allsopp’s evidence concerning the Lake Ridge Estate subject to my comments in the preceding paragraph. With the exception of the mater of the waste transfer station and industrial estate, I think that they support the conclusion that Mr Allsopp’s comparables are of more assistance.

81 Mr Allsopp’s comparables except for Hannam Vale were sales of improved land, for which an adjustment for the value of improvements has to be made to make them comparable. Mr Lunney’s comparable sales were all sales of unimproved land. All other things being equal, comparable sales of unimproved land have the advantage of avoiding an adjustment for improvement. However, Mr Allsopp considered that there were no better sales of unimproved land than his preferred comparables. It is the daily fare of valuers to value land by subtracting the added value of improvements to derive unimproved values: Maurici v Chief Commissioner of State Revenue [2003] HCA 8, 212 CLR 111 at [19]. The Possum Way and Glider Spur sales

lands are generally poorly presented. With the benefit of a view, I think that 23 Lake Ridge Drive and 3 Bellbird Close are the two most comparable sales. As discussed, after adjustments they show an unimproved gross realisable value of, respectively, $280,000 and $285,000 per lot for a seven lot subdivision on the subject land. I propose to adopt $280,000.

Agents Fees and Legal Costs on Sale of each Lot

82 Mr Allsopp assessed agents fees and legal costs on the sale of each lot at 2.5 per cent and Mr Lunney at 3 per cent. Mr Lunney indicated that the difference was largely referable to the difference in realisation values. As I have largely favoured Mr Allsopp's realisation values, I will adopt 2.5 per cent.

Profit and risk margin

83 Mr Allsopp adopted a profit and risk margin of 20 per cent and Mr Lunney adopted 30 per cent. Mr Lunney considered that Mr Allsopp's margin was inadequate particularly because of the risk that rezoning might not occur and, if it did occur, might not permit a seven lot subdivision. I have earlier concluded that the parties to a hypothetical sale at the acquisition date would have been confident that rezoning and seven lot subdivision approval would be obtained within two years. Nevertheless, they would not have thought it was certain, that is, as good as if the land had already been rezoned by the acquisition date. Taking this into account, I consider that Mr Allsopp's profit and risk margin is too low. I propose to adopt a profit and risk margin of 25 per cent for the subject land.

Period of holding interest costs

84 Mr Lunney originally adopted a holding interest costs period of 51 months in a report served before the hearing. However, he produced a further analysis during the hearing which adopted a holding interest costs period of six years ie 72 months: three years for rezoning, one year for development approval and development, and two years for the sales and settlement. No explanation was given for this large expansion of time. Mr Allsopp adopted a three year holding interest costs period: two years for rezoning and development approval and one year for development, sale and settlement. I have earlier indicated that I accept Mr Allsopp's two year period for rezoning; but I think that his one year for development, sale and settlement of all seven lots is too optimistic and that it is more realistic to adopt Mr Lunney's two years. As agreed by the valuers, interest should be charged in relation to only half the latter two year period on the assumption that the lots would be sold progressively over the two year period.

Interest rate during holding period

85 Mr Allsopp adopted an interest rate during the holding period of 5 per cent per annum; Mr Lunney adopted 8.5 per cent per annum. The latter was the relevant prevailing interest rate as at the acquisition date. Mr Allsopp's rationale for adopting a lower rate was that, in his experience, a developer would assume some capital gain during the holding period that would partially offset the interest. Mr Lunney pointed to the slow rate of sales at

the Lake Ridge Estate, but that goes not so much to the issue of anticipated capital gain but to the realistic holding costs period. Markets fall as well as rise. Nevertheless, as discussed at [59(iv)] above, I am prepared to accept Mr Allsopp's evidence, based on his experience, that at the acquisition date, a hypothetical developer would have anticipated some offsetting capital gain over the four year holding period. I therefore adopt the 5 per cent interest rate.

Land tax during holding period

86 The valuers agreed that land tax during the holding period was one per cent per annum, but Mr Allsopp applied it for only one year whereas Mr Lunney applied it for five years. Mr Allsopp said that the land would be exempt from land tax for the period before subdivision development consent was obtained because it would be used for primary production. Section 10AA of the *Land Tax Management Act 1956* exempts land from tax if it is for primary production, meaning, relevantly, that its dominant use is the maintenance of animals for the purpose of selling them or their natural increase or bodily produce. In Mr Allsopp's experience, developers put goats or beef cattle on rural property until they are ready to develop it and thereby obtain the exemption, and he had seen that happen on zoned residential land. Mr Lunney contended that the land was not big enough to attract the exemption. Two factors tend to weigh against bringing this land within the exemption. First, its relatively small size and my visual observation raises doubt whether it would support grazing for long. Secondly, both valuers agree that in the hypothetical subdivision analysis there should be added back the present value of the rental income for the house and shed during the holding period. That use tends to weigh against the suggestion that the dominant use of the land would be for the maintenance of animals. On balance, having regard to these considerations, I consider that land tax should be factored in at one per cent per annum for three years.

Council rates during holding period

87 The valuers agreed that council rates were 0.5 per cent per annum but Mr Allsopp applied them for three years to arrive at a total of 1.5 per cent whereas Mr Lunney applied them for five years. Given my decision as to the holding period, I propose to apply them for three years.

Conclusion

88 My conclusion is that the hypothetical development method yields a value of $705,000 for the parent land before acquisition, calculated as follows:

	$
Gross realisation @ $280,000 per lot for 7 lots (average size 8,997 m2)	1,960,000

Plus value of existing improvements	160,000
Total realisation	2,120,000
Less 10% GST on 6 lots (one with a house no GST)	(181,714)
	1,938,286
Less agents fees and legals on sale of each lot	(48,457)
	1,889,829
Less developer's profit and risk margin (25%)	(472,457)
	1,417,372
Less development costs as per joint report of engineering experts	(560,996)
	856,376
Less interest on development costs 8.5% x 1 year x 50% x $560,996	(23,842)
	832,534

Less acquisition and holding costs:
(a) interest:

- Hold for rezoning (2 years @ 5% pa) 10.0%
- DA development (1 yr @ 5% pa) 5.0%
- Sell settle period (1 year @ 5% pa 2) 2.5%

Total interest 17.5%
(b) Legals on acquisition 0.5%

(c) Stamp duty 4.0%

(d) Land tax 1% pa for 3 years 3.0%

(e) Council rates 0.5% pa for 3 years 1.5%

TOTAL: 26.5%

$832,534 = 126.5% of the residual land value. Therefore 100% =	658,130
Plus present value of rental income from house and shed ($18,200 pa for 3 years 8.5%)	46,486
	704,616
SAY	$705,000

Conclusion re Market Value

89 The last-mentioned figure of $705,000 compares with the value of $790,000 by the direct sales comparison method. Given the greater element of uncertainty with the hypothetical development method, I propose to adopt $790,000 as the market value of the parent land before acquisition.

90 The market value of the acquired land at acquisition, in my opinion, was therefore $490,000 calculated as follows:

Parent land before acquisition	$790,000
Less residue land after acquisition (agreed)	$300,000
Acquired land at acquisition	$490,000

DISTURBANCE

91 The applicant claims loss attributable to disturbance of land under s 55(d) of the *Just Terms Act*. On the acquired land were the applicant's residence and a large shed used by her partner for a landscaping supply business. The disturbance claim largely comprises the costs of connection of services (water, electricity, telephone and road access) to a new residence to be constructed on the south-eastern part of the residue land away from the Pacific Highway, and to a new shed to be constructed on the north-western part of the residue land close to the Pacific Highway.

92 The applicant submits that the disturbance claim falls within the definition of "loss attributable to disturbance" in s 59(c) or (f), which provide:

" **59 Loss attributable to disturbance**

In this Act:

loss attributable to disturbance of land means any of the following:

...
(c) financial costs reasonably incurred in connection with the relocation of those persons (including legal costs but not including stamp duty or mortgage costs),
...
(f) any other financial costs reasonably incurred (or that might reasonably be incurred), relating to the actual use of the land, as a direct and natural consequence of the acquisition."

93 The applicant quantifies her total disturbance claim at $426,295, of which the RTA accepts $22,058. In addition to some quantum disputes, the RTA submits that the disputed disturbance claims are not claimable at law because:

(a) they do not come within the definition of "loss attributable to disturbance" in s 59(c) or (f);
(b) if Mr Allsopp's valuation approach is adopted, s 61(b) of the *Just Terms Act* precludes their recovery;
(c) in any event, they are double-dipping because they are included in the valuers' before and after method of assessing the market value of the land.

94 The market value of land in s 55(a) and any loss attributable to disturbance in s 55(d) are separate components of compensation. The former is assessed in accordance with the hypothetical exercise required by the definition of market value in s 56(1)(a). The latter is assessed by reference to the actual costs and fees specified in s 59, which are qualified by a reasonableness requirement and subject to the limitations on the recovery of loss in s 61. Statements in the context of different legislation that disturbance is not a separate subject of compensation from market value (eg in *Commonwealth v Milledge* (1952-1953) 90 CLR 156 at 164) are inapplicable to the *Just Terms Act* *Peter Croke Holdings Pty Ltd v Roads and Traffic Authority of NSW* (1998) 101 LGERA 30 at 40 (Bignold J).

Quantum

95 Set out below is a schedule of each item of claimed disturbance costs, the parties' competing quantum contentions, and my determination of quantum. This schedule is only concerned with quantum and does not address the RTA's contentions that the disputed items are not claimable at law:

Item	Applicant	RTA	Court

1	Rent of alternative accommodation for 36 months while waiting to rebuild on residue land	62,571.60		62,571.60
2	Removalists	7,700.00	3,850.00	7,700.00
3	Mail Redirection	66.00	66.00	66.00
4	Telephone connection	118.00	59.00	118.00
5	Telephone Redirection	59.00	59.00	59.00
6	Hire fees storage containers	8,817.84		8,817.84
7	Delivery and removal fees storage containers	575.00		575.00
8	Slashing and creation of access to enable consultants advice on relocation of business and placement of storage containers	5,740.00		5,740.00

9	Installation costs for connection of water, power and telephone (materials plus pole construction)	51,085.32	37,000.00 or 17,000.00	44,610.00
10	Construction costs (re item 9) Trenching Bushfire trail between sites Installation Telstra -cable Spread and level of excess soil Tub grinder and shear hire Contingencies for hard -rock and tree stump removal Land clearing	17,330.50 24,310.00 6,083.00 2,200.00 30,800.00 8567.35 4,950.00	2,865.00 (including materials) 1,000.00 4,950.00	17,330.50 24,310.00 6,083.00 2,200.00 15,000.00 4,280.00 4,950.00
11	Installation costs for water/power including trenching, laying cable and connection	Claimed as part of trenching in Item 10	15,000.00	-
12	Creation of access roads by Ditchfield Contracting	102,073.40	74,855.00	74,855.00

13	Replacement costs of waste water management system and on-going costs of operation	12,225.00	12,225.00	12,225.00
14	Development application cost for lodgement of application for relocation of dwelling and business	5,500.00		5,500.00
15	Development application cost for lodgement of application for building envelope	3,330.00		3,330.00
16	Preparation of house plans	4,400.00		4,400.00
17	Consultant advice on relocation of dwelling and business (engineer, waste water management, bushfire hazards)	2,115.00		2,115.00
18	Council fees	6,352.00		6,352.00
19	Extra costs of construction associated with compliance with BASIX and Nathers	4,191.00	4,191.00	4,191.00

20	Water tanks Shed Connection Site preparation and backfill House Connection Site preparation and backfill 1x 20,000 litre tank	2,250.00 476.77 330.00 2,250.00 476.77 330.00 5,900.00	2,250.00 2,250.00 5,900.00	2,250.00 476.77 330.00 2,250.00 476.77 330.00 5,900.00
21	Legal costs s 59(a)	8,024.50	8024.50	8,024.50
22	Valuation Fees s 59(b)	33,906.40	10,000.00	25,000.00
	TOTAL			362,416.98

96 Where the RTA has agreed or not contested the claimed quantum of an item, after considering the evidence I have concluded that it is reasonable. The quantum disputes require further analysis, as follows.

97 **Item 2**: Removalists $7,700. The claim is for $3,850 for temporarily relocating to rented premises, and a further amount of $3,850 for relocating from the rented premises to the applicant's proposed new residence on the residue land, when it is built. The RTA agrees to the first item for removalist costs but says that the second should be disallowed. I consider that the quantum of the applicant's claim is reasonable and allow it.

98 **Item 4**: Telephone connection $118. The applicant claims telephone connection costs of $59 for the temporary premises and a further $59 for the new premises to be built on the residue land. The RTA agrees with the first sum but not the second. I think both are reasonable and should be allowed.

99 **Item 9**: Installation costs for connection of water, power and telephone, $51,085. This is a claim for materials, except that it also includes the cost of constructing a power pole (material, construction, laying of cables and connections), to bring services from the boundary of the residue land to the house and shed proposed to be constructed thereon. The RTA's competing amount is $37,000 for three phase power or $17,000 for single phase power. The RTA says that its item 9 allowance of $37,000 and item 11

allowance of $15,000 covers everything that the applicant claims in items 9 and 10.

100 This item includes the cost of three phase power to the proposed house and shed. The applicant enjoyed three phase power at her house and shed on the acquired land. The evidence of Mr Paul Parker, a civil engineer called by the RTA, was that for a standard residential allotment, three phase power would not be provided upfront, and that whether it was necessary for the proposed shed depended on what was in the shed. At one point of his oral evidence he appeared to indicate that if only one phase power were allowed this would reduce the claim to $32,800. As the applicant had three phase power on the acquired land, it is reasonable that she should also have three phase power on the retained land. Therefore I do not propose to make any reduction on account of three phase power. If it were necessary to go further, I would add that a letter in evidence from Country Energy indicates that the acquired land and other properties were supplied from a substation fitted with a three phase transformer, and it is unclear whether the residue land could in future be supplied from a substation fitted with a one phase transformer.

101 The RTA also submits that item 9 should be reduced by disallowing the power pole, to support a meter box, proposed to be located near the boundary of the residue land. The basis of the submission is evidence tendered by the RTA indicating that a cheaper alternative is to attach a meter box to the side of either the proposed house or the proposed shed, one meter box being sufficient to read the power for both. The power pole costs, including the laying of cables and connections, total $13,475. Mr Parker accepted cable laying and connection costs should be allowed for a meter box attached to the side of the house or shed, at a cost that he guessed would be around $3,000.00. It is unclear whether there is also a cost for the actual attachment of a meter box to the house or shed. As the RTA raised the alternative method, I think it bore an evidentiary onus of costing it. A guess by the RTA expert is not a satisfactory method of costing. However, it is reasonably clear that the alternative method proposed by the RTA must be cheaper than a power pole. Doing the best I can in this state of the evidence, I propose to disallow the claim for $13,475 for the power pole and to allow instead $7,000 for the alternative. The net effect is to reduce the claimed quantum of item 9 by $6,475 to $44,610.

102 **Item 10**: Construction costs claimed $94,240.85. Item 10 comprises 7 sub-items as costed in a report by Mr Con Constantine, a construction contractor, on which he was not cross-examined. Competing evidence for the RTA was given by Mr Paul Parker, a civil engineer. The sub-items are as follows:

> (a) Trenching $17,330. The RTA allowed $15,000 for this item (see item 11 in the table above). I am unable to see a reason for reducing the applicant’s claim, which I allow.

(b) Bushfire trail between the house and shed $24,310. Mr Parker mentioned that he thought this was doubling up but that seems to have been on the mistaken assumption that it was the same as the access road from the boundaries of the residue land to the house and shed (which are claimed in item 12). I allow the claimed amount of this item.
(c) Installation Telstra cable $6,083. The RTA allows approximately half that amount $2,865, which was Mr Parker's estimate. I accept Mr Constantine's estimate.
(d) Spread and level off excess soil $2,200. Mr Parker said he thought this should have been covered by other items in Mr Constantine's quote. There is no indication in Mr Constantine's evidence or quote that he is doubling up. I allow the claimed amount.
(e) Tub grinder and shear hire $30,800. The RTA allows $1,000 based on the evidence of Mr Parker that the tub grinder would only be needed for one day at about $150 per hour given that it related to the creation of a trench approximately one metre wide. Mr Parker conceded that he had made no specific inquiry as to the cost of the machine but was relying on general experience. Mr Constantine's evidence was not disturbed by cross-examination. Nevertheless, Mr Parker's evidence has raised sufficient doubt in my mind that I think a reduction is warranted. I propose to reduce the claimed quantum of this item by about half to $15,000.
(f) Contingencies for land rock and tree stump removal $8,567.35. Mr Parker's criticism was that it is unreasonable for an experienced person to accept a quote from a contractor that has a contingency item rather than being on a schedule of rates basis. The applicant does not appear to be an experienced person. However, it would be reasonable when contracting to introduce a schedule of rates. In closing submissions the applicant accepted that in assessing the reasonableness of a claim for the contingency item, account could be taken of the fact that the contingency may not be realised. On balance, I propose to reduce the quantum of this item by about half to $4,280.
(g) Land clearing $4,950. The RTA and Mr Parker had no issue with the quantum of this item and I

allow it.

103 **Item 12**: Creation of an access road to the house and an access road to the shed on the residue land by Ditchfield Contracting $102,073.40. A quote from Ditchfield Contracting in this amount is in evidence. There is a requirement for safe access from the public road system to the proposed house and shed for the rural fire service providing property protection during a bushfire and for occupants faced with evacuation. The RTA allows $74,855 based on the evidence of Mr Parker. The difference represents the cost of a creek crossing. Although there is a creek in wet weather periods, Mr Parker considered that the amount claimed was unjustified. He allowed for a cheaper form of creek crossing appropriate to the conditions. I accept Mr Parker's evidence and reduce the quantum of this item to $74,855.

104 **Item 22**: Valuation fees of $33,906.40 are claimed by the applicant under s 59(b) of which the RTA accepts $10,000. These were Mr Allsopp's valuation fees. The RTA submits that they are unreasonably high. It contrasts his valuation fees charged to the Bunyah Local Aboriginal Land Council in July 2007 for valuing their adjoining land in the sum of $4,592.50. **I**n cross-examination Mr Allsopp denied a suggestion that the Aboriginal valuation case was no more or less difficult than this one, which he described as extremely difficult and as one of the most complex matters he has ever had to do having regard to the disturbance issues, the landscape business and the potentiality of two applicants. The potential second applicant was the applicant's partner but, eventually, after consultation with lawyers, it was decided that he would not make a claim. I give weight to Mr Allsopp's assessment of the complexity and difficulty of his valuation of the subject land. However, I think there should be a deduction for the element of his fees referable to a potential claimant who did not make a claim. That element has not been specifically quantified in the evidence but, doing the best I can, I propose to reduce this item to $25,000.

Section 59(c) or (f)

105 The RTA submits that, contrary to the applicant's contention, the disputed disturbance items do not fall within s 59(c) or (f) of the Just Terms Act.

106 The disputed disturbance items all flow from the necessity for the applicant to relocate from the acquired land as a result of the acquisition.

107 The word "relocation" in s 59(c) has a wide meaning. This is indicated by Minister for Army v Parbury Henty & Co (1945) 70 CLR 459 at 507 (notwithstanding that the case was decided under different resumption legislation) per Dixon J who held that disturbance costs include costs that a claimant:

> "reasonably incurs in removing his furniture and goods including tenants' fixtures and the expenses in setting up in new premises for the purposes of carrying on his business.

> Nor is it denied that the expenses may include the net cost of installing fixtures, both those removed and, where reasonably necessary, newly acquired fittings. The residual value which would remain to him must of course be taken into account".

Williams J said (at 514) that the claimants were entitled to compensation:

> "not only for the value of the proprietary interests so acquired, but also for what can be compendiously called expenses of removal into premises at least as commodious and congenial taking a broad view of the matter, as those of which they were dispossessed".

108 The width of the meaning of "relocation" in s 59(c) is also indicated by the decision in Peter Croke Holdings Pty Ltd v Roads and Traffic Authority of NSW (1998) 101 LGERA 30. Bignold J allowed as s 59(c) relocation costs, the costs of a dispossessed tenant in relocating and re-establishing a business on another site. They included the cost of obtaining development consent, the cost of site preparation including drainage, kerb and guttering, and removal of pergolas; the cost of additional advertising to promote the new location; the cost of reprinting business stationery; the cost of management time involved with re-establishing contacts; and the cost of electricity connection.

109 Similarly, in Home Care Services (NSW) v Albury City Council [2003] NSWLEC 214, 136 LGERA 117 at [18] Bignold J held that "the amount of compensation recoverable pursuant to s 59(c) in the present case includes all of the relocation costs incurred by the Claimant in re-establishing its business premises in the Swift Street premises". The relocation costs that his Honour allowed included fit-out costs.

110 Section 59(f) is a catch-all provision and the words "any financial costs" should not be read down: Fitzpatrick Investments Pty Ltd v Blacktown City Council (No 2) [2000] NSWLEC 139, 108 LGERA 417 at [20] per Lloyd J. There are three requirements for financial costs to fall within s 59(f). First, they must be reasonably incurred or might reasonably be incurred. Secondly, they must relate to the actual use, as distinct from the potential use, of the "land", which means the acquired land and not residue land: MIR Bros Unit Constructions Pty Ltd v Roads & Traffic Authority of New South Wales [2006] NSWCA 314 at [88]; Roads and Traffic Authority of New South Wales v Peak [2007] NSWCA 66 at [56], [59], [66], [67]. However, if the actual use of the residue land is so intimately connected with the actual use of the acquired land so that use of the one is dependant on use of the other, that is sufficient to bring the actual use of residue land within s 59(f): Peak at [71]; McBaron v Roads and Traffic Authority of New South Wales (1995)

87 LGERA 238 (Talbot J), approved in *Peak* at [71]. Thirdly, they must arise as a "direct and natural consequence of the acquisition". Those words direct attention to the nature or degree of the required causal relationship: *Almona Pty Ltd v Roads and Traffic Authority (NSW)* [2008] NSWLEC 112, 160 LGERA 375 at [60] (Jagot J). It is not necessarily the same as the applicant's wishes in relation to the building of a new residence: *Peak* at [74].

111 The width of s 59(f) is indicated by *Peak*. That case was concerned with costs associated with the relocation of a residence from one position to another on residue land. There was a claim for disturbance under s 59(f) for costs to be incurred on residue land for a bridge over a gully, compliance with a development application, disconnection of electricity to the old house and connection of electricity to the new house, septic at the new site plus connection, removal and relocation of a gazebo, relocation of fences, and furniture removal to the new house: at [51]. Focusing on the terms of s 59(f), on appeal Beazley and Tobias JJA held that these costs were recoverable if the use of the residence was an intimate part of the use of the acquired land, and remitted the matter to the trial judge to determine whether it was: at [80] – [91].

112 In *Parbury Henty*, *Peter Croke* and *Peak* costs of the same or similar character as the bulk of the disturbance costs in the present case were held to be recoverable (subject, in *Peak*, to the further finding the subject of the remitter).

113 The RTA submits that s 59(c) is limited to relocation costs already incurred before trial, whereas some of the alleged relocation costs claimed in the present case are yet to be incurred. The submission is based on the fact that s 59(c) – like s 59(a) and (b) - refers to financial costs "incurred", in contrast to s 59(d), (e) and (f) which refer to costs "incurred" or that "might" be incurred. The RTA argues that under s 59(d), (e) and (f) future costs of the type described therein are recoverable because of their additional words "or that might reasonably be incurred", and that the absence of those words in s 59(c) means that future relocation costs are not recoverable. In effect, the RTA's submission is that the reference in all subsections of s 59 to costs or fees "reasonably incurred" should be construed as costs or fees that "have been reasonably incurred" (that is, in the past), and that the additional reference to costs "that might reasonably be incurred" in s 59(d), (e) and (f) should be construed as costs "that might or will be reasonably incurred" (that is, in the future).

114 That is a possible construction, in my view, except that it is difficult to construe the word "might" as including future costs where it is certain that they will be incurred. Another possible construction, in my view, is that the reference to costs and fees "reasonably incurred" means whenever incurred (that is, in the past or in the future) as determined on the balance of probabilities, and that the reference to costs "that might reasonably be

incurred” means future costs where the chance of them being incurred is less than on the balance of probabilities.

115 It may be of some assistance to consider the construction issue against the background of the approach of civil courts to the determination of past damages, on the one hand, and future damages, on the other. The courts determine that past damages have been incurred on the balance of probabilities, that is, if there is a 51 per cent chance that they have been incurred. If they are proved to a lesser standard, the applicant recovers nothing. It is an all or nothing assessment. In contrast, because the future is often not predictable, where future damages are not certain the courts determine them according to the degree of chance that they will be suffered, ranging from 1 per cent to 99 per cent, and will adjust the quantum of damages to reflect that chance. See Malec v JC Hutton Pty Ltd [1990] HCA 20, 169 CLR 638 at 642 – 643. Similarly, the words “might reasonably be incurred” in s 59(d), (e) and (f) may be construed as acknowledging a degree of chance which is less than certain that the costs to which they are referred will be incurred. That may provide some support for the RTA’s submission except that it does not seem to accommodate future costs where the court is certain that they will be incurred.

116 However, everything depends upon the subject matter and the context. There are strong contrary contextual and purposive considerations which, in my opinion, carry the day. First, within 30 days after publication of an acquisition notice the acquiring authority must give the former owner written notice of the compensation offered as determined by the Valuer-General: s 42(1). At that early stage, s 59(a), (b) and (c) costs are unlikely to have been incurred. If the RTA’s construction is correct, future s 59(a), (b) and (c) costs could not be included in the Valuer-General’s determination or in the statutory offer. The statutory machinery would become unworkable in that respect. Secondly, if the RTA’s construction is correct and the matter proceeds to trial, an acquiring authority would obtain a windfall in avoiding liability for costs under s 59(a), (b) and (c) by the chance circumstance that the trial occurs before the costs are incurred. The Court is entitled to pay the legislature the not excessive compliment of assuming that it did not intend that unjust consequence when its stated objective was to ensure compensation on just terms: s 3(1)(b).

117 The preferable and purposive construction, in my opinion, is that costs “incurred” in s 59(a), (b) and (c) means whenever incurred as determined on the balance of probabilities, and that the expanded “might…be incurred” in other subsections means costs where it is less than probable that they will be incurred. That construction is consistent with the decision to allow likely future removalist costs under s 59(c) in Horton v Wyong Shire Council (No 2)[2005] NSWLEC 45 (Talbot J). If that is not the correct construction, then, in order to arrive at just compensation, the final determination of compensation might have to be postponed and the completion of the trial

adjourned until s 59(a), (b) or (c) costs were actually incurred. The inconvenience of such a course tends to reinforce the construction that I have proposed. The quantum of compensation where the conclusion is that costs “might” be incurred may reflect the degree of chance.

118 I am satisfied that the disputed costs, to the extent that they have not already been incurred, will be incurred by the applicant.

119 In my opinion, to the extent that they were reasonably incurred, the disputed disturbance costs fall within s 59(c) as financial costs in connection with the relocation of the applicant, or fall within s 59(f) as financial costs reasonably incurred, or that might reasonably be incurred, relating to the actual use of the acquired land, as a direct and natural consequence of the acquisition. The parent land was the applicant’s home. It is a direct and natural consequence of the acquisition that she would continue to live in her large backyard, that is, on the residue land, and relocate her house and shed there. Prior to acquisition the use of the residence and shed were an intimate part of the actual use of the acquired land and the residue land, and the actual use of the residue land was so intimately connected with the actual use of the acquired land that the use of each was dependent on use of the other. Consequently, the disputed costs, insofar as they relate to expenditure on the residue land, relate to the actual use of the acquired land within the meaning of s 59(f).

120 The conclusion I have reached as to the application of s 59(c) or (f) is subject to one exception, namely, that the rental claim for $62,571.60 for the period after the applicant vacated the acquired land does not fall within either and is not recoverable. Section s 34(3) of the Just Terms Act authorises a resuming authority to charge a dispossessed person rental while they remain in occupation of the acquired land after occupation. In my opinion, this indicates a legislative intention that post-acquisition rental is not compensable. A s 59(c) claim for rent pending acquisition of an alternative property was disallowed in Horton at [19] on the different basis that it is was unreasonable to allow it for the following reasons, which would equally apply in the present case:

> “Whilever Mr and Mrs Horton reside in the rented premises they do not incur the inherent costs and overheads, such as rates and maintenance, associated with ownership of property. Furthermore, interest may be earned on the balance of the advance payment they have available for investment from time to time and statutory interest will be received on the compensation still outstanding, pending final determination of the claim. Arguably they could be saving on a commitment to

interest on future borrowings. Interest has been saved on the mortgage debt repaid out of the advance payment. On balance in the circumstances it is not reasonable that they receive a separate payment of compensation to reimburse the rent payments made pending acquisition of an alternative property."

Section 61(b)

121 Section 61(b) of the Just Terms Act provides:

" **61 Special provision relating to market value assessed on potential of land**

If the market value of land is assessed on the basis that the land had potential to be used for a purpose other than that for which it is currently used, compensation is not payable in respect of:

...

(b) any financial loss that would necessarily have been incurred in realising that potential."

122 The RTA submits that if the market value of the acquired land is assessed on the basis that the subject land had potential to be used as part of a seven lot subdivision, as Mr Allsopp contends, s 61(b) operates to exclude the contested disturbance items. I have earlier accepted that the market value of the acquired land should be assessed based on that potential.

123 Section 61(b) precludes a claim for disturbance costs to the extent that it is inconsistent with a claim for market value based on the potential use of the land. Otherwise the applicant would be unjustly compensated. Thus, s 61(b) precludes compensation for financial loss based on the existing use if that use would necessarily be terminated in realising that potential: Peter Croke Holdings Pty Ltd v Roads and Traffic Authority of NSW (1998) 101 LGERA 30 at 44 (Bignold J); Serbian Cultural Club v Roads & Traffic Authority of New South Wales [2007] NSWLEC 673 at [120], [123] (Jagot J). In Peter Croke at 44 Bignold J said that, although s 61(b) must be interpreted according to its own terms, its apparent effect:

"[is] to deny recovery of compensation for disturbance loss where a claim to such compensation is inconsistent with another claim to compensation based upon the market value of the land, where that value is assessed on the basis of a potential higher use of the land than the existing use

> and where the realisation of that potential necessarily terminates (or postulates the termination of) that existing use."

124 This principle of excluding inconsistent claims is a longstanding one in resumption legislation. The decision of a majority of the English Court of Appeal in Horn v Sunderland Corporation [1941] 2 KB 26 has been influential. In that case a resumed farm was worth $X as building land but much less as agricultural land. The Court of Appeal held, by a majority, that the dispossessed owner farmer was entitled to no more than $X unless the value of the land as agricultural land together with the amount of the disturbance costs exceeded $X, in which case he was entitled to $X and the amount of the excess. The decision was based on the view that in order to realise the value of $X, it would have been necessary for the farmer to sell the farm and go out of possession. Greene MR said at 35:

> "In the present case the respondent was occupying for farming purposes land which had a value far higher than that of agricultural land. In other words, he was putting the land to a use which, economically speaking, was not its best use, a thing which he was, of course, perfectly entitled to do. The result of the compulsory purchase will be to give him a sum equal to the true economic value of the land as building land, and he thus will realize from the land a sum which never could have been realized on the basis of agricultural user. Now he is claiming that the land from which he is being expropriated is for the purpose of valuation to be treated as building land and for the purpose of disturbance as agricultural land, and he says that the sum properly payable to him for the loss of his land is (a) its value as building land plus (b) a sum for disturbance of his farming business. It appears to me that, subject to a qualification which I will mention later, these claims are inconsistent with one another. He can only realize the building value in the market if he is willing to abandon his farming business to obtain the higher price. If he claims compensation for disturbance of his farming business, he is saying that he is not willing to abandon his farming business, that is, that he ought to be treated as a man who, but for the compulsory purchase, would have

> continued to farm the land, and, therefore, could not have realized the building value."

125 The conclusion reached in *Horn* was explained in *Commonwealth v Milledge* (1952-1953) 90 CLR 157 at 165 per Dixon CJ and Kitto J:

> "The conclusion reached was that when land being used for agricultural purposes is ripe for building, and compensation for its compulsory acquisition is fixed on the basis of its value as building land, compensation for disturbance of the agricultural business should only be awarded to the extent (if any) that the value of the land for agricultural purposes together with the compensation for disturbance exceeds the compensation payable on the basis of the land being building land."

126 Some examples (adapted from examples given in *Horn* at 36) illustrate the meaning of "financial loss" in s 61(b). Assume that the applicant is voluntarily selling her land for its existing rural use for $500,000, that it will cost her $100,000 to move to replacement property, and that the replacement property costs $500,000. She will have suffered a financial loss of $100,000. If the case were one of compulsory purchase, it would be obvious that unless she receives $100,000 for disturbance, she would, to that extent, have suffered financial loss. To take an example within s 61(b), now assume that she sells the land for its potential as residential subdivision land for $900,000, that it will cost her $100,000 to move, and that she purchases the replacement property for $500,000. She is $300,000 better off than she would have been if she had continued to farm on the land. She has suffered no financial loss. If the purchase were a compulsory one, and she was awarded $100,000 for disturbance in addition to the $900,000, she would be $400,000 better off. In such a case, the $100,000 is not an element of financial "loss" within s 61(b), but merely a diminution of the profit which she obtains by giving up an inferior economic use of the land and realising its higher economic value. The extra value which she could realise could only be realised by ceasing the existing rural use and would more than compensate her for the cost of relocating to another property.

127 The following cases illustrate the application of the principle in s 61(b).

128 In *Horn* and in *Milledge*, the whole of the claimant's land was acquired and the disturbance claims were for the cost of relocating a business on other land. *Horn* and *Milledge* were considered in *Crisp & Gunn Co-operative Ltd v Hobart Corporation* [1963] HCA 55, 110 CLR 538. The appellant had carried on its timber business on three physically separated parcels of land, only one of which was resumed. It was awarded compensation for market value assessed on the basis of its potential use which exceeded its present

use value. Its claim for disturbance for the cost of relocating the business activities to another site was rejected. It unsuccessfully attempted to distinguish the earlier cases where claims for the whole of the land used by the owner's business had been rejected. The High Court, in a joint judgment, said (at 547-548):

> "The principles implicit in these observations apply with equal force, we think, whether the land resumed represents the whole of the land or one only of several parcels upon which business activities are conducted. Further we are of the opinion that the requirement of the statute that regard should be had in assessing compensation to a number of factors including 'disturbance and any other matter not directly based on the value of the land' does not justify the award of any amount for disturbance in addition to the market value of the land where, as here, that value exceeds the 'present use' value by an amount in excess of any loss resulting from disturbance."

129 In Perry v Roads and Traffic Authority of New South Wales [1999] NSWLEC 109, land acquired for the purpose of an upgrading of the Pacific Highway bisected the retained land. The market value of the acquired land was assessed on the basis of its potential use. During construction of the highway, the applicant could not transfer cattle from his feeding paddocks and holding areas on one side of the highway to his abattoir on the other side of the highway. This Court allowed a disturbance claim under s 59(f) for supplementary cattle feed costs during the construction period, holding that it was not a loss "that would necessarily have been incurred" in realising that potential of the acquired land: at [300] – [307]. The decision was upheld on appeal: Roads and Traffic Authority of New South Wales v Perry [2001] NSWCA 251, 52 NSWLR 222 at [80] – [91]. Handley JA (Powell and Hodgson JA agreeing) said: "The disturbance claims allowed in this case would only be inconsistent with a claim for special potential if construction work would inevitably have caused the claimant to incur these costs": at [91].

130 In Damjanovic v Roads and Traffic Authority of NSW (No 2) [2005] NSWLEC 371, the market value of resumed land was assessed on the basis of its highest and best use potential. The applicant claimed legal costs and stamp duty on the purchase of another property in order to relocate their business and house. Citing Crisp & Gun, Bignold J held that s 61(b) precluded a disturbance claim in respect of legal costs and stamp duty for the new property: at [23] – [25].

131 In A Woodbury v Wyong Shire Council [2006] NSWLEC 48, the market value of land was assessed on the basis of its potential. Following the

resumption, one of the applicants purchased a replacement property to provide him his residence. He claimed as disturbance items, stamp duty and legal fees on the new purchase, removalist expenses, legal fees on negotiations with the council and valuation fees. Bignold J held that s 61(b) precluded their recovery: at [83] – [88].

132 In Costantino v RTA [2006] NSWLEC 248, land was valued on the loss of its potential as a residential subdivision, which was more valuable than its existing use. Pain J held that a disturbance claim for legal and stamp duty costs and relocation costs under s 59 were precluded by s 61 because, in order to realise the potential of the more valuable use, it would be necessary for the applicants to move from the acquired land in any event: at [102].

133 In Nasser v Roads and Traffic Authority (NSW) (No 2) [2006] NSWLEC 562, 149 LGERA 289, Pain J held that s 61(b) did not prevent a disturbance claim for stamp duty on a purchase of replacement land held by a developer when what was being claimed was not a financial loss incurred in realising the potential of the land: at [24].

134 In Serbian Cultural Club Jagot J held that s 61 precluded a disturbance claim for business losses resulting from ceasing the existing club use because market value compensation was awarded on the basis of a potential residential use that would necessitate termination of the existing club use: at [123].

135 In the present case, the applicant's disturbance costs were or are to be incurred because her existing residential and business use of the acquired land was terminated by the resumption.

136 The question under s 61(b) is whether any of these disturbance costs would necessarily have been incurred in realising the seven lot subdivision potential of the acquired land on which Mr Allsopp's market value was assessed. In my opinion, the answer is no. In Mr Allsopp's assessment, which I accept, the existing residential use continues on one lot in the subdivision and the business continues on another lot. Thus the applicant would not have to move off the land to realise the subdivision potential. Consequently, in my opinion, s 61(b) is not engaged.

Double-Dipping

137 The RTA submits that, in any event, the disputed disturbance claims are double-dipping because they are captured in the valuers' before and after method of valuation. The valuers disagreed as to whether or not that was so. The RTA submits that the contested disturbance costs are captured in the before and after valuation method because:

(a) Mr Allsopp included in the before value of the parent land an amount of $160,000 for the value of the existing improvements; in his after value of the residue land at

$300,000 no such amount is included because there are no improvements on the residue land. The after value is discounted because it takes into account the expected costs of providing services such as power, water and sewerage: Roads & Traffic Authority (NSW) v Peak [2007] NSWCA 66 at [83], [87], McBaron v Roads and Traffic Authority of New South Wales (1995) 87 LGERA 238; Gosford Shire Council v Green (1980) 48 LGRA 201 at 208; MIR Bros Unit Constructions Pty Ltd v Roads & Traffic Authority of New South Wales [2006] NSWCA 314 at [32] and [46].

(b) to allow the contested disturbance costs would be akin to recognising the principle of reinstatement, a principle nowhere referred to in the Just Terms Act (MIR at [46]), such that the applicant would be doubly compensated if they were also to be allowed as disturbance items.

138 In essence, the RTA's submission is that the contentious disturbance costs are double-dipping because they reinstate on the residue land services that were on the acquired land for which the applicant has been compensated in the assessment of market value, or because they will add to the value of the residue land.

139 The before and after method and what it captures have been considered by the Court of Appeal in a number of cases. In Gosford Shire Council v Green (1980) 48 LGRA 201 at 208 Reynold JA (Samuels and Mahoney JJA agreeing) said as follows:

> "If the whole parcel is valued at the time of resumption and then the residue is valued, the difference is the ascertained amount of compensation, and severance damage and enhancement of the value of the residue are comprehended without necessity for specification."

140 Similarly, in AMP Capital Investors Ltd v Transport Infrastructure Development Corporation [2008] NSWCA 325, 163 LGERA 245 at [65] Hodgson JA said:

> "This method takes the value of the whole parcel immediately prior to acquisition (unaffected by the proposal) and subtracts the value, immediately after the acquisition, of what the person is left with (affected by the proposal); and this gives a figure which takes account of the elements of s 55(a), s 55(c) and s 55(f)."

141 In Roads and Traffic Authority (NSW) V Collex Pty Ltd [2009] NSWCA

101, 165 LGERA 419 at [101] – [103] Beazley and Tobias JJA approved the following observations in *Roads and Traffic Authority (NSW) v Muir Properties Pty Ltd* [2005] NSWCA 460, 143 LGERA 192 at [103] – [104] per Tobias JA (McColl JA and Hunt AJA agreeing):

> "It is often the case that when only part of a dispossessed owner's land is compulsorily acquired, a 'before' and 'after' valuation exercise of the whole of that owner's land is conducted. In other words, the market value of the land before acquisition is determined (including the acquired land) as is its value after acquisition (excluding the acquired land). In this way the difference between the two values determines not only the market value of the acquired land but also captures any injurious affection to the retained land by reason of the acquisition for the public purpose. This approach will also, in an appropriate case, capture any loss due to the severance of the dispossessed owner's land by that acquisition.
>
> In proceeding according to that approach, there has never been any doubt that the *Pointe Gourde* principle is applied in the 'before' valuation exercise. In other words, the 'before' value is determined on the basis of disregarding any decrease in the value of the land arising out of the purpose of the compulsory acquisition and any steps in the scheme leading to that acquisition. It is only in the 'after' value that any decrease by reason of the proposed implementation of the public purpose for which the resumed land was compulsorily acquired is taken into account.'"

142 In *MIR Bros Unit Constructions Pty Ltd v Roads & Traffic Authority of New South Wales* [2006] NSWCA 314 at [67], Spigelman CJ (Handley and Tobias JJA agreeing) referred to the judgment of the primary judge, McClellan J, as follows:

> "His Honour set out an extract from *Gosford Shire Council v Green*, part of which I have quoted above. I note that Reynolds JA said the method encompassed both `severance and enhancement of the value of the residue' as well as market value. McClellan J continued:

> ‘[20] The fact that the "before and after" method captures compensation for severance and any special value to the owner has been explained in many cases (see Morrison v Commonwealth (1971) 34 LGRA 273; Commissioner of Highways v Tynan (1982) 53 LGRA 1. It has been found to be particularly useful to avoid double counting in relation to matters of enhancement or severance…”

143 Spigelman CJ said of the before and after method, at [32]:

> “The end result is that the residue land, considered as a component part of the whole in the ‘before’ valuation, was valued at 5 per cent less per square metre than it came to be valued in the after valuation, when it was considered as a separate lot. However, the before and after method subsumes a number of steps that could be conducted separately. It focuses on market value and, by doing so, in my opinion, subsumes matters of potentiality such as subdivisibility.”

144 All these authorities accepted that the before and after method captures s 55(a) market value, s 55(c) severance and s 55(f) increase or decrease in value of residue land (sometimes still called “injurious affection” in memory of the description of the concept adopted in the context of earlier, less specific resumption legislation). They did not say that the method captures s 55(b) special value, no doubt because the method usually operates by reference to market value only: MIR at [83].

145 Nor did they say that the before and after method captures s 55(d) loss attributable to disturbance. The explanation may be twofold. First, unlike the other matters listed in s 55 (apart from solatium), s 55(d) loss attributable to disturbance is concerned not with value but with costs. Secondly, recovery of disturbance costs is governed by a highly prescriptive regime in ss 59 and 61. If a disturbance cost answers a description in s 59, it is recoverable unless it is excluded by s 61 or is double-dipping. The exclusion of disturbance costs for double-dipping is not expressed in the Just Terms Act. Its implicit exclusion is not as obvious as the exclusion of other s

55 heads of compensation for double-dipping because they are all concerned with value. Value is not necessarily to be equated with cost; indeed, some disturbance costs are obviously unrelated to value. I take double-dipping of disturbance costs to be implicitly excluded by the just compensation override in s 54, and by the requirement of s 55 that one amount of compensation be determined having "regard" only to prescribed heads of compensation. That is not a requirement that each head of compensation be quantified and aggregated without regard to whether in fact it is captured in another head of compensation.

146 Double-dipping potentially may occur if, for example, s 55(f) compensation for decreased value of residue land, which would be captured in the before and after method, and disturbance costs are each engaged by a single set of facts. That was the case in McBaron v Roads and Traffic Authority (NSW) (1995) 87 LGERA 238 where the acquisition severed a dairy farm, making milking at the existing dairy impractical. Talbot J allowed for the cost of a new dairy on the residue land as s 55(d) disturbance costs within the definition in s 59(f) even though a claim under s 55(f) for decreased value of the residue land was also available.

147 A similar situation arose in Roads & Traffic Authority of New South Wales v Peak [2007] NSWCA 66, prompting Beazley and Tobias JJA to say, at [84]:

> "In other words, due to the injurious affection of the residue land by reason of the carrying out or the proposal to carry out the public purpose for which the acquired land was acquired, a hypothetical purchaser of the residue land would have discounted the price he or she would pay for that land due to the impact of the new highway on the residence rendering it uninhabitable and thus necessitating the construction of a new dwelling 300 metres removed from the highway boundary. That discount would directly reflect the extra costs involved in providing the very same services and facilities which the respondents now claim under s 59(f)."

and [at 87]:

> "…it would be a case of 'double dipping' to allow as disturbance the cost of improvements to the residue land caused by the necessity to relocate the residence which had been rendered uninhabitable because those costs had been reflected in the loss of value of the residue land which

had been incorporated into the assessment of the value of the improvements (presumably the residence) under s 55."

and at [101]:

"…If a person is required to relocate because of the injurious affection caused by the acquisition and, in doing so, incurs costs that are not otherwise reflected in the 'before' and 'after' valuation, then that claim can be made under s 59(c)."

148 Where the before and after method captures the decreased value of the residue land, a disturbance claim under s 59(f) would be double-dipping to the extent of the capture. This may be the explanation for the short statement in MIR Bros Unit Constructions Pty Ltd v Roads & Traffic Authority of New South Wales [2005] NSWLEC 467 at [22], that the amount deduced from the before and after method included any amount for disturbance arising from the fact that the applicant would have to develop two parcels of land rather than one as a result of the acquisition. Where both s 55(f) and s 59(f) are engaged by a single set of facts, the different operation of those provisions may, however, lead to different outcomes, as Jagot J pointed out in Almona Pty Ltd v Roads and Traffic Authority (NSW) [2008] NSWLEC 112, 160 LGERA 375 at [63].

149 The question is whether the before and after valuation justly compensates the applicant for disturbance costs due to the compulsory acquisition. To assess if it does, a "finding has to be made on evidence and it is not sufficient for a trial judge to make a finding on the basis of an underlying valuation assumption unless the assumption in fact applies to the land in question ": Peak at [107].

150 In Peak, serious noise, glare and loss of privacy affectation from a new highway, for which purpose the land was resumed, rendered uninhabitable the dispossessed owners' dwelling on the residue land. As a result, they decided to relocate to a new residence on the residue land to be built some 300 metres from the boundary of the residue land with the highway, with the consequential need to incur the cost of providing services and the like to the new residence. The owners claimed that the acquired land was part of their business and the use of their residue land was so intimately connected with the business that had been carried out on the acquired land that it was "an actual use" of the acquired land within the meaning of s 59(f): at [52]. This gave rise to a claim for disturbance under s 59(f) of the Just Terms Act for the costs of a bridge access over a gully, compliance with a development application, disconnection of electricity to the old house, connection of electricity to the new house, septic at the new site plus connection, removal and relocation of a gazebo, relocation of fences, and furniture removal to the new house: at [51]. Beazley and Tobias JJ held that:

(a) it was an error to assume that the disturbance items claimed were captured by the before and after method of valuation of the acquired land: at [75];
(b) it was difficult to see how these items could have been captured, having regard to the separate summation valuation (which involves valuing each component separately rather than together) adopted with respect to the market value of the residence: at [75], [78];
(d) in a conventional before and after approach, the valuation of the residue land in the after would have required a discount to reflect the fact that the residence had been rendered uninhabitable and the extra costs of providing the facilities the applicant claimed under s 59(f): at [84];
(e) the trial judge was in error in accepting a submission that it was double-dipping to allow as disturbance the cost of improvements to the residue land caused by the necessity to relocate the residence which had been rendered uninhabitable because those costs had been reflected in the loss of value of the residue land which had been incorporated into the assessment of the value of the improvements. In fact, no such loss of value to the residue land had been so incorporated: at [87].
(f) Although the primary judge had erred, in order to decide whether s 59(f) applied, the matter had to be remitted to make the necessary findings of fact as to whether the use of the residence was an intimate part of the use of the acquired land and the residue land: at [88] - [91].

151 Where the whole of an applicant's improved property is resumed and the applicant purchases a replacement property, there is authority that it is double-dipping to award market value compensation for the resumed property and to also allow disturbance costs for reinstating equivalent improvements on the replacement property: Richardson v Roads and Traffic Authority of New South Wales (1996) 90 LGERA 294 at 303; Matcam Pty Ltd v Kogarah Municipal Council [1999] NSWLEC 181, (1999) 105 LGERA 266 at [43].

152 In Richardson, the whole of the applicant's property was resumed and the applicant purchased a replacement property. Talbot J disallowed a s 59(c) relocation claim for costs that constituted improvements to the replacement property, namely, the cost of installing irrigation and water supply, constructing earthworks, building wind shelters, electricity connection and soil tests. His Honour said at 303:

> "…These are alleged to be reasonable expenses incurred as a direct result of the acquisition. They were incurred for the purpose of improving the property purchased by Mr Richardson to facilitate the

> future conduct of his business. They are capital improvements. The value of existing improvements on the acquired property have been allowed as part of the market value. The cost of re-establishment of a business on a property which proves to be unsuitable for that purpose is not a cost of relocation. If a dispossessed owner is fortunate enough to find a replacement property which suits his particular needs without requirement for further capital expenditure beyond the purchase price, that has no effect on the amount of compensation for which he would be entitled for disturbance. Equally, the dispossessed owner is not entitled to purchase a property which requires significant improvement and capital expenditure and then expect the resuming authority to always pay for the cost of the improvements as a cost of relocation. The scheme of the Just Terms Act is that the owner is to be compensated for the loss of property and the actual cost of relocating. I agree…that these sums are not relocation expenses at all. They are costs associated with the bringing of another property into a condition which approximates the condition of the property resumed. It would be a classic case of 'double dipping' to allow compensation for existing improvements on the acquired property and then to allow further compensation as the cost of reinstating the equivalent fixtures and improvements on another property."

153 In *Matcam*, the whole of the applicant's property was resumed. Bignold J allowed the cost of relocating telephones, but disallowed a s 59(c) and (f) claim for the cost of fitting out as medical suites new premises bought to relocate a medical practice from resumed property. His Honour's reasons were as follows, at [43]:

> "(1) The applicant is to receive full compensation in the sum of $880,000 reflecting the market value of the compulsorily acquired land in its existing use as an established medical practice. That compensation includes compensation for the fitout as medical suites of the

compulsorily acquired land.
(2) To award further compensation for the cost of fitting out the newly acquired premises would involve an element of double recovery of compensation. Richardson at 303; cf Peter Croke Holdings Pty Ltd v Roads & Traffic Authority of NSW (1998) 101 LGERA 30 at 64 to 66.
(3) In purchasing the alternative premises, the applicant paid $844,800 for those premises fitted out as medical suites. This transaction invokes the presumption that in paying that purchase price for those premises, the applicant obtained value for money: Service Welding Ltd v Tyne & Wear County Council (1979) 38 P&CR 352.
(4) Although that presumption is rebuttable, the evidence led by the applicant has not rebutted it.
(5) Even assuming that compensation for the compulsory acquisition had been claimed by the applicant on the reinstatement basis (which generally reflects the maximum amount of compensation recoverable for a compulsory acquisition), the cost of acquiring the fitted out new premises ($844,800) was less than the agreed market value of the compulsorily acquired land $880,000."

154 Richardson and Matcam are distinguishable. In each case the whole of the applicant's land was resumed. The applicant bought replacement land and the presumption was that the applicant thereby obtained value for money. The fact that the applicants in those cases had to incur costs to make the replacement land fit for use was beside the point because they could have acquired replacement land which was already fit for that use. In contrast, in the present case only part of the applicant's land was resumed and the applicant did not purchase replacement land for value but was left with residue land to which she is to move but which is not habitable without incurring costs for the provision of services. It is arguable that those points of distinction are dispositive of the double-dipping question, but I propose to proceed to the basis that they are not.

155 The valuers agreed that the value of the improvements on the acquired land was $160,000. Mr Lunney attributed $30,000 of this to services [see [39(e)] above. I accept his attribution.

156 The outstanding fact is that the disturbance costs of over $300,000 for

services on the residual land are very much larger than the market value of improvements relating to equivalent services on the acquired land of $30,000. I am not aware of a case that has had to address such a situation. The reason for the large difference was not explored in evidence and I must take the evidence as it stands.

157 The applicant cannot begin to live on the residue land without incurring costs now in dispute, yet will not be compensated in market value by the RTA for the equivalent of those costs except to the extent of $30,000. In other words, the market value of the services on the acquired land reflects only $30,000 of the disturbance costs for equivalent services on the residue land.

158 It would be double-dipping, I think, to allow that $30,000 for the market value of services in the before value of the parent land so that the differential between the before value of the parent land and the after value of the residue land increased, and then in addition allow disturbance costs in the same amount in respect of equivalent services on the residue land.

159 The mere fact that expenditure for services on the residue land would increase its existing value does not, in my view, establish double-dipping in circumstances where those costs fall within s 59(c) or (f) and are not excluded by s 61. Further, I have accepted that the residue land should be valued on the basis of its potential as a four lot subdivision. The disturbance costs for services on the residue land do not appear to relate, and therefore would not add, to that value. For example, the proposed access road (at a cost of $74,855) would not be in the same position as a road as in a four lot subdivision and would add no value to a four lot subdivision valuation. This is not a case where, for example, s 55(f) loss of value of residue land has been incorporated into the before and after valuation method. In such a situation (which does not arise in the present case), there would be double-dipping if s 55(f) loss of value of residue land resulted in the after value of the residue land being reduced so that the differential between the before value of the parent land and the after value of the residue land increased, and the disturbance in respect of the same costs as were reflected in the loss of value in the residue land were awarded in addition: Peakat [86].

Conclusion re disturbance

160 In my opinion, the disturbance costs quantified at [95] above in the total sum of $362,416.98 should be allowed, except for the sum of $30,000 captured in the before and after valuation method (see [158] above) and the rental claim (item 1) in the sum of $62,571.60 (discussed at [120] above). The net amount of the applicant’s disturbance claim that should be allowed is therefore $269,845.38, which I round to $269,846.

CONCLUSION

161 For these reasons, I assess the compensation payable as follows:

		$
Market value	s 55(a)	490,000
Disturbance	s 59(c) or (f)	269,846
Solatium	s 55(e)	21,823
TOTAL		781,669

162 The respondent is to pay the applicant's costs. The exhibits may be returned. The parties are to bring in agreed or competing short minutes of order to reflect my decision within one week. The matter will be listed before me at 9.30 am on 20 July 2009 to make final orders.

20/07/2009	-	By consent, the sum of $4,280 is inserted against contingencies in item 10 in [95] and consequential corrections are made to the following paragraphs: at [95] the total is changed to $362,416.98; at [160] delete $358,136.98 and insert $362,416.98, delete $265,565.38 and insert $269,845.38 and delete $265,566 and insert $269,846; at [161] delete $265,566 and insert $269,846 and delete $777,389 and insert $781,669. - Paragraph(s) 95, 160, 161
28/07/2009	-	formatting in paras 88, 92, - Paragraph(s) 88, 92
21/10/2009	-	By consent, at [2] $173,794.70 is deleted and $22,058 is inserted; at [159] $102,000 is deleted and $74,855 is inserted. - Paragraph(s) 2, 159