A valuation methodology proposal for the Torres Strait Regional Authority ILUA template 2011

Prepared for
Torres Strait Regional Authority

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1 EXECUTIVE SUMMARY

This report establishes a recommended valuation framework to facilitate negotiated consent to secure the use of native title lands for public purposes (particularly infrastructure and housing projects), on the outer islands of the Torres Strait region.

It proposes that such a framework could balance the need for a consistent and robust valuation process, with the need for the giving of expeditious and effective native title consent over lands sought for public purpose projects (project areas), and lands that are to be used for ancillary works such as access and service supply lines, (Ancillary Project Areas).

Some cases in the future would be likely to have a number of inherent difficulties for valuation assessments. There could be limited sales evidence or issues pertaining to the level of development and so forth.

It is surprising, that nearly nineteen years after the recognition of native title as part of Australia’s system of land law, there is little by way of agreed methodology, nor court determined compensation principles for affects on, or the extinguishment of, such interests.

This research and its recommendations should go some way towards advancing deliberations on those matters. The objective of this report is to provide a logical and equitable framework for the valuation of exclusive native title. land that is subject to exclusive native title and, as a result, having no open market evidence of sales transactions. The methodology framework is particularly focused on the outer islands of the Torres Strait.

Key recommendations in establishing this framework are as follows:

i. **The primary basis of valuation is sales evidence**
   As much as possible, the proposed native title valuation methodology based on freehold equivalent land values, must follow accepted international standards as reinforced by established valuation practice and numerous court determinations. That is, that sales evidence must be considered as the primary basis for valuation.

   The fact that there are specific issues and difficulties in this case must not detract from that maxim and the search for sales evidence must extend as wide as is necessary – in this case, to reasonably reliable sales evidence that exist in a number of the inner islands. Whilst adjustments will need to be made, and the opinion and experience of the valuer recognised, such comparisons and analysis processes should be kept as simple as reasonably possible. The added complexity of artificially contrived comparative values needs to be avoided.

ii. **The equivalent is notional freehold value as a base value**
   For the purpose of this exercise, native title should be assessed according to the equivalent of ‘notional freehold value’, which is
otherwise referred to as ‘ordinary title’. With that established; the basic
principles of compensation for securing exclusive rights (through a
leasehold grant) or rights of way (such as through an easement),
become fairly clear (given accepted professional practice and the
extensive body of case law that exists).

### iii. Base value determination

The initial consideration in the valuation process is the determination
of a base value that may, or may not apply to all native title land. In
line with mass appraisal concepts, it is practical to examine whether
all the properties to be considered fall within a relatively homogenous
area, with the only adjustments being attributed to the size of the land.
If this is not possible, divisions into separate areas should be kept to a
minimum with only major property differences acknowledged. Section
7 of this report is concerned with the base value recommendations.
Issues related to the base value would be:

#### a) Value is based on area and amenity

This report sees little value in, and would recommend against, the
largely artificial division of the outer island areas into a
number of zones. The locational identification may have
relevance in a geopolitical sense however, it adds (in the
opinion of this report), an unnecessary complication.

Following that line of argument, it is suggested that the level of
urban amenity and services on each of the inhabited islands
(outside Thursday, Horn and Prince of Wales Islands) is
reasonably similar. In the interest of simplicity and certainty, the
prime determinant of variation from that base value should
therefore be a function of the size of land parcels (i.e. square
metres).

The base value should be established at a particular point in
time, by a valuer with experience in the region and by an
investigation of sales evidence. Once a base value is
established, it could be reviewed and updated periodically.

#### b) Partial interests and easements

Where the equivalent of an easement is established, consideration may be given to a flat fee payment for that right. A flat fee payment would reflect an emerging approach by some constructing authorities elsewhere and would also align with the general objective of simplicity encouraged in this overall framework. It also might be recommended that claims for betterment should not be pursued; again, this would simplify processes while at the same achieving the required outcomes.
iv. **Treatment of special cases**

The framework, together with the base value, would provide grounds for a negotiated settlement without the need for closer specific investigations or costly and protracted resumption actions. However, to ensure equity, the ability should exist for a special assessment of property that is demonstrably different from the norm in characteristics other than location.

v. **Special Indigenous Value**

As reflected by the lack of relevant court decisions and in the significant body of literature on the subject, the assessment of native title compensation is not a matter that can be assessed based on the economic value established through valuation practice. It is essential to acknowledge that the existence value considerations of indigenous people are different and not directly comparable to economic value considerations. The special indigenous value as noted in the template ILUA appears as a possible addition to the market value figure for a future act. It is stressed that determining the fair value of native title land as a percentage of market value of ‘ordinary’ title land is not consistent. However, a base value could be augmented by an additional amount to reflect a ‘special indigenous value’ applicable to native title rights and interests.

Two final comments should be made here:

- First, an inclusive approach to acquisition needs to be undertaken with dispossessed owners (reflecting contemporary resumption practice).

- Second, the acceptance of the valuation framework may well be facilitated by a workshop of experienced practitioners and academics from across the discipline.
2 INTRODUCTION

This report, prepared by senior researchers at the University of the Sunshine Coast (USC), aims to provide a rationale and framework for negotiated settlements for securing native title lands for public purposes and infrastructure, both as primary and ancillary uses (that is, those necessary for, or, supporting those primary uses).

The report is principally focused on valuation methodologies, building a framework from well established property valuation principles and practise that could be applied to the inhabited native title Islands of the Torres Strait. It recognises and addresses particular characteristics and idiosyncrasies of that region, its tenure systems, stage of development and issues of availability of sales evidence.

The research team consisted of Professor Mike Hefferan, Pro Vice-Chancellor (Engagement); Professor Terry Boyd, Adjunct Professor of both USC and Central Queensland University; and Ms Judith Mannix, research assistant. Additionally, confidential advice was sought on various components of this report, particularly from Mr Peter Tooley who was previously Head of Valuation Programs in the Department of Natural Resources Brisbane (effectively at that time the Valuer General for Queensland) and Mr Terry Gould who is a registered valuer in private practice (based in Cairns) and previously a partner of Knight Frank, Cairns. Terry Gould has extensive experience in valuation and resumption matters and litigation, with particular experience in Cape York and in the Torres Strait.

Mr Terry Gould has been subsequently and independently engaged by the Torres Strait Regional Authority (TSRA) to produce a separate report on actual valuation figures having regard to the methodology guidance provided by this report.

Professors Hefferan and Boyd have recently had in-depth involvement in key property research projects. Of significance here, they co-authored a major report that has been influential in the complete revision of the Valuation of Land Act 1944 in Queensland over the past two years.

Both Professors have had, and continue to have, wide-ranging involvement in professional bodies involved in the valuation sector, particularly the Australian Property Institute (API). Professor Hefferan is the immediate past president of the Queensland chapter of the Australian Property Institute. Professor Hefferan has also had considerable experience in North Queensland and, to a lesser extent, Thursday Island.

Sound methodology and policy framework can help in the production of the best outcomes, both in terms of professional practice and equity. It must be noted however, that because of the unusual characteristics of this task, the physical location involved and other parameters, it would be wrong to
suggest that there would be absolute results to these deliberations and in valuations of specific cases. However, those observations should not be seen as impediments to a fair and expeditious resolution.
3 INSTRUCTION AND ASSUMPTIONS

3.1 Instruction

The TSRA requested that the University of the Sunshine Coast (USC) provide a report that includes a basis for a generic valuation methodology that could be used in the development of a template Torres Strait public housing and infrastructure Indigenous Land Use Agreement (ILUA), particularly in relation to the quantification of compensation to be provided for in the template ILUA. The report is also to comment on the approach and practicability of native title recognition in the context of fundamental and applied valuation issues.

This generic valuation methodology will provide a framework that will enable the assessment of levels of compensation payable to native title holders for future acts comprising public infrastructure and housing projects. That framework, in turn, will guide further valuations. Once values are established, the determination of dollar amounts per square metre, on a notional freehold value basis, for ILUA areas involving the different determination areas, across the various inhabited islands of the Torres Strait region, should be possible. Mr Terry Gould is attending separately to that task.

Specifically, the report will address:

- Project areas
- Ancillary project areas
- Comment on special indigenous value.

3.2 Assumptions

The template ILUA will be applicable to all inhabited and exclusive native title lands within the Torres Strait region. Separate ILUAs based on the template could be entered into with each native title Prescribed Body Corporate (PBC) in the region.

The consideration for consent in the proposed ILUA is the base value of the land affected by the project activity plus a special indigenous value which will incorporate all aspects of native title and cultural heritage.
The base value of the land is to be assessed as the ‘notional freehold value’.

The application of accepted valuation methodologies, issues arising from limited sales evidence and an unusual and remote physical environment, all place additional parameters on these investigations. These should not be considered, however, as insurmountable issues, nor should unreasonable assumptions be made. Rather, a robust and reliable framework must be established in the first instance and actual valuations and negotiations can then be undertaken within that accepted structure.

The wide acceptance amongst the profession of such a framework is needed to create a relatively simple, understandable, expeditious and equitable negotiated settlement; the preferred outcome in this case. In the event that certain matters may need to proceed to resumption and / or litigation, such a structure must help provide guidance in those assessments which will always have a significant element of professional judgement.

It also needs to be noted that whilst this report aims to establish that framework, it does not comment on specific values / ranges of values to be applied.

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1 Although the Draft Infrastructure and Housing ILUA uses the term ‘Notional Freehold Equivalent Value’ (NFEV), this report will use the term ‘notional freehold value’.
Figure 1: Torres Strait Region (Source: Australian Government 2004)
4 CONTEXT

4.1 Torres Strait

The Torres Strait is a body of water located between the Northern Peninsula area of Queensland and Papua New Guinea. The Torres Strait region covers a geographic area of around 48,000 square kilometres and includes the islands of the Torres Strait and some areas of the Cape York mainland. In total, there are more than 100 islands, with around 38 of these inhabited and, of those, 18 islands that have established communities.

The Torres Strait region is known for its ecological complexity and biodiversity and the region’s marine environment is recognised as an area of national and international importance.

Having the only active international border in Australia, the region is strategically important and has a strong government presence (both federal and state) with government departments representing customs, quarantine, immigration and defence amongst others.

Five major island clusters in the Torres Strait region are recognised by the Queensland government – the top western group, the near western group, the central group, the eastern group and the Thursday Island group (including some communities of the Northern Peninsula of Cape York).

Three local councils have administrative control in the region:

- Torres Shire Council (TSC), which includes Horn Island, Thursday Island and Prince of Wales Island
- Torres Strait Island Regional Council (TSIRC), which includes the islands of; Boigu, Mer, Badu, Hammond, Erub, Dauan, lama, Masig, Mabuiag, Moa, Poruma, Saibia, Ugar, Coconut, Yorke and Warraber
- Northern Peninsula Area Regional Council (NPARC), which includes the communities of Umagicao, Injinoo and New Mapoon, Seisia and Bamaga.

Despite the various geographical and political distinctions, in his summary of the Torres Strait Regional Sea Claim case, Justice Finn commented that there was a recognised, single, Torres Strait society and not multiple societies as contended by both the Queensland and Australian (Commonwealth) governments. This represents an important observation in the matters under consideration here. There may be geopolitical groupings of various types throughout, however Justice Finn, in his determination, recognised the unity of the society / community despite these other classifications.
The TSRA is recognised as the Native Title Representative Body (NTRB) under the Native Title Act 1993 (Cth) for the Torres Strait region. In that capacity, the TSRA is responsible to provide “native title and related assistance to their constituents effectively and equitably” (TSRA 2007b).

4.2 Native Title Act

This report acknowledges the complexity and still evolving nature of native title recognition and assessment in Australia. It stresses that this work does not intend, nor should it be accepted as, a legal analysis of these matters. Rather, it concentrates on basic valuation issues that arise largely because of the remote and unique nature of the properties and property markets involved and the limited sales evidence that exists. To the best of the authors’ understanding, it reflects contemporary determinations in valuation and in property law. It also recognises both the surprising unresolved nature of valuation assessment for native title claims, and the opinion of various commentators that quite different concepts of value might reasonably apply to native title, these being separate to economic assessments of market value.

Although well documented in many other publications, a brief overview of the Native Title Act 1993 (Cth) and its relevance to the issues under discussion in this report provides context. It is noted that this report is principally concerned with issues of valuation methodology.

In 1992 in the Mabo case, the High Court of Australia ruled that Australia was not terra nullius (or belonging to no-one) when settled by Europeans and that native title rights survived settlement, subject to the sovereignty of the Crown. Native title rights are a right to land – not goods or intangible things, and native title rights are also a property right (Federal Court of Australia 2011).

The Native Title Act 1993 (Cth) came into operation in 1994 and has, as a core objective, the recognition and protection of native title, as well as seeking to ensure that a reasonable degree of certainty in land management as it relates to native title is achieved.

Native title recognises the rights of Aboriginal and Torres Strait Islander peoples to land and waters in accordance with their traditional laws and customs. These rights range from access to a specific area of land, to involvement in decisions on how land and waters might be used by others. Native title cannot be bought or sold, but it can be transferred by traditional law or custom. Native title can be compulsorily acquired by the Crown.

In order to determine their right to native title, claimants must prove:

1) they hold property rights today according to their traditional laws and customs
2) those same rights were held by indigenous people when Britain acquired sovereignty over the land, and

3) they acquired those rights from those indigenous people.

(Chambers 2008:229)

The majority of lands in the Torres Strait have already been the subject of native title determinations. These determinations recognise native title rights and interests which confer possession, occupation, use and enjoyment of the native title landholders to the exclusion of all others. A reasonably direct comparison can be made between the rights and interests in land derived from exclusive native title and the rights and interests in land derived from freehold title. Therefore, native title may only be extinguished or reduced if the Crown uses its “radical title to allocate the land to itself or others” (Chambers 2008:231).

Accordingly, legislation in Australia recognises the rights of native title holders to receive compensation for “any loss, diminution, impairment or other effect” of the compulsory acquisition of their “native title rights and interest” (Native Title Act 1993 (Cth)).

Further discussion and an in depth analysis of the proposed template ILUA as it relates to the issues canvassed by this report, is provided by Gilkerson Legal and is included in Appendix 1.

To date, there is limited judicial comment on the manner of determining compensation for extinguishment or other affects on native title, whether involving compulsory acquisition, or surrender, or the affects of future acts. In fact, there were no determined compensation cases of particular relevance for native title at the time of writing (NNTT 2011b).
Figure 2: Native Title Determination Areas in the Torres Strait (Source: NNTT 2011)
4.3 Indigenous Land Use Agreements

As a result of amendments in 1998 to the *Native Title Act 1993 (Cth)* provision is now made in the legislation for native title parties to negotiate and register ILUAs. These agreements allow native title parties to negotiate with other relevant parties for compensation for the loss of, or affect on, their native title rights and interests. The compensation can be monetary or non-monetary (see Appendix 1 at Section 3.2. b)

According to the National Native Title Tribunal (at the time of writing), there were 516 registered ILUAs in Australia, with 273 of these located in Queensland (around half of the national total at 53 percent). ILUAs can be one of three types:

- A body corporate agreement. This type of ILUA can only be made “where there is at least one registered native title body corporate for the entire agreement area. This means that there must be at least one determination of native title in place in relation to the entire agreement area” (NNTT 2011c).

- An area agreement. This type of ILUA is made when there is “no registered native title body corporate for the entire agreement area” (NNTT 2011c).

- An alternative procedure agreement. This type of ILUA is made when “there is no registered native title body for the entire agreement area. However, there must be at least one registered native title body corporate for part of the area or at least one representative Aboriginal/Torres Strait Islander body for the agreement area” (NNTT 2011c).

In Queensland, most ILUAs are area agreements, with only 21 of the total 273 ILUAs (7.7 percent) registered as body corporate agreements (see Appendix 2 for details).

In attempting to simplify the processes of acquiring native title lands in the Torres Strait region for various infrastructure and housing related activities, the TSRA, the State of Queensland (through the Department of Environment and Resource Management (DERM)) and TSIRC have already made substantial progress in the development of a template ILUA (Gilkerson 2011).

The template ILUA is a body corporate agreement (of the kind provided for in Part 2 Division 2 Subdivision B of the *Native Title Act 1993 (Cth)*. Once put in place with a prescribed body corporate (PBC) for a native title determination area and registered, ILUAs based on the template will enable consent to be given to a whole range of infrastructure and housing related activities within each ILUA area.
ILUAs based on the template will take effect both as contracts between the parties and through the statutory effect of them being registered, that is, entered on the Register of Indigenous Land Use Agreements (NNTT 2011c, Gilkerson 2011).

4.4 Valuation approach

In Australia, valuation principles of assessment have been developed over a span of more than one hundred years. It is the authors’ intention to (as much as possible) align the recommended approach with those established methods and practices. It needs to be stressed that to be successful and sustainable here, the maxim must be to establish an approach that is ‘as simple as possible but no simpler’ – that is, attempting to enshrine sound basic principles and practice whilst also recognising the inherent complexities of the case.

Later sections in this report identify internationally accepted valuation approaches, underpinned by statute and by legal determinations. These, as reflected in their long development, are well understood and consistent.

A primary case is Spencer where a classic definition of value is provided – Chief Justice Griffith at 432 noted:

“"In my judgment the test for value of land is to be determined, not by inquiring what price a man desiring to sell could actually have obtained for it on a given day, that is, whether there was in fact on that day a willing buyer, but by inquiring ‘what would a man desiring to buy the land have had to pay for it on that day to a vendor willing to sell it for a fair price but not desirous to sell?’ It is, no doubt, very difficult to answer such a question, and any answer must be to some extent conjectural. The necessary mental process is to put yourself as far as possible in the position of persons conversant with the subject at the relevant time, and from that point of view to ascertain what, according to the then current opinion of land values, a purchaser would have had to offer for the land to induce such a willing vendor to sell it, or, in other words, to inquire at what point a desirous purchaser and a not unwilling vendor would come together”.

Further, Justice Issacs in his judgement at 441 commented:

“To arrive at the value of the land at that date, we have, as I conceive, to suppose it sold then, not by means of a forced sale, but by voluntary bargaining between the plaintiff and a purchaser, willing to trade, but neither of them so anxious to do so that he would overlook any ordinary business consideration. We must further suppose both to be perfectly acquainted with the land, and cognizant of all circumstances which might affect its value, either
advantageously or prejudicially, including its situation, character, quality, proximity to conveniences or in conveniences, its surrounding features, the then present demand for land, and the likelihood, as a rise or fall for what so ever reason in the amount which one would otherwise be willing to fix as the value of the property”.

Whilst there are a range of valuation methodologies, there is constant reinforcement of the inherent primacy of the use of comparable sales as evidence of value, either by the way of direct comparison or the analysis of more complex commercial property to establish acceptable rates of return. This is particularly applicable in this case given that both the TSRA and DERM have already reached consensus on freehold equivalent values being the appropriate basis for valuing native title lands.

In some cases, comparative analysis of property to property is quite simple – consider, for example, the assessment of value of a newly subdivided residential allotment where numerous comparable sales exist in the same estate. In a range of other cases, there will be no closely comparable sales, but the search for evidence will need to proceed as widely as necessary so that a body of evidence of value can be developed. This needs to be done carefully and logically, and would rely on the experience and professional acumen of the valuer involved so that a sound and defendable assessment of value can be established.

It is important, in the case under consideration here, that the problems associated with a lack of close sales evidence, whilst presenting challenges, should not be seen as so inherently difficult as to, in some way, render sound assessment impossible.

In a market with little or no sales, the outcomes may well be less than an absolute solution. However it is important to return, as much as possible, to sales and other market evidence that may be available, keeping arguments as simple as possible, but also ensuring that the analysis does not become contrived or artificial and so failing basic tests of logic and rationality.

Each parcel of real property is unique and the idiosyncrasies of a particular property need to be taken into consideration. Without a consistent valuation approach, no certainty could be expected at the arrival of actual assessments for particular cases.
5  VALUATION METHODOLOGY APPLIED

5.1  Introduction

The valuation of land (as a basis for resumption or indeed for any other purpose) in the Torres Strait should, as much as possible, conform to established valuation principles across Australia, these also being based on International Valuation Standards. It is potentially risky to allow a methodology to stray outside of those fundamentals as, if that course was taken, the chances of inconsistency and inequity would almost certainly arise.

5.2  Markets

Three types of property markets can be identified when considering property markets in general: an open market, a restricted market and no market. This research will be assessing a value related to the notional open market, therefore, detailed consideration of restricted markets or non-existent markets are not needed here.

The International Valuation Standards define market value as follows:

“The estimated amount for which a property should exchange on the date of valuation between a willing buyer and a willing seller in an arm’s length transaction after proper marketing wherein the parties had each acted knowledgeably, prudently, and without compulsion” (IVSC 2007:27).

Further, the standards go on to comment that:

“...the concept of market value presumes a price negotiated in an open and competitive market, a circumstance that occasionally gives rise to the use of the adjective open before the words market value...” (IVSC 2007:81).

The standards do not endorse the use of ‘open’ before market, as an open market is simply a market – where goods and services and, in this case, property, are exchanged in an environment in which there are no unwarranted restrictions placed upon buyers and sellers. According to this accepted standard, the use of both words, ‘open’ and ‘market’ is, in fact, tautology.

In further considering the concepts of property markets, several other matters are relevant here:

- In some areas, no real market for land may exist or, more correctly, cannot be established by sales evidence in the same location. Perhaps there is, for whatever reason, no land available for sale or likely to become available for sale.
• In other cases, the market may be highly restricted by law and / or custom so that only certain individuals, groups or clans can trade in that property. Such restrictions may well be such as to preclude any transfer (either recorded or customary) to any person who cannot prove hereditary or tribal linkage.

• Whilst the acceptance of nominal freehold value allows for simpler assessment as regards economic value, it cannot resolve this quite separate basis for transactions.

5.3 **The most suitable valuation method**

Even as regards notional freehold value, cases such as those in the Torres Strait exhibit other complications for market analysis.

In the first instance, existing freehold sales are for properties located in the inner islands (particularly Horn and Thursday Islands). Both islands are reasonably urban in nature, with a range of urban services and amenities available. It could be reasonably assumed that those sale values would be significantly higher than for those that could be achieved for properties to be assessed on the outer islands, where urban amenity may be of a lower standard.

Where possible, it is normally good valuation practice to select sales across a range of values, both higher and lower than the subject, thereby ‘framing’ or confining the range of values likely for the subject property. This would probably not be possible in most assessments of value in this case and, consequently, the valuer would assume increased responsibility in applying his / her skills of analysis to determine how much higher or lower these sales in comparison to the subject land might be assessed.

An additional complication relates to the fairly limited market evidence even in a location such as Thursday Island. Whilst there is no doubt that a market exists, there is a quite limited urban land supply on the island that cannot be easily added to, thus putting upward pressure on values. Secondly, it is understood that many sales are of improved land and involve purchase by government authorities, which, it might be argued, may take a more expedient approach to negotiations than a private owner. Such observations however, are anecdotal and evidence is provided by individual sales on the merits or otherwise of those sales investigations.

Within valuation guidelines there are a number of methodologies that could be used, each reflecting the application of market evidence to the particular case. These methods include direct comparison, summation (cost and depreciation base), capitalisation of rental incomes, hypothetical development and hypothetical subdivisions. A detailed explanation of each is not necessary here, as it is clear that for the analysis of vacant or lightly
improved land, particularly in locations such as those under consideration, direct comparison represents the preferred method of assessment.

In Hyam (2004:126), the determination of the land value from comparable sales evidence is noted as a fundamental method of valuation:

“The use of comparable sales evidence is the most widely accepted method of determining the market value of land: Redeam Pty Ltd v South Australian Land Commission (1977) 40 LGRA 151 at 156” and that “in applying most methods of valuation it is necessary for the valuer or the court to use market transactions for the purpose of obtaining basic information”.

It is well accepted in the profession and by the Courts, that part of the valuation process involves and depends on the skilled opinion of the valuer and that “the valuer’s skill gained through education and experience provides the means of resolving the many complex issues encountered in property market analysis” (API 2007).

For the assessment of a whole parcel of land that would normally involve arriving at a single value for the entire property, but with all other things being reasonably equal, an assessment based on value per square metre of area would also be applicable, particularly when not all of an existing site was to be acquired.

Gilkerson (2011) confirms that the determination of the quantum of compensation on a basis that could be reduced to a value per square metre follows an appropriate methodological approach for this case. Both the TSRA and Gilkerson legal have advised that this approach has also been adopted by DERM.

5.4 Underlying principles

The underpinning principles (that are of particular relevance to such cases here) would be that:

- Primacy is to be placed on the evidence provided by comparable sales (the word ‘comparable’ not meaning ‘the same’, but rather, ‘able to be compared’).
- Analysis should be undertaken using the simplest approach possible under the circumstances – but no simpler.
- Notional freehold value must be the starting point in establishing value as this is the most common ‘baseline’ form of tenure. Adjustments could be made to that in a particular case, but the established notional freehold value benchmark would remain consistent across a range of properties. For the purposes of this case, exclusive possession native
title lands should be considered as the equivalent of freehold. A 99 year or similar long term lease should likewise be accepted and assessed on the basis of freehold. This is not a matter of particular importance – in normal (economic) assessment at least, deferring the residual value for such a period of time (well beyond commercial horizons) is fairly normal. Such long term lease tenures over other DOGIT lands are already in place for housing, and would therefore be considered acceptable (DERM 2010).

- Valuation is an economic analysis and therefore, concepts of ‘economic value’ or ‘value as much as money can express’, represent the underlying tenet. This is not to suggest that other payments cannot be considered and applied, for instance betterment, severance, injurious affection, disturbance and potentially special value to the owner.

- These, depending on the circumstances and precedent, can be additions to or subtractions from that economic value. Nevertheless, economic value must be the primary starting point.

- All of these represent well established principles, not only across the profession, but also reinforced in law and precedent going back to 1901 in Australia and well before that in English Law. Once the premise of economic or notional freehold value is accepted, other variations and applications (including potential heads of claim for resumption; ‘lease’ values for a range of periods; and assessment of ancillary works, for example in gross easements, licences, accesses and servicing arrangements) could be assessed using the same contemporary principles of valuation as applied elsewhere in Queensland.

It is not suggested that the Torres Strait Island cases (particularly those involving resumption or some comparable agreement) are easy. Closely comparable sales on island lands in the Torres Strait region outside Thursday, Horn and Prince of Wales Islands are not known to exist.

Sales cannot be ‘manufactured’ and complex contrivances by some other means would become abstract and hypothetical, and could be the cause of more debate and disagreement. Consequently, one must work within the parameters of sales that do exist, recognising several key issues:

- Sales on Thursday Island and Horn Island will generally be of serviced properties. It needs to be noted here that, although Prince of Wales Island is in close proximity to Thursday Island and therefore unique, it is not serviced. Properties on other islands may not have the same level of services or amenity found on Thursday or Horn Islands. This is one of several factors that the valuer would have to take into account when considering lands on the other islands.
• It would appear that government activity / demand for land in the islands (particularly Thursday Island) underpins demand to a very considerable extent. This may be inevitable however it does reinforce the need for an equitable and consistent approach.

The limited availability of freehold land on Thursday Island (and increasingly on Horn Island) may be an understandable factor in constructing authority decisions to pay a comparatively high value for land to expedite transactions. As much as possible, this must be avoided given the expectations and precedent that such unsubstantiated settlements may produce. This could have serious adverse downstream affects, particularly in a region where government property activity is reasonably common.

To assist valuers in this difficult task and to promote consistency in approach, a number of general principles and activities are recommended. As well as those outlined above, these would include:

(i) A forum or meeting of professionals, perhaps in Cairns, as soon as possible, to accept / reinforce the above principles and to consider appropriate values for lands outside the three islands identified above.

(ii) While each property is inherently different and whilst some latitude needs to be provided for valuers to reflect the idiosyncrasy of any particular site, this exercise requires the consideration of the generic attributes of the islands. The valuation exercise should therefore attempt to find a benchmark value that is applicable to most islands. Hopefully it would only be necessary to identify a few homogenous areas within the islands. Again some latitude must be provided to address significant esoteric characteristics of a particular site but, even then it would be difficult to imagine large variations.

(iii) Betterment claims would not be considered (and are unlikely to emerge as having large quantum in any case).
6 TECHNIQUES AND COMPARATIVE ANALYSIS FOR BASE VALUES

6.1 Sales analysis

In general, to arrive at a value for a subject property, the valuer would seek a range of the most comparable sales evidence, followed by an adjustment process to determine the market value of the subject property. The adjustment process must consider the value determinants and how they differ between the sales and the subject property.

Whipple (2006:262) states:

“Valuers use up to four methods in weighing comparisons between sold and subject properties in value estimation. These are:

- review and intuition
- construction of an adjustment grid
- quality point rating
- regression analysis”.

Regression analysis is not relevant here, as it is based on the identification of sensitivities of a range of variables related to complex future incomes. Further, whilst adjustment grids and quality point rating analysis techniques are relevant to the comparison process where a range of clearly defined, distinctive, characteristics exist, they do require wider, reliable data points to populate the matrices. Such data is not available in the subject study area.

On that basis, ‘review and intuition’ as Whipple describes, is fundamental to comparison in cases such as these addressed here.

6.2 Mass appraisal process

As the intention of this report is to describe a methodology for valuation that could be applied to all exclusive possession native title lands in the Torres Strait region, it is helpful to consider the mass appraisal approach that has been developed for rating and taxing valuations.

Mass appraisal may be defined as:

“The systematic appraisal of groups of properties at a given date using standardised procedures and statistical testing” (d’Amato 2004:205)
There is comprehensive literature available on the methods developed for mass appraisal systems, and the International Association of Assessing Officers (IAAO) continues to be active in improving assessment practice. In their book, *Mass Appraisal Methods: An international perspective for property valuers*, Kauko and d’Amato (2008) compile a list of the latest tools being used to enhance automated valuation methods and empirical modelling of value – both used extensively in the computer assisted mass appraisal of property.

Although it is recognised that such sophisticated computer modelling would not be necessary for the case under consideration, it is important to take into account and abide by the primary objectives of mass appraisal - those of simplicity, consistency and relativity (Hefferan & Boyd 2010). This requires the setting of fair values that acknowledge similarities and major differences between individual properties.

The mass appraisal process requires the determination of:

(i) homogeneous areas, and

(ii) a benchmark property (or properties) within each homogeneous area.

Relevant sales are then analysed and compared to the benchmark property or properties. It is preferable that the sales evidence is taken from within the homogeneous area, but if only limited sales evidence is available within a homogeneous area, comparable sales may be sought from other areas. Within a homogeneous area, the value of individual properties is based on the benchmark property or properties to which differential factors would be applied (when necessary).

### 6.3 Valuation process

In applying the comparative sales approach and the mass appraisal technique to the Torres Strait region, several logical steps in the valuation process are to be followed, these being:

1. Identify the homogeneous areas

   Guidance notes:

   (i) Outside of Thursday, Horn and Price of Wales Islands (the inner islands), it may be appropriate to consider only one homogeneous area for the Torres Strait region (bearing in mind that the value consideration is limited to native title lands). It may also be appropriate to consider a few homogeneous areas for the entire region - but the rule should be to have fewer rather than more distinct areas.
(ii) For the purposes of this exercise, the homogeneous area(s) should be differentiated on the basis that the land value is substantially different between the areas. The value differential should take account of the property characteristics that are considered of value to the local residents who represent the notional market.

(iii) As previously noted, the paucity of closely comparable sales in any environment creates particular challenges in assessment. Such situations however, are not without precedent. Regional shopping centres, tourist and island resorts, special infrastructure and port facilities (and a range of other asset types) present other examples. Normal practice and the professional opinion of these authors would strongly recommend the following approach:

- Sales evidence represents the best form of proof of value and if closely comparable sales are not available, the search needs to be widened to find sales and other evidence that build up a logical case for the value recommended. If less comparable sales have to be used, professional acumen and experience, together with the assembly of any relevant information that may help to build a logical argument, would form a part of the final assessment.

- As with any valuation, particularly in cases where closely comparable evidence is not available, it is important to ‘keep the process as simple as possible, but no simpler’.

- In such analysis too, care must be taken not to ‘contrive’ markets or develop complex abstract models that, in a holistic assessment, are less than rational and logical.

- Finally, it must be accepted by all, that there is no absolute or definitive answer possible. This is not to suggest unnecessary generalisation, but it does require the acceptance of the fusion of professional opinion and good logical arguments.

(iv) In applying this reasoning to the Torres Strait case, the following points are relevant:

- As regards geographic identity across the Torres Strait region, there are a number of recognised island clusters. Horn Island and, particularly, Thursday Island are the most settled and have good sales evidence of value (though it might be noted that many of those sales are understood to involve government purchasers who can ‘set the market’ and, again particularly on Thursday Island, available land is in short supply, therefore pushing up demand, also discussed in Section 5.2 above).
Thursday Island provides a good level of urban amenity, reasonably comparable with many small towns elsewhere in Queensland. Horn Island has a slightly lesser level of urban amenity, but is in close proximity and quite accessible to Thursday Island. Prince of Wales Island might be considered quite unusual - almost aberrant given that it has quite a convenient location but poor urban amenity. Nevertheless, the underlying valuation point is that enough sales evidence occurs in these areas to render the assessment of value achievable.

- The other islands in Torres Strait are scattered over very extensive areas of ocean. The region as a whole has three local authority areas and also a number of locality groupings as reflected in previous DERM valuation reports (see Section 3.1 above).

- It is not suggested that in each of the inhabited islands specific parcels of land, such as those that might be acquired under an ILUA, would be identical (and indeed no two parcels of land anywhere are that). Nevertheless, under the parameters and suggested valuation practice as outlined in this report, it would be held that each parcel of land likely to be covered by an ILUA on the outer islands, would have comparable levels of urban amenity and available services.

Consequently, and for valuation purposes, it should be accepted that lands are closely comparable and any differentiation in value should be attributable only to area (that is, square metre size). It needs to be stressed that this approach seeks a level of standardisation that is reasonable and logical however, there does need to be proviso that, where a particular block has fundamentally different characteristics, a specific assessment may be necessary and a special determination, again based on that valuer’s professional opinion, may need to be made. Hopefully, any such special assessment would have regard to the guideline values established in this and other associated investigations and reports.

Notwithstanding the principles to be adopted here, good practice and corporate responsibility would require sound proactive and sensitive dealings with affected native title holders through a consultative process and information sharing. The process protocol developed to guide implementation of the proposed ILUAs provides for this.
2. Find and analyse comparable sales

Guidance notes:

(i) Based on the premise that the value being assessed is the notional freehold value, freehold sales should be sought. Initially, these would be within the homogeneous area(s) and then, if necessary, beyond the boundary of the homogeneous area(s).

(ii) The sales should be analysed to determine the value determinants, that is, the main factors contributing to the price differentials. It is acknowledged that the limited number of sales would not permit rigorous statistical studies to assess the differentials and that valuer judgement would be a component of this analysis as noted above in Section 5.2. The value determinants may include several factors such as land productivity, available services, infrastructure and public amenities, location, topography, area, shape, aspect, access, surrounding development, statutory and planning parameters and other property features. The analysis would link to the specification of the benchmark properties (Step 3 below and as discussed at Section 6.2).

(iii) The impact of land size and utility on price should be specifically considered. Is there a standard residential lot size and how would values change with the change in land size? What is the highest and best use for the property? Does any form of statutory zoning of the property affect its value?

3. Set benchmarks and norms for each homogeneous area

Guidance notes:

(i) It needs to be considered whether there is a differentiation for any use restriction or control for certain properties, if so, it would be necessary to define the submarket.

(ii) The appropriate land size categories and incremental factors for size change need to be considered. Care needs to be taken in regards to the use of discrete size categories because of ‘feathering’ problems.

(iii) One or more benchmark properties need to be determined. One benchmark property should be adequate unless there were submarkets within the homogeneous area.

(iv) The notional freehold market value for the benchmark property should be assessed from the sales analysis and, where possible, a comparative grid illustrated. The value should be expressed as a
dollar amount and as a rate per square metre. If more than one benchmark was used, then a benchmark value would need to be determined for each submarket.

A significant issue could begin to emerge with the proliferation of such submarkets. Because of inherent difficulties with such assessments, care must be taken not to contrive markets. There would seem little point in attempting, quite artificially, to subscribe value differentiations between the outer islands when such a differentiation cannot be proven. Also, the differentiation may be quite small. Whilst the case for accuracy is unquestioned, such accuracy in these assessments may never be definitively established.

(v) The value adjustment for size differences between parcels needs to be specified by determining the size (square metre) range categories and the appropriate rates per square metre as a sliding scale.

(vi) It needs to be considered whether any differentiation factors would be necessary for specific property characteristics that were incompatible with the rate set for the benchmark property. This should only be undertaken for cases where the value differential is substantial.

The application of this process would result in benchmark values for each designated homogeneous area, as well as specify any variation in the value for parcel size and, if necessary, particular property characteristics.
7 ILUA CONSIDERATION FOR CONSENT: VALUE COMPONENTS

The ILUA under consideration specifies the development of a valuation methodology that would allow for consent consideration amounts to be calculated for major infrastructure program projects, non-major infrastructure program projects and housing projects (excluding a native title holder’s house area).

This report discussed and confirmed that the consideration amount would be a combination of the notional freehold value and a special indigenous value. The consideration amount could be either monetary, non-monetary or a combination of these.

The notional freehold value is described as the base value and this base value would relate to a long term lease for the activity. A long term lease is generally considered to cover a period of 99 years, or close to this timeframe. Leases of up to 99 years are now provided for.

7.1 Base value assessment for 99 year lease

The base value for a period of 99 years would be assessed on the project land area.

The value would equal the project area size multiplied by the relevant base amount. These tables are examples only and it is important to note that the number of tables will relate to the number of homogenous areas. The base amount is taken from the tables below:

Table 1 PROPERTY TYPE no. 1

<table>
<thead>
<tr>
<th>Project area</th>
<th>Base amount calculation</th>
</tr>
</thead>
<tbody>
<tr>
<td>1,000m² or less</td>
<td>$X</td>
</tr>
<tr>
<td>1,001m² to 3,999m²</td>
<td>$X plus $Y/m² for every m² above 1,000m² (max $Z)</td>
</tr>
<tr>
<td>4,000m² to 9,999m²</td>
<td>$Z plus $A/m² per m² above 3,999m² (max $B)</td>
</tr>
<tr>
<td>1 ha to 4ha</td>
<td>$B plus $C/m² per m² above 9,999m²</td>
</tr>
</tbody>
</table>
Table 2 PROPERTY TYPE no. 2

<table>
<thead>
<tr>
<th>Project area</th>
<th>Base amount calculation</th>
</tr>
</thead>
<tbody>
<tr>
<td>1,000m$^2$ or less*</td>
<td>$D$</td>
</tr>
<tr>
<td>1,001m$^2$ to 3,999m$^2$</td>
<td>$D$ plus $E/m^2$ for every m$^2$ above 1,000m$^2$ (max $F$)</td>
</tr>
<tr>
<td>4,000m$^2$ to 9,999m$^2$</td>
<td>$F$ plus $G/m^2$ per m$^2$ above 3,999m$^2$ (max $H$)</td>
</tr>
<tr>
<td>1 ha to 4ha</td>
<td>$H$ plus $J/m^2$ per m$^2$ above 9,999m$^2$</td>
</tr>
</tbody>
</table>

Note: It may be necessary to make further adjustments to the base amount for a differential factor.

### 7.2 Base value assessment for 30 year lease

In determining a medium term interest in land, say in the order of 30 years, it would be logical to structure this value as a proportion of the freehold value. As a long term lease (i.e. 99 year lease) is to be regarded as the notional equivalent to freehold, it is then possible that the difference between the 99 year lease and a shorter period lease could be determined. This time differential could be evaluated on a financial basis.

Using time value principles, the simplest way to determine this amount would be to assume a fixed regular income (in real value terms) for the time of the interest (99 years and 30 years) and then assess the present value using a real property premium discount rate. This would provide a proportional relationship between the two values.

The discount rate would have to be determined at the same time as the unit land value assessment was carried out. As with those land value assessments, it would be important that the rate would be used uniformly in all cases. Although it is preferable that a rate oriented to the property market would be used, in a case such as this, an acceptable market rate could be difficult to determine. The bond rate represents at least one known and consistent benchmark and, whilst it or some derivative of it (such as bond rate plus two percent) could be used, the link to acceptable property market returns would be preferred where possible.

By discounting to a present value at a real rate of four percent per annum, the resultant value for the 30 year period would be approximately 70 percent of the 99 year term. This suggests that the base value for a 30 year lease would be 70 percent of the value of a 99 year lease.
Table 3 Calculation of financial benefit differential: 30 to 99 years

<table>
<thead>
<tr>
<th>Benefit: $100 per annum (end period)</th>
<th>Present value using 3% rate</th>
<th>Present value using 4%</th>
<th>Present value using 5%</th>
</tr>
</thead>
<tbody>
<tr>
<td>for 99 years</td>
<td>$3,154.69</td>
<td>$2,448.52</td>
<td>$1,984.03</td>
</tr>
<tr>
<td>for 30 years</td>
<td>$1,960.04</td>
<td>$1,729.20</td>
<td>$1,537.24</td>
</tr>
<tr>
<td>Percentage difference</td>
<td>62%</td>
<td>71%</td>
<td>77%</td>
</tr>
</tbody>
</table>

The consideration for consent for this subsection should state that the base value would be assessed as follows:

Base value for 30 year lease = relevant base amount from Tables (in Section 7.1) x 0.7

7.3 Ancillary projects

Construction activities in the Torres Strait that are secured through negotiation or acquisition may include both the acquisition / procurement of the site to be used for the particular project (referred to in the ILUA as the ‘Project Area’), as well as, ancillary works and projects on other land (referred to in the ILUA as an ‘Ancillary Project Area’). Ancillary project areas may involve dedicated road access or some other access arrangements and could include access for works above, on, or over land. Ancillary project areas may also comprise of service lines for water, electricity, gas (or other services), temporary sites for the storage of materials to be used in the scheme and rights of way for drainage works away from the site. There may be a wide variety of such uses and activities that pertain to the main project area.

By way of general guidance, a list of ancillary works has been included in Appendix 4 (as under the Transport Infrastructure Act 1994 (Qld)), though this list may not be definitive for the purposes under consideration here.

If the ancillary project was to have an impact on the land, then that impact could be assessed by considering the native title rights and interests that would be curtailed or restricted during the course of those ancillary project works.

For example, the general practice regarding compensation for easements has traditionally been based on a proportion of the freehold value. While the resultant figure would be a rate per square metre of affected land, it may be
possible to derive a fair (average) rate that could be applied to all ancillary works, with possible adjustments for size categories and different impact levels.

If the overall concept of notional freehold value is accepted, then many of the principles that could or should be applied in this locality are already established in statute, professional practice and precedent.

Even with that premise accepted however, there would be several suggested variations based on physical and other parameters of the Torres Strait. These special considerations might include:

- As regards access, normal practice on the mainland would involve access to a dedicated / gazetted road. On the islands, such access may be more likely secured across exclusive possession native title lands by way of easement or licence (i.e. wayleave).

- Enhancement derived from the works of the constructing authority on land acquired would normally be accepted as an offset against compensation claimable. In the Torres Strait cases, it is suggested that enhancement offsets not be included in assessments. In these cases, enhancement would be likely to be enjoyed across the entire community (not only by the dispossessed owner).

Further, enhancement claims are likely to be relatively small and could open up other grounds for conjecture – remembering that a basic tenet of the recommended approach here is to keep the assessment as simple as reasonably possible.

On that basis and following research and discussions with relevant senior officials of constructing authorities elsewhere in Queensland, the following observations on contemporary practice relevant to acquisition generally and specific to ancillary works are made.

7.3.1 Resumptions for public purposes

The principles of resumption law and precedent are well established in Queensland, Australia and across a range of British based jurisdictions.

As well as the value of land taken, typical heads of compensation involve:

- Injurious affection
- Severance
- Disturbance
- Enhancement (also termed Betterment)
• Solatium

• Other losses, expenses or costs stemming from the resumption (not including the time of the dispossessed owner).

These terms are defined in Section 10 of the report.

A basic and overall principal of resumption is that of a ‘before and after’ assessment – that is, ensuring that, as far as money will allow, the dispossessed owner should be in the same position after the resumption as before the scheme commenced.

In practice, few cases ever advance to litigation. Wherever possible, constructing authorities attempt to avoid the time and additional costs of formal resumption by negotiating settlements in advance of completion of that process. A Notice of Intention to Resume is often issued to establish the constructing authorities’ interest, but negotiations in the interim mean that only a fairly small proportion ever proceed to final proclamation. An even smaller number require arbitration or litigation. Such an approach not only results in quicker outcomes for all parties, but also provides a more desirable outcome for the constructing authority and for wider government when overall corporate and political environments are considered.

A number of observations could be reasonably made regarding recent developments in resumption practice and case law. These are as follows:

• The scale of public projects and their typical location within urban and peri-urban areas, as well as the political and other implications of public works, has resulted in a much more sensitive approach to resumption activities.

  This manifests itself in activities such as: a more comprehensive impact assessment process; a much greater emphasis placed on consultation; and / or the taking of more generous corridors to provide buffer areas. As a general observation, the components (including impact, acquisition cost and public impact) of construction works have become a far higher determinate of projects than in the past.

• Aligned with that general philosophy are recent cases that somewhat widen the previously strict application of injurious affection assessments. The historic approach (identified in the valuation profession as the Edwards principle) confined claims for injurious affection to activities emanating from the actual land resumed from the dispossessed owner. More recent case law, in particular the Marshall case (establishing the Marshall principle), and prior to that, the Treston and Beaver Dredging cases, have now established a wider interpretation.
• For a claim to exist land still had to be physically taken, however the grounds for the diminution in value need not necessarily be related only to works or activities on that land secured from the dispossessed owner, but could relate to the activities of the constructing authority elsewhere. In the Marshall case, the High Court (on appeal) held that:

“…. it was plain in s 20 (1), Acquisition of Land Act 1967 (Qld) in assessing compensation, regard is to be had not only to the value of the land taken but also to the damage caused by the exercise of any statutory powers by the construction authority otherwise injuriously affecting the remaining, severed land. This section clearly distinguished between the land taken and the severed, retained land. It did not seek to distinguish between the various activities carried out by a constructing authority in the exercise of its statutory powers, for example, the conduct of a survey, the construction of a road, the building of a bridge, the installation of drainage or footpaths beside the road, and the subsequent use of everything that has been done or brought into existence as, and for the purposes of, a road. The section compensated the dispossessed owner for the injurious affection upon the residual land resulting from the undertaking and the implementation of that purpose, actual and prospective” (in Brown 2004:171).

These are important evolutionary changes reflecting contemporary economic realities and, arguably, community values, and can be observed in the approach towards resumption outcomes or in negotiated settlements by authorities with compulsory acquisition powers.

7.3.2 Easements

As noted above, many of the ancillary works would involve the establishment of less than a total acquisition, therefore, an elaboration on such interests may assist in a wider understanding in this case.

An easement establishes a new equitable (and in most cases, ‘in perpetuity’) interest in land. Rights transferred do not represent exclusive ownership but, according to the conditions of that specific easement, will nominate certain activities that the grantee may undertake whilst allowing all other uses to continue as normal. Such an agreement will not only identify the transferee’s rights, but it may also specifically limit certain activities within the surveyed easement area. Such an easement is typically in gross which indicates that the grantee does not own adjoining lands.
The easement is registered on title and transfers with ownership. Provisions exist for the extinguishment of easements in the event that the easement is not used for its identified purpose for a considerable length of time.

A registered easement not only establishes the right to construct powerlines, underground cabling, or other works, but specifically identifies an easement area. For example, in the case of electrical installations, these can typically range in width from a metre or two for underground cables, through to a corridor of up to 60 metres for major transmission lines (where building, building heights and particular land uses can be controlled, to ensure safety around the lines, access to poles and the specific enforcement of statutory clearances from lines).

Easements also specify allowances for the clearing of vegetation and for access for vehicles and pedestrians to cross adjacent lands to reach that easement. Such easement agreements are fairly uniform in wording (depending on whether installations are above or below ground) and, because of their very specific nature, are important for the later physical maintenance and protection of the integrity of the installations.

Whilst no cases are known to exist in Queensland, the existence of such a registered easement would place the authority (that is, the grantee) in a very strong position if an injunction or mandamus action became necessary. In Queensland, constructing authorities on these types of works usually prefer an easement to a less certain wayleave agreement and would normally require easements for access into, say, new subdivisions, for the protection of critical link lines, higher voltage 33KV or 132KV sub transmission lines, or 275 KV transmission lines in the case of power infrastructure.

Again, in the case of power infrastructure, on-ground switching or transformer equipment would not normally be located on an easement area – given that those types of installations require a level of exclusivity of land use that the concept of an easement cannot accommodate. Such facilities may be provided for on road reserves or, in the case of major power installations, a separate parcel of freehold or long term leasehold land.

A wayleave licence achieves the same outcome whereby installations can be erected legally on private property, however, the level of control and tenure security is not nearly as strong. Wayleave agreements are normally simple, one page, written agreements, and in some cases do not even refer to a plan to identify those installations. A wayleave does not represent an equitable interest in land and cannot under normal circumstances be registered on title.

Many local power lines in Queensland, in some cases including higher voltage 11KV or even 33KV lines, are secured only on wayleaves, though this seems to reflect historic rather than contemporary practice. The potential issues here however, relate to matters of certainty and clear definition of rights which are not specifically established under wayleaves.
The concept of easements, licences, wayleaves, or concessions are well recognised in Australian property law, and constructing authorities in Queensland have historically used both 'in gross' easements and wayleaves - depending on the circumstances of the case. Again, in most cases, only nominal consideration is involved. There is now, however, a clear recognition by constructing authorities that registered, in-gross easements are preferred to wayleave arrangements as they provide a much higher level of tenure security. Anecdotally, it would seem that wayleaves are more a matter of historical practice than of policy or corporate preference, particularly in urban or peri-urban areas.

In rural, particularly grazing areas, where there is little likelihood of significant land use change, constructing authorities seem generally willing to allow existing wayleave arrangements to continue without an active program to convert them into more specific and certain registered easements. Further, it is understood that for minor and non-contentious installations, wayleave arrangements are still being established.

The reason for the continuation of lesser wayleave agreements was not specifically stated by constructing authorities. Anecdotally however, it might be reasonably observed that the continuation of their establishment might be based on:

- The cost in survey and legal fees in transfer
- As regards corporate risk, there appears to few cases where wayleaves have caused significant or operational problems (of course, this is on the premise that they are being used for fairly minor constructions / installations)
- Finally, to attempt to convert wayleave arrangements to easements may draw attention to arrangements that, whilst not perfect, appear at least to be operationally satisfactory.

Historically, injurious affection claims were not entertained in easement cases as no land was actually taken and only a use was secured (Edwards). Assessment was, therefore, normally made on the basis of a percentage of the value of land within the easement areas.

Whilst holding to the percentage approach on less valuable or lightly used land (Stanfield), compensation can now consider the impact on the whole of the property. On a rural-residential property for example, depending on the specifics of the case, a percentage compensation over the value of the entire property including improvements may be allowed, thus reinforcing the maxim of ‘before and after’ assessment (together with disturbance and other costs).

Important to the current investigation, is the change in practice to the provision of a minimum payment for the securing of in gross easements that would have only a minor impact, such as a simple crossing of land by aerial
conductors. A truly nominal, say ‘$100’ would be ascribed the minimum amount, however, this nominal amount to be paid by major constructing authorities would be more substantial. Whilst such figures may well be discoverable through title searches, the constructing authority interviewed asked that the specific figure not be identified in this report for commercial reasons, given that the figure is, to some extent, arbitrary.

Suffice to say here, old case law such as Edwards, which identified a very small quantum of compensation in times prior to the greater recognition of injurious affection, have been superseded.

In the contemporary environment, even a ‘nominal flat fee’ represents a significant payment, which could be seen as an acknowledgement of the inconvenience and ‘mark on title’ that an easement can represent, no matter how insignificant.

As with other resuming authorities, those specifically involved in the securing of grants of easements and rights of way have sought to ensure that the grants have been made validly for native title purposes, but have not, as yet, received compensation claims and, therefore, some contingent compensation liability almost certainly exists.

### 7.3.3 Native title and ancillary works

A second important observation relates to native title issues and constructing authorities in Queensland. Clearly many construction activities such as road and rail construction, pipelines, powerlines and so forth, require negotiated purchase or resumption of corridors. This could be for the purchase or compulsory acquisition of a right to cross, either through an ‘in gross’ easement, or the establishment of an easement with dominant and servient tenements. Both of these types of tenure are normally rights in perpetuity – with an equitable interest established in the land. This interest is attached to the land and is not personal to the owner of the land (Hyam 2004).

Contemporary cases applicable to these areas include Wambo Cattle, Kater, Stanfield and Blower. Summaries of these and other relevant cases are included in Appendix 3.

An alternative approach in the securing of a right of way for public works, is to establish a licence or ‘wayleave’ agreement which establishes a right to those activities but not an equitable interest in land. The vast majority of all of these cases involved dealings with freehold land, where, by definition, native title has been extinguished. However, such corridors will, in many cases, cross un-alienated crown land (of one sort or another) including riparian or littoral areas where native title may still exist.

Within the Queensland environment, many of these areas may already be subject to a native title determination that is yet to be resolved. In any case,
resuming authorities have had to address the need to proceed with the construction whilst recognising prima facie or potential native title claims.

Under Section 24MD of the *Native Title Act 1993* (Cth), constructing authorities can act to have native title extinguished (particularly in the case of exclusive title such as freehold use being required), such may be sought by the proponent of a new building, dam, highway or similar, where full and exclusive use of the land is required. In other cases, native title is not extinguished rather, it is suppressed, where future (or concurrent) indigenous use may still be possible. That is, the native title holders would not be prevented from having reasonable access to the land after the works were complete. Examples of this could be the crossing of such lands by an underground pipeline or overhead cables, where walk through or other traditional uses are impacted (to a greater or lesser extent), but certainly not excluded.

Whilst the legal and operational processes to permit construction are well established, it is important to note that, to the best of the researchers’ knowledge and investigations, no claim for compensation by any indigenous group related to such work has been made, let alone assessed and settled in Queensland. This would appear to establish a potentially significant contingent liability on constructing authorities that has yet to be addressed.

### 7.3.4 Implications for Torres Strait cases

Provided that exclusive possession native title land is the equivalent of notional freehold values, then the basis for assessment, as outlined, would be fairly well established for resumptions and rights of way for ancillary works.

As previously noted, contemporary court decisions generally accept a wider definition of implications for injurious affection, provided that land is actually acquired from the dispossessed owner and an overall ‘before and after’ assessment is applied.

At the risk of generalisation, it must be noted the actual impact of works such as access ways for occasional use, overhead power cables, underground pipes or drains would be minimal. A percentage approach, as upheld in *Stanfield*, of ten percent might reasonably apply in most areas of the Torres Strait. However, assessing underlying land value when no closely comparable sales exist is still an issue. On that basis, a nominal or flat rate value could be considered as fair and reasonable for the equivalent of securing such rights. This presumes that:

- All other costs and the making good of the topography is undertaken by the constructing authority
• That sensitive and inclusive negotiations take place throughout the process

• As with other assessments, the opportunity should always exist for a specific assessment of compensation where the circumstances and characteristics of the case are demonstrably abnormal and impactful.

7.3.5 Impact of ancillary projects

It would be anticipated that there would be varying degrees of impact upon ancillary project area lands. As the lands under discussion would be exclusive native title lands, the value of the land would be determined in relation to the use as if the land was freehold land, as per the guidance notes from Section 6.3 of this précis.

It would therefore follow that the quantum of compensation would adhere to current practices on mainland Australia. Where land is lightly used, such as grazing land or land covered in natural vegetation, 10 percent of the value of the land would apply. This could be increased by up to 60 percent for land that is actively used for agriculture. If the impact of the works was such as to render the land unable to be used, or another similar significant impact, then a ‘before and after’ assessment would be recommended.

7.4 Special indigenous value

7.4.1 Concepts of indigenous value for the Torres Strait Islands

In this particular examination of special indigenous value, most of the subject lands are those where exclusive native title has been determined to exist. Pertinent observations on the special indigenous value of these lands are put forward as follows:

• Whilst obviously different, the nature, culture and philosophy of native title within the Torres Strait region may be easier to comprehend and appreciate (at a number of levels) for European understanding, given the quite permanent nature of settlements (as opposed to the much more nomadic and transitory uses of land by mainland Australian aborigines).

• The Torres Strait region has its own and acceptable level of community and infrastructure and an expectation that their communities will receive similar treatment to all other communities within Australia.
• The involvement of the communities affected, and a full appreciation of their general and specific observations, would represent the most critical component of an early and successful settlement.

7.4.2 Categories of culturally significant sites

Both the draft *Infrastructure and Housing Indigenous Land Use Agreement* and the draft *Process Protocol* comment on and provide a process for identifying cultural heritage concerns. However, these documents only consider low or high impacts on cultural heritage. Given that, it would appear reasonable to seek a clear identification of categories of culturally very significant sites from native title holders, to ascertain where no development should occur. These sites may already be covered under a cultural heritage register.

If possible the land could be classified into a few levels of significance:

(i) iconic sites
(ii) highly significant sites
(iii) other native title property (ordinary land).

The first category of iconic sites would be unique sites (such as Uluru) and it would be anticipated that these sites would never be considered for future development.

The second category of highly significant sites would be considered as requiring special consideration, while the third category would be the expected level of indigenous value that would be accounted for within an ILUA.

7.4.3 Value apportioned to special indigenous value

Cultural value concepts of indigenous people are best described as existence values, and derive their value from tradition, beliefs or history. It would be difficult and inaccurate to assess these values on economic (supply and demand) factors. An attempt to analyse such special considerations using fundamentally capitalist economic and ‘European’ law may seem to be the antithesis of native title concepts in the first place (Lavarch in Tilbury 2000).

Within environmental economics, there are several evaluation methods that determine the worth of property that is infrequently, or never, traded in the property market place. They are generally referred to as contingent valuation methods or some similar form of cost-benefit analysis. Beder (1996) explains the basis and the problems of cost-benefit analysis and Rolfe and Windle (2003) provide an example of the value of Aboriginal cultural heritage sites.
Using these concepts as an alternative method to economic or market value to determine compensation would require that contingent valuation methods be based on sound non-market techniques and the creation of a hypothetical market. The incorporation of inputs from the affected indigenous people would also be essential (Young 1997).

It is important to understand that the summation of several values should, in total, represent the fair compensatory amount. When determining existence values, the composition of a total fair value has different value elements. In particular, the market value component has to be hypothesised and this may distort the value of the other elements. Burke (2002) in his discussion paper *How Can Judges Calculate Native Title Compensation*, put forward an interesting conceptual model that attempted to demonstrate the head of compensation ‘solatium’ as a method of determining compensation (Figure 3).

Although this model encapsulates an important point made in Burke’s paper - that often indigenous lands have limited economic or market value, the authors of this paper would prefer, when describing market value as a component of native title, to term this value as a communal or an existence value. It is worth noting also, that the head of compensation ‘solatium’ is not recognised in the *Acquisition of Land Act 1967 (Qld)*.

![Figure 3: The Keon-Cohen/Sheehan/O’Rourke model of the expected relative proportions of the basic elements of compensation in compulsory acquisition (Source Burke 2002:7)](image)

In the assessment of compensation claims under standard resumption practice and precedent, there is no such head of claim as special indigenous value. However, for commercial reasons (including time / cost, corporate position and relationships), a constructing authority may quite legitimately decide on such an additional payment, having regards to the entire project they are undertaking and their wider corporate interests.
While there is no logical relationship between the freehold market-based value and a special indigenous value, the current process would indicate that special indigenous value would usually be determined as a proportion of the market-based value, and that this arrangement would often be viewed as a commercial reality. This is a totally arbitrary figure and lacks a sound foundation, but it does provide a simple and transparent formula.

Therefore, if the special indigenous value must be considered as a percentage of the market value figure, then it is recommended that the three categories listed above in Section 6.4.2 become the basis of determining the appropriate percentage to provide an additional amount for cultural heritage or special indigenous value.

A standard quantum of compensation (either monetary or non-monetary) that relates to all exclusive possession native title land could be established as the default amount referred to in the ILUA. This ‘standard’ or ‘ordinary’ native title land category (Category iii) could have an additional amount of around 20 percent of the market value of the land, on the basis that this was in line with accepted market practice.

The second category of ‘significant sites’ (Category ii) should receive a substantially higher percentage of market value depending on the cultural, spiritual or heritage importance of the site and, preferably, include tangible benefits to the local community. The additional percentage may be in the order of fifty percent or above. It is suggested that the second category would, in terms of the Native Title Act 1993 (Cth), be compensated on ‘just terms’ rather than being limited to market value considerations.

These significant sites could also be identified in a register, such as the cultural heritage register administered by DERM.

It is not anticipated that any land within the iconic sites category (Category i) would be the subject of an ILUA.

When determining compensation for special indigenous value, there are several related considerations that should be taken into account. These include:

- the betterment that may be gained by the native title holders through the taking of the land
- any severance or injurious affection caused by the taking.

It is important to also note, that any negotiated settlement should place the dispossessed owner in no worse a position than could be reasonably anticipated in regards to the nature and extent of compensation than as if it had been determined under Part 2 Division 5 of the Native Title Act 1993 (Cth).
8 COMMENTARY ON SVS APPROACH TO BASE VALUES

8.1 Introduction

In early June 2011, an email to the TSRA from Brian McFadyen of DERM included suggested valuation figures for the Torres Strait.

In examining those value proposals formulated by the State Valuation Service (SVS), the following commentary is provided on the five zones proposed, the selected size categories and the valuation figures applied to each zone. Also provided are some initial recommendations.

8.1.1 The five zones

The five zones principle lacks justification if it is intended to represent homogeneous areas that are differentiated on property desirability factors. The document appears to imply that the zones have been determined on the average income per individual. However when this relationship was examined, (income value for 1000 square metres for the $60,000, $40,000 and $30,000 figures) a strong negative correlation was found, meaning that the islands with the lowest income have been valued at the highest figures. This would not justify the zone differentiation.

In addition, the document appeared to suggest that Horn and Thursday Islands should be included as a single zone (Zone 5), even though there were significantly different land values recorded for each of these two islands. This is contrary to the concept of zones.

8.1.2 The size categories

The proposal prepared by the SVS appeared to determine the valuations on the basis of five size categories being 1000 square metres, 2000 square metres, 4000 square metres, one hectare and two hectares. The rationale for these categories would need to be explained from sales evidence. In addition, there should be a mechanism to correct for the feathering effect between discrete zones.

8.1.3 The valuation figures in each zone

The valuations allocated to the zones and sizes were understood to be the proposed base values for the ILUA. These valuations would be used to represent the notional freehold value and, therefore, must be based on comparable evidence of freehold sales. Comparable sales may be available in a few islands with freehold property however, there was no analysis of these comparable sales provided with the email to justify the proposed land valuations.
This does not infer that comparable sales analysis was not undertaken, but that no evidence of this process was included with the background materials provided to USC by the TSRA.

8.1.4 Initial recommendations

Although several homogenous areas would need to be established, it would be recommended that these areas or zones should represent broad homogenous areas and that differentiation into separate areas should only be undertaken when there is a substantial difference between the value derivatives between islands or island groups.

The values established should be adjusted for different property sizes. This would include a detailed explanation of the analysis of the comparable sales to the subject land value(s), which would provide the basis of the average notional freehold land value(s) for those areas of the Torres Strait Islands where native title has been determined to exist.
9 CONCLUSIONS AND RECOMMENDATIONS

There are obvious inherent difficulties in determining valuations for any purpose in remote locations such as the Torres Strait. These difficulties include limited sales evidence, which is concentrated in the inner islands, together with overall native title considerations in the Torres Strait.

It is remarkable that almost two decades on from the landmark *Mabo* decision there appears to be no really relevant court determinations of compensation for native title and with that, no methodology established through judicial decisions.

It is clear that to facilitate the timely provision of necessary infrastructure and housing a negotiated settlement with dispossessed owners is to be preferred, rather than to proceed by way of formal resumption and or litigation given the uncertainties presented by lack of precedent in relation to any ensuing compensation claims.

This work would hold that a reasonable framework could be established and that, with good faith on both sides, this could result in expeditious securing of sites for public works and ancillary services, whilst also adhering quite closely to recognised and accepted valuation standards.

Such an approach would be based on the following framework:

- As much as possible sales evidence must be considered as the primary basis of valuation, with the search extended for those sales as wide as necessary and certainly including the inner island sales.

- Given the limited sales evidence, it is important to develop a sound argument, whilst keeping the comparison as simple as reasonably possible and avoiding overly complex modelling; that would almost certainly have a fairly abstract rationale.

- Based on the above criteria, the outer islands should be considered as homogenous. Despite the fact the there are geopolitical sub-groupings, in the assessment of economic value the urban amenity of each inhabited island should be considered as equal.

On that basis, and for the purpose of securing equitable negotiated settlements, the single criteria should be on size (square metres). However, there should also be the capacity to allow for the provision of individual special assessment where the land involved had exceptional characteristics and that would involve parties applying the ‘opt out’ provisions in the ILUA.

- Exclusive possession native title lands should be considered as having notional freehold value.
• The square metre rate to be applied needs to be separately assessed (under a separate and following report) and that base value should be regularly assessed every two to three years.

• With the acceptance of the notional freehold value maxim, issues related to the securing of the sites for ancillary works would generally follow widely accepted existing corridor / right of way assessment practices.

• As regards special indigenous value (and reflected in relevant Court decisions), the assessment of native title is not a matter that can be assessed based on the economic value established through valuation practice, as there would appear to be a fundamental differentiation between cultural considerations.

The unusual characteristics and particular sensitivity of compensation extinguishing or otherwise substantially affecting, native title is well recognised and success would not only rest on the establishment of a robust framework, but also to the adherence of contemporary practice by constructing authorities. By ensuing high levels of genuine consultation and negotiations; the avoidance (as much as possible) of lands of particular of community, social, or cultural significance; and the prior acceptance of a uniform valuation methodology such as that outlined in this report, it would be anticipated that a successful outcome for all parties could be achieved.

This final component may be best secured by the holding of a forum or meeting of professionals actively involved in such negotiations.
10 DEFINITIONS

Compulsory Acquisition

“Where an asset is acquired by a statutory authority through legislation, irrespective of whether an owner is willing to sell or not” (API 2007:29)

Resumption

A term that can be used interchangeably with compulsory acquisition

Market Value

“Market value is the estimated amount for which an asset should exchange on the date of valuation between a willing buyer and a willing seller in an arm’s length transaction after proper marketing, wherein the parties had each acted knowledgeably, prudently and without compulsion” (API 2007:73).

Heads of Compensation:

- Value of Land Taken

  The market value of the land having no regard for any changes in value that may arise from the public purpose / purposes that were the reason of the acquisition

- Severance

  The concept of severance is to determine what the balance land would be worth after the resumption. It is concerned with the physical characteristics of the balance land.

  “Where only part of a dispossessed owner’s land is compulsorily acquired it is not only necessary to assess compensation on the basis of the value of the land taken, but consideration must also be given to any damage which the retained land has suffered as a result of the acquisition” (Hyam 2004:334)

  The severed land can be a single but reduced unit, or the land can be bisected therefore leaving the owner with a number of separate parcels. Severance can lead to matters of injurious affection or enhancement (Brown 2004:163-164).

  In Castle Hill Brick, Tile & Pottery Works Pty Ltd v Baulkham Hills Shire Council (1961), the Queensland Land Appeal Court commented at 207 that;

  “Severance damage arises from the separation or division of the claimant’s land as a result of the resumption. The severance may be
by way of a division of the retained land into two parts, for example, by way of a resumption for an intersecting road. It may also occur where a part only of the claimant’s land is taken leaving a compact parcel. Severance damage is depreciation in the value of the retained land resulting from its division into two or more parts, or its reduction in area and consequent loss of value for some current or higher (potential) use”.

- **Injurious Affection**

Injurious affection occurs where the value of the retained land is reduced as a result of the scheme or purpose underlying the resumption. The concepts of injurious affection and severance are closely related and are at times confused. The concept of injurious affection does not include sentimental value (Brown 2004, Hyam 2004).

- **Enhancement**

In Brown (2004:142), enhancement is discussed as being one of three types;

  o “...where land is resumed and the value of the land increases due to the purpose of the resumption...
  o ...where land is severed and the value of the retained portion by the owner is enhanced due to the purpose of the resumption..
  o ...where on parcel of land is resumed and the value of adjoining land owned by the claimant is enhanced...

*The principle does not apply to neighbouring land owned by another person”*

Compensation “…cannot include an increase in value which is entirely due to the scheme underlying the acquisition” (Brown 2004:140).

Enhancement can also be termed ‘betterment’

- **Disturbance**

The “…loss or damage that a dispossessed owner incurs when required to vacate the land taken. It relates to the moving process from the resumed land” (Brown 2004:147)

- **Solatium**

A discretionary amount of compensation “…to console the owner for his or her injured feelings” (Brown 2004:172), as a result of the acquisition. The Acquisition of Land Act 1967 (Qld) does not make provision for solatium.
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12.2 List of Cases

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13 APPENDIX 1: BACKGROUND ILUA INFORMATION

Provided by Gilkerson Legal

1. Proposed ILUA

1.1 The TSRA, the State of Queensland (through the Department of Environment and Resource Management ("DERM")) and the Torres Strait Island Regional Council have already made substantial progress in the development of a template Indigenous Land Use Agreement ("ILUA").

1.2 It is to be an ILUA of the kind provided for in Part 2 Division 2 Subdivision B of the Native Title Act 1993 (Cth). Once put in place with a prescribed body corporate ("PBC") for a native title determination area and registered, ILUAs based on the template will enable consent to be given to a whole range of infrastructure and housing related activities within an ILUA area which affect native title.

1.3 Negotiations between the parties to date have given rise to Draft 5 of the template ILUA and Draft 3 of a Process Protocol. Although ILUAs based on the template will take effect both as contracts between the parties and through the statutory effect of them being registered (i.e entered on the Register of Indigenous land use agreements), the Process Protocol is a non-legally binding guide. It contains clear steps to guide a project proponent and a PBC on the practical measures they can take to enable the efficient implementation of the ILUA for particular projects.

1.4 Insofar as relevant to ILUAs based on the template, the essential effect of the statutory scheme in Part 2 Division 3 of the Native Title Act 1993, is as follows:-

- a) Wherever it exists at law, native title is legally protected by provisions which provide that, to the extent that a future act (as defined in Section 227 of the Native Title Act 1993) affects native title, it will be valid if covered by one of the subdivisions in Part 2 Division 3 and invalid if not.

- b) A future act will be valid if the parties to a registered ILUA consent to it being done.

- c) If a future act is not the subject of consent in a registered ILUA, it will be valid only to the extent it is covered by one of the other basis for validity in Subdivisions F to N.

2. Statutory Compensation Applications

2.1 Where a future act is covered by one of the other basis for validity, the native title holders are given a statutory entitlement to compensation “for the act” in accordance with Part 2 Division 5 of the Native Title Act 1993.

2.2 Consistent with requirements under the Australian Constitution and having regard to the application of the Racial Discrimination Act 1975 (Cth), it is a requirement under Part 2 Division 5 (Section 51(1)), that the statutory entitlement to compensation:

“is an entitlement on just terms to compensate the native title holders for any loss, diminution, impairment or other effect of the act on their native title rights and interests”.

2.3 Other features of the statutory compensation application scheme under Part 2 Division 5 are as follows:-

- a) Determinations of compensation in any particular case arise by way of a PBC or persons authorised by a compensation claim group making a compensation application to the Federal Court of Australia. That application is then determined in the way provided for in Part 3 of the Native Title Act 1993. It includes provisions for good faith negotiations about the compensation application, in the context of which Section 79 requires any proposal for all or part of the compensation to be in a form other than money, to be considered. The transfer of land or other property or the
provision of goods or services are given as examples of compensation in a form other than money.

b) Under Section 51(2), where Part 2 Division 2 Subdivision M is applied by way of the compulsory acquisition of native title in a particular case, any determination of compensation may have regard to any principles or criteria for determining compensation set out in the law under which the compulsory acquisition takes place (for example, the Acquisition of Land Act 1967 (Qld)).

c) Other than where a compulsory acquisition of native title is involved, if the “similar compensatable interest test” in Section 240 of the Native Title Act 1993 is satisfied in a particular case, Section 51(3) provides that any determination of compensation must, subject to certain statutory requirements, apply any principles or criteria for determining compensation (whether or not on just terms), contained in any legislation or other law that would be applicable to the case if the native title holders instead held an ordinary freehold estate in the land or waters concerned.

d) If there is not a compulsory acquisition of native title under, in Queensland, State compulsory acquisition legislation and the similar compensatable interest test does not apply, Section 51(4) provides that any determination of compensation on just terms may have regard to any principles or criteria set out in the Commonwealth or, in Queensland, the State compulsory acquisition laws for determining compensation.

e) Where Part 2 Division 5 applies in determining compensation, the total amount of any compensation must not exceed the amount that would be payable if a compulsory acquisition of a freehold estate in the relevant area had instead been undertaken, however this limit is only applicable where native title is actually extinguished.

2.4 Once a statutory compensation application has been determined, the compensation is recoverable from the Commonwealth or, in Queensland, the State depending on which level of government the future act is attributable to.

2.5 It is possible for the Commonwealth or a State to make laws providing that another person is liable to pay the compensation. However it is understood that no such laws are currently in place in Queensland.

3. Compensation Under an ILUA

3.1 The position in relation to compensation for future acts consented to in, or surrendered under, a registered ILUA is different.

3.2 In relation to body corporate agreement ILUAs of the kind which the template facilitates, key provisions in Part 2 Division 3 of the Native Title Act 1993 are as follows:

a) Compensation for a future act is one of a number of matters any one or more of which an ILUA must, under Section 24BB, be about. The word “compensation” is specifically used in Section 24BB(ea).

b) Section 24BE(1) says that the ILUA itself “may be given for any consideration............ (other than consideration............that contravenes any law)”. Section 24BE(2) provides that without limiting the subject of matter of the consideration, it “may be the grant of a freehold estate in any land, or any other interests in relation to land whether statutory or otherwise”. Clearly the consideration can be both monetary and/or non-monetary.

c) It is noteworthy that the Native Title Act 1993 distinguishes between the provision of consideration and compensation in an ILUA. The lack of other prescriptions about consideration and compensation in Part 2 Division 3 Subdivision B, suggests that it is intended that parties to ILUAs have maximum flexibility in reaching agreement about quantifying the compensation and/or consideration in any particular case and in agreeing on the form of the compensation and/or consideration.
3.3 Other provisions in the *Native Title Act 1993* relevant to the issue of ILUA consideration and compensation are contained in Part 2 Division 3 Subdivision E. Key provisions are as follows:

a) Section 24EA(1)(a) provides that a registered ILUA has effect, additional to its statutory registration effect, as a contract among the parties. This reinforces the concept of the content of an ILUA being subject to agreement through negotiation and having the element of consideration. Consideration is something of value given by both parties to a contract which induces them to enter into the agreement and involves an exchange of mutual benefits or undertaking of mutual performances. Consideration under a contract needs to be something that has a value that can be objectively determined. In the context of a commercial contract negotiation, the mutual benefits or mutual performances are generally commensurate with each other because they are bargained for.

b) Although a registered ILUA takes contractual effect, Section 24EA(1)(b) provides a statutory effect of it being binding on “all persons holding native title……..(in the ILUA area)……..who are not already parties to the agreement………”. Given that all persons who hold native title affected by a future act are deemed to be bound, there would appear to be an onus on the ILUA parties ensuring that the consideration and compensation provisions are fair and reasonable for all persons who hold the native title rights and interests.

c) Section 24EB(4) contains a particularly important compensation related provision. It is as follows:-

“Section 24EB(4). In the case of an agreement under Subdivision B the following are not entitled to any compensation for the act under this Act, other than compensation provided for in the agreement:-

(a) any registered native title body corporate who is a party to the agreement;

(b) any common law holder of native title:-

i. for whom such a registered native title body corporate holds native title rights and interests on trust;

ii. for whom such a registered native title body corporate is the agent or representative; or

iii. any native title holder who is entitled to any of the benefits provided under the agreement”.

Again, this places an onus on the ILUA parties to ensure that the ILUA specifically does contain provisions that adequately provide for appropriate compensation.

3.4 In the context of an ILUA being a commercial and contractual bargain between the parties, it can be assumed that the extent of the compensation under an ILUA would be regarded by the native title party as having to be at least as beneficial as the nature and extent of the compensation which would be determined in respect of the relevant future act under Part 2 Division 5 of the *Native Title Act 1993*. Otherwise the native title party would obviously decline to enter into an ILUA and pursue their statutory entitlement to make a compensation application under Part 2 Division 5 once the future act is done under one of the other bases for validity.

3.5 To the extent that an ILUA provides for compensation that is agreed between the parties, the concept of what the compensation is actually for will be similar to the concept of compensatory damages in civil law. It provides different measures of damages usually depending on whether they arise out of a breach of contract or a tort.

3.6 For a breach of contract, the quantum of the damages is generally determined with a view to restoring the injured party to the economic position they would have been in had the contract not been breached. In tort, a determination of the quantum of compensatory
3.7 In the ILUA context, the compensation will relate to an “affect” which a future act has on native title – something quite analogous with “harm” in the context of compensatory damages. The benefit obtained by the proponent of a future act to which ILUA consent is given, is specified in Section 24EB(2):

“Section 24EB(2). The act (to which consent is given) is valid to the extent that it affects native title in relation to the land or waters in the area covered by the agreement”.

3.8 Section 227 of the Native Title Act 1993 contains the following:

“Section 227. An act affects native title if it extinguishes the native title rights and interests or if it is otherwise wholly or partly inconsistent with their continued existence, enjoyment or exercise”.


4.1 Consent to Future Acts and Non-Extinguishment Principle

4.2 Clause 7.1 in the template ILUA provides that the non-extinguishment principle applies to any future acts that are covered by the agreement. The non-extinguishment principle has a statutory meaning in Section 238 of the Native Title Act 1993. Essentially, where it applies to a future act any native title is deemed to be not “extinguished” even although it may be substantially, or even completely, “affected”.

4.3 The affect may be in terms of a complete inconsistency between the native title on the one hand and the future act (or the affect of the future act) on the other. In such a case Section 238(3) says that although the native title continues to exist, the native title rights and interests themselves “have no effect” (i.e cannot be exercised or enjoyed), in relation to the future act.

4.4 Clause 9.1 of the ILUA contains a table which specifies seven classes of future acts. The effect of the clause is that any future act within the definition of each class has the consent of the parties (and hence is valid for native title purposes), provided that any specified conditions relating to each class are met. The seven classes are as follows:-

a) Class 1 - Major infrastructure projects. These will need to be supported by the grant of a long term lease over the primary infrastructure site (or “Project Area”).

b) Class 2 - Infrastructure projects which are not major infrastructure projects. These may also involve Project Areas in respect of which tenure security by way of the grant of long term leases is required.

c) Class 3 – Home ownership housing projects for persons who are Traditional Owners. These will require the grant of long term home ownership leases. The Traditional Owners benefit in respect of home ownership is accepted as adequate compensation for affects on native title.

d) Class 4 – Home ownership housing projects for persons who are not Traditional Owners. These will require the grant of long term home ownership leases but as it is not a Traditional Owner who will be receiving the benefit of home ownership, compensation for the affect on native title is necessary.

e) Class 5 – Housing projects involving the renovation of existing dwelling houses. Irrespective of any affect on native title, the ILUA does not require any compensation to be paid.

f) Class 6 – Social housing projects for persons who are Traditional Owners. These will require the grant of social housing leases to a housing authority which will then
enter into residential tenancy agreements for the occupancy of the house by Traditional Owners. It is proposed that the Traditional Owners accept the social housing as effectively the compensation in return for the affect on native title.

g) Class 7 – Social housing projects for persons who are not Traditional Owners. These will again require the grant of long term social housing leases to a housing authority which will then enter into residential tenancy agreements for the occupancy of the house by persons who are not Traditional Owners. As a Traditional Owner does not benefit from the social housing, appropriate compensation needs to be paid for the effects on native title.

4.5 One of the conditions for each of Class 1, Class 2, Class 4 and Class 7 effectively relates to the payment of compensation in relation to the future act. That is the condition which requires the proponent of the future act to enter into a Benefits Agreement with the PBC. The quantum of monetary compensation provided for in a Benefits Agreement is calculated on a case by case basis by reference to formulas to be contained in Clause 11.

4.6 The formulas for compensation in Clause 11 anticipate the future acts for all such projects being of located on areas of two types:-

a) Project Areas – This is the project site itself. Apart from any other future acts relating to construction of the project etc, the Project Area will be the subject of a long term exclusive possession lease giving the project tenure security over its core site. Currently in the Torres Strait, the lease would be in the nature of a trustee (Torres Strait Islander) lease under the Torres Strait Islander Land Act 1991 (Qld). It would be entered into between the trustee of the relevant deed of grant in trust ("DOGIT") for the Project Area and the project proponent.

b) Ancillary Project Area – This area would cover any specified land outside the Project Area which is necessary for support services such as the underground, surface or overhead reticulation of water, sewerage, electricity etc. These are the sorts of areas in respect of which an easement would ordinarily be granted. An Ancillary Project Area will not include activities on areas for which there is a statutory power enabling such things to be done and hence they would not need to be the subject of compensation in a Benefits Agreement.

4.7 The Process Protocol anticipates the project proponent preparing a plan of the Project Area and any Ancillary Project Area. In the Process Protocol there is a process for discussion between the parties about the location and size of the Project Area and any Ancillary Project Area. A Final Project Plan, which must include details of the size in square metres of the Project Area and any Ancillary Project Area, is given by the proponent with a Final Project Notice. It finally locks in the areas where all project related future acts will occur.

4.8 In terms of completing a Benefits Agreement, the template ILUA then anticipates the project proponent and the PBC making a simple calculation involving the size in square metres of the Project Area and any Ancillary Project Area and certain dollar amounts for each square metre which are prescribed in Clause 11. The Benefits Agreement contains provision for the rates to be increased by CPI and for any GST.

4.9 Clause 11 proposes different rates per square metre for a Plan Area and an Ancillary Project Area - reflecting the different degree to which the different types of future acts on a Plan Area and an Ancillary Project will affect native title.

4.10 In respect of a Plan Area, it is understood that there is consensus that, despite the non-extinguishment principle, the affect on native title will be absolute. Because an exclusive possession lease over the Plan Area will give the project proponent (as lessee) exclusive possession to the land, there will be a complete inconsistency between the proponent’s lease and the native title.

4.11 Given the nature of infrastructure and housing projects, the project proponent’s lease will be for a long term. The Torres Strait Islander Land Act 1991 provides for leases of up to 99 years. It can reasonably be anticipated that leases granted for the types of projects
facilitated by the ILUA will have terms of more than 30 years and possibly as long as 99 years. The term of the lease will be beyond the span of a generation and hence will have the effect of depriving all living common law native title holders of the ability to exercise and enjoy any of their native title rights and interests in a Plan Area at all.

4.12 In the Torres Strait region, most of the land on which projects of the kind facilitated by the ILUA will be located, are already the subject of determinations of native title. The determinations recognise native title rights and interests which confer possession, occupation, use and enjoyment of the land on the native title holders to the exclusion of all others. A direct comparison can be made between the rights and interests in land derived from the native title and the rights and interests in land derived from freehold title.

4.13 Given the above, the parties to the template ILUA negotiations have already reached consensus that, in respect of Project Areas an appropriate methodology for quantifying compensation on a basis that can be reduced to a per square metre dollar amount, is the equivalent freehold value of land which may be included in any Project Areas. Given the circumstances outlined above that is an appropriate methodological approach.

4.14 The remaining issues for agreement in respect of the ILUA compensation methodology and the main topics considered by this report are as follows:-

a) Project Areas:

   i) How to determine the dollar amounts per square metre on a freehold equivalent basis for ILUA areas involving all of the different determination areas across the various Islands of the Torres Strait.

   ii) How to calculate what is referred to in the ILUA as a Special Indigenous Value and whether this additional amount to the freehold equivalent value is appropriate.

b) Ancillary Project Areas:

   i) How to assess an appropriate dollar amount per square metre and whether that is an appropriate methodological approach.
# 14 APPENDIX 2: LIST OF ILUAS IN QUEENSLAND (AUGUST 2011)

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Note: Blue highlight indicates body corporate agreement
(Source: NNTT 2011d)
15 APPENDIX 3: SUMMARIES OF RELEVANT RESUMPTION CASES

Appendix 3.1 Marshall v Director General Department of Transport (2002)

Appendix 3.2 Wambo Cattle Company v Queensland Electricity Transmission Corporation Limited (2000)

Appendix 3.3 Brief overview of Stanfield, Kater and Blower

Appendix 3.4 State of Tasmania v Effingham Pty Ltd (2005)

Appendix 3.5 Gold Coast City Council v Halcyon Waters Community Pty Ltd (2011)

Appendix 3.6 YMCA of Brisbane v Chief Executive, Department of Main Roads and Chief Executive, Department of Transport (2011)

15.1 Appendix 3.1 Marshall

Marshall v Director General Department of Transport (2002) QLC 51

Hyam (2004) provides an overview of the case as follows;

“part of a large area of land adjoining a major highway was resumed for road purposes. Before the resumption the highway consisted of two lanes. The owner sought compensation, inter alia, under s 21 (1) (b) of the Acquisition of Land Act 1967 (Qld) which provided that in assessing compensation regard was to be had not only to the value of the land taken but also to damage caused by the exercise of any statutory powers by the constructing authority otherwise injuriously affecting other land of the dispossessed owner. The claim was based on alterations to the highway drainage system which rendered the residual land more susceptible to flooding. No part of the widened highway or the altered drainage system was located on the resumed land. Nor was the acquired land used to carry out the work for the widening of the highway or the drainage system” (Hyam 2004:346).

The claim was rejected by the Queensland Land Court and “an appeal to the Queensland Court of Appeal was rejected affirming that there was no entitlement to compensation for injurious affection unless, at least, some of the drainage of the residual land was caused by works performed on the resumed land” (Hyam 2004:346).

Brown (2004) in discussing the development of case law regarding injurious affection has this to say about the Marshall case:

In Marshall v Director General Department of Transport (1999), 5,555 square metres of land was resumed for the widening of road. The court held that the Edwards principle applied – that is, the assessment was restricted “to the effect of the performance of work carried out on the resumed portion” (Brown 2004:171). However this was challenged on appeal and the High Court held that;

“it was plain in s 20 (1), Acquisition of Land Act 1967 (Qld) in assessing compensation, regard is to be had not only to the value of the land taken but also to the damage caused by the exercise of any statutory powers by the construction authority otherwise injuriously affecting the remaining, severed land. This section clearly distinguished between the land taken and the severed, retained land. It did not seek to distinguish between the various activities carried out by a constructing authority in the exercise of its statutory powers, for example, the conduct of a survey, the construction of a road, the building of a bridge, the installation of drainage or footpaths beside the road, and the subsequent use of everything that has been done or brought into existence as, and for the purposes of, a road. The section compensated the dispossessed owner for the injurious affection upon the residual land resulting from the undertaking and the implementation of that purpose, actual and prospective” (Brown 2004:171).
15.2 Appendix 3.2 Wambo Cattle

Wambo Cattle Company v Queensland Electricity Transmission Corporation Limited (2000) QLC

An easement area of 29.44 hectares was taken to allow the placement of steel tower structures that support electrical transmission lines – the scheme is part of a national grid interconnector system.

The claimant company served on the respondent a claim for compensation made up as follows:

Land, severance, injurious affection $1,200,000

Disturbance: Legal’s and Valuation $18,000

Amount of claim $1,218,000

Leave was sought and granted to amend the claim to the amount of $470,228 which included an allowance of $5,000 for disturbance in relation to construction activities and $5,228 for professional fees, the latter amount having been agreed between the parties.

The constructing authority’s valuation was in the amount of $10,000, together with the agreed amount of $5,228 for professional fees.

The court determined the total compensation at $25,228, based on these calculations;

Value Before Resumption -

Land as approved for 24,000 SCU Feedlot, with licence in place, including existing infrastructure and water license - $340,000

Value After Resumption - Adopt $320,000

Compensation $20,000

Disturbance - Professional fees as agreed $5,228

Total Compensation $25,228

In considering his decision, Wenck commented;

"I have formed the opinion that, once the market value of the site with the feedlot licence in place has been established, any deleterious effects caused by the easement would relate in the marketplace to the merged value of the component parts"
15.3 Appendix 3.3 Brief overview of Stanfield, Kater and Blower

Stanfield v Brisbane City Council (1995) QLC

The compensation for an easement over grazing land is determined as 10% of the value of the area of the easement.

The claimants had part of their rural residential property resumed for an easement for water supply purposes. The pipe was underground, with only a marker peg and a manhole cover providing any visible evidence of its existence. The claimants claimed a total amount of $13,162. The judge held compensation of $2981 was to be awarded to the claimants. In making the determination, the judge noted that;

“The authorities including Joyce supra, hold that diminution in value in a case where the easement is over land with no higher use than a grazing use, may be related to diminution in value of the area encumbered by the easement (in this case 628m2) and the application of a factor of 10% is common”

Kater v Electricity Transmission Authority of NSW (1996) NSWLEC, unreported

The ‘before and after’ method of valuation to determine the amount of compensation due to a property owner is discussed in comparison to using the piecemeal or summation method.

The case dealt with the creation of an easement over land. The valuation was for part of the property that was acquired for a section of an electricity transmission line easement.

Justice Pearlman “considered that the before and after approach and the piecemeal approach to the assessment of compensation before concluding there was no principle requiring the adoption of either” (Hyam 2009:357).

Blower v Queensland Electricity Transmission Corporation (1997) QLC

The claimants sought to include ‘injurious affection’ in their claim for compensation. The judge held that compensation for injurious affection was included in the ‘before and after’ method of valuation. It was held that;

“The authorities discussed in Landsburys case demonstrate that the great advantage of the ‘before and after’ method is that it assesses compensation as provided for in section 20 of the Acquisition of Land Act 1967, including the value of the land taken, severance and injurious affection, offset by any enhancement to the remaining lands. That has been the approach adopted in this case and therefore any injurious affection is included in the difference between the valuation before resumption and the valuation after resumption. The claimants are therefore not entitled to a separate head of claim for injurious affection as that would amount to a doubling up of compensation already assessed”
15.4 Appendix 3.4 Effingham

State of Tasmania v Effingham Pty Ltd [2005] TAS GL 55

This case is of importance for the consideration of a range of factors relevant to injurious affection to land of a resumee outside the acquired easement area. The easement in question was to provide for a major natural gas pipeline over a grazing property in northern Tasmania (bordering Bass Strait). The pipeline was all underground apart from a large valve and marker posts. The easement area was not fenced, thus not impeding free movement of vehicles and stock.

Precedent

In considering the injurious affection issue, the Court referred to the following cases establishing governing principles:

Marshall v Director General, Department of Transport (2001) High Court:

“Injurious affection does not include damage resulting from the act of severing the land. That is a separate head of damage. But it includes any other injurious consequence, resulting from the exercise of a statutory power, which depreciates the value of or increases the cost of using the ‘other land’. If the exercise of the power limits the activities on or the use of that land, interferes with the amenity or character of the land, deters purchasers from buying the land or makes it more expensive to use the land, the claimant is entitled to compensation for injurious affection.”

Spencer v The Commonwealth (1907) High Court:

“The test of value of land is to be determined, not by inquiring what price a man desiring to sell could actually have obtained for it on a given day, i.e., whether there was in fact on that day a willing buyer, but by inquiring ‘What would a man desiring to buy the land have had to pay for it on that day to a vendor willing to sell it for a fair price but not desirous to sell?’”

Joyce v Northern Electrical Authority of Queensland (1974) QLD Land Appeal Court:

“The principles to be applied in the compulsory taking of an easement are no different from those applying when the full fee simple is taken. This Court must restore, as best it may, the claimant, in money form, to the position which he enjoyed prior to the taking of the easement. For practical purposes it becomes a matter of assessing the extent to which he has been disadvantaged as the natural and reasonable consequence of the taking of the easement.

The test is the attitude of the hypothetical prudent purchaser and the extent to which in the opinion of such a person the claimant has suffered diminution in the value of his property resulting from the erection of the transmission line over his land, the creation of the easement including where appropriate severance and injurious affection damage.”
The Easement and the Adjacent Land

In assessing the claim for injurious affection the Court was quick to discount any effects that were directly related to the “easement area”; the amount of compensation to be awarded for acquiring the “easement area” had already been agreed by the parties.

INJURIOUS AFFECTION ON CLAIMS

The Court considered a range of factors on this issue dismissing some and making allowance, as part of a composite award, for others.

Restriction on Use by the owner

The Court held that there was insufficient evidence that any restrictions imposed by the easement would affect use of area outside the easement.

Safety Risks

There was sufficient evidence that the probability of a catastrophe such as a rupture or leak of the pipeline was “less than likely” and “practically hypothetical”; “the hypothetical purchaser must be supposed “to be perfectly acquainted with the land, and cognizant of all circumstances which might affect its value”. Furthermore, there was no evidence of the respondent having to pay higher insurance premiums as a result of the presence of the pipeline.

No amount was awarded for alleged safety risks.

Occupational Health and Safety

Conflicting amounts were put forward by expert witnesses on this issue. It was held that only a minimal amount of compensation for updates on a worker’s instruction manual and training would be required.

Visual impact

The visibility of the valve site, protection boxes and markers constructed on the easement might have a significant detrimental effect on the sale price of the property.

Sound and smell

The small amount of gas discharge producing a hissing sound and slight smell, as well as a monthly helicopter inspection of the easement, was of no significant impact on the land.

Security

There was found to be an increased risk of trespassers and resulting theft or damage caused to the land.
Privacy

As the homestead was approximately 450 metres from the pipeline, the privacy of the homestead was significantly affected. The Court described it as follows:

“As a result of the pipeline being there, some 36 visits per year need to be made to the valve site; there are the monthly aerial and annual vehicular inspections that I have referred to; and workers will need to come onto the easement for various other purposes at irregular intervals. For example, workers will need to come to a point quite near the homestead to construct a culvert over a creek in the near future. The presence of workers undertaking tasks related to the pipeline is likely to be more disruptive during lambing and calving than at other times.”

The court made a separate allowance (5% reduction in the value of the homestead) under this sub-head.

Contamination

The increased number of visitors to the property was found to increase the risk of weeds, plant diseases and stock diseases (such as footrot); however the risk was assessed as minimal.

Digging near the easement

The restriction of digging on the “easement area” should not be considered in injurious affection; however, as reasonable and prudent caution required the resumee not to engage in digging near the easement, further compensation was required for the land adjacent to the easement. Also, drains may in the future have to follow a less direct course around the pipeline.

Heavy Machinery

Injurious affection resulted from the restriction on heavy machinery being used on or near the pipeline (machinery over 30 tonnes). Also, special precautions were needed in case a vehicle became bogged near the pipeline.

Restriction on Mining

A sand mining lease was renewed on the resumee’s land but with a restriction that mining not be conducted within 100 metres of the pipeline. It was held that the demand for the sand deposits was not high enough to cause injurious affection in this case.

Fencing

An increase in the number of gates was held to cause injurious affection, despite the fact that the gates might not be the responsibility of the resumee.

The Blot on the Title

The Court held that it was common ground that the registration of a pipeline easement was likely to have an adverse impact on the market value of the land.
This was found to be significant since many farmers enjoy autonomy, and might be put off by having to liaise with a pipeline operator in relation to farming activities.

Final Award

The compensation for injurious affection was quantified as $50,350 for the reasons stated above. This was ordered in addition to compensation for the easement, GST and interest.

(Source: Review of Valuation Cases, 2009)
### Appendix 3.5 Halcyon Waters

**Gold Coast City Council v Halcyon Waters Community Pty Ltd (2011) QLAC 0003**

The respondent Council resumed part of the claimant’s land for road, park and recreation purposes. A balance land area comprising the allegedly enhanced “Flebus” lots (the enhanced land) and an adjacent unenhanced lot (the retained land) was left in the hands of the claimant. Such ownership was assumed for purposes of this hearing, although the ownership of the enhanced land remains in dispute. None of the balance land physically adjoined the resumed land but was separated from the latter by an existing dedicated road.

The Land Court held the allegedly enhanced land had to be physically adjoining the resumed land for the enhancement provisions of the *Acquisition of Land Act (ALA)* to apply. The Council appealed.

The question of enhancement (governed by s.20(3) of the *ALA*) on appeal was whether the word “adjoining” should be construed narrowly, requiring “physical contiguity”, or more widely, extending to land which “is or lies close to or neighbours on” the land taken.

The Court held:

1. The narrow view or the natural meaning of the word “adjoining” with respect to s.20(3) should be adopted.

2. The proper interpretation of “adjoining” in respect of land is physical contiguity. It requires a common boundary, or at least a common boundary point.

3. The “Flebus” land did not come within the description “land adjoining the land taken” in s.20(3) of the *ALA*. As a result, the Council was not entitled to assert that any of the enhancement of the value of the Flebus land from the resumption scheme could be relied upon by way of set-off or abatement, in the assessment of compensation for the taking of the resumed land.

4. The appellant’s claim for a set off for enhancement be struck out.

5. To come within the term ‘severance’, the resumed land did not have to be physically contiguous to the retained land. However, common ownership in the resumed and retained land was not sufficient to establish severance. Some additional ‘connecting factor’ was necessary.

6. In view of the conclusion that the Flebus land was not adjoining the resumed land, it was unnecessary to consider whether the retained land also had to be enhanced to trigger any enhancement claim for the Flebus land which adjoined it.

The case is also of interest for observations made by the Court on the degree of arbitrariness in the statutory provisions relation to compensation.

This was in response to an example provided by Council of a case where a landowner might have some land resumed, and some of the landowner’s retained...
land is benefited by the project for which that land is resumed, but any resultant enhancement in the value of some of the retained land would not be available by way of set-off or abatement, unless a wide meaning is given to the word “adjoining” s 20(3).

The Court stated:

“A landowner, none of whose land is resumed, and who is adversely affected by the project for which the resumption is carried out, has no right of compensation; whereas a landowner who suffers the loss of a very small portion of land may be awarded a large amount of compensation, principally for injurious affection. Equally, a landowner whose land is resumed, and who has other land which could in no sense be said to be adjoining the resumed land, or severed from it, may enjoy a great enhancement of the value of that other land by reason of the project for which the land is resumed. Again, the statute does not provide for that to be taken into account in the assessment. The provision of an example where, on one construction of the section, some enhancement is not taken into account, is not particularly persuasive. It is of considerably less weight than an examination of the statutory language in context, in the light of long-standing authorities dealing with a closely related topic”.

(Source: Review of Valuation Cases, 2011)
15.6 Appendix 3.6 YMCA

YMCA of Brisbane v Chief Executive, Department of Main Roads and Chief Executive, Department of Transport (2011) QLC 0039

It is most unusual for land held under a Deed of Grant of Trust (under the Land Act 1994) to be resumed for public purposes. The current case is one where the Court had to consider, as a preliminary point of law, the appropriate approach to assessing compensation in such instance. Was reinstatement a proper approach and, if so, what, if any, limitations applied?

Background Facts

In 1966, a Deed of Grant in Trust was issued to the Young Men’s Christian Association (YMCA) upon trust for recreation (youth and community centre) purposes. YMCA conducted a gymnasium and child-care centre in buildings it constructed on the land situated at Lutwyche. The land was resumed in 2008 for the Airport Link Project.

The effect of the Deed of Grant in Trust was that, so long as the trust continued, the YMCA had the right to occupy land rent-free conditional on observing the terms of the trust. YMCA sought compensation in the total sum of $11,624,000. Principal items claimed were: replacement land for a gym and child-care centre and replacement new improvements for the existing buildings.

With no directly applicable precedent in Australia or even in overseas jurisdictions, the Court had to consider the competing arguments from a close analysis of the relevant legislation with assistance from some broadly comparable case law.

Issue

The Court had earlier ordered that the following issue be determined by way of a preliminary hearing:

“Whether, on the proper interpretation of s.18(5) of the Acquisition of Land Act 1967 (ALA), in particular, of the expression ‘the amount of actual damage caused to the trust by reason of the taking’, in a case where the trust is a trust of a lot of land, and the land resumed was the whole of that lot, the compensation payable to the claimant may or may not include any costs incurred by the claimant to relocate or reinstate its operation to another site.”

Section 18(5) of the ALA provides that:

“The claim for compensation of a trustee or trustees of any land in respect of the taking thereof shall be limited to the amount of actual damage caused to the trust by reason of the taking, and no such trustee shall have any other right, remedy, or claim whatsoever in respect of such taking.”

Parties Contentions
At the hearing of the preliminary point, the Applicant (YMCA) contended that the following four findings should be made:

1. That the Trust has not come to an end.

2. That “the amount of actual damage caused to the Trust” in s.18(5) of the ALA can include loss of land.

3. That it is open for the reinstatement method to be applied in determining the compensation in this case.

4. That the determination of the entitlement to, and assessment of, compensation is to be made pursuant to the provisions of the ALA only.

The Respondent submitted that the preliminary issue should be answered along the following lines:

“In this case where the land resumed was the whole of the land the subject of the Deed of Grant in Trust governed by the Land Act 1994, the compensation payable to the Applicant may not include any costs incurred by the Applicant to relocate or reinstate its operation to another site, such as those claimed in the Applicant’s claim for compensation dated 27 November 2008.”

The Court held:

1. There is nothing in s.20 of the ALA to expressly provide for reinstatement; however, it has been generally held that an approach to assessing compensation by employment of the reinstatement method is appropriate in assessment of ‘value to the owner’ of the land taken.

2. Where there is no appropriate market or for some reason a market sale is not seen as the appropriate measure of compensation, other approaches may be adopted e.g. (the conventional capitalization formula).

3. The employment of the reinstatement principle is appropriate only where other approaches to assessment of value have been shown to be inappropriate or as not producing a fair result. Reinstatement is not a method of first resort.

4. There is no suggestion that one has regard to the fairness of assessment in a general sense, but only in the sense that traditional methods of valuation do not give proper effect to the principle of compensation on the basis of value to the owner. It is thus not a matter of simply having regard to all of the evidence, and based upon that, determining that a reinstatement method of valuation ought to be employed. The essential question which must be asked in a case of this nature is: what is the ‘value to the owner’ of the land acquired compulsorily.

5. Four categories of application of the concept for reinstatement have been adopted by the Land Appeal Court in Queensland:

Application in the classical sense as it applies to churches, schools and the like where reinstatement of the whole of the structure may be the subject of the award.
Reinstatement of business premises of a type where there is no general demand in the marketplace for the type of property under consideration.

Reinstatement applying where the reconstruction of part of an essential component within a single undertaking is appropriate.

In the case of the resumption of a lease, or of possession, for a limited period, of fee simple land.

6. The right to claim compensation and the heads under which it can be claimed depend exclusively upon the terms of the relevant statutory provisions. It is purely a question of construction of the particular statute, and consequently judicial decisions on statutes in different terms are only of limited application.

7. Little assistance is gained from the detailed review of the previous Acts in England and in New Zealand because the language of the Acts which have been passed in Queensland is in different terms and evidences a different approach to the question of calculating compensation.

8. Compensation for compulsory land acquisition is a matter of statutory entitlement and does not rest on the common law. At the same time, case law has provided considerable scope for development of the law where the statute sometimes uses concepts and not precise rules in addressing the question of compensation.

9. It remains a matter to construe the intended affect of s.18(5) which, on its face, clearly seems to contemplate some restriction on the rights of trustees seeking compensation to receive only what is expressed to be their “actual damage caused to the trust by reason of the taking”.

10. The Deed of Grant of land to the YMCA land contained no provision whereby the consent of the Governor-in-Council or any other entity could permit the sale of the land.

11. The inclusion of s.18(5) into the ALA in 1967 was a completely new addition, there being no derivation from the older compensation statutes. Equally, s.18(5) was not substituted for a provision that had been interpreted by the court so as to produce an unsatisfactory result.

12. There is no explanatory note or observation in the Second Reading speech which provides any guidance as to how s.18(5) is intended to be applied. Accordingly, it falls to the usual rules of statutory interpretation to ascribe some meaning to the provisions.

13. It would be a mistake to import into the construction of a statutory provision an entitlement to compensation which was not intended by the legislature.

14. It appears that the legislature was trying to implement a statutory regime which prevented parties holding land on trust from being compensated by way of payment for the value of land which they never owned or, possibly, preventing them from gathering windfall gains by recovering the current value of land for which they never paid. (No finding was made on this point).
15. The following factors appear to be determinative of the entitlement of the Applicant to compensation:-

(a) The Applicant holds the land pursuant to a statutory trust.

(b) The Applicant holds the land in fee simple subject to that trust.

(c) Pursuant to s.12(5) of the ALA upon the gazettal of the resumption notice, the trust is dissolved.

(d) The ALA has a limiting provision which is clearly intended to limit the amount of compensation to which a trustee is entitled.

(e) The legislature, it might be assumed, has carefully chosen the words “actual damage” in s.18(5).

16. The ALA distinguishes between the “value of the land taken” and the “actual damage” suffered by a trustee in circumstances where land is resumed. [ALA s.20(1) and s.18(5).] Had the legislature intended that the phrase “actual damage” should be construed so as to include the “value” (used in its widest sense) of the land taken it might be thought that it would have said so.

17. By the insertion of the phrase “actual damage” in s.18(5) the legislature may be taken to be indicating that a trustee is not entitled to the broad ambit of compensation which may be available to the owner of a fee simple.

18. The Lang Park Trust case exemplifies a circumstance in which the Court has been inclined to allow for the costs of some reinstatement so that the trustee could re-establish parts of their operation on the remnant trust land.

19. The consequence of the resumption is the Applicant has been dispossessed of its buildings and forced to vacate the entirety of the land granted to it on trust on which it carried out its operations.

20. So long as the Applicant continues to carry on operations in accordance with its aims, there seems to be no statutory requirement that it must purchase replacement land. However, an inability to demonstrate that it has or intends to purchase replacement land may inhibit a Court from contemplating reinstatement costs as part of or an appropriate methodology to determine compensation.

21. There is nothing in the ALA which precludes the adoption of the reinstatement principle in appropriate circumstances. Although, of course, it may not be the only method available to assess the appropriate compensation.

22. As to actual damage suffered by the YMCA, it seems clear that can adequately be described under three headings:

The loss of the buildings constructed on the subject land together with the fixtures therein.

The loss of an entitlement to occupy the land essentially rent-free in perpetuity.

Any properly identified disturbance items.
23. The amount of ‘actual damage’ caused to the YMCA as trustee can include the costs of reinstatement of their operations on other land.

Comment

The question of how reinstatement is to be assessed will be dealt with at the next stage of proceedings. Presumably detailed evidence will be led by both parties.

Assuming YMCA provide evidence of an intention to reinstate, two key matters that will need to be addressed by the Court are likely to be:

1. Will reinstatement value of the buildings be assessed on a new basis but only to the standard of the existing buildings?

2. If YMCA can only be reinstated on unencumbered fee simple land, will there be some discounting of this value, given the resumed land was subject to a Trust and unable to be sold. (However, it did have the advantage of being able to be mortgaged to secure loans for development on the Trust land).

(Source: Review of Valuation Cases, 2011)
15.7 Appendix 3.7 Springfield


The Court of Appeal decision in Springfield was noted in last year’s Review. Since then, the High Court has granted Springfield Land Corporation (SLC) special leave to appeal – a relatively unusual event. The appeal was dismissed by majority (four to one). Compensation was determined at nil.

It is convenient to briefly repeat the factual background and issues before noting the High Court’s findings.

Factual Background

In October 2005, the respondent (Department of Main Roads) issued notices of intention to resume land owned by the appellant SLC at Springfield near Ipswich. The expressed purpose of the resumption was the use of the land “for future transport purposes including the facilitation of transport infrastructure (namely road and busway, rail or light rail) for the South-West Transport Corridor”.

The total area of this land was a little less than seven hectares.

The parties were unable to agree on the amount of compensation and so the matter proceeded to arbitration. On 9 October 2008 the arbitrator made an award under which the respondent was to pay to the appellant compensation assessed at $1,468,806.

The appellant had been developing the area now known as Springfield since about 1992. On any view it was, and is, a very large residential development project, containing 2,851 hectares and expected to house at least 60,000 people. It was developed from a greenfield site.

In 1994, a draft Springfield Development Control Plan was prepared which identified a “Regional Transport Corridor”. In 1998, the appellant and the Ipswich City Council entered into what was called the Springfield Infrastructure Agreement, whereby certain land within the development site was to be dedicated for road purposes, and in particular for this transport corridor.

In the course of planning of an extension of the corridor from the Springfield Town Centre to Ripley, it was found that some of the land within the corridor land earlier set aside would not be required, but that some other land owned by the SLC adjacent to the corridor land was required instead.

The newly required land was called the “Transfer Land”. It was, in that context, that the respondent gave the notices of intention to resume in October 2005.

Issues

The principal issue in the case turned on the interpretation of the enhancement provisions of the Acquisition of Land Act (ALA).
Section 20(3) of the Act requires that "any enhancement of the value of the interest of the claimant in any land adjoining the land taken or severed there from by the carrying out of the works or purpose for which the land is taken" must be taken into consideration by way of set-off or abatement in assessing the compensation to be paid.

In the present appeal, the question that arose for determination was:

• whether "the works or purpose for which land [was] taken" from the appellant were limited to the works immediately associated with the land taken or whether they included the totality of a road building project of which those works were a part;

The other issue before the Court of Appeal of what lots “adjoin” the Transfer Land was not argued before the High Court.

The High Court held:

1. Section 7 of the ALA, provided for the Chief Executive to serve notices of intention to resume the Transfer Land and required that the notices "specify the particular purpose" for which the Transfer Land was required. The Chief Executive stated the intention to take the Transfer Land “for future transport purposes including the facilitation of transport infrastructure (namely road and busway, rail or light rail) for the South-West Transport Corridor” (emphasis added).

2. The agreed discontinuance by the parties of procedures under the ALA was in exchange for (i) the transfer of the Transfer Land for amalgamation with land already held by the Department of Main Roads, and (ii) payment of compensation for the Transfer Land, in accordance with the requirements of Pt 4 (SS 18-35) of the ALA, "as if" the Transfer Land had been taken under that statute.

3. The onus was upon the State of Queensland (acting through Main Roads) to establish that there was some relevant enhancement and its amount.

4. In the context of considering enhancement to other lands for the purposes of Section 20(3), the Pointe Gourde principle was not relevant.

5. The “purpose” in s 20(3) would appear to correspond with the purpose for which there is a power of compulsory acquisition. That indicates that the purpose was to be understood as the public benefit or end to be achieved, rather than some means to that end. The arbitrator’s identification of the purpose was incorrect.

6. The relevant "purpose" was that for which the Transfer Land would have been taken had the statutory processes set in train by the s 7 Notices not been supplanted by the Agreement. “These were future transport purposes including the facilitation of transport infrastructure, being road and busway, rail or light rail for the South West Transport Corridor.” This was the statutory purpose and the determinative purpose.

7. The "purpose" was not identified by some factual inquiry, beyond the terms of the s 7 Notices, into the reason why the s 7 Notices were given in the then current state of planning for the road corridor – that is, a decision to realign the proposed road corridor “in minor respects”. (Source: Review of Valuation Cases, 2011)
ancillary works and encroachments means—
(a) the following things—
(i) cane railways;
(ii) monorails;
(iii) bridges, overhead conveyors or other overhead structures;
(iv) tunnels;
(v) rest area facilities;
(vi) monuments or statues;
(vii) advertising signs or other advertising devices;
(viii) traffic and service signs;
(ix) bores, wells, pumps, windmills, water pipes, channels, culverts, viaducts, water tanks or dams;
(x) pipes;
(xi) tanks;
(xii) cables;
(xiv) paths or bikeways;
(xv) grids or other stock facilities;
(xvi) buildings, shelters, awnings or mail boxes;
(xvii) poles, lighting, gates or fences;
(xviii) pumps and bowsers; or
(b) any of the following activities—
(i) drilling;
(ii) clearing;
(iii) trimming;
(iv) slashing;
(v) landscaping;
(vi) planting;
(vii) burning off;
(viii) removing trees;
(ix) road safety related activities;
(x) sporting activities;
(xi) camping;
(xii) conducting a business (for example, a market);
(xiii) moving stock, other than under a stock route travel permit under the Land Protection (Pest and Stock Route Management) Act 2002;
(xiv) holding meetings; or
(c) other encroachments declared under a regulation to be ancillary works and encroachments; but does not include public utility plant.