ACT CIVIL & ADMINISTRATIVE TRIBUNAL

PLANET RED PTY LTD v COMMISSIONER OF ACT REVENUE (Administrative Review) [2017] ACAT 18

AT 82 - 84/2015

Catchwords: **ADMINISTRATIVE REVIEW** – jurisdiction – onus of proof in tax matters – land valuation – comparable sales method – premium for an existing tenancy – heritage restrictions – value of improvements

Legislation cited:
ACT Civil and Administrative Tribunal Act 2008 s 68
Planning and Development Act 2007 s 46
Rates Act 2004 s 6
Taxation Administration Act 1999 ss 4, 7, 100, 101, 104, 107A, 108A
Taxation Administration Act 1953 (Cth) s 14ZZK
Valuation of Land Act 1916 (NSW) s 40

Cases cited:
Bray v CFACTR [2007] ACTAAT 15
Brewarrana Pty Ltd v Commission of Highways (No 2) (1973) 6 SASR 541
Bushell v Repatriation Commission (1992) 175 CLR 408
Challenger Property Asset Management Pty Ltd v Stonnington City Council [2011] VCS 184
CFS Managed Property Ltd v Valuer-General [2016] NSWLEC 2
City Hill Pty Ltd v ACT Planning and Land Authority and ACT Civil and Administrative Tribunal [2015] ACTSC 40
Commonwealth v Arklay (1952) 87 CLR 159
Commonwealth Custodial Services v Valuer-General [2007] NSWCA 365
Estate of Notaras and Commissioner for ACT Revenue [2017] ACAT 2
Giusida Pty Ltd v Commissioner for ACT Revenue [2016] ACTSC 275
ISPT Pty Ltd v City of Melbourne [2007] VCAT 652
ISPT Pty Ltd v Melbourne City Council [2008] VCA 180
Maurici v Chief Commissioner of State Revenue (2003) 212 CLR 111
Rawson Finances Pty Ltd v Commissioner of Taxation [2013] FCAFC 26
Rigoli v Commissioner of Taxation [2014] FCAFC 29
Re Sharkey and Commissioner of Taxation (2007) 95 ALD 509; [2007] AATA 1435

Spencer v Commonwealth (1907) 5 CLR 418
The Optimise Group Proprietory Limited and Commissioner of Taxation [2010] AATA 782
Turner v Minister of Public Instruction (1956) 95 CLR 245
Valuer General v Fenton Nominees Pty Ltd (1982) 150 CLR 160

Appeal Tribunal: Presidential Member G McCarthy
Senior Member D Lovell

Date of Orders: 22 March 2017
Date of Reasons for Decision: 22 March 2017

AUSTRALIAN CAPITAL TERRITORY)
CIVIL & ADMINISTRATIVE TRIBUNAL) AT 82/2015

BETWEEN:

PLANET RED PTY LTD
Applicant

AND:

COMMISSIONER OF ACT REVENUE
Respondent

TRIBUNAL: Presidential Member G McCarthy
Senior Member D Lovell

DATE: 22 March 2017

ORDER

The Tribunal orders that:

1. The decision of the respondent is set aside and substituted with a decision that the unimproved value of Blocks 1 and 25, Section 48, City as at 1 January 2015 was $1,207,000.

……..
Presidential Member G McCarthy
Delivered for and on behalf of the Tribunal

AUSTRALIAN CAPITAL TERRITORY)
CIVIL & ADMINISTRATIVE TRIBUNAL) AT 83/2015

BETWEEN:

PLANET RED PTY LTD
Applicant

AND:

COMMISSIONER OF ACT REVENUE
Respondent

TRIBUNAL: Presidential Member G McCarthy
Senior Member D Lovell

DATE: 22 March 2017

ORDER

The Tribunal orders that:

1. The decision of the respondent is confirmed.

……..
Presidential Member G McCarthy
Delivered for and on behalf of the Tribunal

AUSTRALIAN CAPITAL TERRITORY)
CIVIL & ADMINISTRATIVE TRIBUNAL) AT 84/2015

BETWEEN:

PLANET RED PTY LTD
Applicant

AND:

COMMISSIONER OF ACT REVENUE
Respondent

TRIBUNAL: Presidential Member G McCarthy
Senior Member D Lovell

DATE: 22 March 2017

ORDER

The Tribunal orders that:

1. The decision of the respondent is set aside and substituted with a decision that the unimproved value of Blocks 18-19, Section 48, City as at 1 January 2015 was $648,000.

……..
Presidential Member G McCarthy
Delivered for and on behalf of the Tribunal

REASONS FOR DECISION

1. The applicant is the Crown lessee of the following parcels of land in the Sydney Building, Canberra City:

   (a) Blocks 1 and 25, Section 48, City. These blocks are at the north-west corner of the Sydney Building primarily facing Alinga Street at the addresses 54 Northbourne Avenue and 90-104 Alinga Street, Civic (**the Alinga blocks**).

   (b) Blocks 9-12, Section 48, City. These blocks are along the western side of the Sydney Building at the addresses 42-50 Northbourne Avenue, Civic (**the Northbourne blocks**).

   (c) Blocks 18-19, Section 48, City. These blocks are along the eastern side of the Sydney Building at the addresses 35-41 East Row, Civic (**the East Row blocks**).

2. The Alinga blocks, Northbourne blocks and East Row blocks are described, collectively, in these reasons as the subject blocks.

3. By valuation notice dated 17 July 2015, the Commissioner for ACT Revenue (**the Commissioner**) redetermined the unimproved value (**UV**) of the Alinga blocks to be $1,398,000 as at 1 January 2015. Noting the size area of the Alinga blocks (619 m²), the Commissioner's redetermination calculated the UV at $2,258/m².

4. By valuation notice dated 17 July 2015, the Commissioner redetermined the UV of the Northbourne blocks to be $1,243,000 as at 1 January 2015. Noting the size area of the Northbourne blocks (806 m²), the Commissioner's redetermination calculated the UV at $1,542/m².

5. By valuation notice dated 17 July 2015, the Commissioner redetermined the UV of the East Row blocks to be $746,000 as at 1 January 2015. Noting the size area of the East Row blocks (404 m²), the Commissioner's redetermination calculated the UV at $1,846/m².

6. The valuation notices record that the Commissioner had redetermined the UV of each of the subject blocks in the same amount as at 1 January 2013 and 1 January 2014.

7. The Commissioner used the three valuations to determine the average unimproved value (**AUV**) for each of the subject blocks to assess the applicant's rates payable on each of the subject blocks for the year ended 30 June 2016. The Commissioner issued rates assessment notices to the applicant in relation to each of the subject blocks stating the rates payable in each case for the year ended 30 June 2016.

Jurisdiction

8. The *Rates Act 2004* (**the Rates Act**) is a tax law for the purposes of the *Taxation Administration Act 1999* (**the TAA**).[1] 'Tax' is defined in the Dictionary to the TAA to include "any other amount paid or payable by a taxpayer to the Commissioner under a tax law". Rates payable under the Rates Act are therefore a tax for the purposes of the TAA.

9. Section 7(1) of the TAA (within Part 3 of the TAA) empowers the Commissioner to "make an assessment of the tax liability of the taxpayer." Where rates are a tax, the rates assessment notices were assessments made for the purposes of section 7.

10. Section 100(1)(a) of the TAA entitled the applicant, as a taxpayer, to object to an assessment shown in the notice of assessment given the taxpayer. 'Assessment' is defined in the Dictionary to the TAA to include an assessment made by the Commissioner under Part 3 of the TAA, and therefore included the rates assessment notices given to the applicant in relation to the subject blocks. The applicant objected to each assessment notice on the grounds that the assessed UV of each block was too high.

11. The Commissioner determined the objections under section 104 of the TAA and, by letters each dated 23 October 2015, confirmed the valuations upon which the rates assessment notices were based.

12. The Commissioner's determination, in each case, of the applicant's objection to each assessment constituted a "reviewable decision" under section 107A(1)(a) of the TAA. The applicant applied to the Tribunal under section 108A of the TAA for review of each of those reviewable decisions. By agreement, the applications were heard concurrently. Mr Allan of counsel appeared for the applicant. Dr Jarvis of counsel appeared for the Commissioner.

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[1] *Taxation Administration Act 1999*, section 4

Onus of proof

13. The applicant accepts[2] that it carries an onus, unlike in ordinary Tribunal proceedings involving merits review of an administrative decision, to persuade the Tribunal that the redeterminations should be varied. Section 101(3) of the TAA provides:

> *The burden of showing that an objection should be sustained lies with the taxpayer making the objection.*

14. Regarding discharge of the onus, Dr Jarvis submitted on behalf the Commissioner:

> *The applicant must demonstrate even within the parameters within which the valuation process can differ, that its propositions ought to be upheld. So the short answer is it makes their case more difficult. They must show even within the area of tolerance that one might allow, having regard to the partly conjectural nature of the valuation process that their propositions are correct.*[3]

15. Dr Jarvis relied on the decision of the (then) ACT Administrative Appeals Tribunal in *Bray v CFACTR*[4] where Peedom P said:

> *43. The general rule in resolving issues in proceedings before the Tribunal is that neither the applicant nor the respondent bears an onus of proving that the decision under review is wrong or that it is right (see Ladybird Children's Wear Pty Ltd and Department of Business & Consumer Affairs (1976) 1 ALD 1). The general rule does not apply, however, in cases where the legislation pursuant to which the relevant decision has been made spells out the incidence of the burden of proof (see Minister for Health v Thompson [1985] FCA 208; (1985) 8 FCR 213 at 223-224 and Federal Capital Press of Australia Pty Ltd & Ors and Commissioner for ACT Revenue [1995] ACTAAT 102 (1 February 1995)). In those cases where the relevant legislation places a requirement or onus on one or other of the parties to establish a particular matter the same requirement or onus applies before the Tribunal (see McDonald v Director-General of Social Security [1984] FCA 57; (1984) 1 FCR 354).*

16. After considering the evidence, Peedom P ruled:

> *62. The evidence before the Tribunal does not, in my opinion, establish on the balance of probabilities that the respondent's decision to not uphold the applicant's objection in relation to the decision that the grant should be repaid was not the correct or preferable decision. That decision should be affirmed.*

17. In the ordinary course of administrative review and the Tribunal deciding under section 68 of the *ACT Civil and Administrative Tribunal Act 2008* whether to confirm, vary or set aside the decision under review, an applicant is not subject to any burden or onus of

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[2] Transcript, 22 June 2016, page 16, line 18
[3] Transcript, 22 June 2016, page 47, lines 16 - 22
[4] [2007] ACTAAT 15

proof. The Tribunal's obligation is to hear the matter 'afresh' and to decide what it considers to be the correct or preferable decision on the material before it.[5]

18. Section 101(3) of the TAA modifies that position in relation to an objection to a reviewable tax decision by requiring the applicant to sustain its objection, meaning in this case to establish that the valuations are too high.

19. Section 101(3) of the TAA is a general provision applying to a wide spectrum of decisions to which a taxpayer may object under section 100 of the TAA. Whether the onus has been discharged is sometimes readily decided: the Tribunal finds that a decision is right or wrong, for example whether land tax or payroll tax is payable, or not, and the amount payable according to a statutory formula. However, concerning land valuation, to decide whether the onus has been discharged is problematic. The parties agreed (and properly so) that there is no 'correct' decision, when determining the UV of land. It is necessarily a subjective exercise where legitimate opinions can and invariably will differ, as they do in this case. How then can the applicant discharge the onus?

20. In *Re Sharkey and Commissioner of Taxation*[6] the Administrative Appeals Tribunal (Cth) said in relation to 14ZZK of the *Taxation Administration Act 1953*, being the material equivalent of section 101(3) of the TAA:

> *But the practical reality in most cases is more likely to be that proper consideration of all of the material will lead the tribunal to a state of comfortable satisfaction that a particular outcome is either 'correct or preferable' in all the circumstances. Comfortable satisfaction that a different result is 'preferable' will justify the tribunal in regarding an applicant for review as having discharged the burden imposed by s 14ZZK(b) of the Taxation Administration Act — of showing that the taxation decision 'should not have been made or should have been made differently'*

21. In *Rawson Finances Pty Ltd v Commissioner of Taxation*[7] Jagot J, sitting as a judge of a Full Court of the Federal Court on appeal, said as follows regarding this passage from *Re Sharkey*:

> *These observations seem to me to confuse the Tribunal's general obligation as a merits decision-maker which may by s 43(1) of the AAT Act "exercise all the*

[5] *Bushell v Repatriation Commission* (1992) 175 CLR 408 at 424; [1992] HCA 47; *Drake v Minister for Immigration and Ethnic Affairs* (1979) 24 ALR 577at 589
[6] (2007) 95 ALD 509; [2007] AATA 1435 at [212]
[7] [2013] FCAFC 26

> *powers and discretions that are conferred by any relevant enactment on the person who made the decision" (a power which has been held to oblige the Tribunal to make the correct or preferable decision on the available material) with the Tribunal's duty to apply s 43(1) subject to the modification imposed by, relevantly in this case, s 14ZZK(b)(i) of the TA Act. In a case where s 14ZZK(b)(i) of the TA Act applies the correct or preferable decision is to set aside the decision under review if the applicant has discharged the burden of proving that the assessment is excessive and to dismiss the review application if the applicant has not discharged that burden. The fact that the Tribunal cannot be satisfied that the Commissioner's assessments represent the correct or preferable decision does not mean that the applicant must succeed and the Commissioner fail. This would involve not only the casting of an onus of proof on the Commissioner but would also relieve the applicant of the applicant's burden of proof. Both would be impermissible.*

22. In *Rigoli v Commissioner of Taxation*[8] the Federal Court endorsed Jagot J's approach and then said:

> *... where s 14ZZK applies, the only state of satisfaction that the AAT is required to reach is whether, on the facts as found by the AAT, the taxpayer has proved that the assessment is excessive. If that state of satisfaction cannot be reached, the application for review must be dismissed.*

23. These authorities demonstrate, in our view, that the Tribunal must approach its task not by endeavouring to determine what the valuations ought to be on the evidence before it and then substituting those valuations as the 'preferable' decisions for those of Commissioner. Rather, the Tribunal must first determine whether, on the evidence, the applicant has established within margins reasonably open to the Commissioner that the valuations are too high. Where valuation is necessarily a discretionary decision, in our view for the applicant to show that its viewpoint or the Tribunal's conclusion is merely marginally preferable in all the circumstances to the Commissioner's determination would not discharge the onus. In *The Optimise Group Proprietory Limited and Commissioner of Taxation*[9] Forgie DP said:

> *49. The Tribunal's task was explained more fully in Federal Commissioner of Taxation v Dalco. Brennan J observed that the purpose behind an assessment, objection and appeal or review "... is to ascertain the true tax liability of the taxpayer under the substantive provisions of the Act." Speaking of an appeal,* ***but the principles are equally apt to a merits review in this Tribunal****, his Honour continued:*
>
> *... It would be inappropriate for a court determining an appeal to make an order altering the tax liability assessed ... unless the court were satisfied that the amount*

[8] [2014] FCAFC 29 at [26]
[9] [2010] AATA 782 at [49]

> *to which it proposed to alter the assessment represented the true tax liability of the taxpayer. Although the grounds of objection limit the grounds of appeal, the ultimate question for the court hearing the appeal is not whether the grounds have been made out but whether the amount assessed as taxable income is wrong. The burden which rests on a taxpayer is to prove that the assessment is excessive and that burden is not necessarily discharged by showing an error by the Commissioner in forming a judgment as to the amount of the assessment.*(emphasis added)

24. To the extent that the Tribunal considers (and has considered in this case) what the valuations ought to be, it is done to establish as a reference point whether the applicant has discharged its onus. If and only if the onus is discharged may the Tribunal proceed – but need not do so – to decide the extent to which the valuations are too high and substitute different valuations.

25. In *Rawson Finances* Jagot J put it this way:

> *The two tasks (on the one hand, being satisfied on the facts as found that the applicant has proved that the assessment is excessive and, on the other hand, being satisfied on the facts as found as to the amount of the liability in the impugned decision) are conceptually different. The statute consigns the first task only to the Tribunal. It may be accepted that, in performing the first task, the Tribunal may consider and/or resolve the second task. No doubt in a case where the Tribunal can satisfy itself, in accordance with the second task, that the facts as found by the Tribunal give rise to the amount of the liability in the impugned decision the Tribunal can also discharge the first task with a high degree of confidence and conclude that the applicant has not proved that the assessment was excessive. Provided the Tribunal's consideration of the second task does not distract it from the task which the statute requires to be performed there will be no question of law capable of vitiating the Tribunal's decision. But the second task cannot be substituted for the first task.*

26. For the applicant to sustain its objection (in this case that the valuations are too high) does not imply that it must prove on the balance of probabilities that its view about the UV of each subject block is 'correct' or require the Tribunal to accept the applicant's viewpoint. The Tribunal therefore rejects Dr Jarvis' submission in this respect. Discharge of the onus is not a 'black or white' exercise. The *Valuation of Land Act 1916* (NSW), section 40(2), similarly places an onus on an appellant to prove its case on appeal to the Land and Environment Court, but proving its case permits the Court to conclude on the evidence what it considers to be the appropriate value of improvements and thus the consequential UV of the land.[10]

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[10] *CFS Managed Property Ltd v Valuer-General* [2016] NSWLEC 2 at [2] and [161] – [179]

The Legislative Framework

27. The valuation notice, in each case, stated as follows:

> *The 2015 unimproved land value will be used together with the 2013 and 2014 unimproved land values to calculate the average unimproved land value (AUD) of your property (shown below for information). The AUV will be used to assess a portion of rates and, if applicable, all land tax and City Centre Marketing and Improvements Levy (CCMIL) charges for 2015-16. In addition, the 2015 unimproved land value will be used to assess land rent charges for 2015-16, if applicable.*

28. Section 6 of the Rates Act sets out the meaning of the term 'unimproved value of land' as follows:

> ***6 Meaning of unimproved value***
>
> *(1) The **unimproved value** of a parcel of land held under a lease from the Commonwealth is the capital amount that might be expected to have been offered on the relevant date for the lease of the parcel, assuming that—*
>
> *(a) the only improvements on or to the parcel were the improvements (if any) by way of clearing, filling, grading, draining, levelling or excavating—*
>
> *(i) if the Territory or Commonwealth had, before the parcel became rateable as a separate parcel, granted a development lease of land that included the parcel—made by the lessee under that lease or by the Territory or Commonwealth, or the cost of which was met by that lessee or by the Territory or Commonwealth; or*
>
> *(ii) in any other case—made by the Territory or Commonwealth or the cost of which was met by the Territory or Commonwealth; and*
>
> *(b) the circumstances that existed on the prescribed date also existed on the relevant date; and*
>
> *(c) on the relevant date, the lease had an unexpired term of 99 years; and*
>
> *(d) a nominal rent was payable under the lease for the 99 year term.*
>
> *Note **Relevant date** is defined in the dictionary.*
>
> *(2) The **unimproved value** of a parcel of land held in fee simple is the capital amount that might be expected to have been offered for the parcel at a genuine sale on the relevant date on the reasonable terms and conditions that a genuine seller would require, assuming that no improvements had been made on or to the parcel.*
>
> *(3) In this section:*
>
> ***prescribed date**, for a parcel of land, means—*
>
> *(a) for a determination of the unimproved value of the parcel—the date the parcel became rateable; or*
>
> *(b) for an annual redetermination of the unimproved value of the parcel—the date the redetermination applies; or*

> *(c) for a redetermination of the unimproved value of the parcel under section 11 (Redetermination—error) or section 11A (Redetermination—change of circumstances)—the date the redetermination begins to apply to the parcel.*
>
> ***relevant date**, for a parcel of land, means a date when a determination of the unimproved value of the parcel is or is to be made*

29. In each application, the relevant date is 1 January 2015.

30. In *City Hill Pty Limited v ACT Planning and Land Authority and ACT Civil and Administrative Tribunal*[11] the ACT Supreme Court per Refshauge J noted:

> *…there is no legal principle that requires any particular method (for valuing land) to be rejected or to be preferred … nevertheless the most common method is what is known as the comparable sales method*.[12]

31. In *Maurici v Chief Commissioner of State Revenue,*[13] the High Court said:

> *16 … The traditional, and usually unexceptionable, method is to seek out relatively contemporaneous sales of comparable properties between parties at arm's length, unaffected by special circumstances, such as, for example, a strong desire by a purchaser to buy an adjoining property, and to use those sales as a yardstick for the valuation of the relevant land.*

32. The Tribunal also notes the long-standing test for determining the market value of land, as stated in *Spencer v Commonwealth*:[14]

> *… 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'?*
>
> *..*
>
> *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 cognisant of all circumstances which might affect its value, either advantageously or prejudicially, including its situation, character, quality, proximity to conveniences or inconveniences, its surrounding features, the then present demand for land, and the likelihood, as then appearing to persons best capable of forming an opinion, of a rise or fall for whatever reason soever in the amount which one would otherwise be willing to fix as the value of the property*.

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[11] [2015] ACTSC 40
[12] [2015] ACTSC 40 at [70] and [72]
[13] (2003) 212 CLR 111
[14] (1907) 5 CLR 418, 432 and 441

33. Similarly, the High Court observed in *Commonwealth v Arklay* that the value should be based on:

> *... an estimate of the price which would have been agreed upon in a voluntary bargain between a vendor and purchaser each willing to trade but neither of whom was so anxious to do so that he would overlook any ordinary business considerations.*[15]

34. In each application, the applicant and the Commissioner agreed, and the Tribunal accepts, that the comparable sales method should be used for the purpose of assessing the UV of the subject blocks.[16] The comparable sales method is one of many methods for conducting valuation but is the preferable method when evidence of a sufficient basket of comparable sales is available, as in this case.[17]

35. The applicant and the Commissioner included the sale of one of the subject blocks (the East Row blocks) as one of the comparable sales for the purpose of determining the UV of the subject blocks at the relevant date. The Tribunal agrees that it may be included, notwithstanding itself being a block in question, and notes that this has occurred in past cases.[18]

36. In *ISPT Pty Ltd v City of Melbourne*[19] the Victorian Civil and Administrative Tribunal, per Morris P commented on the comparable sales method:

> *As the High Court has explained, the principal method of valuing land is to seek out relatively contemporaneous sales of comparable properties and to use those sales as a yardstick for the valuation of the relevant land. Thus if particular land was sold on the relevant date for valuation, and the land was in the form to be valued (for example, it was vacant land), and the sale was not affected by special factors (such as a distressed seller), then that sale would be a perfect yardstick in valuing that land. But rarely is the valuer that lucky. The more usual occurrence is that there are some sales that are comparable, but require either adjustment to be an accurate yardstick or to be given reduced weight in making a valuation judgment.*
>
> *It is sometimes thought that sales are either comparable or not comparable: that is, a binary paradigm should be used to classify sales. In my opinion, this is a flawed approach. Rather there will be gradations of comparability: from identical*

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[15] (1952) 87 CLR 159 at 169-170 quoting *Commissioner of Succession Duties (SA) v Executor Trustee & Agency Co. of South Australia Ltd* (1947) 74 CLR 358 at 367
[16] Transcript, page 22, lines 43-45 - page 23, line 1
[17] *Commonwealth v Arklay* (1952) 87 CLR 159 at 169-170; *Maurici v Chief Commissioner of State Revenue* at [17]
[18] *Rose v Department of Natural Resources and Mines* [2003] QLC 0018 at [28] – [30]
[19] [2007] VCAT 652

> *to irrelevant. As this scale of comparability approaches the irrelevant end, there will be many sales that offer so little assistance that they ought be disregarded. Further, there will be circumstances where there is a sale or sales that are strongly comparable; in which case there will be no need to closely analyse other sales, even though these may be comparable in some way.*
>
> *The strength of the comparison between a sale and the land to be valued will depend on a comparison of the different circumstances. Suppose the land to be valued was sold, in the same condition, one year before the date of valuation. The sale may or may not be directly useful in the valuation: whether it is will depend on evidence of general market movements over the period between the sale and the date of valuation. However, even if there is evidence of substantial market movements over that period, the sale may still be relevant provided adjustments are made for that general market movement. As a matter of logic, a sale after the valuation date is just as relevant as a sale before that date.*[20]

37. The parties agreed that five sales, four of which were sales of blocks in the Sydney Building and the fifth on the eastern side of the Melbourne Building, were comparable sales for the purpose of determining the UV of the subject blocks. Details about those sales, including the East Row blocks, are set out below.

38. The applicant put forward an additional sale in the Sydney Building, Block 16, Section 48, City (30 Northbourne Avenue), as a sixth comparable sale. The sale occurred in February 2014 for a sale price of $800,000.

39. The Commissioner submitted that the 30 Northbourne Avenue sale should be disregarded because the Crown lessor/vendor was in known financial difficulties with creditor litigation pending. The Commissioner referred to a valuation obtained by the purchaser for the purpose of obtaining loan funds which valued the property for first mortgage security purposes at $900,000 notwithstanding the valuation recording that contracts had been issued for the sale of the property at a negotiated price of $800,000. This, the Commissioner said, showed the sale price to be below market value.

40. The Tribunal considers 30 Northbourne Avenue should be included as a comparable sale. There is no evidence that the vendor was "so anxious" that it overlooked "any ordinary business consideration"[21] or failed to negotiate with the buyer in order to obtain the best price, even if its financial difficulties obliged it to sell. Vendors of real property frequently need to sell, and for many reasons, but that does not warrant a

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[20] [2007] VCAT 652 at [50]-[52] upheld in *ISPT Pty Ltd v Melbourne City Council* [2008] VCA 180
[21] *Spencer v Commonwealth* (1907) 5 CLR 418; *Commonwealth v Arklay* (1952) 87 CLR 159 at 169-170

conclusion that they sold their property for less than fair market value. The Tribunal also notes that the agreed comparable sale in the Melbourne Building[22] of near the same size sold in September 2015 for $820,000. As Mr Allan pointed out, the valuation report also states that contracts had been issued for the sale of the property "at a negotiated sale price" of $800,000 inclusive of GST.

41. Opinions may differ about the extent to which the comparable sales are more or less comparable to each of the subject blocks, about which Tribunal comments further below, but the Tribunal is not persuaded that Sale 6 is so lacking in value that it should not even be included in the 'basket of sales' considered for the purpose of applying the comparable sales method when determining a UV of each of the subject blocks.

42. As the Tribunal has previously noted, valuation is more an art than a science. It depends on facts, but the views and opinions formed from those facts will inevitably differ. Interpretation of information is both complicated and subjective.[23]

43. In *Turner v Minister of Public Instruction*[24] Dixon CJ said:

> *But what matters for present purposes is first that valuation cannot be made to depend entirely on a logical process or formula and second that in any case questions of logical reasoning about considerations of fact are not to be confused with questions of law.*

44. The locations of the three subject blocks and four of the five comparable sales blocks are depicted on the following plan of the Sydney Building. The sixth comparable sale, Block 13 Section 1 City, is on the eastern side of the Melbourne Building at 37 Northbourne Avenue approximately opposite Block 16 in the Sydney Building at 30 Northbourne Avenue.

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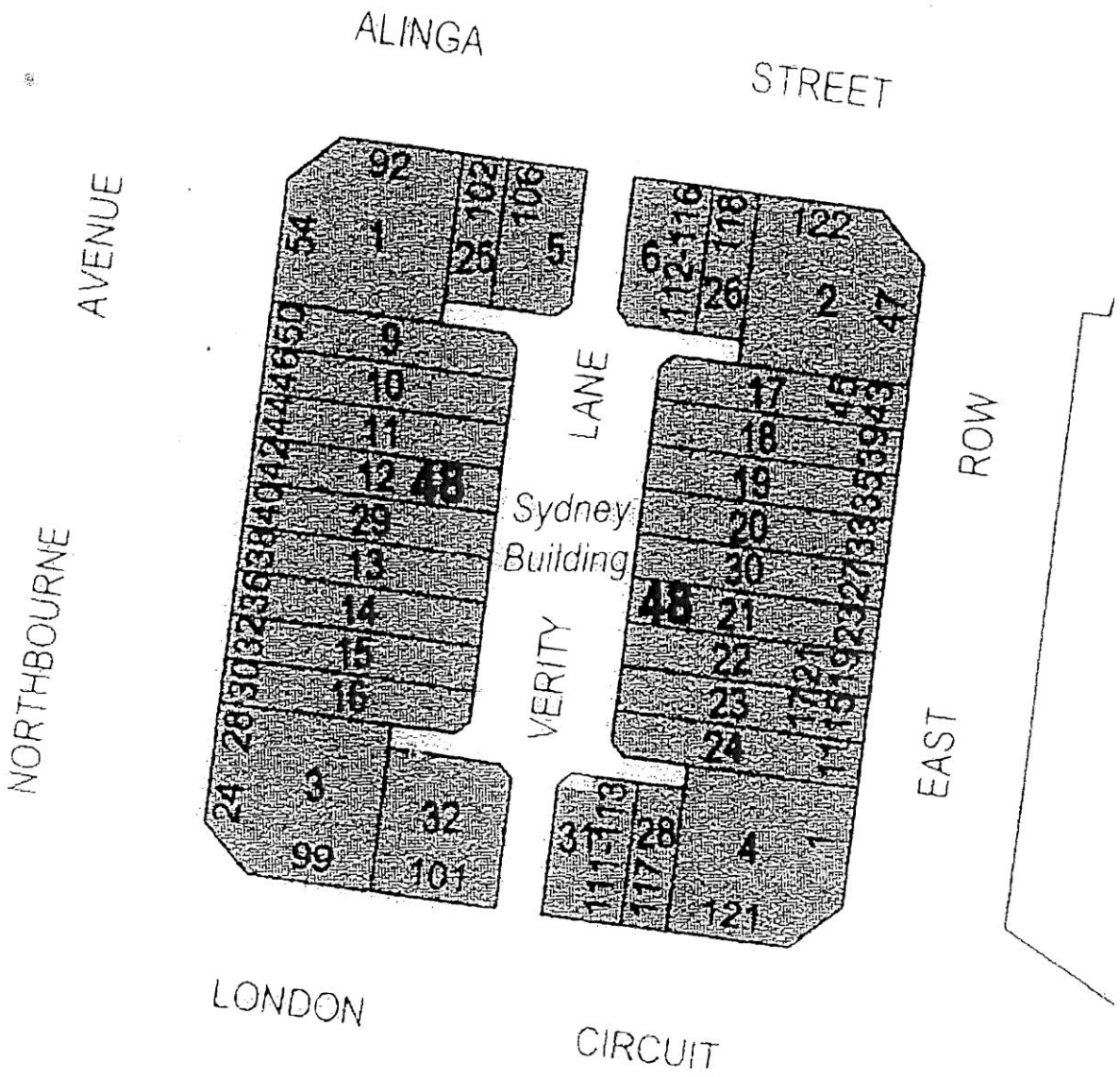
[22] Block 13 Section 1
[23] *Giusida Pty Ltd v Commissioner for ACT Revenue* [2013] ACAT 59 at [66]
[24] (1956) 95 CLR 245 at 268


ALINGA
STREET
AVENUE
NORTHBOURNE
LANE
VERITY
Sydney
Building
ROW
EAST
LONDON
CIRCUIT

45. Primary details about the subject blocks and the comparable sales blocks are as follows:

Property	**Address**	**Sale No.**	**Site Area**	**Sale Price**	**Sale Date**	**Description**
Blocks 1 & 25 Section 48 City	54 Northbourne Ave, 90-104 Alinga Street	N/A	619m^2	N/A	N/A	The Alinga Blocks
Blocks 9-12 Section 48 City	42-50 Northbourne Ave	N/A	806m^2	N/A	N/A	The Northbourne Blocks
Blocks 18-19 Section 48 City	35-41 East Row	1	404m^2	$1,400,000	09/06/15	The East Row Blocks
Block 21 Section 48 City	23-25 East Row	2	202.3m^2	$1,400,000	18/09/13	The Phoenix Pub block
Block 3 Section 48 City	24-28 Northbourne Ave (also known as 91-99 London Circuit)	3	499.9m^2	$2,300,000	04/07/13	The Fletcher Jones block, now Outback Jacks
Block 13 Section 1 City	37 Northbourne Ave	4	196m^2[25]	$820,000	21/09/15	The Melbourne Building block
Block 23 Section 48 City	15-17 East Row	5	202m^2	$1,225,000	11/05/16	The 2014 Fire block
Block 16 Section 48 City	30 Northbourne Ave	6	201m^2	$800,000	XX/02/14	Functional Training (upstairs)

Analysis

46. The Tribunal is mindful of the fact that it must determine the UV of each of the subject blocks by reference to the evidence before it, and in particular the expert opinion evidence of the valuers, Mr Rixon and Mr Shirren, rather than "bring a third set of

[25] This figure for the site area is confirmed by the Crown lease, contrary to a site area of 202 m² claimed by Mr Rixon

opinions into the arena".[26] In *Challenger Property Asset Management Pty Ltd v Stonnington City Council*[27] Croft J said:

> *17 It is clear from the authorities that the role of the Court is not "to bring a third set of opinions into the arena" or to "piece together a valuation of [its] own". Further, in circumstances where there is a disparity between valuers' valuations, the Court must subject each valuer's evidence to critical evaluation. Additionally, it is clear that it is not permissible to average valuations because the result "would be a figure not arrived at by the application by the Court of the established principles of valuation".*
>
> *18 This does not mean, however, that the evidence of one valuer must be accepted on all issues. It is open to the Court to accept the evidence of one valuer on one issue and the evidence of another valuer on another, separate, issue. Thus Zelling J said in Doherty v Commissioner of Highways:*
>
> > *Judges do not have to accept the valuations of the valuers of either side and frequently arrive at a figure or figures which constitute a modification or modifications of the figures submitted by one or more valuers. For a typical example of the process, see the judgment of Walsh J in Anthony v The Commonwealth, especially at p 94. They are guided in coming to the conclusion by the evidence of the valuers together with the other evidence in the case.*
>
> *Nevertheless, as Batt J indicated in 101 Collins Street, care needs to be taken by the Court when it adjusts the evidence of valuers:*
>
> > *Whilst I cannot piece together a valuation of my own (Brewarrana [Pty Ltd v Commissioner of Highways (No. 2) (1973) 6 SASR 541] at 545), it appears to me that I am entitled, by reference to evidence of one valuer, to adjust on a number of aspects the valuation of another valuer, provided that I make allowance for the fact that one variable in a component consisting of several variables may in fact have been balanced in the latter valuer's valuation by one or more of the other variables. In such a case it might, depending upon the circumstances, be necessary to refrain from making the adjustment and to adopt the component in full or not at all.* (Footnotes omitted)

47. Refshauge J of the ACT Supreme Court made a similar observation in *Giusida Pty Ltd v Commissioner for ACT Revenue*,[28] observing that whilst a Court cannot piece together a valuation of its own, "that does not mean that a Court cannot accept some evidence from one valuer and other evidence from another on a separate issue."

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[26] *Brewarrana Pty Ltd v Commissioner of Highways (No 2)* (1973) 6 SASR 541 at 545
[27] [2011] VSC 184 at [17] – [18]
[28] [2016] ACTSC 2 at [157]

48. The comparable sales method entails, as a first step, to consider the sales prices of the comparable sales blocks accepted into the 'basket of sales', and then to determine as best as one can what portion of the price (in each case) should be attributed to the different features of each block in order to derive what portion should be attributed to the UV of the block. So, for example, in the case of the blocks that were sold subject to a tenancy Mr Rixon attributed some of the sale price to the estimated value of that tenancy and some of the sale price to the estimated value of the improvements with the derived balance attributable to the UV of the block. Mr Shirren disagreed with the values that were placed on those features, but followed the same methodology. The Tribunal does likewise. This approach is an accepted methodology when analysing a market sale, even if not permissible when determining the UV of land in the absence of a sale.[29]

49. The Tribunal first considered, in each case, what 'special considerations' (if any) had a bearing upon the sale price. This would include factors such as:

    (a) whether the purchaser had a particular interest in purchasing the block (for example if it adjoined or in some ways had a connection with a block already owned by the purchaser) and so was willing to pay a premium to obtain it;

    (b) whether the sale occurred in the context of abnormal market behaviour, for example at auction between two bidders abnormally wishing to purchase;

    (c) whether the sale occurred otherwise than by voluntary bargaining between the seller and the purchaser neither of them so anxious that they would overlook any ordinary business consideration, or in some way did not meet the test laid down in *Spencer v Commonwealth*.

50. In line with the valuers' methodology, the Tribunal next considered what values (if any) should be attributed to the existing tenancies (where applicable) at the time of the sales. Three of the six comparable sales blocks were sold subject to an existing commercial tenancy. The Tribunal therefore considered the commercial value, if any, of those leases and made an allowance for that value (in each case) in order to arrive at an estimate of what the sale price would have been (in each case) had the block been sold with vacant

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[29] *Commonwealth Custodial Services v Valuer General* [2007] NSWCA 365, referring to *Maurici v Chief Commissioner of State Revenue* [2003] HCA 8; 212 CLR 111 for the first proposition and *Valuer General v Fenton Nominees Pty Ltd* (1982) 150 CLR 160 for the second

possession. This step was necessary (even if that value is zero as Mr Shirren contended), to improve the applicability of the comparable sales, because an estimate of the UV component of each of the subject blocks is assessed on the basis that the land is available with vacant possession.

51. The third step was to assign a value to the improvements on each of the comparable sales blocks. The Tribunal accepted that in each case this required consideration of (i) the heritage aspects of the blocks and (ii) the standard of the improvements which involved consideration of their replacement cost and obsolescence and/or depreciation.

52. After working through these three steps, and attributing a value (where applicable) to each of those components as part of the sale price, the Tribunal adopted the approach of the valuers by regarding the remaining amount or balance as the UV of the block.[30]

53. The Tribunal accepted the position of the valuers that the resulting UV for each comparable sales block should be divided by the site area of each block to arrive at a dollar estimate of the UV per square metre. Those amounts could then be used as a point of reference to estimate the UV per square metre of the subject blocks and then determine the total UV for each block.

54. The UV per square metre of the comparable sales blocks is not a direct comparator for the purpose of determining the UV per square metre of the subject blocks. Allowance must be made for other factors, and in this case the valuers referred to the desirability of the location and the available uses under the applicable Crown lease.

55. The Tribunal now turns to its consideration of each of the six comparable sales blocks.

Special considerations

56. Having included 30 Northbourne Avenue in the basket of comparable sales, the Tribunal considered whether the Commissioner's concerns about that sale constituted "special circumstances" weighing against the value of the sale for the purpose of determining the UV of any of the subject blocks. Dr Jarvis submitted that the sale "should, at the very least, be treated with considerable caution".[31]

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[30] *Maurici v Chief Commissioner of State Revenue* [2003] HCA 8
[31] Transcript, 22 June 2016, page 66, line 7

57. The Tribunal saw no basis to treat the sale "with caution". On the evidence, it was sold at arm's length. The extent to which it is a good or poor comparator turns on its factual similarities not the circumstances of the sale.

58. The Tribunal also considered the circumstance that Sale 1 (the East Row blocks) involved two blocks (blocks 18 and 19) side by side, and whether that involved a premium that would not otherwise have arisen. The Tribunal puts that circumstance aside. The blocks were purchased together, not in a circumstance where one block was purchased by an existing owner of the other.

59. The Tribunal is satisfied that there are no special considerations bearing on the prices paid for any of the comparable sales blocks, and neither of the valuers suggested otherwise, albeit noting Dr Jarvis' submission that 30 Northbourne Avenue be treated with considerable caution.

Leasing considerations

60. Sales 1, 2 and 3 were sold subject (wholly or in part) to a commercial tenancy. The remaining three were sold with vacant possession.

61. Mr Rixon, a certified practising valuer with Colliers International, said that for Sales 1, 2 and 3 an adjustment should be made to the sale price to reflect a 'value' for the existing tenancies. He said that a property with an existing tenant, contractually required to pay rent through to the completion of an unexpired sublease, would attract a premium over a property sold with vacant possession. This premium, he said, reflected the lessor's immediate access to cash flow (i.e. rent), the avoidance of costs associated with leasing the property and the absence of any letting period (i.e. 'down time') while the lessor seeks and awaits a tenant.

62. In quantifying these factors, Mr Rixon allowed for a 12 month letting period (i.e. a 12 month vacancy before the property would be let), agent fees of 15% of the first year's rent and a 'lessee incentive' for an incoming tenant of three months occupation, rent-free.

63. Calculation of the premium, Mr Rixon said, involved totalling the likely down time costs and the costs of leasing the property (all costs avoided because the property is already let) and then applying a 'discount factor' to reflect the unexpired period of the

lease term. Mr Rixon applied discount rates of 67%, 20% and 33% to Sales 1, 2 and 3, respectively.

64. With this methodology, for the three comparable sales blocks that were sold subject to a tenancy, Mr Rixon made the following adjustments to reflect the claimed premium.

Sale 1: 35-41 East Row

65. Mr Rixon totalled 12 months passing rent (i.e. the annual rent payable under the sublease at the time of sale): $156,049; an agency fee of 15% of the first year's rent: $23,407 and a lessee incentive of three months gross rent: $39,012; to a total of $218,469. Mr Rixon then discounted that total by 66.7%, having regard to the weighted average lease expiry (**WALE**) of 1.16 years by income applying to the unexpired sublease to value the premium for the sublease at $72,816. The premium, he said, should be deducted from the sale price ($1,400,000) to reflect the price of the East Row blocks as if sold with vacant possession: $1,327,184. The premium reflected a 5.2% adjustment of the sale price.

Sale 2: 23-25 East Row

66. Mr Rixon totalled 12 months passing rent: $155,643; an agency fee of 15% of the first year's rent: $23,346 and a lessee incentive of three months gross rent: $38,911; to a total of $217,900. Mr Rixon then discounted that total by 20%, having regard to the WALE of 3.37 years by income applying to the unexpired sublease to value the premium for the sublease at $174,320. The premium, he said, should be deducted from the sale price ($1,400,000) to reflect the price of the Sale 2 block as if sold with vacant possession: $1,225,680. The premium reflected a 12.5% adjustment of the sale price.

Sale 3: 91-99 London Circuit

67. This property was sold partially vacant (i.e. the ground floor) but with two tenants on the upper floor. Mr Rixon totalled 12 months passing rent for those upper floor tenancies: $56,718; an agency fee of 15% of the first year's rent: $8,508 and a lessee incentive of three months gross rent: $14,180; to a total of $79,405. Mr Rixon then discounted that total by 33.3%, having regard to the WALE of .66 years by income applying to the unexpired sublease to value the premium for the sublease at $56,718. The premium, he said, should be deducted from the sale price ($2,300,000) to reflect the price of the Sale 3 block as if sold with vacant possession: $2,247,061. The premium reflected a 2.3% adjustment of the sale price.

68. The Tribunal notes that Mr Rixon did not provide any evidence in relation to the existing sublease conditions, or lessee options for renewal or extension of the existing subleases. These considerations can also impact on investor sentiment.

69. Mr Shirren, a certified practising valuer with the ACT Valuation Office, said that for the blocks sold subject to a tenancy no value should be attributed to the tenancy and therefore no adjustment was required in order to determine the sale price as if the blocks had been sold with vacant possession.

70. Mr Shirren considered that all the comparable sales blocks, tenanted or otherwise, were similarly affected by a lessor's leasing costs and 'down time' vacancy periods. In his view, these costs are part of the normal cycle of commercial property investment and no premium would have been paid in the case of any of the tenanted comparable sales blocks for the existing tenancies. The only difference is whether these costs arise 'up-front' (i.e. where a property is sold with vacant possession) in order for the lessor to secure a tenant, or are deferred until expiry of an existing sublease.

71. Mr Shirren's opinion focused on the three tenanted comparable sales blocks which had relatively short WALE's, as opposed (for example) to a long term lease to a government tenant. Mr Shirren accepted that for a long term lease a premium for a tenancy could be paid.

72. The Tribunal prefers Mr Shirren's view that leasing costs are a cyclic part of commercial property investment, and that such costs are incurred sooner or later but not avoided. The Tribunal accepts however that for two materially identical commercial properties 'side by side', one tenanted at market rent and one vacant, the tenanted property would generally sell at a higher price. The exception would be in a market dominated by owner occupiers but the Sydney Building does not fall into this category.

73. How much higher the price would be is best determined from market transactions. However, in the absence of any such transactions, an allowance must be made using a consistent method.

74. Agency and lessee incentive costs are reasonably consistent. However the likelihood of a lessor securing a tenancy, and the period of vacancy before doing so, is inherently speculative.

75. At the hearing, Mr Shirren agreed that some value lies in a commercial property sold with an ongoing tenancy, as opposed to vacant possession, because the lessor is able to postpone or defer the costs of letting the property and the loss of income during the letting period until the expiry of the existing sublease.

76. In the Tribunal's view, deferral notionally requires a sum to be invested at the sale date so that all the costs are covered when the lease expires. The difference between the invested sum and the costs to be incurred at the later date is the saving generated by the existing leases. Allowing a deferral interest rate of 5% pa, and applying that interest rate to the costs put forward by Mr Rixon, the Tribunal determined that the following adjustments should be made:

    (a) 35-41 East Row: present value of $218,489 payable in 1.16 years at 5%pa = $206,467. This represents a difference of $12,022 or 0.85% of the sale price.

    (b) 23-25 East Row: present value of $217,900 payable in 3.37 years at 5%pa = $184,862. This represents a difference of $33,038 or 2.3% of the sale price.

    (c) 91-99 London Circuit: present value of $79,405 payable in 2.6 years at 5%pa = $69,945. This represents a difference of $9,460 or 0.41% of the sale price.

77. For these reasons, the Tribunal concludes that the comparable sales blocks were sold, or should be treated as if sold, with vacant possession for the following prices:

Sale 1: 35-41 East Row	$1,387,978.
Sale 2: 23-25 East Row	$1,366,962
Sale 3: 24-28 Northbourne Avenue	$2,290,540
Sale 4: 37 Northbourne Avenue	$820,000
Sale 5: 15-17 East Row	$1,225,000
Sale 6: 30 Northbourne Avenue	$800,000

Improvements

78. To estimate the UV of the comparative sales blocks, the sale prices (assuming vacant possession) must be adjusted by deducting the value of the built improvements in each case.

79. In order to quantify the value of improvements, valuers routinely assign a dollar amount per square metre. A difficulty in this case was that Mr Rixon assigned that value by reference to the net lettable area (**NLA**) of the building improvements on each of the comparable sales blocks, which excludes voids, common areas, stairways, toilet areas and open areas. In particular (in this case) Mr Rixon excluded the heritage-protected ground floor pathways under the colonnades.

80. Mr Shirren instead assigned a dollar amount per square metre by reference to the gross floor area (**GFA**) of the improvements which includes all the areas excluded under the NLA approach.

81. The valuers calculated the NFA and GFA of the comparable sales blocks as follows:

Sale	**NLA**	**GFA**	**NLA as a percentage of GFA**
Sale 1	492 m²	567 m²[32]	87%
Sale 2	358 m²	475 m²	76%
Sale 3	668 m²	834 m²	80%
Sale 4	333 m²	379 m²	88%
Sale 5	343 m²[33]	365 m²	94%
Sale 6	333 m²	364 m²[34]	91%

82. Mr Rixon's approach, of course, produced a higher dollar amount per square metre for the improvements. However, Mr Rixon said that use of NLA or GFA is not important, so long as the one approach is used consistently when valuing the improvements on each of the comparable sales blocks. He contended that NLA was the better approach because, for each of the comparable sales blocks, it could be more readily found.

83. The Tribunal considers GFA to be the better approach for estimating the value of improvements.

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[32] Mr Shirren originally said the GFA for Sale 1 is 541 m² but in closing submissions Dr Jarvis confirmed that "the correct GFA should have been 567": transcript, 22 June 2016, page 56, line 29

[33] Mr Rixon, in his report dated March 2016 said the NLA is 358 m². The Tribunal believes that is incorrect, and that the correct figure is 343 m². This corrected NLA equates with Mr Rixon's final calculations in his report dated 7 June 2016 at annexure B where he adopted an improvement value of $2,650/m2 and a total of $908,950. Also an NLA of 358 m² produces an unlikely percentage of GFA of 98%

[34] Mr Shirren did not examine this sale, but the Tribunal deduces the GFA to be 364 m² because the building occupies the whole site of 201 m², as does the building on comparable sale block 5 which has a site area of 202 m²

84. First, it places a value on the whole building not just the lettable floor area within it. That is particularly relevant in this case because the front facades and colonnades of each of the comparable sales blocks (and all blocks in the Sydney Building including the subject blocks) are perhaps the most significant part of the improvements and need to be kept and maintained as part of the heritage obligations and restrictions discussed below, but are not part of the NLA.

85. Second, it was necessary, in this case, to consider the heritage protected components of the buildings separately from the non-heritage protected components because (in the Tribunal's view) the condition of the heritage protected components was relatively consistent, unlike the non-heritage components. The heritage protected components are also of greater value per square metre.

86. Third, the replacement construction costs for the improvements on Sale 5 block put forward by a quantity surveyor, Mr Robinson, were the primary if not the only reference point against which the Tribunal could quantify the value of the improvements after determining a level of depreciation. The Tribunal accepted Mr Robinson as an honest, straightforward and reliable witness. Mr Robinson calculated a cost per square metre by reference to the GFA of the Sale 5 block.

87. Fourth, as shown in the table at paragraph 81, there was a significant lack of correlation between the comparable sales blocks regarding the proportion of the NLA forming part of the GFA, which significantly skews the comparisons.

88. Mr Rixon's use of NLA, where Mr Shirren used GFA, significantly hampered the Tribunal's ability to determine a value for the improvements because it could not compare 'like with like'. However the Tribunal has done the best it could to convert Mr Rixon's value per square metre of NLA to a value per square metre of GFA and has also noted the principles that Mr Rixon relied on, when making his calculations, and taken them into account where possible.

Heritage considerations

89. The Sydney Building and its counterpart, the Melbourne Building, are entered on the ACT Heritage Register prepared by the ACT Heritage Council. The Entry lists the features intrinsic to the buildings' heritage significance as being the exterior facades, the remaining original interiors, the central courtyards, the remaining internal light wells

and the London Plane trees. By reference to these features, the Entry lists "specific requirements" concerning maintenance and development or improvement to either building. The Entry states:

> ***Building including alterations and additions***
>
> *a. The external fabric of the building is to be conserved. Where significant original fabric of interiors is found to exist, it shall be retained where practicable as part of any redevelopment.*
>
> *b. There is to be no increase in the height of the original buildings. Extensions to the rear of either building must not rise above the ridge line of the existing tiled roof, nor extend past the property line, and must adopt a sensitive and cohesive design approach which acknowledges and respects the form and scale of the original building.*
>
> *c. Where the first floor balconies are currently open, no enclosures shall be permitted.*
>
> ***Layout***
>
> *a. Existing driveway entry points are to be retained and no additional ones are to be developed.*
>
> *b. The central courtyards and remaining internal light wells are to be retained.*
>
> ***Landscape elements***
>
> *The existing trees in the internal courtyards are to be conserved and appropriately maintained. Where replacement of the existing trees is required the replacements shall be of the same species.*

90. These obligations and restrictions, of course, significantly reduce the UV of the land upon which the Sydney and Melbourne Buildings have been constructed in comparison to nearby adjoining sites unaffected by heritage considerations. However, the heritage obligations and restrictions apply to all the subject blocks and all the comparable sales blocks. For this reason the value of the improvements on the comparable sales blocks, insofar as they are subject to heritage obligations and restrictions, can be reliably applied for the purpose of valuing the improvements on the subject blocks.

91. Planning obligations and restrictions, particularly the zoning of land, can also have significant effects upon the UV of land but again these need not be considered in this case because all the comparable sales blocks and the subject blocks are zoned CZ1 under the Territory Plan made under section 46 of the *Planning and Development Act 2007* and are subject to the same regulatory planning regime.

92. The Tribunal took into evidence (without objection) a schematic diagram which showed that only the front facades, colonnades and the terracotta sections of the roof (where still existing) are subject to heritage protection. The remainder of the building improvements are not heritage protected, noting that the back portions of each building are not part of the original Sydney Building. The interiors of these back portions are not "original fabric". These back portions were constructed in a spectrum of styles and at various times since the Sydney Building was constructed in 1928 and are in widely varying conditions. The Crown lessor is free to demolish them, renovate them or maintain them as it prefers. For this reason, the Tribunal has separately considered the value of the heritage and non-heritage components of each building.

93. Opinions between Mr Rixon and Mr Shirren differed significantly upon (i) how to value the heritage and non-heritage components and (ii) the amount of GFA that is heritage-protected.

94. The Tribunal regarded the latter issue as having little relevance because of the comparatively small area in dispute (in each case) and the relatively marginal difference between the values of the heritage and non-heritage components of each building.

95. For this reason, and where Mr Rixon did not distinguish between heritage and non-heritage components when estimating the value of improvements or consider value by reference to GFA, the Tribunal adopted Mr Shirren's estimate of the GFA attributable to the heritage component and deducted that GFA from the total GFA to calculate the non-heritage component in each case. At hearing, there was a discrepancy about the calculations Mr Shirren had made regarding the GFA of the heritage and non-heritage components and that they totalled a sum greater than the calculated GFA for the whole building. The discrepancy arose from uncertainty regarding the GFA of the terracotta roofs. This discrepancy was resolved when Dr Jarvis accepted that the portion not subject to heritage restriction should be calculated simply by deducting the portion of the GFA that is subject to heritage protection from the total GFA in each case.[35]

96. Regarding the heritage protected component, and primarily because of the long-standing obligation on the Crown lessees to maintain the colonnades, facades and terracotta roofs, the Tribunal finds that the heritage protected component of each of the

[35] Transcript, 22 June 2016, page 57, line 43; page 59, line 19

comparable sales blocks was in materially the same condition at the time of sale. The Tribunal finds that the condition was fair.

97. Mr Shirren said that the GFA of the heritage component of comparable sales blocks 1, 2, 3, 4 and 5 is 108.58m², 55.18m², 289m², 55.28m² and 55.18m², respectively. The abnormality regarding Sale 1 arises from 58m² attributable to the terracotta roof. Mr Shirren assessed the replacement cost of the heritage component, in each case, at $3,000/m² and then discounted that cost by 50% to assess their present value (save for Sale 5) at $1,500/$m^2$.

98. Mr Rixon assigned values to the improvements of each building without distinguishing between their heritage and non-heritage components.

99. Using Sale 5, Mr Rixon relied on the opinion of Mr Robinson, who estimated the replacement cost of the building consequent upon its substantial damage from fire in 2014, to be $1,043,285.[36] Whilst Mr Shirren calculated the GFA to be 365 m², Mr Robinson calculated it to be 366 m² comprised of 167 m² for the ground floor, 24 m² for the area of the colonnades and 176 m² for the first floor, to arrive at a total cost per square metre for replacement of the building of $2,850/$m^2$. The difference appears to arise from a rounding error, but the Tribunal regards Mr Robinson's estimate to be the more reliable. This covered the heritage and non-heritage components of the building without differentiating the cost per square metre between the two.

100. Mr Allan submitted that the colonnade is such a simple portion of the structure that it should be attributed only a nominal value, say $10,000, and that the GFA of the "actual structure" is only 343 m².[37] The Tribunal does not accept that such fine distinctions should be drawn, particularly where Mr Robinson did not draw them, and where construction costs invariably fluctuate across different parts of a building for any number of different reasons. The Tribunal prefers the conventional approach of considering the total GFA and taking an average cost per square metre for that total.

101. Mr Shirren accepted, and it appears clear, that the replacement cost of the heritage component of the Sale 5 building – and of all the comparable sales buildings – would be greater than the replacement cost of the non-heritage component in each case where the

[36] In his initial report, Mr Robinson estimated the replacement cost to be $1,148,861 but revised his estimate to $1,043,285

[37] Transcript, 22 June 2016, page 13, line 45

owner would be free to use modern, conventional and cost-effective methods. Mr Shirren proposed $3,000/m^2$ for the heritage component and $2,000/m^2$ for the non-heritage component. These figures, Mr Shirren said, were drawn from his analysis of the Rawlinson's Guide (being a general guide recognised in the building industry for estimating building costs) but there was no indication of how he arrived at these sums from the Guide or apportioned them between the two components.

102. The Tribunal regards Mr Robinson's report, focused specifically on one of the comparable sales blocks, to be a more accurate and therefore more reliable estimate of the replacement cost of the Sale 5 building, and which can be reasonably applied to the other comparable sale blocks.

103. The Tribunal however needed to apportion Mr Robinson's overall cost of $2,850/m^2$ between the heritage and non-heritage components. The Tribunal estimated, doing the best it could, that the replacement cost per square metre of the heritage component would be 25% greater than the replacement cost per square metre of the non-heritage component. On that basis, using the total replacement cost of $1,043,285, the Tribunal calculated the replacement cost of the heritage component (55 m²) to be $3,431/m^2$ and the replacement cost of the non-heritage component (311 m²) to be $2,745/m^2$.

104. As discussed above, the Tribunal considered the heritage components of each of the comparable sales blocks, save for Sale 5, to be reasonably consistent. It considered the condition to be fair, and accepted Mr Shirren's view that the depreciated value of the heritage component of all the comparable sales blocks is 50% of their replacement cost meaning $1,715.50/m^2$.

105. Mr Shirren assessed the depreciated value of the heritage components (and the non-heritage components) of the Sale 5 building to be the same as their replacement cost, meaning that in his view they had not depreciated at all.[38] In the case of the heritage component, that was not correct. As Mr Rixon – to his credit – observed:

> *It is also reasonable to allow for the value of the improvements that were not destroyed and did not need to be replaced. In regard to Block 23 this would include the heritage facade, colonnade walls and other elements of the building.*[39]

[38] Transcript, 16 June 2016, page 174, line 25
[39] Rixon report, 7 June 2016, annexure B

106. At the hearing, the Tribunal received evidence and heard submissions about the light wells in the Fletcher Jones block (and also in the Alinga blocks) that had a bearing on the condition and value of the heritage components. The Tribunal took the view that this feature was too insignificant to have a material bearing on the value of the improvements. Also, whether they were "heritage protected" is doubtful because of their reconstruction using modern materials: steel and perspex.

107. The Tribunal also put aside the uncertain evidence regarding which sections of the terracotta tiled roof on the Sydney Building have, over the past 70 or so years, been replaced wholly or in part. In many cases, it has been replaced with ribbed metal sheeting, but again details as to the extent of replacement were too small a detail to have real relevance when determining the UV of the comparable sales blocks.

108. The Tribunal is of the view that the heritage component of comparable Sale 6 block should be valued in the same way as the other comparable sales blocks.

109. For these reasons, the Tribunal concludes that the heritage component improvements on the comparable sales blocks should be attributed the following values:

Sale 1, GFA of 108.58 m² at $3,431/m² x 50%	$186,268
Sale 2, GFA of 55.18 m² at $3,431/m² x 50%	$94,661
Sale 3, GFA of 289 m² at $3,431/m² x 50%	$495,780
Sale 4, GFA of 55.28 m² at $3,431/m² x 50%	$94,833
Sale 5, GFA of 55.18 m² at 3,431/m² x 50%	$94,661
Sale 6, GFA of 55.18 m² at $3,431/m² x 50%	$94,661

110. Regarding the non-heritage component, the Tribunal first notes that in light of its determination of the portion of each building that should be treated as the heritage component, the GFA of the non-heritage component of each building is necessarily the remaining portion of the total GFA.

111. Mr Rixon said that the non-heritage components of the building had very little if any obsolescence, particularly economic obsolescence, or depreciated value because there was no economic sense in replacing them. He said:

> *The use of the land is restricted to the heritage status of the improvement. Even if the improvements were removed it is still a requirement to develop a building that is largely the same in size, function and appearance as the existing improvements. It therefore makes more economic sense to retain the existing building than redevelop. Thus the existing improvements have little economic obsolescence and the diminishing effect on value caused by the heritage status is inherent in the land.*[40]

112. Mr Allen made a similar submission stating:

> *The land doesn't really count for much if we have to allocate as between land and the building. The building counts for a lot because there is no point replacing it. What I'm buying -in other words - I'm not buying an opportunity to rebuild this building or rebuild something* [else].
>
> …
>
> *The building has to be worth a lot of money because in that single rate* [purchase price] *that single value, any other commercial person who's bought that land has bought it with a view to the fact that you can only stick with that building which is right there. They can't have bought it with a view to the land beneath it because there is nothing you can do with it.*[41]

113. The Tribunal disagrees. As discussed above, the majority of the non-heritage component of each building is not heritage protected. The Entry confines the height of a replacement building and requires that extensions to the original building must adopt a "sensitive and cohesive design approach which acknowledges and respects the form and scale of the original building" but this permits replacement of structures that were added to the original building, most of which are now significantly depreciated. It is trite to observe that physically obsolete buildings are routinely replaced with new buildings using modern building techniques and materials but which replicate the building envelope of a previous building and/or are sympathetic to it.

114. For the reasons discussed in paragraph 95 above, having calculated the deduced GFA of the heritage component, the GFA of the non-heritage component of comparable sales blocks is as follows:

Sale 1 – 458.42 m²

Sale 2 – 419.82 m²

Sale 3 – 545.00 m²

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[40] Valuation report dated March 2016 in relation to be Alinga blocks, page 20
[41] Transcript, 22 June 2016, pages 26, lines 22-24 page 28, lines 9-15

Sale 4 – 323.72 m²

Sale 5 – 309.82 m²

Sale 6 – 308.82 m²

115. Unlike the heritage components of each of the comparable sales blocks where the condition of those components was reasonably consistent across all the blocks, the condition of the non-heritage components varied considerably.

116. Comparable Sale 1 is the East Row blocks, and one of the subject blocks.

117. Mr Rixon noted that it has an on-site car park at the rear, two ground level retail tenancies and a fair standard of base building accommodation. He notes that the upper level "comprises very basic accommodation with a large open area and small office and storage areas. Amenities are at the rear of the building on an intermediate level "are in poor condition". He describes the upper level, amenities and rear access to be "fair to poor condition".

118. Taking into account Mr Robinson's revised estimate of replacement costs, Mr Rixon adopted a depreciated value of $\$1,400/m^2$ for a NLA of 491.87 m², which totals $688,618,[42] after considering the characteristics of the property, physical depreciation, obsolescence and an analysis of actual construction costs of similar buildings and industry accepted benchmarks.

119. By dividing the total ($688,618) by the GFA (567 m²), the Tribunal calculates Mr Rixon's assessment to equate to a value of $\$1,214/m^2$ of GFA. This amounts to a depreciated value of 44 % of the replacement cost ($2,745/m²).

120. Mr Shirren's calculation was derived from an estimated replacement cost of $\$2,007/m^2$. Mr Shirren estimated the depreciated value to be 48% of the replacement cost, and on that basis he assessed the non-heritage component of the improvements to have a GFA value of $\$968/m^2$. This gives a total of $548,856.

121. Mr Shirren also relied on the applicant's intention to demolish the non-heritage component of the improvements to contend that their value should be assessed as negligible. The Tribunal rejects that approach. Improvements should be assessed according to their value 'as is', regardless of a Crown lessee's intentions. The value of

[42] Rixon witness statement, 7 June 2016, Annexure B

improvements does not rise, fall or remain steady depending on whether a Crown lessee intends to improve them, maintain them or keep them 'as is'.

122. The Tribunal is of the view that the most reliable evidence of the replacement cost is that given by Mr Robinson. For the reasons discussed in paragraph 103 above, the Tribunal has used a replacement cost of $\$2,745/m^2$.

123. Having considered the subjective evidence regarding the condition of the building, including its observations on the view, the Tribunal considers that a depreciated value of 44% ought be applied. On that basis, the Tribunal calculated the value of the non-heritage component of the improvements in Sale 1 as follows:

$$458.42\ m^2 \times \$2,745/m^2 \times 44\% = \$553,680$$

124. Comparable Sale 2 is the Phoenix Pub block. The building was refurbished and extended in the 1980s and includes an intermediate floor.

125. Mr Rixon describes the main building structure as being:

> *in fair to good condition at the time of sale. The upper level accommodation was to a conventional standard with suspended ceiling, recessed T8 fluorescent tube lighting and ducted air-conditioning. The ground level is an operating drinking establishment with male and female amenities.*

126. Taking into account Mr Robinson's revised estimate of replacement costs, Mr Rixon adopted a depreciated value of $\$2,250/m^2$ for a NLA of 358 m², which totals $805,500, after considering the characteristics of the property, physical depreciation, obsolescence and an analysis of actual construction costs of similar buildings and industry accepted benchmarks.

127. By dividing the total ($805,500) by the GFA (475 m²), the Tribunal calculates Mr Rixon's assessment to equate to a value of $\$1,696/m^2$ of GFA. This amounts to a depreciated value of 62% of the replacement cost ($2,745/m²).

128. Mr Shirren agreed that the rear of the building was in fair condition but said that the front section is in a poor condition due to its age and wear caused by its use as a licensed establishment. Mr Shirren said "that the components of the improvements that are not subject to the heritage restrictions are close to the end of its [sic] useful life." Mr Shirren estimated the depreciated value to be 54% of the replacement cost, and on

this basis, again using a replacement cost of $2,007/m^2, he assessed the non-heritage component of the improvements to have a GFA of value of $1,091/m^2, totalling $486,230.

129. Having considered the subjective evidence regarding the condition of the building, including its observations on the view, the Tribunal considers that a depreciated value of 55% ought be applied. On that basis, the Tribunal calculated the value of the non-heritage component of the improvements in Sale 2 as follows:

$$419.82 \text{ m}^2 \times \$2,745/\text{m}^2 \times 55\% = \$633,823$$

130. Comparable Sale 3 is the large block on the corner of Northbourne Avenue London Circuit, the ground floor of which was previously leased to Fletcher Jones and now to Outback Jacks.

131. Mr Rixon considered the main building structure to be "in fair condition." He noted the ground floor to be vacant in lettable condition, and that the upper level containing conventional office/professional suite accommodation with ducted air-conditioning and carpet floor covering was "in a good lettable condition". He noted a skylight which allows good natural light penetration.

132. Taking into account Mr Robinson's revised estimate of replacement costs, Mr Rixon adopted a depreciated value of $2,050/m^2 for a NLA of 667.7m², which totals $1,368,785, after considering the characteristics of the property, physical depreciation, obsolescence and an analysis of actual construction costs of similar buildings and industry accepted benchmarks.

133. By dividing the total ($1,368,785) by the GFA (834 m²), the Tribunal calculates Mr Rixon's assessment to equate to a value of $1,641/m^2 of GFA. This amounts to a depreciated value of 60% of the replacement cost ($2,745/m²).

134. Mr Shirren said that the Fletcher Jones block "required substantial renovations before being leased". Mr Shirren estimated the depreciated value to be 39% of the replacement cost, and on this basis, again using a replacement cost of $2,007/m^2, he assessed the non-heritage component of the improvements to have a GFA of value of $775/m^2, totalling $526,500.

135. Having considered the subjective evidence regarding the condition of the building, including its observations on the view, the Tribunal considers that a depreciated value of 50% ought be applied. The Tribunal took two factors into account. First, the Tribunal was satisfied that the upper floors are well renovated and are depreciated much less than 61%. Second, although the ground floor had been gutted, the structure was in good condition. On that basis, the Tribunal calculated the value of the non-heritage component of the improvements in Sale 3 as follows:

$$545\ m^2 \times \$2{,}745/m^2 \times 50\% = \$748{,}013$$

136. Comparable Sale 4 is at 30 Northbourne Avenue in the Melbourne Building.

137. Mr Rixon describes the main building structure as being "in fair condition." He noted that at the time of sale the building included two sets of toilets for the ground and upper levels and a kitchen at the ground level. Mr Rixon considered the internal fixtures and fittings were "in poor condition" at the time of sale, and noted substantial renovations were done subsequent to purchase.

138. Taking into account Mr Robinson's revised estimate of replacement costs, Mr Rixon adopted a depreciated value of $\$1{,}450/m^2$ for a NLA of 333 m², which totals $482,850, after considering the characteristics of the property, physical depreciation, obsolescence and an analysis of actual construction costs of similar buildings and industry accepted benchmarks.

139. By dividing the total ($482,850) by the GFA (379 m²), the Tribunal calculates Mr Rixon's assessment to equate to a value of $\$1{,}274/m^2$ of GFA. This amounts to a depreciated value of 46% of the replacement cost ($2,745/m²).

140. Mr Shirren said Mr Rixon's assessment did not represent a fair value of the building "that required substantial renovations before being leased." Mr Shirren estimated the depreciated value to be 45% of the replacement cost, and on this basis, again using a replacement cost of $\$2{,}007/m^2$, he assessed the non-heritage component of the improvements to have a GFA of value of $\$907/m^2$, totalling $317,080.

141. Where the parties were near to agreed on the depreciated value as a percentage of replacement cost, the Tribunal adopts a depreciated value of 46%. On that basis but

again adopting $2,745/m^2$ the Tribunal calculated the value of the non-heritage component of the improvements in Sale 4 as follows:

323.72 m² x $2,745/m^2$ x 46% = $408,761

142. Comparable Sale 5 is the 2014 Fire block.

143. Mr Rixon relied on Mr Robinson's opinion, who estimated the replacement cost of the building to be $1,043,285 at $2,850/m^2$. This covered the heritage and non-heritage components of the building.

144. Taking into account Mr Robinson's revised estimate of replacement costs, Mr Rixon adopted a depreciated value of $2,650/m^2$ for a NLA of 343m², which totalled $908,950. By dividing the total ($908,950) by the GFA (365 m²), the Tribunal calculates Mr Rixon's assessment to equate to a value of $2,490/m^2$ of GFA. This amounts to a depreciated value of 91% of the replacement cost ($2,745/m²).

145. Mr Shirren did not allow any discount on the value of the improvements from their 'as new' value, presumably because they were replaced in 2014 consequent upon the fire. On this basis, he assessed the non-heritage component of the improvements to have a GFA value of $2,007/m^2$, being the same as their claimed replacement cost, totalling $673,960.

146. The Tribunal rejects Mr Shirren's view that the value of the improvements equates to their replacement costs. As Mr Rixon noted, Sale 5 block was not completely refurbished and necessarily had some inherent depreciation in the structure.

147. The Tribunal therefore accepts Mr Rixon's viewpoint and adopts a depreciated value of 91% of the replacement cost. On that basis, the Tribunal calculated the value of the non-heritage component of the improvements in Sale 2 as follows:

309.82 m² x $2,745/m^2$ x 91% = $773,915

148. Comparable Sale 6 adjoins the former Fletcher Jones block along the eastern side of the Sydney Building. It was used, and can only be used as a shop.

149. Mr Rixon described the base building accommodation to be in fair to poor condition at the time of sale, and noted that subsequent to purchase, the purchaser cleared the internal area of the ground floor back to a bare shell and refurbish the upper level with

new floor coverings, wall painting, expose ceiling with new metal frame and sarking. Three toilets had been "fully upgraded". It is leased to a physical training business.

150. Taking into account Mr Robinson's revised estimate of replacement costs, Mr Rixon adopted a depreciated value of $\$1,450/m^2$ for a NLA of 333m², which totals $482,850, after considering the characteristics of the property, physical depreciation, obsolescence and an analysis of actual construction costs of similar buildings and industry accepted benchmarks.

151. By dividing the total ($482,850) by the GFA (364 m²), the Tribunal calculates Mr Rixon's assessment to equate to a value of $\$1,327/m^2$ of GFA. This amounts to a depreciated value of 48% of the replacement cost ($2,745/m²).

152. The Commissioner did not consider Sale 6 to be a valid comparator for reasons previously discussed. However Mr Shirren made observations about the sale including that the valuer who provided a valuation for mortgage security purposes noted that the property required approximately $135,000 of upgrades to be in lettable condition; that the tenant had not been paying rent and was evicted; and that after purchase the purchaser promptly carried out significant renovations as described by Mr Rixon. For these reasons, and by comparing the condition of the improvements with the improvements in other similar blocks in the Sydney Building, Mr Shirren considered the improvements should be valued at "a rate well below" $\$1,158/m^2$ of GFA but did not put forward an actual value. The Tribunal presumes that sum was referenced to a replacement cost of $\$2,007/m^2$, consistent with the other depreciated values, which equates to a depreciated value of 58% of replacement cost.

153. The Tribunal accepts that the depreciated value is less than 58% - even the applicant gives it a lower depreciation rate - but in the absence of any quantification on behalf of the Commissioner, the Tribunal accepts Mr Rixon's estimate of 48%. On that basis, the Tribunal calculated the value of the non-heritage component of the improvements in the Sale 6 as follows:

$$308.82\ m^2 \times \$2,745/m^2 \times 48\% = \$406,901$$

154. For these reasons, the Tribunal concludes that the non-heritage component of the improvements on the comparable sales blocks should be attributed the following values:

Sale 1 - $553,680

Sale 2 - $633,823

Sale 3 - $748,013

Sale 4 - $408,761

Sale 5 - $773,915

Sale 6 - $406,901

Conclusion

155. Addition of the values of the heritage and non-heritage components of the improvements on the comparable sales blocks produces the following values of the improvements on each of the comparable sales blocks:

Sale 1 - $186,268 + $553,680 = $739,948

Sale 2 - $94,661 + $633,823 = $728,484

Sale 3 - $495,780 + $748,013 = $1,243,793

Sale 4 - $94,833 + $408,761 = $503,594

Sale 5 - $94,661 + $773,915 = $868,576

Sale 6 - $94,661 + $406,901 = $501,562

156. Deduction of the values of the improvements on the comparable sales blocks from the prices at which they were sold with vacant possession, or the prices that the Tribunal has determined should be assigned as if sold with vacant possession per paragraph 77 above, produces the following UV for each of the comparable sales blocks:

	Sale Price	**Imp'ts**	**Deduced UV**	**Site area**	**$/m2**
1	$1,387,978	$739,948	$648,030	404m2	$1,604/m2
2	$1,366,962	$728,484	$638,478	202.3m2	$3,156/m2
3	$2,290,540	$1,243,793	$1,046,747	499.9m2	$2,094/m2
4	$820,000	$503,594	$316,406	196m2	$1,614/m2
5	$1,225,000	$868,576	$356,424	202m2	$1,764/m2
6	$800,000	$501,562	$298,438	201m2	$1,485/m2

Application of the estimated UV of the comparative sales blocks to the subject blocks

157. The next task was to consider the subjective features of each of the subject blocks compared with the features of the comparable sales blocks in order to form a view about the UV of the subject blocks relative to the estimated UV of the comparable sales blocks.

158. The parties referred to two issues: location and the use (purpose) clauses under the respective Crown leases.

159. Regarding location, the Tribunal concluded – all other things being equal – that the blocks on East Row have the least desirable location, the blocks on the western side of the Sydney Building facing Northbourne Avenue are in a more desirable location, the Melbourne Building block is in a still more desirable location, the two corner blocks on the western side of the Sydney Building are the most desirable blocks and that the Northbourne blocks at the north-western corner of the Sydney Building are less desirable than Block 3 (the former Fletcher Jones block) at the south-western corner on London Circuit.

160. Doing the best it could, referring to location, the Tribunal therefore ranked the comparable sales blocks and the subject blocks from most desirable through to least desirable in the following order: the Fletcher Jones block; the Alinga blocks; 37 Northbourne Avenue; the several blocks in the Sydney Building facing Northbourne Avenue equally; and then the several blocks on East Row equally.

161. The Tribunal next considered available land use under each Crown lease.

162. For the Alinga blocks, the use clause 3(a) in the Crown lease provides as follows:

> *To use the premises only for the purpose of retail shops, cafes, bars, restaurants, personal service establishments, banks, co-operative societies, indoor recreation facilities, social/community facilities, offices/professional suites and/or residential.*
>
> *PROVIDED ALWAYS THAT offices/professional suites and/or residential uses are not located at a ground floor level.*[43]

163. For the Northbourne blocks, the use clause 3(a) in the Crown lease provides as follows:

> *To use the said land only for any one or more of the following purposes:*

[43] The purpose clause was varied by dealing No 710297 entered on 31 October 1990

(i) Shops;

(ii)Restaurants, Cafes and Snack bars;

(iii) Offices, consulting rooms, workrooms, sample rooms and warehouses; and

(iv) Not more than four residences used in connection with the business conducted on the ground floor of the building on the said land.

164. For the East Row blocks, the use clause 3(a) in the Crown lease provides as follows:

> *To use the ground floor of the premises for the purpose only of a shop or shops not more than two in number and to use the upper floor of the premises for the purpose only of a residence in connection with the business conducted on the ground floor and/or shop offices consulting rooms work rooms sample rooms or a warehouse or for the purpose only of residences not more than two in number each in connection with the business conducted on the ground floor or shops not more than two in number or warehouses not more than two number ….*

165. By reference to these differing use clauses, particularly the ability to use the Alinga blocks as a bar (and therefore to sell alcohol), the ability to use the Alinga blocks and the Northbourne blocks as a restaurant (and, again, therefore to sell alcohol), the Tribunal finds that the Alinga blocks are more valuable than the Northbourne blocks which are in turn more valuable than the East Row blocks.

166. Referring to the comparable sales blocks, the ground floor of the Sale 2 block (the Phoenix Pub) can be used as a shop, restaurant or drinking establishment; the ground floor of the Sale 3 block (the Fletcher Jones block) can be used as a shop, restaurant, bank or an office for an insurance company or a building society; the Sale 4 block can be used as a shop or club; the Tribunal did not locate evidence regarding permissible uses of the Sale 5 block (the 2014 fire block) which was and remains vacant; and the ground floor of the Sale 6 block can be used as a shop.

167. Doing the best it could, the Tribunal ranked the comparable sales blocks from most desirable through to least desirable primarily by reference to flexibility of use and whether service of alcohol is permitted.

168. The Tribunal concluded that Sale block 2 was the most desirable, then Sale block 3, then Sale 4 and lastly Sale blocks 1 and 6 equally. The Tribunal did not form a view about Sale 5 (the Fire block).

169. After considering each of these subjective issues, the Tribunal reached the following conclusions regarding the UV of each of the subject blocks.

The Alinga blocks

170. Where the Alinga blocks are materially the same size as the Fletcher Jones block, on the opposite corner of the Sydney Building and have materially the same Crown use clause as the Fletcher Jones block, the Tribunal concludes that the Fletcher Jones block is the best comparator. However, the Alinga blocks are in a slightly inferior location. The Tribunal has estimated the UV of the Fletcher Jones block at $2,094/m^2. Where the Commissioner redetermined the UV of the Alinga blocks at $2,258/m^2, approximately 10% more than the Fletcher Jones block and where, in the Tribunal's view, it should be less than the Fletcher Jones block, the Tribunal concludes that the applicant has discharged the onus of proving that the valuation for the Alinga blocks is too high.

171. Having taken into account its estimates of the UV of the Fletcher Jones block as the best comparator, but also considered its estimates of the UV for the other comparable sales blocks particularly the Northbourne blocks which can also be used as shops, restaurants and cafes but are in a less desirable location, the Tribunal concludes that the UV of the Alinga blocks should be between $1,900 and $2,000/m^2. The Tribunal settled on $1,950/m$^{2.}$ By applying that value to the site area of the Alinga blocks (619 m²), the Tribunal determined that the Commissioner's redetermination should be set aside and substituted with an unimproved value of $1,207,000.

The Northbourne blocks

172. The Tribunal considers the comparable sales on Northbourne Avenue (30 and 37 Northbourne Avenue) to be the best comparable sales for the Northbourne blocks.

173. Each of the four Northbourne blocks is materially the same size (202m^2) as these comparable sales blocks. The Tribunal considers 37 Northbourne Avenue in the Melbourne Building to be a superior location to the Northbourne blocks and to 30 Northbourne Avenue in the Sydney Building. This is consistent with 37 Northbourne Avenue having a higher estimated UV ($1,614m^2) than the Northbourne blocks ($1,542m^2) and 30 Northbourne Avenue ($1,485m^2).

174. Meanwhile, the Northbourne blocks have a superior lease purpose clause because they can be used as shops, restaurants and/or cafes, unlike 30 and 37 Northbourne Avenue

which can only be used as a shop, or as a shop or club, respectively. This is consistent with the Northbourne blocks having a higher UV than 30 Northbourne Avenue.

175. The Tribunal's estimated UV of 30 and 37 Northbourne Avenue and the Commissioner's redetermination of the UV for the Northbourne blocks are all lower than the Tribunal's estimated UV of the East Row blocks. However, in the Tribunal's view, the East Row blocks are in an inferior location. The Tribunal concludes that the anomaly with the blocks on East Row occurs because the UV of the blocks on East Row is too high rather than because the UV of the blocks on both sides of Northbourne Avenue is too low. Alternatively, contrary to the Tribunal's view, the blocks on East Row are more or at least equally desirable to those on Northbourne Avenue. Either way, the Commissioner's redetermination of the UV of the Northbourne Blocks is within the range estimated by the Tribunal.

176. Having regard to the estimated UV of the sales on 30 and 37 Northbourne Avenue, the Tribunal concludes that the UV of the Northbourne blocks would be in the range of $1,500/m². Applying that value to the site area of the Northbourne blocks (806 m²), the unimproved value of the Northbourne blocks would be $1,209,000. The Commissioner determined the UV at $1,243,000, which equates to $1,542/m².

177. Where the difference between the Tribunal's estimated UV and the Commissioner's redetermination is relatively small, and where valuation inherently involves a material element of subjectivity, the Tribunal concludes that the applicant has not established that the Commissioner's valuation is too high. For these reasons, the Commissioner's valuation of the Northbourne blocks is confirmed.

The East Row blocks

178. The Tribunal has estimated the UV of the East Row blocks at $1,604/m². The Tribunal has reviewed its estimate, having regard to its estimate of the UV for the other comparable sales blocks, and sees no reason to depart from it. Sale 2 is, in our view, an anomaly at $3,156/m² even allowing for its use as a bar (the Phoenix Pub). Its significant price might be explained by special circumstances unknown to the parties or the Tribunal or because the market has fallen since 2013 as some suggested.

179. Where the Commissioner redetermined the UV of the East Row blocks at $1,846/m² as at 1 January 2015, 14% higher than the Tribunal's estimate of $1,604/m² based on its

sale price five months later, the Tribunal concludes that the applicant has discharged the onus of proving that the valuation for the East Row blocks is too high.

180. Applying a value of $1,604/m² to the site area of the East Row blocks (404 m²), the Tribunal determined that the Commissioner's redetermination should be set aside and substituted with an unimproved value of $648,000.

……..
Presidential Member G McCarthy
Delivered for and on behalf of the Tribunal

HEARING DETAILS

FILE NUMBER:	AT 82-84/2015
PARTIES, APPLICANT:	Planet Red Pty Ltd
PARTIES, RESPONDENT:	Commissioner for ACT Revenue
COUNSEL APPEARING, APPLICANT	Mr N Allan
COUNSEL APPEARING, RESPONDENT	Dr D Jarvis
SOLICITORS FOR APPLICANT	Boettcher Law
SOLICITORS FOR RESPONDENT	ACT Government Solicitor
TRIBUNAL MEMBERS:	Presidential Member G McCarthy, Senior Member D Lovell
DATES OF HEARING:	15, 16 and 17 & 22 June 2016