HIGH COURT OF AUSTRALIA

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File Number:	M96/2024
File Title:	Valuer-General Victoria v. WSTI Properties 490 SKR Pty Ltd
Registry:	Melbourne
Document filed:	(New) Form 27D - Respondent's submissions
Filing party:	Respondent
Date filed:	20 Jan 2025

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Form 27D—Respondent's submissions

IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

ON APPEAL FROM THE COURT OF APPEAL OF THE SUPREME COURT OF VICTORIA

BETWEEN: VALUER-GENERAL VICTORIA
Appellant

and

WSTI PROPERTIES 490 SKR PTY LTD
Respondent

RESPONDENT'S SUBMISSIONS

Part I: Certification

1. These submissions are in a form suitable for publication on the internet.

Part II: Statement of Issues

2. Section 2(1) of the *Valuation of Land Act 1960* (Vic) (**VLA**) defines the circumstances in which work or material constitutes an 'improvement' for the purposes of determining the site value of land within the meaning of the Act. It relevantly provides:

> ***improvements***, for the purpose of ascertaining the site value of land, means all work actually done or material used on and for the benefit of the land, but in so far only as the effect of the work done or material used increases the value of the land and the benefit is unexhausted at the time of the valuation…

3. There are two issues that arise on appeal:

   (a) In determining whether works or materials are 'improvements' within the meaning of s 2(1) of the VLA, at what time must *"the effect of the work done or material used [increase] the value of the land*"?;[1] and

   (b) Does the appellant (the **VGV**) fail in any event on the facts of the case, because even if the time at which "the work done or material used increases the value of the land" is the date of valuation, the works and materials constituting Landene are still improvements?[2]

Part III: Section 78B Notice

4. Notice under s 78B of the *Judiciary Act 1903* (Cth) is not required.

Part IV: Facts

The Land

5. The dispute concerns a heritage-listed property at 490 St Kilda Road, Melbourne (the **Land**), which was purchased by the respondent (**WSTI**) in 2019.

6. The Land includes a large two-story Queen Anne influenced residence known as 'Landene', which was constructed in 1897. The building has significant historical and aesthetic importance.[3]

7. Since the Land was purchased by WSTI, renovations have been carried out to the building to refurbish it and convert it for the storage and display of private art works.[4] The building is in excellent repair and condition.[5]

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1 This substantially reflects the issues stated in paragraphs [2] and [3] of the Appellant's submissions (**AS**), subject to the qualification in footnote 2 below.

2 AS [3], which suggests that work and materials were used only in 1897, is inaccurate. Works and materials were used at two points in time; *first*, when Landene was constructed in 1897, and *second*, when renovations were undertaken after 2019: [2023] VCAT 734 (**PJ**) at [1], [9] {**CAB 10-11**}, [179]-[186] {**CAB 40**}; [2024] VSCA 157 (**AJ**) at [3] {**CAB 66**}, [64]-[66] {**CAB 76**}.

3 PJ at [1] {**CAB 10**}, [92]-[93] {**CAB 24**}.

4 PJ at [1], [9] {**CAB 10-11**}, [179]-[186] {**CAB 40**}; AJ at [3] {**CAB 66**}, [64]-[66] {**CAB 76**}.

5 PJ at [9] {**CAB 11**}.

8. The Land is subject to planning controls under the Port Phillip Planning Scheme, including a site-specific heritage overlay, HO331 (Landene), which seeks to conserve and enhance Landene's heritage character and ensure that development does not adversely affect its heritage significance.[6] There was no dispute that the effect of the Heritage Overlay – in combination with the other planning controls that applied to the Land – was that Landene should and would be substantially retained and not demolished, and the Land had minimal development potential.[7]

9. The land was valued under the VLA as at 1 January 2020 and 1 January 2021 with a returned site value of $6.2 million and a capital improved value of $7.2 million (ie, the returned valuer assessed that there were improvements which added $1 million in value to the Land in each year).[8] WSTI objected to the two valuations on the basis that the site values were too high. The valuer disallowed each of those objections.[9]

The Tribunal Decision

10. Pursuant to s 22 of the VLA, WSTI brought proceedings in the Victorian Civil and Administrative Tribunal seeking review of the two valuation decisions.[10]

11. Before the Tribunal, the VGV did not defend the returned site values, nor did it contend that Landene was not an improvement relative to the 'natural state' of the Land.[11] Rather, it relied upon expert evidence from a valuer, Mr Haines. He was instructed to conduct two valuations of the Land on a 'highest and best use' basis, assuming two different highest and best uses of the Land:

    (a) 'Scenario 1' - a valuation assuming a highest and best use of the Land as a 15 to 17-storey residential tower; and

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6 PJ at [1], [6] {**CAB 10**}, [47] {**CAB 17**}, AJ at [2] {**CAB 66**}, [30] {**CAB 71**}.
7 PJ at [47] {**CAB 17**}, [55] {**CAB18**} [95], [98] {**CAB 25**}, [135] {**CAB32**}; AJ at [51]-[55] {**CAB 74**}.
8 PJ at [79] {**CAB 21**} [254] {**CAB 54**}; AJ at [33], [40] {**CAB 72**}.
9 AJ at [33]-[46] {**CAB 72**}.
10 AJ at [33]-[46] {**CAB 72**}.
11 PJ at [50] {**CAB 17**}; AJ at [139] {**CAB 91**}.

(b) 'Scenario 2' - a valuation based upon a second highest and best use of the Land constrained by the applicable heritage controls.[12]

12. By comparing these two scenarios, Mr Haines concluded that Landene was not an improvement, because the notional value of the Land was much higher if it could be developed as a 15 to 17-storey tower without the applicable heritage constraints.[13] Based upon that reasoning, Mr Haines concluded that Landene should be included as part of the Land when determining site value.[14]

13. On the other hand, Mr Haines accepted that the renovations conducted to Landene after 2019 constituted improvements.[15]

14. The Tribunal found that the returned site valuations were too high, and made orders reducing the site value in each of 2020 and 2021 to $2.925 million. It stated the correct approach to determining the site value of land subject to a site-specific heritage overlay as follows:[16]

> 132.1. Firstly, to ascertain the specific attributes of the subject property such as location, land area, topography, shape, extent and condition of improvements, planning controls, other instruments etc;
>
> 132.2. Secondly; this would then enable the valuer to consider the [highest and best use] and the suitability of any improvements, which can only be made in the context of the [highest and best use];
>
> 132.3. This would then inform the third step in ascertaining what sales might be appropriate (at the relevant time) and the degree of comparability of those sales; and
>
> 132.4. Finally, the statuary definitions can be assessed and determined.

15. The Tribunal determined that the correct approach to ascertaining whether 'improvements' add value to land is to compare the market value in its full current state (including its limited development potential and existing structures) with the market value that the land would have with the same

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12 PJ at [111] {**CAB28**}; AJ at [58]-[66] {**CAB75**}; [111] {**CAB85**}, [139] {**CAB 91**}. See also Expert Report of Nicholas Haines (May 2022) at [13]-[16] {**RBFM 10**}, [76]-[79] {**RBFM 40**}, [104]-[109] {**RBFM 47**}, [122]-[124] {**RBFM 56**}; Instruction Letter at [8] {**RBFM 64**}; Expert Report of Nicholas Haines (December 2022) at [91]-[94] {**RBFM 250**} Instruction Letter at [8] {**RBFM 279**}.

13 AJ at [58]-[66] {**CAB75**}.

14 AJ at [60] {**CAB75**}.

15 PJ at [179]-[186] {**CAB41**}; AJ at [64]-[66] {**CAB76**}. Expert Report of Nicholas Haines (December 2022) at [47]-[51] {**RBFM 238**}.

16 PJ at [132] {**CAB31**}.

development potential, without the buildings on the land.[17] Applying that approach, the Tribunal found that the evidence was unequivocally that Landene added value to the Land and was therefore an improvement for the purposes of 'site value'.[18] The Tribunal rejected the evidence of Mr Haines, and rejected the VGV's argument that Landene suppressed the value of the land.[19]

16. For completeness, AS [7(c)], which states as an "unchallenged finding and fact" that according to WSTI's expert evidence, the site value of the Land as at 1 January 2020 and 1 January 2021 would likely have been $15.69 million without Landene is incorrect. In fact, WSTI's valuer considered a hypothetical scenario where the Land was not constrained by its existing heritage controls, which was used to illustrate the highest and best use of the Land.[20] This was not accepted as a valuation by either party, by the Tribunal or by the Court of Appeal.[21] Nor was it relied upon by either party as an appropriate valuation of the Land under the VLA.

The Court of Appeal Decision

17. On appeal, the VGV contended that the determination of site value under the VLA required a three-step approach: (1) the identification of improvements; (2) the notional removal of improvements; and (3) the determination of site value. The VGV contended that step 1 did not require any valuation of land – rather, the "valuation process proper" commenced as part of Step 3.[22] It submitted that the Land without Landene was worth more than the Land without the building (ie, in its natural state), because the building "suppressed" the value of the Land.[23]

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17 PJ at [162] {**CAB38**}.
18 PJ at [153] {**CAB37**}.
19 PJ at [136]-[138] {**CAB 32**}, [153] {**CAB 37**}, [214]-[216] {**CAB 48**}; AJ [83]-[84] {**CAB 79**}.
20 Expert Report of Grant Jackson (26 May 2022) at [80] {**RBFM 156**}; Expert Report of Grant Jackson (22 December 2022) at [91] {**RBFM 375**}.
21 PJ at [157] {**CAB 37**}.
22 AJ at [93]-[96] {**CAB 82**}.
23 AJ at [95] {**CAB 82**}.

18. The Court of Appeal found that the statutory definition of improvements in s 2(1) of the VLA contemplated the assessment of the effect of the work and material at two points in time:

(a) *first*, the work or material must have the effect of increasing the value of the land at the time the work is actually done or the material is used; and

(b) *second,* the benefit must be unexhausted at the time of valuation – that is, there must be a continuing benefit as at the date of valuation.[24]

19. In determining whether work or material increased the value of the Land, the relevant question was whether they benefitted the Land in comparison with the hypothetical unimproved 'natural' state of the Land as at the date of the improvements. The Court observed that land could be improved without achieving its highest and best use – it is sufficient that the land be improved in achieving *a* use.[25] In its reasons, the Court of Appeal was informed by the meaning of 'improvement' adopted in *Trust Company* and *Commonwealth Custodial*.[26]

20. The Court of Appeal held that the work and materials comprising Landene increased the value of the Land – because they benefitted the Land in comparison to its natural state.[27] Contrary to AS [17], this did not require an increase in the "ordinary financial sense" – the Court of Appeal expressly rejected that the assessment of improvements required a market assessment of the value of the improvements.[28] It was sufficient that "a use" was advanced.[29] Further, the Court held that the benefit was unexhausted at the time of the valuations, as Landene continued to serve a variety of purposes, including the provision of accommodation and as an art gallery.[30]

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24 AJ at [143]-[149] {**CAB 92**}.
25 AJ at [147]-[148] {**CAB 93**}.
26 *Commonwealth Custodial Services Ltd (as Trustee for Burwood Trust Fund) v Valuer-General (NSW)* (2006) 148 LGERA 38; *Trust Company of Australia Ltd v Valuer-General* (2007) 154 LGERA 437. See AJ at [148] {**CAB 94**}.
27 AJ at [147] {**CAB 93**}.
28 AJ at [153] {**CAB 94**}.
29 AJ at [141] {**CAB 92**}, [148] {**CAB93**} [155] {**CAB 94**}.
30 AJ at [148] {**CAB 93**}.

21. The Court of Appeal also found that the Tribunal was correct to reject the evidence of Mr Haines, which did not engage with the *natural state* test.[31]

Part V: Argument

22. WSTI's argument addresses two propositions:

(a) *first*, paragraph 2(a) of the notice of appeal (which is a limited contention regarding the *timing* of the assessment of whether the work done or material used increased the value of the Land) is incorrect; and

(b) *second*, even if the VGV's contention regarding timing is correct, it is immaterial to the outcome of the case.

23. The VGV's written submissions are directed only to the first issue (being the limited issue of timing). However, that issue is immaterial to the disposition of the appeal. Regardless of the date of the assessment, the effect of the evidence and findings below were that: Landene added value to the Land both at the time the works and materials were used,[32] and at the date of the valuations;[33] and the valuation methodology advanced by the VGV was specifically rejected.[34] Those conclusions are not challenged on this appeal.

The VGV's construction of the Act is incorrect

The Statutory Scheme in the VLA

24. Before turning to the VGV's argument, it is necessary to address the statutory scheme under the VLA.

25. The relevant task that the Tribunal was required to consider was the assessment of "site value" of the Property. "Site value" is defined in s 2(1) of the VLA as follows:

> ***site value*** of land, means the sum which the land, if it were held for an estate in fee simple unencumbered by any lease, mortgage or other charge, might in ordinary circumstances be expected to realise at the time of the valuation if

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31 AJ at [128] {**CAB 88**}, [139] {**CAB 91**}, [155] {**CAB 94**}.
32 AJ at [147] {**CAB 93**}.
33 PJ at [153] {**CAB 37**}; AJ at [147], [155] {**CAB 93-94**}.
34 PJ at [136]-[138] {**CAB 32**}; AJ [83]-[84] {**CAB 79**}, [139] {**CAB 91**}, [155] {**CAB 94**}.

> offered for sale on such reasonable terms and conditions as a genuine seller might be expected to require, and assuming that the improvements (if any) had not been made.

26. As noted by the Court of Appeal, s 2 of the VLA in substance reproduces the test for the valuation of land in *Spencer v Commonwealth* – on the assumption that improvements had not been made.[35] This may be contrasted with the definition of 'capital improved value' in s 2(1):

> ***capital improved value*** means the sum which land, if it were held for an estate in fee simple unencumbered by any lease, mortgage or other charge, might be expected to realize at the time of valuation if offered for sale on any reasonable terms and conditions which a genuine seller might in ordinary circumstances be expected to require;

27. The term "improvements" is defined in s 2(1) of the VLA as follows:

> ***improvements***, for the purpose of ascertaining the site value of land, means all work actually done or material used on and for the benefit of the land, but in so far only as the effect of the work done or material used increases the value of the land and the benefit is unexhausted at the time of the valuation, but, except as provided in subsection (2AA), does not include—
>
> (a) work done or material used for the benefit of the land by the Crown or by any statutory public body; or
>
> (b) improvements comprising—
>
> (i) the removal or destruction of vegetation or the removal of timber, rocks, stone or earth; or
>
> (ii) the draining or filling of the land or any retaining walls or other works appurtenant to the draining or filling; or
>
> (iii) the arresting or elimination of erosion or the changing or improving of any waterway on or through the land—
>
> unless those improvements can be shown by the owner or occupier of the land to have been made by that person or at that person's expense within the fifteen years before the valuation;

28. Section 2(2) provides for the valuation of "improvements" on land:

> In estimating the value of improvements on any land for the purpose of ascertaining the site value of the land, the value of the improvements is the sum by which the improvements upon the land are estimated to increase its value if offered for sale on such reasonable terms and conditions as a genuine seller might in ordinary circumstances be expected to require.

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35 AJ at [13] {**CAB 67**}.

29. It is also relevant to refer to s 5A of the VLA, which sets out the general methodology of valuation for the purposes of the VLA:[36]

> **5A Determining value of land**
>
> (1) Unless otherwise expressly provided where pursuant to the provisions of any Act a court board tribunal valuer or other person is required to determine the value of any land, every matter or thing which such court board tribunal valuer or person considers relevant to such determination shall be taken into account.
>
> (2) In considering the weight to be given to the evidence of sales of other lands when determining such value, regard shall be given to the time at which such sales took place, the terms of such sales, the degree of comparability of the lands in question and any other relevant circumstances.
>
> (3) Without limiting the generality of the foregoing provisions of this section when determining such value there shall, where it is relevant, be taken into account—
>
> (a) the use to which such land is being put at the relevant time, the highest and best use to which the land might reasonably be expected to be put at the relevant time and to any potential use;
>
> (b) the effect of any Act, regulation, local law, planning scheme or other such instrument which affects or may affect the use or development of such land;
>
> (c) the shape size topography soil quality situation and aspect of the land;
>
> (d) the situation of the land in respect to natural resources and to transport and other facilities and amenities;
>
> (e) the extent condition and suitability of any improvements on the land; and
>
> (f) the actual and potential capacity of the land to yield a monetary return.

30. The VGV's argument appears to rest on two premises as to the relationship between the provisions of the VLA:

(a) *first*, that the concept of increasing value in the definition of 'improvements' is not conceptually distinct from the concept of exhaustion – it is "merely its inverse";[37] and

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36 *Australian Postal Commission v Melbourne City Council* (2005) 14 VR 678 at [2] (Charles and Nettle JJA).

37 AS [44], [50]-[53].

(b) *second*, that there is a direct relationship between the definition of 'improvements', and the assessment of 'site value' and 'capital improved value' in s 2(1) of the VLA.[38]

31. Neither premise is established.

The relationship between increase in value and exhaustion of benefit

32. The VGV's construction of the definition of 'improvements' depends upon reading the words *"in so far only as the effect of the work done or material used increases the value of the land and the benefit is unexhausted at the time of the valuation"* as a single composite phrase.[39] According to the VGV: the words "at the time of the valuation" must qualify both the assessment of the increase in value, and the assessment of whether the benefit is exhausted.[40]

33. That does not follow from the ordinary language of the statute. Nor does it follow from the meaning of those concepts as they are expressed in comparable statutory provisions.

34. Contrary to AS [25], the use of the present tense in the definition of improvements ("increases the value") is grammatically neutral as to the time at which the value must be assessed. That is because the present tense may indicate either that it is to be assessed at the time the works or materials were applied (ie, the effect of the works or materials is to increase the value at the time they were applied) or that there is a present increase in the value of the land.

35. The language of the definition of 'improvements' contemplates that there are two separate concepts at work: *first*, there must be an assessment of the increase in value effected by the work or materials; and *second*, there must be an assessment of the ongoing *benefit* of the work or materials.

36. While the first concept focuses on the effect of the works or materials themselves (which arises at the time the works or materials are used), the second

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38 See in particular AS [30]-[36], [55] (see fn 22).
39 AS [37].
40 AS [44], [50]-[53].

concept focuses on a different issue – which is whether there remains an ongoing benefit as a result of the works or materials,[41] or whether the utility of works which would otherwise be an improvement had "died".[42] If the VGV's contention is correct (that the exhaustion of the benefit is simply the inverse of the first task and must be performed at the same time), it would leave the concept of "exhaustion" in the definition of improvements in s 2(1) of the VLA with no work to do.[43]

37. The issue of timing of the assessment of the effect of works or materials should also have regard to the carveouts in sub-paragraphs (a) and (b) of the definition of improvements. Each of those carve-outs directs attention to the time at which the work or materials were used: sub-paragraph (a) requires the assessment of whether work done or material is used by the Crown or statutory public body; and both carve-outs are subject to an exception where the improvements are shown to be made by the owner or occupier of the land within 15 years before the valuation.

38. The distinction between the two concepts is illustrated where the effect of works or materials has increased the value of land, but where the benefit has subsequently been destroyed. For example, in *Kiddle v Deputy Federal Commissioner of Land Tax*, land was partially improved by 'ring-barking' timber (a process which destroys trees and thus clears land over time), but had subsequently been allowed to revert to its original state.[44] If one applies the definition of improvements in the VLA, focusing on the effect of the works and materials: the effect of the works (the ringing of timber) was partially to improve the land; however, the benefit of that improvement was subsequently exhausted.[45]

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41 See, eg, *Goode v Valuer-General* (1979) 22 SASR 257 at 258 (Wells J).

42 Victoria, Parliamentary Debates, Legislative Assembly, 31 August 1909 (p 2885-2886) (emphasis added). By way of illustration, see GSTR 2006/6 - Goods and services tax: improvements on the land for the purposes of Subdivision 38-N and Division 75 at [36].

43 Cf *Project Blue Sky v Australian Broadcasting Authority* (1998) 194 CLR 355 at [71] (McHugh, Gummow, Kirby and Hayne JJ).

44 (1920) 27 CLR 316.

45 The example is considered in *Commonwealth Custodial Services Ltd (as Trustee for Burwood Trust Fund) v Valuer-General (NSW)* (2006) 148 LGERA 38 at [70] (Biscoe J); see also AJ at [133] {**CAB 90**}.

39. The assessment of whether a benefit is exhausted also presupposes an assessment of the original benefit provided by the works or materials. The distinction between the initial assessment of value and subsequent exhaustion is also recognised in Chief Justice Griffith's judgment in *Morrison v Federal Commissioner of Land Tax*:[46]

> I am, of course, speaking of operations the full effect of which has been obtained, as, for instance, in the case of land which was originally covered with stones and thereby unfit for agriculture, and which by their removal has become fit for it. That operation has been completed and the benefit remains, and so far as the benefit continues the value of the improvement is a "constant." While the improvements or the consequent operations of nature are still going on, the value of the improvements may, of course, increase from year to year, just as, in the case of some improvements, it may be exhausted. It is in that sense that I use the term "a constant."

40. Contrary to AS [51], the above passage does not suggest that exhaustion is simply the inverse of value. Rather, it contemplates that: the value of improvements is a constant; the value of those improvements may increase if the improvements are continuing; and the benefit of an improvement may subsequently be exhausted.

41. Similarly, in *Campbell v Deputy Federal Commissioner of Land Tax*, Griffith CJ referred to a distinction between value added to the land at the time of making improvements, and a subsequent deduction from that value as a result of exhaustion.[47]

42. The distinction between: (a) the increase of value as a result of the work or material; and (b) the exhaustion of the benefit at the time of valuation, is also recognised in equivalent legislation in other States. Section s 3(1) of the *Valuation of Land Act 2001* (Tas) provides:

> ***improvements***, in respect of the assessment of land value, means all work done or material used on the land by the expenditure of capital on or for the benefit of the land, but only so far as –
>
> (a) the effect of the work done or material used is to increase the value of the land; and
>
> (b) the benefit of the work is unexhausted at the time of valuation;

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46 (1914) 17 CLR 498 at 504.
47 (1915) 20 CLR 49 at 52; cf AS [52].

43. Similarly, s 23 of the *Valuation of Land Act 2010* (Qld) relevantly provides:

> (1) ***Site improvements***, to land, means any of the following done to the land—
>
> …
>
> (2) However, a thing done as mentioned in subsection (1)—
>
> (a) is a site improvement only to the extent it increases the land's value; and
>
> (b) ceases to be a site improvement if the benefit was exhausted on the valuation day.

44. Each of the above provisions suggests that there is a distinction between the effect of the work or material done on the value of the land, and the (subsequent) exhaustion of any benefit (which is to be assessed at the time of the valuation).

Relationship between definition of improvements, site value and capital improved value

45. Although not the subject of the appeal, the VGV's submissions elide a critical distinction between the reasons of the Tribunal and the Court of Appeal – that is, the relationship between the identification of improvements, and the definition of site value and capital improved value in s 2(1). There are two alternative constructions, which reflect the different approaches taken by the Tribunal and the Court of Appeal:

(a) The *first* construction is that the increase in value of land contemplated by the definition of improvements in s 2(1) represents the difference between 'capital improved value' and 'site value' in the VLA. This reflects the construction adopted by the Tribunal.[48]

(b) The *second* construction is that the identification of improvements (including the assessment of the increase in value in the definition) is a distinct step in the valuation process. On this construction, there need not be a relationship between the test for *identifying* an improvement in s 2(1), and the *valuation* of that improvement for the purposes of ascertaining site value. That reflects the reasoning of the Court of Appeal.[49]

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48 See PJ at [160]-[161] {**CAB 38**}, [289] {**CAB 58**}.
49 AJ at [152]-[153] {**CAB 93-94**}.

46. The VGV advances no reason why the second construction should be preferred. The concepts of 'site value' and 'capital improved value' have independent definitions, which require separate valuations pursuant to the VLA.[50] That was the position advanced by the VGV both at first instance[51] and on appeal,[52] which was accepted by the Court of Appeal.[53]

47. Further, neither construction advances the VGV's position.

48. If the *first* construction is adopted, it must follow that the test for determining the 'increase in the value of the land' in the definition of improvements is the date of valuation. Otherwise, the value of the improvements would not equate to the difference between site value and capital improved value at the date of valuation. However, this does not assist the VGV. That is because the approach to the valuation of improvements adopted by the VGV (which adopted two highest and best uses for the land, and valued the improvements based upon a fictional assumption that the planning controls did not exist) does not reflect the approach to the valuation of land in Victoria.[54] The hypothetical exercise that Mr Haines conducted does not reflect the amount that improvements add to the land under existing planning controls – it also requires the valuer to ignore the effect of s 5A (which requires valuers to take into account, inter alia, the use to which such land is being put at the relevant time, the highest and best use to which the land might reasonably be expected to be put at the relevant time, and the effect of any planning scheme which may affect the use or development of the land).

49. On the other hand, if the *second* construction is adopted, a central premise of the VGV's argument falls away. That is because the VGV's argument assumes that the assessment of value in the definition of improvements must equal the difference between 'site value' and 'capital improved value'.[55] If it is accepted (as the VGV submitted below and the Court of Appeal found) that the *definition*

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50 PJ at [160] {**CAB 38**}.
51 PJ at [50] {**CAB 17**}.
52 AJ at [93]-[94], [96] {**CAB 82**}.
53 AJ at [152]-[153] {**CAB 93-94**}.
54 PJ at [111] {**CAB28**}; AJ at [58]-[66] {**CAB75**}, [111] {**CAB85**}, [139] {**CAB 91**}.
55 See in particular AS [30]-[36], [55] (fn 22).

of improvements is a distinct step in the calculation of site value – there is no reason why the assessment of the definition of works and materials as improvements must be identical to their value at the time of the valuation.[56]

Other jurisdictions provide little assistance to the VGV's construction of the VLA

50. Reference to the decisions on the *Valuation of Land Act 1916* (NSW) and the *Valuation of Land Act 1944* (Qld) (at AS [56]) provide limited support for the VGV's position. That is because none of the cases referred to address the operation of an equivalent provision to the definition of improvements in s 2(1) of the VLA. The *Valuation of Land Act 1916* (NSW) considered in *Commonwealth Custodial* and *Trust Company* did not contain any definition of the term 'improvements'.[57] Further, section 12(2) of the *Valuation of Land Act 1944* considered in *Brisbane City Council v Valuer-General (Qld)* expressly required the assessment of value of improvements at the same time as the assessment of value for the purposes of that Act.[58]

Landene is an improvement irrespective of the VGV's contention regarding timing

51. In any event, even if the time at which "the effect of the work done or material used increases the value of the land" is the date of valuation, the works and materials constituting Landene are still improvements within the meaning of the term.

52. As the Tribunal found, the works and materials constituting Landene added value to the land as at the date of the valuations.[59] In doing so, the Tribunal compared the value of the site with and without the building.[60]

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56 AJ at [152]-[153] {**CAB 93**}. This explains why there is no incoherence between the Court of Appeal's approach to the definition of improvements and the deduction of the present value of the improvements: cf AS [45], [54]-[55].

57 *Commonwealth Custodial Services Ltd (as Trustee for Burwood Trust Fund) v Valuer-General (NSW)* (2006) 148 LGERA 38 at [11] (Biscoe J). The VGV's case at trial was that authorities concerning the *Valuation of Land Act 1916* (NSW) were inapplicable to the VLA: see, eg, AJ at [139] {**CAB 91**}.

58 (1978) 140 CLR 41 at 50 (Gibbs J).

59 PJ at [153] {**CAB 37**}.

60 PJ at [162] {**CAB 38**}.

53. Similarly, the Court of Appeal found that the work and material constituting the building continued to benefit the Land at the date of valuation, and that the building was a valuable structure accommodating a number of uses that continued to benefit the Land.[61]

54. The VGV's case fails because it requires a further step that is not contained in the statutory language – the VGV suggests that the valuer must speculate as to what the highest and best use of the Land might be if the works and materials had not been applied and the planning controls were different, and then compare:

(a) the capital improved value of the Land *including* its applicable heritage controls, with

(b) the value of the vacant Land based upon the assumption that heritage constraints do not apply – and that the Land could be developed on a different basis.

55. It is only by that comparison (based on two highest and best uses) that the VGV was able to conclude that the works and materials constituting Landene did not increase the value of the Land. Once the false comparison is removed and the Land is valued on the same basis, it is clear that the works and materials constituting Landene increase the value of the Land at the time of valuation. The effect of the Heritage Overlay – in combination with the other planning controls that applied to the Land – was that Landene should and would be substantially retained and not demolished, and the Land had minimal development potential.[62] The VGV's own valuer, Mr Haines, accepted that, without the instructed assumption that a 15 to 17 storey tower could be built on the Land without reference to the Land's heritage controls, the work or material constituting Landene increased the value of the Land.[63]

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61 AJ at [147], [155] {**CAB 93-94**}.

62 PJ at [47] {**CAB 17**}, [55] {**CAB18**} [95], [98] {**CAB 25**}, [135] {**CAB32**}; AJ at [51]-[55] {**CAB 74**}.

63 PJ at [158] {**CAB38**}.

56. To be clear, the valuation approach advanced by the VGV was correctly rejected by both the Court of Appeal and the Tribunal. The VGV's submissions do not seek to demonstrate any error in that aspect of the Court of Appeal's reasons (apart from the timing issue of the valuation). That failure is an unsurmountable hurdle in the VGV's appeal in this Court.

57. *First*, the VGV's valuation approach is not supported by any of the cases relied upon in the VGV's submissions.

58. *Second*, the VGV's argument was expressly rejected below. The Tribunal found that the building did *not* suppress the value of the land and rejected the VGV's argument that *"no building equates to no heritage control"*.[64] Those conclusions were not disturbed by the Court of Appeal and are not the subject of the appeal.

59. *Third*, the VGV's approach does not actually identify whether the effect of the works and materials increases the value of the land because it involves a false comparison between an encumbered site with developable land.[65] That approach is inconsistent with the process for valuing land in Victoria. The valuation of land under the VLA requires the valuer to take into account, inter alia, the highest and best use of the land, the effect of laws and instruments which affect use or development, and its actual and potential capacity to derive a monetary return from its unimproved state (including possible development).[66]

60. It is also well established that s 5(3)(b) of the VLA requires the valuer to consider the effect of heritage overlays applicable to the land.[67] In *Australian Postal Commission v Melbourne City Council,* Charles and Nettle JJA said:[68]

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64 PJ at [136]-[138] {**CAB 32**}; AJ [83]-[84] {**CAB 79**}.

65 PJ at [214] {**CAB 48**}.

66 VLA, s 5A. See also *PTDA & Civic Nexus Pty Ltd v Commissioner of State Revenue (Review and Regulation)* [2016] VCAT 1457 at [53] (Garde J); *Australian Postal Commission v Melbourne City Council* (2005) 14 VR 678 at [17] (Charles and Nettle JJA).

67 See, eg, *F.A. Springall Pty Ltd v Boroondara CC (Land Valuation)* [2011] VCAT 388 at [52] (Deputy President Macnamara and Member Jacono); *Pattas v Stonnington City Council* [2010] VSC 487 at [12], [19], [23], [30] (Emerton J).

68 (2005) 14 VR 678 at [17], [20] (citations omitted).

> … Under s 5A the determination of the value of land on the basis of the highest and best use of land requires that the land be considered with all its attributes, existing and potential, at the relevant moment for assessment of value. One must consider the potential uses to which it might be put assuming the restrictions to which it is subject at the time of valuation. Therefore, putting aside the effect of s 2(8), a valuer of heritage-listed land would be required to value it on the basis of all potential uses to which the land might be put under the existing heritage restrictions and consequently would have to take into account any uses to which the land was not being put but might lawfully be put under existing restrictions… Furthermore… under s 5A a valuer is directed also to take into account "any potential use", which we take to mean any use to which the land might be put in future if existing restrictions were altered in a way which at present seems conceivable…
>
> …As matters stand, the sort of valuation that was produced by Mr Buckley, which takes account of existing heritage restrictions but allows for the potential for change and development over time, is exactly the sort of valuation to which a valuer should come under s 5A in the absence of s 2(8). More specifically, the terms of s 5A would be sufficient in themselves to ensure that a heritage property was valued to market (in the way that Mr Buckley has valued the GPO) and so therefore that the valuation ascribed to it accurately reflected the restrictions upon use and development which the existing heritage controls may impose …
>
> (emphasis added)

61. It should also be noted that, even where a valuation exercise involves making an assumption that a building does not exist, it does not follow that heritage restrictions should be disregarded; there must remain a "sense of reality" in the valuation process.[69]

62. *Fourth*, the VGV's approach is internally contradictory. The VGV's approach rests upon the argument that if Landene were not present, the heritage constraints on the Land would not apply and highest and best use of the Land would then be a residential tower). However, if the VGV is correct that Landene is not an 'improvement' within the meaning of the VLA, it would follow that Landene forms a part of the Land for the purposes of determining 'site value'.[70] Accordingly, there is no statutory basis on which the constraints can be disregarded.[71]

63. *Fifth*, where works and materials are applied over time, the VGV's approach would require different works to be assessed by reference to different

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69 *McEwin v Valuer-General* (1993) 60 SASR 241 at 247 (Mullighan J) (in the context of the *Valuation of Land Act 1971* (SA)).

70 Definition of 'site value' in VLA, s2(1).

71 This submission is summarised at PJ at [74]-[75] {**CAB 21**}.

hypothetical planning controls. The difficulties in this approach are illustrated by Mr Haines' approach to the renovations conducted by WSTI. Mr Haines concluded that the renovations conducted to Landene after 2019 constituted improvements, but that the existing two-storey building on the Land was not.[72]

64. *Sixth,* the approach contended by the VGV undermines the premise of its own argument. A central premise of the VGV's argument is that the assessment of value in the definition of improvements must be the same as the test in s2(2) and represents the difference between 'site value' and 'capital improved value'.[73] However, the new approach advanced by the VGV (which values improvements by reference to a highest and best use which is not possible under existing controls) does not represent the value that the works and materials contribute to the Land because it involves a false comparison between an encumbered site with developable land which is not constrained by heritage controls.[74]

Part VI: Notice of Contention / Cross-Appeal

65. Not applicable.

Part VII: Estimate

66. The respondent estimates it will require two hours for oral argument.

Dated: 20 January 2025

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72 PJ at [179]-[186] {**CAB41**}; AJ at [64]-[66] {**CAB76**}.
73 See in particular AS [30]-[36], [55] (fn 22).
74 PJ at [214] {**CAB 48**}.

ANNEXURE TO RESPONDENT'S SUBMISSIONS

No	Description	Version	Provision(s)	Reason for providing this version	Applicable date or dates (to what event(s), if any, does this version apply)
1	Valuation of Land Act 1960 (Vic)	Version 154 (20 November 2019 to 15 December 2020)	s 5A	Version in force on the date of first valuation	1 January 2020: date of first valuation
2	Valuation of Land Act 1960 (Vic)	Version 155 (16 December 2020 to 30 June 2023)	s 5A	Version in force on the date of second valuation	1 January 2021: date of second valuation
3	*Valuation of Land Act 2010* (Qld)	Current (1 March 2023 to present)	s 23	Context	Current
4	*Valuation of Land Act 2001* (Tas)	Current (1 December 2022 to present)	s 3(1)	Context	Current