Supreme Court of Western Australia Decision: McKAY -v- COMMISSIONER OF MAIN ROADS [No 7] [2011] WASC 223

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Body

Perth WA: Supreme Court of Western Australia has issued the following decision 1 September 2011:
JURISDICTION : SUPREME COURT OF WESTERN AUSTRALIA
IN CIVIL

CITATION : McKAY -v- COMMISSIONER OF MAIN ROADS [No 7] [2011] WASC 223

CORAM : BEECH J

HEARD : 19 OCTOBER 20 NOVEMBER 2009, 19 JULY 16 SEPTEMBER 2010, 15 OCTOBER, 25 OCTOBER 5 NOVEMBER 2010, 29 NOVEMBER 2 DECEMBER 2010

DELIVERED : 1 SEPTEMBER 2011

FILE NO/S : CIV 1558 of 2007

BETWEEN : RODERICK DOUGLAS McKAY
KATHLEEN GLENYS McKAY
Plaintiffs

AND

COMMISSIONER OF MAIN ROADS
First Defendant

WESTERN AUSTRALIAN PLANNING COMMISSION
Second Defendant

Catchwords:

Resumption and acquisition of land - Compensation - Valuation of land - Requirement under s 241 Land Administration Act 1997 (WA) to value land discounting any effect on value attributable to the proposed public works - 'Pointe Gourde' principle - Whether statutory discounting permits enquiry into the zoning of the land in the absence of the proposed public works - Determination of zoning of the land in the absence of the proposed public works

Resumption and acquisition of land - Compensation - Valuation of land - Evidence - Relevance and admissibility of planning instruments and other matters after the date of taking in assessing market value - Whether such evidence is admissible to 'confirm a foresight' - Extent of urban potential of the subject land

Resumption and acquisition of land - Compensation - Valuation of land - Valuation methodology - Comparable sales - Hypothetical subdivision analysis
Legislation:
Land Administration Act 1997 (WA), s 241(2), s 241(6), s 241(8), s 241(9)
Result:
Compensation awarded in the sum of $15,427,500 plus interest to be determined
Category: A

Representation:
Counsel:
Plaintiffs : Mr M J McCusker QC, Mr T Houweling, Dr J T Schoombee (19 October - 20 November 2009) & Mr P G McGowan (15 October - 5 November 2010)
First Defendant : Mr K M Pettit SC & Ms F B Seaward
Second Defendant : Mr K M Pettit SC & Ms F B Seaward
Solicitors:
Plaintiffs : Cornerstone Legal
First Defendant : State Solicitor for Western Australia
Second Defendant : State Solicitor for Western Australia

Case(s) referred to in judgment(s):

Table of contents

1 This is an action for compensation for the taking of about 88 ha of land between Mandurah and Pinjarra. The land was owned by the plaintiffs until it was taken for public works to be undertaken by the first defendant, the Commissioner of Main Roads, and the second defendant, the Western Australian Planning Commission (the WAPC).
2 The overarching issue is the value of the land taken. Valuation of the land invites attention to its highest and best use. The plaintiffs contend that the highest and best use of the land is for residential development, or for commercial development combined with intensive residential development. The plaintiffs contend that the land should be valued on the basis that it was, by the date of taking, zoned urban. That is because the relevant statute requires that any increase or decrease in the value attributable to the proposed public works be discounted. The plaintiffs say that, but for the proposed public works, the land would have been zoned urban, and the absence of that zoning decreased its value.

3 The defendants contend that the land should be valued on the basis that, at the date of the taking, it was zoned rural with urban potential in the medium or long term.
4 A major issue in the case was whether, but for the proposed public works, the land would have been zoned urban or rural at the date of taking.
5 The plaintiffs' contentions as to the urban zoning of the land involve a series of alternatives. Each alternative has involved detailed attention to the town and regional planning regimes, broader planning environment, other rezoning applications and other circumstances applying during several different periods between 1990 and 2006. That has had consequences for the volume of evidence in the trial. The trial occupied 17 sitting weeks spread over more than 12 months; there were many hundreds of exhibits, occupying well over one hundred lever arch files.
6 The plaintiffs also contend, in the alternative, that the land should be valued on the basis that its highest and best use, and zoning or potential zoning, included commercial development for a district shopping centre.
7 In broad overview, the plaintiffs' case is that:
(1) valued on the basis of its district commercial centre potential, the land was worth about $60 million to $70 million;
(2) valued on the basis that it was zoned urban, the land was worth about $60 million to $65 million; and
(3) valued on the basis that the land was zoned rural, with strong potential to be imminently rezoned to urban, the land was worth about $36 million to $40 million.
8 The defendants contend that:
(1) as a matter of law, the land must be valued on the basis that it was zoned rural and had urban potential;
(2) alternatively, as a matter of fact, but for the proposed public works, the subject land would have been zoned rural and it should be valued on the basis of rural zoning with urban potential;
(3) the land's urban potential was uncertain and in the medium or long term; and
(4) valued on that basis, the land was worth about $6 million to $7 million.
9 In broad overview:
(1) I do not accept the defendants' first contention;
(2) I find that, but for the proposed public works, the land would have been zoned rural, and it should be valued on the basis that it was zoned rural and had urban potential;
(3) I find that, in the assumed absence of the proposed public works, the urban potential of the land was reasonable, with a high degree of uncertainty; and
(4) valued on that basis, I find that the value of the land was $14.025 million.
10 The balance of this introductory section 1 is organised as follows. Section 1.2 explains the taking order and the land the subject of this action. Section 1.3 identifies the location and character of the subject land. I explain the regional setting in section 1.4. Section 1.5 provides an outline of the local and regional planning, to enable the plaintiffs' case to be understood. After explaining some aspects of the course of the trial in section 1.6, I summarise the plaintiffs' case in section 1.7. Finally, in section 1.8, I summarise the defendants' case and identify the eight major issues for determination. I also state my conclusions on those issues and explain the organisation of the rest of these reasons.

1.2 The taking order and the subject land

11 By Taking Order dated 18 July 2006 (the Taking Order), lots 191 and 192 on plan 2087, comprising 87.6587 ha, were taken under pt 9 of the Land Administration Act 1997 (WA) (the LA Act).
12 By the Taking Order, two other parcels of land were taken. One of those other parcels was lot 189 on plan 2087, also owned by the plaintiffs. In this action, the plaintiffs claimed compensation in respect of the taking of lot 189, as well as in respect of the taking of lots 191 and 192. In the course of the trial, the parties settled the plaintiffs' claims respecting lot 189. Consequently, this action now concerns, and these reasons relate to, compensation only in respect of the taking of lots 191 and 192. I will refer to lots 191 and 192 as the subject land.
13 In 1990, the plaintiffs acquired the subject land as part of a wider landholding known as Windsor Park. Windsor Park included lots 187, 188, 189, 191, 192 and lot 23 Pinjarra Road, North Yunderup. Lots 187 and 188 later became lots 300 and 301 respectively. Lot 23 is a small parcel west of lot 301 and north of lot 300. It was not part of the land taken.
14 The other parcel of land the subject of the Taking Order was a portion of lot 301 on deposited plan 44563. Until 2006, lot 301 was also owned by the plaintiffs. By the date of the taking, lot 301 had been transferred to other parties. Thus there is no claim in this action in respect of lot 301.

15 The transaction by which the plaintiffs sold lot 301 is relied on by the plaintiffs as a comparable sale in valuing the subject land. The transaction was referred to as the 'Clough/Rapley transaction' (reflecting the name of the acquiring parties).
16 The Taking Order was registered on 20 July 2006. Consequently, as is common ground, the date of taking is 20 July 2006. By s 241(2)(c) of the LA Act, the land is to be valued as on the date of taking.
17 The Taking Order stated that the taken land had been 'set apart for the purpose of the following public work, namely New Perth Bunbury Highway and Regional Open Space'.
18 When the land was taken, new lot numbers and titles were created. I will refer to the subject land by its lot numbers before it was taken. For ease of exposition, I will refer to lots 191 and 192 in the present tense, notwithstanding that they no longer exist.
19 Part of lot 192 was taken for the purposes of the New Perth Bunbury Highway and the balance for the purpose of Regional Open Space. All of lot 191 was taken for the purpose of Regional Open Space.
1.3 The subject land: location and characteristics
20 Lots 191 and 192 are on the northern side of Pinjarra Road and Old Mandurah Road in the locality of Ravenswood.
21 The land is about halfway between Mandurah and Pinjarra. It is about 9 km southeast of Mandurah and about 8 km northwest of Pinjarra.
22 Pinjarra Road is a fourlane road that is the main and only direct link between Mandurah and Pinjarra. The plaintiffs' case emphasises the benefits for the subject land of its location on Pinjarra Road.

23 As at 2006, the Kwinana Freeway ended at or ***around*** Baldivis. At that point, the freeway continued into Safety Bay Road. From that road, a traveller from Perth would travel on Mandurah Road (possibly via Ennis Avenue) to Mandurah. The subject land is about 69 km in a straight line ***south*** of the Perth CBD. In 2006, travelling by road it was something more than 80 km from the city.

24 The certificate of title for the subject land indicates the following (exhibit 270B, appendix JF 2). Lots 191 and 192 are broadly rectangular in shape, apart from an excised area of about 2.5 ha that is on the western boundary of lot 192. Lot 192 is located at the corner of Pinjarra Road and Fiegert Road. It is a little over 500 m wide along its northern boundary, and its ***southern*** boundary abuts Pinjarra Road for a length of about 520 m. From Pinjarra Road, it runs to the north for ***around*** 910 m along its eastern boundary. Lot 192 has a total area of 40.3977 ha. Lot 191 is immediately east of lot 192. It is ***around*** 480 m wide along its northern boundary. To the ***south***, it abuts Pinjarra Road for about 280 m, and then Old Mandurah Road for a little less than 230 m. The lot runs to the north for a little more than 1 km along its eastern boundary. Lot 191 has an area of 47.2318 ha.
25 This suggests the total area of the subject land is 87.6295 ha.
26 However, the Taking Order suggests the total area of land taken is 87.6587 ha (exhibit 251B). The difference between these figures (0.0292 ha) is less than one threethousandth of the total area. I will adopt the higher figure of 87.6587 ha as the total area of the subject land.

27 Lots 191 and 192 are close to the Murray River. Lot 189 is on the ***southern*** side of Pinjarra Road, on the Murray River. It can be seen from exhibit 202, as shown below, that the river is at its closest point to Pinjarra Road at lot 189.
28 The subject land was at all relevant times serviced by electricity, water, telephone and, apart from sewerage, other services that might be required for a new urban development. The timing and conditions under which sewerage was available is dealt with in section 4 of these reasons.
29 At the time of the taking, the plaintiffs lived in the house on lot 188 (later lot 301), and used the subject land for grazing cattle.
30 The subject land was flat, sparsely vegetated, cleared rural land. It did not have any buildings or other improvements on it. The land was fenced, pastured and watered to accommodate the cattle grazing enterprise.
31 It is an agreed fact that the subject land does not have any environmental attributes of any significance that would prevent urban development of the land.
1.4 The subject land: regional setting
32 The setting of the land within its locality can be seen by reference to the orthophoto of March 2006 that is exhibit 202.

33 The land north of Old Mandurah Road and Pinjarra Road shown as 'McKay' is lots 191 and 192. The 'McKay' land ***south*** of those roads is lot 189. The land shown as 'Clough/Rapley' is lots 300 and 301. (The broken yellow line on the subject land does not reflect title boundaries.)

34 The small town of Ravenswood is ***south***-east of the subject land, along Pinjarra Road.
35 There are some urban developments in the general locality that are emphasised by the plaintiffs.

36 In 1995, lots 20 and 21 Old Mandurah Road were rezoned to 'special development', permitting urban subdivision, subject to conditions. These lots were the urban development known as Riverland Ramble, situated ***south*** of Old Mandurah Road and, in part, adjoining the then existing town of Ravenswood.
37 The reference to 2004 regarding Riverland Ramble on exhibit 202 is to the year the first stage of the subdivision was released.
38 The plaintiffs' case involves attention to what occurred with Riverland Ramble in several respects. The plaintiffs contend that the approval of the rezoning of Riverland Ramble supports the conclusion that, absent the proposed public works, had application been made for urban rezoning of the subject land, the rezoning would have been approved.
39 They contend that the reasons leading to the rezoning of Riverland Ramble would similarly have applied to lots 191 and 192 and led to the same result. Indeed, as an alternative, they go further and contend that lots 191 and 192 would have been rezoned to urban in preference to Riverland Ramble. Further, one of the alternatives postulated by the plaintiffs is that, but for the proposed public works, they would have made a joint application with the owner of Riverland Ramble for the rezoning of both sets of land.
40 Consequently, in section 4 of these reasons, I give detailed attention to the progress of the rezoning and development of Riverland Ramble.
41 The plaintiffs also point to the approval, in 1996, of the rezoning of Murray River Country Estate. That estate was on the northwest outskirts of the townsite of Pinjarra, with part of that development on Pinjarra Road.

42 Further, the plaintiffs point to Austin Cove, near ***South*** Yunderup, southwest of the subject land and on the other side of the Murray River. In 1989, when first approved, the development was known as the Murray Lakes Golf Course Estate. In 1996, the owners proposed an amendment to increase the development from about 500 to 1,500 lots. That amendment was gazetted in 1998 .

43 Immediately to the west of lot 192, across Fiegert Road, is wetland and bush. Further west of that is the ruralresidential and special rural locality of Furnissdale and Barragup, to the ***south*** and north of Pinjarra Road respectively.
44 Immediately to the east of lot 191 is lot 190. That is part of a larger holding of lots to the north and east owned by the Kelliher family. The Kelliher land includes the land north from lots 190, 191 and 192, two lots beyond Rogers Road and east to Paterson Road. That land had, at 2006, been used for rural purposes for some time.
45 Immediately east of lot 190 are lots 10, 11, 12 and 6. These lots were owned by interests associated with the Emmanuel family. The land was zoned and used for rural purposes.
46 The defendants emphasise that the land to the north and east of the subject land was zoned and used for rural purposes at the date of taking and for many years before. They contend that that land is proxy for the subject land, but for the proposed public works. The plaintiffs submit that that land remained rural for other reasons, not applicable to the subject land, including that the owners did not then want to develop their land.
47 The location of the Ravenswood drag strip (lot 41) can be seen to the east of Ravenswood and Riverland Ramble.
1.5 Overview of local and regional planning and the zoning of the land
48 This introductory overview is intended to do no more than provide a context for understanding the various alternative parts of the plaintiffs' case. The history of local and regional planning will be considered in much more detail later in these reasons. 1.5.1 The preIPRSP period: 1990 1997
49 One part of the plaintiffs' case focused on rezoning under the Shire of Murray Town Planning Scheme No 4 (TPS 4) in the years prior to 1997. On 23 June 1989, TPS 4 was published in the Government Gazette and came

into force under the Town Planning and Development Act 1928 (WA) s 7. Under TPS 4, some land was set aside for the purposes of a reserve. Other land was classified into various zones. The zones included residential, residential development, rural, special rural and commercial. Subsequently, in 1995, in approving the urbanisation of Riverland Ramble, a new zone class was created of 'special development' (see exhibit 25).
50 The parties prepared trial bundles in advance of the trial. The bundles were in four parts. Each part was divided into a (large) number of books. Each book was paginated continuously from the first page through to the last document. Exhibit 25 is found at part 1, book 11, pages 54 74. Throughout the trial, the parties referred to documents by their location in the trial bundle. I will do the same. I will use the shorthand of 1/11/54 to mean trial bundle part 1, book 11, page 54. Statements and reports of witnesses were referred to in a similar way. The shorthand 30/10 refers to page 10 of volume 30 of the witness statements and reports.
51 Some of the scheme maps for TPS 4 are exhibit 13. In TPS 4, a small portion of lot 192 was reserved for the purposes of a major highway. The rest of lot 192 and all of lot 191 were zoned rural.
52 The land surrounding the subject land was also zoned rural in TPS 4 when it was promulgated in 1989.
53 The town planning scheme could be amended by the shire, subject to approval of the Minister: Town Planning and Development Act s 7.
54 One major part of the plaintiffs' case contends that, but for the proposed public works, TPS 4 would have been amended, upon the plaintiffs' application, some time between 1994 and 1997 so that the subject land was zoned urban (the preIPRSP rezoning case). The parties and witnesses often referred to land being rezoned 'urban' in this period, meaning 'residential' or other zoning permitting urbanisation of the land. I will do the same. 1.5.2 The IPRSP

55 Another alternative strand of the plaintiffs' case has, as its foundation, the designation of the subject land, but for the proposed public works, as future urban in the Inner Peel ***Region*** Structure Plan (IPRSP). One of the purposes of the IPRSP was to provide a basis for a regional planning scheme for the Peel ***region***.
56 In July 1996, the WAPC published the 'for public comment' version of the IPRSP (the 1996 IPRSP) (exhibit 7, 1/10/54 178).
57 In December 1997, the WAPC published the final IPRSP (the 1997 IPRSP) (exhibit 6, 1/6/260 323).
58 The IPRSP designated land in a number of ways. Some land was designated for public purposes. The public purposes included 'Open Space Recreation' and 'State Highways and Roads Existing and Proposed'. It also designated land for private uses. The designations included rural, rural living, urban, and several categories of future urban. The designations only indicated existing and proposed future zonings and did not effect any rezonings.
59 Part of lot 192 was designated for the purpose of 'State Highways and Roads Existing and Proposed', for the Perth Bunbury Highway. The balance of lot 192 and all of lot 191 was designated 'Open Space Recreation'.
60 Both the 1996 IPRSP and the final 1997 IPRSP stated that the form of urban development proposed by the IPRSP was in discrete urban villages. Apart from Shire of Murray's main town of Pinjarra, urban villages were contemplated at Ravenswood, Furnissdale/Barragup and Yunderup/Murray Lakes.

61 It is a major part of the plaintiffs' case that, but for the proposed public works (if not already zoned urban), the subject land would have been designated future urban in the IPRSP and would have been part of the proposed urban village of Ravenswood. Future urban designation in the IPRSP was an important step towards being zoned urban in the Peel ***Region*** Scheme. 1.5.3 The Peel ***Region*** Scheme

62 From 1997 until 2002, work was done on the preparation of the Peel ***Region*** Scheme in light of the IPRSP.

63 The Peel ***Region*** Scheme 2003 (the PRS) was published in the Government Gazette on 23 October 2002. It comprises the scheme text and the scheme map sheets numbered 1 to 20. The scheme text is exhibit 116 (1/8/11 21). The scheme map is exhibit 2.
64 Clause 10 of the scheme provides for the reservation of land for public purposes, including Regional Open Space and Primary Regional Roads.
65 By cl 11, land is classified into zones under the scheme. Each zone has a stated purpose. The zones include urban, urban deferred and rural.

66 The scheme map reserves lot 191 and part of lot 192 for Regional Open Space. The balance of lot 192 is reserved for Primary Regional Roads.
67 The scheme map, in the locality, is set out in section 6.1 below.

68 A large area of land ***south*** of Old Mandurah Road ***around*** Ravenswood is zoned urban. It includes the land comprising the Riverland Ramble estate and Settlers Village. It is bordered on the east by lot 52 Old Mandurah Road. Lot 52 is zoned rural. The urban zoned area takes in the Ravenswood townsite and extends to the junction of Old Mandurah Road and Pinjarra Road.
69 Lot 41 Old Mandurah Road and part of lot 2, both east of lot 52, are zoned urban deferred.
70 None of the land north of Old Mandurah Road is zoned urban or urban deferred. It is all zoned rural.

71 There is an area zoned urban at Yunderup, and another urban area further ***south*** that is Austin Cove stage 2.
72 One part of the plaintiffs' case contends that, had the land been designated future urban in the IPRSP, the land would have been zoned urban or urban deferred in the PRS from the time the PRS came into force.
73 Alternatively, if the land had been zoned rural in the PRS as at 2003, the plaintiffs contend that the land would have been zoned urban or urban deferred by amendment to the PRS made some time between 2003 and the date of taking. 1.5.4 Urban potential
74 The plaintiffs also have, as an alternative, an urban potential case. The plaintiffs say that if, contrary to their primary contentions, but for the proposed public works, the land would have been zoned rural, its highest and best use would nevertheless have been urban, and, as at the taking date, it would have had a very high likelihood of being rezoned to urban in the near future.
75 As I will explain in detail in section 2, the defendants contend that the only question is in the urban potential of the land. They contend that its urban potential was uncertain and only in the medium to long term.
76 Some of the planning matters relevant to the question of the subject land's urban potential at July 2006 are as follows.
77 In September 2004, the WAPC published Network City. See exhibit 4A (1/13/1); exhibit 4B (1/13/2 131); exhibit 4D (4/2/338). In November 2005, the WAPC published 'Network city a milestone in metropolitan planning', exhibit 4C (1/13/132 143). There are issues between the parties and between their respective planners about how Network City bore on the prospects of urbanisation of the subject land as at July 2006.

78 Also in 2004, the Peel ***Region*** Planning Committee of the WAPC determined that amendments to the PRS needed to be considered and there needed to be a review of the IPRSP. I will give detailed attention to the progress and status of the review, as at July 2006, in section 7.
79 On 13 September 2004, the State Government announced the construction of the New Perth Bunbury Highway: see exhibit 9.
80 In August 2005, the shire adopted draft Town Planning Scheme 5 (TPS 5) (exhibit 5A and exhibit 5B) and the draft Local Planning Strategy (the draft LPS) (exhibit 47). Those documents had been in the course of preparation for many years. Officers of the shire had communications with and input from officers of the Department for Planning and Infrastructure (the DPI), including Mr Cameron Bulstrode.
81 The draft TPS 5 identified a significant amount of land as 'development areas'. That included land to the north and east of the subject land.
82 The draft LPS included land north of Old Mandurah Road as 'urban'.
83 In late 2005, the shire forwarded the draft LPS and TPS 5 to the WAPC.
84 On 20 June 2006, the Planning and Development Services Committee of the shire resolved to modify the draft LPS to include additional land north of Old Mandurah Road in the triangle bounded by the Highway, Paterson Road and Old Mandurah Road (exhibit 11). Thus by the date of taking, all of the land in that triangle, as far east as lot 6, other than the subject land, was designated urban in the draft LPS.
85 It is common ground that TPS 5 required the approval of the Minister and that the draft LPS required the endorsement of the WAPC before they would come into operation. See for TPS 5, Town Planning and Development Act s 7 and Planning and Development Act 2005 (WA) s 87; and for the draft LPS, Town Planning Regulations 1967 (WA) reg 12B.
86 It is also common ground that the WAPC's consideration of the draft LPS and TPS 5 would, as at July 2006, take place in the context of the WAPC's then pending review of the IPRSP. There is an issue as to the prospects of

that review producing a view of future urban land consonant with that stated in the draft LPS. More broadly, there are issues as to what the wellinformed hypothetical purchaser would have expected, as at July 2006, about the timing and likely outcome of the WAPC review.

87 There are also issues between the parties as to:

(a) the extent to which the draft LPS enhanced the prospects of shortterm urbanisation of the subject land, but for the proposed public works; and

(b) the extent to which what is shown in the draft LPS is relevantly attributable to the proposed public works.

1.6 The plaintiffs' case and the course of the trial

88 It is convenient to outline the plaintiffs' case in the context of outlining the course of the trial. On a number of occasions in the course of the trial, issues have arisen about what is and is not part of the plaintiffs' case. Over the course of the action there have been changes in the plaintiffs' case. That is not said as a criticism, but for the purposes of exposition and clarity.

89 It was clear, well before the trial, that the plaintiffs' primary case was that, but for the proposed public works, the subject land would have been zoned urban at the date of taking: see the statement of claim [20] and reply dated 24 August 2009 [2]. No particulars of those paragraphs were sought. The defendants joined issue with those pleas, pleading that, but for the proposed public works, lots 191 and 192 would have been zoned rural under the PRS and TPS 4 (the defence [10]). No particulars were sought of the statement of claim [20] and the reply [2].

90 For reasons which I explained in McKay v Commissioner of Main Roads [No 5] [2010] WASC 273, in my view, the high level of generality of the pleadings meant that they could not fairly serve as the exclusive statement of what was the plaintiffs' case. See, in particular, [34] [36], [74] [79].

91 Some of the history of the proceedings is outlined in McKay [No 5].

92 Because it appeared to me, before the trial, that the real issues in the action did not emerge clearly from the pleadings, at a directions hearing in May 2009, with the agreement of the parties, I ordered that the parties exchange statements of issues, facts and contentions.

93 The plaintiffs' Statement of Issues, Facts and Contentions (SIFC) filed 28 August 2009 contended that, but for the proposed public works, the subject land would have been zoned urban as at July 2006. The SIFC did not attempt to identify any particular time at which or period during which the land would, but for the proposed public works, have become zoned urban. The nub of the plaintiffs' contentions in the SIFC was that, at the time of taking, the land would either have been zoned urban or it would have had a high potential to be rezoned to urban in the very short term.

94 The plaintiffs' SIFC foreshadowed what was referred to as the 'split taking' case. Before the SIFC, the action had proceeded on the basis that the plaintiffs' case was that the effect of both proposed public works the highway and the regional recreational facility was to be discounted. The split taking case involved the contention that the land taken for each of the two purposes should be treated separately. In the case of the land taken for the highway, the regional recreation facility was not to be discounted. Similarly, in the case of the land taken for the regional recreation facility, the presence of the highway was not to be discounted.

95 The trial was listed for six weeks to commence on 19 October 2009.

96 On 16 September 2009, the plaintiffs served substantial further evidence in support of the split taking case, including statements from planning and engineering experts.

97 On 18 September 2009, the plaintiffs filed and served valuation reports based on the split taking approach.

98 The split taking case contended that the highest and best use of the subject land was for substantial commercial development, including a district shopping centre, together with intensive residential development. That marked a change in the plaintiffs' case. The plaintiffs' planning evidence exchanged up to August 2009 put forward a number of concept plans said to reflect a suitable development for the subject land. There were three plans prepared by Greg Rowe & Associates and several development plans prepared by Mr Butterly of Whelans. None of those plans involved a district shopping centre.

99 Earlier, in May 2009, the valuers had agreed during their conferral that for the purpose of their hypothetical subdivision analysis, as part of their valuation, the urban development concept plan number 1 prepared by Greg Rowe & Associates (the GRA concept plan) (exhibit 191A, 25/392) was the plan to be adopted by them in relation to lots 191 and 192. Thereafter, the parties had acted on the basis that the GRA concept plan represented the plaintiffs' case as to the appropriate development of lots 191 and 192 for the purposes of the valuation of those lots.

The plan showed the bulk of the land dedicated to the production of more than 1,000 residential lots, with 2 ha in the southeast corner designated for commercial development.

100 On 18 September 2009, the defendants filed an application seeking orders to the effect that the plaintiffs be precluded from advancing the split taking case. The defendants' application was made returnable on 22 September 2009.

101 On 21 September 2009, the plaintiffs' solicitors advised the defendants' solicitors and the court that the plaintiffs abandoned the split taking case.

102 The trial commenced as planned on 19 October 2009.

103 On 28 October 2009, the eighth day of the trial, in the course of opening, the plaintiffs indicated that they relied on part of one of the reports of their valuer, Ms Jennifer LeFevre, which had been exchanged as part of the split taking case. The report stated that the land was to be valued on the basis that its highest and best use was for a district centre, and valued the land accordingly. The defendants immediately objected. With the parties' agreement, I directed that the issue about the plaintiffs' proposed reliance on evidence supporting the district centre case be dealt with at the completion of the plaintiffs' opening.

104 The defendants filed an affidavit in support of their opposition to the plaintiffs' reliance on the district centre case.

105 On 3 November 2009, the plaintiffs indicated that, in light of the defendants' affidavit, they did not propose to lead evidence in support of the district centre case (ts 1180).

106 On or about 9 November 2009, the plaintiffs served a number of new witness statements on the defendants. The concurrent expert evidence session of the planners was then due to commence on or about 11 November 2009.

107 On 11 November 2009, the defendants objected to the plaintiffs' reliance on parts of the newly served witness statements. The case supported by the witness statements was, in broad summary, that, but for the proposed public works, the plaintiffs would have joined with the developers of Riverland Ramble in the 1990s to seek rezoning of the subject land to urban, and that the same result would have occurred in relation to the subject land as occurred for Riverland Ramble, in a similar time frame. The additional witness statements brought into significantly sharper relief the question of whether, but for the proposed public works, the land would have been rezoned to urban in the mid1990s.

108 By that stage, it was abundantly clear that, regardless of the proposed new evidence, the trial would not be completed in the two weeks remaining of the allocated trial dates.

109 After hearing submissions, I gave oral reasons for concluding that:

(a) the defendants would be prejudiced if the plaintiffs were permitted to rely upon the new evidence in the then remaining two weeks; and

(b) the plaintiffs should be permitted to rely on the evidence, but only on the basis that the trial of the issues associated with the new evidence be adjourned (see ts 1782 1788).

110 Following the delivery of my reasons, the parties identified witnesses whose evidence could be taken in the then remaining two weeks that the trial was listed. Evidence was received over that remaining period, and the trial was adjourned partheard.

111 Difficulties with the availability of counsel meant that the trial could not resume until July 2010.

112 From an early stage of the trial, the defendants contended that the plaintiffs had not adequately identified their case in certain important respects. The plaintiffs opened their case at considerable length. Following that, in the course of the defendants' opening in November 2009, the defendants complained that the plaintiffs' case was not adequately articulated and identified. Among other things, the defendants contended that the plaintiffs' case did not identify a particular point in time or period at which it was contended by the plaintiffs that, but for the proposed public works, the land would have become zoned urban. That was necessary, the defendants submitted, because different planning considerations and instruments, facts and circumstances, were applicable at different periods from, say, 1990 through to the taking in 2006.

113 In the course of exchange with senior counsel for both parties, the court requested from the plaintiffs, and the plaintiffs agreed to provide, a document that set out what changes the plaintiffs said there would have been, assuming no proposed public works, in any planning documents or other facts, with a statement of the reasoning for each such change (ts 1433 1447). The request sought articulation of the reasoning for changes in the hypothetical

scenario (as against the actual historical situation) by reference to such points in time or periods as were relied on in the plaintiffs' past hypothetical rezoning case (see, for example, ts 1436 1438, 1679 1681).

114 On 19 November 2009, the last day of the trial before it was adjourned until July 2010, the plaintiffs provided a document of that date entitled 'Changes in Documents and Events that the Plaintiffs say Would Probably have Occurred but for the Proposed Public Works' (the Changes Document).

115 The Changes Document states that:

(a) its purpose was to summarise what changes to facts and planning documents the plaintiffs hypothesised there would have been, but for the proposed works, and the reasons which the plaintiffs say support each of those hypotheses; and

(b) it was not intended to be a pleading or pleading-like document, or to override or restrict the evidence of the experts: [23].

116 The Changes Document contends that the plaintiffs would have engaged an experienced planner in 1992, alternatively in 1994, to progress the rezoning of lots 191 and 192 to urban and that, by 1996 or 1997, an amendment of TPS 4 to that effect would have been achieved: [34], [40] [41]. (I will refer to this as the preIPRSP rezoning case.) Paragraph 42 states that, 'in that case', the IPRSP would have included lots 191 and 192 as part of the proposed urban village of Ravenswood. Consequently, the PRS would have shown lots 191 and 192 as urban: [43].

117 The Changes Document states, as a further alternative, that on the hypothesis that the subject land was zoned rural or urban deferred in the PRS as at July 2006, the purchaser would have considered it was likely to be rezoned to urban in a short time.

118 At a directions hearing on 9 December 2009, the plaintiffs confirmed that another alternative part of their case (although not spelled out in the Changes Document) was that, but for the proposed public works, the land would have been designated future urban in the IPRSP. (I will refer to this as the hypothetical IPRSP case.)

119 At the directions hearing on 9 December 2009, the exchange of further evidence and expert evidence was programmed.

120 The plaintiffs exchanged substantial further proposed evidence and expert evidence on or about 31 March 2010. That evidence primarily concerned the preIPRSP rezoning case. It also included evidence in support of a contention that, but for the proposed public works, the highest and best use and zoning or potential zoning of the subject land would have been for a district centre with associated commercial and intensive residential use. There was no objection to the addition of that latter contention to the plaintiffs' case.

121 The defendants' expert reports in reply responded to those elements of the plaintiffs' case.

122 In the ninth week of the trial, in August 2010, an issue emerged about the scope and content of the plaintiffs' hypothetical rezoning case. The issue emerged in the context of the identification of questions for the agenda for the concurrent expert planning session. The issue was whether a question proposed by the plaintiffs for the planners' concurrent session should be permitted. The question was in these terms: If lots 191 and 192 were not included as 'future urban' in the IPRSP, would they have been zoned urban or urban deferred in the PRS in 2003, or by amendment of the PRS before July 2006?

123 That directed attention to the scope of the plaintiffs' hypothetical past rezoning case, as it had been articulated in the pleadings, SIFC, opening and the Changes Document.

124 I delivered reasons for decision on 16 August 2010, later published: McKay [No 5]. In summary, I decided that:

(a) the plaintiffs had not articulated a case that the subject land (assuming it to be rural in the hypothetical IPRSP) would have been rezoned to urban between 1997 and 2003;

(b) the plaintiffs should not be permitted to advance a case to that effect; and

(c) notwithstanding that the plaintiffs had not, in the Changes Document or otherwise, articulated a case of rezoning between 2003 and 2006, subject to further objection from the defendants in the event of prejudice by way of surprise, the plaintiffs were permitted to advance a case that the land would have been rezoned by amendment of the PRS between 2003 and 2006.

As to (c), my attention was not drawn in argument to something said by senior counsel for the plaintiffs in the course of the defendants' opening. Counsel articulated a case of rezoning between 2003 and 2006 (ts 1321), although the Changes Document did not include that contention. In any event, I did not disallow that case, and the case was run.

1.7 Overview of the plaintiffs' case

125 The main elements of the plaintiffs' case may be summarised as follows.
(1) The land is to be valued on the basis that, as at the date of taking, it was zoned urban. That is because, but for the proposed public works, it would have been zoned urban. I will refer to this as the plaintiffs' past hypothetical rezoning case. That case arises in the following three alternative ways. But for the proposed public works:
(a) the plaintiffs would have applied in the early to mid1990s for the rezoning of the land, and the land would have been rezoned to urban/residential prior to 1997 (the preIPRSP rezoning case);
(b) if not, the land would have been designated future urban in the IPRSP and would have been zoned urban in the PRS in 2003 (the hypothetical IPRSP case); or
(c) alternatively, if the land had been rural in the IPRSP and the PRS in 2003, it would have become urban or urban deferred in the PRS by amendment to the PRS between 2003 and 2006 (the 2003 2006 rezoning case).
(2) Alternatively to (1), if, but for the proposed public works, the land would have been zoned rural at July 2006, it would then have had a high probability of being imminently rezoned to urban.
(3) Further to (1) and, perhaps, (2), the highest and best use and zoning or potential zoning of lots 191 and 192 would have been for a district commercial centre.
(4) There are some additional elements to the plaintiffs' claim:
(a) a claim for an indemnity in respect of the transfer duty payable on a 'replacement property';
(b) an additional amount under s 241(8) of the LA Act to compensate for the taking without agreement; and
(c) interest under s 241(11) of the LA Act on the compensation awarded.
I will deal with these claims in section 10 of these reasons.
126 The valuers relied on by the plaintiffs have provided valuations on each of bases (1), (2) and (3). The plaintiffs' valuers value the land as follows:
(1) urban approximately $60 million to $65 million;
(2) rural with urban potential approximately $36 million to $40 million; and
(3) district centre potential $60 million to $70 million.
1.8 Overview of the defendants' case and the main issues
127 The defendants take legal and factual issue with the plaintiffs' contention that the land should be valued on the basis that it is zoned urban. First, the defendants contend that such an approach is impermissible as a matter of law. They contend that a past hypothetical rezoning, absent the proposed public works, cannot be used as a foundation of valuation. Rather, the only question is as to the urban potential of the land with rural zoning. I will explain the defendants' position in detail in section 2, dealing with legal principles.
128 Secondly, the defendants take issue with the plaintiffs' case at the factual and evidentiary level. Assuming the past hypothetical rezoning question arises, the defendants contend that, but for the proposed public works, the land would have been zoned rural. They deny that the plaintiffs would have made an application in the first half of the 1990s for rezoning and deny that, if made, the application would have been successful. They deny that, but for the proposed public works, the land would have been designated future urban in the IPRSP. They deny that any application to amend the PRS between 2003 and 2006 would have been successful.
129 In summary, the defendants contend that the only permissible inquiry at law, alternatively the relevant inquiry on the evidence, is as to the urban potential of the subject land. They contend that the subject land would have had an uncertain urban potential and that any urbanisation would have been in the medium or long term.
130 The defendants' valuers expressed the opinion that the land, valued on the basis that it is rural with urban potential, is worth something between $6 million and $7 million.
131 In May 2007, the defendants made an (open) offer of compensation to the plaintiffs under s 217 of the LA Act. The plaintiffs rejected the offer. On 16 May 2007, the defendants made an offer to make an advance payment in partial discharge of the plaintiffs' claim. The plaintiffs accepted that offer. On 22 May 2007, the defendants paid the sum of $10,063,956.16 by way of advance payment, of which $9.6 million was principal compensation. The balance was interest on that sum at 6% from 1 August 2006 until payment.
132 The defendants counterclaim for the return of some of the advance payment on the basis of mistaken payment or total failure of consideration. That counterclaim rests on the defendants' contentions about the value of the subject land. The parties agreed that the submissions on and resolution of the counterclaim should be deferred pending the court's determination of the value of the subject land.
133 At a broad level, the major issues involve the following eight questions. (My answer to the question, and the section of the reasons dealing with the issue, is identified in parenthesis.)

(1) As a matter of law, is it relevant and permissible to inquire what the zoning of the land would have been, but for the proposed public works? (Yes; see section 2)
(2) But for the proposed public works, would the land have been rezoned to urban in the years up to 1997, as a consequence of an application by the plaintiffs for rezoning? (No; see section 4)
(3) If not, but for the proposed public works, would the land have been designated future urban in the IPRSP, and as a result been zoned urban in the PRS in 2003? (No; see section 5)
(4) If not, but for the proposed public works, would the land have been rezoned to urban or urban deferred by amendment of the PRS between 2003 and 2006? (No; see section 6)
(5) If not, but for the proposed public works, what was the urban potential of the land at the date of taking? (Reasonable, but highly uncertain, and the odds did not favour approval of short-term rezoning; see section 7)
(6) But for the proposed public works, would the land have been zoned or had the potential to be zoned for commercial use so as to permit a district centre in the way suggested by the plaintiffs' commercial planner? (No; see section 8)
(7) Once the appropriate planning basis for the valuation is identified, what is the value of the subject land? ($14.025 million; see section 9). I will outline the major valuation issues in section 9. Among the broad issues are:
(a) what, if any, sales are useful as comparable sales?
(b) what is the proper analysis of the sales relied on as comparable sales?
(c) what are the preferable assumptions and inputs for a hypothetical subdivision analysis of the subject land?
(d) what are the relative merits, in this case, of the comparable sales method as against hypothetical subdivision analysis?
(8) What amounts, if any, should be awarded in respect of the plaintiffs' additional claims? (10% compensation for the taking without agreement, and interest; see section 10).
134 There were numerous objections to evidence. I made many rulings during the trial. The parties were content for rulings on some categories of objections to be given, to the extent necessary, in the course of my reasons. I deal with those in section 3.
Section 2: Legal principles 2.1 The statutory framework
135 In any valuation case it is fundamental that the statutory framework must be kept squarely in mind. That has been repeatedly emphasised in the cases, and more so in recent years.
136 As I have said, the subject land was taken under pt 9 of the LA Act. By s 202 of that Act, every person having an interest in land that is taken under pt 9 is entitled, subject to pt 10 of the LA Act, to compensation for the interest from the acquiring authority.
137 The amount of compensation is fixed by one of the following mechanisms under s 217, s 219 and s 220:
(a) acceptance by a claimant of the offer made by the acquiring authority, or by a subsequent agreement between those parties;
(b) an action for compensation by the claimant against the acquiring authority; or
(c) reference of the claim to the State Administrative Tribunal.
138 The plaintiffs commenced this action for compensation under s 220 and s 223 of the LA Act. The WAPC is the acquiring authority in relation to the land (lot 191 and part of lot 192) acquired for the purpose of Regional Open Space (ROS). The first defendant is the acquiring authority in relation to the land (part of lot 192) taken for the purpose of the extension to the Perth Bunbury Highway.
139 Section 241 of the LA Act governs the assessment of compensation in an action for compensation. Section 241(1) and s 241(2) of the LA Act are in the following terms: (1) In determining the amount of compensation (if any) to be offered, paid, or awarded for an interest in land taken under Part 9, regard is to be had solely to the matters referred to in this section.

(2) Regard is to be had to the value of the land with any improvements, or the interest of the claimant in the land, assessed as on -(a) in the case of an interest taken for a railway or other work authorised by a special Act - the first day of the session of Parliament in which the Act was introduced;

(b) in the case of an interest taken by agreement under section 168 - the date of the execution of the agreement, unless the agreement provides otherwise; or

(c) in the case of an interest to which paragraphs (a) and (b) do not apply - the date of the taking,
and discounting any increase or decrease in value attributable to the proposed public work.
140 In dealing with the plaintiffs' additional claims in section 10 of these reasons, I will refer to subsections (6), (8), (9), (11) and (12) of s 241.
141 Section 241(1) makes s 241 an exhaustive statement of the matters to which regard may be had in determining the amount of compensation.
142 On a proper construction of s 241, the effect of s 241(1) and s 241(2) is that compensation is to be awarded for the value of the land taken, assessed on the relevant date according to whichever of pars (a), (b) or (c) of s 241(2) is applicable.
143 Section 241(2) requires that any increase or decrease in value attributable to the proposed public work be discounted. What is involved in and permitted by that discounting requirement is a substantial issue in the action. I will deal with that in section 2.7 of these reasons.
2.2 General principles: the meaning of 'value'

144 Compensation for the value of the land involves determining a money equivalent of the asset: Housing Commission of New ***South*** Wales v Falconer [1981] 1 NSWLR 547, 570. 'Value' means exchange value. Value is determined by presupposing a person who is willing to give the thing that is being valued in exchange for money and another willing to give money in exchange for what is being valued: Spencer v The Commonwealth [1907] HCA 82; (1907) 5 CLR 418, 431; Boland v Yates Property Corporation Pty Ltd [1999] HCA 64; (1999) 74 ALJR 209 [79].
145 In summary, value is determined by identifying the price of a notional bargain between hypothetical vendor and purchaser who are prudent, well informed and willing, but not anxious, to complete the exchange.
146 In Spencer v The Commonwealth, Griffith CJ stated the test of value in the following terms: [T]he 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, ie, whether there was in fact on that day a willing buyer, but by inquiring 'What would a man desiring to buy the land have had to pay for it on that day to a vendor willing to sell it for a fair price but not desirous to sell?' It is, no doubt, very difficult to answer such a question, and any answer must be to some extent conjectural. The necessary mental process is to put yourself as far as possible in the position of persons conversant with the subject at the relevant time, and from that point of view to ascertain what, according to the then current opinion of land values, a purchaser would have had to offer for the land to induce such a willing vendor to sell it, or, in other words, to inquire at what point a desirous purchaser and a not unwilling vendor would come together (432).
147 In the same case, Isaacs J stated that: 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 (441).
148 These statements have been consistently applied in cases since then. The position was summarised by McHugh J in Kenny & Good Pty Ltd v MGICA (1992) Ltd [1999] HCA 25; (1999) 199 CLR 413 [49] [50] in a passage cited with approval by the High Court in Walker Corporation Pty Ltd v Sydney Harbour Foreshore Authority [2008] HCA 5; (2008) 233 CLR 259 (Walker HCA) [51]. McHugh J said as follows: Value is determined by forming an opinion as to what a willing purchaser will pay and a not unwilling vendor will receive for the property. In determining that value, there must be attributed to the parties a knowledge of all matters that affect its value. Those matters will include the predicted impact of future events as well as the experience of the past and the rates of return on other investments. As Isaacs J pointed out in Spencer v The Commonwealth:'We must further suppose both to be perfectly acquainted with the land, and cognisant of all circumstances which might affect its value, either advantageously or prejudicially, including its situation, character, quality, proximity to conveniences or inconveniences, its surrounding features, the then present demand for land, and the likelihood, as then appearing to persons best capable of forming an opinion, of a rise or fall for what reason soever in the amount which one would otherwise be willing to fix as the value of the property.' (emphasis added by McHugh J)The market for the

property is, therefore, assumed to be an efficient market in which buyers and sellers have access to all currently available information that affects the property [49] [50]. (footnotes omitted)

149 The hypothetical purchaser should be regarded as prudent: Spencer (440 441); Mount Lawley Pty Ltd v Western Australian Planning Commission [No 3] [2008] WASCA 158 (Mount Lawley [No 3] (2008)) [25]. Consistently with that, the hypothetical purchaser is to be taken to act rationally: Mir v ValuerGeneral [2009] NSWLEC 139 [43] [45]. I think the same notion is implicit in what Callinan J said in Boland v Yates [265] [269], in contrasting the artificial exercise of identifying the price of the notional bargain with the real world in which sentiment and emotion may significantly influence decisionmaking.

150 The value determined in the way explained above reflects market value.

151 In some cases, land may have a 'special value' reflecting a value to the owner over and above the price which a hypothetical purchaser may pay. See, for example, Boland v Yates [16] and [292]; Mount Lawley Pty Ltd v Western Australian Planning Commission [2004] WASCA 149; (2004) 29 WAR 273 (Mount Lawley (2004)) [281] [287]; Arcus Shopfitters Pty Ltd v Western Australian Planning Commission [2002] WASC 174; (2002) 125 LGERA 180 (Arcus Shopfitters (2002)) [70] [75]. In this case, the plaintiffs made no claim of special value to the owner.

152 There are a number of methods of assessing value. One method, often the primary method, is by analysis of comparable sales. Other methods may be appropriate, depending on the expert evidence: Bronzel v State Planning Authority (1979) 21 SASR 513, 516; Boland v Yates [79], [280] [291].

153 Whatever method is used, it must be borne in mind that the method is only a means to an end. The end the ultimate task is to identify the price at which the hypothetical Spencer parties would reach a bargain: Brewarrana Pty Ltd v Commissioner of Highways (No 2) (1973) 6 SASR 541, 559 560, 576 578; Minister for the Environment v Florence (1979) 21 SASR 108, 116 117; Minister of Environment v Petroccia (1982) 30 SASR 333, 362; Kelly v Western Australian Planning Commission [2006] WASC 208 [157] [158].

154 I will say more about the choice between competing methods of valuation in section 9.

2.3 Highest and best use

155 The notional sale postulated by the Spencer test involves the hypothetical purchaser purchasing the land 'for the most advantageous purpose for which it was adapted': Spencer (441). This is often referred to as the land's highest and best use.

156 In a passage adopted by the Court of Appeal of Victoria in ISPT Pty Ltd v Melbourne City Council [2008] VSCA 180; (2008) 20 VR 447 [40], Biscoe J explained the concept of highest and best use in Commonwealth Custodial Services Ltd v ValuerGeneral (NSW) [2006] NSWLEC 400; (2006) 148 LGERA 38 [15]: There is no statutory definition of 'highest and best use'. It has been described in the High Court as 'the most advantageous purpose for which [the land] was adapted': Spencer v The Commonwealth[1907] HCA 82; (1907) 5 CLR 418 at 441 per Isaacs J. It 'is the present value alone of such advantages that falls to be determined': Cedar Rapids Manufacturing and Power Co v Lacoste [1914] AC 569 at 576 per Lord Dunedin. In Park v Allied Mortgage Corporation Ltd (FCA, 5 July 1995, unreported) Hill J said at [70]: 'As Spencer's case itself makes clear the valuation must proceed by reference to the best use of the property. For this purpose the valuer will take into account not only the present use to which the land is applied, but any more beneficial use to which it may reasonably be applied. This is the process which a purchaser negotiating to purchase the property would undertake. Thus, it is not inappropriate in valuing property to take into account a potential development of the property, for among the range of hypothetical purchasers can be assumed to be a person who would undertake such a development as would maximise the usage of the land'. In Adelaide Clinic Holdings Pty Ltd v Minister for Water Resources (1988) 65 LGRA 410 at 415 (SC/SA) Jacobs J said:'Common experience shows that land ideally suited for commercial development will fetch a higher price per unit of area than residential land, but it does not follow that the highest and best use of all land is a commercial use, for the highest and best use means exactly what it says - the most advantageous use of the subject land having regard to planning and all other relevant factors affecting its present and future potential. The first task of the valuer is to determine what that use is and then to value the land on that basis. It is not appropriate to determine the highest and best use by reference only to value.'

See also Trandos v Western Australian Planning Commission [2001] WASCA 346 [72].

157 In Mount Lawley (2004), the Full Court said as follows: The skill of the valuer lies in assessing (in this case) the market value of the reserved Mount Lawley land, had it been offered for sale on 7 May 1996. That value would reflect the highest and best use to which the land could be put, consistent with its zoning: Boland v Yates at [271].

As we have noted, in carrying out the valuation the valuer will take into account any potential the land may have for a higher and better use than permitted by the current zoning. In so doing the valuer should exercise an independent judgment about the likely perception of such matters in the relevant market [184] [185].

158 Thus if the most profitable use of the land is one not permitted by its current zoning, the concept of highest and best use requires the potential of the land to be used for that more profitable use, after necessary planning approval, to be taken into account. It does not require or permit an assumption that the necessary planning approval will be forthcoming. The prospects of such approval as determined on the evidence, viewed from the perspective of the hypothetical parties, will bear on the assessment of the value of that potential use.

159 In a particular case, the highest and best use of land may be a single use or a package of alternative uses, depending on the evidence: ISPT v Melbourne City Council [57].

2.4 The knowledge to be attributed to the hypothetical parties

160 The knowledge of and information available to the hypothetical parties is expressed in the passages in Spencer (441) and Kenny & Good v MGICA [49] [50] set out in section 2.2 above. The hypothetical parties are taken to have access to all currently available information that affects the property.

161 The hypothetical parties are taken to be aware of all information relevant to the market price about which a prudent purchaser would inquire: Port Stephens Shire Council v Tellamist Pty Ltd [2004] NSWCA 353; (2004) 135 LGERA 98 [489]; Mount Lawley [No 3] (2008) [25].

162 The hypothetical purchaser would have such expert advice as a prudent purchaser would, in the circumstances of the case, have obtained: Cook v Roads and Traffic Authority of New ***South*** Wales [2007] NSWLEC 136 [12]; Coundrelis v Roads and Traffic Authority of New ***South*** Wales [2008] NSWLEC 72 [51]; Taylor v Port MacquarieHastings Council [2010] NSWLEC 113 [49]. See also De Ieso v Commissioner of Highways (1981) 27 SASR 248, 252; Walker Corporation Pty Ltd v Sydney Harbour Foreshore Authority [2004] NSWLEC 315; (2004) 134 LGERA 195 [123] (overturned on appeal, but not on this point). The court's role when there is conflicting expert evidence is to view the conflicting opinions through the eyes of the hypothetical purchaser. That may or may not involve the court in resolving the conflicting opinion and determining the preferable opinion on a particular point. In some circumstances, the court may conclude that the hypothetical purchaser would note and take into account the existence of conflicting opinions.

2.5 The nature of valuation and the role of the court

163 In determining the value of the land taken, the court relies on the evidence of professionally qualified valuers. The court is not itself a valuation agency: Mount Lawley (2004) [183].

164 By its nature, valuation involves an inquiry about which reasonable minds may well differ widely: Boland v Yates [12], [174]; Mount Lawley (2004) [182].

165 Valuation is an art not a science; it involves the exercise of many subjective judgments and the steps in reasoning are not always able to be articulated fully. In The Secretary of State for Foreign Affairs v Charlesworth, Pilling & Co [1901] AC 373, the Privy Council said as follows: It is quite true that in all valuations, judicial or other, there must be room for inferences and inclinations of opinion which, being more or less conjectural, are difficult to reduce to exact reasoning or to explain to others. Everyone who has gone through the process is aware of this lack of demonstrative proof in his own mind, and knows that every expert witness called before him has had his own set of conjectures, of more or less weight according to his experience and personal sagacity. In such an inquiry as the present, relating to subjects abounding with uncertainties and on which there is little experience, there is more than ordinary room for such guesswork; and it would be very unfair to require an exact exposition of reasons for the conclusions arrived at (391).

That passage has been cited with approval in a number of cases in the High Court, beginning with Spencer, and in other Australian appeal courts.

166 Some of the adjustments to values deduced from comparable sales in order to arrive at valuation may be 'nothing more than the best guess that can be made': Leichhardt Municipal Council v Seatainer Terminals Pty Ltd(1981) 48 LGRA 409, 434; Yates Property Corporation Pty Ltd (in liq) v Darling Harbour Authority (1991) 24 NSWLR 156, 182 183. See also Duffy v The Minister for Planning [2003] WASCA 294 (Duffy (2003)) [29] [31].

167 It has often been said that the court must not allow itself to be cast in the role of the 'third valuer': Brewarrana Pty Ltd v Commissioner of Highways (No 2) (544 545); Bronzel v State Planning Authority (523); Arcus Shopfitters

(2002) [76]; Tyler v Thomas [2006] FCAFC 6; (2006) 150 FLR 357 [55] [56]. Valuers have their own experience, training and skill and that role must not be usurped by the court: Bronzel (523).

168 On the other hand, it is clear that the court is not obliged simply to adopt one of the valuers' opinions. The court can make such adjustments to value as are required by the evidence: Mount Lawley Pty Ltd v Western Australian Planning Commission [2007] WASCA 226; (2007) 34 WAR 499 (Mount Lawley (2007)) [391]; Arcus Shopfitters (2002) [76]; Corporation of the City of Adelaide v City of Port Adelaide Enfield [2000] SASC 271; (2000) 110 LGERA 153 [88] [89]. If the court finds any valuation evidence to be defective, incomplete or irreconcilable in some respect then it should use other evidentiary material to correct, complete or reconcile that evidence:Brewarrana (545).

169 This invites attention to what precisely is impermissible.

170 There was no issue between the parties in this respect. The parties agreed that the court cannot adopt a valuation methodology that was not supported in any of the valuers' evidence. Further, the parties agreed that the court cannot simply take an average of competing valuations in order to resolve their differences. I am content to accept those propositions. However, I note that there is room for doubt about the first proposition: seeDownie v Sorell Council [2005] TASSC 74; (2005) 141 LGERA 304 [33]. The parties did not identify anything else that is impermissible.

171 At the risk of stating the obvious, I would add that, in valuation as in all spheres of the judicial function, the court must act only on the basis of evidence.

172 In this case, the valuers have expressed different opinions about the weight to be given to the comparable sales method as against the hypothetical subdivision analysis method. Further, they disagree on the proper analysis of various of the sales relied by some as comparable sales; and they disagree on whether and to what extent various sales are comparable with the subject land. Further, the valuers disagree on a number of the inputs in their hypothetical subdivision analyses. The parties agreed that in considering those issues, the court was not obliged to simply to choose among the competing view of the experts. Rather, it is open to the court to come to a conclusion on any of these issues that was not specifically espoused by any valuer (see ts 7289 7295, 7363 7367).

173 It is a conventional element of the judicial task to resolve competing expert opinion. The judge determines what expert evidence is to be preferred, what evidence is accepted and what evidence is rejected. The judge is not obliged to accept all or any of either of two competing expert opinions. In an ordinary civil case, if the judge rejects both experts' opinions on a question, the burden of proof may resolve the gap left by the rejection of all the expert evidence on a particular point. In a valuation case, the burden of proof does not always provide a means to resolve an absence of evidence on a question of valuation. The court must come to a conclusion on the question of value; it cannot say that the value was not proven. The notion that the court is not a third valuer expresses limits on the role of the court in a valuation case. In my opinion, those limits do not require the court to act on any evidence of any valuer which, for proper reason, the court does not accept.

174 As will be seen in section 9 of these reasons, in the end I reject the major elements of the reasoning of all of the valuers. I identify those sales which I think assist in deriving a value, and analyse what each sale indicates. My views do not accord, even broadly, with any of the valuers. After looking at the sales evidence as a whole, I derive a value from the sales I find of assistance. It might be said that, in substance, this means that I undertake my own valuation. I do not think that is the question. In light of the findings I make in section 9, I see no alternative but to do what I do.

2.6 Doubts to be resolved in favour of the dispossessed owner

175 The plaintiffs emphasised the often stated principle that in determining value for compensation purposes, doubts regarding the compensation payable to a dispossessed owner should be resolved in favour of a liberal estimate. The principle was stated by Dixon J in Commissioner of Succession Duties (***South*** Australia) v Executor Trustee and Agency Company of ***South*** Australia Ltd [1947] HCA 10; (1947) 74 CLR 358, as follows: I should like, however, to add for myself that there is some difference of purpose in valuing property for revenue cases and in compensation cases. In the second the purpose is to ensure that the person to be compensated is given a full money equivalent of his loss, while in the first it is to ascertain what money value is plainly contained in the asset so as to afford a proper measure of liability to tax. While this difference cannot change the test of value, it is not without effect upon a court's attitude in the application of the test. In a case of compensation doubts are resolved in favour of a more liberal estimate (373 374).

176 The principle was approved by Callinan J in Boland v Yates [356], [100] (Gaudron J), [111] (Gummow J). The principle has been applied in many cases. See, for example, Cook & Edwards v City of Stirling (1991) 4 WAR 469, 473.
177 This principle is not a substitute for the undertaking by a court of its duty to evaluate and adjudicate upon disputed issues of fact, including conflicting expert opinion: Peter Croke Holdings Pty Ltd v Roads and Traffic Authority of NSW (1998) 101 LGERA 30, 50. The position was explained by Allsop P in Sydney Water Corporation v Caruso [2009] NSWCA 391; (2009) 170 LGERA 298 [3] [4] , (Sackville AJA agreeing [191]): The general principle that in determining compensation to a dispossessed owner doubts should be resolved in favour of a more liberal estimate is well-known: see generally A Hyam The Law Affecting Valuation of Land in Australia (4th Ed 2009 Federation Press) at 316318. That does not, however, detract from the need to engage with and evaluate evidence and competing witnesses. If, however, upon engagement and assessment, the judicial valuer finds, for example, as Anderson J did in Cook and Edwards v City of Stirling (1991) 4 WAR 469, that the reasoning of both valuers was not fallacious, that their respective capitalisation rates were open, that none took into account irrelevant considerations and no errors otherwise appeared, the proper conclusion might be that there are simply two open views on the relevant issue as there can be in ascribing a value: cf Fenton Nominees Pty Ltd v Valuer-General (1981) 27 SASR 258 at 264; 47 LGRA 71 at 7677. In such circumstances, applying the general principle would be uncontentious.

It is not helpful to examine the scope of the general principle in the abstract beyond saying that it is not a licence to accept one expert over another without undertaking the task of assessing the evidence in the usual way. If a judge properly undertakes that task, the evaluation of the evidence may well persuade the judge to accept the evidence favouring the resuming authority. That would be a product of assessing the evidence. That process is not to be abandoned as the statement of the judge at [81] of her reasons would suggest she did [3] [4].
178 The different approach taken by Tobias JA [140] [148] was a minority view. In Walker Corporation Pty Ltd v Sydney Harbour Foreshore Authority [2009] NSWLEC 219; (2009) 173 LGERA 155 [30], Biscoe J applied what was said by Allsop P. I propose to do the same.
2.7 'Discounting any increase or decrease in value attributable to the proposed public work'
179 Section 241(2) of the LA Act requires the value of the land to be assessed on the date of taking 'discounting any increase or decrease in value attributable to the proposed public work'.
180 The parties put fundamentally different positions about what the application of the discounting element of this section required or permitted in this case.
181 Before dealing with those issues, it is convenient to deal with two matters that were not in substantial controversy between the parties. The first is the identification of the 'proposed public works' in this case; the second is the proper construction of the word 'attributable' in s 241(2). 2.7.1 Identifying the proposed public works
182 The parties were agreed as to the identification of the proposed public works in this case and the action was conducted on that basis.
183 Part of lot 192 was taken for the purpose of 'New Perth Bunbury Highway'. The parties agreed that the proposed public work is the 70 km of new road to link the Kwinana Freeway, where it previously terminated at Safety Bay Road in Baldivis, to connect to the Old Coast Road at Lake Clifton. In these reasons I will refer to that by the shorthand 'the Highway'.
184 In opening, the defendants accepted that notwithstanding that, at different times from the 1970s until 2006, there were differences in the proposed alignment of the Highway (although not over lot 192), the references in planning and other documents to the Highway were, from the 1970s, attributable to the proposed public work (ts 1317 1319); cf Mount Lawley (2007) [29], referred to below.
185 The rest of lot 192 and all of lot 191 were taken for the purpose of ROS. It was pleaded in the statement of claim and admitted in the defence that this land was resumed for the purpose of ROS with the intention of constructing the Regional Recreation Facility (RRF). The plaintiffs' SIFC stated that the land was taken for ROS, the relevant public work being 'more specifically the [RRF]': [3].
186 The plaintiffs' opening, and other documents provided by the plaintiffs, including the Changes Document, proceeded on the basis that the proposed public work of ROS encompassed the RRF and that the effect of the proposed RRF on the value of the subject land was part of what was to be discounted under s 241(2). The plaintiffs

adhered to that position in closing (ts 7326 7328). In closing, the plaintiffs also pointed out that the purpose of the taking was ROS, so that any use within that broader purpose would be consistent with the purpose of the taking. That may have significance for other purposes; for present purposes, the plaintiffs accepted that the proposed public work encompassed the ROS and the RRF.

187 Given the parties' agreement as to the identification of the proposed public works, it is not necessary to give detailed attention to the process by which the proposed public work is to be identified. The following are among the matters that might be relevant.

188 The power to take land is exercised under LA Act s 161. If no agreement to take the land is reached, a notice of intention to take must be given under s 170. The notice of intention must include particulars of the public work for which the land is proposed to be taken: s 171(1)(b)(i).

189 The taking order must contain the matters required by s 178. One of the things a taking order must do is designate appropriately any land or interest in land required for the purpose of the public work: s 178(1)(d). 'Designate' is defined in s 151 to mean 'to reserve, declare, covenant, dedicate, set apart or otherwise mark off for use for a specified purpose by means of an annotation on or instrument registered against the certificate of title or certificate of Crown land title'. Section 241(2) refers to the proposed public work, not in terms to the designated purpose.

190 The term 'proposed public works' is also used in s 182(1) and in s 186.

191 In the Clause and Committee Notes, Land Administration Bill 1997 (WA), 190 it is said of s 241(2) that '[i]n considering the valuation of the land and improvements the future impact of the public work is disregarded'. The reference to 'future impact' should be noted. Nevertheless, for reasons which will emerge, I do not consider that the discounting required by s 241(2) relates only to the future impact of the public work. Rather, this section requires also that an increase or decrease in value occurring or caused by something prior to the taking, and attributable to the proposed public work, is to be discounted. The contrary was not argued by the defendants.

192 In this statutory context, the terms of the notice of intention may be relevant to the identification of the proposed public works. In this case, the notice of intention is not in evidence.

193 In any event, as I have said, the parties agreed as to the identity of the proposed public works. 2.7.2 The meaning of 'attributable' in s 241(2)

194 In Mount Lawley (2007), the Court of Appeal construed s 36(2b) of the Metropolitan ***Region*** Town Planning Scheme Act 1959 (WA) (the Scheme Act). That section stated that the value of land acquired by the WAPC was to be determined 'without regard to any increase or decrease, if any, in value attributable wholly or in part to the Scheme'.

195 At [26] [27] and [29] [30], the court said as follows: In considering what is, or is not, a 'step' in the context of s 36(2b), the question to be answered is, as we have said, whether or not an increase or decrease in the value of the land to be acquired by the respondent is 'attributable to' the Scheme. Any number of events having an effect on the value of land, including political, scientific, social or commercial occurrences, might be precursors to, or lead up to or have some relation to, a Scheme, but that is not to say that those changes in value are necessarily attributable to the Scheme itself. They may or may not be so.

The difficulty is most acute when considering 'steps' that precede the Scheme. On the face of it, they will have an impact on value attributable to the Scheme only if that impact is attributable in whole or in part to the proposed Scheme itself as, for example, the advertising of the Scheme or a publication of some other kind that is a prerequisite to the coming into effect of the Scheme. However, proposed Schemes may alter as they develop and foreknowledge of their likely occurrence can be obtained by the property market during the development stage. In Wilson v Liverpool Corporation [1971] 1 All ER 628 Lord Denning said:'A scheme is a progressive thing. It starts vague and known to few. It becomes more precise and better known as time goes on. Eventually it becomes precise and definite, and known to all. Correspondingly, its impact has a progressive effect on values. At first it has little effect because it is so vague and uncertain. As it becomes more precise and better known, so its impact increases until it has an important effect. It is this increase, whether big or small, which is to be disregarded as at the time when the value is to be assessed. (634)'Just when this effect on value is attributable to a step in 'the

Scheme' (as opposed to something less than or different from the Scheme) raises difficult questions in the application of s 36(2b).

...

It is true that a Scheme is 'a progressive thing'. However, as we have said, the step or occurrence affecting value must be 'attributable' to the Scheme itself and not (as we understand s 36(2b)) to some different, or as yet unformed, notion that ultimately led to the creation of the Scheme. A step must be attributable to the Scheme, not the Scheme to a step. That is to say, the step must have been taken in order to bring about the Scheme itself, or a variant of it that is not materially different. As to this last proposition, it seems to us that a step may be attributable to a Scheme even if the form which the proposed Scheme then took differed from that which the Scheme ultimately took, so long as the difference is not such as to lead to the conclusion that the Scheme ultimately created was not substantially that which had been proposed. It also seems to us that the step must be taken with the intention of facilitating the Scheme or for the purpose of creating it, if it is to be attributable to the Scheme. So, for example, some proposed general planning consideration that may or may not lead to a Scheme of the kind ultimately implemented could not be said to be attributable to the Scheme merely because, as matters turned out, a Scheme which adopted that planning consideration was subsequently implemented (cp the approach taken in respect of the different legislation in San Sebastian (213)).

Also, the words 'attributable to the Scheme' plainly have the consequence that the effect on value of characteristics or location of the land, or other factors affecting the land (such as population pressures), which always had the capacity to enhance, or reduce, its prospects of development and hence its value are not to be disregarded merely because they led, ultimately, to the Scheme. That is so even if they are specifically identified, or otherwise referred to, by the Scheme: see in this respect the approach adopted (albeit in the context of different legislation) by Basten JA in Walker No 1 [63]. The same is true of inherent characteristics of, or other factors affecting, land that is adjacent to the subject land, so far as those characteristics or factors are capable, independently of the Scheme (and its steps), of affecting the development potential, and hence the value, of the subject land. Regard to characteristics and factors of either kind might lead a hypothetical, informed purchaser to anticipate, independently of the Scheme and its steps, an outcome similar to that which in fact happened as a result of the Scheme. In such a case the Scheme (or knowledge of steps leading to it) may have no impact on the value of the land.

196 The following propositions emerge from these passages.

(a) It is not sufficient, in order that an increase or decrease in value be attributable to the Scheme, that something is a precursor to, leads up to or has some relation to the Scheme [26].

(b) The step or occurrence affecting value must be attributable to the Scheme itself and not to some different notion that ultimately led to the creation of the Scheme [29].

(c) The step must be attributable to the Scheme, not vice versa. That requires that the step must have been taken in order to bring about the Scheme itself or a variant of it that is not materially different [29].

(d) If it is to be attributable to the Scheme, the step must have been taken with the intention of facilitating or for the purpose of creating the Scheme [29].

(e) The effect on value of the characteristics or location of the land, or other factors affecting the land (such as population pressures), which always had the capacity to enhance or reduce its prospects of development and hence its value, are not to be disregarded merely because they led, ultimately, to the Scheme [30].

197 In opening (ts 251 252) and closing submissions (ts 7375) the plaintiffs submitted that the approach in Mount Lawley (2007) to the construction of 'attributable to the Scheme' was applicable to the proper construction of 'attributable to the proposed public work' in s 241(2). The defendants also invited application of the approach in these paragraphs of Mount Lawley (2007) (closing submissions pars 72, 82, 100).

198 Consistently with this, in Startrail Pty Ltd and Main Roads Western Australia [2009] WASAT 243 [42], Chaney P held that the discussion in Mount Lawley (2007) regarding increases or decreases in value attributable to the

Scheme was applicable to the proper construction of increases or decreases in value attributable to the proposed public works in s 241(2). That is the approach I propose to adopt.

199 In section 4.5 I will make findings about what matters, if any, prior to 1995 are attributable to the ROS/RRF. 2.7.3 Does s 241(2) invite or permit attention to the hypothetical zoning of the land, absent the proposed public works? 2.7.3.1 HYPOTHETICAL ZONING QUESTION: INTRODUCTION

200 As I have explained in section 1, the plaintiffs contend and the defendants deny that, in this case, s 241(2) has the effect that the subject land should be valued on the basis of the zoning which it would have had, but for the proposed public works (the past hypothetical rezoning). The plaintiffs contend that, in order to do so, the court should make a finding about what zoning the land would have had, but for the proposed public works.

201 As I have outlined already, the plaintiffs' case is that:

(1) as a matter of fact, the retention of the rural zoning and the reservation of the land were attributable to the Highway and the ROS/RRF;

(2) but for the proposed public works, the land would have been zoned urban at the date of taking;

(3) accordingly, the retention of that rural zoning and the reservation of the land decreased the value of the subject land;

(4) consequently, under s 241(2), that decrease in value must be discounted; and

(5) the practical effect of this, or at least an appropriate means of discounting under s 241(2), is to value the land as if it had been zoned urban at the date of taking.

202 The defendants say that the plaintiffs' past hypothetical rezoning approach is impermissible in law, being contrary to both principle and authority. The defendants contend that s 241(2) requires the discounting, not the disregarding, of increases or decreases in value. It does not require the disregarding of any facts. They contend that s 241 does not permit the construction or postulation of an assumed state of affairs (a 'hypothetical universe') without the proposed public works, or the making of a finding about what the zoning would have been. Further, they contend that, for the purposes of valuation, the only question is about the potential, as at the taking date, of rezoning from rural to urban. The making of a finding, on the balance of probabilities, about what the zoning would have been at that time is impermissible. Consequently, the defendants object to the voluminous evidence of witnesses called by the plaintiffs bearing on the past hypothetical rezoning case, on grounds of irrelevance. The defendants agreed that I should rule on the objection in the course of my reasons for decision.

203 The issues between the parties can be explained by reference to the IPRSP and the PRS. In the IPRSP, the subject land was designated for public purposes: 'State Highways and Roads Existing and Proposed' and 'Open Space Recreation'. In the PRS it was reserved for Regional Open Space and for Primary Regional Roads. The plaintiffs contend that, but for the proposed public works, the subject land would have been designated future urban in the IPRSP (if not already urban under TPS 4) and zoned urban in the PRS. The defendants contend that that is an impermissible approach, and that the land must be valued on the basis that it was designated and zoned rural.

204 For the reasons that follow, I do not accept these contentions of the defendants and would reject the defendants' objection on grounds of relevance. In my view, the discounting requirement of s 241(2) is capable of being given effect to in the manner contended by the plaintiffs. 2.7.3.2 THE CASES: GENERAL

205 The defendants' contention that the plaintiffs' past hypothetical rezoning approach is contrary to authority invites attention to the decided cases. In my view, the weight of authority supports the permissibility of the past hypothetical rezoning question. I begin in this section 2.7.3.2 with a general survey of the cases on what has, in the past, been termed the Pointe Gourde principle (Pointe Gourde Quarrying and Transport Company Ltd v SubIntendent of Crown Lands [1947] AC 565). I then move in section 2.7.3.3 to cases which support the past hypothetical rezoning approach.

206 Recent cases have emphasised that a question about how a section like s 241(2) applies to a case must be approached as a matter of construction of the particular statutory provision, in the context of the statute as a whole. In construing statutes, the court must give effect to the purpose of the legislation. The primary guide to understanding the purpose of legislation is the natural and ordinary meaning of the words of the legislation. Courts should not 'slavishly follow judicial decisions of the courts of another jurisdiction in respect of similar or even identical legislation': Walker HCA [31]. It is the terms of the relevant legislation that are determinative. It should not be assumed that legislation reproduces or attempts to reproduce an understanding of 'principles' stated in other cases such as Pointe Gourde: Walker HCA [47]. See also to the same effect Mount Lawley (2007) [15]; Trandos v WAPC [70].

207 Nevertheless, as the Court of Appeal observed in Mount Lawley (2007) [15], the cases concerning the Pointe Gourde principle and various statutory emanations of it are helpful. Of course, the various different statutory contexts of the cases must be kept in mind. I turn to some of those cases.
208 In Pointe Gourde (572) it was held 'that compensation for the compulsory acquisition of land cannot include an increase in value which is entirely due to the scheme underlying the acquisition'.
209 In Melwood Units Pty Ltd v Commissioner of Main Roads [1979] AC 426, the Privy Council held that the principles stated in Pointe Gourde apply equally to any decrease in the value of the land due to the scheme underlying the acquisition. The Privy Council said as follows: A resuming authority cannot by its project of resumption destroy the potential of the whole 37 acres for development as a drive-in shopping centre, and then resume and sever on the basis that that destroyed potential had never existed. Moreover, in their Lordships' opinion the principle remains applicable in a case such as the present, notwithstanding that planning permission had not been given for the whole 37 acres and would not have been given, when the lack of such permission was manifestly due to the expressway project, and it is established that, without the expressway project, such planning permission would have been given for the whole 37 acres. To hold otherwise in this case would enable the acquiring authority to inflict by its project the same injustice at one remove (434).
210 The Privy Council's statement of the purpose of the Point Gourde approach was adopted by the High Court inThe Crown v Murphy [1990] HCA 42; (1990) 64 ALJR 593 to which I will refer shortly. Similar statements of the purpose can be found in many cases. See, for example, Rees v Minister for Planning and Housing (1991) 76 LGRA 167, 171; Haig v Minister Administering the National Parks and Wildlife Act 1974 (1994) 85 LGERA 143, 149 150.

211 In Housing Commission of New ***South*** Wales v San Sebastian Pty Ltd [1978] HCA 28; (1978) 140 CLR 196, the court was concerned with s 124 of the Public Works Act 1912 (NSW). That section provided that compensation for land compulsorily acquired should be assessed without regard to any alteration to the value of the land arising from the establishment of any public works upon or for which the land was resumed. Jacobs J (205) described s 124 as stating in statutory form a principle which had been developed in the cases independently of express statutory provision, referring to Pointe Gourde. (In this respect, what his Honour said must be taken as having been overtaken by what is said in Walker HCA [29] [47].) Jacobs J then said: A difficulty which arises in the application of this principle is that valuation is in the ordinary case based on market value and, if the proposed public purpose and the possibility or likelihood of resumption therefore has become known prior to the date of resumption, the market value at the time of resumption will probably reflect by way of increase or decrease the possibility or likelihood of resumption for that public purpose. Therefore that value cannot be accepted. Yet it is inevitably in most cases the starting point of the process of valuation. With the actual market value at the time of resumption as the starting point it is then necessary to determine whether that value has been depressed or elevated by the market's foreknowledge of the possible or likely public purpose and consequent resumption. It is therefore inevitable in such circumstances that the public purpose has to be taken into account in the process of valuation but it can be taken into account only for that purpose (205 206).
212 Jacobs J dealt first with situations where there was what he called a 'direct relationship' between the imposition of restrictions on land use and the proposed establishment of the public works. Those cases encompassed situations where the explicit or practical use of the land was restricted to a use for a public purpose for which the land might be resumed and where such a restriction had been imposed as a result of consultation with or direction by the public authority concerned with the carrying out of the relevant public purpose. In such situations the effect on value of the zoning or restriction must be ignored (206).
213 His Honour then went on to consider situations where the relationship between the zoning and the proposed public work is not so clear cut. He explained, by way of an example, as follows: Assume an area of land on the outskirts of existing settlement, and assume a planning authority concerned to designate land uses in a planning scheme. The land is designated open space. Thereafter it is resumed for the purpose of a public reserve. The fact that the land was zoned as open space may have depreciated its value. Does the resuming authority pay compensation at the depreciated value of open space or at some other value? The question cannot be correctly answered without knowing whether there was any connexion between the zoning as open space and the subsequent resumption. If the zoning was done with the intent or in anticipation that the land should be resumed for a purpose such as a public reserve or if the zoning was proposed or dictated by the resuming authority then s 124 requires that the zoning be ignored. It is only a step in the process of subsequent resumption. But in other

circumstances the resumption may be unconnected with the act of zoning. It may be that the resuming authority selects the land for resumption as a public reserve because it is zoned open space; if it does so it is doing no more than ensuring that it, as well as others, conforms to the planning scheme. In those circumstances there is no relevant relationship between the zoning and the public purpose. No public purpose, existing or anticipated, intended, or urged by the zoning authority, leads to the zoning; rather, the zoning leads to the public purpose and consequent resumption (206 207).

214 The reference to something being 'a step in the process of subsequent resumption' has been taken up in many other cases. The notion of a step should not be accorded statutory force. Section 241(2) directs attention to what is 'attributable to the proposed public work'. In Mount Lawley (2007) [19] the court adopted the parties' approach of treating the notion of a 'step' in the Scheme as reflecting something that was attributable to the Scheme.

215 These passages which I have set out were cited with approval in Mount Lawley (2007) [17] [18].

216 In these passages Jacobs J described two situations where the zoning was to be ignored as a step in the process of subsequent resumption:

(a) if the zoning was done with the intent or in anticipation that the land should be resumed for a purpose such as a public reserve; or

(b) if the zoning was proposed or dictated by the resuming authority.

217 Jacobs J considered that the question of what the zoning would have been, but for the purpose of public housing for which the land rezoned, was relevant to the amount of compensation payable under s 124 (211 212).

218 In San Sebastian, Jacobs J construed the words 'establishment of public works' as being: [W]ide enough to cover the whole subject matter of the establishment of the particular public work - proposal or requirement by the relevant authority, intention of the planning authority by such a zoning to induce the establishment of a public work, even urging by outside bodies that the public work should be established (213).

219 With reference to that passage, the Court of Appeal in Mount Lawley (2007) [25] pointed to the wider language of the NSW statute, compared to s 36(2b) of the Scheme Act.

220 In The Crown v Murphy, the High Court was concerned with a resumption under the Acquisition of Land Act 1967 (Qld). Land zoned rural was resumed under that Act for environmental protection purposes (namely, the protection and preservation of a turtle rookery). An application to rezone the land to residential had earlier been refused by the local authority because of the detrimental effect on the turtle rookery, having also received submissions to that effect from the National Parks and Wildlife Service.

221 The Queensland Full Court had stated that restrictions on land use maintained as a result of consultation with the resuming authority must be ignored for the purpose of assessing the value of the resumed land. The High Court described that statement of principle as unexceptionable (595). The court said as follows (595): One purpose of this principle is to ensure that a resuming authority does not employ planning restrictions to destroy the development potential of the land and then assess compensation for its resumption on the basis that the destroyed potential had never existed: Melwood Units Pty Ltd v Commissioner of Main Roads [1979] AC 426, 434. The principle applies in cases where there is a direct relationship between the planning restriction and the scheme of which resumption is a feature and extends to cases where there is merely an indirect relationship, provided that the planning restriction can properly be regarded as a step in the process of resumption: Housing Commission of New ***South*** Wales v San Sebastian Pty Ltd, at 206 207.

222 This passage was applied in Mount Lawley (2007) [14].

223 The High Court went on to point out that a characteristic or attribute of the land, affecting its value, must be taken into account in the assessment of compensation even if the planning restriction that was a step in the process of resumption was dependent upon or directed to that characteristic or attribute. Ultimately, that point was of decisive significance in the case.

224 In Walker HCA, land owned by Walker Corporation was acquired by the Sydney Harbour Foreshore Authority 'for the purposes of the Sydney Harbour Foreshore Authority Act 1998' [4]. The applicable legislation entitled an owner of land to compensation. One of the matters required to be considered was the market value of the land on the date of its acquisition. 'Market value' was defined by s 56(1)(a) of the Land Acquisition (Just Terms Compensation) Act 1991 (NSW) (the Just Terms Act) to require that 'any increase or decrease in the value of the land caused by the carrying out of, or the proposal to carry out, the public purpose for which the land was acquired' be disregarded.

225 For many years before the announcement of the acquisition by the Foreshore Authority, the local council had maintained industrial zoning of the land to prevent development for residential purposes with a view to the land later being acquired by the council or by the State Government for use as a public park.
226 Section 3(1)(a) of the Just Terms Act provided that one of its objects was 'to guarantee that, when land affected by a proposal for acquisition by an authority of the State is eventually acquired, the amount of compensation will be not less than the market value of the land (unaffected by the proposal) at the date of acquisition'.
227 The High Court at [53] [54] held that in this statutory context it was not sufficient that there be an 'indirect relationship' as identified in San Sebastian, where the maintenance of the planning restriction by the local council was seen as a 'step in the process of resumption', in order that the effect of the restriction on the land's value could be disregarded. That is because the court construed s 56(1)(a), in light of s 3(1)(a), as directing attention to a proposal of the resuming authority, not of some other entity such as the local council. The policy revealed by the section was to require a disregard only of that increase or decrease in value for which the resuming authority was responsible.
228 In this case, although the defendants' written closing submissions suggested otherwise, the defendants accepted that a like conclusion could not be drawn in relation to s 241(2). I am content to proceed on that basis, which seems to me to be correct. The discounting required by s 241(2) is not limited to decreases or increases in value caused by the conduct of the acquiring authority. It is any decrease in value attributable to the proposed public works that is to be discounted. For example, a decrease in value attributable to a reservation by the shire, in the relevant town planning scheme, for the purposes of a proposed public work for which the land is later taken by an acquiring authority is to be discounted under s 241(2), notwithstanding that the reservation of the land is not an act of the acquiring authority. 2.7.3.3 THE CASES: PAST HYPOTHETICAL REZONING QUESTION?
229 There are a number of valuation cases concerning other legislation which support an approach along the lines invited by the plaintiffs in this case, to the following effect. If the zoning or reservation of land is attributable to the scheme/acquisition/public work and decreases the value, the court should, or at least may, determine what the zoning of the land would have been but for the scheme/acquisition/public work, and then value the land on that basis. 2.7.3.3.1 NSW cases
230 In RTA v Perry [2001] NSWCA 251; (2001) 52 NSWLR 222 [14] Handley JA stated, quoting the speech of Lord Hope of Craighead in Fletcher Estates (Harlescott) Ltd v Secretary of State for the Environment [2000] UKHL 10;[2000] 2 AC 307, 315, that 'the whole question must be approached upon a consideration of the state of affairs which would have existed if there had been no scheme'.
231 In the passage from Melwood Units I have set out above there is specific reference to the fact that, but for the resumption, certain planning permission would have been given.
232 In Rukavina v The Council of the City of Wagga Wagga [1993] NSWLEC 29, Pearlman J applied s 56(1)(a) of the Just Terms Act, the provision dealt with in Walker HCA. Pearlman J described the task of the judicial valuer as being to determine what planning controls would apply to the land had it not been reserved or zoned for a particular purpose. Pearlman J acknowledged that that determination may by its nature be 'largely conjectural'.

233 The plaintiffs relied heavily on the threestep approach enunciated in Smith v Roads and Traffic Authority of New ***South*** Wales [2005] NSWLEC 438 [63]. In that case, McClellan CJ stated that the traditional approach under s 56(1)(a) of the Just Terms Act involved three steps: Identify the zoning of the land at the date of acquisition. Determine whether that zoning was imposed or retained in order to facilitate the implementation of the public purpose for which the land was acquired. If the answer to question 2 is yes, that zoning is notionally set aside, and the potential of the land and ultimately its market value is assessed by determining how the land would have been zoned, at the date of acquisition, but for the proposal to carry out the public purpose [63].
234 His Honour cited a number of decisions in this regard.
235 The defendants submit that Smith supports making a finding as to the zoning of the land on the taking date, but does not support making a finding about the zoning of the land at any date before the taking date (ts 7119, 7122 7123). I do not accept that submission. In Smith, the taking date was in 2004, though the location of the public work, a bypass road, had been fixed since the early 1970s [131]. McClellan CJ found that the land would have been zoned in a certain way under a 1989 plan and zoned that way at the date of acquisition [124], [131]. It was implicit that the zoning under the 1989 plan would have endured to the date of taking.

236 The approach in Smith was considered by the New ***South*** Wales Court of Appeal in Sydney Harbour Foreshore Authority v Walker Corporation Pty Ltd (No 2) [2006] NSWCA 386; (2006) 68 NSWLR 487 (Walker CA (No 2)) [57] [62]. In summary, the Court of Appeal emphasised the need to formulate questions with reference to the statutory language. It commented that if the three questions from Smith [63] were reformulated to reflect the statutory language, that approach would be legitimate. The second question was reformulated to reflect the statutory language in NSW as follows: Determine whether the imposition or retention of that zoning was part of the carrying out of the public purpose or part of the proposal to carry out the public purpose for which the land was acquired [60].
If it was, and if it caused a change in the value of the land, the change needed to be disregarded. One method of doing that was for the court, consistent with the third question in Smith, to determine, on the probabilities, the zoning which would have otherwise applied and to assess value on that basis: [59] [61].
237 In the present context, if an analogous approach would be taken to LA Act s 241(2), the question would be whether the zoning of the land was attributable to the proposed public works. If it was, and if caused a change in the value of the land, one method of discounting that change is to determine the zoning that would have otherwise applied at the taking date and to assess value on that basis.
238 Contrary to the defendants' submissions set out below, that determination considers the alternative zoning of the land from the point in time at which the zoning was first attributable to the proposed public works. In short, that approach supports the plaintiffs' contentions.
239 What was said in Walker CA (No 2) in this regard was considered in Mount Lawley (2007). The defendants submit that in Mount Lawley (2007) the court said that the approach in Walker CA (No 2) and in Smith was generally inapplicable. For reasons to be developed, I do not accept that submission. I will deal with it in the context of considering Mount Lawley (2007).

240 These New ***South*** Wales decisions must now be understood in light of the decision in Walker HCA. The effect of the High Court decision is that in New ***South*** Wales, it is only changes in value for which the resuming authority is responsible that must be disregarded. That means it is only if the imposition or retention of the zoning is caused by the resuming authority's proposal that the zoning must be disregarded and the zoning that the land would otherwise have had, but for the proposal, must be determined: Caruso v Sydney Water Corporation [2008] NSWLEC 320 [36] [38]. As I have stated above, the limit explained by the High Court in Walker HCA does not apply to s 241(2). 2.7.3.3.2 WA cases
241 In a number of cases concerned with Public Works Act 1902 (WA) s 63 (at one time called the Land Acquisition and Public Works Act 1902 (WA)), judges at first instance in this court have given attention to what the zoning of the land would have been, but for the reservation or public work.
242 Section 63 of the Public Works Act provided that the value of land was to be determined 'without regard to any increased value occasioned by the proposed public work'. The courts have applied this section on the footing that it also applies to a decrease in value caused by the proposed public work.
243 In Duffy v The Minister for Planning [2002] WASC 201 (Duffy (2002)) [17] [18], McKechnie J made a finding that the City Northern Bypass Reservation (CNBR) had blighted the land in question and surrounding land. He made a finding as to the most probable zoning of the land under the applicable scheme if the CNBR had not existed [39].
244 Further, in considering comparable sales, McKechnie J stated that the blight caused by the CNBR needed to be brought to account, as follows: In the present case the blight increases the need and speculation by valuers and town planners looking back to 1963 and then hypothesising as to future development which may have occurred without the CNBR. Thirtytwo years have passed affecting the land within the CNBR. There was clearly a blighted effect caused by the reservation. The best that can be done is to hypothesise as to the probable development of Newcastle Street over a third of a century. Necessarily, this gives rise to possible differences of opinion, each opinion being reasonably held. Each opinion is a forecast of the future in hindcast.

What is a Judge to do? I perceive the task to be to listen to the experts' opinions, select those which seem, for one reason or another, to be the most persuasive and credible, and determine from those opinions, and other evidence, the probable development of a blighted area had a reservation over land not existed. A Judge usually decides

which sales of land are most comparable to the subject land. From this the Judge is to reach a conclusion as to the fair market value for the land at the time of the resumption. In this exercise, the Judge is not an investigator. These are adversarial proceedings and the plaintiff carries the onus of establishing the fair market value on the balance of probabilities. Nor is the Judge a valuer. The Judge must decide on the factual evidence having regard to such expert opinion evidence or part thereof which the Judge accepts [115] [116].

245 An appeal from McKechnie J's decision was dismissed: Duffy (2003). These aspects of the decision did not seem to be in question. At [11], McLure J (Anderson and Steytler JJ concurring) observed that it was not in dispute that the valuers had to make allowance for decreases in market value as a result of the CNBR. At [18], McLure J said that the trial judge found that in the absence of the CNBR the land would have been zoned in a particular way and that finding was not contested. There was no suggestion it was the wrong question.

246 In Arcus Shopfitters (2002) Pullin J referred to the difficulties that arise when a reservation had been in place for over 30 years. He said that the court can consider 'careful professional informed speculation to arrive at conclusions about what conditions would have been relevant to the development of the subject land' on the date of resumption, had there been no CNBR [59]. He posed the question, and made a finding about, what the zoning of the land would have been if there were no reservation: [64] [65]. There was no challenge to that finding on appeal: Western Australian Planning Commission v Arcus Shopfitters Pty Ltd [2003] WASCA 295 [15] (McLure J, Anderson and Steytler JJ concurring). Nor was it suggested that the finding was directed to an irrelevant question.

247 In Flotilla Nominees Pty Ltd v Western Australian Land Authority [2003] WASC 122; (2003) 27 WAR 403 [12] [16], Pullin J set out what he described as the scheme leading to the resumption. He found that part of the scheme was carried into the shire local rural strategy: [13]. He concluded as follows [17]: For the purposes of assessing compensation, these restrictive provisions in the Oakajee Industrial Scheme which adversely affect the value of the subject land must be disregarded because it was the Oakajee Industrial Scheme which led to the resumption. See Pointe Gourde Quarrying & Transport Co Ltd v Sub Intendent of Crown Lands [1947] AC 565; Housing Commission (NSW) v San Sebastian Pty Ltd [1978] HCA 28; (1978) 140 CLR 196; R v Murphy [1990] HCA 42; (1990) 95 ALR 493 at 496; Wilson v Liverpool Corporation [1971] 1 All ER 628 at 634 and 635; Roads & Traffic Authority of New ***South*** Wales v Perry [2001] NSWCA 251; (2001) 52 NSWLR 222 at 232; Rees v Minister for Planning & Housing(1991) 76 LGRA 167 at 171. These authorities indicate that in assessing compensation, there must be excluded from consideration those planning restrictions on the land which result from a scheme for the implementation for a public purpose for which the land was acquired. Such a scheme may be an evolving and progressive process, and may involve several statutory authorities. The ultimate question then becomes one of determining the planning status and value of the subject land as if the public purpose for which it was resumed had never been contemplated (RTA v Perry (supra) at 232).

248 Startrail and Main Roads concerned a claim by Startrail for compensation from Main Roads in relation to land compulsorily taken for the purposes of the Perth Bunbury Highway. The parties proceeded by way of preliminary determination of certain questions. The first question was what would the zoning of the taken land and remaining land have been if not for the primary regional road reservation for the Perth Bunbury Highway. The preliminary questions were framed by the parties, not by the Tribunal. Nevertheless, there is nothing in the Tribunal's reasons to indicate that it considered the first preliminary question to be the wrong question. To the contrary, the Tribunal's discussion of s 241 of the LA Act, and of Mount Lawley (2007) and San Sebastian, appears to me to indicate that the Tribunal considered that the question properly arose in the application of s 241: see [41] [44]. 2.7.3.4 THE DEFENDANTS' SUBMISSIONS

249 Contrary to the approach taken in all these cases, the defendants contend that no question can arise as to whether the land would, but for the proposed public works, have been zoned urban. Rather, the only question is about the potential for rezoning from rural to urban at the date of taking.

250 The defendants support the submission in a number of ways.

251 First, the defendants say that this approach is compelled by the decision of the Court of Appeal in Mount Lawley (2007). I will return to that submission.

252 Next, the defendants refer to cases which state that the court cannot treat as an actuality what is merely a potentiality, and that it is the land's potentiality, not its later realised potential or hypothetically realised potential that is to be assessed. The defendants refer, among other cases, to Turner v Minister of Public Instruction [1956] HCA 7; (1956) 95 CLR 245 and to McKenna v Municipality of Burnie [1970] Tas SR 279; (1970) 22 LGRA 402, 409. I do

not think that these cases, or the other cases relied upon in this respect by the defendants, are of assistance in determining the issues now under consideration. The comments in those cases were directed to the general approach to valuation, not to the disregarding or discounting of the effects on value of the proposed public work or scheme in question.

253 Next, the defendants point to the language of s 241(2) of the LA Act. They emphasise that what is required to be done is to discount an increase or decrease in value, not to disregard facts or events. I accept what the defendants say about the language of s 241(2).

254 The defendants pointed to the decision of the trial judge in Mount Lawley Pty Ltd v Western Australian Planning Commission [2006] WASC 82 (Mount Lawley (2006)) [49] [50] in support of their submission. However, inMount Lawley (2007) the Court of Appeal considered that the trial judge had, in that respect, erred. The court explained the position as follows: The trial judge appears to have accepted a submission to the effect that s 36(2b) of the Scheme Act does not require or authorise the Scheme itself to be ignored, but only the effect on value of the Scheme [49]. Then, he said that this construction led to the submission that, if the Scheme was not to be ignored, it was not permissible to inquire what the zoning of the relevant land might have been, had there been no Scheme [50]. If the effect on value is to be ignored, it will ordinarily be necessary, as it was in this case, to ask what would have been the market perception of the likely zoning in the absence of the Scheme, here the reservation of the Mount Lawley land and the upzoning of the neighbouring land. There is, consequently, no relevant distinction, at least for the purposes of this case, between ignoring the Scheme and ignoring its effect on value. However, it seems to us that this error had no consequence of any significance. It is apparent, from the judgment read as a whole, that the trial judge accepted that it was permissible to consider what was the prospect of upzoning of the Mount Lawley land as at the valuation date and that he regarded the issue of the likely zoning as being foreclosed only in the sense that he was required to assume, as at that date, that the land was still zoned rural [247].

255 The position may be understood in the way explained in Walker CA (No 2). If it is shown, for example, that zoning of the land was attributable to the proposed public work, and if that zoning affected the value, then one way of discounting the increase or decrease attributable to that zoning, in accordance with the command of s 241(2), is to determine what the zoning of the land would have been, but for the proposed public work, and value the land on that basis. As I have said, that is the approach that has been adopted in a number of cases. That is not to say that it is the only permissible approach. Another approach might be along the lines of the prima facie approach explained by Jacobs J in San Sebastian (205 206). One could begin by ascertaining the actual market value, then identify the increase or decrease brought about by the public work, and adjust the market value accordingly.

256 Next, the defendants submit that the approach invited by the plaintiffs involves too many imponderables and is a practically impossible task. While I certainly accept the difficulties inherent in the task, I do not think that it can be said that the difficulties support the conclusion that the approach invited is wrong in principle. In many of the cases I have mentioned the difficulties of the required hypothetical exercise are acknowledged: see, for example, Duffy (2002), Arcus Shopfitters (2002), Rukavina.

257 Further, the defendants submit that:

(a) by their past hypothetical rezoning case, the plaintiffs are seeking compensation for opportunities that were lost some time before the taking date for reasons independent of the proposed public works and so not still in existence at the taking date; and

(b) compensation must be assessed at the taking date, so that opportunities not still existing at the taking date are not compensable.

(See the defendants' closing submissions pars 77 80, 104 114; see also ts 7160 7171.)

258 The defendants give a number of examples of respects in which they contend that the plaintiffs seek to be compensated for opportunities they had lost prior to the taking date. For example, the defendants submit that the plaintiffs' past hypothetical rezoning case seeks to take advantage of the permissive planning environment applying before the IPRSP so as to obtain a hypothetical rezoning before 1997. The defendants submit that the planning environment pertaining before the IPRSP was long gone by the taking date, given the IPRSP in 1997 and the PRS in 2003, and that the only question by 2006 was how the subject land would be treated in the WAPC review then underway.

259 The defendants rely on Griffith City Council v Polegato (1990) 20 NSWLR 696; Roads and Traffic Authority of New ***South*** Wales v Mosca [2006] NSWCA 159; (2006) 146 LGERA 335; and Goodman v Roads and Traffic Authority of New ***South*** Wales [2000] NSWLEC 185.
260 The plaintiffs deny, that for the purpose of these authorities, their case is properly characterised as involving a lost opportunity. For reasons to be developed below, I accept the plaintiffs' submission in this regard.
261 Griffith City Council v Polegato concerned a claim for special value to the owner. Land was resumed in October 1980. Earlier, in 1976, the owners had obtained development consent and building approval to erect shops and residential flats on the land. Some work commenced in 1977. Work ceased after a council officer said, in effect, that work should not take place because there was a strong possibility that the council would require the whole of the land for a car park. The primary judge found that the development project was viable in 1977 until May 1979, but that by October 1980 it had become nonviable. He found that the council's conduct led to the owners abandoning their development project (698 699).
262 The primary judge reasoned that in order for the compensation to be fair, the whole resumption process had to be taken into account, which meant that the viability of the project was to be tested in 1977 or 1978, not 1980 (699).
263 The Court of Appeal upheld an appeal against this part of the primary judge's decision. The court held that the special value must exist at the date of resumption and valuation (701). On the primary judge's findings, that special value, constituted by the opportunity to develop in accordance with the development approval, no longer existed at the date of assessment (701).

264 The court made the following observations about the decision in San Sebastian: The decision in Housing Commission of New ***South*** Wales v San Sebastian requires courts, when assessing compensation for a resumption, to disregard the effect of the proposed acquisition in either depressing or increasing land values. It also requires them to disregard the effect on value of any step in the proposed resumption including any re-zoning of the land undertaken or procured by or at the request of the resuming authority to facilitate the fulfilment of the relevant public purpose. However, the decision goes no further than authorising the assessment of compensation for the land taken at the date it was taken on a basis which disregards the effect on value at that time of the resumption and the proposed use of the land for public purposes.

...

The principles applied in Housing Commission of New ***South*** Wales v San Sebastian require the land to be valued at the relevant date on the artificial, but just, assumption that such value has not been affected by the resumption process. It does not require or authorise the court to disregard facts themselves independent of the resumption process such as costs of building and general market values at the date of resumption (700 701).
265 Contrary to the defendants' submissions, Griffith City Council v Polegato was referred to in Smith v Roads and Traffic Authority (NSW): see [85]. I do not consider Smith to be inconsistent in any way with the reasoning inPolegato.
266 In my view, in Polegato, the court was concerned with an issue of a different character to cases like Smith and to the question, in the present case, of whether the past hypothetical rezoning question is a permissible inquiry under s 241(2). In Polegato, the claim was for special value to the owner. The special value was constituted by an opportunity to develop in accordance with the approved development plans. By reason of economic circumstances, by the date of the assessment, that opportunity had no value. The plaintiffs' past hypothetical rezoning case does not, on a proper analysis, involve a claim for a lost opportunity which no longer existed at the date of taking. Rather, the plaintiffs' case is that, but for the proposed works, the land would have been rezoned to urban in the preIPRSP period, or in 2003 under the PRS (in consequence of a future urban designation under the IPRSP) and that zoning would have endured to the date of taking.
267 For corresponding reasons, I do not consider that the decision in Roads and Traffic Authority (NSW) v Mosca assists the defendants. That case also relevantly concerned an award of compensation in respect of lost opportunities.

268 The primary judge found that the subject land was undeveloped at the resumption date because of the blighting or deterrent effect of the relevant road proposal: [5], [8]. He stated that that planning blight had caused the owner to lose opportunities that earlier development had offered, including:
(1) the value of the lost opportunity to realise the development potential by implementing the detailed planning provisions of certain planning instruments as they affected the subject land and neighbouring land;
(2) the value of the lost opportunity to realise that development potential by either selling the land to a developer or by a joint enterprise between the applicant and neighbouring landowners; and
(3) the value of the lost opportunity to realise that development potential by adopting a particular drainage solution.
269 He said that although the losses had been incurred before the date of compulsory acquisition they decreased the value of the land at that date: see [12] [13].
270 The Court of Appeal held that none of these claimed lost opportunities were relevant to the assessment of compensation. Neither of the first two opportunities were lost. The development potential of the land was to be assessed ignoring the effect of the road proposal at the resumption date, so that the first two opportunities still existed at the taking date: [15] [17]. The third opportunity was lost because of a change in drainage policy by the shire, unconnected with the resumption process. Consequently, its effect on value was not something to be ignored: [18] [19].
271 The third case relied on by the defendants is Goodman v Roads and Traffic Authority (NSW). In my view, that case deals with the specific question of whether the disregarding of the effects of the proposal to carry out the public purpose justifies hypothesising that a landowner would have taken particular steps, such as the making of a planning or development application: see [34] [36]. That is a separate ground of objection raised by the defendants to the past hypothetical rezoning approach. I will deal with that in section 2.7.3.7.
272 The defendants submit that these three cases support this proposition: whatever effects the proposed public works may have had at any time before the taking date, it is only the effects of the proposed public works on the value of the subject land, continuing as at the taking date, that are relevant to the assessment of compensation (closing submissions par 112). In my view, the plaintiffs' past hypothetical rezoning case is consistent with that proposition. The past hypothetical rezoning case contends that:
(a) at various alternative points in time before the taking date, but for the proposed public works, the land would have been rezoned to urban; and
(b) that urban zoning would, but for the proposed public works, have applied at the taking date.
273 Thus, on the plaintiffs' past hypothetical rezoning case, the zoning effects of the proposed public works continued to have effect on the taking date.
274 That brings me, finally, to the decision of the Court of Appeal in Mount Lawley (2007). 2.7.3.5 THE MOUNT LAWLEY (2007) DECISION
275 As I have said, the defendants rely heavily on this decision, suggesting that it required that in this case the only question be of the potential, as at the taking date, for the land to be rezoned. I do not accept that submission. InMount Lawley (2007), the Court of Appeal held that the only question in that case was of the urban potential of the land. In my opinion, that was based on the circumstances of that case it does not dictate a like conclusion for this and all other valuation cases under s 241(2).

276 It is necessary to put the case into its factual and statutory framework. In the late 1980s there was a proposal (by others, not the acquiring authority) to develop land (the Ellenbrook land) located near to the land the subject of the appeal (the Mount Lawley land). The Ellenbrook land to be developed was rezoned from rural to urban deferred by way of an amendment to the Metropolitan ***Region*** Scheme (Amendment 879/33). That amendment also effected the reservation of 301 ha of the Mount Lawley land for parks and reservations. Another portion of the Mount Lawley land was reserved for a controlled access highway. The unreserved portion (***around*** 12 ha) was rezoned by Amendment 879/33 to urban deferred. Before that, all of the Mount Lawley land had been zoned rural.

277 Subsequently, Mount Lawley applied to the WAPC for approval to develop earthworks for urban development on the Mount Lawley land. The development application was refused. The appellant claimed compensation for injurious affection brought about by the making of a town planning scheme. The applicable statutory regime meant that the WAPC was the authority responsible for compensation in respect of amendments to the Metropolitan ***Region*** Scheme (the MRS). The terms of the legislation gave the WAPC an option to pay compensation or to elect

to acquire the affected land. The WAPC elected to acquire the land. Section 36(2a) of the Scheme Act required that the price to be paid was the value of the land as determined in accordance with s 36(2b). Subsection (2b) read as follows: The value of the land referred to in subsection (2a) shall be the value thereof on the date the Commission elects to acquire the land under that subsection, and that value shall be determined -

(b) ...(ii) by the Supreme Court - if the value of the land claimed by the owner thereof is more than $1000;or

(c) by some other method agreed upon by the Commission and the owner of the land,

and that value shall be determined without regard to any increase or decrease, if any, in value attributable wholly or in part to the Scheme.
The 'Scheme' was defined in the legislation: see Mount Lawley (2007) [7].
278 Both parties proceeded on the basis that Amendment 879/33 and a later amendment (Amendment 950/33, which rezoned the Ellenbrook land and the unreserved portion of the Mount Lawley land from urban deferred to urban) were the Scheme for the purposes of s 36(2b): [8].
279 After noting the parties' agreement as to the Scheme [16], the court said the next question was to determine what decreases in the value of the land are 'attributable wholly or in part to the Scheme' [17]. The court described that question as one that can be difficult to answer.
280 The court emphasised that the agreement about what constituted 'the Scheme' did not relate to other amendments to the same effect that might have been made to the MRS, in the absence of Amendments 879/33 and 950/33 [21].

281 The court referred [20] to the decision of the New ***South*** Wales Court of Appeal in Sydney Harbour Foreshore Authority v Walker Corporation Pty Ltd [2005] NSWCA 251; (2005) 63 NSWLR 407 [85] (Walker CA (No 1)) where it was said that:
(a) the lesson of San Sebastian is that no narrow view should be taken of steps which may affect the value of the land; and
(b) 'it is necessary to distinguish between conduct which constitutes a proper exercise of planning powers irrespective of the ultimate resumption and a use of planning powers in pursuit of the proposed resumption'.
282 The court stated that it was not open to make a finding on the balance of probabilities that the same planning decisions would have been made prior to the valuation date [23]. In explaining why that was so, the court emphasised that the amendments giving effect to the reservation of the Mount Lawley land and the upzoning of the Ellenbrook land amounted to the Scheme itself, not to a step in the Scheme [23]. That seems to me of critical significance to the court's reasoning. It does not apply in the present case: the reservation or zoning of the land is not the proposed public work it is, or is contended to be, attributable to the proposed public work.
283 The court continued, as follows: Section 36(2b) requires that the value of the Mount Lawley land is to be determined as at the valuation date without regard to any increase or decrease in value attributable wholly or in part to the amendments that constitute the Scheme. That is to be done by ignoring, as at the valuation date, the reservation and upzoning given effect to by those amendments. Ignoring the effect on value of the amendments as at the valuation date has the consequence of reviving the pre-amendment rural zoning for both the Mount Lawley land and the Ellenbrook land. Accordingly, consistently with what was held in the first appeal ([141], [162], [185]), we are required to ignore the fact of the upzoning (and reservation) and the issue to be determined is what, if any, premium the hypothetical purchaser would be prepared to pay over and above the rural value in order to reflect the urban development potential of the Mount Lawley land [24].
284 The defendants rely on what was said in [24], but I do not consider that it assists their argument. Paragraph 24 explains why, in Mount Lawley (2007), the effect of ignoring the Scheme was to ignore the amendment to the zoning and reservation of the land and so to revive the rural zoning. That in turn explains why the focus was consequently on the potential for urban development and the premium that a purchaser would pay above the rural value. I do not think that what is said in Mount Lawley (2007) controls the present case. In Mount Lawley(2007), the

Scheme had rezoned the land from rural. Thus when the scheme was ignored, that made the zoning rural. See also [398(3)]. In this case, the question remains what the zoning would have been if the proposed public work is ignored. Would it have been rural or urban?

285 In Mount Lawley (2006), the trial judge relied on the 'traditional approach' identified in Smith v Roads and Traffic Authority (NSW). The Court of Appeal considered that approach, and the observations about it made inWalker CA (No 2). The court concluded that, in the Mount Lawley (2007) case, the questions proposed by McClellan CJ in Smith were irrelevant [245]. The defendants submitted that the Court of Appeal rejected the approach in Smith and Walker CA (No 2) as being inapplicable. In my opinion, the court in Mount Lawley (2007) found that the questions posed in Smith were irrelevant because those questions were directed to a statutory scheme where the issue was whether or not the zoning of land was a step in the relevant process and therefore something to be ignored. As the Court of Appeal noted [23], in those cases the zoning of the subject land can be a neutral planning decision that does not need to be disregarded in assessing value. However, in Mount Lawley(2007), the reservation and upzoning constituted the Scheme itself and so had to be ignored. Consequently, when the Scheme was ignored the land was to be treated as rural, with the result that what was required to be determined was the development potential of the land absent the Scheme [245].

286 That reasoning does not seem to me to reject the potential utility of the questions posed in Smith (as reformulated in Walker CA (No 2)) for all cases. In Mount Lawley (2007), the court set out without disapproval what was said in Walker CA (No 2) [57] [61]. The court found that in Walker CA (No 2) the NSW Court of Appeal had not rejected the traditional steps formulated by McClellan CJ in Smith, but it emphasised that the questions must be posed with close regard to the applicable statutory language: Mount Lawley (2007) [243].

287 Moreover, earlier in their reasons in Mount Lawley (2007), the court appeared to acknowledge the potential utility, in some cases, of considering what the zoning would have been, but for the acquisition for a public purpose. The trial judge identified three categories of cases: first, where the subject land had no development potential because of its unique characteristics; second, where the land is ideally suited for development but is acquired for a public purpose thereby destroying a potential development which would have otherwise been realised; third, where the land is between these two extremes, being suitable for development but having some environmental attributes warranting its conservation: Mount Lawley (2006) [104] [106]. The trial judge said that for land that in the second category of cases it is appropriate to consider what the zoning would have been but for the acquisition. The Court of Appeal described that approach as being plainly correct: Mount Lawley (2007) [125]. The Court of Appeal made further reference to this at [228] when they observed that, as the trial judge had said, when dealing with land that is ideally suited to the development, but which is acquired for public purpose, it is appropriate to consider what the zoning would have been but for the acquisition.

288 Thus, as I read the decision, the Court of Appeal in Mount Lawley (2007) did not reject the threestep approach in Smith generally. Rather, the court explained why it did not assist in the circumstances of the Mount Lawleycase.

289 In my opinion, in this case, as in the New ***South*** Wales cases as identified in Mount Lawley (2007), a central issue in valuing the subject land is whether the zoning of the land was a step attributable to the proposed public works. 2.7.3.6 PAST HYPOTHETICAL REZONING QUESTION: CONCLUSIONS

290 In my opinion, the application of the discounting element of LA Act s 241(2) is capable of permitting the plaintiffs' past hypothetical rezoning case as outlined in section 2.7.3.1. That seems to me to be consistent with the language and evident purpose of the section, and to be supported by authority.

291 In my view, the purpose of the Pointe Gourde approach identified in Melwood Units (434) and The Crown v Murphy (595) applies to the discounting element of s 241(2). A purpose of that approach is to ensure that an acquiring authority cannot by a proposed public work, cause planning restrictions to destroy development potential of land and then assess compensation for its taking on the basis that the destroyed potential had never existed. It is consistent with that purpose to construe s 241(2) as being capable of being given effect to in the manner contended by the plaintiffs as outlined in section 2.7.3.1.

292 The weight of authority in Western Australia and in other jurisdictions supports that approach, albeit that the cases deal with other legislation. In Startrail and Main Roads, the court determined as a preliminary question the zoning of the land but for the proposed public works [45]. 2.7.3.7 PAST HYPOTHETICAL REZONING BASED UPON LANDOWNER APPLICATION

293 The defendants advance an alternative contention against the plaintiffs' past hypothetical rezoning case. As a matter of fact, the plaintiffs' past hypothetical rezoning case relies, in substantial part at least, on a hypothetical application for rezoning by the plaintiffs. For example, it is an essential element of the plaintiffs' preIPRSP rezoning case that the plaintiffs would, but for the proposed public works, have applied to the shire for the rezoning of the subject land to urban. It is part of the plaintiffs' case that in the preIPRSP period, rezoning of land and was 'developer driven'. In other words, land was not rezoned at the initiative of the shire. It was rezoned if and when a landowner sought to have the land rezoned in order to subdivide and develop. This is discussed in section 4.1 below.
294 The defendants contend that if, contrary to their primary position, the past hypothetical rezoning question arises, that question must be answered by reference to objective criteria of orderly and proper planning. The past hypothetical rezoning cannot, the defendants contend, be founded upon a hypothetical application for rezoning by the landowner.
295 In support of that contention, the defendants point to the inherently objective character of the process of valuation. If the past hypothetical rezoning, absent the proposed public works, can be founded on a hypothetical application by the landowner, the landowner's personal characteristics will bear upon whether any such application would have been made. The defendants submit that it is antithetical to that objective character that the land would be valued differently depending upon the personal and subjective characteristics of the landowner.
296 Further, the defendants submit that such an approach is liable to give rise to inherent contradictions of a kind illustrated by the facts of this case. On the plaintiffs' preIPRSP rezoning case, the plaintiffs would have applied to rezone the land so that they could develop it and subdivide it, and the shire would have approved the rezoning so that it could be developed. Yet by definition, the land cannot be valued on the basis that it was developed and subdivided. Rather, it would be valued on the basis of an urban zoning, but on the assumption that it had remained, for some 10 or so years, a large undeveloped en globo lot of urbanzoned land.
297 Further, the defendants submit that there is no authority supporting hypothetical rezoning based upon a hypothetical application by the landowner, but that there is some authority against it.
298 The plaintiffs did not identify any case in which hypothetical rezoning had been based upon a hypothetical application for rezoning by the landowner. My research has not revealed any such case.
299 The defendants rely on the decision in Goodman v Roads and Traffic Authority (NSW). One of the issues in that case was the market value of the applicant's land, resumed by compulsory acquisition. The highest and best use of the resumed land (disregarding the proposal for which the land was acquired) lay in its potential to be developed for medium density residential units in the form of five townhouses. In determining the value of that potential, the applicant submitted that if the property had not been affected by the road widening proposal, the applicant would have obtained development consent for five townhouses on the site the year before the date of acquisition. Consequently, the applicant submitted, the land could be valued on the assumption that the property would have been offered for sale with the benefit of that consent, together with a building approval or construction certificate at the date of acquisition [34].

300 In rejecting that submission, Talbot J said as follows [35]: Although the fiction developed at common law and perpetuated in s 56(1)(a) of the Just Terms Act entitles the Court to disregard any increase or decrease in the value of the land caused by the proposal to carry out the public purpose of road widening, it does not go so far as to justify any presumption that a landowner would have taken particular steps that were not in fact taken. The market value must be determined at the date of acquisition on a basis which disregards the effect on value of the proposed use of the land for the public purpose. Decisions such as Housing Commission of New ***South*** Wales v San Sebastian Pty Ltd & Ors [1978] HCA 28; (1978) 140 CLR 196 go no further than that (see Griffith City Council v Polegato and Anor (1990) 71 LGRA 208 particularly at 212).
301 His Honour considered that enquiries made by the applicant 12 months before the taking date, and the response to those enquiries, could properly be taken into account in concluding that the hypothetical purchaser would have been satisfied that development consent would be forthcoming without extended delay: see [36] [38].
302 The plaintiffs sought to distinguish Goodman and submitted, in the alternative, that it should not be followed. The ground of distinction, the plaintiffs submitted, is that Goodman dealt with the question relating to a notional development application, not to the zoning of the land. There does not seem to me to be much force in this alleged ground of distinction. Whether there was an extant approval of the development application would have affected the

value of the land. Moreover, Talbot J explained his reason for rejecting the applicant's argument in terms that would apply equally to a rezoning application. His Honour stated that disregarding s 56(1)(a) of the Just Terms Act did not justify any hypothesising about what the landowner would have done but for the proposed public purpose: see [35].

303 The plaintiffs submit that the purpose of the discounting requirement applies equally to a past hypothetical rezoning based on a landowner application as it does to other hypothetical rezonings. Moreover, the plaintiffs point out that the third question posed in Smith is not in terms of what the zoning of the land would have been independent of any action by the owner. Rather, the third question directs attention to the broad issue of what the zoning of the land would have been but for the proposal to carry out the public works. In answering that broad question, the plaintiffs submit, there is no ground to exclude a conclusion about the zoning of the land based on or influenced by hypothetical application by the landowner.

304 It is not necessary to determine whether the past hypothetical zoning question may permissibly involve rezoning based upon a hypothetical landowner application. That is because, for reasons to be explained in section 4.3 of these reasons, I am not satisfied that, absent the proposed public works, the plaintiffs would have applied to have the land rezoned.

2.8 The effect of the proposed public works on the surrounding land

305 I accept the plaintiffs' submission that if the proposed public works have constrained the zoning or development of land surrounding the subject land in a way that decreases the value of subject land:

(a) that decrease in value is required to be discounted by s 241(2); and

(b) one method of doing so is to hypothesise what the development of the surrounding land would have been, but for the proposed public works, and value the subject land on that basis.

306 That approach is supported in a number of the cases to which I have already referred. See, for example, Duffy(2002) [115] [116]; RTA v Perry [14]; Roads and Traffic Authority (NSW) v Mosca [50] [55]; Rees v Minister for Planning and Housing (170).

2.9 Evidentiary considerations relating to planning questions: subjective or objective?

307 In the context of a question about the prospects, at the date of valuation, of future planning permission being given for a particular (more profitable) use, it is wellestablished that the question is to be approached objectively, by reference to orderly and proper planning, not subjectively by reference to the likelihood of particular decisionmakers approving the contemplated future use. In Trandos v WAPC, Anderson J (Wheeler J & Einfeld AJ concurring) put the position as follows: It seems to me that an evaluation of highest and best use does not necessarily depend on an assessment of the subjective intentions and personal views of the particular Minister of the day. Mr David Smith, who was the Minister who granted advertising approval with respect to Amendment 542, was not called to give evidence. Neither was his successor in office, on whom the responsibility would have fallen to grant or refuse the amendment. The potentiality of the land is to be judged by reference to planning considerations viewed objectively, the question being: what is the most advantageous use to which the land can be put, having regard to the dictates of orderly and proper planning? No doubt, this question can be posed in terms of what uses the relevant planning authorities were likely to approve, but care must be taken not to turn the question into a subjective one. I do not think it would be to the point to prove, for example, that a particular Minister was given to disregarding sound planning advice [73].

See also De Ieso v Commissioner of Highways (253).

308 It is common ground in this action that a corresponding approach is to be taken in relation to a question of past hypothetical rezoning. The approach in Trandos v WAPC applies; the question is to be determined by reference to the dictates of orderly and proper planning, not by reference to what a particular decisionmaker would have decided. See the plaintiffs' closing submissions pars 2.103 2.105, 4.221 4.222; ts 7370 7373; and, as to the defendants, ts 7174 7181. I accept that.

309 It is also common ground and I accept that the content and application of orderly and proper planning varied over different periods, and that, insofar as attention is directed to a past hypothetical zoning question, it was the content of orderly and proper planning at the relevant time in the hypothetical past, not at the time of the trial, that is to be applied.

Section 3: Objections to evidence

3.1 Introduction

310 Numerous objections to evidence were made in the course of the trial. Many of them were dealt with by ruling and oral reasons in the course of the trial. I will say no more about those. I also gave written reasons in relation to some rulings: see McKay v Commissioner of Main Roads [2009] WASC 353; McKay v Commissioner of Main Roads [No 2] [2010] WASC 153; McKay v Commissioner of Main Roads [No 3] [2010] WASC 232; and McKay v Commissioner of Main Roads [No 6] [2010] WASC 274.

311 Throughout the trial, the parties adopted the approach of identifying those objections on which a party sought a ruling immediately, and those on which both parties were content for the ruling to be given in the course of the reasons, to the extent that it proved necessary. There was a very substantial volume of objections. Many of the objections related to evidence that was not, or did not appear to be, of central significance. The deferral of a ruling on some objections provided further opportunity for conferral between counsel in relation to those objections. That conferral could then take place in the context of a better appreciation of the evidence as a whole, and the significance or otherwise of the evidence to which objection was taken. In many respects, the opportunity for further conferral proved fruitful. In light of those matters, and given the prospect of argument and resolution of the objections substantially disrupting the progress of the trial, the approach adopted by the parties seemed to me a sensible approach (notwithstanding the general desirability of determining evidentiary objections in the course of the trial, as to which see Dasreef Pty Ltd v Hawchair [2011] HCA 21 [19] [20], [135];Professional Services of Australia Pty Ltd v Computer Accounting and Tax Pty Ltd [No 2] [2009] WASCA 183 [96] [98]).

312 In the course of the trial, a number of documents were filed by the parties setting out the objections in the deferred ruling category. Conferral in the course of the trial, and between the completion of the evidence and the presentation of closing submissions, substantially reduced the objections ultimately pressed by the parties. The objections ultimately pressed by the parties were set out in two documents. The first was dated 23 September 2010 and related to evidence admitted provisionally and set out those objections which, after conferral, were maintained. The other document was dated 13 October 2010. It dealt with evidence that had already been admitted provisionally and identified which objections were maintained and which were withdrawn to such evidence.

313 The two most substantial areas of objection on which deferred rulings were sought were:

(a) the defendants' objections to evidence led by the plaintiffs in support of the past hypothetical rezoning case; and

(b) the plaintiffs' objections to various evidence led by the defendants on the ground that it was inadmissible because the evidence was after the date of the taking (posttaking evidence).

I will say something about the other objections in section 3.6 below.

314 I have dealt with and overruled the defendants' objection to the plaintiffs' evidence in support of the past hypothetical rezoning case. See section 2.7.

315 At some points in the trial, the plaintiffs took steps to pursue a ruling, in the course of the trial, on their objections to posttaking evidence. However, in the end they elected not to seek a ruling during the trial, but rather to permit the evidence to be led and received provisionally subject to their objection, with the objection to be determined in the course of my reasons for decision. That was also the approach invited by the defendants. I was content to adopt the approach sought by both parties and defer ruling on the posttaking objections. The plaintiffs led some evidence in rebuttal of the defendants' posttaking case. That evidence was also received provisionally on the basis that if the plaintiffs' posttaking objection was ultimately upheld, the evidence provisionally received in rebuttal would fall away. In closing submissions the plaintiffs confirmed that they did not rely on any posttaking evidence as part of their case, and relied on it only in rebuttal, if their posttaking objection was overruled (ts 7225).

316 I turn to the plaintiffs' objections to the posttaking evidence relied on by the defendants.

317 It is convenient to begin by identifying, in broad terms, the posttaking evidence relied on by the defendants, and their contentions about the admissibility of that evidence.

3.2 Posttaking evidence: the defendants' position

318 All the posttaking evidence whose admissibility is in dispute relates to the question of the value of the subject land, based on its urban potential at the date of taking.

319 The defendants accept that the starting point for valuation is the value of the land assessed by reference to the knowledge of the hypothetical purchaser and vendor at the date of taking. However, they contend that there are various exceptions to the general rule against the receipt of evidence of events after the taking date. One of those exceptions is uncontroversial. I begin with the uncontroversial exception.

320 It is common ground that comparable sales after the date of taking can be taken into account in determining the value of the land. This is wellestablished by authority: Melwood Units (436); Arcus Shopfitters (2002) [79];Housing

Commission (NSW) v Falconer (576). As Mahoney JA explained in Falconer (576), evidence of subsequent sales is not admitted on the basis that the hypothetical parties would have known or could have foreseen them. Rather, it is admitted because it assists the court in the process of identifying what the hypothetical parties would have found acceptable for the land at the relevant time.
321 The other purposes for which the defendants contend that posttaking evidence is admissible are:
(a) to 'confirm a foresight';
(b) to explain or complete a process that had began by the taking date; and
(c) to exemplify delays and contingencies in the planning approval process.
322 The 'confirmation of a foresight' contention is founded on a statement by Hope JA in Housing Commission (NSW) v Falconer (558) to the effect that where a future event is foreseeable at the time of taking, evidence of that future event is admissible to confirm the foresight, although evidence of future events is inadmissible to prove a hindsight. The defendants submit that that statement has been followed in many cases subsequently.
323 The defendants submit that the 'completion of a process' basis for the receipt of posttaking evidence is supported by the decision of Pain J in Chino Pty Ltd v Transport Infrastructure Development Corporation [2006] NSWLEC 768; (2006) 153 LGERA 136 [66], and by what is said in Jacobs M, The Law of Resumption and Compensation in Australia (1998) [16.6.19.1]. In the latter respect see also Jacobs M, Law of Compulsory Land Acquisition (2nd ed, 2010) [19.190]. The defendants do not point to any authority in support of the third exception they rely upon, to 'exemplify delays and contingencies ...'
324 The plaintiffs deny that posttaking evidence is admissible for any of these purposes.
325 For reasons to be developed, I do not accept that posttaking evidence is admissible for any of these purposes. There are, in my view, other relevant purposes for which posttaking evidence is admissible in this trial. I will identify these in section 3.4 below.
326 The posttaking facts relied on by the defendants were set out in a document dated 29 December 2009, filed on 26 May 2010.

327 The defendants rely primarily on the contents of two planning documents released in June 2009. One is entitled 'Directions 2031: Draft Spatial Framework for Perth and Peel' (Directions 2031). The other is entitled '***Southern*** Metropolitan and Peel SubRegional Structure Plan (for public comment)' (the SMPSRSP). The SMPSRSP was the product of the review of the IPRSP that commenced in 2005 and that was on foot at the date of taking.
328 The defendants contend that, in various respects, Directions 2031 and the SMPSRSP confirmed the foresight of the expert planners relied upon by the defendants. For example, the defendants' expert planners expressed the opinion that, for various reasons, the WAPC was unlikely to endorse urbanisation north of Old Mandurah Road in the short or medium term. These reasons include:

(a) the Peel ***region*** had more than sufficient urban zoned land to comfortably meet the demands of population growth until at least 2031;
(b) urban development would be prioritised for land that is already zoned urban or urban defined;
(c) WAPC would not support the expansion or ribbon development of commercial activity along the Mandurah Pinjarra corridor; and
(d) activity corridors, referred to in Network City, would not be interpreted to allow ribbon development after the further investigative work prescribed in Network City.
329 The defendants point to various aspects of what is said in Directions 2031 and in the SMPSRSP as confirming their planners' 'foresight' in these respects.
330 The defendants foreshadowed an intention to crossexamine the plaintiffs' planners on their evidence as to what was foreseeable in July 2006 by reference to Directions 2031 and the SMPSRSP. However, in the end the defendants elected not to do so. Instead, counsel put to the plaintiffs' planners that, at the date of taking, particular outcomes of the review were foreseeable.
331 Directions 2031 and the SMPSRSP were published in June 2009 for public comment. In August 2010, the final version of Directions 2031 was published, entitled 'Directions 2031 and Beyond: Metropolitan Planning Beyond the Horizon' (Directions 2031 Final). Also published in August 2010 was a draft for public comment of the 'Outer Metropolitan Perth and Peel SubRegional Strategy' (the OMPPSRS). The 2010 planning instruments, Directions

2031 Final and the OMPPSRS, were received provisionally as exhibit 246A and exhibit 246B respectively, subject to the plaintiffs' posttaking objection.
332 The defendants did not point to any particular parts of Directions 2031 Final or the OMPPSRS in their submissions. I take it that the defendants contend that these instruments confirm the foresights of their planners in ways corresponding to the 2009 for public comment publications Directions 2031 and the SMPSRSP.
333 The defendants relied upon what they termed the 'completion of a process' exception in relation to the evidence of Ms Marion Thompson. I will outline the evidence in section 3.5.3 below.
334 The defendants also rely on the 'completion of a process' exception in relation to applications for rezoning of neighbouring land. The defendants contend that applications that were already on foot at the date of taking can be followed through to completion. See section 3.5.4 below.
335 I note that, in their oral evidence, the defendants' planners did not, to any substantial extent, refer to or rely upon posttaking evidence to support their opinions.
336 In the end, on my analysis of the evidence as a whole, it is not clear to me how much significance, if any, the posttaking evidence has to the resolution of the question of the value of the subject land based on its urban potential. Nevertheless, in deference to the detailed submissions made, and to the attention given to the question in the course of the trial, I will state my views and reasons in detail.
3.3 Posttaking evidence: review of the authorities
337 To my mind it is important to return to the starting point the method by which market value is determined. As I have said, in this case value means market value, because there is no claim for special value. The approach to ascertaining market value was summarised in the passage in the judgment of McHugh J in Kenny & Good v MGICA[49] [50], set out in section 2.2 above. The reference to the parties having access to 'all currently available information' should be noticed.
338 In Spencer v The Commonwealth Isaacs J said the following about the relevance of events subsequent to the date of valuation: All circumstances subsequently arising are to be ignored. Whether the land becomes more valuable or less valuable afterwards is immaterial. Its value is fixed by Statute as on that day. Prosperity unexpected, or depression which no man would ever have anticipated, if happening after the date named, must be alike disregarded. The facts existing on 1st January 1905 are the only relevant facts, and the all important fact on that day is the opinion regarding the fair price of the land, which a hypothetical prudent purchaser would entertain (440).
339 In Longworth v Commissioner of Stamp Duties (1953) 53 SR (NSW) 342, Owen J made these observations about the task of valuation and the relevance, or otherwise, of subsequent events: A tribunal which is called upon to make such an assessment of value must in each case decide what facts affecting values would have been in the contemplation of the notional buyer and seller at the relevant date, and what, if any, effect on values the existence of those facts would have had on the sum which the one was prepared to give, the other to take. One such relevant fact may be the probability or possibility that an event will later occur, and the existence or nonexistence of that contingency may have its effect on values. If so, it is relevant. But the value must surely be ascertained in the light of the facts, including the probabilities, then existing, and without taking notice of subsequent happenings (348).

340 That passage has been cited with approval in many cases. See, for example, Multari v Roads and Traffic Authority of New ***South*** Wales [2004] NSWLEC 649 [30]; Maidment v Roads and Traffic Authority of NSW [2006] NSWLEC 606; (2006) 153 LGERA 249 [47].

341 Consistently with that approach, in Gosford Shire Council v Green (1980) 48 LGRA 201, the New ***South*** Wales Court of Appeal held that the knowledge of the hypothetical parties to an assumed sale of the land was limited to knowledge at the date of the resumption. The court rejected the appellant's argument that evidence of events and circumstances after the resumption date (which differed in some respects from that which would have been expected as at the resumption date) should be received on the basis that the court should prefer fact for prophecy or expectation: see (207, 210 211). Reynolds JA stated that 'as a matter of principle, what in fact happened can have no logical probative relationship to what a reasonable purchaser would at an earlier date have expected to happen' (207).
342 A similar approach was stated by Mahoney JA in Housing Commission (NSW) v Falconer (576) in relation to the ascertainment of the market price as follows. The hypothetical parties are 'taken to know what an appropriately

informed person would know on that date' and no more. The price which the parties would accept would be 'affected by the uncertainties as at that date' as to matters such as future demand, future decisions of zoning authorities.

343 These statements were cited with approval by Santon JA (in dissent) in Port Stephens v Tellamist [157] [158].

344 As I have said, the defendants' submissions rely heavily on a statement of principle by Hope JA in Housing Commission (NSW) v Falconer in support of the alleged 'confirmation of foresight' basis for admission of posttaking evidence. It seems to me important to put the statement into its context in the case. The facts may be summarised as follows. The plaintiffs were owners of land resumed by the Housing Commission. The plaintiffs were in the course of taking steps to have new buildings constructed on the land. After the resumption, the plaintiffs sought a new site. They purchased replacement land and entered contracts for the carrying out of the construction work. They claimed a sum comprising the additional building cost as compared with the cost at the time of resumption, the market value of the resumed land and amounts for aborted expenditure. The primary judge proceeded on the basis that the owners were to be compensated so as to be reinstated to the position from which they had been displaced by reason of the resumption. Consequently, he allowed compensation for the actual and estimated future increases in costs occurring during reasonable delays in the owner's building programme following resumption.

345 The majority of the New ***South*** Wales Court of Appeal (Hope and Mahoney JJA) held that application of the reinstatement principle was inappropriate in the circumstances of the case. They found that the loss suffered by the plaintiffs by reason of the increase in the cost of erecting, on other land, the buildings they had proposed to build on the resumed land, was a consequential loss resulting from the resumption to which regard could be had in assessing the value of the resumed land. Those matters went to the special value of the land to the owner: see (555 556, 574, 576 577). Special value to the owner is assessed by reference to any additional amount that a prudent purchaser in the position of the owner would pay to avoid missing out on owning the subject property (556 557, 573).

346 This did not justify adding the total amount of the actual and estimated future loss to what would otherwise be the market value. Rather, the amount of the loss that was anticipated at the date of resumption should be taken into account in assessing the value of the land to the owner (557, 574B, 575B). Consequently, the primary judge was entitled to take the extra cost of building into account in deferring the value of the property, but not simply to add it as a component of compensation (559C, 580B).

347 The court said the following about the extent to which the primary judge was entitled to take into account the actual increase in building costs, given that those additional costs had only emerged subsequent to the date of the resumption. Hope and Mahoney JJA both emphasised that that question fell to be considered in the context that it was a claim of special value to the owner. Hope JA's reasoning can be summarised as follows:

(a) The question is not what a prudent purchaser in the position of the owner would pay after he had obtained a knowledge of all the circumstances that in fact occurred after the date of resumption, but what a person in his position would pay in the light of knowledge available at the time of resumption (557F).

(b) However, the decided cases dissolve into uncertainty (557F).

(c) He referred to the decision in Gosford Shire Council v Green, stating that there was no evidence in the case to suggest that a change of plans might have been contemplated by a hypothetical purchaser at the time of resumption (558AB).

(d) In the passage relied upon by the defendants, Hope JA said as follows (558BC):

However, there are many decisions, including decisions of the High Court, in which it has been held that evidence of future events is admissible not to prove a hindsight, but to confirm a foresight: see for example, Trustees Executors and Agency Co Ltd v Commissioner of Taxes (Victoria) [1941] HCA 18; (1941) 65 CLR 33; Minister for Army v Parbury Henty & Co Pty Ltd [1945] HCA 52; (1945) 70 CLR 459, at pp 514, 515, McCathie v Federal Commissioner of Taxation [1944] HCA 9; (1944) 69 CLR 1, at p 16; Australian Apple and Pear Marketing Board v Tonking [1942] HCA 37; (1942) 66 CLR 77, at p 108.

(e) The relevant principle was that the amount of compensation is a matter of assessment and so, like damages, it can be calculated in the light of subsequent facts to the extent that they throw light on items of value properly taken into account having regard to the circumstances existing at the date of acquisition: Minister for Army v Parbury Henty & Co Pty Ltd [1945] HCA 52; (1945) 70 CLR 459, 514 (Williams J).

(f) Applying that principle at the date of resumption, a prudent purchaser would have anticipated a significant rise in building costs, but the court could not attribute to the prudent purchaser an exact knowledge of what increases would occur. Rather, the question is what the attitude of a prudent person would have been (558G).
(g) The actual increases could be looked at in confirmation of what the hypothetical purchaser would have foreseen (558 559).
(h) The extent to which foresight coincided with or approached fact is a question of fact, but in this case it would be impossible to conclude that a purchaser in 1974 could predict what building costs would be seven years later.
(i) Accordingly, the primary judge was not entitled to simply add the incurred and anticipated increase in building costs and discount slightly. Rather, he should have determined what the hypothetical prudent purchaser would have added to the purchase price by reason of his appreciation of what the future might hold in respect of delay in building and increase in building costs (559C).
348 Mahoney JA emphasised that it is necessary, in determining the relevance of subsequent events, to distinguish between a claim for market value and special value. In relation to a claim for market value, the principle on which the market price is determined prevents or restricts reference to subsequent events. The hypothetical parties are taken to know what an appropriately informed person would know on that date and not more (576BC). They would take into account then existing uncertainties as to future matters and evidence of what subsequently occurred in relation to those matters is not ordinarily admissible.
349 A different approach applies in relation to claims for special value. In relation to claims for special value, the considerations restricting reference to subsequent events for market price do not apply. Accordingly, the general rule that courts prefer facts to prophesies should be applied (577).
350 Mahoney JA also referred at (578) to the principle stated by Williams J in Minister for Army v Parbury Henty set out in par (e) of my summary of the reasoning of Hope JA.
351 Glass JA took a different view on the question of the proper approach to valuation. He found no error in the primary judge's reinstatement approach (565 566).
352 It can be seen, therefore, that Hope JA's statement that evidence of future events is admissible not to prove a hindsight but to confirm a foresight was said in the context of a claim for special value to the owner, not a claim for market value. Examination of the cases to which he referred in support of that proposition reveals that three of those cases did not relate to a question of market value. The fourth case concerned subsequent sale of the property to be valued.
353 Trustees Executors & Agency Co Ltd v Commissioner of Taxes (Victoria) [1941] HCA 18; (1941) 65 CLR 33concerned the value of a life interest for the purpose of assessing probate duty. Minister for Army v Parbury Hentywas a claim for compensation for special value, not market value (492, 508, 514 515). In McCathie v Federal Commissioner of Taxation [1944] HCA 9; (1944) 69 CLR 1, the task was to assess real value, not the market value, as Williams J emphasised (6 7). In Australian Apple & Pear Marketing Board v Tonking [1942] HCA 37; (1942) 66 CLR 77the posttaking evidence was the subsequent sale of the fruit to be valued.
354 I turn to cases that have applied or referred to the 'confirmation of a foresight' statement in Housing Commission (NSW) v Falconer.
355 In Caruso v Sydney Water Corporation [2008] NSWLEC 320, land was acquired in March 2007. The owner of the land sought compensation on the basis that the highest and best use of the land was by development in accordance with a scheme referred to as the Bewscher Scheme. The question arose as to the advice that a prudent hypothetical purchaser would obtain in relation to the possible development of the land. Pain J considered that a prudent purchaser would have spoken to an officer of the council to obtain advice on whether the Bewscher Scheme, or something like it, was likely to be considered for approval. A meeting was held in January 2008 with an officer of the council in which it was recorded that advice was given that a scheme such as the Bewscher Scheme would be considered. Pain J held that the advice in January 2008 was reasonably close in time to the date of acquisition and that it was appropriate to take the information in the minute of the meeting of January 2008 into account as information that a prudent hypothetical purchaser would have been likely to have obtained (in March 2007) [83]. In so holding, Pain J referred to the statement in Falconer that events after the date of acquisition which confirm foresight can be relied upon.
356 As I understand this decision, the evidence of the January 2008 advice was received on the basis that it was likely (able to be inferred) that similar advice would have been given in March 2007. This seems to be the sense in which it is said that what occurred in January 2008 confirmed the foresight as at March 2007.

357 I accept that evidence of advice given after the taking date may, in some cases, be admissible on the basis that the inference is open that the same or similar advice would have been given at the taking date. That approach was also taken in McDonald v Roads & Traffic Authority of NSW [2009] NSWLEC 105 [26].
358 In Minister Administering The Crown Lands Act v Deerubbin Local Aboriginal Land Council (No 2) [2001] NSWCA 28; (2001) 50 NSWLR 665 Spigelman CJ considered that the primary judge had relied upon and applied the dictum of Hope JA in Housing Commission (NSW) v Falconer. The primary judge made findings as to what was and was not foreseeable at the time of acquisition. Spigelman CJ (Powell & Heydon JJA agreeing) held that there was no error in the primary judge's findings. Spigelman CJ's discussion appears to involve an acceptance of the correctness of what was said by Hope JA in Falconer. That is how it was taken in McDonald v Roads & Traffic Authority (NSW) [29].
359 Minister v Deerubbin Local Aboriginal Land Council (No 2) was not a valuation case.

360 Minister Administering The Crown Lands Act v New ***South*** Wales Aboriginal Land Council [2009] NSWCA 151was also not a valuation case. The central question related to whether a Minister held a particular opinion at the time a claim was made under land rights legislation. One of the grounds of the appeal related to the primary judge's reliance on postclaim events. In dismissing the appeal Basten JA (Beazley & Tobias JJA agreeing generally) approved the dictum of Hope JA and said that the primary judge had applied it correctly: see [67] [70]. He also observed that Falconer was a valuation case and the comments were specific to valuation. Outside that sphere, the general principle does not exclude reference to later events as evidence relevant to a situation at an earlier point in time [68].
361 In McDonald v Roads & Traffic Authority (NSW) a question arose as to the potential for rezoning of the subject land. In that context, the resuming authority submitted that the fact that the subject land had not been rezoned by the time of trial, 18 months postacquisition, confirmed the hypothetical purchaser's foresight that there would be a significant delay in the rezoning of the land, relying on Falconer. Biscoe J emphasised the dangers in applying this principle. These include the danger of 'bootstraps' argument that it was foreseeable at an acquisition date that something would or would not happen because that thing did or did not happen after the acquisition date. Further, he referred to the dangers noted in Minister v NSW Aboriginal Land Council [68] as follows. Firstly, reliance on later evidence may distract attention from the point in time at which the relevant assessment must be made. Secondly, there are dangers in drawing inferences from later evidence, without close attention to the circumstances in which it arose.
362 In the end, Biscoe J gave weight to evidence of witnesses and of matters closer in time to the acquisition date and made a finding without regard to the fact that, by trial, rezoning had not occurred. He said he would make the same finding if he took into account that the rezoning had not occurred by the trial date: see [29] [31]. Consequently he did not need to decide whether to take that into account.

363 In Maggiotto v Roads and Traffic Authority of New ***South*** Wales [2006] NSWLEC 54, the land in question was the subject of a constraint due to airport noise. After the acquisition date, the airport was closed. Cowdroy J referred to the general principle that it was the factual circumstances at the date of acquisition that must be considered, because those were the considerations for the notional prudent purchaser. He referred to the dictum of Hope JA in Housing Commission (NSW) v Falconer. As at the time of the acquisition there had been some newspaper articles speculating that the airport would close and the council had a publicly stated policy in favour of seeking the closure of the airport. The court concluded that the material at the time of acquisition did not point to a trend which a prudent purchaser would have expected to continue after acquisition but rather merely amounted to conjecture about the possible future closure of the airport. Consequently, the subsequent closure of the airport could not be characterised as confirming a foresight: see [76] [78].
364 In Maidment v Roads and Traffic Authority (NSW) [46], a case concerning market value, Biscoe J referred to the dictum of Hope JA in Falconer in the course of setting out a series of statements of principles from the cases. So far as I can see, he did not give specific attention to any posttaking evidence.
365 In Multari v Roads and Traffic Authority (NSW), the applicant sought to lead evidence of events subsequent to the date of resumption in relation to the proposed closure of an airport which was proximate to the subject land and which constrained residential development over that land. Talbot J ruled the evidence to be inadmissible. His Honour distinguished between real value and market value, saying that what was said in McCathie v Federal

Commissioner of Taxation had to be understood in that context. Further, he emphasised that in Housing Commission (NSW) v Falconer the court was concerned not with market value but with special value to the owner. See [26] [37]. As would be apparent, I agree with Talbot J's reading of Falconer.
366 NSW Aboriginal Land Council v Minister Administering the Crown Lands Act [2007] NSWLEC 481, was a land claim case, not a valuation case. In setting out a number of general principles Jagot J referred to the dictum in Housing Commission (NSW) v Falconer: [17(7)]. It appears that the court reasoned to its decision in the absence of the subsequent material and then concluded that that subsequent material, if relevant, was consistent with the findings made. See [104] [110].

367 In Sorell Council v Downie [2005] TASSC 2, a substantial amount of evidence was led regarding matters occurring after the date of valuation. Evans J described the evidence as being of very limited assistance because with limited exceptions a determination of market value revolves ***around*** the information available to the hypothetical parties at the assessment date. That approach to the determination of market value means that the court's general preference for actual facts over prophesies when assessing damages in both personal injury and wrongful death cases has very little application to land acquisition cases concerned with market value. I agree with that observation
368 Evans J referred to what Mahoney JA had said in Housing Commission (NSW) v Falconer (576). He also referred to what Hope JA had said in Falconer (557 559). Evans J concluded that he agreed with the approach taken by Hope JA and considered that the court was not entitled to attribute to either of the hypothetical parties exact knowledge of any of the subsequent events. In some instances, however, that evidence reinforces the conclusion that matters in question were contingencies that the parties would have foreseen [23].
369 Evans J observed that different considerations can apply to the utilisation of evidence of matters occurring after the date for assessment when considering heads of compensation other than market value such as special value, severance, betterment, injurious affection and disturbance. I agree with that observation.
370 I have not identified any subsequent evidence to which Evans J had regard in his reasoning.
371 In Chino Pty Ltd v Transport Infrastructure Development Corporation one of the issues concerned the value of the loss of an easement for support. The respondent (TIDC) sought to rely on an extensive amount of the post-acquisition documents in support of its case. It argued that it had an intention to restore the easement for support and that that intention was able to be known by a prudent hypothetical purchaser at the date of acquisition from the documents then available and was confirmed by events subsequent to the date of acquisition which were able to be taken into account. Under the heading of TIDC's submissions on public purpose, Pain J said as follows: While generally events after acquisition are not able to be taken into account, subsequent or future events can be considered in the following circumstances:

(a) Where the future events were foreseeable, evidence of them is inadmissible not to prove a hindsight, but to confirm a foresight: Housing Commission of NSW v Falconer [1981] 1 NSWLR 547 at 558 per Hope JA;

(b) If inquiries by a prudent purchaser on the date of acquisition would have been sufficient to establish what was to occur. This includes inquiries of the resuming authority in cases where injurious affection or increase in value after acquisition is being considered. In Brisbane City Council v Thorpe (1965) 13 LGRA 31, the Council compulsorily acquired a strip across the front of the claimant's house and two years after the date of acquisition (and before the conclusion of the hearing of the claim for compensation) offered to move the improvements wholly onto the retained land. In holding that this offer could be taken into account by the Court in assessing compensation, Gibbs J, said (at 37):'It was reasonable to expect that the Council would offer to make the building available, since the purpose of the resumption was to widen a road and possession of a portion of a building could be of no use to the Council. The fact that it has since made the offer may be regarded to show that as at the date of resumption, the building would have been available.'(c) Where a course of events is in process and comes to fruition proximate in time to the acquisition date but after it, that is, events or policy development which commenced prior to resumption may be followed to their result after resumption: Marcus Jacobs, The Law of Resumption Compensation in Australia, LBC Information Services, North Ryde, 1998.

The defendants rely upon this as a statement of principle. In particular, they point to par (c) which they submit supports their 'completion of a process' contention. However, read in context, this passage seems to me to be a summary of TIDC's submissions rather than the court's statement of principles. Further, that can be seen from what is said by the court at [98].

372 The court's decision about whether post-acquisition documents were able to be considered is at [95] [106]. Pain J referred to Gosford Shire Council v Green and to Housing Commission (NSW) v Falconer. Her Honour appeared to accept the dictum of Hope JA that evidence of future events is admissible to confirm a foresight but not to prove a hindsight. See [98] and [103]. The court found that because TIDC's subjective intentions in relation to reinstatement of the easement were not relevant, and because there was no communication of that intention before the date of acquisition, there was nothing to disclose to a prudent hypothetical purchaser any statement that the easement would be reinstated. In those circumstances, documents becoming available to the public after the acquisition could not be considered [104] [105].

373 The defendants also rely on Cairns City Council v CMB No 1 Pty Ltd (1997) 96 LGERA 306. That case concerned a claim for compensation for injurious affection arising from the rezoning of land. The new town planning scheme, promulgation of which was the foundation of the claim for injurious affection compensation, mistakenly designated the land not as commercial (as was intended) but as rural. Subsequently, the error was discovered and drawn to the attention of the council and corrected.

374 McPherson JA began by identifying that it was a claim for injurious affection. While the statutory provisions directed attention to market value as the means of determining injurious affection, his Honour stated that compensation for injurious affection was not necessarily to be approached on the same basis as compensation for compulsory acquisition (309). He then considered the authorities regarding the relevance of subsequent events in some detail. He explained that if the conventional approach such as that taken by Mahoney JA in Housing Commission (NSW) v Falconer was applied the subsequent rezoning of the land would retain the character as a contingency to be relied on only to show what as a reasonable person a hypothetical seller and buyer might have foreseen. He did not consider that that was the appropriate approach in the circumstances of the case. He referred to authorities such as Minister for Army v Parbury Henty, McCathie v Federal Commissioner of Taxation and Australian Apple & Pear Marketing Board v Tonking in support of an approach that favoured evidence of the true facts rather than predictions. He also referred to the approach taken in personal injuries cases (312 314). He concluded that the court was bound to take into account the fact that the error had been rectified and the other subsequent events (314 315).

375 A similar approach was taken by Williams J (320 321).

376 Thus the fact that the case concerned a claim for injurious affection was central to the court's reasoning regarding the use of subsequent events. On that basis McPherson JA expressly distinguished the case from the general market value approach, on which the approach of Mahoney JA in Falconer was the conventional approach.

3.4 Posttaking evidence: summary of principles

377 From this review of the authorities, I would summarise my conclusions as follows.

(1) Outside of the sphere of valuation, there is no general limit on the use of later events as evidence relevant to and assisting in determining a situation at an earlier point in time: Minister v NSW Aboriginal Land Council [68]. In other contexts relating to compensation and assessment of damages, the courts often express a preference for subsequent facts (occurring between the date of assessment and trial) over prophesies.

(2) In valuation cases, different considerations apply depending on whether the subsequent event is said to bear upon market value, real value, special value, injurious affection, severance or other notions of value.

(3) Special considerations apply when the question is one of market value. That is because the basic principle by which value is determined the notional bargain of the hypothetical purchaser and vendor directs attention to what was known and knowable at the time of valuation, and not to subsequent material.

(4) Because of that, in cases involving market value, the general preference of the court for subsequent facts over prophesies that applies in relation to questions of compensation and assessment of damages, has little role to play.

(5) The dictum of Hope JA that subsequent events may be admissible to prove a foresight was made in the context of a claim for special value, not market value. Moreover, the cases upon which Hope JA relied were not concerned with market value.

(6) Some subsequent cases have proceeded on the basis that the dictum applies to questions of market value. See, for example, Chino v TIDC; Sorell Council v Downie; Maggiotto v Roads and Traffic Authority (NSW);

andMaidment v Roads and Traffic Authority (NSW). However, in none of those cases did application of the dictum result in the admission of any evidence of any real significance to the outcome of the case.

(7) I am not persuaded that, on a question of market value, posttaking evidence is admissible to 'confirm a foresight'. In other words, I do not consider that Hope JA's dictum applies to a determination of market value. I agree with the observations of Mahoney JA in Housing Commissioner (NSW) v Falconer (576 577); Talbot J inMultari v Roads and Traffic Authority (NSW); and Evans J in Sorell Council v Downie that I have referred to in section 3.3. I also agree with the summary in Hyam A, The Law Affecting Valuation of Land in Australia (4th ed, 2009), 502. In my view, acceptance of a 'confirmation of a foresight' exception on a question of market value is not consistent with the fundamental principles about the process by which market value is determined. See, for example, the passages I have set out from Spencer (440); Kenny & Good v MGICA [49] [50]; Longworth (348) andGosford Shire Council v Green (207).

(8) Evidence of advice given, or other events, after the taking date may, in some circumstances, be admissible on the basis that it may be inferred that the same or similar advice would have been given to the hypothetical purchaser at the taking date: see, for example, Caruso v Sydney Water Corporation.

(9) I do not accept that posttaking evidence about a matter relating to market value can be admitted on the basis that it relates to acts or policy development which commenced prior to resumption and can be followed to completion. In my view, a 'completion of a process' exception is not consistent with the basic principles about the determination of value: the notional bargain of the hypothetical parties. That bargain is based on what was known and knowable at the relevant time. The only authority cited for this alleged exception is Chino [66]. As I have explained, in my view, that passage was a summary of a party's submissions, not a statement of principle.

378 These observations are all in the context of the question of value based on urban potential. For the sake of clarity, I should make clear that I do not exclude posttaking evidence insofar as it bears upon a different question: whether the land would, but for the proposed public works, have been zoned urban prior to the date of the taking. That question seems to me to be of a different character to the question of the land's urban potential viewed through the eyes of the hypothetical purchaser. Determining the potential of the land involves evaluating the probability, in the mind of the hypothetical purchaser, of a possible rezoning. On the other hand, the past hypothetical rezoning question involves an assessment, on the balance of probabilities, of whether something would or would not have occurred prior to the date of the taking. That question is not determined through the eyes of the hypothetical purchaser. Rather, it is determined by the court, as part of the process of discounting required by s 241(2). The answer to the past hypothetical rezoning question becomes a premise for the hypothetical purchaser's consideration of the price to be paid. Consequently, in assessing the past hypothetical rezoning question, the special considerations relating to the ascertainment of market value do not arise.

379 Thus, for example, in determining whether the subject land would have been rezoned to urban at some time before the IPRSP, the IPRSP itself is not inadmissible, notwithstanding that it was published after the period in question. It is open to have regard to planning decisions and policies reflected in the IPRSP in assessing the probability that, had an application been made in say 1995, rezoning would have been approved. Of course, the question of weight is another matter.

3.5 Posttaking evidence: rulings 3.5.1 The SMPSRSP and Directions 2031

380 As I have said, the defendants submit that parts of Directions 2031 and the SMPSRSP can be used to 'confirm the foresight' of the defendants' planning experts Mr O'Neill and Mr Moran. I have summarised in section 3.2 a number of the respects in which the defendants say their experts' opinions as to what was foreseeable was confirmed in Directions 2031 and the SMPSRSP.

381 In many instances the passages relied on by the defendants are not expressed in terms of what, in the relevant planning expert's opinion, was foreseeable as at July 2006. Moreover, some of the passages do not squarely state the propositions said by the defendants to be stated in the passage. However it is not necessary to determine the objections on these bases. That is because, I do not accept the defendants' contentions that:

(a) there is a 'confirmation of foresight' exception to the general rule against admission of posttaking evidence on a question of market value; and

(b) the 'confirmation of foresight' exception (if it exists) applies to the use of the SMPSRSP and Directions 2031 as confirming the defendants' planners' opinion on what was foreseeable at the taking date.

382 What the defendants refer to as the foresight of their planners is the planning advice that would have been given to the hypothetical purchaser as at the taking date. The defendants submit that this does not involve placing

into the mind of the hypothetical purchaser information not ascertainable at the taking date. Rather, the defendants submit, a court can take account of subsequent events in assessing the competing views of planning experts. The defendants contend that consideration of the SMPSRSP and Directions 2031 assists the court to prefer the defendants' planners because their views better accord with the outcome, three years after the taking date, of the review on foot at the time of the taking.

383 The court assesses the advice of the competing views of the planners from the perspective of the hypothetical purchaser: De Ieso v Commissioner of Highways (252); see section 2.4 above. Contrary to the defendants' submissions, to use the subsequent outcome to assess the competing views about the appropriate advice to the hypothetical purchaser seems to me to involve, indirectly at least, placing that subsequent information into the mind of the hypothetical purchaser.

384 Further, the reasoning invited by the defendants seems to me to involve using the benefit of hindsight, in the form of what subsequently emerged in the ultimate review, to test the force of the competing opinions about what was foreseeable at the date of taking.

385 The defendants did not cite any authority in which subsequent events were permitted to be used to test or support an expert view about what was or was not foreseeable at the time of taking in the context of an assessment of market value.

386 I have concluded, in section 3.4, that there is no confirmation of foresight exception to the general rule of inadmissibility of posttaking information in assessing market value. For that reason, I reject the defendants' contentions about the admissibility of the SMPSRSP and Directions 2031.

387 Further, even if, contrary to my view, there is a 'confirmation of foresight' exception in the context of an assessment of market value, for the reasons in this section 3.5.1, I am not persuaded that that exception applies so as to permit the use of subsequent events to test or support an expert view about what was or was not foreseeable at the time of acquisition.

388 For these reasons, I rule that the SMPSRSP and Directions 2031 are inadmissible for the purpose of assessing the urban potential of the subject land. The defendants did not seek to rely upon these documents for any other purpose. Accordingly, they are inadmissible. 3.5.2 Related objections

389 For the same reasons, I uphold the plaintiffs' objections to the 2010 planning publications received provisionally as exhibit 246A and exhibit 246B: Directions 2031 Final and the OMPPSRS.

390 The plaintiffs called Mr William Burrell in rebuttal of the defendants' posttaking case relying upon Directions 2031 and the SMPSRSP (ts 1883). As I have said, given that the ruling on the posttaking objection was deferred, the plaintiffs led the evidence of Mr Burrell against the contingency that their objection to the defendants' Directions 2031 posttaking case was rejected.

391 The defendants sought to rely on aspects of Mr Burrell's evidence. However, the plaintiffs' objections to Directions 2031 and the SMPSRSP having been upheld, the contingent basis for the receipt of Mr Burrell's evidence falls away.

392 In any event, my conclusion that there is, in the present context, no confirmation of foresight exception, and the other matters raised in section 3.5.1 above, mean that Mr Burrell's evidence cannot be used to 'confirm the foresight' of the defendants' planners.

393 More generally, in light of my ruling regarding Directions 2031 and the SMPSRSP, any evidence adduced by the plaintiffs in rebuttal of the defendants' reliance on Directions 2031 and the SMPSRSP is taken not to be in evidence.

394 The plaintiffs made three specific objections in relation to particular paragraphs of one of Mr Moran's reports. To the extent that those paragraphs refer to Directions 2031, or matters derived from Directions 2031, or matters otherwise occurring after the taking date, I uphold the objections. Consequently I uphold objection 24 in relation to the first sentence of exhibit 196B, 34/196 [8]. The second sentence of that paragraph does not rely on Directions 2031 and is unexceptionable. I uphold objection 25 to Mr Moran's report, exhibit 196B, 34/197 [14]. Objection 26 relates to 34/197 [15]. I uphold that objection, but only to the extent that paragraph refers to subsequent matters. I rule that the words '(not subsequently experienced in 2008/2009)' in [15(2)] and the words 'not 53% as targeted by the Government' in [15(3)] are inadmissible as posttaking evidence.

395 In the defendants' planners reports and valuers reports there are other references to the planning position as at the time of the report and thus after the taking date. Some of those references were the subject of objections

advanced earlier in the trial but not ultimately pressed by the plaintiffs. For the reasons that I have given, I attach no weight to evidence of that kind. 3.5.3 Evidence of Ms Marion Thompson

396 It is necessary to outline some of Ms Thompson's evidence in order to put the plaintiffs' objections, and the defendants' contentions in response, into context.

397 On 7 June 2006, prior to the taking date, the Minister for Planning and Infrastructure convened a land supply summit. The catalyst for the summit was the critical shortage of vacant residential lots on the market in Perth and Peel and the apparent anomaly that there was a large pool of lots with conditional approvals but a shortage of lots available for sale.

398 Following the land supply summit, Ms Thompson was appointed 'land release coordinator'.

399 In August 2006, the Department for Planning and Infrastructure (the DPI) carried out a survey of conditionally approved subdivisions in the Perth metropolitan ***region*** and the Peel sector with 30 or more lots that, as 30 June 2006, were yet to be developed. The purpose of the survey was to collect evidence of the supply of forthcoming lots and the extent and types of delay experienced by land developers. The results of the survey were provided to Ms Thompson.

400 In February 2007, Ms Thompson prepared and published a report entitled 'The Coordination of Land Release for Perth and Peel: February 2007' (the Land Release report). The Land Release report is an attachment to Ms Thompson's statement. The plaintiffs object to the admission of the Land Release report on the ground that it was published after the date of taking. A substantial part of Ms Thompson's evidence recites or summarises conclusions from that report: see exhibit 213A [32] [42].

401 The defendants rely on conclusions said to be drawn in the Land Release report including:

(a) the shortage of vacant residential lots was caused by difficulties in delays in converting en globo urban zoned land to finally approved serviced lots;

(b) there were various causes for the difficulties and delays indentified in the reports; and

(c) there was no shortage of en globo urban zoned land and consequently no recommendation to rezone more land to urban.

402 The defendants contend that the results of the inquiry conducted by Ms Thompson, in the form of the Land Release report, are admissible on the basis that they reflect the completion of a process that was underway at the time of the taking. For the reasons given in sections 3.3 and 3.4, I do not accept that posttaking evidence is admissible on the basis of a 'completion of a process' exception. In this case the hypothetical purchaser would have known of the critical shortage of available residential lots, of the apparent anomaly given the large number of conditionally approved lots, and that steps were to be taken to investigate issues about lot supply. A hypothetical purchaser would not have known in advance, the outcome of that process. Rather, the hypothetical purchaser would have known that there was uncertainty associated with the results of the inquiries then to be undertaken.

403 For these reasons, I am not persuaded that the Land Release report or Ms Thompson's evidence in exhibit 213A [32] [42] is admissible, as the defendants contend, on the basis of the 'completion of a process' exception to the general rule against posttaking evidence. The defendants do not put any other basis for admission of this evidence. Consequently, I uphold the objection to this evidence.

404 In preparing the Land Release report, Ms Thompson used a preliminary report about the results of the survey conducted in August 2007.

405 Subsequent to the publication of the Land Release report, and following further analysis of relevant data by the DPI in June 2007, the DPI published a report entitled 'Residential Developers Survey: Lot Supply, Sales Outlook and Development Delays' (the Developers Survey report). The Developers Survey report was an attachment to Ms Thompson's statement. The plaintiffs objected to the Developers Survey report, and paragraphs of Ms Thompson's statement referring to it, on grounds that it was posttaking evidence.

406 Separately from their posttaking objection, the plaintiffs objected to the admission of the Developers Survey report on the ground that it was hearsay. That objection was argued in June 2010. I upheld the objection: McKay [No 2]. A number of paragraphs of Ms Thompson's witness statement were also consequently ruled inadmissible on grounds of hearsay.

407 The Developers Survey report was referred to, and was said to be an attachment, in a report of Mr Brian Haratsis (a witness called by the plaintiffs). Consequently, the Developers Survey report was received as a exhibit, and the defendants tendered the paragraphs of Ms Thompson's statement which had earlier been struck out under

my ruling, for the limited purpose of rebutting so much of Mr Haratsis's opinion as referred to or relied upon the Developers Survey report (ts 5118 5120). It was accepted by the defendants that receipt of the Developers Survey report as an exhibit on this basis did not detract from my ruling that the contents of the Developers Survey report were inadmissible hearsay.

408 For corresponding reasons to those I have given respecting the Land Release report, I would also uphold the plaintiffs' posttaking objection to the Developers Survey report and to those parts of Ms Thompson's statement setting out or summarising its contents (exhibit 213A [23] [28]). 3.5.4 Mr Cameron Bulstrode

409 The parts of Mr Bulstrode's evidence to which objection is taken relate to the progress of rezoning applications after July 2006. Specifically, the evidence relates to the approach taken by the Peel ***Region*** Planning Office in the second half of 2007, and to decisions made in September 2007 and at later times. That evidence is the subject of objections 4, 5, 13 and 16. For the reasons that follow, I uphold those objections. The defendants relied on the 'confirmation of foresight' and 'completion of a process' exceptions. As I have explained, in my view there is no confirmation of foresight exception and no completion of a process exception. What is relevant is what the wellinformed hypothetical purchaser would have expected, as at July 2006.

410 The defendants also submitted that the progress, after the taking date, of these other applications is admissible 'to exemplify delays and contingencies' in the planning and approval process. No authority was cited in support of this contention. I do not accept that that is a basis to admit evidence of events after the taking date. The question is what was known and knowable at the taking date.

411 The focus on the knowledge of the wellinformed hypothetical purchaser on the taking date does not mean that there is a blanket prohibition on the receipt of any evidence relating to an event after the taking date. For example, evidence of how an application was dealt with on the day after the taking date may have been admissible on the basis that it supports an inference that advice to similar effect would have been given on the date at the taking; see point 8 of my conclusions in section 3.4. However, the evidence objected to relates to events more than a year after the taking date. I am not persuaded that this evidence is probative of anything relating to advice that would have been given to, or the knowledge, as at the taking date, of the wellinformed hypothetical purchaser.

412 Two other objections were maintained in relation to other parts of Mr Bulstrode's evidence: objections 9 and 14. It is not clear to me whether the defendants ultimately relied on the evidence the subject of these objections. It was not identified in the defendants' list of posttaking facts relied upon, subject to one possible exception. The exception is the defendants' general statement in submissions that they rely on the progress of applications for rezoning in the locality of the subject land commenced prior to the taking date which were completed or continued after the taking date. As I have said, I do not accept that there is a completion of a process exception to the general rule against the receipt of posttaking information in the present context.

413 In any event, it seems to me to be unnecessary to rule on the evidence the subject of these objections. The evidence the subject of objection 9 relates to amendments made to the PRS since it was finalised in 2003. The substantial majority of those amendments were initiated and completed prior to the taking date. The dates of the initiation and finalisation of amendments are set out in attachment 18 of Mr Bulstrode's statement. One amendment was finalised in 2007 relating to regional open space in West Pinjarra. In my view, even if a completion of a process exception otherwise justified the receipt of this evidence, it is not probative of anything relating to the issues in this action.

414 Objection 14 relates to a generalised statement (exhibit 200B, 35/19 20) about the fate of urban rezoning requests in the four years up to the date of the statement, namely 27 August 2008. That generalised statement is not probative of anything. To the extent relevant, the progress and responses to the applications are dealt with in detail in Mr Bulstrode's evidence and in other evidence. 3.5.5 Peel Sector Review Report

415 Dr Andrew Montgomery, the director of Urban Growth Management in the Department of Planning (formerly the DPI), gave evidence about the preparation of the SMPSRSP and the preparation of Directions 2031.

416 Dr Montgomery prepared a report to the WAPC in July 2006 (exhibit 92, annexure ADM 3, 51/203212A plus attachments). Dr Montgomery finalised and signed the report on 25 July 2006. Prior to that, the report existed only in the form of draft on his computer. It was not available to the public in that form (ts 2086).

417 The plaintiffs object to the admission of this document on the basis that it was finalised and provided to the WAPC after the taking date. The defendants contend that the document can be received as an indication of what

would have been revealed by the DPI, on inquiry, had inquiry been made as at the date of taking. The defendants submit, in particular, that the report states, and advice would have been given in response to an enquiry that:
(a) the DPI did not then have sufficient reliable information to conclude its review; and
(b) substantial further investigation was needed before any decision were to be made on urbanisation.
418 I admit the document on the basis that it includes those matters that, it is open to infer, would have been revealed by the DPI on inquiry as at the date of taking. That is not to say that the full extent of the contents of the report would have been so revealed.
419 I will say more about this report in section 7.3 of these reasons. 3.5.6 The evidence of Mr Dawkins
420 The defendants point to some evidence of Mr Dawkins (ts 2172 2175) concerning the deliberations of the Network City implementation committee as confirming the foresight of the defendants' planners about what Network City did and did not support. They also point to parts of Mr Dawkins' evidence (ts 2129 2130, 2133 2136) as confirming their planners' foresights in relation to the draft LPS. The plaintiffs object to the use of this evidence for that purpose.
421 Consistently with the approach I have taken elsewhere, I would not admit evidence of posttaking events on the basis that it confirms the foresight of the defendants' planners. However, the relevant evidence of Mr Dawkins (ts 2129 2130, 2133 2136, 2172 2175) does not seem to me to concern events after July 2006. Consequently, I do not uphold the objection to this evidence of Mr Dawkins.
3.6 Other objections 3.6.1 The plaintiffs' objections
422 The plaintiffs objected to five parts of the evidence of one of the defendants' valuers, Mr Brian Zucal. All of these objections (objections 6, 7, 19, 20 and 21) are to evidence that is part of Mr Zucal's response to the reports of the plaintiffs' valuers. In particular, the evidence objected to relates to Mr Zucal's response to comparable sales relied on by the plaintiffs' valuers.
423 The grounds of objection were that the process of reasoning was inadequately revealed, or hearsay, or both. After the objections were initially made, the defendants supplemented the evidence of Mr Zucal by his statement of 7 September 2010 (exhibit 272C, 48/290 293). In light of the supplementary statement, the plaintiffs maintained their objections, contending, in substance, that the reasoning as disclosed by the supplementary statement did not and could not support or sustain the conclusions stated in the evidence to which the objections were taken.
424 It is not necessary to deal with the plaintiffs' contentions by way of objection because, given Mr Zucal's reasoning as articulated in the supplementary statement, I do not attribute any weight to any of the evidence to which the objection was taken.
425 The same applies to the one objection (objection 44) taken to a passage of the evidence of the defendants' other valuer, Mr Keith Wilson.
426 Mr Jeremy Dawkins was the chairman of the WAPC from January 2004 to February 2009. The plaintiffs objected to a number of parts of Mr Dawkins' evidence. The objections were argued before Mr Dawkins gave evidence. In the course of argument, the defendants agreed to the deletion of some of the passages to which objection was taken. In relation to some of the objections, I ruled that the evidence should be received provisionally. In conferral, after Mr Dawkins' evidence was given and after all of the evidence in the trial had been received, the plaintiffs withdrew a number of the objections they had made. The plaintiffs were content for many of the matters on which they had made objections to be dealt with, instead, by way of submissions as to the weight to be given to the evidence.

427 Following this process, the plaintiffs maintained only one objection to the evidence of Mr Dawkins. The objection is to exhibit 92 [25]. In its redacted form, after conferral, [25] states that as at July 2006, Mr Dawkins' view was that the WAPC should not contemplate further urban development in the North Yunderup area in the absence of more detailed strategic planning and subsequent planning policies for the area, including the ***South*** Metropolitan and Peel ***Region*** Urban Growth Management Strategy and specific scientifically verified measures to address the critical impact of urban development on the PeelHarvey catchment.
428 Initially, the plaintiffs objected to this evidence on three grounds. However, following conferral, they withdrew two of those grounds. The ground ultimately pressed was that the evidence was irrelevant because the views of the WAPC would not have been sought or obtained by reasonable enquiry of a prudent hypothetical purchaser at the date of the taking. That form of objection appears to relate to the form of the paragraph before it was redacted. In any event, it is unnecessary to rule on this objection. For the reasons given in section 7.3 below, without regard to

this evidence, I am satisfied that the hypothetical purchaser would have known that no rezoning would occur until the substantial completion of the Planning Review.
429 I deal with the plaintiffs' objection to exhibit 205 (received provisionally) in section 4.9. 3.6.2 The defendants' objections
430 With the exception of the objections relating to the plaintiffs' hypothetical rezoning case, none of the defendants' objections seem to me to raise matters of central significance to the resolution of the action. I deal with the defendants' objections in sch 1 to these reasons. I have not found it necessary to determine all of the defendants' objections. Some of those objections are on grounds of relevance. I have not formally resolved those objections. If I have referred to evidence in the course of my reasons then, by definition, I consider it relevant in the context and for the purpose there identified. If I have not referred to it, I consider it to be not relevant or not of sufficient weight to influence my reasoning. In some other cases, I have not ruled on an objection because I have concluded that I would not accept the relevant evidence in any event.
Section 4: PreIPRSP rezoning: but for the proposed public works, would the subject land have been rezoned to urban between 1990 and 1997?

4.1 PreIPRSP rezoning: overview of the parties' cases 4.1.1 The plaintiffs' case
431 On the plaintiffs' case, the question of whether the subject land would have been rezoned to urban before 1997 involves two questions. First, would the plaintiffs have made an application to have the land rezoned; secondly, what would have been the likely outcome of such an application? The plaintiffs require favourable answers to both questions in order to succeed on the preIPRSP rezoning case. As will emerge, I answer both questions unfavourably to the plaintiffs.

432 The plaintiffs accept that an application to rezone the land would have been necessary in order that rezoning occurred. In other words, the plaintiffs do not contend that rezoning would have occurred without action by the plaintiffs as the owners of the land. As was a central theme of the plaintiffs' case, rezoning in the preIPRSP period was developer initiated and developer driven. See, for example, the unchallenged evidence of Mr Michael Berrie: exhibit 231A [3] [4]. There is no evidence of rezoning of land to residential in the preIPRSP period at the instigation of the shire. There is evidence that the shire, at times in and ***around*** 1991, encouraged owners to initiate a rezoning (see section 4.4). The experts agreed that without an application by the plaintiffs, the subject land would not have been, or at least was unlikely to have been, rezoned to urban in the preIPRSP period (ts 3954 3956). I accept that, absent a rezoning application, the subject land would not have been rezoned in that period.
433 The plaintiffs contend that, but for the proposed public works, they would have applied prior to 1997 to have the subject land rezoned. On the plaintiffs' case, that would have occurred either in 1991 1992, following the invitation to landowners by the shire's letter of 15 January 1991, or in 1994, following Mr McKay's discovery of sewerage works in the area. I will deal with those contentions below in sections 4.5 and 4.3 respectively.
434 On the plaintiffs' case, the question of whether the plaintiffs would, but for the proposed public works, have applied for rezoning of the subject land is to be determined subjectively. In other words, the question is whether, but for the proposed public works, the plaintiffs would have applied. The question is not whether a reasonable landowner would have applied. In determining that question, the plaintiffs submit, and I accept, that in assessing whether the plaintiffs would have applied, regard can and should be given to objective facts and circumstances bearing on whether a reasonable landowner would have applied.
435 The second question concerns the result of a hypothetical rezoning application. The plaintiffs and the planners called by the plaintiffs pointed to a range of matters as supporting the conclusion that, absent the proposed public works, had the plaintiffs applied for rezoning of the subject land prior to 1997, the land would have been rezoned to residential/urban. The following provides a broad overview of the major matters on which they relied.
436 First, in the period in question there was a 'permissive planning environment' in which the shire and planning authorities were generally supportive of rezoning proposals. More particularly:

(a) there was a shortage of urban land supply in Western Australia, and in the Peel ***region*** in particular, in the late 1980s and early 1990s;

(b) the need for sewering of land was a major constraint on rezoning rural land to residential in the Peel ***region*** in this period, especially for land near the Serpentine and Murray River systems;
(c) Ravenswood was one of the priority areas for the Shire of Murray for land to be sewered and rezoned;
(d) the attitude of the shire towards a rezoning proposal influenced the state planning authority's decisions; and

(e) consequently, any land that was capable of being sewered in the ***region***, and especially in or ***around*** Ravenswood, had good prospects of being rezoned.

437 Furthermore, in January 1991, the shire sent a letter to landowners ***around*** Ravenswood, creating an opportunity to have land connected to deep sewerage and asking for expressions of interest in residential development. The plaintiffs contend that, but for the proposed public works, they would have received that letter, which would have been a catalyst for the plaintiffs applying to rezone the subject land. I will deal with that contention in section 4.5 below.
438 Secondly, the location and characteristics of the land favoured its urbanisation and provided no constraints to its urbanisation. Some of the land's locational and physical characteristics are summarised in the planners' joint report of 30 June 2010 (exhibit 240 [7]).
439 Thirdly, other rezoning applications in the relevant period indicate the principles of orderly and proper planning during that period which are to be applied to the hypothetical preIPRSP rezoning application. Consideration of other successful rezoning applications in the period, namely Riverland Ramble, Murray River Country Estate (MRCE), and Austin Cove demonstrates that a hypothetical rezoning application of the subject land would have been successful. The plaintiffs contend, and some of their planners expressed the opinion, that the location of the subject land and its absence of constraints made it superior to other land rezoned in the 1990s. I will deal with the rezoning of Riverland Ramble in section 4.6 below and with other rezonings in section 4.7.
440 Fourthly, unlike Riverland Ramble, the subject land did not suffer from the detrimental noise effects of the Ravenswood drag strip. Consequently, had a rezoning application been made, the land would have been rezoned ahead of and in preference to Riverland Ramble. Alternatively, the plaintiffs contend that the land would have been rezoned together with the rezoning of Riverland Ramble. I deal with those contentions in section 4.6. As a third alternative, the plaintiffs contend that the subject land would have been rezoned in addition to and separately from the approval of the rezoning of Riverland Ramble.
441 Fifthly, the plaintiffs contend that the subject land would have become part of the urban node of Ravenswood. They contend that, had there been no proposed public works, given the noise issues arising from the drag strip, Ravenswood would have grown in a westerly direction, rather than to the east.

442 Sixthly, planning instruments and publications support the hypothetical preIPRSP rezoning of the subject land. They supported urban development in and ***around*** the subject land or indicated its future urban potential. I will deal with the planning documents, and what can be taken from them, in section 4.8 below.
443 Seventhly, the contemplated possible alignment of the Highway in the relevant period caused the subject land and other land in the area to be retained as rural as a broader corridor through which the final alignment would travel. The plaintiffs say that planning during this period required the retention of land as rural so as to create a rural buffer near the Highway and provide flexibility in finalising the alignment of the Highway. They also contend that the Highway alignment had the effect of discouraging urban zoning in the vicinity, as that would conflict with the Highway. That caused parts of the subject land to be identified for other public purposes, namely for possible TAFE use and for the Regional Recreation Facility (RRF). I will deal with these contentions in section 4.10 below. 4.1.2 The defendants' case
444 The defendants' first contention is that the preIPRSP rezoning case involves an impermissible enquiry, because the only question is the urban potential of the land as at the taking date. I have dealt with and rejected that contention in section 2 of these reasons.
445 The defendants also submit that it is impermissible to ask whether the plaintiffs would have applied to rezone the land in the past hypothetical rezoning approach. That contention was discussed, but not determined, in section 2.7.3.7 above.
446 Further, the defendants contend that, but for the proposed public works:
(1) the plaintiffs would not have applied to have the land rezoned in the period prior to 1997; and

(2) in any event, had such an application been made, orderly and proper planning would have led to the refusal of the application.
447 As to the 'permissive' planning environment, the defendants' planners agree that, prior to the IPRSP, the shire would likely have supported a rezoning proposal. However, they emphasise that does not mean the rezoning application would have been supported by the WAPC and the Minister, or that it reflects good planning.
448 Among the matters pointed to by the defendants and the planners called by the defendants in support of their contention, that a hypothetical rezoning application would have been refused as a matter of orderly and proper planning, are the following:

(a) Strategic planning documents at the time, namely the 1990 draft Peel Regional Plan, the 1992 report of Martin Goff & Associates to the ***South*** West Area Transit Steering Committee (the SWAT report) and the 1994 Peel Regional Strategy, would not have supported the hypothetical rezoning of the subject land.

(b) Given the proposed rezoning of Riverland Ramble, there would have been seen by the WAPC and Minister to be sufficient existing urban zoned land in and ***around*** Ravenswood, and in the Shire of Murray, for the foreseeable future. A rezoning of the subject land as well would have led to an unjustifiable oversupply of urban land.

(c) Rezoning of the subject land to urban, in addition to Riverland Ramble, would not have been a logical or wellplanned development of urbanisation ***around*** Ravenswood and would not have involved consolidation of urban development in and ***around*** existing urban areas, as good planning favoured.
(d) The views of the WAPC expressed in the 1996 IPRSP are a good indication of what were likely to have been the WAPC's views in the year or so leading up to 1996, had an application for rezoning been made. In the IPRSP, it appears that Riverland Ramble and MRCE were regarded as providing adequate residential land for the Ravenswood Pinjarra area for some time. The defendants' planners also point to the choice of Option 2, and not Option 3, in the 1996 IPRSP and final 1997 IPRSP.
(e) The subject land would not have been approved as a hypothetical substitute for Riverland Ramble because, among other reasons, to do so would have meant that there were two nodes of urbanisation at Ravenswood that were not contiguous.
(f) By 1995, the regional structure planning then underway would have or may well have precluded major urban rezoning, pending the completion of the structure planning process.
449 The plaintiffs and their planners denied that considerations of population, and the supply of and demand for urban land were significant to the determination of rezoning applications in the preIPRSP period. The planners were also at issue about what could be drawn from, first, the planning instruments and publications, and secondly, from what occurred in relation to other rezoning applications. 4.1.3 The task of the court
450 The ultimate question, in this section, is whether, but for the proposed public works, the subject land would have been rezoned to urban in the preIPRSP period. That question is to be determined as a matter of orderly and proper planning. In dealing with the preIPRSP question, I must make findings about historical facts, and findings about hypothetical facts in the assumed absence of the proposed public works. Most of the controversies centred on the hypothetical facts what would have occurred, but for the proposed public works? The vast majority of the historical facts are not in dispute. In the course of this section 4, I will make detailed findings about things which occurred in the preIPRSP period, and findings about what things would have occurred differently, or not, in the assumed absence of the proposed public works.
4.2 Evidence
451 A very large volume of evidence was led on the preIPRSP rezoning case, especially by the plaintiffs. I will begin with the evidence of the expert planners, and then introduce the other evidence led by the plaintiffs. 4.2.1 Planners' evidence 4.2.1.1 ORAL EVIDENCE
452 The plaintiffs relied on the evidence of five planners: Mr Timothy Auret, Mr Greg Rowe, Mr Vernon Butterly, Mr Brett Flugge and Mr Brian Robinson. The defendants relied on the evidence of Mr Trevor Moran and Mr Chris O'Neill. All are very experienced planners.
453 At the outset of the concurrent session, each planner gave an outline of their opinion, and their reasons, whether the subject land would have been supported for rezoning in the 1990s, up to December 1997, under TPS 4 by the shire, the WAPC and the Minister, assuming that the Highway and the RRF had never been proposed for the subject land.

454 All of the planners called by the plaintiffs answered the question in the affirmative; both the defendants' planners answered in the negative.

455 Mr Rowe said that there was a strong sentiment to encourage residential development, particularly in Ravenswood. The provision of sewerage was really the only hurdle. Beyond dealing with the need for sewerage, the council was 'not particularly strict or strategic' other than seeking urban development and residential growth. If the sewer problem could be solved, council was 'really grabbing it with both hands' (ts 3684). Taking the process through the WAPC and the Minister 'wasn't particularly onerous or difficult' (ts 3684).

456 Mr Auret expressed a similar view. He said that the atmosphere, both at 'the top', with the Minister for Planning, and at 'the bottom', with the shire, was that there were drastic land shortages everywhere and 'more was much better than less' (ts 3685). He described it as a 'very conducive period' for rezoning of land to urban (ts 3685).

457 Mr Robinson emphasised the locational characteristics of the land, including that it fronted Pinjarra Road, which was a regionally important road and a growth corridor, as it had been recognised in strategic documents. The land was clear of vegetation and free of significant environmental constraints. It is located between Mandurah and Pinjarra in close proximity to the Ravenswood townsite and the recreational facilities associated with the Murray River. It was not affected by the Ravenswood Raceway (ts 3685; see also the planning experts' joint report of 30 June 2010, exhibit 240 [7]).

458 The existence of these characteristics is not in dispute. It is also not in dispute that those locational and physical characteristics of the land are not the sole criteria for whether and when the land would be rezoned to urban.

459 Mr Butterly agreed with the points made by Mr Rowe, Mr Auret and Mr Robinson. He also referred to the 1974 report by TS Martin & Associates on the southwest metropolitan corridor (the TS Martin report) (ts 3686).

460 Mr Flugge agreed with the comments of others about the permissiveness of the planning environment. He said that the shire and the state government were working cooperatively to see things happen particularly in the locality of Ravenswood. He also emphasised the absence of environmental constraints of this land compared to many other sites (ts 3687).

461 Mr Rowe and Mr Auret expressed the view that an application at any time from about 1990 to 1997 would have been treated favourably (ts 3855). Mr Butterly expressed a view to the same effect (ts 3856).

462 Mr Flugge's primary assumption seemed to be that an application would have been lodged at about the same time as Riverland Ramble's, possibly in conjunction with that application (ts 3857 3859). In any case, Mr Flugge's opinion was that an application at any time from 1990 onwards would have succeeded (ts 3859).

463 Mr Moran expressed a contrary view to the plaintiffs' planners. He said that his view was based on a reading of the strategic documents, at the time, for the area. He referred to the 1990 Peel Regional Plan and the 1994 Peel Regional Strategy. He did not disagree about the locational characteristics of the land. Mr Moran also referred to the rezoning of MRCE. He expressed the view that some of the hurdles which that rezoning faced, albeit that the hurdles were ultimately overcome, would have been issues for any hypothetical rezoning application of the subject land (ts 3693 3695).

464 Mr O'Neill accepted the capability and serviceability of the subject land for the purposes of rezoning. However, he emphasised the need to focus on the broader considerations of where urban development should expand. That is governed by broader considerations than simply land capability. Questions of consolidation of urban development, infrastructure servicing and demand for additional urban land also come into play (ts 3695). He also referred to the 1990 Peel Regional Plan and the 1994 Peel Regional Strategy as militating against the success of the hypothetical rezoning of the subject land.

465 He considered that the notional absence of the Perth Bunbury Highway would have the effect of reducing the demand that would otherwise be there. He referred to the fact that in 1991, a number of landowners were sent invitations in relation to urbanisation of land, and only one owner (Riverland Ramble) pursued it (ts 3697).

466 Mr O'Neill also referred to the WAPC response to the MRCE application and the question of whether there was a demonstrated need for additional urban land in the locality in the short to medium term. Further, he referred to the lack of contiguity or connectivity between the subject land and Riverland Ramble. He also pointed to the undesirability of urban sprawl, as referred to in the 1994 Local Rural Strategy (the LRS) (ts 3697 3698).

467 The plaintiffs' planners drew support from their opinions from a number of planning instruments and publications: the TS Martin report, the 1990 Peel Regional Plan, the 1994 Peel Regional Strategy, the 1992 SWAT

report, the 1994 LRS, and TPS 4 itself. I will refer to what they said in that respect in dealing with those planning instruments and publications in section 4.8 below.
468 Mr Rowe pointed to the approval of Riverland Ramble as supporting his opinion in relation to the subject land. He said that the same approach would have applied to the subject land and other land in the general locality. He saw no reason why the rezoning of the subject land would not have progressed in the same way as in Riverland Ramble, except that the difficulties arising from the raceway would not have arisen (ts 3878). Mr Flugge and Mr Robinson agreed with Mr Rowe (ts 3879). All three expressed the same opinion in their written reports. Messrs O'Neill and Moran expressed contrary views.
469 Mr Flugge and Mr Robinson considered that the approval of the MRCE rezoning supported their view on the hypothetical rezoning of the subject land (ts 3871 3872, 3875 3876).
470 I will say more about the planners' opinions on what can be taken from the progress and approval of Riverland Ramble and MRCE in sections 4.6 and 4.7 below.
471 Question 1 on the agenda for the preIPRSP planning concurrent evidence session was framed in terms of whether an application for rezoning would have been supported by the shire, the WAPC and the Minister. It is not directed, in terms, to whether rezoning at that time would have been consistent with orderly and proper planning. The parties agreed, and I accept, that the question is what is dictated by orderly and proper planning, at the relevant time, and not the subjective views of a particular decisionmaker. See section 2.9 above.
472 The plaintiffs contend that the decisions made during the relevant period are a good indication of what orderly and proper planning, at that time, required.
473 There was some oral evidence, at the conclusion of the preIPRSP concurrent session dealing specifically with this. In substance, the plaintiffs' planners said that all decisions were consistent with orderly and proper planning (ts 3907 3910). The defendants' planners raised questions and expressed doubts in that regard, suggesting that decisions may have been made without adequate data (ts 3911). I do not need to resolve any issue in that regard. That is because I do not think that any difference between any rezoning decision made in this period and orderly and proper planning affects my view of the fate of the hypothetical application to rezone the subject land. 4.2.1.2 PLANNERS' REPORTS
474 When the trial commenced in October 2009, the plaintiffs relied on a number of reports by various planners called by the plaintiffs. In many of those reports, an opinion was expressed that, but for the proposed public works, the land would probably have been rezoned urban. In those reports, an opinion to that effect was generally expressed without identifying a particular period in which, in the planners' opinions, the land would have been rezoned to urban. Various of these reports referred to a multitude of considerations, some of which applied in the 1990s and others of which applied only in the time leading up to the taking. In opening, the defendants criticised that aspect of the plaintiffs' planners' reports, and the plaintiffs' case. In my view, there was force in that criticism.

475 As I have explained in section 1.6, the case was adjourned in November 2009 and resumed in July 2010. The catalyst for the adjournment was the provision of a number of witness statements and reports by the plaintiffs ***around*** 10 November 2009. These included reports of Messrs Rowe and Flugge. Those reports and statements were directed to the preIPRSP period.
476 By the time the trial resumed in June 2010, the plaintiffs' planners had prepared a number of reports that were specifically directed to the question of preIPRSP rezoning. See, in this regard, the reports of Mr Flugge of 30 March 2010 and 6 August 2010; Mr Robinson's reports of 30 March 2010 and May 2010; Mr Rowe's report of 29 March 2010; and Mr Butterly's reports of June 2010 and August 2010. The substance of the reasons for the opinions expressed in those reports have been outlined in the plaintiffs' case in section 4.1.1, and in outlining the oral evidence of the planners in section 4.2.1.1.
477 After conferral, the planners prepared a joint report of 30 June 2010 (exhibit 240). It set out the competing views, the substance of which is reflected in the outline I have given. 4.2.1.3 THE RELEVANCE OF THE REGIONAL EXPERIENCE, IN THE RELEVANT PERIOD, OF THE PLAINTIFFS' PLANNERS

478 The plaintiffs submit that the opinions of planners who were involved in the planning decisions in the ***region*** and period in question, for that reason, carry more weight than the opinions of those who were not so involved. There are cases that provide, or may provide, some support for that submission. See for example Smith v Roads

and Traffic Authority (NSW) [54] [56]; and W and H Carter v Roads and Traffic Authority of NSW [2006] NSWLEC 89;(2006) 144 LGERA 375 [49].

479 Given that the question of hypothetical past rezoning is to be approached objectively, by reference to what is dictated by orderly and proper planning, and not subjectively, by reference to particular decisionmakers, it is not clear what significant advantage is derived from an expert having been involved in the ***region*** during the relevant period. It may be that that involvement provides a greater familiarity with the decisions made in the relevant period and those decisions indicate or evidence what orderly and proper planning involved in that period. In any event, the fact of experience in the ***region*** during the period is not a standalone reason for preferring an expert opinion over an opinion expressed by another expert without such experience, independent of the merits of the reasoning supporting the opinion. The cases do not suggest otherwise. In the cases I have referred to, the court found the reasoning of the planners with experience in the area to be more cogent, and preferable, to that of the other planner.
480 In my opinion, in the end the primary focus must be on the cogency of the reasoning that underlies and supports the opinions in question. In that regard, among the matters of significance are the extent to which it is supported by the planning instruments and publications relied on and relevant at the time, and by other planning decisions in the period. 4.2.2 Nonexpert evidence
481 The plaintiffs relied on the evidence of a number of witnesses whose statements were tendered in support of the preIPRSP rezoning case. Some of these witnesses were required for crossexamination, some were not. The plaintiffs also tendered a very large volume of documents.
482 One of the plaintiffs, Mr McKay, gave evidence relating to whether, but for the proposed public works, the plaintiffs would have applied to have the land rezoned to urban in the period up to 1997. I will deal with this evidence in section 4.3 of these reasons.
483 The plaintiffs led evidence from Mr Ray Jones, one of the developers of Riverland Ramble (exhibit 211A and exhibit 211B). Part of his evidence related to the plaintiffs' contention that, but for the proposed public works, the plaintiffs would have joined forces with the developers of Riverland Ramble in relation to sewerage and rezoning of their respective land.
484 The plaintiffs called two former Ministers for Planning, Mr David Smith (exhibit 236) and Mr Richard Lewis (exhibit 234).

485 The plaintiffs tendered witness statements from three former officers of the Department of Planning and Urban Development (the DPUD): Mr Karl Berzins (exhibit 189A and exhibit 189B); Mr Karl White (exhibit 233); and Mr John Scharf (exhibit 193A and exhibit 193B). Mr Berzins was manager of the Peel ***region*** office of the Ministry for Planning in 1994 and 1995. Mr White was an officer of the Mandurah office of the DPUD from 1994 to 1997. Mr Scharf was manager of the Peel ***region*** office of the Ministry for Planning from 1996 to 2001. The name of the DPUD changed to the Ministry for Planning in 1995, and changed to the DPI in 2001. I will refer to these entities without careful discrimination about which was correct at the time.
486 The plaintiffs tendered witness statements from Mr Michael Berrie, a shire planner at the Shire of Murray from May 1991 until July 1994 (exhibit 231A, exhibit 231B and exhibit 231C). Some of the expert planners called by the plaintiffs, namely Messrs Flugge and Robinson, had previously worked in the planning section of the shire.
487 The plaintiffs also called a former shire president of the shire, Mr Michael Greenup. His statements were exhibit 171A and exhibit 171B.
488 I will say more about some of the evidence relied on by the plaintiffs in what follows, including in sections 4.3, 4.5, 4.10 and 4.11 below. At this stage, I make the following general observations.
489 The evidence of planning officers of the shire and the department, and of the shire president, concerned events that had occurred 15 or more years earlier. Much of the evidence in the witness statements was drawn from an examination of documents from the period in question.
490 It was apparent that, in many cases, the selection of which documents would be referred to was made by the plaintiffs' solicitors, not by the witness. For example, Messrs Rowe, Greenup and Berzins accepted that that was so. Moreover, in some cases the summaries of the document offered in the witness statements were at best incomplete and, at times, inaccurate or misleading.

491 In any event, in my view, quite apart from these points, it is the documents from the period in question that are the most reliable evidence of the events that occurred, the decisions made and, to the extent relevant, the reasons for those events and decisions. By way of example, in some respects the time at which certain events occurred is significant, and is in contention. The timing and detail of the development by the shire of a proposal to use the subject land for a TAFE college site or a regional recreation facility is an example. To my mind, the contemporaneous documents are a far more reliable guide than the memory of witnesses 15 years or more after the events.

492 In my view, the categories of evidence of the greatest significance to the determination of the preIPRSP rezoning question are the planning instruments and publications applicable during the relevant period; the documents revealing the progress and consideration of other rezoning applications in the relevant period; and the expert evidence of the planners.

4.3 But for the proposed public works, would the plaintiffs have applied to have the land rezoned to urban in the preIPRSP period? 4.3.1 Introduction

493 As I have explained in section 4.1.1, an affirmative answer to this question is an essential element of the plaintiffs' preIPRSP rezoning case.

494 On the plaintiffs' case, the question is not whether a reasonable landowner would have applied; it is whether the plaintiffs would have applied. In other words, the question of whether the plaintiffs would have applied is to be determined subjectively. That does not mean that objective facts and circumstances are irrelevant. To the contrary, as the plaintiffs submit, in assessing whether the plaintiffs would have applied, regard should be had to the objective facts and circumstances that bear on whether a reasonable landowner would have applied. Moreover, the known facts and circumstances about the plaintiffs, including what in fact was and was not done by the plaintiffs, are also significant considerations in assessing whether the plaintiffs would have applied.

495 In these respects, there is some analogy with the assessment of the evidence of a plaintiff in a medical negligence case whose evidence is that, had he or she been warned of a particular risk, they would not have proceeded with the surgery. Because a plaintiff's evidence is given in hindsight on a hypothetical question, substantial weight must be given to the objective and known circumstances, including those that relate to the plaintiff at the relevant time, in assessing the plaintiff's evidence: see, for example, Chappel v Hart [1998] HCA 55; (1998) 195 CLR 232, 246 (note 64), 272; Prast v Town of Cottesloe [2000] WASCA 274; (2000) 22 WAR 474 [47] [49], [62] [63].

496 In the Changes Document, the plaintiffs contend that there are two events that would each have led to an application for rezoning being made in the hypothetical preIPRSP period. The first is the contention that, but for the proposed public works, the plaintiffs would have received the letter of 15 January 1991 from the shire, seeking expressions of interest in residential development, as a result of which the plaintiffs would have applied for rezoning in 1991 or 1992. The second is that, but for the proposed public works, the plaintiffs would have applied for rezoning in 1994, upon learning about the availability of sewerage in Ravenswood.

497 The plaintiffs did not give evidence directly supporting the first contention. Mr McKay's evidence was about what he would have done in 1994. He did not give evidence about what he would have done had he received the letter of 15 January 1991.

498 The first contention directs attention to the question of whether the failure of the plaintiffs to receive the letter is attributable to the proposed public works. I determine that question adversely to the plaintiffs in section 4.5.

499 I turn to the plaintiffs' contention about a rezoning application being made in 1994. I start with that contention as that was the substance of Mr McKay's evidence. It was also the essential thrust of the plaintiffs' closing submissions in support of the preIPRSP case.

500 By way of broad overview of this section 4.3:

(1) Mr McKay's evidence is that:

(a) in the mid1990s, he wanted to develop his land, including the subject land, by having it rezoned to urban and then subdividing it; and

(b) in 1994, he would have applied for rezoning of the subject land, had he not been told that the proposed Highway and RRF precluded rezoning of the subject land.

(2) I do not accept that evidence because:

(a) it does not sit well with the objective facts about the timing of the RRF proposal;

(b) on his evidence, his conduct in taking no steps in relation to the RRF proposal does not make sense when measured against other aspects of his conduct at other times;
(c) his evidence invites attention to why he made no rezoning application in respect of lots 300, 301 and 189. His evidence on that question was inconsistent and unsatisfactory;
(d) other indications of his intentions in the 1990s weigh against acceptance of his evidence; and
(e) in other respects, his evidence was inconsistent and unsatisfactory.
501 I turn to examine Mr McKay's evidence in detail and to set out and explain my findings. 4.3.2 Mr McKay's evidence
502 Mr McKay's evidenceinchief is contained in two statements; the first dated 26 October 2009 (exhibit 175A) and the second dated November 2009 (exhibit 175B).
503 The plaintiffs bought Windsor Park in 1990. As explained in section 1, Windsor Park comprised six lots, of which the subject land is two lots.
504 In his first statement, Mr McKay says that before buying Windsor Park, he inspected and conducted some investigations about the land. That led him to identify features of the land that he thought made it desirable for future residential development: exhibit 175A [5]. He decided to buy the land with the intention of using it for farming operations 'in the short term': exhibit 175A [6]. In crossexamination, he said that by 'short term', he meant something like two to five years (ts 3274). His intention was to run cattle on his land until he had an opportunity to rezone it, and then to develop and subdivide it into residential lots: exhibit 175A [6].
505 Part of his first statement is in the following terms: I did a lot of work connecting water and sewerage in the Mandurah area. In 1994 I learned that the Water Corporation (for which I was doing work) was proposing to build a pump station for deep sewerage at the corner of Old Mandurah Road and Pinjarra Road with a rising main back to Furnissdale and also to service the general Ravenswood area. I understood it would involve rising (high pressure) mains, and I thought it could be utilised for my proposed development of the Land. The pump station would provide deep sewerage for the residential development then planned for Riverland Ramble.

I saw this as an opportune time to seek urban rezoning of the Land, under the local town planning scheme, so I went to the offices of the Shire of Murray to ask about rezoning prospects where I was told by a Shire officer that the Shire was most unlikely to support any application to have the Land rezoned from rural to urban, as that would be incompatible with the Regional Recreation Centre ('RRC') planned by the Shire over lot 191, and part of lot 192, and also with the proposed extension of the PerthBunbury Highway ('the Highway') the route of which was to pass over lot 192.

I decided to seek to have both projects moved away from the Land, to allow me to carry out my plan for a residential development.

But for these projects, I would have developed the Land, in conjunction with the developers of Riverland Ramble, and taken the opportunity to extend the sewerage line down Pinjarra Road, through Furnissdale, sharing the cost with Riverland Ramble. A sewerage plant was built in 1999/2000. It services Ravenswood (including Riverland Ramble) and is available to service a residential subdivision on the Land (exhibit 175A [8] [11]).
506 In his statement, Mr McKay had defined 'the Land' to refer to the six lots comprising Windsor Park: exhibit 175A [4]. Consequently, the effect of this evidence is that his intention was to apply to rezone and subdivide the whole of the six lots comprising Windsor Park. As I will explain, some of his evidence in crossexamination was inconsistent with that. His evidence in his statement is that when he went to the shire he asked about the rezoning prospects of the land comprising Windsor Park, not solely lots 191 and 192. Again, some of his oral evidence was inconsistent with that.
507 It can be seen that in exhibit 175A [10], Mr McKay says that after his conversation with the shire officer, he decided to have both the Highway and the RRC projects moved away from his land.
508 In his second statement, Mr McKay says that if he had been told by the shire, when he made inquiries, that there was opportunity to rezone, or to join together with the proposed developer for Riverland Ramble, he would

have engaged planners and been 'ready, willing and able to do so' (exhibit 175B [6]). If the opportunity had presented itself, he would have sought rezoning approval and would have welcomed working together with other landowners to bring the sewerage line down Pinjarra Road and into the locality of Ravenswood (exhibit 175B [8]).
509 He did not progress his inquiries regarding urban development beyond his inquiry with the shire: exhibit 175B [5].
510 Part of his second statement is in the following terms: However I was not able to progress beyond 'first base' because the situation was clear that my land was impacted by the Perth to Bunbury Highway alignment which at that stage was not as yet clearly defined.

In 1992 Mr Colin Rogers came to see me and told me that the Local Government was interested in buying my land for a sports facility with Federal Government funds to be arranged by Mr Beazley, who was a member of Parliament.

In 1994 when I had attended at the Shire of Murray I learnt that my land North of Pinjarra Road, not required for the Highway, was earmarked by the Local Government for a sports facility. Upon returning home I called Colin Rogers who was then a councillor and I said to him 'you have buggered me up, I cannot develop this land'. He told me that I would not be able to do anything with my land as it was intended to be the future sports and recreation facility for the Peel Area (exhibit 175B [10] [12]).
511 In crossexamination, he gave some further detail about the conversation with the shire officer that was referred to in exhibit 175A [9] (ts 3292 3294). He went to the front counter without an appointment. The person at the front counter brought another person to the counter. Mr McKay was fairly sure the latter person was male. That latter person said that he was a planner. Mr McKay asked what he could now do to advance the rezoning of lots 191 and 192, because he had just learned about the Water Authority proposal to build a pump station (ts 3293). The man who said he was a planner told Mr McKay that 'lot 191 and 192 between them were set aside for a road to come through and what was [not] for the road was going to be for a recreation centre' (ts 3294).
512 In this evidence, he says he asked about rezoning lots 191 and 192, whereas his evidence in exhibit 175A [9] was that he asked about rezoning of all of the land comprising Windsor Park. The version in Mr McKay's oral evidence invites attention to why his enquiry related only to the subject land and not to the whole of Windsor Park. I will return to that question.
513 Mr McKay said he thought the conversation was in early 1994 (ts 3303).
514 He was asked whether he decided to try and have the recreation centre moved elsewhere. His first response was that 'I tried to get everything moved off our land where possible' (ts 3294). Asked again whether in 1994 he decided to try and have the proposal for a recreation centre on his land moved elsewhere, he responded, 'No, not in 1994. No, it was a waste of time for the [recreation] centre' (ts 3294).
515 In the earlier part of his oral evidence, the only step which Mr McKay said he took was to telephone a councillor, Mr Colin Rogers and perhaps other councillors. He said he asked Mr Rogers if what he was told at the shire was true and was told that it was (ts 3296, 3323). The only other step he identified was he thought he spoke to 'a couple of other councillors' (ts 3296). After that, he did nothing more because the 'damage was done' (ts 3296). He referred to speaking to other councillors again at ts 3301. He said he did not speak to his local member about it (ts 3302).
516 At a later point in his evidence, Mr McKay said that he contacted two Members of Parliament. One of those was Mr Marshall, who was his local member in the Legislative Assembly. He said that each reported to him that they knew nothing about it. Notwithstanding those reports, Mr McKay's evidence was that he continued to accept that there was nothing he could do to move the recreation centre or to have his land rezoned to urban (ts 3325 3327).
517 In his oral evidence, Mr McKay did not give evidence about precisely what it was that the planning officer said so as to convey that it would have been a waste of time to attempt to move the recreation centre. He did not ask to see anything in writing or write to anybody about it (ts 3295).
518 In the course of his evidence, Mr McKay said, on a number of occasions, in emphatic terms, that following his discussion with the planning officer at the front desk of the shire, and his subsequent discussion with Mr Rogers, he

considered that there was no point in doing anything to attempt to have the RRF proposal moved from lot 192. For example:
(a) he considered that any rezoning prospect was 'dead before I even got started' (ts 3275);
(b) any possibility of rezoning lots 191 and 192 'was dead and buried' (ts 3301; see also ts 3324);
(c) he took what the planning officer at the front desk said, and what, Mr Rogers said, as 'gospel' (ts 3326);
(d) he said that, by these conversations, 'it was made very clear to me the sports and recreation centre was set in concrete, would not be shifted under any circumstances' (ts 3334). He considered the regional recreation centre was 'set in concrete' but there was a chance that he might be able to shift the Highway (ts 3334 3336); and
(e) he was satisfied, after speaking with the planner and Mr Rogers, that he had done everything he could to move the RRF off lots 191 and 192 (ts 3323).
519 In his evidence, Mr McKay was in no doubt that he was told in 1994 about a proposed regional recreation centre on his property. He described a suggestion that he was mistaken about it as 'absolute rubbish' (ts 3307). He repeatedly rejected any suggestion that he might have been mistaking a reference to the TAFE college proposal for a reference to a recreation centre: ts 3312, 3314, 3319.
520 Mr McKay gave no evidence that his failure to apply for rezoning of the subject land arose from or was influenced by any understanding on his part that urban rezoning of the land near the proposed Highway was precluded by a need for a rural buffer near the Highway, or by a need to keep a corridor free of development to keep options open for the alignment of the Highway. He gave no evidence that he had any such understanding.
521 Further, Mr McKay gave no evidence that he focused his efforts on moving the Highway because it was likely that if the Highway was moved, the RRF would also be moved (compare plaintiffs' submissions pars 4.208, 4.213). Indeed, that is not consistent with his evidence. His evidence was that he believed he could move the Highway, but had no hope of moving the RRF.
522 The defendants submit that Mr McKay's evidence should not be accepted because, among other reasons, there was no proposal at the shire in 1994 for the use of the subject land for an RRF.
523 Consequently, the evidence of Mr McKay must be considered in the context of what is known about the proposals for a TAFE college site and RRF on the subject land at the relevant time (the TAFE proposal and the RRF proposal).
524 In the next two sections, 4.3.3 and 4.3.4, I will set out my findings on what is revealed by the documents about the TAFE proposal and the RRF proposal. A more detailed analysis of what is revealed by each document about the TAFE proposal and the RRF proposal is in sch 2.
525 In section 4.3.5, I outline evidence relied on by the plaintiffs about the timing of the RRF proposal at the shire. I set out my conclusions on the status of the RRF proposal for the subject land in 1994 in section 4.3.6. I then outline aspects of Mr McKay's conduct that seems to me to be inconsistent with his uncritical acceptance of what a planner told him at the front desk of the shire in 1994 (section 4.3.7). Next, I will outline other evidence bearing on the plaintiffs' intention in this period (section 4.3.8), before identifying other aspects of Mr McKay's evidence I found to be inconsistent, contrary to commonsense, or otherwise unsatisfactory (section 4.3.9). Finally, I state my conclusions in section 4.3.10. 4.3.3 The TAFE proposal: a short chronology
526 The following facts are established by the documents.

527 By mid1989, the shire was contemplating and proposing to representatives of TAFE that a Peel TAFE college should be located between the Serpentine River and Pinjarra, possibly as specifically as in or ***around*** Ravenswood (see exhibit 258A, 46B/39; exhibit RR146.1, 8).
528 The 1990 Peel Regional Plan identified the need for higher education facilities, including a TAFE college. It suggested a site on the Mandurah Pinjarra corridor, possibly in Murray (exhibit 181, 1/5/73, 85).
529 Other documents in 1991 and 1992 suggest that the shire was then pursuing a proposal that the TAFE college be built at a site at Ravenswood (exhibit 258C; exhibit 258D; exhibit 258E).
530 In December 1992, the TAFE Peel College Site Selection report (the TAFE College Site report) was published, identifying the site at Fiegert Road, site 8, comprising lots 190, 191 and 192, as the preferred site (exhibit 28, 1/5/253 254).
531 In January 1993, the Department of Employment, Vocational Education and Training (DEVET) wrote to the plaintiffs advising that lots 191 and 192 had been identified as part of the most suitable site for the future TAFE college (exhibit 182A, 15/63 66). The letter stated that site 8 encompassed lots 191 and 192, together with the

adjoining lot 190; a total area of 111 ha. The DEVET only required 20 ha for a TAFE college site. The letter also stated that the Minister for Education had approved the recommendation in the report and announced the selection of the preferred site. The status of site 8 as the preferred site was subject to certain site conditions being satisfied.

532 By mid1993, internal documents showed that the DEVET's preferred site was a different site, at Gordon Road, Mandurah (exhibit 258J).

533 In July 1993, Mr McKay wrote a letter to his local member of state parliament, complaining about delay in finalising the TAFE process (exhibit 176).

534 For the remainder of 1993, the shire was still advocating site 8 at Fiegert Road (exhibit 258N; exhibit 258O).

535 In May 1994, a newspaper article suggested that the Fiegert Road site had been rejected (exhibit 258Q). The Shire of Murray LRS was published in July 1994. It set out planning considerations for precinct 7, Ravenswood. One of those considerations was that the [s]ite adjoining Pinjarra Road, Figirts Road [sic] and future PerthBunbury Highway alignment, is the subject of a report commissioned by Peel Local Government Commission and Peel Development Commission, for selection of a Regional education facility (exhibit 29, 1/11/180).

536 One of the further planning needs for the Ravenswood precinct was the identification of the location and land use implications of possible tertiary education facilities (1/11/183).

537 On 9 August 1994, the shire wrote to the Minister. The letter primarily concerned issues about the Ravenswood raceway and the Riverland Ramble rezoning application. In the course of the letter, reference was made to the announcement that the Ravenswood site would not be used for the TAFE facility (exhibit RR146.41). The Peel Regional Strategy, published in September 1994, reveals that the Gordon Road site was selected for the TAFE college in August 1994. 4.3.4 The RRF proposal: document chronology

538 There is no document that evidences a proposal by the shire for a regional recreation facility at Ravenswood at any time prior to 1995. There are many documents in which it could be expected that any such proposal would have been mentioned, at least if it was well advanced.

539 The 1990 Peel Regional Plan identified the need for a regional level sports facility and proposed that it be located in the major urban growth centre at Furnissdale/Barragup. The land use plan (exhibit 197) identified recreation sites at Furnissdale, Pinjarra and in Mandurah, but not in Ravenswood.

540 In February 1992, the shire considered a report about a proposed recreation centre at Pinjarra. It was resolved to apply for a grant for the construction of a recreation centre at Pinjarra that included a pool (exhibit 171A, 46B/313 314).

541 The documents about the TAFE proposal in 1992 and 1993 do not mention a proposal for an RRF, either alone or in association with the TAFE proposal. See, for example, exhibit 258C; exhibit 258F; exhibit 258G; exhibit 258I; exhibit 258O.

542 Furthermore, a proposal for an RRF is not mentioned in the detailed discussion in the TAFE College Site report of December 1992. It seems unlikely that a proposal to locate regional sports facilities with the TAFE college in Ravenswood, if it existed, would not have been mentioned when discussing the impact of the TAFE college on community services, urban development and compatibility with adjacent land uses. Those matters formed part of the essential site selection criteria for the TAFE college: see exhibit 28, 1/5/219, 225.

543 In his report of 5 July 1993, Mr Flugge discussed regional planning as it affected the Riverland Ramble proposed rezoning (exhibit 182D, 15A/483). The report stated that when viewed in conjunction with the possible siting of a TAFE facility immediately to the northwest, and the future Perth Bunbury Highway alignment to the west, the Riverland Ramble site becomes a very attractive proposition for urbanisation. The report made no mention of any contemplated proposal for a regional sports facility in the locality.

544 In July 1994, the shire's LRS suggested that there was still the possibility that the TAFE college would be located on the Fiegert Road site (exhibit 29, 1/11/180, 183). There is no mention of any proposal by the shire to develop an RRF in Ravenswood. If there had been any serious proposal for a major recreation facility on the subject land in the first half of 1994, one would expect it to have been mentioned in the LRS in relation to the Ravenswood precinct.

545 Moreover, the shire's letter of 9 August 1994 to the Minister, in expressing disappointment about the government's announcement about the TAFE proposal, did not mention any proposal to locate an RRF on the Fiegert Road site, whether in conjunction with the TAFE college or otherwise (exhibit RR146.41).

546 The Peel Regional Strategy identified the location of an RRF as being on land north of Mandurah, rather than in Furnissdale/Barragup as had been proposed in the 1990 Peel Regional Plan (exhibit 30, 1/6/122). It stated that the regional sporting facility proposed for the site north of Mandurah should be planned in conjunction with the proposed sporting facility at Lark Hill (1/6/124). The land use plan (exhibit 198) shows the preferred location for the regional sports facility in North Mandurah, as well as a smaller facility ***south*** of the Dawesville Cut. There are no regional sporting facilities identified anywhere in the Shire of Murray.
547 Given the shire's input into the Peel Regional Strategy, through Mr Evans, a shire councillor, one might have expected some reference to a shire proposal for a recreation facility in Ravenswood, had such a proposal existed. Clearly, the shire would not have been contemplating the unilateral creation of an RRF of the scale of lot 191 and part of lot 192. If the shire had in mind an RRF in Ravenswood, the Peel Regional Strategy was an appropriate occasion to raise it, so that it might be included in the regional structure planning exercise that was to follow.

548 It appears from the documents that the proposal for an RRF ***around*** Ravenswood emerged in the course of a regional recreation strategy prepared for the Ministry of Sport and Recreation in February 1995. That is the effect of what is said in Working Paper No 4 (exhibit 178, pages 20, 22) and in the 1996 IPRSP (exhibit 7, 1/10/98, 142).
549 By letter of 8 January 1996 (exhibit 182D, 15A/496), the shire wrote to Mr Auret. The letter referred to discussions between Mr Auret and Mr Flugge regarding potential sites for a regional sporting facility to be included in the IPRSP. The letter stated: Council resolved at its meeting on 21 December 1995 to advise you that, if you are of a mind to include in the structure plan for this area a large site for the establishment of a regional recreation/sporting complex, then you are asked to carefully and sincerely consider the site previously under consideration as suitable for the Peel TAFE College, in the Ravenswood locality (exhibit 182D, 15A/496).
550 This appears to be the first suggestion in a document that the Fiegert Road site, including the subject land, be the site for an RRF. In Mr Auret's oral evidence, he said that he may have suggested this to Mr Flugge prior to the letter (ts 3434, 4251).
551 It should be noticed that this letter was the subject of a resolution of council. That may suggest that if, at an earlier time, there had been a firm proposal for an RRF on the subject land, it would have been the subject of a resolution and communication to other relevant authority.
552 The 1996 IPRSP notes that the preferred location for an RRF was in the Ravenswood locality and that the subject land was selected at the request of the Shire of Murray (exhibit 7, 1/10/142).
553 I would conclude the following from my analysis of the history of the TAFE proposal and the RRF proposal in sections 4.3.3 and 4.3.4, and the more detailed outline in sch 2.
(1) From 1989, the shire favoured a site in Ravenswood for a TAFE college. It is unclear whether the shire favoured use of the subject land specifically as the Ravenswood site prior to 1992.
(2) In late 1992, the subject land was identified as part of the preferred site, site 8, for the TAFE college.
(3) By mid1994, it was clear that the TAFE proposal on the subject land would not proceed.
(4) Up to the end of 1994, there is no documentary support for or reference to any regional recreation centre on the subject land, either in association with or separately from the TAFE proposal for the subject land. There are many documents where it would be expected that any serious proposal would have been mentioned, if it existed.
(5) The proposal to use the subject land for the contemplated RRF for Peel did not arise before November 1995.
554 In response to the defendants' submission that the RRF proposal did not arise at the shire before late 1995, the plaintiffs rely on the evidence of Mr Greenup and Mr Berrie. The evidence of Mr Flugge is also relevant. I turn to that evidence. 4.3.5 The evidence of Mr Greenup, Mr Berrie and Mr Flugge
555 Mr Michael Berrie was the shire planner at the shire from 20 May 1991 until midJuly 1994. Three statements by Mr Berrie were tendered. He was not crossexamined.
556 His third statement, dated 31 July 2010, includes the following: Soon after starting work at the Shire of Murray, either John Treloar or (more likely) Don McClements, said to me something like: 'You don't have to worry about that land [indicating the land on the eastern side if the proposed PerthBunbury Highway] because that's where the shire's sports centre is going, or the Kelliher's land because they are not interested in rezoning'.

...

When I left working as the Shire Planner at the Shire of Murray there was nothing to indicate that the Council's intention had changed with respect to the location of the Regional Sports Complex on the eastern side of the proposed Perth to Bunbury Highway (exhibit 231C [3], [7]).
557 As can be seen, that is not consistent with what is suggested by the documents.

558 Mr Greenup's first statement is dated 29 March 2010 (exhibit 171A). The only mention of the contemplation of an RRF is in the following terms: After the site was not used for a TAFE college, Council became interested in locating a recreation facility over the land adjacent to the Perth to Bunbury Highway as it was a key strategic site for the Peel ***Region***, attracting access from the north, ***south***, east and west along Pinjarra Road (exhibit 171A [54]).
559 In this passage, Mr Greenup says that the council's interest in an RRF over the subject land came after the rejection of the site for a TAFE college. In his second statement, Mr Greenup put it differently.
560 Mr Greenup's first witness statement refers to the fact that the shire's letter of 15 January 1991 was not sent to the plaintiffs: exhibit 171A [23]. The next paragraph states that the subject land had been identified for the Highway and 'there was also some consideration of their site for the purposes of a TAFE college': exhibit 171A [24]. I read [24] as intending to explain why no letter was sent to the plaintiffs. I will deal that contention in section 4.5below. For present purposes, it should be noticed that no mention is made in [24] of the possible use of the subject land for an RRF.
561 Mr Greenup's second statement, dated 26 July 2010, includes the following: From 1990 to 1994 there was a proposal for a TAFE college for the site. Following the election of a new liberal government, the funding for the TAFE college was no longer secure. Council had been keen to develop its own sports pavilion and wished to have a 50m swimming pool which could not be accommodated at the Pinjarra recreation site in the Pinjarra township. This proposal for the Pinjarra sports pavilion was discussed in 1992.

In 1993 the proposal for the TAFE college at the 'Fiegerts Road site' was becoming less certain. It was for that reason that it was proposed to address the need for a 50m swimming pool and to colocate a recreation facility together with the City of Mandurah adjacent to the site identified for the TAFE college.

I recall discussions that I participated in that identified the fact that this was an ideal location for a recreation facility to service both Murray and Mandurah. At that time the proposal was for Lot 190 (Kelliher's land) and the McKay land of Lots 191 & 192 Pinjarra Road.

In addition a part of McKay's land had been identified in the Town Planning Scheme for a road reservation.

I chaired a number of meetings when the problem of progressing the rezoning of land in Ravenswood and the proximity of the raceway was discussed.

The drag strip had the effect of preventing urban development in Ravenswood.

By 1994: the drag strip noise problem still had not been resolved and this was preventing the rezoning of Riverland Ramble from proceeding; and it was decided that Ravenswood would not be the site for the TAFE college.Because of the noise problem from the drag strip I recommended at a number of meetings of Council and/or meetings of the Planning Committee that we orient the development toward Fiegerts Road.

Councillors agreed with me that this would be an ideal solution to retaining the drag strip and enabling urban development in Ravenswood. However, the planning staff present at those meetings told us that this was not possible. One of the people who voiced his opinion about this was Mr John Treloar.

The reason given that it was not possible, was the fact that the Perth to Bunbury Highway had been identified for the McKay land and there was a buffer required to it as well as land in Ravenswood adjacent to the highway being identified for a TAFE college, the location of which became more clear in 1992.

I recall the Councillors discussing a Joint Venture type arrangement to colocate a Recreation Facility with the TAFE. At the meetings I recall being told that funding would be easier to obtain to acquire the land if we progressed a proposal with the TAFE and included Mandurah in on the proposal.

After the TAFE proposal had fallen over the Shire still wanted to progress its idea for a Recreation Centre for the land adjacent to the Highway (exhibit 171B [7] [18]).
562 Thus, in his second statement, Mr Greenup says that while the TAFE proposal for the subject land and lot 190 was current, the shire was interested in colocating an RRF at that site.
563 In crossexamination, Mr Greenup was asked why his first statement did not mention the Kelliher brothers, the owners of lot 190, who did not get the letter of 15 January 1991. Like many of his answers, Mr Greenup's answer was not responsive to the question. He said as follows: If I didn't mention the Kellihers, I think it would have been fair to say that they were never at that time they weren't interested in development, and also that area of the Kellihers and McKays was identified or was being pursued by the councillors for the TAFE and the sport and recreation centre (ts 3170).
564 In his evidence immediately following that, Mr Greenup reiterated that in January 1991 the council had plans for a sporting complex on the Kelliher land and the subject land (ts 3171 3172). I deal with this evidence in section 4.5 below. For the reasons given there, I do not accept this evidence.
565 Later in his evidence, Mr Greenup said that some time in 1993 1994, the council became interested in locating a recreational facility in the vicinity of the subject land. He did not know any exact date of when the council became interested in developing a recreation facility (ts 3208). He denied that the first time the shire had in mind to support an RRF on the subject land was in 1995, saying that he had had, on two occasions, informal discussions with the Mayor of Mandurah about a joint venture for a 50 m pool 'in that area' (ts 3209).
566 Mr Greenup's evidence referred to the proposal in 1992 for a sports pavilion in Pinjarra. That included an indoor heated pool. Mr Greenup's evidence was that that proposal was scrapped by council before he left in 1995, on the basis on funding and because by then council wanted to investigate whether it could get a 50 m pool. Those were the reasons why the shire talked about a joint venture with the City of Mandurah for a recreation complex in the Fiegert Road/Pinjarra Road area that included a 50 m pool (ts 3210 3211).
567 Mr Greenup agreed that the lack of documentation about this idea meant that it never reached any formal proposal stage. He said that the idea would not have prevented a competing proposal to develop lots 190 and 191 from being brought to the council to consider (ts 3212).
568 Mr Flugge joined the shire in July 1994 (exhibit 182A, 15/12). The effect of Mr Flugge's evidence is that it was after the TAFE proposal for the subject land had fallen over, and as part of the IPRSP process, that the shire proposed an RRF on the subject land (exhibit 182D [31], [59] [61]). That is consistent with what is revealed by the documents. But for Mr Berrie's unchallenged evidence, I would make findings in accordance with the documents and Mr Flugge's evidence. 4.3.6 Analysis of the competing evidence about the RRF proposal for the subject land before 1995
569 As I have set out in section 4.3.4 above, in my view, the documents strongly support a conclusion that, prior to late 1995, there was no proposal, certainly no serious proposal, by the shire to locate a regional recreation facility on the subject land. That is consistent with the evidence of Mr Flugge. However, both Mr Berrie and Mr Greenup gave evidence that, in their time at the shire, there were discussions about locating an RRF on the subject land, possibly in conjunction with lot 190. Mr Berrie left in mid1994. Mr Greenup left in April 1995.

570 Mr Berrie was not crossexamined. The absence of crossexamination of Mr Berrie is a circumstance to be borne in mind in considering, in the light of all the evidence, whether to accept Mr Berrie's evidence. I adopt the outline of principles about the rule in Browne v Dunn (1893) 6 R 67 in The Bell Group Ltd (in liq) v Westpac Banking Corporation [No 9] [2008] WASC 239; (2008) 225 FLR 1 [1023] [1041]. Of particular relevance for present purposes are [1023], [1036] [1041]. In summary:
(a) noncompliance with the rule in Browne v Dunn does not mean that the court is obliged to accept the evidence in question. The court has a broad discretion about how to respond to the noncompliance; and
(b) however, in many cases it would be unfair not to accept evidence where the rule in Browne v Dunn has not been complied with.
571 Notwithstanding what the documents reveal, given the absence of crossexamination of Mr Berrie, I accept that at some time prior to July 1994, when Mr Berrie left the shire, there was discussion at council about the prospect of locating a sports complex on the subject land or lot 190. During the period when Mr Berrie worked for the shire, the shire was advocating that site for a TAFE college. I infer that any discussions about the use of that site for a sports complex took place in that context, and involved a sports complex in association with the TAFE proposal.
572 Notwithstanding the absence of crossexamination of Mr Berrie, I do not accept the evidence in exhibit 231C [3] set out above. The substance of that paragraph is that soon after Mr Berrie started working at the shire in May 1991, he was told by a shire planner or councillor something to the effect that he would not have to worry about the subject land because 'that's where the shire's sports centre is going'. Paragraph 3 does not refer to a sports centre in association with a TAFE college; it refers only to a sports centre. There is no evidence in the statement to explain the context of the conversation. I would infer that any such statement must have been made in the context of the shire's desire, in the period immediately after Mr Berrie joined in May 1991, to identify land for possible urbanisation. I will outline that context in detail in section 4.5 below. In mid1991 and for sometime before that, the shire had been advocating a TAFE college in Ravenswood. There is no documentary support for any proposal or contemplation of a sports facility on the subject land at that time. I am satisfied that if, in 1991, someone at the shire was explaining why the subject land was not a candidate for urbanisation, the reason given would have been the TAFE proposal, not a possible sports centre.
573 If Mr Greenup's evidence about the discussions regarding locating a regional sports facility on the subject land had stood alone, I would not have accepted it. That is because it is entirely unsupported by, and to a degree inconsistent with, what is revealed by the documents. Further, as I will explain in section 4.11 of these reasons, my overall impression of Mr Greenup's evidence was that, to the extent that it was not supported by contemporaneous documents or other reliable evidence, it needed to be scrutinised with considerable care before being accepted. However, Mr Greenup's evidence does not stand alone. To some degree it is supported by the unchallenged evidence of Mr Berrie.
574 At its highest, from the plaintiffs' perspective, Mr Greenup's evidence is to the effect that the shire had discussions about locating a sports facility on the subject land. Up to about mid1994, what was contemplated was a sports facility in association with the proposed TAFE college. There was always uncertainty about whether the TAFE proposal in Ravenswood would proceed. After the TAFE college proposal for this site was rejected in about mid1994, the shire pursued its proposal for a sports facility on the subject land. The suggestion of a sports facility never reached the stage of a formal proposal. It was not the subject of any resolution, report or any form of documentation. It was not mentioned in the 1994 LRS or the Peel Regional Strategy.
575 At most, on the evidence of Mr Berrie and Mr Greenup, there had been discussion of a concept no proposal had been put to anyone. There was not even a resolution of council stating commitment to the concept. Indeed, as Mr Greenup accepted, there was no council record of any discussion of the idea before 1995. The shire was plainly not going to unilaterally purchase such a large piece of land for a sports facility. Thus, the decision to build a major regional sports facility, and the selection of a site, did not lie within the power of the shire. The shire had not put forward a written proposal to the City of Mandurah or to any state government department or authority. Consequently, there was a very high degree of uncertainty whether the concept of a major regional sports facility in Ravenswood would ever be adopted by state authorities. There was even further uncertainty about whether the subject land would be selected as the site for a major regional sports facility in Ravenswood.
576 Mr McKay's oral evidence is that the effect of what he was told in early 1994 by the planning officer at the front desk of the shire was that the subject land was going to be used for an RRF and that the position was so certain that it would be a waste of time for Mr McKay to attempt to do anything about it. In the circumstances I have

outlined, a statement by a shire planner in 1994 to that effect would have been entirely without foundation. I am satisfied that no such statement was made.
577 For corresponding reasons, I do not accept Mr Kay's evidence that in 1992 he was told by Mr Rogers of the shire's intention to buy his land for a recreation centre. Mr Rogers was not then a shire councillor. There is no evidence of any proposals in 1992 for a regional recreation centre in Ravenswood or for the use of any of the land owned by the plaintiffs for that purpose. Further, in 1992, the council was attempting to develop sports facilities in Pinjarra and had applied for federal funding. I am satisfied that any conversation in 1992 between Mr Rogers and Mr McKay about Mr McKay's land related to use for the TAFE college not for a recreation centre.
578 In my view, these conclusions are reinforced by consideration of Mr McKay's conduct, to which I turn. 4.3.7 Other conduct of Mr McKay
579 Consideration of Mr McKay's conduct over many years does not paint a picture of a person who would readily accept a statement that land which he wished to rezone and develop was definitely unavailable for that purpose, because it was intended by the shire to be used for a sports complex, to mean that there was nothing he could do about it.
580 In late 1992, it had been recommended in the TAFE College Site report that lots 191 and 192 (together with lot 190) be purchased for the purpose of a TAFE college. By July 1993, Mr McKay was frustrated by the delay in resolution of the TAFE proposal. He wrote a strongly worded letter of complaint to Mr Marshall, the MLA for Murray (exhibit 176).

581 When the proposal for the Highway to be located on the subject land was identified in the 1996 IPRSP, Mr McKay took a number of steps. As he put, he 'objected to pretty well every government department that [he knew he] could at the time' (ts 3270). The plaintiffs made submissions in response to the 1996 IPRSP and engaged a consultant to lodge submissions (exhibit 142, 1/6/224, 238). He joined the Peel ***Region*** Action Group to protest against the proposed reservation over his land. He attended a meeting with state officers involved with the IPRSP, where he stood up and made his views known (exhibit 175A [12]; ts 3296). He wrote a letter to the Main Roads Department dated 29 March 1997 (exhibit 214A, attachment LB 19, 49A/117). I will say more about the contents of that letter in section 4.3.8 below.
582 After that, he joined with nearby landowners in engaging a consultant, Dr O'Brien, to prepare a report on options for the route of the Highway (see report dated 30 June 1999, exhibit 214A, attachment LB 22, 49A/128 149).
583 When the report did not produce a favourable response in Western Australia, Mr McKay travelled to Canberra in order to secure the assistance of federal authorities to have the Highway moved (ts 3297, 3300).
584 The plaintiffs lodged submissions on the draft PRS in 2002 (exhibit 16A, 1/7B/424; exhibit 16B, 1/7B/687).
585 Further, in other ways, he has demonstrated a determination to protect his rights and not to accept, uncritically, a position adopted by a government department or instrumentality. He refused a government department request to allow engineers on the subject land prior to the taking of the land. After receiving a valuation from the defendants for part of lot 189, Mr McKay 'took [the valuer] to task over this' and told the valuer that he considered his valuation was 'disgraceful' (exhibit 175A [34]). He took Supreme Court proceedings to challenge the validity of the Taking Order. He took proceedings for an injunction against the building company in relation to noise associated with the construction of the bridge. I make no criticism of Mr McKay for taking these steps. It is, plainly, the right of every citizen to take steps to ensure that his or her rights are protected. The point, for present purposes, is that Mr McKay's conduct in these and other respects stands in marked contrast to, on his evidence, his apparently uncritical acceptance, based on something said by a shire officer at the front counter and a conversation with a councillor, that there was nothing he could do about the proposal to acquire his land for a recreation centre. 4.3.8 Other indications of the plaintiffs' intentions

586 There are a number of pieces of the evidence from various periods which provide some indication of the plaintiffs' intentions during the preIPRSP period. In my view, these indications do not support, but weigh against, Mr McKay's evidence that, in and ***around*** 1994, he wished to have his land, including the subject land, rezoned so that he could develop and subdivide it.
587 In oral evidence, Mr McKay said that 'this land was bought purely with the idea of developing it whenever we could and as soon as we could' (ts 3271). In my view, Mr McKay's conduct strongly suggests otherwise.

588 As I have said, Mr McKay's evidenceinchief in his witness statement was to the effect that he wanted to have all of his land rezoned so that he could pursue development and subdivision of it.

589 Paragraph 9 of his first witness statement, set out in section 4.3.2 above, says that when he went to the shire, he was told that the shire was unlikely to support an application to have 'the Land', meaning all of his land, rezoned from rural to urban. In those terms, the evidence is not credible. The reasons said to have been given by the shire officer related only to lots 191 and 192. Those reasons would have provided no impediment to an application for rezoning of lots 300 and 301 (then called lots 187 and 188).

590 On Mr McKay's evidence, he wanted to rezone and develop all of his land and he was given reasons against the rezoning of lots 191 and 192. That squarely raises the question of why he did not pursue any rezoning application in respect of lots 300, 301 and 189.

591 He knew sewerage was available in North Yunderup when he bought (ts 3269 3270). Lots 300 and 301 then had some urban development nearby to the ***south*** (ts 3269).

592 Even if, contrary to my view, the reference in exhibit 175A [9] to 'the Land' was mistaken, and was intended as a reference to the subject land, the question of why he did not pursue any rezoning application for lots 300, 301 and 189 would still arise.

593 In crossexamination, Mr McKay was asked this question on a number of occasions. I found his answers unsatisfactory and unconvincing.

594 On one occasion, when asked why he did not apply to rezone and develop lots 300 and 301, he said that it was 'a very valuable piece of land', but he thought 'the logical thing' was to develop lots 191 and 192, which were 'nowhere near as valuable' as lot 189 (ts 3329).

595 Asked again for a reason why he did not proceed to rezone and develop lots 300 and 301, he said it was 'a prime piece of real estate' with 'enormous potential' (ts 3329). Asked a third time, he said that he would have liked to have kept them for the long term (ts 3329; see also ts 3330).

596 His answers about why he did not apply to develop lot 189 were broadly similar. He said it was 'a very valuable piece of land that's got unlimited potential' (ts 3330). He said that lots 191 and 192 were easier to work with and that '[t]he land I wanted to develop was 191 and 192 because it was so easy to develop' (ts 3330).

597 This evidence is inconsistent with Mr McKay's evidence in his witness statement. In his witness statement, he said that he intended to develop all of his land. In this part of his oral evidence, Mr McKay said that his wish was to develop lots 191 and 192 only.

598 Further and in any event, I do not accept Mr McKay's attempts to explain why he made no rezoning applications for lots 300, 301 and 189 at any time during the 1990s. To my mind, the fact that he made no such rezoning application during the 1990s weighs significantly against the acceptance of Mr McKay's evidence that during the preIPRSP period he wanted to have his land generally, or the subject land in particular, rezoned to urban so that he could develop and subdivide it.

599 As late as 2002, when he had a new house built on lot 301, he was not intending to subdivide that property (ts 3268).

600 Prior to Mr McKay learning about the sewerage being constructed in 1994, the plaintiffs did not make any enquiry at the shire, or take any step of any kind in furtherance of any contemplated rezoning and urban development of any of their land. Moreover, although it was not put to Mr McKay, as a neighbouring landowner he must have received notice of the Riverland Ramble rezoning application when it was advertised in late 1993 (see section 4.6 below). Further, on his evidence (which I do not accept), he was told by the shire when he bought the land that he could subdivide the subject land 'within a few years' (ts 3273), yet he did not take any step before 1994.

601 As I have said, by letter of 29 March 1997, Mr McKay wrote to the Main Roads Department opposing the proposed alignment of the Highway through lot 192. The letter was in the following terms (exhibit 214A, 49A/117): Dear Sir/Madam

We wish to appeal in the strongest terms possible against your proposed ***Southern*** Freeway Extension passing through our property at North Yunderup.

Not only does it take the most of Lot 192 and by separating Lot 188 & 189 with the proposed Freeway is of no benefit to us what so ever, its a total disaster as far as we are concerned. The loss of just on 188; of our farm makes it totally unviable, it no longer is a viable farming proposition. It also is a disaster to our neighbours to the North of us, our neighbours being the Mannion's and Kellihers. The Mannion's and Kellihers totally support our proposal in asking you to relocate the freeway extension so that where it crosses Paterson Road and it follows it on the inside alignment of boundaries of Lots 1, 2, 209, 206 and then down the road reserve that adjoins lot 205, 204, 190 and along the boundary of our lot 189. This way it does as little damage as possible to our existing farming operations and lifestyle.

We ask you to consider this proposal.

Thanks for your time.

Sincerely,

ROD MCKAY

602 In this letter, Mr McKay set out the reasons why he proposed a different alignment for the Highway. The letter does not mention any wish to pursue urban development of lot 192 or lot 191. When it was put to him in crossexamination that the reason he gave was, as set out in the letter, that a proposed realignment 'does as little damage as possible to our existing farming operations and lifestyle', Mr McKay sought to suggest that the reference to 'our lifestyle' could or should be understood to include the benefits for the plaintiffs' lifestyle of the proceeds of developing the land at a later time: 'Our lifestyle' could probably be elaborated a little bit more to say that in buying this land, this was our super fund. We don't have a superannuation fund or anything like that as such and this land was bought purely with the idea of developing it whenever we could and as soon as we could. When I say 'lifestyle' there, of course to enjoy a good lifestyle you need a couple of dollars (ts 3271).

603 I do not accept that that was any part of Mr McKay's thinking when he wrote the letter.

604 In the submissions in response to the 1996 IPRSP lodged by the plaintiffs, and by a consultant on their behalf, it does not appear to have been suggested that the Highway and proposed RRF impeded a plan for urban development. See exhibit 142, 1/6/224, 238. The submissions appear to have been primarily directed to opposing the Peel Regional Park (topic 1.2 of the report: see 1/6/191) as it affected lots 187 (300), 188 (301) and 189. The plaintiffs' submissions in response to the IPRSP did not seek inclusion of any of their land as urban or future urban (topic 2.5: see 1/6/192, 224, 238).

605 In at least part of 1992 and 1993, Mr McKay had lots 191 and 192 on the market or was willing to sell to the government at the right price (ts 3333). That does not sit well with Mr McKay's evidence that, at least as at 1994, his intention was to rezone and subdivide lots 191 and 192, while at that time he did not wish to develop lots 300, 301 and 189.

606 Much later, in 2002, the plaintiffs made submissions against the draft PRS. The primary focus of the submissions appeared to be on lots 187 (300), 188 (301) and 189. In relation to the subject land, the submission proposed that if the Northern Option 3 alignment for the Highway were accepted, the subject land would be rezoned to 'urbanspecial rural' (see exhibit 16A and exhibit 16B). While that does not appear to have been an available zoning class, it is noteworthy that, even in 2002, the plaintiffs were not asserting a wish for the subject land to be zoned urban for residential development.

607 The first application for rezoning of any of their land was made by the plaintiffs in August 2003 in relation to lot 189 (exhibit 114, 3/9/115).

608 To my mind, all of these matters tend against acceptance of Mr McKay's evidence that during the preIPRSP period he wanted to have the subject land, or his land generally, rezoned to urban. 4.3.9 Other observations on Mr McKay's evidence

609 In my view, there are material aspects of Mr McKay's evidence that are inconsistent in respects that are of some significance.

610 First, Mr McKay's evidenceinchief was that after his conversation with the shire planner, he 'decided to seek to have both projects moved away from the Land' (exhibit 175A [10]). Initially, in crossexamination, he said that he tried to get everything moved off the land where possible. However, his evidence thereafter was to the effect that once he had spoken to the shire planner, the councillor and possibly other councillors, he decided it was a waste of time and did nothing further. Mr McKay said that he was absolutely certain that after he had spoken to Mr Rogers he did not decide to do anything because he had concluded that it was hopeless (ts 3323). He accepted that his oral evidence could be 'a little bit' inconsistent (ts 3323) with what was in exhibit 175A [10].

611 Secondly, his witness statement expressed what was said to him by the planning officer to be that the shire was 'most unlikely' to support a rezoning application. As I have outlined in detail in section 4.3.2, Mr McKay's oral evidence during crossexamination put the effect of the conversation with the planner in much more emphatic terms.

612 Thirdly, there was some inconsistency in Mr McKay's evidence during crossexamination about what followup steps he took after his conversation with the shire planner. Earlier in his evidence, he said that he spoke to Mr Rogers and possibly other councillors and did nothing else. He said he did not speak to his local member (ts 3302). Later in his evidence he said that he contacted two members of Parliament, one of whom was Mr Marshall, his local member (ts 3325 3327).

613 Fourthly, as I observed in section 4.3.2, in his statement (exhibit 175A [9]) he said he asked a shire officer about progressing rezoning for the whole of Windsor Park, whereas his oral evidence (ts 3293) was that he asked about rezoning only lots 191 and 192.

614 Further, aspects of Mr McKay's evidence seem to me to not make sense or be inherently unlikely. For example, his evidence was that he spoke to two members of Parliament about the proposal and each said that he knew nothing about it. Yet, the effect of Mr McKay's evidence was that he continued to accept that there was nothing he could do and, so far as his evidence reveals, did nothing further about it.

615 The effect of Mr McKay's evidence was that, following his conversation with the shire planner, he thought there was a prospect of moving the Highway, but no chance of having the proposed RRF relocated. Consequently, he said, he took steps to seek to have the Highway moved, but no steps to relocate the RRF. The RRF proposal affected more of the subject land than did the Highway proposal. The purpose of attempting to have the Highway moved, while accepting the proposed location of the RRF, is by no means evident. Success in the endeavours to move the Highway would have left only a relatively small part of the subject land, namely part of lot 192, available for rezoning to urban. Mr McKay's evidence when he was asked questions about this was unconvincing (ts 3336).

616 Moreover, the view adopted by Mr McKay, on his evidence, that he had prospects of moving the Highway, but not the RRF, appears somewhat surprising. As at 1994, the Highway had been contemplated for a long time and was the subject of a reserve in TPS 4, published five years earlier. By contrast, the proposal for an RRF was not the subject of any document; Mr McKay's understanding is said to have been based on a conversation with a planning officer at the shire and with one or perhaps more councillors.

617 I did not find Mr McKay's evidence about the nature and scope of the development that he had in mind in the preIPRSP period to be credible. He said that he had in mind a development with a commercial component that could in the future have included shops like Coles and Woolworths (ts 3277). He said he thought 'we could have had a hell of a commercial set up there' (ts 3273). In 1994 to 1996, Ravenswood was a small town of a few hundred people. It was at least 1.2 km away from the subject land. In my view, this evidence of Mr McKay is the product of hindsight, given in light of the contention, as part of the plaintiffs' case in this trial, that the subject land had significant commercial potential.

618 On many occasions, Mr McKay's answers were not responsive to the questions that he was asked (see, for example, ts 3273, 3275, 3279, 3281, 3300, 3329 3330, 3333, 3346). On at least some of these occasions, it seemed to me that Mr McKay was seeking to advance his case, or wishing to avoid making what he perceived to be a concession against his case, rather than answer the question. 4.3.10 Conclusions

619 For these reasons:

(a) I do not accept Mr McKay's evidence that in the preIPRSP period he wished to have his land generally, or the subject land in particular, rezoned to urban so that he could develop and subdivide it;

(b) I do not accept Mr McKay's evidence that, in 1994, he had a conversation with a planner at the shire in which the planner told Mr McKay anything to the effect that the shire would oppose rezoning of lot 191 because that land was proposed by the shire to be used for an RRF and that, as a consequence, Mr McKay thought there was nothing he could do about rezoning the subject land; and

(c) I am not satisfied that, but for the proposed public works, the plaintiffs would have applied to have the land rezoned to urban in the preIPRSP period.

620 In summary, I have reached these conclusions because:

(1) As at 1994, any discussion by the shire of the idea for an RRF on the subject land had not reached the stage of being a firm proposal. There would have been no foundation for a shire planner to say anything to the effect alleged by Mr McKay.

(2) Mr McKay's conduct bears strongly against finding that he accepted that although he wished to have lots 191 and 192 rezoned, he did nothing about it because he accepted what the shire planner and one or more councillors told him.

(3) The plaintiffs took no steps to have lots 300, 301 or 189 rezoned to urban at any time in the 1990s. I found Mr McKay's attempts to explain why that was so to be unconvincing.

(4) There are other indications of Mr McKay's intentions that weigh against acceptance of his evidence.

(5) In a number of respects I found Mr McKay's evidence to be inconsistent, contrary to commonsense or otherwise unsatisfactory.

621 These conclusions are fatal to the plaintiffs' preIPRSP rezoning case. However, for the sake of completeness, I will determine whether a rezoning application, if made, would have been successful. Sections 4.6 to 4.12 are concerned with that question. Sections 4.4 and 4.5 are primarily concerned with the plaintiffs' contention that, but for the proposed public works, they would have received a copy of the shire's letter of 15 January 1991. Section 4.4 also provides background for sections 4.6 and following. 4.3.11 The economics of rezoning and subdivision

622 There is a further matter that supports the conclusion that the plaintiffs would not have applied for rezoning. That matter involves considering whether it was economically viable to subdivide the subject land for residential development in the preIPRSP period.

623 Mr McKay accepted that the plaintiffs would not have applied to rezone their land unless they intended immediately thereafter to develop, subdivide and sell residential lots (ts 3277).

624 If, contrary to my findings, the plaintiffs had an intention, in the mid1990s, to rezone and develop their land then, in my view, that intention would have been to do so only if and when they were satisfied that development was immediately viable. Consequently, in my view, it was incumbent on the plaintiffs to prove that in the preIPRSP period they would have been satisfied of viability and so would have applied for rezoning. They have not proved that.

625 The six lots comprising Windsor Park had a land area of more than 175 ha. There is no evidence directed to the viability of a possible urban development in the 1990s of Windsor Park generally or the subject land in particular. In my view, the surrounding circumstances lead to very considerable doubt about the viability of any such project. Ravenswood was a small town of a few hundred people. Riverland Ramble was substantially progressed by mid1994 and, by later that year, all the indications were that it would be approved. It had or would soon have enough urban zoned land to accommodate thousands of people. Against that background it is difficult to see how, in the mid1990s, the plaintiffs could have expected sufficient demand to make urban development of Windsor Park, or the subject land, economically viable in the near term. The fact that, at ***around*** this time, the developers of

Riverland Ramble considered their proposed development to be economically viable (ts 5024) does not translate into a like conclusion for the differently located subject land, facing competition from Riverland Ramble. Mr McKay's evidence in very general terms about demand (ts 3275) falls well short of being sufficient.

626 For these reasons:

(1) if, contrary to my findings, I had accepted Mr McKay's evidence that in 1994 he wanted to have Windsor Park or the subject land rezoned and developed, I would have found that that intention was to do so only if he was satisfied that the development was economically viable;

(2) I am not persuaded that in the preIPRSP period the plaintiffs would have been satisfied of the viability of urban development; and

(3) consequently, I am not persuaded that the plaintiffs would have applied for rezoning of the subject land.

627 Finally, if contrary to the plaintiffs' submissions, the past hypothetical rezoning question is to be determined objectively by reference to the reasonable landowner, rather than subjectively by reference to the plaintiffs, then, for the reasons set out in this section 4.3.11, I am not satisfied that the reasonable landowner would have applied for rezoning in the preIPRSP period.

4.4 Background to the sewerage issue and the shire's letter of 15 January 1991

628 The background facts on these topics are not in any substantial dispute. In large measure, they are common cause. The following outline draws heavily on exhibit 267, a statement of agreed facts regarding provision of sewerage in Ravenswood, and on exhibit 146, a chronology of events for Riverland Ramble, with numerous attached documents.

629 By 1989, it was a requirement under the environmental regime that all developments within 2 km of the PeelHarvey estuary system be connected to sewerage (exhibit 255A).

630 On 9 June 1989, the shire clerk of the Shire of Murray wrote to the Minister for Housing and the Minister for Water Resources about what was described as the land crisis in the Shire of Murray, requesting a meeting (exhibit 261A). The letter stated that the costs of development, given the requirement of sewerage, was one of the main reasons for the lack of subdivision. Land stocks in Pinjarra were said to have reached crisis point. Other areas were experiencing a shortage of suitable vacant land because of the lack of sewerage infrastructure. It was recommended to the Minister for Water Resources that discussions occur on the provision of infill sewerage areas to Ravenswood, Furnissdale and North Yunderup to reduce overall sewerage extension costs for developers.

631 On 13 June 1989, the shire wrote to the director of the PeelHarvey Implementation Steering Group identifying Ravenswood, together with Furnissdale and North Yunderup, as areas urgently needing deep sewerage, being 'prime areas for development' (exhibit RR146.1). The letter enclosed a copy of the shire's 'Land Crisis Report', said to identify the need and concerns regarding the lack of housing development due to the absence of deep sewerage.

632 On 27 July 1989, the council resolved to advise the Water Authority of Western Australia (the WAWA) that it strongly supports the Department of Agriculture on the matter of sewerage needs within the PeelHarvey catchment area, with particular emphasis on Ravenswood, Pinjarra, Furnissdale, Barragup and North Yunderup (exhibit 171A, 46B/294).

633 The draft Peel Regional Plan of October 1990 identified that the availability of sewerage was a major constraint to the urban potential of some areas. In its discussion of sewerage schemes, it stated that [t]he lack of sewerage schemes has imposed considerable constraints on development potential in parts of the ***Region***, such as Furnissdale and Ravenswood in Murray Shire. Planning must recognise the importance of giving higher priority to providing sewerage services to such areas in the light of the urgent need for additional urban land, and commitments to improving water quality in the PeelHarvey system (exhibit 181, 1/5/71).

634 There were further resolutions of council and its committees, correspondence and meetings (see exhibit 171A, 46B/297 303). The Premier met with members of the council. Following that, the Premier wrote to the shire confirming that the WAWA was working closely with the shire and developers to extend the sewerage scheme to Ravenswood as quickly as possible (46B/304).

635 On 9 January 1991, the Minister for Water Resources wrote to the shire stating, among other things, that the WAWA was keen to work with the shire to develop a strong case for sewering the shire's top priority area,

Ravenswood. The letter further stated: When I met with Council on November 8, 1989, it was agreed that you would put together an overall plan for future urban development within the Shire, perhaps involving the rezoning of some large areas suitable for major developments. I am advised that the Water Authority is still awaiting the plan together with some indication of Developers' intentions in Ravenswood and other priority areas (exhibit 171A, 46B/306).

636 On 10 January 1991, the shire council considered the 1990 draft Peel Regional Plan. Among other comments, it resolved to state its support for references to a lack of sewerage in Murray in the report and the need for deep sewerage to be installed (exhibit 171A, 46B/331).

637 On 15 January 1991, the shire wrote to 12 landowners in identical terms. The letter was in the following terms (exhibit RR146.3): Dear Sir,

DEVELOPMENT OF LAND

Over the last decade, residential and semi residential developments in the Ravenswood locality have not been able to proceed primarily due to the economic constraint of providing deep sewerage.

The Water Authority of WA have advised Council that they are prepared to consider assisting any developer in providing deep sewerage to the Ravenswood locality should any landowner wish to develop.

Should you, as a major landowner in this area, be interested in residential and/or semi residential (note: not special rural) development, please contact the Shire offices, so that discussions between the Water Authority, Council and yourself can be undertaken to establish the economic's of providing deep sewerage and what contributions are necessary from each party.

For further information please contact the Shire Planner during normal office hours.

Yours faithfully,

D A McCLEMENTS

Shire Clerk

638 As I have said, the plaintiffs contend that, but for the proposed public works, they would have received a similar letter. I will deal with that contention in section 4.5.

639 The extent of responses to the letter of 15 January 1991 is dealt with in detail in exhibit 267. The defendants emphasise that only one landowner, Kimba Pty Ltd, then owner of the lots comprising Riverland Ramble, took up the offer in the sense of seriously pursuing rezoning and the undertaking of sewerage works.

640 By April 1991, there had been responses from four landowners.

641 Later in 1991, there were council resolutions and correspondence about a meeting involving landowners to discuss the provision of sewerage in the locality (exhibit 191G, 25A/603; exhibit RR146.10). There is no evidence whether the meeting occurred.

642 After November 1991, no landowner other than Kimba participated in any application for urban rezoning pursuant to the shire's invitation. There is no evidence that the WAWA made an offer to any landowner in Ravenswood, other than Kimba.

643 By February 1992, State Planning Policy SPP 2.1 required, by cl 5.1, that land not be rezoned for urban purpose unless all lots have been connected to an adequate sewerage service or alternative system satisfactory to the Environmental Protection Authority (the EPA) and Health Department (exhibit 255B, 1/9/21). That applied to all land in the PeelHarvey coastal plain, not merely to land within 2 km of a river.

4.5 But for the proposed public works, would the plaintiffs have received a copy of the letter of 15 January 1991?

644 The plaintiffs submit that their failure to receive a copy of the letter from the shire was because the subject land was part of an area identified as a corridor for the Highway and because the subject land had been identified for a TAFE college and RRF (closing submissions par 4.119).

645 They submit that, but for the proposed public works, the plaintiffs would have been able to take advantage of the opportunity to have the subject land connected to deep sewerage in 1991.

646 In the context of the plaintiffs' case, the question is whether the failure of the plaintiffs to receive a copy of the letter is attributable to the proposed public works. I think that question can be expressed in affirmative terms by asking whether, but for the proposed public works, the plaintiffs would have received a copy of the letter. I am aware that, in some contexts and for some purposes, the 'but for' test is not a complete test for causation. In the present context, I think the 'but for' test is an acceptable negative criterion for testing what is 'attributable'. If the 'but for' test is not satisfied, the event is not 'attributable' to the proposed public work. If it is not attributable to the proposed public works, then any impact on the value of the subject land, flowing from that circumstance, does not need to be discounted under the LA Act s 241, and the circumstance that the plaintiffs did not receive the letter is unaltered in the plaintiffs' past hypothetical preIPRSP rezoning case.

647 I begin with the agreed facts about who was and was not sent a copy of the letter, and the location of the lots owned by those parties.

648 The recipients of the letter are set out in a document that is evidently a council record from 1991 (exhibit 171A, 46B/307 308). That document included a copy of the letter, addressed to one of the recipients, followed by a list of names and addresses of the other recipients. The list sets out landowners with a relevant lot number or numbers identified in handwriting. All but one recipient is listed in respect of one lot of land. One recipient is listed in respect of two lots. Consequently, the letter was sent to the owners of 13 lots.

649 The location of those 13 properties is shown in attachment JB 3 to the statement of Ms Janet Benaim (exhibit 244, 49A/463). It can be seen from exhibit 244 that:

(a) lots 2, 3 and 4 straddle Old Mandurah Road to the north and ***south***. With the exception of those properties, all the properties listed are entirely ***south*** of Old Mandurah Road;

(b) the properties cover virtually all land between Old Mandurah Road to the north, Pinjarra Road or the Murray River to the ***south***, and extending east as far as including lot 4, apart from land to be developed near the Ravenswood settlement;

(c) all the lots are within 2 km of the Murray River;

(d) lot 1 (Thomasfield) is southwest of Pinjarra Road and north of the Murray River;

(e) lot 12 is southwest of Pinjarra Road, ***south*** of the Murray River; and

(f) lot 17 is north of Pinjarra Road and ***south*** of the Murray River.

650 One of the recipients of the letter was Lanstal Pty Ltd. It was listed as a recipient in respect of lot 4, which straddles Old Mandurah Road north and ***south***. Lanstal also owned lots 6, 10, 11 and 12, each of which was wholly north of Old Mandurah Road. However, the handwritten list did not refer to lots 6, 10, 11 and 12.

651 Mr Kelliher, the owner of lot 190, and the plaintiffs were not listed and did not receive a similar letter. The plaintiffs did not receive a letter in respect of lot 189, which was adjacent to the Thomasfield property.

652 The plaintiffs submit that the letter refers to major landowners, a description which fits the plaintiffs, and went to persons who owned land within 2 km of the Murray River, as did the McKays (closing submissions par 4.120). However, those were not the only criteria for receipt of the letter. Other major landowners within 2 km of the Murray River were not sent the letter, for example the Kellihers.

653 Further, the plaintiffs submit that letters went to landowners who owned land well beyond the townsite, to the corner of Paterson Road and Old Mandurah Road, being further from the townsite than the subject land (par 4.137). I accept that that is so. However, that fact does not lead to a conclusion that, but for the proposed public works, the McKays would have received a copy of the letter.

654 In my opinion, the evidence does not support a conclusion that the identification of those who were to receive the letter was influenced by the proposed public works. The plaintiffs did not lead any direct evidence about the criteria for identification of the recipients of the letter. Apart from inference drawn from the location of lots owned by known recipients, the only evidence bearing on the selection of recipients of the letter came from Mr Greenup and Mr Rowe, to which I will come.

655 Finally, the plaintiffs submit that there is no reason in the evidence why the plaintiffs did not receive the letter (par 4.138). That submission, if accepted, would not make the plaintiffs' case. It is for the plaintiffs to establish that their failure to receive the letter was attributable to the proposed public works. The plaintiffs' submission must be intended to mean:

(1) apart from the proposed public works, there is no other reason in the evidence as to why the plaintiffs did not receive the letter; and

(2) consequently, it should be inferred that, but for the proposed public works, the McKays would have received the letter.

656 I do not accept the first step in that submission. Analysis of the location of lots owned by the landowners, as stated on the shire's list, supports an inference that the criterion for selecting recipients of the letter was that the recipient owned land, close to the existing Ravenswood townsite, ***south*** of Old Mandurah Road, from the junction of Pinjarra and Old Mandurah Roads; east to Paterson Road; ***south*** to Thomasfield; and, to a small extent, across the Murray River. That is the inference I draw. It is supported by the location of lots owned by those who received the letter, and those who did not. Further, it is supported by the fact that the entry on the shire's list for Lanstal Pty Ltd refers only to lot 4, and not to the other lots owned by Lanstal that were north of Old Mandurah Road.

657 In his report dated 31 May 2010, Mr Rowe expressed the opinion that, but for the proposed Highway, the plaintiffs would have received the letter of 15 January 1991 (exhibit 191I [11] [13]). He said that 'apart from the alignment of the highway and the proposed regional sporting complex, there is no reason why the McKay landholding would [have been] treated any differently' to those who were invited to consider rezoning of their land (exhibit 191I [13]). I am not sure that this is a question for an expert planner. In any event, for the reasons above, and expanded on below, I do not agree with Mr Rowe's opinion.

658 Mr Greenup's primary witness statement referred to the fact that the letter was not sent to the plaintiffs (exhibit 171A [23]). The next paragraph stated that the subject land had been identified for the Highway and there was also some consideration of their site for a TAFE college. The RRF was not mentioned. His witness statements do not contain any evidence about the criteria by which the recipients of the letter were identified. His statements do not refer to the fact that the Kellihers did not receive a letter as the owner of lot 190 (and other lots).

659 As mentioned in section 4.3.5, Mr Greenup gave the following nonresponsive evidence about that omission: If I didn't mention the Kellihers, I think it would have been fair to say that they were never - at that time they weren't interested in development, and also that area of the Kellihers and McKays was identified or was being pursued by the councillors for the TAFE and the sport and recreation centre (ts 3170).

660 He said that to the best of his knowledge, as at January 1991, the Kelliher land was being pursued for a sporting complex (ts 3171). A little later in his evidence, Mr Greenup made reference to the fact that the Kellihers had said to him categorically that they were not interested in urban development. Asked whether it was for that reason that they were not sent a letter he responded that he believed 'that would be the reason why, yes' (ts 3172).

661 I do not accept this evidence about why a letter was not sent to the Kellihers. The evidence is expressed in terms that demonstrate that it is in the nature of surmise or reconstruction, not a recollection of events of which he

had firsthand knowledge. The events had occurred almost 20 years earlier. He had not referred to any documents in this respect. There are no documents in evidence which support Mr Greenup's surmise about why the Kellihers were not sent a copy of the letter.

662 Moreover, if it were necessary to decide, I do not find his evidence on this topic credible. I found his responses to questions about what could be drawn from the sending of letters to owners of land near the raceway to be unsatisfactory. Mr Greenup repeatedly failed to give responsive answers to questions (ts 3175 3179). At times he suggested letters were sent to owners near the raceway only as 'a courtesy' (ts 3175, 3176, 3177) or as a 'formality' (ts 3179). I formed the distinct impression that he was unwilling to make what he perceived to be a concession against the interests of the plaintiffs' case. See also my general observations on Mr Greenup's evidence in section 4.11.

663 Further, I am satisfied that by January 1991, there was not, at the shire, any firm proposal that lots 190, 191 and the balance of 192 (apart from that which was reserved for the Highway under TPS 4) be used for an RRF. See section 4.3.4 and sch 2. I am not satisfied that there was a proposal at the shire to use the subject land for a TAFE college that was sufficiently definite and well developed to lead to a decision not to send the letter to the plaintiffs.

664 Even if, contrary to my finding, there had been such a proposal at the shire, and that proposal was the reason that the letter of 15 January 1991 was not sent to the plaintiffs, nevertheless, in my opinion, the failure to send the letter to the plaintiffs would not thereby be 'attributable to the proposed public works'. The TAFE college is not one of the proposed public works and is not attributable to the Highway (see section 4.10.4).

665 If, contrary to my findings, there had been discussions at the shire prior to January 1991 about the use of the subject land for a regional recreation facility, any action taken in consequence of that idea (or any proposal, if discussions had reached that stage) would not thereby have been attributable to the proposed public works.

666 The proposed public works are the Perth Bunbury Highway and the ROS/RRF. That does not mean that any discussion, at any level of government, at any time, about the possibility of a recreation facility is attributable to the proposed public works. See Mount Lawley (2007) [26] [30] and section 2.7.2 above. I refer to the history of the proposal for an RRF set out in section 4.3.4 and sch 2.

667 Lot 191 and part of lot 192 were reserved for Regional Open Space in 2003 in the PRS. That followed the designation of the land for the purpose of 'Open Space Recreation' in the final 1997 IPRSP and in the 1996 IPRSP. It was clear from the 1996 IPRSP that the designation 'Open Space Recreation' was contemplated for the purposes of an RRF: see pt 9.4 of the 1996 IPRSP (exhibit 7, 1/10/98).

668 It is not in doubt that the designation in the IPRSP and the reservation in the PRS are attributable to the proposed public work. The question is what matters, if any, relating to a proposal for an RRF on the subject land, prior to the IPRSP, are attributable to the proposed public work.

669 Attention must be directed to the RRF contemplated in the 1994 Peel Regional Strategy and proposed in the 1996 IPRSP, not to the general concept of a regional recreation centre. There is nothing in the evidence that sufficiently connects any proposal or idea at the shire before 1995 with the locating of the RRF proposed in the IPRSP. On the evidence, the genesis of the location of the RRF on lot 191 was the shire's letter of 8 January 1996 and its resolution of 21 December 1995 and, possibly, a preceding conversation between Mr Flugge and Mr Auret. In this light, in my opinion, nothing before 1995 is attributable to the ROS/RRF public work.

670 For these reasons, I find that the failure of the plaintiffs to receive the letter of 15 January 1991 is not attributable to the proposed public works. That finding has the consequence that the plaintiffs' preIPRSP rezoning case cannot involve an assumption that the plaintiffs received the letter and took steps in consequence of that. That means the plaintiffs would not have become interested in applying for rezoning early enough to have joined with Riverland Ramble.

671 For the sake of completeness, I should add that, even assuming Mr McKay had received the letter of 15 January 1991, the evidence in very general terms from Mr McKay and Mr Jones does not persuade me that there would have been a joint rezoning application. The benefit of savings in expenditure on sewerage, in an indeterminate amount, are not shown to have been sufficient to lead a developer of a large piece of land, intended to be staged over ten years, to join forces with the owner of an additional 87 ha of land nearby.

672 Moreover, even on Mr McKay's evidence, he intended to hold the land for 2 5 years before seeking rezoning. This letter comes less than a year after he and his wife had acquired the land. This provides a further reason, in addition to what I have said in section 4.3, to conclude that if the plaintiffs had received the letter of 15 January 1991, they would not have applied for rezoning of the subject land.

673 For completeness, I turn to consider, on the assumption that the plaintiffs applied to rezone the subject land in 1994, whether that application would have been successful.

674 The answer to that question is based upon a consideration of the evidence relating to a number of different topics. In the following sections, I consider what is revealed about the likely fate of the plaintiffs' assumed application by:

(a) the progress of the Riverland Ramble rezoning application (section 4.6);

(b) other rezoning applications in Murray made during the preIPRSP period (section 4.7);

(c) the preparation of the draft 1996 IPRSP (section 4.9); and

(d) the principles of orderly and proper planning that are revealed by the planning documents from this period (section 4.8).

675 I address the contentions made by the plaintiffs and their planners about the 'blighting effect' of the Highway generally on planning in this period (section 4.10), before turning to deal with other parts of the evidence relied upon by the plaintiffs (section 4.11).

676 I set out my conclusions on the plaintiffs' preIPRSP rezoning case in section 4.12.

4.6 The rezoning of Riverland Ramble 4.6.1 Introduction

677 The historical events of the rezoning of Riverland Ramble are not in any real dispute. There is an agreed chronology (exhibit 146) with over 100 annexures. What is in substantial dispute is what the progress and consideration of the Riverland Ramble rezoning process reveals about the likely fate of a hypothetical rezoning application by the plaintiffs. In that regard, among the matters to be considered are:

(a) whether, as the plaintiffs submit, their hypothetical application in 1994 would have been approved in preference for and ahead of the Riverland Ramble application;

(b) if not, whether the plaintiffs' hypothetical application would have been approved following and in addition to the Riverland Ramble application, or in conjunction with it;

(c) the extent and nature of any references, in considering the Riverland Ramble application, to planning instruments or publications;

(d) the extent of any references to questions of population and demand for urban land; and

(e) the extent of references to the desirability of building further urban land on the existing Ravenswood townsite, or on building urban areas onto existing urban areas generally.

678 In the course of what follows, I make findings about the historical facts relating to Riverland Ramble. I will also make findings about what these facts reveal about these issues. 4.6.2 Chronology of events of the Riverland Ramble rezoning

679 By the time of its rezoning in 1995, Riverland Ramble comprised lots 20, 21 and 22 Old Mandurah Road. In 1991, the land compromised lots 13 and 14 Old Mandurah Road, and lot 61 Rodoreda Crescent.

680 By letter of 29 January 1991, Kimba Pty Ltd responded to the shire's letters of 15 January 1991 to Valcan Nominees Pty Ltd and Kitley Holdings Pty Ltd. Valcan had been the owner of lot 61 and lot 14; Kitley had been the owner of lot 13. Kimba's letter advised that it was the new owner, having consolidated the three lots into one ownership. The letter stated Kimba's intention to rezone and develop the land (exhibit 191G, 25A/604).

681 Valcan and Kitley had previously made enquiries about rezoning lots 13, 14 and 61, and had received support from the council and Committee for Statutory Procedures, subject to conditions, in late 1989 and early 1991 (see exhibit RR146.2; exhibit RR146.4).

682 On 6 May 1991, the WAWA wrote to Kimba's town planners stating that it would be prepared to provide a permanent pump station and rising main to accept effluent from the subdivision of lots 13, 14 and 61, provided that the developer paid for all internal sewer reticulation and the standard headworks charge per lot (exhibit RR146.7).

683 By letter of 31 May 1991, town planners provided advice to representatives of Kimba on the development potential of proposed lots 20, 21 and 22 (exhibit RR146.8). The letter referred to the fact that the shire appeared to be keen to encourage intensive residential development ***around*** the Ravenswood townsite. The letter also referred to the support derived for the proposed development from various aspects of the draft Peel Regional Plan. One of those aspects was the statement that expansion of the Ravenswood townsite would occur on its northern boundary, with new residential growth building on the existing settlement (exhibit RR146.8, page 2).

684 In February 1992, the then planners for Kimba, Greg Rowe & Associates (GRA), wrote to the Department of Planning and Urban Development (the DPUD), enclosing a draft structure plan for lots 20, 21 and 22 Old Mandurah Road and requesting the DPUD's comment. The draft structure plan was a substantial document of 88 pages, plus attachments (exhibit RR146.11).

685 The document referred to Ravenswood as having a population of 297 people (exhibit RR146.11, page 27). The very limited extent of urban land in Ravenswood was shown in figure 1.2 (page 10).

686 The draft structure plan pointed to what was said in the 1990 Peel Regional Plan, about the expansion of Ravenswood along its northern boundary, as supporting the rezoning application. It said as follows: 7.2.1 Relevance of Regional Plan to Study Area

In its written explanation of the land use strategy, the Peel Regional Plan Report states the following in relation to the Shire of Murray:

'Murray: new urban areas are indentified in several parts of the Murray Shire to accommodate local growth and an increased proportion of total urban growth in the Mandurah area. These new areas avoid prime agricultural land and sensitive environmental areas. Where possible they build upon existing settlements, with a logical extension of utility services'. In relation to Ravenswood, the Report states:

'Expansion of Ravenswood townsite along its northern boundary is proposed. New residential growth will build upon the existing settlement, utilising land of only moderate agricultural potential. The land is outside flood risk areas. However, a high water table would necessitate detailed investigation of drainage and other services'. Whilst the Land Use Strategy Plan itself is somewhat 'broad brush' in its application of land use classifications, the plan generally shows a band of 'future urban land', surrounding the existing Ravenswood townsite, such land being generally consistent with the location of the Study Area.

Our discussions with Officers of the [DPUD] indicate their acknowledgement that the Peel Regional Plan supports the notion of urban development over the Study Area land (exhibit RR146.11, page 46). (original emphasis)

687 In this passage, it is said that support for the rezoning comes from the Peel Regional Plan and from the fact that the Riverland Ramble proposal involved expanding on the existing townsite of Ravenswood. As will be seen, similar statements were also made: by the proponents again later in their report in support of the rezoning in September 1992 (exhibit RR146.16) and in meeting with the Minister in May 1994; by the shire in 1994 (exhibit RR146.41); and by the DPUD in reports of July 1993 (exhibit 193A, 46B/94 114) and November 1994 (exhibit RR146.42).

688 By letter of 8 May 1992, GRA sent to the shire the final report of its Ravenswood structure plan (exhibit RR146.15).

689 By letter of 11 May 1992 from Mr Flugge, the DPUD expressed support in principle for the draft structure plan of February 1992, but identified a number of issues that would have to be addressed. Among those issues was the following: EMPLOYMENT BASE

The Department has concerns over whether the developer has taken into consideration the impact of the population increase from the estate on the employment base for both the locality and the Shire, since this development can not be regarded as a natural progression to Ravenswood's previous growth.

It is noted that the Peel Regional Plan makes reference to the Tourism and Recreational potential of the ***region*** as providing good employment prospects. In addition, the progressive development of transportation links will improve opportunities to commute to employment centres, both within and outside the ***region***. The proponent could examine these aspects in greater detail as part of further justification for the proposal at the rezoning stage (exhibit 191G, 25A/607).

690 On 15 July 1992, the SWAT report was published (exhibit 199, 1/5/130 203).

691 In September 1992, GRA provided to the shire and the DPUD a report in support of the proposed rezoning of lots 20, 21 and 22. The report made a formal application for rezoning. The proposed amendment to the shire's TPS 4 became known as Amendment 43. The report identified that the area within the structure plan would ultimately generate approximately 1,500 dwellings, accommodating approximately a population of 4,200 people (exhibit RR146.16, page 6). The report proposed the creation of a new zone known as special development. That new zone class was designed to allow sufficient flexibility to enable broadacre development to occur progressively in accordance with an outline development plan to be approved by the council and the ***South*** West ***Region*** Planning Committee (the SWRPC) (page 8). The structure plan was proposed to be the outline development plan (ODP).

692 The SWRPC was a committee of the State Planning Commission (the SPC). The SWRPC had delegated power from the SPC to give consent to the advertising of the amendment to TPS 4. The name of the SPC changed to the WAPC in March 1995 (exhibit 185). I will use the names SPC and WAPC without careful discrimination about which was correct at the time.

693 Section 3 of the report is titled 'Projected growth and demand for residential development' and sets out the response to concerns expressed by the DPUD about the impact of the population increase, attributable to the Riverland Ramble development, on the ***region***'s employment base.

694 The following is a summary of some points made in that section.

(1) The project consultants question the need to substantiate their application, since the impact on employment is not a consideration for developments in the City of Mandurah, and this development is close enough to Mandurah to be a viable and attractive option to accommodate some of Mandurah's growth.

(2) The 1990 Peel Regional Plan notes the rapid population growth forecast for the Peel ***region*** and Mandurah.

(3) An important part of the Peel Regional Plan is to ensure that there is a variety of welllocated urban land that is sufficient to meet anticipated demand. This means authorities should be promoting the planning and creation of urban land prior to actual demand being established.

(4) The bulk of the additional urban land will be in Mandurah and will be sufficient to accommodate the population forecast for 2011. However, significant new urban areas are needed in Murray, and it is expected that more people will choose to live in Murray before potential urban land supplies in Mandurah begin to dwindle.

(5) The area proposed for the Riverland Ramble subdivision is identified as 'future urban' in the Peel Regional Plan.

(6) Annualised population growth rates for Mandurah and the Peel ***region*** from 1986 1991 show that both areas have significantly higher rates of population growth compared to other similarly sized regional areas. The Peel ***region*** accounted for 5.9% of the total population growth in WA during this period, and 50.3% of the population growth in the southwest ***region***.

(7) It is reasonably assumed that a strong demand for new urban land will continue for at least the foreseeable future.

(8) Additional pressure on the supply of urban land will increase as Mandurah and Murray become more linked with employment in the metropolitan ***region***. This will be enhanced by the new Perth Bunbury Highway.

695 On 15 October 1992, the WAWA wrote to GRA advising that it was prepared to carry out design and construction of the pump station and pressure main from the development to be funded from capital works and not requiring prefunding by the developer. That was said to be on the understanding that the first stage would be constructed within 30 months and would include about 150 residential lots. The letter stated that if those presumptions proved to be incorrect, funding would need to be renegotiated (exhibit RR146.17).

696 On 19 October 1992, the shire's Health Building and Planning Committee considered the proposed rezoning. The minutes record that Mr Gary Middle of the EPA addressed the committee in relation to the raceway noise issues of the proposed amendment (exhibit RR146.18). Five options were identified. The shire could:

(1) obtain an exemption in regard to noise restrictions or have a separate regulation established for the raceway;

(2) obtain compromise between the parties;

(3) refuse the development;

(4) approve the development; or

(5) relocate the raceway.

697 On 28 October 1992, the EPA wrote to the shire about the proposed rezoning (exhibit RR146.19). The EPA's advice was to the effect that:

(a) the resolution of the matter was one for the planning agency to determine;

(b) the two land uses are currently incompatible;

(c) an exemption under the Environmental Protection Act 1986 (WA) is unlikely to be supported by the EPA because exemptions generally apply to onceoff events; and

(d) should development proceed within the buffer of the raceway, the noise generated during its operation will almost certainly attract complaints, for which the shire must take responsibility.

698 The letter also set out the five options discussed at the meeting on 19 October 1992.

699 On 2 November 1992, the shire council resolved to amend TPS 4 by the adoption of Amendment 43. It was resolved to recommend to the DPUD that the proposal be referred to the EPA for assessment, with particular reference to the noise problem from the raceway. It was also resolved that the applicants be advised that council had agreed to initiate the amendment on the clear understanding that the applicants will resolve the Ravenswood Raceway noise issue prior to the finalisation of the amendment, and in the event that the issue is not resolved to council satisfaction, the council will not permit the amendment to proceed to final approval (exhibit RR146.20).

700 A letter to that effect was sent by the shire to the proponents of Riverland Ramble on 1 December 1992 (exhibit 268, page 13).

701 Thus, by the end of 1992, the shire had expressed its support for the amendment in substance, subject only to the resolution of the issues arising from the noise associated with the raceway. That fact is relevant to the plaintiffs' contention that a rezoning application by the plaintiffs, no earlier than 1994, would have been approved in preference to Riverland Ramble. Of course, I am aware that approval to advertise the amendment does not mean the authority will give final approval to the amendment.

702 By letter of 29 December 1992, the EPA commented on the shire's draft rural strategy. In relation to Ravenswood, it was said that the noise emanating from the Ravenswood Raceway was a significant planning issue that needs to be addressed. It was likely that land near the raceway would experience noise levels that exceed the levels acceptable to the EPA as set out in draft noise regulations then under consideration (exhibit RR146.22, page 2).

703 In March 1993, in advice to their clients, GRA expressed concern regarding the delay in the rezoning of Riverland Ramble arising from the noise issues. In particular, those delays could mean that the 30month requirements of the WAWA were not met, which could, in turn, significantly influence financial viability (exhibit RR146.25).

704 On 7 May 1993, the EPA responded to the DPUD regarding Amendment 43. In substance, the EPA reiterated its position in its letter to the shire of 28 October 1992.

705 On 11 May 1993, GRA wrote to the shire expressing concern that members of the SWRPC had previously raised questions 'particularly in regard to the need or demand for residential development in this location' (exhibit RR146.27). The letter asks the shire to make direct representations to the members of the SWRPC, prior to it considering whether or not to give consent to advertise the proposal in June 1993.

706 The proponents were 'deeply concerned' that the SWRPC were raising these issues and noted that DPUD officers had acknowledged that 'it is not the role of the [SPC] to determine the appropriate timing or staging of urban

development' and that it should not be a consideration in relation to rezoning (exhibit RR146.27, page 11). Rather, the proponents argued that once land had been identified as suitable for urban development, it was the function of the market to dictate timing, staging and the rate of land production.

707 The letter notes that the SWRPC did not generally pay any serious attention to questions of need or demand for developments in Mandurah. The proponents outline what they consider to be the three most obvious factors in support of the Riverland Ramble development:

(1) the site is identified for urban development by the state government's draft Peel Regional Plan;

(2) the notion of residential zoning and development is supported by the shire and DPUD officers; and

(3) the owners of the land have made a commercial judgment, backed by a substantial financial commitment, that a demand exists for residential land in this location.

708 The letter set out a number of longterm benefits to the shire. These included population growth by ultimately housing over 1,500 families and the provision of a complete range of community services to the Ravenswood community. Most of those were not then available to the residents of Ravenswood or Yunderup.

709 The making available of those services to the Ravenswood and Yunderup communities was a benefit offered by the Riverland Ramble rezoning and development. If the plaintiffs applied to rezone their land, in circumstances where the Riverland Ramble rezoning was so likely as to effectively be a given, the rezoning of the plaintiffs' land would not have offered similar benefits because the Riverland Ramble development would anyway be providing those services.

710 In this letter, GRA argue against the notion that questions of need or demand were proper planning considerations. However, it should be noticed that by May 1993, representatives of the SWRPC had raised those questions. Some of the evidence of the planners called by the plaintiffs seemed to suggest that questions of population and need did not arise, at all, prior to consideration of the Murray River Country Estate (MRCE) application in 1995. The evidence is to the contrary. As will be seen, in addition to this evidence, there are other examples where questions of population and need are considered by officers of the DPUD. I turn to one such example.

711 In July 1993, Mr Flugge prepared a report to the SWRPC (exhibit 193A, annexure JES 2, 46B/94 114). (It is also annexed to one of Mr Flugge's statements.) At that time, Mr Flugge was head of the Peel Regional Office of the DPUD. Under the heading of 'Department's Comments', in relation to noise problems, the report set out the five possible options identified by the EPA. The report stated that as council had indicated its desire to progress the amendment, the DPUD considered option 2, attempting to negotiate a solution, to be the most appropriate course of action at that stage. Option 5, to allow the development to close down the raceway or facilitate its relocation, was likely to be pursued once urban development began to encroach closer to the raceway (46B/103).

712 The report includes the following comments about the staging of development and the regional planning context: In terms of the regional perspective, the [Riverland Ramble] land is earmarked under the draft Peel Regional Plan (released for public comment in October 1990 and programmed for review/finalisation before the end of 1993) as suitable for 'Future Urban' use, subject to detailed investigation of drainage and others services due to the high water table. However, the Regional Plan does not specifically address the question of appropriate timing of such development in terms of population projections and the demand for residential lots in the general locality. The relationship of this residential development to other large scale urban expansion proposals does not appear to have been adequately investigated, particularly in relation to the availability of employment centres to service long term urban growth areas. This raises the question as to whether in fact, the Commission should 'dictate' the early release of future urban land by zoning new areas way ahead of schedule, or leave this matter for the market place to determine. This is a complex issue having Statewide implications, and it may not be reasonable to complicate the processing of this Amendment by addressing the matter here.

With specific regard to Ravenswood, the Shire of Murray has previously been somewhat constrained in progressing the development of urban land close to Pinjarra due to the lack of appropriate service infrastructure, environmental constraints (ie drainage problems) and inadequate social/community facilities. This rezoning proposal has been put forward with the intent to try and address these deficiencies. When viewed in conjunction

with the possible siting of a TAFE facility immediately to the north west and the future PerthBunbury Freeway alignment located just over a kilometre to the west, the site becomes a very attractive proposition for urbanisation. The expansion of the Ravenswood Town centre can also be seen as promoting 'nodal village' type development as distinct from urban sprawl (exhibit 193A, 46B/105).

713 A number of matters should be noted from this passage. First, as Mr Flugge accepted (ts 3903), whether a proposed rezoning to urban was consistent with what was shown in the 1990 Peel Regional Plan was a relevant factor in considering a rezoning application. Secondly, questions of need and demand were also a consideration, as Mr Flugge also accepted (ts 3903). Thirdly, a rezoning that promoted nodal village type development was preferable to one that involved urban sprawl. Fourthly, the prospect of the Perth Bunbury Highway was a factor in favour of the proposed urbanisation of Riverland Ramble. Of course, that factor must be removed from consideration of the hypothetical application to rezone the subject land.

714 The report notes that there are still unresolved issues about the Riverland Ramble structure plan, including the impact on the local employment base: Economic Development - the proponent is requested to examine in greater detail the future employment base within the Shire to service such a major urban expansion which cannot be regarded as a natural progression to Ravenswood's previous growth (exhibit 193A, 46B/107).

715 It was recommended that the proponent address that issue, among others, during the public advertisement period, prior to the proposal being considered for final approval. It was also resolved that council be advised that in the event that the noise issue involving the raceway was unresolved following the close of the public advertisement period, the amendment would not be recommended for final approval (46B/108).

716 The report recommended that consent be given for the advertising of the amendment, subject to some modification and subject to conditions.

717 At its meeting on 23 July 1993, the SWRPC resolved to give consent to advertise the amendment in accordance with and subject to the conditions in the DPUD report by Mr Flugge (46B/110).

718 On 5 August 1993, the DPUD wrote to the shire advising that the SWRPC had given its consent for the amendment to be advertised subject to the required modifications (exhibit RR146.31). The letter advised that in the event the noise issue was not resolved, the amendment would not be recommended for final approval. The letter also advised as to matters relating to the structure plan to be addressed by the proponent prior to the documents being considered for final approval. Among those matters was 'Highway Treatment'. It was said that the visual amenity associated with residential development joining a major arterial road in what was still a predominately rural environment needs careful treatment. Provision of a landscape vegetation buffer along the Pinjarra Road frontage and redesign of the estate to delete direct vehicular access onto the Highway should be addressed to the satisfaction of Main Roads (exhibit RR146.31, page 2). The defendants point to this passage. They contend that it illustrates the way in which residential development close to a highway can be and was accommodated. There seems to me to be force in that contention. I will return to this topic in section 4.10 below.

719 On 7 October 1993, the DPUD wrote to the shire advising that consent for Amendment 43 to be advertised for public inspection had been granted (exhibit RR146.32). One of the conditions was that the matters outlined in the DPUD letter of 5 August 1993 be addressed before final approval.

720 In November 1993, the shire's Health Building and Planning Committee and the council resolved that the Minister for Water Resources be advised that delays arising from the then current impasse on the noise situation and asked that the Minister agree to an extension of time for the WAWA's sewerage contribution (exhibit 171A, 46B/339).

721 Advertising of Amendment 43 proceeded from 30 October 1993 to 13 December 1993.

722 The Kellihers made a submission opposing Amendment 43 (exhibit RR146.33). Among the reasons stated were that housing developments on adjoining land would pose a threat to further rural use and potential industrial use of their land; and that their land was used for breeding and fattening cattle, and they intended to keep it rural for that purpose. The Kellihers reiterated their opposition to Riverland Ramble in early 1995, when its ODP was being considered for approval (exhibit 191G, 25A/644).

723 It is to be inferred that the Kellihers would have opposed any application in this period by the plaintiffs for rezoning of the subject land. The plaintiffs submit that opposition from the Kellihers would not be decisive. Of

course, I accept that proposition. However, it seems to me that opposition from the Kellihers would have been of more significance to an application from the plaintiffs than it was to the Riverland Ramble applications. The Kellihers' land has only a small degree of relationship with the northwest portion of the Riverland Ramble property. By contrast, it surrounds the subject land both to the east and to the north. Urban rezoning of the subject land would have more potential impact on the use of the Kellihers' land than would rezoning of the Riverland Ramble estate. Because the subject land is north of Old Mandurah Road, where all the surrounding land was rural, it would also have raised broader structure planning issues than were raised by the Riverland Ramble rezoning. I will return to this in section 4.12.

724 I do not accept the opinions of Mr Rowe (ts 3979), Mr Robinson (ts 3979) and Mr Flugge (ts 3980), that the attitude of the Kellihers would be irrelevant to the prospects of success of a rezoning application for the subject land. As Mr O'Neill (ts 4007) and Mr Moran (ts 3980 3981) said in relation to lot 190, if the Kellihers had joined in with the plaintiffs' application, it would have improved the integration of the subject land with Riverland Ramble.

725 On 13 December 1993, the shire's Health Building and Planning Committee outlined the public's submissions in response to the advertising of Amendment 43 (exhibit RR146.34). The majority of the response objections were from owners of land in the Ravenswood townsite. They objected on grounds relating to the fundamental change in the character of the area that would be brought about by the development. There was also an objection from the owners of the raceway. The objection stated that the raceway had been in operation for a number of years and that urban development was incompatible with the raceway and would pressure the raceway to reduce noise or cease operation.

726 Meanwhile, efforts were continuing to work towards a compromise between the shire, the EPA, the Ravenswood Raceway and the proponents of Riverland Ramble. By letter of 17 December 1993, the EPA enclosed a set of draft conditions for noise for the raceway to GRA (exhibit RR146.35). By February 1994, the third draft of noise conditions had been developed. The shire proposed a meeting in March for the parties to signify their acceptance or otherwise of those conditions (exhibit 191G, 25A/620).

727 By 22 March 1994, council noted that no mutually acceptable agreement had been reached between the EPA, the developers and the Ravenswood Raceway. Council resolved that having considered all the submissions, Amendment 43 be adopted with modifications in accordance with the DPUD letter of 5 August 1993 (exhibit 171A, 46B/340).

728 Thus by March 1994, subject to the satisfactory resolution of the noise from the raceway issues, the shire had resolved that Amendment 43 be adopted. Of course, that was subject to the other matters identified in the DPUD letter of 5 August 1993. Nevertheless, that state of affairs seems to me to present a formidable obstacle to any contention that a rezoning application by the plaintiffs, some time after March 1994, would have been approved in preference to and ahead of the Riverland Ramble application.

729 On 5 May 1994, the Department of Environmental Protection (the DEP) wrote to the shire (exhibit 191G, 25A/622). The letter noted that noise from the raceway exceeds requirements, but in light of the operation of the raceway since 1969, the DEP was reluctant to impose noise controls measures that would force it cease operating from that site. The DEP attached a set of noise conditions to the letter that were scheduled to apply from 30 June 1994. The conditions included restrictions on the number and duration of the meetings of the raceway, and restrictions on the number of meetings per year for jet engine and topfuel powered vehicles.

730 On 6 May 1994, representatives of GRA met with the Minister for Planning. GRA's notes for use at the meeting are exhibit 266. Among the points proposed to be put in favour of the development were that it adjoins the existing settlement and is consistent with current regional strategic planning.

731 At that meeting, evidently the Minister expressed reluctance to approve the development while the raceway continued to operate, on the ground that it would promote a conflict of land use. That was recorded by Mr Barnett of GRA in his notes in preparation for a subsequent project meeting with the proponents (exhibit RR146.36). Mr Barnett proposed a more aggressive strategy, with approaches to the relevant Ministers (the Minister for Planning and the Minister for Environment), to bring about a satisfactory resolution.

732 On 24 May 1994, Mr Barnett of GRA wrote to the Minister for Environment making a submission in relation to the proposed declaration of a ministerial noise exemption for the raceway (exhibit RR146.37).

733 By letter of 14 July 1994, Mr Armstrong, a director of Kimba, wrote a strongly worded letter to the shire (exhibit RR146.38). The letter complained of the apparent recent serious change of direction involving the proposed provision by the EPA of an exemption that would enable the raceway to continue to operate without modification. The letter also complained about delays in the process of rezoning and complained that the proponents' approach of negotiation appeared to have been a serious mistake. The letter recorded that the Minister for Planning had advised that absent an acceptable solution to the noise issues, he would not approve development within the area affected by the raceway noise pollution.

734 By letter of 27 July 1994, Mr Baker of the DEP wrote to GRA. The letter advised that the Minister for Environment had advised that he considered it appropriate to grant an exemption for the raceway. The exemption would be subject to conditions, which would introduce a compromise position. It was expected that all parties involved would contribute to the balance of this compromise and a meeting would be held to that end (exhibit RR146.39).

735 On 29 July 1994, council resolved, in effect, to support that process, to be part of the meeting and to support noise control guidelines that would support growth and development to coexist with the operations of the raceway (exhibit 171A, 46B/347).

736 On 9 August 1994, Mr Berzins, manager of the SPC Peel office, wrote to the EPA requesting advice to assist in resolving the issues relating to the raceway (exhibit RR146.40).

737 On 9 August 1994, the shire, by its president, wrote to the Minister for Planning (exhibit RR146.41). The letter was said to assist in the Minister's deliberations on Amendment 43. The letter referred to the fact that the relevant land was identified in the 1990 Peel Regional Plan as future urban. The letter referred to the drainage problems and the pressure in the Ravenswood precinct for rezoning and subdivision, and to the fact that the structure plan was to be implemented and staged over a 10year period. The letter stated that in the event that the environmental decision reached placed future urban development in jeopardy, council would have to seriously reconsider its positive attitude towards retention of the raceway.

738 In August 1994, a memorandum was sent to the Minister for Planning by the WAPC. The memorandum referred to a letter of 28 July 1994 from the DEP. The DEP's letter had stated that the only solution acceptable to residents was to relocate the raceway; that the DEP supported rezoning together with trying to keep the raceway open; and that the DEP was working on a set of conditions, acceptable to all parties, to allow an exemption order to achieve that (exhibit 268, page 15).

739 On 13 September 1994, the Deputy Premier, Minister for Environment and Minister for Planning met and agreed that the raceway would be asked to relocate within five years and that residential development could proceed adjacent to the raceway within the limitations set by the EPA (exhibit 245A, 49A/178).

740 On 28 October 1994, the EPA issued an exemption order for the raceway. The exemption order allowed the raceway to operate to 1 July 1999 with restrictions on the number and duration of meetings, the number of meetings with jet engine and topfuel powered vehicles, and restrictions on noise omissions generally (exhibit 190). The exemption set a 1 km buffer ***around*** the raceway, beyond which the specified noise levels could not be exceeded.

741 At this point, it is convenient to deal with the plaintiffs' contention that the subject land would have been rezoned in preference to Riverland Ramble. I have found that the plaintiffs would not have received the shire's letter of 15 January 1991. Consequently, any application by the plaintiffs would have followed from Mr McKay's discovery of the sewerage works being conducted in Ravenswood in 1994.

742 In light of this chronology of events, I see no force in the plaintiffs' contention that a hypothetical application by them in 1994 would have been approved in preference to the Riverland Ramble application.

743 Mr McKay's evidence was not specific as to when in 1994 he learnt of the availability of sewerage in Ravenswood. If that discovery had been the catalyst for making a rezoning application, there would, of course, have been substantial work and time involved in progressing from an intention to do so, through to the making of an application. At the least, many months of work would be involved. I note that in relation to Riverland Ramble, there was a year between the expression of an intention to apply for rezoning and the presentation of the first draft of the structure plan, and a further six months before the formal application was made. On the most optimistic

assumptions for the plaintiffs, an application might perhaps have been made in the second half of 1994. After that, the process requires:

(a) consideration and approval by the shire;

(b) consideration by an officer of the DPUD;

(c) consideration by the SWRPC and its consent to advertise;

(d) the making of any modifications required by the SWRPC;

(e) an advertising period; and

(f) staged consideration by all the same sets of decision makers after submissions are received.

744 Against the background of events I have set out, to my mind it is unthinkable that, at that very late stage in the process of rezoning Riverland Ramble, the shire, or for that matter the Minister, would have turned its back on the Riverland Ramble rezoning application in favour of the plaintiffs' application. Further, the defendants point to the evidence of Mr Greenup (ts 3188 3191). Mr Greenup's evidence was to the effect that the council was not going to allow the raceway to prevent urban development of Riverland Ramble; that the council would have remained supportive of Riverland Ramble; and that by 1994, the 'writing was on the wall' for the raceway (ts 3189). Application of the principles of orderly and proper planning would not have led to a preference in 1995 for a hypothetical rezoning application for the subject land over the rezoning of Riverland Ramble. There are additional reasons why I reject the plaintiffs' contention that the hypothetical application for rezoning on their part would have been preferred to Riverland Ramble. I will deal with that in section 4.6.4 below.

745 I return to set out the chronology of events for the Riverland Ramble rezoning.

746 Mr Berzins of the DPUD prepared a report to the Minister for Planning on the decision whether to give final approval to the Riverland Ramble rezoning (exhibit RR146.42). The report was considered at the meeting of the Committee for Statutory Procedures on 8 November 1994. That committee had taken over the roles of the SWRPC. The committee adopted the recommendations in Mr Berzins's report, with some amendments (see exhibit 146.42, page 12).

747 The report outlined the history of the rezoning application. It dealt with the points made in submissions received in opposition to the application during the advertising period. The report noted a submission that residential density was too high and that the proposed population of about 4,000 people, with 1,200 residential lots, was too intense for the residential locality. Council's comments were recorded that the structure plan had been modified to delete the higher density sites and the residential component was revised to R15, reducing the overall development yield by 300 lots. That meant that the population would be approximately 3,400 people (exhibit RR146.42, page 5).

748 The report set out the following departmental comments in relation to that objection: Departmental Comments

The Peel Regional Strategy was recently released and part of the initiative of the Strategy was to undertake structure planning between Mandurah and Pinjarra. The structure planning exercise will occur in the next twelve months. Considering the timing of the structure planning exercise it is considered unreasonable to delay the determination of the current amendment as the proposal has been in the public domain for 18 months to date.

The applicant has indicated to Council that the density of the proposal can be reduced.

There are two population projections for the Shire of Murray to the year 2006 and these are a low and a high projection. The growth in population under the low scenario is 3 600 and the projection for the high scenario is 4 300 people to the year 2006. The subject development would take up a large percentage of the projected growth however as will be seen in a following section the lot yield will be further reduced due to the imposition of a noise buffer zone.

The proposal is long term in nature and should not be ruled out because it is too large in the context of the development of the Shire of Murray. On the contrary, the proposal has potential to accommodate a large percentage of Murray growth (exhibit RR146.42, page 6).

749 The figures in the report are consistent with the shire's 1994 Local Commercial Strategy (exhibit 31, 1/11/315 316), which reported the 'preferred estimates' from the 1992 DPUD report 'Preliminary Population Projections: NonMetropolitan Local Government Areas'. This predicts an increase of 3,600 people from 8,600 people in 1991 to 12,200 people in 2006. The Local Commercial Strategy notes that the new population projections revealed significantly lower population growth in Mandurah and Murray compared to the figures for 2001 in the 1990 Peel Regional Plan.

750 Two aspects of the comments in the passage I have set out are worthy of note. First, the report refers to the structure planning exercise which was then underway, saying that it would occur in the next 12 months. Because the Riverland Ramble proposal had been in the public domain for 18 months it was considered unreasonable to delay the determination of the current amendments. Had a rezoning proposal by the plaintiffs first come to light in late 1994, the reason given in this report not to delay determination of the amendment pending the structure planning exercise would not have applied.

751 Secondly, in this passage, the report considers population predictions for the shire and the relationship between the expected population in the shire and the number of people able to be accommodated in the proposed Riverland Ramble urban area. In the last paragraph of the passage quoted, the conclusion reached is that the proposal should not be ruled out on the ground that it is too large in the context of the development of the shire, but that it had the potential to accommodate a large percentage of Murray's growth. An application in respect of the subject land would have given rise to quite different considerations of population and demand. In my view, by this time, any application by the plaintiffs would have fallen for consideration in the context that approval of the Riverland Ramble was so likely as to be a given. Thus, Riverland Ramble would have been sufficient to accommodate a large percentage of the shire's population growth over the following 10 years. The previously perceived strong need for further urban land in Ravenswood (see section 4.4) would no longer exist. To the contrary, in Riverland Ramble there was an apparently ample source of urban land for Ravenswood for many years.

752 In response to a submission that the Riverland Ramble development was premature, the report recorded council's comments that the development would be staged over a 10year period and was based on a definite potential market for residential land in the Ravenswood locality. The departmental comments were to the effect that the staged nature of the proposal would enable lots to be brought onto the market as required and that it was for the market, in the end, to determine the rate at which land is developed (exhibit RR146.42, page 7).

753 Again, an application by the plaintiffs would raise different considerations, in light of Riverland Ramble's approval or impending approval. Thus, in my view, issues of need and supply would present an obstacle for an application by the plaintiffs, whereas for the Riverland Ramble application, those factors militated strongly in favour of the application being approved.

754 Another objection considered in the report was the adverse impact of the rezoning on the raceway. The report recorded that the proponents had agreed that lot 22, which was substantially affected by the 1 km buffer zone announced by the Minister for Environment, would not be included in the area rezoned for residential purposes. That caused a reduction in the number of people generated by the development from 3,400 to 2,500 people. That reduction meant that 'this one development takes up approximately 60% of the predicted population increases in the shire of Murray for the next 10 years' (exhibit RR146.42, page 9).

755 The report identified some required modifications to the text of the scheme amendment. The conclusion of the report was in the following terms: The imposition of the 1km noise buffer ***around*** the Ravenswood Drag strip as well as the setting of environmental conditions which will lead to the closure of the Raceway after 5 years are supported in the context of residential expansion at Ravenswood. The concept of a new residential node is supported as is the reduction of a projected population of 3 400 to 2 500 people over a 10 year period. The scale of the proposal has had to be reduced and consequently the applicant will be required to prepare a new ODP.

Detailed structure planning between Pinjarra and Mandurah has been programmed by the Department for the following 12 months and this development will be accommodated by that planning.

The report has highlighted opportunities for better design in the new ODP and these issues or opportunities will be conveyed to the applicant.

Finally the wording of the scheme amendment has been modified to reflect the imposition of the noise buffer in the locality as well as the need to have public participation in the formulation of the ODP (exhibit RR146.42, page 11).

756 It should be noticed that specific support is expressed for the reduction in the projected population from 3,400 to 2,500 people over a 10year period. Again, there was reference to the detailed structure planning for the area between Pinjarra and Mandurah programmed for the following 12 months.

757 The report recommended that the Minister withhold final approval until the amendment documents, including the ODP, were modified in accordance with the report. In revising the ODP, the applicant and council were to have regard for the ODP providing for positive linkage between the existing residential development at Ravenswood and the future development in Riverland Ramble. Of course, that is not something that could have been offered by the urbanisation of the subject land. Moreover, given the proposed staged development of Riverland Ramble (see exhibit 193A, 46B/138), how linkage with Riverland Ramble would have been achieved in urbanising the subject land is not obvious. I will return to that topic.

758 In the recommendations section of the report (exhibit RR146.42, page 12), there are two handwritten additions. I infer that those were added in the course of the meeting on 8 November 1994. One of those additions is that in preparing a revised ODP, the applicant and council should also have regard to the need to prepare an indicative subdivision plan for that area of lot 22, which was excluded from the special development zone. That indicative subdivision plan was to ensure that when the 1 km noise buffer ***around*** the Ravenswood Raceway was lifted, the further subdivision could occur in an orderly manner with appropriate linkages to the special development zone. That recommendation seems to me to reflect a concern that areas of urbanisation be appropriately connected. That concern would have arisen in relation to a proposed rezoning of the subject land, particularly given the proposed staged development of Riverland Ramble over a period of 10 years.

759 Although not mentioned in any party's submissions on the preIPRSP rezoning, to my mind, this report is a significant document. It reflects the thinking of the DPUD and the Committee for Statutory Procedures in late 1994, and its recommendations were adopted.

760 On 29 November 1994, the Minister approved the recommendation of the Committee for Statutory Procedures (exhibit RR146.43). By letter of 1 December 1994, the SPC advised the shire that the modifications in the attached schedule were required to be made before the Minister would approve the amendment (exhibit RR146.44).

761 On 23 February 1995, the shire council resolved to adopt TPS 4 Amendment 43 for final approval, subject to the modifications required by the Minister being made, and subject to lot 22 being deleted from the special development zone (exhibit RR146.47).

762 Those changes were made and the amendment was forwarded on 21 March 1995 to the SPC for final approval by the Minister.

763 On 3 March 1995, the shire resolved to support the ODP for lot 20, subject to some conditions (exhibit 191G, 25A/633 643).

764 By letter of 7 April 1995, the WAPC wrote to GRA in relation to the road network associated with the development of Riverland Ramble (exhibit 193A, annexure JES 6, 46B/143). The letter referred to the SWAT report of 1992 and to the unpublished 'Mandurah Pinjarra Structure Plan'. The latter document is not in evidence. The letter stated that the proposed urban cell in the SWAT report included lots 20 22 on Old Mandurah Road and land adjoining to the north and east, and that the cell was anticipated to accommodate approximately 25,000 people within the next 25 years. I interpose that the last observation is incorrect. The SWAT report predicted 3,000 people for Ravenswood by 2021 and predicted an ultimate population of 25,000 people: see exhibit 199, 1/5/153. The letter

stated that it was accordingly considered appropriate to establish a district road network, so that Old Mandurah Road would need to be widened.

765 On 26 April 1995, the WAPC wrote to the shire advising that the Minister had granted final approval for Amendment 43, which was to be published on 28 April 1995 in the Government Gazette (exhibit RR146.48). The amendment was gazetted as foreshadowed (exhibit 72).

766 At its meeting of 23 May 1995, the Committee for Statutory Procedures considered and adopted recommendations in a report prepared by Mr White and authorised by Mr Berzins (exhibit 193A, 46B/119 139). The report related to the ODP for lot 20 Old Mandurah Road. Lot 20 was 67.7 ha. The ODP proposed subdivision in accordance with an R15 density, giving rise to 633 lots, mainly single residential lots. Lot 20 is the most western of the lots comprising Riverland Ramble. Its eastern boundary is east of the boundary between lots 10 and 11, north of Old Mandurah Road. Its western boundary is Pinjarra Road. See the plan reproduced in section 4.6.3 below.

767 The report repeated the statement from the letter of 7 April 1995 about the SWAT report estimating the Ravenswood cell to accommodate 25,000 people within the next 25 years and said that a modification to the ODP was required to widen Old Mandurah Road. As I have mentioned, that was an error in that the 25,000 was the ultimate population, but only 3,000 people were expected in the next 25 years.

768 The plaintiffs and their planners point to the reference to and reliance upon the SWAT report. However, to my mind, it is one thing to refer to the SWAT report to justify a condition regarding roads. What urban rezoning is justified as at 1996 is quite a different question. I will return to that point in dealing with the SWAT report in section 4.8.4 below.

769 On 6 June 1995, the WAPC wrote to GRA, advising that the ODP for lot 20 had been approved, subject to stated modifications. The letter stated that the WAPC was prepared to accept the staged release of residential subdivision proposed on the ODP (exhibit 245H, 49A/208 211). 4.6.3 Riverland Ramble: expert evidence

770 Mr Rowe expressed the view that the approval of Riverland Ramble demonstrated what he had already said in oral evidence about the preparedness and desire of the decision makers to rezone land for urban development. He was of the opinion that the same approach would have applied to the subject land and other land in the general locality, leading to the same result. He could 'see no reason why a rezoning [of the subject land] wouldn't progress in the same way' (ts 3878). The only exception to that is that the subject land would not have encountered the problems that Riverland Ramble experienced arising from proximity to the raceway (ts 3878).

771 Mr Flugge and Mr Robinson agreed with Mr Rowe (ts 3879).

772 Each of these experts had expressed a similar opinion, in general terms, in his written reports.

773 I will explain in the next section why I do not accept that evidence. I consider there are very significant differences between the Riverland Ramble application, and an application in respect of the subject land.

774 Mr Robinson suggested there would have been a need for structure planning as part of the examination of the subject land, in that the subject land was further removed from the Ravenswood townsite than Riverland Ramble. The structure planning would need to show how the subject land would have a relationship with the existing townsite and Riverland Ramble. Mr Robinson expressed the view that the shire and SPC would like to see how the subject land would have related to the land immediately to the east along Old Mandurah Road (ts 3880).

775 Mr Robinson considered that the subject land 'physically abuts Riverland Ramble and therefore would have presented a contiguous expansion of the Ravenswood townsite' (ts 3880, 3883). He expressed the view that the subject land, together with Riverland Ramble, would have represented 'a consolidated urban node' (ts 3885). Mr O'Neill and Mr Moran disagreed with the proposition that the two land areas were contiguous.

776 I agree with the defendants' planners. As can be seen from the plan below (derived from exhibit 7A), while the two areas of land do have a common corner at one point, namely the junction of Old Mandurah Road and Pinjarra Road, that does not create much connection between the two large pieces of land. Moreover, the lack of connection is exacerbated by the known fact that Riverland Ramble was intended to be developed in stages over 10 years. Thus for some years, the part of Riverland Ramble closest to the subject land would not be subdivided.

777 In Mr O'Neill's opinion, the lack of contiguity of the two parcels of land would have militated against the rezoning. At that time, planning principles required that urban development be planned in a coherent way. If urban

land in excess of Riverland Ramble were thought to be desirable, Mr O'Neill considered it much more logical to extend Riverland Ramble north of Old Mandurah Road to enable infrastructure to be shared, including primary schools and commercial centres (ts 3881).

778 Mr O'Neill expressed doubt as to whether the WAPC would have considered it desirable to expand urban land ***around*** Ravenswood beyond that provided by Riverland Ramble. In that regard, he referred to the fact that no additional land was identified in the IPRSP as urban (although there was some future urban land to the east of Riverland Ramble).

779 Mr Moran agreed with Mr O'Neill and suggested that the addition of lots 191 and 192 to Riverland Ramble would have been a significant expansion, both in terms of size and also by introducing urban development north of Old Mandurah Road (ts 3882 3883).

780 In response, Mr Robinson expressed the view that the SWAT report supported a much larger community and that development along Pinjarra Road would have been preferred to development north of Old Mandurah Road (ts 3883). I will deal with what can be drawn from the SWAT report in section 4.8.4. I do not agree with Mr Robinson in this respect.

781 In Mr Rowe's opinion, the need or preference for development to be a natural consolidation or extension of existing urban land would not have prevented the subject land being rezoned. In Mr Rowe's opinion, if one assumed that there was no application to rezone Riverland Ramble, he considers that a rezoning of the subject land would have proceeded (ts 3885). He said that '[t]here was not a climate of concern to stop those sorts of rezonings' (ts 3886). He did not consider that, on that assumption, the fact the subject land would have been a new and separate urban front would have led to a refusal of the application. He considered that, if it had to be rationalised, the development would have been rationalised by the view that ultimately it would be connected, but that the approach would be that the shire wanted to get a rezoning approved and sewerage put in place (ts 3887).

782 Mr Butterly expressed a similar view (ts 3887).

783 Mr Moran referred to his report, stating that to rezone the plaintiffs' land in the absence of Riverland Ramble would have opened up a second node of development about 2 km from the Ravenswood townsite, which would be contrary to good planning practice. The townsite was, according to the 1990 Peel Regional Plan and 1994 Peel Regional Strategy, going to form the nucleus of an urban village (ts 3889). Mr O'Neill also considered that a planning authority would wish to build on the existing Ravenswood townsite (ts 3890).

784 In a written report, Mr Flugge expressed some opinions about what might have occurred had there been a joint application by Riverland Ramble and the plaintiffs: exhibit 182C [6] [10]. I have already found that, assuming no proposed public works, no such joint application would have occurred: see section 4.5. 4.6.4 Riverland Ramble: conclusions

785 I draw four sets of conclusions from this lengthy review of the rezoning of Riverland Ramble.

786 First, it demonstrates the relevance of certain factors in a rezoning application:

(1) Mr Rowe believed that questions of demand and population projections were 'nonexistent criteria' in the early 1990s, and were not taken into account by the shire and other decision makers (ts 3746 3748). Mr Robinson did not consider these matters were a factor at all prior to the MRCE rezoning application (ts 3750 3751). Mr Flugge considered it was 'almost a nonexistent criteria' and would not be taken into account 'in any great manner' before then (ts 3752). What happened with Riverland Ramble is inconsistent with those views and I do not accept them. Questions of population, need and supply were raised by the DPUD in 1992, by the SWRPC in discussions before May 1993, and in the DPUD reports of July 1993 and November 1994. In my opinion, those questions were relevant considerations in determining, as a matter of orderly and proper planning, whether rural land should be rezoned urban.

(2) The desirability of building on existing urban areas, and proximity and connection to existing urban areas, was repeatedly emphasised in what was written by the proponents and in DPUD reports. I find that that reflects orderly and proper planning in the preIPRSP period.

(3) There was also repeated emphasis on the support to be drawn from the Peel Regional Plan. Thus I do accept Mr Auret's evidence (ts 3700) that the Peel Regional Plan was never used in considering rezoning applications.

(4) Finally, by late 1994, there was reference to the structure planning exercise that was underway following the publication of the Peel Regional Strategy.

787 Secondly, I have already said that I reject the plaintiffs' contention that a hypothetical application for rezoning of the subject land would have been approved in preference to the rezoning of Riverland Ramble. One of the reasons for that conclusion arises from the timing of the respective applications. By the time, on my findings, the plaintiffs' hypothetical application would be made in the second half of 1994, Riverland Ramble was close to final approval. Certainly, by the time the plaintiffs' hypothetical application would be considered by the Committee for Statutory Procedures for consent to advertising, that would have been the case. Further, and in any event, the hurdles arising from the raceway were not, by mid1994, going to be of enduring significance to the fate of the Riverland Ramble application.

788 There is no expert evidence in support of the contention that the subject land would have been rezoned in preference to Riverland Ramble. As I have set out in the preceding section, Mr Rowe and Mr Butterly expressed the view that, assuming there was no application to rezone Riverland Ramble, a rezoning of the subject land would have been approved. That is a very different question from whether the rezoning of the subject land would have been approved in preference to Riverland Ramble. The question of whether the rezoning of the subject land would have been approved, assuming that there was no application by Riverland Ramble, does not arise. Hypothesising the absence of the proposed public works does not lead to the absence of a rezoning application by Riverland Ramble.

789 There are other reasons why I reject the contention that, as a matter of good planning, the subject land would have been rezoned to urban in preference to Riverland Ramble. Riverland Ramble had the considerable advantage of abutting the existing Ravenswood townsite. Consequently, it was the natural starting point for additional urbanisation in the vicinity of Ravenswood. Further, Riverland Ramble was designated future urban in the 1990 Peel Regional Plan. The subject land was not, and would not have been so designated in the absence of the proposed public works: see section 4.8.3.3.

790 Thirdly, I reject the opinion of Mr Rowe, Mr Flugge and Mr Robinson that the approach taken to the approval of Riverland Ramble would have applied to the subject land and there was no reason that the rezoning of the subject land would not have progressed in the same way. In my view, one cannot reason from the fact of approval of the Riverland Ramble application to infer the likely support for the rezoning of the subject land. On my findings (see section 4.5), the application to rezone the subject land would fall to be considered in the context that the rezoning of Riverland Ramble was imminent or had been approved. In my view, there are fundamental differences between the application to rezone Riverland Ramble and an application to rezone the subject land, made in the context that Riverland Ramble was or was about to be zoned urban. Those differences are as follows.

791 The first difference relates to the questions of need, supply and demand. At the time of the application to rezone Riverland Ramble, there was a perceived significant shortage of available urban land in Murray, and in Ravenswood in particular. Riverland Ramble more than catered for that shortage. It constituted an enormous expansion of the available urban land ***around*** Ravenswood, which was then a small town of about 300 people. Thus, there was no longer any perceived shortage of land. To the contrary, the urbanisation of Riverland Ramble, even in its final reduced size, provided 60% of the expected growth in population for the whole shire for the next 10 years. Consequently, whereas the perceived need for land was a strong factor in favour of Riverland Ramble, the scale of Riverland Ramble and its proposed staging would have given rise to issues of whether rezoning of the subject land was premature and would lead to an undesirable oversupply.

792 The second difference is that Riverland Ramble had the benefit of bringing to the small town of Ravenswood substantial further additional services. Once Riverland Ramble was in place, that was not a benefit that would have been offered by the rezoning of the subject land.

793 The third difference relates to the location of the land to be rezoned, and the character of the land surrounding it. The rezoning of Riverland Ramble was a natural progression of urbanisation. Riverland Ramble abutted the existing townsite. Further, it is bordered on the northern side by Old Mandurah Road and on the western side by Pinjarra Road. The approval or impending approval of Riverland Ramble carried with it, to a large degree at least, a confirmation that the Ravenswood urban node would be based ***around*** the existing townsite. The subject land was

between 1.2 and 2.5 km from the existing townsite. The location and surrounds of the subject land would raise issues that did not arise in relation to Riverland Ramble. The relationship with Riverland Ramble itself would have been an issue. I refer to my earlier observations about the relationship between the two parcels of land. Further, the subject land is surrounded to the north and east by the Kelliher land. The Kellihers evidently wished to continue to farm their land and objected to any urbanisation near them. As I have said, their objection in relation to the subject land would have raised more issues than did their objection to Riverland Ramble. Further, an application in relation to the subject land would have raised broader issues about the relationship between the subject land and land north of Old Mandurah Road, all of which was at that time rural.

794 The fourth difference is that urbanisation of Riverland Ramble was supported by the Peel Regional Plan. That plan designated Riverland Ramble as future urban and provided for expansion of Ravenswood townsite on its northern boundary and for residential growth to build on the existing settlement. This was a positive factor for the Riverland Ramble rezoning; it would have been a negative for rezoning of the subject land.

795 The final difference arises from the different timing of the applications. On my findings, any application to rezone the subject land would have been made no earlier than the second half of 1994 and would, at best, have been considered by DPUD officers, the Committee for Statutory Procedures and the WAPC in 1995. By that time, the structure planning process following the Peel Regional Strategy, in preparation of the IPRSP, would have been underway. There would have been a question whether to defer a decision on rezoning applications pending the publication of the IPRSP. The reason stated in the DPUD report against taking this course for Riverland Ramble was that the rezoning application had been in the public domain already for a long time. That reason would not have applied to the subject land.

796 The final set of conclusions from my review of the rezoning of Riverland Ramble is that it provides indications of significant obstacles for the hypothetical rezoning of the subject land. It provides support for the defendants' planners' views that a rezoning application would have failed, taking into account:

(a) the absence of need and concerns of oversupply of urban zoned land;

(b) the lack of contiguity and close connection between Riverland Ramble and the subject land, particularly taking into account the staging of development of Riverland Ramble and the rural use of land north of Old Mandurah Road and immediately north of Riverland Ramble;

(c) the broader structure planning issues arising from rezoning any land north of Old Mandurah Road; and

(d) the fact that by late 1994, the structure planning process was underway and any application may have been deferred pending that process being completed.

797 I will return to these matters in section 4.12 below. I turn to other rezonings in the preIPRSP period.

4.7 Other developments

798 To varying degrees and in varying respects, some of the plaintiffs' planners relied on three other developments: MRCE, Austin Cove and Point Grey. As I have said, the defendants' planners also relied on aspects of what occurred in relation to the MRCE rezoning. I begin with that rezoning. 4.7.1 MRCE 4.7.1.1 MRCE: EXPERT EVIDENCE AND SUBMISSIONS

799 In some of the reports of the plaintiffs' planners, reliance is placed on MRCE in a generalised way. Broadly, it is said that the subject land was superior to MRCE, so that the fact that MRCE was rezoned demonstrates or evidences that the subject land would have been approved for rezoning to urban.

800 Mr Flugge expressed the view that the subject land satisfied all the relevant criteria for rezoning, consistent with land such as Riverland Ramble and MRCE which, despite having not been identified in strategic planning documents, received rezoning to enable urban development (exhibit 182D [58(a)]).

801 Mr Robinson expressed the view that the subject land is very similar to Riverland Ramble and MRCE, which were rezoned for urban purposes 'contrary to recommendations outlined by the Shire of Murray [Local] Rural Strategy 1994' (exhibit 180A [521(k)]). The reference to the 1994 LRS may be intended to mean that MRCE illustrates that land not earmarked for urban in the LRS, but identified for small rural holdings, was not thereby incapable of being approved for urban rezoning. I accept that proposition, which I understand to be common ground.

802 Mr Butterly expressed the view that, disregarding the Highway, the subject land is superior to other urban areas in the IPRSP, such as MRCE, and that the subject land would have been a stronger candidate for urban development than those other areas (exhibit 194G [11]).

803 I do not accept these opinions. In short, I consider there are too many differences between the nature and circumstances of the MRCE development and an application to rezone the subject land, for the MRCE rezoning approval to have much significance for the question of whether the subject land would have been approved for rezoning to urban. MRCE was a golf course estate with a hotel and significant tourist component.

804 I note that in the oral evidence, no planner expressed the view that the rezoning approval of MRCE in itself supported a conclusion that the subject land would have been rezoned. Rather, the planners relied on the MRCE rezoning in more specific ways in their oral evidence.

805 Mr Auret expressed the view that the WAPC's consideration of MRCE in 1995 reflected its thinking in 1995, but should not be taken as necessarily reflecting thinking at any earlier time (ts 3873). All the planners agreed with that proposition (ts 3873 3875). Mr Auret said that, in addition to the reference to the question of demand, the WAPC's consideration of MRCE also revealed, at that time, concern that there was a new structure planning process in train. Mr O'Neill agreed (ts 3874).

806 Mr Flugge said that MRCE, along with Riverland Ramble, demonstrated that there were development pressures along the Mandurah Pinjarra corridor (ts 3871). In developing that view, he said that there were significant development pressures along that corridor that council were willing to accommodate but 'it had to be adjoining or adjacent to existing infrastructure' (ts 3871). He said that MRCE was adjacent to the Pinjarra townsite and Riverland Ramble was adjoining an existing already developed settlement (ts 3871 3872). (MRCE was, in fact, adjacent to the existing townsite: see exhibit 263D, page 42). That evidence of Mr Flugge does not necessarily support the plaintiffs' case, because the subject land was not adjacent to the Ravenswood townsite.

807 Mr Robinson said that approval of MRCE demonstrated a preparedness on the part of the decision makers to approve, for urban use, land not all of which had been identified as having urban potential in the 1990 Peel Regional Plan (ts 3875 3876). I accept that proposition.

808 As I have noted, Mr Moran expressed the view that two of the hurdles for MRCE, reflected in the report of July 1995 to which I will shortly come, would have been issues for the subject land. The hurdles were questions of demand and population, and the structure planning process then underway. As will appear, I accept that evidence.

809 Mr O'Neill said that the MRCE application demonstrates that towards the period in 1995, the issue of demand was a consideration. Further, he said that there are a number of considerations for the subject land that did not apply to MRCE, so that not too much can be drawn from the approval of MRCE. He mentioned the separation of the subject land from the adjacent Riverland Ramble urban area, the issue of the lack of continuity in urban development, and the interposition of rural land between the subject land and Riverland Ramble (ts 3869). I accept Mr O'Neill's opinion that these are all differences and that they are of some significance.

810 Mr O'Neill agreed that, although in the report of July 1995, the WAPC referred to the need to demonstrate need for rezoning by reference to population forecasts, the Minister approved the advertising of the application without any such demonstration and, after advertising, the WAPC recommended to the Minister that he grant final approval, as he did (ts 3899). 4.7.1.2 MRCE: CHRONOLOGY OF REZONING

811 In the 1994 LRS, part of what eventually became MRCE was identified as an area suitable for special residential development on lots between 2,000 sqm and 1 ha in size. It was also put forward as a suitable location for special rural development with 2 4 ha lots (exhibit 29, 1/11/184, 238, 242).

812 In March 1995, representatives of the proponents of MRCE, Everland Pty Ltd, addressed a meeting of the committee responsible for preparing the draft IPRSP. The committee was advised about the details of the proposal and that the proponents would be requesting the shire to endorse the project and initiate an amendment to TPS 4 (exhibit 186, page 3). That was later initiated by the shire as Amendment 72 (exhibit 263A).

813 In July 1995, the Statutory Planning Committee considered whether to give its consent to advertising Amendment 72 for public inspection. The report to the Committee of Mr Pride, senior planning officer of the Peel ***region***, dated 3 July 1995, is exhibit 263A.

814 The report records that the purpose of the amendment is to enable a 193 ha development comprising 1,100 residential lots in golf course estate format, a 36 hole private golf course and a tourist node containing a 100 room motel, with apartment, villa and chalet accommodation. Under the heading of 'Need for the Development', the following is said: Combined with other proposals in the locality - Ravenswood (1,500 lots) and ***South*** Yunderup (1,000 lots) - this proposal (1,100 lots) would result in sufficient zoned residential land to accommodate forecast population growth within the Shire of Murray to the year 2021. Other proposals are also emerging, ie, expansion of the ***South*** Yunderup development (a further 500 lots) and a new development at Point Grey (estimated 1,750 lots).

It is possible, therefore, that zoning for all developments referred to above may exceed short to medium term residential needs. However, the ***South*** Yunderup, Point Grey and current proposals are all golf course estates which envisage a substantial tourist component. Accordingly, these zonings may be justified on grounds separate to forecast population growth.

The supporting documents do not include information to substantiate the need for the rezoning. It is suggested that Council should be requested to provide an analysis of the need for the additional residential land at this stage, prior to consideration of final approval (exhibit 263A, page 19).

815 Mr Pride recommended that the WAPC give consent to advertising the amendment on conditions that include that council provide an analysis of the need to zone additional land to permit residential development in the area at this stage, with specific reference to forecast residential population, and having regard to other residential and tourism related golf course proposals in the area (pages 22 23).

816 The Committee did not adopt those recommendations and at the foot of page 23, in handwriting, is 'new recommendation on next page'. That recommendation is as follows: The Commission resolved to recommend that as there are fundamental planning objections, the Hon Minister withhold consent for the Amendment to be advertised for public inspection for the following reasons: The rezoning of an extensive area at this location for residential purposes would preempt current structure planning for the area; Combined with other land in the locality which is already zoned for residential purposes (ie. at Ravenswood and ***South*** Yunderup), the proposed rezoning would significantly exceed the shortmedium term needs of forecast resident population growth. In this regard, the need for the proposed rezoning has not been substantiated; The environmental impacts of the proposed rezoning require assessment and in this respect, the Commission considers that the Amendment documentation should be released for public inspection at the same time as the environmental review documents for the proposal; Evidence of the acceptability of the proposals in terms of floodway management has not been provided; The rezoning does not make satisfactory allowance for regional public recreation adjacent to the Murray River, and does not demonstrate that satisfactory public access to land required for this purpose will be possible (exhibit 263A, page 24).

817 Several matters should be noticed about this report and the WAPC's recommendations. First, it is suggested that the then existing proposals at Austin Cove and Riverland Ramble, together with MRCE, would mean there would be sufficient zoned land to accommodate forecast population in the shire to the year 2021. In addition, there was reference to further proposals emerging, including an expansion of Austin Cove. Secondly, the report suggests that MRCE, like Austin Cove, is a golf course estate with a substantial tourist component which may therefore be justified on grounds separate to forecast population growth. Thirdly, the WAPC's first stated reason to recommend the withholding of consent was that the zoning would preempt the then current structure planning for the area.

818 Of course, as the plaintiffs' submissions emphasise, the significance of these matters must take account of the fact that the WAPC's recommendations were not followed by the Minister. However, that does not mean that the matters raised by the departmental officer and the WAPC are irrelevant for present purposes. First, they reflect the thinking of the DPUD officers and WAPC. Secondly, they provide a basis to draw conclusions about the reasoning, as a matter of proper planning, underpinning the Minister's decision.

819 In September 1995, the Minister gave consent for the advertising of the amendment for MRCE: exhibit 263B. There was no condition of that consent relating to any analysis of the need for additional urban land. The Minister was not required to and did not give reasons for his decision.

820 The ODP, prepared by the proponent's planning consultants in 1995, emphasised the golf resort and tourist character of the proposed development. See exhibit 263D. The proposed development was referred to as the Ravenswood Sanctuary Golf Resort.

821 In August 1996, a report written by Mr Pride and authorised by Mr Scharf was provided to the Statutory Planning Committee in relation to the proposed final approval of the amendment for MRCE (exhibit 263E).

822 The report noted that the proposed amendment was consistent with the draft IPRSP, which had just been released. Under the heading of 'Tourist Development', the following comments were made: The proposed amendment is based on a proposal for a major tourism development. This justifies commencing the amendment ahead the forecast resident population growth in the ***region***. It also forms the basis for exemption from the requirement for a primary school site within the amendment site. To ensure that the tourist development proceeds, Council has proposed a 'sunset clause' which would allow Council to initiate an amendment to rezone the land to Rural if the golf course estate and tourist node are not commenced within three years and five years, respectively (exhibit 263E, page 73). (original emphasis)

823 The conclusions included the following: The proposed amendment is consistent with draft structure planning for the ***region***.

The establishment of a tourist development in this locality, adjacent to the river, is a logical use of land with a regional attraction. It would also provide economic and social/recreational benefits for residents of the Peel ***Region*** and those from the immediate locality. The golf courses would provide visual enhancement to the locality when compared to conventional residential development. The establishment of the tourist development and golf courses adjacent to the proposed residential area is likely to have a positive effect upon the perception and enjoyment of the residential area itself and is likely to contribute to the better development and socioeconomic structure for this part of the Peel ***Region*** (exhibit 263E, page 75).

824 These passages emphasise the centrality of the golf course estate and tourism character of the MRCE development. In my view, because of that the Minister's approval of the advertising of the MRCE amendment, and its subsequent approval, notwithstanding the raising of concerns regarding population and supply, does not support a conclusion that considerations of population and supply were not important relevant considerations on rezoning of land to allow residential development.

825 The report recommended that the WAPC resolve to recommend that the Minister grant final approval, subject to some stated modifications. The WAPC, by the Statutory Planning Committee, adopted that recommendation on 13 August 1996 (exhibit 263E, page 76). The report, as adopted by the WAPC, was forwarded to the Minister, who adopted the WAPC's recommendation on 18 August 1996 (exhibit 263F, page 99).

826 The WAPC approved the ODP for MRCE on 27 August 1996, in accordance with the recommendation of Mr Pride. In Mr Pride's report to the Statutory Planning Committee, the benefits of the tourist development and golf course estate were emphasised: see exhibit 263G, page 101.

827 Amendment 72 was gazetted in September 1996. 4.7.1.3 MRCE: CONCLUSIONS

828 For the reasons I have given, I do not accept that the approval of the rezoning of MRCE supports or tends to support the success of a hypothetical rezoning application of the subject land. That is because the development and rezoning of MRCE was founded on or centrally influenced by its character as a golf course estate and tourist development.

829 The report and recommendations of July 1995 indicate that, by then, the WAPC had formed the view that Austin Cove and Riverland Ramble would, with MRCE, mean that urban zoned land significantly exceeded the shorttomediumterm needs of the forecast resident population growth. A DPUD officer expressed the view that these proposals would result in sufficient zoned residential land to accommodate the forecast population growth to the year 2021. Those matters led the WAPC to conclude that the need for the proposed MRCE rezoning had not been

substantiated. That did not prove to be a fatal obstacle to the rezoning. In my view, that is because of its character as a tourist development and golf course estate. I conclude from my review of the MRCE rezoning that a rezoning proposal could be progressed, even though it was not needed to accommodate shorttomediumterm population growth, even leading to an oversupply of residential land, if it could be justified on other grounds, such as tourism and recreation. The sunset clause referred to in the first passage of the August 1996 report set out in the previous section was a mechanism to ensure that the development of MRCE was based on its tourism and golf course elements.

830 There is no suggestion that the tourism and golf elements would have been a part of a hypothetical application to rezone the subject land. The WAPC's views in 1995 about population and supply would have created significant obstacles for a proposed rezoning for residential purposes of the subject land. In November 1994, an officer of the DPUD expressed the view that Riverland Ramble would supply sufficient land to accommodate 60% of the shire's projected growth to 2006. By mid1995, the view was expressed that Riverland Ramble, Austin Cove (without its 1996 expansion) and MRCE would create enough urban zoned land to meet population projection for the shire to 2021.

831 Further, the concerns of the WAPC, reflected in its recommendations in July 1995, of preempting current structure planning, would, as I have said in section 4.6.4, arise in relation to the subject land. 4.7.2 Austin Cove

832 Austin Cove is located ***south*** of the Murray River and the Murray Lakes Canal Estate. It is an area of 526 ha. The plaintiffs emphasise that a significant portion of the land is affected by floodways, wetlands and creeks. 4.7.2.1 AUSTIN COVE: EVIDENCE OF THE PLANNERS AND PARTIES' SUBMISSIONS

833 In their written reports, some of the plaintiffs' planners rely on the approval of Austin Cove, like MRCE, as generally supporting the approval of the hypothetical subdivision of the subject land.

834 Mr Flugge expressed the view that the subject land is better located than the Austin Cove development, which was rezoned by TPS 4 Amendment 3 in 1990 and further by Amendment 115 in 1997 (exhibit 182D [58(c)]). Mr Butterly expressed the view that the subject land was superior to other urban areas such as Austin Cove, approved for rezoning in the 1990s (exhibit 194G [11]). Mr Robinson expressed the view that development of the subject land would be more logical than the Austin Cove Estate given the significant wetland and drainage issues associated with Austin Cove, and its lack of frontage to a public transport corridor (exhibit 180A [431]).

835 None of the planners expressed this view in oral evidence (ts 3918 3921).

836 Mr Robinson also stated in his report that Austin Cove was reliant on the new Perth Bunbury Highway for improved access. In oral evidence, Mr Butterly expressed the view that the initial proposal, in 1988 to 1990, did not rely on the Highway, but the expansion of the proposed development to 1,500 lots did (ts 3918, 3923 3924).

837 Mr Moran expressed the view that the Austin Cove development proceeded as a golf course estate with a holiday resort theme, and given that no such thing was proposed for the plaintiffs' land, he did not consider the approval of Austin Cove to be relevant (ts 3920). In essence, I agree with Mr Moran.

838 In response to Mr Moran, Mr Flugge pointed to passages in a report he had written in 1989, to which I will shortly come. Mr Flugge pointed out that the rezoning and proposed development of Austin Cove in 1990 also included a component of urban development.

839 In oral evidence, no planner gave any further evidence about the extent to which the Austin Cove rezoning was relevant to or supportive of an opinion about the hypothetical rezoning of the subject land (ts 3921). 4.7.2.2 AUSTIN COVE: CHRONOLOGY OF REZONING PROCESS

840 In 1984, the land or some of it, later comprising Austin Cove, was rezoned from rural and tourist to special use under the Shire of Murray, West Murray Town Planning Scheme (exhibit 72, pages 5 6). It is common ground that the alignment of the proposed Highway ***south*** of the Murray River, near Austin Cove, was fixed after that rezoning in 1984.

841 The original proposal to rezone and subdivide the land was known as the Murray Lakes Golf Course Estate. In September 1988, the then owners submitted a proposal to the EPA, to develop a golf complex and low density residential estate comprising 400 lots, mostly 1,000 2,000 sqm in size (exhibit 72, page 15). The proposal covered an area of 391 ha.

842 In May 1989, the EPA gave conditional support to the proposed golf course development (exhibit 72, page 21). Recommendation 5 of the EPA report was as follows: The [EPA] recommends that development in proximity to the PerthBunbury Highway be in accordance with the policy on land use adjacent to major highways and roads being developed by the State Planning Commission (exhibit 72, page 14).

843 In June 1989, TPS 4 was gazetted (exhibit 25, 1/11/54 74). TPS 4 included the golf course in the canal development zone.

844 In September 1989, the EPA gave approval to implement the development proposal, subject to conditions (exhibit 182D, 15A/414 415). Condition 5 was in similar terms to recommendation 5 in the May 1989 report, set out above.

845 In November 1989, whether to give consent to advertise Amendment 3 to TPS 4 was considered by the Committee for Statutory Procedures. The amendment was to facilitate the establishment of a recreational and residential estate to be known as the Murray Lakes Golf Course Estate. The proposal included a golf course complex, hotel and other recreational facilities, and a residential estate with ***around*** 630 residential lots. See Mr Flugge's report of 28 November 1989 to the Committee for Statutory Procedures (exhibit 182D, 15A/406 415).

846 The DPUD's comments on the proposed rezoning were as follows: The Department supports the submitted rezoning in providing a much needed boost in recreational and tourist facilities for the Yunderup district and the Shire as a whole.

The development concept appears a logical extension of recreational facilities and urban development to the ***south*** of the existing Murray Lakes Canal Estate and the Murray River Resort.

The proponent has to adhere to the stringent environmental conditions and management controls placed on the project by the EPA and well as those commitments set out in the Notice of Intent.

In relation to the EPA's condition No. 5, the Department has not yet prepared its policy on land use adjacent to major highways and roads. As such, development in this area is to accord with the general land use principles which have been applied to other projects on previous occasions (exhibit 182D, 15A/410).

847 The Committee, on behalf of the SPC, gave its consent to advertise the amendment, subject to conditions, including that the council be further advised about the future traffic impact of the proposal, particularly in regard to the adequacy of ***South*** Yunderup Road to cater for the increased traffic (15A/411).

848 In March 1990, final approval of Amendment 3 was given by the Minister and the amendment was gazetted on 23 March 1990 (exhibit 72, page 45). The effect of Amendment 3 was to rezone parts of the Austin Cove land from rural to public recreation/conservation reserve, a residential zone, hotel/motel zone and private recreation zone, and to apply Rcode designations within the residential zoned areas of the estate. Further, a new cl 6.8 was introduced to TPS 4, requiring development to be in accordance with the development plan dated August 1989 (see the copy at exhibit 182D, 15A/440). It also provided that if construction of a golf course estate had not been substantially started within 30 months of rezoning, the developer would be called before a full council meeting to give reasons why the estate should not be 'dezoned' to rural. In the absence of sufficient reasons for the delay or the commencement of work, the shire was empowered to rezone the land back to rural (exhibit 72, pages 45 46).

849 A subdivision application to create 522 residential lots, a resort hotel site, a golf course and a retirement village was approved by the SPC in August 1990. The approval expired in August 1993. The proponent did not proceed with the development, due to financial constraints, and the land was sold to another developer (exhibit 182D, 15A/424 [5.3]).

850 The new owner of the land applied to renew the previous subdivision approval for 522 residential lots, so as to proceed with the same development. In October 1993, Mr Byrne wrote a report to the Committee for Statutory Procedures (exhibit 182D, 15A/422 433). The authorising officer for the report was Mr Flugge. The report set out

the background to the Murray Lakes Golf Course Estate proposal. The report stated that [t]he subject land is located within an urban expansion corridor between Mandurah and Pinjarra. The land abuts the future PerthBunbury Freeway alignment and is situated in close proximity to Ravenswood which is the subject of a proposed major residential subdivision (exhibit 182D, 15A/422).

851 In my view, the 'proposed major residential subdivision' is a clear reference to Riverland Ramble. In this context, in his witness statement of 30 March 2010, Mr Flugge referred to the 1992 SWAT report. He stated that the SWAT report was being used by the DPUD as a plan identifying the future strategic growth within the locality of Ravenswood (exhibit 182D [23]). I will return to that question. There is nothing in the documents pertaining to Austin Cove that seems to me to support that view.

852 The SPC gave subdivision approval for creating 522 lots in November 1993. The subdivision conditions included upgrading ***South*** Yunderup Road, setting aside land for the proposed Highway as a separate lot, installing bunding between the Highway reserve and the development, and the development satisfying the recommendations in the May 1989 EPA report (exhibit 182D, 15A/425 429).

853 The Murray Lakes Golf Course Estate was listed as an existing land use in the 1994 LRS and the area rezoned in March 1990 by Amendment 3 is shown as urban in the 1994 Peel Regional Strategy (exhibit 198).

854 The owner of the land purchased additional adjoining land (lots 2 and 3), and, in June 1994, submitted a modified development proposal to the EPA. The proposal involved extending the development onto the two adjoining rural lots (exhibit 72, pages 54, 69). At the request of the Minister for Environmental Protection, a report on the modified proposal was prepared for the EPA (exhibit 72, page 54).

855 In 1996, the proponent sought to have council initiate a change in zoning via an amendment to TPS 4, in substance, to allow development on lots 2 and 3 under the then existing approvals over the golf course and lakes estate. The proponent sought to increase the residential yield of the development to about 1,500 lots and to extend the golf course from 18 holes to 27, in accordance with the modified concept plan (exhibit 182D, 15A/444 446; exhibit 72, pages 54 55). The modified concept plan as at May 1996 appears at exhibit 72, page 71. Lot sizes were proposed to be reduced to be generally 700 800 sqm, to reflect the market trends at the time with regard to residential development (15A/445).

856 The proposed rezoning, Amendment 115, sought to consolidate the existing zonings for the Murray Lakes Golf Course Estate and the adjoining rural lots by having them all rezoned in a special development zone.

857 On 28 November 1996, the shire resolved to forward Amendment 115 to the WAPC for consent to public advertising (exhibit 182D, 15A/434). Before advertising could commence, the shire required that, among other things, ODP be replaced 'to accommodate a future road connection with the Perth to Bunbury Highway at the ***southern*** end of the Estate' (exhibit 182D, 15A/454).

858 The consultant for the proponents, Taylor Burrell, prepared a report dated January 1997 on Amendment 115 (exhibit 182D, 15A/435 448). The text of the report does not mention the Highway, but the ODP attached to the report includes an interchange in the southeast corner of the estate (15A/448).

859 The July 1996 IPRSP, and the final 1997 IPRSP, made reference to the approvals for Murray Lakes Golf Course Estate. See exhibit 7, 1/10/104, 107 108; exhibit 6, 1/6/283, 287. The 1997 IPRSP showed part of lot 1 as urban and lots 2 and 3 as future urban category A1.

860 Consent to advertise Amendment 115 was given by the WAPC on 23 May 1997 and advertising closed on 4 July 1997 (exhibit 182D, 15A/458). On 19 August 1997, the shire's Planning, Health, Building and Environment Committee considered the submissions received on the amendment. The submission from Main Roads WA notes that it had not approved the proposed Highway interchange site at the southeast corner of the estate and that the land requirements for the interchange will be significantly greater than shown on the ODP. The shire's response was that they sought to include the interchange 'to facilitate improved eastwest access connections back towards Pinjarra along Beacham Road' (exhibit 182D, 15A/455). The modified ODP attached to the minutes of the meeting appears to be taken from Taylor Burrell's January 1997 report.

861 The shire deferred giving final approval to Amendment 115 until after it had consulted with the adjoining landowners that would be affected by the interchange road requirements (15A/457).

862 Council adopted amendment 115 for final approval in January 1998. The shire then requested documents to be returned and time to be extended to allow the owner and the shire to meet regarding the proposed sunset clause. On 9 April 1998, the shire resubmitted the documents to the WAPC for final approval with a modified sunset clause extending the time limit for the commencement of development to 60 months. The proponent requested the removal of the sunset clause. In its report of June 1998 to the Minister, the WAPC recommended that the amendment be approved and the sunset clause be deleted (15A/458 462). The Minister approved the amendment in accordance with the recommendation.

863 The report includes the following: The new Development Plan (refer to attachment C) which depicts a 27 hole golf course facility comprising a club house, resort complex and lake features (230ha) and a residential estate of approximately 1510 dwellings including single residential lot sizes of 700m2800m2 and grouped housing sites.

In the Shire of Murray Local Rural Strategy this land is in 'Precinct 6: Yunderup' where the principal objective is to provide an opportunity for alternative residential lifestyles and tourism facilities based on the canal development theme, without detriment to the precinct's natural environment. The proposed lakes development is generally consistent with the intent of the Rural Strategy.

The amendment is consistent with the Inner Peel ***Region*** Structure Plan and the proposed zoning to be included in the Peel ***Region*** Scheme (exhibit 182D, 15A/459).

864 The ODP attached to the report appears to be taken from Taylor Burrell's January 1997 report.

865 The text of the report does not mention the Highway or proposed interchange.

866 Amendment 115 was gazetted in September 1998 (exhibit 72, pages 76 77). 4.7.2.3 AUSTIN COVE: CONCLUSION

867 In my opinion, the approval of the rezoning of Austin Cove does not provide any substantial support for the conclusion that the subject land would have been approved for rezoning to urban. In my view, its character as a golf course estate means that its initial approval, and the approval of its expansion in the period 1996 to 1998, provides very little assistance on the preIPRSP rezoning question for the subject land. In that regard, I accept the evidence of Mr Moran.

868 Mr Butterly expressed the opinion that the expansion of Austin Cove in 1996 to 1998 was based upon access to the Highway and, without that access, the expansion would not have occurred (ts 3918, 3923 3924). In constructing his hypothetical IPRSP, Mr Butterly said that without the Highway, Austin Cove would have been isolated, and not served by a major regional road and, consequently, would have been no more than a third of its 1997 size of 1,500 lots (ts 4064; exhibit 194A, 27/47 [5.31] [5.35]).

869 In similar vein, Mr Robinson said that it would have been far more difficult to justify the 1997 expansion of Austin Cove without the Highway (ts 4066). He said that Austin Cove relies on the Highway for improved access: exhibit 180A [431].

870 I am not persuaded that the application to vary and expand the approved development at Austin Cove, or the approval of that application, were attributable to the Highway. There was no reference to the Highway in the detailed scheme amendment report prepared by Taylor Burrell on behalf of the proponents of Austin Cove, although the Highway was shown on a plan annexed to the report. Nor was there any reference to the Highway in WAPC reports considering the application for further rezoning via Amendment 115. As Mr O'Neill said (ts 4069 4071), during this period, the Austin Cove development was a golf course estate.

871 As I will explain in section 7, I take a different view on a similar question about Austin Cove as at the taking date. 4.7.3 Point Grey

872 Messrs Flugge and Robinson pointed to Point Grey in support of their opinions on the rezoning of the subject land (exhibit 180A, 16/62 63; exhibit 182D, 15A/394 395; ts 3922). The plaintiffs submit that the zoning history of Point Grey supports the conclusion that the subject land would have been rezoned to urban. It is not clear whether they submit that it supports a conclusion that the subject land would have been rezoned to urban in the preIPRSP

period, given that Point Grey was not rezoned urban in that period. The land was identified within rural categories in the 1990 Peel Regional Plan and 1994 Peel Regional Strategy (exhibit 197; exhibit 198). It was zoned rural until it was rezoned as urban deferred in the Peel ***Region*** Scheme 2003 (the PRS). Point Grey was indentified as 'Tourist Existing and Future' in the 1997 IPRSP. In relation to the process of drafting the IPRSP, Mr Auret said there was 'no doubt ... that the persuasive power of the owners of Point Grey held sway perhaps over strictly planning criteria' (ts 3922).

873 In any event, Point Grey does not assist in assessing the prospects of rezoning of the subject land. Its peninsula location is central to its very different character from the subject land. Mr Flugge, who expressed some reliance on Point Grey, accepted that if there were no tourist facilities Point Grey would not have proceeded as a purely residential development (ts 3926).

874 The experts agreed that no other rezonings were relevant to their opinion. In particular, it was agreed that neither Old Sarum Estate or Settlers Village was relevant to their opinions (ts 3929 3931). 4.7.4 Other rezonings: conclusions

875 In my view, contrary to the opinions of Messrs Flugge, Robinson and Butterly, the rezonings of MRCE, Austin Cove and Point Grey do not provide any support for a conclusion that the subject land would have been rezoned urban. Further, MRCE supports Mr Moran's and Mr O'Neill's view that questions of population and supply, and the structure planning process underway by 1995, would have been formidable obstacles for an application to rezone the subject land.

4.8 The planning documents 4.8.1 Planning documents: introductory overview

876 The plaintiffs and their planners put considerable emphasis on the plans and strategies published concerning the Peel ***region*** from the mid1970s onwards. Those plans and strategies were summarised in Appendix 1 of the 1996 IPRSP (exhibit 7, 1/10/153 164). The planners agreed that Appendix 1 was a useful and accurate summary of the planning history up to 1996 (ts 4215 4217). Subject to clerical or typographical errors, and to one matter referred to in section 4.8.3 below, I agree with that. The following broad outline draws on Appendix 1.

877 TS Martin & Associates were commissioned by the Metropolitan ***Region*** Planning Authority (MRPA) to undertake a study of the southwest corridor as part of a continuing review of corridor development proposed by the MRPA. The study (the TS Martin report) produced alternative strategies in order to identify the extent and form of urbanisation which would ultimately occur. The strategies were based on different population potentials. The plaintiffs' planners relied on the inclusion of the subject land within the corridor under strategy 2 as supporting the potential of the land for urbanisation. Further, some of the plaintiffs' planners relied on the population projections in the TS Martin report.

878 After the TS Martin report, there was substantial public consultation that led to the 1980 publication, 'A Planning Strategy for the SouthWest Corridor' (the 1980 Preferred Strategy). The 1980 Preferred Strategy showed the proposed Perth Bunbury Highway passing west of the subject land. The TS Martin report had proposed a nonurban break between Mandurah and Rockingham. The 1980 Preferred Strategy merged urbanisation from Mandurah into Rockingham and the southwest corridor, and thus into the urban fabric of the metropolitan ***region***. Much of what was proposed in 1980 was subsequently superseded.

879 In 1984, the Town Planning Department released the draft Mandurah and Districts Planning Study for public comment, which was a study of the Shires of Mandurah, Murray, Waroona and much of the Shire of Harvey. The Mandurah and Districts study shows the planned Perth Bunbury Highway route passing east of the Peel Inlet and west of Pinjarra and SouthWest Highway. The route appears to be a little to the west of the subject land. The plaintiffs emphasise aspects of the report that refer to the need or desirability of control of development on rural sections of the proposed Highway and the need to keep future routes free of development. I will deal with that in section 4.10. The report proposed some expansion at Yunderup, and no expansion beyond the existing urban land at Ravenswood.

880 The notion, in this study, of reinstating a distinctive nonurban break between Mandurah and the metropolitan ***region*** was not subsequently taken up. In Appendix 1 of the 1996 IPRSP, the Mandurah and Districts Planning

Study is said to have had limited influence. In the 1990 Peel Regional Plan (exhibit 181, 1/5/13), it is said that the 1984 study was not adopted.

881 In June 1989, TPS 4 came into operation.

882 In October 1990, the draft Peel Regional Plan was released by the DPUD. The plan addressed the Peel ***region***, comprising Mandurah, Murray, Waroona and Boddington.

883 In Appendix 1 of the 1996 IPRSP, it is said that the Peel Regional Plan proposed expansion northwards of the Ravenswood townsite to about 3,000 people. In my view, the reference to 3,000 people is an error. I will return to that in dealing with the Peel Regional Plan in detail in section 4.8.3.

884 The plaintiffs' planners identified some general aspects of the Peel Regional Plan as supporting their opinion on the preIPRSP rezoning question. The defendants' planners expressed the opinion that the general statements in the Peel Regional Plan about the expansion of Ravenswood, and the location of future urban land surrounding Ravenswood identified in the Plan, would have weighed against the preIPRSP rezoning of the subject land.

885 In 1992, the Minister for Transport formed the ***South*** West Area Transit Steering Committee to provide to the Minister recommendations for the rail transit type most suitable to meet the government's urban planning and development objectives for the southwest area, and other matters. One of the reports referred to in the final report of the Steering Committee is a report of Martin Goff & Associates dated June 1992, titled 'An Ultimate Land Use and Settlement Vision for the SouthWest Area' (the SWAT report) (exhibit 199). The purpose of the report was to model the ultimate patronage that could be expected to use the public transport systems being investigated by the study.

886 The SWAT report stated that the southwest area may ultimately, after 2050, support a population in excess of 700,000 people. The ultimate population was estimated at 170,000 people in Mandurah and 124,000 people in Murray. Appendix 1 to the 1996 IPRSP described the vision for the Shire of Murray as 'innovative'. The study contemplated that, ultimately, towns of 25,000 people each could develop at Furnissdale/Barragup, Ravenswood and Pinjarra.

887 The plaintiffs' planners emphasised the vision of Ravenswood as a town of 25,000 people as supporting an affirmative answer to the preIPRSP rezoning question.

888 In September 1994, the DPUD published the Peel Regional Strategy: A Strategy Policy Statement and Land Use Plan. The Peel Regional Strategy was the outcome of the public consultation processes associated with the 1990 draft Peel Regional Plan. The report identified four corridors or areas for the purposes of structure planning. One of those areas was the Rockingham/Mandurah/Pinjarra corridor, which was seen as the major development corridor. There are references in the Peel Regional Strategy, emphasised by the plaintiffs and their planners, to the pressure for commercial and residential development adjacent to and in the vicinity of Pinjarra Road.

889 Thus relevantly, part of the upshot of the 1994 Peel Regional Strategy was to state the need for structure planning to identify areas suitable for urban development in the Mandurah to Pinjarra corridor. That led to the preparation and drafting of the IPRSP, which undertook that task.

890 The Peel Regional Strategy includes a land use plan (exhibit 198). The planners were at issue about the purpose and the significance of that plan. It is said in Appendix 1 to the 1996 IPRSP that because of the long time lapse between the 1990 draft Peel Regional Plan and the 1994 Peel Regional Strategy, the final strategy did not include any consideration of the future urban areas that had been suggested in the 1990 draft Plan. Rather, the 1994 Peel Regional Strategy raised issues that should be addressed through the structure planning process. As will emerge, I agree with that view of the Peel Regional Strategy.

891 In 1994, the shire published its LRS.

892 In the remainder of this section 4.8, I will deal with the planning publications one by one, identifying relevant aspects of their provisions, what the experts said was to be taken from them, and stating my conclusions about those matters. 4.8.2 The TS Martin report 4.8.2.1 THE TS MARTIN REPORT

893 This report is exhibit 18 (1/1/1 304).

894 TS Martin & Associates were commissioned by the MRPA to undertake a study of the southwest corridor as part of a continuing review of corridor development proposed by the MRPA. The study was to recommend a

strategy for corridor development up to the end of the twentieth century. In the report, the southwest corridor was divided into sectors: Cockburn, RockinghamKwinana, and Mandurah.

895 In ch 5, two alternative strategies are put for population growth. The report proceeded on the basis of an estimate of the population of the southwest corridor, including Mandurah, of 370,000 people by the year 2000 (exhibit 18 [2.25] [2.27], [5.2]). Under strategy 1, the population of Mandurah in 2000 was forecast to be 72,000 people. Under strategy 2, the forecast for Mandurah was 113,000 people (with a corresponding decrease in the estimated population for the Cockburn sector). See exhibit 18 [5.21]. The report did not recommend between the two strategies, saying further consultation and evaluation was required: exhibit 18 [5.24].

896 Plans setting out areas of existing development and proposed development under strategy 1 and strategy 2 are at 1/1/52 and 1/1/54. Under strategy 1, new residential areas are shown as far north as Madora, as far east as the Serpentine River and as far ***south*** as Miami. In strategy 2, new development is shown as far north as Peelhurst and as far east as the Murray River and the new alignment of the coastal road where it bypasses Mandurah (exhibit 18 [6.45]).

897 Under strategy 2, but not under strategy 1, the area of proposed development extends to the subject land. The extent of proposed development under strategy 1 and strategy 2 is shown in more detail in the proposed structure plan at 1/1/74. It can be seen that the subject land is at the easternmost extremity of the proposed urban development for strategy 2.

898 Development is proposed to occur substantially in concentric circles, in a phased way: see 1/1/82.

899 In the plans for both strategy 1 and strategy 2, a new proposed major road is shown, which is an extension of the Kwinana Freeway through to Pinjarra Road. It met Pinjarra Road near the Murray River close to Ravenswood. The proposed road is shown in the plan at 1/1/199. (See also 1/1/211 [D55].)

900 In Appendix 1 to the 1996 IPRSP it was stated that a feature of both strategies in the TS Martin report was that there would be a very wide nonurban break separating Mandurah/Murray from Rockingham. It was said that: Since 1974 not many of the land use arrangements proposed by TS Martin and Associates on [the structure plan accompanying the two strategies] for the ***southern*** portion of the corridor and the City of Mandurah have been implemented. The inner bypass road featured in the plan has now been constructed but otherwise the existing and planned future roads showed little relationship to the patterns in these plans. The Kwinana Freeway extension which is shown oriented towards Pinjarra was subsequently realigned ***south*** to join the existing MandurahBunbury Road ***south*** of Harvey Estuary (exhibit 7, 1/10/153).

901 The population of Mandurah was less than 50,000 people in 2000. By 1991, it was 29,200 people (exhibit 117, 1/9/221; exhibit 188, page 8). As early as 1980, in the Preferred Strategy, it was known that the TS Martin population figures were unlikely to be met before 2010 (see exhibit 21, 1/2/128, 213; ts 3367). 4.8.2.2 THE TS MARTIN REPORT: PLANNERS' OPINIONS

902 In their oral evidence, Messrs Rowe, Flugge, Robinson and Butterly indicated that they rely on the TS Martin report as supporting their opinion on the preIPRSP rezoning question (ts 3724).

903 Mr Robinson said in his oral evidence that the TS Martin report is relevant in that it examined growth in the Mandurah area and made some 'clear recommendations' about 'the need for urban land to the east of Mandurah' in the Shire of Murray (ts 3727). See also exhibit 180A [208]. In his view, the TS Martin report supports the opinion that, as early as 1974, there was acknowledgment of the constraints on urban growth north and ***south*** from Mandurah, and the report 'identified the principle of Mandurah expanding further eastward' along the Pinjarra Road corridor (ts 3732; see also ts 3728). He considered this relevant to the subject land due to the later reports indicating that some of the urban land east of Mandurah was not suitable for development (ts 3728).

904 In crossexamination, Mr Robinson recognised that the TS Martin report's population forecasts had not been met by 1992 and that the planning environment and limitations identified in the report had 'changed significantly' by 1992 (ts 3732).

905 Mr Rowe expressed a similar view to Mr Robinson. He relied on the TS Martin report as showing that 'there was a view then that there needed to be more urban or residential growth accommodated in the Peel area' and that the development could be accommodated eastwards towards Pinjarra (ts 3728). Further, the report indicated that

under at least one scenario, development extended to part of the subject land and that it would be suitable for that purpose. That is, in his view, the report gave no reason to preclude development on the subject land (ts 3728 3729). See also exhibit 191A [29].

906 In crossexamination, Mr Rowe agreed that more recent documents such as the 1990 Peel Regional Plan, 1992 SWAT report and 1994 Peel Regional Strategy were, in terms of population and demand in the 1990s, to be preferred over the TS Martin report (ts 3746). He maintained the view that the TS Martin report was relevant (ts 3744). He said that was not to do with population projections (ts 3745) and explained it this way: Well, as with most planning studies and proposition as to whether land might be suitable for a purpose, it's important to look at all of the background and see what is being said by others in the past and right up to date on a planning proposition. Martin identified the land as suitable for urban residential growth. That's still the case. If Martin had indicated that the land was poor or had some inherent problem, that would be an important consideration as well (ts 3745).

907 Mr Flugge agreed with Mr Rowe that the relevance of the TS Martin report is that it considered expansion out towards the Murray River and it also took an optimistic view on predicted growth and future populations in the Peel ***region*** (ts 3729). However, in crossexamination he accepted that in 1992, more recent documents would 'paint a more definitive and accurate picture of population projections' (ts 3740).

908 Mr Butterly said the significance of the TS Martin report is that it 'set the framework for the urbanisation which mostly still applies today' (ts 3725). He agreed, in crossexamination, that the population forecasts in the report were, at 1992, 'more misleading than useful' (ts 3739). Mr Butterly said that the TS Martin report does not show the Perth Bunbury Highway, but instead shows a bypass road ***around*** Mandurah, which he calls 'Road A' (ts 3721).

909 The defendants and their planners emphasise that urban development as far east as the subject land was only contemplated under strategy 2, which involved population projections that had not been met by the taking date.

910 Mr O'Neill says that in the 1990s, the TS Martin report had no significant relevance as it was superseded by more recent population projections, estimates of urban land and strategic planning initiatives. In his view, the proposals in the TS Martin report that were considered relevant or appropriate would have been considered by the 1990 draft Peel Regional Plan and 1994 Peel Regional Strategy. The focus should be on those more recent planning documents (ts 3731).

911 Mr Moran agreed with Mr O'Neill about this in relation to the TS Martin report and extended it to apply, in his view, to all reports before 1990 (ts 3731).

912 Mr Auret said that reliance on the TS Martin report for supporting urbanisation of the subject land in the preIPRSP period was 'drawing a pretty long bow', because the result of the TS Martin consultation process resulted in the 1980 Preferred Strategy, which did not show urbanisation east of the Serpentine River. Further, the TS Martin report was directed more towards the southwest corridor rather than the Mandurah Pinjarra corridor (ts 3748 3750).
4.8.2.3 THE TS MARTIN REPORT: CONCLUSIONS

913 I accept the evidence of Mr O'Neill, Mr Moran and Mr Auret in relation to the TS Martin report. In my view, the TS Martin report is of little or no relevance to the preIPRSP zoning question. At its highest, it may provide some support for the capability of the subject land for urbanisation. That is because the subject land was part of the very large area of land identified under strategy 2 for contemplated future urbanisation. Even on the question of capability, I do not think that a nearly 20yearold study would be given great weight in the 1990s. In any event, the capability of the land itself is not the question. Rather, the important question relates to the timing of any urbanisation. In relation to timing, I consider the TS Martin report to be of no real assistance.

914 Strategy 2 of the TS Martin report is founded upon a population projection or scenario for Mandurah of 113,000 people by 2000. By the early 1990s, it was readily apparent that that would not be achieved. By 1995, the DPUD, in preparing the IPRSP, assessed that there was a 60% chance that the population of Mandurah would reach 111,000 people by 2021, as forecast in the 1992 SWAT report (exhibit 188, pages 8 9). Consequently, contrary to the evidence of Mr Rowe and Mr Robinson, in the 1990s, the TS Martin report did not say anything of value about the 'need' for urban land to the east of Mandurah or in the Peel ***region***.

915 Given that strategy 2 is founded on what quickly proved to be an overly optimistic projection of the population of Mandurah, one might contend that in later years, the TS Martin report could be used to argue against the prospects

of urbanisation of the subject land. An argument might be put to the following effect. It was only under strategy 2, with a population projection of 113,000 people for Mandurah by 2000, that urbanisation was contemplated as far east as the subject land. That urbanisation was only in the last phase of urban development. Given that population had increased, and by the mid1990s was forecast to increase, significantly more slowly than had been postulated in strategy 2 of the TS Martin report, the prospects of urbanisation of the subject land in the medium term would be slim.

916 However, in my view, reasoning along these lines would be inappropriate. That is because by the early 1990s, the thinking reflected in the TS Martin report had been superseded in various significant respects, which in themselves provide further reasons for giving little or no weight to the TS Martin report.

917 One example of this is the TS Martin model of the progress of urbanisation by gradual expansion in concentric circles, eastwards from Mandurah. By the 1990s, that model of urban expansion had been superseded by the notion of discrete urban villages or urban nodes. In this context, I should mention some evidence of Mr Butterly.

918 In his primary report, Mr Butterly expressed the view that the philosophy of orienting development away from major roads had the effect of limiting urban expansion east of Mandurah near the proposed Highway route in the lead up to the preparation and adoption of the 1997 IPRSP: exhibit 194A [5.4] [5.6]. He expressed the opinion that that philosophy carried forward in the IPRSP, in that land identified for future urban development did not progressively move eastwards in concentric circles from Mandurah, but rather leapfrogged areas, creating satellite settlements at ***South*** Yunderup and Ravenswood (exhibit 194A [5.7]). In my opinion, that form of urban development was not attributable to the proposed Highway. Rather, it reflected a model of the urban form that, independently of the Highway proposal, preferred urban nodes to progressive development outwards from Mandurah. That model was beginning to be articulated by 1990: see the 1990 Peel Regional Plan. The same thinking can be seen in DPI/WAPC reports in the preIPRSP period and in IPRSP Working Paper No 4 (exhibit 178, pages 9, 22 24).

919 A preference for urban nodes to linear sprawl was also expressed in the 1994 LRS (exhibit 29, 1/11/180 183).

920 In my view, in their evidence in response to the court's questions, Messrs Flugge, Robinson and Rowe overstated the significance of the TS Martin report, including as regards its population projections. For example, both Mr Rowe and Mr Robinson stated that the TS Martin report supported conclusions, in the 1990s, about 'need'. It was only subsequently, in crossexamination, that each of these planners accepted that, by the 1990s, the population projections had proven to be overly optimistic. 4.8.3 The 1990 Peel Regional Plan 4.8.3.1 THE PEEL REGIONAL PLAN

921 The Peel Regional Plan was published in draft by the DPUD in October 1990 for public comment.

922 In the introduction, section 1.3 deals with the purpose of the Plan (exhibit 181, 1/5/13). It is stated that the need for a strategic plan for the Peel ***region*** had long been recognised. In recent times prior to 1990, the need to resolve a number of major issues in protecting important regional values had highlighted the absence of a plan to address four matters, one of which was, as the plaintiffs highlight, the demands of a rapidly growing population for housing, education and employment.

923 Population projections are set out in pt 2 of the Plan (1/5/3637). As at 1989, the ***region*** was estimated to have a population of just under 35,000 people, of which about 7,500 people were in Murray. Under the lowmedium scenario, this was expected to grow to just under 83,000 people in the ***region*** by 2011, with 13,600 people in Murray. Under the highmedium scenario, Murray was estimated to have about 17,400 people by 2011.

924 Part 3 deals with regional values and planning issues. Part 3.7 relates to lifestyle and urban development. Under 3.7.1, it is said that focusing development within distinct urban villages is a means of avoiding sprawl. The concept relies on consolidating established communities and developing new ones ***around*** neighbourhood centres (1/5/68 69).

925 At 1/5/70, it is said that while Perth's rapid growth affects Peel, until well beyond the year 2001, the main demand for new urban land in Mandurah/Murray will come from growth within the Peel ***region***.

926 The Plan provided estimates of the requirements for future urban land from 1986 to 2011. It identified that ensuring availability of a variety of welllocated urban land, sufficient to meet anticipated demand, was an important part of the Plan (1/5/70). It was estimated that almost 2,300 ha of new urban land would be needed in the ***region*** by 2001 and a further 1,000 ha by 2011. The bulk of that was required for Mandurah. For Murray, table 12 states that for 1986 2001, a further 272 ha would be required and from 2001 2011, a further 160 ha (1/5/70).

927 The following is said about sewerage: The lack of sewerage schemes has imposed considerable constraints on development potential in parts of the ***Region***, such as Furnissdale and Ravenswood in Murray Shire. Planning must recognise the importance of giving higher priority to providing sewerage services to such areas in the light of the urgent need for additional urban land, and commitments to improving water quality in the PeelHarvey system (exhibit 181, 1/5/71).

928 The reference for the urgent need for additional urban land should be noticed. Of course, this was in 1990 and so before the Riverland Ramble rezoning.

929 Part 4 describes the proposed Peel Regional Plan. It was intended to be a nonstatutory framework to manage change and to provide a guide for local authority plans and decisionmaking (1/5/76).

930 The Plan identified a number of areas for future urban, based on an assessment of land capability, servicing potential, location, accessibility and the need for choice.

931 The primary objective for urban development and infrastructure was to ensure orderly and proper urban development while retaining the quality of life and character of the Peel ***region*** (1/5/89). Among the objectives for housing and urban development was to ensure an adequate supply of urban land ahead of demand.

932 Part 4.3 deals with the ***region***'s towns. Ravenswood is not mentioned.

933 Part 4.4 sets out a land use strategy. The strategy comprises a land use plan (exhibit 197), a land use table and strategic planning areas. Appendix 1 to these reasons contains an extract of what is shown for the relevant area in exhibit 197. The land use strategy in pt 4.4 is deliberately broad to allow more detailed planning by responsible authorities, especially local government. Nevertheless, it is intended to be used as a guide to future planning and daytoday decisionmaking. The land use strategy plan shows the preferred land uses within the Peel ***region*** (exhibit 181, 1/5/96). The land use strategy identified new urban land capable of meeting the demand for almost 3,300 ha of new residential land between 1986 and 2011 (1/5/96). The following is said as to future urban land: New areas were selected from an assessment of land capability, servicing potential, location, accessibility and the need for choice. Further planning, including staging, is required. Development should occur on a frontal basis to minimise servicing costs (exhibit 181, 1/5/96).

934 In relation to Murray, the following is said: New urban areas are identified in several parts of the Murray Shire to accommodate local growth and an increased proportion of total urban growth in the Mandurah area. These new areas avoid prime agricultural land and sensitive environmental areas. Where possible, they build upon existing settlements, with a logical extension of utility services.

A major new urban growth area is proposed at Furnissdale/Barragup. The Strategy envisages extensive residential development focusing on a major centre comprising education facilities, Government services, regional recreation facilities and commercial development. The area has good access to Mandurah and Pinjarra, the coast, Peel Inlet, and inland parts of the ***Region***. Fringed by small rural holdings and encircling waterways, the area could adopt an island theme.

Allowing 40 ha for the nonresidential centre, the area could generate about 3,000 lots accommodating 8,500 people. Only half of this growth is expected during the plan period, unless there is greater 'spill over' of residential demand from Mandurah.

Expansion of Ravenswood townsite along its northern boundary is proposed. New residential growth will build upon the existing settlement utilising land of only moderate agricultural potential. The land is outside flood risk areas. However, a high water table would necessitate detailed investigation of drainage and other services (exhibit 181, 1/5/97). (emphasis added)

935 The repeated references to new urban areas building on existing settlements should be noticed.

936 Table 13 is a land use table, which is also reproduced in exhibit 197. In relation to future urban land use, the table includes the following:

Locality (See Plan)

Preferred Principal Land Uses

(B) Murray

Growth centre at Furnissdale/Barragup. Expansion of Ravenswood townsite, Pinjarra and North Pinjarra. Modest growth at Dwellingup.

Urban development at Furnissdale/Barragup including a regional centre. Residential/holiday development at Ravenswood and Dwellingup. Residential expansion at Pinjarra.

(exhibit 181, 1/5/99) 4.8.3.2 THE PEEL REGIONAL PLAN: THE PLANNERS' OPINIONS

937 Each planner considered that the 1990 Peel Regional Plan supported his opinion on the preIPRSP rezoning question.

938 In Mr Rowe's opinion, the Peel Regional Plan recognised the potential population growth of the ***region*** and placed greater emphasis than previously on ensuring the availability of urban land to meet that growth (exhibit 191A [44]). I accept that.

939 Mr Robinson gave evidence that the Peel Regional Plan advocated growth of urban nodes along the Pinjarra Road corridor, in particular at Furnissdale/Barragup and at Ravenswood (ts 3756). Mr Butterly gave evidence to similar effect (exhibit 194A [3.14]; ts 3758), as did Mr Rowe (ts 3754 3755).

940 I accept that opinion. However, the question is the extent and location of that Ravenswood node.

941 Mr Robinson said the Peel Regional Plan was intended to be flexible. That is not in doubt. He pointed to the location, in the land use plan, of future urban land in Barragup, which was later identified as not being suitable for urban development (ts 3703). I will say more about that in my conclusion in section 4.8.3.3.

942 Mr Robinson accepted, in crossexamination, that the future urban land shown on the land use plan to the north and east of Ravenswood reflected that, in the drafters' opinion, this was considered to be the most logical place for urban expansion (ts 3776).

943 Mr Rowe relied upon the summary of the Peel Regional Plan contained in Appendix 1 to the 1996 IPRSP. In his view, the Plan identified growth areas along Pinjarra Road, located at Furnissdale, Barragup and Ravenswood. He believed that the area shown on the land use plan would not accommodate the population of 3,000 people, which the 1996 IPRSP says was intended by the Peel Regional Plan for Ravenswood (ts 3754). Based on this, he believed that development would occur at other locations that fitted the intention to locate growth along Pinjarra Road near Ravenswood (ts 3755).

944 The figure of 3,000 people for Ravenswood is, so far as I can see, not mentioned in the Peel Regional Plan. It only appears in the 1996 IPRSP Appendix 1 discussion of the Plan. Mr Auret said in drafting Appendix 1, he might have confused the Peel Regional Plan with the population of 3,000 people associated with the Ravenswood urban cell in the 1992 SWAT report (ts 3809). I find that that is what occurred. Thus, I find that the Peel Regional Plan does not express any expectation that Ravenswood would have a population of 3,000 people.

945 Consequently, the evidence of Mr Moran (ts 3763 3769) and Mr Auret (ts 3760) that is based on the incorrect assumption that the Peel Regional Plan contemplated 3,000 people in Ravenswood need not be further considered. In any event, Riverland Ramble would have accommodated more than that number (see exhibit RR146.43, page 2).

946 Mr Rowe did not accept that the location of future urban land shown on the land use plan meant that the drafters saw this as the best option for urban expansion (ts 3779). I found his responses on that topic to be unconvincing and unimpressive. See section 4.8.3.3 below.

947 Mr Robinson also placed weight on the fact that the Highway alignment was not finalised in the Peel Regional Plan and, as such, the WAPC was not going to propose urban development in areas where the alignment might prejudice the ability to establish the Highway (ts 3756 3757, 3777 3778). Consequently, in his opinion, consideration was not given to the urban development potential of the subject land. I will deal with this in the next section 4.8.3.3.

948 Mr Auret said that the proponents of Riverland Ramble in part relied on the 1990 Peel Regional Plan to show the development was consistent with the urban expansion of Ravenswood, but that he did not think the decision makers at the time would use what was shown in the Plan as a reason against approving a rezoning application (ts 3881). However, he pointed out that he was not involved in the consideration of rezoning applications, and relied only on his structure planning work (ts 3759).

949 As I have said, the defendants' planners relied more directly on the 1990 Peel Regional Plan as supporting their opinions on the preIPRSP rezoning question.

950 Mr Moran pointed to the future urban area on the northern boundary of the existing Ravenswood townsite on the land use plan, in what he says approximates the area of what became Riverland Ramble (ts 3687 3688). Mr Moran also pointed to the part of the land use table referring to Murray, reproduced above (ts 3691 3692). Based on exhibit 197 (and the 1994 Peel Regional Strategy), Mr Moran suggested 'at the strategic level there was no strategic impetus for urban development other than the small area indicated ***around*** Ravenswood' (ts 3693). He placed significant weight on the description that Ravenswood was intended to accommodate residential holiday accommodation, with no contemplated plans for significant expansion (ts 3754).

951 Mr Moran agreed that it was a reasonable statement that the Peel Regional Plan indicated to local government authorities that they were able to identify growth areas and provide for their growth, independent of what was shown on the land use plan (ts 3769). Thus Mr Moran did not consider the land use in the Peel Regional Plan to be determinative. Mr O'Neill gave evidence to similar effect, saying that in his view, the Peel Regional Plan, as a draft, was a presumption, but not a prohibition, against rezoning the subject land as urban before 1994 (ts 3773 3774).

952 Mr O'Neill agreed with Mr Moran (ts 3696). He considered that the Peel Regional Plan supports his opinions to the extent that it reflected the considered position of the SPC at that time, showing a limited identification of additional urban land in Ravenswood area, which did not extend ***around*** or past the subject land (ts 3754). Rather, the subject land and a large adjoining area were identified to be used for rural purposes as 'Rural [Category] B' (ts 3757 3758). 4.8.3.3 THE PEEL REGIONAL PLAN: CONCLUSIONS

953 At the risk of stating the obvious, the weight to be given to the Peel Regional Plan in assessing a hypothetical application to rezone the subject land would be influenced by the time at which the application was made. In 1991, the 1990 Peel Regional Plan would be given significantly more weight than in, say, late 1995, when the 1994 Peel Regional Strategy had been published and the structure planning for the IPRSP was well underway.

954 With that caveat, I prefer the evidence of the defendants' planners about the relevance of the 1990 Peel Regional Plan to the preIPRSP rezoning question than the evidence of the plaintiffs' planners.

955 The Peel Regional Plan involved an assessment of where future urban land should be provided taking into account land capacity, sustainability, population growth and other factors. The land use plan (exhibit 197) showed the location of the proposed future urban areas. Part 4 of the Plan proposed expansion of the Ravenswood townsite along its northern boundary. That was consistent with the general theme of the Peel Regional Plan that new residential land should build upon an existing settlement, and that development should be within distinct urban villages to avoid urban sprawl.

956 Those matters support the defendants' planners' opinion that, prior to the IPRSP, the logical place for new urban development to commence was immediately north of and adjacent to the existing Ravenswood townsite. The Peel Regional Plan did not support urbanisation of the subject land, which is not located adjacent to Ravenswood or any existing settlement.

957 Mr Rowe expressed the opinion that an application any time from 1990 to 1997 would have been approved. In my view, the Peel Regional Plan would have been a substantial obstacle to an application lodged in 1991 or 1992, in a context where there was also an application to rezone Riverland Ramble. I do not think Mr Rowe's evidence grappled in any satisfactory way with that obstacle.

958 In crossexamination, Mr Rowe refused to accept that the future urban areas shown on the land use plan reflected the drafters' view that the best planning for further urban land was contiguous with and to the north and east of Ravenswood. He said that the plan was not intended to identify the preferred option for future urban and he did not know why the drafters had created the land use plan (ts 3779). He appeared to me to be unwilling to make a concession that plainly ought to have been made, because he perceived the concession was contrary to the position he had adopted.

959 As I have said, Mr Robinson pointed to the identification of Furnissdale/Barragup for substantial growth in population. He said, in effect, that when Furnissdale/Barragup was later identified as not being suitable for urban development, that would have created additional opportunities for urbanisation of other land, such as the subject land, in the Mandurah to Pinjarra corridor (ts 3703). The force of that notion can only be assessed by reference to particular periods, since the thinking about the population potential of Furnissdale/Barragup has varied over time. The Peel Regional Strategy, published in September 1994, identified the issues associated with development in that area including fragmented ownership, lowlying land, lack of sewerage and environmental impact on the estuary (exhibit 30, 1/6/133). Consequently, in 1995, a decision maker taking into account the 1990 Peel Regional Plan would also have taken into account what was by then known about the issues associated with Furnissdale/Barragup. To that extent, I accept what Mr Robinson says. However, as has been seen in sections 4.6and 4.7, by 1995, officers in the DPUD took the view that the then approved or imminent developments at Austin Cove, Riverland Ramble and MRCE would provide sufficient population potential to accommodate the expected population growth of the entire shire to 2021.

960 Two of the plaintiffs' planners gave evidence that the land use shown in the Peel Regional Plan was influenced by the Highway.

961 I am not satisfied that:

(a) the identification of proposed future urban areas ***around*** Ravenswood; or

(b) the general preferences expressed in the Peel Regional Plan for further urbanisation to build on existing settlements;

are attributable to the Highway.

962 Mr Butterly expressed the opinion that the Peel Regional Plan included the Highway (ts 3705). It is not clear to what extent that is so. The Highway is mentioned only in passing in relation to transport (exhibit 181, 1/5/74, 90 91). The Highway is not shown on the land use plan itself (exhibit 197).

963 In any event, there is no evidence that the general preference for building on existing settlements is in any way attributable to the Highway. The only evidence that might perhaps be taken to support a conclusion that the identification of future urban land ***around*** Ravenswood was influenced by the Highway is the evidence of Mr Robinson I have set out above. That evidence, if accepted, falls short of establishing that, but for the Highway, a different future urban area would have been proposed. In any event, I do not accept that evidence of Mr Robinson. It does not seem to me to be supported by anything in the text of the Peel Regional Plan, or by any other identified circumstances or matters. Rather, it appears to me to be speculation based on a generalised assumption. Thus I find that, assuming no proposal for the Highway, the Peel Regional Plan would not have been materially different in the respects I have mentioned. 4.8.4 The 1992 SWAT report 4.8.4.1 THE SWAT REPORT

964 The SWAT report stated that the southwest area may ultimately (after 2050) support a population of in excess of 700,000 people. Within that structure, the Shire of Murray could have the following urban populations: 15,000 people by 2011; 33,000 people by 2021; and an ultimate population of 124,000 people (exhibit 199, 1/5/133 134).

965 The executive summary to the SWAT report notes that 'the report goes beyond previous planning time frames and makes assumptions and reaches conclusions which, though based on advised facts and probabilities, are often intuitive and necessarily subjective' (exhibit 199, 1/5/132).

966 In relation to Murray, the report stated that there were areas at Amarillo, Barragup and Ravenswood which had potential for urban settlement. Two communities of 25,000 people each could be developed at Amarillo. It is suggested that by 2021, mainly on the stimulus of Amarillo, the Murray Shire urban population could have increased to 33,000 people. The report stated that another suburb north of Ravenswood could be developed as a community of 25,000 people. The population of the Ravenswood community was forecast to be 3,000 people by 2021. Thus, in this study, substantial growth in Ravenswood is said to be something which would occur some time after 2021 and by about 2050 (1/5/147 149).

967 It is said in pt 6.3 that it is desirable to plan for communities in the order of 25,000 people so that each will have access to facilities and services providing the necessary convenience and amenity of contemporary suburban life (1/5/174).

968 Figure 10.2 of the report is map 8 of exhibit 71. It shows an urban cell, cell 4, on both sides of Old Mandurah Road, taking in the subject land and extending to the power lines at the east and the new proposed Highway to the west. The activity centre for the Ravenswood urban cell is located north of Old Mandurah Road, on the boundary of lots 10 and 11. Figure 10.2 states an ultimate population of 25,000 people for the Ravenswood urban cell, with a population at 2011 of nil, growing to 3,000 people by 2021. See also exhibit 199, 1/5/153. 4.8.4.2 THE SWAT REPORT: THE PLANNERS' EVIDENCE

969 The plaintiffs' planners considered that the SWAT report supported their opinion on the preIPRSP rezoning question.

970 Mr Rowe relied on the SWAT report as providing 'a good crosssectional view of how the authorities view that area at that time', which included a future urban area on adjacent land to the north, east and northeast of the existing Ravenswood townsite, ultimately to a population of 25,000 people (ts 3801).

971 Mr Flugge treated the SWAT report as being the first planning document to introduce the notion of an inland development corridor in the Peel ***region***, with 'visionary and [innovative] projections for populations', stretching from Amarillo to the proposed Ravenswood urban cell, which would link the Murray Shire with the metropolitan ***region*** (ts 3802, 3807).

972 Mr Auret viewed the SWAT report as 'conjectural', but useful; in substance repeating what he had written in Appendix 1 of the 1996 IPRSP (ts 3802).

973 He saw it as being based on 'seriously entertained views at the time', and stated that it was rapidly picked up in other planning documents, such as the 1992 TAFE College Site report and the 1994 LRS (ts 3802 3803). The LRS took the SWAT report and its land use vision into account in determining what land might be used for urban purposes and thus should be preserved from ruralresidential development (ts 3804, 3815).

974 Mr Auret stated that in his view, unlike for the 1994 Peel Regional Strategy, servicing agencies, particularly the Water Authority, paid serious attention to the SWAT report and started longterm planning in the Ravenswood area on that basis (ts 3760), though planning would have started before 1992 and was not exclusively based on the areas identified in the SWAT report (ts 3783, 3787 3788).

975 Mr Moran agreed with Mr Flugge that the SWAT report provided 'an innovative and visionary ultimate land use and settlement vision for the southwest area', but said that this did not imply that areas identified for future urban settlements were immediately available for urban rezoning (ts 3804). The report was not intended to be used as the foundation for a rezoning. See also exhibit 196B, 34/174 [29].

976 When the court asked about the relevance of what the SWAT report said about the population of Ravenswood in 2011 and 2021 to the preIPRSP rezoning of the subject land, only Mr Robinson offered an opinion (ts 3809). In his view, it reflected that the plan was based on 'balanced growth' within the Mandurah Pinjarra corridor (ts 3809).

977 The only evidence of a reference to the SWAT report in the context of a rezoning application was in relation to road widening conditions imposed on Riverland Ramble and Settlers Village (ts 3810 3811).

978 Mr Auret did not think that the SWAT report would change significantly in the Ravenswood area if the Highway was removed from consideration, other than to expand the Ravenswood urban cell over the land where the Highway would have been (ts 3999). He did not view the SWAT report being based on projections linked to the Highway, but as based on the aspirations and advice from 'the servicing authorities, the local authorities and major players in the development industry' (ts 4000). In my view, the SWAT report assumed a high capacity road

extending the freeway alignment during the period of the study: see exhibit 199, 1/5/136 137, 200. 4.8.4.3 THE SWAT REPORT: CONCLUSIONS

979 In my opinion, the SWAT report does not provide any support for an affirmative answer to the preIPRSP rezoning question. That is so for the following reasons.

980 First, while the report involved an aggregation of a broad range of views, it was a report to Transperth. It was not a report of or to the WAPC (then SPC).

981 Secondly, the urban cell at Ravenswood is shown as having a population of nil at 2011 and 3,000 people at 2021. It is only in the 'ultimate' scenario that a population of 25,000 people is shown. The plaintiffs' planners seem to me to overlook this, or to place insufficient weight upon it.

982 The plaintiffs submit that the low figures in the SWAT report for population in Ravenswood in 2011 and 2021 are not significant because population statistics were not used to guide rezoning applications (reply submissions par 3.105). I do not accept the premise of that submission. Riverland Ramble and MRCE demonstrate that population statistics were a consideration in rezoning applications. In any event, I do not accept that, in the context of a rezoning application, all that matters in the SWAT report is that it identifies a broad area as ultimately urban, thereby supporting urban rezoning of a small part of that broad area, without regard to what it says about when and in what circumstances that area would be urbanised.

983 As I have mentioned in section 4.6 and again above, in some correspondence and reports, planning officers stated that the SWAT report anticipated that the Ravenswood cell would accommodate 25,000 people within the following 25 years after 1995. That is an incorrect understanding of the SWAT report. In determining the preIPRSP rezoning question, I apply the principles of orderly and proper planning. Those principles require a correct application planning instruments and publications, regardless of any misunderstanding that may have existed during a relevant period.

984 Thirdly, the only evidence of use of the SWAT report in the context of a rezoning application relates to the imposition of road widening conditions from 1995. Given the nature and purpose of the SWAT report, it is understandable that it may be taken into account in seeking to ensure that roads are planned to accommodate ultimate urban expansion. It would be a quite different use of the SWAT report to use it to justify a rezoning of particular land. There is no evidence of the SWAT report being used in that way. For example, it was not referred to in the Riverland Ramble or MRCE rezoning processes.

985 At its highest, the SWAT report may provide some support for the suitability of the subject land and surrounding land for ultimate urbanisation. In my opinion, it provides no support for rezoning of the subject land, in the short or medium term, in the preIPRSP period. 4.8.5 The 1994 Peel Regional Strategy 4.8.5.1 THE PEEL REGIONAL STRATEGY

986 The Peel Regional Strategy is exhibit 30 (1/6/96 144).

987 This report was prepared by the Peel Regional Strategy Steering Committee on behalf of the DPUD. In the foreword, it was said that the Peel Regional Strategy would be the basis for land use decisionmaking within the ***region*** though the regional office of the SPC and a regional planning committee.

988 Part 1.2 of the Peel Regional Strategy states that following assessment, pt 4 of the 1990 Peel Regional Plan, which set out a land use strategy, remained appropriate as the basis for the Peel Regional Strategy (1/6/106). The aim of the strategy is [t]o assist the Peel ***Region*** in the management of economic and social development and the sustainable use of natural resources.

To this end the strategy contains: Objectives and Actions, which provide guidance for more localised decision making by government, private enterprise and the community; guidance for regional structure planning; and a land use plan to indicate regional allocations of uses to land (exhibit 30, 1/6/107). (original emphasis)

989 In the objectives for urban development, there was reference to taking advantage of existing infrastructure in locating urban growth; consolidating existing urban settlements; and to urban villages (1/6/123 124).

990 Part 3.1 identified the reasons for the need for regional structure planning: This plan provides regional guidance for more detailed and localised planning and decision making. The land use plan indicates future land uses beyond the boundaries of the ***region*** and is based on: an understanding of likely and preferred future uses at the regional level, land use allocations currently in place in district planning schemes within the ***region***, and land use allocations currently in place outside the ***region*** in Perth Metropolitan and BunburyWellington ***Regions***.There is a need, however, to plan further into the future and provide more regional and structural guidance in some parts of the Peel ***Region***. These are areas which are now under significant pressure for development or are likely to be under pressure in the near future. Local government requires assistance to resolve issues and plan for this development. The regional structure planning areas identified in this plan cross the boundaries of more than one local government area and, therefore, require state government to take a coordinating role.

Regional structure planning should provide structural guidance for the location of urban areas, infrastructure, conservation, recreation and other uses where there is significant pressure from population growth. It should be considered part of the regional plan and should guide local and district planning (exhibit 30, 1/6/131).

991 The report identified four corridors or areas for the purposes of structure planning. The area designated number 1 comprised the Rockingham/Mandurah/Pinjarra corridor which was seen as the main development corridor: see 1/6/132. That diagram shows the proposed Perth Bunbury Highway extension passing substantially through its ultimate location relative to the subject land.

992 In relation to structure plan area 1, the following is said: 3.3 STRUCTURE PLAN AREA 1: Rockingham/Mandurah/Pinjarra

This acknowledges that, although the separate identity of the Mandurah and Pinjarra communities should be protected, there will be significant connections between Rockingham and these centres. Urban development proposals east of Rockingham and Mandurah are influencing decisions about the location of services and infrastructures in Rockingham, Mandurah and Pinjarra. This structure planning should not review the entire ***South*** West Corridor Structure Plan; but should assess where impacts from the Amarillo and the Mandurah to Pinjarra corridor will impact on the ***South*** West Corridor of the Metropolitan ***Region***. The pressure for commercial and residential development adjacent to and in the vicinity of Pinjarra Road, particularly in the Furnissdale/Barragup location are important considerations. The rivers and wetlands in the area are an important part of the Peel-Harvey Estuarine System.

ISSUES

TASKS

Potential Urban Areas

Identify areas suitable for urban development in the Mandurah to Pinjarra corridor. The Furnissdale/Barragup area, in particular, is under pressure for development. Issues associated with this area include fragmented ownership, low lying land, lack of sewerage, environmental impact on the Peel-Harvey Estuarine System

(exhibit 30, 1/6/133)

993 Because the experts and the parties were at issue about the nature and purpose of the land use plan that is part of the Peel Regional Strategy, I refer to the provisions of pt 4 dealing with the land use plan, in some detail.

994 The purpose of the plan was explained as follows: The land use plan provides an indication of the broad emphasis of future land uses in different locations of the ***region***. It is not intended to replace district or local level planning but provides a guide for the community, private enterprise and government agencies to understand the intended patterns of future land use at a regional level. It complements the Objectives and Action Statements of this plan and places them in geographic context (exhibit 30, 1/6/138).

995 The summary of the plan included the following: The allocation of urban, industrial and regional open space uses outside the ***region*** reflect existing regional plans and structure plans including the Metropolitan ***Region*** Scheme, the ***South*** West Corridor Structure Plan, the BunburyWellington ***Region*** Plan and the Greater Bunbury Structure Plan.

Urban and industrial uses in the ***region*** are based on existing local schemes. The long term regional allocations of these uses will be determined by regional structure planning as explained in Part 3(exhibit 30, 1/6/138).

996 Under the heading 'Ongoing role of the plan', it was stated that as more localised planning was undertaken the regional allocations on the plan may become superseded. A committee would monitor the status of the plan and would update it digitally to enable modification and reproduction of updated versions of distribution to the community (1/6/138).

997 The categories on the plan were explained in the following way (exhibit 30, 1/6/139):

CATEGORY

EXPLANATION

Urban

Existing zoned development & undeveloped land for residential, commercial, general industry and public purposes.

Future Urban

Land which is shown as urban in the existing regional structure plans for the ***South*** West Corridor and Greater Bunbury and which is shown as Urban Deferred in the Metropolitan ***Region*** Scheme (MRS).

Areas under consideration for Future Urban

Land which is under consideration as part of regional and local planning and land which is within townsite boundaries in the Bunbury Wellington Regional Plan.

998 The land use plan is exhibit 198. An extract of what is shown for the relevant area in exhibit 198 is in Appendix 2 to these reasons. A small amount of urban land is shown at the Ravenswood townsite. There is no future urban or areas under consideration for future urban anywhere in the vicinity, except for some land ***south*** of the Murray River and ***south*** of Pinjarra Road and east of the Highway alignment. That area is shown as under consideration for future urban. Riverland Ramble is not shown as urban, future urban or under consideration for future urban. 4.8.5.2 THE PEEL REGIONAL STRATEGY: THE PLANNERS' OPINIONS

999 The plaintiffs' experts emphasised that the Peel Regional Strategy advocated structure planning in the Mandurah Pinjarra corridor, within which the subject land is located. That is not in doubt.

1000 It is also not in doubt that the Peel Regional Strategy identified issues regarding urbanisation of Furnissdale/Barragup.

1001 The defendants' experts emphasised the very limited urban, future urban and 'under consideration for future urban' land shown ***around*** Ravenswood in the land use plan and said that supported a presumption against the rezoning of the subject land: Mr Moran (ts 3692 3693); and Mr O'Neill (ts 3791).

1002 In response, Mr Rowe said that, because of the long delay from the 1990 Peel Regional Plan to the 1994 Peel Regional Strategy, the Peel Regional Strategy did not attempt further land use allocation, but merely reflected the existing position (ts 3707, 3792). With the exception of Mr O'Neill, other planners agreed with that (ts 3794). 4.8.5.3 THE PEEL REGIONAL STRATEGY: CONCLUSIONS

1003 In my view, the Peel Regional Strategy is of limited assistance in answering the preIPRSP rezoning question. Relevantly, the upshot of the Peel Regional Strategy is to identify the need for structure planning so as to identify areas suitable for urban development in the Mandurah to Pinjarra corridor. That corridor was seen as the main

priority area for urban development. Thus, it is the context for the IPRSP, which undertook that structure planning task.

1004 As I have already noted, the Peel Regional Strategy identified the issues surrounding urbanisation of Furnissdale/Barragup.

1005 I do not accept the opinion of the defendants' planners that the land use plan is of any significant weight against the preIPRSP rezoning of the subject land. I agree with Mr Rowe's opinion, shared by other planners, that the land use plan did not involve any further land use allocation, but simply reflected the existing position. The definition of future urban would mean that it is not focused on land in the Peel ***region***. Consistently with that, almost no future urban land is shown in the Peel ***region*** on the land use plan. I note that Riverland Ramble is not shown as an area under consideration for future urban. 4.8.6 The 1994 LRS 4.8.6.1 THE LRS: INTRODUCTION

1006 The LRS was published by the Shire of Murray in July 1994 (exhibit 29, 1/11/75 289). None of the planners placed very substantial reliance on the LRS in support of their opinion on the preIPRSP rezoning question. In my view, for the reasons following, the LRS does not provide significant assistance in the resolution of that question.

1007 That is because, in essence, the LRS is about regulating ruralresidential development, not urban rezoning. In regulating ruralresidential development, the LRS seeks to ensure that land with urban potential is preserved. It does not focus on the identification of which land should be rezoned to urban at what stage.

1008 I will outline relevant provisions of the LRS to explain my view, and to identify some relatively minor issues that arose in relation to some of its provisions. 4.8.6.2 THE LRS: PROVISIONS

1009 The LRS is focused on the identification of areas potentially suitable for various forms of ruralresidential development and horticulture (1/11/81).

1010 In the LRS, the Shire of Murray is divided into 22 precincts. Each precinct then has identified planning objectives and corresponding development guidelines. Development of the strategy was guided by the following principles:

(a) the need for an integrated catchment based approach;

(b) protection of the shire's agricultural base;

(c) protection of environmental, heritage and cultural values;

(d) protection of potential urban or industrial land; and

(e) enhancement of tourist development potential. See exhibit 29, 1/11/81, 160 163.

1011 The executive summary states that the primary use of the LRS is to guide council when considering land subdivision and development proposals. It is said in bold type that whether or not a development proposal occurs within areas which the report identifies as 'potentially suitable', the key requirement for all development proposals is to address, to council's satisfaction, issues raised in the precinct description and the selection and development criteria given in Appendix C to the LRS (exhibit 29, 1/11/84). Appendix C sets out general principles for selection and development criteria for ruralresidential land uses (1/11/268 272). That supports my reading of the LRS as principally concerned with ruralresidential development of rural land.

1012 Part 3.1 deals with demand and pressure for change. It includes the following: Population projections for the Shire of Murray produced as part of the Peel Regional Planning Study (SPC 1990) indicate that the expected population in 2001 will be between 10600 and 13600 with major growth areas ***around*** Yunderup, Pinjarra, Furnissdale/Barragup and Murray Lakes.

A more recent study conducted for Transperth (Martin Goff and Associates 1992) attempts to determine the extent of land between Fremantle and Pinjarra which might ultimately be settled for urban usage.

In that study Murray Shire was envisaged as becoming part of the metropolitan urban fabric with a population of ***around*** 15000 by 2011. Major urban growth cells were identified at Barragup, Ravenswood, Pinjarra and 'Amarillo' (exhibit 29, 1/11/138).

1013 Part 5.1 deals with the five guiding principles set out above. In protecting the agricultural base of the shire, it is stated that the grazing land within the central part of the coastal plain is the shire's 'agricultural heartland' (1/11/161). Unless identified by the LRS as having potential for other forms of development, all rural areas to the west of and including the Darling Scarp are recommended as having a 40 ha minimum lot size (1/11/161).

1014 Part 5.1.4 deals with protection of potential urban or industrial land and states: Protection of potential urban or industrial land is required in order to maintain planning flexibility and best capitalise on future development options. While it is necessary for the Strategy to recognise these areas within the context of planning for the future of the shire's rural areas, this study does not attempt the planning analysis necessary to nominate potential new urban or industrial areas (exhibit 29, 1/11/162 163).

1015 Instead, the LRS refers to the 1990 draft Peel Regional Plan and the 1992 SWAT report as providing the most uptodate assessment of potential areas for urban development (1/11/163). This is an explicit recognition that the LRS is not directed to the identification of new urban areas.

1016 The subject land is located in precinct 7, Ravenswood, shown on the map at 1/11/85 86. Precinct 7 is bordered by the proposed Highway on the west, Rogers Road to the north and extends ***south*** of the Murray River, taking in what later became MRCE.

1017 In relation to the Ravenswood planning precinct, the following appears: Description:

Land adjacent to Murray River and between the future PerthBunbury Highway and the Pinjarra urban precinct (8). It comprises predominantly sandy, lowlying country (Bassendean soils) in the vicinity of Paterson and Old Mandurah Roads, and recent alluvial soils (Swan association) near the river.

Existing Land Uses:

Urban node at Ravenswood; Special Rural development near Yunderup precinct (6) between the river and proposed PerthBunbury highway; Rural, grazing lands; Drag strip to the east of Ravenswood.

Principal Objectives:

Provide opportunities for rural-residential development and low key tourism ***around*** Ravenswood and Murray River, with some peripheral farmlet development (mainly for 'hobby farming equestrian' uses) away from the main development pressure corridor between Mandurah and Pinjarra. These development opportunities to be provided with minimal detriment to the environmental and landscape values of the precinct (exhibit 29, 1/11/180).

1018 Under 'Planning Considerations' (1/11/180), reference is made, among other things, to:

(a) the future urban development potential for the area located north of the river and ***south*** of Old Mandurah Road and west of the powerline corridor, referring to the SWAT report (the reference to ***south*** of Old Mandurah Road should be noticed);

(b) the TAFE College Site report and the identification of the subject land in site 8 as the recommended site;

(c) it being generally considered desirable, in the long term, to prevent a linear residential sprawl from Mandurah to Pinjarra; and

(d) residential expansion in the proximity of Ravenswood being likely to be affected by noise from the drag strip.

1019 The development guidelines for the Ravenswood precinct include the following: Support the development of land to urban residential densities in the immediate vicinity of Ravenswood subject to the provision of sewerage and the satisfactory resolution of the issue of noise from the Ravenswood Drag Strip.

Support specialrural and specialresidential developments within areas of identified potential, subject to proponents satisfying Council in relation to the ability of actual site conditions to meet the selection criteria given in Appendix C.

...

Maintain a rural land use buffer adjacent to the proposed highway route as far as possible (exhibit 29, 1/11/182).

The reference to urbanisation in the immediate vicinity of Ravenswood should be noticed.

1020 Among the future planning needs is structure planning for the Ravenswood urban node. The planners disagreed about what was meant by 'the Ravenswood node'.

1021 Other planning needs included the identification of the location and land use implications of possible tertiary education facilities, and development of specific criteria for the protection of scenic amenity values along highways and important tourist routes (1/11/183).

1022 At 1/11/184, a plan is shown of precinct 7 identifying areas for potential specialresidential and potential special rural development. One area identified as having these two potentials takes in part of what later became MRCE. An area referred to in handwriting as 'Ravenswood Structure Plan Area' comprises what later became the Riverland Ramble development. That is the area north of existing Ravenswood and ***south*** of Old Mandurah Road.

1023 There was an issue between the planners as to how this handwritten annotation was to be read, and whether it was an original part of the document.

1024 The plaintiffs also made reference to what the LRS provides for planning precinct number 19, BeachamCurtis. See 1/11/219.

1025 Part 5.4 of the LRS deals with the identification of key areas for intensive agriculture; urban or industrial development potential; ruralresidential, specialresidential and farmlet development; and areas with conservation needs, landscape values or tourism opportunities (1/11/232 246).

1026 The LRS refers to the 1990 draft Peel Regional Plan and the SWAT report as identifying the Amarillo, Furnissdale/Barragup and Ravenswood areas as having urban or industrial development potential (1/11/237). The following is also said: There is also possible long term potential for light industry, agricultural industries or service industries within Precinct 3 (Murrayfield Wandalup), and the western most portion of Precincts 4 (Nambeelup west of Paterson Road), and 7 (Ravenswood - ***south*** east of the junction of Figerts and Rogers Road). This would be associated with the urban development of Furnissdale, Barragup and Ravenswood, and possibly in the longer term, Amarillo. The potential for these forms of industrial development in those locations is enhanced by the fact that they are outside the proposed DandalupKarnup UWPCA (exhibit 29, 1/11/237).

1027 The LRS states that it supports the possible future development of rural land for urban purposes as outlined, subject to appropriately detailed planning and environmental studies. It says the role of a LRS is primarily to ensure that areas with potential for urban or industrial development are not prevented from achieving that potential through subdivision for ruralresidential purposes (1/11/238). Again, to my mind this reflects the focus of the LRS. 4.8.6.3 THE LRS: CONCLUSIONS

1028 A reading of the LRS as a whole supports the conclusion that its focus is on ruralresidential development of rural land, not on the identification of new urban areas. For what it is worth, that is also the view of Mr Martin Wells, the drafter of the LRS (exhibit 170A, 26/24; ts 3130 3132).

1029 Because the focus of the LRS is not upon the identification of land suitable to be rezoned, the weight of the next point I make is quite limited.

1030 In so far as the LRS refers to urbanisation of land ***around*** Ravenswood, it does not say anything to favour the prospects of urbanisation of the subject land. In discussing the Ravenswood precinct, future urban development potential is said to exist ***south*** of Old Mandurah Road and there is reference to development of land in the immediate vicinity of Ravenswood.

1031 However, for the reasons I have given, I consider that to be a matter of little weight in identifying whether orderly and proper planning in, say 1995, called for the rezoning of the subject land.

1032 The LRS stated that there should be structure planning for the Ravenswood urban node. Mr Robinson expressed the view that that structure planning was not intended to be limited only to the area ***south*** of Old Mandurah Road and that the further structure planning could have led to lot 191 being identified as an extension of the Ravenswood urban node (exhibit 180A [70]; ts 3822, 3825 3826).

1033 I do not agree with Mr Robinson's reading of the reference in the LRS to structure planning for the Ravenswood urban node. In my view, in context, the 'Ravenswood node' refers to the land ***south*** of Old Mandurah Road. That is what appears on the plan in exhibit 29, 1/11/184. In that regard, Mr Wells said, and I accept, that the handwriting on the plan is his, from which I infer that it was part of the original document. (In deriving my construction of the LRS, I do not rely on the evidence of Mr Wells' subjective view of what was intended.)

1034 In any case, even without regard to the plan, reading the part of the LRS dealing with the Ravenswood planning precinct, as a whole, it seems to me that the reference to a Ravenswood node refers to land ***south*** of Old Mandurah Road.

1035 In the end, it does not seem to me that much turns on this debate. That is because it is not in doubt that by September 1994, the Peel Regional Strategy had called for structure planning of the corridor between Mandurah and Pinjarra, along Pinjarra Road.

1036 Finally, the plaintiffs rely on provisions in the LRS that recommend a rural buffer be provided near the Highway. They refer to the evidence of Mr Wells that these provisions stifled the urban potential of the subject land. I will deal with that contention in section 4.10. 4.8.7 The TAFE College Site report

1037 Thompson, Taylor & Burrell was engaged by the SouthWest Development Authority on behalf of state and local government agencies to produce an independent analysis of possible TAFE college sites in the Peel ***region***. That resulted in the December 1992 Peel College Site Selection report (exhibit 28). This report was relied on by Mr Auret in support of his opinion on the preIPRSP rezoning question.

1038 The report stated that the college site should be centrally located in the context of longterm urban development expected to occur in the City of Mandurah and the Shire of Murray. For that purpose, the extent of longterm urban development was defined as the extent of urban land identified in the 1990 Peel Regional Plan, projections in the SWAT report produced by Transperth and comments of officers of the DPUD undertaking a review of the southwest urban corridor (exhibit 28, 1/5/213). That led to the conclusion that the site should be within the area bounded by Gordon Road to the north, Yunderup to the ***south***, Fremantle Road bypass to the west and Ravenswood to the east (1/5/213).

1039 Figure 2 (1/5/211) showed shortterm development close to Mandurah, a large area of longterm development in Furnissdale/Barragup, and another large area of longterm development in Ravenswood, taking in part of the subject land. The longterm urban area at Ravenswood appears to be the same as that in the SWAT report (see exhibit 71, tab 8). It includes land to the east and ***south*** of the subject land, north of the existing townsite of Ravenswood, on both sides of Old Mandurah Road, and ***south*** of Paterson Road and Rogers Road, as far east as the power lines (1/5/211).

1040 One of the sites considered in the TAFE College Site report is site 8, taking in lot 190 and the subject land. The report includes the following comments: Regional Context (Proximity to Urban & Industrial Areas)

The Fiegerts Road site cannot be argued to be centrally located in the context of urban development within the ***region*** in the short term. In the longer term however, as urban expansion is directed eastward towards Ravenswood the site will become more central.

...

Regional and Community Impacts

The Fiegerts Road site is perceived as being more central to the Shires of Murray, Boddington and Waroona. The site is consistent with existing public expectations generated by proposals contained in the Peel ***Region*** Plan. The site also provides the opportunity to introduce community facilities to a fledgling urban area presently consisting of Ravenswood, Murray Lakes and Yunderup (exhibit 28, 1/5/239).

1041 The map of site 8 at 1/5/240 shows the proposed Perth Bunbury Highway substantially in its ultimate location on the subject land.

1042 On the topic of environmental constraints, it is said that the Fiegert Road site is situated on land with a high water table and in close proximity to the Murray River. Any proposal to introduce subsoil drainage would need to be carefully engineered in order that nutrient export to the river does not occur. The extent of clearing on the site would necessitate a revegetation program for aesthetic and environmental reasons (exhibit 28, 1/5/241). It is also said that development of the Fiegert Road site would necessitate the development of a sewerage pump station to connect the sewerage treatment plant at Yunderup.

1043 The report identified site 8 as the preferred site (1/5/253). Among the factors were that it had the second lowest acquisition and servicing costs.

1044 Mr Auret placed some reliance on the fact that since the Peel TAFE College Site report had recommended site 8, it implied that the subject land was suitable for urban purposes of some kind (ts 3437, 3890 3891, 3990 3991). In his view, the recommendation of the report would have enhanced the prospects for rezoning the subject land (ts 4009 4010). He explained that that was because the recommendation was based on longterm urbanisation to the east of the subject land, suggesting that in 1992 there was consideration of urbanisation ***around*** the subject land (ts 4010).

1045 To my mind, that is a consideration of very limited weight when regard is had to the expected timing of urbanisation east of the subject land. As at 1994/1995, there was no expectation of shortterm or mediumterm urbanisation of the Kelliher land (lot 190) or the Emmanuel land (lots 6, 10, 11 and 12). 4.8.8 Other planning documents

1046 The plaintiffs' submissions refer to some other planning documents, primarily in support of their contentions about the blighting effect of the highway. I will deal with that in section 4.10. 4.8.9 Planning documents: conclusions

1047 I would summarise my conclusions as follows.

(1) Contrary to the plaintiffs' planners' opinions, the TS Martin report is of very little, if any, assistance on the preIPRSP rezoning question. By the 1990s, its population projections and its planning philosophies had been overtaken by other studies.

(2) Contrary to the plaintiffs' planners' opinions, the 1990 draft Peel Regional Plan does not support an affirmative answer to the preIPRSP rezoning question. Rather, it offers some support to a negative answer. The Plan supported expansion of the Ravenswood townsite along its northern boundary. The land use strategy plan identified future urban areas. The proposed future urban area identified ***around*** Ravenswood approximated the Riverland Ramble land. The extent of the influence of the Peel Regional Plan would have lessened over time after its publication. Nevertheless, it would have remained a consideration as at 1994 or 1995.

(3) Contrary to the plaintiffs' planners' opinions, the SWAT report does not provide support for an affirmative answer to the preIPRSP rezoning question. It identifies an ultimate scenario for the purposes of transport planning. It does not provide support for rezoning of the subject land in the short or medium term in the 1990s.

(4) The Peel Regional Strategy is of little assistance in relation to the preIPRSP question. Contrary to the defendants' planners' view, the Strategy's land use plan is not significant because it does not involve any further land use allocation, but simply reflects the then existing position.

(5) The LRS provides little assistance. It is primarily directed to the question of development of ruralresidential land, not to the rezoning of land from rural to urban.

(6) By late 1994, it was a central feature of the planning environment in the Shire of Murray that structure planning was needed, in particular in the Mandurah Pinjarra corridor. That process got underway in late 1994. Consequently, any application for rezoning that fell for consideration in late 1994 or 1995 would have been determined having regard to the existence of that ongoing structure planning. In the next section, 4.9, I outline the progress of the structure planning process in developing the IPRSP.

4.9 The structure planning process leading to the 1996 IPRSP

1048 What occurred from late 1994 up to the publication of the 1996 IPRSP is relevant to two broad issues. The first is the preIPRSP rezoning question. The second is the hypothetical IPRSP question, to be dealt with in section 5 of these reasons. Some parts of what I will outline in this section are relevant for the second of those purposes.

1049 On 2 November 1994, the senior planning group of the DPUD resolved that there would be a new committee known as the Peel Regional Planning Advisory Committee (the IPRSP committee) (exhibit 261B).

1050 Minutes of that meeting record that it held its first meeting on 19 December 1994 (exhibit 184). The IPRSP committee included officers of the DPUD, including Mr Auret and Mr Berzins, representatives of shires, including Mr Evans from the Shire of Murray, and the MLA for the state seat of Murray.

1051 The principal task of the IPRSP committee was to oversee the preparation of structure planning in the Rockingham/Mandurah/Pinjarra corridor.

1052 In his report entitled 'Report to the Inaugural Meeting of the Peel Regional Planning Advisory Committee', Mr Auret identified five issues for structure planning. Mr Auret gave secondary evidence, without objection, in relation to this report (ts 3434). One of the things to be done was to identify a site for a regional sports facility. By the time Mr Auret became involved, it was known, and he knew, that the TAFE college was not going to be located ***around*** Ravenswood, but would be in Mandurah, ***south*** of the greyhound track (ts 3435).

1053 In the course of the meeting, Mr Evans raised the issue of how major projects were to be treated whilst the structure planning was progressing. It was resolved that if developers approached a council with a large scale proposal, it would be prudent for the council to advise the developer to contact Mr Berzins, who could then arrange for the developer to address the committee if deemed appropriate. A letter would be sent to Mandurah Council and Murray Shire Council to that effect (exhibit 184, page 4).

1054 There is evidence that that occurred. Representatives of the proponents of what became MRCE addressed the March 1995 meeting of the IPRSP committee: exhibit 186. The minutes record that Mr Auret asked why the particular parcel of land was chosen by the proponent. Mr Auret was asked in evidence whether he recalled having concerns about why the land was chosen. He said that at that time, they were getting down to the idea that there should be three distinct nodes along Pinjarra Road; Mandurah, Ravenswood and Pinjarra. Mr Auret was concerned that zonings were 'creeping up along Pinjarra Road to get away from the principle of consolidated urban villages and more towards strip development on the road' (ts 3423). I accept that evidence. In my view, the preference for consolidated urban villages over strip development along Pinjarra Road was apparent from 1990 throughout the preIPRSP period and reflected good planning in that period.

1055 More generally, Mr Auret recalled that development applications during the structure planning period were referred to him. That was in accordance with his considerable experience as to what usually occurred when a structure plan was being prepared (ts 3448 3449). Against the background of the planning history set out in section 4.8, in my view, in the period 1995 to 1996, it was consistent with orderly and proper planning for any major proposed urban rezoning to be referred to those engaged in the structure planning process for comment.

1056 In January 1995, Mr Auret produced an unedited draft Working Paper No 2, entitled 'A Review of Population and Employment to the Year 2021' (exhibit 188). In the introduction, the paper began with the proposition that population growth provides the basis for all future strategic/structure planning. It was said that the planning period for the structure plan was to the year 2021. The paper discussed the need to identify the study area for the structure plan. In section 1.4, it identified a number of different types of population projections or forecasts.

1057 Section 1.5 of the paper considered population forecasts for Mandurah and Murray. The paper referred to the forecasts in the SWAT report and forecasts produced by the DPUD in 1994. The 1994 DPUD forecast are not in

evidence, but they are summarised in this paper. The SWAT report forecasts are characterised as being in the nature of what the paper called a scenario, namely a statement of a possible future under a hypothetical assumption, not supported by any probability assessment about the assumption (exhibit 188, pages 4 5). The SWAT report scenario for the Shire of Murray at 2021 was 33,000 people. The DPUD forecast for 2021 for the shire was 20,000 people (exhibit 188, page 8). The DPUD forecast was said to be substantially more probable than the SWAT report forecast. The conclusion drawn was that it would be not unreasonable to treat the SWAT report forecasts as the upper limit for planning and to treat the DPUD forecasts as the planning target populations. The paper stated that: [s]tructure planning should ensure that sufficient urban land is identified to meet the needs to the year 2021. An excessive oversupply should also be avoided because it can lead to dispersed speculative developments with the consequent inefficient provision of social and servicing infrastructure (exhibit 188, page 9).

1058 Mr Auret confirmed in oral evidence that that reflected his view (ts 3428).

1059 I accept that this view reflects orderly and proper planning in 1995. It is also supported by the subsequent adoption by the WAPC of Option 2 over Option 3 in the 1996 IPRSP. See section 5.5 below.

1060 The working paper analysed the proposed urbanisation inherent in the then current review of the Mandurah Town Planning Scheme, the approved SouthWest Corridor Structure Plan, the Amarillo proposals, existing urban zoning in the Shire of Murray Town Planning Scheme, Metropolitan Development Program proposals and new developer initiatives. These were combined into figure 3. (Figure 3 is not able to be seen in exhibit 188). The combined proposals had a population potential of 288,000 people, with 15,000 people in existing zoning and development proposals in the Shire of Murray. The paper commented that the total amount of land identified could accommodate the projected population growth for the area for the next 50 60 years (exhibit 188, page 11).

1061 The conclusion reiterated that population and employment forecasts formed the basis of structure planning, determining the extent and rate at which land will be developed.

1062 At the meeting of the IPRSP committee of 1 February 1995, Mr Auret tabled a ***brief*** summary of Working Papers Nos 1 to 9 and indicated that Working Papers Nos 1 and 2 were substantially complete (exhibit 185, page 2).

1063 In the course of the meeting, Mr Auret referred to the shire's LRS and said that his aim in preparing the draft structure plan would be 'to identify the boundaries of future urban areas which would then lead to the protection of surrounding rural areas' by minimising the urban development potential of those other rural areas (exhibit 185, page 3).

1064 Working Papers Nos 1 and 2 were distributed to members of the IPRSP committee at the meeting of 1 March 1995 (exhibit 186, page 2). In the course of general business, Mr Auret referred to Working Paper No 2 on the issue of population. He expressed the opinion that, based on population projections, the Amarillo proposed urban development was not needed (exhibit 186, page 4).

1065 On 9 March 1995, Mr Auret sent a facsimile to Mr Berzins at the Ministry for Planning (exhibit 187). Attached to the facsimile was a draft paper about the position of the DPUD on Amarillo.

1066 In the course of that paper, attention was given to the question of need. Some analysis was done of population projections to 2021. The projections were said to be DPUD projections of March 1995. Murray is forecast to have a population of 20,000 people at 2021. The report referred to a number of projects and plans in Murray that were then approved or in the pipeline which, together, could accommodate about 20,000 people. The paper referred to 'Pinjarra 5,000, Carcoola 1,000, Ravenswood 3,000, Murray Lakes/Yunderup 3,000, Point Grey 3,000, Furnissdale/Barragup 5,000' (exhibit 187, page 4). The figure shown for Pinjarra reflects an estimate of its then population. It does not reflect any allowance for MRCE. The allowance for Point Grey should be discounted as being attributable to the Highway. Nevertheless, bearing in mind that no allowance is made for MRCE, the views in this paper support a conclusion that the existing urban settlements, together with Riverland Ramble, Austin Cove and MRCE, were sufficient to accommodate the expected population, as at 2021, of 20,000 people. That is consistent with the position stated in the report of July 1995 regarding MRCE (exhibit 263A).

1067 Mr Auret's draft report concluded by recommending that Amarillo not be included as urban in the current structure plan (exhibit 187, page 6).

1068 Some time in early 2005, Mr Auret produced a working draft of a structure plan showing designations of various parcels of land (exhibit 205). Exhibit 205 was received provisionally, over the objection of the plaintiffs on ground of relevance. For reasons which would be apparent from what follows, I consider the document to be relevant.

1069 Exhibit 205 shows the following for the area described as Ravenswood North:

Area Type
Allocation
Urban
22 ha
Category A1 Urban
6 ha
Category B Urban
184 ha
Ultimate Urban
1,389 ha
Population Potential
44,000 people

1070 Effectively, all of Riverland Ramble is shown as category B urban. The document was presumably prepared in ignorance of the imminent rezoning of Riverland Ramble. The land east of Riverland Ramble is all shown as ultimate urban. Substantially all of the land in the triangle between Paterson Road, Old Mandurah Road and the proposed Highway is shown as ultimate urban. It is notable that, at this stage, just over 200 ha is shown as urban, or category A or B urban. That does not give any encouragement to the prospects of the hypothetical rezoning of the subject land.

1071 In May 1995, in his report to the Committee for Statutory Procedures about the Riverland Ramble ODP for lot 20, Mr White described the work that had been done on a draft IPRSP as a seriously entertained planning proposal: exhibit 193A, 46B/121.

1072 Mr Auret produced an unedited draft of Working Paper No 4 in November 1995 entitled 'Strategies, Objectives and Options for Structure Planning in the Inner Peel ***Region***' (exhibit 178). The paper set out population projections for Mandurah and Murray to 2021. Again, there was reference to the SWAT report scenario forecast of 33,000 people and a DPUD forecast of 20,000 people for Murray in 2021. The paper states that the 20,000 population projected for Pinjarra (meaning Murray) would require approximately a total of 1,000 ha of urban land. The paper stated that the overprovision of land leads to inefficiencies in the planning and provision of urban services, increases the costs to government and leads to competition among developers to reorder priorities (exhibit 178, page 5).

1073 The working paper referred to the issues and tasks for structure planning along the Rockingham/Mandurah/Pinjarra corridor, identified in the 1994 Peel Regional Strategy (see exhibit 30, 1/6/133). Those tasks included identifying potential urban areas, determining the suitability of the Amarillo site for urban development and identifying a site for a regional sports facility.

1074 The paper identified three options for the urban form to be adopted for structure planning purposes. These broadly reflect the options subsequently set out in the 1996 IPRSP. The three options were mapped in the form of broad schematic diagrams and assessed against each other against a number of criteria. The conclusion is that Option 2 ranks first (exhibit 178, pages 9 14). The table setting out the criteria and scores for the three options was included in the 1996 IPRSP (see exhibit 7, 1/10/95). Under Option 2 in the 1996 IPRSP, the northern boundary of the urban node of Ravenswood was Old Mandurah Road, as it was in the 1997 IPRSP. Thus, on the face of it, this November 1995 paper would appear to provide no support for urbanisation of the subject land. However, that is

subject to the effect of the Highway and Regional Recreation Facility (RRF), which is to be discounted. The effect on the IPRSP of ignoring the proposed public works is dealt with in section 5.

1075 The paper identified four potential sites for a regional sports facility. One was described as Ravenswood, 60 ha 'east of Pinjarra Road and just east of the Ravenswood townsite, between Pinjarra Road and the future PerthBunbury Highway' (exhibit 178, pages 21 22). Figure 9 in the report has the Ravenswood site west of Ravenswood and Pinjarra Road. Mr Auret said that the description in the text was an error. He 'must have had a bad day' (ts 3433). He added that he believes that he knew there was talk about the sports facility being 'on the northern side' (ts 3434), which I take to mean the northern side of Pinjarra Road.

1076 In July 1996, the 1996 IPRSP was published for public comment, (exhibit 7, 1/10/54 178). I will summarise and set out many of the provisions of the 1996 IPRSP in section 5 below. For present purposes, I would mention the following features.

1077 The 1996 IPRSP set out population projections for the inner Peel ***region***, referring to projections of the Ministry for Planning of January 1996. The medium scenario for Murray was a population of 15,000 people at 2011 and 26,000 people at 2021. The high scenario was for a population of 16,000 people at 2011 and 28,000 people at 2021 (exhibit 7, 1/10/82). These figures reflect an increase in the expected population of Peel at 2021, compared to figures available in 1995.

1078 The report set out three options as models for the structure planning. Option 2 was the model favoured in the 1996 report. That model proposed urban villages in the Shire of Murray: Furnissdale with 12,000 people; Yunderup/Murray Lakes 13,000 people; and Ravenswood, between Old Mandurah Road and the Murray River, with 10,500 people. It was said that Pinjarra could be expanded to 24,000 people, referring to the Ravenswood Sanctuary development (MRCE) (1/10/93). In evaluating the options, reference was made to the disadvantages of excessive overprovision of future urban land, including the difficulties of determining priorities for urban infrastructure and inefficiencies for servicing authorities (1/10/94 96).

1079 The urban form proposed in the IPRSP was described in ch 10.1. It was an 'essential objective' of the IPRSP to 'contain urbanisation into discrete urban villages' with a distinctive identity and character, and discrete boundaries (exhibit 7, 1/10/103, 104).

1080 The proposed urban village of Ravenswood is located between the Murray River and Old Mandurah Road (1/10/104).

1081 In Option 2, the urban villages in Murray were based on multiples of about 12,000 population, that being the minimum population unit normally required to support one high school (1/10/93). Mr Auret gave evidence that the reason Ravenswood was projected to have 10,500 people, rather than the ideal of 12,000 people, was because of the absence of interest in urbanisation of owners north of Old Mandurah Road, not because it was seen to be the desirable size for an urban village in the IPRSP (ts 3989 3990). I will say more about this evidence in section 5.

1082 It is a central theme of the 1996 IPRSP that urbanisation outside of Mandurah should be in urban villages with discrete boundaries and separately identifiable communities. See, for example, exhibit 7, 1/10/91 94, 99 100, 103 104, 107, 130. That planning philosophy seems to me to have been consistently prevalent in Peel in this period, at least since the publication of the draft Peel Regional Plan in 1990. It reflected orderly and proper planning in the preIPRSP period. It was not attributable to the proposed public works.

1083 Appendix 1 of the 1996 IPRSP identified development initiatives that should be referred to as part of the structure planning process (1/10/163 164).

1084 In relation to Austin Cove, Appendix 1 stated that it had been proposed to extend the development to accommodate about 3,000 people, up from the previous 1,700. Riverland Ramble (mistakenly referred to as P29, rather than P28) was said to envisage 150 lots as the first stage, ultimately leading to 1,500 lots at a density of R15 to accommodate about 4,000 people. The MRCE proposal was said to be still conceptual, envisaging a prestige tourist health spa development with golf course with an ancillary residential component of about 1,000 lots to accommodate about 3,000 residents (exhibit 7, 1/10/164).

1085 On 27 August 1996, the WAPC resolved to prepare a ***region*** planning scheme for Peel. The resolution was in the following terms: [T]o firstly, form the opinion that there are matters of State and regional importance to warrant

the preparation of a regional planning scheme for the Peel ***Region*** due to the significant population growth and development pressures in the ***region***, and the need to effectively implement regional plans, resolve land use planning issues and secure land for regional recreation, conservation, community purposes and major infrastructure. Secondly, to prepare a Regional Planning Scheme for all that land within the City of Mandurah and the Shires of Murray and Waroona, and as shown by the broken black border on the Western Australian Planning Commission Plan No. 4.1460 (exhibit 261E).

4.10 The blighting effect of the Highway on the subject land and other surrounding land 4.10.1 Introduction

1086 The extension of the freeway from Kwinana to form a four lane road from Perth to Bunbury was proposed in the 1970s and was being taken into account in planning by 1980, if not earlier. It is a major theme of the plaintiffs' case that the presence of the proposal for the Highway has cast a long shadow over the subject land and land surrounding it. Both in submissions and in witness statements it has been said that the urban potential of the land was 'blighted' or 'sterilised' by the proposed Highway.

1087 The plaintiffs' closing submissions traversed a number of planning instruments and publications of or reports to the Main Roads Department in considerable detail: see, for example, pars 1.108 1.132, 4.11 4.86. The plaintiffs tendered a large volume of documents on this topic, including the Highway Chronology (exhibit 260) and many supporting documents, including exhibits 260A 260M.

1088 The plaintiffs point to provisions in a number of planning instruments, and in publications of or reports to the Main Roads Department, to the effect that a rural buffer should be maintained ***around*** major highways. Similarly, they point to provisions to the effect that the noise of a major highway meant that urbanisation of surrounding land was an inconsistent use that was to be avoided. Further, the plaintiffs point to provisions in planning documents or other evidence to the effect that land surrounding the proposed Highway should be kept rural so as to keep options open for the final alignment of the road. Finally, the plaintiffs led some evidence suggesting that land surrounding a proposed major highway should be kept rural so as to keep the costs acquiring land for the highway to a minimum.

1089 The plaintiffs also led evidence from planners and others to the effect that the effect of the proposed Highway was, taking into account the need for a rural buffer and for a corridor to keep alignment options open, to 'sterilise' or 'blight' the urban potential of the subject land and surrounding land.

1090 In my view there are two short answers to these contentions. First, these considerations were not absolute. Even if applied in the relevant locality, the first three of these considerations would not have precluded urbanisation of lot 191 or the land surrounding the subject land to the east and north. Secondly, and more fundamentally, in the preIPRSP period none of these considerations in fact operated to affect the zoning of the subject land (apart, obviously, from that part of lot 192 that was reserved in TPS 4) or any land surrounding the subject land. No rezoning applications were made for the subject land or the surrounding land to the north or east. Apart from the road reserve, the Highway did not in fact have any causal consequence for the zoning of the subject land or surrounding land. I proceed to explain those answers in more detail. 4.10.2 Did the Highway proposal affect the zoning of the land?

1091 The question is what the zoning of the subject land would have been, but for the proposed Highway and RRF.

1092 The question is not whether the Highway proposal would have led to a refusal of a rezoning application. At least as regards the part of lot 192 reserved in TPS 4, it may be accepted that an application for rezoning would have been refused. The question is whether, in the preIPRSP period, the rural zoning of lot 191 and the balance of lot 192 was attributable to the proposed Highway. The prospects of a hypothetical rezoning application are to be assessed in the assumed absence of the Highway proposal, not in light of the Highway proposal. The likely prospect for a rezoning application, made in light of the Highway proposal, is relevant only so far as it bears on whether the absence of the plaintiffs making an application was attributable to the Highway. That last question has to be determined in light of the plaintiffs' evidence about what were and were not reasons that a rezoning application was not made in the preIPRSP period. As I observed in section 4.3.2, Mr McKay gave no evidence that his failure to apply for rezoning was influenced by any understanding that the need for a rural buffer, or the need to preserve a wider corridor to keep options open for the alignment, would preclude rezoning of lot 191. He gave no evidence that he had any such understanding.

1093 The plaintiffs point to provisions in earlier planning instruments, such as the West Murray Town Planning Scheme 1976 (exhibit 19) and the Mandurah and Districts Planning Study 1984 (exhibit 22), about the need for or desirability of keeping a rural buffer ***around*** the Highway. Those provisions are not causally relevant to the zoning of the subject land or land surrounding it. On the plaintiffs' past hypothetical rezoning case, if the Highway is assumed away, I am satisfied that the subject land and surrounding land would have been zoned rural, as it was under TPS 4 when it was first introduced in 1989. I did not understand the plaintiffs to suggest otherwise in closing submissions. In this context, it is instructive to see the very limited extent of urban land at Ravenswood in 1989 when TPS 4 came into operation (see exhibit 13). Thus, I reject the plaintiffs' submission that the effect of the Highway alignment in TPS 4 was that land immediately surrounding the Highway was 'retained' for rural purposes: see closing submissions par 1.47 and the similar submissions at par 4.25.

1094 The plaintiffs' submissions respecting the effect of the Highway appear to overlook the developer driven rezoning environment in the relevant period. For example, the plaintiffs submit that because 'urban development has been oriented away from [the Highway], [the subject land] was not identified for urban development': par 1.314. In this period, the shire did not 'orient' development. It simply dealt with rezoning applications as they occurred. Similarly, with the exception of identifying landowners to receive the letter of 15 January 1991, the shire did not take steps to identify land for urban development. I have already found in section 4.5 that the shire's failure to send the plaintiffs' that letter was not attributable to the proposed public works.

1095 As I have already observed, from 1990 to 1996, rezonings of rural land to urban in the Shire of Murray were developer driven. The plaintiffs accept that; indeed it is a major theme of the plaintiffs' case. No application to rezone the subject land, or any of the surrounding land north of Old Mandurah Road, was made in this period. Consequently, no occasion arose for the shire to determine whether the desirability of a rural buffer, the need to keep options open for alignment of the Highway, or the other considerations relied on by the plaintiffs, called for the subject land not to be rezoned to urban. The questions simply did not arise. That being so, the provisions in the LRS about the desirability of maintaining a rural buffer 'as far as possible' never fell to be applied. Further, the plaintiffs could not point to any other rezoning applications, made in this period, in which those considerations were applied in a way that would be analogous to how they would be applied to the subject land. For those reasons, I do not accept the assertions in the plaintiffs' reply submissions par 3.71 that lot 191 and that part of lot 192 adjacent to the Highway were identified to be 'maintained as a rural buffer' and that this was clearly 'a direct consequence of the public work'.

1096 To my mind, these points are a complete answer to the plaintiffs' contentions about the blighting effect of the Highway: apart from the road reserve itself, the Highway did not in fact have any causal consequence for the zoning of the subject land or the surrounding land.

1097 For the sake of completeness, I would also mention that, contrary to the plaintiffs' submissions, the LRS did not relevantly require the maintenance of a rural buffer; it recommended that one be preserved as far as possible. Further, there are many methods of creating a buffer between the Highway and urban land that would not have precluded the urbanisation of the whole of the subject land. If the LRS had ever been applied, in my view, it would not have precluded the rezoning to urban of lot 191. Much less would it have precluded rezoning the Kelliher land or Emmanuel land.

1098 The same is true about any concern relating to noise impacts of the Highway, emphasised in the plaintiffs' closing submissions pars 4.56 4.86. Even if the question had ever arisen, concerns about noise impacts would not have precluded urbanisation of lot 191, let alone lots 190, 10, 11, 12 or 6.

1099 The same reasoning applies to the opinions expressed in a number of reports of the planners relied on by the plaintiffs that are to a similar effect as the plaintiffs' contentions. For example:

(a) Mr Butterly said that the Highway and its associated buffer, and subsequently the identification of land adjacent to the Highway for public purposes, sterilised the subject land: exhibit 194G [5], [11]; see also exhibit 194A [5.24].

(b) Mr Flugge stated that from a planning perspective it was important to keep land adjacent to the proposed alignment of the Highway free from development to create a corridor of rural land on which the final road alignment could be constructed: exhibit 182D [30]; see also exhibit 182E, 15A/524 525. He expressed the view that the subject land had been 'sterilised for urbanisation before 1997' as a result of having been identified for public purposes: exhibit 182D [58(e)].

(c) Mr Robinson expressed the view that the guidelines in the 1994 LRS, that there should be a rural land buffer adjacent to the proposed Highway route as far as possible, led to a 'conscious effort to orient development away from the PerthBunbury Highway': exhibit 180B [152], [194]; see also exhibit 180I [10].

(d) Mr Rowe stated that planning aimed to retain land adjacent to the proposed route of the Highway as rural so as not to prejudice any future alignment till the route was finally agreed upon and settled, maintaining a corridor: exhibit 191G [27].

1100 The plaintiffs' submissions also point to generalised statements in the evidence of a number of witnesses such as Mr Greenup, Mr Scharf, Mr Wells, Mr Berrie, Mr Davidson and Mr White, to the effect that the presence of the Highway had blighted the urban potential of the subject land or that urban land was being 'oriented' away from the Highway 'to retain options for the alignment' (Mr Scharf, exhibit 193A [22]).

1101 For all the reasons set out above, I do not accept this evidence.

1102 Mr Robinson's opinion as to why it was highly unlikely that urban development adjacent to the Highway 'would have been permitted' (exhibit 180I [17]) is not addressed to any relevant question. That evidence, like some other evidence of the plaintiffs' planners, focuses on why an application to rezone the land would not have been approved, taking into account the proposed use of the land for the Highway and RRF. Any past hypothetical rezoning question arises in the assumed absence, not presence, of the proposed Highway and RRF. As previously noted, the consequences for a rezoning application of the proposal for the Highway and the RRF might be relevant, if and to the extent that it was a reason that no application for rezoning was in fact made. That however, is a different question.

1103 Further, the plaintiffs' submissions point to passages in the evidence of former Planning Ministers, Mr Smith and Mr Lewis. I will outline this evidence in section 4.11. This evidence is not specific to the particular location. In any event, my earlier observations apply again to this evidence. 4.10.3 Need for a corridor?

1104 There is also a further answer to the contention that the subject land and surrounding land was 'retained' rural in order to keep options open for possible alignments of the Highway. That contention invites attention to whether there is evidence that, in the period in question, the alignment of the Highway in the relevant area, namely north of Pinjarra Road, was in any substantial doubt. It is true that the environmental work to finally determine the alignment had not been done by 1995; that work was put out to tender in 1995 (exhibit 260J), and work was subsequently done (see exhibit 32). Nevertheless, the evidence does not satisfy me that any sufficient doubt existed in the period 1990 to 1995 so as to influence zoning or planning in the Ravenswood vicinity.

1105 The evidence of Mr Fernandez (exhibit 235) does not identify any contemplated alignments between the gazettal of TPS 4 in 1989 and the publication of the 1997 IPRSP.

1106 I am not satisfied that, in the period of 1989 to 1995, the alignment north of Pinjarra Road was in any sufficient doubt as would call for other land to be 'retained' rural to preserve a corridor for possible alignments of the Highway. The minutes of the Peel Deviation Engineering and Environmental Study Group of 10 August 1995 record that: Although the alignment of the section north of Pinjarra Road had been fixed for some time, this study will review the proposal and if strong enough reasons found, changes would be recommended (exhibit 260K [3.1.5]).

1107 The statements in this document are admissible as truth of their contents under the Evidence Act 1906 (WA) s 79C.

1108 Given the contemporaneity of the statement and given the fact that those in attendance would be expected to have knowledge of the subject matter, I place significant weight on the statement in this document that the alignment of the section of the Highway north of Pinjarra Road had been fixed for some time. I prefer that evidence to the oral evidence of some witnesses called by the plaintiffs, unsupported by any documents, suggesting there was some doubt about the alignment of the Highway during this period. Moreover, Main Roads had purchased land immediately ***south*** of the Murray River for the Highway. Further, there was no suggestion up to 1995 (or subsequently) of any environmental issues for lot 192. Evidence, such as Mr Smith's (exhibit 236, [19] [20]), about the lack of finality of the route of the Highway generally in this period, without reference to locality, is not to the point. The plaintiffs also point to the evidence of Mr Lewis: exhibit 234 [7]. That evidence is not to the point. However, apart from anything else, that evidence relates to the reasons and purposes of regional planning. By definition, the preIPRSP period is before the regional planning in the IPRSP came into being.

1109 Mr McKay gave evidence that in or before 1994 he was shown different alignments of the Highway (ts 3324). I do not accept that evidence. It is not supported by the documents. It is also inconsistent with his conduct. He did not take any steps to attempt to move the Highway before 1996. Despite being asked, he did not explain why that was so (ts 3324).

1110 The fact that the minutes of 10 August 1995 (exhibit 260K) also record the suggestion that a wider corridor be investigated north of Pinjarra Road is not presently relevant. For present purposes, the question is about the extent to which, up to 1995, the route had not been determined, with the consequence that planning for the area had preserved a wider corridor, free of development, so altering what otherwise would have been the zoning of the subject land or surrounding land.

1111 Because of the emphasis placed by the plaintiffs on issues relating to Highway alignment, I will set out my findings on what possible alignments were considered, and when.

1112 In March 1996, the report titled 'Perth Bunbury Highway Peel Deviation: Road Alignment Definition Report' was provided by Ecologia Environmental Consultants to Main Roads (the Ecologia report) (exhibit 32, 3/13/227 314). Between Stock Road and Pinjarra Road, the Ecologia report identified two options, referred to as Northern 1 and Northern 2. The Northern 1 option was the route shown on TPS 4. The Northern 2 option deviated east of Northern 1 at Stake Hill Bridge, and rejoined northern 1 towards the northern part of lot 192. The routes can be seen on figure 2A from the Ecologia report, seen below (exhibit 32, 3/13/243 244; exhibit 71, map 20).

1113 The report identified Northern 1 as the preferred route.

1114 There is no evidence of any contemplated alternative routes in this area, further east than Northern 2, prior to 1996.

1115 In August 1996, another route, termed Northern 1.5, was identified for consideration. It took account of environmental concerns regarding Nambeelup Brook. See exhibit 260L, 3/20/56 61. Northern 1.5 was east of route Northern 1 and west of Northern 2.

1116 In January 1997, Ecologia provided another report proposing the adoption of Northern 1.5 (exhibit 260M, 3/14/1 134).

1117 In 1996 and in 1997, the Kellihers, the plaintiffs and the Mannions objected to the proposed alignment which traversed their land. See, for example, exhibit 32, 3/13/307; exhibit 260L, 3/20/59; exhibit 214A, 49A/112 118. They proposed a different alignment, substantially further to the east. That led to the identification of an alignment of what was called Northern 3: see exhibit 214A, 49A/119. The Northern 3 option was well east of Northern 2, and followed Paterson Road to about Rogers Road, then going ***south*** to the east side of lot 190.

1118 Subsequently, the Main Roads Department evaluated the Northern 3 alignment. See exhibit 214A, 49A/120 127; exhibit 216, 3/14/281, 326 327.

1119 The 1997 IPRSP stated that finalisation of the route of the Highway was awaiting final environmental approval after public submission. In the meantime, it adopted the Main Roads' preferred route (exhibit 6, 1/6/287 289).

1120 The upshot of this is that it was only in late 1996 or 1997 that the Northern 3 option was generated. From 1990 to early 1996, there was not any sufficient doubt about the alignment of the Highway north of Pinjarra Road so as to influence planning or zoning in the Ravenswood vicinity. In particular, as all the options that passed though lot 192 did so along the same alignment, no corridor would be required on the subject land; still less would a corridor have been required on lots to the east of lot 191. 4.10.4 Nonurban use of land surrounding the Highway?

1121 The plaintiffs also submit that the identification of and reservation of part of lot 192 for the Highway:

(1) meant that urban use of lot 191 and the rest of lot 192 was inappropriate, due to the considerations already referred to; and

(2) led to the identification of alternative uses for lot 191 and the balance of lot 192, namely the TAFE proposal and the RRF proposal. (See, for example, closing submissions par 4.179 and reply par 3.109.)

1122 There is some support for these propositions in reports of planners relied on by the plaintiffs: see, for example, Mr Berrie (exhibit 231B [6] [7]); and Mr Flugge (exhibit 182E, 15A/525). Mr Berrie asserted that without the Highway, the adjacent land would not be as attractive for a TAFE college or RRF and, in that event, the subject

land would have been available for possible rezoning. Mr Flugge stated that the shire identified the land adjacent to the Highway as an ideal site for nonurban development in the form of either a TAFE college or RRF and it was 'with that in mind' that the shire resolved on 21 December 1995 to write to the committee that was drafting the IPRSP. I put no weight on Mr Flugge's assertion about what the council had in mind.

1123 It is not clear what the plaintiffs say follows from acceptance of these propositions. It appeared that these propositions were put in support of the general conclusion invited by the plaintiffs that, but for the Highway, the subject land would have been urban.

1124 I have already explained why I do not accept the first proposition.

1125 As to the second proposition, since the RRF is itself one of the proposed public works whose effect on value is to be discounted, it is not clear why it is important to analyse the causal connection between the proposed Highway and the proposal for the RRF.

1126 The plaintiffs did not submit that the TAFE proposal was one of the proposed public works (ts 7326). At various points in their closing submissions, the plaintiffs state that the shire's identification of the subject land for a TAFE college was as a consequence of or caused by the Highway proposal: see, for example, pars 1.448, 4.179, 4.187. The plaintiffs also emphasise that the proposed Highway made the subject land more accessible for the purposes of a TAFE college. That latter contention was accepted by the defendants: see Annexure A of the defendants' closing submissions, pars 1.448, 4.90 4.92. The plaintiffs did not articulate any submission that the TAFE proposal was attributable to the proposed Highway, so that its existence was to be assumed away, or its effect on value disregarded.

1127 In any event, I am not persuaded that the TAFE proposal for the subject land was attributable to the Highway. Independent consultants, Thompson, Taylor & Burrell, analysed the pros and cons of three sites in Ravenswood, among 10 sites in the Peel ***region*** (exhibit 28). The immediate proximity to the Highway of site 8, which included the subject land, compared to sites 9 and 10, the other sites in Ravenswood, was not a factor articulated in any of the reasoning that led to site 8 being identified as the preferred site in the TAFE College Site report. Having been assessed as providing largely identical opportunities, the preference for site 8 over sites 9 and 10 was based on development and acquisition costs. The identification of site 8 as the preferred site was not a decision of the shire. It was not made because of or influenced by any perceived need for a nonurban buffer adjacent to the Highway, or a need to preserve further land in case of a change on the alignment.

1128 For these reasons, I reject these two submissions of the plaintiffs. 4.10.5 A larger Ravenswood without the Highway?

1129 In his written report of 9 November 2009, Mr Robinson expressed the opinion that if it was not for the Highway, the [WAPC] would have been pursuing a much larger urban area at Ravenswood to ensure the establishment of a sustainable community as advocated by the Peel ***Region*** Plan, [SWAT] report, State Planning Framework and other applicable strategic documents (exhibit 180F, [20]).

1130 In its context, it is unclear whether Mr Robinson was referring to what would have occurred in the preIPRSP period, or what would have occurred in the preparation of the IPRSP itself. Insofar as it might mean the latter, I will deal with it in section 5 of these reasons. Insofar as it is referring to the preIPRSP period, for the reasons that follow, I do not accept this opinion.

1131 In crossexamination, Mr Robinson explained that he meant by exhibit 180F [20] that the proposed Highway precluded the WAPC from pursuing a larger area at Ravenswood (ts 3370). In his view, uncertainty about the alignment of the Highway, and the need for a rural buffer, precluded lots 10, 11, 12 and 6 from urbanisation (ts 3370 3371). Mr Robinson was not aware of any documents from 1990 to 1995 that suggested the Highway alignment north of Pinjarra Road on lot 192 was in doubt (ts 3371 3373). Mr Robinson did not research whether, as a matter of fact, in this period, the WAPC had the view that the Highway alignment was not set (ts 3375).

1132 Mr Robinson was asked whether he had ever seen any form of drawing or suggestion that the Highway might move as far east as any of lots 10, 11, 12 or 6. His answer was to the effect that he had seen an alignment that would have located the Highway within 500 m or so of lot 10 (ts 3374). In context, it is clear that his answer is a reference to the Northern 3 alignment. As I have explained, that option had not been generated before 1996.

1133 Consequently, Mr Robinson could not, when asked, point to any drawing or document in the relevant period, 1990 1995, which suggested that the Highway might move further east so as to affect lot 10. Much less is there is any support for his assertion that the Highway affected or precluded development on the lots further east as far as lot 6. His assertion to that effect is, in my opinion, so lacking in foundation as to adversely affect the weight of Mr Robinson's evidence more generally.

1134 For several overlapping reasons, I do not accept Mr Robinson's evidence in exhibit 180F [20] and at ts 3370 3371. First, it was evident that Mr Robinson had no foundation for his asserted conclusion. Secondly, I am not persuaded that there was any real uncertainty in 1990 to 1995 about the route of the Highway immediately north of Old Mandurah Road, or that the WAPC perceived there to be any such uncertainty. Thirdly, in any event, the WAPC had no occasion to 'pursue' any particular urban area at Ravenswood as, apart from Riverland Ramble, no owner applied for rezoning. In the preIPRSP period, apart from the IPRSP process itself, it was only when an owner applied for rezoning that the WAPC or DPUD had occasion to give consideration to the extent of the urban area at Ravenswood. The Peel Regional Strategy did not seek to identify urban areas, but only the need for structure planning. Fourthly, in any event, I am not persuaded that the WAPC had any objective of creating a larger area at Ravenswood, beyond the existing townsite and Riverland Ramble, once the Riverland Ramble application was in train. To the contrary, the indications were, as has been seen in sections 4.6 and 4.7, that the WAPC considered that Riverland Ramble provided ample urban land for a great many years.

1135 Mr Moran expressed the opinion that the Highway enhanced the planning growth of Ravenswood: exhibit 196C [6]; exhibit 196B, 34/176 [47]. In the mid1990s, construction of the Highway was not contemplated for many years and no firm timetable was set. The only rezoning growth was through Riverland Ramble. I have already found that the decision to approve the expansion of Austin Cove was not attributable to the Highway. Given these matters, I am not satisfied that the Highway made a material difference, either way, to planning decisions made in the preIPRSP period. However, I accept that the population and demand issues relating to the rezoning of the subject land must be addressed, bearing in mind the assumed absence of the Highway. The absence of the Highway would, if anything, have dampened expectations about population growth in Ravenswood. 4.10.6 Conclusion on 'blight'

1136 I will set out my conclusions on the result of a hypothetical application to rezone the subject land in section 4.12. For these reasons, I find that in the preIPRSP period, (apart from by way of a rezoning application) the rural zoning of the subject land (apart from the road reserve), and the surrounding land to the north and east, was not attributable to the Highway. If the Highway had not been proposed, the subject land and the surrounding land would have been rural, as, in the case of the surrounding land and some of the subject land, it in fact was.

4.11 Other evidence relied on by the plaintiffs

1137 I have already referred to much of the evidence, especially expert evidence, relied on by the plaintiffs. Among the evidence relied on by the plaintiffs is:

(a) evidence of two Ministers for Planning, Mr Smith and Mr Lewis;

(b) evidence of three former officers of the DPUD, namely Messrs Berzins, White and Scharf;

(c) evidence from Mr Berrie, a planner at the shire from 1991 to 1994;

(d) evidence of Mr Greenup, a former president of the shire; and

(e) a letter dated 5 February 1993 from the ValuerGeneral's office. 4.11.1 The Planning Ministers

1138 Mr David Smith was Minister for Planning from February 1991 until February 1993. Mr Richard Lewis was the Minister for Planning from 1993 to 1997. Most of the first part of Mr Smith's statement (exhibit 236) concerns general background about the early 1990s. Paragraph 17 and [19] [23] concern the alignment of the Highway and the endeavours to 'protect a broad corridor from urbanisation in the area through which the proposed highway might be constructed' (exhibit 236 [20]).

1139 For the reasons given in section 4.10, I do not think these generalised statements are of any weight in identifying whether, had an application to rezone the subject land been made, the land would have been rezoned to urban.

1140 Mr Smith said that in considering a rezoning application, the views of the local government were significant, especially if the WAPC also recommended the rezoning: exhibit 236 [24]. There does not seem to me to be

anything very significant about that statement. It says nothing of how the position would be resolved when the WAPC recommended against a rezoning supported by the shire. In any event, the hypothetical rezoning question is to be determined objectively as a matter of orderly and proper planning, not by reference to how a particular Planning Minister might have exercised a discretion whether to consent to an amendment: see Trandos v WAPCand section 2.9 above.

1141 Similar observations apply to Mr Lewis' evidence. He stated that, in general terms, rezonings would be approved by him provided that the rezoning did not have a credible public objection, was recommended by the WAPC and satisfied some planning criteria he referred to in his statement: exhibit 234 [12].

1142 The plaintiffs point to Mr Lewis' statement that he did not see an issue of any oversupply of zoned land in the Peel ***region*** as a reason for not approving local authority rezoning requests: exhibit 234 [13]. Again, the question is not how a particular Planning Minister would have exercised a power, but what is dictated by orderly and proper planning. Mr Lewis' statement that he did not see an issue of oversupply as a reason to reject a rezoning request does not, alone or in combination with the other evidence in this trial, justify a conclusion that considerations of absence of need and oversupply were not part of orderly and proper planning. For the reasons I have given in sections 4.6 to 4.9, I am satisfied that those considerations were a part of orderly and proper planning in the preIPRSP period. 4.11.2 DPUD officers

1143 Much of the evidence in the statements of Messrs Berzins, Scharf and White was evidence of fact about the events relating to rezonings in the 1990s. As I have said in section 4.2.2, the documents are the best evidence in that respect.

1144 In his first statement of 29 March 2010, Mr Berzins expressed the view that any application for rezoning of the subject land 'would have been considered on its merits' (exhibit 189A [28], [31]). In his statement dated 31 May 2010, Mr Berzins expressed the view that having regard to the approval of Austin Cove, Riverland Ramble and MRCE, any rezoning application for the subject land would have been considered similarly (exhibit 189B, 46C/88). That statement is not supported by any detailed reasoning. For the reasons I have given in sections 4.6 and 4.7, I do not accept that opinion.

1145 Most of the opinions in Mr Scharf's written statements (exhibit 193A and exhibit 193B) were removed by redaction following conferral. Given the evident difficulty Mr Scharf had in answering questions in crossexamination, and in correctly recalling relevant planning matters (see for example ts 3573 3575), I would not place weight on Mr Scharf's opinion.

1146 Mr White was not crossexamined. He expressed the view that, but for the Highway and the uncertainty of the alignment, had the plaintiffs applied for rezoning, the land would have been 'seriously considered for urbanisation' (exhibit 233 [33]). Of course, the question is not whether it would have been seriously considered, but whether, on the balance of probabilities, it would have been approved for rezoning. 4.11.3 Mr Berrie

1147 Mr Berrie said, in his statement of 4 June 2010, that it would have been reasonable to expect the shire, based on past performance, to have initiated a rezoning amendment for the subject land in like manner to Riverland Ramble, with similar prospects for final approval (exhibit 231B [4]). There is no reasoning expressed in support of this broad conclusion. For the reasons in sections 4.6 and 4.7, I reject his conclusion.

1148 I have dealt with what Mr Berrie says about the Highway blighting the subject land in section 4.10.

1149 I have dealt with parts of his third statement dated 31 July 2010 (exhibit 231C [3], [7]) in section 4.3. 4.11.4 Mr Greenup

1150 I have dealt with some of Mr Greenup's evidence, relating to the extent of discussions at the shire of an RRF prior to 1995 in section 4.3, and relating to the shire's letter of 15 January 1991 in section 4.5.

1151 In his first statement, Mr Greenup gave evidence that he expressed the view at council meetings that development should, at that time, have been 'oriented' away from the drag strip: In considering land which could be identified within Ravenswood for urbanisation I articulated the view very strongly, at Council meetings, that the development ought to occur along Pinjarra Road extending to Fiegerts Road so as not to affect the operations of the drag strip.

...Council took the view that it was attractive to maintain the Ravenswood drag strip.

For this reason, extending the Ravenswood node of urban development towards or in close proximity to the drag strip was seen as problematic, from the Shire's perspective, because of the noise constraints associated with the drag strip.

Having this in mind, and while the outline development plan for [Riverland Ramble] was under scrutiny by Council, I articulated and put forward the view that the urban development should simply extend along Pinjarra Road up to Fiegerts Road to form a sufficient node for development. The constraints of the proposed highway limited this being identified for urban.

My proposed orientation of the urban footprint towards Fiegerts Road away from the drag strip was not accepted given the alignment of the Perth to Bunbury Highway and the desire to keep land 'free' of development surrounding the Perth to Bunbury Highway to enable a transport corridor, particularly as the final alignment of the highway had not been fully settled or determined.

It was for this reason that the proposals that I had put were not accepted. The discussions in respect of this occurred over several meetings.

At the time I was on the Council, I took the view that but for the proposed Highway, the [subject] land should have been included in the urban node of Ravenswood (exhibit 171A [46] [52]).

1152 Mr Greenup's second statement includes the following: I chaired a number of meetings when the problem of progressing the rezoning of land in Ravenswood and the proximity of the raceway was discussed.

The drag strip had the effect of preventing urban development in Ravenswood.

By 1994: the drag strip noise problem still had not been resolved and this was preventing the rezoning of Riverland Ramble from proceeding; and it was decided that Ravenswood would not be the site for the TAFE college.Because of the noise problem from the drag strip I recommended at a number of meetings of Council and/or meetings of the Planning Committee that we orient the development toward Fiegerts Road.

Councillors agreed with me that this would be an ideal solution to retaining the drag strip and enabling urban development in Ravenswood. However, the planning staff present at those meetings told us that this was not possible. One of the people who voiced his opinion about this was Mr John Treloar.

The reason given that it was not possible, was the fact that the Perth to Bunbury Highway had been identified for the [subject] land and there was a buffer required to it as well as land in Ravenswood adjacent to the highway being identified for a TAFE college, the location of which became more clear in 1992.

I recall the Councillors discussing a Joint Venture type arrangement to colocate a Recreation Facility with the TAFE. At the meetings I recall being told that funding would be easier to obtain to acquire the land if we progressed a proposal with the TAFE and included Mandurah in on the proposal.

After the TAFE proposal had fallen over the Shire still wanted to progress its idea for a Recreation Centre for the land adjacent to the Highway.

...

The minutes I have been shown do not reflect the proposals I made to orient the development to Fiegerts Road. Matters to be put to Council were first discussed openly at Committee and then put to the Council meeting. For that reason I am not surprised that the Council minutes do not reflect all discussions, they are intended to reflect the resolutions of Council meetings (exhibit 171B [11] [18], [21]).

1153 Even if I accepted this evidence of Mr Greenup, it would not affect my answer to the preIPRSP rezoning question. At its highest, it may support a finding that, but for the Highway, the shire would have supported the urban rezoning of the subject land. But that is not the important issue. The defendants' planners accept that the shire would likely have supported the hypothetical preIPRSP rezoning of the subject land. What is in issue is whether it would have been supported by the DPUD/WAPC and the Minister or, more correctly, whether it would have been in accordance with orderly and proper planning. Mr Greenup's evidence does not assist on that.

1154 In any event, for the reasons that follow, I do not accept Mr Greenup's evidence in exhibit 171A [46] [52] and exhibit 171B [14] [16]. In short, the evidence is not supported by the documents or by other evidence; some of this evidence is internally inconsistent; and in some respects, what Mr Greenup says does not accord with commonsense or the objective probabilities. Moreover, in a number of respects, I found Mr Greenup's evidence generally to be unsatisfactory. I proceed to explain these conclusions in more detail.

1155 Mr Greenup's evidence was that he suggested that the council 'orient the development' towards Fiegert Road at several meetings of council in 1992 1994: exhibit 171A [46] [51]; exhibit 171B [14]; ts 3196 3197, 3229. In exhibit 171A [46], Mr Greenup states that he 'articulated the view very strongly'. Yet there was nothing in council minutes to record any such proposal: exhibit 175B [21]. Mr Greenup accepted that there was no record of his proposal (ts 3201). In oral evidence, he said that he had articulated his proposal at committee meetings (ts 3196, 3201, 3235). He said that committee meetings were council meetings, so his witness statement was not incorrect (ts 3202). Discussions never got to voting (ts 3235).

1156 In my view, the absence of any documentary support for what Mr Greenup says was discussed at meetings more than 15 years ago weighs significantly against acceptance of his evidence. Moreover, Mr Greenup's evidence is not supported by evidence from any other witness.

1157 On the face of it, given that these paragraphs of the two witness statements relate to the same general subject, one would think that these passages in the two witness statements are referring to the same meetings. That is how I would understand Mr Greenup's evidence. On that basis, there are, as I will explain, significant inconsistencies. On the other hand, if these passages in the two witness statements are intended to refer to different conversations at council meetings then, on Mr Greenup's evidence, these conversations occurred over several years without ever being recorded.

1158 There are a number of inconsistencies between what is in the two statements:

(a) Mr Greenup said that the discussions referred to in exhibit 171A [46] occurred in 1992 and in 1993 (ts 3196 3197). He said that the discussions referred to in exhibit 171B [14] occurred in 1994 (ts 3229).

(b) Further, the two statements appear to place the discussions in different contexts. The first statement is said to have been made in the context of consideration of the Riverland Ramble ODP, which occurred in 1992.

(c) In his first statement, he says that the reason for rejecting his suggestion related to the Highway. The first statement does not mention the identification of the land for a TAFE college. The second statement says that the TAFE college was one of the reasons given for rejecting Mr Greenup's suggestion.

1159 Next, to my mind, in a number of respects, Mr Greenup's evidence about what he suggested and the response at council (or committee) meetings does not make sense, either in light of the then known facts, or at all.

1160 The reason said by Mr Greenup to have been given for the rejection of his suggestion included that the land was earmarked for the TAFE proposal: exhibit 171B [16]. However, certainly by the middle of 1994, the TAFE proposal for the subject land was dead. Indeed, earlier in the same statement, Mr Greenup said that by 1994 it was decided that Ravenswood would not be the site for the TAFE college: exhibit 171B [13]. In any event, as Mr Greenup accepted (ts 3198), the use of 20 ha of lots 190, 191 and 192, as was contemplated under the TAFE proposal, would not have prevented urbanisation of those lots generally.

1161 In his first statement, he says that in the context of considering the ODP for Riverland Ramble, he said that 'the urban development' should extend along Pinjarra Road up to Fiegert Road: exhibit 171A [49]. His evidence does not make clear what he was talking about in putting that suggestion. What is 'the urban development'? Was he referring to other land that should be pursued for urbanisation in preference to Riverland Ramble, or in addition to it? What other land? On the face of it, the natural candidates would appear to include lot 10, owned by the Mannions, and lot 190, owned by the Kellihers. There is nothing in the evidence to suggest that either of those parties was interested in urbanising their land during this period. More importantly, I do not accept that anyone expressed a view that anything about the Highway precluded urbanisation of lot 190 or lot 10.

1162 Further, Mr Greenup's evidence is that he proposed urbanisation up to Fiegert Road. By this time, the Highway reserve had been in place for some years. I do not accept his evidence in attempting to explain this (ts 3200 3201). Moreover, the tenor of his evidence is that he proposed this 'orientation' of development so as to avoid affecting the operations of the drag strip. Yet, by 1994, it was, Mr Greenup accepted, clear that the drag strip would have to go (ts 3191).

1163 In his second statement, he says that he recommended that 'we orient the development' toward Fiegert Road: exhibit 171B [14]. Mr Greenup was not able to identify or explain what he was referring to as 'the development'. He was asked what he meant by 'the development' in [14] on a number of occasions and never answered the question (ts 3229 3230). Contrary to Mr Greenup's assertions, I am satisfied that the language of [14] reflects the drafting of the plaintiffs' solicitors, not Mr Greenup's language.

1164 Mr Greenup's evidence was that Mr Treloar was one of the planning staff who said that his suggestion was not possible: exhibit 171B [15]. In crossexamination, he said that he was sure about that (ts 3233). When it was put to him that Mr Treloar was not at the shire in 1994 and had left during 1991, Mr Greenup said that it may have been Mr Flugge (ts 3233). Mr Flugge gave no evidence to support this evidence of Mr Greenup.

1165 In his first statement, Mr Greenup sets out the view he took about the position, but for the proposed Highway, saying that the plaintiffs' land 'should have been included' in the urban node: exhibit 171A [52]. I do not accept that evidence. I am satisfied that no occasion arose for Mr Greenup to consider, during the preIPRSP period, whether the subject land or any other land should have been in the urban node in the assumed absence of the Highway. I am satisfied that in 1992, 1993 and 1994, he did not form any view on that hypothetical situation.

1166 There were a number of aspects of Mr Greenup's evidence generally that I found unsatisfactory.

1167 First, I do not think that his witness statements reflect his evidence expressed in his own words. In my view, they reflect, to an unacceptable extent, the language, drafting and emphasis of the plaintiffs' solicitors. At times he conceded that the language was that of the solicitors (for example, ts 3202). Moreover, in a number of respects, he said that he had been 'assisted' by the plaintiffs' solicitors with the wording. See, for example, ts 3166 3167, 3154, 3157. In other respects, notwithstanding his denials, I am satisfied that part of his statement reflected the plaintiffs' solicitors drafting and not the recollection of Mr Greenup expressed in his own words. In various respects parts of his statement misstated the effect of documents. Notwithstanding that Mr Greenup described that as his error, I find that, in these respects, the preparation and typing of the draft of the statement was done by the plaintiffs' solicitors and it was their error. See, for example, ts 3154 3156, 3159 3160.

1168 Secondly, on a number of occasions, Mr Greenup responded to questions about what had happened, or what he recalled, in terms of what 'would have' happened. See, for example, ts 3201, 3205 3206, 3229. In my view, that was indicative of a general feature of Mr Greenup's evidence. See also my observations about Mr Greenup's evidence in section 4.5. His evidence was often based more on reconstruction than any recollection. Given that the events were more than 15 years earlier, that is not surprising.

1169 Thirdly, on many occasions, Mr Greenup's evidence was not responsive to the question he was asked. See, for example, ts 3166, 3170, 3175 3179 (as to which, see section 4.5), 3191, 3201, 3202 3204, 3229 3230, 3233 3234.

1170 In the end, I formed an impression of a witness who was overly mindful of maintaining the view of events that had been advanced in his witness statements. At times, he was defensive. At times, he wanted to seek to explain or justify, rather than answer the question. At times, his failure to respond directly to a question seemed to me to stem from an unwillingness to make what he perceived to be a concession. Unless his evidence is supported by documents or other evidence, I would scrutinise his evidence very carefully before accepting it. 4.11.5 The ValuerGeneral's office's letter of 5 February 1993

1171 The plaintiffs' submissions rely on a letter dated 5 February 1993 from the ValuerGeneral's office to a manager at the Ministry of Education: closing submissions pars 4.192 4.195, 4.204, 4.215 4.216. The letter is exhibit 258H.

1172 The subject of the letter is the proposed TAFE site on lots 190, 191 and 192. The letter refers to the Riverland Ramble proposal that was then on foot. The letter states: It is a logical extension to conclude that at some stage in the future lots 190, 191 and 192 would receive a similar rezoning if the current proposal does succeed.

This anticipation is probably part of the reason for Lots 191 and 192 asking price moving from $540,000 (VGO letter to DOLA dated 6 March 1992) to the present figure of $685,000 (exhibit 258H, page 2).

1173 The plaintiffs submit that this letter supports the conclusion that, but for the proposed public works, the land would have been rezoned urban in the preIPRSP period. In my opinion, the letter is of little or no weight on the preIPRSP rezoning question. First, the plaintiffs invite a hearsay use of the statements in the letter. The letter is not a business record and consequently is not admissible as to the truth of its contents under the Evidence Act 1906 s 79C. Secondly, in any event, the statements in the letter amount to no more than an expectation that, at some unknown time in the future, lots 190, 191 and 192 could be rezoned. Nothing in the letter says anything about the timing of that.

4.12 PreIPRSP rezoning: conclusions

1174 I will begin by restating some of the findings that I have already made:

(1) In the preIPRSP period, the shire did not initiate rezoning of land from rural to urban. Rezoning was developer initiated and developer driven. In the absence of a rezoning application, the subject land would not have been rezoned to urban (section 4.1).

(2) During the preIPRSP period, there was no rezoning application made respecting the subject land or surrounding land to the north and east. Thus, no occasion arose for the shire to determine whether the desirability of a rural buffer or a need to keep options open for the alignment of the Highway called for the subject land or surrounding land not to be rezoned to urban. The Highway did not have any causal consequence for the zoning of the subject land or surrounding land. Apart from a hypothetical rezoning application, the zoning of the subject land was not attributable to the Highway (section 4.10).

(3) Assuming away the proposed public works, the plaintiffs would not have applied for the rezoning of the subject land to urban (section 4.3). That in itself is fatal to the plaintiffs' preIPRSP rezoning case. However, for the sake of completeness, I have dealt fully with the preIPRSP case on the assumption that the plaintiffs applied for the land to be rezoned.

(4) In the absence of the proposed public works, the plaintiffs would still not have received the shire's letter of 15 January 1991. Consequently, any application would have been prompted by Mr McKay's discovery in 1994 of sewerage works ***around*** Ravenswood (section 4.5).

(5) Thus, at the earliest, any application for rezoning by the plaintiffs would have been made in the second half of 1994 and would have fallen to be considered by the DPUD no earlier than 1995.

(6) By 1995, the approval of the rezoning of Riverland Ramble had either occurred or was imminent. If a rezoning application for the subject land had been made in 1994, the subject land would not have been rezoned to urban in preference to Riverland Ramble (section 4.6).

(7) Orderly and proper planning in 1995 1996 invited attention to questions of need, supply and population growth. Questions of need, supply and population were considerations taken into account by the DPUD in 1993 and 1994 for the Riverland Ramble application (section 4.6), and in 1995 for the MRCE application (section 4.7).

(8) By 1995, an officer of the DPUD expressed the view that Riverland Ramble, MRCE and Austin Cove (without its 1996 1997 expansion) would provide sufficient capacity to accommodate all of the shire's expected population growth to 2021. That was consistent with work done by Mr Auret earlier in 1995. In July 1995, the Statutory Planning Committee of the WAPC expressed the view that, with Riverland Ramble and Austin Cove, the MRCE proposal would significantly exceed the shorttomediumterm needs of forecast growth, and that the need for the proposed rezoning had not been demonstrated (section 4.7).

(9) Consistency with and support from the 1990 Peel Regional Plan was a factor in favour of approval of an application to rezone land to urban, as consideration of the Riverland Ramble rezoning illustrates (section 4.6).

(10) The preferred form of urban development was in urban nodes or urban villages. Good planning favoured additional urban areas being an extension of existing urban areas and favoured good linkage between urban areas. That can be seen from the 1990 Peel Regional Plan, the 1996 IPRSP, and from consideration of DPUD reports during the period. See, for example, Mr Flugge's report of July 1993, Mr Berzins's report on Riverland Ramble of November 1994, and the recommendation of the Committee for Statutory Procedures in November 1994.

(11) By late 1994, work had commenced on the preparation of the draft 1996 IPRSP. The fact that that process was underway, then expected to take 12 months, was a factor brought to bear in considering any substantial rezoning application. Depending on the circumstances, good planning might have required that a rezoning application be refused or deferred, pending the completion of the structure planning process. That consideration was raised in relation to the Riverland Ramble rezoning, but dismissed because of its long history. It was also raised in the MRCE rezoning application.

(12) Contrary to the plaintiffs' planners' opinions, the rezonings of Riverland Ramble and MRCE do not provide any support for an affirmative answer to the preIPRSP rezoning question.

(13) Contrary to the plaintiffs' planners' opinions, the TS Martin report, the 1990 Peel Regional Plan and the 1992 SWAT report do not support an affirmative answer. In the case of the Peel Regional Plan, it favours a negative answer because of what it says about urbanisation by extension of the Ravenswood townsite.

1175 In my opinion, for the reasons that follow, in the assumed absence of the proposed public works, an application in 1994 to 1996 to rezone the subject land to urban would not have succeeded.

1176 The findings already made remove most of the central elements of the reasoning of the plaintiffs' planners in support of their opinions. These findings are that:

(a) by late 1994 and thereafter, in light of Riverland Ramble, there was no longer a shortage of urban land in Ravenswood or in Murray;

(b) other rezonings in the period do not support an affirmative answer to the preIPRSP rezoning question;

(c) the progress of the Riverland Ramble rezoning would not have been different in the absence of the proposed public works. Consequently, the Ravenswood node, which by then comprised the existing town and Riverland Ramble, would not have been different; and

(d) planning instruments and publications do not support an affirmative answer to the preIPRSP rezoning question.

1177 By contrast, with the limited exceptions I have identified, I accept the central elements of the reasoning of the defendants' planners.

1178 In my opinion, three considerations taken together lead to the conclusion that had an application for rezoning been made, as a matter of orderly and proper planning, the subject land would not have been rezoned to urban. The first consideration is the question of need, population and supply; second, the location of the subject land relative to the Ravenswood townsite and Riverland Ramble, and its proximity to rural land; the third is the structure planning process then underway.

1179 By 1995, the environment in Murray regarding the supply of urban land was very different from what it had been in 1991. There had been a perceived significant shortage of urban land. That no longer applied in 1995. To the contrary, there was seen by the DPUD to be more than adequate urban zoned land for the short and medium

terms. As a matter of good planning, there would have been a real question whether rezoning the subject land in 1995 would have been premature and have led to an excessive oversupply of urban land. The DPUD was sensitive to that question in its 1994 report in relation to Riverland Ramble, and in July 1995 in relation to MRCE. That concern was overcome in relation to MRCE because that development was seen as not simply residential, but based on tourism and a substantial golf course component. Overcoming that concern would have been a substantial obstacle to the success of a rezoning application for the subject land.

1180 Secondly, in my view, rezoning of the subject land in 1994 to 1996 would not have been consistent with the preferred form of urban expansion by urban nodes. It would have involved a substantial area of new urban land with little or no connection to other urban land. The tiny scale of the existing Ravenswood townsite in 1995 should not be overlooked. At its closest point, lot 191 was more than 1.2 km from the existing townsite. Parts of lot 192 were more than 2.5 km away. Riverland Ramble was proposing a staged development. Only an extremely small part of Riverland Ramble in the northwest corner shared a boundary with the subject land. It was known that urbanisation in the northwest of Riverland Ramble would be many years away. Rezoning of the subject land would not have built on existing urban areas or created a coherent or logical Ravenswood node. See the plan set out in section 4.6.3 above. If the subject land was rezoned urban, the Ravenswood node would have lacked clearly defined boundaries.

1181 The linkage and connection obstacles for the rezoning of the subject land are exacerbated by the fact that the land immediately abutting most of Riverland Ramble to the north was rural and, evidently, its owners intended it to remain that way for some time. The Kellihers were opposed to the rezoning of Riverland Ramble. I have already found that they would have opposed the rezoning of the subject land and that that opposition would have raised greater issues for the hypothetical rezoning of the subject land than it did for Riverland Ramble.

1182 To an extent, Mr Robinson accepted that the location of the subject land would give rise to issues of this kind. He suggested that they would be overcome by localised structure planning. There is no direct evidence as to how structure planning would have overcome that issue. I am not convinced that structure planning would have been successful in that respect. Given its location and surrounds, urban rezoning of the subject land would have raised broader issues about possible urbanisation of other land north of Old Mandurah Road and questions about defining some discrete limits on urbanisation of the Ravenswood node. I am not persuaded that, as a matter of good planning, these obstacles could have been successfully overcome in the preIPRSP period.

1183 Given the issues referred to, and given that regional structure planning was underway, I conclude that, as a matter of orderly and proper planning, a hypothetical application to rezone the subject land urban in 1995 would have been rejected or, at best, deferred pending the regional structure planning process being undertaken by Mr Auret. Even had there been no regional structure planning underway, I am not satisfied that the hurdles provided by the first two considerations would have been overcome.

1184 For the reasons explained in sections 5.1 and 5.5, I find that the subject land would not have been designated as future urban in the hypothetical IPRSP. Consequently, if a rezoning application had been made in the preIPRSP period and deferred pending the regional structure planning process, it would ultimately have been rejected at the end of the IPRSP process.

1185 That brings me to the plaintiffs' hypothetical IPRSP case, which I will deal with in section 5.

Section 5: Hypothetical IPRSP

5.1 Introductory overview

1186 In section 4, I have concluded that, on the assumption that there was no proposal for the public works on the subject land, that land would have been rural in TPS 4 and would have remained rural up to 1997. This section 5deals with the plaintiffs' alternative claim that, but for the proposed public works, the land, zoned rural in TPS 4, would have been designated future urban in the IPRSP. It was common ground that this, of itself, would not achieve rezoning the subject land to urban. The planners agreed that being designated future urban in the IPRSP was an important factor in favour of land being rezoned at a later stage. It was the plaintiffs' case that if the subject land was shown as future urban in the hypothetical IPRSP, it would have been zoned urban in the PRS in 2003.

1187 As I will explain in section 5.4, in substance, the plaintiffs' planners support an affirmative answer to the hypothetical IPRSP question by two, perhaps three, different lines of reasoning. One is espoused by Mr Butterly,

another by Mr Auret. To a large extent, others of the plaintiffs' planners adopted Mr Auret's reasoning. To an extent, Mr Bulstrode adopted some of Mr Auret's reasoning.

1188 I will outline the evidence and reasoning of Mr Butterly and Mr Auret in detail in section 5.3 below. In his written report, Mr Butterly constructed a detailed and comprehensive hypothetical IPRSP in the assumed absence of the proposed public works. That involved removing some of the land designated future urban in the actual IPRSP and replacing it with the subject land and other land north of the subject land. I do not accept Mr Butterly's opinion. Most fundamentally, in my view, the hypothetical IPRSP constructed by Mr Butterly does not conform with the principles in the IPRSP about urban form. Those principles are not attributable to the proposed public works. Consequently, any hypothetical IPRSP must conform to those principles.

1189 Mr Auret took a different approach. His opinion rested on several assumptions. One of his assumptions was that the plaintiffs had been actively pursuing the rezoning of their land by 1996. Another assumption was that planners, engaged by the plaintiffs for that purpose, had prepared district structure plans for the subject land and the land surrounding it, to demonstrate how the urbanisation of the subject land would integrate with the surrounding land and form part of an urban village in accordance with IPRSP principles. As I will explain, I find that, in the hypothetical absence of the proposed public works, those assumptions are not satisfied. On those grounds, Mr Auret's opinion does not sustain the plaintiffs' hypothetical IPRSP case. Further, there are additional grounds on which I do not accept Mr Auret's opinion. I will explain those additional grounds in section 5.5.

1190 I will outline the possible third approach in section 5.4.

1191 In section 5.2, I will set out and summarise relevant provisions of the 1996 IPRSP and the 1997 IPRSP. In section 5.3, I will outline the planners' opinions on the hypothetical IPRSP question. In section 5.4, I will make some general observations about the plaintiffs' hypothetical IPRSP case and about methodology and reasoning in the context of the hypothetical IPRSP. In section 5.5, I will set out my findings and conclusions on the hypothetical IPRSP question and explain why I do not accept the opinions of Mr Auret and Mr Butterly. In section 5.6, I will state my conclusions on how, if at all, the Ravenswood urban node would have been different in the hypothetical IPRSP.

5.2 The IPRSP: background and relevant provisions

1192 In my view, the plaintiffs' hypothetical IPRSP case requires detailed attention to the provisions of the (actual) IPRSP. Much more is required than simply identifying those provisions which directly affected or governed the subject land. The whole of the IPRSP must be considered, so as to discern its objects and purposes, and the principles which informed the allocation of land uses in the IPRSP.

1193 That process is also assisted by consideration of the process leading to the IPRSP. In that respect, I refer to section 4.9 above.

1194 I begin with the 1996 IPRSP. 5.2.1 The 1996 IPRSP

1195 The executive summary identified the major objectives of the IPRSP as being: Give effect to the aims, objectives and action statements of the Peel Regional Strategy (September 1994) so far as these can be interpreted in physical land use arrangements. Be accurate and specific enough to provide the basis for development control decisions and form the basis for future reviews in local town planning schemes. Provide the basis for a statutory regional town planning scheme for the Peel ***Region***. Identify and define land requirements for major infrastructure corridors, including regional open space, which will be required within the area in the future (exhibit 7, 1/10/65).

1196 Among the social and demographic considerations referred to in the report are the following: The Peel ***Region*** is the fastest growing ***region*** outside the metropolitan ***region***, with the population almost trebling from about 42,000 in 1991 to about 116,000 in 2026.7.2 Peel ***Region*** Demographic Trends

Following a similar methodology as the State Planning Strategy, the growth prospects for population in the Peel ***Region*** were re-examined for structure planning purposes. Two important assumptions have been made in these projections, which enhance the growth prospects for the Peel ***Region***. It is assumed that the Kwinana Freeway will be extended at least as far as Pinjarra Road. It is assumed that the Rapid Transit (Rail) System from Perth to Rockingham and Mandurah will have reached Mandurah.These two major elements of transportation infrastructure

will have the effect of more closely integrating the Peel ***region*** to the Perth Metropolitan ***Region*** and consequently, the overflow factor from the Perth Metropolitan ***Region*** into the Peel ***Region*** will be greater than was assumed under the State Planning Strategy discussion papers.

Table 2 gives the populations to the year 2026 with an indicative projection to the year 2041. Accepting the medium scenario as the most likely, the population for the Peel ***Region*** is expected to rise from a current estimate of 50,200 to 150,000 by the year 2026 (exhibit 7, 1/10/81).

1197 As can be seen from that passage, one of the assumptions made in the 1996 IPRSP was that the Kwinana Freeway would be extended at least as far as Pinjarra Road. That assumption, described as important, was said to enhance the growth prospects for the Peel ***region***. While it is not possible to quantify the influence of this consideration, it should not be overlooked in the hypothetical IPRSP exercise. Thus, in discounting the proposed public works, the expected stimulation of growth by the Highway, to the extent it affects value, must be discounted.

1198 Chapter 9 of the 1996 IPRSP identified three options for regional structure planning. The thinking underlying the three options was explained in this way: The essential task for identifying potential urban areas is to decide how much urban area will be needed. Normally, for regional structure planning, a planning horizon of about 25-30 years is adopted and the population projections for that period are normally taken to be the target population for the purposes of calculating the required amount of urban land. At present, the estimated population of 52,000 in the study area occupies about 2,500 hectares of developed urban land. By the year 2021 (approximately 25 years) a target population of 116,000 would require between 5,000 6,000 hectares of urban land.

By contrast, a full development scenario based on the 'Ultimate Land Use and Settlement Vision' discussed in Appendix 1.5, would require about 12,000 hectares of urban land and accommodate approximately 320,000 population.

As discussed in Chapter 3, it is unlikely that local authorities, developers and landowners would be prepared to restrict the urban planning horizons to accept a plan which identified less than 6,000 hectares of future urban and retain the remaining potential (expected) urban land to rural. This especially applies to the City of Mandurah, where virtually all the land with urban potential in the city has been identified in the current City of Mandurah Town Planning Scheme Review No. 3 (exhibit 7, 1/10/91).

1199 The defendants emphasise that Option 1 is described as the normal approach for structure planning, based on a planning horizon of 20 30 years.

1200 Option 1 is described in the following way: This option takes the standard strategic/structure planning approach of identifying a planning horizon 25 30 years. Population projections are made for the area and then working backwards to identify land with the best potential or the most likelihood for urbanisation. In Option 1, the target year has been taken as 2021 and the target population 135,000. See Figure 7.

...

Development in the Shire of Murray could be contained in a series of discrete nodal developments with most development concentrated in an expansion of the Town of Pinjarra to approximately 12,000. Outside Pinjarra population could be concentrated in four small villages based on primary school catchments (population 3,000). Furnissdale could be expanded to 3,000 population. Yunderup and Ravenswood could be expanded to 6,000 population each, based on two primary schools in each village. Pinjarra North could be expanded to 3,000, based on a full sized primary school (exhibit 7, 1/10/91 93).

1201 The following is said in relation to Option 2: Option 2 is an extension of Option 1 in that it retains the essential greenbelt features but gives more acknowledgment to current development trends and expectations. The estimated population potential of Option 2 is 260,000 comprising about 140,000 in the City of Mandurah, about 65,000 in urban nodal developments between Mandurah and Pinjarra and 55,000 in a new urban area at Amarillo. This population potential is well beyond any forecasting period currently being contemplated but on current trends could occur somewhere between the years 2041 and 2051. See Figure 8.

The rationale for this option is that it is more in line with current developer, local authority and landowner expectations for the future development of the ***region***.

... In the Shire of Murray small towns have replaced the villages contemplated in Option 1. These small towns are based on multiples of about 12,000 population, that being the minimum population unit normally required to support one high school. In this scenario the Town of Furnissdale could be expanded to approximately 12,000. Yunderup and Murray Lakes could be considered one town unit with a population potential of 13,000. The boundaries shown for the Town of Ravenswood between Old Mandurah Road and Murray River have a calculated population potential of 10,500. The Town of Pinjarra could be expanded from 12,000 to 24,000 by the inclusion of the proposed Ravenswood Sanctuary Resort development (6,000) and the expansion of urbanisation along the ***South*** Western Highway to join Pinjarra and Pinjarra North (6,000) (exhibit 7, 1/10/93).

1202 Figure 8 (1/10/93) shows the designation of urban and future urban land. I will say more about what, if anything, can be taken from that in outlining the 1997 IPRSP.

1203 Option 3 was described as the ultimate settlement scenario. It was described in the following way: This option is an interpretation of the ultimate land use vision for the ***region*** shown in Figure A9 in Appendix 1. [From the 1992 SWAT report.]

The urban form in Option 3 is described as an urban coastal corridor with an urban corridor extending between Mandurah and Pinjarra. Amarillo could still be regarded as a separate satellite city rather than an extension of the corridor urbanisation. Physically, Option 3 could be considered the ultimate extension of Options 1 and 2 in that the essential urban structure, road hierarchy and greenbelt principles are retained but are modified to accommodate the additional urbanisation. See Figure 9.

...

The overall population potential of this option, considered the ultimate land use vision, is approximately 355,000. This is an additional 95,000 over Option 2 which would (speculatively) represent the growth potential to about 2075 (exhibit 7, 1/10/94).

1204 In Option 3, population potential was increased in the Shire of Murray, excluding Amarillo, from 65,000 in Option 2 to approximately 140,000 people. That population was contemplated to be contained in three large towns: Furnissdale/Barragup (32,000); Ravenswood (44,000); and Pinjarra (41,000).

1205 Although Option 3 was not the subject of a plan, the schematic diagram in figure 9 (1/10/94) and the population potential of 44,000 for Ravenswood suggest Option 3 involved urbanisation of substantially all of the land north of Old Mandurah Road and ***south*** of Paterson Road. I find that, but for the proposed public works, the subject land would have been included in the land proposed for ultimate urbanisation as part of Option 3. That was not in issue in this action.

1206 Chapter 9.2 deals with the evaluation of the options. It includes the following: Deciding the relative merits of each option depends upon the criteria against which they are assessed. The criteria selected have been derived from the objectives for the Peel ***Region*** contained in the Peel Regional Strategy (1994) and from general structure planning principles.

...

Essentially, the evaluation shows that Option 1 and Option 3 could be considered to be at the extremes. Option 1 succeeds by being conservative and efficient in the use of land but fails by being too restrictive, not addressing the wider implications of longer term development. On the other hand Option 3 succeeds in fulfilling expectations for the longterm future by providing a picture of the ultimate land use configuration. It would provide maximum flexibility for the free market mechanisms to decide the priorities for development thereby allowing free competition and a cheaper supply of urban land. It fails by being an excessive overprovision of future urban land making it difficult to determine the priorities for the provision of urban infrastructure. It could be very inefficient for the servicing authorities and the Government to implement (exhibit 7, 1/10/94 96).

1207 Option 2 was considered a pragmatic compromise between the two extremes and was ranked as the preferred option.

1208 In ch 9.4 of the 1996 IPRSP, consideration is given to regional sports facilities. At 1/10/98 it is said that a site of approximately 60 ha has been identified just east of the Perth Bunbury Highway/Pinjarra Road intersection and just north of the Ravenswood townsite. That site was said to be favoured for regional recreation by the Shire of Murray. The appropriate location was identified as part of the Sport and Recreation Strategy being prepared for the Ministry of Sport and Recreation.

1209 Chapter 9.5 deals with greenbelts. I will refer to what is said on that topic in the 1997 IPRSP.

1210 Chapter 10 outlines the proposed structure plan. The structure plan itself is shown on figure 13, to which I will shortly come.

1211 Chapter 10.1 describes the urban form proposed in the structure plan. Substantially identical provision is made in ch 4 of the 1997 IPRSP (exhibit 6, 1/6/278). Because, to my mind, the urban form proposed in the IPRSP is one of its fundamental underlying principles, I set out in detail what is said about the urban form: The urban form proposed in the structure plan can be described as a coastal urban corridor - an extension of the SouthWest Corridor, with discrete 'urban villages' developed along the MandurahPinjarra axis and with Point Grey as a separate tourism resort. Amarillo could be regarded as a separate urban area, linked to Perth, Rockingham and Mandurah.

... Widespread use of greenbelts is proposed as part of the plan. The greenbelts in the plan comprise regional open space and privately owned residential areas, especially in Parklands, Barragup and Furnissdale.

In the Peel ***Region***, unless recognition is given to the idea of permanent greenbelts, those areas which are private property will come under development pressures in the future and will begin to breakdown the principles for urban form which are featured in this structure plan.

While the structure plan recognises a fairly continuous, but narrow, coastal corridor, the essential objective of development is to contain urbanisation into discrete urban villages within the corridor with separately identifiable communities.

An urban village is a compact, welldefined, community, featuring mediumdensity development, a clear pedestrian environment, a strong and interactive community focus, housing and land use mix, generous public open spaces and highquality urban design (Hocking Planning and Architecture, 1993).

The proposed pattern of growth envisaged by the structure plan takes into account community concerns regarding continued lowdensity urban sprawl. It seeks to retain the area's character and heritage by creating residential areas with a sense of identity and community.

The urban form envisaged in the structure plan seeks to: Promote the concept of urban communities with a distinctive identity and character, and discrete boundaries.... Encourage the grouping of neighbourhood facilities and activities to promote easy access and to provide a suburban focus and meeting place. Promote more journeys by foot, bicycle and public transport....

The form of an urban village is geared towards supporting pedestrian movement and encouraging public transport usage. Each urban village would house about 12,000 16,000 people and be broken down into three or four neighbourhoods, each based on a primary school. Each village would have its own high school, recreation facilities, retail facilities and community services. While it is unlikely that each village would be selfsufficient in local employment, all villages would be linked by a public transport system for commuters.

...

The essential feature to the preservation of the urban form contemplated by the structure plan is that all the proposed urban areas should have distinctive and clear boundaries at their edges. These edges can be formed by major roads, open space or even some other forms of non residential land use. The integrity of the urban form of the inland urban villages should not be allowed to degenerate by the ad hoc additions of extensions to the urban villages, or the future urban areas along the coastal corridor by intrusions into the greenbelt, or by too gradual a transition from urban residential densities to rural densities through the overprovision of special residential zones adjoining the future towns (exhibit 7, 1/10/103 104).

1212 Containing urbanisation within discrete urban villages is described as the 'essential objective of development'. An urban village is 'compact' and 'welldefined'. The need for distinctive and clear boundaries at the edges of urban villages is described as the 'essential feature to the preservation of the [proposed] urban form'. In my view, any hypothetical IPRSP must conform with and reflect these principles.

1213 Chapter 10.2 deals with population, housing and urban land. It says that the proposed urban land identified on the structure plan amounts to 9,700 ha, of which 2,480 ha are in the Shire of Murray and 1,914 ha are in Amarillo (1/10/104).

1214 Four categories of urban land are identified in the structure plan representing the likely staging of future development (1/10/104). The four categories are urban, future urban category A1, future urban category A2 and future urban category B. Future urban A1 is land assessed as having no constraints to urban development in the short term, within 5 10 years. Future urban A2 is land that should become available after 10 years. Future urban B is land that has constraints, but which could become available for development in the longer term, up to 2041. The categories are not intended to be definitive or restrictive. The categories are explained in the same way in the 1997 IPRSP (exhibit 6, 1/6/283).

1215 The proposed urban areas in the Shire of Murray are broken down into four urban village precincts. One of them is Ravenswood. Ravenswood is said to be bounded by the Murray River and Old Mandurah Road (1/10/104). Identical provision is made in the 1997 IPRSP (1/6/283).

1216 The other urban villages in Murray were Pinjarra, Furnissdale and Yunderup/Murray Lakes.

1217 Each proposed urban village is the subject of separate discussion in ch 10.2. In relation to the Ravenswood urban village, the following is said: The structure plan identifies 388 ha of existing and potential urban land representing a population potential of 10,500.

In line with urban village planning principles the boundaries of Ravenswood Urban Village should be clearly demarcated. This will occur naturally on three sides where the Murray River floodway and the energy transmission corridor will form distinct boundaries to future urbanisation. It is on the northern boundary, Old Mandurah Road, that there will be pressure for more intensive subdivision adjoining Ravenswood.

RAVENSWOOD

Urban 22 ha

Category A1 Urban 6 ha

Category A2 Urban 184 ha

Category B Urban 176 ha

Population Potential 10,500

(exhibit 7, 1/10/107)

1218 In the 1997 IPRSP, the last sentence of the second paragraph is omitted (exhibit 6, 1/6/286).

1219 The 1996 IPRSP identified the need for further, more detailed structure planning: The level of detail conveyed in the structure plan is intended to be at the regional level. The detailed arrangement of land uses, including any refinements to the boundaries of urbanisation (within the principles discussed in this report), will be subject to future district and local structure planning (exhibit 7, 1/10/104).

1220 The reference to the need to abide by the principles outlined in the IPRSP in any refinements of boundaries should be noticed. Corresponding provision was made in the final 1997 IPRSP (1/6/283).

1221 The preparation of district and local structure plans is said to be an essential part of the implementation of the IPRSP (1/10/149; 1/6/319).

1222 In a passage relied on by Mr O'Neill, it is said that the inland towns planned within the Shire of Murray, including Ravenswood and Furnissdale, are 'too small to be regarded as full districts for structure planning purposes', but nevertheless, should be subject to district/local structure plans (exhibit 7, 1/10/149). The area for structure planning for Ravenswood is described as: The Town of Ravenswood bounded by the Murray River on the

south ... Pinjarra Road on the west, Old Mandurah Road on the North and the power easement on the east (exhibit 7, 1/10/149; see also exhibit 6, 1/6/319).

1223 These provisions repeatedly emphasise the need for the welldefined boundaries. Further, the district or local structure planning that is contemplated is confined to those areas which have been identified in the IPRSP as urban or future urban.

1224 As I have explained in section 4.8, Appendix 1 of the 1996 IPRSP provides an overview of the previous planning in the ***region***.

1225 The proposed structure plan in the 1996 IPRSP was set out in figure 13 (exhibit 7B).

1226 Although I do not think anything turns on it, what is shown in figure 13 does not accord with the allocation of urban land shown in the table for Ravenswood in the 1996 IPRSP (1/10/107). Both the table and figure 13 show a small area (22 ha) of urban land and 6 ha of category A1 future urban. The table shows 184 ha of category A2 future urban and 176 ha of category B future urban. I take the category B future urban land to be intended to be the land east of Riverland Ramble, extending to the power lines. In figure 13, apart from the urban and category A1 future urban, all of the balance of the land ***south*** of Old Mandurah Road, west of the power lines, is shown as future urban category B. There is no category A2 future urban land shown at Ravenswood in figure 13.

1227 Given that most of Riverland Ramble, namely lots 20 and 21, had been rezoned in April 1995, there are errors in the designation of some of this land. I would surmise that an early draft was prepared at a time when it was not known that Riverland Ramble had been or was soon to be rezoned to urban, and the position was not corrected before the publication of the 1996 IPRSP in July 1996. (See, in this regard, the allocations ***south*** of Old Mandurah Road in exhibit 205.) However, the position was corrected in the 1997 IPRSP.

1228 That brings to me to the final IPRSP, published in December 1997. 5.2.2 The 1997 IPRSP

1229 The introduction explained the purposes of the structure plan and the perceived need for it.

1230 In ch 1.2, reference is made to the data and methodology explained in the 1996 IPRSP. It is clear that the 1997 IPRSP is to be read consistently with that.

1231 Chapter 1.7 of the introduction states that while there was no specific timetable for the implementation of the proposals in the structure plan, the plan attempts to look 30 50 years to the future (exhibit 6, 1/6/272).

1232 Chapter 1.9 refers to the 1996 IPRSP and to the submissions received. It says that a number of modifications were recommended to the draft plan following the submissions. Among the significant modifications were extensive revision and reduction of regional open space proposals, following visits to landowners and detailed site inspections (1/6/273).

1233 The general objectives of the structure plan are to:

(a) give effect to the aims, objectives and action statements of the Peel Regional Strategy, where these can be interpreted into physical land use arrangements;

(b) be accurate and specific enough to provide the basis for sound planning decisions; and

(c) identify and define land requirements for major infrastructure corridors, including regional open space required within the area in the future (1/6/274).

1234 One of the functions of the structure plan is to provide a basis for staging development. It is said that the structure plan indicates the staging of development by classifying future urban land according to the constraints to development and demand. However, the classification is indicative only and actual development will, the report says, occur according to the priorities set by government and land developers, the need for additional land and the ability of the servicing agencies to provide the essential services required (exhibit 6, 1/6/274).

1235 Chapter 3.1 dealt with previous plans. It included the following: Peel is the fastest growing ***region*** in the State outside the Perth Metropolitan ***Region***. While the Peel ***Region*** has a long history of European settlement, dating back nearly to the foundation of Western Australia, urban development in the ***region*** has, until quite recently, tended to be relatively slow. It is only over the past two decades that urban development has gathered pace.

This growth has not taken place in a planning vacuum. There has been a considerable history of planning and development initiatives over the past two decades for the Peel ***Region***, providing the context within which much of the current development has occurred. It has also helped set expectations about how development will occur in the future.

The current round of structure planning therefore does not start with a clean sheet. Rather it builds on the previous work, which has been ongoing, some of which is quite recent and some of which is being undertaken concurrently with the structure planning process (exhibit 6, 1/6/275).

1236 There was a summary of what was said to be the most significant of that previous work. There is also reference to the comprehensive review of previous planning, and an assessment of the associated issues in Appendix 1 to the 1996 IPRSP.

1237 Chapter 4 explained the urban form adopted in the IPRSP (1/6/278). It is in terms substantially identical to the provisions in the 1996 IPRSP set out in section 5.2.1 above.

1238 Chapter 5 dealt with greenbelts. It included the following: Greenbelts are nonurban areas where future urbanisation should never be allowed to occur. The essential difference between greenbelts and other undeveloped rural areas is that their undeveloped or nonurban status is intended to be permanent and will be actively promoted and protected as the appropriate end use of the land.

By their nature, greenbelts can be in public or private ownership. They can be directed to environmental conservation, protection of landscape amenity, recreation, rural living, agriculture, or even broadacre countryside. They can vary in size from small local parks of a few hectares to huge national or regional parks which may cover hundreds of square kilometres. They can be used as buffers to keep urbanisation out of defined areas or they can be used as belts to contain urbanisation within defined areas. To date, buffers have been used more effectively than greenbelts as instruments for directing urban expansion in and ***around*** the Perth Metropolitan ***Region***.

Another form of greenbelt is a linear greenbelt, the parkway, which is associated with transport corridors. The parkway concept along major roads through urban areas is an effective tool against perceptions of urban sprawl. It can be effectively used to promote the separate identities of different localities which are otherwise joined by continuous urban development (exhibit 6, 1/6/279).

1239 Among the means for achieving the structure plan's greenbelt objectives are: To provide a greenbelt along the Serpentine River as a prominent feature in the ***region***. This will effectively separate Amarillo from the other urban development occurring in the ***South***-West Corridor.

Further ***south***, greenbelts along the Serpentine River (Goegrup Lake) and Black Lake should separate Furnissdale/Barragup from Greenfields in Mandurah and future urbanisation at Ravenswood. Also, the Murray River/***South*** Dandalup River should provide the major basis for an eastwest greenbelt (exhibit 6, 1/6/279).

1240 Chapter 6 deals with population, housing and urban land. The proposed urban land identified in the structure plan amounts to 9,420 ha, of which about 5,444 ha are in Mandurah, 2,062 ha are in Murray and 1,914 ha are in Amarillo. That provides a population potential of 255,000, with a capacity for 150,000 people in Mandurah, 55,000 people in the Shire of Murray and 52,000 people in Amarillo (1/6/283).

1241 As I have said in the context of 1996 IPRSP, the final 1997 IPRSP proposed four urban village precincts in Murray: Pinjarra, Ravenswood, Furnissdale and Yunderup/Murray Lakes. I have set out in section 5.2.1 what is said in relation to the Ravenswood urban village. Table 1 of the 1997 IPRSP quantifies the structure plan designations of urban and future urban land. The following appears for Ravenswood (exhibit 6, 1/6/284):

Urban

154

Cat A1 Urban

6

Cat A2 Urban

-

Cat B Urban

228

Total Urban Area

388

Urban Population Potential (@ 27p/ha)

10,476

1242 In relation to the Furnissdale urban village, the following is said: The structure plan identifies 385 hectares of existing and future urban land in Furnissdale generally bounded by the Serpentine River on the west and ***south***, the Murray River floodway on the ***south***, Tonkin Drive and Barragup Swamp conservation reserve on the east and Pinjarra Road on the north, providing a population potential of 10,390.

While some expansion of the existing urban area is likely with the introduction of reticulated sewerage which is about to reach the area, urban development throughout the remainder of the area designated on the structure plan is likely to be slow because the land is so fragmented.

A major issue with the development of an urban village at Furnissdale will be to preserve the integrity of the remainder of the greenbelt in the Furnissdale/Barragup area. Being close to Mandurah and being entirely subdivided for special rural zones, it is likely that some landowners in the area designated as greenbelt will have development aspirations. If the principle of urban villages and the greenbelt is to succeed, pressure for ad hoc intensive subdivision will need to be resisted (exhibit 6, 1/6/286 287).

1243 This passage shows that the fragmentation of ownership in Furnissdale was recognised and, nevertheless, Furnissdale was proposed as an urban village. Further, the emphasis on the need to preserve the principle of urban villages and to avoid ad hoc intensive subdivision should be noticed.

1244 Chapter 7.1 deals with the regional road system. In relation to the Kwinana Freeway Peel Deviation Highway, the IPRSP refers to the March 1996 Ecologia report to Main Roads, considering various possible alignments for parts of the proposed Highway (see exhibit 32). The preferred Main Roads WA route alignment for the Highway, which may be subject to further minor variation, is reflected on the structure plan (1/6/288 289).

1245 I have also referred to other provisions in the 1997 IPRSP, mirroring provisions in the 1996 IPRSP.

1246 The structure plan itself is set out in the IPRSP. A broad view of the designation of land in the area surrounding Mandurah and Pinjarra is seen below (exhibit 6, 1/6/280):

1247 The designation of the subject land and the immediately surrounding land in the 1997 IPRSP is magnified below in exhibit 201:

1248 As can be seen, Ravenswood and lots 20 and 21, comprising part of Riverland Ramble, are shown as urban. Lot 22 and the land east of Riverland Ramble to the power transmission lines is shown as future urban category B. Apart from the subject land, all of the land north of Old Mandurah Road, east of the Highway and ***south*** of Paterson Road is shown as rural. The subject land is designated for the Highway and the RRF.

1249 Figure 3 in the 1997 IPRSP is a schematic representation of the urban form (exhibit 6, 1/6/282). It substantially mirrors what was shown in figure 8 of the 1996 IPRSP (exhibit 7, 1/10/93). It is shown below.

1250 In his first report, Mr Rowe expressed the view that '[a] careful analysis of this diagram shows the subject land as being considered for urban development, with the small triangle of 'Urban' land being the adjacent Ravenswood urban area now being developed to the east of the subject land' (exhibit 191A [58]). Mr Rowe did not back away from that opinion when asked about it in crossexamination (ts 4836 4838, 4843).

1251 In his first report, Mr Robinson also expressed the view that figure 3 supported the urban potential of the subject land. He stated that figure 3 'clearly shows that land on the west [(intended to be east: ts 4846)] side of the Peel Deviation, north of Pinjarra Road would become urban' (exhibit 180A [100]). By that, he intended to convey that the subject land was shown in figure 3 as becoming urban (ts 4846 4847). Mr Robinson said, in crossexamination, that he no longer held that opinion, having heard Mr Auret say that this was not intended by figure 3 (ts 4847).

1252 In my view, the opinion that figure 3 in the IPRSP indicated support for the urbanisation of the subject land is not, and was not, a view open to any reasonable planner. Like any instrument, a planning instrument is to be read as a whole. The 1997 IPRSP included a final structure plan (exhibit 6, 1/6/280). That structure plan identified with precision the designation of particular land. The schematic diagram at figure 3 could not reasonably be thought to be intended to detract from or contradict that structure plan. Moreover, the 1997 IPRSP identified the urban village of Ravenswood as being bounded by the Murray River and Old Mandurah Road (1/6/283).

1253 To my mind, Mr Rowe's explanation for how he derived his opinion that figure 3 showed the subject land for future urbanisation detracted from the weight of his evidence. Mr Rowe said that he superimposed figure 3 on to a cadastral plan (ts 4837 4838). He said that he did not attempt to explain the discrepancy between what figure 3, treated in that way, revealed and the adopted Option 2 shown in the structure plan itself (ts 4837). Mr Rowe accepted that using figure 3 in this way showed that Riverland Ramble was greenbelt (ts 4838). Mr Rowe did not accept that it was obvious to any planner that figure 3 could not be used to identify the urban potential of land north of Old Mandurah Road (ts 4838).

1254 I agree with Mr Auret's opinion that it is not plausible that an experienced planner would take the view that figure 3 indicates urban potential for lots 191 and 192 (ts 4210). Mr O'Neill was mindful that it may be viewed as hyperbole, but described the use of figure 3 in this way as 'a nonsense' (ts 4839). He expressed the view that plans of this type are not unusual and are clearly not intended to be interpreted with reference to cadastre. Moreover, he had never heard of anybody interpreting a plan of this kind in that way (ts 4839). I accept Mr O'Neill's evidence.

1255 To my mind, the opinions expressed by Mr Rowe and Mr Robinson that figure 3 could be used in support of the urban potential of the subject land detract from the weight to be afforded to their opinions generally.

5.3 The hypothetical IPRSP: the planners' opinions

1256 In this section 5.3, I will outline the opinions of the planners on the question of whether the subject land would have been included in the hypothetical IPRSP. I will begin with the planners' joint report, before outlining the two main opinions relied on by the plaintiffs: those of Mr Auret and Mr Butterly. Both Mr Butterly and Mr Auret expressed their opinion on the hypothetical IPRSP question in reports tendered at trial, and explained their opinions in oral evidence in the planners' concurrent session. All the planners responded in oral evidence to Mr Auret's opinion. I will outline some of those responses. Finally, I will deal with Mr Robinson's opinion in his report of 9 November 2009. 5.3.1 The planners' joint report

1257 The planners' joint report dated 9 July 2010 (exhibit 241) records the following opinions on the hypothetical IPRSP in the absence of the proposed public works.

1258 Messrs Auret, Rowe, Robinson, Flugge and Butterly said that the subject land and land adjacent to it would have been shown as an urban village, whereas O'Neill and Moran considered that the subject land would have been rural, as the surrounding land was. Mr Bulstrode considered it would have been rural, based on his reliance on the adoption in the IPRSP of the medium growth scenario (Option 2), rather than on an analysis of all the planning considerations undertaken by others (exhibit 241, page 2).

1259 The report records the following summary of the reasons for those opinions (see exhibit 241, pages 3 5). Messrs Auret and Flugge considered that the future urban area shown east of lot 22 of Riverland Ramble (East Ravenswood) on the actual IPRSP would have been located over the subject land and land adjacent to it because:

(a) 400 ha were required for an urban village of about 10,000 people;

(b) the subject land does not have the environmental constraints of East Ravenswood;

(c) services to Ravenswood came from Mandurah along Pinjarra Road, making the subject land more accessible for services;

(d) the subject land was the closest unencumbered land, in one ownership, to the growth area of Mandurah that was readily developable;

(e) the subject land and existing urban land at Riverland Ramble would have promoted the design of a compact cell ***around*** the proposed commercial centre of Ravenswood; and

(f) the subject land and land adjacent to it was strategically located with respect to the future urban expansion of Mandurah.

1260 Mr Flugge considered that creating an urban cell, including the subject land, would consolidate the greenbelt area between Ravenswood and Mandurah. He also expressed the view that an expansion of the urban village to encompass a larger area of land, north of Old Mandurah Road, would have been consistent with the IPRSP notion of creating nodal urban development, separated by the Barragup lakes greenbelt area and lowdensity special rural development between Mandurah and Ravenswood. This would represent a logical northern extension of the existing Ravenswood townsite.

1261 Mr Rowe agreed with these points and also said that the delivery of land in a timely way would have been facilitated by including the subject land as future urban, given that there were constraints on development and rezoning of the Furnissdale land and the East Ravenswood areas identified in the 1997 IPRSP as future urban.

1262 Mr Robinson agreed with the above points and added that, in the assumed absence of the Highway, Pinjarra Road was the preeminent activity corridor in the ***region***.

1263 Mr Moran expressed a different view. While he recognised the validity of many of the points made by the plaintiffs' planners, the main differences he saw were in the timing of future urbanisation. The following matters led him to the conclusion that the land would have been treated as rural in the hypothetical IPRSP:

(a) in the IPRSP, all urban land at Ravenswood is ***south*** of Old Mandurah Road;

(b) an arc to the north of the existing Ravenswood urban area would have been more likely than an area including the subject site;

(c) the subject land was constrained by being surrounded by a viable rural operation. Preservation of productive rural land was an important consideration in the State Planning Policy;

(d) the SWAT report vision, relied on to some extent by other planners, was an ultimate vision; and

(e) comparison of the subject land to Austin Cove is untenable because it was then known as the Murray Lakes Golf Course Development and was not an urban development.

1264 Mr O'Neill agreed with points (a) to (e) above. However, he did not consider it was only a matter of timing. He considered there would be a significant degree of uncertainty as to the future designation of the subject land in the hypothetical IPRSP. He added the following points:

(a) sufficient urban land was identified in the 1997 IPRSP, without the subject land, for 30 years;

(b) areas of future urban category B land, in Furnissdale and East Ravenswood, while constrained, were not undevelopable;

(c) in the absence of the Highway, there would be increased concentration on urban consolidation rather than isolated peripheral urban expansion;

(d) the principle of urban consolidation was a recognised planning principle; and

(e) it was strategically significant to retain a break between the urban areas of Mandurah and Ravenswood.

1265 In essence, the opinion of the plaintiffs' planners on the hypothetical IPRSP recorded in this joint report (exhibit 241) involves a reconfiguration of the Ravenswood urban node from that node in the 1997 IPRSP. The land east of lot 22, East Ravenswood, is not shown as future urban in the hypothetical IPRSP; in its place, the subject land and (unspecified) land adjacent to it is shown as future urban. The joint report does not record any element of expansion of the proposed urban node at Ravenswood. In this respect, the reference to the need for an urban village of about 10,000 people should be noticed.

1266 As I will outline in detail in sections 5.3.3 and 5.3.4, in oral evidence, the plaintiffs' planners expressed the opinion that in the hypothetical IPRSP, the urban node at Ravenswood would have been both reconfigured and expanded from the node shown in the 1997 IPRSP, so as to accommodate a population of 12,000 16,000 people. 5.3.2 Mr Butterly's hypothetical IPRSP

1267 Mr Butterly's report of April 2008 (exhibit 194A) contains an extensive discussion of a hypothetical IPRSP without the Highway. He explained his approach in oral evidence (ts 4093 4099).

1268 The way he constructed his hypothetical IPRSP is as follows. He broke up the potential urban areas within the inner Peel ***region*** into 12 areas, shown on figure 23 of his report (exhibit 194A, 27/138). For each area, he considers its future urban potential. The subject land is in Area 6. He considers that Area 6 would have had 'first priority' for future urbanisation on the basis of: its geographical position approximately 10 kilometres east of the Mandurah CBD and approximately 8 kilometres from the Pinjarra townsite; current urban development in Ravenswood (ie the Riverland Ramble estate), suggesting that there is a market demand for residential land in this locality; the area can be well serviced, thus not creating unnecessary economical demands for human services and extension of infrastructure; land is strategically accessible to take advantage of public transport; large vacant landholdings in ownership of a few landowners make urban structure planning easier; area is not restricted by the Peel Scheme Flood Management Policy; Area 6 is not within areas mapped as potentially having High Risk Acid Sulphate Soils; good opportunity for consolidated urban corridor growth along Pinjarra Road and proposed 'Road A' shown in Figure 8; it is a logical progression of the urban front east of Mandurah, which follows good transport links; and it is within an area proposed for a new District Commercial Centre, Peel ***Region*** Sporting Complex and Tafe College (exhibit 194A, 27/55 [5.35]).

1269 He considers that the Austin Cove development and Point Grey were heavily dependent on the Highway (exhibit 194A, 27/57, 59).

1270 Mr Butterly postulates that without the Highway, there would have been a regional road, that he terms 'Road A', which he says comes from the TS Martin report. Road A is a northsouth road between Fiegert and Paterson Roads that runs along the eastern boundary of lot 191. He postulates that Fiegert Road would be a boundary between the Furnissdale/Barragup ruralresidential land and the urban land on the eastern side of Fiegert Road: exhibit 194A, 27/60 [5.41].

1271 Mr Butterly's hypothetical IPRSP has the following major changes, as compared to the actual IPRSP:

(a) Road A is included, and no Highway;

(b) there is a reduced area for the P29 (Austin Cove) urban area;

(c) the regional open space for the RRF has been relocated to the eastern side of Road A, fronting Old Mandurah Road and abutting the eastern side of lot 191. (Thus, a specific alternative location for the RRF has been postulated);

(d) there is additional urban land, being the subject land and the lot immediately north of the subject land (lot 203). There is also additional future urban land further north again, being the four lots north of lot 203 (ts 4097). This, he says, gives a 'more consolidated urban growth management strategy' for Ravenswood (exhibit 194A [5.43] [5.46]); and

(e) the future urban area at East Ravenswood, as well as lot 22, is deleted and designated rural, as it is further from Mandurah than the urban and future urban area he has created.

1272 Mr Butterly's designation of additional urban land on the subject land and lot 203 is evidently intended to be a designation future urban category A1 (ts 4064). Land was designated 'urban' in the IPRSP only if it was already zoned urban.

1273 His hypothetical IPRSP is shown below (exhibit 194A, 27/140).

1274 Mr Butterly used 'urban deferred', a zoning category in the PRS, to describe future urban land in his IPRSP.

1275 Mr Butterly did not know the population potential of the additional urban and urban deferred areas which he proposed (ts 4097). Neither his report nor his oral evidence identified the land area of lot 203 or the four lots north of lot 203 that Mr Butterly considered would be designated future urban in the hypothetical IPRSP.

1276 In his report, Mr Butterly expressed the opinion that the planning philosophy of preserving a rural buffer adjacent to major roads and highways contributed to the configuration of urban areas in the IPRSP: exhibit 194A [5.6] [5.8]. I have explained in section 4.8.2.3 above my view that the choice of urban nodes rather than concentric circles as the preferred urban form was not attributable to the Highway.

5.3.3 Mr Auret's opinion on the hypothetical IPRSP

1277 In his statement of 27 July 2010 (exhibit 183E), Mr Auret expresses the opinion that, assuming it were not already zoned urban, and assuming no proposed public works, and on certain additional assumptions referred to below, the subject land would have been identified as category A1 future urban land in the draft hypothetical IPRSP.

1278 Mr Auret had the primary carriage of production of the 1996 IPRSP. He describes himself, appropriately, as its author. In his statement, Mr Auret says something about the process of developing the options in the 1996 IPRSP. He elaborated considerably on this in his oral evidence.

1279 I will first outline his written evidence in exhibit 183E and then his oral evidence.

1280 Mr Auret says that the general practice is that the starting point is to identify all possible future urban land that could be envisaged as ultimately urban, even at a date well beyond the planning horizon for the structure plan. Then one scales back the ultimate land use settlement pattern to a scale consistent with the planning time horizon for the structure plan. Planning must take a longterm perspective, so that the plans in the structure plan for the time horizon chosen do not preclude the efficient attainment of ultimate land use vision. The scaled back version of Option 3 in the IPRSP was reported as Option 2: exhibit 183E [10] [11].

1281 At the time of structure planning in 1995 1996, it was evident to Mr Auret that there was increasing pressure for urban expansion into the Shire of Murray on either side of Pinjarra Road. There had been ad hoc rezoning applications, such as Riverland Ramble and Murray Lakes Golf Course Estate: [19].

1282 An element of the structure planning strategy was to consolidate urbanisation ***around*** the Pinjarra townsite and Ravenswood. Ravenswood was an overflow for the easterly expansion of Mandurah: [20].

1283 Ravenswood was strategically desirable as a location for an urban village of about 10,000 people, requiring about 400 ha of land. That village would become the core for the ultimate urbanisation of North Ravenswood, with a population of 44,000 people: [21].

1284 In his statement, Mr Auret says that the initial urban village size of 10,000 people was selected on the basis of selfsufficiency and sustainability, being a size to support a high school and a small district shopping centre: [22]. In his oral evidence, Mr Auret said that the preferred size was 12,000 16,000 people and that it was only due to the absence of available land, north of Old Mandurah Road, that the smaller size was chosen (ts 3989 3990). I will return to this point in section 5.5.

1285 In his statement, Mr Auret said that at the time of the IPRSP there had been no interest expressed by landowners north of Old Mandurah Road for urbanisation. The IPRSP identified the land east of Riverland Ramble, East Ravenswood, to meet the land requirements for a sustainable urban village population. That land was not ideal because it had significant environmental constraints, was more isolated from the existing and planned servicing of public transport infrastructure along Pinjarra Road, and was further away from the planned future commercial heart of the new village planned on the western edge of Riverland Ramble, fronting Pinjarra Road: exhibit 183E [24], [32].

1286 If the Highway and RRF were removed, the IPRSP could have reconfigured the shape of the urban village, from an elongated strip, ***south*** of Old Mandurah Road, to a more compact semicircle straddling Old Mandurah Road, being closer to Mandurah, closer to the site identified as the future commercial heart of Ravenswood and adjoining Pinjarra Road: [25]. In his oral evidence, Mr Auret said that he could not draw the hypothetical node of Ravenswood because the detail would depend on further district structure planning (ts 4090). I will return to this

further structure planning and its significance. Mr Auret said that the additional land would probably include lots 190, 191 and 192 (ts 4090).

1287 In conclusion, he says in his statement that he is 'sure' that if a powerful and well connected developer such as the Department of Housing or Landcorp, or a less well connected developer such as Satterley Pty Ltd or Peet and Company, had made a submission in support of Category A1Future Urban zoning over the subject land ... it would have been shown as such in the final [IPRSP]. All a proponent would have needed to demonstrate (by way of a district level structure plan) was how the planning of the subject land was to be integrated with surrounding land in the future North Ravenswood urban area (exhibit 183E [27]).

1288 The 'if' in this conclusion should be noticed. In similar vein are the assumptions he identified in his oral evidence, to which I will come. Further, in this passage he referred to the need for the proponent to demonstrate, by a district level structure plan, the integration of the subject land into the proposed urban node of Ravenswood, particularly the other land north of Old Mandurah Road. As will be seen, this was a significant element of his oral evidence.

1289 In Mr Auret's statement, he responded to the statement by Mr Moran that the rezoning of the subject land would have created a new urban front, north of Old Mandurah Road, surrounded by rural zoned land (exhibit 183E [33]). That statement of Mr Moran had been made in the context of hypothetical preIPRSP zoning, but that was not made clear to Mr Auret in preparing his report of July 2010 (ts 4206). Mr Auret says that there is no reason why the 87 ha subject land could not have been included as part of an urban village as future urban A1, planned to be the first stage of development north of Pinjarra Road/Old Mandurah Road. The balance of the land to the north and east of the subject land, of about 110 ha, could have been identified as future urban B, to make up the balance of the urban village. Alternatively, it could have been left as rural in the knowledge that, ultimately, all the land north of Old Mandurah Road would be urbanised: [33].

1290 It can be seen that, in his statement of 27 July 2010, Mr Auret said that no owners north of Old Mandurah Road had expressed interest in urbanisation (exhibit 183E [24]). However, he did not connect that to the identification of Ravenswood as an urban village of about 10,000 people (see [21] [22]). Nor does this statement appear to express the opinion that, in the hypothetical IPRSP, the urban node of Ravenswood would be 12,000 16,000 people, rather than 10,500. Mr Auret's statement includes repeated references to a population of ***around*** 10,000 people at Ravenswood as being intended by the IPRSP or required for a sustainable urban village: see, for example, exhibit 183E [21] [22], [24], [29] [30], [33] [35].

1291 At the outset of his oral evidence, Mr Auret asked what assumptions he could make in the hypothetical IPRSP. He identified a number of possibilities or questions (ts 4054):

(1) Had there been a longstanding intention to prosecute urban zoning?

(2) Had the landowners engaged a professional planning firm such as GRA?

(3) Although not finalised, had rezoning been talked about, with approaches to the council and to the state planning authority?

(4) Had a rezoning been initiated and, if so, at what time?

(5) Had there been consent to advertise?

(6) What was the council's final recommendation in response to the advertising?

1292 If all these matters had been in train, designation as future urban would have been 'more or less a foregone conclusion' (ts 4055). In other parts of his evidence, Mr Auret put the position in significantly less clearcut terms.

1293 Mr Auret identified the assumptions he had made in expressing his opinion as follows (ts 4056):

(1) the landowners would have been prosecuting the idea of urban development from a few years back;

(2) they would have engaged a planning firm, such as GRA, to further their cause, both with the local authority and the SPC/WAPC;

(3) one of the early things GRA would have done would be to register their intentions for the land with the DPUD and be included in the Metropolitan Development Program (the MDP); and

(4) he did not assume that any rezoning application had been made.

1294 With those assumptions, he would have been obliged to give the subject land 'very serious consideration in the [IPRSP]' (ts 4056).

1295 In his oral evidence, Mr Auret made it plain that there was an additional critical assumption to his hypothetical IPRSP opinion. He assumed that a planning consultant engaged by the plaintiffs would have prepared a district structure plan, which demonstrated how an urban village of 12,000 16,000 people, conforming with the IPRSP urban form principles, would have been achieved in including the subject land as future urban. This assumption was articulated by Mr Auret in a number of parts of his evidence: see, for example, ts 4059 4060, 4062, 4083 4085, 4090, 4092. I will return to this topic in section 5.5.2.

1296 Mr Auret explained a number of factual matters about what occurred in the planning process for the 1996 IPRSP and the role of the Peel ***Region*** Planning Advisory Committee (the IPRSP committee).

1297 The approach to urban form adopted in the IPRSP was that there should be distinct nodes of urban development. The smallest of them in Option 2 was an urban village, based on a population of 12,000 16,000 people, being the population normally supporting a high school, four primary schools and a district level shopping centre (ts 4057).

1298 I interpose that that description is consistent with the description of the urban form in the 1996 IPRSP, set out in section 5.2.1 above (see exhibit 7, 1/10/103).

1299 The IPRSP used a gross density of 27 people per hectare as a 'rule of thumb' in calculating the population potential of urban and future urban areas (ts 4057; exhibit 6, 1/6/284 285). On the approach taken in Option 2, a village of 12,000 people required about 450 ha.

1300 Mr Auret said that if, for all he knew, the landowners north of Old Mandurah Road had not applied for or taken steps towards urbanisation, he would have taken that as an expression that they did not want it. In the structure planning process, the IPRSP committee did not approach landowners and ask for their views on whether rezoning was wanted (ts 4056). (See also his evidence at ts 4083, referred to below.)

1301 When they looked at the proposals for urban development (which I take to be in the MDP: see exhibit 7, 1/10/163 164), they saw that it was only ***south*** of Old Mandurah Road that interest had been expressed in the Ravenswood locality (ts 4057, 4092). Given that, the IPRSP committee identified all the land ***south*** of Old Mandurah Road, as far east as the power transmission corridor, for future urbanisation, which included vegetated areas. The 388 ha so identified has a population potential of about 10,500 people, assuming a gross density of 27 people per hectare. That did not affect the IPRSP committee's view of what was an ideal scale for Ravenswood (ts 3989 3990, 4057 4058, 4092).

1302 In explaining how things would or might have been different without the Highway, Mr Auret then hypothesised, at length, about what would or might have been submitted to him by the planning consultant on behalf of the plaintiffs. He reiterated his assumption that the possibility of rezoning the land had been prosecuted for a fair amount of time and was reflected in the MDP, and that the planning consultant made submissions to the IPRSP committee or the planners on the committee (ts 4059). He said that the submissions might have been along the following lines:

(a) the subject land could be the embryonic start for the longterm vision shown in the SWAT report;

(b) a structure plan could be produced as to how it would not impinge on the neighbouring Kelliher land in the short term, and how it could be integrated as development progresses, so that it was integrated with Riverland Ramble; and

(c) including the subject land as future urban could have enabled the IPRSP committee to avoid designating the East Ravenswood land, with remnant vegetation on it, as future urban (ts 4059).

1303 Mr Auret expressed the view that he would have seen merit in such submissions. He would have been looking for places to 'get this urban village off the ground' (ts 4060). He thought he would have recommended, depending on the discussions with the other planners on the IPRSP committee (Mr Flugge and Mr Berzins), somewhere between 450 and 600 ha be shown in a concentric pattern, both north and ***south*** of Old Mandurah Road, up to the boundary of lot 52 (ts 4060). Later in his evidence, I asked him to draw this urban node, but he explained that he

could not, since its location and boundaries would depend on the necessary district structure planning undertaken by the landowners' consultant planners (ts 4090).

1304 Mr Auret said that in the IPRSP process, the prominent consideration was an urban village of 12,000 16,000 people, regardless of whether that would have been required by 2021 to meet the population projections (ts 4090).

1305 Mr Auret summarised his view this way. The thing that changes from the actual position in the IPRSP process is that previously, there was no indication from anybody north of Old Mandurah Road for any urbanisation. When a substantial component 'headed in the right direction for the long term' was introduced, it would have changed what the structure plan had to say about the shape and configuration of the Ravenswood urban village (ts 4062 4063). To my mind, this reflects a fundamental feature of Mr Auret's hypothetical IPRSP. What distinguishes the actual IPRSP from Mr Auret's hypothetical IPRSP is not the absence of the proposed public works themselves, but his assumption that, in their absence, the subject land would have been put forward for urbanisation.

1306 I will summarise the major threads of Mr Auret's reasoning in section 5.5.2 below. 5.3.4 Other planners' responses to Mr Auret's opinion

1307 The other planners called by the plaintiffs expressed their agreement with Mr Auret's opinion.

1308 Mr Rowe did not express an opinion on the hypothetical IPRSP question in a report. In his oral evidence, he expressed his agreement with Mr Auret's oral evidence and emphasised that the urban village of Ravenswood in the IPRSP did not meet the general criteria in Option 2 of having 12,000 16,000 people for an urban village. It did not meet the 'bottom of the band width to achieve the village concept' (ts 4063). If somebody had made available another 80 100 ha of unconstrained land, he considers the authors of the structure plan and the authorities involved would 'grab it' because that would 'underwrite the success of the [urban village] model' (ts 4063).

1309 Later in his evidence, Mr Rowe was asked how he might have gone about preparing a district structure plan of the kind that had been referred to by Mr Auret and others. I will refer to this evidence in section 5.5.2.

1310 Mr Rowe considered that, based on the definitions in the IPRSP, the subject land would have been future urban category A1, because it would have been assessed as having no constraints to urban development in the short and medium terms (ts 4063 4064).

1311 Mr Flugge and Mr Robinson agreed with that latter opinion (ts 4065).

1312 In Mr Flugge's report of 30 March 2010, he expressed the opinion, without any detailed reasoning, that, but for the proposed public works, the subject land would have been designated future urban: exhibit 182D [58(e)].

1313 In his oral evidence, Mr Flugge expressed the opinion that, but for the proposed public works, the IPRSP would have been changed in several respects:

(a) the future urban B land shown in the Furnissdale locality in the actual IPRSP, given its lowlying nature and fragmented ownership, would instead have been shown as 'greenbelt rural living';

(b) the East Ravenswood land would be rural and would not have been shown as category B future urban, given its vegetation and floodplain constraints; and

(c) there would have been a larger urban node at Ravenswood, with a greenbelt being supplied by the Furnissdale/Barragup special rural zone and the lake system (ts 4065).

1314 Mr Robinson considered that the Barragup locality would have provided the greenbelt break between urban development in Mandurah and the subject land (ts 4066). Mr Robinson agreed with Mr Butterly that it would have been more difficult to justify expanding Austin Cove to 1,500 lots in the absence of the Highway. That would have led to a greater impetus for urbanisation in the Ravenswood locality (ts 4066).

1315 Both Mr Flugge and Mr Robinson assumed, in expressing their opinions, that the landowners would have been pursuing urbanisation of the subject land (ts 4065 4066).

1316 Mr Bulstrode expressed a measure of agreement with the opinions of Mr Auret. He spelt out the assumptions on which he would consider that the subject land may have been shown as future urban in the hypothetical IPRSP (ts 4075, 4078):

(a) the owners would have had to have actively pursued the rezoning of the land before 1996;

(b) the owners would have had to have engaged a planning consultant and other consultants to demonstrate how the development of the subject land could form part of an urban node of 12,000 16,000 people, without creating

pressure for a major urban area extending out to Paterson Road. This would involve the preparation of a district structure plan; and

(c) adjoining landowners would need to have not raised major objections to the identification of lots 191 and 192 as future urban and not objected to any supporting concept plan or district structure plan.

1317 Mr Bulstrode's assumptions about a district structure plan being prepared, and what it would have demonstrated, were an important foundation for his opinion. See also ts 4074, 4088, 4104, 4164, 4284 4285.

1318 Like Mr Auret, Mr Bulstrode considered that Old Mandurah Road was not an immutable boundary to the proposed urban village of Ravenswood. The identification of the boundaries would be a necessary part of the district structure plan process (ts 4102, 4104).

1319 In his oral evidence, Mr Moran expressed his reasoning quite briefly, as follows. Mr Moran described Mr Auret's explanation of the structure planning process as very impressive (ts 4066). Mr Moran drew on Mr Auret's witness statement (exhibit 183E [10] [11]), where Mr Auret says that one plans for the ultimate horizon and then scales back to a set timeframe so as not to preclude the efficient attainment of the ultimate land use. In Mr Moran's view, part of the scaling back methodology was to find a convenient boundary to scale back to. Often a physical, cadastral or other significant boundary was used (ts 4067). He said that in Option 2, the boundary scaled back to was Old Mandurah Road. If the attainment of the ideal urban village of at least 12,000 people was paramount, then the scaling back could have finished somewhere north of Old Mandurah Road, and included the Kelliher land and the Emmanuel land, and, perhaps, the subject land. Mr Moran believed that that was not deemed necessary, because Option 2 was based on a 25year planning horizon. Using Old Mandurah Road as the northern boundary did not preclude the ultimate expansion of the Ravenswood urban village to the north in later years, as per Option 3. Consequently, the final structure plan was a 'pragmatic outcome', allowing for the village to commence and then ultimately expand (ts 4067).

1320 Mr Moran did not consider that the removal of the Highway would alter the location of the existing Ravenswood townsite as the starting point or focal point of the Ravenswood urban node (ts 4113). If additional land had been sought by the WAPC for the Ravenswood urban node, the Kelliher and Emmanuel land along Old Mandurah Road, north of the Ravenswood townsite and Riverland Ramble, would have been a more natural candidate than the subject land (ts 4113).

1321 In substance, Mr O'Neill characterised Mr Auret's opinion to be not simply assessing the IPRSP in the absence of the Highway and RRF, but as substantially reundertaking the IPRSP process (ts 4068). He considered the need for a larger urban cell at Ravenswood was not indicated in the IPRSP. There was nothing to stop the actual IPRSP from having included additional land if additional land were needed (ts 4069). In Mr O'Neill's view, additional future urban land in the hypothetical IPRSP did not result from a deletion of the Highway, but was a 'different and parallel universe' (ts 4072; see also ts 4124 4125).

1322 Like Mr Moran, Mr O'Neill considered that if the WAPC were to look for additional urban land in the Ravenswood locality, the logical place would have been immediately north of Old Mandurah Road, namely lots 10, 11 and 12 (ts 4069, 4092, 4138). Mr O'Neill considered that the fact that no land north of Old Mandurah Road was designated future urban in the 1997 IPRSP had 'nothing ... to do with the presence or absence of the [H]ighway' (ts 4092).

1323 Mr O'Neill also referred to the State Planning Strategy 1997. That included a plan for the SouthWest Urban System, referring to nodal development between Mandurah and Pinjarra (exhibit 261G, 4/2/137). The node identified in the relevant area corresponds to Riverland Ramble. Mr O'Neill interpreted the plan as showing a dot representing a population of 2,000 5,000 people (ts 4071).

1324 Mr O'Neill explained why he did not consider that the subject land would have been included as future urban in the hypothetical IPRSP in preference to East Ravenswood in the following way: I have indicated previously that I think it would be an irrational and illogical extension of the predetermined Ravenswood Ramble area and I think this would be apparent if it's seen, if you like, as an entity. I don't think it meets the prerequisites to an integrated urban cell of the type that is referred to in the IPRSP.

...

Because I think it would be illogical to include a kind of a sporadic expansion of an urban cell merely because you had suitable, if you like, suitable land in a location and the landowner was at that time currently prepared to approve it. I think the much more considered and much more rational approach from a structure planning point of view would be to look at the long-term integrity and amenity and workability and accessibility of development within a cell accepting that constrained land may take some time to develop over time.

...

... this land might have been connected to it might have had a common boundary with Riverland Ramble but the elongated shape of the resultant urban centre and the, if I can call it, irrationality of the boundary of that would still be a factor, in my view.

In other words, it is preferable to have an urban centre which is consolidated rather than elongated, if you like. I have expressed that as lack of contiguity but it's also related to its relationship in terms of shape and in that sense I would refer to the elongation of that urban centre along Pinjarra Road (ts 4123, 4132, 4138 4139).

1325 Mr O'Neill referred to the fact that in the IPRSP, the general concept of an urban village was expressed in terms of a population of 12,000 16,000 people. However, in ch 13.3 of the 1997 IPRSP, it is said that the inland towns planned for the Shire of Murray, one of which was Ravenswood, were too small to be regarded as full districts for structure planning purposes, but nevertheless should be subject to district/local structure plans (see exhibit 6, 1/6/319). Consequently, Mr O'Neill suggested, it could be inferred that the IPRSP identified the extent of Ravenswood to be more confined than would produce an urban village of 12,000 16,000 people. Had it been considered desirable to produce a larger village of 12,000 16,000 people, that could have been done by identifying land north of Old Mandurah Road, including the Emmanuel land (ts 4090 4092). 5.3.5 Mr Robinson's written report on the hypothetical IPRSP

1326 In his report of 10 November 2009, Mr Robinson expresses the opinion that, if it were not for the Highway and the RRF, the subject land would have been identified for urban purposes in the IPRSP (exhibit 180F [2]). Essentially, that opinion is based on what he describes as the 'well recognised need for additional urban land' and the need to ensure that development at the Ravenswood node was consistent with the recommendations of strategic planning documentation available at the time: [3].

1327 Under the heading, 'Need for Additional Urban Land East of Mandurah', he sets out a number of references from earlier planning documents. This material does not seem to me to provide a sound basis for his conclusion that there was, in 1996, a wellrecognised need for additional land at Ravenswood.

1328 He expresses the opinion that, but for the Highway, the WAPC would have been pursuing a much larger urban area at Ravenswood. He says that is based on the Peel Regional Plan, the SWAT report and the 1997 State Planning Strategy: [20].

1329 I have already explained in section 4.10.5 that I do not accept this opinion insofar as it relates to the preIPRSP period. For corresponding reasons, I do not accept it insofar as it relates to the preparation of the IPRSP itself. In my opinion, there is nothing in the evidence to sustain a conclusion that, but for the Highway, the WAPC would have pursued a larger urban area at Ravenswood. Nothing in the IPRSP itself suggests that the presence of the Highway in any way limited the urban potential of Ravenswood. To the contrary, the 1996 IPRSP expressly identified the Highway as a factor in favour of population growth. There is nothing in the IPRSP, or elsewhere in the evidence, that persuades me that the presence of the Highway was seen by the WAPC as favouring the housing of expected population elsewhere than in Ravenswood. Further, I refer to section 5.5.2.

1330 For those reasons, to the extent that, in this report, Mr Robinson expresses reasons different from Mr Auret, I do not accept Mr Robinson's reasoning or opinion.

5.4 The hypothetical IPRSP: general observations on methodology, reasoning and the plaintiffs' case

1331 The plaintiffs' closing submissions refer to numerous parts of the evidence of the planners on the hypothetical IPRSP question, without differentiating between different approaches taken by different planners. To the extent that Mr Robinson took a distinct approach in his report of 10 November 2009, I have explained why I do not accept that approach. Leaving that to one side, I think that three distinct approaches to the hypothetical IPRSP question can be discerned in the various planning evidence relied upon by the plaintiffs. However, no planner espoused the second approach in oral evidence.

1332 First, in his first report (exhibit 194A), Mr Butterly constructed a detailed and comprehensive hypothetical IPRSP in the assumed absence of the Highway and RRF on the subject land. Mr Butterly advanced that view in his oral evidence (ts 4065). No other planner adopted Mr Butterly's hypothetical IPRSP.

1333 Secondly, in Mr Auret's statement of 27 July 2010 (exhibit 183E), he expressed the opinion that, on certain assumptions, the subject land would have been designated future urban in the hypothetical IPRSP as part of the urban node of Ravenswood. As I have said in section 5.3, that view appeared to be expressed on the basis of a Ravenswood node of the same size as is reflected in the actual IPRSP. It may also reflect the opinion expressed by the plaintiffs' planners as recorded in the joint statement of experts (exhibit 241). On this view, the subject land would have been part of a reconfigured, but not expanded, urban node of Ravenswood in the hypothetical IPRSP. In the planners' concurrent session concerned with the hypothetical IPRSP, no planner articulated or adopted this view, as distinct from the third approach, to which I now turn.

1334 In his oral evidence, Mr Auret expressed an opinion on the hypothetical IPRSP that, whilst drawing on his written evidence, went beyond what appeared in his July 2010 statement. His opinion was that, on certain assumptions, the subject land would have been designated future urban in the hypothetical IPRSP, as part of a reconfigured and expanded Ravenswood urban node. I refer to the expanded Ravenswood urban node because, on Mr Auret's assumptions, he considered that the availability of the subject land would have enabled the Ravenswood node to be configured to produce a population potential of between 12,000 and 16,000 people, whereas in the actual IPRSP, the population potential of Ravenswood was 10,476 people. Other of the plaintiffs' planners, and, to an extent, Mr Bulstrode, supported and adopted Mr Auret's reasoning.

1335 Question 1 of the agenda for the planners in the concurrent expert evidence session was based on the assumption that the Highway and RRF had never been proposed for the subject land and was in these terms: Assuming that lots 191 and 192 had not already been rezoned:(a) Would lots 191 and 192 have been included in the IPRSP in 1996/1997 as future urban; and

(b) if so, what category of future urban?

1336 To my mind, there is a danger in approaching the question of the designation of the subject land in the hypothetical IPRSP in the absence of the Highway as an abstract question. This is so for two reasons. First, the rationale for the hypothetical IPRSP question lies only in the discounting of that which is attributable to the proposed public works. Consequently, departure from the actual IPRSP is justified only if, and to the extent that, the presence or absence of a provision in the IPRSP is attributable to (one of) the proposed public works. Thus, in my view, the proper approach involves the following steps:

(1) start with the (actual) provisions of the IPRSP;

(2) identify those elements of the IPRSP that are attributable to the proposed public works; and

(3) identify, with reasoning, how, in accordance with orderly and proper planning, those elements would have been treated in the IPRSP in the absence of the proposed public works.

1337 If, and to the extent that, an opinion on the designation of the subject land in the hypothetical IPRSP is given in the abstract, without articulating what would be different in the hypothetical IPRSP and why, then it may not address the salient question, or is not supported by articulated reasoning. Moreover, it may involve what the defendants characterise as a 'clean slate' approach.

1338 This action does not provide an occasion to revisit the IPRSP generally, or to correct any perceived mistakes in the planning decisions reflected in the IPRSP. The reports of the plaintiffs' planners did not always adhere to that.

For example, in his first report, Mr Robinson expressed the view that the IPRSP 'inappropriately dismissed' what had been said in the SWAT report (exhibit 180A [278]). As it happens, I do not agree with that proposition. More importantly, even if true, it would be beside the point. The only justification for a departure from the actual IPRSP is if, and to the extent that, some element of it is attributable to the proposed public works.

1339 Secondly, as I have outlined in section 5.2, the IPRSP adopted urban villages as the form of urban development, and espoused principles about urban villages. One of the proposed urban villages was Ravenswood. If the subject land was to be designated future urban, that would be as part of the Ravenswood urban village. Consequently, in assessing the weight of an opinion that the subject land would have been designated future urban in the hypothetical IPRSP, it is relevant to consider whether it is accompanied by reasoning explaining how the configuration of the Ravenswood urban node in the hypothetical IPRSP is consistent with what is said about the form of urban development in the actual IPRSP, or whether it, at least, says something on that topic. If not, it may be difficult to give the opinion substantial weight.

1340 However, the plaintiffs' hypothetical IPRSP case, as articulated in opening and closing, did not identify the boundaries of the Ravenswood node in the hypothetical IPRSP. There is no doubt that the urban zoned areas of Ravenswood and lots 20 and 21 (part of Riverland Ramble) would have been urban in the hypothetical IPRSP. Despite some evidence to the contrary, I think it clear that the remainder of Riverland Ramble (lot 22) would have been future urban. The question is what additional land would have comprised the Ravenswood urban village.

1341 In the 2010 opening, following a complaint by the defendants, the plaintiffs articulated how, in the absence of the proposed public works, the IPRSP would have differed from the actual IPRSP (ts 2973 2983). The plaintiffs articulated the position as follows. In the hypothetical 'no proposed public works' IPRSP, the Ravenswood node would have been constructed to house 10,000 12,000 people. The land designated urban in the IPRSP (namely Riverland Ramble) would have been similarly designated in the hypothetical IPRSP. The future urban category B land east of the urban land in Riverland Ramble through to the power transmission lines would have been lesser in extent. It would have ended at the western boundary of lot 52, so as to only include lot 22. Instead, there would have been some additional future urban category B land north of Old Mandurah Road. The additional future urban category B land would have extended to the west along Pinjarra Road, as far as Fiegert Road, including the subject land. The additional future urban category B land would 'probably' have included some of the land north of Old Mandurah Road that is immediately north of Riverland Ramble. The plaintiffs were unable to specify how far north the future urban category B land extended.

1342 The plaintiffs' closing submissions referred to numerous parts of the evidence of planners on the hypothetical IPRSP without identifying what, on the plaintiffs' case, would have comprised the urban node of Ravenswood in the hypothetical IPRSP. In the conclusion to this section of their submissions, the plaintiffs contend that the Ravenswood node would have included the subject land 'as well as a portion of the land to the east' (par 5.171), without identifying that other land.

1343 Thus, on the plaintiffs' case, the subject land would have been part of the Ravenswood node in the hypothetical IPRSP, together with some other unspecified land north of Old Mandurah Road. As I have said, Mr Auret gave a reason why he did not identify the boundaries of the Ravenswood node in the hypothetical IPRSP. Nevertheless, as I will explain, in my view, the difficulty in specifying the hypothetical Ravenswood urban village reflects a significant obstacle for the plaintiffs' hypothetical IPRSP case. In short, in my view, any hypothetical IPRSP must reflect and conform with the urban village principles in the IPRSP. I am not persuaded that the Ravenswood node would, consistently with those principles, have been configured in the hypothetical IPRSP so as to include the subject land.

1344 I turn to explain in detail why I do not accept the plaintiffs' hypothetical IPRSP case.

5.5 The hypothetical IPRSP question: analysis and conclusions

1345 For the reasons that follow, I am not satisfied that, as a matter of orderly and proper planning, but for the proposed public works, the subject land would have been designated future urban in the IPRSP. I find that in the hypothetical 'no proposed public works' IPRSP, the subject land would have been designated rural. I will explain these conclusions by reference to the planners' opinions relied upon by the plaintiffs. I will deal first with Mr Butterly's opinion, then Mr Auret's opinion on a reconfigured and expanded Ravenswood node, and then deal with the hypothetical IPRSP involving a reconfigured, but not expanded, Ravenswood node. I deal with the reconfigured,

but not expanded, Ravenswood node last because that view was not articulated or adopted in any planner's oral evidence. 5.5.1 Mr Butterly's hypothetical IPRSP: conclusions

1346 In my opinion, Mr Butterly's methodology in constructing a hypothetical IPRSP does not accord with the approach required by the law in constructing the IPRSP in the assumed absence of the proposed public works. That is because, in my view, neither Mr Butterly's methodology nor his conclusions are consonant with fundamental principles in the IPRSP about urban form.

1347 In my view, the following principles in the IPRSP are not attributable to the proposed public works. The IPRSP identified that urbanisation was to occur in urban nodes or urban villages. It emphasised the fundamental significance of ensuring that an urban village was compact and well defined, with clearly demarcated boundaries. The IPRSP chose Option 2 as the preferred model. In Option 2, urban villages were based on a notional population of 12,000 16,000 people.

1348 In my opinion, in constructing his hypothetical IPRSP, Mr Butterly has not sought to adhere to these principles, and his conclusions are not consistent with them.

1349 In constructing his hypothetical IPRSP, Mr Butterly did not focus on the identification of appropriate urban villages. Rather, he asked the general question of 'where would urban areas likely to have occurred under an alternative [IPRSP] in which there were no plans for a Perth Bunbury Highway?' (exhibit 194A [5.28]). He identified 12 broad areas for potential urbanisation and compared the attributes of those areas. In that sense, he approached the hypothetical IPRSP with a 'clean slate', rather than in the framework of analysis adopted in the IPRSP. There is nothing in his report that demonstrates that he was mindful of identifying urban villages of the scale contemplated under Option 2 in the IPRSP or of any particular scale. Moreover, his conclusions demonstrate that he did not attempt to do so.

1350 Mr Butterly did not know the population potential of the additional urban and future urban land at Ravenswood that he identified. That in itself is some indication that Mr Butterly was not endeavouring to produce an urban village of any particular scale. His written and oral evidence did not identify the land area of the additional urban and future urban land that he proposed. Based on a visual assessment, the subject land and five further lots to the north proposed by Mr Butterly would have been an area in excess of 350 ha.

1351 Similarly, so far as can be discerned from his report, Mr Butterly did not consider the effect on the urban village of ***South*** Yunderup of removing some of the future urban land proposed for Austin Cove.

1352 Further, in assessing areas for potential urbanisation, Mr Butterly refers to information and events from after 1997 that would not have been known when drafting the actual IPRSP. See, for example, exhibit 194A, 27/55 56 [5.32], [5.38]. A hypothetical IPRSP should not be constructed with the benefit of hindsight.

1353 Further, the urban and future urban land ***around*** Ravenswood in Mr Butterly's hypothetical IPRSP does not accord with the IPRSP model of urban villages that are a compact consolidated urban area. To the contrary, it involves adding a large elongated future urban area to Ravenswood and Riverland Ramble, in circumstances where only lot 191 has any direct connection to any of the then existing urban land at Ravenswood and Riverland Ramble. (As I have explained in section 4, that direct connection was very limited.) I share Mr Auret's opinion that Mr Butterly's hypothetical IPRSP does not accord with and reflect the urban village principles in the IPRSP (ts 4099, 4177).

1354 For these reasons, I do not accept Mr Butterly's opinion.

1355 Further, Mr Butterly has impermissibly relocated the RRF to a particular location immediately to the east of lot 191. Assuming away the proposed public works does not involve relocating it in a specific location to give the subject land the potential benefits of the public work.

1356 The defendants contend that there is a further reason why Mr Butterly's opinion should be rejected. The defendants contend that Mr Butterly's postulation of Road A is impermissible as:

(a) Road A is substantially equivalent to the Highway and the postulation of an alternative location for the Highway is impermissible; or

(b) alternatively, that if Road A is not the equivalent of the Highway, there is no basis for its postulation.

1357 Given the conclusions I have reached in this section 5.5.1, it is not necessary to deal with these contentions of the defendants. 5.5.2 Mr Auret's opinion of a reconfigured and expanded Ravenswood node: analysis and conclusions

1358 At times, Mr Auret was described as the 'author' of the IPRSP. He described himself as the author of the 1996 IPRSP. He was the person primarily responsible for drafting the 1996 IPRSP and was, in that sense, its author. However, it should be borne in mind that the IPRSP is an instrument of the WAPC, not of Mr Auret. In effect, Mr Auret made recommendations and the WAPC made decisions. Further, Mr Auret was only involved in preparing the 1996 IPRSP, and not the final version (see exhibit 6, 1/6/263).

1359 Mr Auret's evidence must be viewed in this light. Some of his evidence is background historical fact about the IPRSP process. Other parts of his evidence were expressed in terms of what he would have recommended. That evidence may be taken as conveying an implicit opinion that the WAPC would have adopted his recommendation. It is what the WAPC would have done or more correctly, what would have reflected orderly and proper planning in the assumed state of affairs, not what Mr Auret would have done, that is of central significance.

1360 Partly for that reason, in my view, the starting point in determining what the WAPC would have done as a matter of orderly and proper planning is the provisions of the IPRSP, subject to identifying what elements of it are attributable to the proposed public works. In that way, the objectively ascertained thinking of the WAPC, revealed by the provisions of the IPRSP, is a better guide than the subjective thinking of Mr Auret almost 15 years after the event.

1361 In any case, as will emerge, for reasons independent of those considerations, I do not think that Mr Auret's evidence sustains an affirmative answer to the hypothetical IPRSP question.

1362 As I understand Mr Auret's written and oral evidence, the strands of his reasoning may be summarised as follows:

(1) The IPRSP espoused a model of population of 12,000 16,000 people for an urban village.

(2) The Ravenswood urban village was identified in the IPRSP to be between the Murray River and Old Mandurah Road, being an area of 388 ha, with a population potential of 10,500 people.

(3) The reason that the Ravenswood urban village was smaller than the general urban village model was that no landowner north of Old Mandurah Road had pursued or expressed interest in urbanisation.

(4) In the absence of the proposed public works, Mr Auret assumed that the plaintiffs would have pursued urbanisation of the subject land, meaning that, in the hypothetical state of affairs, there would have been an indication of owner interest in urbanisation north of Old Mandurah Road.

(5) In those circumstances, inclusion of the subject land in the urban village of Ravenswood would have enabled the Ravenswood node to conform with the IPRSP general model of 12,000 16,000 people.

(6) That fact, in itself, does not automatically mean that the subject land would have been added to the Ravenswood node, in order to achieve a population of between 12,000 and 16,000 people. It was still necessary that the Ravenswood node conform with the village principles in the IPRSP. Mr Auret assumed that consultant planners engaged by the plaintiffs would have prepared a district structure plan that would have demonstrated how the subject land could be designated future urban as part of an urban village of 12,000 16,000 people that conformed with the principles of urban villages in the IPRSP.

(7) The subject land would have been preferable to the East Ravenswood land for designation as future urban because, among other reasons:

(a) the East Ravenswood land was environmentally constrained and not as well located as the subject land, being further from Mandurah and being further from the existing and planned servicing and public transport infrastructure on Pinjarra Road; and

(b) by contrast, the subject land was free of physical, environmental and servicing constraints, closer to Mandurah and located on Pinjarra Road.

(8) There had been previous indications of the urban potential of the subject land and surrounding land in earlier planning documents.

1363 The first two propositions are not controversial. The third proposition is controversial. Before dealing with it, I will make findings about the assumptions made by Mr Auret and whether those assumptions would, in the hypothetical state of affairs, have been true.

1364 It is not in doubt that Mr Auret made an assumption to the effect summarised in proposition 4. However, whether he made an assumption to the effect in proposition 6, or whether he expressed an opinion to that effect, is in issue. The plaintiffs invite the latter understanding of his evidence. 5.5.2.1 WOULD THE PLAINTIFFS HAVE PURSUED URBANISATION OF THE SUBJECT LAND?

1365 The first of Mr Auret's assumptions, proposition 4 in my summary, is that, prior to 1996, in the absence of the proposed public works, the plaintiffs had been pursuing the possible urban development of their land, including by engaging consultant planners and communicating their intentions with the shire and WAPC. I am not satisfied that those assumptions would have been true in the hypothetical 'no proposed public works' state of affairs. For the reasons set out in section 4.3 above:

(a) I find that, assuming away the proposed public works, the plaintiffs would not have engaged planning consultants to pursue urban rezoning of the subject land and would not otherwise have taken steps to that end by 1996 or 1997; and

(b) I am not satisfied that in the period of 1990 to 1997, the plaintiffs intended or wanted to have the subject land rezoned to urban.

1366 That conclusion is fatal to acceptance of Mr Auret's opinion. However, there is an additional assumption made by Mr Auret, the truth of which, in the hypothetical 'no proposed public works' state of affairs, I am not satisfied. 5.5.2.2 THE PREPARATION AND CONTENT OF A DISTRICT STRUCTURE PLAN

1367 In my opinion, one of Mr Auret's further assumptions was that the planning consultants engaged by the plaintiffs had prepared a district structure plan which demonstrated how an urban village of 12,000 16,000 people that conformed with the principles of urban villages in the IPRSP would be achieved by including the subject land (and perhaps surrounding land) as future urban. As I have explained in section 5.3.4, a similar, although not identical, assumption was made by Mr Bulstrode.

1368 The plaintiffs submit that there was a 'consensus' among planners that issues of connectivity, consolidation, urban sprawl and the like could be overcome by district structure planning (closing submissions pars 5.168 5.170; reply pars 4.4, 4.48). I do not accept that submission. In particular, I do not accept that the planners expressed an opinion that district structure planning would overcome issues of this kind. Rather, the planners, particularly Mr Auret and Mr Bulstrode, articulated an assumption to that effect, upon which their opinions rested.

1369 Further, if, contrary to my view, any planner expressed the opinion that district structure planning would have overcome concerns about whether designation of the subject land as future urban was consistent with urban village principles in the IPRSP, no reasoning was articulated in support of that opinion. I turn to the evidence in detail to explain these conclusions.

1370 I begin with Mr Auret's evidence.

1371 In my view, a reading of Mr Auret's evidence as a whole reveals an assumption on his part that, in the absence of the proposed public works, a planning consultant would have prepared a structure plan that demonstrated an urban village, including the subject land, in accordance with the IPRSP urban village principles. Mr Auret does not express an opinion on whether that assumption would have been fulfilled. Still less does he articulate any reasoning in support of an opinion to that effect.

1372 Mr Auret articulated an assumption to this effect in the earlier parts of his evidence. See, for example, ts 4059 4060, 4062.

1373 Later in his evidence, he expressed the position in this way: I don't think the structure plan would have been too sympathetic to an isolated idea for the subject land to have been just included as [future] urban category A without a proper contextual structure plan showing how this would be done. The point is whether or not there were objections from the adjoining landowners, if the structure planning was such that it demonstrated that a good urban village of 12 to 16 thousand would be achieved by the inclusion of that land and wouldn't in the short term interfere with the cattle grazing operations of the adjoining land, on those assumptions I feel serious consideration would

have been given to including the subject land as part of an urban village whose viability had been demonstrated through district structure planning processes (ts 4083). (emphasis added)

1374 To my mind, this passage supports two propositions about Mr Auret's evidence. First, for the purposes of his opinion, he assumes that structure planning demonstrated how the subject land would be included in a Ravenswood node of 12,000 16,000 people, consistent with IPRSP urban village principles. Secondly, he explains why he makes, and needs to make, this assumption. Without any such structure planning, the addition of the subject land to Riverland Ramble and Ravenswood would not have created an urban village consistent with the urban village principles in the IPRSP: see the first sentence of the passage set out. In my view, these two propositions reflect Mr Auret's evidence as a whole. That is reflected in proposition 6 in my summary of Mr Auret's reasoning.

1375 It is open to interpret Mr Rowe's evidence (ts 4063) as taking a different approach from Mr Auret as regards proposition 6. Mr Rowe's evidence might be understood to mean that, given the benefit of increasing the urban village of Ravenswood to something above 12,000 people (the 'minimum' base), the 88 ha of the subject land could have simply been added to what was proposed in the IPRSP. If that is what was meant by Mr Rowe, I do not accept his evidence. In my view, a hypothetical IPRSP that added the subject land to the urban and future urban land that was identified ***around*** Ravenswood in the actual IPRSP would not conform with the IPRSP urban village principles requiring an urban node that is compact and well defined.

1376 A little later in his evidence, in discussing the urban form and role of Old Mandurah Road in the IPRSP, Mr Auret said as follows: [P]rior to 1993, 94 the general model for structure planning was based on corridortype development. By 95, 96 it had changed to one of distinct communities in urban villages or towns where each town was a distinct physical entity.

...

With regard to our current situation in Ravenswood, bearing in mind that these were the sorts of ideas floating ***around*** in vogue at the time, I submit that those principles and concepts for an urban village of 12 to 16 thousand would have had to have been demonstrated by way of district level structure planning and I am assuming for purposes of my evidence that such had indeed been done and such had indeed demonstrated the viability of an urban node being produced which included the subject land.

...

Now, I don't mean to infer by any of this that it would have been open slather. All I'm saying is that the whole idea that there has to be some impenetrable technical boundary or demarcation beyond which there is some psychological barrier to follow the expansion doesn't have to be there if structure planning for the area at the time had demonstrated both how the urban village in this case could be handled and if indeed there was expansion, how it could be further integrated (ts 4084 4085). (emphasis added)

1377 When I asked Mr Auret if he could identify the boundaries of the reconfigured Ravenswood node in his hypothetical IPRSP, he responded as follows: Your Honour, I'm not in a position to actually draw lines because as I said, the extent it would be based on the assumption that a district level structure plan had drawn those lines and had demonstrated the boundaries. Now, I would have had to rely on the likes of Mr Rowe to come and prove that. However, I said, or if I didn't say it I should have said, it would have been most likely to have included lots 192, 191 and 190 in the most ***south*** westerly of the land fronting Old Pinjarra Road (ts 4090). (emphasis added)

1378 To my mind, all these passages support the understanding of Mr Auret's evidence that I have stated.

1379 In my view, to the extent that Mr Bulstrode expressed any support for an affirmative answer to the hypothetical IPRSP question, one of the assumptions on which that was based was that planning consultants engaged by the

plaintiffs would have prepared a suitable district structure plan. Mr Bulstrode identified that at the outset of his evidence (ts 4078). He considered it essential that there be a district structure plan to provide a logical boundary for the limits of the urban area (see also ts 4088, 4104 4105).

1380 Mr Rowe was not convinced that a district structure plan was absolutely necessary, but agreed that it was practice and would likely have been required (ts 4108). That reflects or suggests a view that does not accord with my view, or that of Mr Auret, about the purpose and fundamental significance of the contemplated district structure plan. Mr Rowe then explained how he would have gone about designing a structure plan that would provide for boundaries to the urban village: MR ROWE: Yes. Likely and it has been my practice to try and identify a centre or a focus of a structure plan. In this circumstance, and knowing this area, I would likely concentrate ***around*** the intersection of Pinjarra Road and Old Mandurah Road. It gives good access, good exposure, for a focus or a community or town centre.

MR McCUSKER: Yes.

MR ROWE: Then from there develop an area of urban land that would generate the numbers that have been talked about in terms of the village and that might need up to 600 hectares. The concept of access and internal walkability and communication would likely determine not so much a circle but a radial approach north and east rather than an elongated corridor shape, so as a result you might find that you end up identifying land several hundreds of metres or more in a northerly, north-easterly and easterly direction (ts 4108).

1381 His evidence at ts 4285 4287 related to preparation of a district structure plan in the different context where the land had already been designated future urban in the IPRSP.

1382 In my view, that evidence set out above and Mr Rowe's evidence generally does not sustain a conclusion that a district structure plan would, on the balance of probabilities, have been prepared so as to demonstrate to the WAPC how the subject land would be included in the Ravenswood node in a way that conformed with and reflected IPRSP urban village principles. The evidence is in very general terms. The evidence was directed to the approach that Mr Rowe would take in preparing a district structure plan. It is not directed to the likelihood of the production of a structure plan that demonstrated what I have just explained.

1383 It may be noticed that, in that passage, Mr Rowe said that in designing a district structure plan he would likely have concentrated on the intersection of Pinjarra Road and Old Mandurah Road as the focal point or centre. That evidence is not an opinion that, in the hypothetical IPRSP, the Ravenswood node would have been reconfigured so as to radiate from a focal point at that junction. Mr Bulstrode expressed the view that locating the focal point at that junction could have been proposed at that time, and would have been 'an appropriate planning approach' (ts 4163). That is not an opinion on how the hypothetical IPRSP would have identified any focal point for development of Ravenswood. In any event, for the reasons in the following paragraph, I am not persuaded that the absence of the proposed public works, and consequent availability of the subject land, would have led to the identification of that junction as the focal point for future urbanisation of Ravenswood in the hypothetical IPRSP.

1384 I accept Mr Moran's evidence (ts 4113). By 1995, lots 20 and 21 within Riverland Ramble had been rezoned to urban. That reinforced the Ravenswood townsite as the starting point for future urbanisation. Further, the urbanisation of Riverland Ramble was proposed to be staged over 10 years. That urbanisation was not proposed to start in the northwest corner of lot 20 adjoining the junction of Old Mandurah Road and Pinjarra Road. Moreover, as at 1996, the Riverland Ramble commercial centre was proposed to be on Pinjarra Road towards the southwest corner of Riverland Ramble (see exhibit 193A, 46B/122 123; exhibit RR146.57; exhibit 245H, 49A/208, 211). As at 1996 and 1997, there was no urban development contemplated in the short term ***around*** the junction of Old Mandurah Road and Pinjarra Road and, in my view, any environmental or locational advantages of that junction over the existing Ravenswood townsite would not have led to a decision in 1996 1997 to make that junction the focal point for future urban development.

1385 In my view, no planner gave evidence to the effect that, in his opinion, a district structure plan would have been prepared that would have included the subject land as future urban in the Ravenswood node in a way that was consistent with the IPRSP urban village principles. If any planner is to be taken as implicitly expressing an opinion to that effect, it was not supported by any articulated reasoning and I would not accept it.

1386 For these reasons, I find that Mr Auret's assumption about what would have been demonstrated by a district structure plan has not been proven to be true in the hypothetical state of affairs. That provides a second distinct reason why Mr Auret's opinion does not sustain an affirmative answer to the hypothetical IPRSP question. 5.5.2.3 INTEREST IN URBANISATION NORTH OF OLD MANDURAH ROAD

1387 I turn to the third proposition of Mr Auret's reasoning, as outlined in my summary at the beginning of this section 5.5.2. Part of Mr Auret's reasoning was his view that the reason the Ravenswood urban village in the actual IPRSP was smaller than the general urban village model of 12,000 16,000 people was that no landowner north of Old Mandurah Road had pursued or expressed interest in urbanisation. I do not accept that view. A number of considerations lead me to that conclusion.

1388 First, given the longterm role and purpose of a structure plan, it would seem surprising if the absence of landowner support were a barrier to designating land, for example, as future urban category B, for longterm urbanisation.

1389 Secondly, the IPRSP is described as a nonstatutory 'ideas plan' or 'policy guide', which left the task of rezoning land to be undertaken by regional and local town planning schemes (exhibit 6, 1/6/272). Given that the 1996 IPRSP was published in draft for public comment, the role of the IPRSP in designating, as opposed to rezoning, land as future urban does not, to my mind, suggest that an indication of support for urbanisation by landowners was specifically required.

1390 Thirdly, there is nothing to suggest that landowners' support for urbanisation was obtained before the designation of the substantial area of future urban land at Furnissdale. In my view, the same is true of the future urban category B land designated at East Ravenswood. The plaintiffs submit that, ultimately, the location of urban and future urban areas in Ravenswood in the actual IPRSP was 'a direct consequence of knowing that the landowners ***south*** of Old Mandurah Road were interested in the urbanisation of their land', whereas there had been no such indication from landowners north of Old Mandurah Road (closing submissions par 5.119). I read this as asserting that the owners of the East Ravenswood land (lots 52, 41 and 2) had indicated their support for their land being designated as future urban in the IPRSP. I do not accept that submission.

1391 The evidence of the owners of the East Ravenswood land is primarily or exclusively directed to events in 2005 2007 and does not contain evidence in support of the plaintiffs' submission: see exhibit 77; exhibit 78; exhibit 84.

1392 To my mind, the evidence of Mr Auret on which the plaintiffs rely (ts 4057, 4092) does not support a reading that the owners of the East Ravenswood land had indicated a desire for urbanisation of their land. The future urban land in Furnissdale and East Ravenswood is not recorded as an MDP project or other developer initiative as reflected in Appendix 1 to the 1996 IPRSP (exhibit 7, 1/10/163). My impression from Mr Auret's evidence is that East Ravenswood was included simply due to its proximity to Riverland Ramble and its location ***south*** of Old Mandurah Road (ts 4057).

1393 Fourthly, designation of land north of Old Mandurah Road for future urban was contemplated in the 1996 IPRSP under Option 3. In that context, absence of landowner support for urbanisation was evidently not an impediment to future urban designation. The choice of Option 2 in preference to Option 3 was not based on the absence of landowner support for urbanisation in accordance with Option 3. Indeed, to the contrary, Option 3 was said best to reflect the expectations of owners and developers for longterm urbanisation. Further, the choice of Option 2 in preference to Option 3 is not attributable to the proposed public works. The reasons for that choice are explained in the 1996 IPRSP (see section 5.2.1 above). The choice of Option 2 reflects a determination of what is the appropriate accommodation of the relative advantages and disadvantages of more and less provision for future urban land.

1394 Fifthly, in a draft land use plan in early 2005 (exhibit 205), Mr Auret contemplated commercial and longterm future urban land north of Old Mandurah Road, including the subject land, regardless of any absence of owner

support for those notions. As Mr Flugge accepted, that was an indication that urbanisation north of Old Mandurah Road was considered an option, but in the IPRSP it was nevertheless decided to restrict Ravenswood in Option 2 to ***south*** of Old Mandurah Road (ts 4430).

1395 Sixthly, even on Mr Auret's evidence, absence of landowner support would not, of itself, exclude future urban designation in the hypothetical IPRSP. Mr Auret expressed the view that, if the subject land had been available, it might have been designated future urban in conjunction with land north of Old Mandurah Road, not withstanding any absence of support from the owners of that adjoining land: see exhibit 183E [33]; ts 4062. Mr Auret also indicated that shortterm opposition to urbanisation was not a permanent obstacle to urbanisation north of Old Mandurah Road (ts 4059, 4062, 4083).

1396 Seventhly, as Mr O'Neill and Mr Moran said, there are indications in the IPRSP that the general ideal of an urban village of 12,000 16,000 people was not seen as an absolute goal, and the choice was made to designate a village at Ravenswood of a lesser size. Given that, in Option 3, land north of Old Mandurah Road was proposed for future urbanisation, it may be inferred that the decision not to include future urban land north of Old Mandurah Road in Option 2 was based, not on a lack of support by landowners, but on some other reason.

1397 As Mr Moran and Mr O'Neill said, if attainment of the ideal urban village was paramount, Old Mandurah Road would not have been identified as a northern boundary and other land to the north could have been included in the urban village (ts 4067, 4069, 4092). Mr Moran expressed the view that although it could have been included, land north of Old Mandurah Road was not included because it was not seen to be necessary in terms of expected population in the planning horizons contemplated in the IPRSP. (That view derives some support from Mr Auret's evidence in his statement: exhibit 183E [21] [22], referred to above.) Old Mandurah Road provided a clearly demarcated boundary. That did not preclude subsequent ultimate expansion of the urban village across Old Mandurah Road (ts 4067). Mr Moran characterised the approach adopted in the IPRSP for Ravenswood as being the 'first stage in an evolving urban village' (ts 4114).

1398 The proposed urban village of Furnissdale did not have a scale within the ideal range of 12,000 16,000 people in either the 1996 IPRSP or the final 1997 IPRSP. In the 1996 IPRSP, Furnissdale was proposed to have a population of 11,600 people; in the 1997 IPRSP, it was 10,400 people. That supports the notion that attainment of the ideal of 12,000 16,000 was not an absolute goal.

1399 As Mr O'Neill pointed out, both the 1996 IPRSP and 1997 IPRSP stated that the urban villages of Furnissdale and Ravenswood were too small to be regarded as full districts for structure planning purposes, but should nevertheless be subject to district/local structure plans (exhibit 7, 1/10/149; exhibit 6, 1/6/319).

1400 In my opinion, it was not the absence of landowner support for urbanisation north of Old Mandurah Road that led to the absence of designation of future urban land in that area. Rather, the proper conclusion is that, in the context of the general choice made in the IPRSP of Option 2, a choice was made to make Ravenswood a village of 10,500 people, bounded by Old Mandurah Road, on the basis that was sufficient for the relevant planning horizon and provided a discrete and clearly defined boundary. That choice was not attributable to the proposed public works. For these reasons, I find that the choice in the IPRSP of the scale of Ravenswood as an urban village with a population potential of 10,500 people is not to be discounted or disregarded.

1401 Consequently, for the reasons set out above, I do not accept the third proposition in my summary of Mr Auret's reasoning. Like each of the two assumptions made by Mr Auret to which I have referred, this step appears to me to be essential to his reasoning in answering the hypothetical IPRSP question. Consequently, my rejection of that step provides a third discrete ground for not accepting Mr Auret's opinion on the hypothetical IPRSP question.
5.5.2.4 PREVIOUS INDICATIONS OF THE SUBJECT LAND'S URBAN POTENTIAL

1402 For the sake of completeness, I will say something about proposition 8 of Mr Auret's reasoning. To some extent, Mr Auret, and the plaintiffs' planners in their reports generally, refer to earlier planning documents that are said to support the recognised urban potential of the subject land. For example, there are references to the TS Martin report (strategy 2) and to the SWAT report. For two main reasons, I do not think that anything in earlier planning documents sustains an affirmative answer to the hypothetical IPRSP question.

1403 First, the earlier documents provide very limited support for urbanisation of the subject land and surrounding land north of Old Mandurah Road. In particular, they do not support urbanisation in the short or medium term as at 1996 to 1997. See section 4.8 above. Mr Auret said that, whilst Option 3 was an interpretation or expansion of the

pattern of urbanisation in the SWAT report, the SWAT report did not feature in Option 2 (ts 4207). Option 2 had a planning timeframe to 2041. Secondly, the IPRSP considered all the historical planning documents and gave them such weight as was determined to be appropriate. The hypothetical IPRSP is not an occasion to revisit that weighting, except to the extent that an element of IPRSP is attributable to the proposed public works.

1404 I will deal with proposition 7 of Mr Auret's reasoning in section 5.5.3. 5.5.3 The subject land as part of a reconfigured, but not expanded, Ravenswood

1405 As I have explained in section 5.4, it is possible to discern a third basis for the view that, but for the proposed public works, the subject land would have been designated future urban in the hypothetical IPRSP. That basis is that the subject land would have been part of a reconfigured, but not expanded, urban node of Ravenswood in the hypothetical IPRSP. In essence, the node of Ravenswood would be reconfigured by deleting the 180 or so hectares at East Ravenswood and replacing it with the subject land and some other land north of Old Mandurah Road to create an urban village of 10,500 people. That other land is not identified.

1406 The plaintiffs' closing submissions do not make clear that they invite acceptance of this approach as a distinct alternative to Mr Auret's reconfigured and expanded Ravenswood node. Moreover, no planner espoused this approach in oral evidence. Nevertheless, for the sake of completeness, I deal with it. 5.5.3.1 EVIDENCE OF THE PLANNERS

1407 As I have said, no planner espoused the view in oral evidence that the subject land would have been designated future urban as part of a reconfigured, but not expanded, urban node of Ravenswood. To my mind, that fact in itself weighs heavily against acceptance of that conclusion. Because this view was not espoused in oral evidence by any planner, it was not tested by interchange of views between the planners or by crossexamination. In the circumstances, I would be cautious before accepting this view. In any event, I am not persuaded of its correctness.

1408 This view finds little support in the reports of the plaintiffs' planners.

1409 An opinion to this effect may be found in Mr Auret's written statement. However, in my view, his written statement must be read in the light of, and subject to, his oral evidence. In particular, consistently with what is said in exhibit 183E [27], his opinion is, as I have said, subject to the assumptions I identified in section 5.5.2. As I explained in that section, I find that those assumptions are not established in the hypothetical state of affairs. Consequently, Mr Auret's opinion does not sustain an affirmative answer to the hypothetical IPRSP question.

1410 An opinion to this effect may also be found in the planners' joint report (exhibit 241). However, that must be seen in light of the failure of any planner to espouse an opinion to this effect in his oral evidence. Further, the planners' report does not state with specificity how the Ravenswood node would be reconfigured in the IPRSP and simply stated that the subject land and 'land adjacent to it' would have been designated future urban.

1411 Further, both Mr Flugge and Mr Robinson made clear in their oral evidence that their opinions were based on an assumption that the landowners were progressing attempts to have the land urbanised. 5.5.3.2 IS THE SUBJECT LAND PREFERABLE TO THE EAST RAVENSWOOD LAND?

1412 The reasoning in support of including the subject land in a reconfigured Ravenswood node, whether expanded or not, rests primarily on the superior location and characteristics of the subject land as compared to East Ravenswood. The points are outlined in proposition 7 of my summary of Mr Auret's reasoning in section 5.5.2. East Ravenswood was environmentally constrained and distant from Mandurah and from the infrastructure located at or near Pinjarra Road. By comparison, the subject land was free of physical, environmental and servicing constraints, was located on Pinjarra Road, and was closer to Mandurah. Moreover, it is contended that the known constraints of the East Ravenswood land meant that an urban village that included that land was less likely to achieve the aims of an urban village, compared to a village that instead contained the subject land.

1413 The evidence of Mr Auret and Mr Bulstrode was, and I accept, that environmental concerns about lot 52 and part of lot 2, containing remnant vegetation, were known during the IPRSP process (ts 4059, 4157; exhibit 183E [24]). At one point in his evidence, Mr Auret said that East Ravenswood was included as future urban B, 'completely disregarding any environmental constraints' (ts 3989). I do not agree with that way of expressing the position. To my mind, a better way to put it would be to say that East Ravenswood was included as future urban B, notwithstanding its known environmental constraints. Those constraints were not overlooked or disregarded. They were taken into account. No doubt those constraints explain why the land was designated category B. Mr Auret said

that he was aware of the remnant vegetation on lot 52 in the preparation of the 1996 IPRSP. He said that he did not consider that one block of remnant vegetation would be determinative or important in the context of the question of longterm urbanisation (ts 4181). Given that the land was designated future urban category B in the 1997 IPRSP, it seems to me to be evident that the WAPC took a similar view. I accept Mr O'Neill's evidence substantially to this effect (ts 4130, 4137, 4166).

1414 In this context, the plaintiffs also point to exhibit 204. Exhibit 204 was admitted provisionally, over the objection of the defendants. It is notes of a meeting on 18 December 1997 regarding a preliminary draft of the PRS environmental report. It records agreement at the meeting to recommend that lot 52 be retained in the PRS as rural instead of urban deferred, in recognition that further investigations were required to confirm whether the vegetation was of regional significance, and given that the land was shown as future urban category B.

1415 In considering the assistance derived from this evidence, it is necessary to understand the purpose of the meeting. The meeting was concerned with the early stages of preparation of the PRS based on the IPRSP. It was not concerned with the finalisation of the IPRSP. A recommendation that lot 52 be zoned rural in the PRS is entirely consistent with its designation as future urban category B in the IPRSP. Given the definitions of future urban categories A1, A2 and B, and given the different planning horizons of the IPRSP and the PRS, it is to be expected that some of the land designated future urban category B would be zoned rural in the PRS, but would be expected to be urbanised in the longer term.

1416 The defendants objected to admission of the documents on grounds of relevance. As I explained in sch 1 to these reasons, I am not persuaded to exclude the document on grounds of relevance, but, for the reasons just explained, it seems to me to be of very limited assistance.

1417 The plaintiffs submit that the known constraints arising from the remnant vegetation on lot 52 meant that East Ravenswood would be fragmented from, not connected with, the proposed urban village of Ravenswood. They submit that Mr O'Neill's evidence supports this (ts 4137). I do not think Mr O'Neill's evidence supports this submission. As Mr O'Neill said, the expectation reflected in the IPRSP was that the constraints on urbanising lot 52 would not be insurmountable (ts 4137). Constrained land may take some time to be able to be developed (ts 4132).

1418 The plaintiffs submit that the ability of the subject land to be developed in the short term, given its absence of constraints, would have been a factor leading to it being preferred to the East Ravenswood land. I do not think that would have been a consideration of much weight. There is no indication in the IPRSP of any perceived need in the short or medium term for more land, in addition to Riverland Ramble, ***around*** Ravenswood. Nor was there any shortterm shortage in Murray generally, such as would lead to a preference for additional shortterm urban land. The land designated urban and future urban in Murray was thought to be sufficient for many decades. The 1997 IPRSP adopted the medium series projection of 31,000 people in Murray in 2026 (exhibit 6, 1/6/302). Even with both the Furnissdale and Ravenswood urban nodes having less than 10,500 people, it allocated enough future urban land to accommodate approximately 55,000 people (1/6/284), thus substantially beyond what was forecast for 2026 (see also 1/6/278).

1419 The defendants submit that any attempt in the hypothetical IPRSP to remove the future urban land at East Ravenswood and replace it with the subject land is impermissible in principle. That is because, the submission continues, the designation of East Ravenswood as future urban is not attributable to the proposed public works.

1420 I do not accept that the deletion of East Ravenswood from the future urban land in the hypothetical IPRSP is impermissible in the abstract, or necessarily involves a 'clean slate' approach. If the subject land was not available for future urban designation for reasons attributable to the proposed public works, so that, in the absence of the public works, the subject land is available, it is open to consider, whether, in those circumstances, the subject land would have been included in preference to some other land that was in fact designated future urban. If, as a matter of fact, it is shown that had the subject land been available it would have been preferable, as a matter of good planning, to the land that was designated future urban in the actual IPRSP, and if the unavailability was attributable to the proposed public works, then, in my view, the designation of that other land and the failure to designate the subject land as future urban is each attributable to the proposed public works. However, as I will explain, I am not persuaded, as a matter of fact, that had the subject land been available, it would have been designated future urban in preference to East Ravenswood, whether or not the Ravenswood node was expanded. I turn to explain why that is so.

1421 First, and importantly, as I have said, the view that the subject land would be preferred to East Ravenswood in a reconfigured, but not expanded, Ravenswood node was not expressed in oral evidence and finds little support in any report of a planner.

1422 Next, the fact that East Ravenswood was designated as future urban as part of the Ravenswood node, whereas land north of Old Mandurah Road, referred to by the defendants as 'the proxy land', was not, provides a substantial obstacle to acceptance of this view.

1423 In their oral closing submissions, the plaintiffs criticised the defendants' contention that lots 190, 10, 11 and 12 were proxy for the subject land. The plaintiffs contend that, in the absence of the proposed public works, the subject land would be different as regards the important element of owner interest for urbanisation. In effect, the submission was that:

(1) it was because of the lack of owner interest in urbanisation that no land north of Old Mandurah Road was designated future urban, relying on Mr Auret's evidence;

(2) but for the proposed public works, the plaintiffs would have been pursuing urbanisation of the subject land prior to 1996; and

(3) consequently, the 'proxy' land is not a proxy for the subject land; it is materially distinguishable.

1424 For the reasons explained in section 5.5.2, I do not accept the first two steps of that submission. Rejection of each step is, in itself, fatal to acceptance of this submission of the plaintiffs.

1425 The plaintiffs' written submissions in reply pars 4.9, 4.24 also point to a 1992 Water Authority of Western Australia (WAWA) plan of areas that were sewered or proposed to be sewered. The plan was referred to in the 1994 Local Rural Strategy (LRS) (exhibit 29, 1/11/144 145). The plaintiffs point to the fact that lots 10, 11 and 12 are not shown within the area that is sewered or proposed to be sewered. The plaintiffs invite the conclusion that that explains the failure to designate lots 10, 11 and 12 as future urban land in the IPRSP. Further, they contend that, in turn, that means that in the actual IPRSP, designating lot 190 as future urban would have created an isolated area of land north of Old Mandurah Road and it would not, in those circumstances, have been designated future urban.

1426 I do not accept these submissions. The evidence does not suggest, much less establish, that the 1992 WAWA document was brought to bear in any significant way in determining what areas would be designated for longterm future urbanisation in the IPRSP. In this respect, I do not overlook Mr Robinson's evidence at ts 4437 4438. Further, substantial land north of Old Mandurah Road, not identified in sewerage areas in the WAWA plan, was identified for future urbanisation under Option 3 in the 1996 IPRSP. Further, and in any event, East Ravenswood itself is not shown as having sewerage or proposed sewerage in the 1992 WAWA plan.

1427 Consequently, I conclude that the IPRSP made a choice to prefer East Ravenswood to lots 190, 10, 11 and 12 as future urban land. To my mind, the likely inference is that orderly and proper planning would have led to a corresponding choice being made to prefer East Ravenswood to the subject land, had the subject land been available. That takes into account matters such as population projections and the need for more future urban land; the choice of Option 2 over Option 3 in the IPRSP; and what the IPRSP says about urbanisation occurring in compact, discrete urban villages, with distinctive and clear boundaries. Thus, I do not accept proposition 7 of Mr Auret's reasoning as summarised above and, accordingly, do not accept the plaintiffs' hypothetical IPRSP involving a reconfigured, but not expanded, Ravenswood node. 5.5.3.3 URBAN VILLAGE PRINCIPLES

1428 There is a further obstacle to acceptance of this basis for the plaintiffs' hypothetical IPRSP case. As I have said, the plaintiffs were unable to precisely identify the land that would comprise the urban node of Ravenswood, in its reconfigured, but not expanded, form. For reasons already explained, that is important so as to ensure that the hypothetical node accords with and reflects IPRSP urban village principles. I have already found that simply adding the subject land to the existing Ravenswood townsite and Riverland Ramble would not create an urban node consistent with those principles: see section 5.5.2.2. To suggest, as the plaintiffs' submissions do, that lot 190 and the subject land should be added to the Ravenswood townsite and Riverland Ramble, would invite attention to why lot 10 and lot 190, or lots 10 and 11, would not have been seen as a preferable addition, given their greater connection to Riverland Ramble. I accept the evidence of Mr Moran (ts 4113) and Mr O'Neill (ts 4069, 4137 4138) to that effect. On the face of it, those lots would be sufficient to replace East Ravenswood in a reconfigured, but not expanded, Ravenswood node.

1429 For these reasons, I do not accept that, in the absence of the proposed public works, the subject land would have been designated future urban in the hypothetical IPRSP as part of a reconfigured, but not expanded, Ravenswood. 5.5.4 Conclusions

1430 For the reasons set out above, I find that in the absence of the proposed public works, the subject land would have been designated rural in the hypothetical IPRSP.

5.6 Blight? Ravenswood in the hypothetical IPRSP

1431 It is convenient to summarise my conclusions about whether and to what extent the Highway and the RRF affected the size and configuration of the urban and future urban designated land at Ravenswood in the IPRSP. In other words, how, if at all, would the Ravenswood urban node have been different in the hypothetical IPRSP?

(1) I do not accept Mr Butterly's opinion that the philosophy of orienting development away from major roads had any limiting effect on contemplated urban expansion east of Mandurah in the IPRSP. In my view, the choice of form of urban development by distinct urban nodes was not attributable to the Highway: see section 4.8.2.3.

(2) The choice in the IPRSP of the scale of the urban node at Ravenswood (10,500 people) was not attributable to the proposed public works: see sections 5.3.5 and 5.5.2.

(3) In the absence of the proposed public works, the subject land would not have been part of a reconfigured Ravenswood node: see sections 5.5.2 and 5.5.3.

(4) I am not otherwise satisfied that the urban node at Ravenswood in the IPRSP would have been different in the absence of the proposed public works.

Section 6: Rezoning 2003 2006

1432 In section 4, I concluded that, in the absence of the proposed public works, the subject land would have been zoned rural in TPS 4 in 1997. In section 5, I concluded that, but for the proposed public works, the subject land would have been designated rural in the IPRSP. This section 6 deals with the plaintiffs' 2003 2006 rezoning case. By that case, the plaintiffs contend that, assuming the subject land was rural in the IPRSP, and in the Peel ***Region*** Scheme 2003 (the PRS) when promulgated, in the absence of the proposed public works, the subject land would have been rezoned to urban or urban deferred by amendment to the PRS between 2003 and the taking date.

6.1 Background and context

1433 From late 1997, the IPRSP was used as a basis for the preparation of the PRS. The following features of the IPRSP, described in more detail in section 5, should be noticed:

(1) the IPRSP was the product of three years of study and consultation from late 1994 until its publication in December 1997;

(2) the 1996 IPRSP provided three options for possible urban development. In section 5, I found that, but for the proposed public works, the subject land would have been part of Option 3 for ultimate urbanisation, but it would not have formed part of Option 2;

(3) the 1997 IPRSP referred, in general terms, to an ideal population for urban villages of 12,000 16,000 people;

(4) the IPRSP identified 388 ha of existing and potential urban land in the Ravenswood locality, representing a potential population of just under 10,500 people;

(5) the IPRSP enunciated urban village planning principles, requiring an urban village to be compact with clearly demarcated boundaries; and

(6) the urban village of Ravenswood was bounded by the Murray River to the ***south***, Pinjarra Road to the west, Old Mandurah Road to the north and the power transmission corridor to the east. In section 5, I found that, in the absence of the proposed public works, the urban village of Ravenswood in the hypothetical IPRSP would not have been different.

1434 At times, in their written and oral evidence, some of the plaintiffs' planners described the IPRSP as an 'ideas plan' without any statutory status. That is how the IPRSP described itself, and that was its status when first published. However, it acquired a statutory status from 1998, when the WAPC published Statement of Planning Policy 8 (SPP 8) (exhibit 3). SPP 8 included regional and subregional structure plans that had been adopted by the

WAPC. One of these was identified as the IPRSP. By s 7(5) of the then Town Planning and Development Act, a local government was required to have due regard to the state planning policy provisions in preparing planning schemes or in making decisions about amendments to planning schemes.

1435 In 2000, SPP 1 superseded SPP 8. It was not materially different.

1436 In March 1999, a background report on the then draft PRS was published for public comment (see exhibit 200B, attachment 24, 1/6/457 494).

1437 In August 2000, the Environmental Protection Authority (the EPA) provided a report and recommendations on the draft PRS (exhibit 38, 1/6/328).

1438 By 2002, submissions on the draft PRS had been considered and were the subject of a report on submissions.

1439 In August 2002, the Statutory Planning Committee of the WAPC resolved to advise the shire that the WAPC would be prepared to adopt the proposed Furnissdale Structure Plan as a guide to future development of the area, subject to specified modifications (exhibit 259A). The final report on the Furnissdale Structure Plan and Traffic Impact Study (exhibit 42) was published in November 2003.

1440 By the time of its promulgation in October 2002, the PRS had been the subject of almost five years of consultation and study.

1441 The Peel ***Region*** Scheme 2003 was published in the Government Gazette on 23 October 2002. The PRS comprises the scheme text and the scheme map sheets numbered 1 to 20.

1442 The scheme text is exhibit 116 (1/8/11 21). The scheme map as at the taking date is exhibit 2. The scheme map as at October 2005 is exhibit 40. (It appears that the formal scheme map sheets numbered 1 to 20 are not in evidence.)

1443 A closer view of the relevant part of the scheme map, as at the taking date, is exhibit 12.

1444 Clause 6 sets out the aims of the scheme. Those aims include to: (a) promote the sustainable development of land taking into account relevant environmental, social and economic factors;

...

(f) provide for future urban purposes and prevent development which could prejudice the future development of urban land; [and]

(g) protect strategic agricultural land considered to be of regional importance (exhibit 116, 1/8/18).

1445 Clause 10 provides for the reservation of land for public purposes including Regional Open Space and Primary Regional Roads.

1446 By cl 11 and cl 12, land is classified into zones under the scheme for the following purposes: (a) Urban - to provide for residential development and associated local employment, recreation and open space, shopping, schools and other community facilities;

(b) Urban Deferred - land suitable for future urban development but where there are various planning, servicing and environmental requirements which need to be addressed before urban development can take place;

(c) Regional Centre - the Mandurah central business district within which commercial, civic, cultural, service and administration activities servicing the ***region*** should be located;

(d) Industrial - to provide for manufacturing industry, the storage and distribution of goods and associated uses;

(e) Rural - to provide for the sustainable use of land for agriculture, assist in the conservation and wise use of natural resources including water, flora, fauna and minerals, provide a distinctive rural landscape setting for the urban areas and accommodate carefully planned rural living developments;

(f) Private Recreation - to accommodate regionally significant open space and recreational activities in private use.

1447 The scheme map reserves lot 191 and part of lot 192 for Regional Open Space and the balance of lot 192 for Primary Regional Roads.

1448 The scheme map as at July 2006, covering the relevant area, is shown below (exhibit 12).

1449 There were some changes to the PRS between 2003 and the taking date. In the PRS in 2003, lot 22, the eastern lot of Riverland Ramble, was urban deferred. It was rezoned to urban in 2005. The small piece of urban land in Furnissdale abutting Pinjarra Road on its ***south*** was initially zoned rural in 2003 and was rezoned to urban in April 2005 (exhibit 249A; exhibit 249B). For other amendments to the PRS between 2003 and 2006, see the evidence of Mr Bulstrode (exhibit 200A, 35/14, 158).

1450 In many but not all respects, the PRS followed the designations in the IPRSP.

1451 Some of the areas designated future urban in the IPRSP were zoned urban in the PRS. That includes the western part of Austin Cove and some land ***south*** of Pinjarra Road in the Coodanup vicinity. Some land designated future urban B in the IPRSP was zoned rural in the PRS. That is so for lot 52 and the ***southern*** part of lot 2, and for substantial parts of Furnissdale. Of course, as explained in section 5, not all future urban category B land would be expected to be zoned urban or urban deferred, as the IPRSP had a longer planning horizon than the PRS.

1452 Apart from the subject land, all of the land north of Old Mandurah Road is zoned rural. The land west of the Highway and north of Pinjarra Road is zoned rural, apart from some regional open space reservations.

1453 As I explained in section 1.6 above, in the course of the trial I ruled that the plaintiffs had not articulated a case, as an alternative, that had the subject land been rural in the IPRSP, it would have been rezoned to urban under TPS 4 before 2002 or, if not, would have been zoned urban in the PRS when promulgated: McKay v Commissioner of Main Roads [No 5] [2010] WASC 273 [80]. I also ruled that the question of whether, if lots 191 and 192 were designated rural in the IPRSP, they would have been zoned urban or urban deferred in the PRS by 2003, should not be permitted to be asked of the experts in the planners' concurrent evidence session.

1454 Consequently, for the purposes of this action, it follows from my findings in sections 4 and 5 (that the land would have been rural in TPS 4 in 1997 and would have been designated rural in the hypothetical IPRSP), that the land would have been zoned rural in the PRS when it was promulgated in 2002.

1455 In the course of the same ruling, I found that:

(a) the plaintiffs had not distinctly articulated, as an alternative limb of their case, that the land would have been rezoned to urban by amendment of the PRS some time between 2003 and July 2006; but,

(b) nevertheless, the plaintiffs should be permitted to advance a claim to that effect, and a question on that subject should be permitted in the planners' concurrent evidence session: McKay [No 5] [81] [88].

1456 Question 4 on the agenda for the planners' concurrent evidence session was in the following terms: If lots 191 and 192 were not urban or future urban in the IPRSP, and were rural in the PRS in 2003, would they have been zoned urban or urban deferred by amendment to the PRS before July 2006?

I will refer to that question as the 2003 2006 rezoning question.

1457 Following that ruling, there was further argument as to which of the plaintiffs' planners should be permitted, in accordance with the parties' agreed position, to answer the 2003 2006 rezoning question in the concurrent evidence session. I gave oral reasons in the course of the trial ruling that, of the plaintiffs' planners, only Mr Robinson and Mr Flugge should be permitted to answer question 4. I ruled that none of the other plaintiffs' planners

had a written report on the question and so could not answer without the leave of the court, and that leave should not be granted to permit them to do so (ts 4239 4245).

1458 I turn next, in section 6.2, to the evidence relied on by the plaintiffs. As will emerge, after crossexamination, one of the plaintiffs' planners, Mr Flugge, altered his opinion and expressed a negative answer to the 2003 2006 rezoning question. I will outline the evidence of the defendants' planners in section 6.3. In section 6.4, I will explain my conclusion that, but for the proposed public works, the subject land would not have been rezoned to urban in the PRS in 2003 2006.

6.2 The evidence of Mr Robinson and Mr Flugge

1459 To a limited extent only, Mr Flugge and Mr Robinson expressed opinions in writing on the 2003 2006 rezoning question. Mr Flugge expressed an opinion in terms that, but for the proposed public works, the subject land would have been rezoned to urban at or ***around*** 2004. See exhibit 182A [32] [33], [36] [37]; exhibit 182B [18] [23]. Mr Robinson's report was directed primarily to the question of the urban potential of the subject land as at the taking date. However, in some parts of his report, he expresses the opinion that, but for the proposed public works, the land would have been urban. See, for example, exhibit 180A [530] [531].

1460 In the concurrent expert evidence dealing with this question, Mr Robinson and Mr Flugge initially answered the question affirmatively, although later Mr Flugge expressed a different view. Mr O'Neill, Mr Bulstrode and Mr Moran answered the question in the negative.

1461 Mr Robinson's initial articulation of the reasons for his opinion may be summarised as follows.

(a) Both the 1994 LRS and the Peel Regional Strategy advocated structure planning to address the potential for urban growth in the development pressure corridor between Mandurah and Pinjarra.

(b) The LRS shows that the council was seeking developer input to confirm the areas with capability for urban development and to progress structure planning.

(c) By the early 2000s, the recommendation for the draft PRS that lot 52 Old Mandurah Road, which was future urban category B in the IPRSP, be regional recreation, not urban, was known.

(d) Based on that, and other recommendations in the background report, the landowner could have commenced works on an amendment to the shire's TPS 4 in ***around*** 2000.

(e) By 2002, the Furnissdale Structure Plan demonstrated that the growth anticipated in the IPRSP in Furnissdale would not occur.

(f) In those circumstances, a strong case could have been put forward for the urban growth anticipated for the Furnissdale area (and East Ravenswood) to be concentrated on an amended form of the Ravenswood node (ts 4345 4346).

1462 Mr Robinson's subsequent evidence made it clear that part of what he contemplated, in expressing his opinion, is that there would be detailed district structure planning, by the proponent, of the proposed modified Ravenswood area. In response to Mr O'Neill's evidence, Mr Robinson said that by 2003 it had become clear that some of the land in East Ravenswood, identified as part of the Ravenswood node, was not suitable. In the circumstances, a modified Ravenswood node could have been configured that complied with the requirements of the IPRSP for a clearly demarcated urban village at Ravenswood. This would be achieved by some more detailed district structure planning. An urban node comprising an area of 12,000 16,000 people could thus be achieved (ts 4359 4363).

1463 The modified Ravenswood node would be clearly demarcated by Fiegert Road on the west, Pinjarra Road to the ***south***, the existing Ravenswood townsite and Riverland Ramble to the east, with the northern limit to be determined through land capability studies and structure planning (ts 4360, 4365).

1464 At the outset, Mr Robinson said that he qualified his opinion by the fact that he referred to the timeframes he had identified of 3 4 years for the entire process of rezoning, and recognised that in reality, the review of the IPRSP could have delayed the finalisation of a PRS amendment if that scheme amendment was not finalised by 2005 (ts 4346; see also ts 4443, 4446, 4467 4468).

1465 I will outline the progress of the review of the IPRSP in detail in section 7 below. By 2004, the Peel ***Region*** Planning Committee (the PRPC) and the WAPC recognised the need for a review of the IPRSP and the PRS. That review was underway, but not substantially progressed, by 2005.

1466 Mr Robinson is of the view that, if, following the publication of the Furnissdale Structure Plan, the owner commenced taking steps in 2002 and 2003 to progress an amendment to the PRS, the amendment could have been finalised by 2005 (ts 4347).

1467 Mr Flugge said at the outset of his oral evidence that he holds a very similar opinion to Mr Robinson. The reasons expressed by Mr Flugge were substantially similar. His reasons include the following.

(a) The LRS states a need for district structure planning in the Mandurah to Pinjarra corridor.

(b) That area was a development corridor undergoing immense pressure in the late 1990s and early 2000s, reflected by inquiries made at the shire.

(c) The Furnissdale Structure Plan ruled out substantial urbanisation in Furnissdale.

(d) Other areas in East Ravenswood, identified as future urban category B in the IPRSP, also fell away for urbanisation.

(e) With those points in mind, he believes that the landowner, or someone on their behalf, would have made an approach to the shire to seek an amendment to TPS 4, prior to the coming into effect of the PRS, so as to test the waters as to whether the council was supportive of an amendment for urbanisation.

(f) Following the gazettal of the PRS, the landowner, or someone on their behalf, armed with the material used in relation to the proposed TPS 4 amendment, including a contextual structure plan showing the relationship of the subject land with the Ravenswood settlement (among other things), could have approached the DPI/WAPC to seek an amendment to the PRS (ts 4349).

1468 At an early stage of his evidence, Mr Flugge said that the 'only doubt' he had is that rezoning might not have been supported by the WAPC because of its review of the IPRSP, so that the WAPC may have viewed this type of rezoning as preempting future structure planning reviews (ts 4350).

1469 After substantial crossexamination, Mr Flugge said that, on balance, he favoured a negative answer to the 2003 2006 rezoning question (ts 4435 4437). In the end, that reflected a concession on Mr Flugge's part. However, in his evidence prior to that he seemed, to me, to exhibit a marked reluctance to make concessions, often avoiding responding directly to questions. I will give two examples.

1470 First, in his evidence about exhibit 151, Mr Flugge seemed to me to avoid directly responding to questions because he did not wish to concede that the document accurately recorded what he had said at the meeting.

1471 Exhibit 151 is Mr Bulstrode's notes of a meeting between Mr Bulstrode and Ms Bell of the DPI, and Messrs Flugge and Robinson of the shire. The meeting was held on 19 April 2002. The notes record that Mr Flugge advised that the shire's draft Local Planning Strategy (LPS) did not propose any new greenfield urban sites and that there was currently sufficient areas of residential zoned land. When questioned with reference to these notes, Mr Flugge agreed that he had said that there was no new greenfield urban sites proposed in the draft LPS. He did not accept that he had expressed the view that there was then currently sufficient areas of residential zoned land. His evidence on this point (ts 4404 4406) was at times unresponsive and I found it unconvincing. I find that Mr Flugge made both statements recorded in the first paragraph of exhibit 151.

1472 Secondly, he was asked a number of questions about documents that appeared to suggest that the DPI/WAPC had the view that the PRS provided ample urban land for many years. When it was put to him that that material would put approval of urban rezoning 'in very grave doubt', Mr Flugge simply said that it would be a matter the WAPC would 'take into account' (ts 4420 4421). Asked to explain why he had not mentioned information about the supply of land as an aspect of his response to the 2003 2006 rezoning question, Mr Flugge said that he did not believe it would be a major factor (ts 4421). He then said that he agreed that questions of supply would be a major factor from a WAPC perspective, but said that he considered the amount of already urban zoned land that was undeveloped would not be a consideration for the shire as at 2002 2003 (ts 4421 4422). When I asked whether that approach of the shire would be consistent with orderly and proper planning in 2002 2003, Mr Flugge initially did not respond directly to the question. When the question was repeated, Mr Flugge responded in terms, '[f]rom a planning perspective I suppose you would have to accept that it may not have been' (ts 4423). While, as a general rule, too

much should not be read into particular language used in isolation, in the context of Mr Flugge's preceding evidence, I formed the distinct impression that that choice of language revealed the reality of a reluctance on Mr Flugge's part to make what he saw to be a concession.

6.3 The defendants' planners' evidence

1473 As I have said, all three of the defendants' planners expressed a negative answer to the 2003 2006 rezoning question.

1474 Mr Moran considers that the WAPC would have considered a proposal for the urban rezoning of lots 191 and 192 in isolation as an ad hoc proposal. Further, in the period leading up to 2005, the shire was preparing a draft LPS and from 2005, the WAPC was undertaking a review of the IPRSP. In those circumstances, he considers the WAPC's attitude would have been to await a more comprehensive review of planning in the area (ts 4351).

1475 In explaining the reasons for his opinion (ts 4355 4357), Mr Bulstrode referred to the following matters.

(a) Priorities for the early amendments were matters that were very minor in character (in the nontechnical sense) and those that were needed to enable any urgent or very significant development proposals (see also ts 4315).

(b) From 2004, the review of the IPRSP had been initiated and, particularly from 2005, the PRPC was reluctant to initiate or progress urban rezoning proposals until further progress had been made on the strategic planning for the ***region***. He gave examples of that, including the September 2005 decision regarding the Clough/Rapley land, and the initial decision in March 2005 in relation to lots 2 and 3 Balwina Road, Greenfields (notwithstanding that that amendment was ultimately initiated in April 2006).

(c) In the period from 2003 to the taking date, the Peel ***region*** office of the DPI had staff and resources shortages and many other demands on its time.

1476 As to Mr Flugge's comment about Furnissdale, Mr Bulstrode pointed out that the land in Furnissdale shown as future urban category B in the IPRSP was not included as urban or urban deferred in the PRS. Thus, from a land supply point of view, it had not been zoned urban and therefore was not expected to accommodate any of the ***region***'s population. As I will explain, in crossexamination, Mr Flugge and Mr Robinson subsequently accepted this. Further, the background report for the PRS in 1999 indicated that the WAPC considered that the amount of land zoned urban or urban deferred in the PRS would be sufficient for 20 to 30 years' land supply (ts 4357).

1477 Asked about how the merits of the proposal would have been viewed, Mr Bulstrode said that he considers 'we [(DPI officers)] would have been very conscious of the strategic planning ramifications [of the proposal] and we would have really been recommending that it await the structure planning process to be progressed further' (ts 4358).

1478 Much of Mr Bulstrode's evidence was couched in terms of how he and others in the DPI would have responded to an application. In that context, it represents evidence of subjective views, rather than an opinion on the objective question of what orderly and proper planning dictated.

1479 Mr O'Neill answered the question with a 'firm no' (ts 4351). He relies essentially on the IPRSP. He says that was intended to guide the preparation of the PRS, as well as amendments to the PRS and to local government schemes. The IPRSP had a timeframe of 2021 and refers to a land allocation sufficient to accommodate the demand for urban land for the next 30 to 50 years (ts 4351). He does not agree that there were changes elsewhere that would have justified a significant change to the delineation of the urban cell of Ravenswood to include the subject land (ts 4351). Later in his evidence, he said that the reconfiguration of Ravenswood contemplated by Mr Robinson is too substantial to have been accepted outside of the review of the IPRSP (ts 4365 4366).

1480 Mr O'Neill considers that the addition of the subject land to the existing urban land in the IPRSP (Riverland Ramble and the township) would constitute an ad hoc extension, contrary to the principles in the IPRSP (ts 4364).

6.4 Analysis and conclusions

1481 To my mind, as Mr O'Neill said, it would be for a person applying to amend the PRS, soon after its promulgation, to justify a change to a scheme that had come about from such a long and thorough process (ts 4368).

1482 For the reasons that follow, I do not accept Mr Robinson's opinion on the 2003 2006 rezoning question. In my view, but for the proposed public works, assuming an application were made, orderly and proper planning would have dictated that the subject land would not have been rezoned to urban under the PRS in the period from 2003 to July 2006. 6.4.1 Why I do not accept Mr Robinson's reasons for his opinion

1483 I begin with Mr Robinson's reasons for his opinion, as I summarised them in section 6.2.

1484 First, Mr Robinson relies upon the LRS and the Peel Regional Strategy as advocating further structure planning in the 'development pressure corridor' between Mandurah and Pinjarra. Both those planning documents were dated 1994 and preceded the IPRSP. The IPRSP involved regional structure planning. The IPRSP proposed district and local structure planning, but only for those areas identified in the IPRSP as urban or future urban. Thus, for example, district and local structure planning was proposed for Ravenswood, bounded by Murray River to the ***south***, Old Mandurah Road to the north, Pinjarra Road on the west and the power lines on the east (exhibit 7, 1/10/149; exhibit 6, 1/6/319).

1485 Secondly, Mr Robinson points to Furnissdale and lot 52, which were designated future urban category B in the IPRSP. He said that, by 2002, the constraints on the growth anticipated in Furnissdale and on urbanisation of lot 52 were known. That is true, but it provides no support for Mr Robinson's opinion on the 2003 2006 rezoning question. The constraints on urbanisation of Furnissdale and East Ravenswood were known before the PRS was finalised. The PRS zoned what was considered to be sufficient urban land for 25 30 years (exhibit 200B, attachment 24, 1/6/461). Given that Furnissdale and lot 52 were zoned rural in the PRS, the fact that the constraints on their urbanisation were known did not give rise to any occasion for the PRS to find more land to 'replace' those future urban category B parcels of land and thus to reconfigure the Ravenswood node to include the subject land. This was pointed out by Mr Bulstrode (ts 4357) and was, in effect, accepted by both Mr Flugge and Mr Robinson (see ts 4415 4417, 4434 4435, 4442).

1486 In the plaintiffs' submissions, a similar point is made about the need to replace land at Keralup/Amarillo. The plaintiffs submit that, while Keralup was identified as future urban in the IPRSP, it received an environmental review that indicated significant constraints: closing submissions pars 7.1, 7.15. Keralup was zoned rural in the PRS. See also the background report to the PRS (1/6/474). Thus, again, there was no occasion to 'replace' Keralup; it had not been zoned urban or urban deferred in the PRS.

1487 Thirdly, Mr Robinson expressed the view that an amended Ravenswood urban node of 12,000 16,000 people could have been put forward to include the subject land and replace the land at Furnissdale and/or East Ravenswood. For three reasons, I do not accept that. The first reason is that, as I have said, there was no occasion to replace the land at East Ravenswood and Furnissdale. The future urban category B land at Furnissdale and lot 52 had been zoned rural in the PRS. The second is that the IPRSP did not contemplate an urban node at Ravenswood of 12,000 16,000 people. Ravenswood was delineated by a geographical area with a population potential of 10,500 people. As I have found in section 5, the choice of size of the Ravenswood node was not attributable to the proposed public works. Moreover, there was nothing in the planning environment that existed in the period 2003 to 2006 that supported an urban node of 12,000 16,000 people at Ravenswood. In particular, the shire's draft LPS did not support that approach. In effect, Mr Flugge and Mr Robinson accepted this (see ts 4427 4428, 4430 4432, 4440). The third reason is that, in any event, I accept the evidence of the defendants' planners that a reconfiguration of the Ravenswood urban node so as to include the subject land would have involved significant departure from the IPRSP and raised issues that were too fundamental to be dealt with independently of the review of the IPRSP that was underway by 2005. I will outline the progress of that review in detail in section 7 below. By the second half of 2005 and in 2006, the WAPC and the PRPC were adopting the position that amendments to add land to the urban zone should not be permitted, pending the structure plan review process. See exhibit 259F; exhibit 9, 2/1/27 31; exhibit 10, 2/1/135; exhibit 49; exhibit 123; exhibit 138.

1488 In my view, that approach was in accordance with orderly and proper planning. It was good planning to try to ensure that the broad and longterm review of structure planning and strategic thinking for the ***region*** was not prejudiced by an individual rezoning decision taken in isolation from and prior to that review.

1489 Fourthly, Mr Robinson's opinion was, he said, based on his belief that there was an identified urgent need for rezoning of land to urban in the period 2002 to 2006 (ts 4447 4448, 4458). His belief in that respect was based

solely on his experience working as a planning officer at the shire (ts 4448 4450). When questioned, his experience did not, in my view, provide a sound foundation for his belief (ts 4450 4452). Further, I found substantial parts of his evidence in crossexamination on this topic to be unconvincing. See, for example, ts 4453 4465. The evidence does not support his belief that there was, in this period, an identified urgent need for rezoning of land to urban. I will deal with the evidence in more detail in section 7.5.

1490 For all these reasons, I do not accept any of the major strands of Mr Robinson's reasoning in support of his opinion on the 2003 2006 rezoning question. 6.4.2 The plaintiffs' other submissions

1491 I turn to some additional matters relied on in the plaintiffs' closing submissions in support of their 2003 2006 rezoning case.

1492 The plaintiffs point to what they say is the recognition by the DPI, WAPC and others, in 2004 2005, of:

(a) substantial population growth in Peel, requiring further urban land;

(b) some recognition of deficiencies in the strategic planning in the ***region***, which was thought, by some at least, to be outdated by then; and

(c) a recognition of a need to review the strategic planning in the ***region***.

1493 I will give detailed consideration to these matters in the course of considering the IPRSP review in detail in section 7 below. For present purposes, it is enough to observe that, in my view, these matters were all part of the context for the IPRSP review; they were not matters thought to lead to the rezoning of individual pieces of land, in isolation from and prior to the completion of the review. Moreover, nothing in what is pointed to by the plaintiffs in this respect suggested a perceived need, much less an urgent need, for rezoning of land specifically in the area north of Old Mandurah Road or Pinjarra Road.

1494 The plaintiffs' submissions emphasise the identification of Pinjarra Road as an activity corridor in Network City. They contend that that substantially enhanced the urban prospects of the subject land. I will deal with how Network City affected the urban prospects of the subject land in detail in section 7. Nothing in Network City supported rezoning of the subject land to urban in the period 2003 to 2006, independently of and prior to completion of the IPRSP review. That is illustrated by the response to the rezoning application of the Clough/Rapley land, lots 300 and 301. That land, like the subject land, was on Pinjarra Road. Moreover, the Clough/Rapley land was earmarked in Network City for 'future communities'. Nevertheless, the rezoning of the Clough/Rapley land was deferred pending the IPRSP review.

1495 The plaintiffs' submissions also point to what was said to be the desire of the shire for additional urban land as reflected in the draft LPS. I will deal with the draft LPS in more detail in section 7. Any rezoning would require the support of the WAPC, not simply the shire. The WAPC had not completed its review of the draft LPS prior to the date of taking. It was clear that the WAPC's review of the draft LPS would be bound up with its broader review of the IPRSP generally. Consequently, nothing in the draft LPS sustains an affirmative answer to the 2003 2006 rezoning question.

1496 Finally, the plaintiffs submit that the DPI was 'keen' on extending the amount of urban land north of Old Mandurah Road: closing submissions par 7.33; see also par 7.10. In my view, the evidence falls well short of supporting that conclusion. I accept Mr Bulstrode's evidence that some time after 2002, at a meeting with Mr Flugge, Mr Bulstrode suggested that land north of Old Mandurah Road be put forward in the draft LPS for consideration or investigation for future urbanisation (ts 4378 4379, 4401 4403, 4409, 4474 4476, 4586). I do not accept the evidence of Mr Flugge and Mr Robinson to the effect that that discussion occurred at the meeting of April 2002 (ts 4406 4409). The notes of the meeting of April 2002 (exhibit 151) record the substance of the meeting and did not include anything to that effect. To the contrary, the notes record Mr Flugge's statement that no new greenfields urban land was proposed and that there was currently sufficient areas of residential zoned land. That opening statement makes it unlikely that this meeting provided the context for Mr Bulstrode's suggestion of considering land north of Old Mandurah Road for future urbanisation. I accept Mr Bulstrode's evidence that he recalls making the statement at a meeting attended only by Mr Flugge and him. Mr Bulstrode struck me as a careful witness who was cautious before saying that he could specifically recall any particular matter. I find that that

suggestion by Mr Bulstrode occurred some time after this meeting in 2002. I will say more about this evidence in section 7.4.5. 6.4.3 2003 2006 rezoning: conclusions

1497 For all these reasons, I find that, but for the proposed public works, had a rezoning application been made, the subject land would not have been rezoned to urban in the PRS in the period 2003 to 2006.

1498 In addition, Mr Robinson's and Mr Flugge's opinions were based on an assumption that the plaintiffs made an application for rezoning, initially under TPS 4 and later under the PRS, early in the period 2000 2006. For reasons corresponding to those given in section 4.3 and section 5.5, I am not persuaded that, but for the proposed public works, the plaintiffs would have made any such application. In addition to what I have said in sections 4.3 and 5.5, I refer to Mr Tucker's evidence about Mr McKay's stated reasons for selling lots 300 and 301 (ts 3020).

Section 7: Urban potential

7.1 Urban potential: background and context

1499 The result of the findings I have made in sections 4 to 6 is that, but for the proposed public works, the land would have been zoned rural at the date of taking. In valuing the subject land it is necessary to consider what potential, if any, there was for the land to be rezoned to urban.

1500 This section is concerned with the planning element of urban potential. Rezoning of the land to urban is a necessary but not sufficient step to realising the urban potential of rural land. For example, land may be rezoned to urban before there is sufficient demand to make urban subdivision of the land viable or desirable from the owner's perspective. Because this section is concerned with the planning element, I will use 'urban potential' to refer to the potential of the land to be rezoned to urban.

1501 The degree and timing of land's urban potential affect the value of rural zoned land.

1502 The planners expressed opinions about the urban potential of the subject land in the assumed absence of the proposed public works. All the planners agree that, assuming the land was zoned rural, it had urban potential at the taking date. They differ on the degree and timing of that urban potential. Further, the planners agree that, given that urban potential, among other reasons, the land would have been very unlikely, as at July 2006, to be approved for ruralresidential development. I am satisfied that the highest and best use of the subject land lies in its urban potential.

1503 The question of the urban potential of the land is to be viewed from the perspective of the hypothetical parties to the notional sale contemplated by the Spencer test. My task is not to determine how, in fact, the WAPC would have assessed that potential as at the taking date; the question is how the hypothetical parties would have viewed that potential. I outlined relevant legal principles in section 2. See, in particular, section 2.2 to 2.5. In summary:

(a) the hypothetical purchaser is prudent and acts rationally;

(b) the hypothetical parties are taken to have access to all information, currently available at the taking date, which affects the property;

(c) the hypothetical parties are taken to be aware of all information relevant to the market price about which a prudent purchaser would enquire;

(d) the hypothetical purchaser would obtain such expert evidence as a prudent purchaser would, in the circumstances of the case, have obtained; and

(e) where there is conflicting expert evidence, the court's role is to view the conflicting opinions through the eyes of the hypothetical purchaser. That may or may not involve the court in resolving the conflicting opinion.

1504 In my opinion, the hypothetical purchaser would have obtained advice from a planning consultant about the urban potential of the subject land.

1505 I turn to outline the planning framework in which the urban potential of the land, as at July 2006, would fall to be considered. This involves a review of some matters outlined earlier in these reasons, as well as explaining some matters not previously mentioned.

1506 The Planning and Development Act 2005 (WA) (the PD Act) came into operation on 9 April 2006. Accordingly, it governed the position on the taking date.

1507 By section 33(2) of the PD Act, the PRS continued in force and had effect as if enacted by the PD Act.

1508 I outlined the provisions of the PRS and set out the scheme map as at July 2006 in section 6.1.

1509 Under the legislative scheme prior to the PD Act, the PRS prevailed over any inconsistent local scheme, but did not have the effect of legislatively amending it. When the PD Act came into operation, by s 126 of the PD Act, TPS 4 was amended to give effect to the reservations in the PRS.

1510 A hypothetical purchaser proposing to develop the subject land would know that to do so would require an amendment to the PRS to zone the land urban. The process of amending a ***region*** scheme such as the PRS was governed by pt 4 of the PD Act. In summary:

(1) the WAPC has power to prepare an amendment to a ***region*** planning scheme: s 35;

(2) any amendment of the PRS must be referred to the EPA: s 38;

(3) ministerial consent is required for the seeking of public submissions on an amendment proposed by the WAPC and, if given, public submissions must be sought: s 42 and s 43;

(4) following the receipt of submissions, the WAPC must consider those submissions and submit the amendment, with any modifications, and other supporting material to the Minister: s 44 and s 48; and

(5) the Minister can present the amendment to the Governor for approval: s 53.

1511 If the WAPC forms the opinion that a proposed amendment does not constitute a substantial alteration to a ***region*** planning scheme, then it is treated as a minor amendment. The procedure for minor amendments is set out in div 4 of pt 4 of the PD Act. That different procedure may have consequences for the time taken to achieve a proposed amendment.

1512 A local planning scheme is not to be approved by the Minister unless the provisions of the local planning scheme are in accordance with and consistent with any relevant ***region*** planning scheme: PD Act s 123. A ***region*** planning scheme prevails over a local planning scheme, to the extent of any inconsistency: PD Act s 124(1). If there is an inconsistency, the local government must amend the local scheme to be consistent with the regional scheme: PD Act s 124(2); see also s 125 and s 127.

1513 It can be seen from this outline of the legislative scheme that the preparation and amendments of ***region*** schemes and local planning schemes is determined at the state government level and not at the shire level. An amendment of a ***region*** scheme is proposed by the WAPC and must be approved by the Minister. The shire's amendment of a local planning scheme requires ministerial approval. A local planning scheme must be consistent with the ***region*** scheme. Both the WAPC and the Minister take advice from and work closely with officers of the DPI. The shire has significant input and influence in the planning process, but decision making authority rests with the WAPC and the Minister.

1514 In preparing or amending a town planning scheme, a local government must have due regard to any relevant state planning policy: PD Act s 77; Town Planning and Development Act 1928 (WA) s 7(5).

1515 Statement of Planning Policy No 1 State Planning Framework Policy (SPP 1) is exhibit 1 (1/9/1 14). SPP 1 was initially prepared and published in the Government Gazette in December 1998 (as SPP 8) pursuant to the Town Planning and Development Act s 5AA. That version is exhibit 3. When the Planning and Development Act came into operation in April 2006, SPP 1 continued in force as a state planning policy under the PD Act and had effect accordingly: PD Act s 25. Exhibit 1 is the version of SPP 1 published on 3 February 2006 and in force at the date of taking.

1516 Another state planning policy, SPP 3, sets out principles applying to planning for urban growth and settlement. SPP 3 is exhibit 50 (1/9/241 249). I will outline the relevant provisions of SPP 1 and SPP 3 in section 7.4 below.

1517 Prior to the taking date, the WAPC published Network City. SPP 1 and SPP 3 state that Network City was a regional strategy adopted by the WAPC for Peel as well as for metropolitan Perth. There is an issue between the planners about how Network City affected the urban prospects for the subject land.

1518 In 2004, the WAPC proposed a review of the IPRSP. Relevant provisions of the IPRSP and my findings about the hypothetical no public works IPRSP are set out in section 5 and summarised in section 6.1. The scope of what

was to be reviewed varied over 2005 and 2006, as I will explain in section 7.3. By the taking date, a substantial review of planning in the Peel ***region*** was underway (the Planning Review). In these reasons, I use the term Planning Review to refer to the review of planning in the Peel ***region*** underway in 2005 and 2006 without attempting to discriminate between a review of the IPRSP and a review of any different scope. In section 7.3, I make findings about the scope of the Planning Review as at the taking date, viewed from the perspective of the hypothetical purchaser.

1519 In August 2005, the shire resolved to adopt a new town planning scheme, TPS 5, and the draft LPS. The shire resolved to forward both to the WAPC, for consent to advertising of TPS 5 and certification prior to advertising of the draft LPS. There are substantial differences of view between the planners about the extent to which the draft LPS can be taken to support the urban potential of the subject land, measured at the date of taking. It is common ground that at the date of taking, the WAPC had not completed its consideration of the draft LPS or TPS 5, and had not responded in relation to those documents. It is also common ground that the response of the WAPC would be given in the context of the Planning Review that was underway.

1520 The planners also agree that the urban potential of the subject land, tested at the taking date, was wrapped up with the likely or expected outcome of the Planning Review then underway.

1521 The joint report of the planning experts dated 9 July 2010 (exhibit 241) recorded that all the experts, apart from Mr O'Neill, agreed that, in the absence of the Highway (and, I interpolate, the RRF), there was a high prospect that the subject land would have been identified for future urban development in the IPRSP review. Mr O'Neill considered that there was a significant uncertainty as to the outcome of the review with respect to the designation of the subject land. That apparent near unanimity masks differences of view about the likely timing of future urbanisation after the Planning Review. As I will explain in section 7.3.11, identification of the land for future urbanisation in the Planning Review would not necessarily have involved or permitted immediate rezoning of the land to urban. For example, it was open for the review to have identified various categories of land for future urbanisation, in the same way as had been done in the IPRSP itself. At July 2006, the approach to be taken to the identification of future urban land, and whether different categories would be used, was unknown. As will be seen, as at July 2006, there was much that was uncertain about the Planning Review.

1522 In section 7.2, I will outline the planners' opinions on the urban potential of the land. In section 7.3, I will make findings about planning events that occurred in the period leading up to the taking date. That will include:

(a) the progress of the Planning Review, and its scope as at July 2006;

(b) the development of the draft LPS; and

(c) decisions made by the WAPC in relation to rezoning applications made in the period leading up to the taking date.

1523 In section 7.4, I will consider the relevant planning instruments, and draft instruments, in detail to determine what each meant for the urban potential of the subject land. In section 7.5, I will consider the question of the available information about population growth and the supply of urban and urban deferred zoned land, and how that bore on the Planning Review and the prospects of urbanisation of the subject land. Finally, in section 7.6, I will state my conclusions on the urban potential of the subject land at the date of taking.

7.2 Urban potential: planners' opinions

1524 I outline the opinions expressed by the planners on the urban potential of the land, in the assumed absence of the proposed public works, and on the assumptions that the land was designated rural in the IPRSP and zoned rural in the PRS at the date of taking, as follows.

1525 Opinions were expressed about the prospects of the subject land being identified for urban in the IPRSP review. As I will explain in section 7.3, by July 2006 the Planning Review had a scope wider than a review of the IPRSP. Nevertheless, in outlining the planners' opinions, I will use their language (and the language of the questions posed to them) in referring to the IPRSP review. 7.2.1 Mr Flugge

1526 Mr Flugge expressed the opinion that there would have been a very high prospect of the land being designated future urban in the IPRSP review. He expressed the following reasons for that view (ts 4495 4497):

(a) the subject land would meet Network City principles in strengthening the activity corridor on Pinjarra Road;

(b) urbanisation would have been consistent with nodal development, in that Furnissdale would have been the green break separating Ravenswood from Mandurah;

(c) the subject land would be accessible to future employment areas, including Nambeelup and other industrial areas on or near Pinjarra Road;

(d) in August 2005 the council adopted the draft LPS, showing a proposed significant expansion of North Ravenswood for urban, and further expanded that area in June 2006. That would have been an important consideration fed into the IPRSP review;

(e) the shire's contemplated Ravenswood village in the draft LPS would have been much larger than the 12,000 16,000 people discussed in the IPRSP. The shire's proposed urban area could have held a population of 30,000 40,000 people but that would need further investigation and structure planning; and

(f) Mr Flugge did not express any view about the position at July 2006 of the likely outcome of the review as regard to the size and configuration of any larger urban village of Ravenswood.

1527 Mr Flugge considered that the result of the Planning Review would be that the subject land would be identified for future urbanisation in the immediate or short term (ts 4515 4516).

1528 Mr Flugge's written reports were primarily directed to the past hypothetical rezoning question rather than the question of urban potential. The reports expressed the opinion that, but for the proposed public works, the subject land would have been zoned urban. To the extent that he relied on factors still applicable in 2006, the factors leading to that opinion may be of assistance in assessing urban potential. The factors leading to that opinion, still applicable in 2006 and in addition to those set out above, included the following:

(a) the 'strategic' location of the land midway between Mandurah and Pinjarra on Pinjarra Road;

(b) the serviceability and lack of constraints of the land; and

(c) the planning history showing support for urbanisation TS Martin strategy 2, the SWAT report, the TAFE College Site report and the draft LPS.

1529 He disagreed with Mr Moran's view that the land would not be urbanised before 2020, referring to these factors and the statistics that he said supported the rapid population growth in the area (exhibit 182B [15], [24] [25]). His report did not set out any detail about those population statistics. 7.2.2 Mr Rowe

1530 Mr Rowe expressed the opinion that it would be an 'almost certain' outcome that the land would be designated, in the IPRSP review, for urban purposes (ts 4497). In his oral evidence, he expressed the following reasons for that view (ts 4497):

(a) the land and the land ***around*** it would be found to be suitable for urban;

(b) there had been a change in thinking from the IPRSP, reflected in Network City and Liveable Neighbourhoods;

(c) a larger urban village, such as discussed by Mr Flugge, would be consistent with those documents, as would be urban growth along the activity corridor identified in Network City;

(d) a larger urban village might have a population between 18,000 and 30,000 people; and

(e) as at July 2006, it was intended to have a major activity centre of district centre size in this area. If located at the junction of Old Mandurah Road and Pinjarra Road, the Pinjarra Road connection and the forming of a major node to create an activity centre would have led to the urbanisation of the subject land.

1531 This last proposition appears to involve an assumption that there would be an activity centre at the junction of Old Mandurah Road and Pinjarra Road. That assumption was spelled out later in his evidence (ts 4552). He said that the PRPC report of April 2006, and the WAPC decision, reflected a firm decision for a district centre at that location. (As will emerge, I take a different view.)

1532 Mr Rowe's opinion is that the result of the Planning Review would be that the subject land would be identified for future urbanisation that could be progressed immediately (ts 4502 4504).

1533 Later in his evidence he explained his view that Liveable Neighbourhoods supported the urban potential of the land (ts 4534 4540). I will outline that evidence in section 7.4.

1534 In Mr Rowe's first report, dated April 2008 (exhibit 191A), he expresses the opinion that the 'highest and best use' of the subject land was urban. He points to the matters I have already summarised. He also refers to the

planning history, to the draft LPS, and to available population projections for Peel and the Shire of Murray (see exhibit 191A, for example, [134] [139]). He considers that the subject land would be viewed as a logical extension of the emerging Ravenswood area to the east of the subject land (exhibit 191A [136]; see also exhibit 191B [38]).

1535 In Mr Rowe's second report, dated September 2008, he also suggested that in the IPRSP review, the WAPC would take into account what was known about Furnissdale by 2006 that it would not accommodate the 10,000 people contemplated in the IPRSP (exhibit 191B [29] [34]). In identifying areas to replace that future urban land, the WAPC would focus on land on or near Pinjarra Road, that being designated an activity corridor under Network City (exhibit 191B [35]).

1536 Mr Rowe also pointed to the shire's support, in February 2006, for the rezoning of the Clough/Rapley land (exhibit 191B [36] [37]). In his report of December 2008, he makes a corresponding point about the shire's support, in June 2007, for rezoning of the Gold Fortune land (exhibit 191C [28] [31]). However, of course, that latter decision would not have been known to the hypothetical purchaser in July 2006. The same is true of the PRPC's decision on 20 August 2009, on behalf of the WAPC, to initiate, as minor amendments of the PRS, the urban rezoning of the Clough/Rapley and Gold Fortune land, which was also relied on by Mr Rowe (exhibit 191E, attachment GR 2, 25/497 498).

1537 In response to Mr Moran's opinion that there was sufficient urban zoned land to meet demand for many years, Mr Rowe emphasised that not all urban zoned land leads to urban lots. Fragmented ownership may make coordinated development of suitable structure plans problematic. In addition to environmental and servicing constraints, onerous subdivision conditions may be imposed (exhibit 191E [27] [30]). 7.2.3 Mr Butterly

1538 Mr Butterly agreed with Mr Flugge and Mr Rowe. He referred to what he called the 'perceived demand at that time', which he said was peaking in 2006. He also referred to the Peel ***Region*** Infrastructure Plan (the PRI Plan) which stated that demand was moving ahead of supply (ts 4498). The PRI Plan was published in October 2006. I will say more about the PRI Plan in section 7.5.2.

1539 Mr Butterly's first report, dated April 2008, expresses the opinion that, but for the proposed public works, having regard to the planning history and population growth and demand for residential land in Peel as at July 2006, the land would have already been zoned for urbanisation or would be imminently capable of being considered for urban rezoning (exhibit 194A [5.2], [7.4]).

1540 A major element of Mr Butterly's reasoning is his view that, but for the proposed public works, the subject land would have been designated future urban in the IPRSP in 1997. I have explained in section 5 why I do not accept that view. I identify below some of the matters he refers to that may bear on the urban potential of the subject land (on the basis that it is rural in the IPRSP and in the PRS).

1541 In his first report, he expresses the view that the IPRSP and the PRS had not anticipated the 'hypergrowth' that would occur within the Peel ***region*** in 2005 and 2006; and that the draft LPS appeared to be the most current recognition of 'the need to identify land for the purposes of urban subdivision' (exhibit 194A [5.19]). It is not clear from the report what is said to substantiate that 'need' and the 'hypergrowth'. The report refers, relevantly, to the 2006 MDP. In its initial form, Mr Butterly's report also referred at length to the PRI Plan. However, that section of the report (27/37 42) was redacted by consent of the parties following conferral.

1542 In Mr Butterly's report of 5 September 2008 (exhibit 194B), he expresses his disagreement with Mr Moran's opinion that in 2006 there was adequate urban zoned land to meet expected demand until at least 2020. One important element of Mr Butterly's response is his view that, but for the proposed public works, the subject land would have already been identified for urban development, and in preference to other urban zoned or designated areas: see, for example, exhibit 194B [2.3] [2.5], [2.15]. I have explained in sections 5 and 6 why I do not accept that view. Mr Butterly also expresses the following opinions in exhibit 194B:

(a) the 2003 Furnissdale Structure Plan showed that Furnissdale would not accommodate the 10,000 people contemplated in the IPRSP. The subject land would be well located to accommodate the replacement population: [2.5], [2.12], [2.13], [2.18];

(b) similarly, problems with Amarillo, known by 2006, meant it could not be expected to accommodate a substantial population as envisaged in the IPRSP: [2.14];

(c) by 2005, the WAPC knew that insufficient land had been identified for urban development, and a review of the IPRSP and PRS was necessary: [2.6] [2.7], [2.11]; and

(d) he adopted what he called the Peel Development Commission Annual Report population figures for 2021 to suggest a 10% increase in expected population, compared to the IPRSP: [2.7]. He also referred to those figures as suggesting population increased more quickly than expected in the IPRSP: [2.18]. If that is intended as a reference to something different from the PRI Plan of October 2006, it is not in evidence and has not otherwise been referred to in the evidence. I will say more about population projections in section 7.5 below. 7.2.4 Mr Robinson

1543 Mr Robinson expressed the view that there would have been an extremely high likelihood that the land would be identified for future urban in the IPRSP review. In his initial oral evidence, he did not spell out reasons for his view.

1544 Mr Robinson's written reports are extensive and detailed. I will not attempt a detailed outline. Many of the elements of Mr Robinson's reasoning echo points made by others of the plaintiffs' planners that I have outlined already.

1545 Mr Robinson's reports include many opinions about what he considers was appropriate or inappropriate about planning decisions taken at earlier stages. For example, Mr Robinson repeatedly criticises some of the planning decisions made in the IPRSP and the PRS: see, for example, exhibit 180A [278], [300], [301], [318] [320], [349], [352], [572]; exhibit 180B [243]; ts 4864. In similar vein he criticises aspects of Network City: exhibit 180A [362] [365]. A central element of these criticisms is Mr Robinson's evident view that the SWAT report correctly identified 25,000 people as an appropriate minimum for a sustainable community, and that urban cells should have been configured with that goal centrally in mind. As I have mentioned, in my view, this action is not an occasion for a general revisiting of the merits of planning decisions taken at an earlier time. Mr Robinson's criticisms of the IPRSP, PRS and Network City are relevant only for a specific purpose. A criticism may be relevant as informing the prospects of a different approach being taken in the Planning Review. That is not the framework in which Mr Robinson's criticisms are offered. In any event, I am not persuaded of the planning merits of his criticisms, or, more relevantly, that those merits would have been expected to lead to a change in approach in the Planning Review.

1546 Some of the elements of Mr Robinson's reasoning for his opinion, in exhibit 180A, that the subject land had a high urban potential as at July 2006, include the following:

(a) by the time the PRS came into effect, there was a critical shortage of urban land to cater for the future: [349];

(b) that shortage was identified in the draft LPS, which adopted a 'more realistic plan' for identifying future urban land: [351], [353];

(c) there was a clear need to identify additional land, beyond that provided in the PRS, for both immediate and future development: [355];

(d) in accordance with SPP 3, the additional urban land should be adjacent to the existing small settlements on a major transport corridor, namely Pinjarra Road: [356];

(e) the subject land is located in close proximity to the existing urban centres of North Yunderup and Ravenswood, within 10 km of the major employment centres in Murray and Mandurah and with all necessary services and without environmental constraints: [521]; and

(f) Barragup would perform the function of a greenbelt separating Murray from Mandurah: [500] [504]. 7.2.5 Mr O'Neill

1547 In oral evidence, Mr O'Neill said that his view was that the potential of the land to be rezoned to urban in the PRS after July 2006 was uncertain, but possible. Urban zoning of the land would represent a significant change of strategy compared to the IPRSP and State Planning Strategy that indicated a discrete urban village centred ***around*** Ravenswood (ts 4489). To expand the urban area into an extended residential corridor would be a strategically significant departure from that approach. Further, urban zoning of the subject land would involve a significant departure from the then current thinking expressed in Network City, which emphasises consolidation and avoidance of urban sprawl (ts 4489).

1548 Mr O'Neill considered that any future urbanisation of the land would likely be in the long term. That was based on his view of available population projections at the time, in WA Tomorrow No 6 (see section 7.5.2), compared to

the then available stock of zoned land in Murray (see ts 4504 4506). That included Austin Cove and Riverland Ramble. There was also future urban land identified in East Ravenswood. Mr O'Neill suggested that the expected population increase for Murray in WA Tomorrow No 6 involved about 100 lots per year from 2006 to 2011 and might be 150 or 200 lots per year after that. That affected whether the subject land would be identified for future urban in the review (ts 4507, 4703, 4705). Further, even if identified as future urban, it would not necessarily be permitted to be 'first cab off the rank' (ts 4704 4705; see also ts 4694 4696).

1549 Mr O'Neill expressed the view that at 2006, there were no indications in the prior strategic planning of the likelihood of the land becoming urban in the foreseeable future (ts 4696). He said that Network City indicates intended urban expansion for 'future communities' and this area was not part of that expansion (ts 4697). Mr O'Neill accepted, after some hesitation, that, but for the public works, the subject land would have been proposed for urban in the draft LPS. However, he said the draft LPS was not consistent with the IPRSP and had not been approved by the WAPC (ts 4698 4699). 7.2.6 Mr Moran

1550 Mr Moran considered that there would have been a high probability of the land being identified in the IPRSP review for future urbanisation. That is based primarily on its location in the Pinjarra to Mandurah corridor (ts 4494).

1551 Mr Moran addressed the question of the likely timing of the future urbanisation of the subject land by reference to population information and the amount of available zoned land. Thus, his view on timing did not hinge on the expected timing of completion of the IPRSP review (ts 4491 4492). Mr Moran's analyses of population and land supply included the following (he explains these analyses in detail at ts 4518 4529):

(a) considering population projections under WA Tomorrow No 6 against the IPRSP;

(b) considering population figures in the PRI Plan against the IPRSP;

(c) Network City;

(d) an estimate of undeveloped urban zoned land in the PRS; and

(e) an adjusted estimate, taking into account comments made by Mr Haratsis.

1552 I will say more about these matters in section 7.5 below.

1553 Mr Moran concluded that in July 2006, he would have advised the hypothetical purchaser that the land had prospects of rezoning somewhere between 6 and 15 years hence (ts 4493). 7.2.7 Mr Bulstrode

1554 Mr Bulstrode expressed the view, as he had in the conferral and reflected in the joint report, that there was a high prospect that the IPRSP review would identify the subject land for future urbanisation. He did not agree with the plaintiffs' experts, who described it as very high or almost certain (ts 4499). However, it appears that Mr Bulstrode founded that opinion on an assumption that the landowner and planning authorities were willing to progress rezoning. That assumption was identified in question 12 of the planners' joint report, but not in question 11. Question 11 in the joint report deals with the prospect of identification of the subject land for future urbanisation in the IPRSP review. Question 12 dealt with the likely time frame for rezoning from rural to urban. Nevertheless, Mr Bulstrode said, and I accept, that in expressing the opinion of 'high' prospects, he was assuming the landowner and planning authorities were willing to progress rezoning. If that assumption was removed, he would consider that there would be some reasonable prospect that it would be included for future urbanisation (ts 4880 4881). Future urbanisation could include longerterm future urban (ts 4881). Assuming a landowner was willing and had approached the DPI, there would be a high prospect for urbanisation (ts 4880 4881).

1555 Mr Bulstrode expressed the following reasons for his opinion (ts 4499 4500, 4510 4514, 4583 4589):

(a) structure planning for Nambeelup had raised questions including the possibility of an internal inland corridor running northsouth from Ravenswood to Amarillo. He was not sure how much that idea had gone into the public domain. He thought it was one of the options explored at a workshop in May 2006. I will say more about that workshop in section 7.3;

(b) the thinking by 2006 was moving away from an urban node of 12,000 to 16,000 people, to a northsouth corridor of a larger size;

(c) there had been discussion about contemplating future urban land north of Old Mandurah Road;

(d) the draft LPS reflected the council's position; and

(e) there were no major constraints on the land. 7.2.8 Timing for necessary steps from taking date to rezoning

1556 In the end, subject to one matter, all planners agreed that, as at July 2006, it would have been expected that the IPRSP review would take about 18 months to complete, allowing 12 months for publication of a draft and then public consultation and finalisation of the document (ts 4598 4599). The qualification relates to the effect of the expansion of the Planning Review to cover the southeast and southwest metropolitan areas, in addition to the Peel sector.

1557 Mr Robinson considered that the timeframe before the land would be zoned urban would be about 5 6 years, allowing two years for the IPRSP review, two years for the scheme amendments and two years for the structure planning (ts 4499).

1558 Mr Flugge agreed with Mr Robinson that the subject land could have been rezoned within 4 5 years from July 2006 (ts 4514 4515). Mr Flugge considered that the result of the IPRSP review would be to permit an immediate application for rezoning (ts 4515).

1559 Mr Rowe considered that urban rezoning would take 4 5 years, comprising one year for the IPRSP review and then 3 4 years for the steps identified in question 12 of the joint report (ts 4502 4503, 4760).

1560 The agreed steps for rezoning set out in question 12 of the joint report (exhibit 241) were:

(1) an amendment to the PRS;

(2) an amendment to TPS 4, including an outline development plan;

(3) a district structure plan amendment, including utilities and services infrastructure; and

(4) an environmental assessment, including groundwater monitoring.

1561 Mr O'Neill agreed with Mr Rowe's estimate of 4 5 years for the timing for those steps (ts 4504, 4703). He did not demur from questions that put his estimate as 5 6 years. However, as I have explained, Mr O'Neill's opinion was that the timing of urban rezoning was not simply dictated by the taking of those steps. Rather, there were the more fundamental issues to be considered, which I outlined in section 7.2.5 above.

1562 Mr Butterly estimated 5 6 years for those steps. He said that the only 'area[s] of discussion' were the population projection matters raised by Mr O'Neill and whether the PRS amendment would be considered major or minor (ts 4508).

1563 Mr Bulstrode suggested that the steps would take 6 7 years, as reflected in the joint report (ts 4508).

1564 In estimating the expected duration of the IPRSP review, none of the plaintiffs' planners took into account that, as I find in section 7.3 below, the Planning Review had, by May 2006, become a review of the ***southern*** metropolitan and Peel sectors. Mr Butterly accepted that the fact that the Planning Review had that greater scope meant it was likely to lengthen the period before which it would be finalised (ts 4718). Mr Robinson's view was that it would take two years from July 2006 to finalise the wider Planning Review (ts 4720). When Mr Flugge took the wider scope into account, he increased his estimate by a year to 5 6 years (ts 4769). Mr Flugge also accepted that he would have advised the outcome could be that the subject land be investigated for future urban (ts 4770).

1565 Mr Rowe and Mr Robinson said that their estimates could reduce by about 12 months if the owner engaged planners to take steps before the review or during the review period (taking the risk that the land would not be identified as urban in the Planning Review) (ts 4601 4602). Similarly, Mr Bulstrode considered his estimate might fall by a year if the proponent carried out a drainage review and environmental plan during the Planning Review period (ts 4612).

1566 Mr Bulstrode's view of the timing generally was influenced by the demands on the time of the Peel office of the DPI (ts 4509 4510). Further, the inland urban corridor which he says was then in contemplation would have involved a number of regional road issues with associated environment, landowner and community issues (ts 4510). These matters would have affected the timing.

1567 Mr Moran's views on timing were not related to the procedural steps, but were founded on issues of need for and supply of urban zoned land: see section 7.2.6 above.

7.3 Urban potential: findings of fact 7.3.1 The focus of this section

1568 In this section 7.3, I will make findings of fact about various matters relevant to an assessment of the urban potential of the subject land as at the taking date. Those matters include:

(a) the status, progress and scope of the Planning Review, which includes the IPRSP review and any wider review;

(b) the development of the shire's draft LPS;

(c) decisions made in relation to other rezoning applications in the time leading up to the taking date;

and what each of these would have revealed to the hypothetical purchaser about the thinking of the DPI and the WAPC as at July 2006.

1569 It will be relevant to identify whether particular documents were available to the public on enquiry and thus potentially available to the hypothetical purchaser. Documents available to the public on enquiry will be known to the hypothetical purchaser if and only if a prudent purchaser would have made that enquiry: see section 2.4 above.

1570 The question of value generally, and of urban potential in particular, is to be determined as at the taking date on 20 July 2006.

1571 Thus, it is on the taking date that the hypothetical purchaser will be assessing the significance of the events, decisions and other matters that I will outline in this section. For ease of exposition I will outline events in chronological order. However, it should not be overlooked that the events would be viewed by the hypothetical purchaser in a sense retrospectively as at 20 July 2006. In that way, the starting point is that the later documents as at the taking date, and thus most recent, will be accorded more weight. Of course, in the end the weight to be given to a document or event will depend on all the circumstances.

1572 In this section, as elsewhere in these reasons, where I outline the contents of minutes or other record, unless I say otherwise, I accept the accuracy of the document.

1573 The title of each subheading is intended to refer to the most significant events in the relevant period, but is not intended to be comprehensive. 7.3.2 2001 2003: development of a draft LPS

1574 Work on a draft LPS and new TPS 5 commenced well before the IPRSP review was proposed. However, by the time the draft LPS was adopted by the shire in August 2005, the existence of the review was known.

1575 By 2001, there had already been communications between the DPI and shire officers about the preparation of the draft LPS and TPS 5.

1576 In April 2002, Mr Flugge and Mr Robinson of the shire met with Mr Bulstrode and Ms Bell of the DPI (exhibit 151). Mr Bulstrode's notes of the meeting record that Mr Flugge advised that the (then current draft) LPS did not propose any new 'greenfield' urban sites, and that there was currently sufficient areas of residential zoned land. I have found, in section 6.4, that Mr Flugge made statements to that effect at the meeting.

1577 I will say more about the nature and extent of the DPI's input in the draft LPS in section 7.4.5 below.

1578 In 2002 and 2003, the Furnissdale Structure Plan was published and adopted by the WAPC.

1579 By letter of 13 September 2002 (exhibit 152), the shire forwarded a draft TPS 5 and LPS to the DPI. The text of those documents is not evidence.

1580 By letter of 27 February 2003 (exhibit 153), the DPI responded to the shire about the draft TPS 5 and LPS that had been forwarded in 2002. The letter explained the requirements of reg 12A of the Town Planning Regulations 1967 (WA). It stated that the draft LPS would be unlikely to be endorsed by the WAPC for the reasons set out in the letter. Two options to progressing the scheme review were identified. One was to use the draft LPS as a scheme report, the other was to modify it to accord with the requirements of the regulations. The submitted LPS was said to be deficient in a number of respects identified in the letter. Among them was that the document contained no analysis of the existing supply of or demand for urban, ruralresidential and other rural type subdivisions in order to explain and justify the subdivision strategy in the draft LPS (exhibit 153, 3/20/103).

1581 By letter of 7 November 2003 (exhibit 154), the shire sent to the DPI an updated draft of the LPS. The letter referred to a meeting in August 2003. It requested a response from the DPI as a high priority. Again, the text and scheme maps accompanying the letter are not in evidence. 7.3.3 Recognition of a need to review the IPRSP: events in 2004

1582 An extract of the minutes of the meeting of the PRPC of 16 July 2004 is exhibit 43 (3/23/207). The minutes record that the chairman referred to the need to consider possible amendments of the PRS to 'accommodate the rapidlyincreasing population of the ***region***, especially the demand for residential land'. The chairman was then Mr

Terry Martin, who continued to chair the PRPC during Mr Dawkins' first year as chairman of the WAPC (ts 2156). Mr Martin was not called to give evidence. Mr Dawkins agreed in crossexamination that everyone was aware of the population growth in the ***region*** and the demand for residential land (ts 2157). Mr Bulstrode similarly agreed (ts 4390, 4618).

1583 The minutes of 16 July 2004 record that the PRPC resolved to request that the DPI review the need for possible amendment of the PRS to accommodate the increasing population of the ***region***, such review to include an examination of the priority that should be given to the project, its cost and the funding requirements necessary for the 2005/2006 year.

1584 In September 2004, the Network City Framework, Network City Action Plan and the Network City: Community Planning Strategy for Perth and Peel were released for public comment. See section 7.4.3 below.

1585 By letter of 2 December 2004 (exhibit 155), the shire provided comments on the Network City Community Planning Strategy. The shire's letter included the following: In terms of future planning and management of urban growth in the Murray Shire, the network city framework has omitted key proposals which are being considered as part of Council's District Planning Scheme review and preparation of a Local Planning Strategy. As part of this review process Council has taken into account recommendations contained in the adopted Inner Peel ***Region*** Structure Plan, with significant variations based upon more detailed structure planning work having been carried out in certain planning precincts and localities. In particular, the Furnissdale locality is to be retained as predominately rural residential with a minor expansion of the Furnissdale townsite for urban purposes and an expanded mixed business use node situated either side of Pinjarra Road, between Husband and Ronlyn Roads and Watson and Furnissdale Roads. This area should be denoted as an Activity Centre along an activity corridor with potential in the longer term for a possible light rail link between Mandurah and Pinjarra, subject of separate detailed study.

Council's Local Planning Strategy also identifies an additional major activity centre at the junction of the Perth to Bunbury Highway with Pinjarra Road and a future regional recreation site situated east of Fiegerts Road in the Ravenswood locality. An expanded urban catchment is also being considered to service future recreation, education and commercial facilities, strategically located half way between Mandurah and Pinjarra. It is requested that the Commission give this activity node at Ravenswood serious consideration in the future planning for the activity corridor extending between Mandurah and Pinjarra that could end up having far more planning merit than creating a satellite urban settlement on environmentally sensitive land east of the Serpentine River, referred to as the Amarillo Regional Centre (exhibit 155, 3/20/145 146).

1586 The letter also observed that the goal of only 40% of new homes being in new growth areas was thought to be overly restrictive and have the potential to severely curtail future urban growth areas in Murray. The letter raised concerns about whether the DPI had sufficient resources to address all the broad issues and strategies raised by the Network City plan.

1587 The minutes of the meeting of the PRPC of 10 December 2004 (exhibit 45) record that the chairman (Mr Martin) advised that he had met with senior officers from the DPI regarding a review of the IPRSP. He requested that a report should now be presented to the WAPC as soon as possible to convey the PRPC's position on the need to 'urgently review' the IPRSP. Mr Bulstrode said that the need to urgently review the IPRSP was because of population pressures and the demand for urban zoned lots (ts 4394).

1588 Mr Dawkins' evidence was that the WAPC shared the view that the strategic planning was well behind and thus further strategic planning was needed. However, the Commission considered that the product of that planning should not simply be an updated structure plan, but be a more strategic document (ts 2161 2163). When asked when the decision was made that there should be a wider strategic review, rather than simply a review of the IPRSP, Mr Dawkins' answers were not very specific. He said that from when Network City was adopted in October 2005, that guided what should happen, as distinct from merely updating the previous IPRSP. But Mr Dawkins could not say when a decision along those lines was made in a formal sense (ts 2164). As will appear, the evidence generally does not make that clear.

1589 As will be seen, the documents and the evidence generally reveal some changes in the scope and focus of the proposed review and, at times, some apparent inconsistencies in that regard.

1590 On 13 September 2004, the government announced that the Highway would be constructed soon (exhibit 8).
7.3.4 March September 2005: the proposal for a Furnissdale Pinjarra Structure Plan

1591 At the next meeting of the PRPC, on 18 March 2005, a councillor requested an update on the review of the IPRSP. Mr Bulstrode advised that consultants were currently researching and preparing a study ***brief*** for the project that was expected to be completed in late April 2005 (exhibit 259D).

1592 There were further email exchanges between the DPI and the shire about the LPS in late March and early April 2005 (exhibit 156).

1593 A draft project ***brief*** for the Peel ***Region*** Structure Plan, updated to 2 May 2005, was prepared by Taylor Burrell Barnett (TBB) (exhibit 207). On page 4 of the document, concerned with urban growth, it is stated that '[w]ithin the past five years, the ***region*** has experienced unprecedented demand for residential land, with the consequence that the planned urban expansion areas within the IPRSP are developing at a substantially faster rate than originally projected'. Mr Bulstrode said that reflected his understanding, although he had not done any detailed analysis (ts 4618). As demonstrated in Mr Bulstrode's report of 9 September 2005, Mr Bulstrode was referring to high demand for residential land primarily in Mandurah, rather than in Murray (exhibit 48 [2.3]).

1594 The next sentence of the May 2005 draft ***brief*** stated that '[o]n this basis, it is anticipated that the ***region*** will start to experience residential land shortages within the next five to ten years, unless new directions for urban expansion are identified' (exhibit 207, page 4). Asked whether that accorded with his thinking at the time and as at July 2006, Mr Bulstrode said that it was 'generally in line with the need to look at urban expansion' (ts 4618).

1595 It should be noticed that that passage was not retained in the discussion of urban growth in the draft project ***brief*** for the Furnissdale Pinjarra Structure Plan (exhibit 265), which was presented to the PRPC meeting of 9 September 2005. In that document, that passage is replaced with the following: 'Investigation is required to determine whether additional future urban land is required within the study area and, if so, to determine appropriate areas for this purpose' (exhibit 265, 3/15A/270).

1596 In my view, that change reflects or mirrors a change in the DPI's thinking from late 2004 and early 2005, on the one hand, to late 2005 and 2006 on the other hand. In the early stages of the Planning Review there was a view stated that the high demand for urban land meant that further land for urban use needed to be rezoned. In the later period, the view was that there was high demand for and a shortage of residential lots, but whether additional zoned land was needed was unclear and needed investigation. That was also the effect of the evidence of Mr Dawkins (exhibit 95 [15] [16]; ts 2168 2170).

1597 The only evidence about what was done with exhibit 207 is that Mr Bulstrode thought that this draft ***brief*** for discussion purposes was 'ultimately' produced to the PRPC (ts 4619). That is likely to be a reference to exhibit 265, the different draft ***brief*** produced at the September 2005 PRPC meeting. If not, there is no evidence about what was said about the draft document, or when and in what context it was considered by the PRPC. It cannot be taken to reflect DPI or WAPC thinking. I am not satisfied that exhibit 207, which is marked 'draft for discussion purposes only', was available to the public. Consequently, I do not think this document is of any real assistance.

1598 On 18 July 2005, Mr Bulstrode met with the mayor of the City of Mandurah and a representative of the proponents for a proposed rezoning of lots 2 and 3 Balwina Road, Greenfields (exhibit 259F). By then, the PRPC had refused a rezoning request on the basis that it was inconsistent with the IPRSP, and would set a precedent for similar rezoning requests and should instead be considered as part of the review of the IPRSP. Mr Bulstrode's notes of the meeting of 18 July 2005 record that he raised the possibility that the review of the IPRSP would focus only on certain specific locations, including those along Pinjarra Road. That might mean that the Greenfields locality would not be the subject of future structure planning reviews.

1599 However, as will emerge, on 16 September 2005, the PRPC decided not to focus the IPRSP review in this way.

1600 On 26 July 2005, the relevant shire committee recommended that the council adopt TPS 5 and the draft LPS, and to forward them to the WAPC for consent to advertising. The minutes of 26 July 2005 referred to the review of the IPRSP that was expected to commence shortly and take two years to complete (exhibit LPS150.10).

1601 On 8 August 2005, Mr Bulstrode sent an email to Mr Bastin, apparently in response to Mr Bastin's request for assistance regarding a presentation involving the WAPC. The email stated that Mr Bulstrode understood that last year Mandurah was the fastest growing local government ***region*** in Australia. He set out the following population projections:

	LGA	2006	2021
Mandurah	65,422	99,969	
Murray	12,374	22,025	

1602 The following comments were made about urban land supply: There has been a sustained high residential subdivision activity in Mandurah over the past few years. In the past year, there has been a noticeable increase in subdivision activity in Murray. Consequently, the development of major residential estates has been exceeding major developers expectations. The concern is that the continued rapid uptake of urban land, particularly in Mandurah, could cause some urban land supply issues. However, as I have mentioned to Andrew Montgomery, there needs to be an assessment made to quantify this. This information should be able to be obtained from the MDP.

There are relatively large areas zoned for urban purposes in Murray, however, due to drainage and nutrient management issues, the development of these areas are likely to [be] more complex (exhibit 206, page 1).

1603 Mr Bulstrode said in crossexamination that up to 2006, the concerns he expressed about the possible urban land supply issues were not suggested to be wrong. Mr Bulstrode said that that happened ***around*** late 2007 or 2008 (ts 4616). Of course, the question is not what Mr Bulstrode was told, but rather what position was adopted by the DPI/WAPC. Moreover, the position expressed by Mr Bulstrode did no more than to raise the prospect that continuing rapid uptake 'could' cause urban land supply issues, saying that an assessment needed to be made. It can be seen that the concerns expressed in the August 2005 email about the pace of development of urban zoned land are primarily directed to Mandurah.

1604 The following day, Mr Bastin prepared and sent a draft document to Mr Bulstrode (exhibit 259I). It was a draft of a ***briefing*** paper to the commissioners of the WAPC. A modified version of the paper was used to ***brief*** the commissioners for a visit to Peel (exhibit 259L). Both versions contain the following passages: Urban Growth

Issue: Department projections of population growth for 2004 2021 estimate that the City of Mandurah and the Shire of Murray will experience a high rate of growth of over 3%, which is twice the 1.5% rate of the Perth metropolitan ***region***. This >3% growth rate will be among the top 5 in the State. It is expected that the growth in the City of Mandurah will be higher in the early part of this period and then over time subside, while the Shire of Murray's growth will increase to its peak in the latter part of this 2004 2021 period. Growth in the Shires of Waroona and Boddington is negligible (<1%). The combined population of the City of Mandurah and Shire of Murray is projected to increase by about 44,200 to over 120,000 between 2006 and 2021; ie 56% of the 2006 population.

Response: There is a need to assess the capacity to accommodate this growth, and identify additional land for urban growth needs. Some areas in the Shire of Murray zoned Urban are likely to be constrained by drainage and nutrient management issues.

...

Mandurah Pinjarra Corridor

Issues: Network city's urban spatial response identifies Mandurah as one of the seven prime activity centres, which is connected through a primary and secondary activity corridor to Pinjarra (another activity centre). This activity corridor is not identified as containing an eastwest transport corridor upon which activity would rely.

Response: A structure plan will be prepared for this area. A draft ***brief*** had been prepared in consultation with the City of Mandurah and the Shire of Murray and will be forwarded to the Peel ***Region*** Planning Committee in the near future. Consideration will be given to the opportunity to link the Bunbury rail line through to Mandurah.

Responsibility: Western Australian Planning Commission and Dept for Planning and Infrastructure (exhibit 259I). (original emphasis)

1605 These population figures reflect or are consistent with the figures in Mr Bulstrode's email of 8 August 2005.

1606 The issue raised regarding the Mandurah Pinjarra corridor seems to be that Pinjarra Road might be required to serve the twin, incompatible roles of activity corridor and transport corridor.

1607 As I have foreshadowed, the preparation of a structure plan for the specific area from Furnissdale to Pinjarra did not proceed. See below.

1608 This email exchange between Mr Bulstrode and Mr Bastin would not have been available to the hypothetical purchaser.

1609 On 19 August 2005, Mr Bulstrode advised the PRPC at its meeting that as part of the IPRSP review, a structure plan was proposed for an area subject to increasing pressure that extended from Furnissdale to Pinjarra. He said that a study ***brief*** had been prepared and forwarded to local governments and would be presented at the September 2005 PRPC meeting for endorsement (exhibit 259J [25.4]). That project ***brief*** is exhibit 265, to which I will come shortly.

1610 In August 2005, the Shire of Murray adopted a draft LPS and TPS 5 (exhibit LPS150.10). The form of the draft LPS maps at the time of their adoption is shown in exhibit LPS150.8. The land north of the subject land and north of lot 190, up to Rogers Road, is shown as urban. Lot 10 was also shown as urban. Lots 11, 12 and 6 were shown as ruralresidential. I will consider the draft LPS in detail in section 7.4.5 below.

1611 As he had foreshadowed, Mr Bulstrode prepared a report on 9 September 2005 for the September meeting of the PRPC. The report (exhibit 48, 3/15A/263 267), included the following: 2.0 Background

2.1 In September 1994 the [DPUD] released the Peel Regional Strategy - A Strategic Policy Statement and Land Use Plan. The Strategy contained regional objectives and listed recommended actions relating to matters such as the environment, economic development and social development. In response to one of the recommended actions of the Strategy, the Inner Peel ***Region*** Structure Plan(IPRSP) was prepared, which was released for public comment in July 1996 and finalised in December 1997. One of the functions of the structure plan was to provide the basis for formulating and promulgating a regional planning scheme for the Peel ***region***. The Peel ***Region*** Scheme was released for public comment in March 1999 and promulgated in March 2003.

2.2 When the IPRSP was finalised in 1997, it provided a clear direction for the future development of a significant portion of the Swan Coastal Plain within the Peel ***region***. The IPRSP proposed a total of approximately 9,420 ha of urban land, of which 5,444 ha was in the City of Mandurah, 2,062 ha in the Shire of Murray and 1,914 ha in Amarillo. The existing and future urban areas were to provide a population potential of about 255,000, with a capacity for 150,000 people in the City of Mandurah, 55,000 in the Shire of Murray and 52,000 at Amarillo.

The current projected populations for the City of Mandurah and Murray are as follows:

Local Government
2006
2021
City of Mandurah
65,422
99,969
Shire of Murray
12,374
22,025
Shire of Waroona
3,600
3,900
Total Population
81,397
125,894

2.3 Since the finalisation of the IPRSP a significant portion of the 1,147 ha of Future Urban Category A1 areas (short to medium term urban eg Seascapes, Mariners Cove, Southport, Meadow Springs) and portions of the 1,068 ha Future Urban areas - Category A2 areas (medium term - eg Lakelands Estate) identified in the structure plan have either been developed or are currently in the process of being developed.

2.4 It is now considered that the IPRSP is becoming less effective in providing specific guidance for the future development of the area for developers, local governments and the various State government agencies involved in providing community services and service infrastructure. Furthermore, the IPRSP needs to be reviewed in view of the following:(i) the structure plan was essentially prepared in the mid 1990s having regard to then current planning philosophies and principles;

(ii) numerous structure plans, precinct plans and outline development plans have been prepared and approved by the Councils and the Commission, many of which propose variations to the IPRSP (Figure 1 shows the study areas for some of the current structure planning projects and one environmental project for the ***region***);

(iii) considerable environmental investigations are required to determine how any existing underdeveloped urban land and any additional future urban areas can be planned and developed in a manner that will not adversely impact upon the water quality in the ***region***'s waterways; and

(iv) the Shire of Murray has adopted a draft Local Planning Strategy, which will soon be forwarded to the Commission for consent to advertise. This Strategy proposes various variations to the planning proposals recommended in the IPRSP, including additional future urban areas (exhibit 48, 3/15A/263 264). (original emphasis)

1612 Mr Bulstrode confirmed that this represented his view at the time (ts 4396 4397).

1613 In his report, Mr Bulstrode recommended that the review of the IPRSP be undertaken as two projects. The first project would be to prepare a reasonably detailed structure plan for the localities along Pinjarra Road from Furnissdale to Pinjarra. That would be progressed as a matter of high priority. The second project would be a

broader project covering the whole Swan coastal plain to the Darling Scarp, within the Peel ***region*** (3/15A/264). In relation to the contemplated Furnissdale Pinjarra Structure Plan, his report says that the project study area of 3,700 ha was identified because it is currently subject to substantial development pressures and there are numerous planning issues needing to be addressed. He also refers to the Shire of Murray local planning strategy as having proposed additional future urban areas. His proposal was that structure planning for this critical area be progressed as a matter of high priority and be done concurrently with the assessment and finalisation of the Shire of Murray LPS. The aim would be to finalise the proposed structure plan by February 2007 (3/15A/264 265).

1614 The draft project ***brief*** that accompanied Mr Bulstrode's report is exhibit 265, relating to the Furnissdale Pinjarra Structure Plan. I have already referred to what it said about the need for investigation to determine whether additional future urban land is required in the study area and, if so, to determine appropriate areas for that purpose. Because, as I explain below, the proposal to prepare a Furnissdale Pinjarra Structure Plan was not adopted, it does not seem to me to be necessary to outline other parts of the draft consultant's ***brief*** which were said by the plaintiffs to support their urban potential case. The draft consultant's ***brief*** was prepared by TBB, not by Mr Bulstrode or anyone at the DPI, although it was presented by Mr Bulstrode to the PRPC.

1615 Mr Bulstrode's report said that no ***brief*** was prepared in relation to the broader Peel planning strategy (exhibit 48, 3/15A/266). In saying that, Mr Bulstrode may have overlooked the draft of 2 May 2005 (exhibit 207) or, less likely, he may not have seen the draft. Mr Bulstrode recommended in his report that the broader Peel planning strategy commence the following financial year and that it was anticipated that it would take about two years to complete.

1616 In his report, Mr Bulstrode recommended that the PRPC resolve to agree to undertake the proposed Furnissdale Pinjarra Structure Plan in accordance with the draft consultants' project ***brief*** as a matter of high priority, before the broader review of the Peel planning strategy (3/15A/266). This report came before the PRPC at its meeting of 16 September 2005. The PRPC resolved not to adopt Mr Bulstrode's recommendation.

1617 Exhibit 49 is the minutes of the PRPC meeting of 16 September 2005. The minutes include the following: Mr Bulstrode outlined the reasons for proposing the initiation of regional planning studies within the Peel ***region*** and the proposal to prepare a moregeneralised strategy for the Peel ***region*** as a whole and a moredetailed structure plan for the Furnissdale-Pinjarra corridor, which is subject to more immediate development pressures.

The Committee agreed that the substantial population growth and consequential development pressures make it necessary to review the [IPRSP] as a priority. However, Mr Frewer advised that there was a need to ensure that a comprehensive approach is taken to the strategic planning of the ***region*** and this matter will be discussed when the [WAPC] visits the ***region*** later in the year. For this reason, Mr Frewer proposed that the Committee note the study ***brief*** at this stage (exhibit 49, 3/19/19 20).

1618 The resolution records that the PRPC resolved 'to note the proposed study ***brief*** for the Furnissdale Pinjarra Structure Plan and that the [WAPC] will be giving consideration to how best approach the strategic planning for the ***region*** during its visit of the Peel ***region***' (3/19/20).

1619 It can be seen, therefore, that the approach of the PRPC was to give priority to the need for a comprehensive approach, notwithstanding the particular development pressures regarding the area from Furnissdale to Pinjarra surrounding Pinjarra Road.

1620 In some subsequent reports of Dr Montgomery in July 2006 and November 2006, this decision is characterised as a decision to undertake a strategic planning overview encompassing the southwest corridor (see exhibit 164, 3/19/61 and exhibit 92, 51/206, both referred to below). It is not clear from the minutes that that decision was made at this meeting in September 2005. In any event, for reasons that will emerge, I am satisfied that that decision was made before the taking date.

1621 The plaintiffs' submissions put very heavy emphasis on the contents of Mr Bulstrode's report of 9 September 2005 and the accompanying draft project ***brief*** prepared by TBB. However, the weight to be given to those

documents by the hypothetical purchaser is necessarily limited by the decision of the PRPC not to adopt the recommendation in the report, and by the fact that those documents were prepared 10 months before the taking date. As will be seen, the DPI/WAPC's thinking and planning had progressed over that 10month period.

1622 At the meeting of 16 September 2005, the PRPC also considered a request for amendment of the PRS in relation to lots 300 and 301, the Clough/Rapley land. The minutes record that Mr Bulstrode advised that two requests had been received in relation to the land. The first requested that the regional open space reservation that affects part of the two lots be deleted. The second requested that the land be included in the urban zone (exhibit 49, 3/19/20). Mr Bulstrode had prepared a report to the PRPC, dated 25 August 2005, on the two requests (exhibit 9).

1623 His report recommends that the request for rezoning the land to urban be declined for the reason that doing so would prejudice the outcome of the proposed review of the IPRSP and set an undesirable precedent, to the detriment of orderly and proper planning of the ***region***. Among other things, the proposed review was to identify land requirements for sustainable urban growth in this part of the Peel ***region*** (exhibit 9, 2/1/31).

1624 The minutes of 16 September 2005 (exhibit 49) record that the PRPC concurred with the reasons put forward by Mr Bulstrode in his report and Mr Bulstrode's recommendation was adopted by the PRPC at that meeting (exhibit 10, 2/1/135).

1625 This decision is one of many indications to the hypothetical purchaser in the period leading up to the taking date that an application to rezone the subject land after the taking date would not have been approved, pending the completion or substantial completion of the Planning Review. 7.3.5 October December 2005

1626 In October 2005, commissioners of the WAPC, including the chairman, Mr Dawkins, visited the Peel ***region*** and met with many people, including representatives of the shire. Officers of the DPI prepared a ***briefing*** paper for that visit (exhibit 259L; also exhibit 100). It included passages to the effect set out earlier in the draft of August 2005 (exhibit 259I). It said that a draft project ***brief*** for the Furnissdale Pinjarra Structure Plan 'will be forwarded to the [PRPC] in the near future'. It identified the Furnissdale Pinjarra Structure Plan as an ongoing project of the WAPC and DPI, and did not identify a review of the IPRSP (see exhibit 259L, pages 4, 7). It appears that the ***briefing*** paper was drafted before the meeting of the PRPC of 16 September 2005 and had not been amended in light of the decision at that meeting regarding the Furnissdale Pinjarra Structure Plan draft project ***brief***. In any event, the ***briefing*** paper would not have been available to the public and does not necessarily reflect the views of the WAPC at that time.

1627 In November 2005, the WAPC released 'Network city a milestone in metropolitan planning' (exhibit 4C). I will say more about this in section 7.4.3 below.

1628 On 4 November 2005, Mr Bulstrode asked Mr Ryan, a senior project officer with the DPI, for information on the urban land supply situation in the Peel ***region***. Mr Ryan replied by email on 8 November 2005 (exhibit LPS150.9). His assessment, attached to the email, was as follows:

	Murray	Urbanised	Vacant
Total	PRS Urban area (ha)	519	1228
1748	x 7.5 dwellings per ha	Urban dwellings	
9210			
	x 2.46 ppd	Urban pop'n potential	
22657			
	Additional pop'n forecast 2006 2021 (WAPC 2005)		
9225	9975		
	Estimated years' supply Urban subtotal		
36.8	34.1		

PRS Urban Deferred (UD) area (ha) 3 597
600 x 7.5 dwellings per ha UD dwellings
4478

x 2.46 ppd UD pop'n potential
11015

Additional pop'n forecast 2006 2021 (WAPC 2005)
9225 9975
Estimated years' supply UD subtotal
17.9 16.6

Total estimated years supply
54.8 50.6

Notes: see WAPC 2005 for commentary on confidence levels up to and beyond 2021 and Methodology explanation

(WAPC 2005) = 'Western Australia Tomorrow', DPI Research Branch (due for release late 2005)

Murray = 9600 additional persons for 2006 2021; plus or minus 3.9% mean absolute error range

NB: Preliminary estimate only DRAFT NOT FOR PUBLICATION

(original emphasis)

1629 The email stated that the PRS currently provides for about 34 years' worth of urban zoned land, plus an additional about 16 years' worth in Murray. The email pointed out that the attached spreadsheet was not for publication and stated that any forecast 'beyond, say, 15 years (2021)' was 'well and truly open to interpretation' (exhibit LPS150.9).

1630 Mr Bulstrode was asked in crossexamination whether the receipt of that information caused him to suggest that the draft LPS be modified to reduce the areas of proposed urban land. Mr Bulstrode said that with any local planning strategy, some analysis of potential population and housing supply would be expected, and the WAPC

would expect the DPI to review and comment on that analysis. Mr Bulstrode said that because he had not done any such analysis at the time, it would not have been appropriate to make any suggestion about the reduction of urban areas (ts 4473).

1631 This email exchange would not have been available to the hypothetical purchaser.

1632 On 16 November 2005, Mr Rory O'Brien, team leader of Urban Growth Management, sent an email to Mr Bulstrode providing preliminary comments on the shire's draft LPS and maps. His preliminary comments included the following: There does not appear to be any assessment of Population Projections and therefore it is difficult to understand how they got to the urban, residential and rural land uses and land allocation. I would have expected to see more urban/residential to cater for the projected future population.... Another major issue is the way the MandurahPinjarra corridor has been proposed. They are proposing a Rural Wedge between the two! This is outdated Strategic Planning. The whole thrust of 'Network city' is to strengthen up Activity Corridors. The MandurahPinjarra corridor should be high intensity where land capability permits. The wedges will be there in the form of waterways and floodways! Overall the LPS appears to me to suggest that the Shire of Murray is locked in the 'small town' trap. It has not dawned on them that they are part of one of the fastest growing ***regions*** in Australia and that they need to play a major role in the development of the PerthPeel Metropolitan ***region*** (exhibit 257).

1633 The plaintiffs' submissions emphasise these comments by Mr O'Brien. The comments are not admissible as expert evidence as to the correctness of the opinions expressed. This document is a communication between officers of the DPI; it is not a business record. The document is relevant and admissible for the fact that these comments were made in the context in which they were made. Mr Bulstrode asked for the email to be placed on the shire LPS file (exhibit 257). The comments are part of the process of considering the draft LPS and bear upon the DPI/WAPC review of the draft LPS as an element of the Planning Review. There is no evidence that the comments would have been available to the public. Further, there is no evidence as to what weight, if any, the comments were attributed in the review of the draft LPS. In any event, as I will explain, that review was not underway, in any substantive sense, by the taking date.

1634 By letter of 21 November 2005 (exhibit 259M; also exhibit LPS150.10), the shire advised the DPI that, in August 2005, council had adopted TPS 5 and the draft LPS for consent to advertise, subject to the modifications set out in the letter. The shire forwarded the draft LPS and TPS 5 to the DPI for assessment, prior to the DPI reporting to the WAPC on certification of the draft LPS for advertising and consent to advertise TPS 5.

1635 Exhibit 259O and exhibit 259P appear to be part of a report prepared in late 2005. These documents were not the subject of any oral evidence, or any written or oral closing submission. The undated report that is exhibit 259O is entitled 'Urban Growth Management Program; Peel ***Region*** Coordination of Growth Management'. The report was noted by the WAPC at its meeting on 22 November 2005 (exhibit 259N). It refers to a number of projects currently in progress that should be coordinated into a single overall direction. It refers, by way of example, to the preparation by the DPI of a programme for a review of the structure planning along the Furnissdale to Pinjarra corridor, saying that this needs to proceed soon, to ensure that the future land allocation realises the Network City strategies. The report suggests that it should be possible to reduce the preparation of an overall structure plan to 12 months rather than the usual 24 months. The WAPC resolved at its meeting to request a further report that provides more detail about the scope of work to be undertaken in the Peel ***region*** (exhibit 259N).

1636 Exhibit 259P is a set of Gantt charts dated 22 and 23 November 2005 dealing with a number of projects. One of the projects is the preparation of the Furnissdale Pinjarra Structure Plan, which it is proposed will commence on 1 December 2005 and will be finalised by the end of 2006.

1637 This suggests that, as at November 2005, the idea that a Furnissdale Pinjarra Structure Plan be separately prepared was still alive. However, if that were so, that suggestion was not taken up by the WAPC in 2006. To the contrary, as will emerge, a review of wider scope was instituted, involving the ***southern*** sectors of the metropolitan area, as well as the Peel sector.

1638 On 24 November 2005, the DPI sent out pro forma letters to various government agencies seeking comments to assist in the DPI's assessment of the draft LPS and TPS 5 (exhibit LPS150.11). In late November 2005, there

were emails between Mr Bulstrode at the DPI and Mr Selby at the shire about the assessment of the draft LPS (exhibit 159; exhibit LPS150.12). 7.3.6 January - February 2006

1639 In January 2006, the WAPC published the report entitled 'Metropolitan Development Program 2005/2006 to 2009/2010' (the MDP report). It referred to the IPRSP review and the proposal relating to the Furnissdale Pinjarra corridor. It stated that it was essential that broad structure planning is undertaken on the lower metropolitan area and important to ensure that Network City strategies are included in the planning (exhibit 94, 1/9/337). The MDP report also stated that the Shire of Murray's draft LPS and proposed district zoning scheme had been forwarded to the WAPC for consent to advertise (1/9/337). I will say more about the MDP report in section 7.5.

1640 The Shire of Murray Planning and Development Services Committee met on 17 January 2006. Extracts from the minutes of this meeting are exhibit 123 and exhibit 138. Exhibit 123 contains those parts of the minutes relating to rezoning the Clough/Rapley land. Exhibit 138 relates to rezoning the Gold Fortune land. The reports to the committee on both rezoning proposals, as set out in the minutes, record that the WAPC has previously advised that it is not willing to undertake amendments to the PRS until such time as the review of issues associated with the development framework as part of the IPRSP has been finalised. However, the council's planning framework clearly indicates that those parcels of land are located in an area suitable for future development, subject to further detailed analyses of site conditions (exhibit 123, 2/1/137; exhibit 138, page 15). See also the statements to similar effect in exhibit 54 and exhibit 139.

1641 The shire resolved to defer consideration of the Clough/Rapley rezoning. In respect of the Gold Fortune land, the shire resolved to advise the planning consultants for the proponents that council was prepared to further consider initiating a scheme amendment to TPS 4 for that land, and to advise the consultants that environmental issues associated with Wilgie Creek should be considered (exhibit 138, page 17).

1642 Later, in March 2006, the shire resolved to initiate the amendment to the zoning of the Clough/Rapley land, subject to EPA assessment (exhibit 252B).

1643 On 3 February 2006, the DPI held a workshop for what the notes of the workshop described as the '***Southern*** Sectors Review' (exhibit 259S). The workshop related to the ***south*** metropolitan and Peel ***regions***. This is the earliest document or evidence using the phrase '***Southern*** Sector Review' or otherwise suggesting that the Planning Review had progressed so that the IPRSP review would be part of, or overtaken by, a wider review.

1644 Attendees at the workshop included a number of DPI people, some consultants and representatives of a number of local governments, and others.

1645 In the course of the DPI introduction, Mr Ryan 'presented an overview of the MDP implications in the ***South*** Metropolitan and Peel ***regions***' (exhibit 259S, page 2). He said that about one third of metropolitan growth would be in the Rockingham, Mandurah and Murray areas. He also referred to the balance between greenfield land supply and Network City intentions. Mr Burrell is recorded as providing an overview of the proposed Amarillo development (exhibit 259S, page 3).

1646 Dr Mike Mouritz, outgoing executive director of the DPI, outlined some of the initiatives being undertaken in the ***South*** Metropolitan and Peel ***regions***, including 'Network City implications' and 'urban growth management'. Later comments refer to 'the need for long term (100 years) regional planning' (exhibit 259S, page 2). The notes record comments by Mr Bulstrode that the planning is dated, referring to 1996, and that a review of the structure plan is urgent and that the issues are of critical importance (exhibit 259S, page 6). Mr Beyer, incoming executive director of the DPI, made some closing comments. Among these were that the structure plans were out of date, considerable further work was needed, and that the Mandurah/Peel corridor was urgent. A follow up workshop was scheduled for May 2006 (exhibit 259S, page 7).

1647 On 10 February 2006, Mr Bulstrode and Mr Muscara of the DPI met with some planning consultants and representatives of Clough/Rapley, the purchasers of lots 300 and 301. The subject of the meeting was to discuss the possible development of the Clough/Rapley land and the possibility of an amendment to the PRS. According to the note of the meeting (exhibit 53), Mr Bulstrode advised that:

(a) the IPRSP was being reviewed and that any amendment to the PRS to rezone the land from rural to urban will require the IPRSP review to be sufficiently advanced;

(b) a major amendment to the PRS would be required and that may take two years to complete;

(c) the PRPC has not been supporting the rezoning of land from rural to urban as there is a lack of structure planning in the ***region*** and that similar urban zoning requests were viewed as ad hoc and out of context, and therefore were not supported;

(d) it was Mr Davis' view that it may take up to three years to process a major PRS amendment, including with the review of the IPRSP. Mr Bulstrode stated that this time frame was a good guide; and

(e) Network City promoted the idea of activity corridors with a range of uses and Pinjarra Road was an example of an activity corridor, so any development on the Clough/Rapley land should have regard to Network City and a range of uses and densities for the land.

1648 As Mr Bulstrode explained in his oral evidence, the position regarding the time needed for rezoning the Clough/Rapley land should not be equated with the position regarding the subject land. The Clough/Rapley land related to an identifiable precinct, comprising it and the Gold Fortune land, whereas the subject land was part of a much broader area north of Old Mandurah Road. Consequently, rezoning of the subject land would have raised more issues and would have taken longer (see ts 4604 4606, 4610).

1649 On 17 February 2006, Mr Dawkins, chairman of the WAPC, issued a statement to the press in the following terms: Speculation on urban sprawl ***around*** Pinjarra

The Western Australian Planning Commission is alarmed about the rapid increase in speculation in rural land in the Peel ***Region***.

There appears to be highly unrealistic expectations of urbanisation in parts of the ***region***, particularly in the farming areas east of the Peel Harvey estuary.

Land owners, developers, investors and speculators need to understand that there are no plans to convert extensive areas of rural land to urban zoned land. There are no current plans to approve major new subdivisions in the area.

Members of the public are warned that investment schemes based solely on the prospects of rural land being rezoned and subdivided may be purely speculative.

The Peel ***Region***, centred on Mandurah, has outstanding natural and other attractions and is experiencing sustained urban growth. From next year it will have a fast, frequent rail service connecting it to the entire Perth ***Region***. Construction of the Perth Bunbury Highway will dramatically improve access to Perth, Bunbury and the SouthWest.

The WAPC is working with state agencies, the Mandurah and Murray councils and the community so that the resulting growth can be sustainable.

The WAPC will seek to minimise the loss of farmland, to maintain agricultural production and jobs. The WAPC will manage urban development to ensure that it creates communities, brings local employment, delivers affordable housing, reduces travel demand, supports public transport, minimises impacts on rivers, lakes and estuaries and protects bushland.

All of these principles apply in Perth, where 50 years of regional planning and the operation of the Metropolitan ***Region*** Scheme has enable governments to manage urban growth in the longterm public interest.

The Peel ***Region*** now has the Peel ***Region*** Scheme. The WAPC assures the community that it will be used to prevent sprawl and to avoid loss of the ***region***'s precious environmental assets. New urban development will be planned with the community and will meet much higher standards of urban design and environmental performance.

Land owners, developers, investors and speculators are warned that the community demands excellent planning and sustainable development and expects the WAPC to ensure that plans serve the longterm interests of the ***region*** (exhibit 95, 49/10 11).

1650 On 21 February 2006, the Minister for Planning issued a statement in the following terms: Land investors warned to do their homework

Investors should carefully weigh up the risks before committing money to residential land investment schemes in the Peel ***Region***, Planning and Infrastructure Minister Alannah MacTiernan said.

'The Western Australian Planning Commission (WAPC) is alarmed about the increasing speculation in rural land in the ***region***,' Ms MacTiernan said.

'There appear to be some highly unrealistic expectations of rezoning, particularly in farming areas east of the Peel Harvey estuary.'

'Land owners, developers, investors and speculators need to understand that changing the zoning of large tracts of rural land will only follow careful planning.'

The Minister said investment schemes based solely on the prospects of rural land being rezoned and subdivided might be purely speculative.

'Good planning is the key to avoiding an endless urban sprawl and ad hoc housing developments,' she said.

The Peel ***Region***, centred on Mandurah, has outstanding natural and other attractions and is experiencing sustained urban growth.

'From next year, the ***region*** will be connected to Perth by the ***Southern*** Suburbs Railway and the construction of a new highway will dramatically improve access to Perth, Bunbury and the SouthWest,' the Minister said.

WAPC is working with State agencies, the Mandurah and Murray councils and the community to ensure sustainable growth.

At the same time, the commission will seek to minimise the loss of farmland, to maintain agricultural production and jobs.

Ms MacTiernan said new urban development would have to follow the Peel ***Region*** Scheme, the Metropolitan ***Region*** Scheme or the planned Greater Bunbury ***Region*** Scheme.

'These schemes will be used to prevent sprawl and to avoid the loss of precious environmental assets,' she said (exhibit 95, 49/12).

1651 Exhibit 99 (3/21/165 167) is a ***briefing*** paper to the Minister from the DPI's Director General, dated 1 February 2006, recommending a press release along the lines of what was published. The plaintiffs put some emphasis on this document. To my mind, the reasons for the press release are not of much importance. The press releases themselves are not evidence of the truth of their contents. To the extent that the press releases have any real significance, that arises from the fact that they were in the public domain before July 2006. Consequently, they are a part, albeit a small part, of what would have been known to the hypothetical purchaser at the taking date. The ***briefing*** paper was not available to the public. Further, the hypothetical purchaser would not have asked for it it was not sufficiently material. 7.3.7 April 2006: the WAPC decision about the Riverland Ramble Commercial Centre

1652 On 18 April 2006, the Statutory Planning Committee, on behalf of the WAPC, broadly adopted the recommendations in a report dated 3 April 2006 by Mr Sanderson, of the DPI, to approve a revised outline development plan in respect of lot 602, previously lots 20 and 21, Old Mandurah Road (being Riverland Ramble). See exhibit 245J, exhibit 245K and exhibit 245L (most of which is duplicated in exhibit 259T). By April 2006, the Statutory Planning Committee had taken over what had been the role of the PRPC.

1653 Mr Rowe took a particular view of the effect of this decision. This view formed an important element of his reasoning for his opinion on urban potential. It is also important in the context of the plaintiffs' commercial case. Consequently, it is appropriate to give detailed attention to this decision and the report accompanying it. 7.3.7.1 THE DPI REPORT OF 3 APRIL 2006

1654 In explaining the background, Mr Sanderson's report stated that in light of increasing development pressure in the shire, and changes to planning practice regarding residential subdivision, the proponents sought to revise the ODP. Under the existing approved ODP, much of the land was approved for R15 residential development with a small commercial centre located on Nancarrow Way in the southwest corner of the estate. About 250 lots were subject to current subdivision approval, of which 100 had already been constructed and sold (exhibit 245L [2.1]). The major modifications put forward by the proponent under the revised ODP included the relocation of the commercial centre to the intersection of Pinjarra Road and Old Mandurah Road, and an increase in the size of the centre, which was a neighbourhood centre in the existing approved ODP.

1655 Initially, the proponent intended that only the area set aside for the proposed commercial centre in the northwest corner of Riverland Ramble would be excluded from WAPC approval and be subject to further planning (see the yellow shaded area in exhibit 245L, attachment 3, 49A/229). The proponent also lodged a subdivision application for the remainder of the estate. Following discussion with the DPI, the proponent agreed to increase the area subject to further planning to include a band surrounding the proposed commercial centre (exhibit 245L [2.3]). This is the 'area of further planning and investigation' shown in the subdivision plan (exhibit 245L, 49A/230). The report notes that the proposed revised ODP will need to be modified to reflect this increased area.

1656 In the context of regional planning, the report stated that a workshop had been held for the proposed review of the IPRSP in February 2006 and a further workshop would be held in May 2006. It also stated that a strategic planner had recently been appointed to undertake the strategic planning for the Peel sector and that work was now progressing on the project (exhibit 245L [4.1.1]). If the reference to a strategic planner is to an external consultant, rather than to Mr Andrew Montgomery of the DPI, the evidence does not otherwise reveal that any appointment had occurred, or who was appointed.

1657 The report also referred to the draft LPS and proposed TPS 5, saying that significant areas of urban land had been identified in the draft LPS north of Old Mandurah Road, adjacent to the junction with Pinjarra Road. The report stated that the assessment of the draft LPS would have to be considered in light of the regional strategic planning work that would be undertaken for the review of the IPRSP (exhibit 245L [4.3.2]).

1658 The report stated that three planning consultancy firms were in the process of preparing some very preliminary concept plans to show how the area bounded by Old Mandurah Road, Paterson Road and the Perth to Bunbury Highway could be developed for urban purposes and that a request would be made for this to be reflected in the draft LPS and TPS 5 (exhibit 245L [4.4]).

1659 The report referred to a two day workshop in February 2006 conducted by the Department of Housing and Works on the proposed Amarillo development. It referred to a regional context plan attachment 7 to the report (49A/234) prepared after the workshop, showing a transit route and employment corridor running northsouth from Amarillo to Ravenswood. Ravenswood was shown as a regional centre at the junction of the Highway and Pinjarra Road. The report stated that the plan had no status (exhibit 245L, 49A/219).

1660 I infer that this may be the plan referred to by Mr Bulstrode in his evidence (ts 4512).

1661 At [4.4.1], reference was made to the regional sporting facility and the benefits of the proposed commercial centre being in close proximity of the regional sporting facility. At [4.5], reference was made to the proposed Perth to Bunbury Highway and the proximity of lot 602 to that intersection.

1662 Section 5 of the report sets out comments that include the following:

(a) The existing location of the commercial centre was previously considered desirable as it was located in the vicinity of the existing tourist facilities in Ravenswood, near the river: [5.1.1].

(b) Since then, the Peel ***region*** has experienced significant urban growth and the development of a regional sporting facility site at the junction of the Highway and Pinjarra Road provides an opportunity to reconsider what is the most appropriate land uses at the location: [5.1.2].

(c) The relocation of the centre, regardless of ultimate size, is considered favourable as:

(i) the site is a transport focal point for the surrounding district;

(ii) the proposed centre is located on the Pinjarra Road activity corridor between Mandurah and Pinjarra, 500 m east of the proposed highway intersection with Pinjarra Road and central to the localities of Ravenswood, Yunderup, Furnissdale and Murray Lakes (Austin Cove);

(iii) the proposed commercial centre is adjacent to the proposed regional sporting facility site. There is an opportunity for the two facilities to complement each other. Consistent with Network City, colocation encourages development of an activity centre and public and private transport nodes;

(iv) the existing commercial development in Ravenswood adjacent to the Murray River is tourism oriented in nature and the likely uses of a district commercial centre, such as retail, offices and medical practices, would not be compatible with that existing development or with the planning objectives ***around*** the river; and

(v) the site is not affected by the existence of multiple ownerships as is the case with Pinjarra; while Pinjarra will develop into a historical town character with a district centre, the proposed Ravenswood district centre would be more contemporary in nature: [5.1.3].

(d) The location of the proposed district centre is consistent with the evolving urban and commercial structure of the ***region*** and will contribute to consolidating district and regional level functions at the primary transport node within the ***region***: [5.1.4].

(e) Attachment 9 Shire of Murray Commercial Structure shows the evolving and planned commercial centre structure of the ***region***, and includes the following components:

(i) district level centres at Ravenswood (serving Ravenswood, Yunderup, Murray Lakes and portions of Furnissdale and Barragup) and Pinjarra. It is possible with further urban development in Ravenswood, Furnissdale and Barragup, subject to the completion of the IPRSP review, there may be sufficient demand for a regional level centre in Ravenswood; and

(ii) neighbourhood centres will be incorporated in future development at Murray River Country Estate (MRCE) and Murray Lakes Estate: [5.1.5].

Attachment 9 is marked 'DPI internal use only' (exhibit 245L, 49A/236).

(f) The proposed revised ODP proposed a district centre size development, whereas the already approved ODP included a neighbourhood centre. The proposed revised ODP will be modified to expand the area subject to further study in accordance with attachment 3 to the report, which will allow for a possible increase in approved net lettable area, if further urban land is identified and rezoned following the completion of the Furnissdale Pinjarra Structure Plan: [5.1.6]. I take the reference to the Furnissdale Pinjarra Structure Plan to be intended to be either a reference to the IPRSP review, or to an outcome of that review.

(g) Assessment of the demand was done using land identified as urban and urban deferred in the PRS in the Ravenswood catchment, with some reference to land designated future urban in the IPRSP: [5.1.7].

(h) On this basis, approximately 12,000 dwellings will be created within the catchment of the proposed centre resulting in a catchment population of about 30,000 people in 2031: [5.1.8]. That leads to approximately 12,000 sqm of net lettable area (NLA), applying the SPP 4.2 guideline of 0.4 sqm NLA per capita: [5.1.9].

1663 These issues had come before the Statutory Planning Committee earlier on 28 February 2006. Mr Sanderson had prepared a substantially similar report for that meeting (exhibit RR146.80). At the February meeting, the Committee resolved to defer consideration pending some further information about the structure planning for the area.

1664 The minutes of the February 2006 meeting also referred to the draft LPS, and recorded concern that it had been 10 years since there had been a review of structure planning for the area, saying the matter was pressing given increasing development pressures in the shire (exhibit RR146.80, page 8).

1665 In summary, the report of 3 April 2006 recommended that the revised ODP be approved, subject to the area identified as being subject to further planning being enlarged to ensure that any further planning for the proposed district commercial centre and associated road network would not be prejudiced. This modification is shown by the black line and annotation, 'area "subject to further study" to be increased', on the proposed revised ODP (exhibit 245L, attachment 3, 49A/229). This modification itself expands the area for further study from that shown in the subdivision plan attached to the report. The revised ODP shows residential development in the southwest corner where the commercial centre had been previously located.

1666 It was also recommended that there should be an annotation on the ODP specifying that the maximum NLA of the commercial centre should be 12,000 sqm, unless additional future urban areas are identified in the proposed centre's catchment under a future regional planning strategy approved by the WAPC and additional floor space is supported by a future local commercial strategy endorsed by the WAPC: [5.1.10]. 7.3.7.2 THE STATUTORY PLANNING COMMITTEE DECISION OF 18 APRIL 2006

1667 On 18 April 2006, the Statutory Planning Committee approved the revised ODP, subject to a number of modifications. The Committee resolved broadly to accept what was recommended in the 3 April 2006 report. However, the approved ODP differed from what was recommended in three respects:

(a) it did not accept the recommendation to include the annotation about the maximum NLA of the commercial centre;

(b) it increased the area 'subject to further planning' in the northwest corner beyond what was recommended in the report; and

(c) it did not approve residential development in the southwest corner, but instead excluded this area from approval as being subject to further planning.

1668 I explain below what I consider can be drawn from these departures from the report's recommendations.

1669 The Statutory Planning Committee approved new notes in the outline development plan variation criteria set out on the revised ODP. One of those notes was: The further detailed planning for and subsequent development of the areas identified on the Outline Development Plan as 'areas subject to further study' will be dependent upon the outcomes of further regional planning for the Peel ***region*** (exhibit 245J).

1670 The ODP, as approved, is exhibit 14 (and also exhibit 245M).

1671 What would the decision of 18 April 2006 and the accompanying report reveal or suggest to the hypothetical purchaser? In short, in my view, the hypothetical purchaser would draw from this that the DPI/WAPC thinking at April 2006 was:

(a) the commercial centre that was to form part of the Riverland Ramble development would, in due course, be located in the northwest section of the estate, near the junction of Old Mandurah Road and Pinjarra Road;

(b) the scale of that commercial centre would be determined as part of or in light of the Planning Review, but the current expectation was that in years to come it would be a district centre; and

(c) neither of these were based on an expectation of urbanisation north of Old Mandurah Road. Whether such urbanisation would occur was a matter to be considered in the Planning Review then underway.

1672 I proceed to explain those findings.

1673 There is no binding decision that the commercial centre in Riverland Ramble is to be relocated from the southwest corner, where it had been located under the earlier approved ODP, to the northwest area. Both of these areas were shown 'subject to further planning' on the new ODP approved on 18 April 2006 (exhibit 14).

1674 Nevertheless, in my opinion, in substance it is clear from the decision and accompanying report that the commercial centre was intended to be, and was very likely to be, relocated in due course to the northwest area. The report concludes that the northwest location is preferable, for the reasons stated in exhibit 245L [5.1.3]. Further, the northwest area that is 'subject to further planning' in exhibit 14, had already been approved for residential subdivision under the earlier approved ODP. If that land was not to be considered for commercial use, the reason for the need for further planning was not apparent.

1675 Moreover, the report concluded that a district centre should be planned for Ravenswood, and, subject to further regional planning in the Planning Review, possibly a regional centre. The area 'subject to further planning' in the northwest of Riverland Ramble was first increased, from what was proposed by the proponent, at the instigation of the DPI. The area was then increased by Mr Sanderson in his April 2006 report, and was increased further by the WAPC in the ODP approved on 18 April 2006. In my view, those increases are in accordance with the rationale of the report, so as not to prejudice further planning for the proposed commercial centre and surrounding residential development. The area originally contemplated for the commercial centre in the southwest part of the estate, on Nancarrow Way, was too small to accommodate a district centre.

1676 The WAPC's decision, contrary to the recommendation of the report, to make the southwest area subject to further planning does not, in my view, indicate that the commercial centre was not intended to be relocated to the northwest area. As previously noted, the decision is one of three material departures by the WAPC from what was recommended in the report. There is no direct evidence about the reasons for those departures. To my mind, the other two differences are best understood as reflecting a deliberate choice by the WAPC to keep the options for commercial planning in Riverland Ramble, and the uses within the northwest part of the estate, as open as possible, so as to avoid any possibility of prejudicing the outcome of the Planning Review. In that context, I take the view that the WAPC also wished to accommodate the possibility of future commercial planning identifying the southwest corner of the estate for nonresidential purposes to service the surrounding residential areas and to complement the commercial development in the northwest corner.

1677 The relocation of the commercial centre is not said, in the report, to be based on any expectation of future urbanisation of land north of Old Mandurah Road.

1678 I have outlined the parts of the report which reflect an evident expectation, on the part of the author, Mr Sanderson, that a commercial centre of at least district centre size would be appropriately planned for at Ravenswood. See exhibit 245L [5.1.5] [5.1.10] and attachment 9. The report does not purport to state a firm and definite position; it states a position based on 'initial investigations'. The report says: While only preliminary work has been undertaken [on] some of the strategic planning projects for the ***region***, initial investigations suggest there is a need for a major commercial centre at Ravenswood, at least a district centre or possibly a regional centre [1.3].

1679 As I have said, the report contemplates that that commercial centre would be located at the junction of Old Mandurah Road and Pinjarra Road. On the face of it, the contemplation of a district centre at that location might be thought to provide support for an expectation of future urbanisation north of Old Mandurah Road. However, the reasoning in the report explained the decision to relocate the centre for reasons that do not involve any expectation of urbanisation north of Old Mandurah Road: see [5.1.3]. Further, the contemplated increase in size of the commercial centre to a district centre is justified by reference to future demand, based on existing zoned urban and urban deferred land, and future urban land in the IPRSP: [5.1.7]. The report is mindful of the existence of the

Planning Review and is careful to avoid prejudging the out come of that review, including whether there would be any urbanisation north of Old Mandurah Road. The report is conscious of the prospect of possible future urbanisation north of Old Mandurah Road and, should that eventuate, of the consequential increase in the catchment population for the commercial centre at that location: [4.3], [4.4], [5.1.5(i)], [5.1.6], [5.1.10]. The intent of the approach taken is to keep the options open, so that any increase in population can be accommodated by the ultimate scale of the commercial centre.

1680 The contemplated location of a future commercial centre at the junction of Old Mandurah Road and Pinjarra Road, and its contemplated scale as likely to be a district centre, may be thought to increase the urban prospects of the subject land. I will analyse the extent to which I think that is so later, in sections 7.4 and 7.6. To the extent that those matters would have increased the urban prospects of the land, they would thereby have increased its value. Consequently, attention should be given to whether those matters were attributable to the proposed public works. If they were attributable to the proposed public works, then any increase in the value of the land arising from them is required by the LA Act s 241(1) to be discounted. For the reasons that follow, in my opinion those matters are not attributable to the proposed public works.

1681 The increase in the expected scale of the commercial centre at Riverland Ramble is based on an analysis of the expected catchment area for the centre, using urban and urban zoned land in the PRS and future urban land in the IPRSP. I do not think those zonings and designations are attributable to the public works. Consequently, the increase in scale of the commercial centre is not attributable to the proposed public works.

1682 The proposal to relocate the commercial centre is explained by reference to a number of matters in exhibit 245L [5.1.3]. Those matters are said to favour the relocation of the centre regardless of its proposed ultimate size. It is, I think, fair to say that the proximity to the Highway and colocation with the RRF were emphasised in explaining the benefits of relocation of the commercial centre: see exhibit 245L [4.4], [4.5], [5.1.2], [5.1.3(i)], [5.1.3(iii)], [5.1.4]. Nevertheless, I do not think that the question of whether, in the absence if the proposed public works, the same support for relocation would have been expressed is to be assessed by reference to a close analysis of the reasons in these paragraphs. That is because the report reveals a firm desire to retain flexibility in planning the scale of a future commercial centre. The report contemplates a commercial centre of district centre scale and possibly even larger. The area contemplated for the commercial centre in the earlier approved ODP is too small to accommodate a district centre. Consequently, I am satisfied that without the proposed public works, the report would have expressed firm support for the relocation of the commercial centre to the northwest section of the estate so as to enable planning for a commercial centre of appropriate scale, once that scale was determined after the Planning Review.

1683 Also in April 2006, but independently of the decision about the Riverland Ramble commercial centre, on 21 April 2006, the PRPC resolved to amend the PRS in relation to proposed amendments in the Gordon Road precinct and including lots 2 and 3 Balwina Road Greenfields. The amendment was treated as a minor amendment under the PD Act (exhibit 259U). 7.3.8 May 2006: planning workshop and Dr Montgomery's report of 25 May 2006

1684 On 2 and 3 May 2006, an enquiry by design workshop was held for the WAPC Planning Review then underway. The note of the workshop (exhibit 259V) is entitled '***Southern*** Sectors Review Enquiries by Design Workshop'. The note was an attachment to Dr Montgomery's report of 25 May 2006 (exhibit 210) to which I come shortly. Consequently, as I will explain, it was available to the public prior to the taking date.

1685 The note set out a number of issues and challenges arising from the workshop. Under the heading of 'Network City', the issues included: Activity corridor from Mandurah to Ravenswood?

... Activity corridor linking Mandurah and Pinjarra?

... Activity nodes best placed along the coast. Create one new service commercial node along Old Mandurah Road. Retain existing commercial nodes at Lakes and Furnissdale (exhibit 259V, page 2).

1686 It can be seen that the activity corridor from Mandurah to Ravenswood and all the way from Mandurah to Pinjarra, was said to give rise to be questions. It was not seen to be a given, dictated by Network City.

1687 Under the heading of 'Urban Growth', the matters listed included the following: Develop Ravenswood centre (location and design subject to further study). Extent of Ravenswood residential area will be dictated by the capacity of Pinjarra Road.

... Furnissdale as a buffer between Pinjarra and Mandurah. Developers Land Banks. Plan for the carrying capacity of the Perth/Peel [area] rather than conform to expected growth. Growth can move, the environment can't be replaced (exhibit 259V, page 3).

1688 Under 'Amarillo', the points made were: Amarillo high density therefore less urban area required in ***south*** Pinjarra corridor. If Amarillo does not go ahead further develop along Furnissdale/Pinjarra Corridor (exhibit 259V, page 3).

1689 These points draw a direct connection between Amarillo's urbanisation and the extent of future urbanisation in the Furnissdale Pinjarra corridor.

1690 In early May 2006, there was correspondence and communications between the shire and the DPI regarding the progress of the DPI review of the draft LPS and TPS 5 (see exhibit 160, exhibit 161 and exhibit 162). Those discussions generated the suggestion that the DPI progress its review of TPS 5 separately from the draft LPS. That was because TPS 5 was based on current zonings and the PRS, whereas the draft LPS raised much broader regional planning issues.

1691 In an email of 19 May 2006 (exhibit 162), Mr Bulstrode raised the concerns of the shire about the time taken for the WAPC/DPI review of the draft LPS and TPS 5. In the course of that, Mr Bulstrode stated that it should be recognised that there 'are major issues with Council's proposed LPS, particularly as it proposes major new urban areas with very limited planning or environmental work' (exhibit 202, 3/21/202). As I will explain in section 7.4.5 below, in my view, that is a fair observation about the draft LPS. In the same email, Mr Bulstrode stated that the Peel office of the DPI had been mindful of the strategic planning exercise for the ***southern*** metropolitan and Peel sectors needing to be progressed so as to provide a regional planning context to make an informed planning assessment of the draft LPS. The email referred to the strategic planning workshops in February 2006 and May 2006, and said that it would be at least another year before there was a reasonable strategic plan for the ***region*** to enable an assessment of the major planning proposals in the shire's draft LPS.

1692 By letter of 23 May 2006 (exhibit LPS150.22), Mr Bulstrode wrote to Mr Selby at the shire. The letter referred to the parties' recent meeting and confirmed that the DPI had not yet undertaken a comprehensive analysis of the draft LPS. This was said to be 'primarily due to the fact that broader regional planning for the ***southern*** metropolitan and Peel ***regions*** is only in the early stages of review' and was not sufficiently advanced to provide a basis upon which the LPS could be assessed. Mr Bulstrode's letter stated that the shire's suggestion to progress the proposed TPS 5 ahead of the draft LPS was an acceptable approach. The review of TPS 5 would be given a high priority from midJuly 2006, when Mr Haynes returned from leave.

1693 The reference in that letter to the review of broader regional planning for the ***southern*** metropolitan and Peel ***regions*** should be noticed.

1694 This is consistent with Mr Bulstrode's evidence, which I accept, that by July 2006 he understood that the IPRSP review was being done in the context of a wider review of the ***southern*** metropolitan and Peel sectors (ts 4883, 4888). Mr Rowe was also aware by then that the Planning Review covered the ***southern*** metropolitan and Peel sectors (ts 4889), although other planners were not (ts 4890 4892).

1695 By report dated 25 May 2006, Dr Andrew Montgomery, director of Urban Growth Management in the urban policy division of the DPI, provided a report to the WAPC entitled '***Southern*** Sectors Review Progress Report' (exhibit 210). The report provided an overview of what was termed the ***Southern*** Sectors Review, including its objectives, the workshops that had been held in February and May 2006 (and the issues and challenges there raised), and the next actions proposed for the review.

1696 The report outlined that the ***Southern*** Sectors Review covers the southwest, Peel and southeast sectors. The southwest sector includes the local government areas of Cockburn, Kwinana and Rockingham. The southeast sector covers Armadale, Gosnells and SerpentineJarrahdale. The report recited that the structure plans for all three areas were currently being reviewed. It stated that due to substantial projected population growth in the Peel

region, the WAPC had previously recommended a review of the IPRSP and an outcome of the review was anticipated to a be a new structure plan for the Peel ***region***.

1697 The key objectives for the ***Southern*** Sectors Review are listed as follows: To plan for the coordination of land use, transport, utility infrastructure, conservation, and other key strategies planning issues in the ***Southern*** Sectors. To plan for the increasing land development pressures in the ***Southern*** Sectors, particularly in the ***South*** West and Peel. To develop transport oriented development ***around*** key station locations along the Perth to Mandurah rail line. To define the City Centre roles of Rockingham and Mandurah. To plan for employment opportunities in appropriate locations. To develop a 30 year planning and management strategy for the ***Southern*** Sectors. To engage appropriate stakeholders throughout the Review and to develop a Partnership process (exhibit 201, page 3).

1698 The breadth of these objectives is readily apparent.

1699 It was proposed that sector managers would be appointed for each sector. The role of the sector manages would include establishing priorities for the next 5 10 years, including ensuring an urban land bank in each sector.

1700 The report attached the notes from the February and May 2006 workshops (see exhibit 259S and exhibit 259V), to which I have already referred.

1701 The report referred to some of the key issues raised at the February workshop. Among them was said to be a concern about the land supply in the southwest and Peel sectors, and in particular that all currently urban and urban deferred zoned land might be developed by ***around*** 2019. The report stated that it was suggested at the workshop that there was 'an urgency to consider the rezoning of land for urban development for the next 30 years and beyond' (page 3).

1702 There was a reference to the need to consider densities being developed in urban areas and the application of transport oriented development principles.

1703 The report outlined what had occurred at the enquiry by design workshop in May 2006. Among the key objectives for that workshop was to confirm planning and developing issues through the use of explorative scenarios. The report set out seven scenarios that had been considered by the workshop.

1704 Scenarios 1 and 2 involve no new land for urban development and development in accordance with Network City policies. In that framework, scenario 1 invited a testing of what increase in residential density would be required to cope with the projected growth. Scenario 4 was entitled '2025 and beyond view: urban land shortage'. It postulated development in accordance with the areas identified in Network City, and the prospect of an urban land shortage at some time down the track, inviting consideration of what response might be made to that scenario. Scenario 5 involved Mandurah becoming a major regional city, employing at least 30,000 people. It involved using corridors, namely the Amarillo corridor and the Pinjarra corridor, as major spurs into Mandurah, and a new centre at Ravenswood. It also involved no growth along the Highway ***south*** of Pinjarra. Scenario 6 is described as the laissezfaire option. It involved allowing Highwayinduced market led growth, including ***south*** of Pinjarra. Ravenswood would develop as a major centre at the Highway interchange.

1705 The scenarios involved differing assumptions about Amarillo. Scenarios 1 and 2 assume that there is no development at Amarillo and instead focus development along the coastal corridor between Rockingham and Mandurah, or inland between Armadale and Mundijong (pages 4 5). Scenario 3 appears to allow for development at Amarillo, in the sense that it is not expressly precluded, but the scenario was focused on identifying areas for urbanisation that were consistent with promoting the use of the Mandurah rail line (page 5). Scenario 4 assumes that Amarillo has been fully developed by 2025 and then asks the question about where future urban areas are to be located (page 5). Scenario 5 promotes the growth of the Amarillo corridor as a major spur into Mandurah and restricts urbanisation ***south*** of Pinjarra along the Perth Bunbury Highway. Scenario 6 also sees the growth of Amarillo as 'a model [Liveable Neighbourhood]' and allows ad hoc development of land for residential use based largely on developers' intentions (page 6). It does not seem to promote the idea of consolidating urban development in existing urban areas, and Amarillo seems to be developed as a 'satellite' development.

1706 One of the major points of discussion following the consideration of these scenarios was the role of Amarillo, and whether it was to be held undeveloped as an urban land bank or be developed to provide a relief valve for residential land supply and affordability (page 7).

1707 These are among many indications to the hypothetical purchaser that, in mid2006, whether and especially when Amarillo would be developed was uncertain. The notes of the May 2006 workshop provided another example. See also the MDP report (exhibit 94, 1/9/331, 337).

1708 As I have mentioned in section 7.2.7, Mr Bulstrode's evidence was that he thought the possibility of an internal corridor running northsouth from Amarillo (Keralup) to Ravenswood was raised at the planning workshop in May 2006. Exhibit 210 and its annexures suggests consideration was given to a corridor running ***south*** from Amarillo, but connecting to Mandurah and not to Ravenswood. Scenario 5 (page 6) involved a corridor from Amarillo into Mandurah. See also the notes of the February and May 2006 workshops: topics 5, 8 and 10 in exhibit 259S; and the first three points under 'Infrastructure' in exhibit 259V.

1709 I also note here that while, on 20 June 2006, the shire added a substantial area of land to the urban area north of Old Mandurah Road in the draft LPS, that was not justified by reference to any contemplation of a corridor from Amarillo to Ravenswood (see exhibit 11).

1710 There is also the consultant's regional context plan, attachment 7 to Mr Sanderson's report of 3 April 2006, showing a northsouth transit node and employment corridor from Amarillo to Ravenswood. The report described the plan as having no status. That plan was produced after a workshop held in February 2006 by the Department of Housing and Works, separate to the ***southern*** sectors workshops (exhibit 245L, 49A/219).

1711 There is no other evidence that suggests, or would have suggested to the hypothetical purchaser, that the concept of an inland urban corridor from Amarillo to Ravenswood was propounded or under serious consideration by the DPI or WAPC. At most, the hypothetical purchaser may have viewed it as a possibility to be considered in the Planning Review.

1712 Dr Montgomery's May 2006 report stated that a further enquiry by design workshop was proposed to be held in July 2006, following further research and mapping by the DPI. Among the further research was the review of the city centre for the Peel ***region***, and a review of future development for the palusplain. The palusplain is a reference to the area east of the PeelHarvey Inlet. That area is a lowlying plain that is seasonally marshy. It was proposed that the July workshop would refine the scenarios and create some viable options for structuring the area (exhibit 210, pages 7 8).

1713 The report made the following recommendations: That the Commission: Recognise the ***Southern*** Sectors Review as an important implementation project. Note the key issues and challenges from the workshops held in February 2006 and May 2006. Endorse the next proposed actions including the preparation of research/position papers for WAPC consideration. Note that the next Enquiry by Design workshop will be held in July 2006. Note that Position Papers on key issues in the ***Southern*** Sectors will be presented to the WAPC at future meetings. Note that Progress Reports are being prepared for WAPC consideration for the Review of Structure Plans in the ***South*** West and ***South*** East Sectors. Require a ***briefing*** note to be prepared for the Minister for Planning and Infrastructure to advise of the progress on the ***Southern*** Sectors Review (exhibit 210, page 8).

1714 The content of this report, and the evidence generally, does not make the relationship between the ***Southern*** Sectors Review and the earlier proposed IPRSP review entirely clear. The report states that the reviews of the SouthWest Corridor and SouthEast Corridor Structure Plans are progressing, and would be the subject of progress reports: see exhibit 210, pages 2, 8; see also recommendation 6 above. There is no similar statement about the review of the IPRSP, although the earlier WAPC recommendation of a review of the IPRSP is mentioned in the report. The description of what would be important in reviewing the IPRSP suggests that a review of the IPRSP had not been abandoned. The anticipated outcome of the proposed review of the IPRSP was said to be a new structure plan for the Peel ***Region*** coast to Darling Scarp (pages 2 3). That regional scope is consistent with TBB's draft project ***brief*** of 2 May 2005 (exhibit 207).

1715 To my mind, the upshot is that in the Planning Review, the IPRSP review was not to be separately progressed to completion independently of this ***Southern*** Sectors Review. Rather, the IPRSP review would either be subsumed by this ***Southern*** Sectors Review or, to the extent necessary, would be progressed only later, in parallel with the ***Southern*** Sectors Review, when sufficient progress had been made on the ***Southern*** Sectors Review to provide an informed framework for a review of the IPRSP. In either case, from the perspective of the hypothetical purchaser, the rezoning of the subject land would need to await the outcome of the strategic planning review of the southwest and southeast metropolitan and Peel sectors.

1716 The contents of exhibit 210 suggest that the Planning Review then underway was wideranging; that it was in its early stages; and that inadequate information was presently available and substantial further investigation was required. All of those matters tend to suggest a high degree of uncertainty at that time about the outcome of the Planning Review.

1717 The evidence of Dr Montgomery, which I accept, was that a report to the WAPC, such as this, would be available to the public on request as part of the WAPC's minutes, after it was tabled at a WAPC meeting (ts 2087). I am satisfied that this report was considered by the WAPC at a meeting in June 2006: see Dr Montgomery's report of 25 July 2006 (exhibit 92, annexure ADM 3, 51/204 205), referred to below. Consequently, the report of May 2006 was available to the hypothetical parties at the taking date.

1718 By report dated 31 May 2006 (exhibit 52), consultants on behalf of Main Roads WA provided a report for presentation to the Federal Minister for the Environment and Heritage. That report followed the Minister's decision that the proposed Highway was considered a 'controlled action' requiring assessment and approval under the Environment Protection and Biodiversity Conservation Act 1999 (Cth) before any action could proceed. This was based upon concerns about the potential environmental impact of development being facilitated by the establishment of the Peel deviation section of the Highway, particularly along the currently undeveloped eastern side of the estuary (3/15B/368).

1719 The thrust of the report was that the Highway was an urban bypass, which would not stimulate urban development. The Highway was a consequence of regional land use planning, rather than a cause of urban development.

1720 The report also:

(a) states that under the State Planning Strategy, urban development is not proposed to expand ***south*** along the new Highway, but rather will extend east from Mandurah along Pinjarra Road (3/15B/384);

(b) refers to the fact that, according to the DPI, there has been a substantial uptake of urban zoned land in the Peel ***region***, particularly in the City of Mandurah, in the previous several years (3/15B/401);

(c) states that 'the WAPC is currently undertaking a major strategic planning exercise for the ***southern*** portion of the Metropolitan ***region*** and Peel sector', leading on to a review of the IPRSP (3/15B/369, 401);

(d) states that the identification of any longterm future urban areas in the Peel ***region*** would be subject to the outcome of the current strategic planning exercise for the ***southern*** metropolitan ***region*** and Peel sector (3/15B/402);

(e) states that the DPI, through Mr Steve Ryan, had indicated that there was then sufficient urban zoned land in Mandurah and Murray under the PRS for at least another 20 years (3/15B/369); and

(f) refers to the statements in February 2006 by the Minister for Planning and Infrastructure and the chairman of the WAPC (3/15B/402).

1721 The evidence does not satisfy me that this report would have been available to the hypothetical purchaser in July 2006. 7.3.9 June 2006: the land summit

1722 The Minister for Planning and Infrastructure convened a land supply summit which was held on 7 June 2006. Given the proximity of that event to the taking date and given its subject matter, one might have expected more direct evidence of what occurred at the land supply summit than was led in the trial. The only witness whose statement dealt with the land supply summit was Ms Marion Thompson. She did not attend the land supply summit. Following the summit, and as a result of it, she was appointed land release coordinator by the Minister.

1723 It appears that the circumstances leading to the land supply summit were not in substantial dispute between the parties in this action. There was no objection to Ms Thompson's evidence in her written statement about those circumstances and it was not challenged in crossexamination.

1724 As Ms Thompson described it in her statement (exhibit 213A), by mid2006 it was evident to the state government that there was a critical shortage of vacant residential lots in Perth and Peel. However, the specific causes of the lot supply shortage were not clear. There were a large number of residential lots with preliminary or conditional subdivision approval in the metropolitan and Peel sectors, but the number of residential lots with final subdivision approval had declined. The Minister convened the summit to explore that anomaly, and to identify reasons for the lot supply shortage and steps that might be taken as to alleviate it: exhibit 213A [15] [17]. In reexamination, Mr Jeremy Dawkins, chairman of the WAPC at the time, who attended the summit, gave evidence broadly to similar effect (ts 2178 2179, 2182).

1725 The land supply summit was attended by representatives of a number of state agencies, local governments and industry groups, including the Urban Development Institute of Australia, the Property Council of Australia, the Real Estate Institute of WA, the Master Builders Association, and the Housing Industry Association (exhibit 213A [18]).

1726 The DPI prepared a document entitled 'Land and Housing Supply Summit: Bottlenecks and Potential Solutions', summarising the matters raised at the land supply summit (exhibit 213A, annexure MT 4, 50/35 36). That document suggests that a shortage of the supply of urban zoned land was not an issue raised at the summit. Because a perceived shortage of urban zoned land was not raised at the summit, an investigation into the adequacy of supply of urban zoned land was not one of Ms Thompson's tasks (ts 5145).

1727 Among the outcomes of the land supply summit was the appointment of Ms Thompson to facilitate converting the more than 40,000 lots with conditional subdivision approval into final approvals and lots on the market. She was also to survey residential land developers to identify their projected lot release plans, perceived constraints and bottlenecks in the subdivision approvals process and suggestions for ways of addressing those problems. The hypothetical parties in July 2006 would have known of the critical shortage of residential lots, of the land supply summit and that these steps were underway as a result of the summit. As explained in section 3.5.3, the hypothetical parties would not have known of the outcome of the investigation to be done by Ms Thompson.

1728 On 20 June 2006, the shire resolved to amend the draft LPS map so that the whole of the land north of Old Mandurah Road, east of the Highway as far as the eastern boundary of lot 6, and ***south*** of Paterson Road (excluding the subject land) was designated urban (exhibit 11). I will say more about this in section 7.4. 7.3.10 July 2006: report of Dr Montgomery

1729 Dr Montgomery's witness statement was drawn with primary reference to the instruments, published in 2009, known as the '***Southern*** Metropolitan and Peel SubRegional Structure Plan (for public comment)' (the SMPSRSP) and 'Directions 2031: Draft Spatial Framework for Perth and Peel' (Directions 2031). I have explained, in section 3, the reasons for my decision that those instruments are not admissible for the purpose for which the defendants sought to rely upon them, namely as confirmation of the 'foresight' of the defendants' planners' opinions. The focus in Dr Montgomery's statement on the 2009 instruments is, perhaps, unfortunate, because it is not conducive to identifying the state of things in July 2006. It is clear from Dr Montgomery's evidence that the Planning Review process ultimately led to the SPMSRSP and Directions 2031. What is less clear is the way in which the review process developed at different stages, to lead to that result and, in particular, what the status of the review or reviews was in July 2006.

1730 Dr Montgomery says, and I accept, that investigations and workshops were held between 2006 and 2007 to identify and address issues for investigation and resolution. In 2005 and 2006, there was a lack of detailed, uptodate information to inform the preparation of the proposed new structure plan. That led to the commissioning of a number of studies: exhibit 92 [13]. I infer, from the contents of exhibit 210 and from Dr Montgomery's report of 25 July 2006, that these studies were commissioned after the taking date.

1731 Dr Montgomery prepared a report in July 2006 to the WAPC entitled 'Peel Sector Review Issues Report' (exhibit 92, annexure ADM 3, 51/203). He signed the report on 25 July 2006 and Mr Beyer, executive director of the

DPI, signed it the following day. It would have gone to the WAPC sometime thereafter. Accordingly, unlike Dr Montgomery's report of May 2006, the contents of this report would not have been available at the taking date.

1732 In my view, that does not make the document inadmissible. As I explained in section 3.5.5, I think the document is admissible insofar as it indicates what would have been revealed by the DPI had an enquiry been made at the date of the taking. I accept the defendants' submission that it is evidence that, had an enquiry been made about the progress of the Planning Review, the DPI would have advised that it did not then have sufficient reliable information to conclude its review and substantial further investigation was needed before any decision could be made on the urbanisation of land in Peel, including the subject land.

1733 The report may also be evidence of the state of things at the taking date. That state of things must be identified before one determines what would have been revealed on enquiry.

1734 The title of this report, and its stated scope, indicates a review project that is distinct from, but related to, the ***Southern*** Sectors Review (the subject of exhibit 210). This report is the 'Peel Sector Review'. The ***Southern*** Sectors Review is at a more 'macro level' (51/208A) than the Peel Sector Review. Moreover, the cover pages on the two reports highlight different elements of the State Planning Strategy as being implemented by each report.

1735 However, in my view, the evidence does not establish that the hypothetical purchaser would have known, by the taking date, that these two reviews were being progressed in parallel.

1736 In the July 2006 report, one of the three broad issues identified about Network City in the Peel ***region*** was what was called the eastern growth area (51/210A 211A). In one sense, the discussion about this issue is interesting, but because the report would have not been available to the hypothetical purchaser, it does not seem to me to be of any assistance. For example, that discussion concludes by identifying a number of wideranging questions. Those questions were put to Mr Rowe, with the suggestion that those questions would have required advice to the hypothetical purchaser about consequent uncertainty and delay (ts 4809 4814). However, I am not satisfied that the hypothetical purchaser would have known that these particular questions were all thought to arise as part of the review of planning in Peel.

1737 Attachment 2 to this report is entitled 'Peel Project Status Table' (51/225 240). It identifies projects, explaining the status of the project, issues arising and actions needing to be taken. In relation to the review of the IPRSP, it states that it was estimated to take 12 18 months to complete, the review 'appears to be on hold' and among the actions proposed to be taken is to 'clarify why the project was stopped' (51/225). See also what is said about the IPRSP review in relation to the LPS: 51/231. The implication that there is a need to identify why the project was stopped seems at odds with the view, adopted in the report itself and revealed by the earlier evidence, that in the time leading up to July 2006, the IPRSP review was subsumed or overtaken by the ***Southern*** Sectors Review. Senior counsel for the plaintiffs crossexamined Mr Bulstrode with reference to this attachment. It appeared that counsel suggested that this attachment was inconsistent with the proposition that the IPRSP review had been replaced or overtaken by a wider ***Southern*** Sectors Review (ts 4882 4888). Mr Bulstrode did not accept that proposition, and neither do I. The plaintiffs' closing submissions do not address the scope of the Planning Review underway as at July 2006.

1738 In any event, for the reasons that follow, this project status table does not sustain a conclusion that, as at the taking date, the review of the IPRSP was to be progressed distinctly from and concurrently with the wider ***Southern*** Sectors Review, and could be expected to finished within 12 18 months.

1739 First, attachment 2 is, by its nature, subsidiary to the July report to which it is attached. Such a reading of the attachment seems to me to be inconsistent with the report itself. Moreover, it is inconsistent with the May 2006 report, also drafted by Dr Montgomery. Secondly, it is unclear who prepared the attachment. Thirdly, Dr Montgomery's report of May 2006 explains the broad strategic review underway for the ***southern*** sectors. It would make no sense to undertake and complete a review of the IPRSP without knowing the outcome of the broader strategic ***Southern*** Sectors Review.

1740 For these reasons, in my view, the hypothetical purchaser would have understood the status and scope of the Planning Review at the taking date to be as revealed by Dr Montgomery's report of May 2006 (exhibit 210). I summarised my view of what that report reveals in section 7.3.8.

1741 There are several other documents from July 2006 onwards. Exhibit 259X is a report of the Department of Local Government and Regional Development entitled 'Peel Economic Perspective'. The report bears the date July 2006. There is no evidence whether or not the report was published before the date of taking. In any event, the report does not appear to contain any material that significantly differs from or adds to information otherwise available to the hypothetical purchaser by the date of taking. In relation to population, the report refers to the historical population growth figures revealed by the Australian Bureau of Statistics figures and the DPI population forecasts in WA Tomorrow No 6. See exhibit 259X, page 164.

1742 On 31 July 2006, Mr Selby, director of planning for the shire, wrote to Mr Dawkins, chairman of the WAPC, about the draft LPS (exhibit LPS150.23). The letter referred to the tour of the shire by the WAPC and DPI officers. The letter expressed concern about the timing of the review of the shire's LPS. It also referred to the recent modifications of the draft LPS to expand the urban area north of Old Mandurah Road. Further, the letter referred to council's previous submission on the Network City project, recommending that a major activity node be considered north of the Ravenswood locality, associated with an expanded urban catchment east of the junction of Pinjarra Road and the PerthBunbury Highway. That desire was also reflected in the draft LPS. Further, it stated that the regional recreation site proposed under the PRS needs to be supported by a surrounding urban framework. Council requested information as to how the strategic planning framework of the IPRSP would be advanced, and how the draft LPS would be handled in the interim.

1743 Given that this document is after the taking date, and by its nature would not, anyway, be available to the public, the document is of little assistance.

1744 In November 2006, Dr Montgomery prepared a report to the Statutory Planning Committee providing a preliminary review of the Shire of Murray draft LPS (exhibit 164, 3/19/61 68). Given the timing of this document, well after the taking date, I do not think that it provides any assistance in assessing the urban potential of the land from the perspective of the hypothetical parties. 7.3.11 Conclusions: what would the hypothetical purchaser have known in July 2006?

1745 I find that the hypothetical purchaser or their planning consultant would have reviewed the minutes of shire and PRPC meetings relating to decisions on rezoning applications in the Peel sector. That review would have revealed that for some time leading up to the taking date, the PRPC was declining to approve applications to rezone land to urban, pending the completion or substantial completion of the Planning Review. The decision made on the Clough/Rapley land in September 2005 illustrates this proposition (see exhibit 10).

1746 Moreover, subject to one qualification, the advice given by Mr Bulstrode in February 2006 to the Clough/Rapley proponents (see exhibit 53) is indicative of the tenor of the advice that would have been given to the hypothetical purchaser or their consultant, had enquiry been made. The qualification is, as I have explained, that rezoning of the subject land would have raised more and broader issues than the rezoning of the Clough/Rapley land. The latter land was part of an identifiable and relatively confined precinct, whereas the subject land would raise issues relating to the large area north of Old Mandurah Road.

1747 The hypothetical purchaser would have known that the owners of the Clough/Rapley land and the Gold Fortune land were pursuing urbanisation of those parcels of land.

1748 The hypothetical purchaser or their planning consultant would also have investigated the status, scope, progress and expected duration of the Planning Review underway at the date of taking. Those investigations would have included reviewing the PRPC minutes and such of the other material I have referred to in this section as being available to the hypothetical purchaser. This includes:

(a) the minutes of the PRPC meetings of 16 July 2004, 10 December 2004 and 16 September 2005; and the minutes of the Statutory Planning Committee of 28 February 2006 and 18 April 2006, and Mr Sanderson's accompanying report of 3 April 2006;

(b) Dr Montgomery's report of 25 May 2006 and its attachments, and the minutes of the June 2006 meeting of the Statutory Planning Committee (those minutes are not in evidence but I have drawn some inferences about their contents);

(c) various shire council and committee resolutions about the draft LPS and TPS 5, and those draft documents themselves; and

(d) the publications in September 2004 and November 2005 of Network City.

1749 In my view, the hypothetical purchaser or their consultant would also have made enquiries of the DPI/WAPC about the status, scope, progress and expected duration of the Planning Review underway at the taking date. I find that, on enquiry, officers of DPI would have advised that:

(a) the Planning Review encompassed a broad review of strategic planning for Peel and the ***southern*** sectors of the metropolitan area;

(b) the Planning Review was only at a relatively early stage;

(c) the WAPC needed to conduct substantial further investigation into a number of broad issues before it could conclude its Planning Review;

(d) one of the matters to be investigated was whether there was sufficient urban zoned land in Peel to accommodate shortterm and longterm needs, taking into account the current high demand for residential lots and available population projections; and

(e) the WAPC would not approve urban rezoning of land before at least the substantial completion of the Planning Review.

1750 In my opinion, each of those matters would anyway have been apparent to the hypothetical purchaser from a review of the available material to which I have referred. I conclude that, as at July 2006, a review of the available material would have revealed the following matters to the hypothetical purchaser.

(1) The shire supported the possible future urbanisation of substantial areas of land north of Old Mandurah Road, as reflected in the draft LPS (I will say more about what can be drawn from the draft LPS in section 7.4.5 below).

(2) However, the draft LPS would have no formal status without WAPC approval. The WAPC's consideration of the draft LPS would occur in the framework of the Planning Review.

(3) Further, urbanisation of the subject land would require an amendment to the PRS, which in turn would require support for the amendment from the WAPC.

(4) Since 2004, the WAPC had proposed or contemplated a review of planning in the Peel ***region***.

(5) Initially a review of the IPRSP and PRS was proposed. However, by the date of taking, the WAPC was conducting a broad strategic planning review of the Peel and ***southern*** metropolitan sectors: see exhibit 210; and the evidence of Mr Bulstrode (ts 4883, 4888) and Mr Rowe (ts 4889).

(6) The WAPC was very unlikely to support an application to rezone the subject land prior to the finalisation or at least substantial completion of the Planning Review.

(7) The ***Southern*** Sectors Review had a broad scope and was at an early stage, as revealed by Dr Montgomery's report of 25 May 2006 (exhibit 210).

(8) In a number of significant respects, the WAPC considered that there was insufficient information available for the purposes of the Planning Review, so that substantial further investigation was required.

(9) As at the taking date, there was, and had been for some period, a critical shortage of available residential lots in Peel. That had led to the land supply summit, which proposed a number of steps.

(10) The substantial population growth that had occurred in Peel, particularly in Mandurah, and the consequent development pressures, were important factors in the WAPC decision that there be a review of the IPRSP in 2004. In late 2005 and early 2006, other considerations reinforced the need for a planning review and affected its scope. These included the publication of Network City and the consequent perceived need for a broad strategic planning review for the ***region***.

(11) During 2006, there had been high level recognition of development pressures in the shire, especially along the Mandurah to Pinjarra corridor, and the need to give priority to the review of the IPRSP or the Planning Review, given those development pressures. See, for example, what was said by Mr Beyer, the incoming executive director

of the DPI, at the workshop on 3 February 2006 (exhibit 259S); and the concern expressed by the Statutory Planning Committee at its 28 February 2006 meeting (exhibit RR146.80).

(12) By July 2006, various people had expressed the view that there was a need for more urban zoned land in Peel. See, for example, what is said in exhibit 210 about the workshop that had occurred in February 2006 under the heading 'Land Supply'. However, by the taking date, it was not clear whether or not the WAPC would take the view that there was a need for more urban zoned land in Peel in the Planning Review. From the WAPC's perspective, it was one of the matters that required further investigation.

(Among the evidence supporting this conclusion is the following. In Network City, referred to in section 7.4.3 below, the WAPC did not say anything to suggest a perceived need for more urban zoned land. The scenarios under consideration in the workshops referred to in exhibit 210 suggest an open mind on the question of whether more urban zoned land was required. Both Mr Rowe (ts 4765 4766) and Mr Flugge (ts 4771) agreed that, at the taking date, there was a live question whether the shortage of urban lots was caused in part by a shortage of urban zoned land, or only by other factors. Mr Rowe accepted that he would have advised a hypothetical purchaser that the WAPC and DPI might take the view that there was adequate urban zoned land to comfortably meet demand in Peel for 25 years (ts 4814 4815). Further, I refer to section 7.5 below.);

(13) Based on the report of 3 April 2006 and the decision of 18 April 2006, the WAPC/DPI's thinking was that:

(a) the commercial centre that was to form part of the Riverland Ramble development would, in due course, be located in the northwest section of the estate, near the junction of Old Mandurah Road and Pinjarra Road;

(b) the scale of that commercial centre would be determined as part of or in light of the Planning Review, but the current expectation was that in years to come it would be a district centre; and

(c) neither of these views were based on an expectation of urbanisation north of Old Mandurah Road. Whether such urbanisation would occur was a matter to be considered in the Planning Review then underway.

(14) Amarillo was still being advanced for future urbanisation: see Mr Burrell's comments at the February 2006 workshop, Mr Sanderson's report of 3 April 2006, the notes of the May 2006 workshop and Dr Montgomery's report of 25 May 2006. Whether and when it would go ahead was uncertain and would be a matter considered in the Planning Review (exhibit 94, 1/9/337). Whether Amarillo would go ahead would affect the extent of appropriate urbanisation in Murray, particularly ***around*** Pinjarra Road (see exhibit 259V).

1751 The material that was publicly available at the taking date about the Planning Review left a great many questions unanswered. One of these is the approach to be taken in the Planning Review to the identification of land for future urbanisation, and whether different categories would be used. Some of the plaintiffs' planners appeared to adopt the view or assumption that the Planning Review would simply identify some land for future urbanisation and other land not, without further discriminating between classes of future urban land. That is the view invited by the plaintiffs' closing submissions: pars 8.203 8.206. For the reasons that follow, I do not accept that approach.

1752 The plaintiffs submit that the term 'urban investigation areas' was not known in 2006 and only emerged in 2009 in Directions 2031. I accept that. Further, I accept that the question is to be assessed as at July 2006. However, in my view, it could not then reasonably have been anticipated that the outcome of the Planning Review would necessarily involve only a single class future urban. The position in that respect was unknown. The IPRSP itself had involved three classes of future urban land. Mr Rowe (ts 4746 4749, 4769) and Mr Flugge (ts 4770) agreed that it would have been anticipated that the Planning Review might similarly have led to multiple classes of future urban land, not all of which would be identified for immediate or shortterm urbanisation. That is the view I take. To my mind, as at July 2006, that was a real prospect.

1753 The available material does not reveal any considered view by the WAPC/DPI, current ***around*** the taking date, of the expected duration of the Planning Review. Mr Bulstrode gave evidence of what he would have thought and said if he was asked. He was not in charge of the Planning Review and he did not ask those directly responsible for the Review about its likely length. Thus, his views are not definitive on timing, or on any other aspect of the Planning Review. The planners broadly agreed that, at the taking date, it would be expected that the Planning Review would take about 18 months (ts 4598 4599). However, some of the planners' estimates had not taken account of the scope of the Planning Review being the ***southern*** sectors, rather than just the IPRSP. In my view, a

consultant planner for the hypothetical purchaser would have advised that the duration of the Planning Review was uncertain, and that the best estimate was in the ***region*** of 18 months to two years. Had the hypothetical purchaser or their consultant made enquiry to the DPI/WAPC, I find that the response would have been substantially to that effect.

1754 In assessing the likely outcome of the Planning Review for the possible urbanisation of the subject land, the hypothetical purchaser would take into account what was said in any relevant planning documents. I turn to those documents.

7.4 Planning documents

1755 In this section 7.4, I will begin by outlining relevant provisions of two state planning policies that were in operation at the date of taking: SPP 1 and SPP 3. These policies provide part of the broad framework in which the question of the urban potential of the subject land is to be assessed. I will then turn to the three planning documents about which there was substantial controversy between the planners and between the parties. The plaintiffs and their planners relied on Network City and the shire's draft LPS as providing significant support to the urban prospects of the land at the taking date. Mr Rowe also relied on Liveable Neighbourhoods as supporting the subject land's urban potential. The defendants and their planners expressed contrary positions to these. 7.4.1 Statement of Planning Policy No 1 - State Planning Framework

1756 As explained in section 7.1, the version of Statement of Planning Policy No 1 State Planning Framework Policy (SPP 1) that was in force at the date of taking is exhibit 1 (1/9/1 14).

1757 SPP 1 refers to the five key principles identified in the State Planning Strategy (exhibit 261G) which elucidate the primary aim of planning to provide for the sustainable use and development of land. The five principles are termed environment, community, economy, infrastructure and regional development (1/9/6).

1758 Each of these principles is elaborated on in SPP 1. The plaintiffs point to what is said in relation to infrastructure, set out below, and particularly emphasise the third point: Infrastructure

Planning should ensure that physical and community infrastructure by both public and private agencies is coordinated and provided in a way that is efficient, equitable, accessible and timely. This means:

(i) planning for land use and development in a manner that allows for the logical and efficient provision and maintenance of infrastructure, including the setting aside of land for the construction of future transport routes and essential services;

(ii) protecting key infrastructure, including ports, airports, roads, railways and service corridors, from inappropriate land use and development;

(iii) facilitating the efficient use of existing urban infrastructure and human services and preventing development in areas which are not well serviced, where services and facilities are difficult to provide economically and which creates unnecessary demands for infrastructure and human services; and

(iv) encouraging consultation with providers of infrastructure, to ensure they have regard to planning policies and strategic land use planning when making their investment decisions, in order to ensure that land use and development are closely integrated with the provision of infrastructure services (exhibit 1, 1/9/8).

1759 In explaining the purpose of SPP 1, cl 2.4 states that the state planning framework unites existing state and regional policies, strategies and guidelines within a central framework that provides a context for decisionmaking on land use and development in Western Australia.

1760 In pt B, SPP 1 states that regional strategies interpret the State Planning Strategy at the regional level and provide a basis for cooperative action to be taken by state and local government on land use and development. Regional strategies endorsed by the WAPC are listed, including Network City (1/9/10).

1761 Regional and subregional structure plans are said to provide for the comprehensive planning of ***regions***, subregions or particular locations to guide change in the short to medium term. The IPRSP is listed among the structure plans endorsed by the WAPC (1/9/11). 7.4.2 Statement of Planning Policy No 3 - Urban Growth and Settlement

1762 'Statement of Planning Policy No 3 Urban Growth and Settlement' (SPP 3) was published in the Government Gazette on 17 March 2006 and was in force at the taking date (exhibit 50).

1763 SPP 3 applies throughout Western Australia: cl 3.

1764 The objectives of SPP 3 are set out in cl 4.

1765 Clause 5.2 deals with 'Managing urban growth and settlement across Western Australia'. It includes statements to the following effect (1/9/246 247):

(a) regional strategies are prepared generally with a planning horizon of 30 years and should provide guidance as to the future settlement pattern for the ***region*** and identify growth areas, taking into account population and housing needs over the period of the strategy;

(b) settlements with growth potential should be identified in regional strategies;

(c) local planning strategies should reflect and build on the urban growth and settlement policies set out in regional strategies; and

(d) proposals for future urban growth will be determined having regard to:

(i) the State Planning Strategy, relevant statements of planning policy and regional and subregional strategies in SPP 1;

(ii) population projections provided by the DPI;

(iii) land release plans published by the WAPC; and

(iv) local planning strategies prepared by local government and endorsed by the WAPC.

1766 The Planning Review, involving the Peel and ***southern*** metropolitan sectors, involved the preparation of a regional strategy for those areas.

1767 The defendants emphasise the statement in pt 5.2 of SPP 3 that proposals for future urban growth will be determined having regard to, among other things, the population projections provided by the DPI. The defendants submit, and I accept, that in the context of the present case, that required proposals for future urban growth to be determined having regard to the then applicable DPI/WAPC population projections, namely WA Tomorrow No 6. In oral evidence, the planners agreed that this part of SPP 3 would mean that the shire and WAPC would have regard to the DPI/WAPC population projections, although some of the plaintiffs' planners expressed the view that those authorities might also have regard to other figures that were available (ts 4540 4548). All of the planners agreed that it is the most recent departmental projections that were intended by SPP 3, and that any projection by DPI from, say, 1996 or 1997 would be of little or no weight (ts 4548).

1768 Part 5.3 is headed 'Managing urban growth in Metropolitan Perth'. Under that heading, it is stated that '[f]uture metropolitan growth will be planned and managed in accordance with Network [C]ity' and that Network City is the metropolitan strategy for Perth and Peel (1/9/247).

1769 The following is said about Network City: It embodies the metropolitan land use strategy, the metropolitan transport strategy, a wholeofGovernment approach, a commitment to partnerships with local governments and a commitment to plan with communities.

The key elements are consolidating residential development in existing areas and directing urban expansion into the designated growth areas which are, or will be, well serviced by employment and public transport; giving priority

to infill development in established urban areas, particularly through urban regeneration and intensification of development of under-utilised urban land, whilst respecting neighbourhood character; locating higher residential densities in locations accessible to transport and services, such as in and ***around*** the CBD, regional and district centres, activity corridors and higher education campuses, and in selected areas of high amenity on the coast and river foreshores; concentrating commercial, health, education, entertainment and cultural developments in and ***around*** activity centres and corridors with good access to public transport and which are easily accessible for the catchment population; developing an integrated land use and transport network which reduces car dependence and broadens travel options, makes it easier for people to use public transport or walk or cycle to their destinations, and establishes defined transport corridors as the major network for the movement of goods and people; protecting biodiversity and areas of environmental significance, and promoting the concept of an interlinked system of regional and local open space; and protecting water resources, and reducing the use of nonrenewable resources and waste generation (1/9/247).

1770 Part 5.4 is headed 'Planning for liveable neighbourhoods'. It refers to the WAPC publication 'Liveable Neighbourhoods', to which I will refer in some detail later in section 7.4.4. It states that new urban areas will be comprehensibly planned as sustainable communities, which provide local facilities, services, public transport and job opportunities within easy reach by walking or cycling, reducing dependence on the private car for travel. It is said that the Liveable Neighbourhoods principles apply to the preparation and review of regional and district structure plans for new growth areas, local structure plans for new subdivisions, and in planning for the revitalisation or redevelopment of existing areas. 7.4.3 Network City 7.4.3.1 INTRODUCTION

1771 Network City comprises a number of instruments published by the WAPC. In September 2004, the WAPC published three documents for public comment:

(1) Network City Framework (exhibit 4A, 1/13/1);

(2) Network City: Community Planning Strategy for Perth and Peel (Network City Community Planning Strategy) (exhibit 4B, 1/13/2 131); and

(3) Network City Action Plan (exhibit 4D, 4/2/338).

1772 The Network City Framework and the Action Plan were endorsed by Cabinet prior to publication (exhibit 259C). That was confirmed in the November 2005 publication 'Network city a milestone in metropolitan planning' (Network City Milestone) (exhibit 4C, 1/13/134).

1773 By May 2006, the WAPC had published a draft for public comment of 'Statement of Planning Policy: Network City' (1/13/144 155, appendix BR11 to exhibit 180A; see also exhibit 180A [151]). It confirmed the primary status of all three of the documents published in 2004 as the metropolitan strategy for Perth and Peel (cl 3).

1774 The parties and their respective experts disagreed about what Network City meant for the urban prospects of the subject land (in the assumed absence of the proposed public works). In this section 7.4.3.1, I will outline the parties' competing contentions. In section 7.4.3.2, I will set out and outline relevant provisions of the instruments comprising Network City. Finally, in section 7.4.3.3, I will state my conclusions.

1775 As I will explain in detail in section 7.4.3.2, two of the important concepts identified in Network City were the 'activity corridor' and the 'activity centre'. The plaintiffs rely on these concepts as providing support for the urbanisation of the subject land in two related respects. First, Pinjarra Road was designated as an activity corridor. The plaintiffs submit (closing submissions pars 1.272, 8.71 8.72), in reliance on the evidence of Mr Paul Trotman, that because the subject land lies adjacent to an activity corridor, 'as such the Government consider that higher residential densities, commercial, health, education, entertainment and cultural developments are all appropriate and intended uses within 800 metres of the centreline of the activity corridor' (exhibit 145A [23], [30]). This passage of Mr Trotman's evidence involves a direct quote from a passage of Network City to which I will refer in section 7.4.3.2.

1776 The defendants submit that that is a misleading oversimplification of what is said in Network City about activity corridors. The defendants contend that the activity corridor is identified as a concept in Network City, but in a way that is proposed to the subject of further discussion and development. In that sense the concept of an activity corridor is a 'work in progress'. Moreover, the defendants contend that a reading of Network City as a whole does not support urban development surrounding all parts of an activity corridor. Rather, they contend that development is contemplated in selected locations along the activity corridor.

1777 Secondly, Ravenswood is identified as an activity centre. The precise location of that centre within Network City is not entirely clear, although the Network City Framework schematic diagram suggests that the activity centre at Ravenswood is intended to be located at the existing township. The plaintiffs submit that by the date of taking, the land at the junction of Pinjarra Road and Old Mandurah Road had been identified for a future district commercial centre. Consequently the notion of intense development within 800 m of an activity centre would support urbanisation of much of the subject land: closing submissions par 1.273. This submission reflects a view expressed by Mr Rowe in his oral and written evidence (ts 4497, 4559; exhibit 191A [121] [133], [135]).

1778 That submission requires attention to what had been determined about a possible Ravenswood district centre by the taking date, and, in particular, what had been determined by the Statutory Planning Committee decision of 18 April 2006. See section 7.3.7.2 and my conclusions in section 7.3.11.

1779 The defendants and their planners rely on Network City in a number of respects.

1780 First, they emphasise some of the broad themes and fundamental principles of Network City. They submit that these include an emphasis on urban growth management that:

(a) uses no more urban land than is needed;

(b) uses land that is already zoned urban in preference to land that is not yet zoned urban; and

(c) contains urban growth within defined boundaries so as to avoid urban sprawl.

1781 Secondly, the defendants point to the designation of land ***south*** of Pinjarra Road and Old Mandurah Road for 'future communities', whereas all the land north of Old Mandurah Road was designated for rural and resource use: see exhibit 4A. The defendants contend that the designation of land ***south*** of Pinjarra Road and Old Mandurah Road involved a departure from the designation of that land in the IPRSP and enhanced the urban prospects of that land. That is to be contrasted, they submit, with the treatment of the land north of Old Mandurah Road.

1782 I turn to outlining relevant provisions of the instruments comprising Network City. 7.4.3.2 NETWORK CITY: RELEVANT PROVISIONS

1783 I will deal with the various instruments comprising Network City in turn. 7.4.3.2.1 The Network City Framework

1784 The Network City Framework set out eight 'headlines' as follows: Managing growth by sharing responsibility between industry, communities and government. Plan with communities. Nurture the environment. Make fuller use of urban land. Encourage public over private transport. Strengthen local sense of place. Develop strategies which deliver local jobs. Provide affordable housing (exhibit 4A).

1785 In the Network City Milestone, these headlines were said to capture the essence of the new directions for Perth and Peel, and were to be the eight fundamental principles against which all regional policies were to be tested (exhibit 4C, 1/13/136).

1786 The Network City Framework stated that the major elements of Network City are activities centres, activity corridors and transport corridors. Those concepts were explained in the following terms: Activity centres are locations where a range of activities are encouraged: for example employment, retail, living, entertainment, higher education and specialised medical services. Strong centres at each end of the 'activity corridors' support an effective public transport system in both directions along the corridor.

Activity corridors are connections between activity centres that provide excellent, high frequency public transport. These corridors are not designed to be highspeed through traffic routes and have a variety of land uses that support public transport.

Transport corridors provide routes for higher speed through traffic, in particular truck routes and express bus services (exhibit 4A).

1787 The Network City Framework schematic diagram that appears as figure 1.3 in the Network City Community Planning Strategy is shown below (exhibit 4B, 1/13/20). That figure does not include the description of activity

centres, activity corridors and transport corridors that appears in exhibit 4A, but is otherwise consistent with the Network City Framework.

1788 As can be seen, the Network City Framework identified activity corridors and activity centres. It showed primary and secondary activity corridors. Pinjarra Road is a primary activity corridor from Mandurah to the Highway. From the Highway to Pinjarra, it was shown as a secondary activity corridor.

1789 Mandurah and Pinjarra were shown as activity centres. An activity centre was also shown at Ravenswood. Mr Rowe stated that Network City did not intend to indicate anything by the relative size or location of the dots showing activity centres in the Network City Framework (ts 4558 4559). Whilst, in my view, the Framework schematic diagram involves some degree of simplification, I do not accept Mr Rowe's opinion.

1790 The Network City Framework identified categories of land by colour coding. Existing urban areas were identified into two categories: those with many opportunities to strengthen networks and centres and those with fewer opportunities for urban consolidation. A third category was described as 'future communities'. A further category was 'rural and resource areas including natural vegetation'. ***Around*** Ravenswood, the land ***south*** of Pinjarra Road and Old Mandurah Road, including the Clough/Rapley land, the Gold Fortune land and lot 189, was shown as 'future communities'. The subject land was shown as a nondevelopment area (as would have been expected, given its reservation in the PRS). All of the other land north of Pinjarra Road and Old Mandurah Road was shown as a 'rural and resource area'. As I have said, the defendants emphasise this treatment of the land north of Old Mandurah Road and its contrast with the land ***south*** of Pinjarra Road (Clough/Rapley, Gold Fortune, lot 189). 7.4.3.2.2 The Network City Action Plan

1791 The Network City Action Plan set out 28 priority strategies, each of which had identified priority actions (exhibit 4D). The Action Plan was also set out in the Network City Community Planning Strategy (exhibit 4B, 1/13/13 16).

1792 The Action Plan and Community Planning Strategy are based ***around*** seven key elements in the planning for the future of Perth and Peel. For each element, the Community Planning Strategy identifies a number of strategies and the key actions to support those strategies, which will enable the planning objectives of Network City to be achieved (exhibit 4B, 1/13/8). The Network City Action Plan is a subset of those strategies and actions that are given priority in implementing Network City.

1793 The priority strategies and priority actions identified under the 'Spatial Plan and Strategy' element are as follows:

priority strategies priority actions Foster land use and transport integration to form a Network city Undertake a detailed evaluation of priority activity and transport corridors. Implement a selected corridor as a demonstration project. Review Statement of Planning Policy Metropolitan Centres. Manage urban growth to limit urban sprawl through staging of development Develop a staging strategy indicating the phased release of development land to limit urban sprawl Ensure the MDP is adopted by Cabinet and - Indicates future development areas

- Indentifies staging requirements

- Demonstrates full cost of servicing as a guide to the preparation of the State Capital Works Program. Provide 60 per cent of required dwellings in existing urban areas and 40 per cent in new growth areas Undertake detailed appraisal of opportunities for providing additional homes and jobs within existing urban areas. Determine housing and job targets by local government areas and subregions. Access current vacant land stocks to assess priority for development or redevelopment.

(exhibit 4B, 1/13/13; see also exhibit 4D)

1794 The reference in the first set of priority actions to the evaluation of priority activity and transport corridors, and the implementation of a selected corridor as a demonstration project should be noticed. These proposed actions are, as the defendants submit, an indication that activity corridors were, in a sense, a 'work in progress'. 7.4.3.2.3 Network City Community Planning Strategy

1795 The Network City Community Planning Strategy sets out the 10 key objectives of the Network City principles and the eight headline statements shown in the Network City Framework (1/13/12). The first two key objectives are delivering urban growth management and accommodating urban growth, primarily with a Network City pattern, incorporating communities.

1796 Chapter 1 explains that urban growth management would extend the life of the current land bank (1/13/18). That is evidently one of the fundamental goals of Network City.

1797 Chapter 1 discusses the three priority strategies identified for the 'Spatial Plan and Strategy'. Strategy 11 is as follows: Foster land use and transport integration to form a network city, by

(a) Developing an integrated land use and transport network with activity and transport corridors as major elements in the movement of goods and people;

(b) Developing (nonindustrial) activity centres at selected locations along activity corridors to support the development of the public transport network with strong centres at the ends of each corridor; and

(c) Encouraging mixeduse development in activity centres, including higher density residential developments and employment generators, especially where centres are well served by public transport and have high amenity, walkable environments (exhibit 4B, 1/13/19).

1798 In my view, the terms of Strategy 11(b) are a clear indication that the concept of an activity corridor does not involve continuous urbanisation and other development along an activity corridor. As will be seen, there are many other similar indications. One indication is the fact that land abutting activity corridors is, in several places, shown as 'rural and resource areas' in the Network City Framework. See, for example, the extent of development ***around*** the secondary activity corridor running ***south*** from Armadale.

1799 The concepts of activity centres, activity corridors and transport corridors are explained in largely the same terms as is set out in the Network City Framework. In a statement emphasised in the plaintiffs' case, the document then says: Within the 'activity corridor' portion of the Network city the general intent is to focus higher density housing, retail, entertainment, business and other high activity uses towards the corridor's centre line particularly at district and local centres, in a fashion which provides increased opportunities for more housing and jobs within a 'walkable' (generally 10 minute) catchment (exhibit 4B, 1/13/21).

1800 This passage is quoted in the evidence of Mr Trotman (exhibit 145A [20(b)]) and is used to support that part of his evidence that the plaintiffs rely on, which I have set out in section 7.4.3.1.

1801 The activity corridor concept was illustrated in figure 1.4 on the next page, which showed Oxford Street, Leederville, and Albany Highway, Victoria Park. The text accompanying figure 1.4 drew a distinction between the primary and secondary activity corridors. It stated that secondary activity corridors are intended to serve a local (rather than regional) area, feeding into and reinforcing the role of major centres sitting at the terminus of the primary activity corridors. Secondary activity corridors may also link existing poorly located high trip generation land uses into the primary activity corridor in order to improve accessibility by all modes of transport (exhibit 4B, 1/13/22).

1802 Actions to support Strategy 11 are identified. The first is to determine the location of and classification criteria for activity centres by reviewing WAPC Statement of Planning Policy 4.2. In the course of the review, among the steps that should be taken are to designate activity centres at selected locations along activity corridors (1/13/23).

1803 Action 11(b) is an indication that activity corridors are a 'work in progress'.

1804 Strategy 12 is to use land resources efficiently by making fuller use of existing urban zoned land by supporting additional residential development within existing urban areas. The stated aim is that 60% of all new dwellings are to be constructed within existing urban areas as soon as possible, and the remaining 40% are to be in new growth areas.

1805 The report than analysed how the 60:40 target might be achieved, by reference to an expected need for 370,000 new dwellings by 2031. I will outline what is said in this respect in section 7.5 below.

1806 It was recognised that the 60:40 strategy could not be applied in a blanket fashion across Perth and Peel. The spatial strategy divided Perth, Mandurah and Murray into three indicative areas, reflecting the three colours shown on the Network City Framework for existing urban areas and future communities. Area 3, the light brown area, was said to consist of land that was earmarked for development through existing zoning or structure planning, but was largely undeveloped at mid2004 (1/13/26).

1807 Strategy 13 is to manage urban growth to limit urban sprawl through a development staging strategy and other complementary techniques (1/13/27). 7.4.3.2.4 Network City Milestone

1808 Network City Milestone outlines the responses to the publication of the Network City documents in September 2004 (exhibit 46, 1/13/136 140).

1809 Following the public submissions, nine tasks for future action by the WAPC were identified as a priority in implementing Network City. Among the priority tasks were to expand and explain the overall metropolitan structure of activity centres, activity corridors and transport corridors; and to develop the activity centre and activity corridor concepts, by determining the character, location and management of those elements (exhibit 46, 1/13/142). Initial projects to advance those tasks were identified. I accept, as the defendants submit, that these are further indications of the inchoate nature of the concepts of activity corridors and activity centres in Network City as at 2005.

1810 In seeking to implement Network City, one of the next steps identified was to prepare a statement of planning policy to confirm that Network City replaced Metroplan. 7.4.3.2.5 Draft for public comment - Statement of Planning Policy: Network City

1811 The draft Network City SPP was published in May 2006, but no final version had been published as at the taking date.

1812 The draft identifies three principles to guide decisionmaking. The first is to enhance efficiency of urban land use and infrastructure (1/13/148). The policy restates the 10 objectives of Network City and the eight headline statements to which I have already referred. Clause 6.2 states that Network City supersedes Metroplan and is the metropolitan strategy for Perth and Peel. See also statements to that effect in the 2006 MDP report (exhibit 94, 1/9/337).

1813 Under the heading 'Implementation', the draft states that the policy is to be taken into account in preparing regional and local planning strategies, and planning schemes and amendments (cl 7.1). The draft policy sets out the nine priority tasks for policy making from Network City Milestone, including developing the activity centre and activity corridor concepts (1/13/150). 7.4.3.3 NETWORK CITY: CONCLUSIONS

1814 Turning to the first of the plaintiffs' contentions about Network City, I accept the defendants' submissions that the location of the subject land adjacent to an activity corridor does not of itself mean that urbanisation of the land is to be supported. To use the particular paragraph of Network City relied upon by Mr Trotman, in the paragraphs of his evidence to which I have referred, is an oversimplification that takes the passage in isolation. It is not supported by reading, as a whole, the instruments comprising Network City. A number of the passages in those instruments set out in section 7.4.3.2 are to contrary effect.

1815 In my view, the proper conclusions about activity corridors in Network City include the following. First, urbanisation will not necessarily be appropriate at all points along an activity corridor. Urbanisation and other intense development is encouraged in selected locations along the activity corridor, including especially at its ends. Those specific locations are the activity centres.

1816 Secondly, the concepts of activity centres and activity corridors remained at a developmental stage in 2004 2006. I share the opinion expressed by Mr O'Neill, which seems to me to be supported by a number of the provisions in Network City to which he referred: see ts 4554, 4556, 4570 4572.

1817 I turn to the plaintiffs' second contention about Network City. That contention is founded on the proposition that by the taking date, the WAPC had decided that a district centre would be located at the junction of Old Mandurah Road and Pinjarra Road. The proximity of the subject land to that junction is said to mean that Network City principles about activity centres provide support for the urbanisation of the subject land. That was an important element of the reasons Mr Rowe identified for his view that the subject land would 'almost certainly' have been identified for future urban use in the Planning Review.

1818 In my view, the plaintiffs' submission and the opinion of Mr Rowe involve an overstatement of the effect of the decision of the WAPC, by the Statutory Planning Committee, on 18 April 2006. I have set out my findings on that decision in section 7.3.7.2.

1819 Further, in my view, Mr Rowe seems to overlook the temporal element of what is said in the April 2006 report about a district centre. The report does not state that a district centre is now or imminently to be established. Rather, the analysis is that by 2031, there would be, or was likely to be, sufficient catchment population to justify a district centre. The report is not specific about when, in that light, a district centre might be established. However, both common sense and the evidence of the commercial planners about the staging of a commercial development, which I consider in section 8, suggest that the existence of an expectation of a population sufficient to support a district centre by 2031 would not support the establishment of a commercial centre of the scale of a district centre in, say, the next 10 years. The zoning of the northwest of Riverland Ramble was yet to be determined, awaiting the further regional planning. In those circumstances, the contemplation of a district centre at the junction of Old Mandurah Road and Pinjarra Road some many years in the future does not sustain the imminent urbanisation of lots 191 and 192. In particular, that contemplation would not have required or supported imminent urbanisation by reference to what is said about activity centres in Network City. It may, however, support the prospects of urbanisation of the subject land in the medium term.

1820 As I will explain in section 7.4.4, Mr Rowe's opinion that Liveable Neighbourhoods supported the urban potential of the subject land was also founded on his view of what was decided by the Statutory Planning Committee on 18 April 2006.

1821 That brings me to consideration of the defendants' submissions about Network City.

1822 I accept the defendants' submission that the major themes of Network City include that:

(a) urban growth management should use no more urban land than is needed;

(b) more efficient use should be made of existing urban land, including both urban land that is already developed, and undeveloped urban zoned land; and

(c) urbanisation should be contained within defined boundaries so as to avoid urban sprawl.

1823 These principles can be seen in priority strategies 2 and 3 of the Network City Action Plan and the priority actions in support of those (exhibit 4B, 1/13/13); the fourth headline statement; and in much of what was written in chapter 1 of the Network City Community Planning Strategy (exhibit 4B, 1/13/24 28). See also the first two key elements of Network City, as set out in pt 5.3 of SPP 3 (exhibit 50). I accept the evidence of Mr O'Neill to this effect (ts 4568, 4570 4572, 4700).

1824 I turn to the defendants' second submission about Network City. That submission highlights the difference in treatment of land ***south*** of Pinjarra Road and Old Mandurah Road on the one hand, and the land north of Old Mandurah Road on the other. The former is shown as 'future communities', while the latter is shown as 'rural and resource areas'. The categories of land use shown on the Network City Framework are explained to some extent on that document. They are explained further in the Network City Community Planning Strategy. The 'future communities' category is said to consist of land earmarked for development through existing zoning or structure planning but being largely undeveloped as at mid2004 (exhibit 4B, 1/13/26). On the face of it, that would appear to suggest that the designations in the Framework merely reflect existing zoning and structure planning, rather than any further analysis for the purposes of Network City itself. However, the designations of land ***south*** of Pinjarra Road and Old Mandurah Road indicate that that is not so. Lot 189, the Clough/Rapley land and the Gold Fortune

land were all shown as greenbelt rural living in the IPRSP, and as rural in the PRS. Nevertheless, they were all shown as 'future communities' in Network City. In my view, that indicated that Network City had involved some further analysis of appropriate additional land for future urbanisation.

1825 The plaintiffs submit that, in the absence of the proposed public works, the subject land would have been designated 'future communities' in Network City (ts 7426). I do not accept that submission. The plaintiffs did not point to any expert planning evidence in support of this submission. No planner expressed an opinion to this effect in oral evidence. So far as I can ascertain, the only planning opinion to this effect is in a report by Mr Robinson concerned with the Gold Fortune land (exhibit 180E [58], 21/2687). In my view, in the absence of the proposed public works, the subject land would have been treated like the adjoining and nearby land north of Old Mandurah Road and Pinjarra Road (west of the junction with Old Mandurah Road) and shown as 'rural and resources'.

1826 The designation of land as 'future communities' in Network City thereby improved the urban prospects of that land. The designation 'rural and resources', as distinct from 'future communities', provided no such encouragement. That is so, notwithstanding the statement in the Community Planning Strategy that there was the potential for 'appropriate forms of development' within the rural and resource areas (exhibit 4B, 1/13/22). 7.4.4 Liveable Neighbourhoods 7.4.4.1 INTRODUCTION; MR ROWE'S EVIDENCE

1827 Mr Rowe relied significantly on Liveable Neighbourhoods in support of his view that the urban prospects of the subject land, without the proposed public works, were almost certain in July 2006. See ts 4497, 4534 4536.

1828 As at July 2006, Liveable Neighbourhoods (exhibit 221) was in the form of a draft published by the WAPC in 2004. It was not in dispute between the planners that, as at July 2006, the WAPC was applying the 2004 draft Liveable Neighbourhoods.

1829 In summary, Mr Rowe expressed the view in his oral evidence that:

(1) Liveable Neighbourhoods involved the identification of a new urban form based on sustainable communities;

(2) the core community, based ***around*** a town district centre, should change from the IPRSP urban village of 12,000 people to a base of 18,000 to 25,000 people, potentially growing to 30,000 people (ts 4497, 4534 4535);

(3) by 2006, the WAPC had determined that there be a district centre at Ravenswood, located at the junction of Old Mandurah Road and Pinjarra Road (ts 4538 4539, 4552);

(4) consequently, in the process of the IPRSP review, the appropriate size of Ravenswood, as reflected in the IPRSP, would be overtaken by the view, reflected in Liveable Neighbourhoods, of a population of 18,000 to 25,000 people (ts 4534 4536); and

(5) to have a population of that size, more land would be needed for Ravenswood. The subject land would be part of the urban centre of Ravenswood, which would extend north to Rogers Road (ts 4535 4536).

1830 Mr Rowe's first report annexes three pages of the 2004 draft (25/385 387). He relies on the passages in those pages of Liveable Neighbourhoods.

1831 I begin by examining the provisions of Liveable Neighbourhoods. I then explain my reasons for not accepting Mr Rowe's view of the effect of Liveable Neighbourhoods on the urban potential of the subject land. 7.4.4.2 THE PROVISIONS OF LIVEABLE NEIGHBOURHOODS, AND MY CONCLUSIONS

1832 Mr Rowe relies primarily on what is set out at page 118 of Liveable Neighbourhoods, including table 1. Table 1 is in the following terms: Table 1: Typical mixed use activity centre types

Strategic regional and regional centres

Strategic regional and regional centres provide for the widest range of activities and employment, and serve a population of typically 80 000 130 000+ in larger metropolitan centres such as Perth.

Typically they will contain a substantial amount of commercial, government, civic, entertainment and communitybased businesses and employment, and medium and high density housing. They will often include major institutional uses (eg university, hospital, council offices, courts).

The role of retail is to attract regional employment by delivering an active and vibrant public domain, whilst satisfying the higher order retail demands of the catchment. Typically retail floor space ranges from 40 000 to 80

000 m2 for these centres, with three or more anchor stores, many speciality shops and closely associated mixed business areas containing bulky goods outlets and other carbased retail forms.

Town (district) centres

Town (district) centres provide a community focus with a compatible mix of uses that satisfy weekly needs and have a wide range of employment generating nonretail commercial, service businesses, smaller light industries, medical centres, and community service employment. There may also be some institutional anchors such as TAFE and council offices.

This type of centre should be supported by six to nine 'walkable neighbourhoods' clustered together, with a denser mixed use core, to provide a base population of ***around*** 18 000 to 25 000 people. For smaller town centres this may be less, but for larger town (district) centres may be up to 30 000 people.

Typically these centres have retail floor space of 15 000 m2, to 25 000 m2, with two or three anchor stores (usually including two competing supermarkets), and diverse specialities, arranged to front streets forming the urban core of the mixed use centre.

Neighbourhood and local centres

These will need to vary in size, depending on a wide range of case specific factors. The majority will be quite small, with many local centres only comprising a corner store of 100250 m2 as the only shop/retail component. However some neighbourhood centres may be quite large, of ***around*** 4 500m2.

On sites with more than a local residential catchment (such as coastal nodes or centres on major traffic routes), several shops and restaurants may also be supported in neighbourhood centres. Each neighbourhood centre should also provide opportunities for an appropriate range of other business uses, such as small business spaces or homebased business sites and often may include a private childcare centre.

(exhibit 221, page 118)

1833 Table 1 is contained in the section of the document dealing with activity centres and employment. Its focus is not on the appropriate form of urban development, but on the function of the various species of commercial centres.

1834 The table refers to a population of 18,000 to 25,000 people only in the context of a town (district) centre. Thus, the third element of Mr Rowe's reasoning is essential to his use of Liveable Neighbourhoods in relation to Ravenswood and the subject land. He acknowledged this (ts 4551). That was his basis for distinguishing Ravenswood from MRCE and Austin Cove, to which, he said, a similar analysis would not apply (ts 4550). I agree with the proposition that not every urban community outside Perth will be planned to be of a scale that justifies having a town district centre. In other words, Liveable Neighbourhoods does not support a view that any urban community should be at least 18,000 to 25,000 people, independent of whether there will be a town or district centre.

1835 The passages on which Mr Rowe relies must be read in the context of Liveable Neighbourhoods as a whole, including its evident object and purposes.

1836 Liveable Neighbourhoods operates as a development control policy, or code, to facilitate the development of sustainable communities (exhibit 221, page 1). The introduction section outlines the circumstances in which Liveable Neighbourhoods applies: Liveable Neighbourhoods is an operational policy for the design and assessment of structure plans (regional, district and local) and subdivision, strata subdivision and development for new urban (predominantly residential) areas in the metropolitan area and country centres, where two or more lots are created on 'greenfields' sites at the urban edge, or on large urban infill sites in developed areas (exhibit 221, page 1).

1837 In pt 5.4 of SPP 3, consistent with the above statement, Liveable Neighbourhood principles are said to apply to the preparation and review of regional and district structure plans for new growth areas, local structure plans for new subdivisions and in planning for the revitalisation or redevelopment of existing areas (exhibit 50, 1/9/248). SPP 3 then sets out those principles, which are a restatement of the 12 principal aims appearing in Liveable Neighbourhoods (exhibit 221, pages 2 3).

1838 Liveable Neighbourhoods notes that in assessing the location of a proposed urban subdivision, the WAPC will be primarily guided by the zoning context and provisions of the relevant local government town planning scheme and statutory ***region*** scheme. It will also have regard to any endorsed regional, district or local structure plans (page 9).

1839 Liveable Neighbourhoods outline eight elements to be considered, as well as the objectives and requirements of each element. The objectives describe the principal aims of each element and the requirements present a range of qualitative and quantitative responses to meeting those objectives. The requirements set out matters that should be considered and matters that must be satisfied in residential development proposals (page 9).

1840 Element 1 deals with the broad question of community design (pages 17 27). The document calls for an urban structure based on walkable mixed use towns and neighbourhoods. The town centre is to act as a district level community focus, with a compatible mix of uses providing a range of weekly shopping needs, community facilities and significant employment (page 17).

1841 Liveable Neighbourhoods recognises the need for structure planning at all levels in order to achieve more sustainable urban outcomes and to focus on designing complete integrated communities, not just housing estates (page 17).

1842 Statements are made about the appropriate density of residential development (pages 18 19).

1843 Requirement 4 in element 1 is that, among other characteristics, a town structure should be formed by the clustering of neighbourhoods, typically with six to nine neighbourhoods needed for adequate population to sustain a sufficientlysized town centre with public transport and a wide range of goods and services (exhibit 221, page 22).

1844 On Mr Rowe's reasoning, the need for and location of a district town centre was already determined in April 2006. Subsequently, when the Planning Review identified future urban land, it would take into account the presence of the town district centre as dictating or supporting a particular pattern of urbanisation, which would include the subject land.

1845 Mr Rowe described Liveable Neighbourhoods as involving 'the identification of a new urban form' (ts 4534), being a 'growth scenario model' to be used in the Planning Review (ts 4536) and as 'an urban form or an urban model' (ts 4538). That is his first proposition, as I have summarised his reasoning above. He expressed this as mandating ('obliged': ts 4536) the WAPC to take a particular approach in the Planning Review.

1846 Generally, Mr Rowe's view of Liveable Neighbourhoods seems to me to overstate the significance of that instrument for WAPC decisionmaking about patterns of future urbanisation. Put at its highest, the effect of Liveable Neighbourhoods in that context may be summarised in the following two ways. First, in preparing, amending or considering a regional structure plan, the planning for a city or town in which it had been determined that there be a district town centre, should, if possible, have that centre associated with six to nine neighbourhoods, clustered in the way explained in Liveable Neighbourhoods, to comprise a population of 18,000 to 25,000 people, although a smaller population may be appropriate.

1847 Secondly, I accept that the major themes of Liveable Neighbourhoods of walkability, sustainability, increased use of public transport, higher density and mixed uses echoed themes of Network City and would have been expected to be themes adopted in the Planning Review. However, adherence to those broad principles does not dictate, and could not have confidently been expected to dictate, the adoption of an urban form of a particular scale, such as that propounded by Mr Rowe.

1848 In any event, for the reasons that follow, I do not accept Mr Rowe's reasoning about the effect of Liveable Neighbourhoods on the urban prospects of the subject land at the taking date.

1849 As I have explained in section 7.3.7.2, the report and decision in April 2006 did not determine that a district centre would be created for Ravenswood. Whether that would occur would be determined only during or after the Planning Review. Thus, the identification of the appropriate size and location of the commercial centre and the determination of the appropriate pattern of future urbanisation would be conducted as part of a coherent planning exercise.

1850 Further, what is contemplated in the April 2006 report is that by 2031 there would be sufficient population to support a district centre. As I explained in section 7.4.3.3 regarding Network City, that does not involve an expectation that a district centre would be established in the short term in Ravenswood. What is contemplated in

the April 2006 report is the establishment of a district centre some many years in the future. While that may well provide support for longerterm urbanisation, in my view it provides no foundation for shortterm urbanisation based on any Liveable Neighbourhoods model of the urban form surrounding a district town centre.

1851 As I have said, Mr Rowe's view that, by the taking date, a firm decision had been made for a district centre at the junction of Old Mandurah Road and Pinjarra Road, and, consequently, that Network City and Liveable Neighbourhoods provided strong support for the urbanisation of the subject land, were two important elements of his reasoning about the subject land's urban potential. For the reasons I have given, I do not accept those opinions of Mr Rowe. 7.4.5 The draft LPS 7.4.5.1 INTRODUCTION

1852 As I have outlined in section 7.3.4, the shire resolved to adopt a draft local planning strategy in August 2005. It forwarded the draft to the DPI for certification for advertising. The draft LPS, in its original form, showed land marked as urban immediately to the north of the subject land, extending to Rogers Road. Lot 10 was also shown as urban. The relevant area covered by the draft LPS maps in exhibit LPS150.8 is shown in Appendix 3 to these reasons.

1853 In section 7.4.5.3, I will give closer attention to what is meant by land being shown as 'urban' in the draft LPS.

1854 In June 2006, just before the taking date, the shire resolved to amend the draft LPS so that (apart from the subject land) all of the land in the triangle between the Highway, Old Mandurah Road and Paterson Road was designated as urban.

1855 Some things were not in doubt about the relevance of the draft LPS (ts 4574 4581). First, it would be taken by the hypothetical purchaser to reflect the views of the shire at the date of taking. Secondly, it required approval by the WAPC before it would come into force. The hypothetical purchaser would have expected that the draft LPS would be reviewed by the WAPC as part of the Planning Review, and adopted only to the extent it was consistent with the results of that review. Thirdly, in the Planning Review, the draft LPS would be taken as reflecting the shire's considered position.

1856 The plaintiffs submit, and their planners expressed the opinion, that the draft LPS provides substantial support for the urban potential of the subject land in the assumed absence of the proposed public works. The plaintiffs' closing submissions include the following:

(a) the draft LPS identified the 'critical shortage' of urban zoned land in the Shire of Murray (par 1.304);

(b) the draft LPS was prepared with substantial DPI input. At no time did the DPI suggest that consistency with the IPRSP was required. Further, the contents of the draft LPS, including the designation of land north of Old Mandurah Road, reflected DPI thinking (pars 1.295, 1.440); and

(c) the hypothetical purchaser would have expected that the results of the IPRSP review would accord with what is shown as future urbanisation in the draft LPS (pars 8.194, 8.267). In this respect, the plaintiffs also refer to the evidence of Mr Flugge (exhibit 182D [81]).

1857 The defendants submit that:

(a) consultation with the DPI in relation to the draft LPS did not reveal any support for urbanisation of land north of Old Mandurah Road;

(b) the draft LPS did not propose immediate urbanisation, but rather that the land north of Old Mandurah Road be investigated for possible future urbanisation;

(c) moreover, the proposal that such land be investigated for possible future urban was heavily influenced by, and dependent on, the Highway and RRF;

(d) the draft LPS reveals a concern that urbanisation occur in distinct nodes, avoiding urban sprawl; and

(e) the hypothetical purchaser would not simply assume that the results of the Planning Review would be consistent with the draft LPS. The extent to which the draft LPS would be reflected in the Planning Review would be influenced by the analysis and reasoning expressed in the draft LPS, in the context of the process expected for the Planning Review. On examination, the reasoning expressed in the draft LPS would not lead to any expectation that its approach would be adopted in the Planning Review.

1858 In section 7.4.5.2, I will say more about the history of the development of the draft LPS and, in particular, the extent of the DPI's input into that process. In the following section, 7.4.5.3, I will outline provisions of the draft LPS.

In doing so, I will give attention to what is proposed in the draft LPS, the reasoning stated for those proposals, and the extent to which the reasoning is based upon the proposed public works. In section 7.4.5.4, I will state my conclusions in relation to how the draft LPS bears upon the urban potential of the subject land. 7.4.5.2 THE DEVELOPMENT OF THE DRAFT LPS

1859 I have already made findings about steps taken in developing the draft LPS in sections 6.4 and 7.3. For convenience, I will repeat some of those findings.

1860 There were communications in 2001 and 2002 between the DPI and shire officers about the preparation of the draft LPS and TPS 5.

1861 In April 2002, Mr Flugge and Mr Robinson of the shire met with Mr Bulstrode and Ms Bell of the DPI. As recorded in Mr Bulstrode's notes of the meeting (exhibit 151), Mr Flugge advised that the then current draft LPS did not propose any new greenfield urban sites and that there was currently sufficient areas of residential zoned land. I have already found, in section 6.4, that a discussion between Mr Bulstrode and Mr Flugge about land north of Old Mandurah Road did not occur at this meeting, but rather occurred at a later meeting, some time in 2003 or 2004.

1862 By letter of 13 September 2002 (exhibit 152), the shire forwarded a draft TPS 5 and LPS to the DPI. The text of those documents is not evidence.

1863 By letter of 27 February 2003 (exhibit 153), the DPI responded to the shire about the draft TPS 5 and LPS that had been forwarded in 2002. The letter explained the requirements of reg 12A of the Town Planning Regulations. It stated that the LPS would be unlikely to be endorsed by the WAPC for the reasons set out in the letter. The submitted LPS was said to be deficient in a number of respects identified in the letter. Among them was that the document contained no analysis of the existing supply of or demand for urban, ruralresidential and other rural type subdivisions, in order to explain and justify the subdivision strategy in the draft LPS.

1864 By letter of 7 November 2003 (exhibit 154), the shire sent the DPI an updated draft of the LPS. The letter referred to a meeting in August 2003. It requested a response from the DPI as a high priority. Again, the text and scheme maps accompanying the letter are not in evidence.

1865 In August 2005, the Shire of Murray adopted the draft LPS and TPS 5. The form of the LPS maps at the time of their adoption is shown in exhibit LPS150.8. The land north of the subject land and north of lot 190, up to Rogers Road, is shown as urban; lot 10 was shown as urban; and lots 11, 12 and 6 were shown as ruralresidential. Lot 190 was shown as partly commercial and partly public purposes.

1866 Officers of the DPI were plainly aware of the shire's adoption of the draft LPS. For example, Mr Bulstrode referred to it in his report of 9 September 2005 (exhibit 48).

1867 There was correspondence and emails between the shire and the DPI about the draft LPS in November 2005. There was also correspondence and emails in May 2006: see sections 7.3.5 and 7.3.8 above.

1868 I accept Mr Bulstrode's evidence about the extent of discussions between him and officers of the shire regarding the inclusion of land north of Old Mandurah Road for possible urbanisation in the LPS. I accept that at a meeting with Mr Flugge in 2003 or 2004, he discussed, probably proposed, including land between Old Mandurah Road and Rogers Road in the draft LPS as an area for investigation or consideration for future urban (ts 4378 4379, 4400 4402, 4409, 4474 4476, 4586).

1869 The statements of Mr Flugge and Mr Selby each include a generalised statement that the draft LPS was developed in close consultation with the DPI and the contents of the LPS reflected the DPI's input (exhibit 182D [86], [87]; exhibit 167B [3]). I do not accept the plaintiffs' submission that the contents of the draft LPS, including the designation of land north of Old Mandurah Road as urban, reflected the DPI's thinking. In my view, that submission overstates the position. I accept that Mr Bulstrode suggested that land north of Old Mandurah Road be proposed for investigation or consideration for future urban use. Further, in his report to the PRPC in September 2005, Mr Bulstrode also expressed support for, indeed proposed, structure planning for a broad area of 3,700 ha between Furnissdale and Pinjarra, along the Pinjarra Road corridor. The report notes that the shire's draft LPS 'has proposed additional future urban areas' and the main objective of the Furnissdale Pinjarra Structure Plan is to provide specific guidance to the future development of the area (exhibit 48, 3/15A/264 265). The PRPC did not adopt Mr Bulstrode's proposal. Nevertheless, his proposal demonstrated to a hypothetical purchaser that he considered that the question of future urbanisation north of Old Mandurah Road warranted investigation through a structure planning project.

1870 I do not think that these matters amount to the DPI supporting the urban designation of that land. Rather, Mr Bulstrode's suggestion was made in the context that consideration of the draft LPS by the DPI/WAPC would involve a wideranging review of various factors, and the shire's proposal regarding land north of Old Mandurah Road would be considered in that context. In colloquial terms, Mr Bulstrode supported putting urbanisation north of Old Mandurah Road 'on the table', for consideration in the Planning Review. He was not expressing support for acceptance of that concept in the Review that was a question for the Review. Moreover, Mr Bulstrode was not in charge of, or directly working on, the Planning Review.

1871 I accept the plaintiffs' submission that at no time during the communications between the DPI and the shire was the question of consistency with the IPRSP raised. The consideration of the draft LPS was to occur in the context of a review of the IPRSP, or the broader planning review of the ***southern*** sectors. Consequently, consistency with the IPRSP was not seen by the shire or the DPI as a requirement of the draft LPS. 7.4.5.3 THE DRAFT LPS: RELEVANT PROVISIONS

1872 The Shire of Murray Draft Local Planning Strategy version 1.1 (adopted August 2005, revised September 2005) for the Shire of Murray TPS 5 is exhibit 47 (1/12/237 370).

1873 Map C2 of the maps accompanying the draft LPS in its 2005 form is map 13 of the book of maps (exhibit 71). This map does not reflect the amendments made on 20 June 2006: see exhibit 11 and see further below. It should be noticed that there is no future urban or urban deferred category of residential land use in the draft LPS. As I will explain, the single broad category 'urban' is used to cover a range of land, some of which is already zoned urban and some of which is contemplated for possible (not certain) future urbanisation.

1874 Part 1.2 outlines the role and purposes of a local planning strategy. These include setting out the longterm planning direction for the local government. That is consistent with one of the statutory functions of a local planning strategy: Town Planning Regulations 1967 reg 12A(3).

1875 Part 1.3 identifies key objectives for the LPS. Among those objectives are the identification of urban expansion areas and future industrial employment centres, and the '[i]dentification of urban expansion areas and future residential areas in distinct "nodal" areas to avoid urban sprawl separated by green belt buffers of rural and semirural landholdings' (1/12/242 243). That objective is one of a number of indications that the draft LPS fosters urban expansion in distinct nodes, avoiding urban sprawl. See also 1/12/262 264, referred to below.

1876 Part 1.3 also identifies key issues. The first is that Murray Shire is located on the fringe of the Perth Metropolitan ***Region***, which is undergoing rapid population growth. Coupled with the Shire being situated in the PeelHarvey Coastal Plain Catchment means that it is in a sensitive environment that is undergoing pressure for subdivision into Urban and semiRural living opportunities (1/12/243).

1877 This passage, the key issues identified in the draft LPS, and a reading of the draft LPS as a whole, do not sustain the plaintiffs' submission that the draft LPS identified the 'critical shortage' of urban zoned land in the shire.

1878 Part 3 deals with the local planning context. Within that part, pt 3.2 deals with population and housing. Historical population figures, revealing population growth for the metropolitan ***region*** and the Shire of Murray, are set out in table 1 (1/12/253). The population in the shire is described as 'experiencing a steady growth pattern'. The population projections in the 1996 IPRSP are referred to. The medium and highmedium projections are said to represent the 'bounds of the likely future growth' in the municipality, indicating a population of 31,000 38,000 people by 2026 and 60,000 75,000 people by 2041 (1/12/254). The draft LPS then states that [t]he significant rate of growth means that substantial residential land needs to be appropriately zoned to satisfy current and projected demands. In addition, sufficient future urban land needs to be identified to accommodate the ultimate population (1/12/254).

1879 It can be seen that the draft LPS does not suggest that the IPRSP projections are outdated or superseded. To the contrary, it adopts them, and does not refer to any other projections. There is no analysis of the extent of currently available undeveloped urban zoned land, or future urban land identified in the IPRSP.

1880 In pt 3.2.2, reference is made to the shire's adoption of local structure plans for various townsites and localities including Ravenswood. The plans are said to have been based on the creation of a distinct urban village with discrete boundaries (1/12/254).

1881 Part 3.4 deals with what is described as the Ravenswood urban village and says as follows: RAVENSWOOD URBAN VILLAGE

A Local Structure Plan has been approved by Council and the Western Australian Planning Commission for land to the north of the existing Ravenswood townsite bordering Nancarrow Way, Pinjarra Road and Old Mandurah Road (Refer to Plan 7). The low lying nature of the land requires water sensitive urban design principals [sic] to be applied. The Local Strategy Plan identifies 388 ha of existing and potential urban land representing a population in the vicinity of 10,000 people in the Ravenswood locality. A range of lot sizes is also proposed from smaller 550 m2 size lots up to 1000 m2 lots to cater for a range of lifestyle opportunities.

A major regional recreation facility site has been identified in the Inner Peel ***Region*** Structure Plan to the east of Fiegerts Road and adjoining the proposed Peel Highway deviation. Potential exists for an increased urban area to border this regional recreation facility and provide an increased urban catchment to cater for regional sporting and recreation needs. Further structure planning will be necessary over this area to demonstrate how the land can be integrated in to the predominantly rural environment (1/12/255 256).

1882 The local structure plan referred to in the first paragraph is the Riverland Ramble structure plan: see 1/12/352. This is the structure plan that had been approved for lots 20 and 21 in April 1995 (exhibit RR146.48; exhibit 245G, 49A/197).

1883 The reference to 388 ha of existing and potential urban land with a population of 10,000 reflects the designations of urban and future urban land in the IPRSP and its estimates of the population potential of that land.

1884 The second paragraph refers to the RRF and the Highway. There is said to be potential for an increased urban area there, and reference to the need for further structure planning to demonstrate how it can be integrated into the surrounding rural environment. This passage supports the defendants' submissions about the draft LPS in two respects. First, the proposal for possible further urban land in this area is put in the context of the RRF and the Highway. Similar references can be found elsewhere. See, for example, 1/12/261. Secondly, what is proposed is about potential future urbanisation, with issues for that urbanisation being identified. The land is not proposed for immediate urbanisation.

1885 The draft LPS refers to the adoption of the Furnissdale Structure Plan (1/12/256).

1886 The description of the LPS's Residential Development Strategy includes repeated references to urban growth nodes separated by greenbelt buffers. The LPS states that '[t]he integrity of the urban form of these villages should not be allowed to degenerate by ad hoc additions or extensions, by intrusions into the green belt rural areas so as to contain urban development into discrete nodes' (1/12/263). See also 1/12/262, 264 265. This draws heavily on the urban form described in the IPRSP: see, for example, exhibit 6, 1/6/278.

1887 After describing what is proposed for the expansion of residential areas in Pinjarra, the following is said about further residential development in Ravenswood: A new urban cell has been identified in the Ravenswood locality adjacent to the proposed Regional Recreation sites and the future Peel Highway Deviation. This future urban node replaces the future urban area, which was identified for the Furnissdale locality in the Inner Peel ***Region*** Structure Plan. A separate study carried out by GHD Consultants of the Furnissdale locality recommended only incremental expansion of the existing Furnissdale townsite with the balance of the area remaining rural residential due to land use and environmental constraints (1/12/263).

This passage refers to a need to replace future urban land at Furnissdale, designated in the IPRSP. It identifies a new 'future urban node' and explains its location by reference to the Highway and the RRF.

1888 One of the strategies in the Residential Development Strategy is to '[e]stablish optimum populations for each town and urban village throughout the Shire based upon projections included in the [IPRSP] (medium population scenario)' (1/12/265). One of the actions proposed is for the 'Local Strategy Plan to include population potential and predicted residential densities, with time frame for establishment of new urban areas' (1/12/266). The LPS also proposes that areas identified as future urban category A in the IPRSP be rezoned to residential in the new TPS, and longerterm urban areas be identified on the LPS plan (1/12/266). That is another indication that designation as

urban on the draft LPS plan reflects, in some cases, a longterm, not immediate, rezoning to urban. The land north of Old Mandurah Road is one of the 'longerterm urban areas'. Another action is to zone sufficient land for urban purposes within townsite areas to cater for future growth potential and satisfy demand for release of residential lots in accordance with the MDP (1/12/266).

1889 Part 5 deals with planning precincts in the shire and development guidelines for those precincts. Ravenswood, precinct 6, is dealt with in pt 5.6 (1/12/307 309). In describing the land use characteristics of the precinct, the LPS refers to the Highway and to the 'major urban development', namely Riverland Ramble, that is said to be occurring ***south*** of Old Mandurah Road as an extension of the Ravenswood urban townsite (1/12/307 308). The principal objectives for precinct number 6 are described as follows: Principal Objectives Provide opportunities for major urban expansion activity node associated with the Peel Highway Deviation and the proposed Regional Recreation site at junction with Pinjarra Road, east of Fiegerts Road. Provide opportunities for residential commercial and recreation development and low key tourism north of Ravenswood Townsite and Murray River. These development opportunities to be provided with minimal detriment to the environmental and landscape values of the precinct (1/12/308).

1890 Again, the new 'urban expansion activity node' is defined by its proximity to the Highway and the RRF. The principal objectives for each precinct are summarised at the start of pt 5. For Ravenswood, it says to '[p]rovide opportunities for urban expansion associated with the Peel Highway Deviation and major activity node at Pinjarra Road junction' (1/12/297).

1891 The actions in relation to precinct number 6 include: Structure planning for expanded urban catchment to be prepared via the review of [the IPRSP] by WAPC in consultation with Shire of Murray and relevant government agencies.

... Local Strategy plan to identify potential urban growth areas subject of further detailed planning (1/12/309).

1892 The reference to structure planning for an expanded urban catchment under the IPRSP review makes it plain that the future urban prospects for land north of Old Mandurah Road are subject to, and to be determined in the course of, the Planning Review.

1893 The second dot point I have quoted explains that the purpose of showing the land north of Old Mandurah Road as urban on the LPS plan is 'to identify potential urban growth areas subject of further detailed planning'. That is a further indication that immediate urbanisation of the land north of Old Mandurah Road is not proposed in the draft LPS.

1894 On 20 June 2006, the shire's Planning and Development Services Committee resolved to modify the draft LPS by changing the designation of various lots contained in the triangle of land bounded by Paterson Road, Old Mandurah Road and the Highway to urban: see exhibit 11. The land in question was owned by the Mannions, the Kellihers and the Emmanuels. The minutes, which include a report from the shire's director of planning and development services, describe the area as being approximately 1,550 ha. Under the draft LPS adopted in August 2005, that land had been designated in various ways including ruralresidential, urban, commercial and others. As I have said, the land north of the subject land to Rogers Road was shown as urban. The land further north and east was shown mainly as ruralresidential.

1895 The defendants invite close attention to the minutes of the meeting. They submit that those minutes reveal the absence of detailed analysis and justification for the urban designation of 1,550 ha north of Old Mandurah Road.

1896 The amendments arose from requests by the three landowners, the Kellihers, the Emmanuels and the Mannions (exhibit 11, page 17).

1897 The minutes identify the research methodology as being a meeting with the proponents and an examination of the LPS (page 18). Thus, there is no analysis of or research into questions of land supply and demand, or environmental issues. The reference to demand for urban land in the last dot point on page 21 does not reveal or suggest any such analysis.

1898 There is reference to the WAPC review of the IPRSP, saying that it was unlikely that regional planning issues would be resolved in the next 12 months (page 19).

1899 The first matters mentioned under the heading 'Strategic Planning' are the RRF and the Highway (page 20). There is reference to the preliminary concept plans that had been provided by planning consultants for the Kellihers

(pages 20 21). The report states that the area identified for 'potential urban development' would yield approximately 10,000 to 13,000 lots and would create a population in excess of 20,000 people. The report does not address any question of when an urban area north of Old Mandurah Road of that scale might be appropriately planned for, or the likely timeframe for that development. The report states that council will be able to 'control the urban form' at the time of rezoning and subdivision. It puts forward ten dot point reasons as justification for the whole area to be designated for urban purposes. The first reason mentioned is that the area is strategically located adjacent to the Highway. The identification of the area for an RRF was also mentioned. Other matters mentioned include proximity to the future Lakes Road industrial area, and the Pinjarra industrial area, proximity to Mandurah and to public transport to Perth on the new Mandurah Perth railway.

1900 In my view, the minutes of 20 June 2006 support three conclusions. First, the Highway and the RRF were central to the proposal for increased urbanisation north of Old Mandurah Road. Secondly, the matters expressed in these minutes reinforce the proposition that the urban designation of land north of Old Mandurah Road in the draft LPS connotes contemplated future urban potential, subject to structure planning; it does not reflect a proposal for imminent urbanisation. Thirdly, it provides some support for Mr O'Neill's view that given the way the draft LPS was developed, it was more valuable as a representation of landowners' interest in having their land included in future urban zoning, rather than as a comprehensive or rational strategy for the expansion of urban areas (ts 4579).
7.4.5.4 THE DRAFT LPS: CONCLUSIONS

1901 My conclusions about the draft LPS are as follows.

(1) Mr Bulstrode supported, indeed probably suggested to Mr Flugge, that land between Old Mandurah Road and Rogers Road be included in the draft LPS as an area for investigation or consideration for future urban. That does not indicate or demonstrate the DPI's support for the designation of land north of Old Mandurah Road as future urban. Mr Bulstrode supported its inclusion in the draft LPS so that it could be considered in the context of the Planning Review. In colloquial terms, the possibility of future urbanisation north of Old Mandurah Road was 'on the table' for consideration in the Planning Review. That is consistent with the discussion in Mr Sanderson's report of 3 April 2006. Mr Bulstrode was not adopting or favouring acceptance of urbanisation north of Old Mandurah Road in the Planning Review; that was a question for the Review. Others were in charge of the Review, and those others had not adopted any particular position.

(2) Given that the draft LPS was to be considered in the context of the Planning Review, there was no requirement of consistency between the LPS and the IPRSP. However, the extent of departure from the IPRSP might have borne upon the prospects of acceptance in the course of the Planning Review of what was proposed in the draft LPS.

(3) It was to be expected that a draft LPS would include some analysis of population figures and the need for further urban land, as Mr Bulstrode said (ts 4473). The need for such analysis was referred in the DPI letter of 27 February 2003 (exhibit 153). Regulation 12 of the Town Planning Regulations requires an analysis of investigations made during the preparation of the scheme the subject of scheme report. However, the draft LPS did not include any independent analysis of future population, or the demand for and supply of urban zoned land. The draft LPS adopted the IPRSP population figures, which were 10 years old by July 2006.

(4) Further, the terms of the draft LPS do not reveal any detailed analysis or investigations regarding environmental issues. Rather, most environmental issues are noted at a broad level of generality and are left to be addressed and investigated in the course of future planning or policy development.

(5) Contrary to the views of some of the plaintiffs' planners, the draft LPS did not recognise a 'critical shortage' of urban land or suggest that the IPRSP's population projections were outdated or superseded.

(6) Land designated as urban in the draft LPS is not thereby proposed for immediate rezoning to urban. Rather, the urban category includes land that is proposed as a 'longerterm urban area' or a 'potential urban growth area'. Moreover, the draft LPS was to identify potential urban growth areas said to be the 'subject of further detailed planning' (1/12/309). In the case of land north of Old Mandurah Road, its designation as urban is subject to further structure planning to integrate the land in the rural environment, to preserve distinct urban nodes and avoid urban sprawl. Thus, under the draft LPS, the timing and extent of the proposed future urbanisation north of Old Mandurah Road is significantly uncertain.

(7) Some of the plaintiffs' planners treated the draft LPS as supporting a high probability of imminent or shortterm urbanisation of the subject land. For the reasons just given, I do not accept that view of the draft LPS.

(8) The importance of ensuring that urban development is confined within distinct nodes, and the need to avoid urban sprawl are repeatedly emphasised in the draft LPS.

(9) The draft LPS suggested a need to replace some of the future urban land designated in the IPRSP, given the recognition in the Furnissdale Structure Plan that Furnissdale should not accommodate a substantial urban population.

(10) In proposing and explaining future urban land north of Old Mandurah Road, the draft LPS emphasised the Highway and the RRF. The focal point and foundation of the new urban expansion node north of Old Mandurah Road was the RRF, not the expansion of the existing town of Ravenswood. I have referred to a number of passages in the draft LPS that support this view. That is also illustrated by the fact that in the draft LPS as originally adopted in August 2005, lot 11 was not designated urban, whereas the land immediately north of the subject land was designated urban. Nevertheless, I consider that, in the absence of the proposed public works, the draft LPS would have proposed urban land north of Old Mandurah Road. However, that proposal would have been based on a natural expansion of Ravenswood and Riverland Ramble, rather than being focused on the junction of Old Mandurah Road and Pinjarra Road. Given the willingness of the shire, reflected in the amendments made in June 2006, to include all the land north of Old Mandurah Road to Paterson Road, I am satisfied, that but for the proposed public works, the subject land would have been part of that large mass of land proposed by the shire for possible future urbanisation.

(11) I do not accept the plaintiffs' submission that the hypothetical purchaser would have expected that the results of the Planning Review would accord with what is shown as urban in the draft LPS. I do not accept the generalised statements to that effect by Mr Flugge (exhibit 182D [81]) and Mr Selby (exhibit 167A [16]). I will outline what I consider the hypothetical purchaser would have expected about the results of the Planning Review in section 7.6. The hypothetical purchaser would have anticipated that the Planning Review would involve a considerably more wide ranging investigation and analysis than what evidently informed the draft LPS. Further, the hypothetical purchaser would not have expected the Planning Review to result in the identification of all of the land north of Old Mandurah Road to Paterson Road for future urbanisation. Moreover, the draft LPS itself contemplated that the Planning Review would refine the land north of Old Mandurah Road that was to be urbanised in the future.

7.5 Population, lot demand and urban land supply 7.5.1 Introduction: the correct framework for analysis

1902 The parties adduced a considerable amount of evidence about population growth projections, the demand for residential lots and the supply of urban land. In the end I think much of that evidence is of little or no assistance on the question of the subject land's urban potential. Much of this lengthy section 7.5 is taken up with explaining why that is so.

1903 In the course of the trial, two purposes for the evidence about population, lot demand and urban land supply were identified (ts 2724 2725). First, these matters would be relevant considerations in the Planning Review and consequently, relevant to the prospects of urban rezoning of the subject land. Secondly, these matters bear upon the potential for locating a district commercial centre on the subject land. In their closing reply submissions, the plaintiffs submit that these are not the only purposes of this body of evidence (reply par 7.62). As I will explain in more detail, the plaintiffs' submissions contend that the central purpose of this body of evidence is to assist in assessing the view of the hypothetical purchaser on the land's urban potential.

1904 In my respectful opinion, the plaintiffs' submissions about population growth projections and urban land supply are not always easy to follow, and not always internally consistent. In the course of this section 7.5, I will set out the major propositions I draw from those submissions, together with my response.

1905 The plaintiffs' first proposition is about the framework of analysis of population projections and land supply. The plaintiffs submit that in assessing population projections and the amount of available urban land, what is important is how those matters affect the view of the hypothetical purchaser, not how those matters affect the view of the WAPC: closing submissions pars 8.244, 8.249, 8.268, 8.317, 8.326; reply pars 7.69 7.71, 7.85. For example, in par 8.249, it is said that the trial 'ought not to descend into what the views were of [the WAPC], but rather what the views were of the hypothetical purchaser who participated in the market'. In par 7.71 of the reply, the plaintiffs

submit that it is '[not] to the point' to consider whether the WAPC would be persuaded to rezone land based on the available statistics.

1906 In the present context, I do not accept these submissions. A hypothetical purchaser may have regard to available information about population growth and projections and urban land supply for a variety of reasons and purposes. I will return to that point. For present purposes, I accept the plaintiffs' submissions that the question is the hypothetical purchaser's view of the urban potential of the subject land. However, I do not accept that the views of the WAPC are irrelevant to answering that question. In order to be developed for urban purposes, the subject land would need to be rezoned. The hypothetical purchaser is well informed. Thus, he or she knows that:

(a) rezoning to urban under the PRS could occur only with WAPC approval;

(b) the Planning Review is underway; and

(c) in that Review, there will be consideration of population projections and the supply of urban zoned land.

1907 Consequently, the hypothetical purchaser would give attention to the information available to be used by the WAPC in assessing those topics and make an assessment of the view likely to be adopted by the WAPC. The wellinformed hypothetical purchaser knows that it is the view of the WAPC on those matters that will determine the prospects and timing of rezoning the subject land.

1908 Many of the plaintiffs' submissions on this topic are couched in terms of what the hypothetical purchaser would have believed, or what 'the market' believed. I take the references to 'the market' as being put forward as indicative of the views of the hypothetical purchaser. Many of the plaintiffs' submissions overlook the point I have just made.

1909 For example, the plaintiffs submit that developers often do their own statistical analysis before purchasing significant property and employ a consultant for that purpose (pars 8.234 8.235). The plaintiffs refer to the evidence of Mr Shrapnel (ts 5715). Mr Shrapnel's comment was made in the context of a developer contemplating the commercial development of a property. I accept that the same would be true for a hypothetical purchaser contemplating the urban development of a property of the scale of the subject land.

1910 A developer may very well do an assessment of expected population and likely demand for the lots to be the subject of the development in order to assess the commercial viability of the contemplated development. However, that is a different assessment, for a different purpose, from the assessment of these matters by the WAPC in the Planning Review. A hypothetical purchaser of the subject land, contemplating its urban development, would have needed to make an assessment of two things: the prospects of urban rezoning; and the commercial viability of the urban development that would follow rezoning. A consultant's independent assessment of the projected population, lot demand and the supply of urban land would, to the extent it differed from information made publicly available by the WAPC, inform the hypothetical purchaser's assessment of the land's urban prospects, only to the extent that the purchaser expected that the WAPC would adopt the consultant's view of those matters in the Planning Review in preference to the view taken in the WAPC's own publications. To the extent that the WAPC's view was not known by the hypothetical purchaser, the question would arise whether the WAPC could be expected to adopt the consultant's view.

1911 Because the questions of population, land supply and lot demand relate to what the hypothetical purchaser would have known or believed, the question is not what, in fact, the WAPC's view was at the date of the taking. The question is what the hypothetical purchaser would know or believe about the WAPC's view on those matters. As I will explain, it seems to me that many of the matters relied upon by the defendants on this topic would not have been available to the hypothetical purchaser and consequently are of no assistance. I identify this information in section 7.5.4 below.

1912 In the next section 7.5.2, I will outline the evidence and draw conclusions about the population projections for Peel and the Shire of Murray that were available at the date of taking. In section 7.5.3, I will deal with other submissions of the plaintiffs, including the evidence of Mr Brian Haratsis. In section 7.5.5, I will outline other information on these topics that was available at the date of taking and what the hypothetical purchaser would draw from that information. Finally, in section 7.5.6, I will state my conclusions on the evidence of population, lot demand and urban land supply. 7.5.2 Population projections 7.5.2.1 THE COURSE OF THE TRIAL

1913 In November 2005, the WAPC published Population Report No 6: Western Australia Tomorrow (WA Tomorrow No 6) (exhibit 117, 1/9/111 240). It contains forecasts of resident populations for Western Australian planning ***regions*** to 2031 and for local government areas to 2021.

1914 During the trial, the plaintiffs proposed to tender evidence of other population projections said to have been available at the date of taking. However, as I will explain, as a result of rulings or concessions made, and consequential amendments or redactions to Mr Haratsis's reports, the plaintiffs did not tender evidence of other population projections available at the date of taking.

1915 In their original form, some of Mr Haratsis's reports referred to other population forecasts said to have been available at the date of taking. In particular, his reports refer to projections by a company he referred to as 'Forecast ID'. The Forecast ID projections forecast higher rates of population growth in the Peel sector, compared to WA Tomorrow No 6. In some of his original reports, Mr Haratsis expressed the opinion that he preferred the Forecast ID projections to other projections, essentially on the basis that subsequent population figures more closely matched the Forecast ID projections.

1916 The defendants objected to these passages of Mr Haratsis's reports on a number of grounds. In the course of argument, senior counsel for the plaintiffs accepted that Mr Haratsis's opinion as to which forecast was preferable was irrelevant (ts 2739 2740). That was evidently because Mr Haratsis's reasoning had regard only to material not available at the time of taking. Another ground of objection was that the Forecast ID projections themselves were not in evidence and there was no evidence about the assumptions or methodology involved in them. On 21 July 2010, ruling on that objection was deferred (ts 2818) because the plaintiffs had agreed to provide to the defendants the Forecast ID projections and assumptions and methodology (ts 2757 2759).

1917 On 18 August 2010, the plaintiffs accepted that no Forecast ID projections that were available at July 2006 had been provided, or would be provided, and that the relevant paragraphs of Mr Haratsis's report should consequently be struck out (ts 4385). Thereafter, Mr Haratsis's reports were amended or redacted to remove references to the Forecast ID projections.

1918 The upshot of all of that is that there is no evidence of any population projections by Forecast ID that were available at the date of taking.

1919 The plaintiffs also proposed to lead evidence from Ms Dorothy Lucks. Her evidence related to the Peel ***Region*** Infrastructure Plan (the PRI Plan), which was published in October 2006. The PRI Plan included some population figures, generated in the way explained in McKay v Commissioner of Main Roads [No 3] [2010] WASC 232. Those population figures were higher than the projections in WA Tomorrow No 6. On 31 August 2010, I published my reasons in McKay [No 3], upholding the objections to Ms Lucks' evidence. My reasons stated that nothing in my decision excluded or affected any evidence of any publication, prior to the taking date, of the population figures in the PRI Plan, or like figures: [48].

1920 Following my ruling, the plaintiffs did not pursue the tender of the PRI Plan, which was MFI 55. Further, the plaintiffs did not lead or attempt to lead any evidence of the publication, prior to the taking date, of the population figures in the PRI Plan, or like figures.

1921 A number of the plaintiffs' planners rely upon the PRI Plan in support of their opinions on the urban potential of the subject land. Given that it was not available at the taking date, it would not have informed or influenced the views of the hypothetical purchaser.

1922 Prior to submissions and ruling on Ms Lucks' proposed evidence, there was a conferral between Ms Lucks, Mr Haratsis and Mr Swasbrook, on 20 August 2010. The joint statement arising from that conferral is exhibit 250. The joint statement must be read in light of the fact that, as at 20 August 2010, it was proposed that Ms Lucks would give evidence about the PRI Plan and its population projections. Ms Lucks had said in her statement of 1 July 2010 that the data for the PRI Plan was collected prior to June 2006: McKay [No 3] [13], [19]. In that light, to the extent that the joint report suggests or indicates that the population figures in the PRI Plan were available at the date of taking, that is based on the assumption, revealed in Ms Lucks' statement, that that would be sufficiently established by her proposed evidence. The plaintiffs did not call any evidence to establish that the population figures in the PRI Plan were published or otherwise available to the hypothetical purchaser by the taking date. Mr Haratsis gave

evidence after my ruling in McKay [No 3]. He gave no evidence about whether the PRI Plan's population figures were published by the taking date.

1923 Consequently, it can be seen that, at the outset, the plaintiffs sought to establish that other population projections, more optimistic than WA Tomorrow No 6, had been published by the taking date. In the end, there is no evidence of other population projections for Murray or Peel published at that time, other than those published by the WAPC, the most recent of which were in WA Tomorrow No 6.

1924 I turn to what is stated in WA Tomorrow No 6. 7.5.2.2 WA TOMORROW NO 6

1925 WA Tomorrow No 6 set out the following population figures:

1996
2001
2006
2011
2016
2021
2026
2031
Murray
9,500
10,900
12,400
13,600
16,800
22,000

Mandurah
40,500
48,900
65,400
78,400
90,100
100,000

The Peel Sector (Mandurah and Murray)
50,000
59,800
77,800
92,000
106,900
122,000

Peel ***Region*** (Mandurah, Murray, Waroona and Boddington

54,700

64,700

82,800

97,100

112,100

127,300

145,100

158,400

(exhibit 117, 1/9/142, 220 222)

1926 In the five years leading to 2006, the population of Mandurah grew considerably more quickly than Murray. The average annual rate of population growth for Mandurah was 6.0%, while for Murray it was 2.6%. In similar vein, the forecasts for the next five years from 2006 were for more rapid population growth in Mandurah (3.7%), than for Murray (1.9%).

1927 Some of the plaintiffs' planners suggested that, by 2006, population growth had meant that the population projections in the 1996 IPRSP were outdated. The IPRSP forecasts did not underestimate growth in the Shire of Murray, but proved to be slightly optimistic. The 2006 population projection for Murray in WA Tomorrow No 6 was slightly less than what the IPRSP forecasts suggested it would be. Further, the population forecasts for Murray in 2011 and 2021 in the medium series of the 1996 IPRSP were for a greater population than was forecast for these years in WA Tomorrow No 6. 7.5.2.3 THE PLAINTIFFS' SUBMISSIONS ON WA TOMORROW NO 6

1928 The plaintiffs submit that while the market would have regard to the figures in WA Tomorrow No 6, it would look at other matters and may take a different view. For example, the market may consider that the figures in WA Tomorrow No 6 are outdated, being based on the census in 2001: closing submissions pars 8.222 8.225; see also pars 8.232 8.233, 8.237. The plaintiffs point to evidence from Mr Swasbrook that in 2006 there was some questioning of the veracity of the WA Tomorrow No 6 figures: see exhibit 229B, 49/428 429; ts 5817 5818. See also the plaintiffs' closing submissions pars 8.260, 8.272 8.273.

1929 I accept this evidence of Mr Swasbrook. However, to my mind, for the reasons I have given in section 7.5.1 in relation to the plaintiffs' first proposition on this topic, these submissions are not directed to the relevant enquiry. For the purposes of assessing the urban potential of the subject land, the hypothetical purchaser would not simply form his or her own assessment of population projections (with or without the assistance of an independent consultant); the hypothetical purchaser would direct attention to the approach likely to be taken by the WAPC. Consequently, the question is whether the hypothetical purchaser would anticipate, in the Planning Review, that the WAPC would depart from the figures in WA Tomorrow No 6. In my view, the plaintiffs' submissions do not point to anything, including Mr Swasbrook's evidence, which sustains an affirmative answer to that question. 7.5.2.4 MR ROWE'S EVIDENCE ON POPULATION PROJECTIONS

1930 In Mr Rowe's first report he sets out a table of population forecasts for the Shire of Murray and an opinion on what he drew from the table (exhibit 191A [116] [117]). For the reasons that follow, I do not accept Mr Rowe's view of the relevant population projections at the time, and his evidence on the topic detracts from the weight of his opinion on the subject land's urban potential. The table at [116] in Mr Rowe's report appears as follows:

Document Title

Document Date

Actual

Forecast Population

2001

2006
2011
2016
2021
2026
2041
SWAT Report (Transperth)
1992

33,000

Local Commercial Strategy (Shire)
1994

12,000

Inner Peel ***Region*** structure Plan (WAPC)
1997

33,000

Peel ***Region*** Sport & Recreation Complex (State Government)
2005

15,000

2020 Report (PDC)
2005
11,000

44,000

In '2020 Report' (DPI)
2005

22,000

Local Planning Strategy (Shire)
2005
11,000

31,000- 38,000
60,000- 75,000
Future Plan (Shire)
2006
11,000

31,000
60,000
Shire Profile (Shire)
2008

12,500 Actual

21,000

37,000

50,000

1931 In his report, Mr Rowe says the table shows there is 'a certain level of consistency', with the 'general expectation that the population will reach in the order of 40,000 people by 2021' [117]. I do not think Mr Rowe's table shows any such consistency. In crossexamination, he accepted that the table demonstrated the disparity, not the consistency, between the forecasts for the Shire of Murray to 2021 (ts 4733).

1932 At the outset of his oral evidence, he said that he adhered to the view expressed in [117] that 40,000 people was a reasonable estimate, as at 2006, for the population of Murray in 2021 (ts 4728).

1933 Mr Rowe agreed that his population analysis in exhibit 191A [116] [118] was intended to be a statement of an aspect that would inform advice to be given to the hypothetical purchaser in July 2006 (ts 4734 4735). He accepted that, accordingly, the Shire Profile figures, not available until 2008, had to be excluded. With those figures excluded, he adhered to the view expressed that a forecast of 40,000 people by 2021 was not unreasonable (ts 4735). At that stage, he was still relying on the figure of 44,000, which was said to come from the '2020 Report' published in 2005 (exhibit 191A [116]). He also relied on the SWAT report forecast of 33,000 people, notwithstanding that it had been made in 1992. He did not accept that the SWAT report was of marginal relevance (ts 4737 4739). I found his evidence in this respect unconvincing. To me, it seemed that he wished to maintain reliance on the SWAT report because he thought it provided some justification for his conclusion of 40,000 people being a reasonable estimate for the shire in 2021.

1934 It then emerged that the figure of 44,000 in his table had in fact come from the PRI Plan that was published in October 2006 (ts 4740). That meant that the only two figures in his table for 2021 that were available at the taking date were the WAPC figure of 22,000 people, from WA Tomorrow No 6, and the SWAT report estimate from 1992. When asked whether it would be unreasonable to advise a client to operate on a projection of 40,000 people, Mr Rowe failed to respond directly to the question. Instead, he said that he 'would still not subscribe to the 22,000', but would say to a client that he 'would have trouble putting a figure on that at all' (ts 4742). Mr Rowe said that the WAPC's figure of 22,000 people 'seemed terribly low' to him, but that was based on 'a feeling', with 'no science to it' (ts 4742).

1935 In his evidence on this topic, Mr Rowe exhibited a marked reluctance to alter his view that in 2006, 40,000 people was a reasonable projection for the population of Murray in 2021, or to make any concession that might be thought to undermine that view. In the end, that view was plainly without foundation. Even then, Mr Rowe did not directly accept that.

1936 Mr Rowe's evidence on whether altering his projected figure of 40,000 people to 22,000 people would affect his opinion on urban potential was also unsatisfactory (ts 4742 4743). 7.5.3 Other submissions of the plaintiffs 7.5.3.1 MR HARATSIS

1937 In light of the plaintiffs' written and oral closing submissions, it is not clear to me whether and to what extent the plaintiffs contend that information available at the taking date about expected population growth, lot demand and urban land supply constituted an affirmative factor enhancing the urban prospects of the subject land at the taking date. See ts 7383 7386. The plaintiffs submit that the hypothetical purchaser would take advice from someone such as Mr Haratsis: see, for example, reply par 7.86. The submissions do not identify what conclusions the hypothetical purchaser would draw from Mr Haratsis's numerous reports, or point to any particular analysis of land supply as at 2006. As explained in section 7.5.1, the views of an independent consultant, such as Mr Haratsis, may assist a hypothetical purchaser in answering the question of the view the WAPC was likely to take on matters of population growth, lot demand and urban land supply.

1938 In any event, to the extent it addresses that question, Mr Haratsis's evidence does not satisfy me that a wellinformed hypothetical purchaser would have considered that the WAPC was likely to conclude, in the Planning

Review, that there was a shortage of urban zoned land in Murray or Peel, so that more land needed to be rezoned to urban. There are a number of overlapping reasons for this, including the following.

(1) Mr Haratsis often relied on information and publications not available at July 2006.

(2) Mr Haratsis equated a shortage of residential lots with a shortage of urban zoned land.

(3) Mr Haratsis was not the sole author of his reports. In his oral evidence, he often exhibited a lack of familiarity with his reports.

(4) There were other flaws in the essential steps in his urban land supply analysis.

(5) There were other aspects of his evidence that substantially detracted from his credibility. At times, his reports and oral evidence exhibit a tendency to make unsupported assertions without clear reasoning, or to invoke specious arguments in favour of the position he advanced. Overall, to my mind, Mr Haratsis's evidence exhibited a lack of objectivity.

(6) In any event, I think there are too many uncertainties in an analysis of this kind for it to produce a confident prediction in the mind of the hypothetical purchaser about the WAPC's expected view, after the Planning Review, of the sufficiency of urban zoned land.

1939 I proceed to explain the first five of these reasons. I will explain the sixth reason in section 7.5.5, when I deal with Mr Moran's evidence.

1940 First, Mr Haratsis often relied on information not available at July 2006. Consequently, his reports do not reflect the advice that would have been given to the hypothetical purchaser in July 2006. Examples of Mr Haratsis's reliance on posttaking information include:

(a) In Mr Haratsis's first report, he relies on 2006 census data and on a WAPC report of March 2008 (exhibit 212A, 23/22 33, 36).

(b) Mr Haratsis's supplementary report number 1 (exhibit 212C) is replete with reliance on publications not available at the date of taking. For example, it relies on the Developers Survey report published in 2007 (23/173 175, 190 191); a 2006 Urban Development Institute of Australia report (23/173); the 2006 ABS census data (23/176 187); and a WAPC State Lot Activity quarterly report from 2009 (23/190 191).

(c) Mr Haratsis's supplementary report number 2 also makes extensive reference to and relies upon the Land Release report prepared by Ms Thompson and the Developers Survey report, both of which were published in 2007 (exhibit 212D, 23/207 208, 210 213). It also relies on environmental reports published after 2007 (23/209).

(d) Much of his October 2009 report is concerned with what is to be drawn from the Land Release report: see exhibit 212F, 23A/36 37, 39 40. As the Land Release report was not available to the hypothetical purchaser, Mr Haratsis's response is of little assistance.

1941 Secondly, Mr Haratsis equated a shortage of residential lots with a shortage of urban zoned land. In his oral evidence, Mr Haratsis accepted that, in exhibit 212C, he interpreted the Developers Survey report to mean there was not only a shortage of lots, but also a shortage of urban zoned land (ts 5350, 5352). He did not turn his mind to whether there was or may be a distinction between the two ideas (ts 5352).

1942 The same thinking is apparent in exhibit 212D. There, Mr Haratsis refers to statements in the Developers Survey report about a critical shortage of vacant residential lots, and translates them into statements that the government knew that the ***region*** had a critical shortage of urban zoned land: see exhibit 212D, 23/211, 214, 216. See also exhibit 212F, 23A/40, dealing with the Land Release report.

1943 I do not accept his opinion that a spike in lot prices is unlikely if there is enough zoned land (exhibit 212F, 23A/36; ts 5360). That view overlooks all the barriers to producing vacant lots from urban zoned land the subject of the land supply summit and Ms Thompson's enquiry and report.

1944 Thirdly, Mr Haratsis was not the sole author of his reports. Mr Haratsis wrote his reports in conjunction with 'at least' two other people (ts 5940). Typically, each would write sections and then one person, apparently not necessarily Mr Haratsis, would put together the report as a draft (ts 5940). In his oral evidence, he often exhibited a lack of familiarity with his reports.

1945 He was unable to recall how he had derived the population figures he used in figure 31 in his first report (exhibit 212A, 23/43). In his oral evidence, he thought that the figures had come either from WA Tomorrow No 6 or from the Forecast ID projections (ts 5331). In fact, as his report reveals, he adjusted the WA Tomorrow figures by reference to ABS census data (23/41 42). Mr Haratsis was also asked about another passage in exhibit 212A (23/24). He said he was not sure if he wrote it, and could not explain what it meant (ts 5363).

1946 In his report of 20 August 2010 (exhibit 212G, 23A/153), figure 16 shows lot release estimates, with a large area in Murray shaded tan or brown. It is clear from the crossexamination that no weight should be given to the geographical areas shown in figure 16. Mr Haratsis could not explain what the geographical boundaries for the areas shaded were, or who derived the figure (ts 5313 5315).

1947 Mr Haratsis said he was not able to answer a question about how much of the number '760' in his first report comprised demand transfer from Mandurah to Murray in 2021 (exhibit 212A, 23/45; ts 5332). His evidence thereafter demonstrated a lack of understanding of the figures and analysis in his own report: see ts 5333 5336. He said that the figure 760 included some element of demand transfer (ts 5335), when it is plain that it did not (ts 5336).

1948 This lack of familiarity is of some significance because the assumption of demand transfer was a core part of Mr Haratsis's analysis.

1949 Fourthly, there were other flaws in his land supply analysis (see exhibit 212A, 23/36 47). There are two essential steps in Mr Haratsis's land supply analysis which I do not accept. In other words, I do not consider that the hypothetical purchaser would have proceeded on the basis of Mr Haratsis's reasoning in these respects. There is also a third significant aspect of his reasoning that I do not accept.

1950 The first essential step involves calculating the expected lot yield that could be achieved on undeveloped urban zoned land. Mr Haratsis starts with an estimate of the amount of gross undeveloped urban zoned land. He applies a rate of 50% to estimate the amount of net developable land. That allows for matters such as environmental constraints, drainage, flooding, regional roads and the need for regional open space. He then applies an average dwelling density of 10 lots per hectare of net developable land. That density allows for local roads, shops and schools and 10% local open space.

1951 These steps together involve an assumption or assessment that five lots would be produced per gross hectare of urban zoned land. For the reasons in the following paragraph, I am not persuaded that that assessment provides a sound foundation for Mr Haratsis's urban land supply analysis. It seems to me to materially underestimate the residential densities that could reasonably be achieved on undeveloped urban zoned land. Further, and in any event, I am not satisfied that a hypothetical purchaser could have been confident that that assessment would be adopted by the WAPC in its urban land supply analysis in the Planning Review.

1952 First, Mr Haratsis did not exhibit a good understanding of density regimes in Western Australia, including Rcodes (ts 5305 5309). Secondly, Mr Haratsis referred to Austin Cove as reflecting a yield of 10 lots per hectare (exhibit 212A, 23/38). However, the yield of 10 lots per hectare at Austin Cove would reflect a yield per gross hectare of urban zoned land, not per net hectare of developable land (ts 4671). Thirdly, as Mr Saunders points out, Mr Haratsis's assumption about lot yield is inconsistent with what is revealed by the March 2006 State Lot Activity report (exhibit 218C [24] [25]). Mr Saunders was not crossexamined on this evidence, and I accept it. Generally, where the evidence of Mr Saunders and Mr Haratsis conflicts, I prefer the evidence of Mr Saunders. In areas of conflict, Mr Saunders has significantly more expertise than Mr Haratsis. The areas of conflict relate to the core of Mr Saunders' expertise, whereas Mr Haratsis's expertise is considerably broader. Mr Haratsis confessed to being unable to understand various elements of Mr Saunders' work, even though at times he sought to rely on parts of it.

1953 Based on his assumptions or estimates of 50% of land being developable, and 10 lots being produced from each developable hectare, Mr Haratsis's analysis was that, if not for demand transfer, there would be sufficient urban zoned land in Murray to meet needs until 2023 (exhibit 212A, 23/45). Using a higher urban density of, say, eight or nine lots per gross hectare, would very significantly alter the projection of when the supply of developable land would run out.

1954 The second essential step in Mr Haratsis's reasoning involves 'demand transfer'. This approach was based on his view that urban land in Mandurah would run out in 2012 and the consequential surplus demand for lots in Mandurah could be transferred to Murray. In exhibit 212A, Mr Haratsis expressed the opinion that, assuming 100%

demand transfer from Mandurah to Murray, urban land would run out in the Shire of Murray by 2016. With a 50% demand transfer rate, supply would run out by 2018 (23/45 46). In my view, Mr Haratsis's evidence reveals that his use of demand transfer involves unsupported assumptions: see ts 5344 5345. I accept Mr Swasbrook's criticisms of Mr Haratsis's reliance on demand transfer (exhibit 229C [3] [9]). Moreover, I do not accept the premise of Mr Haratsis's demand transfer analysis that urban zoned land in Mandurah would run out by 2012. I accept Mr Swasbrook's evidence to the contrary, on which there was no crossexamination (exhibit 229A [61]).

1955 Further, Mr Haratsis put substantial reliance on the 2006 MDP report as indicating the extent of supply of urban zoned land. His explanation for that (ts 5062 5063, 5321 5322) was unconvincing. The MDP is based on developers' intentions, and provides indications of shortterm and to some extent mediumterm expected lot production. It is not a reliable indicator of the extent of longterm supply of urban zoned land. See, for example, the evidence of Mr Saunders (ts 5221) and the MDP report itself: exhibit 94, 1/9/290 291.

1956 Finally, there were many other aspects of Mr Haratsis's evidence that detracted from his credibility. Some examples of this are as follows.

(a) In his first report in the course of referring to the MDP, he states that '[t]he MDP process indicates that residential use of the subject land was potentially likely in the relatively short term' and, later on the same page, that '[i]f the land had not been reserved, then the subject site would have been zoned to accommodate residential development' (exhibit 212A, 23/35). There seems to me to be nothing in the reasoning in the surrounding paragraphs to provide support for these assertions about the subject land's prospects.

(b) In exhibit 212C, Mr Haratsis expresses views in the conclusion that do not flow from what is said in his report, and lie outside Mr Haratsis's areas of expertise. He says that it was 'highly likely that additional land would need to be rezoned in the short to medium term' and that the subject land, 'with limited environmental constraints adjacent to the Mandurah urban area, with existing infrastructure and easy access to services meant that [it] had a very high probability of being rezoned for residential use' (23/196). Mr Haratsis said he is not a statutory planner (ts 5307). He is not well qualified to express an opinion on the probability of rezoning of the subject land and his reasoning on that question is sparse. To my mind, the making of this assertion and those I refer to in the preceding paragraph are some of many indications of Mr Haratsis's lack of rigour that suggests a lack of detachment.

(c) Mr Haratsis said, in effect, that a net migration of 24 people from Mandurah to Murray over a fiveyear period was an indication that demand transfer from Mandurah to Murray had started to occur (ts 5340). He said that the gross figure of 1,003 people moving from Mandurah to Murray was what was important. He did not accept that the figure of 979 people moving the other way, from Murray to Mandurah, was necessarily relevant. His attempts to explain why that was so seem to me to involve speculation and unsupported assumptions, and to be unconvincing (ts 5340 5341, 5346).

(d) Mr Haratsis suggested that the major goldmining project at Boddington, about 150 km from Ravenswood, was a reason that population growth in Ravenswood was or might be more influenced by economic boom conditions than was the Perth metropolitan area (ts 5338 5339).

(e) Mr Haratsis included the obviously flawed figure 6, based on or drawn from the PRI Plan, in his report of 20 August 2010 (exhibit 212J, 23A/214). See ts 5316 5317. When this became apparent, his answers were often not responsive and his evidence about the extent to which he relied on these figures was confusing and inconsistent (ts 5317 5325).

(f) In several passages in his reports, Mr Haratsis states that there was 'higher than expected population growth': see, for example, exhibit 212A, 23/45; exhibit 212G, 23A/133. His evidence about what he meant by this was confusing and unconvincing (ts 5336 5337, 5346 5347, 5375 5377).

(g) There are other examples of matters detracting from his credibility arising from Mr Haratsis's reports on the commercial potential of the land. See section 8.4.

1957 On very many occasions, Mr Haratsis did not respond to questions directly asked of him. Often, that seemed to me because he wished to argue a case rather than answer a question. In the end, I was driven to the conclusion that Mr Haratsis's written and oral evidence did not represent an objective independent assessment, but reflected more the role of an advocate than of an independent expert. 7.5.3.2 MR ROWE'S EVIDENCE

1958 Further, the plaintiffs rely on evidence of Mr Rowe which, they contend, reflects the market's view of the relationship between land supply and demand in Peel in the period ***around*** the taking date.

1959 The plaintiffs' submissions set out a passage from the oral evidence of Mr Rowe (ts 4592 4593). The main points drawn from Mr Rowe's evidence are:

(1) There was in 2006 a difference between land supply at an arithmetic or theoretical level, and the practical consequences 'on the ground'. If, as some said, there was a surplus of urban zoned land, there was nevertheless a shortfall in the supply of lots.

(2) Buyers were not getting lots of the different types that they wanted and the price of residential lots was increasing.

(3) Some landowners were holding their urban land back from development, or were attempting to alter the character of the development to obtain a better yield or to deliver different lot types.

(4) The DPI started to realise that there was a shortage of residential lots and their response was focused on how to create and deliver residential lots to the market, to meet the different demand types.

(5) Prior to 2006, Mr Rowe stated that the DPI's answer to the issue of demand was simply that 'there is enough zoned land. We don't need more zoned land'.

(6) That view ignored that not all zoned land is the same in terms of its location and ability to deliver price-attractive residential lots. The assessment of the amount of zoned land in Perth or Peel does not address the question of whether there was sufficient zoned land in Ravenswood or Murray to meet the demand for lots in those areas.

(7) One way of dealing with the shortage of lots was to rezone 'more land in the right place that could be delivered in a timely way'.

1960 In my view, in considering the approach the hypothetical purchaser expected the WAPC to take, the hypothetical purchaser would view those considerations as follows. The shortage of lots was clear. What was not clear was whether that translated into or reflected a shortage of urban zoned land. That was a matter to be investigated in the course of the Planning Review. In short, from the hypothetical purchaser's point of view, it was uncertain.

1961 I agree with Mr Rowe that, in the Planning Review, attention would be given to the sufficiency of zoned land, not only at the broad level, in Perth and Peel, but also at the more local level, in Murray and in Ravenswood. However, I am not persuaded that a more local focus would assist the urban prospects of the subject land. In Ravenswood, only about 150 lots had been sold in Riverland Ramble by the taking date. The approved ODPs and subdivision applications, including for lot 22, provided for a total of about 1,520 lots, with the prospect of additional more dense residential lots in the northwest corner associated with the contemplated commercial centre in the large area subject to further planning. See exhibits RR146.57, RR146.68, RR146.80 and RR146.83. Elsewhere in Murray, Austin Cove had an approved ODP for about 1,500 lots (exhibit 182D, 15A/446) and MRCE had approval for about 1,200 lots (exhibit 263G). By the taking date, about 180 lots had been sold in MRCE (exhibit 109, 46/438 467). Lots were not released at Austin Cove until late 2007. For reasons to be explained shortly, I discount most of Austin Cove's lots from this analysis. Given that WA Tomorrow No 6 forecast a population increase in Murray of less than 5,000 people in the ten years from 2006 to 2016, even after discounting much of Austin Cove's expected lot contribution, these subdivisions would have appeared to provide sufficient urban lots to cater for expected demand for a considerable period.

1962 A similar conclusion could be drawn by having regard to what was said in Appendix A to the 2006 MDP report about the number of expected lots to be produced in Pinjarra, Ravenswood and ***South*** Yunderup: see exhibit 94, 1/9/372. That suggested that developers intended to produce a total of over 2,500 lots in those three areas in the period 2005/2006 to 2009/2010.

1963 I have already found, in section 4.7.2, that the approval of 1,500 residential lots at Austin Cove was not attributable to the Highway. In 2006, that approval was still in place. (Subsequently, approval was given to an increased lot yield, but there is no need to go into that.) To the extent that the existing approval of those 1,500 lots would be expected, in the Planning Review, to accommodate future population growth in Murray, it might thereby diminish the need for additional urban zoned land and consequently decrease the urban potential of the subject

land. That invites attention to whether the expectation, in 2006, that Austin Cove would accommodate future population growth in Murray in the 1,500 approved lots was attributable to the Highway.

1964 Austin Cove was not brought to the market until after the announcement, in 2004, of the imminent construction of the Highway. Of course, that does not demonstrate causation. In the period after 2004, there was significant demand for residential lots in Peel and a shortage of residential lots in 2006, independent of any influence of the Highway.

1965 Mr Rowe's evidence was that the Highway was a major positive influence in the progressing of urban development at Austin Cove in 2006: exhibit 191B [40] [48]. Mr Rowe points to the study traffic report of Riley Consulting (exhibit 105) as supporting the view that access to the Highway was a crucial element of Austin Cove.

1966 The evidences does not enable a precise analysis of the extent to which the Highway influenced or caused Austin Cove being brought to the market in this period, and the extent to which expected demand was attributable to the Highway. In any event, in my view, a precise analysis is not necessary for present purposes. An assessment of expected available lots in Murray to accommodate future population growth is only one of many factors that the hypothetical purchaser would expect might be brought to bear in the Planning Review so as to influence the urban prospects of the subject land. Any such assessment would be broadbrush in nature. I am content to adopt Mr Butterly's assessment, albeit from a slightly different context, that in 2006, without the Highway, about onethird of the 1,500 lots approved at Austin Cove would have been expected to have been developed and sold in the future, rather than the full 1,500: exhibit 194A, 27/57 [5.34]. 7.5.3.3 OTHER SUBMISSIONS

1967 Next, the plaintiffs submit that:

(a) population is only one factor in a rezoning decision under SPP 3 (closing submissions pars 8.229 8.230);

(b) there seemed to be a shortage of serviced, unconstrained land that was able to be developed and converted to lots in a short time (par 8.260); and

(c) questions of population, land supply and lot demand would not have been an impediment to urban rezoning in the future for land, such as the subject land, that was well located and without constraints (par 8.273).

1968 I accept the first point, which is not controversial. As to the second, I do not accept that any perception of an immediate shortage of lots would have sustained an expectation of rezoning for the subject land. Any rezoning would occur after the Planning Review and, given the necessary procedural steps, would not occur until about five years from the taking date. In the meantime, the focus would have been on facilitating the large pool of conditionally approved lots coming onto the market. I will deal with the third point in section 7.6.

1969 The plaintiffs also submit that there is evidence that developers were replenishing their land banking stocks during this period: pars 8.269 8.270, 8.353, 8.357; reply par 7.85. Thus, even if the hypothetical purchaser did not think that the subject land would be imminently rezoned, they would have bought the land for the purpose of land banking. This invites attention to the question: at what price? The plaintiffs' submission is more a valuation proposition than a planning urban potential matter. Section 9 deals with valuation issues, including market circumstances. 7.5.4 Information not available to the hypothetical purchaser

1970 The defendants rely on a number of pieces of evidence in support of their broad contention that the hypothetical purchaser would have known there was no shortage of developable urban and urban deferred land in Perth and Peel and, in particular, in the Shire of Murray. In my view, some of the evidence on which the defendants rely would not have been available to the hypothetical purchaser. 7.5.4.1 EVIDENCE OF MR SAUNDERS ON THE URBAN GROWTH MONITOR

1971 Mr Alexander Saunders is the geospatial analysis manager of the Department of Planning (formerly the DPI). Prior to 2005, the DPI collected and published information about urban land supply based on net site density. In August 2003, the WAPC published a discussion paper entitled 'Greater Perth Residential Land Balance Discussion Paper No 6' (the Residential Land Balance paper). I will say more about this paper, and what it would have revealed to the hypothetical purchaser, in section 7.5.5.

1972 In about 2005, Mr Saunders began to develop a different model for assessing land supply. That is a gross land use model, which was first published as the Urban Growth Monitor in July 2009. The information was compiled as part of the MDP and was used internally within the DPI (exhibit 218A [13]).

1973 Information from the Urban Growth Monitor was used as the basis of a presentation by Mr Saunders in March 2007. Mr Saunders' evidence is that he gave a presentation as part of the ***south*** metropolitan and Peel structure planning process: [13]. This was part of the ***Southern*** Sectors Review that was underway in the first half of 2006.

1974 The assumptions and methodology of the model are accurately outlined in the defendants' closing submissions (pars 976 989).

1975 The model's conclusions are set out in exhibit 218A [16]. For Peel, there were just over 2,600 ha of undeveloped urban zoned land, net of subdivision approvals, about half of which was in Murray. The sufficiency of that supply was tested against historical land consumption. For Peel, the 14year historical average was 86 ha per annum, the fiveyear average was 96 ha per annum and the twoyear average was 119 ha per annum. Applying those rates, it was estimated that the Peel sector had enough zoned land for the next 22 30 years. Murray's historical consumption average for each of those periods was 7 ha per annum. Thus, the urban land supply position in Murray was distinctly stronger than for Peel generally.

1976 The defendants submit that the information from the Urban Growth Monitor was available to the hypothetical purchaser and would have indicated the sufficiency of the existing supply of urban zoned land in Peel and in Murray.

1977 That submission invites attention to two questions. First, would the hypothetical purchaser, or his or her planning consultant, have requested this information from the DPI? Secondly, if such a request had been made, would the information have been provided?

1978 There is room for doubt about whether the first question should be answered affirmatively. In that respect, I note that none of the seven planners said that, in advising a hypothetical purchaser about the urban potential of the subject land, he would have sought information from the DPI or WAPC about their view of the sufficiency of the supply of urban zoned land in Peel. However, it is not necessary to answer the first question, because I am not satisfied that, if enquiry had been made, the information from the Urban Growth Monitor would have been revealed.

1979 The plaintiffs point to Mr Saunders' evidence that the information in [15] [16] of his statement, some of which I have outlined above, was not published by the DPI, but 'was made available on request' (exhibit 218A [17]). However, that evidence must be understood in the light of Mr Saunders' oral evidence. His evidence was that he was unaware of any policy about whether the data he had developed could or could not be provided to people outside the DPI. He said that if he had received an enquiry, he would have answered it to the best of his knowledge. He said that because information of this kind is readily misunderstood, he would have had a conversation to explain the data (ts 5182).

1980 I accept Mr Saunders' evidence. However, I am not satisfied that a planner or other person making enquiries of the DPI about the DPI/WAPC's view of the sufficiency of the supply of urban land would have been directed to Mr Saunders for his response. Nor am I satisfied that the hypothetical purchaser would have known to make enquiry directly of Mr Saunders. In my view, the more probable response to an enquiry of this kind to the DPI would have been to the effect that it was a matter the subject of the Planning Review and that it would be premature to outline a DPI/WAPC position. That finding takes account of the following matters.

1981 First, there seems to me to be no evidence that supports the conclusion that an enquiry of the DPI on this topic would have been directed to Mr Saunders, and there was no evidence that any enquiries were in fact made and directed to Mr Saunders. Mr Saunders could not recall one way or the other whether any enquiries were made before the taking date (ts 5182 5183). Secondly, Mr Saunders was unaware of any policy about the release of information of this kind. Thirdly, this information was not presented to the ***Southern*** Sectors Review or to Ms Thompson until March 2007. Thus, an enquiry in July 2006 would have come substantially before the information had been presented to the Planning Review. Fourthly, the data itself was marked 'Draft UGM data Not for publication': see, for example, exhibit 218A, 53/123. Fifthly, Mr Rowe's evidence, which I accept, was that in the middle of 2006, the planning industry had difficulty in extracting much information from the DPI about its approach to the Planning Review (ts 4749).

1982 For these reasons, I find that the information from the draft Urban Growth Monitor, annexed to Mr Saunders' statement, would not have been available to the hypothetical purchaser. 7.5.4.2 THE MINISTER FOR PLANNING AND INFRASTRUCTURE

1983 The defendants also point to evidence from Ms Thompson and Mr Saunders to the effect that the Minister for Planning and Infrastructure was satisfied that there was enough zoned land, because she had been advised that there was an 18year supply (ts 5132, 5217). It is not necessary to deal with the plaintiffs' hearsay objection to this evidence. In my view, this evidence does not bear on an assessment of the urban potential of the subject land for two reasons. First, both Ms Thompson and Mr Saunders were referring to discussions in 2007, after the taking date. Secondly, in any event, there is no evidence that any view of the minister, even if it had been prior to the taking date, was available to be known by the hypothetical purchaser. 7.5.4.3 OTHER MATERIALS PREVIOUSLY DEALT WITH

1984 I have already found that Mr Ryan's 'not for publication' spreadsheet, attached to his email of 8 November 2005 (exhibit LPS150.9), would not have been available to the hypothetical purchaser: see section 7.3.5. I have also found that the results of Ms Thompson's investigation, and her Land Release report and the Developers Survey report would not have been available to the hypothetical purchaser: see sections 7.3.9 and 3.5.3.

1985 I turn to the information that would have been available to the hypothetical purchaser. 7.5.5 Information available to the hypothetical purchaser

1986 I have dealt with the information available on the question of population projections in section 7.5.2. Other information bearing on the sufficiency of urban land supply at the taking date includes the Residential Land Balance paper, Network City, the 2006 MDP report, and what had been stated in PRPC minutes or reports in the time leading up to the taking date. There is also the question of what expert evidence, if any, would have been obtained by the hypothetical purchaser. 7.5.5.1 PRPC DOCUMENTS

1987 The plaintiffs submit that at the date of taking, the view of the hypothetical purchaser would have been 'similar to that of the WAPC' that:

(a) a review of the IPRSP (or a broader review of planning) was required to accommodate future population growth in the Peel ***region***; and

(b) the provision for future population growth in the IPRSP and PRS was no longer adequate to cater for the ***region***'s future population growth: reply par 7.62.

1988 The plaintiffs draw support for that submission from what was said in PRPC minutes of meetings and reports in 2004 and September 2005. They say that those documents show that the WAPC's perception of population growth and demand was the primary catalyst for the Planning Review (closing submissions pars 8.238 8.242, 8.265 8.266; reply pars 7.63 7.66).

1989 As explained in section 7.3.11, I accept that the substantial population growth that had occurred in Peel, particularly in Mandurah, and the consequent development pressures, were the primary considerations in the WAPC's decision that there be a review of the IPRSP in 2004. While other considerations, such as the publication of Network City, reinforced the need for a planning review and affected its scope, population growth, lot demand and development pressures continued to be central reasons for the Planning Review in 2005 and 2006. In 2006, some continued to express the view that there was a need for more urban zoned land in Peel. However, by the taking date, whether the WAPC would take that view in the Planning Review was unclear. It was one of the matters requiring further investigation. 7.5.5.2 THE RESIDENTIAL LAND BALANCE PAPER

1990 In August 2003, the WAPC published the Residential Land Balance paper as part of a series of nine discussion papers on planning for the Greater Perth ***region***. It, along with the other papers in the Greater Perth series, provided part of the foundations for Network City: see exhibit 4B, 1/13/10, 110 111. The report was based on data current to June 2001.

1991 The discussion paper outlines the sufficiency of the stock of urban zoned land at that point in time, based on different residential density scenarios being applied, to undeveloped and partially developed urban areas. It states that by 2031, an additional 32,400 homes were projected to be needed in the Peel sector (exhibit 218A, 53/33). It suggests that, based on a number of assumptions, there was sufficient undeveloped urban zoned land for between about 40,000 and 50,000 additional homes in the Peel sector, without the need for rezoning (53/84).

1992 The modelling uses information on net site density to calculate the number of additional dwellings that can be built on the stock of undeveloped and partially developed urban zoned land, after making allowances for

infrastructure requirements. The assumptions on which the model is based and the method of calculations are explained in the defendants' submissions (pars 967 973).

1993 In the absence of an Rcode being available for an individual site, the paper applies different residential densities, namely R15 or R20, to produce alternative analyses of potential dwelling yields on undeveloped and partially developed urban zoned land (53/74).

1994 If an R15 density is applied in this way, the paper estimates that undeveloped urban zoned sites had a capacity for 40,364 new homes. Based on population and housing projections for 2031, there would still be surplus developable urban zoned land in the Peel sector for a further 5,950 new homes, without further rezoning and without allowing for infill on partly developed land. If an R20 density were applied, there was capacity for 50,963 new homes on undeveloped land, with a surplus by 2031 of just over 16,000 homes (exhibit 218A [12], 53/93 94). The paper also investigated the capacity of partially developed land and the capacity of undeveloped future urban areas identified in the 1997 IPRSP that were not zoned urban or urban deferred in the PRS (53/69 70, 93 94).

1995 A central focus of the Residential Land Balance paper was to demonstrate the benefits of an increase in density for the longevity of the current stock of urban zoned land. The paper stated that its methodology meant that it could not replace local knowledge of land issues and future intentions, so that continued study and analysis at a local level was needed (53/97 98). The paper also suggested that further development on partially developed sites, which formed a significant part of Perth's future supply of housing, may not actually be possible when individual sites are examined (55/93 94, 97).

1996 As this paper was published in August 2003, it would have been available to the hypothetical purchaser. None of the seven planners who gave evidence on urban potential made any mention of this discussion paper. That indicates, or may indicate, that a planner's advice to the hypothetical purchaser is unlikely to have made reference to this paper.

1997 To the extent that a planner advising the hypothetical purchaser would have had regard to this paper:

(a) it revealed a view, derived from modelling based on a number of assumptions, that there was ample urban zoned land in Peel;

(b) however, it was published in August 2003, based on data up to June 2001. After 2003 and up to 2006, there were repeated statements from various quarters, including the DPI and the PRPC, about the high demand for urban land in Peel. Further, there were some statements in that period that there was a shortage of urban zoned land and other statements suggesting that whether there was enough urban zoned land was a question to be investigated;

(c) in those circumstances, the Residential Land Balance paper would not have given a hypothetical purchaser cause for optimism that there was any perceived shortage of urban zoned land in Peel. It would have been viewed as somewhat dated and not necessarily reflecting current thinking in 2006; and

(d) moreover, the study was conducted at a broad macro level covering all of Perth and Peel. The study itself acknowledged the need for more localised analysis. 7.5.5.3 NETWORK CITY

1998 I have outlined the provisions of Network City, and its main principles and objectives, in detail in section 7.4.3 above. Network City also says something about the WAPC's thinking on urban land supply.

1999 Generally, the analysis in Network City is conducted at a macro level, covering the whole of Perth and Peel. The population of Perth and Peel in 2001 was said to be about 1.46 million people and was expected to grow to 2.2 million by 2031. Consequently, Network City predicted an expected population increase of about 760,000 people. It was said that 375,000 new homes would be needed to accommodate the population increase (exhibit 4B, 1/13/8 9). Thus, the analysis appears to have been based on an assumed occupation rate for new homes of about two persons per dwelling.

2000 The introduction stated that the current average lot size was 789 sqm, equivalent to 12.7 dwellings per net hectare. If that low density was maintained, all currently zoned urban land and more could be used by 2031. If density was increased to 20 dwellings per net hectare, the expected population growth could be accommodated within existing zonings (exhibit 4B, 1/13/8). The benefits of an increase in urban density was a major theme of Network City.

2001 Strategy 12 related to the '60:40' target for new dwellings. It provided as follows:

Strategy 1 2:

Using land resources efficiently, make fuller use of existing urban land by supporting additional residential development within existing urban areas, so that 60 per cent of all new dwellings are being constructed in this area as soon as possible. The remaining 40 per cent of dwellings are to be in new growth areas. Once the initial target is reached, continuously review and monitor the 6040 target.

Meeting the objectives: Deliver urban growth management. Accommodate urban growth primarily within a Network city pattern, incorporating communities. Protect and enhance the natural environment, open spaces and heritage. Ensure employment is created in centres. Deliver a city with urban energy, creativity and cultural vitality.

In establishing the initial 60:40 target of this strategy, it is recognised that there are those who view it as too ambitious, while others see it as too easily achieved. Current (2004) and exploratory analysis suggests the target may be achievable. Notwithstanding this, the proposed local dialogue processes (see strategy 2-6) and the requirement to continuously monitor performance (see strategy 2-8) will constantly review the target. Making fuller use of urban land is not just a case of more efficient use of this resource, there are other issues:

(a) creating opportunities for affordable housing (see strategy 38);

(b) the need to support existing activity centres and develop new ones at appropriate points - (see strategy 11); and

(c) providing more homes and jobs within a walkable distance of each other (see strategy 11).

Based on the overall target of providing 60 per cent of new dwellings in existing urban areas and 40 per cent in new growth areas in the next 30 years, 222 000 dwellings would be located within existing urban areas and 148 000 in new growth areas. Preliminary assessment indicates that there is potential for approximately 192 500 homes within activity corridors and centres in existing urban areas, assuming an average built density at R20 is achieved (based on existing town planning scheme commitments. Table 1 illustrates how these 192 500 homes could theoretically be distributed to the six planning sectors covering Perth and Peel. In order to reach the 60 per cent target of this strategy, space for another 29 500 homes will need to be found within existing urban areas, but not within an 'activity corridor'. To achieve this target, it may be necessary to consider making the R Codes a net housing density code, in order to achieve a given number of dwellings per hectare.

Table 1: Projected distribution of additional dwellings by sector, over time, to achieve 60 per cent of all new dwellings in existing urban areas

Planning Sector

New Dwellings

2002 to 2010

New Dwellings

2002 to 2020

New Dwellings

2002 to 2030
Inner and Middle
10 400
27 000
65 000
North West
2 300
14 000
26 000
East
400
7 000
15 000

South East
1 600
15 000
29 000

South West
2 250
17 500
31 500
Peel
1 000
13 000
26 000
TOTAL
17 950
93 500
192 500

In new growth areas there is additional potential of 249 000 dwellings on existing urban zonings and land already or earmarked for development assuming a built density equivalent to R20 is achieved. The notional distribution of these additional dwellings, by planning sector is shown at Table 2.

Table 2: Distribution of additional dwellings by sector to achieve 40 per cent of all new dwellings in new growth areas

Total
North West
106 000
East

30 000

South East

63 000

South West

44 000

Peel

6 000

TOTAL

249 000

In total, therefore, preliminary assessments indicate Perth, Mandurah and Murray could accommodate some 470 000 new dwellings by 2030, which is 100 000 more homes than the projected need. Assuming trends and forecasts are accurate, then Perth's existing supply of development land would be exhausted some time between 2035 and 2040. Clearly, this situation will not come to pass as mechanisms are in place and being upgraded to monitor and track land supply and development opportunities at a strategic level (see strategy 2-2). Assuming current growth rates continue, additional land would need to be zoned or identified for urban development by about 2020 to maintain an adequate land bank (exhibit 4B, 1/13/24 25).

2002 The analysis in this passage appears to be as follows. The 60:40 target is applied to the 375,000 new homes that had been identified in the introduction. That produces figures of 222,000 dwellings within existing urban areas and 148,000 new dwellings within new growth areas. A preliminary assessment suggested that, within existing urban areas, 192,500 homes could be added within activity corridors and centres, assuming an R20 density. Table 1 was said to illustrate how those new homes could 'theoretically be distributed' over the six sectors. It can be seen from table 1 that the global numbers are not allocated proportionately to the size of each sector.

2003 A potential for an additional 249,000 dwellings is identified in new growth areas on 'existing urban zonings and land already or earmarked for development', assuming an R20 density. Table 2 shows the 'notional distribution' of these additional dwellings.

2004 It should be remembered that the focus of Network City was not upon a detailed assessment of the capacity of undeveloped urban zoned land to accommodate the future population. To the contrary, the focus was on increasing the proportion of the future population that could be housed within the already developed urban areas. To put it another way, there was no difficulty in achieving the 40% target of locating 148,000 homes in new growth areas. The challenges lay in accommodating the remaining 60% of the future population in already developed urban areas. That would explain why the figures in table 2 might involve something less than an assessment of the full capacity of undeveloped urban zoned land in each sector.

2005 The evidence of the planners gave limited detailed attention to what was said in Network City about Peel in particular. Mr Moran and Mr O'Neill both pointed to the statement in Network City, in the passage I have set out, that for Perth and the Peel sector taken together, existing urban zoned land should be sufficient until at least 2035, so additional urban zoning need not occur until about 2020 (ts 4522, 4571).

2006 Mr O'Neill mentioned the figure of 6,000 new dwellings for Peel from table 2, but without any analysis of what it might suggest about urban land supply in Peel (ts 4571). Mr Moran referred to the figure of 6,000 dwellings and analysed it. For the reasons that follow, in my opinion, Mr Moran's analysis involves some errors and I do not accept it.

2007 First, Mr Moran took the figure of 6,000 to represent the 40% target for Peel, for the purposes of the 60:40 strategy. That meant that the total additional dwellings for the Peel sector was 15,000 (exhibit 196A, 34/153 [3.12]; ts 4523). I do not agree with Mr Moran's view. The 60:40 strategy reflected the overall proportion that was sought. However, the analysis in Network City did not involve the blanket application of 60:40 to every sector. Table 1 shows the expected new dwellings in activity corridors and centres in existing urban areas in each sector, which are not calculated based on the dwelling figures in table 2.

2008 Secondly, Mr Moran took the 15,000 new dwellings as translating to 40,000 new people: [3.12]. He described the accommodation of 40,000 additional people as matching what he called the 'higher growth scenario' for 2021 (ts 4524). That is a reference to the PRI Plan. One of Mr Moran's errors is that he takes figures about the new population in Peel and adds them to the existing population of the Shire of Murray to produce an expected population for the shire, rather than for the Peel sector.

2009 For the reasons that follow, the hypothetical purchaser in 2006 would not take the 6,000 dwellings in table 2 to represent an assessment by the WAPC or DPI of the full dwelling potential of undeveloped urban zoned land in Peel.

2010 First, it is not said to represent such an assessment. It is accompanied by three lines of text, saying the table was a 'notional distribution' of additional dwellings to each planning sector.

2011 Secondly, as I have said, the focus of Network City is on the extent of infill that is achievable (the 60%), not the dwelling potential of the undeveloped urban land (the 40%).

2012 Thirdly, 6,000 dwellings would be substantially too low, measured against other WAPC publications available at the taking date, for it to be taken as the dwelling potential of the undeveloped urban zoned land in the Peel sector. Only one year before Network City was published, the Residential Land Balance paper had suggested that the dwelling potential of the undeveloped land in Peel was 40,000 homes, based on an R15 model, or more if an R20 density was adopted. The spare statement in table 2 for Peel should not be taken to reflect a view that that assessment had changed to 6,000 dwellings based on R20 density. Further, the 2006 MDP report, to which I will shortly come, identified that more than 10,000 lots, producing more than 11,000 dwellings, were proposed in the Peel sector in the following five years. I would infer that the vast majority of that development was in new growth areas, not infill in existing urban areas.

2013 The hypothetical purchaser may have taken the figure of 6,000 dwellings as representing the residual difference between the total expected requirements for Peel and what could be produced by infill, as shown in table 1. That is consistent with what is shown in the Residential Land Balance paper, that 32,400 new dwellings would be required for the Peel sector.

2014 The passage I have set out above includes a clear statement by the WAPC about the need for an adequate land bank. The statement suggests that the supply of urban zoned land should be about 15 years ahead of expected demand for urban lots. That was a view expressed by Mr Rowe, Mr O'Neill (ts 4531) and Mr Moran (ts 4528). No planner dissented from this proposition. I accept that, by 2006, the hypothetical purchaser would have considered that the WAPC would approach the Planning Review on the basis that a 15year land bank should be accommodated in urban zoning, so that the supply of urban zoned land should be about 15 years ahead of expected demand for urban lots. 7.5.5.4 THE MDP REPORT 7.5.5.4.1 Introduction

2015 The 'Metropolitan Development Program 2005/2006 to 2009/2010' report (exhibit 94, 1/9/259 381) was published by the WAPC in January 2006. It states that development projects included in the MDP account for ***around*** 80% of the state's new housing and residential lot approvals (1/9/267). Given that, at the taking date, it was a recent publication of the WAPC, I think the hypothetical purchaser would have given the MDP report close attention. I propose to outline its provisions in detail. As will be seen, it deals with a number of topics in addition to population and land supply.

2016 The foreword notes that Western Australia was experiencing strong economic and population growth, which was reflected in high levels of demand for new residential land and housing, especially in the Perth metropolitan ***region*** and Peel sector (the MDP ***region***) (1/9/261). It states that '[a] key finding of this year's MDP report is that there exists an ample supply of new residential lots either approved or in the approval "pipeline" of the statutory planning system' (1/9/261). I will consider that aspect of the MDP report in detail below.

2017 The summary of the report sets out a number of demand indicators and comments on land and housing supply (1/9/267 269):

(1) Western Australia's sustained economic expansion meant increased employment growth, increased labour force participation, population growth and strong housing demand.

(2) The state's housing and construction sector experienced significant employment growth and increased demand since 2001. This coincided with a shortage of skilled labour, resulting in industry capacity constraints and longer construction times.

(3) A number of housing demand projections existed, indicating demand for 12,340 14,000 new homes each year in Perth between 2006 and 2011. At least 1,400 homes are also likely to be built in the Peel sector each year between 2006 and 2011.

(4) A more than adequate supply of residential land can be developed to meet anticipated residential demand across the MDP ***region***, based on several factors:

(a) the MDP report identified ***around*** 74,000 residential lots earmarked for development over the next five years. When lots from small scale subdivisions are included, the identified potential supply amounts to about 100,000 dwellings, or about seven years' worth of supply;

(b) over 35,000 lots, or 56% of the lot supply required to satisfy the MDP ***region***'s housing needs from 2005/2006 - 2009/2010, had already been conditionally approved by the WAPC. Another 16,000 lots (26% of the required lot supply) were in subdivision applications pending approval at 30 June 2005; and

(c) in the past five years, the number of building approvals exceeded the number of new lots being created and it was expected that the ratio of new dwellings to new lots would increase over the next five years.

2018 The report addresses a number of objectives of the MDP related to investigating and reporting on the supply of and demand for residential land. One of these objectives is to 'assess whether an adequate supply of residential land can be developed and serviced to meet anticipated housing demand across the MDP ***region***' (1/9/271).

2019 The MDP report recognises that its supply side information is based on surveys of developers and local governments. It makes it clear that inclusion of a project in the MDP does not obviate the need for developers to undertake appropriate investigations and obtain the necessary environmental, planning and servicing approvals (1/9/271). 7.5.5.4.2 Housing demand and supply

2020 Section 3 of the MDP report explains the fundamental socioeconomic and demographic influences on the future demand for housing in the MDP ***region*** (1/9/272). It contains data from the five years to June 2005 on employment; household income; lot and house prices; lot and housing sales activity; lot sizes and housing types; and household size and composition. In many instances, the information is displayed on a map of the MDP ***region***, broken down by local government areas or census statistical divisions. See, for example, exhibit 94, 1/9/281.

2021 The MDP report looks at housing demand scenarios. It states that the future demand for new homes is a function of population growth and the living arrangements of the future population (1/9/282). The MDP report predicts that whilst the number of dwellings per lot will increase, the number of people per dwelling is expected to decrease, so that the growth in housing demand will be higher than the growth in population.

2022 The MDP report uses the population projections from WA Tomorrow No 6. See, for example, 1/9/282. It notes that the WAPC intends to prepare household and dwelling forecasts after the 2006 census. The available housing demand scenarios forecast demand each year for 12,340 14,000 additional homes in Perth and at least 1,400 homes in Peel.

2023 In respect of the Peel sector, the MDP report notes that the population is expected to increase by 14,200 people between 2006 and 2011, at an average annual growth rate of 3.6%, making it the fastest growing sector in the MDP ***region*** (1/9/335). The MDP report indicates that population growth in Mandurah is the main contributor to population growth in the Peel sector. Between 2006 and 2011, the average annual population growth rate is forecast to be over 3% for Mandurah and ***around*** 1.8% for Murray (1/9/285, 335). Mr Bulstrode gave evidence that the population projections in the MDP report are consistent with WA Tomorrow No 6 (exhibit 200B, 35/16).

2024 Appendix B of the MDP report shows the number of residential building approvals (net of approvals to replace demolished buildings) for local government areas in the MDP ***region***. The following is recorded for Peel (1/9/374 375):

2000/01
2001/02
2002/03
2003/04
2004/05
Total
Annual average
Mandurah
627
1176
1581
1844
1313
6541
1308
Murray
109
185
222
165
145
826
165
Total
736
1361
1803
2009
1458
7367
1473

2025 These figures are used in the calculation of shortterm and mediumterm supply, to which I will come.

2026 These figures show a decrease in residential building approvals in the financial year preceding the report's publication. Being published in January 2006, the report did not include figures for the 2005 2006 financial year. The scale of approvals in Murray relative to Mandurah is noteworthy.

2027 The following tables appear in the part of the MDP report that discusses lot and housing supply in the Peel sector (1/9/336):

TABLE 5.26: Recent lot supply and sales
LGA

Final lot approvals 2000/01 2004/05 5yr average

per annum
5yr total
Vacant lot sales 2004/05
Approved lots (30/6/05)
Mandurah
1230
6152
1338
4568
Murray
70
352
84
883
Total
1301
6504
1422
5451

TABLE 5.27: Recent housing supply, type and sales
LGA
Building approvals 2000/01 2004/05 5yr average

per annum
5yr total
% Clustered and units
Housing sales 2004/05
Mandurah
1308
6541
32
2296
Murray
165
826
2
263
Total

1473

7367

29

2559

2028 These figures reveal that the vast majority of lot supply and housing demand activity in Peel over the past five years has been focused on Mandurah. The levels of final lot approvals and vacant lot sales are ***around*** 16 times higher in Mandurah than in Murray, and the levels of building approvals and home sales are ***around*** eight times higher in Mandurah. 7.5.5.4.3 Future supply estimates

2029 The MDP report analyses the supply of residential dwellings. The total number of dwellings that are anticipated to be supplied in the short and medium terms (the total dwelling supply) is the sum of:

(a) the number of dwellings proposed to be developed in identified MDP projects of 10 or more lots that are deemed likely to be undertaken in the next five years, based on the aggregate of industry forecasts (see Appendix A, 1/9/362); and

(b) the number of dwellings in pending smallscale subdivisions of less than 10 lots (1/9/290, 295, 362). The numbers of small subdivision lots for 2005/06 2009/10 are taken from the planning reports for each sector under the heading 'Potential Supply'. (The smallscale subdivision figures in Appendix A of the MDP report are the previous five years' figures: see 1/9/291, 363. However, nothing turns on this, as those figures are not used in any of the dwelling supply calculations.)

2030 The total dwelling supply is then notionally divided into shortterm supply (dwellings built on lots with conditional subdivision approval) and mediumterm supply (the remainder of the total dwelling supply).

2031 Shortterm supply is calculated based on the existing stock of residential lots with conditional subdivision approval. These lots were available to be serviced and converted into new titles at 30 June 2005 (1/9/290). Because more than one dwelling can be built on a lot, a conversion factor is applied to translate the stock of conditionally approved lots into the number of potential dwellings that can be built on those lots. That is the ratio of net residential building approvals to the number of new lots created, between 2000/01 and 2004/05. The conversion ratios are 1:2 for the inner sector, 1:1.2 for the middle sector, and 1:1.15 for the outer and Peel sectors (1/9/295, 303, 310, 336).

2032 Mediumterm supply comprises those dwellings from proposed subdivisions and identified MDP projects at a relatively advanced stage of the planning process. It also includes dwellings from lots for which subdivision applications had been lodged, but not approved, by 30 June 2005 (1/9/290). It is calculated by deducting the number of potential dwellings based on shortterm supply from the total dwelling supply.

2033 The numbers of dwellings allocated between the shortterm and mediumterm are rounded to the nearest 100 and then converted into the number of years it will take before these dwelling stocks are exhausted, based on historical net building approval figures (1/9/290).

2034 Table 4.2 sets out the shortterm and mediumterm supply outlook for each sector and the MDP ***region*** as a whole (1/9/290):

TABLE 4.2: Indicative short - and mediumterm housing supply

Sector

5yr demand ABSAHURI

Net building approvals (2000/01

2004/05)

Shortterm housing supply

Mediumterm housing supply

Dwellings
Years

equivalent
Dwellings
Years

equivalent
Inner

8683
3700
2.2
8500
4.9
Middle

13 407
6600
2.5
3400
1.3
North

West

16 067
10 600
3.3
8600
2.7
Eastern

8620
3100
1.8
8100
4.7

South

East

7409
4300
2.9
12 200
8.2

South

West

13 218
8600
3.3
15 800
6.0
Perth

region
61 700

70 000
67 404
36 800
2.6 3.0
56 600
4.0 4.6
Peel

7367
6300
4.3
5300
3.6

MDP ***region***

74 771
43 100
2.9

61 900

4.1

7.5.5.4.4 Lot supply in the Peel sector and in Murray

2035 The MDP report indicates that a number of suburbs in Mandurah and Murray can each supply 500 1,000 dwellings in the next five years, including Ravenswood, ***South*** Yunderup and Pinjarra. Dawesville has 1,412 lots available and Halls Head has 1,000 1,200 lots (1/9/292). Further detail is set out in Appendix A to the report. The expected number of single lots is 726 for Ravenswood, 922 for ***South*** Yunderup and 950 for Pinjarra. Over 2,700 lots are shown for Murray as a whole, producing over 2,800 dwellings from MDP projects over the next five years (1/9/372).

2036 Within the Peel sector, it is possible to calculate the shortterm and mediumterm supply of residential lots for Mandurah and Murray using the MDP figures and method discussed above. However, it is not possible to factor in lots from pending smallscale subdivisions, as the figure is not provided for the individual local governments. This will lead to an underestimation of the future supply of residential lots.

2037 Mr O'Neill attempted to calculate the shortterm and mediumterm supply of land in Murray (ts 5674 5679). He calculated that the shortterm supply of land in Murray would last 6.15 years, using the same methodology as in the MDP. To calculate the mediumterm supply, Mr O'Neill:

(1) took the 'Total lots 2005/06 (MDP projects) 2009/2010+' figure of 2,765 lots (1/9/373);

(2) deducted 883 lots, representing conditionally approved lots used in the shortterm supply estimates (1/9/336);

(3) added 1,692 lots, being those that developers intend to bring to the market in 2009/10 2014/15 (1/9/373);

(4) multiplied the result of 3,574 lots by 1.15, to convert that to a number of potential dwellings; and

(5) divided by 165, the average number of net building approvals for Murray (1/9/336).

2038 This revealed a mediumterm supply of 24.9 years' duration.

2039 To take into account the increased population growth rate in Murray beyond 2016, Mr O'Neill then revised this to be at least 10 years' mediumterm supply, on top of the shortterm supply (ts 5679).

2040 The third step of Mr O'Neill's analysis is an error; it departs from the MDP report's method. The MDP did not include lots contemplated for 2009/2010 2014/2015 in calculating the mediumterm supply. The fourth step also departs from the MDP method, although the departure is less significant. The MDP does not use the equivalence ratio of 1.15 for calculation of mediumterm supply; that ratio is used only for shortterm supply. Rather, the MDP relies on what is indicated by developer's intentions about the number of dwellings in each MDP project: see for example 1/9/336, 372 373.

2041 The MDP report does not say whether its methods of calculating shortterm and mediumterm supply are considered equally sound for smaller areas such as a single shire, as for the sectors for which the methods are used. Notwithstanding the errors in Mr O'Neill's calculation, I think the hypothetical purchaser could draw a broad conclusion from consideration of the information in the MDP report about the Shire of Murray. The report indicated some conclusions about the sufficiency of the supply of and expected demand for urban land in Peel over the next five years. Within the Peel sector, these conclusions would apply with greater force to Murray, because recent demand for residential lots was considerably less, proportionately to expected available lots, than in Mandurah.

2042 Mr Moran expressed the view that the MDP report indicates sufficient land in MDP projects to 2014 to accommodate more than 30,000 people, without accounting for Amarillo, Point Grey, or urban zoned land not identified by developers for development. That suggests enough zoned land to 2021: exhibit 196A, 34/110 111 [4.23] [4.27]. To my mind the hypothetical purchaser would treat these longerterm figures with considerable caution, given that the MDP is based on developers' intentions, and given the other assumptions in Mr Moran's analysis.
7.5.5.4.5 The MDP report: conclusions

2043 The MDP report identifies that the MDP ***region*** has a shortterm supply of dwellings to last 2.9 years, and supply for a further 4.1 years in the medium term. This is said to be an ample shortterm and mediumterm supply for the next five years, with about seven years' worth of housing supply being identified at the time of the report

(1/9/291). All sectors, other than the middle sector, have adequate numbers of future dwellings to meet the predicted demand over the next five years.

2044 Mr Bulstrode points out that the MDP report indicated that 7.9 years of shortterm and mediumterm housing supply existed in the Peel sector. This was higher than the MDP ***region*** average of seven years. Mr Bulstrode said that this indicated that there was no demonstrated need for the subject land to be rezoned to urban at the time of taking (exhibit 200B, 35/16 17). I agree that this was one indication that there was no need in 2006 to rezone additional land to urban to meet any perceived shortterm needs in Peel. As I have explained, that conclusion applies more strongly in relation to Murray.

2045 As I have said, the MDP report concluded that there was an adequate supply of residential land in the short and medium terms. The hypothetical purchaser would have known that, by June 2006, it was widely recognised, including by the WAPC, that there was a residential lot supply crisis. These apparently contradictory propositions reflect the limitations of the method used in the MDP report to assess the sufficiency of lot supply. The MDP report assesses shortterm supply by reference to the number of conditionally approved lots. That assumes that such lots will soon be available for purchase. The land supply summit reflected the unsoundness of that assumption in the circumstances prevailing in 2006. It sought to investigate the reasons that, notwithstanding that there was a large pool of conditionally approved lots, there was a severe shortage of new lots being brought to the market.

2046 The conclusion of the MDP report about the sufficiency of the supply of residential dwellings is relevant to the hypothetical purchaser. Had the report concluded that there was an insufficient supply in the short term or medium term, that would have assisted the prospects of the WAPC concluding in the Planning Review that more land should be zoned urban. Of course, the conclusion of sufficient lot supply is very far from determinative. Apart from anything else, it says nothing about whether more land needs to be rezoned to meet expected demand for residential lots in 15 years' time. The MDP report acknowledges that 'it is not a complete inventory of all projects' and only focuses on housing supply in the next five years, based on housing demand from the previous five years. Its estimates of lot supply do not include lots from MDP projects that will be released after the next five years, nor lots from projects that have not yet been included in the MDP on urban zoned land (1/9/290 291). 7.5.5.5 EXPERT PLANNING EVIDENCE

2047 One of the matters relied on by the plaintiffs' planners in support of their opinion on the subject land's urban potential was the view that substantial population growth in the Peel ***region*** had led to a shortage of urban zoned land: see Mr Rowe (exhibit 191A [109] [116]; ts 4592); Mr Flugge (exhibit 182B [15.2]; ts 4596); Mr Butterly (exhibit 194B [2.7]; ts 4772); and Mr Robinson (exhibit 180A [349], [387] [394]; exhibit 180B [324] [328]). Generally, these views did not involve any detailed analysis or, at least, were not supported by any such analysis. Like Mr Haratsis, Mr Robinson equated the undoubted shortage of residential lots with a shortage of urban zoned land. See exhibit 180B [409] [413]. Mr Robinson relies on what is said in a conference paper delivered by Mr Stokes, the director of urban development coordination at the DPI. In my view, it is plain that Mr Stokes was saying that there was an adequate supply of zoned land, but, notwithstanding that, there was a shortage of residential lots. Mr Robinson interprets the paper as supporting the proposition that there was a shortage of urban zoned land. I would mention, for the sake of completeness, that because I am not satisfied that Mr Stokes' paper was delivered before the taking date, I am not satisfied that it would have been information available to the hypothetical purchaser.

2048 I have already made findings about Mr Rowe's written and oral evidence about population growth and his perception of the land supply situation in sections 7.5.2.4 and 7.5.3.2.

2049 I have set out my findings in relation to the evidence of Mr Haratsis in section 7.5.3.

2050 Mr Moran's opinion about the urban potential of the subject land is based primarily on his view that the WAPC would be likely to consider that there was no need for further land to be rezoned to urban for many years. In other words, his land supply analysis is the primary foundation for his urban potential opinion.

2051 Mr Moran approached the question of land supply in a number of different ways.

2052 First, he looked at the population projections in WA Tomorrow No 6 against what had been said in the 1997 IPRSP. Mr Moran considers (and I agree, see section 5 above) that in the absence of the proposed public works, the subject land would not have been part of the Option 2 urban land at Ravenswood, but would have been part of the future urban land under Option 3. He then sought to estimate when the Option 2 population target would be

exceeded, with reference to the population projections in WA Tomorrow No 6, to determine when more land would be rezoned to urban under Option 3. That suggested the subject land would be urbanised, at the earliest, some time after 2052: exhibit 196A, 34/109 110 [4.12] [4.20]; ts 4520.

2053 Given that the IPRSP was, in July 2006, itself under review as part of the wider Planning Review, I do not think that this analysis is of any assistance.

2054 Secondly, Mr Moran undertook a similar exercise using the population figures in the PRI Plan published in October 2006. He used the figures in that document to attempt to estimate when the Option 2 population capacity would be exceeded. Given that the PRI Plan was published after the taking date, its population figures would not have been available to the hypothetical purchaser. Had they been, my comments on Mr Moran's analysis using the WA Tomorrow No 6 figures would have applied again.

2055 Thirdly, Mr Moran relied on aspects of the MDP report. I have already explained his approach and made findings about that in section 7.5.5.4.

2056 Fourthly, Mr Moran pointed to elements of Network City. I have outlined Mr Moran's evidence, and my findings about that, in section 7.5.5.3.

2057 In his responsive report number 3, dated June 2009, Mr Moran made an estimate of the undeveloped urban and urban deferred land in the Peel sector (exhibit 196A, 34/153 157). He overlayed aerial photography as at October 2008 against the PRS zoning map. He assumed that there would have been very little change in urban or urban deferred zoning between July 2006 and October 2008. He also assumed that the amount of undeveloped urban zoned land would be less in 2008 than it was in 2006. These seem to me to be safe enough assumptions.

2058 The total area of urban or urban deferred land in Mandurah was 956.9 ha and in Murray it was 1,086.4 ha. Excluding Point Grey and Furnissdale, there were 771 ha in Murray. He did not include Amarillo in this analysis.

2059 Assuming R20 density and allowing for what he described as a conservative residential lot yield of 12 dwellings per hectare, the undeveloped urban and urban deferred land was enough to produce more than 20,000 lots. At three persons per dwelling, that was enough lots for more than 60,000 people.

2060 Mr Moran then says: Assuming the combined population of Mandurah and Murray in 2009 was 80,000 (high growth scenario), this would be sufficient capacity to meet high growth forecasts for 2026. Given the use of the high growth scenario and the conservative estimates of residential yield, the exclusion of Amarillo, Furnissdale and Point Grey in my opinion Network City's estimate of more land needing to be zoned in 2020 is reasonable particularly as an objective of Network City is to focus development on existing development areas with 6000 dwellings only being required in new growth areas (exhibit 196A, 34/153 154 [3.15]).

2061 It is not clear what population figures Mr Moran is referring to in the first sentence of this passage. His reference to 'high growth forecasts' might suggest he refers to the PRI Plan. If so, Mr Moran may have repeated his error, referred to in relation to his analysis of Network City and again below, in slipping from the Peel sector to the Shire of Murray. In any event, measured against the WA Tomorrow No 6 forecasts for the Peel sector and for the Peel ***region*** to 2026, an additional 60,000 people in the Peel sector would need to be accommodated by about 2026. In WA Tomorrow No 6, the Peel sector's population for 2006 was 77,800 people. By 2026, the Peel sector's population would be between 5,000 and 6,000 less than for the Peel ***region***. The latter was forecast to be 145,100 people by 2026. Taking into account the perceived need for urban zoning to be about 15 years ahead of expected demand, that might suggest more land could need to be rezoned to urban by about 2010.

2062 As I will develop shortly, there are many subjectively determined and contestable variables in Mr Moran's analysis. These include the amount of developable land, the appropriate yield and the number of persons per dwelling. Some of these could plausibly be altered to produce a figure for the number of people to be accommodated on undeveloped urban land that is substantially less than 60,000. That alternative analysis could be used to conclude that additional land would need to be rezoned to urban in or about 2006 in order to meet expected demand by about 2020.

2063 On the other hand, these analyses do not take account of additional population being accommodated through urban infill. A major theme of Network City was to increase urban infill. That would extend the life of the supply of urban zoned land.

2064 The question is what view the hypothetical purchaser would expect the WAPC to take in the Planning Review on the sufficiency of the supply of urban zoned land. To my mind, all of this demonstrates that analyses of the kind undertaken by Mr Moran would not produce a clear answer in the mind of the hypothetical purchaser. In other words, accurate advice given to the hypothetical purchaser would be to this effect: there are too many uncertain elements in the assessment to predict with any great certainty the view that would be adopted by the WAPC in the Planning Review on the sufficiency of the current supply of urban zoned land.

2065 I think this view is reinforced by Mr Haratsis's report in response to Mr Moran and by Mr Moran's response to that report.

2066 Mr Haratsis responded to Mr Moran's land supply estimates and analysis (exhibit 212E). Mr Haratsis's report suggested different assumptions. Mr Moran adopted some of the assumptions proposed by Mr Haratsis and undertook an alternative analysis in his responsive report (exhibit 196B, 34/195 198).

2067 First, Mr Haratsis suggested that only 50% of the urban and urban deferred zoned land should be regarded as developable. Mr Moran said that if all the zoned land in the Peel sector was included, such as Amarillo, Furnissdale and Point Grey, which he had previously excluded, applying Mr Haratsis's assumption of 50% to all zoned land would produce a figure of 1,938 ha, which is higher than what Mr Moran calculated in his original analysis. Secondly, Mr Haratsis suggests that many developments are likely to be at a lower density than 12 dwellings per hectare (exhibit 212E, 23A/5). Thirdly, Mr Haratsis criticised Mr Moran's use of an average household size of three people per dwelling, suggesting instead that 1.7 was appropriate.

2068 Mr Moran applied that average household size in a new analysis. He took 50% of all zoned land and applied to that Mr Haratsis's density of 10 lots per hectare to produce just under 20,000 lots. At 1.7 persons per dwelling, that would house about 33,000 people. Mr Moran then looks at the DPI figures for population growth in the Shire of Murray for the period 2016 2021. He uses those to derive an increase of 1,100 persons per year. At that rate, there is sufficient land for 30 years. His alternative population increase of 2,600 persons per year, I infer, is produced from the figures in the PRI Plan for the shire for the same period.

2069 There is an obvious flaw in this reasoning. Again, Mr Moran is using expected population growth in the Shire of Murray to assess the sufficiency of the population accommodated by land in the whole of the Peel sector. Using the WA Tomorrow No 6 figures, adding the almost 33,000 people that Mr Moran says can be accommodated, to the then existing population in Peel, gives a total population of just over 110,000 people. That approximates the population forecast to be reached some time ***around*** 2017 2018. Allowing for a land bank of 10 15 years would mean that rezoning was needed in 2006.

2070 Leaving aside this error, in my view there is a degree of arbitrariness in the alternative approach adopted by Mr Moran. For example, it is not clear to me why, in response to Mr Haratsis, he would have included 50% of Amarillo, when he had excluded it entirely in his first analysis. Further, the plaintiffs submit that a substantive amount of the land identifiable by Mr Moran as available for urban development was not, on a closer analysis, in fact available (closing submissions pars 8.327 8.352). In particular they submit that that is so for over half of the area of land in Mandurah (956 ha) said by Mr Moran to be available. This is because of environmental constraints, and the intention of some landowner developers to 'drip feed' their land to the market. There is some force in the plaintiffs' submission. Mr Moran and the defendants accept that his analysis is at a broad level of estimating and does not involve close analysis of particular properties.

2071 All of this reinforces the conclusion that this type of analysis is too uncertain to be capable of permitting the hypothetical purchaser to predict with confidence the WAPC's view of the sufficiency of urban supply. 7.5.6 Population, lot demand and urban land supply: conclusions

2072 I draw the following conclusions from the evidence on population, lot demand and urban land supply.

(1) At the taking date, the hypothetical purchaser would know that:

(a) there was a substantial shortage of residential lots on the market in Peel, as well as in Perth generally;

(b) that shortage of lots did not necessarily translate into a shortage of urban zoned land. There was a live question whether the amount of urban zoned land was sufficient to accommodate expected future population growth;

(c) whether the WAPC saw a need for more urban zoned land in Peel, and in Murray in particular, would be determined by the WAPC in the course of the Planning Review;

(d) the view adopted by the WAPC on that question would be a significant factor in the likelihood that the Planning Review would identify the subject land for future urbanisation in the short or medium term;

(e) in assessing the expected future population, the WAPC would use the projections in WA Tomorrow No 6;

(f) other information available at the taking date included the Residential Land Balance paper, Network City and the 2006 MDP report. What the hypothetical purchaser would draw from each of these documents is set out in section 7.5.5;

(g) in assessing the sufficiency of urban zoned land to accommodate expected future population growth, it would be anticipated that the WAPC would adopt the need for a land bank of about 15 years;

(h) it was not possible to predict with confidence the view that would ultimately be adopted by the WAPC in the Planning Review of the sufficiency of urban zoned land in Peel. An analysis of the kind undertaken by Mr Moran and Mr Haratsis could not be used to confidently predict the view that would be adopted by the WAPC. That is because there are too many uncertain elements in an analysis of that kind, including how much of the zoned land is capable of development in the medium term, the expected residential and population density of that development, and the extent of urban infill that could be expected to be achieved;

(i) in determining in the Planning Review how much, if any, additional land in the Ravenswood area should be identified for future urbanisation, and in what time period, the WAPC would have regard to the extent of the available urban and urban deferred zoned land in Murray and Ravenswood (not just to the Peel sector as a whole); and

(j) given the extent of approved lots in ODPs for Riverland Ramble, Austin Cove and MRCE, and given what was revealed in the MDP report about contemplated lots in Murray, the WAPC was unlikely to come to the view that there was any shortterm or mediumterm shortage of urban zoned land in Ravenswood and Murray.

(2) A number of the plaintiffs' planners wrongly equated a shortage of residential lots with a shortage of urban zoned land.

(3) I do not accept Mr Rowe's opinion on the expected population projections for the Shire of Murray as at 2006. Moreover, I consider that his written and oral evidence on that topic detracts from the weight of his opinion on the urban potential of the land.

(4) I also refer to my findings in section 6.4 above on Mr Robinson's evidence that he believed there was an identified urgent need for rezoning of land to urban in the 2002 2006 period.

(5) The view that there was a known shortage of urban land in Peel at the date of taking was a significant element in the opinions of the plaintiffs' planners about the high degree of urban prospects for the subject land. As I have explained, I am not satisfied that the hypothetical purchaser would have known that the WAPC would conclude there was a shortage of urban or urban deferred zoned land. To the contrary, the view of the hypothetical purchaser would be that the WAPC's view would emerge through the Planning Review, and that the view the WAPC would take was difficult to predict. Consequently, a significant element of the plaintiffs' planners' opinions on the urban potential of the subject land is removed.

7.6 Urban potential: conclusions

2073 At the expense of some repetition, I begin by outlining or repeating some of the findings that I have already made. I will then summarise the reasons why I do not accept the opinion of the plaintiffs' planners that the subject land would have had a very high likelihood of being identified for immediate or shortterm urbanisation. Finally, I will state my conclusions on the urban potential of the subject land in the assumed absence of the proposed public works.

2074 Unless otherwise stated, the following points reflect matters that would have been known to the hypothetical purchaser at the taking date.

(1) Rezoning of the land to urban would require an amendment to the PRS which would require support from the WAPC.

(2) From 2004, the WAPC proposed or contemplated a review of planning in the Peel ***region***. Initially, a review of the IPRSP and PRS was proposed. By the date of taking, the WAPC was conducting a broad strategic planning review of the Peel and ***southern*** metropolitan sectors (section 7.3).

(3) The substantial population growth that had occurred in Peel, particularly in Mandurah, and the consequent development pressures, were important factors in the WAPC decision that there be a review of the IPRSP in 2004. In late 2005 and early 2006, other considerations reinforced the need for a planning review and affected its scope. These included the publication of Network City and the consequent need, in the view of the WAPC, for a broad strategic planning review for the ***region*** (section 7.3).

(4) As was revealed by Dr Montgomery's report of 25 May 2006, at the taking date, the Planning Review was wideranging and in its early stages. In a number of significant respects, the WAPC considered that there was insufficient information available for the purposes of the review, so that substantial further investigation was required (section 7.3).

(5) During 2006, there had been high level recognition of development pressures in the shire, especially along the Mandurah to Pinjarra corridor, and the need to give priority to the Planning Review, given those development pressures (section 7.3).

(6) The WAPC was very unlikely to support an application to rezone the subject land prior to the finalisation or at least substantial completion of the Planning Review (section 7.3).

(7) Advice on the likely duration of the Planning Review would have been that it was uncertain, but the best estimate would be in the ***region*** of 18 months to two years (section 7.3).

(8) As at the taking date, there was and had been for some period a critical shortage of available residential lots in Peel and in Perth generally. That had led to the land supply summit, which proposed a number of steps, none of which suggested immediate rezoning of additional land (section 7.3).

(9) The shortage of residential lots did not necessarily reflect a shortage of urban zoned land. From the WAPC's perspective, whether there was a shortage of urban zoned land required investigation.

(10) In 2006, the view continued to be expressed by some people that there was a need for more urban zoned land in Peel. However, by the taking date, it was not clear whether or not the WAPC would take the view that there was a need for more urban zoned land in Peel in the Planning Review. From the WAPC's perspective, it was one of the matters that required further investigation (sections 7.3 and 7.5).

(11) The view adopted by the WAPC on that question would be a significant factor in assessing the likelihood that the Planning Review would identify the subject land for future urbanisation in the short or medium term.

(12) In assessing the expected future population in the course of the Planning Review, the WAPC would use the projections in WA Tomorrow No 6 (section 7.5).

(13) In assessing the sufficiency of urban zoned land to accommodate expected future population growth, it would be anticipated that the WAPC would adopt the need for a land bank of about 15 years (section 7.5).

(14) Other information available at the taking date about land supply included the Residential Land Balance paper, Network City and the 2006 MDP report. What the hypothetical purchaser would draw from each of these documents is outlined in section 7.5.5. As explained in that section, the MDP report provided no support for a view that there was insufficient supply of urban zoned land in the short term. It stated that there was ample shortterm and mediumterm lot supply in Peel, and the same conclusion applied more strongly in relation to Murray.

(15) Amarillo was still being advanced for future urbanisation. Whether and when it would go ahead was uncertain and was something to be considered in the Planning Review. Whether and when Amarillo would go ahead would affect the extent of appropriate urbanisation in Murray, particularly ***around*** Pinjarra Road (section 7.3).

(16) It was not possible to predict with confidence the view that would ultimately be adopted in the Planning Review by the WAPC of the sufficiency of urban zoned land in Peel. An analysis of the kind undertaken by Mr Moran and Mr Haratsis could not be used to confidently predict the view that would be adopted by the WAPC following the Planning Review. That is because there are too many uncertain elements in an analysis of that kind (section 7.5).

(17) The approach to be taken in the Planning Review to the identification of land for future urbanisation was uncertain. In particular, it was unclear whether different categories of future urban land would be identified, some of which would not be proposed for immediate or shortterm urbanisation (section 7.3).

(18) In determining in the Planning Review how much, if any, additional land in the Ravenswood area should be identified for future urbanisation, and in what time period, the WAPC would have regard to the extent of the available urban and urban deferred zoned land in Murray and Ravenswood, not just in the Peel sector as a whole. Given the extent of approved lots in ODPs for Riverland Ramble, MRCE and, discounting the effect of the Highway, in Austin Cove, and given what was revealed in the MDP report about contemplated lots in Murray, the WAPC was unlikely to come to the view that there was any shortterm or mediumterm shortage of urban zoned land in Ravenswood and Murray (section 7.5).

(19) The shire supported the possible future urbanisation of substantial areas of land north of Old Mandurah Road, as reflected in the draft LPS. The WAPC's consideration of the draft LPS would occur in the framework of the Planning Review (sections 7.3 and 7.4.5).

(20) Mr Bulstrode supported the inclusion of land between Old Mandurah Road and Rogers Road as an area for investigation or consideration for future urban in the LPS, so that that could be considered in the context of the Planning Review (section 7.4.5).

(21) But for the proposed public works, the subject land would have been part of the area of land proposed in the draft LPS by the shire for possible future urbanisation (section 7.4.5).

(22) The draft LPS emphasises the importance of ensuring that urban development is confined within distinct nodes and that urban sprawl is avoided (section 7.4.5).

(23) Land designated as urban in the draft LPS is not thereby proposed for immediate rezoning to urban. Rather, the urban category includes land that is proposed as a longerterm urban area or a potential urban growth area. The land north of Old Mandurah Road was designated urban, subject to further structure planning to integrate the land in the rural environment, to preserve distinct urban nodes and to avoid urban sprawl. Thus, under the draft LPS, the timing and extent of the proposed future urbanisation of land north of Old Mandurah Road was significantly uncertain (section 7.4.5).

(24) The draft LPS referred to a need to replace some of the future urban land that had been designated in the IPRSP for the Furnissdale urban village, given that the Furnissdale Structure Plan had subsequently recognised that Furnissdale should not accommodate substantial urban population (section 7.4.5).

(25) It could be expected that the themes from Network City would be maintained in the course of the Planning Review.

(26) Major themes of Network City include that:

(a) urban growth management should use no more urban land than is needed;

(b) more efficient use should be made of existing urban land than had occurred in the past, including both urban land that is already developed, and undeveloped urban zoned land; and

(c) urbanisation should be contained within defined boundaries so as to avoid urban sprawl (section 7.4.3.3).

(27) The main elements of the Network City Framework are activity centres, activity corridors and transport corridors. Pinjarra Road is identified as an activity corridor and an activity centre was identified at Ravenswood (section 7.4.3.2).

(28) Based on the report of 3 April 2006 and the decision of 18 April 2006:

(a) the commercial centre that was to form part of the Riverland Ramble development would, in due course, be located in the northwest section of the estate, near the junction of Old Mandurah Road and Pinjarra Road;

(b) the scale of that commercial centre would be determined as part of or in light of the Planning Review, but the current expectation was that in years to come it would be a district centre; and

(c) neither of these were based on an expectation of urbanisation north of Old Mandurah Road. Whether such urbanisation would occur was a matter to be considered in the Planning Review then underway (section 7.3).

(29) Contrary to Mr Rowe's view, the decision of 18 April 2006 did not involve a firm decision that the commercial centre would be of a scale of a district centre (section 7.3.7.2). Further, the report of 3 April 2006 contemplated a sufficient population for a district centre by 2031, not imminently. Consequently, the decision of 18 April 2006 does not, as Mr Rowe considers, support imminent urbanisation of the subject land on the basis that a decision had been made to locate an activity centre at the junction of Old Mandurah Road and Pinjarra Road (section 7.4.3.3).

(30) The extent to which the location of the subject land, adjacent to the Pinjarra Road activity corridor, supported its imminent urbanisation was uncertain (section 7.4.3.3).

(31) But for the proposed public works, the subject land would have been shown as 'rural and resources' in Network City, not as 'future communities'. By contrast, land ***south*** of Old Mandurah Road and Pinjarra Road, including lot 189, the Clough/Rapley land and the Gold Fortune land was shown as 'future communities', thereby enhancing the urban prospects of that land (section 7.4.3.3).

(32) Contrary to Mr Rowe's opinion, Liveable Neighbourhoods does not provide support for the urban potential of the subject land (section 7.4.4).

(33) The owners of the Clough/Rapley land and the Gold Fortune land were pursuing urbanisation of those parcels of land (section 7.3). That land had been shown as 'future communities' in Network City. The hypothetical purchaser would have thought that this land was likely to be supported for rezoning to urban after the Planning Review, and thus be available to meet demand in the area for urban lots.

2075 I do not accept the opinion of the plaintiffs' planners that the prospects that the subject land would be identified in the Planning Review for immediate or shortterm urbanisation were very high or, in the case of Mr Rowe, 'almost certain'. In other words, that view would not have been adopted by the wellinformed hypothetical purchaser. The findings I have made in this section 7 remove or undermine most of the central elements of the reasoning of the plaintiffs' planners in support of their opinions. For example:

(a) The plaintiffs' planners proceeded on the assumptions or view that, by the taking date, there was a recognised need for more urban zoned land in Peel and in Murray. I have found that that is not so; whether there was a need for more urban land was one of the questions to be investigated in the Planning Review.

(b) The location of the subject land adjacent to the Pinjarra Road activity corridor did not, in itself, mean that the land was likely to be identified for imminent urbanisation in the Planning Review.

(c) Contrary to Mr Rowe's opinion, no firm decision had been made by the WAPC to locate a district or activity centre at the junction of Old Mandurah Road and Pinjarra Road.

(d) Contrary to Mr Rowe's understanding, no new view of urban form involving a larger urban village of 18,000 25,000 people or up to 30,000 people, had been adopted by the WAPC, whether by Liveable Neighbourhoods or otherwise. It would have been anticipated that the pattern of urbanisation adopted in the Planning Review would reflect the themes of sustainability, walkability, increased use of public transport, higher density and mixed uses that were evident in Network City and Liveable Neighbourhoods. Beyond that, as at the taking date it was unclear what view the WAPC would adopt of an appropriate urban form and scale generally, and at Ravenswood in particular.

(e) The draft LPS does not support a high probability of imminent or shortterm urbanisation of the subject land in particular, or more generally, of the large tract of land north of Old Mandurah Road, designated urban, in the draft LPS. Under the draft LPS, the timing and extent of the contemplated future urbanisation of land north of Old Mandurah Road is significantly uncertain.

(f) The plaintiffs' planners adopted a view or assumption that the Planning Review would identify a single category of future urban land, permitting immediate or shortterm urbanisation. I have found that that could not have been confidently anticipated. Rather, one potential result of the Planning Review was that there be multiple categories of future urban land, not all of which were proposed for shortterm urbanisation.

(g) Many of the plaintiffs' planners relied on the PRI Plan, in some cases quite heavily. That was not available at the taking date.

2076 I have also made some findings about aspects of evidence of various of the plaintiffs' planners that detract from the weight of that witness's opinion. For example:

(a) Mr Rowe's evidence on population figures for the Shire of Murray (section 7.5).

(b) Mr Rowe's and Mr Robinson's written opinion that figure 3 in the 1997 IPRSP supported the urban potential of the subject land (section 5).

(c) Mr Robinson's reports contain many criticisms of earlier planning decisions reflected in instruments such as the IPRSP and the PRS. Mr Robinson's views of what was or was not appropriately decided in earlier planning instruments are not relevant and are a distraction from the real questions in this action (section 7.2.4).

(d) I also refer to my findings in section 6.4 on Mr Robinson's evidence that he believed there was an identified urgent need for rezoning land to urban in 2002 2006, and the grounds for that belief. Further, I refer to my findings in section 6.2 on Mr Flugge's evidence. In particular, I found that he exhibited a marked reluctance to make concessions.

2077 There are other matters that seem to me to detract from the weight of the plaintiffs' planners:

(a) Some of the plaintiffs' planners, particularly Mr Flugge and Mr Robinson, seem to me to place extensive weight on historical planning documents from before the IPRSP in their opinion on urban potential in 2006. In my view, by 2006, planning documents from prior to the IPRSP were of very little weight in assessing the future urban potential of rural land in Peel.

(b) Mr Flugge's opinion did not seek to identify the anticipated size and configuration of Ravenswood as a result of the Planning Review, beyond saying that he expected Ravenswood to be bigger than contemplated in the IPRSP. As I will explain further later in this section, it would have been anticipated in 2006 that land such as the subject land would not have been proposed, as a result of the Planning Review, for urbanisation in isolation, but rather only as part of some coherent contemplated future urban area of Ravenswood. Consequently, it is difficult to evaluate the prospects of the subject land being identified for future urbanisation without some associated view of what was to be expected for Ravenswood.

2078 Mr Bulstrode expressed the opinion that the prospect, at the taking date, that the Planning Review would identify the subject land for future urbanisation was high. That was based on assumptions (see section 7.2.7), not all of which are sound in light of my findings. Further and in any event, a central reason for Mr Bulstrode's opinion was his view that, by 2006, the thinking had gone away from an urban village of 12,000 16,000 people to a northsouth corridor of a much larger size, from Amarillo to Ravenswood. In my view, that would not have been the perspective of the hypothetical purchaser. I have found in section 7.3.8 that the hypothetical purchaser would not have considered the concept of an inland corridor from Amarillo to Ravenswood to be under serious consideration by the WAPC or DPI. At most, it would have been viewed as a possibility to be considered in the Planning Review.

2079 I find that the hypothetical purchaser would have considered that the prospects that the subject land would be identified for future urban rezoning in the Planning Review were reasonable, but with a high degree of uncertainty. Further, the hypothetical purchaser would have considered there was additional uncertainty about the timing of any future urban rezoning proposed as a result of the Planning Review.

2080 There were a number of matters that would have indicated grounds for some optimism about the outcome of the Planning Review for the future urbanisation of the subject land.

2081 First, the land's location and physical characteristics supported its potential future urbanisation. It is located on Pinjarra Road, which had been the primary focus of urban development pressures in Murray and which was shown as an activity corridor in Network City. It is located relatively close to Mandurah, where urban development had been most concentrated. It is reasonably close to the Murray River. Further, the land is located reasonably near to employment centres in Peel and close to contemplated future employment centres to the north, at Nambeelup. The land had services. It does not have any environmental constraints. It was a large tract of land in one ownership.

2082 Secondly, possible future urbanisation of land north of Old Mandurah Road was at least being contemplated by 2006. It was contemplated in the LPS, and by Mr Bulstrode of the Peel Planning Office. That contemplation is also reflected in Mr Sanderson's report of 3 April 2006, and in Dr Montgomery's report of May 2006 summarising discussions at the May 2006 workshop.

2083 Thirdly, there was at least room for the view that by 2006 the urban and urban deferred zoned land in Mandurah had been reasonably fully developed, which in turn would lead to an increase in pressure for urban development in the Shire of Murray.

2084 Fourthly, while there was a reasonably substantial amount of undeveloped urban zoned land in Murray, there were questions about the extent of nutrient management and drainage issues constraining development of that land. However, those questions would also arise in relation to proposed possible future urban land.

2085 Fifthly, in the IPRSP it had been proposed that Furnissdale accommodate a population of a little over 10,000 people. By 2006, firm decisions had been made that that would not occur. The Furnissdale Structure Plan had been adopted. Consequently, some of the land contemplated for future urbanisation in the IPRSP would not be

anticipated, in the Planning Review, to be available. Further, Furnissdale could serve as a nonurban break between Mandurah and Ravenswood.

2086 Sixthly, by the taking date, doubts had emerged about whether the environmental constraints of land designated future urban category B in east Ravenswood would preclude urbanisation of that land even in the longer term. To the extent that that view was adopted, again alternative future urban land could be expected to be sought in the course of the Planning Review.

2087 Seventhly, in the IPRSP, a large amount of land was designated future urban category B at Amarillo. It was contemplated to accommodate a population of 60,000 90,000 people. By 2006, there was room for doubt about the prospect that Amarillo would ultimately proceed as a large scale development and how far away that might be. If in the Planning Review, it was determined that Amarillo should not be urbanised in the medium term, that could be expected to enhance the urban prospects of land between Mandurah and Pinjarra, including ***around*** Ravenswood.

2088 Eighthly, it would be expected that the Planning Review would aim to ensure there is a 15year land bank of sufficient urban zoned land.

2089 Ninthly, the prospect (not certainty) of a district centre being located at the junction of Old Mandurah Road and Pinjarra Road some years later enhances the prospect that, some years later, the subject land would be urbanised.

2090 Most of the points I have just made involve uncertainty. In my opinion, the hypothetical purchaser would have thought there was considerable uncertainty about the outcome of the Planning Review and, in particular, what that outcome would mean for the urban prospects of the subject land.

2091 As I have said, the view to be adopted by the WAPC after the Planning Review on whether there was adequate urban zoned land in Peel and in Murray was unpredictable. In my view, the WAPC's conclusion on that question would be significant for the urban prospects of the subject land in the Planning Review. The plaintiffs submit that for land as well located and unconstrained as the subject land, with its environmental characteristics, questions of population, land supply and lot demand would not have been an impediment to urban rezoning (closing submissions par 8.273). For the reasons in the following paragraph, I do not accept that submission.

2092 The question of urbanisation of the subject land arises in the context of the Planning Review, not as an individual rezoning application. The nature of the Planning Review meant that broad regional and strategic considerations, including population, land supply and demand, would inform the view adopted of the pattern of future urbanisation. Moreover, Network City made it clear that urbanisation should be consolidated and existing urban land should be efficiently used; land that would not be needed for urban use within the relevant planning horizon should not be rezoned to urban. In my view, that reflects orderly and proper planning in 2006. Mr Rowe said, and I accept, that at least after Network City, the approach of the WAPC was not to rezone additional land to urban unless there was a need (ts 4822). He also accepted that in 2006 he would have advised a client that the WAPC and DPI might take the view that there is adequate urban zoned land to comfortably meet demand in Peel for 25 years (ts 4814 4815). For these reasons, in my view, the environmental and locational characteristics of the land would not have made questions of population, land supply and lot demand unimportant to the urban rezoning prospects of the subject land.

2093 Another element of the uncertainty about the likely view of WAPC about land supply relates to Amarillo. As I have said, how Amarillo would be viewed in the Planning Review was uncertain, and would itself bear upon the urban prospects of north Ravenswood and the subject land.

2094 There was also considerable uncertainty at the taking date about the view of urban form likely to be adopted by the WAPC in the Planning Review and, in particular, the WAPC's likely view about the appropriate urban form for Ravenswood. The principles in Network City and in Liveable Neighbourhoods require consolidation, sustainability, walkability, encouragement of public use of public transport, and mixed uses. The hypothetical purchaser would have confidently expected those principles to be advanced in the Planning Review. However, beyond that, there was much that was uncertain about the view of the urban form, both generally and at Ravenswood in particular, that would be adopted by the WAPC after the Planning Review. The LPS propounded urban nodes, and the avoidance of urban sprawl. In that way, it echoed themes from the IPRSP. The Planning Review was at a relatively early stage, as indicated by the scenario planning undertaken in May 2006 and continuing. That scenario planning

involved postulating a widely varying range of scenarios in the medium or long term. A range of possible visions for Ravenswood, among many other things, were involved in the various scenarios. The next step was for a further workshop to refine the scenarios. Only then would 'viable options' for structuring the area be identified (exhibit 210).

2095 Mr Bulstrode considered that the potential for urban rezoning of the subject land in the Planning Review was not as additional land in isolation but as part of a larger tract of land north of Old Mandurah Road that included land north and east of the subject land (ts 4510 4514). He considered it unlikely that the WAPC would have supported the rezoning of the subject land in isolation, prior to the completion of the Planning Review (ts 4610 4611). I accept Mr Bulstrode's opinion in these respects as reflecting advice that would have been given to the hypothetical purchaser. None of the other planners directly contradicted Mr Bulstrode in this first respect. Of the plaintiffs' planners, only Mr Robinson expressed the opinion that the subject land was likely to be supported in the Planning Review, or prior to its completion, for immediate rezoning in isolation from other land north of Old Mandurah Road.

2096 Mr Robinson expressed the view that the WAPC might support urban rezoning of the subject land separately from other land north of Old Mandurah Road on the basis that the subject land represents 'a rational expansion of the Ravenswood townsite' (ts 4780). I do not accept that evidence. I consider that view was unlikely to be adopted by the WAPC as reflecting orderly and proper planning, in the context of the Planning Review being underway.

2097 As I have said, Mr Rowe's opinion was that the subject land would be supported in the Planning Review for urbanisation as part of a large area of land north of Old Mandurah Road, probably as far north as Rogers Road (ts 4536). Mr Flugge did not identify the dimensions of the expanded Ravenswood urban node or village that he contemplated. However, he did not express the view that support for immediate rezoning of the subject land in isolation from other land north of Old Mandurah Road was a likely outcome.

2098 In my view, the application of the principles in Network City and Liveable Neighbourhoods, and orderly and proper planning in 2006, would have made support in the Planning Review for immediate urbanisation of the subject land in isolation from other land north of Old Mandurah Road very unlikely. As at 2006, the existing urbanisation at Ravenswood was centred ***around*** the townsite and the early stages of Riverland Ramble. None of that urbanisation approached the junction of Old Mandurah Road and Pinjarra Road. Any future urbanisation of the subject land would have been expected to be in conjunction with lots 10 and 190. Lots 10 and 190 are more closely connected to the urban land ***south*** of Old Mandurah Road than is the subject land. It might have been anticipated that in the Planning Review, one possibility was that lots 10 and 190 might be supported for future urbanisation separately from and in advance of the subject land, but the converse was much less likely.

2099 This means that the subject land would likely be considered for urbanisation as part of a tract of at least 200 ha. That affects the extent of the expected population growth and future lot supply shortfall necessary to warrant the future urbanisation of this land, and consequently, the question of timing.

2100 Moreover, there are further complications affecting this kind of analysis. Lot 10 was owned by the Emmanuels; lot 190 by the Kellihers. Each of those owners owned substantial adjoining and nearby land, and each wanted to progress urbanisation of substantially more of their land than just lot 10 or lot 190 (as the case may be) (exhibit 11). Thus, the hypothetical purchasers would have been cognisant of the risk that the urban prospects of the subject land in the Planning Review would have been tied up with the urban prospects of a much larger tract of land north of Old Mandurah Road, for example extending to Rogers Road. If that approach were taken in the Planning Review, again the supply and demand calculus would be affected. That would have consequences for the likely timing of the anticipated urbanisation of the subject land. For example, I do not think that the hypothetical purchaser would have considered it probable that the Planning Review would result in immediate or shortterm urban rezoning of all of the almost 1,000 ha of land between Rogers Road and Old Mandurah Road, east to lot 12 or lot 6.

2101 Further, the larger the area of land under consideration for future urbanisation, the larger the issue of nutrient management thereby raised. The question of nutrient management in the ***region*** was one of the matters under consideration in the Planning Review: see Mr Dawkins' evidence (exhibit 95 [10], [12]; exhibit 210, pages 4, 6 7 and attachment 3). Thus, consideration of a larger area of land north of Old Mandurah Road for possible future urbanisation would have faced additional uncertainty associated with environmental issues, particularly nutrient management.

2102 For the reasons I have given, I find that the hypothetical purchaser would have considered that:

(a) there was a reasonable prospect that the result of the Planning Review would support shortterm urban rezoning of the subject land;

(b) however, there was considerable uncertainty about that, and there was also a reasonable prospect that the outcome would not support urban rezoning of the subject land until at least the longer term;

(c) there was also some prospect that urban rezoning would not be supported within the planning horizon of the Planning Review; and

(d) support for immediate or shortterm urban rezoning of the subject land was not a 'more probable than not' outcome of the Planning Review.

2103 Taking into account the evidence referred to in section 7.2.8, and my findings in section 7.3 about the expected duration of the Planning Review, I find that the hypothetical purchaser would have expected that, if the subject land was identified in the Planning Review for immediate urban rezoning, it would take about 5 6 years from the date of taking to achieve the rezoning to urban.

Section 8: The potential of the land for a commercial district centre and intensive residential use

8.1 Introduction: the plaintiffs' commercial case; the valuers' assumptions, and an overview

2104 In section 1.6 of these reasons, I outlined the way in which the plaintiffs' case developed so as ultimately to include what has been referred to as the plaintiffs' commercial case. The plaintiffs' commercial case is that the highest and best use of the subject land was for a commercial centre of district centre scale, with associated intensive residential development on the land.

2105 The plaintiffs' commercial case was founded on the evidence of Mr Haratsis and Mr Paul Kotsoglo, and on the evidence of the plaintiffs' two valuers, Ms LeFevre and Mr Brown. In response, the defendants relied on the evidence of Mr Moran, Mr O'Neill and an experienced planner specialising in the planning of urban centres, Mr Anthony Shrapnel. The defendants' valuers also responded to the plaintiffs' valuers' commercial valuations.

2106 All the planners agreed that any district centre for Ravenswood would be planned to develop in stages: beginning as a neighbourhood centre and later growing to a district centre when population was thought to support it.

2107 Mr Kotsoglo expressed the opinion (exhibit 222C) that, but for the proposed public works:

(a) the subject land would have represented the optimal location for a district level commercial centre in the Ravenswood area;

(b) the highest and best use of the subject land is for commercial purposes in establishing a district level shopping centre with a retail floor space of 12,000 15,000 sqm, with potential to evolve into a regional level centre with up to 50,000 sqm retail floor space; and

(c) future commercial development and associated residential development of the subject land would have been along the lines of the land use and zoning plans in appendix 1 of Mr Kotsoglo's report of March 2010 (exhibit 222C, 24A/168 169).

2108 Table 1 sets out the development which, in Mr Kotsoglo's opinion, was likely to occur.

Floor Area (m2)

Land Use

3000

Supermarket

4000

Specialties

8000

Discount Department Store

3500

Offices

250

Post Office

250

TAB

800 1000

Fast Food Outlet / Eating House

250

Service Station / Convenience Store plus car wash

2500

Tavern / Bottle shop

4000

Showroom / Large Format Retail

4500

Town Square

2000

Weekend Market stalls

4 6 Cinemas

Cinema Complex

6 Rooms

Consulting Rooms / Medical Centre

1500 car parking bays

Car parking both at grade and roof top

Land Area (hectares)

Lot/Dwelling Density and Yield Breakdown

2.3228 hectares

R20 - 39 LOTS @ 500m2 (47 lots, less 15% for Design Contingencies)

11.7919 hectares

R30 - 334 LOTS @ 300m2 (393 lots, less 15% for Design Contingencies)

12.9519 hectares

R40 - 500 LOTS @ 220m2 (588 lots, less 15% for Design Contingencies)

3.9788 hectares

R60 - 187 LOTS @ 180m2 (221 lots, less 15% for Design Contingencies)

4.5319 hectares

R80 MULTIPLE DWELLINGS - 362 LOTS @ 125m2 (1.0 plot ratio)

2.3942 hectares

R100 MULTIPLE DWELLINGS - 299 UNITS @ 100m2 (1.25 plot ratio)

4.4044 hectares

AGED PERSONS (RETIREMENT VILLAGE) R60 DENSITY - 265 UNITS @ 120m2 (4.4044 hectares, less 15% for Infrastructure & Design Contingencies = 3.7437 ha. Note: Aged Persons Density Bonus = 120m2 land area per dwelling)

6.6773 hectares

DRAINAGE AND POS - 10% of residential zoned land, including infrastructure but excluding commercial zoned land

(exhibit 222C, 24A/164)

2109 The district centre land use plan in appendix 1 of Mr Kotsoglo's report showed the locations of these various uses on the subject land. The retail and department store were in the southwest sector of lot 192. To the east of that was a mix of land uses including some further retail and medical, cafes and restaurants, a cinema complex and other uses. Further east of that is shown some high density residential of R80 density. The southeast and northern parts of lot 191 and the northern part of lot 192 is shown for residential use, with densities of R30 or R40.

2110 The plaintiffs' case is that what is shown on Mr Kotsoglo's land use and zoning plans represents the highest and best use of the subject land. That was spelled out in the plaintiffs' 2010 opening (ts 2891) and at the conclusion of the planning evidence in September 2010 (ts 6054 6056). The plaintiffs' valuers' commercial valuations adopted Mr Kotsoglo's land use and zoning plans (exhibit 270F, 39A/1214 1215, 1226; exhibit 269H, 44A/1707 1708; ts 7014).

2111 The Greg Rowe & Associates concept plan number 1 (the GRA concept plan) (exhibit 191A, 25/392) was used by all valuers in assessing the urban potential of the subject land. That plan included a small area of about 2 ha of commercial land in the southeast corner of lot 191.

2112 Apart from those two plans, the plaintiffs' valuers did not conduct any valuation of the subject land based on a commercial use as an element of the land's highest and best use.

2113 It cannot be assumed without evidence that commercial potential of any character, extent and timing necessarily leads to a higher value than other potential uses such as for urban development. Commercial potential that has not been considered and valued by the valuers cannot be assumed to be the highest and best use. Further, the plaintiffs' commercial case was clearly identified in the course of trial as being founded on Mr Kotsoglo's plans.

2114 Consequently, the central question for the purposes of this section 8 is not 'what commercial potential did the subject land have?' Nor is it the general question of whether, as at the taking date, the subject land had potential for use as a district centre. Rather, the question is whether commercial use of the property as reflected in Mr Kotsoglo's plans represented the highest and best use of the subject land. That invites attention to the prospects, at the taking date, (in the absence of the proposed public works) that rezoning and other approvals would be given to permit future use of the land in accordance with those plans.

2115 Among the assumptions made by the plaintiffs' valuers in their commercial valuations were that, but for the proposed public works:

(1) the subject land would have been zoned urban by 1996 or 1997; and

(2) the subject land would have been preferred to Riverland Ramble as the primary commercial centre in the Ravenswood area.

2116 These assumptions were spelled out in section 3.2(c) of the joint statement of the valuers dated 28 July 2010 (exhibit 273) and were confirmed in oral evidence (ts 6130, 7014). See also the valuers' commercial valuation reports: Ms LeFevre, exhibit 270F, 39A/1213, 1225; ts 7072; and Mr Brown, exhibit 269G, 44A/1671 1672; ts 7028.

2117 The first of these assumptions is contrary to the findings I have made.

2118 There may be ambiguity in the second assumption. I think the more likely meaning is that, but for the proposed public works, prior to the taking date, the subject land would have been preferred to Riverland Ramble as the primary commercial centre in the Ravenswood area. However, the valuers might have meant that they considered that at the taking date, it could be expected that the subject land would be preferred. I think the first meaning was intended by the plaintiffs' valuers, for the following reasons.

2119 First, I consider that linguistic and textual indications in the experts' reports and the joint report favour that understanding.

2120 Secondly, consistently with that understanding, the plaintiffs' valuers did not value an uncertain possible commercial potential that would depend on the outcome of the Planning Review. They did not value the possibility

that, at the taking date, the Planning Review might have been anticipated to conclude that the subject land would be the primary commercial centre for Ravenswood. A valuation on that basis would have analysed the uncertainty of the outcome of the Planning Review and assessed the probability that the subject land would be selected as the location of the major commercial centre for Ravenswood. The plaintiffs' valuers did not undertake any analysis of that kind. They valued on the basis that in the future the subject land would, not might, be used in the way set out in Mr Kotsoglo's plans. As I will explain, this feature of the plaintiffs' valuers' commercial valuation does not fit with the planning evidence. Even on the plaintiffs' planning evidence, at the taking date there was a prospect, not a certainty, of future development of a district centre on the subject land.

2121 Consistently with that understanding, Mr Brown's reports also articulated his assumption that the subject land was already zoned for commercial use by the taking date (exhibit 269G, 44A/1671 1672, 1674; exhibit 269H, 44A/1706). He allowed for three-and-a-half years of deferral (44A/1706; ts 7028). That reflects a delay, but not any uncertainty.

2122 The foundation for the second assumption, that at some time before the taking date the subject land would have been preferred to Riverland Ramble as the primary commercial site in Ravenswood, was never clear to me at any stage of the trial. In particular, it was not clear to me how, when and in what circumstances a competition would have arisen between Riverland Ramble and the subject land as contenders for the major commercial centre in Ravenswood. Although in the course of Mr McKay's crossexamination he said that he intended commercial use for the subject land, there is no evidence that, but for the proposed public works, the plaintiffs would have applied at any time for rezoning and approval of an ODP to permit any particular commercial use of some part of the subject land.

2123 This second assumption may have been founded on passages in a report of Mr Kotsoglo. I will refer to those passages, and set out my findings in relation to them, in section 8.3.

2124 For reasons that I will explain in more detail later in this section 8, this second assumption does not reflect my view of what would have occurred in the absence of the proposed public works. Rather, what in fact occurred in relation to progressing contemplated commercial development at Riverland Ramble would have occurred, with little material change, in the assumed absence of the proposed public works. Only at the taking date would the question have arisen for the hypothetical purchaser: would it be expected that the subject land would be selected as the site for the major commercial centre in Ravenswood? For reasons to be developed, in my opinion the hypothetical purchaser would have viewed that as very unlikely.

2125 The oral evidence of the commercial planners began with a question that asked about the prospects, as at the taking date, of the subject land being zoned or identified in the future for commercial use, on the assumptions that:

(a) the subject land was zoned urban; and

(b) no other site had been identified for a commercial site ***around*** Ravenswood.

2126 In effect, that question directed attention to a comparison, in the abstract, of the subject land and other potential candidates as the suitable location for the major commercial centre in the Ravenswood area.

2127 Mr Kotsoglo and Mr Haratsis expressed the opinion that the subject land would be the favoured location. Mr Kotsoglo's plans have the commercial centre on lot 192. Mr Haratsis favoured the southeast portion of the subject land, on lot 191, as the commercial site. All of the defendants' commercial planners favoured the northwest part of Riverland Ramble as a preferable site to the subject land.

2128 In section 8.2, I will explain why I prefer the views of the defendants' commercial planners on this question.

2129 Of course, the hypothetical purchaser's assessment of the prospect that the subject land would be preferred to Riverland Ramble as the location for the major commercial centre in the Ravenswood area would not arise with a clean slate. The hypothetical purchaser's view of the prospects of commercial development on the subject land in accordance with Mr Kotsoglo's plans would take account of the circumstances applying at the taking date, adjusted for the assumed absence of the proposed public works. In section 8.3, I will outline some of the history of proposed commercial development in Murray, focusing primarily on the status of the proposed commercial element of the Riverland Ramble development. In my view, consideration of those circumstances reinforces the conclusion that the hypothetical purchaser would not have expected the subject land to be selected in preference to Riverland Ramble as the site for the major commercial centre in the Ravenswood area.

2130 Those conclusions are sufficient to determine the plaintiffs' commercial case adversely to the plaintiffs. For the sake of completeness, I deal with questions of contemplated timing of commercial development in section 8.4. The views of the commercial planners on the expected timing for commercial development differed. I will explain in section 8.4 the reasons why I prefer the evidence of Mr Shrapnel on this issue.

2131 As a general observation, I distinctly prefer the evidence of Mr Shrapnel to the evidence of Mr Haratsis whenever their evidence conflicts. I have set out in section 7.5 reasons why I have considerable hesitation in accepting Mr Haratsis's opinions. I found Mr Shrapnel an impressive and helpful expert in that:

(a) he exhibited a familiarity with the planning instruments and considerations;

(b) he articulated his reasoning clearly in a readily comprehensible way;

(c) his reasoning was cogent and logical; and

(d) I saw no sign of any lack of objectivity in stating and explaining his opinions.

2132 In my view, the fact that, for a period after the taking date, Mr Shrapnel acted for Vogue Marketing Pty Ltd, the developer of Riverland Ramble, does not detract from the weight and objectivity of his opinions in the trial (see ts 5511 5514).

2133 Many of the plaintiffs' closing submissions on their commercial case are founded on the proposition that, but for the proposed public works, the extent of urbanisation ***around*** Ravenswood would have been very different. In particular, the plaintiffs submit that the subject land would have been more central to the urbanisation in and ***around*** Ravenswood (pars 9.72, 9.85, 9.87). The findings I have made in sections 4 to 7 are contrary to that proposition. In the absence of the proposed public works, urban zoning and urban development in Ravenswood as at July 2006 would not have been materially greater in extent or materially different in configuration. See sections 4.10, 5.6 and 6.4. See also section 9.3.5 below.

8.2 Location in the abstract: would the subject land have been selected as the location for the major commercial centre in the Ravenswood area?

2134 As I have said, the commercial planners expressed differing views on the question of the preferable site for the major commercial centre in Ravenswood:

(a) Mr Kotsoglo favoured the ***southern*** portion of lot 192, being the southwest part of the subject land.

(b) Mr Haratsis favoured the southeast portion of the subject land.

(c) The defendants' planners favoured the northwest portion of Riverland Ramble.

2135 Mr Haratsis's view does not reflect the plaintiffs' case. Nor does it reflect what the valuers valued. The difference in Mr Kotsoglo's view and Mr Haratsis's view cannot be overcome by 'flipping' Mr Kotsoglo's plan, as the plaintiffs' closing submissions par 9.144 suggests. In any event, for the reasons which follow, I prefer the evidence of the defendants' planners that the northwest part of Riverland Ramble would have been viewed as preferable to the subject land for the major commercial centre in Ravenswood.

2136 Mr Shrapnel considered that the only real possibility for commercial development of the subject land was for a small area in the southeast portion to be developed as part of a larger centre based in the northwest part of Riverland Ramble. Mr Moran expressed a similar view. Apart from what is reflected in the GRA concept plan, that possibility has not been valued by the valuers, and is not part of the commercial case articulated by the plaintiffs at trial. Consequently, no more need be said about it.

2137 The wellinformed hypothetical purchaser would know that the future location of the major commercial centre in Ravenswood would be determined by planning authorities, after a structure planning process. It would not be determined simply by developer choice. I accept Mr Shrapnel's evidence to this effect (ts 5452 5454, 5652). That reflects orderly and proper planning. It also reflects the position that applied at the taking date. The Planning Review was underway. The identification of future commercial centres in Peel would be considered in the course of that review. See, for example, exhibit 245L.

2138 The fact that the selection of the location for a future commercial centre would be determined by the planning authorities in the Planning Review leads to one of the reasons for my preference for the defendants' planners' evidence over that of the plaintiffs' planners. The defendants' commercial planners approached the question of the

identification of the preferred location as a matter of planning. Further, planning is at the core of the expertise of each of them. By contrast, the plaintiffs' planners, particularly Mr Haratsis, often focused their evidence on what a developer or 'the market' would think, rather than what would constitute good planning. Moreover, Mr Haratsis has considerably less expertise in planning than do the defendants' commercial planners.

2139 Mr Kotsoglo described the subject land as 'the best site in the locality' (ts 5431) and as 'the ideal and logical place' (exhibit 222C, 24A/160). He considers that the subject land maximises centrality to the catchment population, and is centrally located on a straight portion of Pinjarra Road with good site lines and permitting appropriate traffic controls (24A/161; ts 5432). By contrast, Riverland Ramble is on a bend in Pinjarra Road. Mr Kotsoglo also referred to potential amenity of the subject land, with the nearby river (on the other side of Pinjarra Road).

2140 Mr Haratsis's report on the district centre potential of the subject land (exhibit 212I) sets out a number of reasons why he considers the subject land to be a suitable location for a district centre. However, the report does not involve a comparison of the merits of the subject land and Riverland Ramble as locations for the major commercial centre.

2141 In his oral evidence, Mr Haratsis described the subject land as being very well located in a fringe location, and having a good catchment (ts 5423 5425). He expressed the view that the subject land has the advantage over Riverland Ramble of being on the 'inboard side' (ts 5425): because the subject land is further west, it is closer to the major urban and work centre of Mandurah (ts 5555). This is an example of Mr Haratsis's focus on the perspective of a developer, rather than the perspective of planning authorities. His focus on the market's view of the location of the site can be seen elsewhere in his evidence: see, for example, ts 5430.

2142 Mr Haratsis's view was that, assuming lots 191 and 192 were urban, with other land north of Old Mandurah Road not urban, it would be difficult to choose between the subject land and Riverland Ramble as the site for the major commercial centre (ts 5738). That evidence, even if accepted, would not greatly assist the plaintiffs' commercial case. It assumes the subject land is urban. He is comparing the southeast part of the subject land with Riverland Ramble, not the southwest part of the subject land as in Mr Kotsoglo's plans. If, as Mr Haratsis says, it was difficult to choose, the hypothetical purchaser would assess the prospects of approval of major commercial development on the subject land. The hypothetical purchaser would not, as the plaintiffs' valuers have, assume that major commercial development would occur on the subject land.

2143 I do not accept the opinions of Mr Kotsoglo and Mr Haratsis that, in the abstract, the subject land would be selected as the location for a major commercial centre for Ravenswood in preference to the northwest portion of Riverland Ramble. In my view, the Riverland Ramble site is more central to other existing and shortterm and mediumterm urban areas than the subject land. As I will explain, a commercial centre at the Riverland Ramble site would create a greater walkable catchment, be more suitable as a future town centre and be better able to serve the needs of the existing population for a neighbourhood centre.

2144 In my view, those three features would outweigh the other matters pointed to by Mr Kotsoglo. Further, contrary to the opinion of Mr Haratsis that, in the circumstances he postulates, it is difficult to choose between the subject land and Riverland Ramble, to my mind, those features give Riverland Ramble a marked advantage over a location on the subject land.

2145 As Mr Shrapnel said, it would be expected that in the structure planning process the location of a future district centre would be selected so as to make it the town centre of Ravenswood. Thus, civic and cultural considerations would be relevant. The aim would be to make the district centre as close to the urban centre of Ravenswood as possible (ts 5459, 5504, 5508). Because the existing town of Ravenswood is ***south*** of Riverland Ramble, and given the location of the urban zoned land ***south*** of Old Mandurah Road in Riverland Ramble itself, a site in the northwest section of Riverland Ramble is more closely connected to the existing urbanisation and expected shortterm future urbanisation than the subject land.

2146 In response to this point, the plaintiffs submit that further urbanisation was expected north of Old Mandurah Road, to which the subject land is more closely connected. However, as I have found in section 7, future urbanisation north of Old Mandurah Road was uncertain and potentially only in the long term. By contrast, the northwest section of Riverland Ramble is better connected to the existing urban development, and what was expected to occur in the short term.

2147 Further, the subject land has no urbanisation, or expected future urbanisation, to its ***south***. To the southwest there was no existing urbanisation, with the prospect of some future urbanisation of the Clough/Rapley land and, more distantly, the Gold Fortune land. The urbanisation ***south*** of Murray River would not have access to the subject land, because there is no bridge across the river in that area (ts 5538 5539). Based on that, locating a commercial centre on the Riverland Ramble site would capture a greater population living within a walkable distance of that centre (ts 5539, 5569).

2148 As I have already mentioned, the planners agreed that any commercial centre in Ravenswood would commence as a neighbourhood centre before expanding to a district centre when a sufficient population base had been established. I accept Mr Shrapnel's evidence that the location of any future district centre in Ravenswood would be selected so that it could perform its initial function of a neighbourhood centre for the local area (ts 5462 5463). In my view, that consideration provides a major advantage to a site on Riverland Ramble over the subject land. That is because the Riverland Ramble site is better connected to the location of urbanisation as existing at the taking date and as expected over the following five years. All the existing and expected shortterm urbanisation was southeast of the junction of Old Mandurah Road and Pinjarra Road, and thus closer to and more connected with the Riverland Ramble site than is the subject land. This appeared to be a point made by Mr O'Neill (ts 5444, 5549 5551). The subject land's location would have made it unsuitable for a neighbourhood centre for the five years or more after the taking date.

2149 In question 1 on the commercial planners' agenda, the prospects of the subject land being identified as the major commercial centre are dealt with on the assumption that the subject land was zoned urban by the taking date. Question 4 involved an assumption that the subject land was not urban in July 2006 and was not likely to be urban. On that assumed scenario, all the commercial planners agreed that the subject land would not be a candidate for the major commercial centre for Ravenswood (ts 5734, 5737, 5740, 5749, 5751 5752). In question 8, the assumed scenario was that the subject land was rural, but was likely to be urban within four to five years after the taking date. In that scenario, most of the planners said that their answer to question 1 applied, although in some cases that involved an assumption that substantial other new urban rezoning north of Old Mandurah Road was also likely to occur in conjunction with the rezoning of the subject land (ts 5889 5896).

2150 On my findings in section 7, the position regarding the urban potential of the subject land is somewhere between the assumptions involved in question 4 and question 8. There is a reasonable prospect of urban rezoning within about five years, but the odds are not in favour of it. That provides an additional substantial obstacle to a conclusion that the subject land was likely to be identified for the major commercial centre in Ravenswood. In any event, as I have explained, even assuming the subject land were urban, I accept the defendants' planners view that, in the abstract, Riverland Ramble would have been seen as a preferable location.

2151 For these reasons, I accept the opinion of the defendants' commercial planners on the relative merits of the subject land and Riverland Ramble as sites for the major commercial centre for Ravenswood. Assuming a blank canvas, Riverland Ramble would have been viewed by the wellinformed hypothetical purchaser as likely to be the preferable site in the eyes of the WAPC. That view is reinforced when consideration is given to the circumstances existing in 2006. I turn to outlining the status of approved and contemplated commercial development in Murray, particularly in Ravenswood.

8.3 Applications and approvals for a commercial centre at Riverland Ramble

2152 From the outset, it was always proposed that the development of Riverland Ramble include a commercial element. Approval for a small scale commercial development was given at an early stage. Although there was no formal approval for commercial development in place at the taking date, the firm indications from the history are that the major commercial centre for Ravenswood would be at Riverland Ramble.

2153 The draft Ravenswood structure plan prepared by GRA in 1992 included a notional neighbourhood shopping centre site of 1.5 ha on the northeastern corner of Pinjarra Road and Nancarrow Way. That site was said to accommodate about 3,000 sqm of retail floor space (exhibit 146.11, pages 53, 58). While the location of that proposed commercial centre was not central to Riverland Ramble and the existing townsite, a number of factors were said to support its proposed location (pages 58 59).

2154 In the GRA report of September 1992 in support of the proposed rezoning of lots 20, 21 and 22 Old Mandurah Road, it was said that the location of the neighbourhood shopping centre remained notional because the final

approval of the proposed shopping centre site was contingent on the shire completing a local commercial strategy, as required by the Department of Planning and Urban Development (the DPUD) (exhibit RR146.16, page 7). See also exhibit 193A, 46B/41, 53; exhibit RR146.31.

2155 In April 1994, the shire adopted its Local Commercial Strategy (exhibit 31, 1/11/290 424). It included the following:

(a) The Local Commercial Strategy is a nonstatutory document to guide amendments to the Shire of Murray TPS 4 and the preparation of a future statutory town planning scheme (1/11/306).

(b) Pinjarra is to be promoted as an important multifunctional centre and the Local Commercial Strategy has an objective to direct as much retail growth as possible to Pinjarra in the short to medium term (1/11/298 299).

(c) The Strategy adopts 0.93 sqm net lettable area (NLA) per capita as the total requirement for district, neighbourhood and local shopping in Murray (1/11/359). This rate of demand is the same as in the metropolitan ***region*** (1/11/333, 358). This is distributed as 0.63 sqm NLA per capita to Pinjarra as a 'Strategic Country Centre', and 0.3 sqm NLA per capita to neighbourhood and local centres (1/11/300 301). Greater emphasis is placed on district level shopping in Murray compared to the Perth ***region*** and Mandurah (1/11/359).

(d) Ravenswood is specifically discussed in ch 10 (1/11/402 404). The proposed extension to the existing commercial centre would offer 670 sqm NLA, which is sufficient to adequately cater for demand out to 2001, when the population was expected to be 1,040 people (1/11/402).

(e) The Riverland Ramble subdivision would expand the capacity of the Ravenswood catchment to 6,000 people, creating a total demand for 3,180 sqm NLA. This provides additional potential for neighbourhood or local shopping floor space of 2,510 sqm NLA (1/11/402).

(f) The 6,000 people would also generate 2,400 sqm NLA demand for a district centre, but that potential was below the minimum size required for a district centre (10,000 sqm NLA, or 25,000 people at 0.4 sqm NLA per capita). That district centre demand potential was instead allocated to Pinjarra (1/11/403).

(g) It was, however, recognised that Ravenswood had longterm potential for a district centre, though not until after 2021, based on the land use vision in the SWAT report (1/11/403). Urban development and district centre potential at Ravenswood was in 'the very long term' and could not be incorporated into the 1994 Strategy (1/11/362). Instead, the Strategy only includes planning for neighbourhood and local centres in Ravenswood.

2156 The Strategy recommended that:

(1) there be no increase in retail floor space in Ravenswood until the population passed 1,000 people;

(2) the then existing centre on Lloyd Avenue and Pinjarra Road (and its approved extension) be a local centre with a maximum floor space of 700 sqm NLA;

(3) new centres in the Riverland Ramble subdivision should not be located on Pinjarra Road, but be centrally located on a local distributor road, close to the proposed primary school;

(4) the new centre in Riverland Ramble should be a neighbourhood centre with 2,000 sqm NLA floor space; and

(5) new centres should also recognise that additional centres may be required on land north of Old Mandurah Road in the very long term (1/11/404).

2157 It stated that any new neighbourhood centre established may become the first of 'a comprehensive system of neighbourhood and local centres', serving a much larger community (1/11/403).

2158 In November 1994, the Committee for Statutory Procedures recommended approval of the Riverland Ramble structure plan, subject to modification to comply with the Local Commercial Strategy. A required modification was to provide that the retail uses in the neighbourhood shopping centre be limited to 2,000 sqm NLA, or such greater area as can be justified by demonstrated demand (exhibit RR146.42, pages 12, 25). The Minister approved the structure plan with the modifications recommended by the Committee (exhibit RR146.43).

2159 The approval stated that in preparing a revised ODP, the applicant and council should have regard to the recommendation that the proposed neighbourhood commercial centre be located on an internal local distributor road (exhibit RR146.42, page 12).

2160 A revised structure plan for Riverland Ramble was prepared in November 1994, locating the commercial centre further east along Nancarrow Way, near the primary school (exhibit 245G, 49A/197). That structure plan, as well as the April 1995 ODP for lot 20 (49A/205), also made provision for the commercial centre to be located on the corner of Pinjarra Road and Nancarrow Way.

2161 On 23 May 1995, the Committee for Statutory Procedures, on behalf of the WAPC, considered the proposed ODP for lot 20. In relation to the commercial centre, the report to the Committee said as follows: The Structure Plan shows two possible locations for the neighbourhood shopping/community purpose site; on Nancarrow Way, approx 500 m from Pinjarra Road, opposite an existing residential area, and on the corner of Nancarrow Way and Pinjarra Road.The local authority has supported the centre on the location on the corner of Nancarrow Way and Pinjarra Road, within the current ODP. Discussions with the local authority's manager of planning services and the applicant indicates that this location is preferred to ensure that the centre services the entire Ravenswood townsite, to minimise the loss of amenity with the established residential areas and to integrate with the established commercial area on the opposite corner of Nancarrow Way.

The Commission's Policy 2.6 supports the central location of the shopping centres, in close proximity to the school and open space and forming an integrated neighbourhood centre, easily accessible to all residents. Additionally the policy recommends the centre be located away from a district distributor, preferably on a local distributor. A central location is preferred.

It is noted however that the Shire of Murray Retail Strategy has already established a commercial site on the opposite (***southern***) side of Nancarrow way. This site contains a convenience store, with provision for two additional retail outlets, and is adjacent to the Ravenswood tavern and caravan park and bounded by the Murray River to the ***south***. It may be appropriate to locate the proposed shopping centre into this existing retail precinct. The retail strategy can ensure that uses are restricted to convenience shopping with a district catchment. The number of corner stores may be increased to improve accessibility to convenience shopping.

It is recommended that the Commission support the location of the neighbourhood shopping centre in the centre of the estate, on Lot 21, in accordance with Policy. However, consideration may be given to the centre on the corner of Nancarrow Way and Pinjarra Road subject to the preparation of a retail and traffic study, demonstrating how the centre may be integrated with the adjacent land uses, incorporating the realignment of Nancarrow Way and minimising any adverse effects on the existing townsite. This plan would be advertised for public comment. The possible staged release of the OPD, as previously discussed, can exclude the neighbourhood shopping centre site until the appropriate studies have been completed (exhibit 245G, 49A/190 191).

2162 The recommendation adopted by the Committee at the meeting on 23 May 1995 was to approve the ODP for lot 20, with the commercial site on the corner of Nancarrow Way and Pinjarra Road 'being accepted as appropriate'. The ODP approval was subject to six modifications, which included that the proponent prepare a retail and traffic study to show how the commercial centre would be integrated with adjacent uses and minimise effects on the existing townsite (exhibit 245H).

2163 A revised structure plan and report was prepared by GRA dated September 1997 (exhibit RR146.57). It referred to the retail and traffic study that had been prepared in accordance with the WAPC requirements of May 1995 (page 8).

2164 At its meeting of 9 February 1999, the Statutory Planning Committee approved the relocation of the proposed Ravenswood neighbourhood centre to the corner of Pinjarra Road and Nancarrow Way and endorsed the retail and traffic study that had been done (exhibit RR146.61).

2165 The commercial centre then proposed by the proponents had 2,510 sqm NLA of retail floor space. The report to the Committee noted that that was consistent with the recommendations of the Local Commercial Strategy on the additional local and neighbourhood centre floor space in Ravenswood. The proponents also requested the Committee to approve including district centre floor space in Riverland Ramble, based on the IPRSP's population

forecast of 10,480 people in the Ravenswood urban node. That additional area was not supported because the IPRSP and the shire's Local Commercial Strategy both promoted Pinjarra as the only district shopping centre in the locality (exhibit RR146.61, page 2). The inclusion of 840 sqm of nonretail commercial use was also not supported, for similar reasons (page 3).

2166 In 2005, the owners of Riverland Ramble proposed a variation to the ODP which, among other things, relocated the commercial area to the junction of Pinjarra Road and Old Mandurah Road. In October 2005, the shire wrote to the WAPC advising that the shire's Planning and Development Services Committee had considered the proposed variation to the Riverland Ramble ODP. Among the council's resolutions was to require the proposed commercial node at the junction of Pinjarra Road and Old Mandurah Road to be subject of a separate detailed planning and engineering study in consultation with Main Roads, the DPI and the shire, examining linkages with the future regional recreation sporting facility site and a future expanded urban catchment area to the north of Old Mandurah Road (exhibit RR146.77).

2167 In February 2006, the Statutory Planning Committee met and deferred consideration of the proposed revised ODP. In April 2006, the Committee considered the revised ODP, with a detailed DPI report.

2168 I have set out in detail what was said in Mr Sanderson's report of 3 April 2006, and what was decided by the Statutory Planning Committee on 18 April 2006 in section 7.3.7. As I explained in that section, in my view, the hypothetical purchaser would draw from the decision of 18 April 2006 and the accompanying report of 3 April 2006 that the DPI/WAPC thinking at April 2006 was:

(a) the commercial centre that was to form part of the Riverland Ramble development would, in due course, be located in the northwest section of the estate, near the junction of Old Mandurah Road and Pinjarra Road;

(b) the scale of that commercial centre would be determined as part of and in light of the Planning Review, but the current expectation was that by 2031 there would be sufficient population to support a district centre; and

(c) neither of these conclusions was based on an expectation of urbanisation north of Old Mandurah Road. Whether such urbanisation would occur was a matter to be considered in the Planning Review. The possibility of such urbanisation was to be taken into account in determining the location and scale of the commercial centre. That would be considered as part of the Planning Review.

2169 In one of his reports, Mr Kotsoglo expresses the view that:

(a) all the factors referred to in the DPI reports of 17 February 2006 (exhibit RR146.80) and 3 April 2006 (exhibit 245L) are directly applicable to the subject land;

(b) the subject land is superior to Riverland Ramble for a commercial centre; and

(c) the identification of Riverland Ramble as the site for the commercial centre, as opposed to the subject land, 'is only explicable on the basis that the subject land was precluded for Commercial Development' (exhibit 222C, 24A/157; see also 24A/154).

2170 Mr Kotsoglo also says that the prospect of establishing a district centre on the subject land would likely have been obvious to an experienced commercial developer for several years before 2006, and, but for the proposed public works, would have been the subject of proposed development before or by the taking date (exhibit 222C, 24A/163; see also exhibit 222D, 24A/200). This reasoning does not reflect any permissible legal analysis. There is no basis in law to enquire whether, prior to the taking date, an experienced commercial developer (which the plaintiffs were not) would have proposed commercial development on the subject land in the absence of the proposed public works.

2171 This impermissible assumption may be the foundation for his view summarised in par (c) immediately above. If not, the occasion for any commercial site selection is not apparent. The question of choosing between Riverland Ramble and the subject land as the site for Ravenswood's commercial centre never arose up to the taking date. In the absence of the proposed public works, the position would have been the same the question would not have arisen.

2172 Further, I have already explained in section 8.2 the reasons why I do not accept Mr Kotsoglo's view that the subject land was superior to Riverland Ramble for a commercial centre.

2173 As I explained in section 8.1, the view that, absent the proposed public works, at some time before the taking date, the subject land would have been preferred to Riverland Ramble as the commercial centre for Ravenswood,

appears to be a central assumption of the plaintiffs' valuers' commercial valuations. For the reasons just given, it is without foundation.

2174 As I have found in section 7.3.7, the decision of 18 April 2006 was not a binding decision in any respect about the size and location of the commercial centre in Riverland Ramble, or elsewhere in Murray. Nevertheless, to my mind, against the history I have already set out, the hypothetical purchaser would have considered that the decision of 18 April 2006 meant that it was very likely that the major commercial centre for Ravenswood would be located in Riverland Ramble.

2175 Further, as Mr Shrapnel said, the decision of April 2006 indicated that the WAPC did not see any imperative for commercial development in Ravenswood in the short term. That could await further planning.

2176 Taking into account my conclusions in this section and section 8.2, in my view, the hypothetical purchaser would have considered it very unlikely, as at the taking date, that the subject land would be preferred to Riverland Ramble as the site for the major commercial centre for Ravenswood.

2177 That conclusion is sufficient to reject the plaintiffs' commercial case. For the sake of completeness, I will deal with the question of the expected likely timing of development of a district centre at Ravenswood.

8.4 District centre potential: timing

2178 In their written reports, the plaintiffs' commercial planners expressed considerably more optimistic expectations about the likely timing of a district centre for Ravenswood than the defendants' planners. In their oral evidence, the plaintiffs' planners' views on likely timing differed from their respective written reports.

2179 In his report, Mr Kotsoglo said that a district centre on the subject land could be constructed and in operation by 2010 2011: exhibit 222C, 24A/163. I note that his written report expresses an assumption that the surrounding land would be developed entirely for urban purposes at a density of 17.5 dwellings per gross hectare (24A/164). There is no foundation for that assumption.

2180 Mr Kotsoglo considered that necessary planning approval for a district centre could have been in place by 2006 (exhibit 222D, 24A/200). Again, this is based on the impermissible assumption that a commercial property developer would be 'proactive' and would have pursued the necessary planning approvals for development of a district centre before the taking date (24A/200).

2181 In his oral evidence, Mr Kotsoglo took a less optimistic approach. He said that it would take 2 3 years after the taking date for structure planning and to obtain development approval, following which it would be one to two years to develop the local centre. He stated that three or four years after the structure planning process, a neighbourhood centre would be developed, and sometime thereafter a district centre: ts 5431 5432. These estimates were based on the assumption that the subject land was already zoned urban in the PRS at the taking date (ts 5431).

2182 Mr Kotsoglo accepted that if urbanisation did not occur north of Old Mandurah Road, a district centre would not be required: ts 5587. That is a markedly different view from that he expressed in his reports.

2183 In any event, Mr Kotsoglo did not profess any expertise in the analysis of population catchment. Rather, that was a matter on which he said he would take advice from a separate consultant (ts 5434, 5441, 5916).

2184 The commercial planners considered that approval of a district centre would ordinarily require a forecast catchment population of ***around*** 25,000 people: ts 5591 (Mr Haratsis), ts 5667 (Mr O'Neill); exhibit 223, 52/20 (Mr Shrapnel). In his oral evidence, Mr Shrapnel said that at least 20,000 people were required for a district centre to be commercially viable (ts 5667).

2185 I accept the following evidence of Mr Shrapnel.

2186 Mr Shrapnel considered that once the structure planning was completed, the timing of the various stages of the commercial centre, from neighbourhood centre to district centre, could be left to the market (ts 5461 5464). Mr Shrapnel considered the likely outcome of the structure planning process as regards a district centre in Ravenswood to be a 'tricky' question (ts 5467). That was because of the long timeframe concerned. In the end, he considered it likely that the population growth would eventually be sufficient to support a district centre. One of the neighbourhood centres in the catchment would be identified as the site for the future district centre and it would be allowed to grow to a district centre in the long term (ts 5467 5469).

2187 That is consistent with the indications in exhibit 245J, exhibit 245K, and exhibit 245L.

2188 Both Mr Haratsis and Mr Shrapnel assessed the question of when, as at the taking date, it would be expected that there might be sufficient catchment population to support a district level commercial centre on the subject land or in Ravenswood generally. The primary methodology is not in contention. It is based upon a State Planning Policy. A trade area is defined for a potential site. Primary and secondary trade areas are delineated. Population and forecast population is then considered within the trade area.

2189 All planners were content to adopt a 5 km radius catchment for the purposes of analysing the catchment of a proposed district centre at Ravenswood.

2190 Mr Shrapnel considered that a neighbourhood centre might be commenced ***around*** 2012, when a population of about 7,000 people was expected, with expansion to a district centre sometime after 2026 (ts 5666). Developers might have been prepared to develop the neighbourhood centre suitably 'prematurely', in ***around*** 2010 (ts 5534). Even if a developer wanted to expand early for commercial reasons, from a commercial point of view a population of at least 20,000 people would be needed, which would be sometime after 2021 (ts 5667). The first stage of a district centre might be expected to be feasible between 2016 and 2021 (ts 5461 5462).

2191 SPP 4.2 was the metropolitan centres policy in force at the taking date (appendix 2 to exhibit 222C; ts 5621). It sets out a hierarchy of commercial and shopping centres, and provides guidelines on how the retail floor space that is provided to the catchment population is to be distributed within the hierarchy of centres.

NLA per person (sqm)

Perth Central Area

0.20

Regional Centres

0.61

District Centres

0.40

Neighbourhood and Local centres

0.53

Total

1.74

2192 The function and expected floor space of each of these types of centres is set out in a table in SPP 4.2; see also Mr Shrapnel's report (exhibit 223, 52/9). Regional centres are generally up to 50,000 sqm; district centres generally up to 15,000 sqm; and neighbourhood and local centres up to 4,500 sqm.

2193 The commercial planners agreed that these were guidelines, to be applied flexibly. That is also clear from the terms of SPP 4.2.

2194 Both Mr Haratsis and Mr Shrapnel estimate a catchment population in 2016 between 9,000 and 10,000 people: exhibit 212I, 23/227; exhibit 223, 52/23. The difference in their estimates of population catchment is not significant. The significant difference between their respective analyses lies in the application of the guidelines to that expected population catchment.

2195 Mr Haratsis considers that:

(a) a commercial centre on the subject land would serve the dual roles of district centre, and neighbourhood and local centre; and

(b) consequently, the floor space allowances for district centres (0.4 sqm NLA per person) and for neighbourhood and local centres (0.53 sqm NLA per person) can be combined as the allowance for the one centre.

The first proposition is not controversial. The second is. Mr Shrapnel expressed firm disagreement with it. For the reasons that follow, I accept Mr Shrapnel's evidence.

2196 The approach of Mr Haratsis would result in a single centre being developed to meet the district, neighbourhood and local level retail needs of the catchment population. There would be no floor space available to be allocated to other such centres in the catchment area.

2197 In rejecting that approach, Mr Shrapnel and Mr O'Neill considered that the prospect that a district centre will also play the role of a neighbourhood centre for its locality is taken into account in the guidelines in SPP 4.2: ts 5607 (Mr Shrapnel), 5607 5608 (Mr O'Neill). Further, in my view, even if some adjustment was required, allocating the entire catchment's neighbourhood and local retail floor space to the one centre in Ravenswood would not be justified, as that centre would only perform a dual role for people living close to the centre who used it for neighbourhood and local shopping; see also ts 5640 5641.

2198 Further, the importance of establishing and maintaining a hierarchy of centres is emphasised throughout SPP 4.2: see, for example, cl 3, cl 4.1.2, cl 4.2 and cl 5.3. Strategic planning for the future development of a district centre would always provide for a network of local and neighbourhood centres: exhibit 223, 52/30; ts 5453 5454, 5605 5607, 5640.

2199 At the taking date, neighbourhood and local centres were approved or being contemplated elsewhere in the catchment area. Those other centres included:

(a) Austin Cove a neighbourhood centre of 5,000 sqm NLA (or more if demonstrated demand justified it): exhibit 72, page 76;

(b) Furnissdale a neighbourhood commercial precinct on Pinjarra Road: exhibit 249A; exhibit 249B;

(c) MRCE a neighbourhood centre up to 1,400 sqm NLA: exhibit 72, page 94;

(d) North Yunderup a local centre (ts 5473); and

(e) Ravenswood an existing local centre of 700 sqm NLA: exhibit 47, 1/12/285.

2200 In the course of crossexamination, Mr Haratsis sought to downplay the prospects of contemplated or approved commercial development elsewhere in the locality, such as at Austin Cove (ts 5609 5613) and more generally (ts 5628 5631). His evidence was unconvincing.

2201 Mr Shrapnel explained the position as follows: It's a very important principle that local convenience centres be provided at the neighbourhood and local level to satisfy the day-to-day convenience needs of the local population. One of the reasons for having the retail hierarchy and implementing the retail hierarchy as part of implementing centres policy is in order to ensure that there is a balance between the larger centres which are necessary to provide for higher order goods and services and the neighbourhood and local level which are necessary to provide for more convenient access on a more frequent basis. So decisions would need to be made about how to apportion the floor space amongst the hierarchy, so that would be an essential part of the structure plan. That just sets the background for how I see any prospect for zoning for commercial development, let alone a district centre, let alone something as important as a district centre; some kind of overall strategic planning process is necessary for that and it would be a planning authority endorsed strategy or structure plan at the end of the day (ts 5453 5454).

...

In doing these calculations, the population we are working with is not just the population of Ravenswood, it's the population within the catchment area of the district centre, the assumed five-kilometre catchment area. That five-kilometre catchment area includes those suburbs of FurnissdaleBarragup, Austin Cove, Murray River Estate, that area as well. So in the rational planning of this area, the distribution of centres, there's only going to be one district centre planned, just one, but there's going to be several neighbourhood centres planned, perhaps three, perhaps four; perhaps if they're smaller and include some local centres, there could be five or six.

So the idea that you come up with a lesser result by using the 0.4 than you would by using the 0.53 is, in my view, an incorrect approach because with the district centre, which is the 0.4, all of that 0.4 is to go in the one district

centre, whereas the result of using the 0.53 is to be distributed amongst potentially numerous neighbourhood and local centres, not in Ravenswood but in this catchment area that we are talking about, and it could well be that a rational centres pattern for that catchment area which included a district centre at Ravenswood would not also include a neighbourhood centre at Ravenswood; those neighbourhood centres would be elsewhere in the catchment.

The thing is that purely from a commercial point of view one could see how a prospective developer of a district centre in Ravenswood would want the centre to include all of the catchment area's floor space, but that is not an outcome that the planning authorities would ever accept. Now, having said that, I am perfectly happy to agree that in the thinking at this level of analysis one might well assume that the district centre maybe should warrant 0.5 and the neighbourhood local centres might warrant 0.43, something like that, but the idea that all the eggs should go in that one basket is incorrect.

The thing is that I think the whole problem that Mr Haratsis has with sort of justifying the size of the district centre is purely to do with the population that we have for the foreseeable future within the catchment area because if, instead of dealing with the population projections that we have, we were dealing with a catchment area population within our catchment area; not just Ravenswood, the catchment area, within the five K's - if we were dealing with a population of 25,000 people, there's no issue.

0.4 for a district centre equals a district centre of 10,000 square metres. 0.53 for neighbourhood centres equals a total of 13,250 square metres for neighbourhood centres. If you divided that three ways you would have three neighbourhood centres of about four and a half thousand. If you divided it four ways you would have an average each of 3,300 square metre neighbourhood centres distributed throughout the localities so that you had your hierarchy of centres. So you would get your district centre using just your 0.4. The problem is the lack of population; it's not with the manipulations of the ratios (ts 5639 5640).

2202 To my mind, this evidence is cogent and logical, and supported by the provisions of SPP 4.2. I accept it.

2203 In my view, there are other aspects relating to population and demand in Mr Haratsis's report that affect the weight to be given to his evidence. In his District Centre Potential report, Mr Haratsis sets out a table showing a total of just under 17,000 sqm NLA for his catchment population at 2016 (exhibit 212I, 23/228). Of this, just under 4,000 sqm is in the category of district centres. In the two paragraphs immediately following that table, the report states that the subject land and its residential catchment 'could comfortably support' ***around*** 17,000 sqm of retail floor space (23/228). The report then states: This supportable floor space is almost 10,000m2 in excess of the floor space approved for the Ravenswood District Centre located on Old Mandurah Road and Pinjarra Road. That centre is located close to the subject site and could therefore be developed as part of a larger District Centre. It could therefore comprise part of the overall estimated demand for retail of about 16,000m2, allowing another 10,000m2 to be delivered throughout the centre to maximise interaction and activity.

In my view, the report is saying that a 17,000 sqm site could be created at the junction of Old Mandurah Road, with 7,000 sqm at Riverland Ramble and the remaining 10,000 sqm on the subject land.

2204 In his oral evidence, Mr Haratsis said that that was not what he intended in his report. Rather he was saying that 'part of' the remaining 10,000 sqm could be allocated to the subject site (ts 5427). How much, he said, was dependent on the position at Riverland Ramble (ts 5428 5430). I do not accept that that is what Mr Haratsis's report means, or that that is what he intended when he wrote it. In his oral evidence, Mr Haratsis pointed to the words 'part of' in the paragraph I have set out above. In my opinion, the last sentence is intended to be understood in this way: [The Riverland Ramble centre] could therefore comprise part of the overall demand for retail of about 16,000m2, allowing another 10,000m2 to be delivered throughout [the balance of the district centre of 17,000 sqm] to maximise interaction and activity.

2205 Even if the 'it' in that sentence is read as a reference to the subject land, the same conclusion applies. In my view, Mr Haratsis backed away from what he had written in his report because it involved combining the floor space allocations of all four categories of centre and allocating the total entirely to a district centre on the subject land and at Riverland Ramble. In my view, Mr Haratsis knew that no sensible justification could be given for such an approach.

2206 On the following page of his report, Mr Haratsis said as follows: As a District Centre, the subject site would be capable of delivering a mixture of employment generating uses and services. These other uses would be driven by the critical mass of retail floor space and would consist of commercial, community, health and recreational floorspace. At the same time, a District Centre's role is not to detract from Regional Town Centres and Strategic City Centres and therefore the commercial floor space should not be too significant.

As demonstrated in figure 5 below, there will be sufficient growth in the residential catchment to support an amount of commercial/office floorspace commensurate with the total retail provided.

The estimated requirement is based upon the following assumptions: Fulltime equivalent white collar employment equates to 16% of total population across Murray LGA Self sufficiency across Murray LGA is 65% (ie jobs to resident labour force) 10% assumed work at homeThe type of commercial uses that would typically be supported would include accountants, health professionals, banks, legal professionals, real estate agents and health and community workers.

Figure 5. Office Floorspace requirement

Series 1

2005 2016 Subject site 0 2,145 [Primary Trade Area] 1,785 2,475 [Secondary Trade Area] 3,658 5,070 Total 5,443 9,689 Total White Collar Employment 390 695 Office Floor Space 7,028 12,511

(exhibit 212I, 23/229)

2207 In crossexamination, Mr Haratsis said that the numbers in figure 5 involve no element of prediction on his part. Rather, they reflected what Mr Haratsis understood was that the amount of office space that should be planned for in accordance with Network City (ts 5934 5935).

2208 In my view, Mr Haratsis's evidence about figure 5 departs from any fair reading of his report. The natural reading of these passages is that Mr Haratsis was providing an estimated forecast that the growth in the catchment population would support a requirement for office floor space of 7,000 sqm in 2005 and 12,500 sqm in 2016. It is presented as his assessment. The passages in the report were calculated to favour an optimistic view from the perspective of the plaintiffs. When pressed, because Mr Haratsis could not justify what was in the report, he watered down its intended meaning.

2209 In an earlier version of his District Centre Potential report than the one tendered, Mr Haratsis assessed the catchment population by assuming the subject land would have been urbanised by the taking date, and then adding his estimate of the number of people living on the subject land to the population projections for the area (ts 5689). Mr Haratsis retreated from that approach after it was criticised in a report by Mr Shrapnel. In my view, Mr Haratsis's adoption of this approach in his first report is indicative of a lack of rigour. Such an approach is, in my view, so fundamentally flawed that it ought never to have been embraced. To construct a population living on the land to be valued makes no sense. Further, to add the subject land's population to the forecast for the area involves quarantining the subject land, rather than treating it as part of the ***region***.

2210 For these reasons, I prefer Mr Shrapnel's evidence on the likely timing of a possible district centre to that of the plaintiffs' commercial planners.

8.5 District centre potential: conclusion

2211 By way of overview, I would summarise my conclusions as follows.

(1) Assuming the subject land was zoned urban, and ignoring the history and status of the proposal for a commercial centre in Riverland Ramble, the hypothetical purchaser would have considered that the northwest section of Riverland Ramble would be preferable, as a matter of good planning, to the subject land as a site for a future Ravenswood commercial centre.

(2) The prospects that, at the taking date, the subject land would be preferred to Riverland Ramble as the site of the Ravenswood commercial centre are further diminished by the history and status of the proposal for a commercial centre in Riverland Ramble.

(3) The prospects of the subject land being preferred to Riverland Ramble as the major Ravenswood commercial centre are further diminished by the fact that, at the taking date, the subject land was zoned rural, not urban, and had reasonable, but uncertain, prospects that it would be identified for shortterm rezoning to urban in the Planning Review.

(4) Consequently, in the circumstances at the taking date, in the assumed absence of the proposed public works, the hypothetical purchaser would have considered the subject land to be very unlikely to be identified in the Planning Review as the major commercial centre for Ravenswood.

(5) Further, the timing of likely approval and development of any district centre for Ravenswood is in the long term, in accordance with the evidence of Mr Shrapnel.

(6) In light of these conclusions, the commercial valuations of the plaintiffs' valuers are of no assistance. They:

(a) are based on the assumption that the land was zoned urban;

(b) are based on an assumption that by 2006 the subject land would have already been preferred to Riverland Ramble as the major commercial centre for Ravenswood, when in fact that question would never have arisen; and

(c) value what they assume to be a certain development in accordance with Mr Kotsoglo's plans, the only question being one of timing. In fact, on any view of the matter, commercial development of the subject land would have been a question of possibility, not certainty.

(7) Contrary to the plaintiffs' valuers' approach, for the reasons already given and summarised, the prospect of major commercial development on the subject land would have been viewed by the hypothetical purchaser as very unlikely.

2212 For all these reasons, the plaintiffs' commercial valuations are too far removed from the correct assumptions and the facts as I have found them to make any attempt to adjust the valuations. Rather, they can be put to one side as being of no assistance.

Section 9: Valuation of the subject land

9.1 Valuation: principles and methodology

2213 I outlined some general principles about the meaning of value and the process of valuation in section 2. In summary:

(a) value is determined by identifying the price of a notional bargain between hypothetical vendor and purchaser who are willing, but not anxious; prudent; and well informed;

(b) there are a number of methods of assessing value. The comparable sales method is one; others may be appropriate, depending on the evidence;

(c) whatever method is used, that method is only a means to an end. The ultimate task is to identify the price at which the hypothetical parties would reach a bargain; and

(d) valuation is by its nature somewhat subjective, and at times involves significant conjecture, sometimes bordering on guesswork.

2214 In this section 9.1, I set out below some further principles about the two methods of valuing used by the valuers in this case: comparable sales and hypothetical subdivision analysis. In section 9.2, I outline the valuations of each of the expert valuers before identifying the issues in contention between them. I explain the organisation of the rest of section 9 at the end of section 9.2.8. 9.1.1 The comparable sales method

2215 In Maurici v Chief Commissioner of State Revenue [2003] HCA 8; (2003) 212 CLR 111 [16], the High Court described the comparable sales method as the traditional valuation method, involving seeking out relatively contemporaneous sales of comparable properties between parties at arm's length, unaffected by special circumstances, and using those sales as a yard stick for the valuation of the relevant land.

2216 In a passage cited with approval in Western Australian Planning Commission v Arcus Shopfitters Pty Ltd[2003] WASCA 295 [49], Wells J in Brewarrana Pty Ltd v Commissioner of Highways (No 2) (1973) 6 SASR 541, described the comparable sales method as follows: It is general valuation practice for sales characterized as comparable sales to be used as bases for the valuation of lands said to be similar. But allowances must always be made before such sales can be so used. No two parcels of land are identical in all respects: the sale price of any given piece of land is not necessarily the price at which it ought to have been sold, or the same thing as its true value. Before using any allegedly comparable sale, therefore, the valuer must consider whether, having regard to the circumstances appertaining to the parcel of land in question, and to the transaction of sale, there are sufficient similarities to the circumstances appertaining to the subject land and to the notional sale presupposed by the test formulated in Spencer v The Commonwealth of Australia ... to warrant a court's reasoning from the sale price paid under the allegedly comparable sale, with or without other evidence, to a value for the subject land. Adjustments must, of course, be made every time reasoning of that kind is undertaken. For example, in relation to the land itself and the circumstances appertaining to it, it may be necessary to consider such matters as topography, location, size, shape land use (actual and potential), scope for, and difficulties of, development, and in relation to the transaction of sale, the valuer must weigh such things as the character, business and relationships of the parties, their motives, the terms and conditions in their contract of sale, and any other special considerations that induced or may have induced them to conclude the contract at the selling price agreed, as well as the dates when the contract of sale and the transfer were concluded or effected (550 551).

2217 There is not a hard and fast rule distinguishing sales that are comparable from sales that are not. It is a matter of degree, requiring the exercise of expert judgment by the valuer. Some adjustment will always be necessary, but too much adjustment can render it unsafe to use a sale. A sale may be excluded from use in the comparable sales reasoning process, but nevertheless be relevant: Duffy v The Minister for Planning [2003] WASCA 294 (Duffy(2003)) [25]; see also Flotilla Nominees Pty Ltd v Western Australian Land Authority [2003] WASC 122; (2003) 27 WAR 403 [21].

2218 In WAPC v Arcus Shopfitters [51], McLure J (Anderson and Steytler JJ agreeing) said that a core requirement of the comparable sales method is that the comparable sales be sufficient in volume to justify a deduction or inferences to value. Her Honour said that what is sufficient in volume 'will vary from case to case', but generally will require multiple (more than two) sales [51].

2219 Those observations were made in the context of a complaint that the trial judge, and the valuer on whom the trial judge primarily relied, had considered each comparable sale in isolation and determined its comparability with the subject land. Her Honour explained that what was required was that the sample of comparable sales be analysed collectively and individually [52].

2220 On the rehearing following the Full Court decision in WAPC v Arcus Shopfitters, Pullin J said that, in the Full Court, McLure J was not to be taken as suggesting that there is an irreducible minimum of two comparable sales before the comparable sales method has any validity: Arcus Shopfitters Pty Ltd v Western Australian Planning Commission [2004] WASC 85 [18] [23]. I respectfully agree. All the potentially relevant sales must be analysed individually and collectively to determine which, if any, of them are of assistance in deriving a value for the subject land, and what weight is to be given to each relevant sale. The question of weight will vary with the circumstances. For example, the conclusion may be that several sales are relevant and of equal weight, or that one is by far the most important. It could be concluded that there is only one sale of any real assistance. There are no hard and fast rules; it all depends on the circumstances.

2221 As was said in AMP Henderson Global Investors v The Valuer General [2004] NSWCA 264; (2004) 134 LGERA 426 [68], Maurici v Chief Commissioner of State Revenue 'is not authority for the proposition that if there be only one comparable sale it is required to be disregarded and the comparable sales method of valuation rejected'.

2222 The search for comparable sales is not to be distorted by any perceived need for a minimum number of comparable sales: ISPT Pty Ltd v Valuer General [2009] NSWCA 31; (2009) 165 LGERA 25 [27]. In that case, the trial judge had found that sales outside a particular locality were not comparable. The Court of Appeal of New ***South*** Wales rejected a submission that, in order to have a reasonably representative group of comparable sales, the court should have striven to have regard to the sales outside that locality as sales which, with adjustments, could stand as comparable sales.

2223 There is no requirement that a valuer identify a single most important comparable sale: WAPC v Arcus Shopfitters [51]. 9.1.2 The hypothetical subdivision analysis method

2224 Another method of valuation involves notionally subdividing an en globo parcel of land to derive an expected profit from it. The hypothetical subdivision analysis (HSA) method of valuation has long been recognised. The HSA method was described by Roper J in Closer Settlement Ltd v The Minister (1942) 17 LGR (NSW) 62, 65 (in a passage cited by the Full Court in Mount Lawley (2004) [213]) in the following terms: In arriving at the value of land which is suitable for subdivision a familiar and appropriate method ... is to estimate from whatever comparable sales of land in subdivision are available the price which would be realized by the land when sold; then to estimate the costs involved in the subdivision and the length of time that the realization would take, making provision for the payment of rates and taxes and for interest on money outstanding; and an estimated net return on the subdivision is obtained. It is of course clear that a person purchasing land in globo for the purpose of subdividing it would not pay the sum of money which is the present equivalent of the estimated return. Many factors in the calculation are speculative: the land in subdivision may not realize the prices which are at present expected, and the subdivision may take longer to realize than is at present anticipated. To compensate for the risk involved in the venture the purchaser would certainly discount the estimated returns.

2225 Many of the elements of an HSA require the exercise of a subjective judgment by the valuer. In this case, the valuers agreed a notional subdivision plan to be used for the HSA. Their opinions varied as regards the expected sale prices of the lots, the time that would be taken to sell the lots, the costs of project management, and the allowance to be made for the profit and risk of the notional developer.

2226 In Turner v Minister of Public Instruction [1956] HCA 7; (1956) 95 CLR 245, 268, Dixon CJ made the following observations about the HSA method, highlighting its dependence on numerous subjective factors: The formula, the use of which apparently has become so familiar in valuing land suitable for subdivision, contains a number of factors, all of which seem to depend on little or nothing more than opinion and it may be supposed that widely different results may be produced by variations in detail, though no given variation may itself seem considerable. It would appear natural, therefore, for a judicial valuer to seek to check his results by reference to as many sources of information and inference as may be found, even if he might consider that they would not provide him, had they stood alone, with a satisfactory independent basis for an ultimate conclusion.

2227 In 15 Lorimer Street Pty Ltd v Secretary to the Department of Infrastructure (1997) 97 LGERA 239, 252, Byrne J made observations to similar effect: The weakness of the Turner approach is that it applies an apparently scientific formula to a great number of subjectively established variables. The operation of the formula is such that small variations to these variables can have a very great impact upon the result: see Turner v Minister of Public Construction [sic] (at 268) per Dixon CJ. This has caused valuation judges of great eminence and experience to warn against a too ready reliance upon this approach.

2228 This passage was cited with approval by the Full Court in Mount Lawley (2004) [214].

2229 In WAPC v Arcus Shopfitters [65], McLure J (Anderson & Steytler JJ agreeing) observed that the HSA method 'is a less reliable valuation method because of the number and nature of the assumptions that have to be made'. It has been said in many cases that if there are comparable sales, the comparable sales method is generally preferable to the HSA method. See Coastal Estates Pty Ltd v Bass Shire Council [1993] VicRp 92; [1993] 2 VR 566, 576 577; ISPT Pty Ltd v Melbourne City Council [2008] VSCA 180; (2008) 20 VR 447 [88] [90]. In the end, the appropriate methodology depends on the evidence in the case: Boland v Yates Property Corporation Pty Ltd[1999]

HCA 64; (1999) 74 ALJR 209 [280] [291]; Coastal Estates v Bass Shire Council (577); ISPT v Melbourne City Council [87]. As will be seen, in this case the valuers agreed that if there are comparable sales, the comparable sales method is preferable, but they disagreed on whether there are any comparable sales and what assistance could be derived from them.

2230 The HSA method is what is described as a static method. It involves estimating or assessing all revenue and expenditure in then current prices, notwithstanding that revenue will not be received until a later time, and expenses will not be incurred until later. Naturally, by the time the revenue is received, prices are likely to have changed. The same is true in relation to expenditure. This feature of the HSA method has the obvious consequence that the greater the length of time before the hypothetical subdivision is to be carried out and completed, the less reliable the method is. This has been highlighted by many judges.

2231 In Mount Lawley (2004) [215], the Full Court cited the following passage from the judgment of Byrne J in 15 Lorimer Street (253): One feature which runs through these warnings is the danger of applying the approach where the hypothetical development is not to be carried out within a reasonably short time: see Cienda Pty Ltd v SA Urban Land Trust (1988) 66 LGRA 360 at 363, per Jacobs J (King CJ and Bollen J concurring) (SA). It is for this reason that the approach is considered inappropriate when the subject land is not ripe for subdivision or development. Ripeness in this context, however, is a matter of degree and this restriction upon the approach is not to be applied in any mechanical way. What is in question is whether the value of the approach is so diminished by the uncertainties involved in the use of current estimates to future conditions that it lacks utility: see Coastal Estates v Bass Shire Council (at 576-577), per Gobbo J.

2232 One of the inputs into an HSA is the profit and risk factor. In Minister for the Environment v Florence (1979) 21 SASR 108, Wells J explained the profit and risk factor, and its interdependence with the other elements of an HSA: Probably the most important step in assembling a calculation based on a hypothetical subdivision is the introduction of the profit and risk factor. And yet, though, for convenience, one may refer to the addition of a profit and risk factor, it is to foster error and misunderstanding to speak of adding such a factor. For to construct a calculation of this kind is not to bring together a number of independent figures and add them, and subtract from them, much as one might compile statistics whose constituent figures are drawn from several sources The profit and risk factor is related to the other items in a calculation much as a key is related to the mechanism of a high security vault; all parts of the relevant mechanism must be completely coordinated. Judging as best I may from the evidence in this case, and from the authorities to which I have been referred, it seems to me that it is entirely contrary to principle to marshal your figures without the profit and risk factor, and then, drawing on materials whose origins place them beyond the reach and influence of the subject land and the hypothetical subdivision, to introduce a figure to make good the missing item. True it is that the factor may be affected by actual profits made in similar developments, that regard may be had, in a general way, to the percentage given to this factor by other developers when assessing other prospective developments. Such influences can only, however, be comparatively remote. What is far more important is the valuer's appraisal, as a whole, of the hypothetical subdivision under consideration, one of whose principal characteristics is the interdependence of its several parts. There seems to be a suggestion in some writings that a valuer is at liberty to take from valuations based on the hypothetical subdivision that have been examined or approved in decided cases the figure there stated, and use it in the valuation then being prepared. With all respect to those holding or advancing that view, that cannot be right. The actual obstacles to subdivision at the relevant time; the actual price set upon the lots; the actual period decided upon for selling the subject land in its hypothetical forum; and the type of land and the state of the market with respect to it, must all be looked at as a united whole in the particular circumstances of the case, and a percentage fixed accordingly (130 131).

2233 See also Turner v Minister of Public Instruction (264).

2234 The range of matters to be taken into account in fixing a profit and risk factor will depend upon all the circumstances. In Thomson v ValuerGeneral (1949) 17 LGR (NSW) 120, Sugerman J said that the following matters may be relevant:

(1) the demand for lots such as those from the subject land at the relevant time;

(2) the likely delay which would elapse in completing the subdivision;

(3) the dependence of successful subdivision for access on the subdivision of neighbouring lands;

(4) the prospect that neighbouring lands may come on the market at the same time or earlier;

(5) the availability of other subdivision land in the area; and

(6) the fact that on the sale of another subdivision in the neighbourhood it was considered prudent to place only a smaller number of lots on the market at the one time.

2235 In their evidence before me, the valuers all agreed that a prospective purchaser of land of the size and character of the subject land would undertake analysis of the financial feasibility of development of the land by subdivision. They agreed that such analysis would be by way of a discounted cash flow (DCF), rather than an HSA.

2236 A discounted cash flow involves an analysis of the expenses incurred in the subdivision development, and the likely returns, discounted to reflect the timing of the incurring of the expenses and the receipt of the revenue. In a DCF, estimates are made of the price of the revenue and expenses at the time that they will be incurred or received. Those amounts are then each discounted to reflect the respective delays in incurring and receipt. By contrast, in an HSA it is assumed that all expenses and receipts are incurred at the same time, and each item is estimated by reference to prices current at the time of valuation (see ts 6229 6233).

2237 None of the valuers undertook a DCF. Ms LeFevre and Mr Brown said that that was because they understood that a DCF by a valuer had not been accepted by the courts (ts 6233 6234). Mr Wilson said that he had not done a DCF because his valuation was prepared in response to the valuations of Ms LeFevre and Mr Brown and so he adopted the same format (ts 6233).

2238 I would mention that it is not clear to me that the DCF method has been rejected in principle by the courts. It was not rejected in principle in Albany v Commonwealth of Australia (1976) 12 ALR 201; see Boland v Yates [284]; Hyam A, The Law Affecting Valuation of Land in Australia (4th ed, 2009) 209 217. In any event, all the valuers who gave evidence used an HSA, not a DCF.

9.2 Overview of the expert valuation evidence 9.2.1 Introduction

2239 The plaintiffs called three valuers: Mr Gerald Brown, Ms Jennifer LeFevre and Mr David Liggins. The defendants called two valuers: Mr Keith Wilson and Mr Brian Zucal. All are very experienced valuers.

2240 Most of the valuers prepared several valuations on different planning assumptions.

2241 The summary table in the valuers' joint report appears as follows:

Valuers

Rural urban potential

Rural urban potential 2014

Urban

Commercial / Intensive urban

Special rural

Brown

$36,500,000

$30,763,212

$63,250,000

$75,000,000

$19,112,000

LeFevre

$40,000,000

$65,000,000

$86,000,000

Zucal

$6,136,000

$7,695,857

Wilson
$10,520,000
$8,340,000 (6 years deferment)
$11,840,000 (0 years deferment)

Liggins
$38,820,000

(exhibit 273)

2242 In light of their oral evidence, referred to in more detail below, the position of the valuers can be summarised in this way:

Valuers
Rural urban potential
Rural urban potential 2014
Urban
Commercial / Intensive urban
Special rural
Brown
$36,500,000
$25,800,944
$60,000,000
$71,500,000
$19,112,000
LeFevre
$40,000,000

$65,000,000
$70,000,000 $75,000,000

Zucal
$6,136,000

$7,695,857

Wilson

$7,063,616 (6 years deferment)
$9,606,517 (0 years deferment)

Liggins
$38,820,000

2243 The extent of the divergence in valuations within a given zoning assumption is notable.

2244 Mr Brown's first valuation valued the subject land at $36 million on the basis that it was zoned rural with very good prospects of being rezoned to urban imminently. That valuation relies primarily on comparable sales and used the HSA method as a check. Mr Brown also prepared a valuation of the land on the basis that it was rural with urban potential realisable in 2014, valuing the land at $25.8 million. That was based solely on an HSA. In 2009, he prepared a valuation of the land on the assumption that it was urban, valuing the land at $60 million. In 2010, Mr Brown prepared a valuation of the land on the basis that its highest and best use was as a commercial centre with associated intensive residential development. The commercial valuation valued the land at $75 million. He later allowed some deferment for the commercial valuation. Finally, Mr Brown also prepared a valuation on the basis that the highest and best use of the subject land was as special rural, valuing the land at $19.1 million. He did not propound this as the highest and best use of the subject land, but said that it demonstrated flaws in the valuations of the defendants' valuers.

2245 Ms LeFevre initially valued the land on the basis of its imminent urban potential, valuing the land at $40 million. In 2009, she valued the land on the basis that it was zoned urban, valuing the land at $65 million. In 2010, she valued the land for commercial and intensive residential use at $86 million, later allowing some deferral of that amount.

2246 Mr Wilson valued the land in 2007 on the basis that it was rural with some future uncertain urban potential. He valued the land at $10.5 million. In 2009, he reconsidered his view and valued the land at $6.25 million, based on an HSA deferred for 6 years. In 2010, in the process of expert conferral, he revisited his HSA valuation and valued the land at $8.34 million on the basis of a sixyear deferral. In August 2009, he also valued the land on the basis it was zoned urban at $22.6 million. Subsequently, he abandoned that urban valuation in favour of the value produced by his HSA without deferral: $11.84 million.

2247 Mr Zucal's urban potential valuation is his report of February 2007, valuing the subject land at $6.136 million. This valuation is based on comparable sales. Mr Zucal's urban valuation is $7.695 million, based on an HSA.

2248 Mr Liggins did not undertake a conventional valuation of the subject land. I will outline Mr Liggins' evidence in section 9.2.6 below.

2249 The findings I have made in sections 4 to 8 above mean that the land is to be valued on the basis that:

(a) it was zoned rural at the taking date;

(b) its highest and best use reflected its potential future use for urban development;

(c) the hypothetical parties would have thought that:

(i) there was a reasonable prospect that the result of the Planning Review would support shortterm urban rezoning of the subject land;

(ii) there was, however, considerable uncertainty about that prospect, and the odds did not favour that outcome; and

(iii) if the subject land was identified in the Planning Review for immediate urban rezoning, it would take about 5 6 years from the date of taking to achieve the rezoning to urban; and

(d) the plaintiffs' valuers' commercial valuations are of no assistance.

2250 Consequently, attention is to be directed to the valuers' urban potential valuations. Nevertheless, I will make some observations about some of the other valuations because they seem to me to bear on the weight to be given to the valuers' opinions.

2251 As I said in section 7.1, rezoning to urban is a necessary but not sufficient step toward realising the urban potential of rural land. Other factors such as likely development costs, expected demand, and likely lot sale prices will affect the profitability of a contemplated urban development, and thus the value of land's urban potential in the eyes of the hypothetical purchaser. I will say something about these issues in section 9.10.

2252 I outline in sections 9.2.2 to 9.2.6 below each valuers' urban potential valuation, and identify some common ground (9.2.7) and the major issues arising from the valuers' evidence (9.2.8). 9.2.2 Ms LeFevre

2253 In oral evidence, Ms LeFevre says that her urban potential valuation is substantially reflected in her report of 20 April 2008 (exhibit 270B, 36/5 112). In this report, Ms LeFevre values lots 191 and 192 at $40 million. This is based on the land being zoned rural, but with strong potential for rezoning to urban, and that it could be rezoned within a year.

2254 The market value for lots 191 and 192 by a comparable sales method is assessed at $43.8 million, based on $500,000 per hectare. A hypothetical subdivision analysis resulted in a value of $39,250,000. While she considers the best evidence is comparable sales, in the report she adopted the lower of those two figures, then rounded up to $40 million.

2255 The primary valuation method used by Ms LeFevre is comparable sales. The report says, and Ms LeFevre reiterated in her oral evidence, that she also used an HSA as a check method.

2256 Ms LeFevre's valuation report is expressed to be done on the basis that the subject land would have been expected to be rezoned to urban within about a year, and might already have been zoned urban: see exhibit 270B, 36/21 23. In oral evidence, Ms LeFevre said that the valuation was done on the basis that the land could be rezoned within 1 2 years (ts 6322 6323). The report expresses the position that the hypothetical purchaser would have considered there was 'little doubt' or 'little risk' about the urban rezoning of the subject land (exhibit 270B, 36/22 23, 43).

2257 In her oral evidence, she said that she had valued the land on the basis that there would be little or no delay in rezoning, but that in any case, because of the peculiar market circumstances, expected delays in rezoning would make little or no difference to the value of the subject land (ts 6124 6125). She said that in 2006 developers were buying en globo land to land bank, without regard to the timing and extent of its urban potential. I will give closer attention to that evidence, and the foundation for Ms LeFevre's view, in section 9.3.4 below.

2258 Ms LeFevre's April 2008 report sets out a table of relative values for en globo parcels in what she terms the subject area (exhibit 270B, 36/38). This is said to be based on the evidence in the subject area and other localities that she considers show a good degree of comparability. The table sets out a price per hectare for various forms of zoning. Urban land is valued between $700,000 and $800,000; urban deferred is in the range of $500,000 $600,000; and rural (speculative urban) is $350,000 plus. Ms LeFevre suggests the subject land is in the speculative to urban range, between $350,000 and $800,000 per hectare. She allocated lots 191 and 192 a price range of $450,000 to $535,000 per developable hectare (comprising the whole of the site) based on 'the weight of the sales evidence'. She then adopts the midpoint, based on 'further analysis of the more comparable sales' (36/38).

2259 In her written report of April 2008, Ms LeFevre refers specifically to 13 sales that she used for her comparable sales analysis. Seven of these sales were in the subject area and adjacent locality, and six in other localities, mainly Baldivis and one in Wellard. After she had written her first report, she became aware of a transaction involving the

Gold Fortune land. In her April 2009 report, she analysed that transaction and said that it supported her urban potential valuation (exhibit 270C, 39/1085 1086).

2260 In her oral evidence, Ms LeFevre identified five of these 14 sales as assisting her in deriving a per hectare rate for the subject land (ts 6398 6402).

2261 The sales on which Ms LeFevre relies in assessing a rate per hectare are, using her sales numbers from her report:

(a) sale 1, 19 21 Baldivis Road, Baldivis;

(b) sale 2, lots 921 and 922 Baldivis Road, Baldivis;

(c) sale 29, 176 Woolcott Road, Wellard;

(d) sale 28, lots 2 and 105 Doghill Road, Baldivis; and

(e) the Gold Fortune sale.

2262 It can be seen that, of these five, the Gold Fortune sale is the only transaction in the same general locality as the subject land. Baldivis and Wellard are not in the Shire of Murray, or in the Peel ***region***. Whether sales in Baldivis are of assistance as comparable sales is in issue between the valuers; the defendants' valuers say the locations are not comparable. I will deal with that question in section 9.6 below.

2263 The defendants' valuers disagreed with Ms LeFevre's and Mr Brown's analyses of what is revealed by the Gold Fortune transaction. I will deal with that in section 9.5.

2264 Ms LeFevre also relied on an HSA. I will deal with that separately in section 9.10 below.

2265 The remaining nine sales assisted Ms LeFevre to understand the market, but did not help her decide on a per hectare rate for the subject land: (ts 6399 6400, 6611). Ms LeFevre explained the use she made of some of the transactions in her second category (ts 6416 6419). She said she looked at sales in other localities to identify the relationship between the per hectare rate for urban or urban deferred land as against rural land, to assess whether there was a similar relationship in the subject locality (ts 6417 6418).

2266 In her April 2008 report, Ms LeFevre analysed the sale of the Clough/Rapley land (exhibit 270B, 36/30 31). In oral evidence, she said that she considered that it was a contingent sale, but that the conditions of sale indicated market interest and an expectation that rural land in the area could be rezoned. She also said that, if it is accepted as a sale, analysis of it showed a similar per hectare rate as the sales in Baldivis of rural land with perceived urban potential (ts 6419). 9.2.3 Mr Brown

2267 Mr Brown's urban potential valuation opinion is substantially reflected in his written valuation of 30 April 2008 (exhibit 269B, 40/5 144). In this valuation, he uses two methods of valuation to derive a value of $36.5 million for the subject land. Using the direct comparable sale approach, he adopts $420,000 per hectare, producing a value of $37 million. As a check on that, he did an HSA which produced a value of $41.6 million, which, when deferred for two years at 7% per annum, resulted in a value of $36.4 million. In the course of the valuers' conferral in July 2010, he made some adjustments to his HSA. The result of that was a value of $40.7 million, which, when deferred for two years, produced a value of $35.57 million.

2268 His valuation was founded on a view that urban rezoning of the subject land would have been imminent at the date of taking, if it had not already occurred (exhibit 269B, 40/14; ts 6218 6221). He allowed two years of deferral in his HSA, to allow for the time required for the Planning Review. That reflected a delay, but not uncertainty, as to the outcome (ts 6221). Urban rezoning was so close to being a given that it did not matter much (ts 6264 6265).

2269 In his written report and in his oral evidence, Mr Brown says that his valuation is based primarily upon comparable sales (see, for example, exhibit 269B, 40/56). In exhibit 269B, he refers to eight sales of en globo land in Ravenswood, Yunderup, Pinjarra or the surrounding area (40/37 43). Many of these are zoned urban or urban deferred. He also refers to a large number of sales in Baldivis.

2270 In his oral evidence (ts 6419 6422), Mr Brown identified that the sales upon which he relied in coming to a view on value were:

(a) sale 1, Clough/Rapley;

(b) sale 2, Gold Fortune;

(c) sale 9, being various lots on the corner of Baldivis and Zig Zag Road, Baldivis;

(d) sale 10, lots 921 and 922, corner of Folly Road and Baldivis Road, Baldivis;

(e) sale 11, 19 21 Baldivis Road;

(f) sale 12, lots 30 and 31 Kerosene Lane, Baldivis;

(g) sale 17, lots 519 521 Sabina Road, Baldivis; and

(h) sales 18 23 as a package of sales (sale 18 being lot 105 Doghill Road, Baldivis).

2271 Mr Brown explained what he drew from each of these sales in his oral evidence (ts 6422 6430).

2272 This list includes four of the five sales relied on by Ms LeFevre in determining her per hectare value.

2273 It can be seen that the first two sales are in the vicinity of the subject land and the balance are in Baldivis. As I have said, the defendants' valuers say Baldivis sales are not comparable. They also disagree with Mr Brown about what, if anything, can be taken from the Gold Fortune and Clough/Rapley transactions. 9.2.4 Mr Wilson

2274 In his oral evidence, Mr Wilson expressed the opinion that the value of the subject land, as rural land with urban potential, was $8.34 million, as reflected in the joint statement (exhibit 273; ts 6137). That valuation is based solely on an HSA. In his first valuation of the subject land, Mr Wilson took a different approach.

2275 Mr Wilson's first valuation is in his report of 8 February 2007 (exhibit 271A, attachment KW 2, 47/11 80). He valued the land at $10.52 million. He considered that a purchaser would be hopeful of having a rural zoning changed to urban, but would perceive a high risk attaching to any rezoning application being approved in the medium to long term (exhibit 271A, 47/27). He considered a purchaser would be prepared to pay a premium above rural land value in anticipation of a future higher potential use (47/29).

2276 In this report, Mr Wilson analysed a number of sales and other transactions in the general area (exhibit 271A, 47/29 38). He did not reason from these sales, as comparable sales, to deduce a value of the land in the conventional way. Rather, he expressed the view that there appeared to be a proportional relationship between rural land with urban potential on the one hand, and urban or urban deferred land on the other. The first was approximately 34% in value of the second. Using that approach, he derived a value of $120,000 per hectare for lots 191 and 192 (47/39 41).

2277 The plaintiffs' valuers prepared reports responding to this valuation of Mr Wilson and criticising the approach he adopted. However, in his oral evidence, Mr Wilson said that this first valuation had been superseded and could be disregarded (ts 6133, 6199 6201). Consequently, the approach taken by Mr Wilson in his initial valuation was not tested in crossexamination. In those circumstances, I do not put any weight on that approach.

2278 It should be noticed that Mr Wilson's approach in his first valuation involved adopting the view that urban or urban deferred land in the relevant area was worth about $350,000 per hectare (exhibit 271A, 47/39, 41). In later reports, Mr Wilson addressed the question of the value of the subject land on the assumption that it was urban. In those reports, he adopted a quite different approach, producing substantially lower valuations, and made no reference to his view, in February 2007, that urban land was worth about $350,000 per hectare.

2279 By March 2009, Mr Wilson had received substantial planning reports from the planners in this case and the initial valuations of Ms LeFevre and Mr Brown. He prepared a report dated 20 March 2009. In it, he analysed the various planning reports and outlined the view he considered a hypothetical purchaser would adopt. He thought that a hypothetical purchaser would view urbanisation as likely to occur between 2011 and 2014. He adopted 2012. He explained in his oral evidence that he was proceeding on the basis that it was a question of when, not if, the land would be urbanised (ts 6138, 6171).

2280 Consequently, by the time of his report of March 2009, Mr Wilson had a significantly more optimistic view of the urban prospects of the subject land than his view reflected in his first report. Nevertheless, in his report of March 2009, he valued the land at considerably less than his valuation of February 2007.

2281 By March 2009, Mr Wilson had additional available material, including a detailed subdivision plan and engineering advice as to costing. That additional information enabled him to undertake an HSA. Moreover, some of the transactions he had relied upon in his first report were options which, subsequent to his first report, it had emerged had not been exercised. This led him to revisit his first valuation (exhibit 271A, attachment KW 5, 47/89 296). He considered that his initial assessment was too high (exhibit 271A, 47/107 108, 256 258). He referred to the

lower selling rates for urban lots in Ravenswood, the modest selling prices and high development costs as all limiting land value. He also referred to the likelihood of competition from other land earmarked for future urban in the draft LPS (47/256 258). His HSA produced a value of $6.25 million when urbanisation was deferred for 6 years.

2282 Mr Wilson's opinion on value, expressed in his report of March 2009, was based solely on his HSA. There is little direct explanation for this in the report of March 2009. In it, Mr Wilson says that there 'were no directly comparable sales' (exhibit 271A, 47/107 [96]). In his oral evidence, Mr Wilson said that there was no 'direct comparison with comparable sales' (ts 6139) and, later in his evidence, that there were 'no comparable sales' (ts 6200).

2283 In his report of March 2009, Mr Wilson did not test the value obtained from HSA against any indications of value obtained from sales evidence. In my view, the same is true of Mr Wilson's evidence generally. In my opinion, this is a significant weakness in Mr Wilson's analysis. I will return to this in section 9.12.

2284 For example, in his March 2009 report, Mr Wilson analysed the Clough/Rapley transaction (exhibit 271A, 47/137 142). I will outline that analysis in more detail in section 9.4 below. His analysis was to the effect that the transaction should be treated as a sale of lot 301 only, revealing a per hectare rate of $190,000. In other parts of his evidence, Mr Wilson said that that figure, reflecting a transaction of rural land with urban potential in November 2005, could be escalated to July 2006 to a figure of $250,000 per hectare for the Clough/Rapley land, to reflect the rising market. In his March 2009 report and in his oral evidence, there is no reference to the figure derived from that sale in assessing or testing the value of $70,000 per hectare for the subject land, derived by Mr Wilson from his HSA.

2285 In July 2010, after expert conferral, the valuers produced a joint statement. Mr Wilson modified his HSA in the light of that conferral. In particular, some of the entries in the HSA were agreed by the valuers at conferral. He said that his valuation in the March 2009 report was superseded by the modified HSA that he did in the expert conferral (ts 6133). As I have said, based solely on an HSA, Mr Wilson values the land as rural land with urban potential at $8.34 million. In his oral evidence, some corrections to Mr Wilson's HSA emerged. I will explain those in section 9.10 below. The effect of those corrections is that Mr Wilson's HSA suggests an urban potential value of $7.06 million.

2286 Later in 2009, Mr Wilson was asked to value the subject land on the assumption that it was zoned urban. He did so in his report of 10 August 2009 (exhibit 271A, attachment KW 6, 47/297 349). In his report, he made it clear that he did not accept that the land would have been zoned urban (47/311 312). He then put aside that view and assessed the value of the subject land if it had been zoned urban. He did so by reference to the sale of lot 9007, part of Riverland Ramble. He described it as 'the best evidence of value of an en globo urban zone parcel' (exhibit 271A, 47/312 [127]). However, he did not use the sale of lot 9007 to derive a per hectare rate, which could then be adjusted appropriately to take account of differences between lot 9007 and the subject land. He took a quite different approach.

2287 Mr Wilson used the information that he knew about the sale of lot 9007, including its expected lot yield, development costs, sales costs, commission and other costs, to create an HSA for the sale of lot 9007. Mr Wilson made his own assessment of the likely end lot prices, and using the sale price of $15.5 million, derived a profit and risk figure for the purchase of lot 9007. He then used various of the component variables from the lot 9007 HSA as inputs in an HSA for the subject land. He used largely the same income and expenditure items, rate of sale, and profit and risk factor. He used the agreed format for an HSA and the agreed development costs for the subject land. That led to a value of the subject land of $22.6 million (exhibit 271A, 47/312 313, 348 349; ts 6862 6864, 6873 6875, 6901 6905).

2288 In his report of August 2009, Mr Wilson did not comment on the large disparity between the figure of $22.6 million derived in this way and the figure of $9 million derived from his March 2009 HSA with no deferral.

2289 In responsive written reports, the plaintiffs' valuers expressed the opinion that the circumstances of the sale of lot 9007 meant that it was not a reliable indicator of market value.

2290 In his oral evidence, Mr Wilson said that he did not adhere to the approach taken in his report of August 2009 in assessing the urban value of the land. Rather, his urban value opinion was reflected in his valuers' joint report HSA, giving a value of $11.84 million with no deferral (ts 6144 6145, 6864, 6904 6905). Mr Wilson said that that was because, on reflection, he had overlooked the significance of the difference in expected lot size between

Riverland Ramble and the subject land. Riverland Ramble had a general lot size of 650 sqm, whereas for the subject land it was 500 sqm. He had applied the same lot price of $180,000 to the two developments. He considered that that was unrealistic, in that 500 sqm lots would be expected to produce a lesser price (ts 6145, 6864). Further, on reflection, Mr Wilson considered that application of the profit and risk figure of about 20% derived from lot 9007 to the subject land failed to reflect the different risks in the two developments (ts 6904 6905). 9.2.5 Mr Zucal

2291 In February 2007, Mr Zucal valued the subject land on the basis that it was rural with the potential for some possible (unspecified) higher use at some time in the future. He valued the land at $6.136 million. In oral evidence, he said that that valuation continued to reflect his opinion on the value of the subject land (ts 6148).

2292 The form of the report of 13 February 2007 that was tendered by the defendants (exhibit 272A, attachment BEZ 2, 48/9 70) was not the original form of the report of that date. The original form of the report of that date is exhibit 272E. It contains considerably less detail and analysis in relation to comparable sales. The report bearing the date 13 February 2007, tendered by the defendants, was revised by Mr Zucal in March 2008. That is the version of the report to which I will refer below.

2293 Mr Zucal's valuation of 13 February 2007 is done on the basis that the subject land would be seen to have potential for a higher use at some indeterminate time in the future (exhibit 272A, 48/20).

2294 The valuation of February 2007 is based on comparable sales. The comparable sales relied on by Mr Zucal in this report are set out in appendix 1 to the report. In appendix 1, Mr Zucal says that the best areas for comparison are sales in the Pinjarra/West Pinjarra, ***South*** Yunderup and Nambeelup areas (exhibit 272A, 48/34). In those areas he refers to seven sales. These range from about $18,000 per hectare to about $138,000 per hectare. As emerged in crossexamination, the area of these sales ranged from 11 ha to over 90 ha (ts 6527). In his report, Mr Zucal adopted a figure of $70,000 per hectare for the subject land, producing a value of $6.136 million.

2295 It is by no means clear, from reading the March 2008 version of Mr Zucal's February 2007 report (exhibit 272A), how he derived the figure of $70,000 from the seven per hectare rates that varied from $18,000 to $138,000.

2296 In his oral evidence, Mr Zucal said that his view of the urban potential of the subject land was that, based on the economics of subdivision, urban subdivision of the land would not occur until about 10 years after the taking date (ts 6146).

2297 In his oral evidence, Mr Zucal identified the sales upon which he relied in the order of their importance (ts 6431 6433, 6438 6451). The most important sale in Mr Zucal's analysis is lot 23 Pinjarra Road. This 11 ha lot is ***south*** of the part of Ravenswood that is ***south*** of the Murray River. It sold in March 2006 at a rate of about $139,000 per hectare. Mr Zucal described it as providing a ceiling for the per hectare value of the subject land (ts 6440).

2298 On Mr Zucal's analysis, the second most important sale was lot 332 Park Hills Lane, West Pinjarra. That property is well ***south*** of Austin Cove, being ***south*** of Beacham Road. That sale, and the next six in importance for Mr Zucal's assessment, are in precinct 20 of the shire's local planning strategy, being ***south*** of Austin Cove and west of Pinjarra.

2299 In explaining the way in which he assessed each sale, in his oral evidence, Mr Zucal went considerably beyond what had been spelled out in his reports. 9.2.6 Mr Liggins

2300 Mr Liggins expressed an opinion on the value of the subject land. However, his opinion on value was not based on an assessment of the subject land in the orthodox fashion; he reasoned to his opinion in an unconventional way. Mr Liggins expressed an opinion on the value of the Clough/Rapley land, and said that he thought the per hectare rate would be applicable to the subject land. Mr Liggins said that he did not consider his report of 29 March 2010 to be a professionally adequate valuation of the subject land (ts 5232, 5285), although he adhered to his view of the rate per hectare (ts 5285). For the reasons that follow, I do not consider Mr Liggins' evidence assists in assessing the value of the subject land.

2301 In 2008, Mr Liggins valued the Clough/Rapley land as at December 2005 at $250,000 per hectare: exhibit 219B. That was done for a purpose independent of this action. When he did that valuation, he considered that it

was a matter of when, not if, lots 300 and 301 would be rezoned to urban (ts 5241). The comparable sales that he used were properties that were either 'urban or urban assured' (ts 5241).

2302 In assessing the value of the Clough/Rapley land in his 2008 valuation, Mr Liggins took into account the Clough/Rapley transaction of November 2005. Nevertheless, in his 2008 report, he assessed the value of the Clough/Rapley land by reference to other sales and to an HSA, not just by reference to the Clough/Rapley transaction itself.

2303 In his later report of 29 March 2010 prepared for the purposes of this action (exhibit 219A, 46B/250 260), Mr Liggins effectively updated his valuation of the Clough/Rapley land so as to value that land at the taking date. Mr Liggins referred to various transactions, and to market conditions in the period to July 2006. He did three HSAs for a development of 500 lots on the Clough/Rapley land. He concluded that at July 2006, the Clough/Rapley land was worth $425,000 per hectare (46B/257). Then, without any analysis or reasoning, in the immediately following sentences in his report, Mr Liggins expresses the view that the subject land had a value of $420,000 per hectare, producing a valuation of $38.82 million (exhibit 219A, 46B/257). In oral evidence, Mr Liggins agreed that what appears in the valuers' joint statement (exhibit 273) was an accurate description of his valuation method and opinion (ts 5231). The joint statement says that Mr Liggins:

(a) had not prepared a formal valuation of the subject land; and

(b) expressed the opinion that the per hectare value of the Clough/Rapley land would be applicable to the subject land.

2304 Mr Liggins confirmed that, in exhibit 219A, he gave the opinion that his analysis of the Clough/Rapley land was applicable to the subject land (ts 5231). In his oral evidence, Mr Liggins did not articulate reasoning for his opinion that the subject land was worth the same or practically the same per hectare as the Clough/Rapley land.

2305 The plaintiffs also tendered an augmented statement of Mr Liggins (exhibit 219D, 46C/191 197). Mr Liggins' oral evidence left me with serious concerns about the extent to which the augmented statement reflected Mr Liggins' evidence. There were a number of indications that exhibit 219D was prepared by the plaintiffs' solicitors without it reflecting Mr Liggins' opinions and thinking. I will give three examples.

2306 First, in exhibit 219D [2], Mr Liggins refers to Professor Whipple's analysis of the Clough/Rapley and other contracts. Professor Whipple was proposed to be called as a witness for the plaintiffs in this action, but he died before he was called. In July 2010, I ruled that the tender of Professor Whipple's report should be rejected under the Evidence Act s 79C(6): McKay v Commissioner of Main Roads [No 2] [2010] WASC 153. In exhibit 219D [2], Mr Liggins said that he adopted Professor Whipple's analysis as his own. In crossexamination, Mr Liggins was asked a number of questions about the discounting of the gross price of $7.5 million in the Clough/Rapley contract to produce a discounted price of $7.3 million. He said that he received a number of different analyses from various people and took them into account. He was unable to say how he had decided among them (ts 5258 5262). In effect, Mr Liggins accepted that he could not 'make head or tail' of the calculations and that these types of matters were 'not [his] game' (ts 5267).

2307 Secondly, exhibit 219D [2(a)] incorrectly states that Mr Liggins had previously relied on the Frost sale, or Professor Whipple's report relating to the Frost sale. The Frost sale was not mentioned in his first statement, or in his 2008 valuation. Mr Liggins agreed that this part of the augmented statement was drafted by the solicitors and that he did not check it carefully enough (ts 5269).

2308 Thirdly, and of most concern, is what is contained in exhibit 219D [8(c)]. Paragraph 8 of the augmented statement was said to explain the basis for the opinion Mr Liggins had expressed in his report of 29 March 2010 (exhibit 219A, 46B/256), which included the proposition that the ***region*** was undergoing a rapid population increase. Paragraph 8(c) of Mr Liggins' augmented statement is in these terms: The rapid population growth was set out in a number of studies. The study which I have identified closest to the date of the taking was the Department of Local Government and Regional Development's Study which was based on material provided to it by the [DPI] dated July 2006 which is attached hereto and marked 'DL1'. However this is simply a reflection of other publications that refer to the high population growth in the Peel ***Region*** (exhibit 219D [8(c)]).

2309 The plain meaning of [8(c)], read in its context, is that Mr Liggins had relied on the study of July 2006, to which he referred, in expressing the opinion in his statement of 29 March 2010 about rapid population growth. However, it

is clear from Mr Liggins' evidence that the position is otherwise. He accepted that this was another example of something in the statement drafted by the solicitors that was not correct and which he failed to check (ts 5280). Mr Liggins' evidence in crossexamination was that until the draft of his statement arrived, with the document attached, he had never seen the document (ts 5278 5280). Accepting, as I do, that to be the case, the augmented statement should not have been prepared in the form that it was. The statement seems to me to create a quite misleading picture.

2310 Mr Liggins' evidence involves primarily a valuation of the Clough/Rapley land, and secondarily, the valuation of the subject land on the basis that it was worth the same per hectare as the Clough/Rapley land. In my view, it is not of assistance in either respect.

2311 Insofar as Mr Liggins' evidence expresses a view of the value of the subject land, that view is based on an unexplained assertion or implication of an opinion that this land is worth the same or practically the same per hectare as the Clough/Rapley land. That is an inadequate foundation for drawing conclusions about the value of the subject land.

2312 Further, insofar as Mr Liggins' reasoning has been exposed, it is evident that he has not taken into account a number of material considerations. In expressing his view in exhibit 219A, that the value of the subject land was practically the same per hectare as the Clough/Rapley land, Mr Liggins did not consider and compare how Network City or the IPRSP dealt with the two properties (ts 5272). He did not consider the possibility that they had different development costs, or whether there was a difference in the deferral period for any development (ts 5272 5274).

2313 I do not accept that the per hectare rate for Clough/Rapley can simply be applied to the subject land to determine the value of the subject land. Mr Liggins' opinion of the value of the Clough/Rapley land is founded on his view that it was a question of when, not if, the Clough/Rapley land would be rezoned. On my findings, the position is quite different regarding the subject land. In itself, that significant difference in perceived rezoning potential means that a per hectare value of the Clough/Rapley land cannot be simply translated to the subject land. There are additional reasons why that is so, such as the difference in size, and the considerable advantage of the river and creek location of lot 301. I will return to this in section 9.4.10.

2314 Insofar as Mr Liggins' evidence expresses an opinion about the per hectare value of the Clough/Rapley land, I do not think that opinion is to the point. My task is to value the subject land, not to value the Clough/Rapley land. In valuing the subject land I am assisted by consideration of the Clough/Rapley transaction as market evidence; what it reveals about the value of that land as reflected in the transaction; and what that suggests about the value of the subject land. I am not assisted by a valuer's opinion on the value of the Clough/Rapley land, independent of the Clough/Rapley transaction. I am assisted by comparable sales, not by 'comparable' valuations.

2315 For these reasons, I do not consider Mr Liggins' evidence to be of assistance. 9.2.7 Valuation methodology and general principles: common ground

2316 A number of matters were not in issue or not substantially in issue between the valuers about valuation methodology.

2317 First, if there are comparable sales, the comparable sales method is generally preferable to valuation based on an HSA. Ms LeFevre, Mr Brown and Mr Zucal applied that general approach in adopting comparable sales as their sole or primary method of valuing. Mr Wilson agreed that the primary method of valuation is comparable sales method, if there are any: see exhibit 273 [3.2(ii)]; ts 6196 6201.

2318 Secondly, the experts were in agreement about factors to be considered in determining whether a sale was comparable. In Cerini v The Minister for Transport [2001] WASC 309 [106], Parker J said that relevant factors include contemporaneity, topography, zoning, size, proximity, utility, position, potential, site coverage and development controls. In substance, the evidence of the valuers was to the same effect: see Ms LeFevre (exhibit 270B, 36/26 27; exhibit 270C, 39/1076); and Mr Zucal (exhibit 272A, 48/34; ts 6524).

2319 Thirdly, in seeking to identify comparable sales, one should start close to the subject land (ts 6504 6505, 6572).

2320 Fourthly, the valuers acknowledged that in some cases there may be many directly comparable sales; in another situation there may be very few sales which give any assistance at all. In a sense, to some extent a valuer must make the best of whatever is available by way of comparable sales (ts 6470 6471, 6572). The idea can be

expressed in this way. If there are a number of directly comparable sales, then a sale that has many more differences might safely be able to be given little or no weight. If, on the other hand, that latter sale were the only sales evidence, closer attention would need to be given to see what, if any, assistance could be derived from it.

2321 Fifthly, for rural land with urban potential, the price paid will generally increase with the degree of confidence the purchaser feels about the prospects of urban rezoning (ts 6626 6628). However, Ms LeFevre said that market conditions at the date of taking meant that that general approach was not being adopted (ts 6628). I will deal with that opinion in section 9.3 below.

2322 Sixthly, in assessing a per hectare rate for a comparable sale intended for urban subdivision, regard must be had to the extent of the developable area of that land. However, it would be wrong to simply divide the purchase price by the number of developable hectares. For example, some undevelopable areas may be attractive, such as a wetland, or may be used to set off public open space requirements.

2323 Seventhly, if the comparable sale involves deferred settlement beyond the usual period of settlement, some discount should be applied to the nominal contract price of the comparable sale. See, for example, ts 6720 6726, 6682 6683.

2324 Eighthly, the valuers agreed that, generally, a parcel of en globo land intended ultimately for urban use will attract a higher per hectare rate than a much larger parcel. See, for example ts 6499, 6567, 6599. However, Ms LeFevre said that the state of the market at the date of taking was such that there would have been little discount of this kind (ts 6499 6500). A large parcel in one location has some advantages (ts 6499). She did not identify any transactions or other particular evidence in support of that assertion.

2325 Whether there should be a discount for magnitude in using the per hectare rate from a sale of a smaller property as a comparable sale to assess the value of a larger property depends on the evidence; it is not a matter of law: WAPC v Arcus Shopfitters [80] [82].

2326 Whether there should be a discount for magnitude and, if so, of what order depends, of course, on, among other things, the relative and absolute scale of the differences in size of the sold land and the subject land, and the expected purposes of acquiring the land. Here, the subject land would be acquired for future urban development and subdivision. As the staging of Riverland Ramble demonstrates, the scale of the subject land would mean that urbanisation would occur in stages over many years. Given holding costs, I think it likely that land that was, say, about half the size of the subject land, or less, that was acquired for future urbanisation, would attract a higher price per hectare (all other things being equal) than the subject land.

2327 Quantifying a discount for magnitude is difficult. I do not accept the approach taken by Mr Zucal in applying a discount for magnitude to the sale of lot 23 Pinjarra Road (ts 6438 6440). He derived a percentage by comparing the per hectare rates of two urban sales: lot 9007, 42 ha at $368,000 per hectare; and lots 81 83 Pinjarra and Boys Roads, Pinjarra, 5.76 ha at $844,000 per hectare. The larger property's per hectare rate was 43.6% of the rate for the smaller property. He applied that 43.6% to the per hectare rate of the smaller property, lot 23 (11 ha at $139,000 per hectare) to derive a per hectare value for the subject land of $60,000. There seem to me to be a number of flaws in this approach. Apart from anything else, it involves the unsafe assumption that size is the only explanation for the difference in per hectare value for lot 9007 and lots 81 83.

2328 I will deal with questions of discount for magnitude in the context of the specific comparable sales in which the question arises.

2329 Ninthly, the valuers agreed, unsurprisingly, that all other things being equal, higher end lot prices in one area compared to another would mean higher en globo land prices in that first area (ts 6463 6464).

2330 Tenthly, the valuers agreed on a number of elements of the HSA for the subject land. They agreed that the HSA should be based on the GRA concept plan (exhibit 191A, 25/392). An extract of the GRA concept plan is in Appendix 4 to these reasons. In conferral, they agreed the appropriate format for the HSA, and agreed a number of the component variables for the HSA. 9.2.8 Valuation evidence: summary of issues

2331 The first and most important issue is whether there are any comparable sales that assist in assessing the value of the subject land and, if so, which sales are comparable. The plaintiffs' valuers' valuations are founded primarily, if not almost entirely, on comparable sales. Mr Wilson says there is none. Ms LeFevre relies on the Gold Fortune sale, sales in Baldivis, and a sale in Wellard. Apart from the Wellard sale, Mr Brown relies on the sales

relied on by Ms LeFevre, the Clough/Rapley sale and other sales in Baldivis. Mr Zucal relies on lot 23 Pinjarra Road, a number of sales ***south*** of Austin Cove and some other sales.

2332 Secondly, there are issues about the proper analysis of, and what can be derived from, some of the transactions relied upon as comparable sales, particularly the Clough/Rapley and Gold Fortune transactions.

2333 Thirdly, there are issues about the reliability of the sale of lot 9007 as sales evidence and, to the extent that it is reliable, what can be derived from it.

2334 Fourthly, there are issues about the appropriate HSA for the subject land. The major points of departure are selling prices, the selling period, the profit and risk factor and the costs of project management.

2335 Finally, there are issues about the comparative weight to be given to comparative sales and the HSA method in valuing the subject land.

2336 In section 9.3, I will make findings about the market conditions in Ravenswood and Murray at the date of taking. In that section, I will consider Ms LeFevre's evidence that, in the peculiar market circumstances at that time, developers were buying land with urban potential without regard to the timing and extent of that urban potential.

2337 In section 9.4, I will analyse the Clough/Rapley transaction. Section 9.5 will deal with the Gold Fortune transaction. Section 9.6 will consider Baldivis sales and determine whether and to what extent they are comparable or of assistance. Section 9.7 deals with the sale of lot 9007. In section 9.8, I will deal with Mr Zucal's comparable sales, including lot 23 Pinjarra Road. In section 9.9, I will set out observations on what can be derived from the comparable sales. In section 9.10, I will make findings about the valuers' competing HSAs. In section 9.11, I will deal with Mr Brown's valuation on the basis that the land is special rural. In section 9.12, I will explain the reasons why I am unable to accept any of the valuers' opinions on the value of the land. In section 9.13, I will make my findings about the value of the land.

9.3 Market conditions 9.3.1 Introduction

2338 In this section 9.3, I will make some findings about the market conditions at the date of taking. Section 9.3.2 deals with the supply of and demand for residential lots in Peel and Murray. In section 9.3.3, I will make findings about the level of market activity and developer interest in en globo land in the Peel ***region*** generally, and in the Shire of Murray in particular. In section 9.3.4, I will consider Ms LeFevre's evidence that, in the peculiar market conditions in Peel in 2006, developers were purchasing rural land with urban potential without the timing and extent of that potential affecting the price they were prepared to pay.

2339 In section 9.3.5, I will consider a related but different question the conditions in and ***around*** Ravenswood in the assumed absence of the proposed public works. The plaintiffs' valuers, especially Mr Brown, adopt the view or assumption that the Highway substantially 'blighted' Ravenswood; in the absence of the Highway, Ravenswood would have been much more developed than it in fact was. As I will explain in section 9.3.5, I take a different view.
9.3.2 The market for residential lots

2340 As I outlined in section 7.5, in 2006 there was a marked shortage of available residential lots in the Perth metropolitan area and in Peel. Among the factors contributing to the shortage of residential lots were delays in progressing conditionally approved subdivisions to lot production. In 2006, new residential lots often sold immediately on release. At times, purchasers were camping out in order to secure a lot.

2341 The unusual level of demand, relative to supply, meant that developers were accelerating their planned staging of lot production. That, in turn, increased developers' demand for en globo land for land banking purposes. I will say more about that in section 9.3.3.

2342 From 2004, up to and past the date of taking, there was a very significant property price boom in the metropolitan area and in Peel. In several of the valuers' reports, it is described as unprecedented. Mr Brown said that it was the biggest boom of his life (ts 6204). Mr Wilson appeared to agree (ts 6780).

2343 I will say more about the extent of the increase in lot prices and en globo land prices in 2005 and 2006 in section 9.4.8 below.

2344 I turn to lot sale activity in the Shire of Murray.

2345 Until 2004, there were very limited sales of new lots or new building approvals in the Shire of Murray (see the January 2006 MDP report, exhibit 94, 1/9/279, 336, 374 375). By contrast, there was very considerable activity in Mandurah. Parts of Riverland Ramble were rezoned to urban in 1995. Parts of MRCE were rezoned to urban in 1996. Riverland Ramble was not developed to the point of producing new lots until 2004. MRCE did not start producing lots until 2004. I infer that that was because until about 2003/2004, the developer of each of those estates did not perceive there to be sufficient demand for lots at a price that made urban subdivision economical. There is support for that view in the evidence of Mr Ray Jones, one of the principals of the company owning Riverland Ramble in this period (ts 5014).

2346 The first lots were not sold in Austin Cove until November 2007. Similar inferences can be drawn about this.

2347 The statement of Mr Ian Phipps, project manager of the Riverland Ramble estate, provides information about the timing of sale of lots in that estate (exhibit 79). The first stage was put on the market in 2004. Settlements of the first stages, stages 1A and 1B, occurred soon after certificates of title were issued for the lots in April or May 2005. Titles for stages 2A and 2B were released in April or May 2006, and for stage 3 in September 2006. Thus, the first settlements of sales occurred in June 2005. Contracts for the sale of the lots in stages 1A and 1B were made at various dates from 2004 to 2006. The majority were contracted in 2005: see exhibit 79, 46/435 437.

2348 Settlement of sales of the lots for Riverland Ramble occurred between June 2005 and December 2006 as follows (exhibit 79 [2]):

Month
Quantity
June 2005
41
July 2005
9
August 2005
6
September 2005
2
October 2005
6
November 2005
5
December 2005
4
January 2006
2
February 2006
2
March 2006
9
April 2006
15
May 2006
36
June 2006

18
July 2006
3
August 2006
5
September 2006
5
October 2006
55
November 2006
4
December 2006
1
Total
228

2349 It can be seen, therefore, that about 150 lots in Riverland Ramble had been sold and settled by the taking date.

2350 MRCE started selling lots in 2004. By the taking date, about 180 lots had been sold in several stages: see exhibit 109.

2351 In October 2006, the 45 lots comprising stage 7 of MRCE were substantially all sold at auction. The lots were sized from 550 800 sqm. The average price was $175,000 per lot. The 550 sqm lots sold for about $160,000 (exhibit 74 [19] [20]).

2352 I will say more about sale prices and lot sizes when I consider the HSAs in section 9.10.

2353 Mr Phipps says, and I accept, that if more lots had been available in Riverland Ramble in 2006, more sales would have been made (exhibit 79 [10]). See also the evidence of Mr Jones to the same effect (exhibit 211A [14]). Mr Ayres says the same in relation to MRCE (exhibit 74 [21]). In the conditions of the market in 2006, I accept that that is so.

2354 Thus I accept the evidence of Mr Brown and Ms LeFevre that, in 2005 and especially 2006, the number of lots sold in the Shire of Murray reflected the then limited supply of available lots and did not reflect the full extent of demand (exhibit 270E, 39/1149 1150; exhibit 269D, 44/1506). 9.3.3 The market for en globo land

2355 It was common ground between the valuers that at and ***around*** the date of taking, there was a very high level of market activity, and developers were seeking to acquire en globo land holdings of rural land with urban potential to land bank for future development: see Mr Wilson (exhibit 271A, 47/142 [155]); Mr Brown (exhibit 269G, 44A/1672 1673); Mr Liggins (exhibit 219A, 46B/252); and Ms LeFevre (exhibit 270F, 39A/1217). See also the evidence of Mr Farris (exhibit 73 [23] [24]).

2356 As will be seen in more detail later in this section 9, there were very few completed sale transactions of en globo land in the vicinity of Ravenswood in or ***around*** 2006. The plaintiffs sold the Clough/Rapley land in November 2005. The Gold Fortune land was the subject of an option entered into in July 2006. That option was exercised in August 2007. In March 2006, the owners of lot 52 entered into an option providing a purchaser with the option to acquire the land (statement of Mr Tyler, exhibit 84 [18]). The land has category conservation wetlands on it. I infer that that led to the option not being exercised. An option was entered into to acquire lot 41, the site of the old Ravenswood drag strip, in September 2006. The option was not exercised (exhibit 77, statement of Mr Florrison, a representative of the owner). The land is constrained by environmental considerations, including its proximity to the conservation category wetland on the adjoining lot 52. I infer that those constraints dampened interest in lot 41. There was significant interest shown by developers: see exhibit 77.

2357 In his written reports, Mr Wilson expressed the view that, given the lack of sale transactions in the area, there was no developer interest in the locality of Ravenswood. See, for example, his March 2009 report, exhibit 271A, 47/89 296 [38], [264], [269]. I do not accept Mr Wilson's view that there was, in the years 2004 to 2006, no interest shown by developers in the Ravenswood locality.

2358 In my opinion, the evidence establishes that there was significant developer interest in en globo land in Murray and Mandurah, including in the general vicinity of Ravenswood. I have already referred to the evidence of Messrs Florrison and Tyler. Their evidence establishes that developers showed substantial interest in lots 52 and 41. The land north of Old Mandurah Road was held by a small number of landowners: the Kellihers, the Mannions, the Emmanuels and the plaintiffs. There is evidence of significant developer interest in 2005 and 2006 in the Kelliher land: see exhibit 108, the statement of Mr Kelliher. In my view, the absence of sales in the vicinity did not reflect a lack of developer interest. Rather, it reflected that the small number of owners with large landholdings in the area wished to hold their land for future development and did not wish to sell it to developers. Further, unlike the subject land, some of the land in the area had significant environmental constraints. See also the statements of Mr Blowes (exhibit 230 [5] [9]) and Mr Farris (exhibit 73 [4] [9]). 9.3.4 Was the timing and extent of urban potential relevant to the price paid by developers?

2359 As I have said, it is common ground that ***around*** the time of the taking, developers were buying rural land with perceived urban potential for land banking purposes. Ms LeFevre's evidence is that the expected timing of urban potential was not influential on the price paid for rural land. In other words, she considered that rural land with perceived urban potential would attract much the same price regardless of whether it was expected that it could be successfully rezoned to urban in the short term, or would take an uncertain or long time (ts 6123 6124, 6168 6169, 6290, 6299 6301, 6304 6306). Ms LeFevre expressed the same view in her first report (exhibit 270B, 36/24). Mr Brown expressed a similar view (exhibit 269G, 44A/1673; ts 6115 6116).

2360 Mr Wilson expressed a contrary view. He considers that an expectation of urban potential in the long term, compared to the short term, would make a very definite difference in the price paid (ts 6302). As an illustration of this, the difference between an expectation of rezoning in 1 2 years compared to rezoning in 6 years would affect the price to be paid (ts 6303).

2361 Ms LeFevre also expressed the view that, contrary to the normal position, in the market circumstances in 2006, the degree of perceived likelihood of urban rezoning did not affect the price paid for the land (ts 6628). Mr Wilson expressed a contrary view. He considers that the extent of premium paid above rural value was affected by the degree of likelihood of rezoning (exhibit 271A, 47/142 [156]).

2362 For the reasons that follow, I do not accept Ms LeFevre's opinion in these respects.

2363 My starting point is that, to my mind, Ms LeFevre's view does not make commercial sense. For land of the relevant character, the purpose of acquisition is to generate profit by subdividing and selling the land in residential lots. There are costs in holding land. Land with an ability to produce lots, and thus revenue, sooner would consequently be expected to attract a higher price. The same is true of land with a perceived higher probability of urban rezoning. Consistently with this, Ms LeFevre accepts that, generally, the market price for land is affected by the expected timing of rezoning (ts 6295) and the degree of confidence in rezoning (ts 6628).

2364 That invites close attention to the basis for Ms LeFevre's view that the market was acting differently during 2006. Ms LeFevre's view about the conduct of the market is based squarely on what she derived from comparable sale transactions (ts 6123, 6168, 6300, 6303, 6628).

2365 Ms LeFevre explained how a comparable sale transaction supported her view by reference to the Gold Fortune transaction. She said that that transaction illustrated her view that the price paid for land was independent of whether the land could be rezoned and developed in the short term or in a longer or indeterminate period (ts 6306). She said that that was because in the circumstances in which the option was exercised, the timing of rezoning would have been unknown (ts 6306). The same reasoning is evident in earlier parts of her evidence. Ms LeFevre said that the timing of rezoning had no impact on the assessment of value because 'on the basis of the comparable sales, the question of whether some of the other land within the sales could be rezoned within a certain period was uncertain and unanswered' (ts 6168). Whether the land could be rezoned in two years or in four years

would make no difference to value 'because none of the sales had any certainty as to when they might be rezoned' (ts 6169). In other words, Ms LeFevre's logic is that:

(a) in some of the relevant sales, it was unclear and uncertain when and whether the sold land would be rezoned to urban; and

(b) consequently, the purchaser had proceeded on the basis that the timing of urban rezoning was not important.

2366 I accept the first proposition, but not the second. In my view, the proper inference from transactions such as the Gold Fortune transaction is that the purchaser would have made its own assessment of the expected timing and likelihood of urban rezoning and factored that assessment into the price which it was willing to pay to acquire the land.

2367 Consequently I do not consider that the Gold Fortune transaction provides any support for this view of Ms LeFevre.

2368 Ms LeFevre did not identify any other sales evidence which supported her opinion that the timing and extent of urban potential did not affect the price paid for rural land.

2369 I accept that, in the first half of 2006, the real estate market was 'hot' and prices were rising very rapidly. However, that does not mean that purchasers were ignoring the extent of perceived potential for and likely timing of urban rezoning of rural land in determining the price they would pay for it.

2370 For these reasons, I do not accept Ms LeFevre's opinion in this respect. If I did accept the evidence, there would be a question whether the prudent, wellinformed hypothetical purchaser would act in the same way as developers were in 2006 (according to Ms LeFevre). It is not necessary to determine that question. 9.3.5 Was Ravenswood 'blighted by the Highway'?

2371 On many occasions and in many contexts, Mr Brown asserted that the blight of the Highway had impeded development in and ***around*** Ravenswood, including:

(a) on the subject land (ts 6157, 6161, 6163, 6217, 6464);

(b) on other land in the locality, including lot 190 (ts 6932);

(c) at Riverland Ramble (ts 7084);

(d) in and ***around*** Ravenswood generally but for the blight, Mr Brown believed that Ravenswood would have had comparable urban development to Baldivis (ts 6496, 6604 6605, 6624 6625; see section 9.6.2.2); and

(e) rural residential sales in Thomasfield, although when challenged he withdrew that assertion (ts 6848 6849).

2372 I will outline some of this evidence in more detail in section 9.6.2.2.

2373 I have already found that:

(a) the zoning and urban development of the subject land and land ***around*** Ravenswood was not adversely affected by the Highway in the preIPRSP period (see section 4.10); and

(b) the designation of the urban and future urban land in the IPRSP, to form the Ravenswood urban node, would not have been different in the assumed absence of the proposed public works (see section 5.6).

2374 In light of these findings, I am not persuaded that the extent of urban zoning and development in Ravenswood in 2006 would have been any greater in the assumed absence of the proposed public works, particularly the Highway, than it in fact was. If the assumed absence of the Highway makes any difference to the extent of urban development ***around*** Ravenswood it is to decrease, to a small extent, demand for residential lots. Thus, I do not accept what I think is a significant element of Mr Brown's reasoning.

9.4 The Clough/Rapley transaction 9.4.1 The Clough/Rapley land

2375 In 2005, the Clough/Rapley land was 55.5201 ha, comprising lot 300 (13.823 ha) and lot 301 (41.697 ha).

2376 From 1990 to 2006, it was owned by the plaintiffs. It was previously lots 187 and 188. Some of lot 301 was taken in 2006 by force of the Taking Order and the balance became lot 544. I will refer to the land as it was in 2005, when the contract of sale of lots 300 and 301 was entered into.

2377 The location of the Clough/Rapley land can be seen in exhibit 202, set out in section 1.4 above. The Clough/Rapley land is immediately southwest of the subject land. It is ***south*** of Pinjarra Road and north of Wilgie Creek. On the other side of Wilgie Creek is the established residential area of North Yunderup, between Wilgie Creek and the Murray River. The Gold Fortune land is immediately west of lot 300.

2378 The eastern part of lot 301 abuts the Murray River. Some of the land is in the floodway and so is constrained for development. Some of the land has wetlands, also precluding development.

2379 The land is shown as 'greenbelt rural living' in the IPRSP. It was zoned rural in the PRS and was designated urban in the draft LPS and 'future communities' in Network City. 9.4.2 Background to the sale

2380 By an undated memorandum prepared by Cornerstone Legal, the plaintiffs invited tenders for the purchase of lots 300 and 301 (exhibit 144, 2/1/3). The document invited tenders, closing on 21 September 2005, to be submitted to Mr Houweling at Cornerstone Legal.

2381 In the introduction, it was said that: The property represents a rare opportunity for a developer or investor to secure a strategically located and significant land holding in a strategic location near the soon to be constructed Bunbury bypass road. The land is located in close proximity to the proposed commercial centre of Ravenswood and bounded by the prestigious North Yunderup residential area (exhibit 144, 2/1/5).

2382 The executive summary stated that the site will have easy access to Perth and Bunbury. Under the heading 'Proposed Zoning', is the following: The Shire of Murray [Local Planning] Strategy has identified this land for rezoning to urban. While the [PRS] must be amended to reflect this proposal, a critical shortage of residential land has been identified within the Peel ***Region***, with remarkable growth being experienced within Mandurah. As such, it is anticipated that this land will be included in any amendment to the [PRS] (exhibit 144, 2/1/6).

2383 In the section headed 'Location', it was stated that the proposed Bunbury bypass road will pass in close proximity to the site, providing excellent linkages through to the City of Perth and ***south*** to Bunbury. It was also stated that development proposals were likely to take advantage of the fact that the site adjoins the Murray River (2/1/7).

2384 It was identified that approximately 4 ha surrounding the homestead was intended to be retained by the owners.

2385 The memorandum stated that the IPRSP was undergoing amendment and that it was envisaged that any amendment to the PRS to rezone the property will occur at the same time to accommodate amendments to the IPRSP (2/1/14).

2386 Under the heading of 'Anticipated Contractual Terms', it was stated that it was expected that tenderers would submit tenders for the land for a value in excess of $14.3 million. While the owner's preference for an unconditional offer was stated, terms that may be acceptable to the landowner included a condition that the land be rezoned to urban, with settlement within 45 days of the rezoning, and the contract being for a period of one year (2/1/15).

2387 A subdivision concept plan was attached to the tender document as appendix 2 (2/1/21). It included an area of wetland, some regional open space and an area for the widening of Pinjarra Road.

2388 By this time, there had been discussions and correspondence from Mr Robinson and Mr Houweling on behalf of the plaintiffs to and with the Peel ***region*** office of the DPI, including Mr Bulstrode. See the letters of 6 April 2005 and 5 August 2005 (both part of exhibit 9, 2/1/32 35), the record of discussion of 9 August 2005 (exhibit 252A, 2/1/22); the report of the PRPC of 25 August 2005 (exhibit 9, 2/1/27); and the minutes and decision sheet of the meeting of the PRPC of 16 September 2005 (exhibit 49, 3/19/19 22; exhibit 10, 2/1/135). The upshot was that the PRPC resolved on 16 September 2005 not to initiate an amendment to the PRS to include the Clough/Rapley land in the urban zone, pending the outcome of the Planning Review. The shire had expressed its support for the proposed rezoning and subdivision.

2389 The tenor of exhibit 144, the memorandum inviting tenders, suggested a very high degree of confidence that the Clough/Rapley land would be rezoned to urban following the review of the IPRSP. Of course, the memorandum was prepared by the plaintiffs, as sellers, to encourage purchasers. It does not necessarily reflect the perspective of the purchaser about rezoning prospects. Mr Tucker's evidence was that the purchaser expected to achieve

rezoning in about three years (exhibit 143A [13]; ts 3008), although he thought it may be sooner because the amendment might be able to be progressed separately from the IPRSP review (ts 3010, 3045).

2390 The purchasers' expectations of urban rezoning were also reflected in the valuation prepared for it in February 2006 by Burgess Rawson (exhibit 67, 2/1/159 pt 5.1). These passages reflected the purchasers' thinking at the time of contracting (ts 3020).

2391 All the indications are that the parties entered the Clough/Rapley contract with a confident expectation that the urban rezoning of the Clough/Rapley land was likely to be approved within three years, although it was not certain.

2392 In considering the purchase of the land, the purchasers considered the developable area to be 42.3933 ha. Some land was required for regional open space, some for the widening of Pinjarra Road, and some as a 'Resource Enhancement Wetland': exhibit 143A [7]. Mr Tucker explained his thinking, on behalf of the purchasers, in purchasing the land on the terms in the contract (exhibit 143A and exhibit 143B; ts 3025 3026). 9.4.3 The contract

2393 On 14 November 2005, the plaintiffs entered an agreement with parties, to whom I will refer as Clough/Rapley, for the sale of lots 300 and 301. The contract is exhibit 64, 2/1/41 124.

2394 The purchase price was $14.3 million plus $6,500 per lot permitted by the approved subdivision plan. Clause 2.2 set out the time of payment for the purchase price. It was subsequently varied by a deed of variation. In substance, before amendment, cl 2.2 provided for payment in four instalments on fixed dates, totalling $7.5 million; then payment of $6.8 million within two weeks of the buyer obtaining rezoning approval to rezone lot 300 from rural to urban residential; and, within 10 days of the buyer obtaining an approved subdivision plan, the buyer paying $6,500 per lot permitted by the approved subdivision plan.

2395 Settlement in respect of lot 301 was 27 March 2006. For lot 300, settlement was within 10 business days of the buyer obtaining rezoning approval of both lots (subject to cl 2.5): cl 2.3.

2396 If rezoning approval was obtained early, then all of the $14.3 million was payable within 10 business days thereafter and settlement would proceed accordingly.

2397 Clause 2.5 is lengthy. Its full terms are set out in Appendix 5 to these reasons. The substance is, in summary, as follows:

(a) if rezoning approval for both lots is not obtained within three years, the buyer can, within the following two years, elect to exclude lot 300 from the agreement (cl 2.5(a)(i));

(b) in that event, the purchase price of lot 301 is $7.5 million, satisfied by the payments already made (cl 2.5(a)(ii));

(c) if rezoning approval is not obtained within three years, the buyer can, within the next two years, elect to proceed to settlement of lot 300 (cl 2.5(b));

(d) if the buyer elects to exclude lot 300, or if no election is made either way in the two years after rezoning approval is not obtained, the plaintiffs had an option to repurchase lot 301 for $7.5 million, with certain adjustments to be made (cl 2.5(c)); and

(e) if the buyer excluded lot 300 and the seller did not exercise the option to purchase lot 301, or if no rezoning occurred after three years, but the buyer elected to proceed under cl 2.5(b) in respect of lot 300 and no rezoning had occurred within five years from the date of the agreement, there is a mechanism to determine the additional purchase price payable. In substance, the additional price is the difference, assuming it is positive, between the then current market value and the price already paid for the land being purchased by the buyer (being both lots in the second scenario and lot 301 only in the first scenario) (cl 2.5(d)).

2398 By cl 2.8, the seller was entitled to retain possession of lot 301 after settlement until the earlier of settlement of lot 300 or five years from the date of the agreement.

2399 By cl 4, the buyer was responsible for pursing the rezoning applications.

2400 Clause 11 entitled the plaintiffs to excise an area of approximately 4 ha as a residential area from lot 301 at settlement of the sale of that property. The clause provided that if the excision did not occur on the date of settlement, the buyer shall hold the land in trust for the seller until such time as the residential area is subdivided and transferred to the seller. The proposed subdivided area was set out on a plan annexed to the deed (exhibit 64, 2/1/95). 9.4.4 Variations to the contract

2401 Subsequently, by letter in August 2006 (exhibit 66, 2/1/ 204 206), the residential area was varied by agreement so as to increase it by 0.5204 ha. The letter agreement reflected that that led to a reduction in price of $170,772.

2402 The plaintiffs and Mr Brown point to this as evidence of a value of $340,000 per hectare. However, I do not think much weight can be given to an adjustment in respect to an area of only half a hectare.

2403 The parties entered into a deed of variation on 22 May 2006 (exhibit 65, 2/1/190 203). It varied the terms of payment of the first $7.5 million of the purchase price. By May 2006, the first instalment of $1.5 million had been paid. The effect of the variation was that $4.5 million was payable on settlement, due on 26 May 2006, and $1.5 million was payable on 27 September 2007. 9.4.5 The valuers' views of the transaction 9.4.5.1 OVERVIEW

2404 The valuers express different views of this transaction. By way of overview:

(a) Mr Zucal says that the contract is convoluted and conditional to the point that, as a professional valuer, he would not rely on it.

(b) Mr Wilson attempts to analyse the contract to distil from it a core reliable sale for use as evidence, deciding that it showed a committed sale of lot 301 for $190,000 per hectare.

(c) In her reports, Ms LeFevre takes the contract to be a sale of lots 300 and 301 for $17,420,000, a net present value (NPV) of $15,152,498 as at the date of contract, with escalation of 50% to the date of taking. However, in oral evidence, she did not rely on it.

(d) Mr Brown treats the contract as a sale of lots 300 and 301 at a contract price of $14.3 million plus $6,500 per lot, an NPV of $15,334,400 at November 2005, to give a rate of $311,655 per hectare, which he escalates by 25% 45% per annum to the taking date, giving a comparable sale at over $400,000 per hectare.

2405 I will outline each valuers' views in more detail. 9.4.5.2 MR BROWN

2406 The Clough/Rapley transaction was one of the sales on which Mr Brown relied in coming to a per hectare view on value (ts 6420, 6422).

2407 He described lots 300 and 301 as being 'part of the subject land' (ts 6420, 6422). He was asked what he meant by that and the significance, if any, for his valuation, on two occasions. It is not clear how, if at all, he used that notion. See ts 6632, 6668 6670. I do not think his evidence on this point made sense.

2408 Mr Brown's analysis proceeded as follows. The total purchase price for both lots was $14.3 million plus $6,500 per lot. Based on 520 lots, and after adjusting for the delayed settlement, he considered that the contract price in November 2005 was $15.334 million. He treated the land area as 49.203 ha. That produced a per hectare rate of $311,655 (exhibit 269B, 40/38; ts 6422, 6475).

2409 He said that over the ninemonth period to the date of taking an increase in the order of 25% to 45% was justified (40/38). Further, the lot yields for the subject land were said to be superior because of the foreshore reserve and wetlands on lots 300 and 301. That led him to the view that the per hectare rate of $405,000 to $452,000 was fair and reasonable (40/39). At the date of sale, the Clough/Rapley land was 'directly comparable to the subject property, except for ... its location on the opposite side of Pinjarra Road and its frontage to the river foreshore reserve' (exhibit 269B, 40/39).

2410 Mr Brown said in oral evidence that his analysis of this transaction demonstrated that the figure that he had adopted for the subject land of $470,000 per hectare was fair and reasonable (ts 6423). See also ts 6424, 6475.

2411 Thus, it can be seen that Mr Brown treated the transaction involving both lots 300 and 301 as indicating the value of that land zoned rural, with urban potential. Mr Brown confirmed that in his evidence (ts 6632). He denied that his figure of $311,000 per hectare represented the parties' view of urban value, although he agreed that it represented the price of obtaining urban land for the purchaser (ts 6638). 9.4.5.3 MS LEFEVRE

2412 Ms LeFevre accepted in crossexamination that the land was purchased on the basis that it would eventually be rezoned (ts 6305).

2413 In her oral evidence, Ms LeFevre made it clear that she placed little reliance on the Clough/Rapley transaction. It was not one of the five transactions on which she relied in deriving her value per hectare (ts 6398 6401). To the same effect, she said that it was not a direct sale (ts 6475 6476). She said that she did not place much weight on it and drew very little from it (ts 6629, 6631, 6678), mainly because of its conditions.

2414 She observed that analysis of the sale, if it is accepted as a sale, would show a similar rate to the earlier sales of the lands in Baldivis, which were rural with perceived urban potential (ts 6419). Thus she had regard to her analysis of the per hectare rate for the sale in assessing the comparability of Baldivis sales. I will return to that point.

2415 In her initial report of April 2008, Ms LeFevre did an analysis of the Clough/Rapley land that was similar in character to Mr Brown'**s.** She considered it appropriate to derive value from the contract 'having regard to the rights of the Vendor' (exhibit 270B, 36/31). Taking into account the $6,500 per lot, she considered the full purchase price to be $17.42 million, which she discounted to an NPV at the date of sale of $15.152 million (exhibit 270B, 36/30 31, 105 107).

2416 The total area of 55.52 ha, less the homestead lot of 4.7118 ha to be retained by the vendor, left a balance of 50.8083 ha. That led to a per hectare rate of $298,000. Seven hectares of wetlands and 7 ha of river floodway and foreshore reserve were undevelopable, leaving about 36.808 ha of developable land. That produced a figure of $411,000 per developable hectare. She referred to the fact that that figure included a premium for waterfrontinfluence because part of the land fronts the reserve along Wilgie Creek and part has river frontage (36/31).

2417 She expressed the view that the sale was more comparable to lot 189 than to lots 191 and 192 (exhibit 270B, 36/31; exhibit 270C, 39/1084 1085; ts 6646).

2418 She said the market showed a 50% 70% increase over the 12 months to October 2006. Applying that rate for nine months to the raw per hectare rate produces $430,000 per hectare overall and $600,000 per hectare for the developable area (36/31).

2419 In her report, she stated that without any extrapolation (meaning escalation for the increase from November 2005 to July 2008), the sale price rates of $298,000 per hectare and $411,000 per developable hectare were significantly lower than the value of the subject land at the taking date (36/31). 9.4.5.4 MR WILSON

2420 Mr Wilson's analysis placed emphasis on the conditions of the contract. He considered that the effect of the condition requiring rezoning of the land was that the transaction should be treated as a sale of lot 301 only, and not a sale of lot 300. The purchaser is obliged to purchase lot 301, regardless of whether rezoning does or does not occur. The purchaser is not obliged to purchase lot 300, unless rezoning occurs in accordance with the condition, or unless the purchaser nevertheless elects to proceed with the contract. (As will emerge, I agree with these last two propositions.) In substance, therefore, Mr Wilson considered that the transaction should be treated as a sale of lot 301, coupled with an option in respect of lot 300 (see ts 6471, 6597; exhibit 271A, 47/138 142; exhibit 271B, 47AA/78 80).

2421 His analysis of the transaction respecting lot 301 was as follows. The purchase price of lot 301 was, in effect, $7.5 million. The NPV of that sum, taking into account the delay in payment, was originally $7.08 million (exhibit 271A, 47/139 141).

2422 In his June 2010 report (exhibit 271B, 47AA/79 [572]), Mr Wilson recalculated the NPV, taking into account the variations to the manner of payment of the purchase price by the May 2006 deed of variation. The amended payment regime sees the payments made, overall, earlier. The amended NPV is approximately $7.16 million.

2423 In his March 2009 report, Mr Wilson divides $7.08 million by 37.5 ha (being 41.697 ha, the area of lot 301, less the 4.19 ha set aside for the homestead under the original contract). That produces a per hectare figure for lot 301 of about $190,000 (exhibit 271A, 47/141 [151]).

2424 He summarises the position in this way: Put simply, what is most important about the contract is that the purchaser has only committed $7,500,000 to buy Lot 301, in staged payments reflecting a present value of $7,080,000 or $190,000 per ha with its Rural zoning at the date of contract (exhibit 271A, 47/139 [142]). (original emphasis)

2425 Mr Wilson maintained his figure of $190,000 per hectare for lot 301 in his June 2010 report (exhibit 271B, 47AA/79 [577] [578]).

2426 The plaintiffs submit, correctly, that Mr Wilson does not make any use of that view in assessing the value of the subject land or in testing the value of $70,000 per hectare derived from his HSA.

2427 Mr Wilson would escalate that value to $250,000 at the time of the taking of the subject land (ts 6515). That was based on a calculation he had done for the purpose of a report he prepared for this case. That report was ultimately not tendered because it related to lot 189.

2428 Mr Wilson considers lot 301 to be superior to lots 191 and 192. It is closer and adjacent to the river and is significantly smaller (ts 6597). 9.4.5.5 MR ZUCAL

2429 Mr Zucal considers that the transaction was not a comparable sale and was not relevant. That is because it was too conditional and the conditions were not likely to be met (ts 6454 6455, 6589). Mr Zucal agreed that the transaction met his general criteria for comparability (ts 6588).

2430 He referred to the contract as being conditional on the conditions of subdivision being acceptable to the purchaser (ts 6454, 6589, 6590). This is an incorrect understanding of the conditions of the contract. The contractual conditions relate to rezoning, not subdivision approval.

2431 He knew about this transaction in February 2007. He asked Mr McKay about it when he visited the property (ts 6587 6588). He did not mention the transaction in his original February 2007 or in the March 2008 revision of that report.

2432 He described the contract as difficult to understand and acknowledged that there may be implications that he was overlooking (ts 6455).

2433 The analysis in his report responding to Ms LeFevre's and Mr Brown's initial reports is difficult to follow and seems to me flawed (exhibit 272A, 48/84). He deducts his view of the value of the 4 ha residential site from the $7.5 million consideration for lot 301. Given that it was clear from the terms of the contract that the residential 4 ha site was not part of the sale, there is no justification to deduct the value of the 4 ha site from the agreed consideration for the balance of lot 301 that is the subject of the sale. 9.4.6 Is it an arm's length transaction able to be relied on in valuing the land?

2434 The defendants submit that the transaction was contrived by the plaintiffs and their advisers for the purposes of the valuation of the subject land and consequently cannot be relied on. For the reasons that follow, I do not accept that submission.

2435 There is evidence that Mr McKay intended the sale of lots 300 and 301 to constitute a sale for the purposes of valuing lots 189, 191 and 192 (exhibit 175A [24]; ts 3339). To my mind, that is not inconsistent with the use of the transaction as a comparable sale. In wanting to use the transaction as a comparable sale, the plaintiffs would have been thus motivated to obtain as high a price as possible for lots 300 and 301. That is the approach generally taken by a vendor. There is no evidence to suggest that the purchasers were in any way motivated by, or even aware of, the desire on the part of the plaintiffs to structure a sale in a way that was helpful, as a comparable sale, for the purposes of compensation for lots 189, 191 and 192 (see, for example, ts 3020). These circumstances may invite close attention to the substance of the transaction, as distinct to the headline or nominal contract price of $14.3 million. However, that is a process that must be undertaken in any event in analysing a transaction as a potential comparable sale.

2436 In these respects, I accept the evidence of Ms LeFevre (ts 6678 6679). 9.4.7 Analysis of the transaction: what, if anything, does it indicate about the value of lots 300 and 301?

2437 The defendants' primary submission about the Clough/Rapley transaction is that it is too complex and too conditional to be of assistance in assessing the value of the subject land. The submission reflects the opinions of Mr Zucal and Ms LeFevre.

2438 I accept that the contract is complex and highly conditional. If there were a number of other comparable sales providing significant assistance, this transaction would very likely be discarded on these grounds. However, as will emerge in this section 9, in my view there are very few comparable sales of any real assistance, and none of them provides a very firm foundation of assessing the value of the subject land. The assistance, if any, to be derived from a particular sale must be assessed in light of all the other valuation evidence. The valuers appear to agree with this general proposition: see the fourth point in section 9.2.7. In any event, it is the approach I adopt.

2439 Moreover, to my mind, the HSAs for the subject land necessarily involve a high degree of uncertainty. That is because of the length of time from the taking date until all monies are expended and revenue received. On Mr Wilson's approach, that is up to 16 years. Given the static nature of an HSA, this time period substantially magnifies

the subjectivity, sensitivity and uncertainty of an HSA. Consequently, any sale of potentially comparable property should be closely scrutinised to see if it may assist in assessing value, or in reviewing a value based on an HSA, as is Mr Wilson's valuation.

2440 The Clough/Rapley transaction is reasonably close in time to the taking date. The land is close to the subject land, was zoned rural when sold and was sold on the basis of its urban potential. Given the limited assistance to be derived from the few other comparable sales, in my view, the Clough/Rapley transaction is of assistance in assessing the value of the subject land, notwithstanding its conditional and complex nature.

2441 In my opinion, for the reasons that follow, the Clough/Rapley transaction provides two indications of value. First, the whole of the transaction indicates the parties' view of the value of lots 300 and 301 if zoned urban. Secondly, the transaction indicates a floor value of lot 301 alone.

2442 Under the contract, if rezoning approval is obtained within three years of the contract date, the buyer is obliged to proceed to settlement on lot 300. If rezoning does not occur in that time, the buyer can elect to exclude lot 300 or can elect to proceed to settlement of lot 300.

2443 Thus, the purchaser will be obliged to pay the full purchase price only if the lots are rezoned to urban within the agreed period. In that sense, I consider the purchase price to reflect the parties' view of the urban value of the land. I think that in oral evidence, Ms LeFevre accepted this (ts 6305), as did, to an extent, Mr Brown, when he agreed that it was the urban price for the purchaser (ts 6638).

2444 Thus, I do not accept that the full purchase price reflects the value of lots 300 and 301 as rural land with urban potential. It reflects its value as land rezoned to urban within three years after the contract date.

2445 Based on the approaches of Mr Brown and Ms LeFevre that I have already outlined, the urban rate per hectare for lots 300 and 301 is approximately $300,000. (Ms LeFevre derived ***around*** $298,000 and Mr Brown $311,000.)

2446 Ms LeFevre considered the rate per hectare of developable land to be $411,000.

2447 The purchasers' obligation to acquire lot 301 is unconditional. By the contract, the purchasers bound themselves to acquire lot 301 alone, in the relevant circumstances, for not less than $7.5 million (unless they also elected to acquire lot 300).

2448 The defendants submit that the contract gave Clough/Rapley a put option, enabling the purchaser to require the plaintiffs to repurchase lot 301. That submission reflects Mr Tucker's oral (secondary) evidence about the effect of the contract (ts 3028). On my analysis of the provisions of the contract, Clough/Rapley did not get a put option.

2449 The price of $7.5 million constitutes a floor price, not a value, for lot 301. That is so for two reasons. First, if the buyer elects to exclude lot 300, it will by then have paid $7.5 million. That sum will be the minimum purchase price for lot 301. It is the minimum price, not necessarily the full purchase price, because an additional sum will or may be payable under cl 2.5(d). An additional sum will be payable unless the then market value of lot 301 is less than $7.5 million. After paying the additional sum required by cl 2.5(d), the buyer will have paid, in total, the market value of lot 301, not just the sum of $7.5 million.

2450 Secondly, the seller has, in the relevant circumstances, an option to reacquire lot 301; see cl 2.5(c). Thus the seller is not, by this contract, agreeing to bind himself to sell lot 301 for $7.5 million or even for its then market value.

2451 In calculating the rate per hectare reflecting the floor price for lot 301, I adopt Mr Wilson's analysis and the per hectare rate revealed by his June 2010 report (exhibit 271B, 47AA/49 [572], [577]). Mr Wilson initially valued lot 301 under the original contract at $190,000 per hectare. This was based on $7.08 million, the NPV of the $7.5 million purchase price, being paid for 37.5 ha of lot 301. The figures in his June 2010 report take into account the effect of subsequent variations to the contract and reveal an NPV of $7.16 million being paid for 36.98 ha.

2452 This leads to a per hectare floor value of lot 301 of approximately $194,000.

2453 These figures reflect a transaction entered into in November 2005. That invites attention to the extent of escalation of prices from November 2005 to the taking date in July 2006. 9.4.8 Escalation in price from November 2005 to July 2006

2454 For present purposes, the relevant question is the escalation of the price of an en globo parcel of land in the ***region*** of Ravenswood and Yunderup.

2455 That is not necessarily the same as the escalation of lot prices. Ms LeFevre said, and I accept, that the residential lot market and the en globo land market are different markets (ts 6478). What may be a shortterm extreme spike in lot prices would not necessarily be reflected to an identical extent in the price of en globo rural land with urban potential. The lot market would be more sensitive to any immediate imbalances between the supply of and demand for lots. The en globo market would also take into account longerterm expectations about supply and demand of lots, and many other matters not relevant to the shortterm lot market.

2456 As I have said, Mr Brown said that there were en globo land increases of 35% to 55% per annum at the relevant time, meaning that for the nine months of this period there should be an increase of 25% to 45% (exhibit 269B, 40/38). At a different point in the same report, Mr Brown said there was an increase of 30% to 40% per annum in en globo land values (40/44).

2457 Ms LeFevre's report of April 2008 stated that there was a 50% to 70% increase in en globo land values in the 12 months to October 2006 (see exhibit 270B, 36/24, 31).

2458 In oral evidence, Mr Wilson confirmed the assessment in one of his reports of the increase in respect of the Clough/Rapley land from $190,000 in November 2005 to $250,000 in July 2006 (ts 6515). This increase over eight months reveals an annualised rate of 47% (Mr Wilson calculated this as 54% because he treated the period as seven months: ts 6515). That view was not challenged in crossexamination of Mr Wilson.

2459 In her oral evidence, Ms LeFevre said that she considered there was an increase of between 50% and 70% in lot prices in Peel from late 2005 to the date of taking (ts 6480). Mr Wilson said that he had not done specific statistical analysis, but his recollection of the market 'pretty much' accorded with Ms LeFevre's (ts 6484). He referred to the sale of lot 9007 as suggesting caution in relation to whether the market for en globo land was escalating in Ravenswood in the same way as it was elsewhere in Perth (ts 6484).

2460 Ms LeFevre referred to two urban zoned smaller lots, namely lot 9001 and the Pinjarra and Boys Road land, as supportive of her views on escalation in or ***around*** Ravenswood (ts 6484 6485). Mr Zucal said, and I accept, that Ms LeFevre had referred to urban property and that there may be different appreciation rates for rural property with future urban potential (ts 6486).

2461 Ms LeFevre appeared to consider that en globo land ***around*** Ravenswood increased in value by about 45% from October 2005 to July 2006 (ts 6683 6684). That view was founded primarily on the escalation of lot prices and was not supported by en globo sales, because there were insufficient sales (ts 6684 6686). As I have said, I do not think the increase in lot prices can be automatically translated to an increase in en globo land values.

2462 By its nature, the rate of escalation of en globo land in a particular ***region*** in a specific seven or eight month period involves an assessment, not a precise calculation. Consistently with that, most of the valuers expressed their views in terms of a range, rather than a single figure.

2463 In light of the evidence as outlined above, I accept Mr Wilson's evidence that an appropriate escalation of en globo land in this area and, in particular, for the Clough/Rapley land is from $190,000 per hectare in November 2005 to about $250,000 per hectare in July 2006. That view was expressed with specific reference to the Clough/Rapley transaction. That level of escalation is also consistent with the view Mr Brown adopted in his report of April 2008 (exhibit 269B, 40/38, 44). Thus, the per hectare rate of $194,000 escalates to $255,000.

2464 For corresponding reasons, the urban value of $300,000 per hectare for lots 300 and 301 in November 2005 should, in my view, be escalated to a rate of $400,000 per hectare in July 2006. 9.4.9 Discounting the effect on value of the Highway and RRF

2465 Did the Highway and RRF affect the price of the Clough/Rapley sale? If they did, the increase or decrease in the value of the Clough/Rapley land attributable to the Highway and RRF should be discounted before the value of the Clough/Rapley land is used as a comparable sale in valuing the subject land. Alternatively, in such circumstances, the Clough/Rapley sale might be rejected as a comparable sale if its price was substantially affected by the proposed public works, and it was too difficult to make any reasonably reliable assessment of the effect of the proposed public works on value. That latter approach was adopted in Duffy (2003) [144]. Whether the latter

approach is taken may be influenced by the extent of other comparable sales that are unaffected by the proposed public works.

2466 In my view, there is no evidence that the proposed RRF had any affect on the value of the Clough/Rapley land.

2467 The valuers agreed that it was not possible to give any sensible estimate of the extent to which, if at all, land values in the vicinity of Ravenswood had generally been increased by the proposal for the Highway or its imminent construction: see Ms LeFevre (exhibit 270G, 39A/1239 1242); and Mr Wilson (exhibit 271B, 47AA/39 40). Mr Wilson considers that the Highway has increased values, to an extent he cannot quantify; Ms LeFevre does not consider any increase in value by the Highway is demonstrated. In exhibit 270B, 36/31, Ms LeFevre says that she thinks the Highway has an overall negative effect on the value of the Clough/Rapley land.

2468 Mr Tucker's evidence was that the Highway did not materially increase the price Clough/Rapley paid for the land: exhibit 143B [22]. Of course, whether and to what extent the Highway influenced the price paid was not a question that specifically arose for consideration in 2005 when the land was acquired. Rather, Mr Tucker's evidence reflects his current assessment of a past hypothetical question.

2469 Mr Tucker said that the improved access to be given by the Highway was a positive element for the Clough/Rapley land (exhibit 143B [17]; ts 3008). However, he pointed to factors to the contrary, such as the light and noise associated with the Highway and an off ramp, and the preference of some people not to live near a major highway (exhibit 143C [3]).

2470 The benefits of proximity to the Highway were highlighted in the tender memorandum (exhibit 144, 1/2/5 7) and in the 2007 submission in support of rezoning the Clough/Rapley land (exhibit 143A, 32/143, 147, 154).

2471 Apart from the Highway, the Clough/Rapley land had good access because it is on Pinjarra Road. That enabled easy access to Mandurah and Pinjarra, and, from those places, ***south*** and north. So the benefits of the Highway for the Clough/Rapley land are, in my view, less than for land located ***south*** of the Murray River, such as Austin Cove.

2472 In the end, I consider that the Highway would have made a modest positive contribution to the price paid and value of the Clough/Rapley land. Quantifying that contribution is very difficult. I think it would be of an order of something less than 10%, perhaps $15,000 to $20,000 per hectare. Given the large margin of error in the broad process of adjusting for escalation in prices from November 2005 to July 2006, and in adjusting for the comparability of Clough/Rapley property compared to the subject land, to which I turn in section 9.4.10, an increase of the order of $15,000 to $20,000 per hectare is barely material. Nevertheless, I think it needs to be discounted to reflect what is required by s 241(2) of the LA Act.

2473 After discounting the increase in value attributable to the Highway, the per hectare floor value of lot 301, indicated by the Clough/Rapley transaction, escalated to July 2006 is $235,000 $240,000. After discounting, the escalated per hectare urban value of lots 300 and 301 is $370,000 $375,000. 9.4.10 Comparability: how does the value of lots 191 and 192 compare to lots 300 and 301?

2474 The plaintiffs tendered substantial environmental evidence about the Clough/Rapley land, including from Dr Semeniuk (exhibit 225C, 3/161); Mr Butterly (exhibit 194E, 28/1170 1171); and reports of ENV Australia Pty Ltd (exhibit 106, 1/25, 32, 155, 166). The ENV reports analyse the percentage of the total area of lots 300 and 301 that is subject to environmental constraints. There is also engineering evidence about the comparative development costs (statement of Mr Bowyer, exhibit 110, 9/88). I do not think that detailed analysis of the kind in this evidence is of much assistance. The purchaser of the Clough/Rapley land did not obtain reports of this detail and so did not know as much about the environmental characteristics and constraints of the Clough/Rapley land as is revealed in the ENV reports. In any event, I do not think much turns on the question. The purchaser understood there were substantial environmental constraints for the Clough/Rapley land and took that into account in its decision.

2475 The environmental constraints of the Clough/Rapley land limited its developable area. There are no similar constraints for the subject land. The subject land has better overall lot yields per hectare than the Clough/Rapley land.

2476 Nevertheless, for the reasons that follow, in my view these considerations are substantially outweighed by other factors, so that the per hectare value of the subject land is substantially less than the Clough/Rapley land.

2477 A number of the valuers said, in their respective reports, that lot 189 was worth more than the subject land, and that lot 301 was comparable to lot 189. In other words, the Clough/Rapley land was seen as more valuable than the subject land: see Mr Wilson (exhibit 271A, 47/140 [143]); and Ms LeFevre (exhibit 270C, 39/1084 1085). Ms LeFevre maintained this view in her oral evidence (ts 6646). In his reports, Mr Brown said that lot 189 was worth more than lots 191 and 192. However, Mr Brown appeared to avoid the question when it was put to him that he considered the per hectare rate for lot 189 was higher than for the subject land. His first response was to say that he had put lot 189 out of his mind (ts 6646). Then he said that he did not recall what figure he put on lot 189 (ts 6646). When I asked him whether he had thought that lot 189 was worth more per hectare than the subject land, he said, 'I think so but I'm not sure' (ts 6647).

2478 For the reasons that follow, I find that the Clough/Rapley land was worth substantially more per hectare than the subject land. In summary, that is because the Clough/Rapley land had waterfront aspects, superior urban prospects, and was smaller in area.

2479 First, the Clough/Rapley land had the benefit of significant exposure to water. Part of lot 301 abuts the Murray River. Parts of both lots abut Wilgie Creek. It is clear from Mr Tucker's evidence that these features were significant attractions in the mind of the buyer. I think the exposure to water significantly enhances likely demand for lots on the Clough/Rapley land. In my view, the connection to the river and Wilgie Creek significantly enhances the value of the Clough/Rapley land, compared to the subject land.

2480 Next, on the findings I have made about the subject land's urban prospects, the Clough/Rapley land had significantly superior urban prospects than did the subject land. I have found that the parties to the Clough/Rapley transaction entered the transaction confidently expecting that the land would be rezoned to urban within three years. By contrast, on my findings, the hypothetical parties would view the urban potential of the subject land as uncertain. A number of matters explain that difference, including the following:

(a) the Clough/Rapley land was shown as 'future communities' in Network City. I have found that the subject land would not have been designated in that way in the assumed absence of the proposed public works;

(b) the Clough/Rapley land is in close proximity to and has a close relationship with other urban zoned land in the area, including on the other side of Wilgie Creek. Urbanisation of the Clough/Rapley land can be seen as a natural progression and a completion of an urban node. As explained in section 7, urbanisation of the subject land would not be viewed in the same way;

(c) the Clough/Rapley land and Gold Fortune land could be expected to be viewed as a separate precinct for new urbanisation (see exhibit 54, 2/1/144; exhibit 139; ts 4605 4606). By contrast, the subject land would be expected to be viewed by the WAPC as part of a much larger area north of Old Mandurah Road, thus raising greater potential issues and obstacles for urban rezoning; and

(d) by July 2006, the application to rezone the Clough/Rapley land had been underway for more than a year.

2481 Finally, the Clough/Rapley land is smaller in area than the subject land. Particularly where one is analysing lot 301 alone, that consideration favours a lower rate per hectare for the subject land than for the Clough/Rapley land.

2482 As I outlined in section 2.5, the adjustment to values derived from comparable sales may be 'nothing more than the best guess that can be made.' Judicial statements to that effect are made in the context of adjustments made by a valuer, thus based on the valuer's expertise and experience. In this case, no valuer has offered an opinion on the extent of the appropriate adjustment of the floor value of lot 301 to derive a floor value for the subject land. In my view, given the very limited sales data of any assistance and the limitations of the HSA method in this case (see section 9.10), I must make my own assessment of the appropriate adjustment.

2483 There is an element of arbitrariness or guesswork in quantifying an appropriate level of adjustment. Nevertheless, in the end, in my view, I must do the best I can with the evidence I have, in light of the findings I have made.

2484 If and to the extent that this were seen as the court acting as a 'third valuer', it seems to me to be unavoidable and not impermissible (see section 2.5). It is unavoidable because, if I decline to do it, I will be left with no basis to assess the value of the subject land. That is because, as I will explain in more detail in sections 9.9, 9.10 and 9.12, I do not accept the essential steps in the reasoning of any of the valuers in their urban potential valuations. In a nutshell, on my analysis in the remainder of this section 9:

(a) the only transactions of any real assistance are Clough/Rapley, Gold Fortune and lot 23; and

(b) because of the long time period in urbanising the subject land and selling the lots, the HSA method is not reliable.

2485 I express my assessment of the floor price in terms of a range, not a single figure. That reflects the degree of uncertainty, in my assessment, of the quantification of the appropriate adjustment of the floor value of lot 301 to derive a floor value of the subject land.

2486 Taking into account all of the matters I have referred to, and doing the best I can with the limited available evidence, I think the discounted, escalated urban potential floor value of lot 301 of $235,000 to $240,000 at the date of taking suggests a per hectare floor value of the subject land in the range of $145,000 to $175,000 per hectare. Each comparable sale is not to be viewed in isolation. I will revisit this assessment in light of what is revealed by all the comparable sales, and by the HSA.

2487 Taking into account the first and third reasons stated for my view of Clough/Rapley's superiority (the second reason does not apply to an urban valuation), the discounted, escalated urban value of $370,000 to $375,000 per hectare for the Clough/Rapley land suggests a per hectare urban value of something a little under $300,000 for the subject land. In light of my view of the timing and uncertainty of the urban potential of the subject land, this is an indication that the urban potential value of the subject land is something very significantly less than $300,000 per hectare.

9.5 The Gold Fortune transactions 9.5.1 The Gold Fortune land

2488 The Gold Fortune land comprises three lots, lots 123, 185 and 205, with a total area of 20.7 ha. The eastern most of the lots, lot 205, is immediately west of lot 300, part of the Clough/Rapley land. Lot 185 is immediately west of lot 205. Both lots 105 and 205 abut Wilgie Creek to their ***south***. Lot 123 is a small lot running north from lot 185.

2489 See, again, exhibit 202 in section 1.4.

2490 Immediately ***south*** of Wilgie Creek, where it adjoins the Gold Fortune land, is the urban development of North Yunderup and the urban deferred zoned land owned by Mr Frost.

2491 Wilgie Creek creates some floodway and wetlands constraints to urban development.

2492 The Gold Fortune land was zoned rural in the PRS, apart from some regional open space on lot 185 associated with Wilgie Creek. It was designated 'greenbelt rural living' in the IPRSP and 'future communities' in Network City. Lots 185 and 205 were designated urban in the draft LPS. Lot 123 was designated rural residential. 9.5.2 Findings of fact: acquisition of the land by Gold Fortune, the option, and efforts to progress rezoning

2493 Two of the three lots comprising the Gold Fortune land were acquired by Gold Fortune Pty Ltd in June 2005. Those sales were referred to by Mr Wilson in his first report (exhibit 271A, 47/35 36). Lot 205, comprising 11.2 ha, was sold for $1.2 million ($106,500 per hectare). Lot 185 was 7.5 ha and sold for $1.8 million ($239,000 per hectare). So, the 18.7 ha cost a total of $3 million ($160,000 per hectare).

2494 In June 2006, the Gold Fortune land was owned by Gold Fortune Pty Ltd. By an undated deed, the shareholders of Gold Fortune granted an option to Mount Richon Investments Pty Ltd to purchase all the shares in Gold Fortune. Evidence was received by a statement of one of the shareholders, Mr Liddicoat (exhibit 83, 46/364). He was not crossexamined and I accept his evidence.

2495 The only asset of Gold Fortune was the land. The option was entered into in July 2006. The deed is exhibit 60 (2/11/168). The option fee was $545,000. The price payable depended on the time of the exercise of the option. If the option was exercised after 8 August 2006, but before 7 October 2006, the purchase price was $6.447 million. If the option was exercised after 7 October 2006, but before 31 August 2007, the price was $9 million, plus any capital expenditure by Gold Fortune Pty Ltd on its assets during the term of the option.

2496 The option was not exercised before 7 October 2006.

2497 From 4 6 October 2006, the proponents of the Gold Fortune land and the Clough/Rapley land conducted a planning design forum. The forum involved the consultants working for the proponents, local and state government, and members of the community. See exhibit 124, 2/1/210.

2498 In February 2007, the proponents of the Clough/Rapley land wrote to Mr Selby, of the Shire of Murray, copied to the DPI, providing a detailed update on progress in relation to the proposed rezoning of the Clough/Rapley land and the Gold Fortune land (exhibit 124, 2/1/210 218).

2499 In February 2007, Mr Bulstrode had in mind, and proposed to the chairman of the WAPC, that an urban rezoning of the Clough/Rapley and Gold Fortune lands could be supported 'prior to the completion of the strategic planning review project for the ***South*** Metropolitan and Peel Sectors' (exhibit 251D, 2/1/219; exhibit 133, 2/1/222 223). (MFI 133 was not formally admitted into evidence during the trial. It was tendered by the defendants and marked for identification at the request of the plaintiffs: ts 2227 2228, 2242. Plainly, the plaintiffs withdrew their objection to the document because they refer to it and rely on it in their Gold Fortune chronology (exhibit 251). Thus, I admit the document as exhibit 133.)

2500 In March 2007, GRA prepared a proposed outline development plan for the Gold Fortune land (exhibit 132, 2/11/208). The plan showed 215 lots, ranging in size from 312 814 sqm.

2501 In May 2007, the option to acquire the shares in Gold Fortune Pty Ltd was assigned by Mount Richon to Odd Balls (WA) Pty Ltd (exhibit 61, 2/11/172). The consideration for the assignment was $350,000, plus 15 unencumbered housing blocks to be developed on the land.

2502 At a meeting in June 2007, the Shire of Murray Planning and Development Services Committee resolved to initiate a scheme amendment to rezone the Gold Fortune land to special development under the TPS (exhibit 128, 4/1/157 164).

2503 By letter of 20 August 2007, Mr Flugge of GRA, on behalf of Gold Fortune Pty Ltd, wrote to Mr Bulstrode at the DPI (exhibit 129, 2/2/23). The letter gave notice of the intention to lodge a request with the WAPC for urban rezoning of the Gold Fortune land under the PRS. The letter referred to the similar request that had been made by the planning consultants for the Clough/Rapley land to be rezoned under the PRS.

2504 On 29 August 2007, Odd Balls exercised the option to acquire all the shares in Gold Fortune (exhibit 62, 2/11/179A 179B).

2505 There is evidence of further communications, after the exercise of the option, progressing the proposal to rezone the Gold Fortune land urban. See, for example, exhibit 101 and exhibit 57. However, to my mind, it does not seem necessary to give attention to what occurred after the option was exercised. 9.5.3 Valuers' opinions on the Gold Fortune transactions 9.5.3.1 SUMMARY OF VALUERS' OPINIONS

2506 In broad overview:

(a) Mr Brown and Ms LeFevre considered that the Gold Fortune transaction in August 2007 suggested a rate per hectare as at July 2006 of between $450,000 and $500,000, supporting their urban potential valuations of the subject land;

(b) Mr Zucal did not consider the sale could properly be used, and anyway it reflected an urban expectation; and

(c) Mr Wilson considered that the exercise of the option in August 2007 should not be taken to reflect the position in July 2006.

2507 I outline the valuers' views in more detail below. 9.5.3.2 MS LEFEVRE

2508 Ms LeFevre was not aware of the Gold Fortune option transaction when she completed her urban potential valuation report of April 2008. After she became aware of it, she referred to it in her report of 15 April 2009, stating that it supported her urban potential valuation. In oral evidence, Ms LeFevre identified the Gold Fortune sale as one of the five sales on which she relied in assessing a rate per hectare for the subject land.

2509 Ms LeFevre considers that the Gold Fortune transaction in August 2007 supports a rate of about $487,000 per hectare (exhibit 270C, 39/1086, 1121; ts 6413 6416). That involved the following steps. First, she calculates the value of the option, by adding the exercise price to the initial option fee. In doing so, she reaches the sum of $9.454 million. That appears to be an error; the figure should be $9.545 million. Next, Ms LeFevre added the price of the assignment. To calculate the price of the assignment, she stated that the lots would be expected to be realised in about a year's time and, consequently, deferred her estimate of the value of the lots. From that process she derived a total of $10.454 million. She then discounted that at 8% for 9 months, back to July 2006, producing a rate of $487,000 per hectare. The 9month period reflected the time between the entry and exercise of the option, in

addition to the normal settlement period that Ms LeFevre would expect for a transaction of this kind (ts 6416). Her discount is for the time value of money, not for the market increase over that period. That appeared to be on the basis that the price had already been agreed in July 2006, and so should be taken to reflect the position at that time (ts 6416).

2510 Ms LeFevre stated that the land was 'more comparable' to lot 189 in its physical characteristics, but 'not totally dissimilar' to lots 191 and 192 (ts 6413). 9.5.3.3 MR BROWN

2511 Mr Brown's approach is broadly similar to Ms LeFevre'**s.** He was not aware of the Gold Fortune transaction when he completed his urban potential valuation. In a subsequent report, he referred to it, stating that it supports the urban potential value that he had adopted (exhibit 269C, 44/1464 1465). In oral evidence, Mr Brown identified the Gold Fortune transaction as one on which he relied in deriving a per hectare value for the subject land.

2512 Mr Brown valued the option plus the assignment at $9.714 million, leading to a value of ***around*** $466,000 per hectare. Curiously, like Ms LeFevre, he added the option exercise price to the option fee to produce $9.454 million (rather than $9.545 million), then added his assessed value of the assignment to that figure. Mr Brown referred to the outline development plan for the Gold Fortune land, pointing to the lower yield of just over 10 lots per hectare, as against 14 lots per hectare for the subject land. He also pointed to the lack of road access and services as compared to the subject land (exhibit 269C, 44/1465). He said that it may well be the case that being on the river side of Pinjarra Road would mean the Gold Fortune lots would produce a higher price than the subject land, but that would be offset 'to a degree' by higher development costs (ts 6425). He said that he was comfortable with his adopted rate of $470,000 per hectare for the subject land (ts 6425). In his written and oral evidence, Mr Brown did not appear to identify any specific discount that he applied to take account of the fact that the Gold Fortune option was exercised in August 2007, whereas he was valuing the subject land at July 2006. 9.5.3.4 MR WILSON

2513 As I have said, in his valuation report of 2007, Mr Wilson referred to the individual sales of lots 205 and 185 in June 2005. In that report, he suggested that those sales could be taken to reflect 'lifestyle' values (exhibit 271A, 47/35). I will say more about this in section 9.5.6 below.

2514 Mr Wilson referred to the Gold Fortune transaction in his report in 2010, responding to the evidence of Mr Liggins (exhibit 271B, 47AA/80 81). In that report, Mr Wilson emphasises that the option holder elected not to purchase the land in October 2006 for the lower price of $337,000 per hectare, notwithstanding the significant cost penalty in exercising the option after that date (exhibit 271B [585]). His figure of $337,000 per hectare is based on the first exercise price plus the option fee. He puts weight on the fact that the purchaser was not willing to commit to $337,000 per hectare, for 20 ha, without further guidance or assurance about whether and when the land might be zoned urban in the future. He understands that during 2007, WAPC officers gave assurances that they would support residential rezoning of the land and only after that was the option exercised (exhibit 271B [586] [587]). In his oral evidence, Mr Wilson reiterated his understanding that the WAPC had given assurances to the purchaser that it would support urban rezoning (ts 6487, 6490). As I will explain in the next section, I do not think that that reflects the position, although, on my analysis, not much turns on it.

2515 In oral evidence, Mr Wilson explained why he did not consider that the Gold Fortune transaction provided guidance to the value of the subject land at the taking date: I turn my attention to the Gold Fortune land. Both Mr Brown and Ms LeFevre made reference to that sale which is in North Yunderup. My view is that if evidence after the date of valuation is to be considered, then it must have reflected an obvious expectation of the market or a known circumstance as at the date of valuation.

To explain, I do not believe the reasons behind my understanding of eventual sale were a known fact at the date of valuation. In July 2006 the property was the subject of an option with two very different sale figures applicable if the option was exercised on or after certain dates. At July 2006 the tangible date of exercise was August 06, and the price that it could have been exercised at in August 06 was $336,000 per hectare for land that had the same zoning and the same potential as lots 191 and 192 for a much [smaller] parcel and adjacent to a small tributary of the Murray River known as Wilgie Creek.

In my opinion, the important fact as at July 2006 was the August 2006 option was not exercised. The transaction which took place in late 2007 occurred after the then option holder had discussions with the WA Planning Commission, and it's my understanding that the WA Planning Commission gave assurances that it would support urban rezoning of the land.

It's my view that the sale occurred subsequent to those assurances being placed on the land, which is a much more favourable position than it was previously in and made it far more attractive to a potential purchaser, developer, than the rural position which existed in July 06 and in August 06 when the first date of exercising the option was passed up. I don't believe the eventual sale in 2007 can be related to market conditions as at July 2006 and I don't consider the 2007 sale should be used as a comparison in this exercise (ts 6487 6488).

2516 In this passage, Mr Wilson again emphasised that the first option was not exercised.

2517 Mr Wilson considers that if the transaction were to be used, there would have to be an adjustment to reflect the difference in lot size compared to the subject land (ts 6599). 9.5.3.5 MR ZUCAL

2518 Mr Zucal did not refer to the June 2005 individual lot acquisitions, or to the Gold Fortune option, in his initial valuation. He referred to it in his responsive report of 5 August 2009 (exhibit 272A, attachment BEZ 8, 48/151). He refers to the fact that the transaction was an option until exercised in August 2007. By then, he said, it must be surmised that the purchaser was satisfied that he would succeed in urbanising the land. In substance, urban land in August 2007 should not be used to compare with rural land in July 2006. He also emphasised the significantly smaller size of the Gold Fortune land and stated that it was essentially an extension to the North Yunderup residential precinct. See also ts 6455. Like Mr Wilson, Mr Zucal proceeded on the assumption that the purchaser had been given some satisfaction that the land would be approved for residential use (ts 6489). 9.5.4 What do the Gold Fortune transactions indicate about value at the taking date?

2519 The overall question is the value of the subject land at the taking date. The transactions involving the Gold Fortune land may be of assistance insofar as they provide an indication of the value of the Gold Fortune land. In that context, it is important to identify the time at which any such view of the value of the Gold Fortune land is indicated by a transaction involving that land. In my view, for reasons to be developed, the plaintiffs' valuers' analysis of the Gold Fortune transaction does not satisfactorily do this. In particular, their analysis does not adequately recognise that the exercise of the option on 29 August 2007 reflects the purchaser's view of the value of the Gold Fortune land at that date, in the light of the circumstances then existing. Further, the plaintiffs' valuers' analysis overlooks what is indicated about the value of the Gold Fortune land at the taking date by the terms of the option deed entered into in July 2006. In particular, the exercise price fixed for the first period is an indication of a ceiling value, as at July 2006, for the Gold Fortune land.

2520 By the option, the grantors of the option agreed to sell the shares in Gold Fortune Pty Ltd, and thereby the Gold Fortune land, for the two prices referred to in the option deed. They agreed to sell for $6.447 million if the option was exercised before 7 October 2006. Thus, for a sale to be finalised in the three or so months following the option deed, the vendors were willing, and committed, to sell for $6.447 million.

2521 So, in the circumstances existing in July 2006, and as then anticipated to exist by October 2006, the vendors were committed to sell for that price, by the grant of the option exercisable in the first period. The circumstances existing in July 2006 included the general market circumstances, and the then known circumstances bearing upon the urban rezoning potential of the Gold Fortune land.

2522 As I have said, the option was not exercised in the first option period. In my view, an unexercised option to purchase land, granted by a vendor, may be taken as an indication (not conclusive proof) of a ceiling value of that land. The admissibility and relevance of unaccepted offers to purchase land for the purposes of a valuation was analysed in some detail by Buss JA (Miller JA agreeing) in Auxil Pty Ltd v Terranova [2009] WASCA 163. After a review of the authorities, his Honour concluded that while an unaccepted offer to purchase is not admissible as direct evidence of the value of the land, a purchaser's unconditional offer to purchase at a specific price may be of assistance in determining a floor value for the land: Auxil [46], [50]. Correspondingly, an unaccepted offer by a vendor may be evidence of a ceiling value. See, for example, Expectation Pty Ltd v PRD Realty Pty Ltd [2004]

FCAFC 189; (2004) 140 FCR 17 [90], cited in Auxil [32]. Given that an option granted by an instrument is legally binding, an option is, if anything, of greater weight than an unaccepted offer.

2523 In calculating a per hectare rate derived by the Gold Fortune transaction, all of the valuers added the option fee to the exercise price. However, in my view, the option fee should not be included in the calculation of the per hectare value, whether ceiling or otherwise, indicated by the Gold Fortune transaction. Unsurprisingly, the cases do not reveal a universal legal rule about whether an option fee should be included in the calculation of the per hectare rate derived from the exercise of an option. Rather, the approach taken is that that depends on the terms of the option instrument.

2524 The Gold Fortune option deed expressly provides, by cl 5, that the option fee is not to form part of the purchase price (exhibit 60, 2/11/169). To my mind, that is reinforced by consideration of the object and purpose of the option fee. The option fee is the price paid to obtain the certainty arising from the vendor's commitment to sell to the option holder in accordance with the terms of the option. That gives the option holder the opportunity to do whatever due diligence, and take whatever other steps, it wishes to until the end of the option period. Moreover, when the time comes for the option holder to decide whether or not to exercise the option, the option fee is a sunk cost. It does not form part of what the option holder must pay to purchase the land.

2525 Consequently, the first option price of $6.447 million for the 20.7 ha of the Gold Fortune land indicates a per hectare ceiling value of $311,000.

2526 I will explain what I consider that may indicate for the value of the subject land at the taking date in section 9.5.6. Before doing so, I will explain why I do not think that analysis of the exercise of the option in August 2007 is of assistance for present purposes.

2527 The exercise of the option in August 2007 reflects the circumstances then existing. In my view, the most important circumstances affecting whether and when to exercise the option were the purchaser's view of the urban rezoning potential of the Gold Fortune land, and the general market conditions at relevant times, as against the exercise price.

2528 Ms LeFevre's analysis produced a per hectare value based on the exercise of the option in August 2007. She then discounted it at 8% to reflect the time value of money back to July 2006. I do not agree with that approach. The purchaser made the decision to exercise the option in the market conditions that existed in August 2007. Insofar as the exercise of the option in August 2007 is used to derive a value in July 2006, the exercise price should be discounted by the increase in relevant market prices between July 2006 and August 2007. No valuer specifically sought to identify that increase for this purpose. The evidence might suggest an increase of about 15% to 20% (see, for example, ts 6721). In any case, a price per hectare based on the exercise price, discounted in this way, would reflect the value of the Gold Fortune land at July 2006, but with the urban prospects that existed in August 2007 (rather than at July 2006). That is because, as I have said, the exercise of the option in August 2007 occurred in light of the circumstances then existing, including the circumstances affecting the urban prospects of the Gold Fortune land.

2529 In my view, it is not useful for present purposes to derive a value for the Gold Fortune land at July 2006 based on the urban prospects of that land assessed as at August 2007. That is because, as I will explain in section 9.5.6, in my view, the urban prospects of the Gold Fortune land at July 2006 were already better than the urban prospects of the subject land (in the assumed absence of the proposed public works). By August 2007, while urban rezoning of the Gold Fortune land was by no means a certainty, a purchaser of the Gold Fortune land would have had significantly more confidence in its urban prospects than as at July 2006. That was because of the steps that were taken between July 2006 and August 2007 to progress urban rezoning of that land. Consequently, by August 2007, the urban prospects of the Gold Fortune land were further removed from the urban prospects of the subject land at the taking date. 9.5.5 Discounting the effect on value of the Highway proposal

2530 Again, as with the Clough/Rapley transaction, the question arises of whether and to what extent the price of the Gold Fortune land was increased by the Highway and RRF proposals. In that respect, I refer to section 9.4.9 above. With one qualification, I think the position for the Gold Fortune land is similar to the Clough/Rapley land. The qualification is that the Gold Fortune land is not so close to the Highway. That reduces or removes the negative influences of the Highway, such as increased light and noise, and the preference of some people not to live near a major highway. The benefits of the Highway are not materially reduced by the 1 2 kilometre distance to the

Highway. Consequently, I adopt the higher end of the range of discount I used for the Clough/Rapley land. I find that, after discounting the effect on value of the Highway, the first option period under the Gold Fortune option indicates a ceiling value for that land of about $285,000 per hectare. 9.5.6 Comparability: how does the value of the subject land compare with the Gold Fortune land?

2531 Mr Brown considers that the Gold Fortune land is inferior to the subject land, saying it has a lower yield, lack of road access, lack of access to services and higher development costs. The plaintiffs point to expert evidence that supports those conclusions. Mr Butterly has analysed the extent of unconstrained land able to be developed (exhibit 194E, 28/1171). Mr Semeniuk has drawn conclusions about the environmental constraints on urbanisation of the Gold Fortune land, stating that significant nutrient management would be required (exhibit 225C, 3/161). Mr Bowyer, an engineer, considers that the greater requirements for fill for the Gold Fortune land, compared to the subject land, means that development costs would be $10,000 to $15,000 more for the Gold Fortune land (exhibit 110, 9/87 88).

2532 I accept the broad conclusions in these reports, although I consider that the level of detail goes beyond what would have been known by the grantee of the option over the Gold Fortune land, or its ultimate purchaser.

2533 For the reasons that follow, in my view, these considerations are substantially outweighed by other factors, so that the per hectare value of the subject land is substantially less than the value of the Gold Fortune land. By making appropriate adjustments to the ceiling value of the Gold Fortune land derived from the unexercised option, an indication of a ceiling value for the subject land can be derived.

2534 In my view, for three main reasons, the subject land was worth less than the Gold Fortune land as at July 2006.

2535 First, I find that the urban potential of the subject land at the taking date was substantially inferior to that of the Gold Fortune land. Mr Rowe expresses the opinion that the two parcels of land would have similar prospects (exhibit 191C [14] [32]). Mr Robinson expresses the view that because the subject land has better road access and less environmental constraints, but for the proposed public works, the subject land would have had more merit for urbanisation than the Gold Fortune land (see, for example, exhibit 180B, 1244 1245). I do not accept those opinions. It seems to me that they do not give adequate weight to the significance of the different location of the Gold Fortune land in relation to other urban land, as compared to the subject land.

2536 Much of what I said in section 9.4.10 above applies again here. Like the Clough/Rapley land, the Gold Fortune land is in close proximity to and has a close relationship with other urban zoned land in the area, including on the other side of Wilgie Creek. The Clough/Rapley land and Gold Fortune land could together have been expected to be viewed as a separate precinct for new urbanisation. Urbanisation of those two additional pieces of land could have been seen as a natural progression to complete the North Yunderup urban node. In contrast, the subject land would reasonably have been expected to be viewed by the WAPC as part of a much larger area north of Old Mandurah Road. In that way, it would reasonably be expected to raise greater potential issues and obstacles for urban rezoning. Further, unlike the subject land in the absence of the proposed public works, the Gold Fortune land was shown as 'future communities' in Network City.

2537 Secondly, I accept the defendants' valuers' evidence that the difference in size between the Gold Fortune land and the subject land requires a lower per hectare rate to be applied to the 88 ha of the subject land, as against the 20.7 ha of the Gold Fortune land.

2538 Thirdly, as Mr Brown accepted to some extent at least, the Gold Fortune land has a greater waterfront influence than the subject land, with much of the Gold Fortune land abutting Wilgie Creek.

2539 I refer to my observations in section 9.4.10 about the uncertainties involved in quantifying the appropriate adjustment. Doing the best I can with the available evidence, I think the discounted ceiling value of the Gold Fortune land of $285,000 per hectare at the date of taking suggests a per hectare ceiling value of the subject land somewhere in the range of $210,000 to $230,000 per hectare. Like the floor range derived from the Clough/Rapley transaction, I will revisit this assessment in light of all the comparable sales and the HSA.

2540 For the reasons I have given in section 9.5.4, I do not consider that the exercise of the Gold Fortune option in August 2007 can be used to derive a different or higher market value for the subject land.

2541 Finally, I come back to the individual sales of lots 205 and 185 in June 2005. As I have mentioned, in Mr Wilson's first report, he did not put weight on the sales because he thought that they could be taken to reflect 'lifestyle' values. Given that both lots were acquired by the same purchaser, this might be thought to be a surprising view to take. In any case, subsequently, Mr Wilson learned of the Gold Fortune option transaction. By then, the acquisitions in June 2005 could not be understood as reflecting a 'lifestyle' value; they were bought by a wouldbe developer or investor for urban development or onsale for development.

2542 At no point in Mr Wilson's written or oral evidence did he review his value for the subject land of $70,000 per hectare, with reference to the acquisitions of lots 185 and 205 in June 2005. Notwithstanding that those acquisitions were for relatively small parcels, to my mind, those acquisitions, over a year earlier in a sharply rising market, should have caused Mr Wilson at least to reflect further on his ultimate opinion that the subject land was worth $70,000 per hectare, and to say something about how that view sat with those earlier sales.

2543 I will say more about those June 2005 acquisitions in section 9.9.

9.6 Baldivis sales 9.6.1 Introduction

2544 Both of the plaintiffs' valuers relied extensively on sales in Baldivis as comparable sales supporting their per hectare rate for the subject land. The defendants' valuers expressed the view that sales in Baldivis are not useful as comparable sales.

2545 For the reasons that follow, I accept the evidence of the defendants' valuers, in particular Mr Wilson. I begin by outlining what the plaintiffs' valuers said in support of their view that sales in Baldivis were comparable, and what Mr Wilson said in response. 9.6.2 Outline of the valuers' evidence 9.6.2.1 MS LEFEVRE

2546 In two parts of her oral evidence, Ms LeFevre addressed at some length the question of the use of sales in Baldivis as comparable sales. On 27 October 2010, Ms LeFevre identified the comparable sales in Baldivis on which she relied, and outlined the use she made of them in arriving at her valuation (ts 6403 6411). The following day, Mr Wilson responded to the plaintiffs' valuers' outlines in relation to comparable sales. Mr Wilson gave detailed evidence about why, in his opinion, Baldivis sales are not useful comparable sales (ts 6461 6465). Later that day, I invited Ms LeFevre and Mr Brown to respond to what Mr Wilson had said about Baldivis. See ts 6492 6496.

2547 In explaining her use of Baldivis sales, Ms LeFevre made a number of references to the difficulty of finding en globo rural land with urban potential, anywhere, to use as a comparable sale (see, for example, ts 6492, 6494, 6606). Of course, if there is not a sufficient body of comparable sales evidence in the general locality of the subject land, one must look further afield. However, the search for comparable sales is not to be distorted by any perceived need for a minimum number of comparable sales: ISPT Pty Ltd v Valuer General [26] [27]. Thus, in looking further afield, the valuer must assess whether and to what extent the other possible comparable sales are, on a proper analysis, useful as comparable sales.

2548 Ms LeFevre said on a number of occasions that most of the major influencing factors meant that the Baldivis sales were comparable. See, for example, ts 6403, 6405, 6492. On one occasion, she described them as directly comparable.

2549 The features of the Baldivis land which Ms LeFevre said positively supported its comparability were:

(a) the land was zoned rural with perceived urban potential and was purchased for future urban development;

(b) it had a similar topography, being low lying and flat (ts 6404, 6492);

(c) the land had similar requirements for drainage and for fill (ts 6404, 6492); and

(d) Baldivis had a similar relationship with Rockingham to the relationship of Ravenswood to Mandurah, although Ravenswood's relationship with Mandurah was preferable (ts 6492, 6580, 6605 6606).

2550 I accept the first three points. Standing alone, these points fall well short of justifying use of Baldivis sales as comparable. Other matters relevant to the contemplated future urban development must be considered. For example, what is the demand for lots? Of what size? What is the likely selling price? How quickly could lots be sold? How soon could all necessary planning approvals be obtained? What are the likely costs of developing the land to the point of lot production?

2551 These questions reflect the fact that in assessing urban potential, a prospective purchaser looks at more than just the prospect that rural land will be rezoned to urban. The purchaser must also assess the likely economics of urban development of the land.

2552 Ms LeFevre expressed the view that 'there was really the one major difference', namely end lot prices, between the two locations (ts 6494). For reasons to be developed, I do not accept that end lot prices were the one major difference between the locations. I consider that there are other major differences, including Baldivis' accessibility to Perth via Kwinana Freeway, the nature of the respective target residential markets, the level of activity in en globo land and end lot sales in each location, and the extent of residential development at each location.

2553 In her report of 5 August 2009 (exhibit 270E, 39/1148 1152), Ms LeFevre responded to Mr Wilson's view, in his report, that Baldivis sales were not comparable with Ravenswood. Mr Wilson's report (exhibit 271A, 47/92 95) considered comparative lot sale statistics from 2000 to 2006 in Baldivis and Ravenswood, including the number of sales and average prices. In response, Ms LeFevre made a number of points:

(a) the difference in sales activity was explicable because Baldivis had seven subdivision fronts, whereas Ravenswood had only one (Riverland Ramble), with two more in or ***around*** Pinjarra;

(b) lots in Riverland Ramble and MRCE sold well in 2005 and sold out in 2006. Had more been available for sale in 2006, more would have sold; and

(c) it is misleading to use average lot prices in a rapidly rising market.

Mr Brown also made the first two of these points (exhibit 269D, 44/1506). 9.6.2.2 MR BROWN

2554 In Mr Brown's oral evidence, identifying his comparable sales and outlining the way in which he used those sales to arrive at his valuation (ts 6419 6430), Mr Brown said little if anything to identify the basis for his view that sales in Baldivis were comparable.

2555 Mr Brown was invited to respond to Mr Wilson's and Mr Zucal's views about Baldivis. In my view, his response did not identify any reasoning to support his opinion that Baldivis sales were comparable. The first part of his evidence essentially outlined three different areas of Baldivis and said something about some of the comparable sales within those areas (ts 6494 6496). Mr Brown then made the point that Baldivis offered a wide selection of lots, which in itself attracted people who were looking to purchase residential lots to go to that area. Mr Brown said that was not the case at Ravenswood, partly because 'some of the better land was just not available' (ts 6496). He then referred to 'the blight' and posed the question of what the position would be had the subject land not been reserved. He said that he held the view that 'the sums that we were achieving at Baldivis could have reflected on the subject land had the land naturally progressed over the years' (ts 6496).

2556 In substance, Mr Brown's evidence amounts to an assertion that the Ravenswood land is comparable to Baldivis because, without the blight of the Highway, the Ravenswood land would be comparable. Mr Brown did not articulate any reasoning for the conclusion that without the Highway, Ravenswood land would be comparable or would be worth similar prices.

2557 Mr Brown gave further evidence about what he called 'the blight' arising from the reservation for the proposed Highway, in the context of comparability with Baldivis. See ts 6604 6605, 6624 6625. In essence, Mr Brown's evidence was that Ravenswood would look very different without the Highway and there would have been substantially more development. Asked whether Ravenswood would, in his view, have already developed in much the same way as Baldivis but for the reservations for the Highway and RRF, Mr Brown said: Not necessarily the same way but it would have had substantially greater development than it has today (ts 6605).

2558 As I explained in section 9.3.5, in the absence of the Highway proposal, there would not have been any additional urban zoned land in or ***around*** Ravenswood. The only difference made by the assumed absence of the Highway proposal would have been to decrease, to a small extent, the demand for residential lots in the area in the period from late 2004 to the taking date. Consequently, I do not accept Mr Brown's view, or assumption, that without the Highway, there would have been substantially more urban development in Ravenswood.

2559 In his report of 30 April 2009, Mr Brown set out his view that the Baldivis land was subject to a constraint regarding waste water that meant it would not be developable until 2014 or 2015 (exhibit 269C, 44/1422, 1425). He

expressed this position again in his report, responding to the reports of Mr Wilson and Mr Zucal (exhibit 269D, 44/1526), and in his oral evidence. In crossexamination, he appeared to accept that the waste water issue did not emerge to the public until 2007, which was after the major sales relied on by the plaintiffs' valuers (see ts 6626). In any event, that is the finding I make. 9.6.2.3 MR WILSON

2560 In his oral evidence, Mr Wilson stated a number of reasons for his view that Baldivis sales did not provide useful comparable sales for Ravenswood (ts 6461 6465):

(a) Baldivis attracts Perth commuters because of its freeway access and location 40 km from Perth. Ravenswood, 75 km from Perth, does not;

(b) there was substantially more en globo sales activity in Baldivis;

(c) there were 27 estates under development in Baldivis and three in the vicinity of Ravenswood;

(d) there was a substantial residential lot market in Baldivis and not in Ravenswood;

(e) the prices of lots sold in Baldivis were significantly higher than in Ravenswood;

(f) lot sizes were larger in Ravenswood than in Baldivis;

(g) the WAPC and others had identified a need for more urban land in Baldivis and rezoning applications were being progressed on that basis;

(h) lots 191 and 192 would require more expensive fill; and

(i) the lack of community infrastructure in Ravenswood would not be addressed for a considerable time, making it a less attractive location for residential lots in the short term.

2561 In his reports, Mr Wilson set out some statistics about the number of lots sold in Ravenswood and Baldivis' average sale prices. See for example, exhibit 271A, 47/93 95, 163 164. 9.6.3 Are Baldivis sales comparable?

2562 As I have said in section 9.1.1, there is not a hard and fast rule about when a sale may have some utility as a comparable sale. It is a question of judgment and degree. Most of the differences between Baldivis and Ravenswood to which I refer below would not, individually in isolation, lead to the discarding of Baldivis sales as possible comparable sales. However, taking all of what follows into account, I agree with Mr Wilson (and Mr Zucal, who expressed the same view, with less detailed reasoning) that Baldivis sales do not provide assistance as comparable sales.

2563 One parallel between the two areas is that at the relevant time, some of the land in each area was rural with future urban potential, so that rural zoned land may be purchased for future urbanisation. The question is whether sales of land of that character in these two locations are sufficiently similar that a sale in Baldivis can assist an assessment of what the hypothetical purchaser of the subject land would be willing to pay.

2564 In my view, an appropriate starting point is to consider the respective locations and their target markets as residential locations. 9.6.3.1 COMPARING THE LOCATIONS AND THEIR TARGET MARKETS

2565 Baldivis is about 40 km from Perth by car. It is adjacent to the Kwinana Freeway. Ravenswood is about 75 km from Perth via Mandurah or Pinjarra.

2566 There has been freeway access from Perth to Baldivis since 2001. Thus, by the date of taking, Baldivis had had freeway access for five years. I accept Mr Wilson's evidence that that freeway access caused the significant residential growth in Baldivis from 2001 to 2006 (exhibit 271A, 47/163 [261]; exhibit 271B, 47AA/89 [663]). That evidence was not challenged or contradicted, except perhaps for a general statement of Ms LeFevre (ts 6493) set out below, which I do not accept.

2567 Ms LeFevre responded to Mr Wilson's oral evidence about Baldivis. She said that the comments about Baldivis's connection to Perth did not reflect the type of purchaser interested in Ravenswood land. The prospective purchaser of Ravenswood land is from or works in or ***around*** the Mandurah ***region***, and considers Ravenswood as an alternative to purchasing in Mandurah, where prices are much higher (ts 6492).

2568 The effect of this evidence is that Mr Wilson and Ms LeFevre agree that Ravenswood and Baldivis have different target markets for the sale of lots. That is also the effect of Mr Rowe's evidence (exhibit 191E [38]). Baldivis attracts Perth commuters; people who work in Perth or in the metropolitan area and commute to work on the freeway. Ravenswood would largely attract people who work in the Peel ***region***.

2569 Ms LeFevre was asked about the relevance, overall, of the presence of the freeway to Baldivis. Her response was as follows: As Baldivis is a suburb, it provides an easier means of commuting to Perth if they wish, but the continuation of the freeway has had no other influencing effect on Baldivis as a residential suburb. The main difference between the areas would be in the end lot values and that is the adjustment that I have made (ts 6493).

2570 In my view, Ms LeFevre's statement that the freeway provides people an easier means of commuting to Perth 'if they wish', substantially understates the central significance of the freeway to Baldivis as a residential location. 9.6.3.2 THE RELATIONSHIP BETWEEN RAVENSWOOD AND MANDURAH AS A PARALLEL TO THE RELATIONSHIP BETWEEN BALDIVIS AND ROCKINGHAM

2571 As I have said, this is a matter relied upon by Ms LeFevre in support of the use of Baldivis as a comparable location to Ravenswood. The plaintiffs also point to the evidence of Mr Farris (exhibit 73). Mr Farris's statement was tendered and he was not crossexamined. Part of Mr Farris's statement is in these terms: Travelling east from Mandurah, the Ravenswood land forms the first larger parcels of land and is in relative close proximity to Mandurah as the regional centre providing the 'draw card'. Rockingham would have been the major 'draw card' for Baldivis. In this regard the location of Rockingham from Baldivis would be considered as being synonymous, with the location of Ravenswood from Mandurah (exhibit 73 [14]).

2572 Ms LeFevre and Mr Brown expressed their agreement with the evidence in this paragraph (ts 6580).

2573 Mr Brown was asked to explain what he drew from that fact as regards the comparability of the two locations. To my mind, having been asked the question a number of times, he did not respond directly to it. Rather, he simply stated that, but for the reservations, the two locations might have had a similar value (ts 6604 6605).

2574 Ms LeFevre explained that she relied on the relationship of a developing fringe area of subdivision to a major regional centre (ts 6606).

2575 In my view, this aspect is not a matter of significant weight in assessing the comparability of Ravenswood and Baldivis. Apart from anything else, it overlooks the fundamental difference between the two locations. Baldivis is a Perth commuter area; Ravenswood is not. Because of that, the relationship between Baldivis and its nearest regional centre of Rockingham differs from the relationship between Ravenswood and its nearest regional centre of Mandurah. I do not accept that the 'drawcard' for Baldivis is Rockingham. 9.6.3.3 THE EXTENT OF SALES ACTIVITY IN EN GLOBO LAND AND IN END LOTS

2576 It is clear that there was, as at July 2006, a very marked difference in the level of sales activity in both en globo land and end lots in Baldivis as against Ravenswood. As Mr Wilson pointed out in his evidence (ts 6461), Ms LeFevre and Mr Brown refer in their reports to almost 30 en globo sales transactions in Baldivis. There were few in Ravenswood.

2577 The plaintiffs point to reasons for the limited sales activity in en globo land in Ravenswood. In particular, they say that it reflected the choices made by the small number of families who owned substantial holdings in the area. It did not reflect a lack of interest on the part of developers. I have accepted that: see section 9.3. The fact remains that there was a significant amount of en globo sales in Baldivis, and very few in Ravenswood. That fact is a matter to be taken into account in determining the utility of Baldivis sales as comparable sales for Ravenswood.

2578 Mr Wilson's evidence, which was not challenged or contradicted, is that there were 377 lots sold in Baldivis from December 2005 to July 2006, as against 66, in the same period, in Barragup, Ravenswood and Pinjarra combined (exhibit 271B, 47AA/90). Mr Wilson pointed to evidence from Mr Haratsis, and in an MDP report, that there were 27 estates under development in Baldivis in mid2006. There is also evidence of substantial residential lot sales in Baldivis from 2000 to 2006, and very little in Ravenswood until 2005.

2579 As I have said, Ms LeFevre's response to this is that this difference is caused by the lack of available urban zoned land in Ravenswood, whereas there was ample in Baldivis. I do not agree. Riverland Ramble and MRCE had been zoned urban since the mid1990s. They did not start selling lots until 2004, because, I infer, there was not sufficient demand to make it economic to do so. The same is true of Austin Cove, located further away to the ***south***. There is no evidence of landowners seeking urban rezoning of rural land ***around*** Ravenswood in the early 2000s until 2005, when Clough/Rapley applied. I accept that more lots in Ravenswood could have been sold in 2006 in the boom in that period. But, I do not accept that the marked difference in the level of sales in the two areas from 2000 to 2006 simply reflects the difference in the extent of urban zoned land. That difference in urban zoned

land itself reflects significant difference in demand. There was substantial demand for residential lots in Baldivis through the first half of the 2000s. The same was not true in Ravenswood.

2580 Ms LeFevre and Mr Brown agreed that, in 2005 and 2006, Baldivis had an established and strong market for land and for housing, and that Ravenswood did not (ts 6624). Mr Brown said that this was because of the blight on Ravenswood from the Highway (and, perhaps, the RRF). As I have said, I do not accept that view of Mr Brown.

2581 In my view, the very substantial difference in the state of the market for residential sales in Baldivis as against Ravenswood is another factor of some significance against the use of en globo sales in Baldivis as comparable sales. A prospective purchaser of en globo land in Baldivis could see substantial urban lot sales activity over some years in Baldivis. By 2006, Baldivis was a wellestablished and expanding residential suburb. As a residential area, Ravenswood was embryonic. 9.6.3.4 THE PROGRESS OF REZONING IN BALDIVIS

2582 I accept the evidence of Mr Zucal and Mr Wilson that in Baldivis in late 2005 and 2006, the City of Rockingham was proposing substantial amendments to rezone additional urban land, and buyers were proceeding on the expectation that rezoning was imminent and likely (ts 6623). Mr Brown agreed that in this period, both the local authority and the WAPC had indicated an intention to facilitate rezoning more land in Baldivis (ts 6622, 6624). Although at that stage of her evidence, Ms LeFevre appeared to express disagreement, generally she accepted that sales in Baldivis occurred on the basis that the purchaser/developer expected urban rezoning to occur (exhibit 270A, 36/33; ts 6691 6692).

2583 In August 2006, the WAPC initiated amendments 1127 1130/41 (exhibit 256E; exhibit 191D [21]). The City of Rockingham had requested the WAPC to initiate those amendments in 2005: one in July 2005 and the rest in December 2005 (exhibit 191D [21]). Amendments 1127 1129 cover the land between Baldivis Road and the freeway, ***south*** from Millar Road down to Safety Bay Road. Part of those amendments cover two of the sales relied upon by Ms LeFevre in assessing a per hectare rate: sale 1, 19 21 Baldivis Road; and sale 2, lots 921 and 922 Baldivis Road. Those two sales are also relied on by Mr Brown in coming to his view on value (his sale 11 and sale 10, respectively).

2584 According to Ms LeFevre, a contract for 19 21 Baldivis Road was entered into in April 2006 and became unconditional in July 2006. The sale settled in December 2006. When the contract was entered, the City of Rockingham had requested the WAPC to rezone the land urban (exhibit 270A, 36/33). Mr Brown understood that the contract was made on 31 August 2006. By then, the WAPC had initiated amendment 1127/41 (ts 6708).

2585 Ms LeFevre's sale 2 (Mr Brown's sale 10) is lots 921 and 922 Baldivis Road. By the time the contract for this sale was entered in January 2006, the City of Rockingham had requested the WAPC to rezone the land to urban. Further, the ***South*** West District Planning Committee, a committee of the WAPC, had recommended that the WAPC initiate that amendment (exhibit 256D).

2586 This land was shown as 'future communities' in Network City. The land was immediately opposite the established residential area of Baldivis Central (ts 6704 6705).

2587 Mr Brown's sale 9, on the corner of Zig Zag Road and Baldivis Road, Baldivis, was also part of these amendments. The options were entered after January 2006 and settled in December 2006, after the WAPC had initiated the amendments.

2588 The sales of these Baldivis properties were, I find, based on a much more confident expectation of imminent urban rezoning than reflects the hypothetical purchaser's view of the subject land.

2589 I will make some observations about other particular sales relied on by the plaintiffs' valuers before turning to the question of end lot prices in Baldivis compared to Ravenswood. 9.6.3.5 OTHER PARTICULAR SALES

Lot 2 and lot 105 Doghill Road, Baldivis

2590 Both Mr Brown and Ms LeFevre accepted that the contract for sale of these lots did not proceed to settlement (ts 6410, 6429). As Ms LeFevre accepted, a contract that does not proceed to settlement does not constitute reliable sales evidence (ts 6411).

2591 The same is true of all of Mr Brown's sales 18 23 which, he accepted, did not proceed to settlement (ts 6429).

176 Woolcott Road, Wellard

2592 The locational differences between Baldivis and Ravenswood broadly apply to a similar extent in relation to Wellard. Wellard is a little north of Baldivis, east of the freeway. I accept Mr Wilson's evidence that lot sale prices in Wellard were substantially higher than for Ravenswood (exhibit 271A, 47/168).

2593 According to Ms LeFevre, the sale occurred in October 2006. Before that, the land had been included for mediumterm urban in the draft Jandakot Structure Plan of 2001 (ts 6714). Further, in June 2006 the WAPC published an amendment report proposing that the land be rezoned to urban deferred (ts 6714 6715). Ms LeFevre's report does not mention those matters, although she was aware of them. She accepted that on reflection she should have pointed to them in her report (ts 6716).

2594 I turn to particular sales relied on by Mr Brown, not already dealt with.

Sale 12, lots 30 and 31 Kerosene Lane, Baldivis

2595 Mr Brown treated this as a sale of rural land (exhibit 269B, 40/45). However, the land was zoned urban in October 2005: see exhibit 274A and exhibit 274B.

Lots 519 521 Sabina Road, Baldivis

2596 Mr Brown refers to options entered into in December 2006. By then, the amendment had been initiated to rezone the lots urban (exhibit 256E). As was observed in the MRS amendment report, this area was shown as 'future communities' in Network City.

2597 Further, it is unclear from Mr Brown's evidence whether and when the options were exercised. 9.6.3.6 END LOT PRICES

2598 Ms LeFevre said in her evidence that she adjusted her per hectare rate to take account of the difference in end lot prices between Baldivis and Ravenswood. She described this as 'really the one major difference' between the two locations (ts 6494). The way in which she adjusted for the difference in end lot sales is set out in her report of April 2008, in dealing with her sale 1, 19 21 Baldivis Road: The purchaser in this sale considered the land would yield 640 lots, at 390m2 to 500m2 lot size with a raw development cost of $60,000 to $65,000 per lot, and gross sales assessed at $205,000 to $220,000 per lot, as at the date of sale. Our analysis of this sale suggests that the price paid represents more of an 'Urban Deferred' status for the land.

In our view, this land has a very comparable situation to the subject lands, on an unaffected basis, more particularly Lots 191 and 192, in both planning and development aspects and land characteristics. However, there is a detrimental affect from the Freeway on the sold land from the Freeway alignment, and with the Walley Bridge flyover over the Telephone Lane/Railway line/Millar Road corridor at the northern end of the property, whilst on the other hand the subject locality has shown through the new residential estates to have subdivided lot values about 25% lower than equivalent unaffected lots in Baldivis.

However, adopting an average lot sale price of $210,000 indicates a difference of some 20% greater than that applicable to Ravenswood lots at 04/06, suggesting that the sale englobo rate of $640,520/ha would reduce to a comparable rate for the subject lands or approximately $534,000/ha (exhibit 270B, 36/33).

2599 In outlining her reliance on this comparable sale, she explained the approach she took. She said that she 'took into account that the developer had based it on an anticipated end lot value between [$200,000 and $220,000], so [she] calculated what that would mean pro rata based on [her] end lot value for the subject land' (ts 6405).

2600 Her comparison of end lot prices was, therefore, based upon what a particular purchaser expected. It was not based upon her own detailed analysis of Baldivis sale prices (ts 6692 6693).

2601 That is one major deficiency in her analysis. A second is that in comparing lot prices in Baldivis and Ravenswood, she overlooked or gave insufficient weight to the difference in lot sizes in those two localities. I explain this second point immediately below.

2602 She compared her adjusted figure of $210,000 for the purchaser's expectation of Baldivis lots, with her view of $175,000 based on lots of 600 650 sqm in Ravenswood (ts 6695 6696). The Baldivis lots contemplated by the purchaser were between 390 and 500 sqm (ts 6696).

2603 Mr Wilson said that the difference in the size of the lots was important to any analysis of a comparison of end lot sale prices in Ravenswood and in Baldivis. His market research suggested that in Ravenswood at April 2006 (the date of the sale of 19 21 Baldivis Road), lot prices ranged from $93,000 to $152,000 for lots of an average size of 680 sqm. There were no sales in Ravenswood of lots between 390 and 500 sqm, the size proposed by the Baldivis purchaser. The lot sales in MRCE of that size ranged in price between $112,000 and $130,000 (ts 6753 6755). I accept this evidence.

2604 Ms LeFevre agreed that to compare the price of end lots in Baldivis of between 400 and 500 sqm, one must look to sales in MRCE rather than Riverland Ramble, because there were no such sales in Riverland Ramble (ts 6756). She accepted that originally she was working on an assumption of larger average lot sizes for her end lot values in Ravenswood. However, she suggested that the change in lot size would only make about a 5% difference (ts 6790). I do not accept her evidence in that respect. In my view, Ms LeFevre's failure to take into account the difference in lot sizes in assessing comparative lot prices for Ravenswood and Baldivis significantly undermines the reliability of her analysis.

2605 I am not persuaded that there is an adequate foundation for Ms LeFevre's opinion that the difference in end lot prices between Baldivis and Ravenswood is reliably reflected by a 20% downward adjustment of the value of en globo land in Baldivis. Her opinion is not based on a broad analysis of Baldivis sales. It proceeds primarily by reference to the expectations of one particular purchaser. Moreover, there seems to me to be, as Mr Wilson suggests, an insecure foundation for the comparison of prices, given the marked difference in lot sizes for the Baldivis property as compared to the lot sizes in Ravenswood on which Ms LeFevre's analysis proceeds.

2606 Furthermore, as I explain in section 9.10, I am not persuaded that Ms LeFevre's analysis of expected lot prices in Ravenswood is reliable.

2607 I accept Mr Wilson's opinion that it is not appropriate simply to adjust by some other percentage, such as 30% or 40%, to take account of the difference in end lot sizes, and other differences between Baldivis and Ravenswood (ts 6465). There are too many subjective variables to make that process useful in attempting to use Baldivis as a location with comparable sales: see exhibit 271B [665]. 9.6.3.7 COMPARISON WITH KNOWN SALES IN RAVENSWOOD

2608 Ms LeFevre expressed the view that the Clough/Rapley sale, if it is accepted as a sale, shows a similar rate to the earlier sales of the lands in Baldivis which were rural with perceived urban potential (ts 6419). That view is based upon Ms LeFevre's analysis of the Clough/Rapley sale. That analysis derives a rate per hectare for both lots, which Ms LeFevre considers to reflect the sale of lots 300 and 301 as rural land with urban potential. As I have already explained, I do not agree with that analysis. In my view, the rate per hectare of the sale price for lots 300 and 301 reflects a sale on an urban basis.

2609 That being so, the Clough/Rapley sale provides no support for the use of Baldivis sales as comparable sales. To the contrary, it militates against it.

2610 Whatever else can be said about the sale of lot 9007, that sale provides no support for a conclusion of comparability as between Baldivis and Ravenswood. The same is true of the Gold Fortune sale, on my analysis of the ceiling price indicated by the terms of the option created in July 2006. 9.6.3.8 CONCLUSION

2611 For these reasons, I find that sales in Baldivis, relied on by the plaintiffs' valuers, do not provide useful comparable sales, either directly or with adjustment in the manner suggested by Ms LeFevre. In summary:

(a) Baldivis attracted people who work in the city and metropolitan area due to its proximity to the Kwinana Freeway;

(b) Ravenswood did not and would not attract such people (and all the more so in the assumed absence of the Highway). Its market is for people working in Peel;

(c) Baldivis was a wellestablished residential suburb; the same could not be said of Ravenswood;

(d) Baldivis had a strong and wellestablished market for residential lots, whereas there were much more limited sales in Ravenswood;

(e) there was a substantial number of en globo sales in Baldivis, unlike in Ravenswood;

(f) lot sizes were larger in Ravenswood;

(g) end lot prices were substantially higher in Baldivis;

(h) the WAPC and the local authority had identified the need for further urban land in Baldivis and were actively pursuing rezoning. Purchases of urban land in relevant parts of Baldivis in 2006 were made in the expectation of likely imminent rezoning; and

(i) consideration of sales in the Ravenswood vicinity does not support using Baldivis sales as comparable sales.

9.7 The sale of lot 9007, part of Riverland Ramble 9.7.1 Introduction

2612 In October 2006, lot 9007, part of the Riverland Ramble estate, was sold for $15.51 million. The land was zoned urban. The valuers disagreed on whether and to what extent the sale constituted a reliable indication of the market value of lot 9007. For the reasons to be explained later in this section 9.7, I do not think it necessary to resolve that question. In essence, that is because I do not think the sale of lot 9007, as urban zoned land, is capable of informing my assessment of the value of the subject land beyond what is anyway clear from other transactions and the evidence generally. I will set out the circumstances of the sale before explaining why that is so. 9.7.2 Lot 9007: the circumstances of the sale

2613 Mr Raymond Jones was a director of Vogue Marketing and Syndication Pty Ltd (Vogue Marketing). Vogue Marketing owned Riverland Ramble up to 2006. Mr Jones' statements (exhibit 211A and exhibit 211B) outline the circumstances of the sale. He was not crossexamined in any material way about the circumstances of the sale.

2614 By 2004, the first stage of the Riverland Ramble subdivision had been released.

2615 Lot 9007 was one of three adjoining lots comprising Riverland Ramble. It is located primarily north and east of the parts of the estate that had already been released, namely stages 1 and 2 (exhibit RR146.82; exhibit RR146.85).

2616 Mr Jones put together a syndicate for the sale of lot 9007.

2617 Lot 9007 was purchased by Riverland Ramble Pty Ltd from Vogue Marketing in October 2006. The contract of sale dated 26 October 2006 is exhibit 242. The purchase price was $15.51 million. By cl 2.3, the parties agreed that the purchaser was not paying anything for the 4 ha site set aside for a school. The price was determined on the basis that there was no GST payable. If GST was payable, the purchaser would pay the amount of GST (cl 3.1).

2618 Title to lot 9007 was transferred in December 2006.

2619 Mr Jones says that:

(a) the land was not put on the market;

(b) the people within the syndicate, comprising the shareholders of Riverland Ramble Pty Ltd, were all known to him; and

(c) the sale price was based on a valuation received from Mr Wayne Lawrence of Knight Frank (exhibit 211A [9]).

2620 The Knight Frank valuation is dated 31 May 2006. It values the property at that date. That was also the date of inspection. The market value is assessed at $16.8 million on a GST inclusive basis. After some adjustments, the value produced was $15.51 million exclusive of GST (exhibit 211A, 46/516).

2621 The valuation is criticised by Ms LeFevre in one of her reports.

2622 Mr Jones says that he was content to rely on the 'mortgage valuation' of Mr Lawrence as the value for which he sold the land, considering the persons that were within the transaction were known to him (exhibit 211A [11]). Further, his company, Vogue Marketing and Syndication, entered into a contract for the project management of the land (see exhibit 247).

2623 Mr Jones said that had the value been tested on the open market he 'could not be sure what value the land would have attracted' (exhibit 211A [13]).

2624 In his supplementary statement of 9 November 2009, Mr Jones says that the sale relied on the valuation completed in May 2006: The contract did not include any escalation in price between the date of the valuation and the contract. In part this was as a consequence of the fact that the arrangements were with the syndicate that I was

putting together which included a number of my friends and also my long time business associate, Mr Armstrong and it was his family who bought into the syndicate arrangement (exhibit 211B [8]).

2625 In addition, he says he was 'successful in attracting a management agreement' with a base management fee of approximately $360,000 per year, with an additional management fee equal to 3.5% of the gross sale price of the land, to the extent that that exceeded the base management fee (exhibit 211B [10]). 9.7.3 The per hectare rate revealed by the sale

2626 In most of the valuers' written reports, the valuers treated the sale as revealing a rate of $334,000 per hectare. That appears to have been derived by reducing the sale price by oneeleventh on account of GST and dividing that sum by the total area of just over 42 ha. In one of Ms LeFevre's later reports, she said, correctly as I will explain, that after deduction of the school site and without reducing the price for GST, the rate should be about $407,000 per hectare (exhibit 270G, 39A/1257).

2627 In oral evidence, Mr Wilson also considered that the effective per hectare rate was about $408,000 (ts 6141). Mr Wilson and Ms LeFevre both ultimately agreed that the total price of $15.51 million should be divided by 38 ha, taking account of the 4 ha school site. That produces a per hectare rate of $408,000. No deduction should be made for GST.

2628 Given cl 2.3 regarding the school site and cl 3.1 regarding GST, that reflects the correct approach. 9.7.4 What, if anything, does the sale of lot 9007 indicate about the value of the subject land?

2629 There was considerable debate between the valuers about whether the sale of lot 9007 was capable of assisting an assessment of the value of the subject land. In particular, the valuers disagreed about whether the sale of lot 9007 was an arm's length market sale that reliably indicated the value of lot 9007 itself. In that regard, the plaintiffs' valuers pointed to a number of aspects of the sale, including that:

(a) the land was not put on the market;

(b) the parties were known to each other;

(c) the sale was based on a valuation, five months earlier, and that valuation is criticised in detail by Ms LeFevre; and

(d) the vendor entered into a management contract for the land.

2630 If the subject land were to be valued on the basis that it was zoned urban, the sale of lot 9007 would be of considerably more potential assistance. Given that lot 9007 is much smaller than the subject land, and abuts existing and ongoing residential development at Ravenswood, it would be expected to attract a higher rate per hectare than the subject land. However, the subject land is to be valued on the basis that it is zoned rural, with an uncertain urban potential that is at least 5 6 years away. Moreover, the subject land is to be valued on the basis that the odds do not favour urban rezoning in that timeframe.

2631 In those circumstances, assuming the sale of lot 9007 were an arm's length sale reliably indicating the value of lot 9007, all that could be drawn from that transaction would be that the value of the subject land would be something very significantly less than the $408,000 per hectare paid for lot 9007. It is not necessary to determine whether and to what extent the sale of lot 9007 reliably supports that conclusion. That is so for two reasons. First, in my view, in light of the findings I have made, there is nothing to sustain a conclusion that the subject land is worth anything of the order of $400,000 per hectare. Secondly, there are other indications that the value of the subject land is something very substantially less than $400,000 per hectare.

2632 As to the first, the plaintiffs' valuers valued the subject land at more than $400,000 per hectare. However, those valuations were based on comparable sales. I have analysed all of the comparable sales on which the plaintiffs' valuers rely. For the reasons set out in sections 9.3 to 9.6, I do not accept the plaintiffs' valuers' views of their comparable sales. Consequently, there is nothing to sustain a conclusion that the subject land is worth anything of order of $400,000 per hectare.

2633 As to the second reason, I have concluded that the Clough/Rapley transaction indicates a view of that land as worth about $300,000 per hectare as urban land. When that rate is escalated to the date of taking, discounted for the effect of the Highway on value, and adjusted to take account of the superiority of the Clough/Rapley land over the subject land, it suggests a value of the subject land, as urban land, as something a little under $300,000 per

hectare. Consequently, as I have said, the Clough/Rapley transaction indicates that the subject land, as rural land with uncertain urban potential, is worth something very significantly less than $300,000 per hectare.

2634 Further, the Gold Fortune transaction indicates a ceiling value of the subject land of something of the order of between $210,000 and $230,000 (see section 9.5.6).

9.8 Mr Zucal's sales 9.8.1 Lot 23 Pinjarra Road

2635 Lot 23 is 11.17 ha, located on Pinjarra Road, just to the northwest of the intersection with Beacham Road. It sold in March 2006 for $1.54 million, almost $139,000 per hectare. Lot 23 was rural in the PRS and TPS 4. Lot 23 was designated 'special use (home based business)' in the draft LPS.

2636 To avoid confusion, I point out that this property is distinct from and unrelated to the lot 23 that formed part of Windsor Park when acquired by the plaintiffs (see section 1.2).

2637 Mr Zucal considered that lot 23 had superior potential to the subject land (ts 6438). Of course, that view is influenced by Mr Zucal's bleak view of the urban potential of the subject land. See section 9.2.5.

2638 Mr Zucal emphasised the much smaller size of lot 23. I agree that the significant difference in size is a factor that, in isolation, requires a lower rate per hectare to be applied to the subject land. However, as I explained in section 9.2.7, I do not accept the approach taken by Mr Zucal in quantifying that discount.

2639 Because of the difference in lot size, Mr Zucal considered that the per hectare rate for lot 23 provides a ceiling value for the subject land. For the reasons that follow, I do not accept that view.

2640 The defendants' submissions correctly highlight the following similar features of lot 23 and the subject land. First, both are zoned rural. Secondly, both are on Pinjarra Road. Thirdly, both are located in the same general vicinity. Fourthly, both are identified for a higher use in the draft LPS (in the assumed absence of the proposed public works).

2641 However, I accept Ms LeFevre's evidence that the two locations should not be equated. Lot 23 is on the periphery of Pinjarra, whereas the subject land would be part of greater Ravenswood (ts 6502). The closer proximity to Mandurah of the subject land, compared to lot 23, would be an advantage. Secondly, as Ms LeFevre pointed out, services are not available for lot 23 (ts 6502). Thirdly, while both lot 23 and the subject land are rural with a higher use potential, the higher use potential for the subject land is urban, not use for a home based business. Thus, the subject land's higher use is more valuable than lot 23's higher use.

2642 Finally, the sale of lot 23 was in March 2006. In the rapidly rising market in 2006, some allowance should be made for that in valuing the subject land at the taking date.

2643 In my view, the need to discount the per hectare rate for lot 23 for the larger size of the subject land is outweighed by the other matters to which I have referred. I think the sale of lot 23 is an indication that the value of the subject land at the taking date was something not less than, and likely a little more than, the $139,000 per hectare paid for lot 23.

2644 Because lot 23 and the subject land have different potential higher uses, the difficulties in quantifying the adjustment of the per hectare rate for lot 23 to derive a per hectare rate for the subject land are particularly acute. Again, it is in the territory of making best guesses. Viewing the sale in isolation, my best estimate is that the sale of lot 23 indicates a per hectare rate of something in the range of $140,000 to $180,000. I will revisit that assessment in light of the other comparable sales, and in light of what, if anything, is revealed by the HSAs. 9.8.2 Mr Zucal's other sales

2645 Lot 604 Beacham Road, West Pinjarra (sale 17) was a 20.7 ha parcel that sold for $3 million in December 2006. When account was taken of a residence and other improvements, Mr Zucal considered it reflected a rate of about $130,000 per hectare (exhibit 272A, 48/33). The land adjoins a 2 ha special rural subdivision. Mr Zucal considers it had immediate potential for rural residential or special rural subdivision, which he says compares favourably with the potential of the subject land for special rural subdivision in four years (ts 6444). He said a discount for magnitude was needed (48/33; ts 6444). In his oral evidence, Mr Zucal reformulated his written analysis to add 20% to the value he had derived, to reflect his view of the potential of the subject land for urbanisation in 10 years (ts 6444).

2646 In my view, the more valuable potential of the subject land for urban use makes it more valuable per hectare than lot 604, notwithstanding the need for a discount for magnitude (which I accept), and notwithstanding the need to discount the rate for the escalation in prices from July 2006 to December 2006.

2647 Lot 602 Beacham Road, West Pinjarra (sale 6) was a 28.5 ha rural zoned lot that sold in September 2006 for $3.5 million or $122,000 per hectare (exhibit 272A, 48/28). However, because the land was sold for its industrial potential, I accept the evidence of Ms LeFevre, that it does not provide any real assistance in valuing the subject land based on its urban potential (ts 6500).

2648 I do not propose to outline each of Mr Zucal's other comparable sales individually. That is because I do not consider Mr Zucal's other sales to be comparable, to any extent that provides assistance in assessing the value of the subject land. In short, that is because the properties Mr Zucal used as comparable sales did not have any significant urban potential, at least before the very long term. They were selected by Mr Zucal based on his view of the very low urban potential of the subject land, which I do not accept. Certainly, none of Mr Zucal's comparable sales have an urban potential that is similar, even broadly, to that of the subject land.

2649 Mr Zucal's more important comparable sales are located in west Pinjarra, Nambeelup and Nirimba, or outer Pinjarra. Nirimba is ***south*** of Austin Cove. Many of the comparable sales he says are most important in his analysis are substantially ***south*** of the Murray River. Mr Zucal's comparable sales are remote from the urban front. They are not on main roads. Many of them are not on sealed roads. Many of them do not have sewerage or services.

2650 Mr Zucal's comparable sales do not have, and he does not say they have, any urban potential that is less than remote.

9.9 Conclusions from the analysis of comparable sales

2651 In the end, in my view, there is very limited sales data that provides a sound foundation for valuing the land. For the reasons given in section 9.6, I do not think the Baldivis sales are of assistance. There are two transactions relating to land in the vicinity of the subject land that was sold as rural with urban potential: Clough/Rapley and Gold Fortune. However, neither is a conventional unconditional sale and, on my analysis, neither directly indicates the value of the subject land. Rather, one indicates a floor value for the subject land and the other a ceiling value.

2652 On my analysis, the Clough/Rapley contract can be used in two ways. First, it can be taken as an indication of a floor price for lot 301 as rural land with urban potential. That floor price of $194,000 per hectare in November 2005 is escalated to $255,000 per hectare at the date of taking. I consider lot 301 to be substantially more valuable per hectare than the subject land. I would adjust the floor price for the subject land derived from the sale of lot 301 to a figure in the range of $145,000 to $175,000 per hectare (after discounting for the increase in value attributable to the Highway). See section 9.4.10. There is nothing in the other comparable sales that would cause me to review the extent of that adjustment.

2653 Secondly, the Clough/Rapley contract can be taken as an indication of the urban value of lots 300 and 301. On that analysis, a per hectare rate of about $300,000 is shown for those lots. After escalating for the increase in land values to July 2006, discounting for the effect on value of the Highway, and then adjusting for the lesser value of the subject land, this indicates an urban value for the subject land of a little under $300,000 per hectare. Given my view of the uncertain urban potential of the subject land, that indicates that the value of the subject land is something very substantially less than $300,000 per hectare.

2654 The other transaction in the locality involving rural land with urban potential relates to the Gold Fortune land. For the reasons I have explained in section 9.5:

(a) after discounting for the effect on value of the Highway proposal, I think the first exercise price of the Gold Fortune option indicates a ceiling price for the subject land of something in the range of $210,000 to $230,000 per hectare; and

(b) I do not consider that the exercise price in August 2007 can be used to derive a higher per hectare value for the subject land in July 2006.

2655 The other sale of some utility is the sale of lot 23 Pinjarra Road. It sold in March 2006 for about $139,000 per hectare. Notwithstanding that it is a sale of only about 11 ha, for the reasons explained in section 9.8.1, I think it indicates a per hectare value of the subject land in July 2006 that is a little higher than the value of lot 23, in the range of $140,000 to $180,000.

2656 In my view, there are only three sales of real assistance. Each assists in a different way. One indicates a floor, one a ceiling, and only one provides a direct indication of the value of the subject land. Due to uncertainty in the adjustment process, I have assessed each as indicating a range. Thus, I have derived a floor range, a direct value range and a ceiling range. The floor range ($145,000 to $175,000 per hectare) is derived from Clough/Rapley and overlaps to a substantial degree with the direct value range from lot 23 ($140,000 to $180,000 per hectare).

2657 The ranges indicated by those transactions are substantially consistent, but are inconsistent in one respect. The bottom of the range of direct value derived from lot 23 is lower than the bottom of the floor value range indicated by Clough/Rapley. Notwithstanding the conditional character of the Clough/Rapley transaction, given the location, zoning, proposed highest and best use and size of that land, I consider that transaction a more reliable indicator than lot 23. Consequently, I would not select a value less than $145,000 for the subject land, notwithstanding that a value of $140,000 $145,000 is within the range indicated by lot 23.

2658 The ranges indicated by these three sales are consistent with other broad indications in the sales evidence.

2659 The Clough/Rapley transaction suggested an urban value of the subject land of just under $300,000 per hectare, suggesting an urban potential value of substantially less than that. The sale of lot 604 Beacham Road for $130,000 per hectare was based on its ruralresidential or special rural potential. As I explained in section 9.8.2, I consider that the more valuable potential of the subject land for urban use makes it more valuable per hectare than lot 604.

2660 In June 2005, Gold Fortune Pty Ltd paid a total of $3 million to acquire the 18.7 ha comprising lots 185 and 205. The lots were acquired from two different owners in separate transactions. Consequently, they cannot simply be consolidated and treated as a separate transaction for the purpose of comparative sales analysis. All other things being equal, a purchaser of a given area of land is likely to have to pay more for it if it is purchased from multiple, independent owners in separate transactions, than if purchased from a single seller. Nevertheless, I think the acquisition of the two lots is something against which a value or range of values can be checked, to see whether it is 'in the ballpark' or appears out of kilter. Taking into account the difference in sizes, the fact it was acquired from two unrelated owners in separate transactions and the superiority of the Gold Fortune land, on the one hand, and the substantial escalation in prices from mid2005 to mid2006 on the other, the ranges indicated by the Clough/Rapley sale, the sale of lot 23 and the Gold Fortune option are not out of kilter with what is suggested by the June 2005 acquisitions of lots 185 and 205.

2661 As I have said, in analysing what each comparative sale suggests or indicates about the subject land, I have assessed each sale as indicating a range. That range reflects a margin of error or uncertainty in the comparative assessment.

2662 Adopting the midpoint of each range tends to minimise the error inherent in the adoption of the range. Further, adopting the midpoint means that, as assessed, the value adopted is equally likely to be too high, as too low. The same would not be true if a different value in the range were adopted.

2663 As I have explained, the floor value range, direct value range and ceiling value range are broadly consistent, except that a value between $140,000 and $145,000 is consistent with the direct value range indicated by lot 23 but not consistent with the floor value range indicated by Clough/Rapley.

2664 If the midpoint of each range is adopted, there is no inconsistency in what is indicated by each of the ranges.

2665 When I revisit the adjustment for comparability for each of these sales, in light of the sales evidence as a whole, it seems to me that, in each case, adoption of the middle of the range for that sale is my best estimate/guess of what is indicated by that sale.

2666 In these circumstances, leaving aside what may be derived from an HSA, the midpoint of each range should be adopted.

2667 Thus, leaving aside the HSA methodology, the effect of the comparable sales can be summarised as follows:

(a) the Clough/Rapley sale of lot 301 indicates a floor value in the range $145,000 to $175,000 per hectare, adopting $160,000 per hectare as the midpoint;

(b) the Gold Fortune option indicates a ceiling value in the range $210,000 to $230,000 per hectare, adopting $220,000 per hectare;

(c) the sale of lot 23 indicates a value in the range of $140,000 to $180,000 per hectare, adopting $160,000 per hectare;

(d) these values are consistent with other broader indications in the sales evidence; and

(e) these sales support or suggest a value of the subject land of $160,000 per hectare.

2668 The limited extent of assistance derived from comparable sales is relevant to the extent to which hypothetical subdivision analysis provides a useful guide to the value of the subject land. I turn to that topic.

9.10 Hypothetical sales analysis 9.10.1 The valuers' HSAs

2669 The plaintiffs' valuers used the HSA method as a check method in their April 2008 valuation reports valuing the land on the basis that it was rural with imminent urban potential. Ms LeFevre's initial HSA is at exhibit 270B, 36/44 48, producing a value of $39.25 million; Mr Brown's is at exhibit 269B, 40/59 61, producing a value of $36.4 million.

2670 Mr Wilson's response to these HSAs is in his report of 20 March 2009. See exhibit 271A, 47/101 103, 182 184, 241, 253 256. He did his own HSA, valuing the land at $6.25 million when urbanisation was deferred for 6 years (47/270).

2671 Mr Zucal's response to Ms LeFevre's and Mr Brown's HSAs is at exhibit 272A, 48/94 97, 115 118. Mr Zucal did an HSA as part of his urban valuation, but not as part of his urban potential valuation.

2672 On 26 and 28 July 2010, the valuers conferred. As reflected in their joint statement (exhibit 273), a number of elements of the HSA were agreed. These included stamp duty and purchase costs, sales commission and the applicable interest rate on the land. The agreement on those matters led each valuer to recalculate his or her HSA.

2673 All the HSAs were done on the basis of the GRA concept plan (exhibit 191A, 25/392). That has been the case since the valuers' first conferral in May 2009. That concept plan showed 799 R20 lots. During the second conferral in July 2010, or ***around*** that time, it emerged that the 799 R20 lots shown on the GRA concept plan had an average lot size of 486 sqm. Following that, an amended concept plan was prepared which showed 782 R20 lots, with an average size of 500 sqm.

2674 In October 2008, the engineering experts agreed that the likely development cost for the subject land in accordance with the GRA concept plan was $75,000 per lot (exhibit 113). Subsequently, the engineers agreed that the figure of $75,000 per lot continued to apply, notwithstanding the change in the number of R20 lots (exhibit 113A).

2675 The valuers refined their respective HSAs in light of there being 782 R20 lots, not 799. The joint statement in its final form reflected the modified HSAs. The joint statement (exhibit 273) included the following figures in the table setting out the HSA of each valuer.

JL

GB

KW (no deferment)

KW (6 yrs deferment)

BZ

REALISATION

R20 Lots x 782

Price/Lot

180,000

190,000

175,000

175,000

165,000

140,760,000

148,580,000
136,850,000
136,850,000
129,030,000
R30 Lots x 280
Price/Lot
120,000
165,000
122,000
122,000
100,000
33,600,000
46,200,000
34,160,000
34,160,000
28,000,000
175 Residential Units
Price/Lot
50,000
880,000/ha
50,000
50,000
42,000
8,750,000
4,526,280
8,750,000
8,750,000
7,350,000
2 Commercial Sites (20,150 sqm)
Price/sqm
350
450
200
200
250
7,050,000
9,067,500
4,030,000
4,030,000
5,037,500
Total realisation (inc GST)
190,160,000

208,373,780
183,790,000
183,790,000
169,417,500
COSTS
GST on Realisation
17,287,272
18,943,071
16,708,182
16,708,182
15,401,590
Sales Commission

(Agreed at $8.5m)
8,500,000
8,500,000
8,500,000
8,500,000
8,500,000
Project Management

(% of gross realisation)
Included in Profit + Risk
Included in Profit + Risk
2% (incl GST)
2% (incl GST)
1.25% (net of GST)
3,675,800
3,675,800
2,117,710
Profit + Risk
(20% incl project management)
(25% incl project management)
25%
25%
25%
27,395,452
36,186,142
30,981,204
30,981,204
28,679,640
Development Costs (exc GST)

72,613,636
72,613,636
72,613,666
72,613,666
72,613,636
Interest on Development Costs
15,974,999
17,875,135
34,331,727
34,331,727
29,425,467
(selling period 4 years interest rate 8%)
(6 years at 8%)
(11 year period @ 8% development costs + land + holding costs)
(11 year period @ 8% development costs + land + holding costs)
(5.25 years @ 7.5% on development costs)
Holding Costs + Interest (8%)
1,740,551
1,627,674
2,352,798
2,352,798
514,719
Discount for Deferral
n/a
n/a
0 (no deferment)
4,684,356 (6 yrs deferment @ 6% pa)
n/a
Interest on Land (agreed at 7.5%)
7,969,259
9,666,390
4,491,777
4,491,777
3,196,906

(7.5% over 11.5 year period)
(7.5% over 11.5 year period)
(5.25 years @ 7.5%)
Stamp Duty + Acquisition Costs (Agreed at 5.5%)
2,125,136
2,239,711

651,016

458,941

432,272

Residual Land Value

36,513,695

40,722,021

11,840,000

8,340,000

7,695,857

2676 Mr Wilson's HSA with no deferment represented his urban valuation of the subject land.

2677 Mr Zucal's HSA reflected his view of an appropriate HSA on the assumption that the land was already zoned urban at the date of taking. In Mr Zucal's view, if, as he considered, the land's urban potential was many years away from being realised, an HSA approach was inappropriate. As I explain in section 9.10.6, I broadly accept that view.

2678 Mr Brown deferred the value of $40.7 million shown in this table for two years, to derive his urban potential HSA value of $35.6 million (ts 6155, 6209).

2679 The valuers all employed the same basic methodology in their HSAs. That methodology was outlined at the outset of the concurrent evidence on HSAs (ts 6759 6768).

2680 Some modifications and corrections to the table emerged in oral evidence.

2681 In her oral evidence, Ms LeFevre changed her view on the appropriate selling price for R20 lots. In her initial report, and in the table, she estimates a selling price of $180,000 per lot. On 3 November 2010, Ms LeFevre said that, because she then understood the lots to be 500 sqm, rather than between 600 and 650 sqm as she had initially understood, she would reduce the price to $175,000 (ts 6857). The following day, when asked about the same topic, she adopted $170,000 (ts 6981). I will say more about that in section 9.10.3.

2682 The joint statement shows the item for discount for deferral above the item for interest on land. The valuers agreed that that was an error in the joint statement. Their view at conferral, and in giving evidence, is and was that discount for deferral should be below the item for interest on land (ts 6785, 6908 6911).

2683 Mr Wilson's HSA in the joint statement included an arithmetic error in the deduction of the figure for interest on land from the running total (ts 6785 6786).

2684 Contrary to what appears in exhibit 273 and what Mr Zucal said in oral evidence (ts 6761), Mr Zucal calculates project management fees at 1.25% of gross realisation, including GST.

2685 The valuers also clarified the periods of time against which interest was calculated under several items in the table. The table in the valuers' joint statement includes, under interest on development costs, the selling periods adopted by some of the valuers. The valuers agreed that interest on development costs was not payable for the whole selling period, but was payable for the development period, during which initial subdivision works were creating residential lots, plus half of the selling period (ts 6765 6766).

2686 Ms LeFevre adopted an interest period of 2.75 years, with a 1.5year development period and a 'full selling period' of 2.5 years (ts 6365). She assumed that there was some overlap between the two stages, and agreed that she had allowed 3 years for all sales (ts 6365). Mr Brown said he used a 3.5year interest period, based on a 6month development period and a 6year selling period. Mr Wilson and Mr Zucal also used a 6month development period in their HSAs. Mr Wilson initially had a selling period of 11 years, which he reduced to 10.83 years when the number of R20 lots was reduced from 799 to 782 (ts 6766). Mr Zucal adopted an interest period of 5.25 years, based on a selling period of 9.5 years.

2687 The interest period on development costs was also applied to calculate the interest on holding costs and interest on land (ts 6767 6768).

2688 Although Ms LeFevre stated in oral evidence that she had calculated holding costs at 1%, and not 3% like Mr Brown and Mr Zucal (ts 6767), her HSA reveals a figure consistent with 3%. Mr Wilson used a flat rate of $1,500 per residential lot to calculate his holding costs (ts 6767).

2689 The table in the joint statement, amended and recalculated to take account of these matters, would be as follows:

JL
GB
KW (no deferment)
KW (6 yrs deferred)
BZ
REALISATION
R20 Lots x 782
Price/Lot
170,000
190,000
175,000
175,000
165,000
132,940,000
148,580,000
136,850,000
136,850,000
129,030,000
R30 Lots x 280
Price/Lot
120,000
165,000
122,000
122,000
100,000
33,600,000
46,200,000
34,160,000
34,160,000
28,000,000
175 Residential Units
Price/Lot
50,000
25,864
50,000
50,000
42,000

8,750,000
4,526,280
8,750,000
8,750,000
7,350,000
2 Commercial Sites (20,150 sqm)
Price/sqm
350
450
200
200
250
7,052,500
9,067,500
4,030,000
4,030,000
5,037,500
Total realisation (inc GST)
182,342,500
208,373,780
183,790,000
183,790,000
169,417,500
COSTS
GST on Realisation
16,576,591
18,943,071
16,708,182
16,708,182
15,401,591
Sales Commission

(Agreed at $8.5m)
8,500,000
8,500,000
8,500,000
8,500,000
8,500,000
Project Management

(% gross realisation)
Included in Profit + Risk

Included in Profit + Risk
@ 2%
@ 2%
@ 1.25%
3,675,800
3,675,800
2,117,710
Profit + Risk
20%
25%
25%
25%
25%
26,210,985
36,186,142
30,981,204
30,981,204
28,679,640
Development Costs (exc GST)
72,613,636
72,613,636
72,613,636
72,613,636
72,613,636
Interest on Development Costs
17,427,273
20,331,818
34,331,727
34,331,727
29,425,467
8% for 2.75 yrs
8% for 3.5 yrs
8% for 5.91 yrs
8% for 5.91 yrs
7.5% for 5.25 yrs
Holding Costs 3% + Interest 8%
1,508,996
1,931,151
2,352,798
2,352,798
514,719
Interest on Land

(agreed at 7.5%)
7,003,060
10,368,586
4,491,777
4,491,777
3,196,906
Discount for Deferral
n/a
n/a
n/a
@ 6% pa 2,682,761
n/a
Stamp Duty + Acquisition Costs (Agreed at 5.5%)
1,770,126
2,059,209
528,358
388,499
432,272
Residual Land Value
32,184,106
37,440,166
9,606,517
7,063,616
8,535,560

2690 Whilst the values for some items in Mr Zucal's HSA, such as stamp duty and interest on land, are consistent with his residual land value of ***around*** $7.7 million, the subtraction of his cost items from the total realisation leads to a residual land value of $8.5 million as shown above. This discrepancy was not put to Mr Zucal. In any event, for reasons explained below, I do not place any weight on Mr Zucal's HSA in deriving a value for the subject land.

2691 As I have explained, Mr Wilson's HSA values constitute his opinion on the value of the land as urban and as rural with urban potential.

2692 It can be seen that the plaintiffs' valuers' urban potential values derived from their HSAs are about four times the defendants' valuers' urban HSA values. The differences of significance relate to selling period, lot selling price, the profit and risk factor and whether management fees are included in profit and risk.

2693 The individual elements of an HSA should not be considered in isolation from each other. Many of them are interdependent. For example, lot sale prices will affect the likely selling period. The profit and risk factor will be influenced by these and many other matters. Nevertheless, it is convenient to begin by individually analysing some of the significant elements on which there is disagreement.

2694 It is necessary only to deal with deferral, selling period and lot price. That is so taking into account four matters. First, I reject Mr Brown's HSA because it is based on lot sale prices that are unjustifiably optimistic and without foundation. Secondly, Ms LeFevre's selling period is substantially too short. Thirdly, when a given deferral and a given selling period is applied to Mr Wilson's HSA and to Ms LeFevre's HSA, they produce substantially identical values. I explain these points in sections 9.10.2 to 9.10.5 below. Fourthly, I prefer Mr Wilson's HSA to Mr

Zucal'**s.** To my mind, in the concurrent evidence, Mr Wilson demonstrated superior expertise in financial feasibility analysis. In section 9.10.6, I address the question of the weight, if any, that can be given to an HSA when, as here, the notional development will not be completed until 10 15 years after the valuation date. 9.10.2 Deferral

2695 Under the agreed methodology for the HSA, if there was expected to be a delay between acquisition of the land and the commencement of receipt of revenue from realisation of lots, that delay would be brought to account by a discount for deferral. Mr Wilson applied a discount for deferral, reflecting his view that a purchaser would have expected urbanisation by 6 years after the date of taking. Mr Brown applied a twoyear deferral. Ms LeFevre did not apply any discount for deferral to her urban potential HSA. On the face of it, that seems surprising for a valuation on the basis that the land would be rezoned in 1 2 years. In her oral evidence, Ms LeFevre explained why she took that approach. She considered that, in the market conditions in 2006, the HSA method did not provide a reliable assessment of what purchasers would be prepared to pay. The value derived from an HSA without deferral was substantially less than the value she derived from her comparable sales analysis. There was little or no purpose in redoing an HSA with deferral, since that would selfevidently provide a lower figure again, further removed from the value she derived by her comparable sales analysis (ts 6224 6226, 6236 6239).

2696 If Ms LeFevre's analysis included a 2year deferral, it would produce a residual land value of $28.7 million, a per hectare rate of about $325,000. If her analysis included a 4year deferral, the per hectare rate would be about $295,000; with a 6year deferral, the per hectare rate is $270,000.

2697 In light of the findings I have made in section 7, a deferral of about 6 years would represent the hypothetical purchaser's best estimate of when, if a rezoning application were successful, lots could be produced. Four years would be at the most optimistic end of the range of realistic possibilities in the mind of the hypothetical purchaser.

2698 Thus on Ms LeFevre's HSA, with a deferral of 6 years, reflecting the hypothetical purchaser's view of the likely timing of any lot production, the land is worth $270,000 per hectare. That is less than 60% of Ms LeFevre's value of the land, based on her view or assumption that the land would be rezoned within 1 2 years. As I will explain further in this section 9.10, I do not accept Ms LeFevre's HSA. Most significantly, I consider her view, that all of the more than 1,000 lots could be sold in three years, to be unrealistically optimistic. As will be seen, the value derived from an HSA is very sensitive to the length of the selling period.

2699 Before dealing with the question of the selling period, I will make some observations and findings about the evidence relating to expected lot prices. 9.10.3 Lot prices 9.10.3.1 R20 LOTS

2700 I start with the valuers' views of the selling price of R20 lots. As can be seen from the first table, Ms LeFevre's selling price was $180,000 per lot; Mr Brown's was $190,000; Mr Wilson's was $175,000; and Mr Zucal's was $165,000.

2701 However, as I have mentioned, Ms LeFevre altered her view on the appropriate selling price for R20 lots.

2702 To my mind, Ms LeFevre's evidence on this topic bore adversely upon the weight of her evidence on end lot prices and her HSA, and the weight of her evidence generally.

2703 In Ms LeFevre's report of April 2008, she had regard to prices in Riverland Ramble for lot sizes of between 650 and 750 sqm. The report stated that she adopted an end lot value of $175,000 to $185,000 for the R20 density lots of the subject land 'of approximately 600 sqm to 650 sqm', and assessed the average price at $180,000 (exhibit 270B, 36/44). She maintained the figure of $180,000 in the joint report which she signed on or about 22 October 2010. By then, she was aware that the average lot sizes of the subject land were not 600 650 sqm as she had said in her report of April 2008, but rather were an average size of 500 sqm (ts 6344 6345, 6348).

2704 When Ms LeFevre was questioned about her adherence to the figure of $180,000, notwithstanding the reduced lot size, she said that she had undertaken a separate calculation, not revealed in any of her reports, to 'adjust' the R20 lots back to the equivalent of about 580 sqm, which she said was the size she had used in her first report (ts 6345 6346, 6348 6349). Ms LeFevre appeared to say that she did a further HSA in which she recalculated the larger lot sizes to 674 lots averaging 580 sqm (ts 6348 6349). Perhaps not surprisingly, counsel for the plaintiffs did not pursue any inquiries about that evidence from Ms LeFevre. An HSA based upon an assumption of 674 lots averaging 580 sqm would be of no assistance in valuing the subject land, given that all valuers agreed that an HSA should be based upon the GRA concept plan.

2705 Ms LeFevre accepted that when she signed the joint statement she knew that the figure of $180,000, and the consequential gross realisation figure, were wrong (ts 6350 6351). Moreover, in her evidence Ms LeFevre said, in substance, that her HSA in the joint statement superseded her HSA in her initial report of April 2008 and thus reflected her view of an appropriate HSA on the basis that the land was rural with imminent urban potential (ts 6131 6132). She did not volunteer that the figure of $180,000 was wrong and was too high, even though that was her view (ts 6351). Earlier, in her evidence on the same day, when Ms LeFevre was asked whether she considered Mr Brown's view of $190,000 for a lot to be too high, she referred to her figure of $180,000 and did not mention that her figure itself needed revising and was, in her view, too high (ts 6338).

2706 Later in her evidence, in the course of outlining her HSA for her urban valuation, Ms LeFevre modified her estimate of the sale price of R20 lots. On 3 November 2010, she said that she would reduce the lot value from $180,000 to $175,000, 'to reflect the smaller lot sizes than I had originally envisaged' (ts 6857). That is plainly a reference to the issue that had arisen in her earlier evidence. In other words, it is clear that the modification Ms LeFevre made to her R20 sale price in the context of her urban valuation was intended to apply equally to her rural with urban potential valuation.

2707 The next day, Ms LeFevre was taken back to her evidence that her lot price was $175,000 (ts 6980). It was put to Ms LeFevre that, if, as she had said in her April 2008 report, the range was $175,000 $185,000 for lots of 600 650 sqm, it would follow that the bottom of that range would not apply to a lot that was only 500 sqm. In response, Ms LeFevre said that she thought she had said the previous day that she would 'probably look at 170,000' (ts 6980 6981). When she was asked whether she was saying that the position is $170,000 for R20 lots, she said that she 'will adopt 170,000 for R20' (ts 6981).

2708 Thus, in the end, Ms LeFevre adopted the figure of $170,000.

2709 All of this leads me to conclude that considerable caution is needed before relying on Ms LeFevre's assessment of end lot prices in her HSA.

2710 There are other aspects of Ms LeFevre's assessment of expected lot prices for other size lots which seem to me to detract from the reliability of her views on lot prices. I will refer to those later in this section.

2711 Mr Wilson identified sales to which he had regard in coming to his assessment of $175,000 as the expected price for R20 lots. He described his estimate of $175,000 as being at the top of the range (ts 6791). Ms LeFevre's ultimate adoption of $170,000 per lot is consistent with that.

2712 Mr Brown adopted a figure of $190,000 per R20 lot. I do not consider that view to be supportable. He said that in adopting that view, he had used figures from MRCE and from sales in Baldivis (ts 6270). He was asked more than once why he did not put weight on the sales of lots at Riverland Ramble, given its proximity to the subject land. To my mind, his reasons were unconvincing. Initially, his first answer suggested that the subject land, unlike Riverland Ramble, was 'close to the river' (ts 6270). He withdrew that suggestion. He also pointed to the fact that the subject land is closer to Mandurah by 1 2 km (ts 6270 6272). A little later, Mr Brown repeatedly emphasised that he thought the subject land would be more attractive than Riverland Ramble. It was evident that there was little objective foundation for that view or assumption (ts 6277 6281).

2713 When asked if he had taken into account that the proposed R20 lots for the subject land are 500 sqm, whereas the Riverland Ramble lots were 650 sqm, his answer was not responsive to the question (ts 6272). Later in his evidence, Mr Brown accepted that he did not give consideration to the average size of the lots (ts 6380). On that ground alone, Mr Brown's assessment of end lot prices is not reliable.

2714 In Mr Brown's report of April 2008, he set out his understanding of sale prices for lots in the MRCE. He stated that the smaller lots in the range of 528 560 sqm sold in the range of $167,500 $190,000 for lots towards the top of that area range (exhibit 269B, 40/51). When asked, he was unable to explain how, consistently with that, he had assessed the lot price for 500 sqm lots for the subject land at $190,000 (ts 6334 6335). Further, the evidence of Mr Ayres, which I accept, is that in or ***around*** July 2006, sales of lots in MRCE of about 550 sqm produced a price of about $160,000 (exhibit 74 [20]).

2715 At times, it appeared that Mr Brown had regard to his expectation that prices would increase after July 2006 in justifying his figure of $190,000 (see, for example, ts 6274 6275, 6336). That is not consistent with the static approach inherent in a hypothetical subdivision analysis.

2716 Before coming to the lot prices for R30 and other lots in these HSAs, I will say something about the lot prices and selling period in Ms LeFevre's commercial valuation. That is because, in my opinion, they reflect badly on the reliability of her evidence generally. 9.10.3.2 LOT PRICES IN MS LEFEVRE'S COMMERCIAL VALUATION

2717 Ms LeFevre's commercial valuation included a substantial component for intensive residential development of part of the subject land. The residential component comprised over a half of the total value of the land in her commercial valuation report of 15 March 2010 (exhibit 270F). That valuation included an HSA for the residential component. In my opinion, that HSA is so unrealistically optimistic as to detract from the weight to be given to any HSA of Ms LeFevre and to her valuation opinions generally in this action. In particular, to my mind her lot prices and selling period are not open on any reasonable view.

2718 Mr Wilson pointed to the significant discrepancies between the prices adopted by Ms LeFevre in her initial report for a given Rcode sized lot, and the price adopted in her commercial valuation. See ts 7043 7044. In her commercial valuation, Ms LeFevre said R30 lots would sell for $165,000 (producing $55 million); R40 for $140,000 (producing $70 million) and R60 for $110,000 (producing $20 million) (exhibit 270F, 39A/1232). In her urban potential valuation, she had assessed R30 lots at $120,000; R40 at $120,000 and R60 at $80,000 (exhibit 270B, 36/45 47). In responding to what Mr Wilson said, Ms LeFevre made the point that the rates achievable in the context of the commercial valuation, where the development was part of 'the periphery of a major planned community with [a] district centre facility', the rates achieved would be 'slightly higher' (ts 7044). However, she accepted that she had made errors in her calculations. She did not respond specifically to the various figures identified by Mr Wilson. Rather, she observed that if Mr Wilson's total variations of about $25 million were accepted, her residual land value would, she thought, be reduced by something in the order of $5 million to $7 million. But, she added, she had stated throughout her evidence that the HSA was not a reliable method (ts 7044). The upshot was that she did not think the HSA was reliable, so that a variation of $25 million in receipts for lot sales, producing a reduction in land value of about $6 million, was not all that significant. That evidence does not seem to me to justify confidence in the reliability of Ms LeFevre's end lot price assessments.

2719 Further, Ms LeFevre's commercial HSA used a selling period for the residential lots of four years. She assumed residential lot production would begin one year after the taking date (ts 7087). The first stage of commercial development would not begin until about 2011, and full scale commercial development would occur many years after that (ts 7087 7088). Ms LeFevre accepted that she was being 'optimistic' (ts 7083) in saying that very large numbers of R30, R40 and R60 lots would sell at her estimated lot prices so far in advance of the construction of a district centre. I think 'optimistic' is an understatement. To my mind, Ms LeFevre's analysis had no plausible foundation and suggests a lack of rigour.

2720 It should also be noticed that this highly optimistic HSA produced a value of $49.3 million, but Ms LeFevre adopted an even higher value of $51 million as the value of the residential component (exhibit 270F, 39A/1233 1234). 9.10.3.3 R30 AND OTHER LOTS

2721 In her urban potential valuation, Ms LeFevre assessed the price for R30 lots as $120,000 (exhibit 270B, 36/45). Mr Wilson used $122,000 and Mr Brown used $165,000.

2722 In my view, Mr Brown's estimate is unsupportable. I refer to what I have already said about sales of lots larger than 500 sqm in MRCE and Riverland Ramble. Even within the parameters of Mr Brown's view of lot sale prices, his assessment of $165,000 for a lot of between 300 and 330 sqm in Ravenswood cannot be accepted. It is at the bottom of the range of what he said lots in MRCE sized from 528 560 sqm sold for.

2723 There was, as Mr Wilson (exhibit 271A, 47/253) and Ms LeFevre (exhibit 270B, 36/44) say, no history of sales of lots of this small size.

2724 In her report of April 2008, valuing the land on the basis that it is rural with urban potential, Ms LeFevre adopted a price of $120,000 for the R30 lots. She adhered to that in the joint statement. In her oral evidence concerning valuation on the basis of rural with urban potential, she did not say anything to suggest that her view in this respect had altered. She was not asked any questions about the estimated price of $120,000.

2725 In her urban valuation, in her report of April 2009 (exhibit 270C, 39/1124) Ms LeFevre said that in reviewing her earlier valuation of 2008, she considered that she had understated the value of the R30 lots to an R40 value and had not allowed for their better location fringing the POS areas. She reassessed the value at $145,000 per lot.

2726 She was crossexamined about this (ts 6981 6986). In the course of crossexamination, Mr LeFevre did not suggest that that alteration applied also to her rural with urban potential valuation. However, she did say that it was her opinion that the R30 lots would be sold for $145,000 per lot (ts 6985).

2727 I prefer the assessment by Mr Wilson of $122,000 to Ms LeFevre's final view of $145,000 for an R30 lot. For all the reasons already given, I consider Mr Wilson's assessment of end lot prices to be more reliable than Ms LeFevre'***s.***

2728 I also prefer Mr Wilson's assessment of the value of the other residential and commercial sites to the evidence of Ms LeFevre. Ms LeFevre's assessment of the commercial site appeared to involve valuing the land on the basis that things that 'could have' happened in the assumed absence of the proposed public works, were assumed to have occurred or to be certain (ts 6987 6990). Ms LeFevre appeared to accept that that was the approach she had taken (ts 6990). 9.10.4 Selling period

2729 In its final form, the GRA concept plan includes 782 R20 lots, 280 R30 lots, a residential site and two commercial sites. Thus, in total, there is 1,065 lots. In her HSA, Ms LeFevre allowed a total of 3 years for the selling of these lots. Mr Brown allowed 6 years; Mr Wilson, 10.8 years; and Mr Zucal, 9.5 years. So, Ms LeFevre envisaged selling lots at the rate of 355 per year; Mr Brown, 177 per year; Mr Wilson, 100 per year; and Mr Zucal, a little over 110 per year.

2730 No valuer gave evidence of any estate that had sold more than 200 lots per year, much less anything like 350 lots per year. Ms LeFevre referred to several estates in Baldivis which had released lots in two stages, each of which was 50 70 lots per stage (ts 6375). As Mr Wilson pointed out (ts 6378), that falls a long way short of sustaining an expectation of selling 360 lots per year. Further, as Mr Wilson said, the substantial costs of producing lots mean that production of 360 lots per year would involve very substantial commercial risk (ts 6378).

2731 Riverland Ramble sold about 150 lots from late 2004 to July 2006. MRCE sold 180 lots from April 2004 to the taking date (see section 9.3.2 above).

2732 Mr Wilson suggests that a sale of 66 lots in Riverland Ramble in the first seven months of 2006 could be treated as an annual figure of just over 110 lots. When asked how many lots Riverland Ramble had sold in 2006, Ms LeFevre did not immediately answer the question directly (ts 6366 6367). Eventually, she said that her understanding was something in the ***region*** of 90 lots per year (ts 6368). She said that the developers of Riverland Ramble could have sold more if that had not 'drip fed' the market (ts 6367). I have already found that in the market conditions in 2006, more lots would have been sold if they had been available for sale. I do not accept that the unavailability arose from any choice by the developers of Riverland Ramble to 'drip feed' the lots at that time.

2733 In considering the rate of sale of lots from the subject land it is, as Mr Wilson said, important not to overlook the relatively small size of the lots contemplated to be produced from the subject land. The R20 lots from the subject land are considerably smaller than the lots sold at Riverland Ramble, and considerably smaller than the vast majority of lots sold at MRCE. The choice of lot size by the developers of those estates is some indication of their perceptions of the scale of lots for which significant demand existed.

2734 A hypothetical purchaser would take into account expected population growth in Murray during the relevant period. Given the time required for the rezoning of the subject land, the lot production would commence, at the earliest, sometime after 2011. WA Tomorrow No 6 forecasts a growth in population for the Shire of Murray of 3,200 from 2011 to 2016 (exhibit 117, 1/9/193). That averages an increase of 640 people per year. Not all of the increase in population would be accommodated in new urban lots. Even so, the scale of expected population growth for the entire Shire of Murray is significant context for the consideration of the competing views about the selling period for the lots to be produced by urban development of the subject land.

2735 Taking these matters into account, and taking into account the conditions existing in mid2006, I think the hypothetical purchaser would have perceived some significant uncertainty about how long it would take to sell the more than 1,000 lots to be produced from the subject land. I consider that the hypothetical purchaser would expect that the lots would be sold at a rate in the range of 120 175 per year, and thus over a period somewhere between 6 and 9 years, with a 'best guess' of 8 years (about 135 lots per year). I consider Ms LeFevre's view to be clearly unrealistically optimistic, while the approach of Mr Wilson and Mr Zucal is, on balance, a little pessimistic. 9.10.5 The appropriate HSA for the subject land

2736 As I have explained, in my view there would have been significant uncertainty about important elements of a hypothetical subdivision of the subject land. Because of that, I do not think there is a single 'correct' HSA that would be used by the hypothetical purchaser, or that should be used by the court, in assessing the value of the subject land. Rather, in my view, the proper approach is to accommodate the significant uncertainty by doing several HSAs on alternative assumptions about the most important uncertain variables.

2737 The most important uncertain element of an HSA is the sale period. The period of deferral is also of some significance.

2738 In my view, the starting point is a deferral of 6 years, that being the most likely period between the taking date and the production of the first urban lots, assuming the land were approved for immediate rezoning as a result of the Planning Review. A realistic assessment of the likely selling period is between 6 and 9 years, with a best estimate/guess of 8 years.

2739 Mr Wilson's HSA, adjusted with a selling period of 8 years, produces a per hectare rate of just under $140,000. Ms LeFevre's HSA (using $170,000 for R20 lots), deferred for 6 years with a selling period of 8 years, produces about $140,000 per hectare.

HSA with 8 year selling period, deferred for 6 years

Ms Le-Fevre

Mr Wilson

REALISATION

Price/Lot

170,000

175,000

R20 Lots x 782

132,940,000

136,850,000

Price/Lot

120,000

122,000

R30 Lots x 280

33,600,000

34,160,000

1 Residential Site (175 units)

Price/Lot

50,000

50,000

8,750,000

8,750,000

2 Commercial Sites (20,150 sqm)

Price/sqm

350

200

7,052,500

4,030,000

Total realisation (inc GST)

182,342,500
183,790,000
COSTS
GST on Realisation
16,576,591
16,708,182
Sales Commission
Agreed at $8.5m
8,500,000
8,500,000
Project Management (% of gross realisation)
% rate
Included in Profit + Risk
2.00
0
3,675,800
Profit + Risk
% rate
20.00
25.00
26,210,985
30,981,204
Development Costs (exc GST)
($75,000/lot inc GST)
72,613,636
72,613,636
Interest on Development Costs
% rate
8.00
8.00
Development period
1.50
0.50
Selling period
8.00
8.00
Interest period
5.50
4.50
31,950,000
26,140,909
Holding Costs 3% + Interest 8%

1,111,091
2,172,600
Interest on Land
% rate
7.50
7.50
7,411,916
5,803,150
Discount for Deferral (6% pa)
years deferred
6
6
4,756,310
4,551,490
Stamp Duty + Acquisition Costs
Agreed at 5.5%
688,776
659,115
RESIDUAL LAND VALUE
12,523,196
11,983,913
per hectare
142,863
136,711

2740 Both HSAs, deferred for 6 years with a 6year selling period, produce a rate of about $180,000 per hectare.
HSA with 6 year selling period, deferred for 6 years
Ms Le-Fevre
Mr Wilson
REALISATION

Price/Lot
170,000
175,000
R20 Lots x 782

132,940,000
136,850,000

Price/Lot
120,000
122,000
R30 Lots x 280

33,600,000
34,160,000
1 Residential Site (175 units)
Price/Lot
50,000
50,000

8,750,000
8,750,000
2 Commercial Sites (20,150 sqm)
Price/sqm
350
200

7,052,500
4,030,000
Total realisation (inc GST)
182,342,500
183,790,000
COSTS

GST on Realisation

16,576,591
16,708,182
Sales Commission
Agreed at $8.5m
8,500,000
8,500,000
Project Management (% of gross realisation)
% rate
Included in Profit + Risk
2.00

0

3,675,800
Profit + Risk
% rate
20.00
25.00

26,210,985
30,981,204
Development Costs (exc GST)
($75,000/lot inc GST)
72,613,636
72,613,636
Interest on Development Costs
% rate
8.00
8.00
Development period
1.50
0.50
Selling period
6.00
6.00
Interest period
4.50
3.50

26,140,909
20,331,818
Holding Costs 3% + Interest 8%

1,279,471
2,044,800
Interest on Land
% rate
7.50
7.50

7,827,706
6,016,097
Discount for Deferral (6% pa)
years deferred
6

6

6,139,377
6,066,652
Stamp Duty + Acquisition Costs
Agreed at 5.5%
889,062
878,530
RESIDUAL LAND VALUE
16,164,763
15,973,281
per hectare
184,406
182,221

2741 As I have said, the most optimistic realistic assessment of deferral is of 4 years. Both Mr Wilson's and Ms LeFevre's HSAs with a deferral of 4 years and a selling period of 8 years produce a rate of about $150,000 per hectare. A 4year deferral and a 6year selling period produce a per hectare rate of $200,000.

2742 Thus, an HSA based on the most likely assessment of a 6year deferral and an 8year selling period produces a per hectare rate of $140,000. If a more optimistic assessment is made of the selling period, the rate may rise to $180,000. If the selling period were 9 years (the most pessimistic realistic estimate), a per hectare rate of about $115,000 is produced. On the most optimistic realistic possibility for both deferral and selling period, a per hectare rate of $200,000 is produced.

2743 All of these values represent an assessment of the value of the land assuming that it is rezoned to urban immediately following the Planning Review. Ms LeFevre's urban potential valuation proceeds on the basis that there was little risk of not obtaining immediate rezoning. Mr Wilson's valuation proceeds on the basis that it was a question of when, not if, the land was rezoned. Consequently, in light of my findings about the land's uncertain urban potential, the values derived from these HSAs should not be taken to reflect the value of the land. Rather, to the extent that they assist (a question to which I turn in the next section 9.10.6), the HSAs represent an assessment of the value of the land on the assumption that it is rezoned urban as a result of the Planning Review. In other words, they assess value on the assumption that the subject land's uncertain urban potential is realised. The assessment of value in the HSAs needs then to be discounted to reflect the risk that the subject land would not be approved for immediate rezoning following the Planning Review. For the reasons just given, that risk is not captured in the 'profit and risk' figure in the HSA.

2744 When account is taken of that, in my view, consideration of the range of realistic HSAs for the subject land suggests a value of the land of not more than $140,000 per hectare and likely less. 9.10.6 To what extent is the HSA method a reliable indicator of the value of the subject land?

2745 As I said in section 9.1.2, because the HSA method is static, many judges have observed that the longer the length of time before the hypothetical subdivision is to be carried out and completed, the less reliable the method is. The point may be reached that the uncertainties involved in the use of current estimates to future conditions are so great as to mean that a hypothetical subdivision analysis is of no assistance. See, for example,Mount Lawley (2004) [215]. The question is whether that point has been reached in this case.

2746 In my view, the question of whether any, and, if so, how much assistance can be derived from an HSA should be considered in the context of, and not in isolation from, the extent of assistance able to be derived from comparable sales.

2747 In this case, the HSA involves two lengthy periods: first, a period of deferral before subdivision could start; and secondly, the selling period of 6 9 years. Lot sales would not start for between 4 and 6 years; lot sales would not be finished until 10 15 years after the taking date.

2748 Asked whether his deferral period of 6 years and selling period of 10 years made his HSA unreliable, Mr Wilson responded 'perhaps' (ts 6773). The other valuers, including Mr Zucal, were firmly of the view that time periods of the order of Mr Wilson's deferral and selling period made an HSA entirely unreliable (ts 6775 6776).

2749 Mr Wilson accepted that appreciation in the value of the land during the period of deferral was not accounted for in an HSA. Given that the discount for deferral reflects the lost investment opportunity cost over the period of the deferral, Mr Wilson accepted that that 'could be' a flaw in the HSA process (ts 6775). In that context, and in other contexts, Mr Wilson expressed a distinct preference for a DCF, over an HSA, as a method of financial feasibility analysis. Mr Wilson emphasised that developers would do a DCF, not an HSA, for contemplated urban development of land of the scale of the subject land (ts 6232 6233, 6772, 6800).

2750 The reason Mr Wilson did an HSA, not a DCF, is that Ms LeFevre and Mr Brown had done an HSA, and Mr Wilson was asked to take the same approach for comparative purposes (ts 6233, 6772, 6800). That evidence, which I accept, explains as a matter of history why Mr Wilson undertook an HSA and not a DCF. However, it does not assist in assessing the reliability of an HSA against what is indicated about value by an analysis of the comparable sales. Even more clearly, it is not a satisfying explanation of Mr Wilson's approach: to adopt his HSA as the sole basis for valuation of the land, to the exclusion of anything indicated by sales of other land, and notwithstanding the limitations inherent in the static character of the HSA.

2751 As I have explained, there are significant uncertainties in the process of escalation for increasing values and, especially, adjustment for comparability, in the comparative sales method. Nevertheless, I consider what is indicated by the comparable sales to be significantly more reliable than anything revealed by an HSA based on expected costs and revenue over a period of 10 15 years. To the extent that the HSA method suggests a value outside the range indicated by analysis of the comparable sales, I would not rely upon the HSA method. In the circumstances of this case, the results of the HSA method would not lead me to depart from the ranges of value indicated by analysis of comparable sales. More specifically, the HSAs do not lead me to depart from:

(a) the range of floor value indicated by the lot 301 element of the Clough/Rapley transaction of $145,000 to $175,000 per hectare;

(b) the range of ceiling value indicated by the first exercise price under the Gold Fortune option of $210,000 to $230,000 per hectare; and

(c) the range of direct value indicated by the sale of lot 23 Pinjarra Road of $140,000 to $180,000 per hectare.

2752 Application of the HSA method suggests a value of not more than $140,000 per hectare. The question is whether, in the circumstances of this case, the HSA method is sufficiently reliable to inform the selection of where in these ranges the value of the subject land is located. I am not persuaded that it is. To my mind, the long periods from the taking date until the notional subdivision commences and finishes make the static approach in the HSA unreliable. I recognise the uncertainties in the adjustment of comparable sales. Nevertheless, in my view, adopting the midpoints of the ranges indicated by comparable sales is more reliable than using the HSA method to inform the selection from within the ranges.

9.11 Mr Brown's special rural valuation

2753 As I said in section 7.1, no planner considers that the subject land had potential for special rural use. Essentially, that is because the planners considered that the land's highest and best use lay in its potential for urban use, and that the land would remain rural until it was to be used for urban land.

2754 Mr Brown did not express the opinion, even in the alternative, that the highest and best use of the land lay in its potential for special rural use. He did a valuation of the land on the basis of special rural use in order to provide a check on Mr Wilson's rural with urban potential valuation (exhibit 269C, 44/1469 1475). He valued the land on the basis of its potential for special rural use at $19.1 million.

2755 Mr Brown's special rural valuation was done solely on the basis of an HSA, and without giving any attention to comparable sales. That is contrary to the approach taken by Mr Brown in valuing the land for its urban potential and is contrary to the general preference he expressed for the comparable sales method over the HSA method. He did

not explain why he adopted the HSA method exclusively. In particular, he did not suggest that he had looked for comparable sales for the purposes of the special rural valuation and found that there was none.

2756 In my opinion, for the reasons that follow:

(1) I would give Mr Brown's special rural valuation no weight in assessing Mr Wilson's evidence, or in assessing the value of the land generally; and

(2) the flaws in Mr Brown's special rural valuation detract from the reliability and weight generally of his valuation opinions.

2757 First, as Mr Brown acknowledged (ts 6838, 6840), even though his valuation was being used as a check, the end lot prices and other variables in his HSA needed to have a foundation and be reasonably accurate. However, when challenged about the foundation for one of the variables in his HSA, Mr Brown often resorted to saying that his special rural valuation was only done as a check. He accepted that because it was done only as a check, he gave it less attention than if he were putting forward the valuation as reflecting his opinion of value (ts 6844).

2758 Secondly, the lot prices he adopted in his HSA were not supported by reference to sales evidence in his report. He adopts lot prices of $470,000 and $490,000 (44/1473). In oral evidence, he was unable to identify any sales that were capable of supporting those lot prices. All the sales evidence suggested substantially lower prices. In his oral evidence on 3 November 2010, Mr Brown acknowledged that he was aware of several sales in the nearby Thomasfield estate, all suggesting a lot price not exceeding $350,000 (ts 6838 6846). He said that he had taken into account other sales, but was unable then to identify them. He sought the opportunity to consult his notes in order to identify the sales. On 5 November 2010, he identified two further sales in West Pinjarra (ts 7012). Both were after the date of taking. Mr Brown accepted that neither of those sales supported the end lot price he adopted in his HSA (ts 7014).

2759 Mr Brown described the end lot sale price he adopted in his special rural HSA as 'optimistic' (ts 6843). I would go substantially further. In my view, the lot sale prices adopted by Mr Brown were without any foundation. His adoption of sale prices of $470,000 and $490,000 per lot reflected, at best, a lack of rigour, coupled with a tendency to err in favour of a higher valuation.

2760 Thirdly, he did not identify any foundation for the sales rate he adopted.

2761 Fourthly, he adopted $54,000 per lot for development expenses. While he was unsure where he had derived that figure, he thought from recollection that he had used development cost information that he had pertaining to Thomasfield. He could not say whether he had escalated development costs for the two or three years between when Thomasfield was developed and the taking date (ts 6847).

2762 Fifthly, Mr Brown did not include GST in his HSA (ts 6852).

2763 For all these reasons, Mr Brown's special rural valuation reflects poorly on the weight and reliability of his valuation opinions.

9.12 My reasons for rejecting the valuers' urban potential valuations 9.12.1 Introduction

2764 The findings I have made involve the rejection of the essential elements of the reasoning of each of the valuers in his or her urban potential valuation. None of the opinions provide a starting point from which to make appropriate adjustments. At the risk of some repetition, I will explain why that is so with reference to each valuer. I will also add some further observations about why I do not accept a particular valuer's evidence. 9.12.2 Ms LeFevre

2765 Ms LeFevre's valuation was based primarily, if not almost entirely, on her comparable sales analysis. In this section 9, I have rejected the essential elements in her reasoning. None of the comparable sales on which she relies in assessing her per hectare rate of almost $500,000 support the value she adopts. In my view, the Baldivis sales are not useful comparable sales, whether with the adjustments for the difference in end lot sales suggested by Ms LeFevre, or otherwise (see section 9.6). The same is true of the sale in Wellard relied on by Ms LeFevre. Contrary to Ms LeFevre's view, on my analysis, the Gold Fortune transaction does not support a value of the subject land of $450,000 per hectare; it suggests a ceiling value in the range of $210,000 to $230,000 per hectare.

2766 I do not agree with Ms LeFevre's analysis of what is revealed by the Clough/Rapley transaction (although I note that in her oral evidence she did not rely upon that transaction in deriving a per hectare rate for the subject land). Apart from Clough/Rapley and Gold Fortune, the other 'sales' in the general locality, referred to in her report,

are either urban or urban deferred zoned land, or are options rather than sales. Consequently they do not sustain her opinion on urban potential value.

2767 Ms LeFevre's HSA, particularly in its final form modified in accordance with her oral evidence, did not support her opinion of the value of the land. In any event, I do not accept Ms LeFevre's HSA. See section 9.10. The selling period is unrealistically optimistic. Her approach to assessing lot sale prices bore adversely on the weight of her evidence. Her HSA for the residential component of her commercial valuation involved lot sale prices that were without any reasonable foundation. The likely selling period must take account of the proposed lot prices. In that light, Ms LeFevre's selling period for the residential component of her commercial valuation lacked any basis and suggested an absence of rigour.

2768 I would add that, in my view, similar criticisms can be made of Ms LeFevre's comparable sales analysis in her commercial valuation. In this respect, I accept Mr Wilson's evidence, both oral and in his report, responding to Ms LeFevre's commercial valuation (ts 7032 7036; exhibit 271B, 47AA/21 26).

2769 Ms LeFevre's urban potential valuation was based on an overly optimistic view of the timing and likelihood of rezoning. Had that been the only element of her reasoning which I did not accept, adjustment of her valuation approach would likely have been possible. However, in the circumstances that I reject the comparable sales on which her valuation is based, that is not possible or appropriate.

2770 The defendants submit that Ms LeFevre's opinions involved some apparent incongruities.

2771 First, Ms LeFevre's urban potential valuation valued the land on the basis that it would be rezoned within one year and might have already been zoned urban, and that there was little risk in relation to rezoning. Her urban valuation valued the land on the basis that it was already zoned urban, or was in the process of being zoned. The planning assumptions of these two valuations are not all that far apart. The first recognised 'little risk', while the second involves an assumption that there is no risk. On the face of it, it seems surprising that the urban valuation produced a value $25 million more than the first urban potential valuation.

2772 Secondly, at various points in her oral evidence, Ms LeFevre stressed that there was no certainty in relation to urban potential. In other words, she said that one could never say that land that was rural was certain to be rezoned to urban (ts 6628). For example, she said this in relation to sales in Baldivis (ts 6710). However, in her valuation of the subject land she appears to adopt an approach inconsistent with that view. Her urban valuation involved assuming that the land was already urban, or if not, was in the process of being rezoned and in effect certain to be rezoned. See ts 6752 6753.

2773 There is some force in those points. In any event, quite apart from them, for the reasons already explained, I do not accept Ms LeFevre's opinion on urban potential value, and it does not provide a starting point from which adjustments can be made. 9.12.3 Mr Brown

2774 Mr Brown's opinion on value was based essentially on comparable sales: Clough/Rapley, Gold Fortune and a number of Baldivis sales. For the reasons given in sections 9.4, 9.5 and 9.6, none of those sales support Mr Brown's opinion. Contrary to Mr Brown's opinion:

(a) the Clough/Rapley sale suggests an urban value of the subject land at the taking date of a little under $300,000 per hectare, suggesting that the value of the subject land as rural with urban potential is very significantly less than that;

(b) the sale of lot 301 as part of the Clough/Rapley transaction suggests a floor value for the subject land in the range of $145,000 to $175,000 per hectare;

(c) the Gold Fortune transaction suggests a ceiling value of the land in the range $210,000 to $230,000 per hectare; and

(d) the Baldivis sales are not useful as comparable sales to assist in deriving a value for the subject land.

2775 I do not accept major elements of Mr Brown's HSA: see section 9.10.

2776 Those findings are sufficient to mean that I would not rely on Mr Brown's urban potential valuation. There are a number of other aspects of Mr Brown's evidence, including the way in which he gave his evidence, that would anyway lead me to have considerable hesitation in accepting his opinion on value.

2777 First, in the course of the lengthy concurrent oral valuation evidence, Mr Brown was considerably less familiar with the material, including his own reports, than the other valuers. In responding to a question, he often resorted to comments along the lines, 'I have written hundreds of pages of reports and I cannot give you the detail now.' I accept that Mr Brown, like other valuers, prepared a number of lengthy reports over a considerable period of time. Further, I accept that that presents challenges in re-familiarising oneself with the voluminous material. Nevertheless, in the concurrent evidence, Mr Brown was often not able to engage, fully or at times at all, in responding to questions, or to comments made by other valuers, because of his lack of familiarity with the material, including his own reports. I will give some examples.

(a) At the outset of his evidence Mr Brown did not know which of his reports contained his urban valuation (ts 6116 6117).

(b) At an early stage of his evidence, Mr Brown said that the HSAs in his reports had been superseded by what was in the joint report (ts 6131). That was not so, in that he maintained the separate HSA in his urban valuation.

(c) When asked what he meant by passages in his report, at times he resorted to saying 'that is what I said' and avoided addressing what he meant, or said that he did not know what he meant (ts 6670 6671, 6739 6743).

(d) He said he could not remember with any confidence whether in his reports he had said lot 189 was worth more per hectare than lots 191 and 192 (ts 6646 6647).

(e) When asked questions about fundamentally important planning instruments referred to in his report (namely the PRS and the IPRSP), Mr Brown said: [T]his is making me very nervous about matters relating to the fact that I can't remember what I wrote two years ago (ts 6672).

(f) When he was asked questions about his special rural valuation, in a number of respects he exhibited a lack of familiarity with his own valuation and its basis. See section 9.11.

2778 Secondly, on very many occasions, Mr Brown did not directly answer the questions asked of him. At times, I gained the impression that was because Mr Brown preferred to argue for the position he had adopted, rather than answering the question.

2779 Thirdly, Mr Brown exhibited a tendency to assert a conclusionary opinion without stating, or being able to articulate, the reasoning leading to that conclusion. One example of this is that, as explained in section 9.3.5, Mr Brown often resorted to a generalised assertion that the blight of the Highway had impeded development in and ***around*** Ravenswood.

2780 Fourthly, sometimes Mr Brown initially responded to a question by referring to what 'might have' or 'could have' been, and then elevated it to his opinion or assumption that it would have been, without any apparent foundation for doing so (see, for example, ts 6114 6116, 6217, 7077).

2781 Fifthly, at times, Mr Brown tended to assert positions, favourable to a high valuation, that were, in my opinion, entirely without foundation or lacking in any merit. One example is in his end lot prices for his urban potential HSA (see section 9.10 above). Another is his special rural HSA; see section 9.11. I will give some further examples.

(a) He considered that lot 9007, part of Riverland Ramble, adjacent to the urban front and already zoned urban, would not be ripe for development for 5 7 years, and yet he considered the subject land would be urbanised starting much sooner (ts 6662 6666).

(b) He suggested that, without the Highway, Riverland Ramble would have had more people than in fact it had (ts 7084 7085). When asked to explain the basis for this view, his answers were confused and not responsive to the questions. Ultimately, he suggested that without the Highway there would have been five or six estates selling lots ***around*** Ravenswood (ts 7085).

(c) In his written report, he expressed the view that an urban zoned property at Golden Bay was 'slightly superior in regard to location' compared to the subject land (exhibit 269B, 40/42). He adhered to that in his oral evidence (ts 6732 6733). In my view this is a gross understatement.

2782 Sixthly, on many occasions, to my mind, Mr Brown's responses to questions did not make sense. One example is his evidence about the Clough/Rapley land being 'part of the subject land'. See section 9.4.5.2. Another example is the statement in one of his reports at exhibit 269G, 44A/1705 and his evidence about that (ts 7097 7100).

2783 Finally, there are other elements of his evidence that detracted from its weight.

(a) Mr Brown appeared to proceed on the basis that, but for the Highway, there would have been an existing population on the subject land (ts 6217, 7081, 7084). Those people would have bought the land from the plaintiffs sometime before 2006 (ts 7081). When it was put to him that such an assumption could not be made as part of the process of valuing the land to compensate the plaintiffs as owners, he was unable to see the problem. He said he was 'at a bit of a loss' (ts 7081 7082).

(b) Mr Brown's written response to some of the defendants' planners' reports displayed a lack of balance. Mr Brown accepted that he had been sarcastic and had allowed himself to become emotional (ts 6935).

(c) On the last day of the valuers' evidence, Mr Brown was asked to repeat some evidence that he had just given. He did not do so. When counsel asked him again to repeat it, Mr Brown said 'I withdraw that statement' (ts 7092). When I asked Mr Brown to repeat what he had said, he did not do so, saying that he had not finished making the statement. I am satisfied that that was untrue. There had been a discernable pause before senior counsel for the defendants had asked the next question. Mr Brown said this because he wished to avoid repeating his earlier evidence. 9.12.4 Mr Wilson

2784 In the concurrent evidence session, Mr Wilson gave his evidence in a way which was, in a number of respects, impressive. He spoke clearly and answered questions directly. He explained the reasoning leading to his conclusions in a way that was readily comprehensible.

2785 Further, his valuation was based on a view of the urban planning prospects of the subject land that was closer to the conclusions to which I have come than were the other valuers' views.

2786 Nevertheless, for reasons which should be apparent, I do not accept his opinion on the value of the subject land.

2787 Most fundamentally, Mr Wilson's valuation relies solely on his HSA, and derives no assistance from any sales or other property. The findings I have made in this section, particularly sections 9.4, 9.5, 9.8, 9.9 and 9.10, show that I take a quite different view. The fact that there are no sales that are what Mr Wilson calls 'directly comparable' does not justify discarding entirely all comparable sales analysis. In my view, assistance can be derived from the comparable sales and, given especially the lengthy time periods involved in the hypothetical urbanisation of the subject land, comparable sales provide a more reliable guide to value than the HSA.

2788 Further, in his various reports and his oral evidence, Mr Wilson has, in several aspects, changed his approach. The various approaches that he has taken seem to me to give rise to some fundamental questions. Some of those fundamental questions were never asked. Many of them do not seem to me to have been answered satisfactorily.

2789 I refer to the observations I made in the course of outlining Mr Wilson's evidence in section 9.2.4. In my view, Mr Wilson's failure to test the value obtained from his HSA against any indications of value obtained from sales evidence is a significant weakness in his approach. Mr Wilson criticises Mr Brown for not using the price of lot 301 under the Clough/Rapley transaction to assess Mr Brown's per hectare rate of $420,000 (exhibit 271A, 47/219 [549] [550]). In my view, the same criticism can be made of Mr Wilson. He assessed the Clough/Rapley transaction as revealing a rate of $190,000, which he escalated to $250,000 per hectare at July 2006. But in his written and oral evidence, Mr Wilson did not refer to that figure to assess or test the value for the subject land of $70,000 or $80,000 per hectare he derived by his HSA.

2790 I have already made observations to similar effect about Mr Wilson's failure to refer to the June 2005 sale of two of the lots comprising the Gold Fortune land to test his view of the value of the subject land (see section 9.5.6).

2791 As I observed in section 9.2.4, the approach Mr Wilson adopted in his first valuation of February 2007 involved adopting the view that urban or urban deferred land in the area was worth about $350,000 per hectare (exhibit 271A, 47/39, 41). In his later reports, he directly addressed the question of the value of subject land on the assumption that it was urban, adopting a quite different approach producing a substantially lower value. In doing so, he made no reference to his view in the February 2007 report that urban land was worth $350,000 per hectare. He was not asked about that in his oral evidence.

2792 In his report of August 2009, Mr Wilson used the sale of lot 9007 to construct a notional HSA for that sale, and then for the subject land. I explained his approach in more detail in section 9.2.4. The point, for present purposes, is

that Mr Wilson did not explain, in his report of August 2009, why he used lot 9007 to derive an urban HSA for the subject land, rather than using it in the conventional comparable sales approach to derive an adjusted rate per hectare for the subject land. In oral evidence, the closest he came to explaining this was at ts 6139 6142. He said:

(a) assessment of financial feasibility was most important when land was being acquired for shortterm urbanisation;

(b) the larger size of the subject land (87 ha), compared to lot 9007 (38 ha), meant that the sale of urban lots for the subject land would take much longer; and

(c) the difference in proposed lot sizes would affect the sale rate and expected lot price.

2793 I accept these propositions, however it is not clear why they could not be accommodated by appropriate adjustment of the per hectare rate.

2794 Further, in his written and oral evidence, Mr Wilson did not review his urban valuation of $11.84 million ($135,000 per hectare) against the lot 9007 sale rate of more than $400,000 per hectare, to see if those rates could be explained by the differences he identified. In his oral evidence, Mr Wilson criticised the plaintiffs' valuers' urban valuations by reference to the per hectare rate revealed by the sale of lot 9007 (ts 6973 6975). Again, to my mind that is a criticism that could equally be levelled at Mr Wilson. 9.12.5 Mr Zucal

2795 Mr Zucal's urban potential valuation is based entirely on comparable sales. In my view, as explained in section 9.8, the vast majority of sales relied on by Mr Zucal are of no assistance. Like Mr Zucal, I think the sale of lot 23 is of assistance as a comparable sale. I take a different view from Mr Zucal on the relative per hectare values of lot 23 and the subject land.

2796 Consequently, I do not accept Mr Zucal's opinion on value and it does not provide a starting point from which I can make appropriate adjustments.

2797 The plaintiffs' submissions criticise Mr Zucal's methodology on a number of grounds. One criticism is that he identifies a basket of seven sales that he characterises as comparable, with per hectare rates ranging from $18,000 to $139,000. Although Mr Zucal said, in his oral evidence, there was an 'acceptable pattern' in these values (ts 6448), he later agreed that there was no pattern (ts 6566). These seem to me considerable force in the criticism that a range of per hectare values varying by almost an order of magnitude is not a sound basis to derive a per hectare value for the subject land. That is not to deny that a valuer may properly take into account a broad range of properties to provide a context or framework, but use of such a broad diverging values to derive a per hectare rate seems difficult to justify. In any event, I do not accept Mr Zucal's comparable sales to be comparable.

9.13 The value of the subject land: conclusions

2798 I have set out my conclusions earlier in this section 9, particularly in sections 9.9, 9.10 and 9.12. For convenience, I summarise my conclusions on the value of the subject land as follows.

(1) There is limited sales data providing a sound foundation for valuing the land. For the reasons given in section 9.6, the Baldivis sales do not assist.

(2) The Clough/Rapley transaction indicates a floor price for lot 301 as rural land with urban potential. When that price is escalated to take account of the rising market, discounted for the effect on value of the Highway, and adjusted to take account of the superior value of lot 301, it indicates a floor value for the subject land in the range of $145,000 to $175,000 per hectare.

(3) The Clough/Rapley contract can also be taken as an indication of the urban value of lots 300 and 301. After escalating for the increase in land values to July 2006, discounting the effect on value of the Highway and adjusting for the lesser value of the subject land, that indicates an urban value for the subject land of a little under $300,000 per hectare. That is an indication that the value of the subject land, with its uncertain urban potential, is something very substantially less than $300,000 per hectare.

(4) The first exercise price of the Gold Fortune option indicates a ceiling price for the subject land in the range of $210,000 to $230,000 per hectare.

(5) The sale of lot 23 is an indication of a per hectare value of the subject land in the range of $140,000 to $180,000.

(6) These ranges are consistent with other broad indications in the sales evidence.

(7) In the circumstances of this case, the HSA method is not reliable. The long periods from the taking date to the commencement and completion of the notional subdivision mean that it is not a reliable indicator of the value of the land. Adoption of the midpoint of the ranges indicated by comparable sales is more reliable than using the HSA method to inform the selection from within those ranges.

(8) Adopting the midpoint of the ranges, the sales suggest a value of the subject land of $160,000 per hectare.

(9) Adopting that rate produces a total value of $14.025 million. I value the subject land in that sum.

Section 10: The plaintiffs' additional claims

10.1 Introduction

2799 The statement of claim pleads a number of claims in addition to the primary claim for the value of the land taken. Some of those additional claims relate to lot 189 and so have fallen away in light of the settlement of the claims relating to that lot. Some of the claims were expressly abandoned in opening (ts 884 885) and no attempt has been made to resuscitate them. Three additional claims remain for determination.

2800 The first is described as a claim for solatium in an amount of 10% or, as the plaintiffs' primary position, a higher amount fixed by the court in light of exceptional circumstances. I will deal with this claim in section 10.2.

2801 Secondly, the plaintiffs seek an indemnity from the defendants for the transfer duty (formerly stamp duty) payable on the acquisition by the plaintiffs of a substitute broadacre unimproved property possibly to be purchased by the plaintiffs to replace the subject land. That claim is made under s 241(6)(e) of the LA Act. I will deal with it in section 10.3.

2802 Thirdly, the plaintiffs claim interest on the amount of the award under s 241(11) of the LA Act. Although there may have been an issue in this respect at an earlier stage of the case, in the end there was no dispute between the parties in relation to interest. I will outline the statutory regime for interest, and its application to this case, in section 10.4.

10.2 'Solatium': compensation for taking without agreement

2803 Although the plaintiffs refer to this claim as 'solatium', that term is not used in section 241 of the LA Act. Section 241(8) and s 241(9) of the LA Act provide, relevantly, as follows: (8) If the interest in land is taken without agreement, an amount considered by the court ... appropriate to compensate for the taking without agreement may be added to the award.

(9) The additional amount under subsection (8) must not be more than 10% of the amount otherwise awarded ... unless the court ... is satisfied that exceptional circumstances justify a higher amount.

2804 The amount added under s 241(8) is compensation for the taking without agreement. Section 241(9) affects the fixing of that amount. It provides a limit of 10% of the amount otherwise awarded, unless I am satisfied that exceptional circumstances justify a higher amount.

2805 As Parker J held in Cerini v The Minister for Transport [2001] WASC 309 [287], s 241(9) is confined to the additional amount, provided for in s 241(8), which is appropriate to compensate for the taking without agreement. Section 241(9) does not create a distinct power to award compensation, or a new head of compensation. In this respect, the position under s 241(8) and s 241(9) of the LA Act may be different from the position formerly applying under s 63(c) of the Land Acquisition and Public Works Act 1902 (WA).

2806 Particulars of the circumstances said to be exceptional, so as to justify an award of more than 10% under s 241(9), are set out in the particulars to [24] of the statement of claim. Only some of those were relied on in the plaintiffs' Statement of Issues, Facts and Contentions (SIFC): see [66].

2807 In their closing submissions, the plaintiffs rely on three matters to justify an award of more than 10%.

2808 First, the plaintiffs point to the delay by the defendants in making an offer of compensation in circumstances where land prices were rising rapidly. Their submission involves the following steps. Section 217(1) of the LA Act requires the acquiring authority to cause a report to be made as to the value of the interest taken and the damage sustained by a claimant, within 90 days after the service of a claim for compensation. By s 217(3), as soon as

possible after receiving the report under s 217(1), the acquiring authority must serve on the claimant an offer of compensation. The plaintiffs made a claim for compensation on 31 July 2006. The defendants' offer of compensation was made on 15 May 2007, 287 days after the plaintiffs' claim for compensation. In the meantime, land prices in the area were rising rapidly. The plaintiffs intend to buy a replacement property: exhibit 175A [38]. Consequently, the award of interest at the statutorily fixed rate of 6% would not compensate the plaintiffs for their loss arising from the delay in making the offer of compensation.

2809 Ms LeFevre expresses the opinion that the market conditions in the period 2006/2007 were an extraordinary circumstance that should be considered in assessing the amount of compensation: exhibit 270B, 36/13.

2810 I doubt that these matters are within the ambit of compensation 'for the taking without agreement' in s 241(8). It seems to me that what is sought is not compensation for the taking without agreement, but compensation for a loss alleged to have arisen because of delays in the making of an offer subsequent to the taking. In any event, I am not satisfied that these matters constitute exceptional circumstances justifying the award of an amount more than 10% under s 241(9).

2811 Secondly, the plaintiffs submit that the taking of the land deprived them of the opportunity to make 'super' profits by developing the land and taking advantage of the exceptional market circumstances existing in the period 2005 2007: closing submissions par 15.13. The plaintiffs rely on evidence of Mr Brown to this effect: exhibit 269B, 40/70.

2812 There is no factual and evidentiary foundation for this submission, given my findings. On my findings, but for the proposed public works, the land would have been zoned rural at the date of taking. Thus, there is no question of the plaintiffs having lost an opportunity to sell the subject land in the form of urban lots in the period 2005 2007.

2813 Further and in any event, compensation is awarded for the market value of the subject land. The market value takes into account the market conditions that applied at the date of taking.

2814 I am not satisfied that this matter justifies the award of more than 10% under s 241(9).

2815 Thirdly, the plaintiffs submit that the construction of the public works caused the plaintiffs inconvenience and distress due to noise pollution, obstructed access, inability to lead a normal life and other detrimental affects arising as a result of the construction of the works. Although evidently abandoned in the SIFC (see [66]), this point was raised in opening in support of this claim (ts 877). However, the plaintiffs led no evidence in support of a claim along these lines. What was in Mr McKay's witness statement at exhibit 175A [37] was deleted.

2816 Further and in any event, even were such matters proved, in my view they are not within the ambit of compensation for the taking without agreement; they are founded on the construction of the public works, not on the taking.

2817 For these reasons, I am not satisfied that the matters relied on by the plaintiffs, individually or in combination, constitute exceptional circumstances justifying the award of more than 10% under s 241(9).

2818 I award an additional amount under s 241(8), as compensation for the taking without agreement, of 10% of the amount otherwise awarded.

10.3 The claim for a transfer duty indemnity 10.3.1 The plaintiffs' claim

2819 The plaintiffs claim an indemnity from the defendants for liability later incurred by the plaintiffs to pay transfer duty assessed on a possible subsequent acquisition of a replacement property. The claim is said to be founded on s 241(6)(e) of the LA Act (statement of claim [18(viii)]; plaintiffs' closing submissions par 15.1; ts 7408 7412).

2820 In closing submissions, senior counsel for the plaintiffs spelled out for the first time what was sought. He said that the order sought was that 'the defendants indemnify the plaintiffs for stamp duty assessed on a substitute [broadacre unimproved] property purchased by the plaintiffs but limited to a consideration equal to the value of the subject land as assessed by [the court]' (ts 7403, 7405). The claim is said to be founded on a need or desire to purchase a replacement property in order to obtain rollover relief from capital gains tax (CGT) liability in respect of the taking of the subject land.

2821 I proceed to explain the plaintiffs' claim in more detail. Because the subject land was acquired in 1990, it was an asset subject to the CGT regime. If the plaintiffs had sold the land in 2006, they would have become liable for CGT. In the case of a compulsory acquisition of an asset, the legislative regime permits rollover relief if a

replacement property is acquired in certain circumstances. The effect of rollover relief is that the compulsory acquisition is not treated as a disposal of the asset; rather, the cost base of that asset is rolled over into the replacement property, so that CGT liability will arise only on disposal of the replacement property.

2822 Section 124 75(3) of the Income Tax Assessment Act 1997 (Cth) (ITA Act) requires, relevantly, that in order for rollover relief to be available, at least some of the expenditure in respect of the replacement property must have been incurred, relevantly, no later than one year, or within such further time as the Commissioner of Taxation allows in special circumstances, after the end of the income year in which the compulsory acquisition happens. Under Taxation Determination TD2000/40 issued by the Commissioner, where the owner has a protracted legal dispute with the acquiring authority over the quantum of compensation, the Commissioner would generally accept that there were special circumstances sufficient to allow further time (see example 3).

2823 The plaintiffs contend that:

(a) they wish to purchase a substitute property within 12 months of judgment in this action in order to obtain rollover relief, so that the realisation of the property by the compulsory taking does not trigger a CGT liability; and

(b) they should be indemnified for the transfer duty on a substitute property.

2824 Mr McKay's evidence relevant to this claim is that the plaintiffs intend to invest the moneys they receive as compensation in this action in another property with potential for urban development: exhibit 175A [38]. No potential replacement property was identified in any evidence. The plaintiffs did not adduce any evidence that they had used any of the $10.06 million received on 22 May 2007 (see section 1.8 of these reasons) towards the purchase of a replacement property. I infer that they did not do so.

2825 Under s 124 75(3) of the ITA Act, the plaintiffs had until at least 30 June 2008 to incur expenditure in respect of a replacement purchase and be entitled to rollover relief.

2826 Contrary to an apparent premise of the plaintiffs' claim, acquisition of a replacement property within 12 months of judgment in this action will not crystallise an entitlement to rollover relief. Rather, an acquisition after judgment will lead to an application to the Commissioner of Taxation for an exercise of discretion under the legislation. In any event, as I will explain, in my view, the plaintiffs' claim for a transfer duty indemnity fails for other reasons.

2827 The plaintiffs rely on the decision of Lloyd J in Fitzpatrick Investments Pty Ltd v Blacktown City Council (No 2)[2000] NSWLEC 139 [20] [23] in support of this claim. However, that case was decided in a very different statutory framework from the LA Act. The legislation applied by Lloyd J permitted recovery of any financial costs reasonably incurred, or that might reasonably be incurred, relating to the actual use of the land as a direct and natural consequence of the acquisition: [3]. As I will explain, the terms of LA Act s 241(6)(e), on which the plaintiffs rely in their claim for a transfer duty indemnity, are very different. In my view, on a proper construction of s 241(6)(e), this claim is unsustainable. 10.3.2 The proper construction of s 241(6)

2828 Section 241(6) of the LA Act provides as follows: (6) Regard is to be had to the loss or damage, if any, sustained by the claimant by reason of(a) removal expenses;

(b) disruption and reinstatement of a business;

(c) the halting of building works in progress at the date when the interest is taken and the consequential termination of building contracts;

(d) architect's fees or quantity surveyor's fees actually incurred by the claimant in respect of proposed buildings or improvements which cannot be commenced or continued in consequence of the taking of the interest; or

(e) any other facts which the acquiring authority, the court, or the State Administrative Tribunal considers it just to take into account in the circumstances of the case.

2829 In their submissions dated 9 December 2010, filed with leave after the completion of oral submissions, the plaintiffs submit that 'ultimately the question for determination is whether the grant of an indemnity for the costs of a replacement property is just to take into account in the circumstances of the case'. I do not accept that submission. Given the terms of the section under which the claim is made, the question is not simply whether the grant of an indemnity is 'just'. Rather, the question is whether, by reason of facts which the court considers it just to take into account, the claimant has sustained loss and damage for which it should be compensated under s 241(6). In other words, the court's determination of what is just relates to its selection of other facts to be taken into account. That does not detract from the requirement, reflected in the opening words of s 241(6), for loss or damage sustained by the claimant. Moreover, it is that loss or damage to which regard is to be had in determining the amount of compensation to be awarded under s 241.

2830 In my view, that construction of s 241(6) is consistent with and supported by the evident scheme of s 241 as a whole.

2831 The effect of s 241(1) is to make s 241 an exhaustive statement of the matters to which regard may be had in determining the amount of compensation to be awarded. By s 241(2), compensation is to be awarded for the value of the land taken, assessed on the relevant date according to whichever of pars (a), (b) or (c) is applicable (and with the discounting required by the closing words). That proposition is qualified, in specific circumstances, by s 241(3). Section 241(4) excludes improvements made after the registration of a notice of intention. Section 241(7) allows for regard to be had to, and thus compensation to be awarded for, damage suffered by the claimant due to the severing of land taken from any adjoining land also owned by the claimant, or due to a reduction of the value of that adjoining land. Section 241(8) and s 241(9) permit the award of an additional amount appropriate to compensate for the taking without agreement. Section 241(10) and s 241(11) allow an award of interest or rent and profits received by the acquiring authority up to the time compensation is paid.

2832 In that statutory context, in my view, on a proper construction, s 241(6) means that the court can award compensation for any loss or damage sustained by the claimant by reason of any of subparagraphs (a) through to (e). To my mind, that is the natural reading of the language of s 241(6). Moreover, as I have said, it is consistent with and reinforced by the scheme of s 241 as a whole. 10.3.3 The reasons the claim fails

2833 This construction of s 241 is fatal to the plaintiffs' claim for a transfer duty indemnity in three ways.

2834 First, a claim under s 241(6) requires proof that the claimant has sustained loss or damage. For this claim, senior counsel for the plaintiffs identified their loss or damage as their immediate liability for CGT (ts 7407). Counsel submitted that the compulsory acquisition prevented the plaintiffs from developing and subdividing the land, and selling it in stages, thereby deferring the liability for CGT. I do not accept that the earlier receipt of the market value of the property, thereby triggering a CGT liability, is 'loss or damage' for the purposes of s 241(6). Consequently, I am not satisfied that the plaintiffs have sustained loss or damage.

2835 Secondly, and in any event, in my view, what s 241(6) permits is a claim for the loss or damage sustained by the claimant. It does not permit a claimant to identify some loss or damage and then claim compensation that does not reflect that loss or damage. That is what the plaintiffs' claim involves. The plaintiffs do not claim what they say is their loss and damage, namely their immediate liability for CGT. Rather, they claim an indemnity in order to avoid an expense in acquiring a property which will (or, more correctly, may, depending on the Commissioner's discretion) avoid that liability.

2836 Thirdly, in my opinion, s 241 does not empower the court to award an indemnity. The power invested in the court by s 241 is to award an amount of compensation, in a sum to be fixed in accordance with that section and in accordance with s 244.

2837 For these reasons, I reject the plaintiffs' claim for indemnity in respect of the transfer duty payable on a replacement property.

2838 I note that Jenkins J came to a similar conclusion in Mercer v Western Australian Planning Commission[2008] WASC 124. Her Honour rejected a claim for a declaration that the plaintiffs were entitled to compensation for the acquisition costs for a replacement property: [329] [336].

2839 The defendants' written submissions dated 9 December 2010 advanced a number of other reasons why the claim should be disallowed. There appears to be considerable merit in at least some of those other reasons. However, it is not necessary to deal with them.

10.4 Interest

2840 Apart from interest, the amount of the award of compensation is $15.4275 million (comprising $14.025 plus 10% of that: $1.4025 million).

2841 Section 241(11) and s 241(12) provide as follows: (11) If the interest in land taken does not produce any rents or profits, interest is to be paid at the rate prescribed under section 8(1)(a) of the Civil Judgments Enforcement Act 2004 as at the date of entry for construction or carrying out of the work or the date of registration of the taking order, whichever is earlier, and the interest is payable from -(a) the date of the service of the claim on the acquiring authority; or

(b) the date of entry for construction or carrying out of the work,

whichever is earlier, to the date - (c) when the offer was served on the claimant, if the compensation awarded by the State Administrative Tribunal or the court of competent jurisdiction is not more than the amount offered by the acquiring authority; or

(d) of settlement of the claim, in any other case.(12) Subject to subsections (10) and (11)(a) when any amount representing an advance payment of compensation is paid to a claimant, interest on the total amount of compensation is payable only to the date of the first payment, and interest is payable thereafter only on the balance outstanding from time to time; and

(b) when any amount is offered by the acquiring authority as an advance payment of compensation under section 248 and the offer is not accepted by the claimant within 30 days of the day on which it was made, no interest is payable thereafter in respect of the amount so offered.

2842 So far as I understand, the effect of those sections in the circumstances of this case is not in doubt. The rate prescribed under s 8(1)(a) of the Civil Judgments Enforcement Act 2004 (WA) on the taking date was 6% per annum. By s 241(11), interest is to be paid at 6% per annum from the date of service of the claim for compensation to the settlement of the claim by entry of judgment, subject to the effect of s 241(12). As explained in section 1.8, the advance payment made on 22 May 2007 included interest on the principal sum of $9.6 million up to 22 May 2007. The effect of s 241(12) in this case is that interest is payable at 6% per annum, from 1 August 2006 until entry of judgment, on the balance of the judgment amount after deduction of so much of the advance payment made on 22 May 2007 as is referable to the subject land.

2843 The advance payment of $9.6 million was made on account of compensation in respect of lot 189 as well as the subject land. Subsequently, the lot 189 claim was settled by the parties on terms not known to me. The terms of the advance payment are not before me. Further, the terms of the settlement of the lot 189 claim may (presumably would) have spelled out how much, if any, of the $9.6 million advance payment is to be treated as an advance payment in respect of the lot 189 claim.

2844 Consequently, I am not able to determine the interest payable under s 241(11), because I am not able to say how much, if any, of the $9.6 million is to be attributed to lot 189 and thus excluded for present purposes. I will hear further from the parties on the calculation of interest.

2845 Although there is no direct evidence on the point, an inference is open about the derivation of the amount of the $9.6 million, and how much of it relates to lot 189. In May 2007, the defendants had the initial valuations of Mr Zucal and Mr Wilson. Mr Wilson assessed the compensation for lots 189, 191 and 192 as $11.17 million, excluding solatium. Mr Zucal's assessment was $6.943 million, including solatium at 10%. The average (arithmetic mean) of those two valuations, after adding 10% solatium to Mr Wilson's values, is $9.615 million. The advance payment sum of $9.6 million may have been derived by rounding that figure. Mr Zucal allowed $193,400 for lot 189 and Mr Wilson allowed $715,000 (after adding 10% for solatium). The average of those figures is $454,200. This suggests that $9,145,800 of the $9.6 million is referable to the subject land (ignoring the rounding down of the $9.615 million). That in turn suggests that interest is payable on $6.2817 million from 1 August 2006 until entry of judgment.

2846 However, I will hear further from the parties.

2847 The question of how much, if any, of the $9.6 million was an advance payment in respect of the lot 189 claim will also affect the amount for which judgment should be entered in favour of the plaintiffs.

Section 11: Conclusion

2848 I have set out detailed conclusions in most sections of these reasons. See sections 1.8, 4.12, 5.1, 6.4, 7.6, 8.5and 9.13. I do not propose a further detailed summary. The upshot of my reasons is as follows. Unless otherwise stated, these conclusions reflect the position in the assumed absence of the proposed public works:

(1) the subject land would not have been rezoned from rural to urban in the preIPRSP period;

(2) the subject land would have been rural in the IPRSP in 1997, and in the PRS when promulgated in 2002;

(3) the subject land would not have been rezoned to urban in the period 2003 2006;

(4) the subject land would have been zoned rural at the taking date;

(5) the highest and best use of the subject land lay in its urban potential. At the taking date, its urban potential would have been reasonable, but uncertain; shortterm urban rezoning would have taken about 5 6 years. The hypothetical purchaser would have considered that the odds did not favour urban rezoning in that timeframe;

(6) valued on that basis, the value of the subject land at the taking date is $14.025 million;

(7) to that figure should be added compensation for taking without agreement in an amount of 10%, namely $1.4025 million, giving a total of $15.4275 million; and

(8) interest is payable at 6% per annum from 1 August 2006 until judgment on the balance of that sum after deduction of so much of the advance payment of $9.6 million made on 22 May 2007 as is referable to the subject land (see section 10.4).

2849 I will hear from the parties on the question of costs.

Schedule 1: The defendants' objections

Brett Flugge

Objection 1 relates to [31] of exhibit 182A, Mr Flugge's primary statement dated 22 April 2008. That paragraph states: As a member of the technical support group providing assistance for the Peel Regional Planning Advisory Committee I am of the view that the land was identified for the purposes of open space so that the land would not be lost to urban development.

This paragraph is in the context of the preparation of the IPRSP.

The defendants object on the grounds of relevance, hearsay and inexpert opinion. They contend that the motive of the WAPC in reserving land is speculative or hearsay and not amenable to opinion evidence.

The plaintiffs contend that the evidence is admissible as evidence of the purpose of the reservation and does not relate to the subjective intent of anyone.

In this passage, Mr Flugge refers to the fact that he was a member of a support group providing assistance to the Peel Regional Planning Advisory Committee. To the extent that he is saying, in that capacity, that he has knowledge of what unidentified people subjectively intended, I do not consider the evidence to be relevant or admissible. That is not the reading invited by the plaintiffs. Rather, the plaintiffs say that the evidence is opinion about the objective purpose of the identification and designation of the land in the IPRSP.

There is no reasoning identified for the opinion to that effect. For the reasons that follow, I place no weight on the opinion. The designation of land in the IPRSP for a public purpose, such as Open Space Recreation, was intended to lead to the reservation, in the then contemplated Peel ***Region*** Scheme, of the land for a corresponding public purpose. By definition, the reservation of land for a public purpose precludes its zoning for urban or other development. Paragraph 31 of Mr Flugge's evidence is not needed for that conclusion. To the extent that [31] might be intended to go further, it might be that it is implicit that, but for the identification of the land for open space, the land would have been 'lost' to urban development. In my view, Mr Flugge's generalised statement is not probative of what would have occurred in relation to the land, but for the proposed public works.

Objection 2 relates to exhibit 182A [32]. In particular, the second sentence of that paragraph says that it is Mr Flugge's view that 'the recognised higher and better use of adjacent land in the [draft LPS] in 2005 would have, but for the reservation also recognised Lot 191 and 192 as well as the reserved part of Lot 189 for a mix of urban and commercial use'.

The defendants object on the ground that no reasoning is articulated for the opinion expressed.

It is not necessary to deal with this objection. I am satisfied by other evidence that, but for the proposed public works, the subject land would have been shown as urban in the draft LPS: see section 7.4.

Objection 11 relates to [16] of exhibit 182B, Mr Flugge's statement of 26 May 2008. This statement responds to reports of Mr Moran and Mr O'Neill. Paragraph 16 is part of Mr Flugge's response to Mr Moran's report. In [15], Mr Flugge sets out reasons why he does not agree with Mr Moran's view that, as at the date of taking, it is unlikely that the subject land would be urbanised before 2020. Mr Flugge then states: Further and in addition, I note that but for the reservation, this land could have been contemplated for urban development much more quickly, as it was recognised already at an early point that the land was capable for development being proponent driven (exhibit 182B [16]).

It appears that the defendants' objection relates to the words 'being proponent driven'. The defendants say that no basis is set out for the 'opinion re "proponent driven" '.

I do not think that the paragraph expresses an opinion distinctly about 'proponent driven'.

The paragraph is poorly drafted. It is not easy to give meaning to the words 'being proponent driven' at the end of the paragraph. I take the paragraph as a whole to be saying that:

(a) but for the proposed public works, the land could have been contemplated for urban development much more quickly than suggested by Mr Moran; and

(b) that was so because the land had, prior to the taking date, been recognised as capable for urban development.

The paragraph as a whole seems to me to be worthy of little or no weight. It is a summary of opinions expressed by Mr Flugge elsewhere, in more detail, in both written and oral evidence. Paragraph 16 does not identify where and in what respects it had been 'recognised' that the land was capable for development, although one might surmise, from Mr Flugge's other evidence, that this is intended to be a reference to planning publications such as the SWAT report and the TS Martin report.

In this context, the only meaning I can give to the addition of the words 'being proponent driven' in [16] is to read the sentence as if it concludes with the words that the land was 'capable for proponent driven development'. Put in this way, there is no separate opinion being expressed about development being proponent driven. It appears to be a repetitious and inelegant reference to rezoning being developer driven during the 1990s. The objection falls away.

Objection 3 originally related to all of [44] [45] of exhibit 182D, Mr Flugge's statement of 30 March 2010. Objection was taken on the ground of hearsay. Ultimately, the objection was maintained only in relation to the second sentence of [45].

Paragraphs 44 and 45 relate to the Kelliher land. As I have explained in section 1.4, the Kelliher land is east and north of the subject land. In the first sentence of [45], Mr Flugge attaches a letter dated 16 February 1995 from the Kellihers, opposing the residential subdivision of Riverland Ramble, and states that 'for this reason no application was put forward for the rezoning of the Kellihers land'. The second sentence of [45], to which objection is taken, states that '[c]onsequently it was for that reason that it is not identified as urban within the [IPRSP] or strategic planning instruments'.

The defendants object to the evidence as hearsay. The defendants contend that Mr Flugge cannot state the reasons for the inclusion or noninclusion, in the IPRSP, of particular land as urban. I accept that contention. It should be noted, however, that senior counsel for the defendants crossexamined Mr Flugge on the second sentence of [45]. Mr Flugge agreed with counsel's proposition that the attitude of the Kellihers is not the only reason for the failure to identify the Kelliher land as urban in the IPRSP (ts 3406).

In light of that, I propose to deal with the defendants' objections as going to weight rather than admissibility. I do not give any weight to Mr Flugge's statements about why the Kelliher land was not identified as future urban in the IPRSP.

Brian Robinson

Objection 6 relates to [196] of exhibit 180A, Mr Robinson's statement of April 2008. The objection was argued on 15 June 2010. I stated that the evidence would be received provisionally, with a ruling to be given in the reasons to the extent necessary (ts 2451).

Paragraph 196 is in the following terms: I am familiar with the lead up to its inclusion in the Peel ***Region*** Scheme for Regional Open Space and the Perth to Bunbury Highway. In my opinion the very reason the land was included for a reservation was to ensure that the Land was not lost to urban development, this is made clearer when the history of the site is considered.

This evidence is substantially to the same effect as the evidence of Mr Flugge, exhibit 182A [31], to which objection is taken. My comments on that evidence apply here again.

Objection 1 relates to exhibit 180A [198]: From a planner's point of view, the Land has not been identified for urban development due of [sic] the Highway and the Regional Open Space abutting the Highway.

Given what is said in [197] and [199], it would seem that [198] is concerned with lot 189. If that is so, there is no need to consider it further. If, however, it relates also to lots 191 and 192, my conclusions about [196] apply again here. The generalised and conclusionary nature of the evidence, standing alone, means that no significant weight should be given to it. In any event, there is significant other oral and written evidence from Mr Robinson to similar effect in which his reasons for his view can be found. Thus, this evidence in itself adds nothing of substance to other evidence of Mr Robinson to which no objection is taken.

Objection 2 relates to exhibit 180A [577]. It appears that the objection is to the closing part of the paragraph, in which it is stated that 'TPS 5 is intended to comply with the [Peel] ***Region*** Scheme with the [draft LPS] identifying real demand'.

The defendants object to the opinion that the draft LPS reflected demand on the ground that no basis is set out for that opinion. Paragraph 577 does not state that the draft LPS reflected demand, but rather says that the draft LPS identified real demand.

Standing alone, that clause of the sentence comprising [577] seems to me to be worthy of very little weight, given its generality. There are references to the draft LPS in earlier parts of Mr Robinson's report; see exhibit 180A [79] [82], [351] [353]. No objection is taken to those passages. What is said about the draft LPS in [577] does not seem to me to add anything to those passages. I admit the paragraph, but, for the reasons given, the passage objected to is of no probative value.

Objection 32 relates to Mr Robinson's supplementary report number 2 of 5 November 2008, exhibit 180D (20/2506 2676).

Initially, the defendants proposed to argue their objection to that report on 15 June 2010, and seek a ruling in relation to it. However, counsel said that he proposed to seek a ruling, prior to the evidence, only in relation to [58] [63]. After argument, it was accepted that [58] [63] were to be admitted provisionally, and only in rebuttal of the defendants' reliance on Directions 2031 and the SMPSRSP (ts 2463).

Given my upholding of the objections in relation to Directions 2031 and the SMPSRSP, the evidence in exhibit 180D [58] [63] falls away.

That leaves the defendants' objection to the report on the ground of relevance.

In their closing submissions, the plaintiffs rely upon exhibit 180D, Mr Robinson's report about Keralup, in several respects. Among other things, they contend that:

(a) Keralup was designated future urban in the IPRSP; and

(b) by 2006, the environmental issues and other concerns that had emerged about Keralup would have led the hypothetical purchaser to consider that additional urban land, such as the subject land, may need to be rezoned to meet expected further demand.

I accept that for this reason, and on the other bases indentified in pt 6 and pt 7 of the plaintiffs' closing submissions, Mr Robinson's report meets the threshold requirement of relevance, so as to be admissible.

Brian Haratsis

Objections 1 and 2 can be dealt with together. Objection 1 relates to point 3 of the executive summary to exhibit 212D (23/204), Mr Haratsis's supplementary report number 2 of August 2009 entitled 'Peel Residential Dwelling Demand Forecast'. In point 3, Mr Haratsis expresses the opinion that given the significant environmental constraints in the Peel ***region***, only ***around*** 50% of the land area zoned urban and urban deferred in Peel was likely to be available for residential development. This is repeated in the sixth paragraph on 23/207. Objection 2 is expressed to refer to another paragraph, but I treat it as referring to this and, perhaps, the fourth paragraph on 23/208.

The defendants object on the ground that no basis or reasoning is stated for the asserted 50% availability. I do not accept that objection. As Mr Haratsis says in his report, what he says about environmental constraints is based on matters set out elsewhere in his report. See, in particular, section 2.1 of exhibit 212D, 23/208 209.

The defendants object to the third paragraph of 23/214 of the same report. In that paragraph, Mr Haratsis responds to part of Mr Wilson's evidence: Mr Wilson in paragraph 25 and later in paragraph 486 suggests that a prudent developer would expect competition to dilute sales rates. My experience and the 2005 and 2006 experience in the area of influence for the subject land indicates that this is not the case. When demand is high, competition can increase the number of purchasers in the area. As the two estates demonstrated - all lots were sold with no dilution (exhibit 212D, 23/214).

The defendants object to this paragraph on the ground that it is a matter of valuation and it is outside the scope of expertise of Mr Haratsis.

I am not satisfied that Mr Haratsis's experience gives him relevant expertise in relation to the extent to which competition between subdivisions in an area dilutes sales rates. While there is evidence, which I accept, that Mr Haratsis has experience in advising developers who are considering purchasing large pieces of land for subdivision, there is no evidence specifically relating to the question of Mr Haratsis's experience about how having competing subdivisions in an area affect sales rates.

In any event, had I admitted Mr Haratsis's opinion in this respect, I would not give it any significant weight. That is because Mr Haratsis does not say anything to identify the experience upon which he says he relies. Mr Haratsis expands on the other reason identified in this paragraph, namely the 2005 and 2006 experience in the area. He refers to the fact that all lots were sold in Murray River Country Estate and Riverland Ramble. That is not a matter on which Mr Haratsis brings any relevant expertise as to what conclusion can be drawn. In any event, to my mind, the fact that all lots were sold in those two subdivisions does not provide any foundation for a conclusion, one way or another, on whether the presence of multiple subdivisions is likely to dilute sales rates.

Paul Kotsoglo

The defendants object to the whole of Mr Kotsoglo's report dated January 2009, exhibit 222B (24/101 120), on the ground of relevance.

The plaintiffs contend that the report is relevant because it addresses characteristics of land that was relied on by Mr Wilson in one of his reports, namely lots 6, 8 and 5067 Rowley Road, Forrestdale. Because, in his oral evidence, Mr Wilson did not adhere to the views expressed in his earlier report referring to these lots, there is no need to consider what Mr Kotsoglo says about these Rowley Road properties, and so no need to rule on the objection.

Greg Rowe

The defendants object to the whole of Mr Rowe's report dated 29 March 2010, exhibit 191G (25A/543 657). The ground of objection is founded on the defendants' contention that a hypothetical past rezoning case is impermissible in law. For the reasons given in section 2, I have rejected that contention. Further, the defendants object to the report to the extent that it constitutes personal evidence about what Mr Rowe would have done. Little of the evidence in this report is of this character. To the extent there is evidence of such character, and to the extent I consider it relevant, I will deal with it in section 4 of these reasons.

I make the same response to the defendants' objection to exhibit 191G [7].

Martin Wells

The defendants object to one paragraph of the evidence of Mr Wells. Mr Wells prepared a report dated 28 July 2008 that, with its attachments, occupies more than 30 pages. The report was attached to a statement signed by Mr Wells, also dated 28 July 2008, which set out what was described as an executive summary of the report. Point 7 of the executive summary, to which objection is taken, is in these terms: Development was not orientated towards the

future Perth to Bunbury Highway route at the time of the drafting of the 1994 LRS so that the future Highway would be bordered by a rural rather than a residential landscape (exhibit 170A, 26/3).

The defendants object to that paragraph on the ground that no basis or reasoning for it is identified. In particular, the defendants contend, it is not identified what development is referred to that is orientated.

This paragraph is expressed in unhelpfully general terms. To my mind, it can be given weight only to the extent that it can be connected to the detailed substantive evidence in Mr Wells' report. The plaintiffs' response to the objection invited attention to 26/25 26, which refer to the development guidelines for precinct 7 of the Local Rural Strategy (LRS). Mr Wells says that the intent of the guideline was to enable the future Highway to be bordered by a rural rather than residential landscape, for aesthetic reasons.

To the extent that point 7 is intended to encapsulate what is said in the report at pages 25 26, it is unnecessary. To the extent that it is intended to go beyond what is said in that part of the report, the plaintiffs have not identified, and I am unable to identify, reasoning for the general conclusion there stated.

For these reasons, I uphold the objection to point 7 of the executive summary.

Vernon Butterly

The defendants objected to a number of aspects of the evidence of Mr Butterly. Some of the objections were argued in the course of the trial in November 2009. I admitted the evidence provisionally, stating that I would rule on the objections, to the extent necessary, in the course of my reasons at the end of the trial.

The primary substance of Mr Butterly's evidence in exhibit 194A is to postulate an alternative IPRSP and PRS in the assumed absence of the proposed public works on the subject land. As part of that exercise, Mr Butterly postulated a road running northsouth and abutting the eastern border of lot 191 which he called 'Road A'. The defendants objected to substantial parts of the report of Mr Butterly on the ground that there was no basis in law to postulate Road A. The defendants contend that Road A was either an alternative Highway or, if not, there was no basis to assume it into existence.

It is not necessary to resolve this objection because, for other reasons, I have concluded that I do not accept Mr Butterly's evidence. See section 5.

The defendants also objected to exhibit 194A [5.3] on the ground of relevance. That paragraph refers to urban development being developer driven in the relevant period, and goes on to say that, but for the proposed public works, it is likely that the subject land would have been included as urban in the IPRSP. The defendants object to this evidence on the basis that it is an opinion based on the assumption that a developer owned the land, rather than the plaintiffs, and is accordingly irrelevant. I do not accept that submission. In substance, the evidence is that urbanisation of land was owner driven. Whether the plaintiffs would, in the assumed absence of the Highway, have taken steps to have the land rezoned and developed is a different matter, which I deal with in section 4 and section 5.

The defendants also object to exhibit 194A [5.6] [5.8]. In those paragraphs, Mr Butterly expresses the view that the philosophy of keeping the land surrounding major roads free of development had effects in limiting urban expansion in the lead up to the IPRSP and in the designation of land in the IPRSP.

There is a substantial body of other evidence, both written and oral, in which planners called by the plaintiffs expressed the opinion that the philosophy of keeping the land surrounding highways free of development limited urbanisation of the subject land and surrounding land. I am not persuaded that this evidence in [5.6] is inadmissible. Rather, it is to be considered together with all of the other evidence on the point. See section 4 of these reasons.

Similarly, I would not exclude Mr Butterly's opinion, in [5.7], that the IPRSP reflected the philosophy that land ***around*** major roads should be kept free of development. The reasoning for his view in that regard is sufficiently clear from [5.7]. However, as appears in sections 4 and 5, I do not accept Mr Butterly's opinion in this regard. Mr Butterly points to the fact that, in the IPRSP, urban development does not progressively move eastward in concentric circles, but leapfrogs Furnissdale/Barragup, creating settlements at ***South*** Yunderup and Ravenswood. In my view, that does not reflect a philosophy of limiting development near the Highway. Rather, it reflects the philosophy of urban development stated in the IPRSP of preferring urban nodes to continuous strips of development.

Timothy Auret

In pt 9 and pt 10 of Mr Auret's original report dated 21 April 2009, exhibit 183B, he expressed opinions about expectations of the development potential of the subject land in 2006, had it not been reserved in the PRS. In that context, he said that it was likely that the Highway and the RRF would have been located further east of the subject land, within the Ravenswood locality. Objection was taken to pt 9 and much of pt 10 on the ground that his evidence was based on the impermissible assumption that the Highway and the RRF would have been in a specific alternative location near the subject land. The defendants maintained the objection, which was argued in November 2009. I declined to rule on the objection and admitted the evidence provisionally (ts 1682 1683).

Mr Auret prepared a supplementary report dated 10 November 2009, exhibit 183C (30/228). The defendants also make further objections to parts of pt 9 of exhibit 183B and parts of the supplementary report of 10 November 2009.

It is not necessary to rule on any of these objections. Mr Auret gave evidence in the general planning concurrent session. When the evidence reached a point in the agenda concerning the urban potential of the land as at 2006, Mr Auret sought to be excused from giving further evidence, stating that he was not actively involved in the Peel ***region*** after the completion of the IPRSP. Consequently, he did not consider himself well equipped to answer matters relating to questions 3, 4 and 5 on the agenda (ts 4291). Further, I have ruled that the plaintiffs cannot run a case that the land would have been rezoned to urban between 1997 and 2003, although rural in the IPRSP.

In that light, I do not place weight on pt 9 and pt 10 of Mr Auret's first report, or on his supplementary report of 10 November 2009. There is no need to rule on objections relating to those parts of Mr Auret's evidence.

Gerry Brown

The defendants' object to one passage in Mr Brown's report valuing the land on the basis that its highest and best use was for commercial and intensive residential (exhibit 269G, 44/1657 1680).

In that report, Mr Brown considers the question of whether there be a sufficient population to support a commercial shopping centre at the subject land. Mr Brown refers to a report of Mr Haratsis. He then goes on to say: It is my view that at the date of taking the population of North and ***South*** Yunderup as well as what is proposed for North Ravenswood would be sufficient for stage 1 and 2 of a district centre, together with other ancillary uses including offices and the like (exhibit 269G, 44A/1660 1661).

The defendants object to the words 'as well as what is proposed for North Ravenswood', saying that Mr Brown has not explained what he means by that clause of the sentence, with the result that the whole conclusion in the passage quoted is not explained.

Reading the report in isolation, there is force in the defendants' contention. However, Mr Brown was crossexamined at some length about his assumptions regarding population living on the subject land and surrounding land (see ts 7077 7085). Mr Brown's evidence reveals that he was unable to identify with any reasonable clarity the assumptions he made about where a population sufficient to support the district shopping centre would have been living. His evidence was that some of the population would have been on the subject land and the other population 'could have been' north and east of the subject land (ts 7077 7079). Mr Brown gave contradictory evidence about whether he had assumed an increased population in Riverland Ramble in the absence of the proposed public works; see ts 7079, 7085. In light of Mr Brown's oral evidence, I deal with the question of Mr Brown's assumptions about the location of a population sufficient to support a district shopping centre as a matter of weight, rather than going to admissibility. As appears in section 9 of my reasons, I consider these matters bear adversely on the weight of Mr Brown's evidence, both in regard to his opinion as to the value of the land on a commercial basis, and more generally.

Other witnesses

The defendants object to the whole of the statements of Raymond Jones (exhibit 211A), Mr McKay (exhibit 175A and exhibit 175B) and Michael Greenup (exhibit 171A), on the basis that the evidence is irrelevant because it relates to what would or may have been done in the hypothetical past. As explained in section 2 of these reasons, I overrule that objection.

The defendants also object to particular parts of the evidence in Mr McKay's statements on the ground of relevance. I do not propose to formally rule on all the objections on the ground of relevance. To the extent that I

refer to Mr McKay's evidence in my reasons, it is relevant for the purpose and in the context referred to. To the extent that I have not referred to it, it is either irrelevant, or of insufficient probative weight to bear upon my process of reasoning.

Objections to documents

Exhibit 204 was admitted provisionally over the objection of the defendants (ts 4161).

Exhibit 204 is notes of a meeting held on 18 December 1997 regarding a preliminary draft of the PRS environmental reports. It records an agreement to recommend the land containing remnant vegetation adjacent to the Ravenswood raceway (lot 52) be retained as rural instead of urban deferred. This was in recognition that further investigations were required to confirm whether the vegetation was of regional significance.

In their submissions supporting their objections, the defendants correctly pointed out that I had ruled that it was not a part of the plaintiffs' case that the subject land may have been rezoned from rural to urban between 1997 and 2003, notwithstanding that it was designated rural in the IPRSP. See McKay [No 5]. The plaintiffs accepted that that was so and did not seek to support the admission of the document in relation to that question. Rather, the plaintiffs contended that the document was capable of bearing upon what was known about the environmental constraints relating to lot 52 (and also lot 2) at the time that the IPRSP was finalised. The plaintiffs submit that that is relevant to the hypothetical IPRSP question but for the proposed public works, would the subject land have been designated future urban in the IPRSP? In particular, would it have been so designated in preference to land such as lot 52 and lot 2? What was known about environmental constraints relating to lot 52 and lot 2, at the time of finalisation of the IPRSP, is relevant to that question.

I accept the plaintiffs' submissions and admit exhibit 204 on that basis and for that purpose. I note that exhibit 203, which was tendered without objection, is relevant for the same purpose and to the same extent.

Exhibit 209 was admitted provisionally over the defendants' objection. It is referred to in crossexamining Mr Moran about his evidence on the extent of developable urban zoned land. I admit the document, but for the reasons given in section 7.5, I do not think it is of any weight.

Exhibit 215B was admitted provisionally over the defendants' objection on grounds of relevance. I admit the document but, for reasons given in section 4.10, it does not influence my reasoning.

Schedule 2: Outline of documents referring to the TAFE proposal or the RRF proposal, 1989 1996

Minutes of Recreational Needs Study Steering Committee meeting, 21 July 1989 (exhibit 171A, 46B/290 293)

Both Mr Greenup and Mr Nancarrow were members of this committee of the shire council.

The meeting discussed the Recreational Needs Study draft report, which was concerned with a development proposal in Pinjarra. It appears that development was proposed to upgrade the Sir Ross McLarty Park. The project had an estimated cost of $2.5 $3 million, but would not proceed until issues about the management of the new facilities had been resolved. The new facilities would include new outdoor and indoor sports courts, a gym and an indoor swimming pool (but the size had not been determined in the plans).

Minutes of ordinary council meeting, 27 July 1989 (exhibit 258A, 46B/36)

The meeting was attended by Messrs Greenup, Evans and Nancarrow.

The minutes from the Recreational Needs Study Steering Committee from 21 July 1989 were tabled and adopted, with one amendment (46B/38).

The council discussed a proposal to develop a TAFE college in the shire. The minutes refer to a meeting held on 12 July 1989, where TAFE representatives advised that preliminary investigations favoured land in Mandurah. The council's representatives, Messrs Nancarrow and McClements, had argued that a location between the Serpentine River and Pinjarra would better serve the ***region***. The council was requested to put forward submissions if they wanted support for their proposal for a TAFE college in the Shire of Murray.

The minutes record that draft submissions were circulated to members and the council supported the shire president making a presentation to the Minister for Education (46B/40).

Minutes of Health, Building and Planning Committee, 21 August 1989 (exhibit RR146.1, pages 7 8)

The meeting was attended by Messrs Greenup, Evans and Nancarrow.

The minutes note that 'Cr Nancarrow raised the question of siting the new TAFE college at Ravenswood as it would be an asset to our area', but recognised that this development would face the sewerage problems already confronting residential development in the shire.

Draft Peel Regional Plan, October 1990 (exhibit 181, 1/5/1 119; exhibit 197)

Mr Evans was one of the representatives of the Shire of Murray on the steering committee.

The report notes that, at that time, there were no university or TAFE colleges in the ***region***. The Ministry of Education Office of TAFE was considering site options for a new TAFE facility in the Peel ***region***, to be established by 1991 (1/5/41 42).

The location of the TAFE college is discussed in Part 3: Higher education facilities are urgently needed. TAFE is planning a facility in the ***Region*** by 1991. As a regional facility, a site along the Mandurah-Pinjarra corridor would be appropriate. A location in Murray should possibly be favoured to improve access and better serve the training needs of activities such as mining, forestry, agriculture, construction and industry, as well as the service sector (exhibit 181, 1/5/73).

The Peel Regional Plan adopted the strategy of the Office of TAFE developing a regional education facility between Mandurah and Pinjarra by 1991 (1/5/85). The Peel Research Institute is mentioned at 1/5/88.

The current recreation uses and future needs of the ***region*** are discussed: Active Recreation

The ***Region*** is well catered for in terms of active recreation facilities. Most of them are in Mandurah which has many organised sports groups ... Waroona and Boddington lack the population to support a wide range of clubs and facilities.

...

Anticipated active recreation demands in the ***Region*** include more waterski sites, and landbased support facilities for sailing and windsurfing, and recreation facilities in the developing suburbs of Mandurah. The balance between providing local sporting facilities and subregional facilities needs to be addressed (exhibit 181, 1/5/43).

In Part 3, dealing with regional values and planning issues, there is the following comment: There is presently a lack of regional focus for entertainment, culture and sport. Recent efforts to provide suitable facilities should be supported. Special attention should be given to the leisure needs of youth and senior citizens (exhibit 181, 1/5/68).

The Peel Regional Plan stated that land suitable for a future Peel Regional Sports Centre should be identified as part of the new urban centre at Furnissdale/Barragup (1/5/89). That urban growth area was to include extensive residential development focused on a major centre comprising education facilities, government services, regional recreation facilities and commercial development (1/5/97).

There is no mention of a proposal for a facility in Ravenswood. The expansion of Ravenswood is based on new residential growth and does not mention any large community infrastructure projects.

The Peel Regional Plan land use strategy map (exhibit 197) shows recreation and tourist sites in Furnissdale/Barragup, Pinjarra and in the City of Mandurah. There is no site indicated in Ravenswood.

Minutes of ordinary council meeting, 29 November 1990 (exhibit 258B; exhibit 171A, 46B/302)

The meeting was attended by Messrs Evans and Nancarrow.

The council discussed the upcoming visit by the Premier to discuss matters of interest with the shire council. The proposed Peel ***Region*** TAFE college was listed as a matter 'of obvious importance to council' to be discussed with the Premier (46B/302). There is nothing to suggest that a proposal for an RRF was to be discussed.

Council resolved to arrange a meeting with Minister, TAFE representatives and the DPUD to discuss the establishment of a TAFE facility in the shire. The resolution also notes that the Peel Research Institute could be an adjunct to the TAFE facility.

Minutes of special council meeting, 10 January 1991 (exhibit 171A, 46B/330)

The meeting was attended by Mr Evans, with Mr Greenup sending his apologies.

The minutes report the shire planner's comments on the draft Peel Regional Plan. A number of matters are specifically raised for council's consideration. The report notes that the site of the TAFE college, which was not yet identified in the Plan, is a matter that is already being pursued by council (46B/331).

The report mentions that the Peel Regional Plan identified the need to develop a commercial area in Furnissdale/Barragup. The minutes note that 'Council endorses and is actively pursuing this proposition' (46B/332 333). There is no mention about what is said about a regional sporting facility being located in Furnissdale/Barragup or about the absence of a proposal for a facility in Ravenswood.

Minutes of special council meeting, 20 February 1992 (exhibit 171A, 46B/313)

The meeting was attended by Messrs Greenup, Evans and Nancarrow.

Council discussed the Steering Committee report regarding the proposed recreation centre. The committee had considered constructing the centre as a whole, rather than in two stages as had been previously proposed. The committee advised that it was imperative that council apply for funding from the Ministry of Sport and Recreation, as, after 28 February 1992, no further funding applications would be accepted for three years. Council resolved to apply for a grant of $1 million from the Community Sporting and Recreation Facilities Fund.

Attached to the minutes is a report 'Preliminary Cost Study (Amended), Pinjarra Sports Pavilion for the Shire of Murray' dated November 1991, by Brian Delfs & Associates. The proposal discussed was for construction of a centre in Pinjarra and not Ravenswood.

Minutes of meeting between DEVET officers and Peel ***region*** government/planning agencies, 11 September 1992 (exhibit 258C)

The meeting was attended by Messrs Greenup and Berrie (Shire of Murray) and Mr Flugge (DPUD). The objective of the meeting was 'to reach consensus on three preferred locations for siting vocational education and training facilities in the Peel ***Region***'. The meeting discussed the concept of a tertiary education precinct and was contemplating a site of 20 ha. Mr Greenup protested that the focus was solely on sites in the City of Mandurah.

The members discussed a variety of optional sites, none of which is identified.

There is no mention of sporting or recreational facilities.

The minutes record that a further meeting is to be convened as soon as possible.

Article from the Mandurah Mail, 16 October 1992 (exhibit 258D)

The article is about the identification of the Gordon Road site by the DEVET as the preferred location for a TAFE college.

The article says that 'it was announced that two sites at Ravenswood were being considered' and that 'for the past 12 months the Murray Shire has been under the impression the college would be built at Ravenswood'.

Article from the Mandurah Telegraph, 20 October 1992 (exhibit 258E)

Following from the DEVET announcement about the Gordon Road site, Mr Greenup is reported as saying that '[w]e will stick to our guns over the Ravenswood site, which is an idyllic spot for tertiary education'. He believed that funds had been set aside for two years for a TAFE college 'in the Ravenswood area'.

Dr Mitchell (a member of the DEVET Infrastructure Planning Group; see exhibit 258C) said that 'the Ravenswood site was unacceptable for a wide range of reasons, including the exorbitant cost of development and the lack of information and technical links such as Telecom'.

Facsimile from Mr Flugge to DEVET Infrastructure Planning Group members, 23 October 1992 (exhibit 258F)

The cover page says that the attached note sets out the DPUD's views on possible site for a TAFE college or Peel Research Institute between Mandurah and Pinjarra. The comments set out the advantages of a site ' situated

halfway between Mandurah and Pinjarra'. That site is not specifically identified other than by saying it is 'located on major axis of Pinjarra Road, Perth Bunbury Freeway, possible future rail/bus link along Pinjarra Road'. This is consistent with the location of the subject land.

I infer that the contemplated site is in Ravenswood, as the last point mentions that the pros and cons of the Ravenswood site need to be documented so local authorities in the Peel ***region*** can assess the rationale of selecting Mandurah as the preferred site.

The comments mention that the possibility of selecting a site greater than 20 ha should not be overlooked, as that would have potential for linkage with the Peel Research Institute. There is no mention of sports facilities.

Minutes of meeting of reference group for Peel TAFE college site, 9 November 1992 (exhibit 258G)

The meeting was attended by Messrs Greenup and Nancarrow (Shire of Murray). Mr Flugge (DPUD) sent his apologies.

The reference group agreed on the site selection criteria that would be used by an external consultant to assess sites nominated by the four Peel ***region*** local governments. A highly desirable, but not essential criterion, was that the college site was not less than 20 ha as the 'opportunity to reserve additional land for future education and training developments is a consideration'.

There is no mention of sporting facilities.

The consultant, once appointed, would contact the shire clerks of the respective local government authorities. Mr McClements, the Shire of Murray clerk, was also a member of the reference group.

Peel College Site Selection report, December 1992 (the TAFE College Site report) (exhibit 28, 1/5/204 254)

The report notes that it was apparent that the study needed to consider the possibility of the TAFE college being expanded to incorporate additional education facilities including a university and complimentary allied trainers (1/5/207). The minimum site area required was 20 ha, but it was desirable that additional land was available to allow for the development of an extended educational precinct (1/5/219).

One of the preliminary site selection criteria used to exclude some of the sites nominated by the local government authorities was the degree of access to the site by road, bus and rail transport networks. The following is said about road access: Regional Road System - In the short term it is essential that a TAFE College site can be linked to both local and regional road networks without major upgradings or road extensions. In the longer term it will be desirable that the TAFE College site has good access to north-***south*** and east-west road links. Sites adjacent to controlled access highways need to coincide with access and egress points. Conditional support has been given to those sites which are situated close to the regional road networks but for which safe convenient access may be difficult to achieve (exhibit 28, 1/5/213).

Both sites 8 and 10, located adjacent to Pinjarra Road, met the preliminary site selection criteria. Site 9, which is not adjacent to Pinjarra Road, only received conditional support (1/5/223).

The report acknowledges that a college site located adjacent to the extensions of the Kwinana Freeway and metropolitan rail systems has advantages. However, it predicts that only a limited proportion of the college catchment would use those transport options (1/5/224). The report discusses that the TAFE college will complement existing community facilities and services if built close to existing urban centres. However, if located in a new urban release area, the range of community services and facilities developed in conjunction with the TAFE college will form the basis of the community services network (1/5/219). The range of facilities provided in a college that can be shared with the community include a library, performing arts centre, access to video production equipment, child care services and facilities for community meetings (1/5/224).

The detailed consideration of the assessment criteria for each site includes whether or not the site provides the opportunity to expand the range of educational and ancillary uses associated with the college: see, for example, 1/5/238. There is nothing to indicate that regional sports facilities would ordinarily be developed in conjunction with the TAFE college.

In respect of the three sites in Ravenswood, the report says that the sites provide the opportunity to introduce community facilities to the new urban areas of Ravenswood, Murray Lakes and Yunderup: Child minding facilities,

access to meeting areas and library, which could be jointly developed with the Shire of Murray, are services which would normally lag well behind urban development (exhibit 28, 1/5/239).

The report notes that the Fiegert Road site is extensive and 'has the potential to accommodate a technical college plus any number of additional educational facilities' (1/5/242). Those facilities include student accommodation (1/5/251). The report recommends that if this site is selected, then at least 40 ha should be acquired, with possibly more land being acquired for endowment purposes (1/5/242). The same is also said of site 9, which is north of Old Mandurah Road on lots 10 and 11.

In respect of site 10, located within what became Riverland Ramble, the report notes that the current proposal to develop that land for residential use would constrain the ability to acquire more than 20 ha of land. However, 'this would not preclude the opportunity for educational facilities complementary to the college being located adjacent across Old Mandurah Road on site 9' (1/5/249).

In terms of public access, site 8 is described as being 'immediately adjacent' the proposed alignment of the Perth Bunbury Highway. However, the report places greater emphasis on the 'park and ride station' that was proposed in the SWAT report for the intersection with Pinjarra Road and the site's location adjacent Pinjarra Road itself. The public access afforded to sites 9 and 10 is described in exactly the same terms, except that these sites are described as being 'close to' the proposed highway alignment. Nothing is said about how the Highway impacts on the sites' suitability as a location for a TAFE college. In any event, there would be no difference as between the three Ravenswood sites in that respect.

The final recommendation of the report is to acquire 20 ha of lots 190, 191 and 192 for the TAFE college, 20 ha for complementary education facilities, and the balance for endowment purposes. The purchase was subject to confirmation of soil types and drainage requirements.

There is nothing in the report to suggest that there was a desire to include regional sports facilities with the TAFE college, or an independent proposal by the Shire of Murray for an RRF in Ravenswood. It seems unlikely that such a proposal, if it existed, would not have been mentioned when discussing the impact of the TAFE college on community services, urban development and compatibility with adjacent land uses, which formed part of the essential site selection criteria: see 1/5/219, 225.

Letter from executive director of the DEVET to the plaintiffs, 20 January 1993 (exhibit 182A, 15/69)

The letter states that lots 191 and 192 were identified as the most suitable site for a future TAFE college, based on its strategic regional location. The selection of the Fiegert Road site had recently been announced by the Minister for Education and Training, subject to certain site conditions being satisfied.

The letter advised that as the DEVET only requires 20 ha of land, they will be seeking to only purchase a portion of the total area of 111 ha. The preferred site positioning for a college within lots 190, 191 and 192 still had to be resolved, as well as zoning and drainage issues.

Valuation report by Valuer General on lots 190, 191 and 192, 5 February 1993 (exhibit 258H)

This report comments of the future use of the land identified as the Fiegert Road site: Available information suggests the longer term probable use of the 137.3477 ha contained in lots 190, 191 and 192 will be:

13.0ha Main Roads Dept for freeway extension

25.0ha Education Dept for TAFE College

99.3ha Homeswest (or similar) for residential subdivision

137.3ha Total

(exhibit 258H, page 57)

The TAFE Chronology, exhibit 258, says that this report 'shows the thinking in 1993 in respect of the subject land'. To the extent that that is so, that thinking does not apparently include use of any part of the Fiegert Road site for an RRF.

Newspaper article dated between 14 and 23 February 1993 (exhibit RR146.24, page 6)

The article includes comments from the Minister for Community Development, Family and Seniors that the government had stated that they would 'immediately proceed with the purchase of the TAFE site at Ravenswood and that is the way we are going'.

Letter from Valuer General's Office to Main Roads Department, 31 May 1993 (exhibit 258I)

This letter provides information on the cost of acquiring 13 ha of lots 191 and 192 for the Highway. It comments that the Ministry of Education has expressed interest in lots 191 and 192 as a potential site for a Regional College of TAFE. There is no mention of sporting facilities.

Internal memorandum from executive director of the DEVET to Minister for Education, 1 June 1993 (exhibit 258J)

The memo recommends that the Fiegert Road site, the preferred site in the TAFE College Site report, should no longer be considered as a viable option. Instead, negotiations to acquire the Gordon Road site should commence immediately.

The two sites are compared in terms of population catchments, public access and environmental/drainage constraints. There is no mention of a proposal to collocate an RRF on the Fiegert Road site as a factor weighing against adopting Gordon Road as the preferred site.

Article from Mandurah Mail, 9 July 1993 (exhibit 258L)

The article notes that local authorities had reaffirmed their commitment to the Fiegert Road site, but that the Minister for Education had not committed to buying that site.

Letter from Mr McKay to Arthur Marshall MLA, Member for Murray, 9 July 1993 (exhibit 176)

The letter refers to conversations between Mr McKay and Mr Marshall in May and June 1993.

The letter makes it clear that, at that time, there was no clear position on whether lots 191 and 192 would be acquired for the TAFE college, or whether Mr McKay could sell privately without affecting the TAFE proposal.

Report by Mr Flugge to SWRPC on consent to advertise Riverland Ramble rezoning, 5 July 1993 (exhibit 182D, 15A/472)

In the context of a discussion of regional planning, the report notes that, when viewed in conjunction with the possible siting of a TAFE facility immediately to the northwest, and the future Perth Bunbury Highway alignment to the west, the Riverland Ramble site becomes a very attractive proposition for urbanisation.

There is no mention about a proposal for a regional sports facility in the locality.

Minutes of meeting with Education Minister about the Fiegert Road site for the Peel TAFE college, 20 November 1993 (exhibit 258N)

The minutes record the issues discussed at the meeting. It appears that this was a meeting similar to those held on 11 September 1992 (exhibit 258C) and 9 November 1992 (exhibit 258G). The meeting was attended by representatives of the DEVET, TAFE, BMA (the architects), the DPUD, the local government authorities and the Minister for Education.

Under the heading 'Strategic/Statutory Planning', the minutes suggest that the 1990 Peel Regional Plan is under review, including updating policy statements such as SO 11, dealing with the Peel TAFE college proposal.

The minutes also refer to the Metropolitan Development Program and the DEVET's criteria for TAFE college sites including 'colocation requirements including other educational facilities, community/commercial facilities, sports grounds'.

Fiegert Road was reaffirmed by local authority and state government representatives as being the preferred site for a TAFE college, based on longer term needs and desirability for a centrally located site and the future urban growth anticipated in Ravenswood, Furnissdale/Barragup and ***South*** Yunderup/Murray Lakes.

The first point of proposed action to be taken before the Minister for Education would commit to a final decision on the preferred site was: 1. TAFE and BMA to firm up land requirements at Fiegerts Road site, including negotiations with Main Roads over the future Perth Bunbury Highway requirements. TAFE is looking at accommodating a 10 hectare building area for the Campus and associated grassed facilities. The current site for sale comprises 42 ha, with possibly only 20 ha being required for the campus facility (exhibit 258N, page 123). (emphasis added)

I do not think that the 'associated grassed facilities' was a reference to any proposal for an RRF. Whilst the TAFE college might have included playing fields or grassed areas for passive recreation, I do not think this amounts to collocating the TAFE college with an RRF. The grassed facilities are associated with the TAFE campus and not some independent regional proposal.

As a matter of future planning, it might have been possible to collocate an RRF with the TAFE college. The DEVET and the architects, BMA, were to liaise with the DPUD on integrating the TAFE campus with the surrounding long term planning and development. BMA raised the issue of preparing a structure plan for the shaded area surrounding the Fiegert Road site, north of Old Mandurah Road (exhibit 258N, page 124):

Letter from Shire of Murray to the Premier, 20 December 1993 (exhibit 258O)

The letter is from Mr Nancarrow, the shire president, and notes concerns about the TAFE college proposal for Fiegert Road, particularly about delays in commencing development and decisions being made by people outside of the Peel ***region***.

It does not mention any associated proposal for an RRF on the Fiegert Road site.

Article from Mandurah Mail, 6 May 1994 (exhibit 258Q; also exhibit 179)

The article reports on a decision announced on behalf of the Education Minister to build a combined TAFE/Murdoch University campus in Mandurah. This seems consistent with what was said in February 1992 (see exhibit RR146.24, page 6 above) about plans for Mandurah getting 'a Peel Regional College that will be more than a TAFE college'.

The article states that 'it appears the Fiegert's Road site at Ravenswood, earlier earmarked for a Peel TAFE college, has been rejected'.

Shire of Murray Local Rural Strategy, July 1994 (exhibit 29, 1/11/75289)

One of the planning considerations for precinct 7, Ravenswood, is that the [s]ite adjoining Pinjarra Road, Fiegerts Road and future PerthBunbury highway alignment, is the subject of a report commissioned by Peel Local Government Commission and Peel Development Commission, for selection of a Regional education facility (exhibit 29, 1/11/180).

The LRS notes that one of the further planning needs is to identify the location and land use implications of possible tertiary education facilities.

This indicates that in mid1994, the Fiegert Road site was still a possible location for the TAFE college.

There is no mention of any proposal or future intention by the shire to develop an RRF in Ravenswood.

Letter from Shire of Murray to Minister for Planning, 9 August 1994 (exhibit RR146.41)

The letter, from Mr Nancarrow, includes information to assist the Minister in his deliberations on the Riverland Ramble development proposal. It includes the following: The Murray Shire's community expectations and public optimism towards future growth and development prospects in the Mandurah to Pinjarra corridor were then somewhat curtailed, when the Government announced that a proposed TAFE facility previously earmarked for a site adjoining the future PerthBunbury Highway in the Ravenswood locality was overlooked. Council felt that this decision was not taken with due regard for the long term community benefits or with sufficient consultation with State and Local Government Authorities based in the Peel ***region*** (exhibit RR146.41, page 1).

The letter does not mention any existing or new proposal to locate an RRF on the Fiegert Road site, including in terms that the RRF was intended to be developed in conjunction with the TAFE college.

Peel Regional Strategy, September 1994 (exhibit 30, 1/6/96 144; exhibit 198)

Mr Evans represented the Shire of Murray on the steering committee.

The Peel Regional Strategy states, as one of its action points, that the Department of Training should develop a regional tertiary educational facility in Mandurah (1/6/121). The land use plan for the Strategy states that the site for the tertiary education facility was selected in August 1994 (1/6/139). The site identified on the plan (see exhibit 198) corresponds to the Gordon Road site shown in the 1992 TAFE College Site report (exhibit 28, 1/5/235).

The structure plan for the Rockingham/Mandurah/Pinjarra corridor was to examine the linkages of the tertiary education site to surrounding land uses and the Mandurah City centre (1/6/133). There is nothing that suggests the site location was uncertain at that time.

The Peel Regional Strategy also revised the 1990 Peel Regional Plan's proposal for an RRF. This was to be identified on suitable land north of Mandurah, instead of in Furnissdale/Barragup (1/6/122). It also states that the regional sporting facility proposed for a site north of Mandurah should be planned in conjunction with the proposed sporting facility at Lark Hill (1/6/124). The user groups, and the location and area of the regional sports facility were to be identified in the structure planning for the Rockingham/Mandurah/Pinjarra corridor (1/6/133).

The Peel Regional Strategy land use plan (exhibit 198) shows the preferred location for the regional sports facility in North Mandurah, as well as a smaller facility ***south*** of the Dawesville Cut. There are no regional sporting facilities identified anywhere in the Shire of Murray.

Working Paper No 4, November 1995 (exhibit 178)

The working paper, produced for the IPRSP committee, discusses the paper released in February 1995 by the Ministry of Planning about the Sport and Recreation Strategy (page 19). It then sets out and describes four potential sites:

In respect of the Ravenswood site, the following is said: A site of approximately 60 hectares has been identified just east of Pinjarra Road and just east of the Ravenswood townsite, between Pinjarra Road and the future PerthBunbury Highway. This approximate location was identified as part of the Sport and Recreation Strategy being prepared for the Ministry of Sport. The exact configuration of the site will need to be determined after more precise study of site conditions (exhibit 178, pages 20, 22).

Mr Auret clarified in his oral evidence that the references to 'east' were incorrect (ts 3433).

The working paper also notes under the heading 'Issue No 9 Tertiary Education Site' that the greyhound racing track at Gordon Road had been identified for a future university and TAFE college (page 26). No other site is mentioned.

Letter from Mr Kidd to Mr Auret, 8 January 1996 (exhibit 182D, 15A/496)

The letter refers to discussions between Mr Auret and Mr Flugge regarding potential sites for a regional sporting facility to be included in the IPRSP. The letter states: Council resolved at its meeting on 21 December 1995 to advise you that, if you are of a mind to include in the structure plan for this area a large site for the establishment of a regional recreation/sporting complex, then you are asked to carefully and sincerely consider the site previously under consideration as suitable for the Peel TAFE College, in the Ravenswood locality (exhibit 182D, 15A/496). (emphasis added)

This letter suggests a clear preference for any RRF in Ravenswood to be on the subject land.

1996 IPRSP, for public comment (exhibit 7, 1/10/54 178)

The report was produced by the Peel Regional Planning Advisory Committee (the IPRSP Committee), of which Messrs Evans, Berzins, Flugge and Auret were all members. At that time, Mr Flugge was the executive manager of planning in the Shire of Murray. The Committee was chaired by Mr Arthur Marshall MLA, the Member for Murray.

In ch 9.4, potential sites for regional sports facilities are identified and briefly outlined (1/10/97 98). The four sites are:

(1) Lark Hill Sporting Complex;

(2) North Mandurah, which was a site of 60 ha for a regional sporting facility identified in the 1994 Peel Regional Strategy (1/10/98, 141 142; see also exhibit 198);

(3) Ravenswood (discussed below); and

(4) Caddup, ***south*** of the Dawesville Cut, which was also identified as a site for a regional sporting facility in the Peel Regional Strategy land use plan.

In respect of Ravenswood, the 1996 IPRSP notes the following: A site of approximately 60 hectares has been identified just east of the PerthBunbury Highway/Pinjarra Road intersection and just north of the Ravenswood townsite. It is the site previously being considered as a TAFE site and is favoured for regional recreation by the Shire of Murray. This approximate location was identified as part of the Sport and Recreation Strategy being

prepared for the Ministry of Sport and Recreation. The exact configuration of the site will need to be determined after more precise study of site conditions (exhibit 7, 1/10/98).

There are only two significant changes to the text from the 1995 Working Paper No 4 (exhibit 178): the description of the site's location; and the inclusion of the second sentence. Everything else, including the site area of 60 ha, is unchanged from what appears in exhibit 178.

The 1996 IPRSP later clarifies that the Sport and Recreation Strategy identified the need for an RRF to serve the Peel ***region*** and the preferred location was somewhere in the Ravenswood locality. The Shire of Murray requested that the site selected in the IPRSP be the site that was formerly identified as a prospective TAFE college (1/10/142).

The 1996 IPRSP also confirms that the greyhound racing track on Gordon Road has been identified as the future university site in Mandurah and will need to relocate. It suggests along Old Mandurah Road in Ravenswood as one possibility (1/10/98).

The Gordon Road site will be the campus for a future extension of Murdoch University and a TAFE college (1/10/101, 124). The site is sufficiently large to provide for the tertiary education requirements of the ***region*** for the foreseeable future.

Appendices

Appendix 1: Extract of the 1990 Peel Regional Plan (exhibit 197)

Appendix 2: Extract of the 1994 Peel Regional Strategy (exhibit 198)

Appendix 3: Extract of the draft LPS maps (exhibit LPS150.8)

Appendix 4: Extract of the GRA concept plan (exhibit 191A, 25/392)

Appendix 5: Clause 2.5 of the Clough/Rapley contract (exhibit 64) 2.5 If the Rezoning Approval is not obtained

(a) If within a period of three (3) years of the Agreement Date ('Rezoning Approval Period'), the Buyer does not obtain the Rezoning Approval, the Buyer may elect to exclude Lot 300 from this Agreement, in which case the following will apply:(i) upon notice in writing by the Buyer to the Seller of the exclusion of Lot 300 from the Agreement, which notice may be given by the Buyer to the Seller not later than two (2) years from the date of the expiry of the Rezoning Approval Period, the obligations of the Parties set out in this Agreement relating to Lot 300 shall immediately terminate and the Parties shall be released from all obligations in that regard;

(ii) in such circumstances, the purchase price payable by the Buyer to the Seller in respect of Lot 301 shall be fixed at $7,500,000.00, subject to Clause 2.5(d) and to such amount having been paid by the Buyer to the Seller pursuant to Clauses 2.2(a)(i), (ii), (iii) and (iv), it being expressly agreed by the Buyer and the Seller that no additional amount shall be payable by the Buyer to the Seller in respect of the purchase price for Lot 301 (including any additional amounts under Clause 2.2(a)(vi)), except as set out in Clause 2.5(d);

(iii) the seller must provide the Buyer with reasonable assistance to enable the Buyer to obtain a refund of stamp duty (if available) as a consequence of the operation of this Clause 2.5(a); and

(iv) except for Clauses 2.5(c) and (d), the Agreement shall terminate, but without prejudice to any rights of the Parties arising prior to the date of termination.(b) The Parties agree that at any time between the date of the expiry

of the Rezoning Approval Period and two (2) years after that date, notwithstanding that the Buyer has not obtained the Rezoning Approval, the Buyer may elect to proceed to Settlement in respect of Lot 300 by notice in writing to the Seller, in which case the following will apply:(i) within 10 Business Days of notice in writing by the Buyer to the Seller notifying the Seller that the Buyer intends to proceed with the Settlement of Lot 300, the Parties must proceed to Settlement in respect of Lot 300 on the terms of the Agreement (as applicable);

(ii) upon Settlement of Lot 300, the Buyer must pay to the Seller the amount referred to in Clause 2.2(a)(v); and

(iii) following the Settlement of Lot 300 referred to above, but subject to Clause 2.5(d) below, the terms of this Agreement shall continue to apply, including but not limited to the obligation of the Buyer to pay the amount to the Seller as specified in Clause 2.2(a)(vi) upon the Buyer obtaining the Approved Subdivision Plan, provided that the Buyer shall not be obliged to pay any further amount to the Seller upon the Buyer obtaining the Rezoning Approval in accordance with Clause 2.2(a)(v).(c) If the Buyer elects to exclude Lot 300 from this Agreement in accordance with Clause 2.5(a) above, or does not elect to proceed with the purchase of Lot 300 in accordance with Clause 2.5(b), the Buyer agrees that the Seller shall be entitled to exercise an option ('Option') to purchase Lot 301 (which Option is hereby granted by the Buyer to the Seller in consideration for the payment of $10.00, receipt of which is acknowledged by the Buyer) on the following terms and conditions:(i) the Option may be exercised by notice in writing from the Seller to the Buyer within 90 Business Days after:(A) receipt by the Seller of the notice from the Buyer in accordance with Clause 2.5(a)(i); or

(B) the expiry of five (5) years from the Agreement Date (if the Buyer does not elect to proceed with the purchase of Lot 300 in accordance with Clause 2.5(b)),

failing which the right of the Seller to exercise the Option shall terminate absolutely. For the avoidance of doubt, the Parties agree that if the Seller elects not to exercise the Option in accordance with Clause 2.5(c)(i)(A), the Seller's right to exercise the Option under Clause 2.5(c)(i)(B) shall terminate absolutely; (ii) if the Option is properly exercised, then Lot 301 must be sold by the Buyer to the Seller on the following terms:(A) settlement of the purchase of Lot 301 by the Seller shall occur within 30 Business Days of the date of the exercise of the Option;

(B) the purchase price for Lot 301 shall be $7.5 million payable on settlement;

(C) the Seller shall pay all stamp duty assessed on the sale of Lot 301 pursuant to Clause 2.5(c) and on the grant and exercise of the Option;

(D) the price to be paid for Lot 301 is to be first applied to the discharge of any Security Interest over Lot 301 granted by the Buyer so that the Seller purchases the land unencumbered by any such Security Interest;

(E) at the same time as the settlement of the purchase of Lot 301 by the Seller, the Buyer (to the extent that it is able) must assign to the Seller the benefit of any Subdivision Intellectual Property held by the Buyer in respect of the Land, in exchange for the payment by the Seller to the Buyer of 50% of the cost incurred by the Buyer in respect of the Subdivision Intellectual Property (including GST);

(F) to the extent applicable to the sale of Lot 301 as provided in this Clause 2.5(c), Clauses 9.16 and 12 of this Agreement shall apply to the sale of Lot 301; and

(G) upon settlement of the purchase of Lot 301 by the Seller pursuant to the exercise of the Option, this Agreement shall terminate (except to the extent that any provisions, by implication, are intended to survive the termination of this Agreement).(d)(i) Notwithstanding anything to the contrary contained in this Agreement, if:(A) the Buyer elects to exclude Lot 300 from this Agreement, in accordance with Clause 2.5(a), and the Seller does not elect to exercise the Option; or

(B) the Buyer elects to proceed to Settlement in respect of Lot 300 pursuant to Clause 2.5(b), but the Rezoning Approval is not obtained within 5 years from the Agreement Date,

the Parties agree that the provisions of this Clause 2.5(d) shall apply. (ii) In the circumstances referred to in Clause 2.5(d)(i) above:(A) within 15 Business Days of the last date by which the Option can be exercised or the expiry of 5 years from the Agreement Date, whichever is applicable, the Transaction Parties must meet to determine the additional consideration that is to be paid by the Buyer to the Seller in respect of the purchase of Lot 301 (if the Buyer has excluded Lot 300 from this Agreement under Clause 2.5(a)) or Lot 300 and Lot 301 (if the Buyer has elected to proceed with the Settlement of Lot 300 under Clause 2.5(b)) (respectively called the 'Additional Purchase Price' in this Agreement);

(B) if the Parties are not able to agree on the Additional Purchase Price (as applicable) within the period referred to above, the issue must be referred to a Valuer appointed jointly by the Transaction Parties, or in the absence of agreement by the Transaction Parties within 10 Business Days, by the President for the time being of the Law Society of Western Australia;

(C) the Valuer must determine the current market value (exclusive of GST) of Lot 301, or Lot 301 and Lot 300, as the case may be, as at the date of the appointment of the Valuer, applying all appropriate valuation principles, with the Additional Purchase Price then being determined by applying the following formulae:

Lot 301

APP = CMM - A

Where

APP means the Additional Purchase Price in respect of Lot 301

CMM means the current market value of Lot 301 at the relevant date

A = $7.5 million

Lot 300 and Lot 301

APP = CMM - A

Where

APP means the Additional Purchase Price in respect of Lot 300 and Lot 301

CMM means the current market value of Lot 300 and Lot 301 at the relevant date

A = $14.3 million; (D) the determination of the Valuer, for the purposes of determining the Additional Purchase Price (as applicable) is final and binding on the Transaction Parties, with the Valuer acting as an expert and not an arbitrator;

(E) the Transaction Parties must equally share the cost of the Valuer;

(F) the Additional Purchase Price (as applicable) must be paid by the Buyer to the Seller within 20 Business Days of it being agreed, or determined by the Valuer;

(G) simultaneously with the payment of the Additional Purchase Price (as applicable) in accordance with subclause (F) above, the Seller must procure the discharge of the Second Mortgage or caveat referred to in Clause 2.6(c), or the discharge of the charge and withdrawal of the caveats referred to in Clause 2.6(d) (as applicable), and thereafter this Agreement shall terminate, without prejudice to any of the rights of the Parties arising under this Agreement prior to the date of termination. The Transaction Parties expressly agree, that in such circumstances, the Buyer shall not be obliged to pay any additional amounts to the Seller pursuant to Clause 2.2(a)(vi) of this Agreement; and

(H) for the avoidance of doubt, if the consequence of applying the formulae referred to in subclause (C) is a negative amount, the Seller shall not be obliged to effect any payment to the Buyer.

JURISDICTION : SUPREME COURT OF WESTERN AUSTRALIA
IN CIVIL

CITATION : McKAY -v- COMMISSIONER OF MAIN ROADS [No 7] [2011] WASC 223 (S)

CORAM : BEECH J

HEARD : 19 OCTOBER - 20 NOVEMBER 2009,
19 JULY - 16 SEPTEMBER 2010, 15 OCTOBER, 25 OCTOBER - 5 NOVEMBER 2010,
29 NOVEMBER - 2 DECEMBER 2010;
24 NOVEMBER 2011

DELIVERED : 1 SEPTEMBER 2011

SUPPLEMENTARY
DECISION : 2 DECEMBER 2011

FILE NO/S : CIV 1558 of 2007

BETWEEN : RODERICK DOUGLAS McKAY
KATHLEEN GLENYS McKAY
Plaintiffs

AND

COMMISSIONER OF MAIN ROADS
First Defendant

WESTERN AUSTRALIAN PLANNING COMMISSION
Second Defendant

Catchwords:

Costs - Compensation for land taken for a public work - Whether ordinary costs rules apply - Whether O 66 r 1(1)(a) applies - Whether appropriate to identify the party who was 'successful' - Approach to be taken to costs discretion in valuation cases - Relevance of Calderbank offer - Whether Calderbank offer can lead to party-party costs only if the rejection of the offer was unreasonable - Appropriate costs orders

Legislation:

Land Administration Act 1997 (WA), s 223(3), s 223(9)

Rules of the Supreme Court 1971 (WA), O 66 r 1

Result:

Defendants pay plaintiffs' costs to 16 October 2009

Plaintiffs pay defendants' costs after 16 October 2009

Category: A

Representation:

Counsel:

Plaintiffs : Mr P M McGowan & Mr C J Graham

First Defendant : Mr K M Pettit SC & Ms F B Seaward

Second Defendant : Mr K M Pettit SC & Ms F B Seaward

Solicitors:

Plaintiffs : Cornerstone Legal

First Defendant : State Solicitor for Western Australia

Second Defendant : State Solicitor for Western Australia

Case(s) referred to in judgment(s):

BEECH J:

Introduction

1 On 1 September 2011, I delivered my reasons on the trial of the plaintiffs' claim for compensation for the value of land taken: McKay v Commissioner of Main Roads [No 7] [2011] WASC 223.

2 Apart from the question of costs, the orders necessary to give effect to my reasons were not controversial. On 1 September 2011, I ordered that the defendants pay the plaintiffs:

(1) $5,827,500, being compensation for the value of the subject land (lots 191 and 192) and for the taking without agreement, less the advance payment already made; and

(2) $1,778,904.25, being interest on that sum from 1 August 2006 until judgment.

3 I also made directions for submissions and affidavits on the question of costs.

4 Both parties seek an order for costs in their favour, although the defendants seek costs in their favour only from 7 October 2009, the day after they made a Calderbank offer.

5 For the reasons that follow, I would make orders substantially to the effect sought by the defendants.

6 The parties' submissions raised some issues of general significance to the exercise of the costs discretion. The main issues are:

(1) Is there a special rule for costs in compensation cases?

(2) What are the conditions and circumstances in which a Calderbank offer is relevant to the exercise of the costs discretion?

(3) As an aspect of (2), is the test for using a Calderbank offer for indemnity costs applicable to the use of a Calderbank offer for partyparty costs?

(4) What weight should be given to the Calderbank offer in this case?

(5) As an aspect of (4), was the offer, open for ten days immediately before trial, open for a reasonable time?

7 It is convenient to begin with some background.

Background facts and circumstances

8 The subject land, and part of lot 189, were taken under the Land Administration Act 1997 (WA) (the LA Act) in July 2006.

9 In May 2007, the defendants made an open offer of compensation to the plaintiffs under s 217 of the LA Act. The plaintiffs rejected the offer.

10 On 16 May 2007, the defendants made an offer to make an advance payment in partial discharge of the plaintiffs' claim. The plaintiffs accepted that offer.

11 On 22 May 2007, the defendants paid the sum of $10,063,956.16 by way of advance payment, of which $9.6 million was principal compensation.

12 The action was commenced in 2007. As explained in my primary reasons at [12], the action initially concerned compensation in respect of the taking of lot 189, as well as in respect of the taking of lots 191 and 192. The parties settled the plaintiffs' claims respecting lot 189 during the course of the trial. By a Deed of Settlement dated 27 August 2010, the defendants agreed to pay $3.75 million to the plaintiffs in settlement of the claims respecting lot 189, and that part of the costs of this action that related to lot 189.

13 By an amended statement of claim dated 3 October 2007, the plaintiffs claimed the sum of $46.5 million in total, including the claims respecting lot 189, not including compensation for taking without agreement.

14 On 17 July 2008, the defendants made an offer under Rules of the Supreme Court 1971 (WA) O 24A in the sum of $12.3 million plus interest and costs. The offer was not accepted.

15 In May 2009, the parties conducted a mediation before a judge of the court.

16 On 14 May 2009, the defendants made an O 24A offer in the sum of $15 million plus interest and costs. The offer was not accepted.

17 On 28 August 2009, the plaintiffs filed a statement of issues, facts and contentions (SIFC). The plaintiffs' SIFC foreshadowed what was referred to as the 'split taking' case. That notion is explained in my primary reasons at [94].

18 At this stage, the trial was listed for six weeks, commencing on 19 October 2009.

19 On 15 September 2009, the defendants filed their SIFC.

20 On 16 and 17 September 2009, a further mediation of the action took place before the same judicial mediator.

21 On 16 September 2009, the plaintiffs filed substantial further evidence in support of the split taking case, including statements from planning and engineering experts. On 18 September 2009, the plaintiffs filed and served valuation reports based on the split taking approach.

22 On 18 September 2009, the defendants filed an application seeking orders to the effect that the plaintiffs be precluded from advancing the split taking case. The defendants' application was made returnable on 22 September 2009.

23 On 21 September 2009, the plaintiffs' solicitors advised the defendants' solicitors and the court that the plaintiffs abandoned the split taking case. At a directions hearing the next day, I made unopposed orders that the plaintiffs pay:

(a) the defendants' costs of its application of 18 September 2009; and

(b) the defendants' costs of responding to the split taking issue in the plaintiffs' SIFC.

24 On 6 October 2009, two weeks after the plaintiffs' abandonment of their split taking case, the defendants made a Calderbank offer in the sum of $24 million, plus interest and costs. That offer was in respect of the whole of the

plaintiffs' claim, namely their claim in respect of lots 191, 192 and 189. This offer is the foundation of the defendants' position on costs. They contend that the plaintiffs would have been better off accepting the offer than commencing the trial, and that the plaintiffs should pay the defendants' costs thereafter.

25 The offer was expressed to be made in accordance with the principles in Calderbank v Calderbank [1976] Fam 93 and to be open for acceptance until 4.00 pm on Friday, 16 October 2009. The significance of that date was that the trial was due to commence the following Monday, 19 October 2009.

26 On 9 October 2009, the plaintiffs' solicitors wrote to the defendants' solicitors in response to the Calderbank offer of 6 October 2009. The letter:

(a) noted that the defendants had chosen to make an offer in accordance with the principles in Calderbank rather than pursuant to O 24A;

(b) suggested that the principles of Calderbank were inapplicable in circumstances where O 24A was available and where it had not been used in order to circumvent the time limit prescribed in O 24A;

(c) cited a passage from the reasons of Anderson J in Permanent Building Society v Wheeler (No 2) (1993) 10 WAR 569;

(d) stated that any settlement offer put forward by the defendants must allow the plaintiffs enough time to give serious thought to the offer;

(e) requested that the defendants reconsider making the offer pursuant to the provisions of O 24A.

27 There is no evidence of any further communications about the defendants' Calderbank offer.

28 Ms Payne's affidavit of 27 October 2011 states that the defendants did not make their offer of 6 October 2009 under O 24A 'as the offer was made less than 28 days prior to the commencement of the trial on 19 October 2009' (par 8).

29 Order 24A r 3(3) provides that an offer under O 24A shall not be open for acceptance for less than 28 days. By O 24A r 10, a plaintiff who accepts an O 24A offer is entitled to costs up to the day of acceptance. The combined effect of these rules is that if an offer had been made on 6 October 2009 under O 24A, the plaintiffs could have accepted it at any time up to 3 November 2009, more than two weeks into the trial, and be awarded costs, including the cost of the trial, up to 3 November 2009.

30 I infer that it was for this reason that the defendants did not make their offer under O 24A, but made a Calderbank offer open until 16 October 2009.

31 The trial commenced, as planned, on 19 October 2009.

32 I refer to the outline of the course of the trial in section 1.6 of my primary reasons.

33 As the plaintiffs' case developed at trial, they put their case on the value of the land in three ways:

(a) valued on the basis that the highest and best use of the land was as a district commercial centre with intensive residential development, the land was worth about $60 million to $70 million;

(b) valued on the basis that the land was zoned urban, and that its highest and best use was for urban subdivision, the land was worth about $60 million to $65 million; and

(c) valued on the basis that the land was zoned rural, with strong potential to be imminently rezoned to urban, the land was worth about $36 million to $40 million.

34 The defendants' case at trial was that the highest and best use of the land was for future urban use, and that its urban potential was uncertain and in the medium or longterm. Valued on that basis, the defendants contended that the land was worth about $6 million to $7 million.

35 The defendants counterclaimed in respect of the advance compensation they had already paid. They claimed that they had paid more than the land was worth, and counterclaimed for the difference. The parties agreed that the counterclaim should be stood over pending my determination of the value of the land.

36 In the event, I determined that the subject land was worth $14.025 million, and that, including compensation for the taking without agreement, the plaintiffs were entitled to $15,427,500, plus interest. The counterclaim was dismissed.

37 I concluded that the land should be valued on the basis that it was zoned rural with urban potential. A large part of the trial was taken up with the plaintiffs' unsuccessful contention that, but for the proposed public works, the land would have been zoned urban (see sections 4 6 of my primary reasons). The plaintiffs' commercial case was also unsuccessful (see section 8).

38 The valuers' evidence occupied two weeks, one of which concerned the urban potential valuations. Apart from the valuers, substantially all the oral evidence was adduced in the nine weeks from 19 July 2010 to 16 September 2010. More than half of that time was concerned with the plaintiffs' unsuccessful past hypothetical urban rezoning case and their commercial case.

39 It is clear that the defendants' Calderbank offer would have been a significantly better outcome for the plaintiffs than was achieved at the trial. The offer covered all parts of the plaintiffs' claim, which then included lot 189. At that stage, the plaintiffs' claim in respect of lot 189 was valued by their valuers at not more than $3.6 million so, on any view, the offer provided more than $20 million for lots 191 and 192, plus interest on that sum. Taking into account interest, the offer was at least $6 million better for the plaintiffs than was achieved by judgment after trial.

The parties' submissions

40 In summary, the plaintiffs submit that:

(1) different costs principles apply to acquisition cases as against ordinary litigation. Among those differences are that:

(a) in the absence of special circumstances, the general principle is that the dispossessed landowner ought to receive his costs of the action;

(b) for the purposes of O 66 r 1(1), there is not a 'successful party';

(c) there is no suitable method of determining the successful party in this case;

(d) in any event, the success of a party is a factor, but is not determinative of the appropriate costs order;

(2) in any event, to the extent that the question of who was successful bears on the issue of costs, the plaintiffs were the successful party; and

(3) the plaintiffs did not unreasonably refuse to settle. The defendants' Calderbank offer of 6 October 2009 should not be given significant weight for reasons that include:

(a) it was open only for 10 days and was not made under O 24A, which would have allowed 28 days, permitting adequate consideration by the plaintiffs;

(b) despite a request by the plaintiffs, the defendants did not revise the offer to make it under O 24A;

(c) in any event, the plaintiffs acted reasonably in refusing the Calderbank offer.

41 In summary, the defendants submit that:

(1) the special rules for compulsory acquisition cases propounded by the plaintiffs should be rejected;

(2) the principle is no more than that a landowner should receive their reasonable costs of obtaining duecompensation. Those costs ceased once the defendants made their Calderbank offer, since it was for an amount exceeding what the court assessed as just compensation;

(3) in all the circumstances, including that there had been two mediations, one of which was on 16 and 17 September 2009, the defendants' Calderbank offer was open for a reasonable time to enable the plaintiffs to assess and respond to it;

(4) accordingly, the plaintiffs should be ordered to pay the defendants' costs after 6 October 2009; and

(5) alternatively, taking into account the way the trial was fought, and the parties' relative success on the issues, the defendants should be seen as the successful party and should have their costs. If not, the parties should bear their own costs.

42 I start by considering general principles relevant to the exercise of the costs discretion, and the plaintiffs' submission that different principles apply in compensation cases.

General principles: a special rule for compensation cases?

43 In my view, to say there is a special costs rule for compensation cases is an overstatement. However, the fact the case involves valuation for compensation for the taking of land is relevant to and part of the framework for the exercise of the costs discretion.

44 The starting point is and must be the statutory framework.

45 Section 223(3) of the LA Act provides: If a person is entitled to bring an action for compensation under this Part, the action may be commenced and maintained in a court of competent jurisdiction and is to be heard and determined in the same manner as ordinary actions, with ordinary rights of appeal in regard to the amount of compensation awarded or to any question of law or fact or of mixed law and fact, except that no question is to be determined by a jury.

46 As Parker J observed in Cerini v The Minister for Transport [2001] WASC 309 (S) [20], the statement that the compensation claim is to be 'heard and determined in the same manner as ordinary actions' offers little encouragement to the notion that there is a special position for compensation cases regarding the operation of the rules of the court.

47 Section 223(9) of the LA Act provides that the costs of the action are 'at the discretion of the court'. Nothing in that section prescribes the manner of the exercise of the broad discretion which it confers. Of course, the discretion must be exercised judicially: Naidoo v Williamson [2008] WASCA 179 [39], [42]. The discretion must not be exercised arbitrarily, capriciously or so as to frustrate the legislative intent: Oshlack v Richmond River Council[1998] HCA 11; (1998) 193 CLR 72 [22].

48 Order 66 r 1(1) provides as follows: 1. General rules as to costs

(1) Subject to the express provisions of any statute and of these Rules the costs of and incidental to all proceedings including the administration of estates and trusts shall be in the discretion of the Court but, without limiting the general discretion conferred on the Court by the Act, and subject to this Order, the Court will generally order that the successful party to any action or matter recover his costs.

49 The effect of this rule is that O 66 r 1(1) applies to all proceedings unless a statute or rule of the Supreme Court expressly provides otherwise.

50 I do not consider that s 223(9) expressly provides otherwise. Like s 37 of the Supreme Court Act 1935 (WA), it provides a broad discretion to the court in relation to costs.

51 The plaintiffs accept that O 66 r 1(1) applies: ts 7447.

52 In Mount Lawley Pty Ltd v Western Australian Planning Commission [2006] WASC 82 (S) [61], Templeman J said that in exercising the costs discretion the starting point must be O 66 r 1(1). I agree.

53 The plaintiffs emphasise that, in Mount Lawley, Templeman J adopted a view of the limits on the court's role in valuation cases that I do not share. Templeman J said as follows: It is well settled that the Court does not itself carry out valuations. Again, speaking generally, the Court decides the value on the basis of the expert valuation evidence adduced by one of the parties, in preference to that adduced by the other.

It follows, that the outcome of the litigation will be the determination of a value which is, or is close to, that advanced by one of the parties. It will therefore be clear whether the owner or the WAPC has been the successful party.

Adopting that approach in the present case, there can be no doubt that the WAPC has succeeded. That is because I accepted the evidence of one of its valuers at $4 million and did not accept the evidence of Mount Lawley's valuers at between $11 million and $15.5 million [65] [67].

54 It will be apparent from what I wrote, and did, in my primary reasons that I respectfully disagree with Templeman J in this respect. However, in my view that does not detract from the proposition that O 66 r 1(1) applies and, therefore, provides a starting point by reference to the 'successful party'.

55 Order 66 r 1(1) directs attention to identifying the successful party to an action. The character of a compensation action, and the questions which it involves, bear upon the identification of the successful party.

56 Both parties cited numerous authorities in their submissions on costs. Before dealing with the cases, I make two preliminary, but nevertheless in my view important, points.

57 First, the costs discretion falls to be exercised in the applicable statutory framework. Most of the authorities relied on by the parties were decided in other jurisdictions, with different statutory frameworks.

58 Secondly, and in any event, the costs discretion is broad. Observations made by one judge in exercising the costs discretion do not constitute a firm proposition of law and do not control the exercise of discretion in another case. There are no hard and fast rules controlling the broad costs discretion conferred on the court. However, general principles in the nature of guidelines may develop: Oshlack v Richmond River Council [35]. In some jurisdictions, where there is no rule of court to that effect, the general rule that a successful party should receive its costs unless there is good reason to the contrary is one such guideline: Oshlack [35]. Another illustration is the approach to be taken to Calderbank offers in the exercise of the costs discretion: County Securities Pty Ltd v Challenger Group Holdings Pty Ltd (No 2) [2008] NSWCA 273 [30].

59 In Minister for the Environment v Florence (1979) 21 SASR 108, Wells J made the following general observations: Compulsory acquisition cases differ of course from ordinary claims dealt with in the general jurisdiction in one significant respect: the claimant, unlike the ordinary plaintiff, had no choice whether to make a claim or not; the mere acquisition by compulsory process gave him, by virtue of s 18 of the Act, a claim to compensation which he could hardly be expected to renounce.

Upon an ordinary claim in the general jurisdiction it is, generally speaking, obvious who has won and who has lost, and correspondingly clear why costs usually follow the event. Upon a claim for compensation for land compulsorily acquired, it is not, generally speaking, appropriate to speak of one party as having won; compensation is awarded to one who has already been given, by statute, the right to receive it. It is therefore as just to say of the latter sort of case that the claimant ought, in the absence of special circumstances, to receive his reasonable costs of obtaining the compensation that is ex hypothesi, his due, as it is to say of the former sort of case that prima facie costs follow the event in favour of the party who has won. But costs are, as always, discretionary, and no hard and fast rule will ever be allowed to occupy part of an area controlled by a discretion, however predictable the result of its exercise may be in certain sorts of cases (134 135).

60 Both parties rely on this passage. It has been quoted with approval in many cases. I too would adopt it.

61 Wells J suggested that a starting point is that a claimant should generally receive his reasonable costs of due compensation. If due compensation, as assessed by the court, is more than the statutory offer by the taking authority and more than the value contended by the authority at trial then, leaving aside any settlement offers, I think the proper starting point is that the claimant should have his or her costs.

62 There are many other authorities that take that approach. For example, in a passage often cited with approval since, Cripps J said that it was not apparent why a dispossessed landowner should have to bear his own costs of seeking what 'turns out to be just compensation': North Albury Shopping Centre Pty Ltd v Albury Municipal Council (1983) 49 LGRA 215, 221. Although said in the context of a question of statutory construction about whether there was a power to award costs, the statement has often been referred to in the exercise of the costs discretion. See, for example, Constantino v Roads and Traffic Authority (NSW) (No 2) [2005] NSWLEC 209; (2005) 144 LGERA 224 [7] [9].

63 Wells J's observations in Florence were, of course, made in the context of the statutory and rule framework in ***South*** Australia. For present purposes, O 66 r 1(1) applies. As I have said, that directs attention to who was the successful party. In the circumstances that I have just postulated, I consider that, generally but, as I will explain, not inevitably, a claimant in that position is 'successful' for the purposes of O 66 r 1(1).

64 Leaving aside the effect of any without prejudice offers, in this case the plaintiffs were awarded compensation that exceeded the amount of the defendants' statutory offer and the amount for which they contended at trial.

65 The defendants submit that Wells J's observations support recovery of the costs of obtaining just compensation, not the costs of seeking more than just compensation. They contend that just compensation of $15.4 million could have been obtained, indeed substantially exceeded, by acceptance of their offer of 6 October 2009. Thus, they contend Wells J's statement does not support recovery of the plaintiffs' costs after the settlement offer. I will return to this submission when I deal with the relevance of Calderbank offers.

66 In Florence, counsel for the resuming authority invited the court to 'create a new principle' by making costs orders based on the question 'who, on the whole, has been the most successful' (136). Wells J concluded that that was a question that should be asked and answered, in the preliminary stages of reasoning, but was a medial, not decisive, conclusion (137). His Honour's conclusion in that regard must be understood as a response to the submission which had been made. That submission suggested that the question of who, on the whole, was most successful would be determinative.

67 I agree that the costs discretion should not be controlled by the answer to that question. However, the statutory framework for my decision differs from what applied before Wells J. Order 66 r 1(1) creates a starting point of costs in favour of the successful party.

68 Nevertheless, in my view, a broad practical judgment of that kind is of assistance in the exercise of the costs discretion. In Overton Investments Pty Ltd v Minister Administering the Environmental Planning and Assessment Act 1979 [2001] NSWCA 137; (2001) 113 LGERA 439 [72], Stein JA observed (Powell JA and Ipp AJA agreeing) that a judge is entitled to 'look realistically at the litigation, the issues, the way it was conducted and the result, in order to assess who really succeeded and to what extent'. In Mercer v Western Australian Planning Commission [2008] WASC 124 (S) [34], Jenkins J adopted that approach. So do I.

69 In Banno v Commonwealth of Australia (1993) 45 FCR 32, 51, Wilcox J made some tentative observations about costs, without hearing from counsel. He suggested that 'perhaps' people whose land has been resumed should be allowed access to the court to present an arguable and well organised case without being deterred by the prospect of being ordered to pay the Commonwealth costs if their case proves unpersuasive.

70 These observations have been adopted in many cases in other states since. Some of the authorities were collected by Biscoe J in Walker Corporation Pty Ltd v Sydney Harbour Foreshore Authority [2010] NSWLEC 27 [35]. These observations were mentioned among the relevant considerations by Pain J in AMP Capital Investors Ltd v Transport Infrastructure Development Corporation (No 3) [2007] NSWLEC 724 [19] [21]. An appeal from Pain J's costs decision was dismissed: AMP Capital Investors Ltd v Transport Infrastructure Development Corporation[2008] NSWCA 325; (2008) 163 LGERA 245 [101] [104].

71 In Pastrello v Roads and Traffic Authority of New ***South*** Wales [2000] NSWLEC 164; (2000) 110 LGERA 223, Talbot J said that: There needs to be a strong justification for awarding costs against an applicant where the effect of making that order is to erode the benefit of the just compensation recovered as a consequence of the court's determination. It is only in special cases that the court will deprive the owner of the full benefit of the compensation which is determined as fair and just in the circumstances of the case [17].

72 That passage has been referred to with apparent approval in a number of subsequent cases in other states. See, for example, Taylor v Port MacquarieHastings Council [2010] NSWLEC 153; (2010) 175 LGERA 189 [21]; Filip Yakas v Roads and Traffic Authority of New ***South*** Wales (No 2) [2004] NSWLEC 589; [2004] 139 LGERA 116 [12], [20]. The passage was referred to and applied, as one of several considerations, by Pain J in AMP Capital Investors, from which the appeal on costs was dismissed. So far as I am aware, it has not been adopted in Western Australia. It was rejected by Templeman J in Mount Lawley.

73 In Mount Lawley, the plaintiff relied on a number of the cases to which I have referred. Templeman J summarised them in detail. At the end of his outline of the authorities relied on by the plaintiff in that case, Templeman J stated his conclusions that:

(1) there is no overriding principle in a compensation case or valuation case that the amount of compensation determined by the court should not be eroded by denying the plaintiff his costs or by requiring him to pay the costs of the relevant authority; and

(2) it cannot be said that only in an exceptional case should an applicant be deprived of his costs or required to pay the costs of the relevant authority: [51].

74 I respectfully agree with those propositions. Templeman J expressed these propositions, or at least the first of them, as emerging from the cases to which he had referred. I would not say that, but, as I have said, I agree with the propositions.

75 I think that Templeman J's conclusion on these cases was part of what was adopted by Jenkins J in Mercer [24].

76 In one New ***South*** Wales case it was said that the discretion to award costs in compensation matters is 'uniquely applied to tilt the discretion in favour of the dispossessed owner': Nasser v Roads and Traffic Authority (NSW) [2006] NSWLEC 562; (2006) 149 LGERA 289 [32]. That statement has been cited with approval in subsequent cases, for example Walker Corporation Pty Ltd v Sydney Harbour Foreshore Authority [34]; Taylor v Port MacquarieHastings Council [20].

77 With respect, I do not consider that this statement is a helpful framework for the exercise of the costs discretion.

78 The plaintiffs rely on a statement by Osborn J in Murdesk Investments Pty Ltd v Roads Corporation [2007] VSC 175; (2007) 155 LGERA 13 [26] that if a claimant recovers a sum in excess of what was offered by the resuming authority it should be considered as having succeeded on the core issue of the proceedings, so that an entitlement to costs will naturally follow. That statement was made in the context whether the taking authority had conceded the claimant's core entitlement to costs: see [19]. Moreover, it was said in a context where evidently no settlement offers had been made, in that there was no reference to settlement offers in the consideration of the proper exercise of the costs discretion. In that context, provided it is understood as a starting point (as I think was intended by his Honour), I agree with Osborn J's statement.

79 It is uncontroversial that the circumstance that there has been a compulsory acquisition is a relevant circumstance in the costs discretion: Mount Lawley [50]; Cerini [21]; AMP Capital Investors Ltd [2008] NSWCA 325[108].

80 The starting point for cases in the State Administrative Tribunal (SAT) is its general 'nocosts' rule: State Administrative Tribunal Act 2004 (WA) s 87(1). In a valuation case for land taken under the LA Act, the SAT exercises the costs discretion conferred on it under s 223(9) of the LA Act. The SAT Rules 40 42 deal with settlement offers and orders for costs if settlement offers are not accepted.

81 In Clifford and Shire of Busselton [2007] WASAT 89 (S) [54] [57], Barker P outlined some general principles relevant to the exercise of the costs discretion in valuation on compulsory acquisition cases. He suggested that as a starting point, ordinarily, fairness will dictate that an owner who recovers more than the authority had offered should be awarded costs, and an owner who recovers less than that should pay the authority's costs. The costs rules about settlement offers permit, but do not require, that a party who has made a better offer (from the opposing party's perspective) than the ultimate outcome to be awarded costs: [58] [63]. He suggested that, while there is a discretion, that would ordinarily be the result: [61].

82 In Western Australian Planning Commission and Shim [2007] WASAT 262 (S), Chaney DP applied the principles stated by Barker P, and the principles stated by Templeman J in Mount Lawley [51]. Chaney DP said as follows: In my view, the observations by Barker J in Clifford are entirely consistent with the authorities referred to by Templeman J in Mount Lawley and the conclusion reached by him, having regard to the particular statutory context within which the State Administrative Tribunal operates. As Barker J observed, the notion of 'success' requires an examination of the particular circumstances of each case. Sometimes the question will involve nothing more than an examination of the comparison between the compensation awarded, and the position adopted by each party at the hearing. Frequently, however, the determination of compensation will be, as it was in this case, at a figure different from that propounded by either party at the hearing. In those cases, determination of a fair order in relation to costs may involve an examination of the outcome of particular issues in dispute at the hearing and a comparison of the rationale for the ultimate award as against the arguments advanced by each party at hearing.

Where there have been offers made by either or both of the parties in negotiations prior to hearing, whether in accordance with the SAT Rules, or as Calderbank offers, it will be necessary to have regard to those offers to determine what is fair by way of a costs order in the circumstances [9] [10].

83 Although made in the context of the legislation and rules application in SAT, I think these general observations made by Barker P and Chaney DP are broadly consistent with the approach to be taken to costs in a compensation action in this court.

84 Statements in the cases about the proper approach to costs in a resumption valuation claim are not all consistent. Given the discretionary character of the costs decision, that may not be surprising. I do not discern any inconsistency in the Western Australian cases, but I think some of the statements in cases in New ***South*** Wales are inconsistent with each other and with the approach in the Western Australian authorities.

85 From this review of the authorities, I set out my view of the general approach to the exercise of the costs discretion in valuation cases, without regard to O 24A or Calderbank offers.

(1) Section 223(9) of the LA Act confers a very broad discretion in relation to costs.

(2) The character of a valuation case, and the fact that it follows a compulsory acquisition of land owned by the claimant, are relevant circumstances in the exercise of the costs discretion.

(3) A proper starting point is that if due compensation is more than the statutory offer by the taking authority, and more than the value contended by the authority at trial, then (leaving aside any settlement offers) the claimant has succeeded and is prima facie entitled to his or her costs.

(4) However, that is a starting point, not a rule. In exercising the costs discretion, the court can look realistically at the issues in the action, the way the case was fought, and assess who really succeeded and to what extent. Where compensation is determined at a figure different from that propounded by either party, the rationale of the ultimate award can be considered against the arguments advanced by each party at the hearing.

(5) There is no principle in compensation cases that:

(a) the amount of compensation fixed by the court should not be eroded by denying the plaintiff costs or requiring him or her to pay the costs of the taking authority; or

(b) only in an exceptional case should a claimant be deprived of his or her costs or ordered to pay the costs of the relevant authority; or

(c) a claimant should be free to run any arguable case without being constrained by the risk of an adverse costs order.

86 I turn to the topic of Calderbank offers. I do not think that there is anything about compensation cases that detracts from the relevance and weight of a Calderbank offer to the exercise of the costs discretion.

Calderbank offers: general principles; the parties' submissions

87 It was common ground that, at least in some circumstances, a Calderbank offer may be relevant to the costs discretion.

88 The way in which, and circumstances in which, a Calderbank offer affects the exercise of the costs discretion was in substantial dispute in the submissions made to me.

89 The plaintiffs submit that:

(1) a Calderbank offer is never relevant to the identification of the 'successful party' for the purposes of O 66 r 1(1);

(2) the principles that inform and limit the use of a Calderbank offer to sustain an indemnity costs order against the offeree apply equally to the use of a Calderbank offer to award partyparty costs against the offeree;

(3) in particular, a Calderbank offer cannot justify a partyparty costs order against the offeree unless the court is satisfied that its rejection was unreasonable, assessed at the time of the offer and without the benefit of the hindsight view of the judgment after trial; and

(4) the distinction between an O 24A offer, which has presumptive costs consequences, and a Calderbank offer should be kept squarely in mind: a Calderbank offer should not be elevated to equivalent status with an O 24A offer when it comes to costs consequences.

90 The defendants' primary submissions are that:

(a) a Calderbank offer is relevant to the identification of the successful party for the purposes of O 66 r 1(1);

(b) subject to (c), an offeror who makes a 'better than judgment' Calderbank offer is the successful party and, consequently, is presumptively entitled, without more, to a partyparty costs order;

(c) the proposition in (b) will not apply if the offer did not reasonably promote the settlement of the action; for example, if its terms were uncertain, it was open for an unreasonably short time or its amount meant that it did not reflect any element of compromise; and

(d) when the presumption in O 66 r 1(1) is engaged in this way, the question of costs remains one for the discretion of the court, to be exercised in all the circumstances of the case.

91 Alternatively, the defendants submit:

(a) there is a fundamental distinction between the use of a Calderbank offer to sustain indemnity costs, and its use to justify partyparty costs, and different tests apply to those uses;

(b) a Calderbank offer that is (proves to be) more favourable than judgment is, without more, capable of justifying a partyparty costs order against the offeree. In that respect, it is not an essential precondition to the exercise of the costs discretion for partyparty costs against the offeree that the court find that, assessed at the time of the offer, the rejection was unreasonable; and

(c) the weight to be given to a Calderbank offer is a matter for discretion in all the circumstances. The matters in par (c) of the previous paragraph will be relevant, namely whether the offer was sufficiently certain, open for an adequate period and involved an element of compromise. If affirmative answers are given to those enquiries, the policy objectives of promoting settlement mean that substantial weight should be given to the Calderbank offer in the costs discretion.

As will appear, in substance I accept the defendants' alternative submission.

Calderbank offers: general principles

92 Order 24A provides a regime under the rules for making settlement offers which have presumptive costs consequences. A more favourable offer, measured against the judgment ultimately given, gives rise to a presumptive order for costs thereafter in favour of the offeror, unless the court otherwise orders: O 24A r 10(4) and O 24A r 10(5).

93 It is clear, and not in dispute, that O 24A is not an exclusive code for the making of settlement offers with costs consequences. Calderbank offers are informal offers made on terms expressed to be without prejudice save as to costs. A Calderbank offer can be considered as a relevant factor in the exercise of the costs discretion: Dobb v Hacket (1993) 10 WAR 532, 540; Duvall v Godfrey Virtue & Co (a firm) [2001] WASCA 163 [6] [7]; Den Hoedt & Anor v Barwick [2006] WASCA 196 [112] [113]. There are numerous appellate decisions in other States to the same effect.

94 The court's approach takes into account the private and public benefits of encouraging reasonable settlements, including by possible costs consequences for the party rejecting the offer: Dobb v Hacket (540);Grbavac v Hart [1996] VSC 37; [1997] 1 VR 154, 165; Miwa Pty Ltd v Siantan Properties Pte Ltd (No 2) [2011] NSWCA 344 [7]. The policy of encouraging reasonable settlement of an action is a factor in the exercise of discretion on costs.

95 Recently, the New ***South*** Wales Court of Appeal considered the relevance of a Calderbank offer to the exercise of a discretion which was, by the rules, to be exercised presumptively in favour of an order that costs follow the event. Basten JA (McColl and Campbell JJA agreeing) explained that there were two ways of viewing the offer of compromise. One way was to treat it as a basis for the court otherwise ordering; the alternative view is that the offer changed the proper characterisation of the event. On that latter approach, the party who fails to accept the offer and obtains no better result in the judgment is, from the date of the offer, treated as the unsuccessful party:Miwa v Siantan [7]. The defendants invite the adoption of that approach.

96 On that view of things, I think it is clear that the power to use a Calderbank offer to sustain a partyparty costs order is not conditioned on a finding that the rejection of the offer was unreasonable, as judged at the time of the offer. It would not seem to me to make sense that the offeror is, from the date of the offer, the successful party if and only if rejection of the offer were unreasonable.

97 It is not necessary to decide whether a Calderbank offer affects the identification of the successful party for the purposes of O 66 r 1(1). That is because, assuming favourably to the plaintiffs that it does not, I would order that the plaintiffs pay the defendants' costs after the offer. The balance of these reasons is taken up with explaining why that is so.

98 I turn now to explaining why I do not accept the plaintiffs' contention that a finding of unreasonable rejection, judged at the time of the offer, is a precondition to any power to amend partyparty costs based on a Calderbank offer.

Calderbank offers: is unreasonable rejection a precondition to a power to award partyparty costs?

99 In my view, given the breadth of the costs discretion, it is for a party who contends that the power to award costs is constrained by a precondition to make good that proposition. For the reasons that follow, I am not persuaded that the discretion is confined in the way contended by the plaintiffs.

100 Calderbank offers may be used in support of an application for indemnity costs, or for an order that the offeree pay the offeror's costs on a partyparty basis. The plaintiffs rely heavily on the authorities relating to indemnity costs based on a Calderbank offer.

101 In Ford Motor Company of Australia Ltd v Lo Presti [2009] WASCA 115; (2009) 41 WAR 1 [16], [23], [28], the Court of Appeal held that the test for whether a Calderbank offer may justify an award of indemnity costs is whether its rejection was unreasonable. The mere fact that the recipient of the offer is ultimately worse off after judgment than he or she would have been had the offer been accepted does not mean its rejection was unreasonable: [18]. All the relevant facts and circumstances must be considered in determining whether the rejection of the offer was unreasonable: [17].

102 A Calderbank offer in an amount that exceeds the judgment sum does not give rise to a presumptive entitlement to indemnity costs: [31].

103 The assessment of the unreasonableness of the rejection of a Calderbank offer is to be made at the time that the offer is considered, and without the benefit of hindsight. Thus, the issue of unreasonableness is not to be determined by adopting the judgment sum as a yard stick: [89].

104 Buss JA [19] (Wheeler JA agreeing) adopted a nonexclusive list of relevant factors in assessing the reasonableness of rejection of a Calderbank offer:

(a) the stage of the proceeding at which the offer was received;

(b) the time allowed to the offeree to consider the offer;

(c) the extent of the compromise offered;

(d) the offeree's prospects of success, assessed as at the date of the offer;

(e) the clarity with which the terms of the offer were expressed; and

(f) whether the offer foreshadowed an application for indemnity costs in the event of the offeree's rejecting it.

105 Questions arise as to whether and to what extent these principles apply to the use of a Calderbank offer to seek partyparty costs, as distinct from indemnity costs.

106 The plaintiffs contend that the test to support indemnity costs - that the rejection of the offer was unreasonable - applies to the use of a Calderbank offer in support of partyparty costs. On their contention, on the proper approach, each of the discretions will be enlivened if and only if the court is satisfied that rejection of the offer was unreasonable, and the proper order will be a matter for the exercise of discretion. In support of these contentions they submit that:

(1) both uses involve seeking to use a Calderbank offer to alter what would otherwise be the appropriate costs order and 'there is no difference in nature' (ts 7465, 7471) and 'no difference in principle' (ts 7466 7467) between the two possible costs consequences; and

(2) a contrary approach would defeat the principle articulated by Wells J in Florence.

107 I do not accept either of propositions (1) and (2).

108 I accept that it is logically possible that the same test may apply. But to my mind, on the face of it, one might expect a different test of what is required to enliven the power to make these two different costs orders.

109 In my view, there are important distinctions between partyparty costs and indemnity costs. The distinction is not, as the plaintiffs submit, merely a matter of quantum. The power to award indemnity costs is exceptional in character. There needs to be some special or unusual feature to justify departure from the ordinary practice: Lo Presti v Ford Motor Company of Australia Ltd [No 2] [2008] WASC 12 (S) [8]. Most of the situations in which indemnity costs have been awarded involve an element of improper or unreasonable conduct on the part of the party or its advisers in the conduct of the case: Flotilla Nominees Pty Ltd v Western Australian Land Authority[2003] WASC 122 (S); (2003) 28 WAR 95 [9]; ColgatePalmolive Company v Cussons Pty Ltd [1993] FCA 536; (1993) 46 FCR 225, 233 234. In my view, the exceptional character of an award of indemnity costs explains and justifies the need to demonstrate unreasonableness, judged at the time of the offer, to enliven the discretion to award indemnity costs based on the rejection of a Calderbank offer. The same considerations do not apply to the award of partyparty costs. To my mind, that difference supports or would explain the view that there is a lower threshold for an award of partyparty costs than for indemnity costs. I will return to this point.

110 As to the plaintiffs' second proposition, in my view, the principle stated by Wells J in Florence (set out at [59] above) does not require acceptance of the need for a finding of unreasonable rejection before a Calderbank offer can bear on partyparty costs. To the contrary, as the defendants submit:

(a) Wells J supports an award of a claimant's costs of recovering due compensation;

(b) when an offer in an amount that exceeds due compensation is made, the plaintiffs no longer needs to litigate in order to obtain due compensation.

111 I think acceptance of this view is implicit in what Jenkins J said in Mercer [40], about which I will say more shortly.

112 Perhaps surprisingly, the question I am considering does not seem to have been directly addressed in the authorities. Counsel for the plaintiffs did not point to any authority stating that before partyparty costs can be awarded based on a Calderbank offer, the court must be satisfied that rejection of the offer was unreasonable, judged at the time of the offer. Senior counsel for the defendants did not point to any authority expressly to the contrary.

113 In Mount Lawley, Mercer and Shim, the court (or Tribunal) gave substantial weight to the comparison between the amount of the Calderbank offer and the judgment sum, without an assessment of the reasonableness of its rejection judged at the time of the offer.

114 In Mount Lawley, Templeman J determined that the WAPC was the successful party and that costs would follow the event. He went on to express his views on the effect of a Calderbank offer that had been made by the WAPC for an amount exceeding the amount awarded at trial. He would have ordered partyparty costs from the date of the offer. Templeman J said that the question of whether the offeree acted reasonably in rejecting the offer is to be made in hindsight, knowing the result of the trial: [89] [91].

115 In Mercer v WAPC, the defendant had made a Calderbank offer that was for an amount less than the judgment sum. After setting out the law in detail, Jenkins J applied the law to the facts to explain her view that the plaintiff should be awarded costs: On the one hand it may be said that the defendant was the party who on the whole was most successful in that the award of compensation was significantly closer to that proposed by the defendant's valuers than either of the plaintiffs' valuers. Further, it is also true that the defendant was more successful than the plaintiffs in persuading me as to its view in respect to a number of issues raised by the claim. On the other hand, I am of the view that it is a very significant point that the plaintiffs ultimately achieved an award which was some $95,000 more than the Calderbank offer and approximately $468,000 more than the compensation award sought by the defendant at trial. Thus, unlike Mount Lawley, the plaintiffs were, on the face of it, unable to obtain compensation in the amount in which it was awarded without proceeding to trial. It cannot be said that the balance of the amount of the award over and above the defendant's valuations and Calderbank offer was insignificant and did not justify the plaintiffs proceeding to trial in order to obtain it.

I do not accept that I can conclude that if the plaintiffs had queried the validity of their valuers' opinions when they received the Calderbank offer and, as a consequence, sought further negotiations with the defendant that settlement could have been reached at a figure close to my award. That is only one possibility. As I said to the

defendant's counsel during the hearing, it is also possible that the Calderbank offer represented the upper limit of any offer that the defendant was prepared to make [40] [41].

116 In my view, her Honour put significant weight on the fact that the Calderbank offer was less than the judgment sum. The nub of her Honour's reasoning is that the plaintiffs were justified in proceeding to trial to obtain the judgment sum, given that it exceeded, by more than a negligible amount, what had been offered by the Calderbank offer and what was contended by the defendants at trial. I think it is clear that if the Calderbank offer had been more than the judgment sum, her Honour would have exercised the discretion differently. In those circumstances, the plaintiffs would not have been 'unable to obtain compensation in the amount ... awarded without proceeding to trial'.

117 As I have said, in WAPC and Shim, Chaney DP took into account Calderbank offers, as well as offers under the SAT rules, in exercising his costs discretion. See, in particular, [9] [10] and [12] [14].

118 Order 24A is a statutory scheme for making settlement offers. One of the central elements of the scheme is that offers that prove to be better than the judgment sum have presumptive costs consequences. Another element of that scheme is that an O 24A offer must be open for at least 28 days.

119 The plaintiffs submit that a Calderbank offer should not be equated with an O 24A offer. I agree. But that does not mean that a Calderbank offer may not, in some circumstances, in the exercise of discretion, have the same costs consequences. A party who chooses to make a Calderbank offer, open for less than 28 days, does not obtain the benefit of the presumptive costs entitlement that arises under O 24A. A party who makes a Calderbank offer in a sum that proves to be more favourable to the offeree than the judgment sum is not presumptively entitled to an order for costs, whether on an indemnity or partyparty basis. The Calderbank offer is a consideration to be weighed in the costs discretion. The weight to be given to that offer is a matter for the discretion of the court in all the circumstances of the case. This approach is not tantamount to equating a Calderbank offer with an O 24A offer. In the latter case, the offeror knows its presumptive costs consequences. An offeror of a Calderbank offer takes the chance that, when the court exercises its discretion in all the circumstances, the offer will lead to costs consequences.

120 I note the suggestion in Dal Pont GE, Law Of Costs (2nd ed, 2009) [13.58] that the same approach applies to Calderbank offers for partyparty costs as for indemnity costs, but the question of whether costs be awarded on an indemnity basis or partyparty basis would depend on 'the level of unreasonableness'. Such an approach might fit comfortably in a context where the test for indemnity costs were 'plainly unreasonable' or 'so unreasonable as to warrant indemnity costs' or the like. However, it is clear from Ford Motor Company v Lo Presti that this is not the law. The test for whether indemnity costs are available is 'unreasonableness' without any gloss.

121 In my view, the use of a Calderbank offer to found indemnity costs requires a different level of justification from using an offer to lead to partyparty costs.

122 One approach might be to say that the 'unreasonableness' test applies differentially in the two contexts; that it is a different sense of 'unreasonable' for the two different purposes. I think such an approach would be liable to confuse and mislead, and I reject it.

123 Another approach, advocated by the plaintiffs, is that the same test applies to both, and the rest is a matter of discretion. In my view, that has one of two consequences, each of which is unsatisfactory. Depending how 'unreasonableness' is applied in practice, this approach either makes indemnity costs available when it should not be, or it unduly constrains the award of partyparty costs. That reflects my view that there may be many cases where justice requires that a Calderbank offer lead to partyparty costs in favour of the offeror, but where indemnity costs would be wholly inappropriate and should be (and are) unavailable as a proper exercise of discretion. I will give an illustrative example.

124 Imagine an action for damages where the defendant denies it is liable to the plaintiff and, in any event, there is a dispute between the parties about the amount of loss and damage. Both parties have a strongly arguable case based on apparently cogent evidence. The defendant makes a Calderbank offer in a sum substantially more than the amount recoverable on the defence case if is it liable to the plaintiff, and substantially less than the plaintiff's claim. At trial, the plaintiff establishes liability, but is only awarded damages based on the defendant's assessment of loss and damage. In such a case, the plaintiff would be the 'successful' party for the purposes of O 66 r1(1), as it succeeded in recovering damages from the defendant. By refusing the Calderbank offer, the plaintiff put the defendant to the costs of a trial that did not result in the plaintiff obtaining a better outcome than was offered by the

defendant. In those circumstances, a partyparty costs order in favour of the defendant from the date of the offer may well be appropriate.

125 But, often at least, I think indemnity costs would be inappropriate and unavailable. (See my observations in an analogous context in Lo Presti v Ford Motor Company [No 2] [22] [27], upheld in the Court of Appeal, Ford Motor Company v Lo Presti [48] [51], [76] [78]). In my view, in a case of the kind I am hypothesising, the rejection of the offer cannot be said to be unreasonable. Thus, indemnity costs are not available. I do not think that is just a matter of discretion. The rejection was not unreasonable and the discretion to award indemnity costs is not enlivened. Indemnity costs are not an available option within discretion. But, in my view, partyparty costs should be available to meet the justice of the case.

126 In a sense, the present case also illustrates my point. The defendants do not seek indemnity costs. Nor, in my view, could they have. I am satisfied that the plaintiffs did not unreasonably reject the Calderbank offer so as to enliven a power to award indemnity costs. But, for the reasons I explain below, I am satisfied that the justice of the case is met by an order for partyparty costs against the plaintiffs.

127 The breadth of the court's discretion ensures that the court retains the maximum flexibility to meet the justice of the case. The character of what animates the exercise of the exceptional power to award indemnity costs explains why the courts require a finding of unreasonable rejection before indemnity costs are available based on a Calderbank offer. Those considerations do not apply to using a Calderbank offer to order partyparty costs. I do not think the breadth of the costs discretion should be or is constrained by a requirement of finding unreasonable rejection as a prerequisite to a partyparty costs order based on a Calderbank offer.

128 For these reasons, in my view, a finding that a Calderbank offer was unreasonably rejected, judged at the time of the offer, is not a precondition to the power to award partyparty costs based on a Calderbank offer.

129 The reasonableness, or otherwise, of a plaintiff's conduct in rejecting a Calderbank offer may be relevant to determining whether and to what extent the Calderbank offer sustains an exercise of the costs discretion adverse to the plaintiff. The factors identified in Ford Motor Company v Lo Presti [19] are relevant to the question of reasonableness.

130 I turn to the question of the weight to be given to the offer in the exercise of the costs discretion.

The weight to be given to the offer: plaintiffs' submissions

131 The plaintiffs' written submissions [67] [68] asserted that the offer was uncertain in that it failed to particularise the portion of the offer that related to lots 191 and 192. Counsel for the plaintiffs rightly abandoned that contention. The offer was perfectly certain. It offered $24 million plus interest and costs in satisfaction of the whole of the plaintiffs' claims. At the time of the offer, there was no occasion to particularise which part of the offer related to lots 191 and 192.

132 The plaintiffs submit that little weight should be given to the Calderbank offer given:

(a) its timing and duration - the offer was made on 6 October 2009 and was expressed to be open for 10 days until 16 October 2009. The trial commenced on 19 October 2009; and

(b) in any event the plaintiffs acted reasonably in refusing the offer.

133 These are not separate questions. Rather, they are part of the considerations relevant to the weight to be given to the Calderbank offer in the costs discretion. However, for ease of exposition it is convenient to deal with these issues separately.

134 I begin with the question of the duration of the offer.

The duration of the offer: the authorities

135 The duration of the offer bears on the weight, if any, to be given to the offer in the exercise of the costs discretion. In some cases, the short duration of an offer has in itself meant that the offer produced no costs consequences. In other cases, the view has been taken that the shortness of the duration of the offer was relevant to whether the offeree's rejection was unreasonable.

136 At the risk of repetition, I introduce this discussion of the cases with a reminder that each case turns on its own facts and circumstances. The reasonableness of the duration of a particular offer must be assessed in the circumstances of the case.

137 The rules of court in New ***South*** Wales analogous to our O 24A provide that, in the 28 days leading to trial, an offer must be open for a 'reasonable' period. The cases about what period is 'reasonable' for the purpose of the rule are of some general assistance to the general discretionary question that I am considering.

138 In Kooee Communications Pty Ltd v Primus Telecommunications Pty Ltd (No 2) [2008] NSWCA 85, an offer was made the day before the trial, required to be accepted by no later than when the trial was due to commence, less than 23 hours later. The parties had made prior offers. Basten JA concluded that the case was 'truly borderline' but he was not satisfied that the offer was left open for a reasonable time: [23]. Basten JA made these observations: In considering whether the time allowed for acceptance is 'reasonable in all the circumstances' once a trial commences, or indeed final preparation commences, three factors come into play. The first is that both parties may reasonably be expected to have a clear perception of the strengths and weaknesses of their positions, so that the reasonableness of a particular offer may be speedily assessed. Secondly, because significant costs will be accruing on a daily, even an hourly basis, there is a heightened incentive to respond within the time permitted. Thirdly, and counterbalancing the first factor, the need to address the terms of an offer, provide advice and obtain instructions will often be a significant distraction from final preparation.

In relation to the first factor, it should be accepted that by the day before the hearing, in commercial litigation involving experienced counsel and solicitors, the legal representatives would have been able to give the client an immediate assessment of:

(a) the approximate costs incurred to date;

(b) the likely length of the trial;

(c) the approximate amount of costs assessed on an indemnity basis if the matter proceeded to trial, and

(d) the most likely outcome, which may involve a range as to quantum.

It should also be accepted that someone with authority to bind the client would have been available to give instructions based on legal advice as to the preferable response [20] [21].

139 I respectfully agree with these general observations.

140 As senior counsel for the defendants emphasised, the plaintiffs did not lead any evidence to assert or suggest that they considered or found ten days was insufficient to consider and respond to the offer, or about how they were occupied during the relevant period. In Kooee, Basten JA said that such evidence would be irrelevant. The question of reasonableness is to be determined objectively, in the circumstances known or which should reasonably have been anticipated by both parties: Kooee [22]. Before me, both parties adopted this approach (ts 7507).

141 In Maclean v Rottnest Island Authority [2001] WASCA 323, on the Tuesday before the trial (which was commencing the following Monday) the defendant's solicitors served a Calderbank offer that was open until noon that Friday. The trial judge ordered costs in favour of the plaintiff. The Court of Appeal dismissed an appeal from that costs order. The court made these observations: However, the Court should not encourage the use of a Calderbank letter delivered shortly before trial when the other party might reasonably be expected to have their minds on a number of matters. The use of a Calderbank letter is an aid to the administration of justice and should be encouraged. Its use as an indiscriminately wielded tactical weapon should be discouraged.

Cases will vary as to their circumstances, but in the circumstances of this case we do not consider that the trial Judge fell into error in declining to accord the Calderbank letter much weight [36] [37].

142 The plaintiffs rely heavily on these observations.

143 It is clear that each case is to be judged on its own circumstances.

144 One purpose of a Calderbank offer is always to influence the costs discretion if the offer is not accepted. That is why it is marked 'without prejudice save as to costs', not 'without prejudice'. But another central purpose of a genuine Calderbank offer is to bring about a settlement by compromise. A last minute offer might be made in circumstances that support the view that it was not a genuine attempt to reach a settlement of the action by compromise, but was a tactic employed for the primary object of altering the costs orders. In those circumstances the offer would be worthy of little weight.

145 In Permanent Building Society v Wheeler (No 2) (578), Anderson J declined to give significant weight to an O 24A offer that was made four working days before trial and withdrawn after three days of the trial.

146 In Leda v Weerden (No 3) [2006] NSWSC 220, the defendant made an offer of compromise shortly before the hearing commenced, on terms that were more favourable to the plaintiff than the judgment subsequently obtained. The offer was open for four days. The offer was not accepted. Gzell J held that the offer was open for acceptance for a reasonable time in the circumstances. He reasoned as follows: In my view, the parties will be in the best position to assess an offer when it is made shortly before the commencement of the trial. By that stage preparation for the trial will be well in hand and the legal advisers will, therefore, be armed with sufficient information to make a reasoned judgment of the offer.

It was said that the plaintiff was in the throes of significant preparation for trial and was not in a position to give consideration to the offer. The whole point about offers of this nature is to encourage the proper compromise of litigation in the private interests of litigants and in the public interest in the prompt and economic disposal of litigation. Recent reference to these matters was made by Hunt AJA in ***South*** Eastern Sydney Area Health Service & Anor v King [2006] NSWCA 2 at[83].

In my view, the offer was in compliance with the Uniform Civil Procedure Rules 2005, r 20.6 with the consequence that r 42.15(2)(b)(i) applies and, unless the court orders otherwise, Leda is entitled to an order against Mr Weerden for its costs in respect of the claim, to be assessed on the ordinary basis, up to the beginning of the day following that on which the offer was made and Mr Weerden is entitled to an order for costs on an indemnity basis thereafter. I propose to make orders in accordance with that provision. I do not see any basis upon which I should make an order to the contrary [10] [12].

147 In Taylor v Port MacquarieHastings Council, Biscoe J dealt with the costs of a compensation case. The respondent made a Calderbank offer that was open for four days. Under the applicable rules, the offer was required to be open for such time as is reasonable in the circumstances. Biscoe J observed that in many, if not most cases of ordinary litigation, an offer of compromise open for four days made shortly before trial will be open for a reasonable time in the circumstances. His Honour observed that 'shortly before trial is the season for offers' [49]. Biscoe J described the case before him as borderline but determined that the offer was not open for a reasonable time, taking into account the particular factors relating to the age of the applicants and other matters: [50].

148 In Elite Protective Personnel Pty Ltd & Anor v Salmon [2007] NSWCA 322 [117], an offer made at a stage when no trial date was fixed that was only open for seven days was considered by McColl JA not to be one that would attract an indemnity costs order.

149 In County Securities Pty Ltd v Challenger Group Holdings Pty Ltd (No 2), the trial commenced on Tuesday, 20 February. An offer was sent in the middle of the day on Friday, 9 February expressed to be open until 4.00 pm Tuesday, 13 February. Thus the offer was open for less than three business days. The offeree contended that they were not given sufficient opportunity to consider and respond to the offer particularly at a time when they and their advisors were devoting their energies to preparation for the trial. McColl JA (Spigelman CJ and Beazley JA agreeing) rejected that argument. Her Honour said as follows: The next question is whether Challenger and CHL

had an appropriate opportunity to consider and deal with the offer. In my opinion they did. It smacks of naivety to contend that Challenger and CHL were so busy devoting their time to preparation for trial that they could not consider the offer. The period leading up to the trial is precisely when parties are often in the best position to consider an offer. While compromise should be considered from when a party's claim is foreshadowed, clearly the further the process of preparation for trial has advanced, the better will the recipient of an offer be able to assess its prospects of success. Experienced practitioners know that decisions as to whether offers should be accepted are often made in a matter of hours, not days. Further, County had, in my view, clearly explained the basis of its claims on the two earlier occasions to which I have referred. By 9 February 2007 Challenger and CHL had County's affidavit evidence and must have been in a position to evaluate it in light of its own case, an issue to which I will return when considering the reasonableness of the rejection of the offer. In any event, had Challenger and CHL needed more time to consider the offer, they could have asked for it: Elite (at [149]) per Basten JA. Instead they either responded with what could only be described as a disdainful offer of $50,000 inclusive of costs or, if their letter preceded County's, chose to sit on their offer. It can be inferred that they had evaluated what they regarded as County's prospects of success - wrongly as the judgment in this Court makes clear - at the time they sent their 9 February offer [35].

150 It can be seen from these cases that:

(a) in some cases, offers open for less than a week have been sufficient, or described as borderline;

(b) an offer open for less than a day was 'borderline';

(c) in other cases, offers made in the week before trial have been given little weight; and

(d) each case depends on its own circumstances.

Was ten days a sufficient time for the plaintiffs to respond to the offer?

151 In my view, for the reasons that follow, in the circumstances of this case, ten days was sufficient time to provide the plaintiffs with a reasonable opportunity to consider and respond to the offer.

152 The plaintiffs point out, correctly, that the Calderbank offer was not made immediately after the mediation, but was made 19 days after its conclusion. In that respect, it is relevant that immediately after the mediation, the defendants' focus was plainly on the introduction by the plaintiffs of the split taking case. Dealing with whether that should be permitted would have occupied the defendants' legal advisers into early the following week. At the directions hearing on 22 September 2009, the plaintiffs' abandonment of the split taking case was confirmed and consequential costs orders were made.

153 I have found that, on 6 October 2009, the reason the defendants did not make their offer under O 24A was that they did not wish to make an offer that was open until 3 November 2009, the twelfth day of the trial, on terms that the defendants would pay the plaintiffs' costs up to the date of acceptance. I see nothing inherently unreasonable about that.

154 The plaintiffs submit that ten days was not a reasonable time for consideration of the offer, taking into account:

(a) in the two weeks preceding trial, the focus of the plaintiffs and their legal advisers would naturally have been on preparation for the trial;

(b) preparation for the trial was a substantial task. The trial was listed for six weeks; and

(c) the action was complex, involving a large volume of evidence, particularly expert evidence. Consequently, assessing the merits of the competing cases to form an assessment of the offer would have been a complex task.

155 I agree that the matters summarised in pars (a) to (c) are relevant considerations. However, I consider that in all the circumstances, ten days was ample time to consider and respond to the offer. My reasons for that opinion are as follows.

156 First, the plaintiffs had a substantial legal team that was senior and experienced in planning and valuation actions. Three counsel appeared for the plaintiffs when the trial commenced. In the two weeks prior to the commencement of the trial, the plaintiffs' counsel could reasonably have been expected to be available to give advice in relation to the offer.

157 Secondly, at the time of receiving the offer, the plaintiffs and their legal advisers had the defendants' witness statements and expert reports, and their SIFC. They should be taken to have known of the defendants' case, and

the evidence in support of that case, and to have a clear perception of the strengths and weaknesses of the plaintiffs' case.

158 Thirdly, although it is true that the action was complex and involved a substantial body of expert evidence, in another sense the value of the land was centrally influenced by a single issue: the timing of any urban rezoning and subdivision of the land. That was recognised in the plaintiffs' solicitor's letter of 20 May 2009 (annexure C to the plaintiffs' submissions) and was apparent from the parties' SIFCs.

159 Fourthly, and significantly, the receipt of the defendants' Calderbank offer was not the first occasion for consideration by the plaintiffs, and their legal advisers, of the possible settlement of the action. The defendants had made O 24 offers in 2008 and in May 2009. There had been two previous mediations of the action. The more recent of those mediations had been conducted over two days, three weeks before receipt of the offer. Thus, the plaintiffs and their lawyers would have already given detailed consideration to their prospects of success and the question of an appropriate settlement, including only three weeks earlier.

160 I turn to the plaintiffs' contention that they acted reasonably in rejecting the offer.

Did the plaintiffs act reasonably in rejecting the offer?

161 In their written submissions [70] [76], the plaintiffs submitted that they were justified and acted reasonably in rejecting the offer of more than $20 million for lots 191 and 192 in that:

(a) the defendants' valuers' valuation reports then available to the plaintiffs were, as the court subsequently found, defective; and

(b) consequently, it was reasonable for the plaintiffs to have regard only to their valuers' reports, which produced valuations of at least $36.5 million for the subject land.

162 In oral submissions, counsel for the plaintiffs accepted that the first step in this submission involved assessing the defendants' valuers' reports with the benefit of hindsight, informed by the court's conclusions after trial. The argument in that form was not pressed. Rather, the plaintiffs submit that:

(1) because the defendants' offer was for an amount significantly more than the defendants' valuers' opinion, the offer carried an implicit rejection of the defendants' valuers' views;

(2) that being so, the only available valuation reports were those of the plaintiffs' valuers. The plaintiffs' valuers valued the land considerably more than the offer; and

(3) in those circumstances, the plaintiffs' rejection of the offer cannot be said to be unreasonable.

163 I do not accept this submission. Apart from anything else, I do not accept the first step in the submission. The making of the offer of $24 million did not involve, in any sense, a rejection of the defendants' valuers' views. By its nature, an offer of settlement need not be, and often is not, premised on an acceptance of particular evidence and the rejection of other evidence. Rather, an offer of settlement will often involve an element of compromise, producing an offer in an amount that does not reflect the evidence or case of either party. Typically, an offer of compromise will be in an amount that falls between the outcomes achieved by success on the part of either party.

164 The defendants' offer was like this typical case. On the defendants' case, the subject land was worth somewhere between $6 $10 million. On the plaintiffs' case (at the time of the offer), the claim for lots 191 and 192 was worth $44 million, if the land was zoned rural, and substantially more if it were zoned urban. The defendants' Calderbank offer did not involve a rejection of one case and an acceptance of the other. It involved a substantial element of compromise.

165 I will say more about matters bearing on the reasonableness of the plaintiffs' rejection of the offer in the next section of these reasons.

The appropriate costs order

166 I have already found that the defendants' offer:

(a) when viewed objectively against the background of the defendants' case and the evidence they had disclosed at the time of the offer, involved a substantial element of compromise;

(b) was certain in its terms;

(c) was made close to trial, after two mediations, one of which was recent;

(d) was open for acceptance for ten days which was, in the circumstances, ample time to permit the plaintiffs to consider and respond to the offer; and

(e) was in an amount that exceeded (substantially) the judgment sum.

167 The plaintiffs point out that the offer did not spell out how the figure of $24 million was derived. It was not necessary that that be done. The absence of such an explanation does not affect the weight I give to the offer in the costs discretion. The amount of an offer will often be derived by weighing a number of competing considerations, such as the parties' cases, the perceived prospects of success, and the relative costs and benefits of a trial and a resolution by settlement. Viewed objectively, an analysis of that kind is the evident foundation for the defendants' offer in this case. Nothing was to be gained by spelling that out.

168 A party in the position of the plaintiffs who receives an offer in the lead up to trial has to weigh risks, costs and benefits in deciding whether to accept the offer. On any view, the outcome of the trial in this case and, in particular, the ultimate value that might be adopted by the court, was highly unpredictable. In this case, in my view, assessed objectively, the plaintiffs should have appreciated that there was, at the least, a significant risk that:

(a) the plaintiffs' urban rezoning case would be rejected, and the land would be valued on the basis that it was zoned rural and had urban potential;

(b) the court would assess the urban potential as more uncertain and less imminent than was the plaintiffs' case; and

(c) valued on that basis, the court may not accept the plaintiffs' valuers' opinions, and may conclude that the subject land was worth less, perhaps very substantially less, than $20 million.

169 Acceptance by the court of the defendants' valuers opinion was not necessary (although sufficient) for such an outcome.

170 Further, in my opinion, in those circumstances, the plaintiffs should have appreciated that in those events they would be better off to have accepted the offer than continuing with the action and, as intimated in the defendants' offer, they (the plaintiffs) would be at significant risk of having to pay the costs of the trial.

171 In this way, in deciding not to accept the offer, viewed objectively the plaintiffs decided to accept, or may be taken to have accepted, the risk that the result of the trial would be judgment in an amount less than the Calderbank offer. Part of that risk was the risk of exposure to an adverse costs order as a consequence. That risk materialised. I do not think it unjust to the plaintiffs that they should be ordered to pay the costs of the trial that followed their decision not to accept the offer.

172 In the context of a dispute about the amount of compensation, I think the justice of the case favours giving substantial weight to the Calderbank offer. Wells J said that justice requires that, generally, in a land resumption compensation case a claimant should have its costs of obtaining due compensation. I accept the defendants' submission that the costs of obtaining due compensation end when an offer for more than that is made. In my view, in some cases at least, thereafter the claimant should pay costs.

173 I think that approach is consistent with what was said by Jenkins J in Mercer and by Chaney DP in Shim. Although Barker P did not refer to Calderbank offers, I think his discussion in Clifford of the framework for awarding costs in compensation cases is also consistent with this approach.

174 In my view, the policy of the law of encouraging settlements of action supports giving significant weight in the exercise of the costs discretion to the defendants' Calderbank offer.

175 I have considered the plaintiffs' submission that, at most, the Calderbank offer should result in no order as to costs. I do not think that is appropriate. In the circumstances of this case, I think the Calderbank offer is given appropriate weight by an order that the plaintiffs pay the defendants' costs thereafter.

176 For these reasons, I would order that the plaintiffs pay the defendants' costs after the Calderbank offer.

The appropriate costs order without regard to the Calderbank offer

177 For the sake of completeness, I will express my conclusions on the assumption that I am wrong to give weight to the Calderbank offer. On that hypothesis, my starting point is that the plaintiffs obtained substantially more than the statutory offer and the defendants' stance in the trial, and so were 'successful' for the purposes of O 66 r 1(1).

178 However, for a number of overlapping reasons, the plaintiffs should not be awarded all of their costs. Those reasons relate to the way in which the plaintiffs ran their case, the substantial issues on which the plaintiffs failed, and the lack of connection between the rationale for my decision and the submissions made and evidence led on behalf of the plaintiffs. Having regard to these matters, I would exercise my discretion under O 66 r 1(2) and O 66 r 1(3) to order that the plaintiffs should pay the defendants' costs of certain issues (identified below), and otherwise should be awarded one half of their costs.

179 As a starting point, courts will be slow to dissect the issues in a case to identify who succeeded on which as a basis for a costs order: Bowen v Alsanto Nominees Pty Ltd [2011] WASCA 39 (S) [6] [7]. This will not generally be appropriate unless there are discrete, severable issues on which the generally successful party failed, and which added to the costs of the proceedings in a significant and readily discernible way: Amaca Pty Ltd (formerly James Hardie & Co Pty Ltd) v Patricia Margaret Hannell as Executor of the Estate of David Richard Hannell (Dec) [2007] WASCA 158 (S) [7]. It is to be expected that a generally successful party will fail on some issues.

180 It is true, as the plaintiffs emphasise, that they succeeded on the two major legal issues in the action: whether the hypothetical past rezoning case was legally permissible and the admissibility of posttaking evidence on the question of urban potential. But these issues were dealt with by written submissions and the posttaking evidence did not, in the context of the case as a whole, occupy much time.

181 The plaintiffs' hypothetical urban rezoning case was wholly unsuccessful. It occupied a large and identifiable part of the trial. It added very significantly to the cost of the trial. In particular, the preIPRSP rezoning case occupied weeks of oral evidence and was supported by voluminous documentary evidence, chronologies and some expert reports. It did not assist in any significant way on the question of urban potential as at 2006; at that time, urban potential was to be assessed in the framework of the Peel ***Region*** Scheme and the Planning Review. More than a half of the nonvaluation evidence from 19 July 2010 to 16 September 2010 was taken up with the plaintiffs' unsuccessful urban and commercial cases.

182 Not only was the plaintiffs' commercial case unsuccessful, in my respectful opinion it should never have been run. For the reasons explained in section 8 of my primary reasons, the commercial case was misconceived, incoherent and involved inconsistent approaches between the plaintiffs' planners and their valuers. Among other things, the valuers assumed that the subject land would have been preferred, by the taking date, to Riverland Ramble as the Ravenswood commercial centre. There was never any foundation for that assumption. In my view, the commercial case lacked any reasonable degree of merit.

183 Very little of the enormous volume of evidence adduced by the plaintiffs formed the basis for my reasoning in assessing the hypothetical planning status, urban potential and value of the land. I rejected the evidence on which the plaintiffs relied in their urban and commercial cases. On the question of urban potential, I did not accept the opinions of the (numerous) planners called by the plaintiffs, although I derived some assistance from consideration of their evidence. On the question of valuation, I did not accept the evidence of the plaintiffs' valuers. I derived no assistance from Mr Brown's evidence.

184 Without going into chapter and verse, there is force in the points made in the defendants' written submissions on this topic: see [112] [115] and much of [137].

185 Further, the volume of evidence called by the plaintiffs was more than was reasonable, at least for the purposes of partyparty costs. The plaintiffs chose to run their case by calling numerous planners to give written and oral opinions on the same and overlapping questions. Many of the plaintiffs' experts produced a large number of reports. The plaintiffs called five planners in the preIPRSP concurrent evidence session, five on the hypothetical IPRSP and four on the question of urban potential. I do not overlook that some of these had different particular experience and specialist knowledge. Nevertheless, I think it would be unjust to require the defendants to pay the whole of these costs.

186 In my view, there were also other witnesses whose written evidence was disproportionately substantial when measured against the assistance it provided, or was likely to provide.

187 For the reasons set out in detail in sections 7.5.3.1 and 8.4 of my primary reasons, the defendants should not pay the plaintiffs' costs in relation to Mr Haratsis' evidence. To the contrary, the plaintiffs should pay the defendants'

costs in relation to Mr Haratsis' evidence, including the costs relating to the numerous objections and further iterations of his reports, and of the substantial court time occupied by his oral evidence.

188 For these reasons, assuming no weight were given to the Calderbank offer, I would have ordered that:

(1) the plaintiffs pay the defendants' costs of the plaintiffs' commercial case and of all aspects of Mr Haratsis' evidence; and

(2) the defendants pay one half of the plaintiffs' remaining costs of the action, after excluding the costs referred to in (1).

Conclusion: the terms of the cost orders

189 The defendants filed a minute of proposed cost orders. In their minute they sought an order that the costs be taxed as in an action, and sought an order that the limits in the Scale be lifted. However, in oral submissions, senior counsel for the defendants accepted that Item 27 of the Scale, providing for such costs as is reasonable, applies to the costs of this action. Consequently, there is no occasion to lift any limits, since no limits apply.

190 By way of general observations, for the assistance of the taxing officer, although I have not been provided with any draft bill of costs, my starting point would be that what was required on the part of the defendants in order to meet the case presented by the plaintiffs means that it would not be surprising if the defendants reasonably incurred costs of trial, and costs of getting up between November 2009 and July 2010, substantially in excess of the limits provided by the Scale.

191 The defendants' minute provides that the defendants pay the plaintiffs' costs up to the date of the offer. Although the defendants' written submissions, filed before their minute of proposed orders, contended that the defendants should have their costs before the offer, or that there should be no order as to costs in that regard, I proceed on the basis of the defendants' minute. In oral submissions, no argument was addressed to the question of the costs before the Calderbank offer.

192 The defendants' minute provides that the plaintiffs should pay the defendants' costs from 6 October 2009, the date of the offer. I think the plaintiffs should pay the defendants' costs from the date when it is reasonable to expect that they would have responded to the offer. Although I think a reasonable time for the response was less than ten days, I will proceed on the basis, favourable to the plaintiffs, that a response was required by 16 October 2009, as that was the last day that the offer was open. Consequently, I order that:

(1) the defendants pay the plaintiffs' costs of the action, up to and including 16 October 2009, to be taxed if not agreed;

(2) the plaintiffs pay the defendants' costs of the action after 16 October 2009, to be taxed if not agreed.

193 In addition, I make the orders in pars 5 8 of the defendants' minute dated 20 October 2011. Those orders were not opposed by the plaintiffs, in the event that the broad costs issue was resolved against them.

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