IN THE HIGH COURT OF AUSTRALIA
HOBART REGISTRY

No. H10 of 2015

ON APPEAL FROM THE FULL COURT
OF THE SUPREME COURT OF TASMANIA

BETWEEN:

10 **Warwick Coverdale,**
**Valuer-General of**
**the State of Tasmania** Applicant

and

**West Coast Council** Respondent

## APPELLANT'S REPLY

### Part I: Publication

1. This submission is in a form suitable for publication on the internet.

20 ### Part II: Submissions in Reply

### Overview

2. The primary submission of the respondent invites the Court to approach the task of construing s 11 the *Valuation of Land Act 2001* ("the VLA") by commencing with the word "liable". This is consistent with the approach of Estcourt J in the Full Court.

3. The alternative submission of the respondent assumes that despite the definition of "land" in the VLA areas of the sea and the seabed whether Crown land, or not, are "land" and liable to valued under s 11 of the VLA.

4. We contend that both submissions should be rejected.

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### As to the primary submission

5. The respondent's concession that the VLA, the *Local Government Act 1993* ("the LGA") and the *Crown Lands Act 1976* ("the CLA") are not *in pari materia*[1] is inconsistent with the invitation to the Court to interpret the VLA as "a component of an integrated legislative scheme."[2]

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1 Respondent's submissions [43]
2 Respondent's submissions [36] and see also the approach to the scheme in [44] and [45]

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6. The "integrated legislative scheme" to which the respondent refers involves the VLA, s 11 and the LGA, Part 9 (including s 87).[3] However, the "mechanism" identified by the respondent to classify, or define the "assumed characteristic"[4] is the CLA. This means that the "integrated legislative scheme" is not wholly integrated. It requires a further step to be engaged in; namely reference to the CLA.

7. That further step deflects attention from the text of s 11 of the VLA to the CLA to inform the meaning of "Crown land". The approach is exemplified in paragraphs [42], [44] and [45] of the respondent's submissions. It explicitly adopts the definitions in s 2 of the CLA, even though (on the respondent's analysis) the CLA is not part of the integrated legislative scheme.

8. If the common meaning of Crown land is "land belonging to the Crown"[5] the definition in the VLA is sufficiently supplied without reference to the CLA definition.[6] In any event, the meaning to be assigned to "Crown land" will depend on what the legislature has said in the particular legislation.[7]

9. The construction of the VLA is not advanced by the respondent's submission that "it is uncontroversial that the land so classified may, in some cases, be covered by water and may or not be part of the seabed"[8]. The submission simply paraphrases the text of the CLA. It does not explain how it is to apply.

10. At [47] the respondent divides the manner in which parliament has legislated in dealing with Crown land in Tasmania into 3 categories and then selects the first. The submission is unhelpful. It does not address the construction of s 11, beyond the submissions made at [44] and [45].

11. The bulk of the respondent's analysis[9] of the legislative history of rating and valuation statutes in Tasmania confirms that the sea and seabed has historically not been rated.

12. The respondent does not adequately explain the significance to the *State and Local Government Financial Reform Act 2003* ("the *Financial Reform Act*"). At [29] the respondent sets out the relevant amendment made by

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3 Respondent's submissions [36] and [44]

4 ie, Crown land.

5 Respondent's submissions [42]

6 The respondent cites obiter dicta or Kearney J in *Jennings Construction Ltd v Burgundy Royale Investments Pty Ltd* (1986) 42 NTR 1 at 6. That case was affirmed by the NTCA in *Burgundy Royale Investments Pty Ltd v Jennings Construction Ltd* (1986) 43 NTR 1, but reversed in this Court in *Burgundy Royale Investments Pty Ltd v Jennings Construction Ltd* [1987] HCA 10; (1987) 162 CLR 153. The issue was whether a lien under the *Workmen's Lien Act 1893* (SA) was against land vested in the Crown (the Crown having a reversionary interest) or only the leasehold estate in that land The High Court decided the case on the basis of the relevant statututory provisions, not on the basis of Kearney J's reasoning, which did not survive.

7 *Commonwealth v New South Wales* (1923) 33 CLR 1 at 48; *Williams v Attorney-General (NSW)* (1913) 16 CLR 404 a 425 and 440.

8 Respondent's submissions [45]

9 Respondent's submissions [10] to [33]

the Financial Reform Act to s 11 of the VLA. Then at [30] the respondent refers to an amendment made in 2007 (which we contend importantly replaced the word "and" with the words "including any"). The respondent then sets out the situation as it was *before* the *Financial Reform Act.*

13. At paragraph [39] the respondent returns to the 2007 amendment and suggests that it can be explained as if s 11 is a definition section. It is not a definition section. It enacts substantive law. It is not intended merely as an aid to the construction of a statute.[10] It provides part of the content of the Valuer-General's duty to value land.

14. Apart from this attempt to explain the introduction of the phrase "including any" the respondent does not directly address the 2007 amendment. Indeed, the respondent's submission assumes that the 2007 amendment was neither intended to, nor did it effect any change to s 11 of the VLA. That cannot be correct.

**As to the alternative submission**

15. The alternative submission seeks to circumvent the need to construe the meaning of land as it used for the purposes of the VLA.

16. The respondent accepts that, in its ordinary meaning, "land" is to be distinguished from the sea.[11] That must entail the proposition that the marine farming leases in this case do not fall within the ordinary meaning of land. Yet the respondent does not advance a meaning of land that would bring marine farming leases within s 11.

17. The respondent appears to contend that because the marine farming leases in the present case are within the relevant municipal area (and therefore valuation district) the question can be determined on its facts, irrespective of the meaning of land.[12] That must mean that to invoke the duty in s 11 it is sufficient that a marine farming lease is geographically within the municipal area.

18. That proposition assumes that a marine farming lease is land (or an interest in land). The respondent does not explain the reasons for this.

19. Contrary to the submissions of the respondent:

    a. there are contextual indications that "land" in the VLA does not included the sea. The definition of land[13] provides a good example.

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10 cf., *R v Kelly* [2004] HCA 12; (2004) 218 CLR 216 at [103]
11 Respondent's submissions [51]
12 Respondent's submissions [53]
13 VLA, s 3

The definitions of capital value,[14] annual assessed value[15] and land value[16] are also indicative;

b. the definition of land is not sufficiently satisfied merely by the identity of an area of three dimensional space;[17]

c. the point about s 45(1)(c) of the VLA[18] is that it refers to "lands of the Crown". Thus the contention that it is possible to inform the meaning of Crown land by the definition in CLA is not available for s 45(1)(c). The word "lands", in the phrase "lands of the Crown", takes on its ordinary and literal meaning, extended by the definition in s 3. It does not extend to the sea;[19]

d. the respondent's submission[20] assumes that a marine farming lease, once valued, is rateable land. The problems with this approach are highlighted in the judgment of Pearce J in the Full Court;[21]

e. there is no reason to suggest that the definition of "land" in s 3 of the VLA is inadequate. To the extent that the respondent's submission implies that it is inadequate, no reasons are given.[22]

20. The conclusion to which the respondent's argument is directed is that land for the purposes of the VLA includes the seabed of Macquarie Harbour and the water above it. The assumption underlying that conclusion is either that:

a. in each case, "land" for the purposes of the VLA has a variable meaning; or

b. if the meaning of land is fixed (as it should be) it extends not only to Crown land, but to any land which is covered by water, including the seabed.

The conclusion in b. can only be reached by addressing the definition of land and showing how it can extend to the sea under the VLA.

**Circularity, Consequences and Other Matters**

21. The case for circularity[23] advanced by Estcourt J only arises if the task of construing s 11 of the VLA is commenced with the word "liable" half way

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14 VLA, s 3
15 VLA, s 3
16 VLA, s 11(5)(a)
17 Respondent's submissions [55]
18 cf., Respondent's submissions [56]
19 *Risk v Northern Territory:* High Court [2002] HCA 23; (2002) 210 CLR 392 at [26]; Full Federal Court [2000] FCA 1179; (2000) 105 FCR 109 at [34]
20 at [57]
21 *West Coast Council v Coverdale (No 2)* [2015] TASFC 1; (2015) 206 LGERA 323 at [43]
22 Respondent's submissions [59]
23 cf., Respondent's submissions [60]

through the provision.[24] The case for circularity also sets up the unjustified assumption that s 11 fails to create in the Valuer-General a duty to value Crown land, but instead permits the Valuer General to choose where and when to do so. No one contends that the Valuer-General has no duty to value Crown land. The issue is the identification of the Crown land which the Valuer-General must value.

22. The dissenting judgment of Pearce J demonstrates that there is no circularity involved if the inquiry commences with the text of the section and proceeds by recognised principles of statutory construction.

23. The argument that the legislature could have exempted areas of sea within a municipal area[25] assumes that the conclusion that areas of sea are ratable is correct. Moreover, it is susceptible to the contrary argument that if the State had intended areas of the seabed to be used as the foundation for a tax, it would have expressly said so.[26]

**Inconsistency**

24. The respondent's alternative arguments are inconsistent. If the primary submission succeeds, the only submerged land which must be valued is Crown land, while the alternative argument compels the conclusion that all land within a valuation district (whether submerged or not) must to be valued.

25. It would be strange if parliament intended the Valuer-General to value areas of the sea and seabed the fee simple of which is vested in the Crown, but at the same time failed to provide for the possibility that alienated areas of the sea and seabed were to be valued.

26. The more likely explanation is that parliament did not intend the Valuer-General to value any area of sea or seabed (whether owned privately or by the Crown).

Dated: 20 November 2015

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24 Full Court at [32].
25 Respondent's submissions [63]
26 *West Coast Council v Coverdale* [2014] TASSC 42 at [25] & [26]