Supreme Court

New South Wales

Case Name:	Leppington Pastoral Co Pty Ltd v Chief Commissioner of State Revenue
Medium Neutral Citation:	[2017] NSWSC 9
Hearing Date(s):	2-6 May 2016
Decision Date:	30 January 2017
Jurisdiction:	Equity - Revenue List
Before:	White J
Decision:	Refer to para [201] of judgment.
Catchwords:	TAXES AND DUTIES – Land Tax – Land Tax Management Act 1956 s 10AA(3) – Whether primary production use of land was the dominant use – Identification of relevant land – Significance of use of land by consultants – Whether use of land to produce feed for taxpayer's cattle on other land a primary production use – Meaning of dominant use
Legislation Cited:	Environmental Planning and Assessment Act 1979 (NSW) Land Tax Management Act 1956 (NSW) Local Government Act 1919 (NSW) Taxation Administration Act 1996 (NSW) Valuation of Land Act 1969 (NSW)
Cases Cited:	Certain Lloyd's Underwriters v Cross (2012) 248 CLR 378 Chamwell Pty Ltd v Strathfield Council [2007] NSWLEC 114 Council of the City of Newcastle v Royal Newcastle Hospital (1956-7) 96 CLR 493 Council of the City of Newcastle v Royal Newcastle Hospital (1959) 100 CLR 1 Council of the City of Parramatta v Brickworks Limited (1972) 128 CLR 1 Kingston v Keprose Pty Ltd (1987) 11 NSWLR 404 Leda Manorstead Pty Ltd v Chief Commissioner of State Revenue (2010) 79 NSWLR 724; [2010] NSWSC 867 Leda Manorstead Pty Ltd v Chief Commissioner of State Revenue [2011] NSWCA 366; (2011) 85 ATR 775 Maraya Holdings Pty Ltd v Chief Commissioner of State Revenue [2013] NSWSC 23; (2013) 88 ATR 379 Metricon Qld Pty Ltd v Chief Commissioner of State Revenue (No. 2) [2016] NSWSC 332 Re Bolton; Ex parte Beane (1987) 162 CLR 514

	Thomason v Chief Executive, Department of Lands (1994-1995) 15 QLCR 286 Vartuli v Chief Commissioner of State Revenue [2014] NSWSC 678
Category:	Principal judgment
Parties:	Leppington Pastoral Co Pty Ltd (Plaintiff) Chief Commissioner of State Revenue (Defendant)
Representation:	Counsel: A Galasso SC with A Rider (Plaintiff) I Young with S Kanagaratnam (Defendant) Solicitors: Marsdens Law Group (Plaintiff) Crown Solicitors Office (Defendant)
File Number(s):	2015/358292015/123762

JUDGMENT

1 **HIS HONOUR:** This is an application for the review of decisions of the Chief Commissioner of State Revenue to assess certain lands owned by the plaintiff as liable for land tax for the 2011-2014 land tax years. The plaintiff, Leppington Pastoral Co Pty Ltd ("LPC") contends that the lands in question were exempt from land tax pursuant to s 10AA of the *Land Tax Management Act 1956* (NSW). The lands in question are part of lands owned by LPC at Oran Park that it designates as "Farmland". The Farmland is part of a precinct that is a major residential development.

2 LPC carries on a substantial dairy business on various parcels of land in and around Bringelly which is near Oran Park. LPC's dairy business is one of the largest in Australia. As part of that business it grazed heifer cows on the land at Oran Park that it designates as Farmland. The cows were grazed on the land from about the age of six months to about the age of two years before they produced calves and became milking cows. The Farmland was also used to produce fodder, some of which was used to feed the heifers on the Farmland, but most of which was used to feed other cows in LPC's dairy business. LPC also grazed some beef cattle. Its dairy business was conducted not only on the Farmland, but on other areas known as Pondicherry, Greenfields, Romney, Teresa, and in particular, Base Farm. Base Farm carried about 2,000 head of milk cows plus another 800 young stock. The milking facility at the Base Farm produced in excess of 23 million litres of milk annually.

3 Section 10AA of the *Land Tax Management Act 1956* provides:

> "***10AA Exemption for land used for primary production***
>
> *(1) Land that is rural land is exempt from taxation if it is land used for primary production.*

(2) Land that is not rural land is exempt from taxation if it is land used for primary production and that use of the land:

(a) has a significant and substantial commercial purpose or character, and

(b) is engaged in for the purpose of profit on a continuous or repetitive basis (whether or not a profit is actually made).

(3) For the purposes of this section, land used for primary production *means land the dominant use of which is for:*

(a) cultivation, for the purpose of selling the produce of the cultivation, or

(b) the maintenance of animals (including birds), whether wild or domesticated, for the purpose of selling them or their natural increase or bodily produce, or

(c) commercial fishing (including preparation for that fishing and the storage or preparation of fish or fishing gear) or the commercial farming of fish, molluscs, crustaceans or other aquatic animals, or

(d) the keeping of bees, for the purpose of selling their honey, or

(e) a commercial plant nursery, but not a nursery at which the principal cultivation is the maintenance of plants pending their sale to the general public, or

(f) the propagation for sale of mushrooms, orchids or flowers.

(4) For the purposes of this section, land is rural land *if:*

(a) the land is zoned rural, rural residential, non-urban or large lot residential under a planning instrument, or

(b) the land has another zoning under a planning instrument, and the zone is a type of rural zone under the standard instrument prescribed under section 33A (1) of the Environmental Planning and Assessment Act 1979*, or*

(c) the land is not within a zone under a planning instrument but the Chief Commissioner is satisfied the land is rural land."

4 Ultimately there was no issue between the parties as to what comprised the land for the purposes of s 10AA in respect of each of the 2011 to 2014 tax years. But that was a complex question for the reasons explained below. It was only during the course of the hearing that the precise identification of the lands the subject of each assessment was identified.

5 It was common ground that the relevant land for the purposes of s 10AA was the land that was separately identified by the Valuer General in the register kept pursuant to the *Valuation of Land Act* and valued by the Valuer General as at 1 July preceding each land tax year. The land so identified changed each year as the result of subdivisions of the Oran Park land made by LPC as a result of residential developments.

6 LPC purchased 665.9 hectares of land at Oran Park in 1984. The land is within an area formerly known as the South-West Growth Centre that covered approximately 17,000 hectares in the Liverpool, Camden and Campbelltown Local Government Areas. In 2005 the area was designated for long-term development to provide housing and employment. The South-West Growth Centre has been divided by the NSW Government into 18 precincts for the purpose,

over time, of building 110,000 new dwellings and accommodating 300,000 people in the area. Three of the precincts are called the Oran Park precinct, the Catherine Fields precinct and the Marylands precinct. The land the subject of these proceedings lies within each of those precincts, but mostly within the Oran Park precinct. Most, but not all, of the land in question in each year was not zoned as rural land. Some of the land was zoned as rural land. In any event the Chief Commissioner does not dispute that the lands the subject of the assessments, which have been called Farmland, were used for primary production and that that use had a significant and substantial commercial purpose or character and was engaged in for the purpose of profit on a continuous or repetitive basis.

7 The issue is whether the dominant use of the subject lands was for the maintenance of animals for the purpose of selling them or their natural increase or their bodily produce (s 10AA(3)(b)). Either LPC, or a related company Greenfields Development Corporation Pty Ltd ("GDC"), or both, in the relevant years carried on a business, in conjunction with Landcom, of building a new township with associated housing on the Oran Park land. LPC and GDC have done so by progressively releasing Farmland for development. LPC and GDC have called the land so released Development Land. Each year there were multiple subdivisions of the Oran Park land. The Valuer General has accepted that the Development Land should be separately valued from the Farmland. As explained further below, the result is that the Farmland that is claimed to be exempt from land tax on the basis that the dominant use of the land is for primary production reduces in size over time as land is excised from it for the purposes of development. Land tax is assessed on the basis of the value of all of the land holdings of the taxpayer as at 31 December that is not exempt from taxation. It is the changing definition of "Farmland" at the end of each calendar year that enables LPC plausibly to submit that that land is exempt.

8 LPC's description of the land as Farmland is self-serving and has no relevance in the determination of what is the dominant use of the land.

9 LPC has the onus of establishing that primary production was the dominant use of the Farmland for each land tax year (*Taxation Administration Act 1996* (NSW) s 100(3)). I have concluded that LPC has discharged that onus for the 2012 and 2013 land tax years, but not for the 2011 and 2014 land tax years.

Identification of Relevant Land

10 The Chief Commissioner accepted that he is bound by the Valuer General's determination of what is a relevant parcel of land that is separately valued on the Register of Land Values kept under s 14CC of the *Valuation of Land Act 1969* (NSW) both for the determination of what a relevant parcel of land comprises and with its land value as entered in the Register. This follows from s 9 of the *Land Tax Management Act*. That section provides:

> "***9 Taxable value***

(1) Land tax is payable by the owner of land on the taxable value of all the land owned by that owner which is not exempt from taxation under this Act.

(2) The taxable value of that land is the total sum of the average value of each parcel of that land.

(3) The average value of a parcel of land is to be calculated, as provided for by section 9AA, on the basis of the land value of the land.

(4) The land value of land, in relation to a land tax year, is the value entered in the Register as the land value of the land as at 1 July in the previous year.

(5) The fact that there is no land value entered in the Register on 31 December in a year as the land value of the land as at 1 July in that year does not prevent land tax being levied and charged and becoming payable for any following tax year once that land value is entered in the Register and the average value is ascertained."

11 The "Register" referred to in s 9(4) and (5) means the Register of Land Values kept under s 14CC of the *Valuation of Land Act* (s 3). Section 9AA of the *Land Tax Management Act* provides in substance that for the purposes of the *Land Tax Management Act* the average value of a parcel of land is the average land value determined over the current and two preceding land tax years. If the land value in relation to a land tax year is altered, for example as a result of its being reascertained on objection or appeal, the average value of the land must be reascertained on the basis of the altered land value (s 9AA(10)). Changes to the land value thus will result in changes to the amount of land tax payable. Although neither the *Land Tax Management Act* nor the *Valuation of Land Act* defines the expression "*a parcel of land*", s 47(1) of the *Land Tax Management Act* provides that until payment, land tax is a first charge upon the land taxed. Section 47(1AA) deals with the issuing of a certificate by the Chief Commissioner showing if there is any land tax charged on land. Section 47(1AA)(b) provides that a separate application for such a certificate is to be made "*for each parcel of land that is separately valued under the* Valuation of Land Act *1916 or otherwise separately valued for the purposes of land tax assessment*."

12 Section 14A(1) of the *Valuation of Land Act* provides that:

"***14A Valuer-General to ascertain land values***

(1) The land value of each parcel of land in New South Wales, other than:

(a) lands of the Crown, or

(b) land that is within the Western Division and is not within the area of a rating or taxing authority,

is to be ascertained each year."

13 Section 14A(4) and (5) provide:

"*(4) The Valuer-General may separately value different parts of the same parcel of land, in which case this Act applies to each such part as if it were a separate parcel of land.*

(5) Any land value ascertained under this Act is to be entered in the Register of Land Values."

14 Section 26 provides:

"***26 Where lands are to be included in one valuation***

(1) Where several parcels of land adjoin, are owned by the same person, and where no part is leased, they shall be included in one valuation, unless the Valuer-General otherwise directs: Provided that any such parcels of land shall be valued separately if buildings are erected thereon which are obviously adapted to separate occupation.

(2) Where several parcels of land adjoin, are owned by the same person and are all let to one person, they shall be included in one valuation, unless the Valuer-General otherwise directs.

(3) This section does not apply to land which is required, by section 27B, to be separately valued or included in one valuation."

15 Section 26A deals with the valuation of parcels that form part of the site of a building. Section 27 makes certain provision for the separate valuation of parcels of land such as where they are owned by the same person but separately let, or where the lands do not adjoin, or are separated by a road. The *Valuation of Land Act* makes other provisions in relation to the separate valuations of lands (e.g. in ss 27A and 27B).

16 I was told that the Valuer General has issued a policy in relation to the separate valuation of parcels of land which provides as follows:

"*Section 27 sets out circumstances where parcels of land are to be separately valued. The Valuer General has set out his position in the Valuer General's Policy No. 21 August 2014 which provides as follows:*

Parcels and occupancies are to be valued separately where the following statements apply:

The 'degree of separation effected by the owner in using the land' is such that it is obvious that a parcel is, or parcels are, quite separate to the remainder of the property.

It should be clear that the parcels can be, and are, used independently of each other.

The physical boundaries of the proposed parcels can be readily determined.

The buildings are 'obviously adapted for separate occupation.'

There is clearly defined access to each parcel of land from a public road."

17 In the present case there were proceedings in the Land and Environment Court between LPC and the Valuer General that resulted in a consent order being made on 11 December 2012 by which the parties agreed that land of LPC was to comprise four parcels of land. The parties agreed on the land values of each parcel and the applicable land values as at 1 July 2010. The four parcels were given a description of "Farmland", "Modified Raceway Development Lot 1", "Development Lot 2" and "Development Lot 3". The folio references for each separate parcel

were identified in some cases by reference to parts of lots in subdivisions. A plan identifying the different parcels was attached to the consent orders.

18 As at 1 July 2010, the parcel "Farmland" had an area of 508.18 hectares and a land value of $117,875,000. Parcels 2 and 3 that were development lots had a combined area of 127.27 hectares and a combined land value of $59,705,000. The third development lot that was used as a garden adjacent to a road had a land value of only $10,000. Part of the Farmland was zoned rural. Part was zoned for environmental uses, part for residential uses, part for business uses and part for industrial uses.

19 The Farmland as so identified was included in a land tax assessment issued on 25 June 2013. The assessment was in respect of 50 parcels of land owned by LPC. Item 47 of the assessment included the item described as "Farmland" with a taxable value of $117,875,000. (There was no average land value because that was the first and only time that parcel of land was separately valued.) The assessment for the 2011 land tax year was in respect of lands having an aggregated land value of $171,198,909. LPC was assessed as being liable for land tax of $3,408,422.15. If the Farmland were exempt the assessment should have been $2,357,500 lower.

20 Also on 25 June 2013 the Chief Commissioner issued a land tax assessment for the 2012 land tax year. It identified 75 parcels of land, including a parcel designated as "Farmland" comprising an area of 436.68 hectares having a land value of $108,500,000. The title references were different from the 2011 land tax year as a result of resubdivisions. In essence, portions of what formerly had been Farmland were now included in Development Land. The land tax assessed in respect of the land designated as Farmland as at 31 December 2011 was $2,170,000.

21 On 19 December 2014 the Chief Commissioner issued assessments for the 2013 and 2014 tax years. For the 2013 tax year a separate parcel with a land value of $100 million was described as "*The Northern Road, Oran Park PID-3677834 cancelled and replaced by Farmland*". During the course of evidence it emerged that this was a reference to a letter dated 23 October 2014 written by a "Land Data Team Leader LPI-Valuation Information Services" who advised that in accordance with the recommendation of a senior Land and Property Information valuer "Property no. 3677834" had been cancelled and replaced by a new description of land parcels, being Development Site 1, Farmland and Development Site 2. The Farmland had a land value as at 1 July 2012 of $100 million and comprised 409.76 hectares consisting of five lots and one part of a lot in identified deposited plans (Ex. 8). The plaintiff's appeal statement in respect of the 2013 tax year wrongly included eight lots or parts of lots in the parcel designated "Farmland" for the 2013 tax year. The position was only clarified by the fourth day of hearing.

22 Also on 19 December 2014 the Chief Commissioner issued an assessment for the 2014 land tax year. It included the property identified as "*Oran Park Drive, Oran Park PID-3753140*", having a taxable value of $96 million. The new Property Identifier that was PID 3753140

contained new lot and deposited plan numbers comprising 395.15 hectares. One of the lots was part of a lot. The Property Identifier included a plan which in two respects involving lots on the western side of the precinct differed from LPC's understanding of what constituted Farmland.

23 Mr Owens, the general manager of GDC, said that the Oran Park project had done over 100 subdivisions in the previous two years. He said that as land is moved from being identified as Farmland to Development Land, GDC tried to estimate the extent and timing of development works and then started a development application process, being what he called a procedural subdivision or paper subdivision, defining the cadastral boundaries which would then be reinforced with fencing to make a clear definition between Farmland and Development Land (T233, 234). He said it was not easy for the authorities to keep up with the pace of development and subdivisions and it was that which led up to some of the confusion surrounding the 2013, and, I would add, the 2014, years.

24 Over the four land tax years in question the land whose entitlement to exemption from land tax is in dispute, that has been called "Farmland", has reduced in size as parts of what was previously designated as Farmland have been given over to residential or commercial development. The areas and land values of the Farmland whose exemption from land tax is in dispute for each land tax year are as follows:

2011	508.18 hectares	$117,875,000
2012	436.68 hectares	$108,500,000
2013	409.76 hectares	$100,000,000
2014	395.15 hectares	$96,000,000

25 The Farmland surrounds the existing development. If the Farmland is thought of as a doughnut, over time the size of the hole in the doughnut increased and its south-western side was consumed as Development Land.

Relationship between LPC and GDC

26 GDC and LPC have a number of common directors. Anthony Perich, Mark Perich and Wayne Perich are three of the four directors of GDC. Arrowvest Pty Ltd is the shareholder of GDC. It was described as a Perich family company. Anthony Perich, Mark Perich and Wayne Perich are also directors of LPC, although Mark Perich was not a director of LPC at all relevant times. Two other members of the wider Perich family are directors of LPC, including Michael Perich. Michael Perich and Mark Perich gave evidence in the proceedings. They are cousins. The shares in LPC are held by Anthony Perich and Perich Enterprises Pty Ltd.

27 GDC was incorporated to undertake the development of the Oran Park land.

Call Option Deed and Development Rights Agreement between LPC and GDC

28 In 2008 LPC and GDC entered into a Call Option Deed under which LPC gave GDC an option to purchase the "Project Land" from LPC. The "Project Land" was the whole of the Oran Park land encompassing what is now called both the Farmland and Development Land. The Call Option Deed provided that LPC must hold the Project Land, subject to the grant of the Development Rights and Call Options granted pursuant to the deed. The deed provided that LPC would not itself play any active role in undertaking or executing the Project and would not be entitled to make any decisions concerning the Project and would have no entitlement to receive any Proceeds or Profits from the Project (clause 2.1). LPC granted to GDC an option for GDC or a nominee to acquire the Project land. GDC could exercise the call option in stages so as to allow it to acquire Tranche Land parcels individually. Tranche Land meant a development parcel of the Project Land which was identified in an Exercise Notice as a parcel that would be subject to the exercise of the Call Option at a particular time. GDC could identify the land that it proposed to acquire at any time as Tranche Land and exercise the option in respect of only that much of the land. That could be done in stages. LPC was to be paid a price for the land so acquired in an amount determined by a valuer in accordance with a methodology specified in the Deed. The option could be exercised even if a Tranche Land parcel had not been created as a separate lot at the time the Call Option was exercised.

29 Clause 10.1 provided that GDC acknowledged that until the Project Land was disposed of by LPC in accordance with the Deed, Farming Operations carried on by LPC would continue at LPC's discretion on so much of the LPC land (including the Project Land) that had not been acquired by GDC from time to time.

30 The Call Option Deed provided for GDC to have the right to enter into commercial arrangements with any third party in relation to the development of the Project Land or any part of it as a residential, commercial and/or employment (sic) land development, and for it to be able to negotiate and enter into any planning agreements under Pt 4 Div 6(2) of the *Environmental Planning and Assessment Act 1979* (NSW) or any other similar agreement with any public authority under which GDC would make Development Contributions or provide material public benefits in lieu or satisfaction of any Development Contributions.

31 On 11 October 2010 GDC and LPC entered into a further agreement called a Development Rights Agreement in relation to the Project Land. The Development Rights Agreement recited that GDC had requested that LPC allow it to undertake the Project on the Project Land without GDC's being required to first acquire the Project Land under the Call Option Deed. The Call Option Deed was not wholly superseded, but the Development Rights Agreement contains the important terms of the parties' relationship for the land tax years in question.

32 By clause 4 of the Development Rights Agreement the parties acknowledged that GDC wished to undertake the Project (being the development of the Project Land for residential, commercial and associated uses) and was required to pay and fund all costs of the Project which was to be

undertaken at its sole risk and that it would have the sole discretion as to how and when it funded and executed the Project. LPC agreed to hold the Project Land subject to the development rights granted under the document, the Call Options and any Securities. The development rights included the right to develop the Project Land and to carry out the Project. GDC could do this with a third party developer. GDC was entitled to the economic benefit of the Project.

33 Clause 6.1(3)(a)(ii) provided in substance that GDC was entitled to any income derived from the conduct of the Project, including the amount receivable as consideration for the sale of Lots under sale contracts or compensation paid on account of any resumption, assignment or dedication of any part of the Project Land. LPC acknowledged that the Project Land could be developed by GDC in any manner that GDC thought fit, but GDC was not under any obligation to undertake and complete the Project in a particular manner to a particular standard or at all (Clauses 6.2 and 6.3). Clause 8.2 provided:

> "***8.2 Right to access under licence***
>
> *LPC agrees to permit GDC (and its contractors and agents) to enter onto any part of the Project Land before it becomes Development Land, or onto any part of the Balance of LPC Land, for any purpose associated with the Project provided that GDC:*
>
> *(1) provides reasonable notice to LPC of that proposed access;*
>
> *(2) complies with any reasonable direction provided by or on behalf of LPC concerning that access; and*
>
> *(3) causes as little disruption as possible to:*
>
> *(a) the Farming Operations being conducted on that land at the time; and*
>
> *(b) any development of the Balance of LPC Land which is being, or has been, undertaken by a third party with the consent of LPC*."

34 Clauses 16.1 and 18 provided:

> "***16.1 Estate or interest in Project Land***
>
> *LPC acknowledges and agrees that GDC has a beneficial and equitable interest in the Project Land (and in the Project Land Extension Option parcel) and in the Gross Proceeds of the Project, as those are described in the Transaction Documents.*
>
> *GDC acknowledges and agrees that, as between LPC and GDC, subject to any Securities that may exist from time to time and GDC's beneficial and equitable interest, as described:*
>
> *(1) nothing contained in or implied by this document, operates to transfer to, or vest in, GDC any legal estate or interest in the Project Land; and*
>
> *(2) the legal ownership of the Project Land remains vested in LPC until it is acquired by GDC or a Purchaser.*
>
> *…*
>
> ***18 Development Land***

18.1 Purpose

The parties acknowledge and agree that the purpose of the identification of Development land pursuant to this clause 18 is to allow GDC to undertake the Project on that part of the Project Land without being required to acquire title to that land from LPC.

18.2 Content of Development Notice

A Development Notice must contain or be accompanied by the following information:

(1) a plan or diagram which identifies that part of the Project Land to which it applies; and

(2) the date by which GDC requires LPC to vacate the relevant part of the Project Land to which the Development Notice relates, which must be a reasonable time of not less than ninety (90) days.

18.3 Service of Development Notice

GDC may serve a Development Notice on LPC at any time.

18.4 LPC may refuse Development Notice

(1) LPC may, by written notice served on GDC to that effect, refuse a Development Notice if, as at the date that the Development Notice is served on LPC, there is more than twenty five hectares (25ha) of Development Land upon which development has not been commenced.

(2) For the purpose of paragraph (1), ***Commenced*** *in relation to the development of the relevant Development Land, means:*

(a) GDC has engaged a 'principal contractor' with respect to that land;

(b) physical works have been started on that land.

(3) If LPC fails to serve a notice refusing Development Notice in accordance with paragraph (1) within twenty (20) days of receiving that Development Notice, then its right to refuse that Development Notice lapses.

(4) A Development Notice that is refused by LPC in accordance with paragraph (1) has no effect.

18.5 Effect of Development Notice

By the Possession Date, LPC must vacate the Project Land that is identified in a Development Notice to enable GDC to undertake the Project on that land and to give GDC (and its contractors and agents) possession of that land.

18.6 Right to access, use and occupy under licence

After the Possession Date for that land, GDC (and its contractors and agents) may:

(1) enter onto, use and remain in possession of any Development Land for any purpose associated with the Project: and

(2) secure, and exclude any person from, the Development Land at GDC's discretion.

18.7 Maintenance of the Development Land

After the Possession Date for that land, GDC must maintain any Development Land:

(1) in a tidy state having regard to the conduct of the Project;

(2) in accordance with any applicable Laws, or the requirements of any Government Authorities; and

(3) as required by any Approvals."

35 Because land was not to be transferred to GDC before a lot was sold to a purchaser, but GDC was to have a beneficial interest in the gross proceeds of the project that included the income received from sale of lots under sale contracts, clause 26.1 provided that on completion of a sale contract GDC was to pay to LPC the "*LPC Lot Amount*" for the lot the subject of the sale contract. The LPC Lot Amount was to be determined by valuation in accordance with a detailed schedule.

LPC's Financial Statements

36 From the financial year ended 30 June 2010 LPC changed its method of accounting by treating its land as well as its cattle as trading stock. Its land was brought to account at market value of $286,045,000. Its financial statements for the year ended 30 June 2010 recorded land sales of $3,635,715. Its financial statements for the year ended 30 June 2011 recorded sales of land of $28,608,351, but in the following financial year that figure was restated as $63,907,451. Its profit and loss statement recorded "Development Costs" of $1,095,001 for the 12 months to 30 June 2010 and $131,948 in the 12 months to 30 June 2011, but in the 2012 accounts this statement was reclassified as "Development Costs and Sales Costs" in an amount of $33,631,048. LPC recorded land sales of $44,528,652 in the financial year ended 30 June 2012 with development costs and sales costs of $28,327,001. In the financial year ended 30 June 2013 LPC recorded land sales of $59,435,453 and development costs and sales costs of $39,959,552. In the year ended 30 June 2014 it recorded land sales of $101,156,513 and development and sales costs of $47,281,048. The items described as "Development Costs" and "Development Costs and Sales Costs" referred to the share of land sale proceeds payable to GDC in accordance with the Development Rights Agreement plus the land selling costs comprising conveyancing and legal costs.

37 There is a question as to whether LPC ought to have accounted for land sales as part of its trading stock. In a submission by LPC's accountant to the Australian Taxation Office LPC's accountant stated that the accounting treatment was erroneous because only GDC, and not LPC, carried on the business of land development. The question has limited significance because even if LPC carried on the business of land development, the sales were of Development Land. The question is what was the dominant use of the Farmland as it was so designated from year to year. If, as LPC contends, only minor development works were carried out on the Farmland before or, possibly, after 31 December for any tax year, so that the primary production was the dominant use of the Farmland as at 31 December for each tax

year, subject to the argument addressed below, it would not matter if LPC carried on a more substantial land development business on the other lands.

38 In any event, GDC carries on a land development business and the question of what use of land is dominant does not depend on the identity of the user. If GDC uses the Farmland for commercial or residential development, that is to be considered as a competing use in deciding whether the primary production use is dominant. It would not matter that the use is by GDC rather than LPC. Accordingly, LPC's financial statements do not take the matter further.

Was GDC Using all the Farmland for the purposes of s 10AA?

39 The first principal issue is whether at all material times, for the purposes of s 10AA(3), GDC is to be taken to have been using both the Development Land and the Farmland. If GDC is to be taken to have been using the Farmland for its land development business and that use was not confined to the physical works carried on at or about 31 December in each year on the Farmland, but should be considered as part of a use that, considered as a whole, extended across the whole of the Project Lands, then the primary production use of the Farmland, although substantial and significant in character and purpose, would not be the dominant use.

40 In *Council of the City of Parramatta v Brickworks Limited* (1972) 128 CLR 1 Gibbs J, with whose reasons relevantly to the present issue Barwick CJ, Menzies and Owen JJ agreed, said (at 22):

> "*…if the whole of the land in question was acquired for and devoted to the purpose of quarrying and brick-making, the whole may be held to have been used for that purpose although only part of it was physically used. Obviously where an expanse of land has been acquired for the purpose of quarrying it cannot, because of practical considerations, be excavated all at once, but this does not mean that the part which has not been actually dug up is not used for the purpose of quarrying. Similarly a farmer, who has acquired land for the purposes of an orchard, may be said to use the whole of it for that purpose, although only part has been planted with trees.*"

41 In the present case, for what it can be inferred are practical considerations, the whole of the Project Land is not developed at once. Like the expansion of a quarry, the development proceeds in stages. In the case of Oran Park, the land in the centre was developed first and as each year passes, more land is excavated or levelled, developed and built on in stages that move progressively (but not uniformly) away from the centre. But it is clear from the Development Agreement that it is proposed that all of the Project Land will ultimately be so developed. That is so notwithstanding that rezoning of some parts of the land will be required in order for that to occur.

42 The issue in *Council of the City of Parramatta v Brickworks Limited* was whether land acquired in 1939, after a residential district proclamation was made under s 309 of the *Local Government Act 1919* (NSW) in 1932, could be used as a brickworks either without the requirement of the council's consent, or with that consent, or whether the activity was prohibited absolutely. Before 1932 land adjacent to the land acquired in 1939 was used as a

quarry and a site for making bricks. Gibbs J said (at 20-21) that the crucial question was whether it was lawful for the respondent without any consent to extend its quarry onto the new land (viz. the land acquired after 1932) to use the new land for quarrying clay and shale and making bricks. The legislation and delegated legislation was labyrinthine. The effect of a residential district proclamation published in 1931 and 1932 was that it would have been unlawful to use the new land (acquired in 1939) as a quarry or to extend the buildings of the brickworks on the old land onto it (at 13). A new Planning Scheme Ordinance was published as a schedule to an amendment to the *Local Government Act* in 1951. The relevant planning provisions were amended and re-amended. Gibbs J identified the crucial question as follows (at 20-21):

> "*The crucial question that then falls for decision is whether under the provisions of the Planning Scheme Ordinance which was in force in respect of the subject land at least from 2nd August 1957 to 17th May 1971 it was lawful for the respondent without any consent to extend its quarry onto the new land and to use the new land for quarrying clay and shale and making bricks. This is the question upon which members of the Court of Appeal differed. The answer to it depends upon the effect of cll 32 and 33 of the Planning Scheme Ordinance which, since 2nd August 1957, have provided as follows —*
>
> *32 … an existing use of land may be continued.*
>
> *…*"

43 Clause 32 of the Planning Scheme Ordinance applied as from 27 June 1951. Gibbs J said (at 21):

> "*The appellant contended that the new land was not used for the purpose of quarrying or brick-making immediately before 27th June 1951 and that therefore cl 32 has no application in respect of the use of the new land. I would agree that the word 'use' in cl 32 means a present use; it does not include a contemplated or intended use. It is not enough to bring cl 32 into operation that land has been acquired with the intention of using it for a particular purpose in the future. On the other hand, it is not necessary, to constitute a present use of land, that there should be a physical use of all of it, or indeed of any of it*."

44 After referring to *Council of the City of Newcastle v Royal Newcastle Hospital* (1959) 100 CLR 1 Gibbs J made the observations quoted at para [40] above.

45 His Honour continued:

> "*In the present case, immediately before 27th June 1951 the respondent owned one tract of land, all of which had been acquired for the purposes of the quarry and brickworks, and all of which was devoted to those purposes. Some of the land was physically occupied by the buildings and by the brick pit which was in the process of gradual extension. It is beyond argument that some of the land was at the relevant date used for the purpose of quarrying and brick-making. In my opinion there is no justification for regarding the new land as separate from the old, or for saying that the old land was used, but the new land was not, immediately before 27th June 1951. The mere fact that an area of land comprises a number of parcels with separate titles and different histories does not mean that each parcel should be regarded separately for*

> *the purposes of cl 32. If it were otherwise there would be no justification in the present case for treating the old land as an entity; each parcel comprising the old land would have to be separately regarded. However, when cl 32 speaks of 'an existing use of land' it refers to land which from a practical point of view should be regarded as one piece of land, and not to land contained within the boundaries of one subdivision, or described in one certificate of title. It is commonplace that in Sydney land which is devoted to one purpose, and generally treated as being in fact one piece of land — whether it be the site of a commercial building or industrial enterprise or the grounds of a dwelling house — frequently comprises various parcels which remain shown on separate title deeds. There is however nothing in the provisions of the Planning Scheme Ordinance that suggests a concern with conveyancing details rather than with actual use.*" (Emphasis added.)

46 In the present case s 10AA of the *Land Tax Management Act* does not refer to land which from a practical point of view should be regarded as one piece of land. Instead, because of the *Land Tax Management Act's* relationship with the *Valuation of Land Act*, it refers to land that has been identified by the Valuer General as a separate parcel in the Register kept under the *Valuation of Land Act*. That means that in contrast to *Parramatta City Council v Brickworks Limited*, it cannot be said that because the whole of the Project Land is devoted to the purpose of residential development, that a separate parcel, namely the Farmland, although devoted to that ultimate purpose, was for that reason used for that purpose in the relevant land tax years. The fact that the Farmland is earmarked for residential development does not mean that it is all used for residential development at each land tax year.

Dominant Use Under s 10AA(3) is to be Assessed by Reference to the Subject Land

47 It does not follow that the Farmland was not used for residential land development for the years in question. In its opening submissions LPC contended that the dairy use was the dominant use of the Farmland in all tax years because it was physically and economically dominant over the non-primary production use (earthworks) of the Farmland during those tax years.

48 Section 10AA(2) provides that land that is not rural land is exempt if the primary production use of the land has a significant and substantial commercial purpose or character and is engaged in for the purpose of profit on a continuous or repetitive basis. In *Thomason v Chief Executive, Department of Lands* (1994-1995) 15 QLCR 286 at 307, *Maraya Holdings Pty Ltd v Chief Commissioner of State Revenue* [2013] NSWSC 23; (2013) 88 ATR 379 at [73] and *Vartuli v Chief Commissioner of State Revenue* [2014] NSWSC 678 at [36] it has been held that for the purpose of determining whether primary production use of land has a significant and substantial commercial purpose or character, the inquiry is not confined to the use of the land the subject of taxation. If the land the subject of taxation is only part of the lands used for primary production, the use of the other lands can be considered in order to decide whether the primary production use has a significant and substantial commercial purpose or character and is engaged in for the purpose of profit.

49 Although that is the position with respect to s 10AA(2), it was not disputed that for the purposes of s 10AA(3) the question of what is the dominant use of land is directed to how the land the subject of taxation is used. In other words, the question of dominant use under s 10AA(3) is directed to the use of the subject land, notwithstanding that under s 10AA(2) the character and purpose of the use is to be considered having regard to all of the land on which that use is carried on.

Dominant Use

50 The Chief Commissioner has not disputed that the subject land is used for primary production and that that use has a significant and substantial commercial purpose or character and is engaged in for the purposes of profit on a continuous and repetitive basis. The Farmland is used primarily for the grazing of heifers until they are ready to be impregnated or until they are ready to give birth so as to become milking cows as part of LPC's dairy operation. That dairy use unquestionably has a significant and substantial commercial character and purpose.

51 But for the purposes of the dominant use test under s 10AA(3) it is necessary to consider the scale and intensity of the primary production use on the Farmland. Relevant to, but not determinative of, that question, is the extent to which the use of the subject lands makes a financial contribution to LPC's dairy operations. It is also necessary to consider whether activities conducted on the Farmland amount to the commencement of a use of the Farmland for residential development, or whether for each land tax year residential development on the Farmland as it was defined for each land tax year, remained a contemplated future use. It is necessary to consider the nature, extent and intensity of the various uses of the land, the extent of the land used for different purposes, and the time, labour and resources spent in using the land for each purpose (*Thomason v Chief Executive, Department of Lands* at 303).

Timing

52 It is necessary to address the factual issues for each land tax year. Land tax is assessed as at 31 December in the year immediately preceding the commencement of the land tax year (*Land Tax Management Act* s 8). As I said in *Metricon Qld Pty Ltd v Chief Commissioner of State Revenue (No. 2)* [2016] NSWSC 332, where the question is whether a particular use is dominant, and where that use involves a state of affairs that exists as a continuum, experience both before and after 31 December that is part of that continuum can throw light on the position as it existed as at that date (at [132]-[133]). In *Leda Manorstead Pty Ltd v Chief Commissioner of State Revenue* (2010) 79 NSWLR 724; [2010] NSWSC 867, a case where there was a continuum of use both for primary production and residential development through earthworks construction, Gzell J considered that six months before and after the taxing date was a reasonable period of inquiry that allowed consideration of financial statements pertaining to those uses (at [4]). Nonetheless, liability to land tax is imposed and a claimed entitlement to exemption is to be determined as at midnight on 31 December before the relevant land tax year.

Primary Production Activities

53 In 1963 LPC acquired 842 hectares of land at Bringelly that formed what is now referred to as the "Base Farm" at Bringelly. This is the principal location of the dairy business conducted by LPC. It is where the cows are milked. Since 1963 LPC made further acquisitions of land, including the acquisition in 1984 of 665.9 hectares at Northern Road, Oran Park. Other substantial acquisitions were made between March 1980 and October 1997 at places known as Greenways, Pondicherry, Romney and Theresa Park.

54 Mr Michael Perich, a director of LPC, deposed that at the end of each month during the course of the year he undertook, with the assistance of herd technicians employed by LPC, a stocktake which identified the type and number of cattle that were present on land owned by LPC. He provided a spreadsheet summary of such cattle numbers from July 2010 to December 2014. He deposed that it was LPC's practice to rotate cattle regularly between paddocks on Oran Park, Pondicherry, Greenways and Romney. In the spreadsheet summary Mr Perich provided the cattle listed as being at "Greenways/OP" in fact refer to cattle on land that comprised Oran Park, Pondicherry, Greenways and Romney. He deposed that a dairy on Greenways was decommissioned in January 2010. He deposed that:

> "*Up until February 2012 beef cows and calves were grazed on the land at Oran Park and this line entry in the spreadsheet was kept to record the number of beef cows and calves grazed only on the land at Oran Park.*"

55 Mr Perich said this practice ceased after February 2012 and said that the land the subject of these proceedings was included within the land described in the column to the left of his spreadsheet as "Greenways/OP". (Para 19). He also deposed that the spreadsheet summaries he exhibited to his affidavit confirmed that since July 2010 anywhere between approximately 500 and approximately 900 cattle had been kept on the land at "Greenways/OP" each month. He did note that that description, that is, "Greenways/OP" did not assist in identifying where on the land at Oran Park, Pondicherry, Greenways or Romney the cows were kept and were grazing each month.

56 In a later affidavit made on 15 April 2016 Mr Michael Perich deposed that:

> "*2. I understand that the Defendant has caused various subpoenas to be issued concerning the extent and cost of civil works that may have been conducted on the land the subject of these proceedings at Oran Park during the 2011 to 2014 tax years.*
>
> *3. I respond to any such evidence derived from the subpoenaed documents by giving evidence in this affidavit about the financial measure and value to the Plaintiff of the use of Oran Park for dairy farming and other primary production activities.*
>
> *…*
>
> *5. I refer to paragraph 21 of my affidavit dated 23 July 2015 which confirms that since July 2010, at any one time, there was anywhere between approximately 500 and approximately 900 cattle maintained on the land at Oran Park for the purpose of selling their natural increase or bodily produce. At*

paragraph 48 of my affidavit dated 23 July 2015 I confirm that the majority of the cattle are taken away from Base Farm and maintained on Oran Park for the purpose of growing for a period of between twelve (12) months to eighteen (18) months."

57 He then deposed that having reviewed documents recording the movement of cows to and from "*the Oran Park land*" between July 2010 and June 2014:

> "*17. … I calculate that for the 2011 tax year 924 cows were moved from the Oran Park land to Base Farm. For the 2013 tax year 1079 cows were moved from the Oran Park land to Base Farm. For the 2014 tax year 933 cows were moved from the Oran Park land to Base Farm.*
>
> *18. The cows are only moved from the Oran Park land to Base Farm when they are pregnant or ready to be milked. The cows are not ready to be milked until generally between twenty (20) months of age and thirty (30) months of age.*"

58 This affidavit was misleading. Mr Perich admitted under cross-examination that his estimates for the number of cows on what he called the "Oran Park land" included not only the cattle on what has been called the Farmland at Oran Park that is the subject of these proceedings, but also cattle in paddocks on land known as Pondicherry, Greenways and Romney. Pondicherry comprises 140.8 hectares and lies adjacent to and to the north of Oran Park. Greenways comprises 443 hectares and lies adjacent to and to the north of Pondicherry. Romney comprises 85.47 hectares and lies to the north of and adjacent to Greenways.

59 LPC produced four kinds of stock records. It produced returns lodged with the NSW Livestock Health and Pest Authority, later called NSW Local Land Services, being annual returns of land and stock as at 30 June 2011 to 30 June 2014. These returns stated the number of cattle said to be on the lands as at 30 June for each year. Separate returns were lodged for holdings called "Oran Park Pondicherry", Greenways and Romney amongst other places. According to the annual returns as at 30 June 2011 the holding named "Oran Park Pondicherry" consisted of 600 hectares on which 120 beef cattle of six months of age or older and 530 dairy cattle of six months of age or older were held. Greenways was said to be of 340 hectares in area on which 220 dairy cattle of six months of age or older were held as at 30 June 2011. Romney was said to have a pastures area of 174 hectares and was said to hold 320 dairy cattle of six months of age or older as at 30 June 2011.

60 The stated areas of these lands do not correlate with the evidence given by Mr Perich as to the areas of Greenways, Pondicherry and Romney.

61 LPC adduced no evidence of annual returns for 30 June 2010 that could be relevant to the 2011 land tax year.

62 Another form of record produced by LPC was what Mr Perich called a stocktake which he said identified the type and number of cattle that were present on land owned by LPC. He said that he placed the details obtained from each stocktake in a spreadsheet summary and produced spreadsheet summaries for every few months, and in later periods, every month, from July

2010 to December 2014. The stocktakes were said to be for various localities that included localities described as “Farm Base”, “Greenway”, “Greenways/OP” and “Oran Park”. Mr Perich accepted that the areas called Greenway, Greenways/OP and Oran Park covered not just the Farmland on Oran Park, but the areas known as Oran Park, Pondicherry, Greenways and Romney.

63 Nor were the figures shown for “Oran Park” the totality of the cattle on Oran Park. As at October 2010, according to the stocktake, there were 909 heifers and 85 beef cows and calves on the areas called Greenway and Oran Park which could have been on any or all of the four areas. For February 2011, according to the stocktake, there were 473 heifers and 85 beef cattle on those areas. According to the spreadsheet said to have been prepared from the stocktakes, between October 2010 and February 2012 the number of beef cattle for Oran Park remained unchanged.

64 In his affidavit of 23 July 2015 Mr Perich said that until February 2012 beef cows and calves were grazed on the land at Oran Park but that practice ceased after February 2012. He said that he had simply not removed a reference to beef cattle in the spreadsheet. In cross-examination he retracted that evidence when taken to other lines in the spreadsheet after March 2012 that referred to beef cows or beef cows and calves at Greenways/OP. This reflected the unreliability of Mr Perich’s evidence and his apparent lack of familiarity with the records attached to his affidavit.

65 A third set of records produced by Mr Perich was an Excel spreadsheet said to have been prepared from LPC’s dairy management software which showed the movement of individual cows. Mr Perich deposed that all new calves are born at Base Farm and are kept there for six to 12 months after their birth. Between six and 12 months of age, the calves are taken from Base Farm to other land owned by LPC where they are held for between 12-18 months to grow. He said that generally, when the calves leave Base Farm, they are approximately 300 kilograms in weight, and when they return to Base Farm they are anywhere between approximately 600-650 kilograms in weight. He deposed that the majority of those calves were taken to the land “at Oran Park” for this purpose. This meant any of the land at the Farmland at Oran Park, Pondicherry, Greenways or Romney.

66 Mr Perich said that when the heifers are placed on Oran Park, or other land owned by LPC, they are impregnated by way of artificial insemination and the impregnated cows are brought back to Base Farm approximately six to 10 weeks before being due to give birth.

67 The spreadsheet was said to show when individual cows were moved. However, the spreadsheet did not identify where, on the land that Mr Perich called “Oran Park”, the calves were situated. No analysis was undertaken of the 154 pages of the spreadsheet to attempt to show cattle numbers on the Farmland from time to time. An understanding of the spreadsheet is not helped by the fact that in his affidavit Mr Perich misdescribed columns in the spreadsheet

saying that certain numbers referred to Base Farm which he then corrected orally to say that they meant Greenways/Oran Park.

68 Another class of records produced by LPC was a monthly printout of a computer software program of input data with respect to LPC's dairy cattle (Ex MRP 32). In cross-examination Mr Perich accepted that this spreadsheet also did not show where cattle were located as between Oran Park, Pondicherry, Romney or Greenways.

69 Mr Perich was unable to explain discrepancies between the stock returns lodged with the Livestock Health and Pest Authority and the monthly stocktake returns.

70 Whilst I thought Mr Michael Perich to be an honest witness, having regard to his lack of attention to detail, I do not think he is a reliable witness.

71 In a later affidavit of 15 April 2016 Mr Perich sought to attribute a value to the advantage that LPC derives as a result of grazing cattle on the Farmland at Oran Park. He referred to his earlier evidence that from July 2010 there were anywhere between approximately 500 and approximately 900 cattle kept on the land at "Greenways/OP" each month. In that evidence he had noted that the spreadsheets on which he relied for that evidence did not assist in identifying where on the land at Oran Park, Pondicherry, Greenways or Romney the cows were kept and were grazing each month.

72 In his later affidavit he referred only to cattle numbers on the Oran Park land. Although he did not expressly say so in his later affidavit, this was a reference to cattle on any of the four areas of the land at Oran Park or the areas adjacent to Oran Park.

73 Mr Perich said that the average price for a six-month-old heifer weighing 200 kilograms in the 2011 financial year was $700, whereas the average price for a 20-month-old heifer weighing 500 kilograms in the 2011 financial year was $1,800. He argued that the value to LPC for the 2011 tax year of grazing 924 head of cattle was $1,016,400 (924 x $1,100). He made similar calculations for the 2012, 2013 and 2014 tax years.

74 This approach is flawed. First, it is not known how many of the 924 "movements" in the 2011 tax year related to movements of cattle from Base Farm to the Farmland, or from the Farmland to Base Farm, as distinct from movements between other land of LPC and Base Farm. Secondly, Mr Perich's evidence was that generally when calves left Base Farm they were approximately 300 kilograms in weight, and when they were returned to Base Farm they were anywhere between approximately 600-650 kilograms in weight. That was his evidence in paragraph 48 of his first affidavit. The prices he provided in his affidavit of 15 April 2016 were not based on these weights.

75 Thirdly, the dairy cattle, as distinct from beef cattle, were not held to be sold. Dairy cattle are not ready to be milked until generally between 20 months of age and 30 months of age. Most of the 500 to approximately 900 cattle that graze from time to time on the land at Oran Park, Pondicherry, Greenways and Romney were dairy cattle. Accordingly, the suggested value to

LPC of its herd grazing on the Farmland at Oran Park cannot be quantified in the first way proposed by Mr Perich. The numbers of cattle grazing on the Farmland are not established, and the suggested increase in values of the average prices for heifers weighing 200 kilograms or 500 kilograms are not reflective of the actual values of the heifers to LPC.

76 The suggested value to LPC from the increases in value of the heifers would also need to take account of the cost of grazing the heifers on the Farmland. Mr Perich deposed that the cost of having cattle graze on the land was $100,000 per year. He said that that cost of $100,000 was based on the cost of an employee who worked on the site mustering cattle and repairing fences. He said that the $100,000 was that employee's salary plus on-costs, including workers' compensation, superannuation and payroll tax and included an allocation for motor vehicle expenses. In cross-examination Mr Perich agreed that that employee was not employed solely on the Farmland at Oran Park and the cost should have been spread over the four properties. This was contrary to his affidavit in which he said that the estimate of cost of $100,000 was "*… mainly labour costs, of grazing the cattle on our own land being the land the subject of these proceedings*" (para 25). In one sense the correction was against LPC's interests in that the reduction of costs increased Mr Perich's assessment of value derived from the cattle operation. In other respects, however, the correction is adverse to LPC in that it indicates a lower intensity or scale of resources devoted to the cattle operations on the Farmland.

77 This assessment ignored other costs of maintaining cattle on the Farmland, such as feed.

78 A second way in which Mr Perich estimated the value to LPC of the cattle operations on the Farmland was by applying what he said was the current average commercial cost of agisting cattle that was $1.87 per day per head of cattle. This was a rate that was being paid to the plaintiff by a company called Australian Fresh Milk Pty Ltd for the agistment of its cattle on land owned by LPC at Bringelly. He said that that rate had not varied over the previous five years. He said that were the company required to agist between 500-900 head of cattle then this would cost it approximately $341,275 to $614,295 each year.

79 In principle, agistment costs would be a sound basis for assessing the value to LPC of the cattle operations on the Farmland. In assessing that value there remains the problem that LPC cannot demonstrate how many of the cattle either on average or from time to time were grazed on the Farmland. Mr Perich accepted that he could not attribute or allocate or locate a particular number of cattle or dairy cows or heifers to any one of Oran Park, Pondicherry, Greenways or Romney. He also agreed that "[trying] *to do it by relative surface areas, that wouldn't necessarily work either, would it?*". There was no evidence as to how long, on average, cattle were grazed on each of the four areas designated as Oran Park, Pondicherry, Greenways and Romney. Mr Perich said that cattle were moved between those areas and Base Farm according to feed requirements. He did not give any evidence as to whether the quality of the feed on the four areas was the same, similar or markedly different.

80 One possible approach is to recalculate Mr Perich's figures adopting the number of cattle recorded for each of the four areas in the annual land and stock returns as if they were representative for the year as a whole. But there is no evidence that those returns that represent a number of stock as at 30 June in each year do fairly represent the average number of cattle on each of the relevant properties throughout the year, or, as at 31 December. Moreover, the stock returns lodged with the LHPA record only the combined number of cattle on Pondicherry and Oran Park and some further apportioning would be necessary if the land and stock returns were to be used to attempt to assess the average numbers of cattle on Oran Park for each land tax year. There is no proper basis for making that further apportionment, unless it were done purely by area. That has not been shown to be appropriate.

81 If cattle numbers on the Oran Park Farmland were estimated applying a simple apportionment based on land area, then the land area of the Oran Park Farmland as a proportion of the Farmland on Oran Park, Pondicherry, Greenways and Romney, for each land tax year, was 43.16 per cent in 2011, 39.48 per cent in 2012, 37.76 per cent in 2013, and 33.88 per cent in 2014. Using Mr Perich's evidence of agistment costs, and using his estimate of $100,000 as the cost of maintaining the cattle to be apportioned over each of the four areas, on the basis of his evidence, the total number of cattle across the four areas numbered 924 in the 2011 tax year, 900 (being his estimate) in the 2012 tax year, 1,079 in the 2013 tax year and 933 in the 2014 tax year. The value to LPC of the cattle grazing on the Oran Park land on Mr Perich's agistment values was $229,051 in 2011, $203,708 in 2012, $240,331 in 2013, and $181,874 in 2014. (See Appendix A.)

82 As noted above Mr Perich also estimated that during the year a reasonable estimate of cattle numbers on all four parcels of land was between 500 and 900 head of cattle. Using these cattle figures and on the assumption (not supported by the evidence) that the number of cattle grazed on the Oran Park Farmland could be estimated using the proportions of land area between the Oran Park Farmland, Pondicherry, Greenways and Romney, then the value to LPC of the cattle use of the Oran Park Farmland based on agistment costs could be estimated in the range of $104,134-$221,942 in 2011, $95,625-$103,695 in 2012, $91,105-194,198 in 2013, and $81,744-$174,243 in 2014. (See Appendix B.)

83 The agistment rate that Mr Perich applied of $1.87 per day per head of cattle was based on an amount being paid to LPC by Australian Fresh Milk Pty Ltd. That was not a fee agreed between parties negotiating at arm's length. Australian Fresh Milk Pty Ltd is a company the majority of whose directors are members of the Perich family. The Perich family and a family by the name of Moxey through their respective companies each own 50 per cent of the company. But Mr Perich said that the $1.87 agistment price was a figure that was discussed with the Moxeys and was based on calculations on feed price. I accept it as being a reasonable agistment price.

84 Mr Perich propounded a third and additional basis for determining the value to LPC of the use of the Farmland for primary production activities that did not depend upon cattle grazing, but

depended on the growing of crops on the Farmland. He deposed that the cattle on the land at Oran Park are fed by either grazing upon pasture, including improved pasture, on the land, or by being fed from crops that are sown on the land.

85 In the 2011-2012 and 2012-2013 tax years there were nine paddocks on the Farmland and in the 2013-2014 tax year there were seven such paddocks. In each of the four tax years, three of the paddocks (a paddock being up to 89 hectares in area) were sown with crops of oats and rye, or in one case oversown ryegrass. The other paddocks had natural pasture. Mr Perich deposed that when an improved crop was grown on the land, once the crop was fully grown, cattle initially grazed on the paddocks. When there was extra growth, silage was made of the pasture. The pasture would be cut and left on the ground for one to two days, then raked and chopped before being placed on a truck for transport to silage pits on land at Pondicherry or at Base Farm. There were four silage pits at Pondicherry, each having a capacity of about 10,000 tonnes and five silage pits at Base Farm with a capacity of about 30,000 tonnes. This silage would then be used as feed in LPC's wider cattle operation.

86 Mr Perich estimated the savings LPC might be said to have made by using its own land for growing crops to maintain its dairy cows, both those that grazed on the Farmland at Oran Park and those that benefited from the silage produced from the Oran Park Farmland that was used as fodder in its wider operations.

87 The starting point for Mr Perich's estimate was what it would cost to purchase feed for the cows. He said that the cost to obtain Heifer Feed would be $366 per tonne of dry matter (TDM) and the cost of feeding the cows would be $25 (TDM). Mr Perich said that he got that figure from a feed broker who gave him a price on feed for heifers. He was referring to a price provided to him as the price for Heifer Pellet in February 2014. The price delivered on a "dry matter" basis would be $366 plus GST. There was no evidence as to what that price would have been in earlier years.

88 Based on what Mr Perich called a "Feed Value" of $391 per TDM, he then calculated the cost to LPC of producing the pasture and crops on the Farmland. I accept the detail of his estimation of those costs. It involved determining the costs of sowing, spraying, fertilising the oats and rye, and oversown ryegrass, as well as, in some cases, the costs of fertilising natural pasture to produce improved natural pasture. Mr Perich contended that by growing crops on the land at Oran Park rather than by buying feed for its heifers, it saved $975,720 in the 2011 tax year, $893,839 in the 2012 tax year, $837,439 in the 2013 tax year, and $811,064 in the 2014 tax year.

89 Except perhaps in times of drought, every cattle farmer will grow feed on which the cattle graze. I do not accept that a useful indicator of the scale or intensity of the farming operation is the difference between what it would cost the farmer to buy feed for the cattle and the cost of producing pasture or crops to feed the cattle. Producing feed is an essential component of a cattle-farming business. In my view, the demonstration that by LPC's producing its own feed it

made a substantial saving from the position in which it would have been had it had to buy feed, says nothing about the character, scale or intensity of the farming operation.

90 Nonetheless, the cost to LPC of producing feed for cattle that grazed on the Farmland is an indication of the scale of the cattle business on the Farmland, although it was not presented as such. Mr Perich calculated the costs of growing pastures and crops for both grazing and silage to be:

Tax Year	
2011	$145,306
2012	$191,325
2013	$191,325
2014	$132,462

91 The quantities of feed produced in tonnes of dry matter for grazing and silage was estimated to be as follows:

Tax Year	**Grazing TDM**	**Silage TDM**
2011	2,236	1,750
2012	2,026	2,078
2013	2,026	1,678
2014	1,808	1,678

92 When silage is cut from the land it ordinarily comprises 65 per cent moisture and 35 per cent dry matter.

93 I accept Mr Perich's assessment of the quantity of dry matter produced as silage.

94 The production of silage to produce feed for other cattle in LPC's business raises a different question. The Chief Commissioner submitted that this was not a primary production use of the land within the meaning of s 10AA(3). Clearly, it did not fall within s 10AA(3)(a) because the use of the land for cultivation to produce such feed was not for the purpose of selling the produce of the cultivation, but rather for the purpose of using it. Nonetheless, I accept LPC's

submission that that use fell within s 10AA(3)(b) because such feed was used for the purpose of the maintenance of animals within the meaning of s 10AA(3)(b). That is to say, the Oran Park Farmland was used for primary production by the production of such feed because it was used for the maintenance of animals, even though those animals were not located on the land.

95 Although he did not explain his calculation in his affidavit or otherwise in his evidence, it is apparent from Mr Perich's schedule that he attributed a value of $141 per TDM for silage. In the 2011 tax year he attributed a value of $391 per TDM for pasture and crops used for grazing on the Oran Park Farmland and $141 per TDM for the pasture and crops used as silage. Thus, in relation to the South Creek paddock, he said that there was 534 TDM used for grazing and 534 TDM for silage to a total value of $284,088. For the Drive Through paddock, he said 480 TDM were produced for grazing and 640 TDM for silage to a total value of $277,920 and for Wallys there were 360 TDM produced for grazing and 576 TDM for silage for a total value of $221,976. As indicated above he attributed a value of $391 for the feed value for heifer costs and feeding. Although not explained, in his arithmetic he applied a value of $141 per tonne for silage.

96 According to Mr Perich's schedule, precisely the same amount of Total Dry Matter was produced from the South Creek paddock for both grazing and silage (exactly 50 per cent for each) in each of the four tax years. According to him, precisely the same amount of Total Dry Matter was produced from the Drive Through paddock and the South Wally Paddock in the 2012, 2013 and 2014 tax years for both grazing and silage as was produced by the 2011 tax year.

97 If Mr Perich's estimates are accepted, the value of the silage produced at $141 per tonne of dry matter had a value of $246,750 in the 2011 tax year, $292,998 in the 2012 tax year, $236,598 in the 2013 tax year, and again $236,598 in the 2014 tax year.

98 Mr Perich's estimates are just that. No record was produced of the actual quantity of feed produced for silage or for grazing. Mr Perich estimated the Total Dry Matter per hectare for each of the paddocks ranging between two and six TDM per hectare. This explains the consistency of the estimates. However, he gave no explanation of how he determined how much feed was used for grazing and how much for silage from each paddock. Nor did he say how he arrived at what I deduce to be his value of $141 per TDM for silage. He was not cross-examined on these matters. However, his affidavit was served very late; only two and a half weeks before the commencement of the hearing. It was objected to, but I allowed it to be read after being amplified in oral evidence in chief. The explanation for the late service of the affidavit was that it was made in response to subpoenas issued by the Chief Commissioner concerning the extent and cost of civil works that might have been conducted on the Farmland during the 2011-2014 tax years and as a result of an affidavit served by the Chief Commissioner on 25 February 2016 going to those matters.

99 It should not have been necessary for the Chief Commissioner to have served those subpoenas and to have adduced details of the evidence on the question of the extent and cost of civil works conducted on or relating to the Farmland in question. In land tax cases such as this, all of the relevant evidence is known to the taxpayer, or is accessible to the taxpayer through its consultants or contractors. The onus is on the taxpayer to establish its case. The taxpayer is expected to put forward its position frankly, warts and all.

100 Not only was Mr Michael Perich's affidavit served late, but it failed to elucidate many of the assumptions in the schedule to the affidavit. In the circumstances in which the affidavit was served I do not consider that any adverse inference should be drawn against the Chief Commissioner arising from his failure to cross-examine in relation to those concealed assumptions.

101 LPC is entitled to rely upon the grazing of cattle on the land and the production of crops or pasture that are used for the maintenance of animals in the rest of its dairy operation. For the reasons above, LPC has not established either in detail or as an approximation how many cattle have grazed on the subject Farmland in the tax years in question, nor how much additional feed was produced for the benefit of the rest of its cattle operation.

102 Having said that, it is not in issue that to whatever extent it used the Farmland for primary production, that use was a significant and substantial commercial use. Accordingly, it would be the dominant use unless there was some other use or uses of the Farmland that means that the primary production use was not dominant. (In this case no question arises as to the non-use of land.) However, where a substantial competing use arises, or substantial competing uses arise, in any land tax year, in assessing whether the primary production use is dominant, LPC's failure to adduce persuasive evidence of the extent of its primary production use of the Farmland is significant.

Residential or Commercial Development Use: 2011 Land Tax Year

103 In its Appeal Statement in proceeding 2015/35829 LPC alleged that during the period relevant to the 2011 land tax year:

> "*12. … earthworks were carried out on a small part of Parcel 1 to provide landfill for what is now the site of the Oran Park sales office.*
>
> *Particulars*
>
> *a. Area of earthworks: Borrow pit area 4.15 ha*
>
> *Fill area 0.62 ha*
>
> *Top soil stockpile 0.83 ha*
>
> *b. Time taken: 40 days*
>
> *c. Cost: $116,000.00*"

104 "Parcel 1" was the land called "Farmland" for the 2011 land tax year consisting of 508.18 hectares.

105 In its Appeal Statement LPC alleged that apart from those earthworks, no development works occurred on Parcel 1 or Parcel 5 (being the Farmland comprising 436.68 hectares for the 2012 tax year).

106 Consistently with the inaccuracy of its evidence in relation to its primary production activities, LPC resiled from its contention as to the extent and costs of the development works which it admitted had occurred relevant to the 2011 land tax year. Mr Michael Owens was the General Manager of GDC. In his affidavit of 22 July 2015 he re-estimated the cost of the earthworks referred to at para 12 of LPC's Appeal Statement as costing $229,655, or almost double the cost asserted by LPC in its Appeal Statement. These earthworks involved the use of the Farmland for the purpose of the residential or commercial development conducted by GDC on the Development Land.

107 At all times the Farmland was earmarked for residential development. Where there is a comparison between GDC's use of the surrounding lands for residential and commercial development, and LPC's use of the Farmland for primary production, GDC's use is clearly dominant. For example, LPC's revenue from the entirety of its dairy division in the financial years ended 30 June 2011 to 30 June 2014 ranged between $14.6 million and $17.3 million. GDC's revenues were multiples of that.

108 The earthworks involved the excavation of a borrow pit area of 4.15 hectares, the construction of a fill area of 0.62 hectares and a topsoil stockpile of 0.83 hectares. The quantity of the fill was approximately 4,300 cubic metres and there was approximately 8,000 cubic metres of topsoil stockpile. In his affidavit of 22 July 2015 Mr Owens deposed that other minor earthworks also seemed to have taken place on the Farmland at times relevant to the 2011 tax year. The works seemed to have been in the nature of a spillover of batters and feathering of levels with respect to a car park that was to be constructed on the adjacent Development Land. He estimated that the volume of earthworks involved was in the order of 3,400 cubic metres. In a later affidavit, Mr Owens accepted that there were additional earthworks not previously identified that had occurred in about September 2010 involving using an area of approximately 600m² for the purpose of the temporary testing of recycled material for roadbase. He estimated that approximately one hectare of Farmland was disturbed for this use. He estimated that the cost of those works was about $12,500.

109 Hence, on the plaintiff's evidence the cost of the earthworks that were undertaken over a period of about 40-70 days from September 2010 was in the order of $242,000. The plaintiff accepted that this work was relevant to the assessment of a competing use of the Farmland as at 31 December 2010 for the purposes of the 2011 tax year. That concession was well-based.

Consultant Activity: 2011 Land Tax Year

110 In *Metricon (No. 2)* I said at [73] that a developer might use land for the purpose of obtaining necessary approvals, such as by engaging surveyors to go onto the land to plot its boundaries, or drillers to dig holes to ascertain subsurface conditions, to the extent that the work of such

consultants involved a physical use of the land. In that case I concluded that the only current use of the lands in question for residential development was to the limited extent that the lands were physically being used for the carrying out of preliminary activities necessary for the obtaining of requisite approvals for future residential development (at [125]). I noted that it was there admitted, and I would in any event have concluded, that that use of the land for obtaining requisite approvals did not have a character or intensity that meant that the primary production use of the lands in that case was not dominant.

111 In the present case, LPC takes issue with the view I expressed in *Metricon (No. 2)* that physical activities on the land by consultants for the purposes of obtaining approvals for a contemplated future use could itself be a current use of the land to be considered in determining whether the primary production use was dominant.

112 LPC submitted by reference to *Chamwell Pty Ltd v Strathfield Council* [2007] NSWLEC 114 that in s 10AA(3) the determination of whether a primary production use was dominant involved a comparison with other uses that could be characterised as a use for the purposes of planning law where "use" describes the character which is imparted to land as being the ultimate purpose or end which the land is to serve (at [27]). In *Chamwell* a proposed development included land on the part of a development site, the zoning of which prohibited the use of land for a supermarket. Part of the development site included land within that zone that was proposed to be used for the construction of a road that would provide access to a proposed supermarket. "Roads" was a permissible purpose. Preston CJ LEC held that the proposed development in its current form was not capable of approval because the proposed road would have been for the purpose of the supermarket. A retail development such as a supermarket could only be achieved by the physical acts of constructing not only the space on which the supermarket was to stand, but the space for associated activities, including the access road.

113 In my view these matters are remote from the application of s 10AA. Section 10AA is not part of a planning law. The question under s 10AA(3) is not whether a particular use falls under one category or another, but whether a primary production use can be seen to be dominant when compared with other competing uses. I see no reason that the other competing uses which might be weighed in the scales should be confined by any such principle applicable to planning law.

114 In *Leda Manorstead Pty Ltd v Chief Commissioner of State Revenue* [2011] NSWCA 366; (2011) 85 ATR 775 Allsop P (with whom Campbell and Whealy JJA agreed) said (at [24]) that s 10AA was not directed to activity on the land that is preliminary to the undertaking of a future use, and that there must be a present use for which the land is being used. That is not to deny that if the activities amount to a present use of the land, that that present use cannot be considered as a competing use for the purposes of s 10AA(3).

115 Physical acts by which land is made to serve some purpose is sufficient to constitute a "use" of the land (*Council of the City of Newcastle v Royal Newcastle Hospital* (1956-7) 96 CLR 493 at

508). I adhere to my opinion in *Metricon (No. 2*) that the physical use of land by consultants for the purpose of obtaining future approvals for residential development can itself be a relevant competing use for the purpose of s 10AA(3). In the present case, unlike *Metricon (No. 2)*, the intensity and scale of that use does weigh against the primary production use in the 2011 land tax year, being the dominant use.

116 The Chief Commissioner pointed to various activities that he said involved the use of the Farmland, as it existed for each land tax year, by consultants for the carrying out of tests either for the purposes of obtaining requisite consents or to satisfy conditions of approvals.

117 Mr Owens disputed that all of the activity thus identified by the Chief Commissioner took place on Farmland, as distinct from Development Land. A difficulty with Mr Owens' position in this respect is that he took the view that if GDC exercised its right under the Development Rights Agreement by giving notice of a drawdown of Farmland to become Development Land, then, *ipso facto*, the land so drawn down ceased to be Farmland. He explained the matter further in response to a question I asked as follows:

> "*Q. Each time there's a draw down of land under the development rights agreement, does there have to be a further sub-division?*
>
> *A. Not technically, no, your Honour, but there is a process for us to try and, through the development process, to define that by cadastral boundaries and ensure that process by, we try to do it by the end of the tax year, 31 December of each year and, and the reason for that is, is to try and make it as clear as we can about which is formally farm land and park, and farm land and development land, and the reason for that is that it makes it easier for the likes of authorities such as the Valuer General's office and the council office and, to correlate their records with what we do. So, so that's, that's our intention, on top of that we also fence the property to, to* [delineate] *between farm land and development lands.*"

118 But what comprises the relevant land depends upon the relevant property identifier that comprises the Valuer General's identification of the relevant land that is used for the assessment of land tax as at 31 December. It is not clear to what extent Mr Owens' mistake as to the criteria for distinguishing Farmland from Development Land affected his opinion in assessing the extent of use of Farmland by consultants.

119 The earliest activity on affected land identified in the Chief Commissioner's tender bundle was the installation of two groundwater wells by Douglas Partners Pty Ltd on 31 August 2010 for the purpose of assessing the impact of leachate from land filling on another area on the local groundwater system. Mr Owens accepted that the groundwater assessment took place on Farmland. The cost of the work, including laboratory work and reporting, was $10,000. Thirty per cent of the costs were for field work. Further groundwater sampling was conducted by Douglas Partners on the Farmland on 19 September 2010.

120 Between 20 and 29 September 2010 survey work was carried out involving fieldwork of 19 hours described as "static control", and the pegging of a riparian corridor on stage 4. Mr Owens

said that this work was carried out on Development Land and not on Farmland, but he did not explain his reasons for that, and having regard to his understanding of what constituted Development Land, I am not so satisfied. The onus of proof of such a matter is on LPC.

121 The same observation applies to further survey work carried out on 8 November 2010 involving two hours of field work.

122 A vegetation management plan prepared for GDC and Landcom dated December 2010 by Eco Logical Australia Pty Ltd concerned planning for the restoration and stabilisation of a new channel named Julia Creek. The plan aimed at controlling water speed in the creek and providing a stable bed and banks. Preliminary works included soil preparation, seed collection and species substitution. Mr Owens noted that no physical work would have been carried out on the land in preparation of the plan, but the work sometimes included site inspections to verify site conditions.

123 On 10 January 2011 Eco Logical provided a flora and fauna assessment following a site visit on 21 December 2010 to document flora and fauna species to assess potential habitat for threatened species. I accept Mr Owens' evidence that the assessment was of native vegetation along a road reserve that fell outside the Farmland.

124 Douglas Partners conducted a further site visit on 11 January 2011. They noted that a detailed inspection would be carried out in the future to identify whether possible filling areas were present and, should possible filling areas be identified, for the excavation of additional test pits.

125 The same report of 11 January 2011 noted that at the date of inspection the eastern boundary of tranche 8 had been stripped of topsoil in preparation of a trial pavement. Mr Owens accepted that this work occurred on Farmland. He estimated the cost of the undertaking to be in the order of $1,000 of which he said $300 would have represented the cost of physical work on site.

126 Similar on-site work by consultants was undertaken from January 2011 up to June 2011. I think such later work can be considered in an assessment of the use of the land as at 31 December 2010 because the work of such consultants, although consisting of a number of individual tasks, can be assessed as a state of affairs that exists as a continuum. In such cases, to determine whether the primary production use was dominant, an examination is required of the state of affairs as they exist as a continuum, and hence regard can be had to facts spanning some months before and after 31 December (*Metricon (No. 2)* at [132]-[133]).

127 Thirty test pits were excavated on 25 January 2011 over a 30-hectare site on the Farmland.

128 Mr Owens accepted that the excavation of the 30 test pits occurred on the Farmland. It involved a contamination assessment of three areas of land designated as tranche 7, tranche 8 and Anthony Reserve at a cost of $30,000 of which he attributed $9,000 as the cost of the physical work on the site.

129 On 8 February 2011 Eco Logical provided a report called an Ecological and Riparian Assessment relating to a sewer pump station. This involved a one-hour field validation survey. Mr Owens said that this involved no physical work being carried out on the land, but the plan for future work may have included a site inspection to verify site conditions.

130 In June 2011 Douglas Partners provided a report on the results of a salinity investigation and provided a salinity management plan for the areas known as tranches 7, 8 and Anthony Reserve, being a combined area of approximately 30 hectares. The investigation comprised the excavation of test pits, followed by laboratory testing of selected samples, engineering analysis and reporting. The field work commenced on or about 15 February 2011 and involved the excavation of 90 test pits to a depth of up to three metres and then the reinstatement of the test pits to surface level after the samples had been collected. The cost of this work was $40,000 of which Mr Owens attributed $12,000 as being the cost of the physical work on site. He accepted that this work took place on the Farmland.

131 In March 2011 Douglas Partners excavated 24 strip trenches in relation to a filling located in an area known as tranche 6. It was an area that had been identified as an area of environmental concern on the basis that it had been subject to landfilling. The purpose of the investigation was to determine the lateral extent of the filling at the site. The work supplemented other work conducted by Douglas Partners, including the groundwater assessment referred to above. The scope of the work involved strip trenching across lightly filled boundaries to determine the extent of the filling, the collection of samples and the analysis of the collected samples for contaminants. Twenty-four strip trenches were excavated. Mr Owens accepted that the work was carried out on Farmland. He estimated the cost to be $20,000 and estimated that 30 per cent of this cost would have related to the physical work on the site.

132 In April 2011 Douglas Partners carried out a further ground water and surface water sampling assessment in respect of an area known as tranche 2. Mr Owens accepted that this took place on the Farmland and estimated its cost at $5,000 of which he said 30 per cent would have related to the cost of carrying out the physical work on the site.

133 A further ground water assessment was undertaken by Douglas Partners on 4 May 2011 that Mr Owens accepted took place on Farmland. This involved the installation of six ground water monitoring wells. He estimated the cost at $10,000 and allocated 30 per cent of that cost to the physical work on the site.

134 A substantial contamination assessment was conducted by Douglas Partners in May 2011 in respect of areas called tranche 4 south, tranche 5 and tranche 6 involving 318 sampling locations. Mr Owens estimated the cost of that work to be $180,000, but he estimated that only 25 per cent of the sampling locations were located on the Farmland with the balance being on Development Land. Hence he estimated the cost of the work insofar as it related to work on Farmland as being $45,000 of which he said 30 per cent was the cost of the physical work done on the site.

135 Mr Owens estimated the cost to GDC of the work done by Douglas Partners in the year ended 30 June 2011, referable to work on the Farmland, as being $161,000. He said that 30 per cent of this cost related to the cost of physical work done on the site. He described the estimated cost as being the "value for Farmland".

136 I do not accept that description. I infer that the value to GDC of the work conducted by Douglas Partners that involved the physical use of the Farmland as being substantially more than the cost of the work as estimated by Mr Owens. The work was essential for the progress of GDC's residential and commercial development of the Oran Park precinct.

137 It was unclear how much of the work related to work done to obtain approval for future residential development consents. At least some part of the work was required in order to monitor the effects of work that had already been carried out as a requirement of a condition of a consent previously granted.

138 Thus over a period of months before and after 31 December 2010 GDC made significant use of the Farmland, both in carrying out earthworks in connection with its residential or commercial development on the Development Land, and in carrying out testing in relation to existing residential development work and proposed future residential development work.

Chief Commissioner's Arguments

139 In relation to the 2011 land tax year the Chief Commissioner contended that there were three competing uses to the primary production use of the land that meant that the primary production use of the land had not been established to be the dominant use. The three competing uses may be summarised as the earthworks use on the Farmland for the residential development on adjacent Development Land, the use of the land by consultants for existing and future residential development use, and an intangible use of the land by reason of the Development Rights Agreement.

140 The Chief Commissioner also raised two additional arguments which, if correct, would be decisive in relation to all land tax years. He submitted that LPC was using the Farmland as a land bank and that that was a current use rather than an intended future use of the land. The submission was made as a formal submission to preserve the Chief Commissioner's rights on appeal. Counsel accepted that the submission could not be sustained unless I erred in my reasons in *Metricon (No. 2).* Recognising that *Metricon (No. 2)* is on appeal, counsel did not seek to re-agitate that issue.

Parliamentary Debate on State Revenue Legislation Further Amendment Bill 2005

141 The Chief Commissioner raised a second submission that, if correct, is determinative of the case in respect of all land tax years. Counsel referred to the Parliamentary Debate in relation to the State Revenue Legislation Further Amendment Bill 2005 that introduced the current s 10AA. In the Second Reading Speech the Minister noted that:

> "*Land currently qualifies for a land tax exemption if it is within a rural or non-urban zone and is used primarily for primary production; or if it is within an urban zone and is used in the course of carrying on a business of primary production.*
>
> *The Local Government Act definition of 'Farmland' contains a more precise business test. The Bill amends the land tax provisions to be consistent with that definition. These amendments will ensure consistency as between land tax and council rates, in relation to the classification of primary production land in urban zones.*"

142 Counsel noted that in the subsequent Parliamentary debate, the Minister stated in reply that:

> "*… It is important to put on the record that we make no apology for closing tax avoidance measures …*
>
> *…*
>
> *Land tax for rural lands for genuine farm purposes is important. We are closing the loophole that has emerged. A developer buys a parcel of rural land from a genuine farmer and organises rezoning to allow subdivision for residential, commercial or industrial use. Under the current legislation all he or she has to do to retain the land tax exemption that applied previously to the land is to ensure that it is fenced, run some farm animals, periodically sell some of them and buys some replacements. The land is then subdivided in stages. Fences are moved back so that the remaining area of subdivided land can continue to be used for primary production. This process continues until all of the land is subdivided and sold.*
>
> *The only parcels of land on which land tax is ever paid by the subdivider are the subdivided blocks created during the year that have not been sold on 31 December. The amendments will require that the dominant use of the land is primary production. This will allow the portion of the revenue generated from the land from sale of subdivided lots compared to the revenue generated from the sale of animals to be taken into account. The primary production use of the land will have to have significant and substantial commercial purposes, which must be engaged in for the purpose of a profit or on a continuous and repetitive basis. Running a few head of cattle or sheep to attract a land tax exemption rather than to make profits will no longer suffice.*"

143 The Chief Commissioner submitted that this statement shows that by the 2005 amendments to the *Land Tax Management Act* Parliament intended to close the very loophole that might be said to be revealed by this case.

144 Prior to the amendments, land used for primary production that was not rural land was exempt from land tax if the land was so used in the course of the carrying on of a business of primary production. "*Land used for primary production*" was defined as meaning land used primarily for any of the purposes now listed in s 10AA(3) (*Land Tax Management Act 1956*, then ss 10(1)(p)(i) and 3). The relevant amendments in 2005 were essentially twofold. For land that was not rural land to be exempt, the primary production use was required to have a substantial as well as a significant commercial purpose or character (s 10AA(2)). Secondly, to qualify as land used for primary production, the primary production use was required to be the dominant use, rather than the principal use, of the land.

145 I have not been referred to any extrinsic materials that specifically address the significance of the amendment requiring the primary production use to be dominant rather than primary, save for the Second Reading Speech that this would bring the legislation into line with the *Local Government Act*.

146 The Chief Commissioner submits that it is clear from the Minister's speech in reply that by requiring the primary production use to be the dominant use, revenue generated from land sales after 31 December was to be compared with revenue generated from the sale of animals. A scheme whereby, year by year, pastureland could be shrunk and any liability to land tax could, by appropriate timing, be reduced if not eliminated entirely, was a loophole the amendments were intended to close. As expounded in counsel's submissions, the loophole intended to be addressed was that fences and cattle could be moved from a designated block after the taxing point, being 31 December in the prior year, the land could then be developed and the developed land sold before the next taxing point on 31 December in that year. Counsel submitted that as the Court could identify that as the target of the legislation, the Court's proper function was to see that the target was hit, not merely to record that it was missed (*Kingston v Keprose Pty Ltd* (1987) 11 NSWLR 404 at 424).

147 But the Minister's speech, while deserving of serious consideration, is not determinative of the meaning of s 10AA (*Re Bolton; Ex parte Beane* (1987) 162 CLR 514 at 518, 532; *Certain Lloyd's Underwriters v Cross* (2012) 248 CLR 378; [2012] HCA 56 at [25]). The construction of s 10AA must both begin and end with a consideration of the text of the provision, not the subjective intention of the Minister. *Prima facie*, if Parliament's intention were to preclude a claim for a primary production exemption where farm land is subdivided and land sold off for residential development during the course of a year, attention would need to have been given either to the meaning of "land" in s 10AA so as to preclude its redefinition each year, or to the requirement that liability for land tax be determined as at 31 December, or both. It is consistent with the Minister's speech in reply that the mischief aimed at was running a few head of cattle or sheep to attract the land tax exemption. That was achieved by s 10AA(2).

Intangible Use by the Development Rights Agreement

148 The Chief Commissioner submitted that LPC used the Farmland as part of its stock in trade by conferring for value contractual rights and equitable interests in the Farmland in favour of GDC under the Development Rights Agreement and related agreements executed on 11 October 2010 that, in substance, superseded the Call Option Deed. He submitted that LPC had used the Farmland, being part of its stock in trade, before sale to the ultimate purchasers, by dealing with it by the terms of its agreement with GDC and creating contractual and equitable rights in favour of GDC that were akin to a sale. LPC provided those rights for consideration and is entitled to be paid an amount to be determined by valuation in accordance with a detailed schedule when lots in what will have become Development Land are sold.

149 I accept as a matter of principle that the conferral of such rights by LPC on GDC was a non-physical use by GDC of its land. For the reasons I gave in *Metricon (No. 2)* I do not accept that in determining whether the dominant use of land is for primary production the comparison between a primary production use and some other use must be confined to a comparison of physical uses. However, as in the case of a lease of land, where the physical use of land by a tenant is the other side of the same coin as the non-physical use of land by the owner in leasing it, the use of the land by LPC in granting rights to GDC is but the other side of the same coin as GDC's use of the Farmland.

GDC's Use of the Farmland

150 GDC's use of the Farmland has two components, namely the carrying out of the earthworks which was done in connection with its existing residential or commercial development of Development Lands, and the use of the Farmland by consultants for the carrying out tests, either to obtain consents for future residential or commercial development on the Farmland, or to satisfy conditions of approval on either the Farmland or the Development Land.

151 For the reasons above, I consider that these were both relevant competing uses to be assessed in deciding whether LPC has shown that the primary production use was dominant.

Meaning of Dominant Use

152 In *Leda Manorstead Pty Ltd v Chief Commissioner of State Revenue* (2010) 79 NSWLR 724; [2010] NSWSC 867 Gzell J said (at [69]-[71]) that in the expression in s 10AA(3) dominant use, "dominant" in its ordinary meaning connotes ruling, prevailing or most influential. He said that the section requires a determination of which use of the land is the main, chief or paramount use.

153 This language reflects what was said by the plurality in *Federal Commissioner of Taxation v Spotless Services Limited* (1996) 186 CLR 404 at 416 that "*in its ordinary meaning, dominant indicates that that purpose which was the ruling, prevailing or most influential purpose*". Gzell J said that the primary use test under the former provision in the *Land Tax Management Act* was not unlike the dominant use test in the present Act.

154 I think there is a difference of emphasis between the current "dominant use" requirement and the former ss 3(1) and 10(1)(p) of the Act where the question was whether the land was used primarily for a primary production purpose. The online Macquarie Dictionary definition of "*dominant*" is:

> "*1. Ruling; governing; controlling; most influential.*
>
> *2. …*
>
> *3. Main; major; chief …*"

155 Its definition of "*principal*" relevantly is:

> "*1. First or highest in rank, importance value etc; chief; foremost*

…

7. *Something of principal or chief importance.*"

156 The adjectives are not synonymous, although their meaning can overlap. Dominant is the present participle of the Latin "dominari", to dominate. It carries the notion not just of being the chief use or most influential use, but of being a ruling, governing or commanding use. (See Online Oxford English Dictionary.)

157 In this case, three competing uses are to be considered. The question is not simply whether the primary production use is the chief use, being of a greater scale, intensity, character or importance than either of the other two competing uses, but whether having regard to both competing uses, it is the use that dominates.

158 Section 10AA(3) requires weighing the nature and intensity of the competing uses, the physical areas over which they are conducted, the time and labour spent in conducting the different uses, the money spent or assets deployed in each use and the value derived or to be derived from it.

159 In all land tax years the overwhelming majority of the land was used for primary production. If an objective observer viewed the land as a whole, he or she would see that most of the land was being used for the growing of pastures and crops and the grazing of cattle. Moreover, this activity was on a substantial scale, although it is not possible to say what was the number of cattle being grazed on the land in the months before and after 31 December 2010. The Farmland as at 31 December 2010 comprised 508 hectares. Only approximately one per cent of this area was used for earthworks in connection with GDC's residential development use of adjacent land.

160 In the present case, there is an additional consideration relevant to determining what is the dominant use, and that is the importance of the use to the adjacent use of the Development Land. Whilst the primary production use is substantial and significant, the principal significance of the Farmland on Oran Park is its potential for future residential or commercial development and its support for the existing development on the Development Land. Whilst the former is irrelevant for the purposes of s 10AA(3) because it is a contemplated future use rather than a current use, the latter is not.

161 Expenditure is a relevant but not determinative criterion in assessing whether the primary production use is dominant. Expenditure on earthworks and on consultants' activities that involved a use of the Farmland for the 2011 land tax year, substantially exceeded LPC's expenditure on cattle grazing and raising of pastures and crops. (See paras [76], [90], [109] and [135]). I infer that the value of the earthworks on the Farmland was more valuable to GDC than the value of the primary production on the Farmland was to LPC. It is impossible to be definite about this because of the imprecision of the evidence adduced by LPC.

162 The onus lies on LPC to establish that the primary production use of the Farmland was the dominant use. When compared with the use of the Farmland relevant to the 2011 land tax year for earthworks in connection with existing developments on the Development Land, I am not satisfied that it was so dominant. *A fortiori*, I am not so satisfied when the further use of the Farmland by consultants for the purposes of performing tests either to obtain future approvals or to satisfy existing conditions of consent are taken into account.

163 In my view the Chief Commissioner's assessment for the 2011 land tax year should be confirmed.

2012 Land Tax Year

164 By 31 December 2011 the earthworks that had been conducted on Farmland, as it was for the 2011 land tax year, were no longer on Farmland as it was for the 2012 land tax year. Probably other development work had been undertaken on those areas that had been Farmland for the 2011 land tax year, but had ceased to be so in the 2012 land tax year.

165 No comparable earthworks were conducted on the 2012 Farmland as had been conducted on the 2011 Farmland. As noted at para [105] above, in its Appeal Statement in proceeding 2015/35829 LPC alleged that apart from the earthworks conducted on Farmland in the 2011 land tax year, no development works occurred on Parcel 5 being Farmland for the 2012 tax year. However, Mr Owens deposed that earthworks that LPC said in its Appeal Statement in proceeding 2015/123762 had been carried out for the 2013 land tax year in fact occurred between October 2011 and April 2012 and thus were relevant to the 2012 land tax year. He deposed that the stockpiling of excess topsoil occurred over an area of approximately 4,700m², or less than half an hectare to a height of about one metre. The stockpiling occurred when an adjoining lot on Development Land was being developed for the purpose of a school and it was stripped of topsoil to allow civil works to be undertaken. He estimated that the cost of that work was in the order of $12,000. The stockpile was removed between October 2012 and September 2013.

166 Earthworks were undertaken between April and June 2012 on Farmland for the purpose of removing a farm dam and constructing a future detention base as an environmental protection measure to trap construction sediment for the construction of a road. The area of the earthworks was approximately 2.2 hectares. The cost of undertaking the works was $19,564. Having regard to the limited earthworks carried out on the 2012 Farmland, I doubt that these earthworks activity should be considered as being a part of a continuum relevant to determining the scale and intensity of the earthworks use of the 2012 Farmland which is to be assessed as at 31 December 2011.

167 In any event, the scale of those works was much less than the scale of the earthworks for the 2011 Farmland.

168 Physical activities on the Farmland by consultants continued, but at no greater scale or intensity than in the previous year. Thus, a surveyor undertook five hours of field work over two days in September 2011. On 21 October 2011 Douglas Partners established two groundwater monitoring wells in connection with a salinity investigation. Mr Owens deposed that it appeared from aerial photographs that one monitoring well and ten test pits were placed on Farmland and another well and three test pits were placed on Development Land. An ecological study was carried out in November 2011 that may have included site inspections to verify site conditions. But the study was prepared for the purpose of the owner of adjoining land applying for rezoning of that land. LPC's land was included as part of the investigation for that purpose, but LPC did not participate and did not pay for the items in question. I accept Mr Owens' evidence that survey work undertaken in respect of Cobbity Road was not undertaken on the Farmland, but on the adjoining road reserve land.

169 The next significant activity by consultants on the 2012 Farmland was the excavation of further test pits for the purposes of a salinity assessment conducted by Douglas Partners. The field work was undertaken in December 2011 and involved the excavation of 249 test pits. Mr Owens estimated that 60 per cent of that work occurred on Development Land and 40 per cent of the work on Farmland. He estimated that the total cost of the investigation was $100,000 and of that sum he attributed $12,000 as the cost of physical work on the Farmland. In oral evidence, Mr Owens said that he counted the number of wells on Farmland and Development Land by reference to the plan exhibit MO2, being the plan for the 2011 year. If anything, this would have led to his attributing more wells to be on the Farmland than if he had used the correct map, being exhibit MO3, the map for the 2012 Farmland.

170 On 14 February 2012 Douglas Partners provided a further report on salinity investigation and management. The salinity assessment included the collection of samples, inspection of the site, installation of two groundwater wells to a depth of five metres or prior refusal, and the establishment of other wells to determine groundwater level, as well as offsite analysis and reporting. The field work included the excavation of 13 test pits and the drilling of two bore holes as well as the groundwater monitoring wells. The field work was conducted in December 2011. Mr Owens concluded that one monitoring well and 10 test pits were placed on Farmland, and another well and three test pits were placed on Development Land. He estimated the total cost of the assessment to be $13,000.

171 A further salinity investigation and management report was provided by Douglas Partners in April 2012 following field work in January 2012. The field work included the excavation of 72 geotechnical test pits, the taking of sampling from the pits, backfilling each test pit to surface level and inspection of the site for signs of salinity. Mr Owens estimated that 10 of the test pits were on Development Land and 62 on Farmland. He estimated the total cost of the project to be $30,000. I accept those estimates.

172 Douglas Partners also provided a contamination assessment report in April 2012 in relation to the same tranche of land following a contamination assessment conducted in March 2012.

According to the report a total of 22 background test pits were excavated that were positioned across a 24-hectare site. A further 18 test pits were excavated into natural material and samples taken. Mr Owens counted that 13 out of the 40 test pits were on Development Land. The total cost of the assessment, not limited to field work, was estimated by him to be $30,000.

173 Further field work was undertaken by a surveyor between January and April 2012 involving a total of 22½ hours of field work. Mr Owens said that this work occurred on Development Land and not on Farmland, but this was not further explained.

174 A topographical survey over part of the town centre borrow pit occurred on Farmland and was the subject of an invoice on 30 March 2012 from the surveyor, John M Daley. The total cost of the work was $1,105.50. Mr Owens accepted that this work occurred on Farmland.

175 Douglas Partners conducted further field work involving the excavation of 13 test pits to delineate filling material in May and June 2012. Mr Owens accepted that this occurred on Farmland. He estimated the cost of the work to be in the order of $3,000.

176 Mr Owens estimated that the total cost of these works insofar as they related to Farmland was approximately $105,000. (This was before his further discount for what he estimated to be the cost of the physical work on site, as distinct from the further work of analysis and reporting following the field work.) This was less than the estimated costs of such work relevant to the 2011 land tax year.

177 The principal difference in relation to the uses of the 2012 Farmland is the greatly reduced earthworks use. Having regard to the size of the land, the level of earthworks was *de minimis*.

178 Earlier in these reasons I have been critical of the imprecision of LPC's evidence in relation to its primary production use of the Farmland. Notwithstanding that imprecision, I think that in respect of the 2012 land tax year LPC has demonstrated that primary production was the dominant use of the Farmland. The only substantial competing use in that land tax year was the use of the land by consultants for the purpose of carrying out tests in connection with existing and proposed residential development. That work was episodic and was carried out over only a small area. Both in the terms of the area of the Farmland that was the subject of the different uses, the amount of time and labour involved in them on the land, the cost of the different uses, and assets deployed in them, I consider that the primary production use was dominant. In so doing, I consider it in comparison not only to the use of land by consultants, but also with respect to the small earthworks use conducted that was relevant to the 2012 land tax year. Even aggregating the two competing uses, the primary production use was dominant. The 2012 land tax assessment of the Farmland should be revoked.

2013 Land Tax Year

179 For both the 2013 and 2014 land tax years there was confusion about the identity of the parcels of land that constituted Farmland for each year. In its Appeal Statement in proceeding

2015/123762 LPC asserted that for the 2013 land tax year the Farmland comprised the following land:

> "*i. Lot 993 DP 1153029.*
>
> *ii. Lot 18 and Part 19 DP 1153031.*
>
> *iii. Lots 9005, 9006, 9008 and 9009 DP 1169698.*
>
> *iv. Lot 7 DP 1173813.*
>
> *v. Lot 9012 DP 1175454.*
>
> *vi. Lots 9015 to 9019 DP 1178579.*"

180 In oral evidence on the fourth day of the hearing Mr Owens explained why this was incorrect and Farmland did not include the lands referred to at (i), (ii) or (v). Nor did it include Lot 9005 of DP1169698, nor the whole of Lot 9009 of DP 1169698, nor Lots 9015, 9017 or 9019 of DP 1178579.

181 On the basis of those corrections a good deal of work that Mr Lidis (a town planner called by the Chief Commissioner) identified as having been done on Farmland as identified by the plaintiff, was not done on Farmland.

182 In May 2013 earthworks were undertaken on land then known as lot 9020 DP 1180910 that was a substantial part of the former lot 9009 of DP 1169698 that formed part of the 2013 Farmland. However, this was not part of a continuous earthworks use, or other residential development use on the Farmland. I do not think it is a relevant competing use for the purpose of determining the dominant use of the Farmland as at 31 December 2012.

183 Otherwise the only earthworks conducted on the 2013 Farmland at any relevant time was the removal of the stockpile referred to at [165] above that occurred at some unidentified time between October 2012 and September 2013. Mr Owens estimated that the cost of removing that topsoil to be $12,000. Accordingly, as with the 2012 land tax year, earthworks conducted on the Farmland relevant for the 2013 land tax assessment were *de minimis*.

184 The use of the Farmland by consultants engaged by GDC did not increase in scale or intensity in the six months before or after 31 December 2012. Douglas Partners carried out further contamination assessments involving the excavation of test pits and the collection of samples and undertook further salinity investigations requiring the drilling of bore holes and collection of samples. Survey work was undertaken, although it is not apparent to me that this was undertaken on the Farmland as distinct from survey on road reservations. Mr Owens estimated that the cost of Douglas Partners' work on Farmland in the financial year ended 30 June 2013 was approximately the same ($105,000-$106,000) as in the 2012 financial year. I accept that assessment.

185 Neither the primary production use, nor the earthworks use, nor the use of land by consultants engaged by GDC was materially different for the purposes of the 2013 land tax year than in the 2012 land tax year. In my view the primary production use was the dominant use of the

Farmland for the purposes of the 2013 land tax year, just as it was in the 2012 land tax year. Accordingly, the 2013 land tax assessment, so far as it concerned the Farmland, should be revoked.

2014 Land Tax Year

186 There was also confusion as to what was the land the subject of the 2014 land tax assessment. In his assessment dated 19 December 2014 in respect of the 2014 land tax year the Chief Commissioner identified the subject land relevant to these proceedings as being "*Oran Park Drive Oran Park PID-3753140*" and having a taxable value of $96 million.

187 LPC produced a "Land Value Search" from Land and Property Information NSW that referred to property 3753140 with particular lot and deposit plan references, but it was for a gross land value of $90,588,000.

188 This was not the relevant PID. The Chief Commissioner tendered what he said was the current PID 3753140 on the basis of which the 2014 land tax assessment was issued on 19 December 2014. He offered to prove that that was the relevant PID 3753140, but LPC accepted that that was not necessary. The relevant land was there stated as having the land value of $96 million, consistently with the notice of assessment. The land the subject of that PID included part lot 9029 in DP 1199011 and lot 9021 in DP 1180910.

189 The part of lot 9029 so included was depicted in a map for "Farmland" and comprised 19.06 hectares. This was land that Mr Owens had described in his mapping of the Oran Park Farmland for the 2014 tax year as being Development Land rather than Farmland. It comprised the eastern half of a paddock called South Wallys that is shown by Mr Owens as being Farmland for the 2013 tax year, but not for the 2014 tax year. It also included a smaller portion of land on the eastern side of the development in paddocks known as South Creek that would appear to be consistent with the extension of a road or a road reservation that Mr Owens depicted as Development Land.

190 It does not automatically follow that this land was physically used for residential development prior to 31 December 2013. Aerial photographs were tendered taken as at 26 October 2013 and 1 April 2014. By 1 April 2014 extensive earthworks had been carried out on that land and on other Farmland on South Wallys that Mr Owens acknowledged to be 2014 Farmland.

191 The Land and Property Information Service PID for property 3753140 that is the subject of the land tax assessment notice included within the relevant land not only part of lot 9029 of DP 1199011, but also lot 9021 in DP 1180910. This land comprised 32.8 hectares and included land that had formerly been in lots 9006 and 9009 of DP 1169698 in the paddocks called Ticket Boxes and Motorcross (Owens affidavit 14 April 2016 Annexure K). In relation to lot 9021 in DP 1180910 Mr Owens said that:

> "*It is agreed that earthworks occurred on the land during the 2014 tax year, however this land was not Farmland for the 2014 tax year.*"

192 He referred to exhibit MO5 to his earlier affidavit and noted the land which comprised part lot 9009 and lot 9006 in DP 116698 on the exhibit was not noted as being Farmland for the 2014 tax year. But this was because exhibit MO5 to his affidavit is inaccurate. Likewise, Mr Owens said that with respect to lot 9029 there was no such lot number for the 2014 tax year. However, again, he was in error.

193 In these cases GDC's understanding of what constituted Farmland ran ahead of what the actual position was: (see paras [23] and [117]-[118]).

194 LPC did not adduce evidence as to when earthworks commenced on lot 9021 and lot 9029. It is clear that GDC and LPC mistakenly thought that this land was Development Land and not Farmland. With that belief there was no reason for GDC to have waited until sometime after 31 December 2013 to commence earthworks on the land.

195 Mr Lidis who gave evidence for the Chief Commissioner, observed from photographs that work on these areas had been undertaken by April 2014. It does not appear that aerial photography was available at dates closer to 31 December 2013. The aerial photograph dated 26 October 2013 exhibited to Mr Lidis' affidavit indicates that by that date extensive earthworks had been carried out on parts of lot 9021.

196 I am satisfied that extensive earthworks were carried out on land that was 2014 Farmland prior to 31 December 2013. LPC did not provide evidence as to the extent or cost of those earthworks. The onus is on it to show that the primary production use was the dominant use of the land. Mr Owens admitted that extensive earthworks commenced on land he accepted to be Farmland in February 2014. He deposed that between February and June 2014 bulk earthworks occurred on land in lot 9008 DP 1169698 that is referred to as the Kolombo paddock in his exhibit MO5 which lies immediately to the east of lot 9021. He estimated that the bulk earthworks conducted on lot 9008 between February and June 2014 were carried out at a cost of $957,000. In my view that work was a continuation of the work that had commenced on the Farmland immediately to the west, although GDC was under the mistaken belief that the land in question was not Farmland. The whole of the earthwork activity was substantial and was a use of the Farmland for the purposes of the 2014 land tax assessment.

197 The use of Farmland by consultants was substantially greater in the 12 months ended 30 June 2014 than in the two previous financial years. Mr Owens estimated that the cost of such consultants work carried out on the Farmland was almost double the cost incurred in the previous two years.

198 As appears earlier in these reasons, the primary production use relevant to the 2014 land tax year was materially less than it had been in previous years.

199 Accordingly, the case for a land tax exemption in respect of the 2014 year is materially less strong than it was for the 2011 year. It follows that the 2014 land tax assessment should be confirmed.

200 In summary, I conclude that the assessments for the 2011 and 2014 land tax years should be confirmed, but the assessments for the 2012 and 2013 land tax years should be revoked.

Orders

201 For these reasons I make the following orders:

1. In proceeding 2015/35829 I order that:

a) the Land Tax Assessment Notice issued to the plaintiff on 25 June 2013 for the 2011 Tax Year to the extent that it assessed land tax on the land at item 47 described as “Parcel 1”, the full land description being referred to in the attached Schedule to the assessment in the row headed parcel 1 “Farmland”, be confirmed;

the Land Tax Assessment Notice issued to the plaintiff on 25 June 2013 for the 2012 Tax Year to the extent that it assessed land tax on the land at item 75 described as “Parcel 5”, the full land description being referred to in the attached Schedule to the assessment in the row headed parcel 5 “Farmland” be revoked;

In proceeding 2015/123762 I order that:

a) the Land Tax Assessment Notice issued to the plaintiff on 19 December 2014 for the 2013 Tax Year to the extent that it assessed land tax on the land at item 176 described as “Farmland” be revoked; and

202 the Land Tax Assessment Notice issued to the plaintiff on 19 December 2014 for the 2014 Tax Year to the extent that it assessed land tax on the land at item 23 described as “Oran Park Drve Oran Park (PID-3753140)” be confirmed.

203 I will stand the proceedings over to a convenient date to hear argument on questions of costs and to make any consequential orders that might be appropriate having regard to these orders.

Annexures A and B (40.3 KB, pdf)