JUDGMENT 3, 1973

IN THE PRIVY COUNCIL No.16 of 1972 A (2)

ON APPEAL FROM

THE COURT OF APPEAL OF NEW SOUTH WALES

IN TERM No.645 of 1970

B E T W E E N :

THE COMMISSIONER FOR RAILWAYS
THE COUNCIL OF THE CITY OF SYDNEY and
WYNYARD HOLDINGS LIMITED Appellants

- and -

THE VALUER-GENERAL Respondent

C A S E FOR THE COMMISSIONER FOR RAILWAYS

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CASE FOR THE COMMISSIONER FOR RAILWAYS

I. SYNOPSIS.

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1. This case is concerned with the valuation for rating purposes of a substantial property in the centre of Sydney.

2. The basic question is whether this property should be valued as one unit of property or whether it should be divided into parts and those parts valued separately.

3. By reason of amendments in 1961 to the Valuation of Land Act 1916 (N.S.W.), a special category of land was defined and called a "stratum" and separate methods of arriving at its value were enacted. This raises a subsidiary question after the unit of property for valuation purposes is selected, namely, whether that unit answers the description of "stratum" as defined and therefore falls to be valued under the provisions for valuing a stratum.

4. The fee simple of the property in question is owned by the Commissioner for Railways for the State of New South Wales (hereinafter called "the Commissioner") and the property became rateable by reason of its being leased by the Commissioner to Wynyard Holdings Limited (hereinafter called "the Company") for private purposes. By reason of its being rateable it became necessary for the Valuer-General for

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the State of New South Wales (hereinafter called "the Valuer-General") to value it and so arose the problem of what unit or property he should choose for that purpose.

5. It is convenient to state at once in summary form the principal submission of the Commissioner:

(a) All rateable or taxable land is capable of sub-division into units of property for valuation purposes.

(b) The purpose of a Valuer-General's valuation is to provide values for units of property upon which rating and taxing authorities can levy rates and taxes.

(c) Two methods of valuation are provided in the Valuation of Land Act: one is for a part of land which comes within the definition of "stratum"; the other is for a parcel of land which does not come within that definition (hereinafter called "non-stratum land").

(d) The unit of property to be valued must therefore be a stratum (if it falls within the definition of "stratum") or it must be a parcel of non-stratum land (if it does not).

(e) The first step in the valuation process is the selection of the unit of property to be valued.

(f) The second step is to ascertain whether that unit is a stratum within the definition.

(g) If it is, the third step is to value it as a stratum, i.e., under ss. 7A, 7B and 7C of the Act.

(h) If it is not, the third step is to value it as a parcel of land, i.e., under ss. 5, 6 and 7.

6. Two problems presented to the Judicial Committee are therefore:

(i) What unit of property in this case should be selected for valuation purposes?

(ii) Is this unit of property a stratum or is it non-stratum land?

The Commissioner submits that these questions should be answered:

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(i) The whole of the property leased by the Commissioner to the Company.

(ii) This property is non-stratum land because it is not within the definition of "stratum" in the Act.

7. The appeal upon which these problems arise is one by the Commissioner by leave of the Supreme Court of New South Wales from a judgment of that Court in its Court of Appeal Division pronounced on 2nd July 1971 in which answers were given to questions asked in a case stated for the opinion of the Supreme Court pursuant to s.17 of the Land and Valuation Court Act 1921-1965 (N.S.W.) by the Honourable Mr. Justice Else-Mitchell sitting as the Land and Valuation Court. Pursuant to the direction of the Supreme Court, this appeal is consolidated with appeals in the same matter similarly brought by the Council of the City of Sydney (hereinafter called "the Council") and the Company. p.69

8. The proceedings in the Land and Valuation Court were heard over a number of days in March 1969. There were four parties represented in those proceedings, namely, the Commissioner, the Council (being the relevant rating authority), the Company and the Valuer-General. An issue there litigated was the value within the meaning of Valuation of Land Act 1916-1961 as at October 1962 of the property leased by the Commissioner to the Company by lease dated 19th December, 1961. Evidence was called from a number of valuers and in so far as this was a question of fact it was resolved by the determination of the Land and Valuation Court. Questions of law were also raised. In examining these questions it is appropriate to have some regard to the history of the site, the terms of the lease, the relevant statutory provisions and the events occurring between the date of the lease and the hearing. p.77

II. THE HISTORY OF THE SITE.

9. A city block in the centre of Sydney is bounded on the east and the west respectively by George Street and Carrington Street, parallel streets running in an approximately north-south direction. Roughly half way between them and also parallel is a 20 feet wide lane called Wynyard Lane. Bounding Carrington Street on its westerly side is an open area previously known as Wynyard Square and now known as Wynyard Park.

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pp.126-7

10. The City and Suburban Electric Railways Act 1915 (N.S.W.) authorised the construction of an underground railway in the City of Sydney. The authorised work was described in that Act as including an underground station "under Wynyard Square." At the time of its enactment, there existed 13 lots of land opposite Wynyard Square and lying between Carrington Street and George Street. Seven of these lots fronted Carrington Street and the remainder (separated from these seven by Wynyard Lane) fronted George Street. The two northernmost lots in Carrington Street (having a combined area of 16½ perches) were held under registered title pursuant to the Real Property Act 1900 (as amended); the remaining five lots fronting Carrington Street (having a combined area of 1 rood 1¼ perches) and the six lots fronting George Street (having a combined area of 1 rood 9½ perches) were held under common law title. These thirteen lots were in 1915 and 1916 resumed for the purposes of the works authorised by the Act of 1915 and in 1924 were by Act of Parliament vested in the Commissioner. So it happened that as from that date the Commissioner became the owner of land which was to be included in the said lease of 19th December 1961 and which may be seen delineated in the site plan which is annexure "A" thereto.

Facing p.110

11. Between 1926 and 1930 the various buildings on the subject land were demolished, Wynyard Lane was

pp.126-7

temporarily closed and the land, including Wynyard Lane, was excavated to a depth of approximately forty feet. During the same period portions of Carrington Street and Wynyard Square adjacent to the said lane were also excavated and there was constructed therein an underground railway station known as Wynyard Station. There were tendered at the hearing a

Ex."O"-A1

contemporary photograph taken from the south showing Wynyard Park in a partially excavated condition and

Ex."O"-A5

another somewhat later photograph taken from the excavation between Carrington Street and George Street showing the steelwork in position for the construction of the underground station beneath Wynyard Square. These photographs are available for inspection if desired by the Judicial Committee pursuant to the

p.73, ll.10-19

ruling of the Supreme Court upon a motion for directions.

12. For some years the subject land remained in its excavated condition, the excavation being occupied by

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no more than covered wooden ramps which enabled pedestrians to reach the underground station on the west of the land from George Street itself and from a pedestrian tunnel under George Street on the east. Photographs of the subject land in its then condition were also tendered and are so available. E.g,Ex"O"-A6

13. Pursuant to authority conferred by statute in 1932, the Commissioner some time after 1935 constructed the foundations of a building below what had been the level of Wynyard Lane and upon these foundations the surface of Wynyard Lane had by 1940 been restored to trafficable use.

14. In 1941, the Commissioner granted to certain lessees a lease of the subject land which contained a lessee's covenant to build a hotel on the site. By 1942 a two-storey building known as the Plaza Hotel had been erected along the George Street frontage of the land and the excavation to the Carrington Street frontage had been filled with a building up to but not above street level. In 1943 the said lease was assigned to Avrom Investments Pty Limited. For a considerable period thereafter no building work was done and ultimately there ensued litigation between the Commissioner and Avrom Investments Pty Limited. In the judgment of the Judicial Committee in that litigation further facts concerning the history of the site are set out: Commissioner for Railways v. Avrom Investments Pty Ltd. (1959) 1 W.L.R.389. p.128

15. In 1960 Avrom Investments Pty Limited assigned its lease to the Company. Subsequently it was arranged between the Commissioner and the Company that the existing lease be surrendered in return for a new lease on revised terms. Plans were prepared for the construction on the subject land of a thirteen-storey office block facing George Street and a fourteen-storey hotel facing Carrington Street. Pursuant to the arrangement and plans, building work commenced towards the end of 1960; a tendered photograph (also available for inspection) taken from the west and looking across Wynyard Park with Carrington Street in the foreground shows the progress of the building work as at June 1961. The new lease to the Company (leasing the property the subject of the valuation now under appeal) was entered into on 19th December, 1961. p.128, 11.25-41 Ex"O"-A7 p.77

16. The George Street office block (known as "Wynyard House") was built around, over and under spaces in p.34, 11.5-24

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which existed public passageways enabling pedestrians to reach Wynyard Station from George Street itself and from the pedestrian tunnel under George Street as theretofore. These spaces were among those excepted from the property leased. The Carrington Street hotel (known as "Menzies Hotel")was built to accommodate within it the continuation westwards of the above spaces and various other spaces which were also excepted from the property leased and in which, as construction progressed or was completed, were housed a vehicular lift and its approaches, air ducts, a store-room and other railway occupations. In both the buildings shopfronts were constructed facing each side of the spaces excepted for passageways, so that these spaces became in effect both pedestrian thoroughfares and shopping arcades. The hotel was built over Wynyard Lane to connect with Wynyard House and was so constructed as to provide vehicular access from Wynyard Lane to an underground space extending under Carrington Street and Wynyard Park suitable for use as a car park. This building was also constructed to incorporate within it two small underground spaces under the eastern pavement of Carrington Street. Save for the excepted spaces, the Company entered into occupation pursuant to the lease of the whole of the site between Carrington Street and George Street and of the three underground spaces just referred to. A sectional sketch of the buildings erected on the subject land in their completed form and showing the relationship thereto of the underground space beneath Carrington Street and Wynyard Park was tendered at the hearing and is annexure "9" to the stated case.

p.125A

17. In October, 1962, the date as at which the valuations in question were made, the construction of Wynyard House had been substantially completed and building work on Menzies Hotel had reached the top of the second floor above street level.

p.34, ll.25-29

18. On 22nd April, 1963 a supplemental deed of lease was entered into between the Commissioner and the Company whereby the Commissioner leased as from 20th August, 1962 a small underground space having an area of about 47 square feet adjacent to one of the underground spaces under the eastern pavement of Carrington Street already occupied by the Company and providing access to that space from one of the spaces excepted for a pedestrian passageway.

p.111

Plan facing p.114

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III. THE IDENTITY OF THE LEASED PROPERTY

19. By reason of statutory provisions which will be hereinafter referred to, the property leased by the said lease of 19th December, 1961 was rateable and the proper subject of a valuation by the Valuer-General. The necessary starting point for the resolution of the competing contentions which will be advanced in this appeal is to establish the identity of the property leased by the said lease.

20. By this lease the Commissioner leased to the Company for a term of 98 years from 1st December 1961 six "pieces of land" and a "part of Wynyard Lane" therein collectively referred to as "the demised premises." The six pieces of land were the following: p.77, l.27

(a) The piece of Real Property Act land fronting Carrington Street comprising 16½ perches referred to in paragraph 10 above. p.77,ll.17-23

(b) The two pieces of common law title land fronting Carrington Street and George Street respectively, separated by Wynyard Lane and having areas of 1 rood 1¼ perches and 1 rood 9½ perches respectively and also referred to in paragraph 10 above. p.77, ll.24-25

(c) Two small pieces of land under the eastern pavement of Carrington Street each having measured vertical as well as horizontal dimensions as disclosed in plans "E" and "F" annexed to the lease. p.77,ll.24-26 Following p.110

(d) An extensive piece of land under Carrington Street and Wynyard Park also having measured vertical as well as horizontal dimensions as disclosed on plan "G" annexed to the lease. p.77,ll.24-26 Following p.110

The part of Wynyard Lane which was leased is that part between the broken lines on the plan annexure "A" to the said lease. It will be observed that the pieces of land referred to in (c) and (d) above, being the underground spaces commonly referred to as the "E", "F" and "G" spaces, are located outside, but adjacent to, the pieces of land within the area between Carrington Street and George Street. (By cl.55 of the lease the Commissioner was to endeavour to secure a Following p.110 p.105,ll.25-30

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statutory legal title to that part of Wynyard Lane which was leased and to the land comprised in plans "E","F" and "G"; this was achieved by the passing of the Government Railways (Amendment) Act 1965.)

21. From this lease there were excepted certain spaces (all of which related to so much of the leased property as lay between Carrington Street and George Street.) These excepted spaces were:

p.77,l,33-p.78, l.1 (i) A space twenty feet wide and twenty feet high as delineated in the longitudinal section and typical cross section of Wynyard Lane on plan "A" annexed to the lease.

p.78, ll.13-19 (ii) The spaces delineated in plan by distances and bearings in plan "B" annexed to the lease and in elevation by distances and heights in plan "C" so annexed and therein called "passageways."

p.78, ll.20-23 (iii) Three spaces coloured blue and delineated in plan by distances and bearings in plan "J" annexed to the lease (where the blue coloured areas are described as those excepted from the basement area) and in elevation by the heights in plan "E" so annexed.

p.78,ll.24-27 (iv) Various spaces coloured blue and delineated in plan by distances and bearings at various levels in plans "D2" and "D3" annexed to the lease and in elevation by the heights on plan "D1" so annexed.

pp.69-83 22. The lease reserved a number of rights to the Commissioner and conferred a number of rights and liberties upon the Company as well as imposing

pp.85-107 numerous covenants upon the Company but none of these is relevant to the identification of the leased property.

23. By reason of these exceptions, the leased property was defined not only by the vertical boundaries represented by the lateral extremities of the site but also by some non-vertical boundaries represented by the upper and lower extremities of the excepted spaces. Put in another way, the lease of the several pieces of land, while not being expressed to be limited in extent either upwards or downwards, was subject to the incursion at various levels of spaces excepted from the lease.

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24. It is the existence of these incursions with non-vertical boundaries which has caused the Company to assert and the Valuer-General to decide that the property leased could not be valued as non-stratum land and could not be wholly valued in a single valuation at all.

IV. THE STATUTORY PROVISIONS.

Rating and Taxing Statutes.

25. The statute of general application in New South Wales which provides for the rating of land is the Local Government Act 1919. By s.118(1), the council of a municipality or shire is required each year to make and levy a general rate on the unimproved capital value of all rateable land in its area. In this respect, the statute is a re-enactment of provisions of earlier legislation: Local Government Act 1906, s.150(1).

26. The statute which imposes a tax on land in New South Wales is the Land Tax Management Act 1956. Under s.9(1) land tax is payable upon the taxable value of land and s.9(2) provides that "the taxable value of all the land owned by a person is the total sum of the unimproved value of each parcel of the land" less certain deductions. Calculating land tax upon the improved value of land was the method adopted by the Commonwealth Act which this statute replaced (Land Tax Assessment Act 1910, s.10(1)) and also by even earlier State legislation (Land and Income Tax Assessment Act 1895, s.10.)

Unimproved Value for Rating and Taxing.

27. The concept of unimproved capital value as a basis for the valuation for rating and taxing purposes of all land, whether in fact improved or not, is indigenous to Australia. This value is "the capital sum which the fee simple of the land might be expected to realise if offered for sale on such reasonable terms and conditions as a bona fide seller would require, assuming that the improvements, if any, thereon or appertaining thereto, and made or acquired by the owner or his predecessor in title had not been made", Local Government Act 1919, Schedule Three, cl.2(1), re-enacting in substance Local Government Act 1906, s.132(1); cf. Valuation of Land Act 1916, s.6(1). (For a reference to the

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history of the definition of "unimproved value", see the judgment of Sugerman J. in Sydney City Council v. Valuer-General (1956) 1 L.G.R.A.229, esp. at pp.233-236, referred to in Gollan v. Randwick Municipal Council (1961) A.C.82, at p.95.)

28. The system thus enacted is one of rating and taxing not upon the value of the ratepayer's or taxpayer's estate or interest, but upon the value of the "fee simple" ascertained by reference to a hypothetical sale thereof defined in terms which make it independent of the personality of any actual owner for the time being. The expression "the fee simple of the land" in the definition of "unimproved value" comprehends all estates and interests which could exist in the land in question; the sum to be ascertained by the valuation process is what this fee simple could be expected to realise if offered for sale by a person having the capacity to dispose of it. (Decisions of the Judicial Committee which have considered this concept include Toohey's Ltd. v. Valuer-General (1925) A.C.439, Tetzner v. Colonial Sugar Refining Co.Ltd. (1958) A.C.50 and Gollan v. Randwick Municipal Council (supra)).

Assessed Annual Value for Rating.

29. But the unimproved value of land is not the only value upon which in New South Wales rates are levied. Some rates, for example, water rates imposed pursuant to s.96(1) of the Metropolitan Water, Sewerage and Drainage Act 1924 or pursuant to s.100(1) of the Hunter District Water, Sewerage and Drainage Act 1938, are levied upon the assessed annual value of rateable land. This value is arrived at upon the basis of the fair average annual rental thereof: Myerson v. Valuer-General (1933) 11 L.G.R. (N.S.W.)86. Such a basis of valuation is similar to that found in the English rating legislation.

Improved Value for Rating.

30. Furthermore, there is a power in municipal or shire councils to make and levy special rates (Local Government Act 1919, s.120(1)), local rates (s.122(1)) or loan rates (s.124(1)) upon the improved capital value of all rateable land in the area.

Valuation for Rating and Taxing.

31. The Valuation of Land Act 1916, which created

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the office of Valuer-General, is the statute by which in New South Wales uniformity was achieved in the determination of the improved value, the unimproved value and the assessed annual value of rateable and taxable land. The background to and the purpose of this statute were discussed by Owen J. (then of the Supreme Court of New South Wales) in Ex parte Fairfield Municipal Council; re Cousins (1953) 19 L.G.R. (N.S.W.) 38, at p.45 when, speaking of the state of affairs existing at the time it was passed in 1916, his Honour said:

> "There was then functioning in the State a large number of rating and taxing authorities, such as municipal and shire councils, water and sewerage boards, and the commissioners of taxation. For rating and taxing purposes each of those authorities made its own valuation of rateable and taxable land by the hands of its own appointed valuers. A valuation thus made was notified to the ratepayer or taxpayer, who had a right of appeal against such valuation, and the value assessed, either by the authority's valuer or on appeal, became the rateable or taxable value of the land. It could, and doubtless did, happen on occasions that a valuation of a particular parcel of land made, for example, by a municipal council differed from a valuation of the same parcel of land made, for example, by the Water and Sewerage Board pursuant to by-laws made under s.34 of the Metropolitan Water and Sewerage Act 1880, or by the Commissioners of taxation under the Land and Income Tax Assessment Act 1895. The principal purpose of the Valuation of Land Act was to put an end to this bewildering and inconvenient state of affairs by setting up a single authority charged with the duty of valuing land, and by providing that the valuations made by that authority should thereafter be accepted by all rating and taxing authorities for rating and taxing purposes. The machinery for this last-mentioned purpose was provided by Part V of the Act, under which the Valuer-General was directed to furnish each authority with valuation lists containing particulars of the ownership, occupation, value, title and description of all land within that authority's area (s.48), and, from time to time, to supply supplementary lists bringing the original lists up to date (s.49). No alteration in such lists might be made by the rating or taxing authority, except in certain minor respects, without the Valuer-General's consent."

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32. As was said in Gollan's case (1961) A.C., at p.95, "unimproved value ..... as a basis of assessment has been a conception associated primarily with rating." Thus the principal purpose of the unimproved values determined under the Valuation of Land Act is to serve for rating under the Local Government Act, to which end both statutes make them equivalent to the unimproved values referred to in the Local Government Act (see Valuation of Land Act, s.58(1); Local Government Act, s.134(1)). The unimproved value so determined is also the unimproved value for the purpose of imposing land tax: Land Tax Management Act 1956, s.54(1)(a). Likewise, the Valuation of Land Act makes the improved value determined under that Act the improved capital value for the purposes of the Local Government Act (s.59(1)). It also makes the assessed annual value so determined the assessed annual value for the purposes of the Local Government Act and the value to be adopted by rating and taxing authorities under the Hunter District Water Supply and Sewerage Act of 1892 and the Metropolitan Water Sewerage and Drainage Act 1924 (s.60(1)). The latter Act similarly provides that for its purposes the assessed annual value of rateable land shall be the assessed annual value as determined in accordance with the Valuation of Land Act (s.97(1)) as does the Hunter District Water, Sewerage and Drainage Act 1938 (s.101(1)) which supplanted the Act of 1892.

Statutory Provisions as to Parcels of Land.

33. Under the Local Government Act every rate shall be levied in respect of a separate parcel of land (s.139 (3)) and land in respect of which the rate is so levied is subject to a charge for the payment thereof (s.152 (1)) capable of enforcement by an order for sale of the land or so much thereof as may be necessary to provide for such payment: Sutherland Shire Council v. Glendon Court Ltd. (1934) 12 L.G.R. (N.S.W.) 20. The Local Government Act does not define the word "parcel" but provides (s.134(3)) that "any parcel of land separately valued under the Valuation of Land Act 1916 shall be a separate parcel for the purposes of this Act." Both the Metropolitan Water Sewerage and Drainage Act (s.97(3)) and the Hunter District Water Sewerage and Drainage Act (s.101(3)) provide that any parcel of land separately valued under the Valuation of Land Act "shall be a separate parcel of land, and may be separately rated." By s.28B of the Valuation of Land Act, any separately valued stratum or strata shall also be a

separate parcel for rating purposes. The only express directions in the Valuation of Land Act with respect to separate valuations of parcels of land or of strata are in ss.27(1), 27(2), 27A(1), 28 and 28A.

34. The Valuation of Land Act does not provide a definition of "parcel" but in ss.26 and 27 set out directions with respect to the circumstances in which it is mandatory either to include several "parcels of land" in one valuation or to value them separately. The expression "parcel of stratum" is not used in the Act and in a number of provisions (e.g. ss.19, 27, 27A) references are made to "stratum" where the word is used in a parallel sense to "parcel of land." The Valuer-General in choosing land or stratum for separate valuation is not given any express direction as to what should be selected as the parcel of land or, in the case of stratum, the unit of valuation. It is, however, contemplated that what he separately values will be either a parcel of land or a stratum and, upon his separately valuing it, what he has so valued becomes a parcel for rating and taxing purposes. In respect of it he is obliged to determine the unimproved, improved and assessed annual value: s.14.

Valuation and Rating of the Leased Property.

35. It was by virtue of provisions in two of the abovementioned statutes that the leased property became rateable and the proper subject of a valuation by the Valuer-General. One of those provisions was s.132 (2A) of the Local Government Act by which lands in a municipality or shire vested in the Commissioner and which are leased to any person for private purposes are made rateable. The other was s.88(3) of the Metropolitan Water Sewerage and Drainage Act which enabled water rates to be levied upon land so vested and so leased.

36. The Valuer-General is required to make a valuation of all lands Valuation of Land Act, s.14) and, in effect, to furnish to the authorities mentioned in s.47 a valuation list of rateable and taxable lands comprised in their respective areas (ss.48(1), 48(2)). In fulfilment of this duty the Valuer-General was therefore required to determine the unimproved value of the hypothetical fee simple of the leased property, the improved value thereof and the assessed annual value thereof.

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The 1961 Amendments.

37. Prior to 1961 the provisions in the Valuation of Land Act for the ascertainment of the unimproved value of land (s.6) was identical with that contained in the Third Schedule to the Local Government Act set out in paragraph 27 above. In 1961, following the decision of the Supreme Court of New South Wales in Commissioner for Railways v. Valuer-General (1962) S.R. (N.S.W.) 28 (the Lawrence Dry Cleaners case), amendments were made to the Valuation of Land Act which introduced a specially and precisely defined category of land called "stratum" and made (in ss.7A, 7B and 7C) provision for the ascertainment of the improved, unimproved and assessed annual value of a stratum.

V. EVENTS PRIOR TO THE HEARING

38. The leased property being rateable under the statutory provisions just referred to, the Valuer-General in October 1962 made valuations of it pursuant to his obligation under s.48 to furnish a valuation list to rating and taxing authorities.
p.27, l.35-p.28, l.37 As appears from the finding in paragraph 6 of the stated case, the subject matter of these valuations was identical with the leased property.

39. The first of these valuations, which took
p.114 effect in the valuation roll on 12th October 1962, was numbered 710 and was a supplementary valuation supplied under s.49. It took account of changes in value which had occurred since the last valuation list had been furnished and fixed a figure as the "rating and taxing basis" pursuant to s.61A. The
p.115 second of these valuations, which took effect in the valuation roll on 16th October 1962, was numbered 4173 and was a sexennial valuation pursuant to s.48(2). Each of the notices of these valuations notified the unimproved, the improved and the assessed annual value of the leased property. Although separate objections were taken to these valuations and subsequently separate notices of altered valuations issued, no distinction for any purpose which is material to this appeal need be drawn between valuation numbered 710 and valuation numbered 4173.

40. These notices of valuation each contained under the heading "Area or Dimensions" abbreviated

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particulars which corresponded with the leased property and in paragraph 38 of the stated case Else-Mitchell J. said: "I found it established on the evidence that the subject matter of the 1962 valuations was land and that on the proper construction of the notices of valuation ..... the valuation then made was of land notwithstanding the use thereon of the word 'stratum' or 'strata'". His Honour's reasons for this conclusion are amplified in his judgment p.21,ll. 20-33

41. The Company exercised its rights under s.29(dA) to lodge objections to these valuations claiming that the situation, description and dimensions of the stratum were not correctly stated. p.28,ll.38-43

42. On 12th September 1967 the Valuer-General pursuant to s.35(1) altered the valuations, amended the valuation roll and issued notices of altered valuation. These notices substituted for the description by metes and bounds of the subject matter of the valuation, namely the leased property, which had appeared in the notices issued in 1962 a description assigning to each floor of Wynyard House, and to each floor of Menzies Hotel which had been structurally completed in October 1962 a given number of square feet; and stated additionally the area in square feet of the underground spaces described in plans "E" and "G" to the lease and the area of the underground space described in plan "F" thereto, together with the additional 47 square feet leased by the supplementary lease referred to in paragraph 18 above. All these areas were referred to in the notices of altered valuation as "strata", although no vertical dimensions were given. In arriving at the stated area for each floor, there were included only those portions of the floor vertically above or below which there intruded, by the terms of the lease, at some level, one or other of the exceptions from the leased property enumerated in paragraph 21 above. This division of the leased property by the abstraction of the so-called strata left irregularly shaped areas (twelve in number and subsequently referred to as "land islands") scattered through the leased property, into which at no level did any space excepted from the lease intrude. Neither these land islands nor the air space above the second floor of Menzies Hotel (apparently by reason of the circumstance that as at October 1962 building construction had not advanced beyond this

p.28,l.44-p.29,l.12

p.29,ll.23-27

p.29,ll.12-19

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level) were included in the valuation as so altered - even the unimproved valuation - and they were not valued at all.

43. It was by virtue of this substituted description of the subject matter of the valuations that the unimproved value was altered from $2,500,000 (£1,250,000) stated in the original valuations of
pp.114,115 October 1962 to $1,100,000. The basis upon which
E.g.p.116, this reduction in unimproved valuation was calculated
1,13 was not explicitly established by evidence and the only witness called by the Valuer- General in the
p.40, ll. proceedings was a person who had nothing to do with
40-43 the preparation of the valuations the subject thereof.

44. The reduction in unimproved value seems, at least in part, to have been due to the fact that part of the leased property (the "islands") which had been
p.29,l.15 included in the original valuations were wholly excised from the valuations as altered. It may, additionally, have resulted from the importation into the calculation of unimproved value of a figure which came to be called the "severance factor". This was an amount which the hypothetical purchaser of the space occupied by the so-called strata (upon the assumption required by s.7B(1)(a) that the improvements within it had not been made) would deduct from the sum he might otherwise pay for that space by reason of the additional building and constructional costs in which the absence of any physical divisions corresponding with the boundaries of so-called strata
Cf.p.38, would involve him when he came to link up any
l.29 improvements he subsequently placed in that space with the sliced off improvements necessarily assumed (pursuant to s.7B(1)(c)) to be still standing on the various "islands" around and amongst it.

p.29, ll.28- 45. On 4th October, 1967 the Commissioner, being
32 dissatisfied with the Valuer-General's decision on the Company's objections to the valuations, required the Valuer-General to refer those objections to a Valuation Board of Review for hearing and determination pursuant to s.35(2) of the Valuation of Land Act. Thereafter the Council lodged objections to the altered valuations and caused them to be
p.29-30 referred to a Valuation Board of Review as in paragraphs 12, 13 and 14 of the stated case set out.
p.30,l.10 On 20th February 1969 the Commissioner, to ensure his standing to be heard on the issue of quantum and to object if the original valuations were to be taken as

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otherwise than valuations of land, objected generally to the two original valuations. All objections were in due course pursuant to s.36M referred by the Valuation Board of Review to the Land and Valuation Court. p.30, l.30

VI. THE STANDING AND INTEREST OF THE COMMISSIONER

46. The Commissioner stood before the Land and Valuation Court as a person dissatisfied with the Valuer-General's decision on the Company's objections to the valuations (s.35(2)) and as an objector to the valuations (s.29(3A)). His immediate interest in maintaining the unimproved value of the leased property as determined in the original valuations of October 1962 arose from the reddendum of the lease which fixed the rent, after an initial period of three years, by reference to a "percentage of the Unimproved Capital Valuation of the freehold of the land hereby demised (made in pursuance of the Valuation of Land Act 1916 or of any Act amending or in substitution for the same ....)". This provision contemplated a valuation of the whole of the leased property and not merely of some part or parts thereof. He maintained that the entirety of the leased property as comprehended in the original valuations, and not a part thereof produced by some fortuitous division, was the unit of property for valuation purposes. p.84,ll.23-25

47. His general interest in upholding the original valuations of October 1962 as valuations of the entirety of the leased property arose from the frequency with which lands of the Commissioner not required for railway purposes, or not immediately needed therefor, are leased for private purposes at rentals related to the unimproved value of the lands. These lands commonly have both vertical and non-vertical dimensions, such as spaces wholly or partly upon overhead railway bridges and other approaches to railway stations or spaces comprised in columns of air wholly or partly above railway stations or tracks situated in cuttings. His interest was to contend that such spaces, if the subject of a single lease,

(a) should be valued in their entirety as one unit of property for valuation purposes notwithstanding

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that, wholly or in part, they have boundaries which limit their vertical extent;

(b) Should not for valuation purposes be artificially fragmented into portions of limitless vertical extent on the one hand and portions having at least one finite non-vertical boundary on the other.

VII. THE RESPECTIVE CONTENTIONS OF THE PARTIES BEFORE THE LAND AND VALUATION COURT.

p.35,ll.26-31

48. The principal contention of the Commissioner (and of the Council) before the Land and Valuation Court was that the whole of the leased property was non-stratum land whose values could and should be fixed in a single valuation by the Valuer-General pursuant to ss.5, 6 and 7 of the Valuation of Land Act.

49. It was further contended that if, contrary to the principal submission, the two spaces under Carrington Street and the space under Carrington Street and Wynyard Park respectively identified as "E", "F" and "G" in the said lease ought not to be included in the same valuation as the rest of the leased property and should be separately valued as stratum land, by reason of the reference to improvements on the three said plans by which they were delineated (namely the floor and ceiling in the sectional elevations marked thereon), nevertheless the rest of the leased property whose boundaries were delineated by metes and bounds and by plans free of any reference to improvements was non-stratum land and should be valued as such by the Valuer-General.

p.35,ll.32-35

50. In particular, it was contended that the Valuer-General had erred in acceding to the submission of the Company that the fact that certain spaces at various levels were excepted from the lease had the effect of converting what would otherwise have been a lease of non-stratum land into a lease of stratum and of non-stratum land, with the consequent necessity of valuing those parts of the leased property which happened to be above or below an excepted space as stratum separately from any valuations which might be made of the various irregularly shaped pieces of non-stratum land which remained and the consequent impossibility of comprehending the whole of the leased property in one valuation.

p.36,ll.4-7

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51. On the other hand, it was contended by the Company that the exceptions from the lease prevented so much of the leased property as was above or below an exception from being non-stratum land within the meaning of the Valuation of Land Act and that it was consequently stratum. The reason advanced for this conclusion was that, whatever may have been the position before 1961, the amendments to the Valuation of Land Act 1916 made in that year, providing for the valuation of stratum, required that only "land" in the sense of land "usque ad coelum et ad inferos" could be valued as non-stratum land under the original provisions of the Act and that thenceforth everything else which was land less than "usque ad coelum et ad inferos" had to be regarded as stratum and valued under the new provisions added in 1961 (i.e., under ss.7A, 7B and 7C.) p.34,l.40-p.35,l.13

52. The area of the leased property which this argument required to be regarded as stratum was then ascertained by taking a plan of the site between Carrington Street and George Street and hatching so much of it as coincided with any space excepted from the lease at any level. This was done on a plan which was tendered in evidence by the Company and is annexure "11" to the Stated Case. The portion hatched in the manner which corresponds with the legend "land over which Commissioner of Railways retains title at one or more strata levels" (hereinafter called "the hatched space") is arrived at by superimposing on the one plan all the exceptions from the lease coloured blue and delineated in plans "B", "D2", "D3" and "J" annexed to the lease together with the 20 ft. exception relating to Wynyard Lane, and adding to the plan the pieces of land delineated in plans "E", "F" and "G" annexed to the lease. What remains when this is done are twelve disconnected and irregularly shaped and sized areas (marked on the said plan annexure "11" with the letters "A" to "L") being the "land islands" referred to in paragraph 42 above which, on the Company's argument, are the only non-stratum land left in the site. p.129; Following p.110

53. But, it was argued, because the Valuation of Land Act makes a strict dichotomy between non-stratum land and stratum and does not permit the valuation of the two together, these "land islands" should be "excised" before any valuation is made. It was apparently because of an acceptance of this contention that the Valuer-General had upon the p.35,ll.18-25

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objection of the Company altered the original valuations in the manner described in paragraph 42 above.

VIII. THE JUDGMENT AND REASONS OF THE LAND AND VALUATION COURT.

54. The steps by which the judgment of Else-Mitchell J. proceeded may be stated as follows:

p.5, l.3 (a) At the outset lies the question of what should be valued.

(b) "Lands" in s.14 of the Valuation of Land Act and "land" in s.6 can include land defined by horizontal as well as vertical boundaries as can be seen from valuations which have been made under the Act of interests in land less extensive than the entirety "usque ad coelum et ad inferos."

p.6,l.24

p.6,l.44

(c) The amendments effected by the Act of 1961 did not create a dichotomy into land "usque ad coelum et ad inferos" on the one hand and everything else which being less than land "usque ad coelum et ad inferos" had to be regarded as stratum on the other and valued under the new provisions added in 1961. Those amendments were directed exclusively at a limited field of interests of which it would not have been possible to deduce an unimproved value. (Cf. the Lawrence Dry Cleaners case (1962) S.R.(N.S.W.) 28 in which it had been held that it was not possible to deduce an unimproved value of that which is itself an improvement or part of an improvement.)

p.5,11.34-42

p.5,l.43-p.6,l.1

p.7,11.30-36 (d) It would be quite unreasonable to hold that the amendments of 1961 intended to make new and more complex provisions with respect to the numerous situations in which interests in land less than the entirety had previously been valued alone or separately from the residue and in which valuations of such interests were combined with valuations of the entirety of adjoining land.

p.7,11.36-39 (e) All that the amendments were concerned to do was to enable unimproved values to be deduced of

Cf.p.36,11.8-18

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areas which had been held to be incapable of such valuation in the Lawrence Dry Cleaners case.

(f) In answering the question what should be valued, it is proper to look at the instrument by which any so-called stratum is created, if only because a stratum results from the act or agreement of parties. p.37,11.7-9

(g) Adopting this approach -

(i) That part of the lease which was a demise between Carrington Street and George Street does not create a stratum but is a lease of the entirety of the land subject to exceptions and reservations. p.8,11.24-42 Cf.p.37, 11.16-21

(ii) That part of the lease which was a demise of Wynyard Lane (excepting thereout the space 20 ft. x 20 ft.) is a demise of land "usque ad coelum et ad inferos" with a statutory exception and not a demise of stratum. p.8,1.44-p.9,1.7

(iii) The three spaces delineated on plans "E", "F" and "G" are "clearly strata in substance and as demised are defined by improvements constructed under the surface of the land." p.9,11.8-10

55. Ultimately, his Honour:

(i) Found, after a consideration of the evidence of the six valuers who testified, that the unimproved value of the leased property as at October, 1962 was $3,304,770; p.20,11.19-25

(ii) Held that the altered valuations of the Valuer-General of which notice was given on 12th September 1967 (referred to in paragraph 42 above) and the description in the notices of that date were erroneous; and p.20,11.25-28

(iii) Altered the original valuations of October 1962 by deleting therefrom the reference to "stratum" or "strata" and by substituting for the description which they contained an expanded description more fully conforming to the p.20,1.38-p.21,1.10 CF. p.31,11.13-45

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description of the whole of the leased property contained in the lease.

56. It is respectfully submitted that, in reaching the conclusion outlined above, His Honour was (save with respect to the finding that the spaces "E", "F" and "G" were strata and were to be valued as such) correct.

IX. THE QUESTIONS STATED FOR THE OPINION OF THE SUPREME COURT

p.27 57. At the request of the Company His Honour stated a case for the decision of the Supreme Court upon thirteen questions. 10

58. Some of these questions are of an abstract and hypothetical nature but those whose answer is critical to the correctness of his Honour's decision are:

p.41,l.16 A. Was I in error in valuing as land the whole of the demised premises lying between George Street and Carrington Street?

B. Was I in error in valuing as stratum and not as land those portions of the demised premises below Carrington Street and that portion below Carrington Street and Wynyard Park respectively identified as "E", "F" and "G" in the said lease? 20

X. THE JUDGMENT AND REASONS OF THE COURT OF APPEAL

59. The Supreme Court in its Court of Appeal Division (the Honourable Mr. Justice Asprey, the Honourable Mr. Justice Holmes and the Honourable Mr. Justice Moffitt) answered the questions asked in the stated case in a way which involved a ruling that Else-Mitchell J. had been in error in valuing the leased property as a whole in one valuation. In particular, the following rulings were implicit in answers given: 30

(i) The whole of the demised premises lying between Carrington Street and George Street should not have been valued by His Honour as land.

p.69,l.5 (Question A).

(ii) Those portions of the demised premises below

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Carrington Street and that portion below Carrington Street and Wynyard Park respectively identified as "E", "F" and "G" in the lease were correctly valued by His Honour as stratum. (Question B). p.69,l.6

(iii) Of the demised premises lying between Carrington Street and George Street the "land islands" should have been valued as land and the balance as stratum.
(Question C). p.69,ll.6-8

(iv) Since part of the demised premises was to be valued as land and part as stratum, the entirety of the demised premises should not have been included in one valuation.
(Question D). p.69,ll.9-19

60. The reasons for judgment of Asprey J.A. (with which both Holmes J.A. and Moffitt J.A. expressed agreement) proceed through a series of steps which may be set out as follows:

(a) "The legal significance of the word 'land' has an indefinite extent upwards and downwards and includes 'not merely the surface, but all the land down to the centre of the earth and up to the heavens' ". p.44,ll.22-24

(b) The amendments of 1961 did not change the meaning of "land" appearing in the Act. p.45,l.39-p.47,l.4

(c) The word "land" retains its ordinary meaning throughout the Act as amended after 1961.

(d) The definition of "stratum" gives no support to the argument that a stratum is ascertainable by looking at a draughtsman's plans or by such terminology as may be found in a specification. A stratum comes into existence when improvements or the like are physically effected to and upon the subject land. p.47,ll.25-29

(e) The 1961 amendments enabled a space or layer of a particular defined character to be valued for the purposes of the rating and taxing authorities as a "stratum". p.48,ll.3-7

(f) In the result therefore the Act since 1961 p.50,ll.2-6

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specifies two subjects for valuation by the Valuer-General either of which in turn is to be used by the rating and taxing authorities as a rating and taxing basis, namely, stratum as defined and land "usque ad coelum et ad inferos".

p.63,11.7-14 (Moffitt J.A. expressly stated that he found it unnecessary to decide whether this was the correct expression of the dichotomy.)

p.51,11.2-4 (g) The Valuer-General has no discretion to value as stratum that which is land or vice versa.

p.40,l.43-p.51,l.2 (h) Any part of that which, regarded as a whole, is land "usque ad coelum et ad inferos" and is not a stratum as defined in s.4 is to be valued as land and any part of that which regarded as a whole is stratum as defined in s.4 is to be valued as stratum.

p.41,11 (i) The valuations numbered 710 and 4173 issued by the Valuer-General on 12th October 1961 pursuant to s.61A of the Act were made on the basis that the whole of the subject matter thereof was solely strata. (Two slips have been uncorrected here:

p.114 only valuation 710 was issued pursuant to s.61A and the date of its issue was 12th October 1962.

The ruling as to the basis on which the 1962 valuation was made seems in conflict with the

p.39,l.24 express finding in paragraph 38 of the stated case but nothing turns on this if the ruling set out in paragraph (j) below is correct, as it is submitted it is.)

p.54,11.7-10 (j) The Court can correct a valuation by altering the description of the subject matter from "stratum" to "land", that is, it can value the subject matter according to its true description.

p.54,11.39-45 (k) A stratum has no separate existence for the purpose of rating independent of the land of which it is part unless under some statute it is rateable or taxable in itself as distinct from the land. Unless a stratum has such an existence for rating and taxing purposes it is merely an entity of the land which itself may be the subject of a valuation for those purposes and it cannot be separately valued and is therefore not a separate parcel for rating purposes.

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(1) The fact that Else-Mitchell J. held that part of the subject matter for valuation, namely, the three areas under Carrington Street and Wynyard Park depicted respectively on plans "E", "F" and "G" were stratum as defined in s.4 of the Act and that the balance of the subject matter was land, but nevertheless concluded that he was entitled to value the whole of the subject matter as land, gave rise to Question A. (This, with great respect, appears to reflect a misconception of what Else-Mitchell J. had done. The spaces "E", "F" and "G" were not part of the subject matter of the demise which His Honour valued as land: he valued them separately as stratum and included the valuation so derived in the total valuation of the whole of the leased property. These spaces do not lie between Carrington Street and George Street which is the location of that part of the demised premises to which Question A refers. The reason advanced by Asprey J.A. for answering Question A: Yes appears to be that Else-Mitchell J. had valued the whole of the demised premises lying between George Street and Carrington Street as land despite the fact that the three spaces "E", "F" and "G" (found by Else-Mitchell J. to be stratum) were part of the premises so lying. If this was Asprey J.A.'s reason for so answering Question A, it was based on an erroneous belief that these spaces do lie between George Street and Carrington Street.) p.51,ll.20-28

61. Moffitt A.J., while expressing agreement with the judgment of Asprey J.A., added some reasons of his own for concurring in the answers given to certain of the questions, including Question A. Moffitt A.J. appears to have reached the conclusion that the portion of the demised premises lying between George Street and Carrington Street was non-stratum land by omitting from consideration the land islands and confining his attention to the hatched area marked on annexure "11" to the stated case and referred to in paragraph 52 above. Thus His Honour said: p.58,l.4

> "In my view therefore the whole of the land demised which lay between George and Carrington Streets was not land and ought not to have been valued under s.6. Omitting for the moment those portions referred to as the "land islands" such p.62,ll.31-40

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spaces demised in my view constituted strata and fell to be valued under s.7B. The area upwards from a floor level being an improvement was a stratum and the area downwards where it existed from a floor or ceiling level was a stratum and the fact that in the one demise there was a stratum upwards and a stratum downwards with a stratum in between vested in the Commissioner did not alter such areas from their character as strata within the meaning of the definition." 10

62. The greater part of the judgment of Moffit J.A. is devoted to a critical review of opinions expressed by Else-Mitchell J. on subjects which do not appear essential to the decision at which he arrived on matters relevant to Questions A and B.

XI. CONTENTIONS IN SUPPORT OF THE APPEAL.

Table of Contents

(i) What is to be Valued?

63. The making of any valuation must take as its starting point a decision about what is to be valued. Else-Mitchell J. correctly put this question at the outset of his enquiry and Asprey J.A. acknowledged that valuation involves the ascertainment of the subject matter to be valued. Where, as in s.14 of the Valuation of Land Act, the Valuer-General is merely directed to value "all lands", it is necessary for him to choose what the subject matter of each valuation is to be. By s.18(1) of the Valuation of Land Act, a valuation once made under s.14 is to be entered in the valuation roll and s.19 discloses that each entry therein is to be with respect to a parcel of land or a stratum. As Else-Mitchell J. observed, the Act "envisages the separation or division of land into parcels" and "proceeds on the basis that a valuation is to be assigned to each parcel of land." p.5,l.3 p.53,l.15 p.6,l.31 p.12,l.12

64. Prior to 1961 a parcel of land was the only unit of property for valuation purposes which the Valuation of Land Act recognised and the presence in s.34(1)(d) and (e) of the Act of grounds of objection to valuations provided a means whereby the selection by the Valuer-General of parcels could be judicially reviewed.

(ii) Criteria for Choosing a Parcel.

65. What is properly a parcel is a question of fact in the resolution of which aid can be derived from various sources:

(a) the Valuation of Land Act and rating and taxing legislation;

(b) decided cases;

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(c) the historical background.

66. Sections 19, 26 and 27 of the Valuation of Land Act assume that it is possible to recognise a unit of property answering the description of a parcel and that it can be so recognised by reason of its possession of characteristics apart from its tenure, ownership or subjection to a particular rate. From ss.14, 58, 58A, 59 and 60 it appears that everything which can be properly chosen by the Valuer-General as a parcel for valuation is something of which an unimproved, an improved and an assessed annual value may be determined. Each parcel so chosen must be capable of having each of these three values. Therefore, if something selected by the Valuer-General as the subject matter of a valuation is incapable of having one or more of these values, it is at least likely that the selection has been incorrectly made. The nature of the three valuations which the Valuer-General is required to derive in respect of each parcel indicates that a parcel must be marketable and tenantable to enable a valuer to determine what a hypothetical purchaser or tenant would pay as the price therefor or as the annual rent thereof.

67. The rating and taxing Acts referred to in paragraph 33 above disclose an expectation that the Valuer-General will make valuations of parcels. Necessary for the operation of these Acts is the assumption they make that rateable and taxable lands are capable of being so divided for valuation purposes. In providing (in s.153(1)) that unpaid rates should be a charge on the land, the Local Government Act 1919 also contemplates that a parcel will be something which is separately marketable as such. Both the Metropolitan Water, Sewerage and Drainage Act 1924 (s.100; Fourth Schedule, cl.31(1)) and the Hunter District Water, Sewerage and Drainage Act 1938)s.104; Third Schedule, cl.31(1)) make like provision in respect of unpaid rates. A similar provision appears in s.47 of the Land Tax Management Act 1956 in respect of unpaid land tax. If a parcel is not separately marketable the charge for rates and land tax which are levied on the parcel would not be enforceable by sale.

68. That a parcel for rating purposes should be some part of land separately held by an occupier, tenant, lessee or owner also appears from s.136 of the Local Government Act 1906 (the Act in force when the Valuation of Land Act was passed in 1916) which

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provided: "Valuations to be made and adopted under this Act shall be separate valuations made in respect of each parcel of rateable land as separately held by any occupier, tenant, lessee or owner." The words in s.139(3) of the Local Government Act 1919 are different ("Every rate shall be levied in respect of a separate parcel of land ....") but their meaning has been held by the Full Court to be the same: Halloran & Co. v. Council of the Municipality of Queanbeyan (1926) 26 S.R. (N.S.W.) 50, at p.53.

69. Decisions upon objections taken to the selection of areas of land for separate valuation also throw light on the characteristics which a parcel of land properly so called will have. A parcel results from some act whereby land is divided into something which can be spoken of as "one piece", usually because it has a unity of title, of physical division, of occupation or of use. In Nambucca Shire Council v. Brain (1957) 2 L.G.R.A.198, at p.201 McClemens J. said:

> "According to the Oxford English Dictionary, Vol.7, 'parcel' in real property is a 'portion or piece of land', and gives, amongst others as an example, a definition from Sweet's Law Dictionary (1882) as 'a part or portion of land'. One often sees the phrase 'All that piece or parcel of land' in transfers, conveyances and the like although in ordinary parlance the word may be a little archaic. It seems that one may safely start from the definition that the phrase 'a parcel of land' means only a piece of land, and what a piece of land is and whether an individual area is a piece of land really comes back to a pure question of fact."

70. The manner in which, upon an objection, the correctness of the valuer's selection of parcels has been tested, is illustrated in Patullo v. Council of the Municipality of Condobolin (1918) S.R. (N.S.W.) 297. An owner of an area of land had effected a private subdivision thereof, laid out streets and marked out allotments for sale; some lots were sold and the unsold lots in each section remained contiguous, vacant and physically undivided. On the valuation of the property for rating purposes, under the Local Government Act 1906, every individual

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unsold allotment was treated as a separate parcel. The Full Court held that this was wrong in principle and that the contiguous unsold lots in each section should be treated as one parcel separately held. Cullen C.J. said (p.301):

> "If the purchaser bought several contiguous lots and either left them as they stood or enclosed them in a ring fence and held them so, it seems to me to be impossible to say that he would hold three separate parcels. The parcels would not be separated in title, they would not be separated by physical severance nor by use nor by occupation. How could it be any more so in the case of the original owner?"

71. Other cases have affirmed that whether a division of land yields a parcel is not concluded by the presence or absence of a legal subdivision, but depends upon factual matters such as whether the piece in question is physically separated or adapted to separate occupation: see, e.g., Taree Municipal Council v. Clarke (1936) 13 L.G.R. (N.S.W.) 37. It has been said that a fair, practical guide in arriving at an answer to the question whether a person is the owner of two or more separate parcels of land is to enquire whether he owns different pieces of land which have been so separated from each other, either by description of boundaries or by plan, as to be capable of being occupied as separate tenements: Queensland Deposit Bank Ltd. v. City of Brisbane (1928) Q.S.R.13.

(iii) Relevance of the English Tests.

72. The tests which have been thus applied in Australia for the purpose of ascertaining what is a parcel for valuation (and hence for rating and taxing) purposes, are similar to those used for determining what is a hereditament under the English rating legislation. In each case their purpose is to determine the unit of assessment for rating and taxing purposes: in each case what makes this determination necessary is legislation which imposes liability to rates and taxes by reference to the value of land owned or occupied.

73. The English General Rate Act 1967, like the statutes of New South Wales already mentioned, provides no test for determining what is a unit of occupation, but the practice which has prevailed warrants the

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statement of some general rules. In determining whether a property should be divided into separate units for valuation and rating purposes, English cases stress the importance of contiguity, singleness of occupation and function or, as was put in argument in Gilbert v. S. Hickinbottom and Sons Ltd. (1956) 2 Q.B.40, at p.46, "geography, structure and use." Where there is a unity in these respects, the authorities - both English and Australian - point to the existence of a single hereditament or parcel.

74. A parcel, once found to exist, should not (as if subdivided) be valued by the aggregation of the values of each part into which it could possibly be divided; that is to say, it is not permissible to subdivide a parcel for valuation purposes where no subdivision in fact exists: Bowman v. Muswellbrook Municipal Council (1922) L.G.R. (N.S.W.) 14. So, it is inconsistent with the construction of the rating Acts to allow the creation of artificially circumscribed units for valuation purposes not corresponding with any real subdivision of tenure or occupation. As Channell J. said in North Eastern Railway Co. v. York Union (1900) 1 Q.B.733, at p.739: "One thing I think is clear, that property must be rated according to what it is, and not according to what it might be." Else-Mitchell J. expressed the same thought in the present case when he said that the provisions of the Valuation of Land Act "provide no justification for the arbitrary subdivision of an area or parcel of land ..., in the absence of any physically identifiable criterion marking a subdivision, or the separation of ownership or occupation ....." p.12,11.13-16

75. This similarity in English and Australian decisions is not accidental: it results from the common origins which English and Australian rating laws enjoy. That New South Wales has chosen the unimproved capital value as the value upon which certain rates are to be levied does not involve it in the selection of any criteria for the existence of a parcel different from those which determine the existence of a hereditament. Indeed, any properly chosen parcel under the New South Wales legislation will share with a hereditament under the English legislation at least the quality of being tenantable and of having an assessed annual rent.

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(iv) The 1961 Dichotomy.

76. This having been the position up to 1961, it remains to consider whether the amendments to the Valuation of Land Act of that year have altered the criteria by which the unit of property for valuation purposes is to be chosen. Up to that time the only unit of property for valuation purposes was a parcel of land: thenceforth, there were two units, a parcel of land or a stratum. By making special provision concerning those parts of land which answered the definition of "stratum" in s.4, the amendments of 1961 were not bringing into existence any new category of land: rather, they provided a separate method of arriving at the unimproved value of a particular kind of parcel, precisely defined it and gave it a name.

77. It is accepted that the 1961 amendments did introduce a dichotomy, but it is a dichotomy between land which is within the definition of "stratum" on the one hand and that which, though still land, is not within the definition of stratum on the other. The dichotomy is not between land which is usque ad coelum et ad inferos" on the one hand and land which is not "usque ad coelum et ad inferos" on the other hand. A division of land into that which is within the definition of "stratum" and land which is not within that definition would exhaust all categories of land. Again, a division of land into land which is "usque ad coelum et ad inferos on the one hand and land which is not "usque ad coelum et ad inferos" on the other would exhaust all categories of land. But a division of land into land which is within the definition of "stratum" and land which is "usque ad coelum et ad inferos" does not exhaust all categories of land.

78. In so far as it has been held by the Court of Appeal or is contended by the Company or the Valuer-General that the dichotomy in the Act is between land which is "usque ad coelum et ad inferos" on the one hand and land which is a stratum within the definition, on the other, it is respectfully submitted that they are wrong. The true dichotomy is between land which is a stratum within the definition on the one hand and land which is not a stratum within the definition on the other.

79. The following reasons are advanced in support of this submission:

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(a) If the dichotomy is between stratum and non-stratum land, all land is capable of valuation. But if the dichotomy is between stratum and land "usque ad coelum et ad inferos" much land is incapable of valuation: for example, a parcel of land containing no improvements the title to which extends upwards from fifty feet below the surface. Yet such a parcel is in New South Wales by no means uncommon. Cf.p.8,l.37

(b) Nothing in the 1961 amendments expressly excludes parcels of land which have non-vertical boundaries, but which are not strata within the definition, from being valued under the Act. Such parcels were capable of valuation before 1961. The amendments should not be construed as rendering them incapable of valuation.

(c) The dichotomy was introduced only by the stratum provisions. The effect of these provisions is to provide a separate "code" for valuing stratum (in particular ss.7A, 7B and 7C). Any land which is not a stratum is not the subject of this "code". If any land is not the subject of this "code", it falls to be valued under those provisions of the Act which applied prior to the introduction of the "code." That is to say, it falls to be valued under ss.5, 6 and 7.

(d) There is nothing in the Act to suggest that only land which is either "usque ad coelum et ad inferos" or "stratum" as defined can be valued.

(e) The sustained contrast in the Act between "land" and "stratum" does not require or even justify the conclusion that whenever the word "land" there occurs only interests in land extending "usque ad coelum et ad inferos" are being referred to. Although the attribute of extending "usque ad coelum et ad inferos" is one which, in the absence of an indication to the contrary, an estate in land is presumed to have, it is not under the general law an essential requisite of land. There is nothing in the Act which confines the word "land" as therein used to estates which possess this attribute. Indeed, the Act as a whole, by contrasting "stratum" (a part of land) with "land", itself indicates that all parts of land which are not stratum as defined are comprehended by the term "land" as used therein.

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(v) The Criteria Continue After 1961.

80. It is submitted that since 1961 the same criteria should be applied in choosing the unit of property for valuation purposes as applied in choosing a parcel prior thereto. These criteria are the same whether the unit of property is a parcel of land or a stratum. The reasons for this are:

(a) There has been by the amendments no express variation of the criteria to be applied in selecting a parcel and accordingly these remain as before.

(b) From the provisions of ss.7A, 7B and 7C it appears that a stratum must be something which is separately marketable and separately tenantable.

(c) Section 28B of the Valuation of Land Act makes a separately valued stratum a separate parcel for the purposes of the Local Government Act 1919, the Metropolitan Water, Sewerage and Drainage Act 1924 and the Hunter District Water, Sewerage and Drainage Act 1938. By reason of the provisions of these Acts mentioned in paragraph 67 above relating to charges for unpaid rates, a stratum must be something which is separately marketable. So it is true to say of a stratum, as it is of a parcel of land, that the Valuation of Land Act does not provide for the valuation of what is not separately marketable, tenantable and occupiable and the other Acts just mentioned do not provide for the charging of unpaid rates on what is not separately saleable.

(d) Parcels of land and strata receive parallel treatment in ss.26, 27, 27A, 28 and 28A of the Valuation of Land Act and parallel criteria for their selection are appropriate.

(vi) Only the Leased Property as a Whole Meets the Criteria.

81. It follows that if a correct choice is to be made of the unit of property for valuation purposes, whether that unit turns out to be a parcel of land or a stratum, regard must be had to the geographic, functional and structural unity, the suitability for separate occupation and letting and the marketability thereof. An application of these criteria to the

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whole of the leased property shows it to comply with them all. It is separately occupiable and tenantable (indeed it has been separately let), it would form a marketable unit, the whole of it represents a geographic and functional unity.

82. On the other hand, if the criteria are applied to the hatched space and the land islands referred to in paragraph 52 above it will be seen that they are not adapted for separate use or occupation, most, if not all, are not separately tenantable or separately occupiable and are not marketable units; if the land islands alone are taken, they do not form a geographic unity. The principal reasons why neither the hatched space nor the land islands are units of property for valuation purposes are:

(a) Without improvements, neither the hatched space nor any land island is a marketable unit because they are surrounded by the fragments of buildings with fabric, services and structural members severed indiscriminately where they have been notionally sliced off at the boundary; one such fragment (to take an example from the plan annexure "11" to the stated case) is only 35 square feet in area but, if in valuing the hatched space the assumptions required by s.7B are made, this fragment towers, unsupported, thirteen storeys above the empty adjacent ground within the hatched space. p.129

(b) With improvements, none of them are separately marketable units or separately occupiable or tenantable spaces because many of their services such as lift wells, stairs, escalators, plumbing and toilet facilities are outside their respective boundaries. The boundaries do not correspond with any features physically dividing one part of the improvements from another or providing any physically identifiable criterion marking a separation of ownership or occupation but indiscriminately pass through structural members, fabric and services of the building. p.38,ll.34-39

(c) If the hatched space is valued separately, the land islands must each be the subject of a separate valuation (as they do not adjoin: s.27(2)) and so there would have to be at least thirteen separate valuations (one of stratum and

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twelve of non-stratum land) for the leased property.

(d) Some at least of the land islands would be competently without access. Else-Mitchell J. was, with respect, quite right when of the land islands he said: "..... they are not separate
p.12,l.32 parcels in any sense."

83. In these circumstances it is submitted that in choosing the unit of property for valuation purposes the obvious choice is the whole of the leased property. It would be incorrect in principle to choose the hatched space or any or all of the land islands as a unit of property for valuation purposes.

(vii) The Leased Property as a Whole is not a Stratum.

84. Once the unit of property for valuation purposes has been so chosen, the next step is to ascertain whether it complies with the definition of "stratum" in the Valuation of Land Act. If, taken as a whole, it does comply with that definition, it falls to be valued as stratum. If it does not comply with that definition, then by reason of the dichotomy between stratum on the one hand and non-stratum land on the other (referred to in paragraphs 77 and 78 above), it falls to be valued under the provisions applying to non-stratum land. Once the unit of property for valuation purposes has been chosen in accordance with the established criteria it is not permissible for valuation purposes to subdivide it artificially where no real subdivision exists in fact (cf.paragraph 74 above) so as to value part of it under the stratum provisions and part of it under the non-stratum land provisions. In the present case it thus becomes necessary to apply the definition of "stratum" to the whole of the leased property. For reasons about to be stated it can be seen that, when this is done, the leased property as a whole is not a stratum.

85. The first reason why the leased property as a whole is not a stratum is that it does not "consist of a space or layer." The lease does not by its language describe what is leased in terms of spaces or layers extending upwards or downwards from stated non-vertical boundaries (cf. paragraph 20 above); in the words of Else-Mitchell
p.37,l.20 J. it is "a lease of the entirety of the land, subject to exceptions....". If one looks at what is in fact leased it cannot fairly be so described. It may

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additionally be noted that the Company did not contend nor was it in any Court held that the entire subject matter of the lease fell within the definition of "stratum."

86. The second reason why the whole of the leased property is not a stratum is that it is not "defined or definable by reference to improvements or otherwise." The land which is leased is described in the lease by reference not to improvements or physical objects but to lines and measurements on plans. The only way in which it could be contended that it is defined or definable by reference to improvements is to argue that, because it has various boundaries which are not in the vertical plane (corresponding with the exceptions stated in the lease) and, because those exceptions are defined or definable by reference to improvements or otherwise, it follows that the leased property itself is so defined or definable. But for the reasons about to be stated it is erroneous to speak of the exceptions as being so defined or definable.

87. It has already been noted in paragraph 21 above that the exceptions from the demise are defined by reference not to physical objects (whether improvements or otherwise) but to metes and bounds indicated on the plans "A", "B", "C", "D1", "D2", "D3", "E" and "J" annexed to the lease. Thus, for example, the exceptions called "passageways" in plan "B" are laterally defined on that plan by reference to points of commencement on the street frontages at measured distances from corners of the land and then by means of measured distances having stated compass bearings until the lateral extent of each exception is wholly defined. The vertical extent of each such exception is likewise defined in plan "C" by taking a point of commencement in George Street for each such passageway and by indicating with an R.L. figure the level above datum of the bottom of the exception and in a similar way the top of the exception. This process is repeated at various stated distances from George Street until Carrington Street is reached so that the vertical extent of the exception at every point is measured against datum. Likewise, the lateral extent of the exceptions from the demise in respect of lift wells, approaches and air ducts is in plans "D2" and "D3" defined by reference to measured distances marked on the plan in respect of various levels. Their vertical extent is similarly defined on plan "D1" by reference to the height

Following p. 110

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above datum of each such level. The same process is pursued in the definition of an excepted space described as "basement area".

88. From this it is clear that the exceptions (and hence any boundaries of the leased property) are not defined by reference to improvements, or anything in the nature of improvements. Nor are they so definable. It was no doubt contemplated that improvements would exist in and around the excepted areas and that some improvements would have boundaries which corresponded more or less with the boundaries of the exceptions as defined. So much could be inferred from at least some of the descriptions (e.g., lift wells, air ducts) appearing on the plans. It was also true, however, that in respect of some of the exceptions - principally the upper portions of the exceptions marked on "D2" and "D3" - no related improvements were in existence at the date of the lease since at that stage the greater part of Menzies Hotel remained to be built. But, be that as it may, the critical point is that the extent of the exceptions was comprehensively and conclusively determined by the plans to the lease. These exceptions might have been capable of being described by reference to actual or projected improvements, but they were not definable by reference to them.

89. It is important to distinguish between a definition and a description. An accurate description of a particular area of land will ordinarily correspond with the definition of that area, but the description can become inaccurate by change of circumstances whereas the definition cannot. An example of this is land having one boundary along a river. If that boundary is defined by metes and bounds and not by the river, it may be accurate to describe it as being bounded by the river but it cannot be said that it is so defined. Its boundaries will remain the same even though the river changes course; accretions to the bank of the river will not alter the area of the land and the former description will become inaccurate. If, on the other hand, the boundary of the land is not defined by reference to the river, gradual accretions to the river bank will increase the area of the land. That having occurred, it would remain both an accurate description and an accurate definition to speak of the land as bounded by the river.

90. These principles could equally be applied to land comprised in an improvement such as a building. So, if

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the space leased in a building is defined by reference to its structure (e.g., "Room 2 on the Third Floor") and the building subsides, so will the demised premises. But it is otherwise if the space leased is defined by metes and bounds relating to survey marks existing independently of the structure. A test of whether a demise of space is defined or definable by reference to an improvement such as a building is therefore to ascertain whether the demise would move if the building moved.

91. At all points in all directions the exceptions from the lease in the present case are portrayed by lines and measurements on plans. They therefore have an unchanging location and extent wherever any improvement might happen to be and if, for any reason, all improvements were to disappear so that nothing remained but an empty excavated site, the leased property would still be completely defined. Equally, if the location of any improvement on the site happened to shift or if, by reason of errors in construction, the boundaries of any passageways or lift wells or air ducts as actually constructed did not correspond with the boundaries of the exceptions as delineated in the lease, the exceptions created by the lease would remain in exactly the same position. The boundaries of the exceptions and hence of the leased property are therefore dependent upon the location of survey marks and lines and not upon improvements or other physical things. There is no finding that any improvement or improvements in fact exist which at all points or at all actually correspond with the vertical and non-vertical boundaries of any exception as delineated in the lease and there is no finding that the position of those boundaries can be ascertained by reference to any particular improvements. Hence, unless the words "defined or definable by reference to improvements or otherwise" in the definition of "stratum" comprehend a definition by survey marks and lines, the leased property is not within the definition. And every Court by which these words have been construed has held (it is submitted correctly) that "or otherwise" should be read as meaning "something in the nature of an improvement": e.g., Hurstville Super Centre Ltd. v. Valuer-General (1966) 67 S.R. (N.S.W.)110. This has the consequence that a stratum must take its definition from some reference to physical objects and, in the words of Asprey J.A., cannot be "ascertainable by looking at a draughtsman's plans."

Cf.p.47, ll. 21-24

p.47,l.26

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(viii) The Leased Property must be Valued as Non-Stratum Land.

92. It is therefore submitted that the leased property as a whole does not comply with the definition of "stratum" and so must be valued under the provisions relating to non-stratum land, i.e. ss.5, 6 and 7 of the Valuation of Land Act. (If this is not accepted, but it is accepted that the correct unit of property for valuation purposes is the whole of the leased property, the Commissioner would suffer no financial or other disadvantage because (as Else-Mitchell J. in an alternative finding held), provided it is the whole of the leased property that is being valued, its valuation as a stratum would not be different from its valuation as non-stratum land. Such financial difference as could exist between its valuation as so-called stratum and its valuation as non-stratum land resulted (as already observed in paragraph 44 above) from the selection of the unit of property to be valued rather than from the application of the one or the other of the valuation codes. Nevertheless, the valuation of the whole of the leased property as a stratum does appear to involve the errors of principle stated in paragraphs 85 and 86 above).

p.21,l.36-p.22,l.16

93. If the leased property as a whole is non-stratum land, the fact that at various levels it has some non-vertical boundaries does not prevent it being valued under ss.5, 6 and 7 of the Act. Prior to 1961, parcels of land whose boundaries were not all in the vertical plane could be valued under these sections. There is nothing in the 1961 amendments which, in the case of anything which is not a stratum, renders this impossible.

94. If authority were needed for the proposition that an estate in fee simple can exist in a parcel of land limited in the non-vertical as well as the vertical plane, it is to be found among the references given in 32 Halsbury (3rd) 249. In its application to the present case this proposition shows that the fact that, by reason of the exceptions to the lease which in various places and at various levels intrude into the site, not every portion of the leased property has an uninterrupted vertical extent of infinite length in either direction, does not prevent a fee simple estate in land from existing in it.

95. The Valuer-General has at all times been able to value this type of fee simple estate. In the words of

Record p.6,l.42

Else-Mitchell J., provisions in the Valuation of Land Act "consistently with authority and the long practice of the Land and Valuation Court, have led to valuations being made of parts or of interests in land less than the entirety usque ad coelum et ad inferos." In particular, an unimproved value as "land" can be derived by the Valuer-General under s.6 of the Act of a fee simple in a parcel not extending without interruption usque ad coelum et ad inferos. For example, where the Valuer-General identifies the subject matter to be valued as being only land below the surface (because it is only that land which is rateable), he should value the hypothetical fee simple in that sub-surface rateable portion as "land": Cf. Dover Street Estate Co. Ltd. v. Cessnock Shire Council (1923) 6 L.G.R. (N.S.W.) 119. Equally, a separate valuation can be made as "land" of a hypothetical fee simple which does not extend below the surface of the soil: Perpetual Trustee Co. Ltd. v. Valuer-General (1927) 8 L.G.R.(N.S.W.) 135. Hence the Valuer-General can consistently with authority and the long practice of the Land and Valuation Court" derive an unimproved value pursuant to s.6 of the Act of the hypothetical fee simple estate in the leased property as well, of course, as an improved and an assessed annual value.

(ix) Hatched Space and Land Islands - Improper Division.

96. The units of property for valuation purposes which the Company and the Valuer-General have put forward as being appropriate to be valued in the present case are the hatched space in annexure "11" to the stated case and the so-called "land islands". They have contended that the hatched space falls to be valued as stratum and the land islands as non-stratum land. As already noted in paragraph 59(iii) above, this contention was upheld in the Court of Appeal.

97. As already submitted in paragraphs 82 and 83 above, this choice of units for valuation purposes is not correct. But, in any event, even if the hatched space were a proper unit of property for valuation purposes, it does not fall within the definition of "stratum." The boundaries of the hatched space are not defined or definable by reference to improvements or anything in the nature of improvements;

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they are, for the reasons already set out at length in paragraphs 87 to 91 above, defined or definable only by reference to survey marks and lines drawn on a plan.

98. Even if the hatched space and the land islands are chosen as separate units or property for valuation purposes, then, because the hatched space (not being a stratum) falls to be valued as land, the hatched space and the land islands are all parcels of land and all adjoin and should, by virtue of s.26(2), be included in one valuation. In any event, a division of the leased property for valuation purposes into hatched space and land islands is a division where none in fact exists and is not permissible (see paragraph 74 above). The justification put forward by the Company and the Valuer-General for separate valuations of the land islands and the hatched space is that the hypothetical fee simple estate in the land islands is "usque ad coelum et ad inferos" while that in the hatched space is not "usque ad coelum et ad inferos". But, as already submitted in paragraphs 76-79 above, this is not the dichotomy upon which the valuation provisions of the Act are based.

(x) Answers to the Principal Questions.

99. It is the Commissioner's submission that the whole of the leased property is to be valued in one valuation as land under ss.5, 6 and 7 of the Act, so that the answers to be given to the first two questions would be =

Question A = No.

Question B = Yes.

(xi) The Underground Spaces and Question B.

100. Question B raises as a separate issue whether the three underground spaces "E", "F" and "G" are to be valued as land or as stratum. It is convenient to observe that the reason why Questions A and B have been framed in this manner is that Else-Mitchell J. treated these three underground spaces separately from the rest of the leased property and valued them as stratum. It is respectfully submitted that his Honour erred in so doing because:

(a) These spaces were not separate units of property for valuation purposes.

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(b) Even if they were, they did not fall within the definition of "stratum".

101. As to (a). Space "E" was at the basement level and had no means of access otherwise than through the rest of the leased property; it was not separated from the rest of the leased property by any physical structure and was put to a use (the storage of housing of plant) which integrated it with the adjacent portions of the leased property. Space "F" was at the level of the Hunter Street Arcade; it had no access except through other land leased to the Company (being the 47 square feet in the supplemental lease); it was the site for one of the shops lining the Hunter Street Arcade, the remainder of which were in the leased property, space "G" was functionally integrated with the rest of the leased property, being used as a car park for hotel guests and patrons to which access could be had by the lift system in the Menzies Hotel; it was physically integrated by means of the sloping ramp constructed to it from Wynyard Lane across part of the rest of the leased property and which provided it with direct access. But even if "E", "F" and "G" were units of property for valuation purposes, so long as they were not stratum they would have to be included in the one valuation pursuant to s.26(2). p.19,l.20 p.19,l.30 p.19,l.34 p.19,l.38 p.20,l.7 p.34,l.23 Cf.plan p. 125A

102. As to (b). The lease describes the three spaces as "all those pieces of land under common law title" and in the three plans annexed to the lease delineates them. The mode of delineation is similar to that employed in the definition of exceptions referred to in paragraph 87 above. The definition is not by reference to physical objects or improvements (although their existence in the vicinity is acknowledged on the plans) but by reference to metes and bounds indicated thereon. For the reasons given in paragraphs 88 to 91 above, these three spaces are not "defined or definable by reference to improvements or otherwise." p.77,l.24

103. Accordingly, even if it were proper to consider "E", "F" and "G" for valuation purposes separately from the rest of the leased property, the answer to Question B would, it is submitted, still be: Yes.

104. If these three spaces fall to be valued as land, they adjoin the balance of the whole of the

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leased property, they are owned by the same person, they are of the same class of tenure and they are let to one person; therefore (if for no other reason) they should be included in one valuation with the land between George and Carrington Street because of the provisions of s.26(2).

(xii) Summation.

105. The difficulties arising in the instant case (and in the Hurstville Super Centre case referred to in paragraph 91 above) have occurred through a failure to take correctly one or other of the following steps which, it is submitted, are essential to a correct valuation:

(a) The first step is to choose what, applying the established criteria, is the proper unit of property for valuation purposes.

(b) Once the proper unit of property for valuation purposes has been so established, the definition of stratum should be applied to it.

(c) If the definition of stratum applies it should be valued under ss. 7A, 7B and 7C; if the definition of stratum does not apply it should be valued under the provisions of ss. 5, 6 and 7.

Part of the difficulty has also arisen from the suggestion that there is a dichotomy between a stratum within the definition on the one hand and land which is "usque ad coelum et ad inferos" on the other. If the correct dichotomy is recognised, i.e., between stratum on the one hand and non-stratum land on the other, and the steps referred to above are correctly applied, the 1961 amendments present no difficulty.

(xiii) The Remaining Questions.

106. In the light of the foregoing, it is submitted that, if it be thought appropriate to come to the remaining questions, they should be dealt with in the following way:

Question C - On the assumption stated, C(i) should be answered: Yes.

Question D - It is unnecessary to answer this question.

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It is framed on an assumption that it is proper to find in the demised premises more than one unit of property for valuation purposes. But in so far as the question asks whether the Land and Valuation Court was in error in including the entirety of the demised premises in one valuation it should, if it is to be answered, be answered: No.

Question E - It is unnecessary to answer this question but, if it is to be answered, E(b) should be answered: Yes.

Question F - This does not raise any question affecting the correctness of the Land and Valuation Court's determination and need not be answered.

Question G - This question need not be answered, but if an answer is to be given, it should be - G(a): Yes.

Question H - No.

Question I - This question need not be answered, but if an answer is to be given, it should be:

I(a) : No.
I (b): No.
I (c): No.

Questions J, K and L: No party has sought leave to appeal against the answers given by the Court of Appeal to these questions and they need not be answered.

Question M - This question should not be answered as being hypothetical because the records in question were in fact produced.

XII. SUBMISSION

107. The Commissioner therefore respectfully submits that the judgment of the Court of Appeal was as to part correct (namely in its answer to Question I) and as to part incorrect and ought to be varied for the following (amongst other)

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REASONS

1. The dichotomy is between a stratum and all land which is not a stratum and not between a stratum and land "usque ad coelum et ad inferos."

2. The proper unit of property for the Valuer-General to have valued was the whole of the leased property.

3. This unit of property is not a stratum within the definition and is therefore to be valued under ss.5, 6 and 7 of the Valuation of Land Act.

PHILIP JEFFREY.

GERARD HORTON

IN THE PRIVY COUNCIL No.16 of 1972

ON APPEAL FROM

THE COURT OF APPEAL OF NEW SOUTH WALES

IN TERM No.645 of 1970

B E T W E E N :

THE COMMISSIONER FOR RAILWAYS
THE COUNCIL OF THE CITY OF SYDNEY and
WYNYARD HOLDINGS LIMITED Appellants

- and -

THE VALUER-GENERAL Respondent

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