Valuation of Land Amendment Bill 2008

Explanatory Notes

General Outline

Policy Objectives

The objectives of the Bill are to amend the *Valuation of Land Act 1944* (the VOL Act) to:

- Repeal, with retrospective effect, the amendments that introduced the concept of intangible improvements to the VOL Act.
- Cleary define unimproved value as prescribed in the VOL Act to recognise the existing use of the land or highest and best use.
- Include a formula for the valuation of nominated large shopping centres with calculations commencing and based on valuations effective prior to 30 June 2003.
- Clarify the guidelines for the awarding of costs of appeals against valuations.

Reason for the Policy Objectives

Repeal Intangibles:

The VOL Act was amended in 2003 to require that intangible improvements be treated as improvements where statutory valuations are assessed using the improved value of the property. The original intent of the amendments was that intangible improvements would only apply to unique types of commercial property such as major shopping centres and only where:

- The valuer determined the unimproved value by deducting the value of improvements from the improved value of the property (section 3(2) of the VOL Act); and

- The owner had applied to have intangibles taken into account (section 35A of the VOL Act).

Intangible improvements include things like the value of a lease, licence, development approval and goodwill. Others are prescribed by regulation.

When owners applied they were required to provide detailed documentation to support their applications. This was meant to encourage a full and frank disclosure and exchange of information to provide more transparency in the complex process of valuing major shopping centres.

This has not been successful and has created a burden on owners to provide the information and to departmental valuers in attempting to interpret, validate and apply the information.

In October 2007, the Land Appeal Court (the Court) handed down its decision in *PT Limited and Anor v Chief Executive, Department of Natural Resources and Water* (2007 QLAC 0074) (the Chermside decision). The Court determined that the definition of "unimproved value of land" in relation to improved land requires the improvements to be treated as if they had never been made. As a result, the value of intangible improvements must be deducted from the value of the land regardless of the valuation approach adopted by the valuer in respect of any property developed for profit regardless of whether an owner has made an application under section 35A. Further, the application of this decision would require that the site would have to be valued as if there was no certainty that the site could be used for its present use. This would generally result in a much lower valuation, where the present use would otherwise constitute the highest and best use. The decision of the Court has instituted the approach set out by the Privy Council in *Toohey's Ltd v Valuer-General* (1925) AC 439 (the *Toohey's* case).

In 1930 the Parliament of Queensland legislated to negate the approach in Toohey's case by amending the Act to replace the expression *"had not been made*" by the words "*did not exist"* accompanied by the expression "*at the time as at which the value is required to be ascertained", and introducing statutory confirmation of the deduction method* (section 3(2) of the VOL Act). These words were included in the VOL Act when it became law in 1944.

As an example, the Department has historically valued a regional shopping centre site on the basis that the site could continue to be used for that purpose. As a result, the value of the intangible improvements, such as the value of the development approval and the agreements for lease have not been deducted from the value of the land. Under the law as set out in the Chermside decision, the value of these items must now be deducted from the value of the land, so reducing the unimproved value of the land. The historical approach taken by the chief executive, prior to the introduction of intangible improvements in 2003, was that established by the High Court of Australia in *Commissioner of Land Tax v Nathan* (1913) 16 CLR 654 (the *Nathan* case).

The repeal of the amendments made in 2003 will in part restore the position established in the *Nathan* case in Queensland.

Clarify the definition of unimproved value:

The definition of "unimproved value of land" in relation to improved land is proposed to be changed in order to clarify that the approach taken by the High Court in the *Nathan* case is established as the law in relation to valuations done under the VOL Act.

These amendments will do this by confirming that:

- The assumption required to be adopted in determining the unimproved value of improved land does not extend to mean that the history of the use of the subject land is ignored;
- The unimproved value of land includes any increase in the value that results from:
  - the making or use of an improvement; or
  - a local planning instrument; or
  - a development approval, or other approval or authority other than a hotel licence, relating to the land or an improvement on the land;
- There is no requirement to make an assumption that the improvements have never been made;
- The chief executive disregards any risk in realising the current use of the subject land.

Formula for prescribed large shopping centres:

In the Chermside decision, the Court said:

"It is trite to say that the concept of unimproved value is an artifice when dealing with highly improved land. For the Chermside Shopping Centre that artificiality assumes almost ridiculous proportions. If unimproved value is to continue to form the basis for revenue raising, we are of the view that consideration should be given to devising a simpler process for arriving at unimproved value in cases such as these."

The Department of Natural Resources and Water (NRW) will be facilitating a review commencing in March 2008 to determine a simpler and more appropriate methodology for complex valuations such as commercial, industrial and multi-unit.

In the interim, to provide clarity and certainty it has been determined that a formula based on the average change in unimproved value of commercial land, not including shopping centre properties, be applied to regional shopping centres. With the exception of valuations of 12 regional shopping centres which are the subject of grievances, the formula will be calculated on valuations effective immediately prior to 30 June 2003 onwards but will only apply to valuations effective from 30 June 2008.

In respect of the 12 regional shopping centres which are the subject of grievances, where the formula calculation for the effective period 2003 to 2007 results in a lower valuation than the existing valuation, the formula valuation will be applied.

This is only an interim solution. Once the review is finalised and Government is satisfied that a more appropriate approach has been determined, the VOL Act will be amended to remove this interim formula approach from the determination of future valuations. Where legislative change is required to introduce the new approach, appropriate amendments will also be made.

The formula approach is established by the following amendments:

- Including the property identification number for each parcel of land with the specific information required to be displayed on the Valuation Roll maintained under the VOL Act.
- Inserting a new section to require that the unimproved value of prescribed land is to be calculated by multiplying its current unimproved value by the commercial land index.
- Defining prescribed land as including certain large shopping centres, divided into two schedules.
- Defining the commercial land index as the total unimproved value of local commercial land as at the day of issue divided by the total unimproved value of the same local commercial land in effect on the day of issue. This means the index will be the

average change of unimproved value of local commercial land in the valuation about to be issued.

- Defining local commercial land to mean commercial land in the same local government area (not including the prescribed land) as the prescribed land.

Awarding of costs of appeals against valuations:

The Court also recently handed down its decision regarding the awarding of costs relating to the Chermside appeal. The costs decision represents a change in the principles which have previously been applied in awarding costs in valuation appeals. The amendments bring the VOL Act into line with other contemporary legislation such as the *Water Act 2000* and the *Integrated Planning Act 1997*.

The amendments also remove inconsistencies between the VOL Act and the *Land Court Act 2000* with regard to seeking leave to appeal to the Court of Appeal and the associated time frames.

How the Policy Objectives will be achieved

The policy objectives are achieved by amending the VOL Act to remove the provisions dealing with intangible improvements, redefining unimproved value, introducing a formula for unimproved value for nominated shopping centres and clarifying the awarding of costs of appeals against valuations.

Alternatives to the Bill

There are no other viable alternatives that would achieve the policy objectives other than the proposed Bill.

Estimated administrative Cost to the Government for implementation

With the application of the formula retrospectively to the 12 shopping centres subject to grievance, there will be rating and land tax implications for local governments and the Office of State Revenue.

Consistency with Fundamental Legislative Principles

The amendments to remove intangibles and clarify unimproved value are retrospective. This is required to ensure that there is continuity and certainty of valuation approach.

Without retrospective changes to the Act, the Court's views regarding the application of intangibles and determination of unimproved value would have to be applied to other commercial industrial and multi-unit properties for a five year period.

Consultation

Community and industry stakeholders

Consultation has been undertaken with the Shopping Centre Council of Australia, the Local Government Association of Queensland and individual local governments in which prescribed shopping centres are located. In addition, discussions have been held with two senior lawyers in private practice.

Government

Consultation has occurred with the Office of Premier and Cabinet, Queensland Treasury, Office of State Revenue, Department of Justice and Attorney-General, Crown Law and the Department of Local Government, Sport and Recreation.

Results of consultation

The Shopping Centre Council of Australia has been consulted on a number of occasions. The Shopping Centre Council of Australia would prefer that the legislation not be amended and the decision of the Court relating to Chermside be applied. The Local Government Association of Queensland and the impacted local governments (Brisbane, Gold Coast, Logan, Toowoomba and Townsville) have expressed concerns about the retrospective financial impacts.

The Department of the Premier and Cabinet, Queensland Treasury, the Office of State Revenue and the Department of Local Government, Sport and Recreation support the proposed legislative changes. The Department of Justice and Attorney General were consulted and had no objection to the award of costs provisions based on sections 792 and 882 of the *Water Act 2000*.

Notes on Provisions

Part 1 Preliminary

1 Short title

Clause 1 states that this Act is the *Valuation of Land Amendment Act 2008*.

2 Commencement

Clause 2 states that divisions 1 and 2 of Part 2 commence on 1 July 2002. The Chermside Decision related to the unimproved value that was effective on 30 June 2003. The date of valuation for this valuation was 1 October 2002. The clarification of the definition of unimproved value must commence before the effect of the Chermside decision. This is to ensure continuity of valuation approach.

The clause also states that the commencement date for part 3 is 31 August 2003. As the legislation that introduced intangibles is being declared as having never commenced, the regulatory changes relating to intangibles must also be removed to ensure that they do not have any effect in law, even in respect of unimproved values determined in the past.

Part 2 Amendment of Valuation of Land Act 1944

Division 1 Preliminary

3 Act amended in pt 2

Clause 3 states that this part amends the *Valuation of Land Act 1944* (the VOL Act).

Division 2 Amendments taken to have commenced on 1 July 2002

4 Amendment of s 2 (Definitions)

Clause 4 inserts definitions for terminology used in subsequent amendments. The term ‘hotel licence’ has existed previously but was not defined until now. The terms ‘development approval’, ‘property identification number’, and ‘local planning instrument’ are new terms and need to be defined.

The new terms relate to matters which have previously been treated as intangible improvements under the 2003 amendments and also the *Toohey’s* approach to valuations. As the 2003 amendments are being repealed and the *Nathan* approach being re-established, these terms must now be defined.

5 Amendment of s 3 (Meaning of *unimproved value*)

Clause 5 clarifies the meaning of unimproved value to ensure that the historically accepted and applied approach continues.

In the Chermside decision the Court required the value of intangible improvements to be excluded from the unimproved value of land. In doing so it also overturned what has been an accepted approach to statutory valuations under the VOL Act. This historical approach has been that when a valuer determines the unimproved value of an improved property by assuming that the improvements did not exist (section 3(1)(b) of the VOL Act), the unimproved value must reflect that the existing use could continue where it was the proven highest and best use of the land.

The application of the Chermside decision would mean that a valuer can no longer assume that the existing use could continue or had ever existed. This would result in the assumption required in section 3(1)(b) being based on a potential purchaser knowing nothing about any improvements to the land or the use of such improvements, or the trading history of, or rents paid by lessees of the land. Thus the negotiation would proceed on an uninformed basis as to the highest and best use of the land. This assumption would be incorrect as a prudent purchaser would possess this knowledge.

As an example, the department has always valued a shopping centre site on the basis that the site could continue to be used as a site for a shopping centre. Whereas, the application of the Chermside decision would mean that the site would have to be valued as if there was no evidence that the site could be used as a shopping centre. This would result in a much lower valuation.

These amendments clarify that the historically applied approach is the approach to be applied, both to previous valuations and ones to be issued in the future.

Section 3 is to be amended by:

- Inserting section 3(2A) to confirm that the assumption required to be adopted in section 3(1)(b) does not extend to mean that the history of the use of the subject land is ignored;
- Inserting section 3(2B) to confirm that the unimproved value of land includes any increase in the value of the land that results from:
  - the making or use of an improvement; or
  - a local planning instrument; or
  - a development approval or authority other than a hotel licence, relating to the land or an improvement on the land;
- Inserting section 3(2C) to confirm that there is no requirement to make an assumption that the improvements have never been made;
- Amending section 3 to require the chief executive to disregard any risk in realising the current use of the subject land.

6 Amendment of s 5 (Meaning of value of improvements)

Clause 6 provides consistency in terminology by amending ‘amount’ to ‘cost’. Section 5(1) of the VOL Act refers to ‘cost’. This amendment ensures that section 5(2) is consistent with section 5(1) and also refers to ‘cost’.

7 Amendment of s 23 (Chief executive may value stratum orvolumetric lot)

Clause 7 amends section 23 to be consistent with the amendments being made to section 3 to ensure the *Nathan* approach is also applied to unimproved valuations of stratum or volumetric lots.

8 Amendment of s 47 (Valuation rolls—particulars and form)

Clause 8 inserts a specific requirement for a property identification number to be included in the valuation roll. This is the prime identifier for a property and already exists on the valuation roll as a matter of practice. As the property identification number will be used to identify prescribed land in subsequent sections, it is now required to be detailed as a specific component of the roll.

Division 3 Amendments commencing on Assent

9 Insertion of new s 27

Clause 9 inserts a new section 27 that provides a formula based approach to determine unimproved valuations for prescribed shopping centre land. The annual valuation effective 30 June 2008 will be the first to be determined by the application of this formula. Where a local government containing prescribed shopping centre land is not receiving an annual valuation effective 30 June 2008, the next annual valuation will be determined by the application of the formula.

The annual valuation immediately effective just prior to 30 June 2003 will be the starting value for the calculation. This valuation will be increased by the average percentage change in the unimproved values of local commercial properties at the next annual valuation for the relevant local government, as calculated from the valuation roll. The resulting figure will be carried forward until the next annual valuation where the average percentage change in unimproved values of local commercial properties for that annual valuation will be applied. These calculations are continued until the valuation for the annual valuation effective 30 June 2008 has been calculated. This figure will then issue as the annual valuation (effective 30 June 2008) for the prescribed shopping centre land.

The prescribed properties are not included in the definition of “commercial properties” and so do not fall within the definition of “local commercial properties”. As a result, the index will not take into account the increase in unimproved value of the prescribed properties.

If there is no annual valuation effective 30 June 2008 the calculation will apply to the next annual valuation, with the resulting figure issuing as the next annual valuation.

For subsequent annual valuations – the valuation in effect at the date of issue of the subsequent annual valuation shall have the average commercial percentage change applied to determine the resulting figure which will be issued as the unimproved value at the date of issue of the subsequent annual valuation.

Where, during the initial calculation period for valuations effective from and including 30 June 2003 up to the commencement of these amendments, there was a valuation other than annual issued due to either the acquisition or loss of area, the formula valuation that is applicable for that period will be adjusted by the same percentage as the area adjustment. The resulting unimproved value will then have the average increase in unimproved value of local commercial properties applied to determine the subsequent annual valuation.

Where, after the issue of the first annual valuation based on the formula, there is a requirement to adjust the existing formula based valuation due to either the acquisition or loss of area, the formula valuation will be adjusted by the same percentage as the area adjustment. The resulting formula valuation will then form the basis for the calculation of the next annual valuation.

The Chermside decision recognised that a simpler process for arriving at the unimproved value of similar properties needs to be devised.

This formula based approach is only an interim solution. NRW will be facilitating a review commencing in March 2008 to determine a simpler and more appropriate methodology for complex valuations for commercial, industrial and multi-unit properties. Once the review is finalised and Government is satisfied that a more appropriate approach has been determined, the VOL Act will be amended to remove this interim formula approach from the determination of future valuations. Where legislative change is required to introduce the new approach, appropriate amendments will also be made.

10 Amendment of s 67 (Practice and procedure for appeals)

Clause 10 amends section 67 to ensure that either a property owner or the chief executive may appeal a decision of the Land Appeal Court to the Court of Appeal without having to seek the leave of the Court of Appeal or a judge of appeal.

At present, the VOL Act creates an appeal as of right to the Court of Appeal if the appeal is commenced within 28 days. By contrast, the *Land*

Court Act 2000 (LC Act) provides that such an appeal may only be commenced by leave but allows 42 days for that leave to be sought. The proposed amendment to section 67 removes the inconsistency between section 65 of the VOL Act and sections 74(2) and 75(1) of the LC Act. Given that appeals commenced under section 65 of the VOL Act are limited to the grounds that the decision was erroneous in law or in excess of jurisdiction, it is appropriate that this avenue of appeal should be an as of right rather than subject to leave.

11 Replacement of s 70 (Costs of appeal against valuation)

Clause 11 replaces section 70 to provide similar provisions pertaining to the awarding of costs to those existing in contemporary legislation.

The decision of the Court in the Chermside decision in respect of costs represents a change in the principles which have previously been applied in awarding costs in valuation appeals. The amendments bring the VOL Act into line with other contemporary legislation such as the *Water Act 2000* and the *Integrated Planning Act 1997*.

12 Amendment of pt 9 hdg (Transitional provisions)

Clause 12 amends the heading for part 9 by adding ‘declaratory’. This is required as the next clause inserts a declaratory provision into this part.

13 Insertion of new pt 9, divs 2 and 2A

Clause 13 inserts divisions 2 and 2A into part 9. Division 2 contains section 101 and division 2A contains section 101A.

Section 101 states that the legislation that introduced the recognition of intangible improvements as real improvements is taken to have never commenced.

Intangible improvements include things like the value of a lease, licence, development approval and goodwill. Others are prescribed by regulation.

The original intent was that this would only apply to unique types of commercial property such as major shopping centres where the owner had applied to have intangibles taken into account and the valuer determined the unimproved value by deducting the value of improvements from the property’s improved value.

The Chermside decision relates to the 2003 effective valuation. This was the first valuation to be affected by the introduction of intangible improvements and therefore the first where the value of intangibles was deducted from the improved value to determine the unimproved value. The VOL Act is being amended to ensure that the concept of intangible improvements will not need to be applied to valuations conducted in the past or the future.

Section 101 provides that the amendments contained in this Bill will not affect the outcome of legal proceedings that have been determined by a Court.

However, the amendments will apply to those legal proceedings that are still on foot, in order to ensure a continuity of approach in the valuations conducted in the past, between those not subject to appeal and those the subject of an appeal that has yet to be determined.

Section 101 also declares that section 56C from the *Natural Resources and Other Legislation Amendment Act 2004* has never commenced. This section created a new heading for the transitional provisions required for the *Valuation of Land Amendment Act 2003*. As the 2003 Act is now being declared to have never commenced, this section must also be declared to have never commenced.

Section 101A inserts transitional provisions for historical valuations for prescribed shopping centre land.

These prescribed major shopping centres have outstanding grievances for valuations effective in the period from 30 June 2003 until before 30 June 2008.

The notes for *clause 9* describe the calculation process required to determine the formula valuation for the period from 30 June 2003 and up to the commencement of these changes. In an attempt to provide a simple basis for the resolution of the outstanding grievances, the formula valuation will be applied where it is lower than the valuation presently existing for the prescribed land.

14 Insertion of new schedule

Clause 14 provides a list of the prescribed shopping centres subject to sections 27 and 101A. The property identification numbers include those that were current on the valuation roll as at 23 January 2008. There are also property identification numbers that were applicable during the prescribed period and these denote records that should be included as prescribed land. The name and/or property identification number may have been different in the past and may change in the future, however the different configuration will still be taken to be the prescribed property subject to sections 27 and 101A.

Part 3 Amendment of Valuation of Land Regulation 2003

15 Regulation amended in pt 3

Clause 15 states that this part amends the *Valuation of Land Regulation 2003* (VOL Reg).

16 Omission of s 3 (Non-physical improvements that are intangible improvements—Act, s 6(5))

Clause 16 removes section 3 from the VOL Reg. This section was inserted as a consequence of the *Valuation of Land Amendment Act 2003*. As this Act is now being declared as having never commenced, this section must be removed from the VOL Reg.

17 Omission of s 5 (Valuing intangible improvements—Act, s 35A)

Clause 17 removes section 5 from the VOL Reg. This section was inserted as a consequence of the *Valuation of Land Amendment Act 2003*. As this Act is now being declared as having never commenced, this section must be removed from the VOL Reg.