

HIGH COURT OF AUSTRALIA

GAGELER CJ,
GORDON, STEWARD, GLEESON AND JAGOT JJ

VALUER-GENERAL VICTORIA

APPELLANT

AND

WSTI PROPERTIES 490 SKR PTY LTD

RESPONDENT

Valuer-General Victoria v WSTI Properties 490 SKR Pty Ltd

[2025] HCA 23

Date of Hearing: 7 March 2025

Date of Judgment: 11 June 2025

M96/2024

ORDER

- 1. Appeal allowed.*
- 2. Set aside order 2 of the orders made by the Court of Appeal of the Supreme Court of Victoria on 4 July 2024 and remit the matter to the Court of Appeal of the Supreme Court of Victoria for determination according to law.*
- 3. The appellant pay the respondent's costs of the appeal.*

On appeal from the Supreme Court of Victoria

Representation

D J Batt KC with G C Kozminsky and J T Waller for the appellant (instructed by Maddocks Lawyers)

S S Goubran KC with P E Annabell for the respondent (instructed by MinterEllison)

Notice: This copy of the Court's Reasons for Judgment is subject to formal revision prior to publication in the Commonwealth Law Reports.

CATCHWORDS

Valuer-General Victoria v WSTI Properties 490 SKR Pty Ltd

Statutes – Interpretation – Valuation of land – Where land with heritage residence subject to site-specific heritage overlay – Where definition of "site value" in s 2(1) of *Valuation of Land Act 1960* (Vic) means value of land assuming improvements not made – Where definition of "improvements" in s 2(1) of *Valuation of Land Act* means work done or material used that increases value of land and has unexhausted benefit – Whether question whether work done or material used increases value of land determined at time of valuation or at time work was done or material was used – Whether Court of Appeal's erroneous construction of "improvements" was material to its decision to dismiss appeal.

Words and phrases – "benefit is unexhausted", "development potential", "financially feasible", "heritage overlay", "highest and best use", "hypothetical prudent buyer", "hypothetical prudent seller", "improvements", "increases the value", "land value", "legally permissible", "market value", "materiality", "physically possible", "site value", "time of the valuation", "unimproved value", "valuation for rating and taxing purposes", "work done or material used".

Valuation of Land Act 1960 (Vic), ss 2, 5A.

1 GAGELER CJ, GORDON, STEWARD, GLEESON AND JAGOT JJ. Each year the Valuer-General Victoria is required to cause a general valuation of rateable land within local government areas in the State of Victoria to be returned to it and provided to the councils to which the areas relate for rating and taxing purposes.¹ The Victorian legislation specifically defines "improvements" for the purpose of ascertaining the site value of land, that definition being the focus of this appeal.

2 In s 2(1) of the *Valuation of Land Act 1960* (Vic), "improvements" is defined in these terms:

"*improvements*, for the purpose of ascertaining the site value of land, means all work actually done or material used on and for the benefit of the land, but in so far only as the effect of the work done or material used increases the value of the land and the benefit is unexhausted at the time of the valuation, but, except as provided in subsection (2AA), does not include—

- (a) work done or material used for the benefit of the land by the Crown or by any statutory public body; or
- (b) improvements comprising—
 - (i) the removal or destruction of vegetation or the removal of timber, rocks, stone or earth; or
 - (ii) the draining or filling of the land or any retaining walls or other works appurtenant to the draining or filling; or
 - (iii) the arresting or elimination of erosion or the changing or improving of any waterway on or through the land—

unless those improvements can be shown by the owner or occupier of the land to have been made by that person or at that person's expense within the fifteen years before the valuation".

3 While the Victorian legislation specifically defines "improvements", in the context of valuation for rating and taxing purposes the concepts of "improvements"

1 *Valuation of Land Act 1960* (Vic), s 11. See also *Local Government Act 1989* (Vic), s 157 and *Land Tax Act 2005* (Vic), s 19.

Gageler CJ
Gordon J
Steward J
Gleeson J
Jagot J

2.

as things done to land which increase the value of the land and of assessing land's site value (or land or unimproved value) at the time of the valuation by assuming that such "improvements" had not been made to the land are common across several jurisdictions and have been the subject of considerable judicial consideration.²

4 The question which this appeal involves is whether this definition of "improvements" requires the answer to the question whether "the effect of the work done or material used increases the value of the land" to be determined: at the time of the valuation; or at the time the work was done or the material was used (that is, at the time the putative "improvements" were made to or constructed on the land).

5 The Court of Appeal of the Supreme Court of Victoria (Emerton P, Kennedy and Lyons JJA) held that the question whether "the effect of the work done or material used increases the value of the land" is to be determined at the time the work was done or the material was used (that is, at the time the putative "improvements" were made to or constructed on the land).³ As a result, the Court of Appeal granted the Valuer-General leave to appeal, but dismissed the Valuer-General's appeal against orders of the Victorian Civil and Administrative Tribunal ("VCAT") which set aside the Valuer-General's decisions not to adjust the site value of land on which a building known as "Landene" was located in the amount of \$6,200,000 at the relevant valuation times of 1 January 2020 and 1 January 2021 and reduced the site value of that land to \$2,925,000 at those times.⁴

6 As will be explained, the Court of Appeal erred. The definition of "improvements" requires the answer to the question whether the putative "improvements" increase the value of the land to be determined at the time of the

2 See, eg, *Valuation of Land Act 1916* (NSW), ss 4(1), 6A(1); *Valuation of Land Act 1971* (SA), ss 5(1), 11; *Land Valuation Act 2010* (Qld), ss 19, 23-26; *Valuation of Land Act 1978* (WA), ss 4(1), 18; *Valuation of Land Act 2001* (Tas), ss 3, 11(5); *Rates Act 2004* (ACT), ss 6, 10. The rationale for assuming "improvements" have not been made to land in a rating and taxing context is to avoid discouraging capital improvements to land: see, eg, Commonwealth, *Australia's Future Tax System: Report to the Treasurer (Part Two: Detailed Analysis)* (December 2009) at 258.

3 *Valuer-General Victoria v WSTI Properties 490 SKR Pty Ltd* (2024) 261 LGERA 240 at 270 [145]-[146].

4 *Valuer-General Victoria v WSTI Properties 490 SKR Pty Ltd* (2024) 261 LGERA 240 at 258 [90], 271 [158], 272 [167].

3.

valuation. Further, and contrary to the submissions for the respondent, the Court of Appeal's erroneous construction of the definition of "improvements" was material to its decision to dismiss the Valuer-General's appeal. Accordingly, the appeal must be allowed and the matter remitted to the Court of Appeal for determination in accordance with these reasons for judgment.

The statutory scheme

7 By s 9 of the *Valuation of Land Act* "the valuer-general is the valuation authority in respect of rateable land in a municipal district of a council", subject to s 10 (enabling a council to nominate to be the valuation authority,⁵ which nomination the Valuer-General may accept or not).

8 Section 11 of the *Valuation of Land Act* provided that for the purposes of the *Local Government Act 1989* (Vic), a valuation authority must: "(a) cause a general valuation of rateable land within an area to be made as at 1 January in each calendar year; and (b) before 30 April that year, cause a general valuation made in accordance with paragraph (a)": "(i) to be returned to it; and (ii) to be provided to the council of the municipal district to which the area relates".

9 To "return" a valuation was defined, by s 2(1) of the *Valuation of Land Act*, as "the act of the valuer giving to the valuation authority a general valuation or a supplementary valuation which has been signed and dated".

10 Also, by s 2(1) of the *Valuation of Land Act*, "general valuation" was defined as "a valuation that a valuation authority is causing or has caused to be made": "(a) under Part II of all rateable land in an area; or (b) under Part IIA of all non-rateable leviable land".

11 Section 6(1) of the *Valuation of Land Act* provided that a "valuation authority that is going to cause a general valuation to be made must give notice of the valuation to each rating authority interested in the valuation of land in the area for which the valuation is being made". By s 6(2) a rating authority that had received such a notice "may, by notice, require the general valuation prepared by the valuation authority or any specified part of that valuation to show any one or more of the following": "(a) the net annual value; (b) the site value; (c) the capital improved value". By s 6(4), on receiving such a notice, "the valuer-general must request the valuation authority to show the values requested in the valuation, and

5 "Valuation authority" was defined accordingly in the *Valuation of Land Act*, s 2(1).

Gageler CJ
Gordon J
Steward J
Gleeson J
Jagot J

4.

the valuation authority must ensure that the request of the valuer-general is given effect to".

12 Although the relevant value in this case is "site value", other concepts of value in the *Valuation of Land Act* provide context to the meaning of "site value". Accordingly, in that Act, by s 2(1):

"**capital improved value** means the sum which land, if it were held for an estate in fee simple unencumbered by any lease, mortgage or other charge, might be expected to realize at the time of valuation if offered for sale on any reasonable terms and conditions which a genuine seller might in ordinary circumstances be expected to require;

...

estimated annual value of any land, means the rent at which the land might reasonably be expected to be let from year to year (free of all usual tenants' rates and taxes) less— [specified amounts];

...

net annual value of any land, means—

- (a) except in the case of the lands described in paragraphs (b) and (c)—
 - (i) the estimated annual value of the land; or
 - (ii) five per centum of the capital improved value of the land—

(whichever is the greater); ...

...

site value of land, means the sum which the land, if it were held for an estate in fee simple unencumbered by any lease, mortgage or other charge, might in ordinary circumstances be expected to realise at the time of the valuation if offered for sale on such reasonable terms and

<i>Gageler</i>	<i>CJ</i>
<i>Gordon</i>	<i>J</i>
<i>Steward</i>	<i>J</i>
<i>Gleeson</i>	<i>J</i>
<i>Jagot</i>	<i>J</i>

5.

conditions as a genuine seller might be expected to require, and assuming that the improvements (if any) had not been made;

..."

13 Section 2(2) of the *Valuation of Land Act* provides that:

"In estimating the value of improvements on any land for the purpose of ascertaining the site value of the land, the value of the improvements is the sum by which the improvements upon the land are estimated to increase its value if offered for sale on such reasonable terms and conditions as a genuine seller might in ordinary circumstances be expected to require."

14 Section 5A of the *Valuation of Land Act* provides as follows:

- "(1) Unless otherwise expressly provided where pursuant to the provisions of any Act a court board tribunal valuer or other person is required to determine the value of any land, every matter or thing which such court board tribunal valuer or person considers relevant to such determination shall be taken into account.
- (2) In considering the weight to be given to the evidence of sales of other lands when determining such value, regard shall be given to the time at which such sales took place, the terms of such sales, the degree of comparability of the lands in question and any other relevant circumstances.
- (3) Without limiting the generality of the foregoing provisions of this section when determining such value there shall, where it is relevant, be taken into account—
 - (a) the use to which such land is being put at the relevant time, the highest and best use to which the land might reasonably be expected to be put at the relevant time and to any potential use;
 - (b) the effect of any Act, regulation, local law, planning scheme or other such instrument which affects or may affect the use or development of such land;
 - (c) the shape size topography soil quality situation and aspect of the land;

Gageler CJ
 Gordon J
 Steward J
 Gleeson J
 Jagot J

6.

- (d) the situation of the land in respect to natural resources and to transport and other facilities and amenities;
- (e) the extent condition and suitability of any improvements on the land; and
- (f) the actual and potential capacity of the land to yield a monetary return."

15 Section 16(1) of the *Valuation of Land Act* enables a person aggrieved by a valuation of any land to lodge a written objection to that valuation, on any one or more of the grounds set out in s 17. Those grounds included, in s 17(a), "that the value assigned is too high or too low". Objections are to be determined in accordance with ss 20 and 21 of the *Valuation of Land Act*. By s 22(1) an "objector who is dissatisfied with the decision of a valuer or the valuer-general on the objection may apply to VCAT for review of the decision". By s 25, on review VCAT may: (a) by order, confirm, increase, reduce or otherwise amend any valuation; and (b) make any other order it thinks fit.

The land

16 Landene is a two-storey brick residence constructed in the Queen Anne style in 1897 on St Kilda Road in Melbourne. The land on which Landene is located, a lot comprising approximately 1,046 sq m ("the Land"), is surrounded by mostly commercial and residential development of a much greater height and scale than Landene. The multi-storey development surrounding the Land reflects the zoning of the Land and the area surrounding it under the Port Phillip Planning Scheme, the Land being zoned as "Commercial 1" Zone.

17 At the time of the valuations the Land was subject to Heritage Overlay 331 ("HO331") (site-specific) under the Port Phillip Planning Scheme. Clause 43.01 ("Heritage Overlay") of the Port Phillip Planning Scheme provided that the "requirements of this overlay apply to heritage places specified in the schedule to this overlay. A heritage place includes both the listed heritage item and its associated land." By cl 43.01-1 a permit was required, relevantly, to demolish or remove a building subject to a heritage overlay. The schedule to cl 43.01, cl 2.0, contained a table specifying heritage places. HO331 in the table specified the heritage place as "*Landene* ... 490 St Kilda Rd, Melbourne". Under the column heading "Included on the Victorian Heritage Register under the Heritage Act 2017?" the answer "No" is recorded.

VCAT's review

Common ground

18 VCAT recorded that the Land had been purchased in August 2019 for \$8,250,000. VCAT accepted the common evidence of the heritage experts that it was unlikely that a permit for the demolition of Landene would be granted. VCAT also accepted the common evidence of the valuers that the sale in 2019 for \$8,250,000 was the best evidence of the market value of the Land with Landene on it at the relevant valuation times in January 2020 and January 2021.⁶ VCAT noted that this case was "the first proceeding which has attempted this task since the legislative changes which removed ss 2(8) and 2(9) from the [*Valuation of Land Act*] in 2019".⁷ The effect of those repealed provisions was to require the capital improved value, net annual value and site value of certain land (including land with a building on it included in the Heritage Register established under the *Heritage Act 2017* (Vic)) to be calculated on the basis that, relevantly, the "land may be used only for the purpose for which it was used at the date of valuation". In the Second Reading Speech for the relevant Bill, the Treasurer explained that the repeal of s 2(8) and (9) would mean that "valuers ... determine site values for heritage-registered property *taking into account its highest and best use on a consistent basis to all other properties*".⁸

Valuer-General's approach in VCAT

19 Before VCAT the Valuer-General contended that the site value of the Land was to be determined as follows: (a) it was first necessary to determine if Landene was an "improvement" or not as at the time of the valuations (January 2020 and January 2021); (b) to be an "improvement" Landene must increase the market value of the Land at the time of the valuations; (c) to ascertain if Landene increased the market value of the Land at the time of the valuations it was appropriate to compare the market value of the Land at those times with and without Landene on it; (d) according to Mr Haines, the Valuer-General's valuer, the market value of the

6 Albeit, according to the Valuer-General, subject to the deduction of the costs of subsequent renovations the purchaser made to Landene after purchase in 2019.

7 Sections 2(8) and 2(9) were repealed by the *State Taxation Acts Amendment Act 2019* (Vic), s 56.

8 Victoria, Legislative Assembly, *Parliamentary Debates* (Hansard), 28 May 2019 at 1638 (emphasis added).

Gageler CJ
Gordon J
Steward J
Gleeson J
Jagot J

8.

Land without Landene on it at the time of the valuations was \$12,825,000, because (amongst other things) the substance or effect of HO331 would not apply if Landene was not present on the Land and, on that basis, the Land could be developed for a high-rise (15-17 storey) building (with commercial space); and (e) according to Mr Haines, the market value of the Land with Landene on it at the time of the valuations was the sale price in 2019 of \$8,250,000 with an allowance for the cost of renovations and works thereafter in the sum of \$1,285,000 (which the Valuer-General accepted had to be deducted from, rather than added to, the sale price to yield a market value of \$6,965,000).

20 As the market value of the Land with Landene on it was \$6,965,000 and without Landene on it was \$12,825,000 at the time of both valuations, the Valuer-General contended that Landene was not an "improvement" as defined in s 2(1) of the *Valuation of Land Act*, with the consequence that the statutory direction in the definition of "site value" ("... assuming that the improvements (if any) had not been made") did not apply. The site value of the Land therefore was to be determined with Landene on it and was \$6,965,000. As this was greater than the returned values of \$6,200,000 at the relevant times of both 1 January 2020 and 1 January 2021, VCAT should dismiss the applications for review.

Respondent's approach in VCAT

21 In contrast, before VCAT, the respondent contended for the following approach: (a) it was first necessary to determine the highest and best use of the Land at the time of the valuations (January 2020 and January 2021); (b) because HO331, by cl 43 of the Port Phillip Planning Scheme, applies to the Land and Landene, and would continue to do so if Landene did not exist, the highest and best use of the Land was in its current form with Landene on it; (c) therefore, it was irrelevant that, according to the respondent's valuer, Mr Jackson, the market value of the Land without Landene on it would be \$15,690,000 compared to its market value with Landene on it of \$8,250,000; and (d) rather, as Landene increases the value of the Land for its highest and best use (being the Land in its current form with Landene on it), Landene is an "improvement" as defined in s 2(1) of the *Valuation of Land Act*, with the consequence that the statutory direction in the definition of "site value" ("... assuming that the improvements (if any) had not been made") applied to the Land.

22 According to the respondent, on the basis that the "improvements" constituting Landene had not been made to the Land, Mr Jackson assessed a "site value" of \$1,340,000 at 1 January 2020 and 1 January 2021 using what he described as an improved sales analysis and a hypothetical development approach, which both involved deducting the cost of constructing an equivalent building to

Landene on the Land from its market value with Landene on it based on the sale price in 2019 of \$8,250,000. As the site value of \$1,340,000 at the time of the valuations was less than the returned value of \$6,200,000, VCAT should set aside the returned values and substitute the lower site values of \$1,340,000.

VCAT's approach

23 The first part of VCAT's reasoning included that: (a) the "starting point" of the valuation process is fundamental; (b) to ascertain if a building adds value it is first necessary to identify the highest and best use of the land; (c) the factors in s 5A(3) of the *Valuation of Land Act*, including the highest and best use of the land, "should be fully considered before any of the statutory definitions, such as site value can be determined";⁹ (d) given the heritage overlay controls, the heritage experts agreed that Landene would be substantially retained; and (e) "[t]he fallacy in [the Valuer-General's] analysis is that it equates the theoretical assumption of removal of the building, for the purposes of site value assessment, as being the same as if the building were in fact not there. Rather, it is the value of the building, assuming it adds value, that is to be ignored."¹⁰

24 VCAT also considered that the Valuer-General's approach applied two highest and best uses to the Land, being vacant land with a highest and best use of a 15-17 storey building and the Land with Landene on it with a highest and best use of the current use of the Land. VCAT described this as "inconsistent with our view of the proper approach to the legislation".¹¹

25 VCAT's reasons noted that it was common ground between the valuers that if all that could be built on the Land was a replacement of the existing building, Landene added value to the Land (because it already existed and, on that assumption, would save a buyer the costs of constructing the building). VCAT's reasons continued, saying "the correct approach in ascertaining whether the

9 *WSTI Properties 490 SKR Pty Ltd v Valuer-General Victoria* [2023] VCAT 734 at [120].

10 *WSTI Properties 490 SKR Pty Ltd v Valuer-General Victoria* [2023] VCAT 734 at [137]. Note: this observation does not reflect the definition of "site value", which requires it to be assumed that the improvements themselves, if any, had not been made to the land.

11 *WSTI Properties 490 SKR Pty Ltd v Valuer-General Victoria* [2023] VCAT 734 at [113].

Gageler CJ
Gordon J
Steward J
Gleeson J
Jagot J

10.

improvements add value is to compare the market value in its full current state, that is, including its limited development potential and existing structures with the market value that the land would have with the *same development potential*, without the buildings on the land".¹²

26 On this basis, VCAT applied a modified version of Mr Jackson's improved sales analysis to determine a site value of \$2,925,000 at 1 January 2020 and 1 January 2021. This modified version used the sale price in 2019 of \$8,250,000 and deducted from it the cost of constructing a replacement of Landene on the Land. As these values were less than the returned values of \$6,200,000, VCAT set aside those values and reduced each to \$2,925,000.

Court of Appeal's approach

27 The Valuer-General sought leave to appeal to the Court of Appeal. The substantive grounds of appeal were that: (a) VCAT erred in holding that the highest and best use of the Land had to be determined before determining what constituted an "improvement"; (b) VCAT erred in its understanding of the Valuer-General's approach as involving two highest and best uses and otherwise misunderstood the effect of the heritage overlay on the different steps of the valuation process; and (c) VCAT erred in finding Landene was an improvement.

28 The Court of Appeal noted the decision of this Court in *Maurici v Chief Commissioner of State Revenue*,¹³ in which "land value" in s 6A of the *Valuation of Land Act 1916* (NSW) was defined in terms "very similar to the definition of 'site value' in the" *Valuation of Land Act*.¹⁴ In particular, the definition of "land value" in the New South Wales Act contained the proviso "assuming that the improvements, if any, thereon or appertaining thereto, other than land improvements, and made or acquired by the owner or the owner's predecessor in

12 *WSTI Properties 490 SKR Pty Ltd v Valuer-General Victoria* [2023] VCAT 734 at [162] (emphasis in original).

13 (2003) 212 CLR 111.

14 *Valuer-General Victoria v WSTI Properties 490 SKR Pty Ltd* (2024) 261 LGERA 240 at 263 [115].

11.

title had not been made". McHugh, Gummow, Kirby, Hayne and Callinan JJ said in *Maurici* that:¹⁵

"The first step to be taken under s 6A is to identify what is capable of being regarded as improvements, 'other than land improvements'. The second step is notionally to remove the improvements from the land. It is at the third point that difficulties arise. How is the land in its notionally unimproved state to be valued? The traditional, and usually unexceptionable method is to seek out relatively contemporaneous sales of comparable properties between parties at arm's length, unaffected by special circumstances, such as, for example, a strong desire by a purchaser to buy an adjoining property, and to use those sales as a yardstick for the valuation of the relevant land."

29 The Court of Appeal said that *Maurici* was "of limited assistance",¹⁶ as were other decisions, because the Victorian legislation contained a specific definition of "improvements".¹⁷ The Court of Appeal reasoned that as the definition of "improvements" "distinguishes 'the work done or material used', which must increase the value of the land, and the 'benefit' to the land, which must be 'unexhausted at the time of the valuation'", the definition "therefore speaks of two points in time".¹⁸ As the Court of Appeal put it:¹⁹

"First, it refers to the time the work is actually done or the material is used. It imposes the qualification that at that time, the work or material must increase the value of the land. Secondly, it refers to the time of valuation. It imposes the qualification that the benefit must be 'unexhausted' at that time. This is not a requirement that the improvement increase the

15 (2003) 212 CLR 111 at 120 [16].

16 *Valuer-General Victoria v WSTI Properties 490 SKR Pty Ltd* (2024) 261 LGERA 240 at 263 [118].

17 *Valuer-General Victoria v WSTI Properties 490 SKR Pty Ltd* (2024) 261 LGERA 240 at 269 [142].

18 *Valuer-General Victoria v WSTI Properties 490 SKR Pty Ltd* (2024) 261 LGERA 240 at 269-270 [144]-[145].

19 *Valuer-General Victoria v WSTI Properties 490 SKR Pty Ltd* (2024) 261 LGERA 240 at 270 [146].

Gageler CJ
Gordon J
Steward J
Gleeson J
Jagot J

12.

market value of the land at the date of valuation. It is simply a requirement that there be a continuing benefit to the land at the date of valuation."

30 Applying this construction of "improvements", the Court of Appeal considered that: (a) the "construction of Landene in 1897 constituted 'work actually done or material used on and for the benefit of the [L]and'"; (b) "the work benefitted the Land in comparison to the hypothetical unimproved 'natural' state of the Land at the date of the 'improvements'"; (c) "the benefit of the work done was unexhausted at the time of the 2020 and 2021 valuations, in that Landene continued to serve a variety of economic purposes"; (d) "[L]and may be benefitted, and hence improved, without achieving its highest and best use. Thus, the erection of a detached dwelling upon land that could accommodate multi-unit development may benefit the land without achieving the highest and best use of the land. This reflects the meaning of 'improvement' adopted in *Trust Company*^[20] and *Commonwealth Custodial*^[21]"; (e) "even if it were necessary for land to achieve its highest and best use in order to become 'improved', there is no reason to doubt that Landene constituted the highest and best use of the Land when it was added to the Land"; and (f) the "fact that the benefit of an improvement to land may be seen to persist until 'exhausted' was recognised in *Morrison*^[22] ... [which] is consistent with what we consider to be the proper construction of the definition of 'improvements' in the [*Valuation of Land Act*]"^{.23}

31 The Court of Appeal reasoned further that: (a) s 2(2) "does not derogate from this construction ... [I]t does not govern the initial inquiry as to what constitutes an improvement, but is directed to the subsequent valuation exercise. More particularly, s 2(2) relates to 'the value of the improvements'. It does not relate to the value of the work done or material used on the land and is not expressed to govern the question of whether the effect of the work done or material used raises the value of the land. Rather, it is concerned with the valuation of matters that meet the definition of 'improvements'"; and (b) "if contrary to the analysis above, s 2(2) is read as requiring the first qualification in the definition of

20 *Trust Company of Australia Ltd v Valuer-General* (2007) 154 LGERA 437.

21 *Commonwealth Custodial Services Ltd as Trustee for Burwood Trust Fund v Valuer-General (NSW)* (2006) 148 LGERA 38.

22 *Morrison v Federal Commissioner of Land Tax* (1914) 17 CLR 498.

23 *Valuer-General Victoria v WSTI Properties 490 SKR Pty Ltd* (2024) 261 LGERA 240 at 270 [147]-[150]. See also at 270 [151].

13.

'improvements' to be satisfied by reference to the market value test, it still does not govern the question of whether the benefit of the 'improvements' is 'unexhausted' at the time of valuation".²⁴

32 The Court of Appeal said that this construction of "improvements" "is, as a matter of reality, the only sensible one" as it "would be anomalous if an increase in the building bulk permissible within a zone (or other relaxation of planning controls) had the capacity to transform entire neighbourhoods of existing buildings into encumbrances (or 'worsements') overnight, despite the fact that they still facilitate substantial economic use of the lands in question", which would be "a potential consequence of requiring the question of improvement to be assessed by reference to the highest and best use of the Land at the date of valuation".²⁵

33 The Court of Appeal concluded that:²⁶

"On the evidence before it, the Tribunal was correct to reject the approach of Mr Haines, who declined to characterise Landene as an improvement by focusing on the effect of the heritage overlay, rather than whether the benefit of Landene was 'unexhausted' at the time of valuation. Landene is a valuable structure accommodating a number of uses that continues to benefit the Land. On the evidence before it, the Tribunal was correct to hold that Landene is an improvement for the purpose of assessing the site value of the Land.

For Landene to be recognised as an improvement is not to undo the effect or undermine the purposes of the repeal of ss 2(8) and 2(9) of the [*Valuation of Land Act*]. It is to treat the Land in the same way as all other land in Victoria.

24 *Valuer-General Victoria v WSTI Properties 490 SKR Pty Ltd* (2024) 261 LGERA 240 at 270-271 [152]-[153].

25 *Valuer-General Victoria v WSTI Properties 490 SKR Pty Ltd* (2024) 261 LGERA 240 at 271 [154].

26 *Valuer-General Victoria v WSTI Properties 490 SKR Pty Ltd* (2024) 261 LGERA 240 at 271 [155]-[158].

Gageler CJ
Gordon J
Steward J
Gleeson J
Jagot J

14.

There is no challenge to the manner in which the Tribunal otherwise went on to determine the site value of the Land by reference to the relevant expert evidence, including the evidence of the quantity surveyors.

Accordingly, although the Tribunal was not correct to base its method of ascertaining whether Landene was an improvement on first establishing the highest and best use of the Land, grounds 2 and 4 are not made out, and the remaining grounds, whether or not made out, are inconsequential. We will not interfere with the Tribunal's orders."

The required approach: text, context and purpose of the definition of "improvements"

34 Neither party had advocated the construction of "improvements" as defined in s 2(1) of the *Valuation of Land Act* adopted by the Court of Appeal. The construction is contrary to the text, context and purpose of the definition of "improvements" and, on analysis, would be impossible to apply in any practical way.

35 The definition of "improvements" in s 2(1) is only "for the purpose of ascertaining the site value of land". It is therefore first necessary to consider the definition of the "site value" of land to ascertain the relevance of "improvements" to that definition.

36 It is apparent that the conventional concept of "market value" inheres in the definitions of each of: (a) "site value" (by the words "the sum which the land ... might in ordinary circumstances be expected to realise at the time of the valuation if offered for sale on such reasonable terms and conditions as a genuine seller might be expected to require"); and (b) "improvements" (by the words "increases the value of the land", read with s 2(2), which says that "[i]n estimating the value of improvements on any land for the purpose of ascertaining the site value of the land, the value of the improvements is the sum by which the improvements upon the land are estimated to increase its value if offered for sale on such reasonable terms and conditions as a genuine seller might in ordinary circumstances be expected to require").

37 "Market value" involves the conventional concept of a hypothetical prudent seller who would require from the hypothetical prudent buyer "the fair price of the land" if the hypothetical prudent buyer was purchasing the land "for the most

advantageous purpose for which it was adapted".²⁷ The most advantageous purpose for which land is "adapted" is the "highest and best use" of the land. In modern terminology, "adapted" or "highest and best use" of land means the most valuable use of the land, objectively ascertained by reference to the hypothetical buyer, which is "physically possible, legally permissible and financially feasible".²⁸ In addition to the explicit reference to the "highest and best use" of the land in s 5A(3)(a), each of these requirements is embedded in the various aspects of s 5A(3) of the *Valuation of Land Act*.

38 Three other key matters emerge from the definitions of "site value" and "improvements" which confirm that the short paragraph in *Maurici* condensing decades of authority about the underlying concepts is relevant to the definitions in the Victorian legislation.

39 First, because "site value" is a value "assuming that the improvements (if any) had not been made", the first step is to identify if any putative "improvements" on the land are "improvements" either as defined (in the case of the *Valuation of Land Act*) or in accordance with the orthodox meaning given to that term of a thing done to land which increases the value of the land.

40 Second, "site value" is to be determined at the time of the valuation. That is, the orthodox market value approach involving a hypothetical sale of the land for its highest and best use is to be posited as occurring at the time of the valuation.

41 Third, and consequently, the assumption that "improvements" have not been made to the land for the purpose of "site value" must also be applied at the time of the valuation to enable the necessary comparison which underlies the concept of the putative "improvements" increasing the value of the land as referred to in the definition of "improvements".²⁹

27 *Spencer v The Commonwealth* (1907) 5 CLR 418 at 440-441.

28 See, eg, Australian Property Institute, *Definitions* (based on International Valuation Standards Council, *International Valuation Standards Glossary*), available at <<https://www.api.org.au/standards/definitions/>> [<https://perma.cc/Z2GK-4VP2>].

29 *cf WSTI Properties 490 SKR Pty Ltd v Valuer-General Victoria* [2023] VCAT 734 at [137], in which VCAT said that in the definition of "site value" it is "the value of the building, assuming it adds value, that is to be ignored". To the contrary, it is the work done or material used that is the "improvement" which it is to be assumed had

Gageler CJ
 Gordon J
 Steward J
 Gleeson J
 Jagot J

16.

42 To explain further, the requirement that an "improvement" "increases the value of the land" begs the question – increases the value of the land over what value? The answer is that the "improvement" must increase the market value of the land compared to the market value of the land without the "improvement". Accordingly, the question essential to whether a putative "improvement" on land is an "improvement" as defined, being whether the putative "improvement" *increases* the value of the land and the benefit of that putative "improvement" is unexhausted, is to be determined by a comparison of the market value of the land with and without the putative "improvement". Otherwise, it is not possible to know if the putative "improvement" increases the value of the land or not. To enable a meaningful comparison, the alternative valuations are both to be conducted at the time of the valuation. And both alternative valuations are to be conducted based on the orthodox concept of market value, which carries with it the conventional understanding that the market pays for land at its highest and best use, properly understood not as the theoretical maximum development potential of the land which might be legally permissible and physically possible, but the most valuable objectively ascertained development potential which is legally permissible, physically possible and financially feasible.

43 So understood, it is apparent that the concept of "increases the value of the land" in the definition of "improvements" itself involves a valuation exercise. Section 5A, by s 5A(1), applies to every case in which a valuer is to determine the value of any land pursuant to the *Valuation of Land Act*. In accordance with s 5A(1), the valuer must consider "every matter or thing which [the valuer] considers relevant" at that time, including those matters in s 5A(3). Section 5A(3)(a) expressly requires the valuer to take into account "the use to which such land is being put at the relevant time, the highest and best use to which the land might reasonably be expected to be put at the relevant time and to any potential use". The words "might reasonably be expected to be put" in respect of the highest and best use involve the use being not only legally permissible and physically possible, but also financially feasible at the time of the valuation as objectively ascertained. In contrast, a "potential use" is a possible future use for which the market may or may not give an extra allowance depending on the nature of the potentiality.

not been made, as per *Maurici v Chief Commissioner of State Revenue* (2003) 212 CLR 111 at 120 [16].

44 Properly understood, s 2(2) is consistent with this analysis, as it expressly directs the valuer that, to determine if putative "improvements" increase the value of land at the time of the valuation within the meaning of the definition of "improvements", the valuer is to ascertain the market value of the land (that is, a hypothetical sale for the most advantageous purpose for which the land is adapted at that time, meaning the objectively ascertained most valuable use of the land which is physically possible, legally permissible and financially feasible at that time) with and without the putative "improvements".

45 Moreover, the statutory scheme is for land valuations to be conducted across Victoria on an annual basis. It should go without saying that the scheme must be capable of practical application by valuers. On the Court of Appeal's construction, before any "improvement" could be identified, it would be necessary to determine if any work done or material used on land increased the value of the land at the time of that work being done or material being used. The relatively straightforward, even if contestable, exercise the statute requires would be transformed into a near impossible task of attempting to reconstruct matters relevant to market value many years, decades, or even centuries in the past.

46 The history of the legislative provisions also speaks against the Court of Appeal's construction. The concept of work done or material used on land for the benefit of the land, but only insofar as the work done or material used increases the value of the land and the benefit of which is unexhausted at the time of the valuation, has long been part of the Victorian legislation.³⁰

47 In the Parliamentary Debates preceding the enactment of the predecessor legislation, it was said that the words "and the benefit thereof is unexhausted" should be omitted on the basis that it was sufficient for the improvements to have increased the value of the land. The Treasurer, introducing the relevant Bill, agreed to obtain legal advice about the words.³¹ The Treasurer later informed the Legislative Assembly that the legal advice was that the "definition is stronger and more explicit with them in. It is thought that they do not involve any duplication, but merely emphasize what we desire to enforce."³² The inclusion of those words

30 See *Land Tax Act 1910* (Vic), s 3.

31 Victoria, Legislative Assembly, *Parliamentary Debates* (Hansard), 10 November 1909 at 2154.

32 Victoria, Legislative Assembly, *Parliamentary Debates* (Hansard), 25 November 1909 at 2551.

Gageler CJ
 Gordon J
 Steward J
 Gleeson J
 Jagot J

18.

(which is common across several jurisdictions) indicates no departure from the basic position, as explained in the Parliamentary Debates for the predecessor legislation, that the definition of "improvements" does not "take cognisance of the cost of improvements, but of the *present actual value* of the improvements – the amount by which the improvements have enhanced the value of the land".³³

48 Long-standing authority supports this approach to the definition of "improvements" in the Victorian legislation.

49 In *Morrison v Federal Commissioner of Land Tax*³⁴ the issue was the unimproved value of the land. The definition of that term in the then applicable Commonwealth legislation was not relevantly different from "site value" as defined in the present case. That legislation also defined "value of improvements" as "the added value which the improvements give to the land *at the date of valuation* irrespective of the cost of the improvements".³⁵ Griffith CJ (with whom Barton, Isaacs, Powers and Rich JJ agreed) said that it "seems plain enough that that means that the value of improvements is the present enhancement of the value of the land attributable to the operations of man upon the land the benefit of which still continues".³⁶ Griffith CJ gave as an example a dense jungle which was cleared and turned into farmland. The question whether the clearing was an "improvement" involved asking only "[w]hat would be the value of the land if it had continued in a state of nature, and what is its value now?"³⁷ This reference to a "state of nature" is to be understood as nothing more than the land, as it was at the time of the valuation, assuming the clearing, the putative "improvement", had not occurred.

50 In *Toohey's Ltd v The Valuer-General*³⁸ the Privy Council held that to apply the then applicable definition of "unimproved value" of land (not relevantly different from "site value" as defined in the present case), a valuer could not simply

33 Victoria, Legislative Assembly, *Parliamentary Debates* (Hansard), 9 December 1910 at 3148-3149 (emphasis added).

34 (1914) 17 CLR 498.

35 (1914) 17 CLR 498 at 502-503 (emphasis added).

36 (1914) 17 CLR 498 at 503.

37 (1914) 17 CLR 498 at 503-504.

38 [1925] AC 439.

deduct an estimated value of the "improvements" from the improved value of the land. According to their Lordships:³⁹

"Now, what he has to consider is what the land would fetch as at the date of the valuation if the improvements made had not been made. Words could scarcely be clearer to show that the improvements were to be left entirely out of view. They are to be taken, not only as non-existent, but as if they never had existed. ... What the Act requires is really quite simple. Here is a plot of land; assume that there is nothing on it in the way of improvement; what would it fetch in the market? It will be observed that the value is not what has been sometimes designated by the expression 'prairie value.' The land must be taken as it exists at the date of the valuation."

51 In *Tetzner v Colonial Sugar Refining Co Ltd*⁴⁰ the Privy Council again said that the concept of unimproved value of land (again, defined in terms not relevantly different from "site value" as defined in the present case) required the land to be valued "as land void of buildings but situated in the community with the amenities and facilities which have grown up around it".⁴¹

52 In *Spicer v The Valuer-General*⁴² Else-Mitchell J said:⁴³

"The law is quite plain that under the *Valuation of Land Act* [1916 (NSW)] the unimproved value of land must be based upon the best or most profitable potential use [legally capable of being achieved]."

53 Similarly, in *Goode v The Valuer-General*,⁴⁴ Wells J identified the proper approach to a definition of "unimproved value" (being "the capital amount that an unencumbered estate of fee simple in the land might reasonably be expected to

39 [1925] AC 439 at 443. See also *Estate of Late George James v Valuer-General* (1942) 7 The Valuer 132 at 133.

40 [1958] AC 50.

41 [1958] AC 50 at 57.

42 (1963) 10 LGRA 319.

43 (1963) 10 LGRA 319 at 320, referred to in *Trust Company of Australia Ltd v Valuer-General* (2007) 154 LGERA 437 at 446 [32].

44 (1979) 22 SASR 247.

Gageler	CJ
Gordon	J
Steward	J
Gleeson	J
Jagot	J

20.

realize upon sale assuming that any improvements thereon ... the benefit of which is unexhausted at the time of valuation, had not been made ...") in these terms:⁴⁵

"[T]here is a fundamental distinction in principle between what is thought of as an improvement and what, in truth, is an improvement in contemplation of law. It seems to me that what the definition [of unimproved value] commands a valuer to do is to identify first what are improvements within the meaning of the definition; then to assume that, if the benefit of them is unexhausted, they had not been made; and, finally, to value what is left."

54

To identify "improvements" within the definition of "unimproved value", Wells J said, the relevant questions were "first, are the things, said to be improvements that, for the purpose of ascertaining unimproved value, are assumed not to have been made, such as, *having regard to the market in and by which value is to be assessed*, are capable of improving the land; second, do those things actually improve the land and, consequentially, are the benefits of improvement unexhausted?"⁴⁶ Wells J thereafter said:⁴⁷

"[A] court should approach the question of unimproved value upon the basis of the ordinarily accepted standards of those who constitute the market for the land for its highest and best use. One should steadily bear in mind that the amount that might reasonably be expected to be realized from the notional sale contemplated by the definition is, in my opinion, to be determined (as in *Spencer v The Commonwealth*) by asking what price for the land might reasonably be arrived at by a willing, but not anxious, buyer negotiating with a willing, but not anxious, seller; and into that notional situation I should have no hesitation in importing the supposition that both buyer and seller are, to adopt the language of Isaacs J in *Spencer's* case, 'perfectly acquainted with the land and cognizant of all circumstances which might affect its value.'"

⁴⁵ (1979) 22 SASR 247 at 248, 257.

⁴⁶ (1979) 22 SASR 247 at 258 (emphasis added).

⁴⁷ (1979) 22 SASR 247 at 259-260 (footnotes omitted), referring to *Spencer v The Commonwealth* (1907) 5 CLR 418 at 441.

55 This approach is supported by the reasoning of Mason, Murphy, Wilson, Brennan and Dawson JJ in *Valuer-General v Fenton Nominees Pty Ltd*,⁴⁸ in which their Honours said about a definition of unimproved value (being "the capital amount that an unencumbered estate of fee simple in the land might reasonably be expected to realize upon sale assuming that any improvements thereon ... the benefit of which is unexhausted at the time of valuation, had not been made ..."):⁴⁹

"It follows from the terms of this definition that the unimproved value of the respondent's land on 11 June 1979 [the time of the valuation] was to be ascertained by reference to the capital amount that an unencumbered estate in fee might reasonably be expected to realize upon sale, on the assumption that the improvements then existing on the land ... had not been made. It is well settled that in establishing what that capital amount might be it is necessary to inquire what the hypothetical purchaser would pay for the land in a notional condition shorn of its improvements and that it is not permissible to arrive at the figure by identifying the value of the site in its improved state and then subtracting the value of the improvements ..."

56 Properly understood, these cases are saying that the question whether a putative "improvement" is an "improvement" in the sense of increasing the value of the land is to be answered at the time of the valuation and by reference to market value. As noted, determining whether the market value of land has increased is a concept which requires a comparison of notional sales of the land for its highest and best use with the putative "improvements" and without them.

57 There can be no doubt that under both alternatives (with and without the putative "improvements" on it) the land is to be taken as it is at the time of the valuation, as is the surrounding land, the market, and planning and other laws affecting the land.⁵⁰ This has a particular importance if the land is subject to the substance of a legal constraint to which it would not be subject if it is assumed that the land does not have the putative "improvements" on it. With the putative "improvements" on the land, the substance of the legal constraint may confine the highest and best use of the land to the current use, so that for that part of the

48 (1982) 150 CLR 160.

49 (1982) 150 CLR 160 at 165.

50 eg, *Royal Sydney Golf Club v Federal Commissioner of Taxation* (1955) 91 CLR 610 at 624-625.

Gageler CJ
Gordon J
Steward J
Gleeson J
Jagot J

22.

comparison the land is to be valued at that highest and best use. Without the putative "improvements" on the land, the substance of the legal constraint may or may not confine the highest and best use of the land to the current use. The valuer will have to consider the nature of the legal constraint – including, for example, if it is specific to the retention of the putative "improvements" or not – to decide the effect, if any, of the substance of the legal constraint in respect of the highest and best use of the land without the putative "improvements" on it. What cannot be done, however, is to avoid the issue of determining if a putative "improvement" is an "improvement" at the time of the valuation by such a comparison.

58 It is also necessary to record that such reasoning as may be understood to be to the contrary in *Commonwealth Custodial Services Ltd as Trustee for Burwood Trust Fund v Valuer-General (NSW)*,⁵¹ *Trust Company of Australia Ltd v Valuer-General*⁵² and *Surfers Paradise Resort Hotel Pty Ltd v Department of Natural Resources and Water*⁵³ occurred in a context in which the critical distinction between the legally permissible and physically possible maximum development potential of the land and the highest and best use of the land was not made explicit. Once that critical distinction is recognised it is apparent that the proper understanding of the outcome in those cases is that the legally permissible and physically possible maximum development potential of the land in each case was not objectively financially feasible as, given the cost-benefit analysis of achieving that theoretical development potential, the land was worth more with the buildings on it than without the buildings on it. That is, the actual highest and best use of the land, in the relevant objective sense of physically possible, legally permissible and financially feasible in the eyes of the market at the time of the valuation, was the land with the buildings on it. In every such case, the buildings on the land will necessarily increase its value. But that does not mean that a building can be an "improvement" if it inhibits the highest and best use of the land in the proper sense of that term.

59 Whatever else might be said about those cases, each also proceeded on the correct basis that the question whether the putative "improvements" increased the value of the land and were not exhausted was to be determined at the time of the valuation, not at the time of the putative "improvements" being constructed.

51 (2006) 148 LGERA 38.

52 (2007) 154 LGERA 437.

53 (2007) 163 LGERA 14.

Court of Appeal's construction involved material error

60 To the extent the respondent's submission of immateriality relied on the propositions that both VCAT and the Court of Appeal had found that, at the time of the valuations, Landene added value to the Land, a ready answer may be given. It is apparent that VCAT reasoned to a position that meant that, in reality, it merely assumed that the Land would have the same development potential with and without Landene on it at the time of each valuation.⁵⁴ The Court of Appeal, because of its erroneous construction of "improvements", never considered if Landene increased the value of the land at the time of each valuation. It only considered if Landene continued to benefit the land at that time and found that it did.⁵⁵ Asking if a building "still facilitate[s] substantial economic use of the lands"⁵⁶ does not answer whether the building "increases" the value of the land. This is because if it is assumed that the existing building is the highest and best use of the land, then the building, in every case, necessarily adds value to the land and is an "improvement". The definition of "improvements", however, is not concerned with whether a building increases the value of the land assuming it can be used only for the purpose of the existing building. That approach inhered in the now repealed ss 2(8) and 2(9) of the *Valuation of Land Act*, but no land in Victoria continues to benefit from that assumption. Rather, the highest and best use of land with and without any putative improvements is to be ascertained, not assumed.

61 To the extent the respondent's submissions of immateriality relied on the Court of Appeal saying that "Landene is a valuable structure accommodating a number of uses that continues to benefit the Land" and that "[o]n the evidence before it, the Tribunal was correct to hold that Landene is an improvement for the purpose of assessing the site value of the Land",⁵⁷ two answers are necessary. The first is that a benefit to land from putative "improvements" may be "unexhausted" at the time of the valuation yet the putative "improvements" may not increase the

54 *WSTI Properties 490 SKR Pty Ltd v Valuer-General Victoria* [2023] VCAT 734 at [162].

55 *Valuer-General Victoria v WSTI Properties 490 SKR Pty Ltd* (2024) 261 LGERA 240 at 270-271 [147]-[155].

56 *Valuer-General Victoria v WSTI Properties 490 SKR Pty Ltd* (2024) 261 LGERA 240 at 271 [154].

57 *Valuer-General Victoria v WSTI Properties 490 SKR Pty Ltd* (2024) 261 LGERA 240 at 271 [155].

Gageler CJ
Gordon J
Steward J
Gleeson J
Jagot J

24.

value of the land at that time. The second is that, as noted, a proper understanding of the long-standing authority about "improvements" discloses why there is no contradiction in a putative "improvement" being unexhausted and yet not having the effect of increasing the value of the land at the time of the valuation.

Conclusions and orders

62 In construing "improvements" as defined in s 2(1) of the *Valuation of Land Act* as requiring the putative "improvements" to increase the value of the land at the time of construction of the putative "improvements", the Court of Appeal erred. That error of construction was material to the Court of Appeal's reasoning as a whole and to its dismissal of the Valuer-General's appeal.

63 While it follows from these conclusions that the appeal must be allowed, the Valuer-General went further and sought orders setting aside VCAT's orders and ordering instead that the applications for review be dismissed. The Valuer-General did so, however, based on arguments not put below to the effect that the respondent's valuer had valued the Land without Landene on it in the sum of \$15,690,000 at the time of the valuations, which far exceeded the site value in dispute of \$6,200,000, meaning that Landene could not be an "improvement" at those times. It is not appropriate for this Court to make the orders sought by the Valuer-General based on contested factual issues or evidence the precise nuances of which remain in debate. Accordingly, the required orders are that the appeal be allowed and the matter be remitted to the Court of Appeal for determination in accordance with law. In accordance with the conditions of the order of this Court granting the Valuer-General special leave to appeal, the Valuer-General is to pay the respondent's costs of the appeal.

