

SUPREME COURT OF QUEENSLAND

CITATION: *State of Qld v Mowburn Nominees P/L* [2005] QCA 220

PARTIES: **STATE OF QUEENSLAND**
(appellant/applicant)
v
MOWBURN NOMINEES PTY LTD ACN 008 522 030
(respondent/respondent)

FILE NO/S: Appeal No 580 of 2005
DC No 1553 of 2003

DIVISION: Court of Appeal

PROCEEDING: Application for Leave s 118 DCA (Civil)

ORIGINATING COURT: District Court at Brisbane

DELIVERED ON: 24 June 2005

DELIVERED AT: Brisbane

HEARING DATE: 5 May 2005

JUDGES: McMurdo P, Jerrard JA and Muir J
Separate reasons for judgment of each member of the Court,
McMurdo P and Jerrard JA concurring as to the orders made,
Muir J dissenting in part

ORDERS: **1. Grant the application for an extension of time and extend time for filing the application for leave to appeal to 22 January 2005**
2. Allow the application for leave to appeal
3. Dismiss the appeal with costs to be assessed

CATCHWORDS: STATUTES – ACTS OF PARLIAMENT – INTERPRETATION – respondent’s cattle destroyed under statutory disease eradication scheme – compensation determined by chief inspector under *Stock Act* 1915 (Qld) – respondent appealed compensation amount – magistrate allowed appeal by interpreting ‘market value’ in s 31(2)(b) *Stock Act* and s 49 *Stock Regulation* 1988 (Qld) as applying the test in *Spencer v The Commonwealth* (1907) 5 CLR 418 – *Spencer* test states the market price to be the point where a desirous purchaser and a not unwilling vendor meet – District Court judge affirmed magistrate’s decision – whether magistrate and District Court judge erred in applying the *Spencer* approach to stock valuation

APPEAL AND NEW TRIAL – APPEAL – GENERAL PRINCIPLES – INTERFERENCE WITH JUDGE’S FINDINGS OF FACT – WHERE FINDINGS BASED ON

CREDIBILITY OF WITNESSES – evidence led from valuation experts on market value – destroyed cattle were breeding stock not slaughter cattle – applicant contended there was a single cattle market requiring the chief inspector to ignore breeding value in determining compensation – whether magistrate and District Court judge erred in taking breeding value into account to determine compensation

Stock Act 1915 (Qld), s 31, 36

Stock Regulation 1988 (Qld), s 47, s 48, s 49

ANZ Banking Group Ltd v Federal Commissioner of Taxation (1994) 48 FCR 268, cited

Boland v Yates Property Corp Pty Ltd (1999) 74 ALJR 209, cited

HTW Valuers (Central Qld) Pty Ltd v Astonland Pty Ltd (2004) 217 CLR 640, cited

Marshall v Director General Department of Transport (2001) 205 CLR 603, cited

Spencer v The Commonwealth (1907) 5 CLR 418, applied

COUNSEL: R J Douglas SC, with R M Treston, for the applicant
J C Bell QC, with D A Kelly, for the respondent

SOLICITORS: C W Lohe, Crown Solicitor, for the applicant
Thynne & Macartney for the respondent

- [1] **McMURDO P:** The applicant, the State of Queensland, seeks an extension of time for leave to appeal under s 118(3) *District Court of Queensland Act 1967 (Qld)* from an order of a District Court judge dismissing an appeal from a magistrate. The magistrate allowed an appeal under s 36 *Stock Act 1915 (Qld)* ("the Act") from the chief inspector's decision as to the amount of compensation payable under the Act arising from the chief inspector's orders¹ resulting in the destruction of the respondent's stock for the purpose of eradicating bovine tuberculosis. The magistrate determined that the chief inspector had incorrectly assessed the compensation payable under the Act and the *Stock Regulation 1988 (Qld)* ("the Regulation") and instead ordered that the applicant pay the respondent compensation of \$6,495,212. This was later varied by a consent order to \$6,385,467.

The application for an extension of time and for leave to appeal

- [2] The reasons for judgment giving rise to the order the subject of this application were delivered on 21 December 2004. The applicant's counsel were on leave from 23 December 2004 to 17 January 2005. The applicant's solicitor, in calculating the 28 day appeal period, mistakenly excluded three public holidays and wrongly believed that the appeal period expired on 21 January 2005. The notice of appeal should have been filed by 18 January 2005. When counsel alerted the applicant's solicitor of the correct position on 20 January 2005 she prepared this application which was filed on 21 January 2005, a few days late. The error on the part of the State of Queensland was unfortunate and embarrassing, but understandable in the circumstances. The respondent has not suffered any prejudice because of the slight

¹ Under s 30(6) of the Act.

delay. If the matter is an appropriate one in which to grant leave to appeal, the extension of time should be granted.

- [3] The case involves a considerable amount of compensation, well beyond the ordinary jurisdictional limits of either the Magistrates Court or the District Court. It also concerns the interpretation of significant provisions of the Act and Regulation as to assessing compensation for stock destroyed by the State of Queensland, a matter of considerable legal and public importance. For these reasons, leave to appeal should be granted.

The appeal

- [4] The grounds of the appeal and the relevant facts, legislative provisions and issues are set out in the reasons for judgment of Muir J with which I agree. I will only repeat those necessary to make the following brief additional observations.

- [5] The determination of the value of the destroyed stock under the Act and Regulation is a question of fact. The chief inspector was not a valuer and the magistrate found that his approach to ascertaining the value of the breeding cattle on the evidence before him was flawed. The chief inspector did not take into account their full breeding value and that the respondent would not have sold the breeding stock for consumption when the market for breeders was poor, as it was when the stock was destroyed. The magistrate, in preferring instead the valuation evidence which took into account the value of the breeding stock in a reasonable market, considered the principles established in *Spencer v The Commonwealth*² where Griffith CJ explained that:

"... value of land is to be determined, not by inquiring what price a man desiring to sell could actually have obtained for it on a given day, i.e., whether there was in fact on that day a willing buyer, but by inquiring 'What would a man desiring to buy the land have had to pay for it on that day to a vendor willing to sell it for a fair price but not desirous to sell?' "³

- [6] The learned District Court judge also determined that the *Spencer* approach to valuing the destroyed stock under the Act and the Regulation was appropriate on the evidence.

- [7] The appellant contends that the application of the *Spencer* approach is inconsistent with the wording of s 31(2)(b) of the Act which provides:

"The amount of compensation (if any) payable to a person under this section –

- (a) shall be as prescribed by regulation;
- (b) in respect of the stock – shall not exceed the average market value for that class of stock;

... ."

- [8] It follows from s 31(2)(a) of the Act that the amount of compensation under the Act is prescribed by the Regulation, s 49(4) of which provides:

"The owner of any cattle suspected of being infected with tuberculosis that are destroyed or disposed of ... is entitled to compensation equivalent to the estimated market value of the cattle."

² (1907) 5 CLR 418.

³ Above, 432.

- [9] Section 47 of the Regulation defines "estimated market value" of stock as:
 "... the value of the stock, decided by the chief inspector, as if the stock were –
 (a) free of disease; and
 (b) sold and delivered on the holding on which the stock are located when ordered to be destroyed or disposed of."
- [10] The terms "estimate" or "estimated" are not further explained in the Regulation. In *ANZ Banking Group Ltd v Federal Commissioner of Taxation*,⁴ Hill J, with whom Northrop and Lockhart JJ agreed, made the following observations pertinent to the meaning of "estimated":
 "The concept of 'estimate' does not involve arbitrarily seizing upon any figure. What is involved is the formation of a judgment or opinion based upon reason. That judgment or opinion must necessarily be made bona fide but it need not be exact for the process of estimation involves a process of approximation. As Lord Loreburn said in *Sun Insurance Office v Clark* [1912] AC 443 at 454: 'There is no rule of law as to the proper way of making an estimate. There is no way of estimating what is right or wrong in itself. It is a question of fact and figures whether the way of making the estimate in any case is the best way for that case.'
 The task of estimation of a liability ... is a commercial one."
- [11] Section 48 of the Regulation provides:
 "In deciding the estimated market value of stock, the chief inspector may consider the following –
 (a) the stocks' age, sex and breed;
 (b) the stocks' body condition and live weight;
 (c) the place where the stock were destroyed or disposed of;
 (d) the reasonable transport and selling costs the owner of the stock may have incurred in selling the stock if they had not been destroyed;
 (e) other matters relevant to the condition or value of the stock when the stock were destroyed or disposed of."
- [12] Under s 31(2)(b) of the Act, the compensation prescribed by the Regulation cannot exceed "the average market value for that class of stock". The expression "market value of stock" is interpreted in s 4 of the Act as "their value calculated as upon a sale with delivery on the holding where such stock are when ordered to be destroyed". Unsurprisingly, "stock" is defined to include "cattle".⁵
- [13] In s 4 of the Act and s 47 of the Regulation, the market value of stock is said to be, essentially, the stock's "value", although with the qualifications there added which are irrelevant to the issues in this appeal. The *Spencer* approach in ascertaining "value" has been widely jurisprudentially embraced. It has been accepted in determining "market value": see *Boland v Yates Property Corp Pty Ltd*⁶ and *James v Swan Hill Sewerage Authority*.⁷ *Spencer*, *Boland* and *James* concerned the value of land, not cattle, but, despite Griffith CJ's qualifications in *Spencer* emphasised by

⁴ (1994) 48 FCR 268, 280.

⁵ The Act, s 4.

⁶ (1999) 74 ALJR 209, Callinan J, 264-266.

⁷ (1978) 42 LGRA 198, 201-203.

the appellant,⁸ the *Spencer* approach to ascertaining value has also been embraced in valuing items other than land, such as options to acquire shares: see, for example, *Charter Pacific Corporation v Belrida Enterprises Pty Ltd & Ors.*⁹ Statutes which provide compensation are ordinarily interpreted liberally unless a contrary legislative intent is clear: *Commissioner of Succession Duties (SA) v Executor Trustee and Agency Co of South Australia Ltd*¹⁰ and *Marshall v Director-General, Department of Transport.*¹¹ Section 31 of the Act was introduced in 1987.¹² Its predecessor,¹³ introduced in 1978,¹⁴ contained similar provisions as to the rate of compensation for destroyed stock. There is nothing in the responsible Minister's recorded second reading speeches in either 1978 or 1987 to suggest the legislature intended to exclude the already well-established *Spencer* approach to determining the value of compensation for stock under the Act. I do not see why, in the absence of any clear contrary legislative intention, the *Spencer* approach should not also apply to the valuation of stock under the Act and the Regulation.

- [14] In interpreting s 31(2)(b) of the Act, courts cannot, however, ignore that its terms refer not merely to "value" but to "the average market value for that class of stock". The terms "average", "class" and "class of stock" are not defined in the Act and so have their ordinary meaning. The word "average" means: "an arithmetical mean ... the ordinary, normal, or typical amount, rate ...".¹⁵ The dictionary definition of the noun "class" includes "a number of animals regarded as forming one group through the possession of similar qualities".¹⁶ By way of analogy, a class of shares is a category of shares sufficiently different to other shares in terms of rights and benefits to make it distinguishable from any other category of shares: *Clements Marshall Consolidated Ltd v ENT Ltd.*¹⁷ A class of stock or cattle is, similarly, a category of stock or cattle sufficiently different to other categories of stock or cattle because its members have similar qualities distinguishing them from other stock or cattle without those qualities. Jerrard JA, in his reasons, gives many examples of potential classes of stock or cattle.
- [15] As Muir J has demonstrated in his reasons, it was not contended before the magistrate here that there was valuation evidence as to the average market value for the various classes of the respondent's destroyed cattle. It may be that expert valuation evidence can establish a basis for giving a meaning to the words "the average market value for that class of stock". In this case, however, there was no such evidence. Certainly in the absence of such evidence, the magistrate and his Honour were entitled to use the *Spencer* approach to determine under the Act and the Regulation the value of the destroyed cattle. Whilst it is unnecessary to express a concluded view in the absence of such evidence in this case, I would ordinarily expect that the *Spencer* approach is applicable in determining "the average market value for [a] class of stock" under s 31(2)(b) of the Act. That conclusion is

⁸ *Spencer*, 431.

⁹ (2003) 179 F.L.R. 438, 440 [1], 457-460 [67]-[79], 461 [81]; [2002] QSC 254, [752].

¹⁰ (1947) 74 CLR 358, Dixon J (as he then was), 373-374.

¹¹ (2001) 205 CLR 603, Gaudron J, 623.

¹² See *Stock Act Amendment Act 1987 (Qld)*, s 11.

¹³ See s 25B of the Act repealed by s 11 *Stock Act Amendment Act 1987 (Qld)* which also referred to "the average market value for that class of stock".

¹⁴ See the *Stock Act and Another Act Amendment Act 1978 (Qld)*, s 28.

¹⁵ Macquarie Dictionary, Federation Edition, 2001.

¹⁶ Macquarie Dictionary, Federation Edition, 2001.

¹⁷ [1988] Tas R (NC) N1.

consistent with the principle of statutory interpretation applied to compensation statutes to which I have referred earlier in my reasons.¹⁸

- [16] I would grant the application for an extension of time and for leave to appeal, but, for the reasons given by Muir J, dismiss the appeal with costs to be assessed.

ORDERS:

1. Grant the application for an extension of time and extend time for filing the application for leave to appeal to 22 January 2005.
2. Grant the application for leave to appeal.
3. Dismiss the appeal with costs to be assessed.

- [17] **JERRARD JA:** In this application for leave to appeal I have read the reasons for judgment and orders proposed by Muir J, and agree with His Honour's reasons for judgment and with the President's proposed orders. I add these additional comments and reasons.

- [18] Cattle are traded weekly if not daily, throughout the Commonwealth. They are regularly sold in sale yards, directly to abattoirs, and in paddock sales. As Muir J has written, they are sold and bought in a variety of circumstances which establish discrete markets for different classes of cattle. There are markets for cattle sold for slaughter, for store cattle, for breeding cattle, for stud cattle, and for the live cattle sold for export. There are different classes of cattle within each of those general markets. Fat cattle are sold for slaughter for both domestic and identifiable overseas markets, with the latter having different markets for differing varieties of meat, according to its marbling and texture; lean cattle are also sold for slaughter for hamburger meat or pet food. Store cattle can include weaners, bullocks, and dry cows; breeding cattle can include young cows, old cows, dry cows, cows with calves, and cows heavily in calf. Those are some examples of general and common classes of cattle sold in available markets. I respectfully agree with Muir J that the applicant has attempted to exclude consideration of all but one market, namely the market for stock sold only for immediate slaughter, whereas s 31(2)(b) plainly requires consideration of the different market value for every class of stock being destroyed, including – where relevant – the market value for breeding cattle.

- [19] The price a seller gets for cattle within the same class can differ marginally from the price another vendor obtains for cattle in the same class and of comparable quality, sold at the same sale yard. One pen of steers may be sold late in the day, when the keener buyers have already bought; but a current market price for cattle of that class and quality can be identified for cattle sold in that area. Over time that will change, because of factors affecting the market for it. Widespread drought conditions might force down store prices, but then good rain in some areas can result in buyers from those areas pushing up store prices. Fat cattle prices may be higher in widespread drought conditions because of their relative scarcity. These are just some examples; cattle prices are very much market driven.

- [20] The cost of transporting cattle is likely to limit the number of locations to which producers are willing to send their cattle for sale, whether as store cattle, breeders

¹⁸ See these Reasons, [13].

for sale, or cattle sold for slaughter. That helps in assessing the current market value for stock of a particular class and quality, held by a producer in any nominated region. There will be a limited number of sale sites and sale yards in which those cattle can reasonably be expected to be sold.

- [21] The sheer volume of recorded sales of cattle weekly throughout Queensland enables well informed opinions to be reached on the current market value in different regions, for different breeds of cattle, of a class of cattle of a generally common quality e.g. good quality two year old Droughtmaster store steers. Cattle of that description, traded at the sale sites reasonably likely to be used by the intending vendors of those cattle, probably answer the description given by Griffith CJ in *Spencer v The Commonwealth*¹⁹ of “a large or considerable number of articles of the same kind which are the subject of daily or frequent sale and purchase”, about which that learned judge wrote that “the value of the articles is taken to be their current price”.
- [22] Griffith CJ based that consideration on the fact that a person wanting to sell such articles can readily find a purchaser at a price which is fairly certain, and conversely that a person wanting to buy could find a seller at about the same price. He explained that those considerations are not necessarily equally applicable to land, and those observations led to the much quoted passage²⁰ in *Spencer*, where His Honour wrote that the test of the value of land is to be determined, not by inquiring what price a person desiring to sell could actually have obtained for it on a given day, but rather by inquiring what would a person desiring to buy the land have had to pay for it on that day to a vendor willing to sell it for a fair price but not desirous to sell. That test – conveniently described by Muir J and in argument on the appeal as the *Spencer* test – has consistently been applied in a variety of contexts to determine the value of land,²¹ and applied by the High Court when valuing shares for succession duties.²² Muir J has described its widespread application.
- [23] The applicant’s two grounds of appeal which its senior counsel argued, quoted by Muir J, assumed that s 31(2)(b) of the *Stock Act* required imposition of a compensation ceiling consisting of *current* market sale prices for the classes of stock being destroyed, as at the relevant date for determining the estimated market value of those cattle. If s 31(2)(b) did refer to the current market value for (those classes of) stock, that would be a reference to the current market value of articles of which there were a large or considerable number of articles of the same kind, which were the subject of daily or frequent sale and purchase, and of which Griffith CJ opined that their value was taken to be their current price; their current market value would be the current price for stock of that class and general quality. But that is not what the section says. Its effect is to limit the compensation, otherwise obtained by receiving the estimated market value for the cattle, to the *average* market value for that class of stock.

¹⁹ (1907) 5 CLR 418 at 431

²⁰ At CLR 432

²¹ For example, in a claim for damages for professional negligence arising out of resumption proceedings, in *Boland v Yates Property Corporation Pty Ltd* (1999) 74 ALJR 209; in the context of assessing value for stamp duties in *Commissioner of State Revenue v Pioneer Concrete (Vic) Pty Ltd* (2002) 209 CLR 651 at 666-667; when valuing land for tax purposes in *Commissioner of Land Tax v Nathan* (1913) 16 CLR 654 at 661

²² In *Commissioner of Succession Duties (SA) v Executor Trustee and Agency Co. of South Australia Ltd* (1947) 74 CLR 358 at 367 and 373

- [24] Current market values rise and fall regularly enough for cattle of any class, and this can happen over both short and long periods. The relevant market will determine the current value for that class at any given time, and that may differ from the value or “true” value of the stock, as that term is discussed and explained in *HTW Valuers (Central Qld) Pty Ltd v Astonland Pty Ltd* (2004) 217 CLR 640 at 657 [36]. The possibility of a cattle owner whose stock must be destroyed being disadvantaged by a relatively low current market price for stock of that class, which price does not reflect their value, true value, or the statutory estimated market value, is reduced by the limit in the ceiling in s 31(2)(b) being the average market value and not the current market value. It so provides, without specifying any period over which that average is to be taken; and so for any one class of stock in any region can be taken to be the price which would be assessed for cattle there of that class, by well informed parties negotiating a sale when neither was concerned about current market trends or levels for that class. That is actually an application of the *Spencer* test, namely what would a person wanting to buy (that class of cattle) have had to pay for them on (the relevant date for valuation) to a vendor willing to sell the cattle for a fair price (set by the relevant market) but not desiring to sell them.
- [25] For those reasons I consider the applicant was wrong both in its assertion that the current market sale prices were what s 31(2)(b) imposed as a compensation ceiling, and wrong in the argument that neither the magistrate or learned judge should have applied the *Spencer* test when fixing that ceiling. The Queensland legislature has specifically applied it in s 31(2)(b).
- [26] The learned trial judge, and the magistrate, sifted with care through the considerable body of evidence as to value, and the applicant did not establish that a more careful division of the stock to be slaughtered into their various classes, and a calculation of the average market value for each of those classes of stock, would have produced any different result. The onus was on it to show that, and its application should be dismissed.
- [27] **MUIR J:** The applicant applies for leave to appeal from a decision of a judge of the District Court dismissing its appeal from a magistrate’s determination pursuant to s 36 of the *Stock Act* 1915 (“the Act”).
- [28] The respondent was the owner of a herd of cattle on a cattle station in Queensland’s Gulf district when the chief inspector of stock made orders under s 30(6) of the Act for the destruction of the stock for the purposes of disease eradication. In consequence, the respondent, as owner of the stock, became entitled to compensation. Compensation was determined by the chief inspector under the Act and Regulations. Dissatisfied with the determination, the respondent appealed²³ and the learned magistrate who heard the appeal allowed it and determined compensation in the sum of \$6,495,212. The quantum of the determination was subsequently altered by consent to \$6,385,467 in order to correct an error.

The grounds of appeal

- [29] Although there are five grounds (not including sub-grounds) in the proposed notice of appeal, two only were addressed in the applicant’s outline of argument and relied upon on the hearing of the application. They were:

²³ Under s 36 of the Act.

- (a) The decisions of the learned Magistrate and the learned District Court judge misinterpreted the Act “by not imposing a ceiling consisting of current market sale prices”;
- (b) In the alternative, the current market sale prices represented or evidenced market value due to the nature of cattle as chattels regularly traded in the market place.

[30] Ground (a) relies on the wording of s 31(2)(b) of the Act and it is convenient to quote it and the other relevant statutory provisions.

The relevant statutory provisions – Sections 31 and 36 of the Act and Sections 47, 48 and 49 of the *Stock Regulations 1988*

“31 Compensation relating to disease eradication programs

- (1) The owner of stock destroyed or disposed of pursuant to section 30 shall be entitled in respect thereof to compensation under, subject to and in accordance with this section, and the owner shall not be otherwise entitled to compensation.
- (2) The amount of compensation (if any) payable to a person under this section—
 - (a) shall be as prescribed by regulation;
 - (b) in respect of the stock – shall not exceed the average market value for that class of stock;
 - (c) in a case where the owner carries out the destruction or disposal of the stock – may include compensation as prescribed in respect of the costs and expenses incurred by the owner in carrying out the destruction or disposal.
- (2A) The regulations may provide for compensation in respect of destroyed or disposed of stock whether or not the stock are infected.
- (3) A person seeking compensation under this section shall make an application as prescribed.”

36 Appeals to Magistrates Courts

...

- (9) An appeal is to be by way of rehearing;

...

- (11) For the purposes of the appeal, the Magistrates Court has all the powers and functions of the person whose decision is the subject of appeal.”

“47 Definition for div 2

In this division-

‘estimated market value’, of stock, means the value of the stock, decided by the chief inspector, as if the stock were -

- (a) free of disease; and
- (b) sold and delivered on the holding on which the stock are located when ordered to be destroyed or disposed of.

48 Deciding estimated market value

In deciding the estimated market value of stock, the chief inspector may consider the following-

- (a) the stocks' age, sex and breed;
- (b) the stocks' body condition and live weight;
- (c) the place where the stock were destroyed or disposed of;
- (d) the reasonable transport and selling costs the owner of the stock may have incurred in selling the stock if they had not been destroyed;
- (e) other matters relevant to the condition or value of the stock when the stock were destroyed or disposed of.

49 Compensation

...

- (4) The owner of any cattle suspected of being infected with tuberculosis that are destroyed or disposed of after delivery to the Minister under an order under section 30(6) of the Act is entitled to compensation equivalent to the estimated market value of the cattle.”

The applicant’s argument in relation to s 31(2)(b)

- [31] The judge acknowledged in his reasons that the “prescriptions” in s 31(2) and s 49(4) of the Regulations were discrete and that the respondent was “entitled to the lower of these two figures”. He erred, however, by concluding that s 31(2)(b) ought be interpreted as applying the test in *Spencer v The Commonwealth*.²⁴ By reaching that conclusion the judge applied the same test to the section as he applied, correctly, to s 49. This treated the values ascertainable under both provisions as identical, depriving s 31(2)(b) of any practical application.

²⁴ (1907) 5 CLR 418.

- [32] Whilst the regulation “in making the primary market assessment, takes cognisance of matters such as breeding value”, s 31(2)(b) implicitly recognises the existence of a market for stock and “affords a ceiling by reference to current prices payable in the market for stock”.

The respondent’s submissions in relation to s 31(2)(b)

- [33] It is implicit in the applicant’s argument that the judge erred in concluding that the *Spencer* test was applicable to s 31(2)(b), but this was not an argument advanced at first instance or on appeal. The judge, correctly, concluded that the argument now being advanced was not advanced at first instance and there was no need for him to consider it. The judge’s reasons in that regard were:

“There were extensive submissions made both in writing and orally as to the meaning and application of the test of “market value,” but that is not the only significant aspect of the limitation in s 31(2)(c). The actual expression is “average market value of that class of stock.” That gives rise to issues as to what is the relevant class of stock, and how is an “average” market value to be obtained. Does this simply mean that the value of all of the stock the subject of the order is to be determined by reference to an average value which is then to be applied indifferently to all of them regardless of the condition of the individual beasts? Or does it require a consideration of market value over a particular period, or over some particular geographical area, such as, the whole of the State of Queensland? Unfortunately there are no authorities on the interpretation of this paragraph to provide any guidance, and these questions were really not explored in argument nor, so far as I can tell, at the hearing before the magistrate. *Rather the appellant’s argument relied on the section essentially as emphasising the proposition that all that was payable by way of compensation was market value. More importantly, it does not appear that any other approach was adopted in the proceeding before the magistrate. Accordingly, it is unnecessary for me to give further consideration to these issues, since, if there was any error by the magistrate in failing to consider these aspects of the application of the ceiling under s 31(2)(c), this is not a matter which can be raised by the appellant on appeal, because the appellant is bound by the conduct of its case in the proceeding before the magistrate.*” (emphasis added)

- [34] The judge correctly identified “essentially the issue in relation to the matter before the magistrate, and indeed the issue in the appeal” as being whether the chief inspector’s interpretation of the regulation was correct. His Honour concluded that the interpretation was incorrect because it was contrary to the *Spencer* test, despite the applicant’s submissions that the approach of the chief inspector to deciding market value had complied with *Spencer’s* case. That the chief inspector’s interpretation lay at the heart of the dispute is also objectively evidenced by the actual effect which the instruction had on the value; it having caused him to adopt a figure representing meat value with no breeding potential, thereby reducing his valuation of some subject Brahman cross cattle from \$905 each to \$585 each.

- [35] Even if the argument now sought to be advanced by the applicant is open to it, it is wrong as the test in *Spencer's* case applies.

The argument at first instance and the magistrate's reasons

- [36] On p 4 of his reasons, the magistrate identified the issues before him as follows:

“In a nutshell, the dispute is whether or not the applicant is entitled to a breed-on value in relation to the cows. It has been the approach of the chief inspector that the inquiry as to value would not extend to the matters of breeding value or breeding ability. Now, it has been said in evidence that the cows involved are breeder cows and that they are the factory from which calves are produced, and little calves grow up to be big stock and be sold later on.”

- [37] The reasons then proceeded to discuss *Spencer's* case and later compensation decisions before addressing the evidence.

- [38] It is instructive for present purposes to have regard to the 31 page written submissions provided to the magistrate by the applicant's counsel. Those submissions provided in part:

“9. The manifest difference between the parties is largely, if not wholly, one of law, namely proper construction of the Act and the *Stock Regulations* 1998 (‘the Regulations’) enacted thereunder.

10. The touchstone, to be found in Section 31(2)(b) of the Act, augmented by Section 47 of the Regulations, is that the compensation assessed “*shall not exceed the average market value* for that class of stock... as if the stock were ... free of disease... and ... sold and delivered (on Vanrook on the date) when ordered to be destroyed or disposed of’ (emphasis parenthesis ours).

11. Importantly, Section 31(1) of the act [sic] provides that compensation is to be in accordance with Section 31 and ‘*the owner shall not otherwise be entitled to compensation*’. (emphasis ours)

12. It is submitted that this is an important caveat to the legislation as it precluded from consideration of the assessment of compensation matters which are not prescribed in the legislation as matters which have to be taken into account.

13. The Chief Inspector's assessment is based on the market value of each item of stock in the marketplace, as at the date of each order.

14. The appellant's approach to assessment, in truth, is to value the stock subjectively to it, that is assuming that the destruction orders had not been made, he had been forced to dispose of the stock but rather was able to retain the stock for breeding purposes.

15. The appellant's approach is erroneous, not carrying the sanction of the Act or the Regulations.

...

18. Section 31 of the Act constitutes a Code as to the appellant's compensation entitlement.

19. Sections 47 and 48 of the Regulations are also pertinent.

20. Section 48 of the Regulations essays the matters which the chief inspector may address when estimating the 'market value of the stock'.

...

25. As a matter of proper statutory construction of these provisions the compensation arrived at cannot transgress the prescription (in effect a "limit") in Section 31(2)(b) of the Act that such compensation 'shall not exceed the average market value for that class of stock'.

26. Section 31(1) includes the caveat that an owner shall not otherwise be entitled to compensation for matters are (sic) taken into account which are not prescribed for in the legislative scheme dealing with compensation.

27. In the case of compulsory acquisition of land, the seminal case of *Spencer v The Commonwealth* in the judgment of Griffith CJ dictates that the market price is that 'point a desirous purchaser and a not unwilling vendor would come together'."

[39] The next paragraph contains a quotation from the reasons of Griffith CJ in *Spencer v The Commonwealth* in which the Chief Justice observed, inter alia:

"When there is a large or considerable number of articles of the same kind which are the subject of daily or frequent sale or purchase, the value of the articles is taken to be their current price."

[40] Paragraph 29 contains a lengthy passage from the reasons of Davies JA and Williams J in *Emerson v Custom Credit Corporation Limited*²⁵ which concludes with the observation:

"But we think that the purpose of a phrase such as 'market value' is to enable a hypothetical value to be determined disregarding the desire to sell of particular vendors or classes of vendors."

[41] Paragraphs 30, 31 and 36 provide:

²⁵ [1994] 1 Qd R 516 at 520-521.

“30. It is submitted that the obvious statutory intent of Section 31, and the adjunct regulations, is to provide the owner of affected livestock with a prescribed form of compensation, the touchstone of which is the market value of that stock at the time.

32. Attributing, any compensatory value beyond market value is proscribed unequivocally by the words that the owner is ‘not otherwise... entitled to compensation’.

...

36. It is well settled that a state, through legislation, may prescribe how compensation is to be assessed in respect of acquired property. There is no presumption that a state can only acquire property with ‘just’ compensation.”

[42] Much of the remainder of the submissions is given over to contrasting the assessment of “market value” by the applicant’s valuers with the respondent’s valuers’ alleged approach of taking into account matters of particular importance or relevance to the respondent. The evidence of each valuer is reviewed and it is submitted that the evidence of the applicant’s valuers, Messrs O’Brien and Paine, should be preferred. The reasons put forward to support the contention include that they had regard to “actual market transactions when valuing the cows” and that the markets upon which they relied were the “appropriate markets, if not the only markets”.

Evidence relevant to the first argument

[43] In a letter to Mr Paine dated 26 June 2001, Mr Glanville, General Manager, Animal Health, wrote in respect of a valuation of the stock of Miranda Downs performed by Mr Paine:

“I have examined the information provided under the column, ‘reference market and basis for valuation’ and am concerned that the valuations for breeding cattle have not been carried out in a manner that assists the chief inspector to decide their value in accordance with the *Stock Regulation* 1988.

...

I am concerned that the values arrived at do not reflect the prices that would have been realised if the cattle (considered disease free) had been sold and delivered at Miranda Downs on the day you inspected and valued them. *In particular I do not consider it appropriate to determine the price of a breeder cow by adopting a meat value and adding an amount for breeding value based on future calf production.* I do not believe that the chief inspector could adopt this method of valuation when deciding the estimated market value of stock in accordance with the *Stock Regulation* 1988.” (emphasis added)

- [44] Mr Paine admitted that he had been influenced by the letter to revise his initial valuation so as to ignore any “breeding value” and that he took the term “meat value” in the letter to mean the “value at the saleyards”. In cross-examination he conceded that if the respondent’s cattle were being sold to a purchaser as breeding cattle, they would be pregnancy tested and that a “better valuation” would be obtained but because of his instructions that “there was no breed on value”, he did not allow for pregnancies in his valuation.
- [45] In another letter of instructions to Mr Paine dated 1 May 2002, Mr Glanville, instructed:

“The basic principle to be followed is that the owner should receive an amount of compensation similar to that which he would receive if [he was] selling the animal disease free on the open market to a willing buyer. This concept of compensation takes into account as much as possible current market performance for similar animals and does not allow for consideration of future potential value or loss of productivity of the animal or its progeny.”

- [46] Following these instructions, Mr Paine did the subject valuations. Putting the matter broadly, he classified some cows and bulls as suitable for “slaughter only” or as having “meat works value only” and valued accordingly. Other cattle were valued on the basis that they would “suit live export and store buyers”, as having “export and breeder value” or as having “store value”.
- [47] Some Brahman Droughtmaster cross cows were valued by Mr Paine on the basis of prices taken from “paddock sales at Richmond and Hughenden last week”. He commented in a valuation report dated 4 May 2002 that “a lot of cows are very heavy in calf and would expect would start calving once they started mustering”. No allowance, however, was made in his valuation for cows in calf or calves. In cross-examination Mr Paine was referred to the evidence of Mr Daniels that:

“Sales of large numbers of breeding cows are more commonly negotiated as paddock sales rather than them being sold through sale yards.”

- [48] He did not dispute that proposition and, in effect, conceded its accuracy. He conceded also that younger cows would have a greater value than older cows, if sold as breeders, depending “on the breeding value left in those cattle”.
- [49] Mr O’Brien’s valuations are contained in a number of valuation sheets on which he divides the herd into numerous categories including:

“Brahman X cows and calves aged 7-11 years”;
 “Cows + calves aged”;
 “Breeder cows”;
 “Live export cows aged”;
 “Brahman X cows plus calves year branded 4/5”;
 “Pregnant cows branded 4-5”;
 “empty cows”;
 “Braham X cows minus calves aged 7-11 years”;
 “Fat + pregnant cows”;
 “Lighter pregnant cows”;

“Cull boner cows aged”;
 “Live export cows 4/5”;
 “Brahman X 4/5 years branded”;
 “Bulls aged”;
 “Brahman bulls”;
 “Brahman X bulls”.

[50] On the first of the valuation sheets he noted:

“Because saleyard prices at today’s Qld markets do not, in my opinion, represent true market values, I have used ‘best guess’ open market valuations for cows + calves + pregnant cows”.

[51] On another three valuation sheets he noted: “saleyards still not a true market guide so have used open market valuations” or words to that effect. The evidence did not explore what he meant by “open market valuations”.

[52] Under the heading “reference market and Basis for Valuation” he observed variously:

“Paddock sale for delivery northern centres”;
 “L/Wt. direct to works on works grad”;
 “L.export \$1-00kg delvd Karumba”;
 “Open market valuations”;
 “Open market prices”;
 “Best m/works value”.

[53] In a witness statement put in evidence, Mr O’Brien stated:

“In North Queensland, typically, the market does not recognise the future breeding capacity of the cows valued aged more than 7 to 8 years. Most buyers might expect to get one calf from these cows, then wean the calf and fatten the cow for sale to the meatworks. During the drought in 2002, there was no interest in cows older than seven or eight years as breeders.”

[54] By implication, his evidence was that the market did “recognise the future breeding capacity” of younger cows. In evidence in chief, Mr O’Brien said that he treated No 4 and No 5 branded cows²⁶ as being potential breeders but gave cows older than that only meatworks value. In cross-examination he conceded that he understood his instructions as requiring no allowance to be made for “future potential value or loss of productivity of the animal or its progeny”.

[55] Later, in cross-examination he said that if he considered cattle to be “good young cattle” he would “allow for them to be breeding stock”.

[56] The above and later discussion focuses on the valuation of breeding stock, as the principal area of difference between the parties concerned the proper basis for valuation of these cattle.

²⁶ The number is the number branded on the cow by reference to which its age can be determined. In the subject herd at the relevant date No 4 and No 5 cows were 8 and 7 years old respectively.

Consideration of the first argument

- [57] It will be apparent from the foregoing discussion that the contest at first instance did relate to the application and construction of s 31(2)(b) of the Act. But as was found on appeal, the argument advanced was that s 31(2)(b) limited the compensation payable to the market value of the stock at the relevant date. How “market value” was to be defined or arrived at was not identified with precision. Reliance was placed on the passage from the reasons of Griffith CJ in *Spencer’s* case to which reference is made above and it was assumed, implicitly, that there was “a large or considerable number of [cattle] of the same kind which are the subject of daily or frequent sale or purchase”.
- [58] The written submissions endorse the methodology of Messrs Paine and O’Brien which “had regard to actual market transactions ...[including] sales to the live stock market, sales to meatworks and ‘paddock’ sales”.²⁷ Their approach recognised that “there was a limited market for breeder cattle” but that such cattle, “together with other stock, had to be sold off during the drought due to the scarcity of feed”.
- [59] Although the submissions, at some points, refer to s 31(2)(b) as providing a “prescribed” ceiling or “limit” to compensation, the valuers relied on by the applicant, in an approach endorsed by the submissions, treated the subsection as requiring a value to be fixed by reference to reasonably contemporaneous market sale prices. In other words, the valuers and the applicant treated s 31(2)(b) as prescribing the method of assessing compensation which, when complied with, would provide both the upper and lower limit of the compensation payable. Sections 47, 48 and 49 were, in effect, ignored.
- [60] The applicant’s approach does not accord with the language of s 31(2). It requires that the compensation payable under s 31 “be as prescribed by regulation”. Section 49 of the Regulations gives owners of affected cattle an entitlement “to compensation equivalent to ‘the estimated market value of the cattle’.” “Estimated market value” means “*the value of the stock decided by the [chief inspector]*” as if the stock were disease free and “sold and delivered on the holding on which the stock are located when ordered to be destroyed or disposed of”. “Value of the stock”, it will be observed, is not qualified by the term “market”.
- [61] Section 48 of the Regulations sets out matters which the chief inspector “may consider” “in deciding the estimated market value”. The list includes “other matters relevant to the condition or value of the stock...”.
- [62] Consequently, in determining “the value of the stock” the chief inspector has a wide discretion as to the matters to be taken into account. Pursuant to s 36(11) of the Act the magistrate, on appeal, had “all the powers and functions” of the chief inspector.
- [63] The applicant’s argument contends that matters such as “breeding value” may be taken into account for the purposes of the assessment by the chief inspector or the magistrate. The concession is properly made for the reasons given in paragraphs [81] and [82] below.
- [64] Section 31(2)(b) does not limit the matters to which regard may be had in determining value under the Regulations or, for that matter, place a limit on the

²⁷ These avenues of sale are later described as “various markets”.

level of “estimated market value”. However, whatever value is fixed under the Regulations, the claimant is entitled to be paid no more than “the average market value for [the] class of stock” concerned. For s 31(2)(b) to be applied, the subject stock must be classified and “a market value” for each class determined. Then an average must be struck for each such class.

- [65] No process of classification with a view to meeting the requirements of s 31(2)(b) was undertaken by the valuation evidence or made the subject of submissions. No party contended that an “average market value” for any particular class of stock could be deduced from the evidence. The magistrate was thus not able to consider or apply any limit under s 31(2)(b). Consequently, the first ground relied on by the applicant fails.

The applicant’s alternative argument

- [66] It is submitted that if the test in *Spencer’s* case applies to the assessments under s 49 and s 31(2)(b), “the market value falls within the instance identified by Griffith CJ in *Spencer*, where [if] ‘there is a large or considerable number of articles of the same kind which are the subject of daily or frequent sale or purchase, the value of the articles is taken to be their current price’.”
- [67] There was clear evidence that there is a regular market for cattle, whether breeders or otherwise. Because of drought conditions the price was low but, nevertheless, the valuation had to be effected with regard to such prices. The judge on appeal rejected such prices and adopted the view of the valuer, Mr Sturtridge, that “current market values have nothing to do with the value of these cattle as the owners would keep them to reap the benefit of their full breeding potential.”

The respondent’s submissions on the alternative argument

- [68] The applicant’s argument rests on the contentions that the evidence plainly established that there was a single market for cattle and that the prices obtained in that market reflected the value of the cattle. The evidence is to the contrary. It established that there were numerous and diverse markets for cattle, including a slaughter market, a market for store cattle, a breeder market, a premium stud market and a live cattle market. The evidence of Mr Sturtridge, which the magistrate accepted, and which the judge concluded the magistrate was entitled to accept, was that breeding cattle are never sold for slaughter cattle prices but that a premium is paid for their ability to breed.
- [69] The argument in assuming that the stock are equivalent to “articles of the same kind which are the subject of daily or frequent sale”:
- (a) wrongly assumes that all cattle are of the same kind;
 - (b) is contrary to the express language of s 48 which contemplates regard being had to “all matters relevant to the value of the particular stock in question”;
 - (c) promotes a measure of compensation prone to under-compensate by reference to what the applicant, in its written submissions, refers to as “the base value”; and

- (d) is too simplistic in that it ignores the dynamics of the various markets for cattle.

[70] Reliance is placed on the following passage from the reasons of Gleeson CJ in *Boland v Yates Property Corp Pty Ltd*:²⁸

“In the case of chattels for which there is an established market, the exercise may be simple. In other cases it may not be simple. There may be no readily identifiable market or the market may be controlled or for some other reason artificial.”

In this case there was no ready established market for some 8000 head of one line of breeding cattle.

[71] The notional sale contemplated by *Spencer’s* case was described by Callinan J in *Boland* as “a highly artificial one involving many uncertainties and matters of judgment.”²⁹ In constructing the notional sale the chief inspector is not entitled to treat the 8000 head herd, described by Mr Sturtridge as a “calf production factory” as being herded to the abattoir market to be sold for a price which ignored their breeding value.

[72] The regular market, or the 2002 cattle market, propounded by the applicant in argument is merely a contrived reference to types of the markets which existed, namely the meatworks or slaughter market or the live export market. These were the markets which were rightly found to be inappropriate markets for the purpose of the application of the *Spencer* test.

[73] The values adopted by the applicant’s valuers reflected prices obtained for meat values as a result of the chief inspector’s instruction which, in effect, required the valuers to ignore breeding value. The judge rightly concluded that this erroneous instruction justified the magistrate’s rejection of the applicant valuers.

[74] The judge did not specifically adopt Mr Sturtridge’s opinion that “current market values” had nothing to do with the value of the subject cattle. Nor indeed did he implicitly arrive at that conclusion. In relation to Mr Sturtridge’s evidence the judge concluded that he had correctly stated the *Spencer* test. He quoted various areas of conflict between the expert witnesses and noted that the evidence of Mr Daniels and Mr Sturtridge was “to the effect that those figures [prevailing saleyard figures] were not a good guide to the true market value of cattle of this type and quality”. He concluded “in relation to these matters that there was a conflict of evidence and the magistrate was entitled to accept the evidence of the witnesses for the respondent.”

Discussion on the alternative argument

[75] The herd, according to the evidence accepted by the magistrate, consisted of mainly breeding cows which, normally, would not be sold for meat. One valuer, accepted by the magistrate, went so far as to assert “Breeding cattle are never sold for slaughter cattle prices. A premium is paid for their ability to breed”. Whilst that opinion might be regarded as a little absolute in its terms, not even Messrs O’Brien

²⁸ (1999) 74 ALJR 209 at 225.

²⁹ *Boland v Yates* at 264.

and Paine contended that breeding cattle did not usually command a premium over cattle sold for meat value. Mr Paine, in fact, purported to value some of the stock as “breeders”. As is noted earlier, one of Mr O’Brien’s witness statements implicitly acknowledged that breeding cows had a higher market value than cows saleable only for meat.

- [76] In their written submissions, the applicant’s counsel were at pains to point out that both Mr Paine and Mr O’Brien in their valuations made allowance for breeding value of cattle except for those cattle aged seven years or more. Counsel also pointed out that both these valuers had regard to various markets including sales to meatworks, sales for live exports and ‘paddock’ sales. How such allowances were made, and whether they were in fact made, is difficult to glean from the evidence, but what is of significance is that it was accepted by the valuers that they ought be made. It also appears from the evidence that if such allowances were made they were not made by merely applying sale prices in the various markets referred to by them.
- [77] The applicant’s own evidence was thus inconsistent in a significant respect with the applicant’s argument and with the instructions given by the chief inspector to Messrs O’Brien and Paine, at least as those instructions were understood by them. Additionally, both these valuers acknowledged that the most suitable way of disposing of a large breeding herd would be by “paddock” sales of small lots. That concession does not sit comfortably with their marked reliance on live export and meatworks sales.
- [78] The judge, who undertook a careful analysis of the expert evidence, remarked that he “would find it unsurprising if the magistrate had not been impressed by Mr O’Brien”. The transcript of Mr O’Brien’s evidence amply justifies the comment. The judge made no similar criticism of Mr Paine but it is evident, despite considerable confusion surrounding his valuation approach, that he was influenced, to put it as favourably as possible, in his valuations by his interpretation of his instructions that “there was no breed on value” to be allowed.
- [79] In my view, the magistrate had ample justification for rejecting the evidence of these witnesses. He was entitled to conclude from their evidence that it was appropriate to find a value for breeding cows higher than that arrived at by them to take breeding capacity into account.
- [80] In order to determine “the value of the stock”, he was entitled to resort to the evidence of Messrs Sturtridge, Keys and Daniels. The latter was an experienced valuer of good reputation who was unable to attend for cross-examination as a result of illness.
- [81] In undertaking his task under s 36 of the Act, the magistrate could consider any of the matters set out in s 48 of the Regulations including “other matters relevant to the value ... of the stock”. One matter relevant to value is a cow’s breeding potential. Prices obtained for live export and at the meat works could be regarded as relevant. So too could an occasional saleyard or paddock sale of a small herd of breeder cattle. But there is nothing in the language of s 47, s 48 or s 49 which requires the chief inspector, or the magistrate exercising the same functions, to follow the narrow approach urged by the applicant and to do so would be contrary to authority. To adopt the language of Gaudron J in *Marshall v Director General Department of*

Transport,³⁰ statutory provisions conferring a right to compensation for compulsory acquisition “should be construed with all the generality that their words permit. Certainly, such provisions should not be construed on the basis that the right to compensation is subject to limitations or qualifications which are not found in the terms of the statute”.

- [82] It is an accepted approach in compensation cases generally that in assessing compensation in the event of compulsory acquisition by the State “... doubts are resolved in favour of a more liberal estimate”³¹ The concept of the “liberal estimate” has been applied in relation to the compulsory acquisition of shares³² and, in my view, it would be proper for the chief inspector, or a magistrate on appeal, to take it into account in making a determination in the nature of the subject determination.
- [83] Whilst “current market sale prices” provided evidence of “the value of the stock”, it is not the case, as a matter of construction of s 47, s 48 and s 49, that “the current market sale prices represented or evidenced [the value of the stock] due to the nature of cattle as chattels regularly traded in the market place”. The reasons for this conclusion are explained above. Accordingly, this ground in support of the application fails also. It therefore becomes unnecessary to express any concluded views on the controversy over the application of *Spencer’s* case. It may be undesirable to do so in light of my conclusions in respect of the applicant’s first ground that, on the case put forward, the magistrate could not have applied any limit under s 31(2)(b) so as to reduce the amount of compensation determined by application of the regulations. The concession, correctly made, that the value of cows as breeders was a proper matter for consideration in the determination under the regulations makes the application of the test in *Spencer’s* case somewhat academic for present purposes. Accordingly, I will content myself with a few observations.
- [84] The respondent’s counsel, in their submissions, assert that “the applicant in fact cited and embraced the *Spencer* test” in the Magistrates Court and the District Court, and in consequence, cannot now be permitted to advance a different argument. What was meant though by the applicant’s counsel as the appropriate *Spencer’s* case test is the one formulated by Griffith CJ relating to the frequent sale of articles of the same kind. The applicant never contended, as the respondent did throughout, that the test to be applied was “... to consider, from the point of view of persons conversant with the subject at the relevant time, what, according to then current opinion of land values, a willing but not anxious purchaser would have to offer to induce a not unwilling vendor to sell the land. That is the market value.”³³
- [85] Griffith CJ’s own formulation in *Spencer’s* case³⁴ was:

“In my judgment the test of value of land is to be determined, not by inquiring what price a man desiring to sell could actually have

³⁰ (2001) 5 CLR 603 at 623.

³¹ *Commissioner of Succession Duties (SA) v Executor Trustee & Agency Co of South Australia Ltd* (1947) 74 CLR 358 at 373-374; *Boland v Yates Property Corporation Pty Ltd* at paras [111] and [356].

³² *Re Goodyear Australia Limited; Kelly-Springfield Australia Pty Limited v Green & Ors Ltd* [2002] NSWSC 53 (14 February 2002); *Holt v Cox* (1994) 15 ACSR 313; and *Capricorn Diamonds Investments Pty Ltd v Catto* (2002) 41 ACSR 376.

³³ *Boland v Yates Property Corporation Pty Ltd* (1999) 74 ALJR 209 at 213 per Gleeson CJ.

³⁴ At 432.

obtained for it on a given day, *ie*, whether there was in fact on that day a willing buyer, but by inquiring 'What would a man desiring to buy the land have had to pay for it on that day to a vendor willing to sell it for a fair price but not desirous to sell?' ... The necessary mental process is to put yourself as far as possible in the position of persons conversant with the subject at the relevant time, and from that point of view to ascertain what, according to the then current opinion of land values, a purchaser would have had to offer for the land to induce such a willing vendor to sell it, or, in other words, to inquire at what point a desirous purchaser and a not unwilling vendor would come together.”

[86] *Spencer's* case was one concerning compensation for the compulsory acquisition of land and care needs to be applied in transposing expressions of principle appropriate to land values to the quite different sphere of livestock. It is generally regarded, however, that the *Spencer* test has broad application for the determination of “market value”.³⁵ For example, it has been applied in relation to the compulsory acquisition of shares.³⁶

[87] Callinan J observed in *Boland v Yates*:³⁷

“In Australia it has long been accepted that the various statements made by Justices of this Court in *Spencer's* case correctly formulated the principles to be applied in compensation courts.”

[88] The principles in *Spencer* were formulated with a view to determining a just value for compulsorily acquired land having regard to the difficulties in that regard which are graphically described in *Boland v Yates*³⁸ by Callinan J. I can see nothing in the wording of s 47, s 48 and s 49 which would prevent a chief inspector or magistrate having regard to the *Spencer's* case principles. They are *prima facie* applicable to a determination under s 31(2)(b) also but the meaning of “market value” in that provision has to be determined in the light of the words which qualify or follow it, namely “average” and “for that class of stock”. The absence of argument on these matters, preferably assisted by clear evidence and findings of fact, also make it desirable that resolution of this question be deferred to a more appropriate occasion.

Conclusion

[89] For the above reasons, I would dismiss the application with costs.

³⁵ *Port Stephens Shire Council v Tellamist Pty Ltd* [2004] NSWCA 253 at [217] per Santow JA; *MMAL Rentals Pty Ltd v Bruning* [2004] NSWCA 451 at [55] per Spigelman CJ; *Boland v Yates Property Corporation Pty Ltd* at para [266] and *Emerson v Custom Credit Corporation Limited* at 520-521.

³⁶ *Re Goodyear Australia Limited; Kelly-Springfield Australia Pty Limited v Green & Ors Ltd* [2002] NSWSC 53 (14 February 2002); *Holt v Cox* (1994) 15 ACSR 313; and *Capricorn Diamonds Investments Pty Ltd v Catto* [2002] 41 ACSR 376.

³⁷ At para [266].

³⁸ At para [265].