

LAND COURT

BRISBANE

9 April 1998

**Re: Claims for Compensation - Acquisition of Land Act 1967
(A94-92, A94-93)**

Geoffrey G and Hilary R Kuhn

v.

The Crown

Geoffrey G Kuhn

v.

The Crown

(Heard in Cairns)

Introduction

Rainforest covers areas of the Macalister Range west of Cairns. These areas are considered to be so ecologically significant that they have been incorporated into the Wet Tropics World Heritage Area as part of what ecologists have called the "Black Mountain Corridor". Approximately 145.45 hectares of that Corridor were once owned by the claimants, Geoffrey and Hilary Kuhn - part of the land as joint tenants and part by Mr Kuhn. The claimants appreciated the ecological value of the land and urged the Queensland Government to acquire it in order to obtain the level of environmental protection which it did not have as privately owned freehold land.

Discussions about the proposed boundaries of the rainforests for World Heritage listing date back to 1987. In 1989 the claimants were apprehensive that a high voltage powerline might be built by the FNQEB across their properties. The acquisition process in relation to the land taken for National Park purposes did not commence, however, until about April 1991. That process did not go as smoothly or as quickly as the claimants would have

liked. They had hoped for a prompt, voluntary acquisition process. It became, at the claimants' request, a compulsory taking under the *Acquisition of Land Act 1967*.

By notice dated 28 May 1992, Mr Kuhn was advised that the Crown intended to take approximately 80 hectares of his land for National Park purposes. The land was in two parts which were portions of Lot 109 on Plan SR 146, County of Solander Parish of Mowbray (the "original Lot 109"). Lot 109 then had an area of 106.1288 hectares.

By notice on the same date, Mr and Mrs Kuhn were advised that the Crown intended to take about 64 hectares of their land for National Park purposes. That land was part of Lot 108 on Plan SR 146 in the County of Solander Parish of Mowbray (the "original Lot 108"). Lot 108 then had an area of 91.0543 hectares and adjoined Lot 109.

By proclamation published in the Queensland Government Gazette on 11 December 1992, the Governor notified and declared that the following parcels of land were taken by the Crown for National Park purposes:

Lot 998 on Plan 852235 (formerly part of Lot 108) containing an area of 65.15 hectares

Lot 999 on Plan 852235 (formerly part of Lot 109) containing an area of 80.3 hectares.

The taken land was vested in the Crown on and from 11 December 1992, which is the relevant date for determining compensation. The retained land comprised 25.89 hectares of Lot 108 and 25.8 hectares of Lot 109.

Although the land was taken by the Crown at the urging of the claimants, there was a sticking point. The parties could not agree on the amount to be paid to the claimants as compensation. In December 1994 the matters were referred to the Land Court.

The claims for compensation served on the Crown in December 1992 were as follows:

Lot 998	valuation of land	\$ 895,840.00
Lot 999	valuation of land	\$1,104,160.00
	severance	\$ 162,000.00
	Total	\$2,162,000.00

plus unspecified sums for interest and for disturbance in the form of valuation fees, legal costs and consultants' fees.

At the hearing valuation evidence was led for the claimants in the sum of \$1,900,00.00 as compensation for the land taken (Exhibit 6), to which amounts for interest and disturbance would be added. There was no formal application under s 24(3) of the *Acquisition of Land Act 1967* to amend the claim for compensation.

By the end of the hearing the parties had agreed that the amount payable for disturbance costs was \$67,150.00, made up of \$13,180.00 for the construction of alternate water supplies to the retained parts of Lots 108 and 109, and \$53,970.00 for legal, valuation and other consultants' fees.

The claimants did not come to the hearing empty handed. They had been paid, at various dates in 1993, advances totalling \$1,236,000.00 comprising:

\$370,000.00 for Lot 998
\$449,950.97 for Lot 999
\$416,049.03 for the aggregation.

Those advances included components for the value of the taken land, interest, and amounts for disturbance (Exhibit 7).

Although the resumed land was owned in part (Lot 998) by Mr Kuhn and in part (Lot 999) by Mr and Mrs Kuhn, the case was run on the basis that there was one resumption of one aggregation of land.

Assessing the amount of compensation payable

The criteria for determining the claimants' entitlement to compensation are set out in s.20 of the *Acquisition of Land Act 1967*, the relevant sub-sections of which provide:

“Assessment of compensation

20(1) In assessing the compensation to be paid, regard shall in every case be had not only to the value of land taken but also to the damage (if any) caused by either or both of the following, namely -

- (a) the severing of the land taken from other land of the claimant;
- (b) the exercise of any statutory powers by the constructing authority otherwise injuriously affecting such other land.

- (2) Compensation shall be assessed according to the value of the estate or interest of the claimant in the land taken on the date when it was taken.”

Although the original claim served on the Crown nominated severance as a separate compensable item in relation to Lot 999, the submissions put in these proceedings were confined to the value of the land taken plus amounts for interest and disturbance. Compensation for any severance items (including severance from Kauri Creek) was included in the other figures.

The determination of the amount of compensation payable involves a consideration of the use to which the parcels of resumed land together with the retained land could have been put had the land not been acquired by the Crown.

The subject land

The subject land comprised the original Lots 108 and 109, known as “Shady Grove”, Pinnacle Road, Julatten. Mrs Kuhn described the original Lot 109 as “our home property”. Mr Kuhn purchased it in 1974. The claimants purchased the adjoining Lot 108 from neighbours in 1988.

The land is located near Julatten on the Atherton Tableland, about 33 kilometres, or 30 minutes travel time, by road south-west of Port Douglas and some 75 minutes drive by road from Cairns. Fair, all weather access is available to the subject land from the Mossman-Mount Molloy Road (a bitumen sealed two lane highway) then along bitumen sealed Council road and then formed earth and gravel road. At the date of resumption the bitumen seal extended to Flin’s Creek. Since then the road has been sealed to English Road. The original Lot 109 included a strip of land for a private access road.

The subject land was zoned Rural “A” under the Mareeba Shire Town Plan of 1982. Although electricity and telephone services are available to be connected in the locality, the subject land was not connected to electricity and only Lot 109 was connected to Telstra.

The subject land comprises undulating to hilly country. Kauri Creek, a permanent spring fed watercourse, flows (though not always continuously) from the western section of the original Lot 108 through to the south-eastern section of the original Lot 109 and on to the Mowbray River. The land is broken by numerous gullies and minor watercourses, mainly tributaries of Kauri Creek. Another watercourse runs parallel to the northern boundaries of the Lots.

The north-western section of the original Lot 108 includes Red Hill (455 metres high) from which distant sea views are available. A moderate ridge runs from Red Hill to the south-east along the western boundary of the Lot, with views to the west. The original Lot 109 contains a hill (374 metres high) in the south-eastern section, falling to more gentle slopes to Kauri Creek. Distant sea views and views over the Mowbray Valley are available from a low ridge which runs along the north-eastern boundary.

The catchment of Kauri Creek comprises more gentle slopes, falling away to the Mowbray River Valley. The Mowbray River is located close to the southern boundary of the original Lot 108 and the top of the Big Mowbray Falls (“Mowbray Falls”) commences approximately 350 metres from that boundary.

The northern, eastern and southern boundaries of the subject land adjoin the World Heritage Listed State Forest 42 on FTY 1538.

The subject land is in the narrowest section of the “Black Mountain Corridor”, a low rim of rainforested hills which abut the Mount Carbine Tableland Faunal Zone in the north and the Lamb Range section of the Atherton Uplands Faunal Zone in the south. The area between Kuranda and Julatten has a drier climate than is generally encountered along the Wet Tropics coast. Changes in climate have resulted in differences in the vegetation. As the climate dries, the Corridor converts to open forest and the rainforest disappears. When, as at present, the rainforest communities are re-established, the renewed exchange of genetic material between the zones to the north and south is allowed.

The vegetation community in the Corridor is relatively common within the region, with 37,153 hectares of the 48,178 hectares being within the World Heritage Area. It occurs as a fringe rainforest adjacent to fire-prone eucalypt forests.

More specifically, the vegetation on the subject land is predominantly mesophyll vine forest with areas of wet sclerophyll forest and notophyll vine forest in proximity to the Mowbray River Valley. Red Hill and the eastern sections of the original Lot 109 have open low to medium woodlands timbered predominantly with eucalypts such as bloodwood, bluegum, Moreton Bay ash, ironbark and cadagi. Where clearing has taken place, acacia is the dominant regrowth.

In his written statement of evidence, Mr Stephen Goosem, Senior Principal Scientist with the Wet Tropics Management Authority, stated that these “drier and successional rainforests are not expected to contain species of exceptional evolutionary significance as is

the case in many parts of the Wet Tropics such as the refugial Daintree Lowlands and other very wet rainforest areas” (Exhibit 12). Apparently Mr Goosem had not been on the land, and a more detailed account of the flora and fauna on the subject land is contained in an environmental audit which was commissioned by the claimants and conducted by Mr Andrew Small (Exhibit 33). That audit identified various features of the environmental significance on the subject land. Some 164 species of birds were identified as visiting or being regularly on the land. The property seems to be the northernmost distribution of the swamp rat (which had only been found previously at Lake Barrine) and also appears to be the home of pogonomys, prehensile tailed rats no live specimens of which have been captured. Rare flora include the Julatten tamarind and the cassowary satinash which are not found in a national park or other protected area. Eight plant species which are listed on the Queensland Herbarium database as being rare and/or threatened were found on the subject land. Further research may reveal more species. Mrs Kuhn highlighted the significance of having the relatively rare giant pendas, *Xanthostemon whiteii*, on the subject land. The trees are estimated to be at least 500 and possibly 1,500 years old.

Various statements were made extolling the natural attractions of the subject land. For example, Mr Alan Rector, a tourism management consultant, wrote of being “struck by its unique position on the ridge overlooking the Mowbray Valley and the sea beyond as well as the lush rainforest on and surrounding the property” (Exhibit 6 Annexure D). Mr John Wake, a valuer called by the claimants, described the property as “sited in a unique setting with a vista to the surrounding mountain ranges and National Park views as well as expansive seaviews over the Mowbray Valley” (Exhibit 6). He could think of no other properties in Julatten that would have the same combination of features.

Although the subject land has attractive topographic and other features or qualities which make it suitable for use for eco-tourism purposes (a matter discussed in more detail below), the qualities of the land should be considered in context.

First, the subject land is not unique in being the location of particular (including endangered) species of flora and fauna. Mr Goosem said that the number of rare and threatened species varies “quite substantially throughout the region” and that some properties north of the Daintree River might have up to 30 on a block.

The relationship of the subject land to land in the region is evident from the fact that the resumed land was acquired as part of the “Black Mountain Corridor”. In his written

statement Mr Goosem concurred with the assessment apparently made in 1990 and 1991 by Mr Geoff Tracey, an international expert on tropical rainforests, that “the most important value of the vegetated portions of the [resumed land] are their role in the connectivity of rainforest habitats along the Macalister Range.” That linkage applies to flora and, to a much greater extent, fauna.

Mr Goosem concluded:

“If it were not for its strategic position at the narrowest section of the Black Mountain Corridor it is unlikely that these blocks of land would be considered for acquisition. Acquisition is, however, very desirable in this instance to ensure appropriate management for the maintenance of the integrity of this very narrow link.” (Exhibit 12)

His oral evidence to that effect was unchallenged and is supported by Mrs Kuhn’s evidence and sources cited by her, as well as by Mr Wake’s report and by the detailed report of Mr Small, which described the narrow corridor as “critical to the flow of genetic material from one area to another”.

Second, the subject land was not in a completely natural state when the resumed land was acquired. Although the land is not used, and is apparently unsuitable, for agricultural purposes, about 60 acres of land were cleared about 30 years ago for corn growing. There is acacia regrowth on that land. Old bullocky tracks from logging days have been maintained by Mr Kuhn. Trees have been felled for use as timber veneer and flitches of cabinet grade timbers. There was a commercial harvest in reasonably recent times and a fairly intensive harvest in 1991. The latter harvest was on, but apparently was not confined to, land that was not resumed. Mr Kuhn has operated a bush sawmill on Lot 109. The timber which was harvested and sold, or was cut and sliced by Mr Kuhn, was apparently acacia species from regrowth (not old forest timber). The claimants gained income from the timber harvesting, milling, flitching and slicing, as well as from sustainable harvesting of forest products ranging from seed collection to harvesting of tree fern, epiphytes and orchids. Other activities on Lot 109 included the clearing of land for the construction of buildings, such as the homestead and machinery shed, and the horse stud.

In his report on a study of the flora and fauna on and around the subject land, Mr Small wrote that the patterns of vegetation distribution and the species composition of the study area had been “heavily influenced by the activities of Europeans in the recent past”,

including logging and clear felling. He concluded that “human activity has had a marked impact on the integrity of the forest structure” (Exhibit 33).

Although, in the area in which the subject land is located, the structural integrity of the rainforest has been “heavily compromised with sometimes severe logging practices in the past”, Mr Small stated that there is no recorded information of past floristical compositions for the Kauri Creek area to suggest whether or not logging of vital habitats has reduced the chances of long term viability for local populations of some plant species. In areas of little human impact the forest structure and floristical composition are similar in some ways to that of some areas of the lower Daintree (Exhibit 33).

Highest and best use of subject land

At the date of resumption the subject land was used as one large residential site. A residence, associated infrastructure and a small sawmill were located on the original Lot 109. Lot 108 was not separately used for any specific purpose.

Agreement between the parties: By the time of the hearing, the parties had agreed that the highest and best use of the subject land was for eco-tourism purposes. Because the notion of eco-tourism was central to the resolution of this case it is appropriate to review how the parties came to that conclusion and then consider those features of eco-tourism that are relevant to the matters in dispute.

Mrs Kuhn stated that, by 1992, the claimants’ advisers had agreed with the claimants that eco-tourism was “the most appropriate and viable” usage of the subject land. That conclusion had been reached “after extensive research on the regional tourism markets and after much consideration of other land use options for our properties”, including possible subdivision of the land. According to Mrs Kuhn, the valuations of the subject land which the claimants commissioned in 1989 (Ballieu, Knight & Frank) and 1990 (DJ Jones & Co) had emphasised that eco-tourism is the highest and best use of the land (Exhibit 5).

The valuation report prepared for these proceedings by Mr Wake referred to the claimants’ actions to “optimise the value of their asset in an ecologically sensitive manner, linked to tourism” and to a report by Mr Rector that “deals with the features of the property which, in the view of the author, give it potential as an Environmental/Experiential Tourism Resort unparalleled at present in northern Queensland”. Mr Rector stated that the topography and size of the subject land made it possible to construct an eco-tourism resort “in an unobtrusive manner in sympathy with and complementing the natural surroundings”. He

considered that the land had potential for a world class tourist facility (Exhibit 6 Annexure D) and the design concepts considered by the claimants were “very much advanced” on anything that had been built in Australia. Mr Wake formed the opinion that the property was “unique along with the properties in the lower part of Mowbray Valley in that it offered ... the only potential in the Port Douglas area for expansion of nature based tourism”. He considered that such a development is the highest and best use of the subject land as at the relevant date (Exhibit 6).

The Crown did not always share the claimants’ view about the highest and best use of the subject land. Apparently it was only once the opinion of Mr Jeffrey Weigh had been received that the Crown’s position changed. Mr Weigh is the Managing Director of Taylor Byrne Tourism and has considerable experience in the Queensland tourism industry. He inspected the subject land in June 1995 for the purpose of determining whether it had negotiable tourist potential as at the date of resumption and, if so, the extent of the potential and its impact on the value of the land. Having considered various components that are required before a site can command a premium value for tourism and the state of the tourism market at the date of resumption, Mr Weigh concluded that the site would have had a negotiable tourist potential at the date of resumption (Exhibit 15).

The valuation report tendered by the Crown in these proceedings (Exhibit 11) was prepared by Mr Kevin Allan, a senior valuer with the Department of Natural Resources. He stated that the highest and best use of the subject land “would be Tourist Related, ie Eco-Tourism” and the land would “be best marketed as a single large Tourism related site”. Mr Allan listed the attributes for a successful, if low-key, tourism venture on the land as including large diversity of forest types, diversity of bird life, views of Mowbray Valley, access to Mowbray River Falls, and relative accessibility from major centres in the region.

The assessment of valuers concerning the highest and best use of the subject land was consistent with the designation by the Mareeba Shire Strategic Plan (in existence but not in force at the date of resumption) of the subject land as being in a Tourist Facilities location. The plan was adopted by the Council in February 1993 and was gazetted in January 1994. Under that Preferred Dominant Land Use, locations designated for future tourist facilities are considered to be ideally suited for such facilities because of their locational characteristics, physical features, or the views they command or a combination of these features. Most are readily accessible and all are considered to be capable of development without undue

detrimental effect on amenity. In February 1993 the Council indicated its support for an application for Consideration in Principle to use the retained Lot 108 for the establishment of a Tourist Facility. On 8 June 1995 the Council granted approval for the rezoning of Lot 108 to “Special Use (Tourist Resort and Accommodation generally in accordance with Plan of Development Parts A & B)” zone.

I am satisfied that at the date of resumption the highest and best use of the subject land was for eco-tourism purposes - a potential, but unrealised, use of the land.

The features of eco-tourism: The evidence indicates that in 1992, and even at the time of the hearing, the concept of eco-tourism was not clearly defined. There was, at best, a general understanding of what was involved. Mr Weigh thought that the “definitional issues are fairly difficult”. Mrs Kuhn said that there is an ongoing debate about what does and does not constitute eco-tourism. Most definitions include a requirement that the tourism be ecologically sustainable. In that sense it may include adventure elements but only where the experience does not degrade the environment. She quoted the definition advanced by Ceballos-Lascurain in 1987 that eco-tourism is “travelling to relatively undisturbed or uncontaminated natural areas with the specific objective of studying, admiring, and enjoying the scenery and its wild plants and animals, as well as any existing cultural manifestations (both past and present) found in these areas.” (from R Blamey (1995) *The Nature of Eco-tourism: Occasional Paper No 21*, Bureau of Tourism Research, Canberra, page 14, quoted in Exhibit 5). Mrs Kuhn stated that “active, adventurous, nature and culture related travel” fall within the definition of eco-tourism.

A distinction was drawn between “hard” and “soft” forms of eco-tourism. Harder eco-tourism might involve long treks and camping out. Softer eco-tourism might involve more amenities for the tourist and less travel. Although Mr Weigh was not familiar with the labels hard-edge and soft-edge eco-tourism, he suggested that there are degrees of adventure in this field. In his opinion, the soft end tends to comprise a more mainstream market. Mr Rector referred to “degrees of experience” in rainforest eco-tourism. In his opinion, “the ideal experience is to be housed and enclosed and encompassed within the framework of the rainforest”. The experience may be enhanced by, for example, a brook but not necessarily (if at all) by adjoining coastline.

It is apparent from this and other evidence that the concept of eco-tourism has at least three components, namely, the nature of the destination, the purpose of the visit, and the

means by which a person effects a visit to such a destination. There are also degrees of exertion and adventure associated with the eco-tourism experience.

With respect to the first component, the eco-tourist's choice of destination is determined by such factors as its special (or unique) and unspoiled natural resources, reliable counterparts and outstanding professionals and programs. Apparently those factors are more important than low cost, comfort and security. Wilderness is a desirable but not essential component. Attention was given to the value of natural water as an attraction in nature-based tourism destinations, whether they be forest or desert regions. More specifically, Mr Weigh considered that running water and lush rainforest go well together. Thus, the imagery of rainforest meeting the reef had been an important feature in the tourist appeal of the Daintree.

It seems that natural areas and formerly remote places are now highly prized locations. Consequently tourism has to be planned and managed to avoid degradation or a level of visitation which leads to destinations being "loved to death". The Wet Tropics area of the Cairns region is considered to be a particularly high activity area for eco-tourism.

With respect to the second component, the preferred activities of eco-tourists (as part of the nature-based market) include snorkelling/scuba diving, swimming, bushwalking/trekking, wildlife observation (including birdwatching), study of flora and fauna, boat trips (such as canoeing), mountaineering, nature photography and meeting local and indigenous residents.

There was some contention about the nature of the eco-tourism market. Mrs Kuhn referred to studies which yielded a profile of ecotourists as persons who are aged between 35 and 70 years of age, with tertiary education, a high disposable income, and an extended recreational period on an annual basis. Such people are experienced travellers and are environmentally conscious. They seek challenge and diversity. Beyond that group of people, the backpacker with a relevant preference for nature-based activities is also considered to be an eco-tourist. Mr Rector suggested that, as the average age of visitors to this type of facility would be 35 years or older, most people will not be wanting to experience activities involving high levels of physical activity.

Mr Weigh was cautious about distinguishing eco-tourists from any other group. He preferred to describe nature-based tourism as a product and said that people who look for nature-based activities usually want them as part of a wider product. He suggested that the "hard edge" of the eco-tourism market is "fairly thin", in the sense that there are

insufficient numbers of such tourists and, in his firm's experience, they are "not particularly high tariff individuals".

With respect to the third component it is apparent that some places are easier to reach by conventional forms of transport. It is less important how one reaches the site than how one travels across the site to ensure minimum impact on the environment.

According to Mrs Kuhn the rapid growth of the eco-tourism market has been an international phenomenon. One study has shown that in the 1980s, while tourism overall increased at an annual rate of 4 per cent., eco-tourism increased at an annual rate of between 10 and 30 per cent. Apparently the World Tourism Organisation forecast in 1993 that most of the 86 per cent. increase in worldwide tourism receipts projected by the end of the century will come from the types of travel that comprise eco-tourism (Exhibit 5).

There was some argument about whether eco-tourism leads or follows the mainstream tourist market. According to Mr Weigh, it is reasonable to suggest that eco-tourism as a niche market would develop behind the development of mainstream tour package tourism to the region. Specialist niche markets tend to be able to survive because of the maturity of an established destination with comprehensive and regular aviation services and sophisticated visitor infrastructure. Thus one might expect some lag for the development of specialist niche products (Exhibit 15). On the other hand, Mr Rector and Mrs Kuhn considered that in most instances it is eco-tourism that precedes the main tourism thrust into a region. They cited experience from the mid-1980s, when eco-tourists visited the Daintree/Cape Tribulation area, to the 1990s when hundreds of thousands of tourists visited the area annually. As Mr Rector put it, "that's mass tourism and it's followed the eco-tourist". Mr Weigh agreed that eco-tourism has led the market in some parts of the world, but thought that tourism in far north Queensland expanded with the opening of the Cairns International Airport. He also agreed that there had been sectional interest in the Daintree area for some considerable time, but that its reputation and market visibility had been associated with the World Heritage listing and the marketing of far north Queensland generally. In his written statement he expressed surprise that eco-tourism should be such a topical issue, particularly in Far North Queensland, "since it has for many years based its tourism industry product on nature and culture", including such places as Kuranda, Daintree, Mossman Gorge and Cape Tribulation (Exhibit 15).

I consider that the witnesses were not as far apart in their analysis as they may have appeared to be. Whatever their differences, the question whether eco-tourism leads or follows the mainstream market was peripheral to the matter in dispute in this case. By the date of resumption there was a strong tourist industry in the Cairns region and an important component of the market was nature-based, or eco-tourism.

Eco-tourism in the region of the subject land: Much of the information about the history and nature of eco-tourism in the region of the subject land was provided by the claimants, especially in the written report of Mrs Kuhn (Exhibit 5).

Cairns was the gateway and hub of the Cairns Tourism Region. The Region's main attractions - the rainforest and the Great Barrier Reef - are nature-based. The quality of the nature-based attractions was greatly enhanced by the World Heritage listing of the Great Barrier Reef in 1981 and the Wet Tropics rainforest in 1987. Promoters of the regional attractions targeted the adventure travel and eco-tourism markets. With the advent of international tourism to far north Queensland there was a significant development of both domestic and international market niches. The main attractions in the Wet Tropics World Heritage area were Lake Eacham, Lake Barrine, Curtain Fig Tree, Mossman Gorge and North Daintree.

Following the opening of Cairns International Airport in 1984, there was an increase in the number of tourists from various destinations. Between 1985 and 1992 international visitation grew by 25 per cent. and the domestic markets grew for intrastate (9.1 per cent.) and interstate (8.7 per cent.) visitation.

Various tours were available by 1992. River trips as well as rainforest treks (virtually non-existent in 1984) were flourishing by then. Flora and fauna study, wildlife observation (including birdwatching), rafting, cycling, sailing, ballooning, rainforest walks, horse rides and exploratory journeys out of the Cairns region to Cape York were all available. Brochures illustrating a range of such activities were in evidence (Exhibits 17).

Most of the day visitors to the region came from accommodation centres in Cairns and Port Douglas. The predominant movement of day visitors was westwards to Kuranda and the Atherton Tablelands, northwards towards the Daintree and Cape Tribulation area, and to the Great Barrier Reef. A smaller percentage travelled southwards to the Tully, Mission Beach and Innisfail area.

Mrs Kuhn drew on a 1993 Wet Tropics Visitor Use survey to show that, in that year, the total visitation to the area north of the Daintree River - the Daintree/Cape Tribulation conglomerate - was 282,545 people. Mossman Gorge was a popular destination (331,492 people) as were places on the Kuranda Range (374,465 at Henry Ross Lookout) and on the Atherton Tableland (312,281 at Lake Barrine, 369,082 at Lake Eacham, and 220,073 at the Curtain Fig Tree). Lower figures were recorded for the more southern routes on the Gillies Highway in the Goldsbrough Valley near Gordonvale and the Heales Lookout. Other southern destinations attracted comparatively lower numbers of visitors. In 1992 more than 600,000 people visited the Great Barrier Reef.

The Wet Tropics Visitor Use Survey results show that some destinations were visited only by independent visitors while others were visited by independent and commercial visitors. The latter category included the Daintree-Cape Tribulation conglomerate (39 per cent. independent and 61 per cent. commercial), Mossman Gorge (72 per cent. and 28 per cent.), Lake Barrine (53 per cent. and 47 per cent.), Lake Eacham (84 per cent. and 16 per cent.) and Curtain Fig (56 per cent. and 44 per cent.).

Apart from the Cairns-Kuranda railway, there was no regional public transport system. Access to natural attractions was by privately owned or hired vehicles and by tour operators' transportation. The need for transportation became an integral component of day tours in the Cairns region and of trips to overnight accommodation away from Cairns and Port Douglas. Wilderness lodges in the Daintree-Cape Tribulation area, for example, were transferring about 90 per cent. of their guests from Cairns and/or Port Douglas to their accommodation.

Round trips from Cairns and Port Douglas were developed along the main roads to the major attractions in the Wet Tropics World Heritage Area (Lake Eacham, Lake Barrine, Curtain Fig, Mossman Gorge and North Daintree). These routes were used by independent tourists and commercial tours.

The pressure of tourism north of the Daintree River was recognised by the residents, tourist businesses and the planning bodies. By 1992 the adventure travel and eco-tourist activities were generally being provided by commercial tour operators who operated within a permit system in areas that were under public management, such as rainforests in the World Heritage area. The Mossman Gorge, Daintree and Cape Tribulation areas became congested as eco-tourist and adventure travel destinations. In 1993 a moratorium was imposed on the

number of permits for commercial tours operating north of the Daintree River. As a consequence, tour operators were looking elsewhere for tourism venture opportunities.

The WTMA anticipated that tourist expansion at Port Douglas would aggravate pressures on areas to the north. It was proposed in 1992 that alternative day trip destinations be provided to help divert use away from the existing management problem areas such as the Daintree-Cape Tribulation. The WTMA Tourism Strategy in that year recommended that the ferry crossing at the Daintree River should remain with its current capacity as a desirable management mechanism to limit growth of tourism north of the Daintree River and as an integral part of the tourism experience. Douglas Shire Council drafted a Development Control Plan for the Daintree area in 1992. A maximum number of beds in the existing hotels, motels and private cabins as well as hostels and caravan and camping amenities was set at the already approved total in 1992 of 1720 beds north of the Daintree River.

Coach tours increasingly operated south of the Daintree, including on Black Mountain Road and the Rex Range. There was a scenic nature-based route from Cairns and Kuranda to Mossman and the Daintree. Other tours to the Atherton Tableland included circular routes from Cairns to Kuranda by rail then on to Curtain Fig Tree, Lake Eacham and Lake Barrine, returning via the Kuranda Range or the Gillies Highway. The more southern Gillies and Palmerston highways were not used as frequently in the circulate routes.

Tourist ventures were operating in the Mowbray Gorge area, and the district provided a range of attractive natural features and nature-based activities as an alternative to those in the more congested area to the north.

Features of the subject land that suit it for eco-tourism use: The topographic and other natural features of the subject land have already been described and their significance to an eco-tourism venture are readily appreciated.

Mr Weigh listed the following positive features of the land:

- a large and relatively scarce parcel of freehold land
- extent and variety of forest types
- diversity of bird life estimated at 169 species
- views of the Mowbray Valley
- access to Mowbray Falls
- relatively accessible from major centres in the region.

There was no dispute about the positive features. Mr Weigh also listed the following negative site features:

- access to Mowbray Falls is a steep descent and would restrict many visitors from the journey
- no running water on site
- limited on-site activities
- access to national park would be vital to any eco-tourism development
- the national park has no infrastructure of tracks or interpretation.

I am satisfied that some of these negative features are not as significant as Mr Weigh's summary suggests. The importance of access to Mowbray Falls will be dealt with later. The other features should be considered first.

Contrary to Mr Weigh's statement, based on a relatively brief visit to the subject land, there was running water on the subject land. As noted earlier, Kauri Creek is a permanent spring fed watercourse that flows (though not always continuously) across the land. The relatively low volume of water in Kauri Creek means that it is not as significant a feature as, say, the Mowbray River. Although it would be possible to dam part of the Creek to create an attractive water feature, Mrs Kuhn suggested that it is probably too beautiful a rainforest stream to dam. There were concept plans to locate accommodation and resort facilities near the Creek, apparently in the area which had been cleared for growing corn, where the regrowth could be selectively cleared.

The range of activities which could have been enjoyed on or near the subject land include flora and fauna study, nature photography, bush walking, climbing, abseiling, swimming, horse riding, mountain bike riding and more passive activities, such as book reading, letter writing or just relaxing uninterrupted in the tranquillity of a forest environment.

Bird watchers could observe birds there and at other sites in the district, such as Mount Lewis where the blue-faced finch is found. Mrs Kuhn highlighted the "morning chorus" which she described as "a symphony of the hundreds of species of birds in the rainforest" (including honey eaters, warblers, wrens, catbirds, riflebirds, kookaburras and bower birds) and which is all the more impressive when the listener is accompanied by an ornithologist. Different species live in different environments, so the morning chorus on and around the subject land is different from, say, that in other types of rainforests or in

mangroves. Listening to and being instructed about the bird calls can help new bird watchers to locate shy birds in a closed environment and is an educational tool which most birdwatching eco-lodges offer to birdwatchers. Mr Rector said that there is a “very significant” birdwatching market in the north of Australia, with many people coming from overseas to see the bird life of Australia. Their main point of entry is Cairns. Mr Weigh also acknowledged that there is a market in relation to bird-watchers but, in his experience, a resort operator would not rely on bird-watchers to fill lodges. Other bird watching enterprises in the district, however, have demonstrated both that there is a market for this sort of activity and that the activity is enhanced with the involvement of a specialist guide.

The fact that the final part of road access to the subject land was along an earth and gravel road was characterised as a positive feature of the site. According to Mr Rector, the gradual deterioration of the road surface as one travelled from the main road to the subject land contributes to the presentation of the experience and heightens the sense of anticipation when approaching an eco-tourism destination. Since 1995, however, there has been a requirement that Pinnacle Road be upgraded and sealed to provide access to the retained land and some of that work has been undertaken in recent years. The Council may have imposed similar requirements for the development of the subject land.

Mr Weigh seemed to suggest that the appeal of a resort on the subject land would be limited if the activities were only nature-based, and that it would be necessary to expand significantly the range of options that guests could enjoy to include such things as an interpretive centre, canopy walk, library, and tennis. In fact, claimants had such options in mind. Indicative plans for the development of an enviro-park on the subject land show, among other things, an interpretive centre, a research facility, a gallery, restaurants, a canopy walkway and various types of accommodation (Exhibits 16, 20, 44).

Both Mrs Kuhn and Mr Rector stressed the importance of the educational side of eco-tourism. Mrs Kuhn said that, although the quality of the environment is critical to such a venture, the quality of the interpretation of the environment “is probably one of the biggest attractions”. According to Mr Rector the degree to which the interpretation of the environment is expanded is “a very critical factor in the success of the development itself”. Plans for the construction of interpretive centres on the subject land, and the types of educational programs that could be provided, were described.

The final two negative site features seem to refer to the State Forest rather than National Park land. Mr Weigh gave one comparison, stating that the infrastructure of walking tracks in the Daintree National Park is superior to Mowbray State Forest. The main feature within the State Forest that is relevant to this case is Mowbray Falls, discussed a little later in these reasons. The plans for appropriate tracks on the subject land and a possible boardwalk or other suitable construction on the track to Mowbray Falls would overcome those negative site features.

The subject land and the immediately adjoining land clearly have natural features which make the subject land suitable for development involving both soft and hard forms of eco-tourism. It is clear, however, that the nature, extent, and potential success of any such development would have been influenced greatly by the enthusiasm, energy, experience and expertise of the claimants. They had developed a vision to use the land by retaining the integrity of the natural environment and drew on a growing body of knowledge and experience in Australia and elsewhere.

It was proposed not to connect up with Council infrastructure beyond the boundary of the land. Rather there would be solar and wind power generators. Those and other ecologically sensitive facilities could be an attraction to eco-tourists who are curious about how to create an hospitable living environment without some of the services of a city or town. Mr Weigh seemed to suggest that such features may be attractive to the small market of “hard edge” eco-tourists, but that the mainstream tourists want nature-based activities together with comfortable accommodation. He considered that to be “too rustic in your presentation ... would be very risky”. I did not understand the proposal to have involved facilities of a low standard but rather to have used alternative means of achieving a high standard.

Access to Mowbray Falls: Mowbray Falls are located about 350 metres to the south-east of the south-eastern corner of the original Lot 109 (and Lot 999). They are an attractive natural feature which visitors to a resort on the subject land would have wanted to inspect. To gain the most direct access to the Falls people would have had to enter the adjoining State Forest along a steep path from the subject land. Visitors could cross the Mowbray River at or above the Falls and follow the existing Robbins Track, which meanders through rainforest gullies and eucalyptus forest, to the historic Bump Track, a hiking and horse riding track along which people could travel to Connolly Road or Black Mountain Road. The Robbins Track was constructed in 1985 by Mr Kuhn at the claimants’ expense. The tracks are marked on a

Visitor Information sheet on “The ‘Bump’ Walking Track” published by the Queensland Department of Forestry (Exhibit 18).

If the enviro-tourism project on the subject land had gone ahead, and if commercial access to the Falls had been permitted, it is likely that the track would have followed another route which has a gentler gradient and would be more environmentally sensitive. Constructed platforms or elevated boardwalks would have made the approach easier and would have allowed for natural drainage to occur under the walkway.

Three related matters were in issue in these proceedings:

- (a) How important would access to Mowbray Falls have been to an eco-tourism venture on the subject land?
- (b) Would commercial access from the subject land to Mowbray Falls have been officially permitted?
- (c) To what extent would the value of the subject land have been influenced by the availability (or unavailability) of access to Mowbray Falls by patrons of the eco-tourism venture?

How important would access to Mowbray Falls have been to an eco-tourism venture on the subject land? The significance of the Falls to the proposed development of the subject land is apparent from the evidence and was confirmed at an inspection by the parties and the Court.

In her written statement describing the eco-tourism potential of the subject land at the time of the taking, Mrs Kuhn noted that the land “offered a range of access to the Mowbray River and Gorge. It is only a ten minute walk on established tracks through rainforest to the Mowbray River and Big Mowbray Falls.” From one of the sites “a choice of routes to the Big Mowbray Falls can be followed through the riverine gallery forest or along the established tracks” (Exhibit 5).

The significance of the Falls as a marketable feature of an eco-tourism enterprise can be implied from planning material prepared for the claimants. A plan of the proposed development named it the Big Mowbray Falls Eco-tourism Project and the document showing an artist’s impression of the possible structures on the land described the proposed development as Mowbray Falls Enviro-park (Exhibit 44). A letter from one of the bodies who expressed support for the proposed development referred to “a breathtaking 600 ft waterfall on the back property” (Exhibit 43).

In his report acclaiming the eco-tourism potential of the subject land, Mr Rector referred to the property as having “constantly flowing water through the Mowbray River and spectacular falls at Mowbray Falls within walking distance through lush rainforest.” (Exhibit 6 Annexure D). Of course, the Mowbray River does not flow through the subject land, but Mr Rector clearly considered the Falls to be a significant attraction. He thought it would be possible to construct an appropriate track with a more gentle slope than exists at present to the top, and even to the bottom, of the Falls.

Mr Allan considered that access to the Falls is one feature that would have contributed to the viability of a resort on the subject land. Mr Weigh listed access to Mowbray River Falls as one of the positive site features of the subject land. He described the Falls as “a very dramatic and continuous year round waterfall system feeding down to the Mowbray Valley which is a vary attractive delta to the ocean”. He also considered that, because there would be limited on site activities on the subject land, access to the neighbouring land “would be vital to any eco-tourism development”. The attraction of that neighbouring land was not confined to the Falls.

Mr Weigh also listed as one of the negative site features of the subject land the fact that access to the Falls is a steep descent which is “quite demanding for a visit on foot” and which “would restrict many visitors from the journey” (Exhibit 15). Mrs Kuhn, in evidence to the same effect, described the walk to the Mowbray River and Falls as “getting towards the hard end of eco-tourism. You have to work hard to get there.” By comparison, she described a short, enjoyable walk around Red Hill to the pendas as “soft eco-tourism” which is “probably the most that a lot of people want”. In any case, there would not be time for most day visitors who are taking tours to do more than walk to the penda site and experience the canopy walkway and the interpretive centre.

I am satisfied that, although not every visitor to an eco-tourism resort on the subject land would have required access to Mowbray Falls, the Falls would have constituted a very important (though not essential) feature of the eco-tourism experience offered by such a resort.

Would commercial access from the subject land to Mowbray Falls have been officially permitted? The most direct evidence was given by Mr Shane MacLeod, the Tablelands Recreation Officer in the Department of Natural Resources based at Atherton. He had previously been the Visitor Management Officer in that Department, based at Atherton. In

the 18 months before the hearing Mr MacLeod was responsible for assessing applications for and issuing all Commercial Activity Permits for all of Queensland north of Townsville. That work involved the assessment and issue of permits to use parts of State Forests for various activities including recreation, club, competitive event and commercial activity permits.

Commercial tourist operators have been given Commercial Activity Permits for conditional access to Mowbray Creek and Falls from the eastern State Forest 42 by way of a road known as the Bump Track. The claimants have had authorised access to the Falls in the past as part of their commercial tour enterprises. That access has been through a valley to the bottom of the Falls. In 1985 they obtained their first permit for commercial tourism operations in the State Forest area of the Mowbray Gorge. Their horses took tourists up the Bump track to the Mowbray Falls on “Saddleback Safaris”. The claimants also started “Tropical Treks”, rainforest treks into the Mowbray Gorge and onto the Mowbray Falls. (Exhibit 5 at 1.4) Among the permits which they have been granted was one for overnight camping in the State Forest as part of a horse riding trip.

The claimants have not sought permits for commercial purposes to gain access from the subject land to the top of the Falls.

Mr MacLeod’s oral and written (Exhibit 13) evidence was that if an application had been made in 1992 for a Commercial Activity Permit to access Mowbray Creek and Mowbray Falls from a non-gazetted access - in particular from part of the subject land which was resumed - “it would almost certainly be refused”. His assessment was based on his understanding of “wider Departmental policy and the Recreation Subprogram at this time”. In December 1992 no provisions were in place relating to private infrastructure (such as walking tracks) being constructed by adjoining land holders or others on State Forest for the purpose of a Commercial Activity Permit. According to Mr MacLeod, a “lot of this policy was unwritten in 1992” and was, in effect, in the heads of public servants. Mr MacLeod identified the two “major contributors” to the decision” to refuse a permit as:

- the exclusive use in an area which would have had no gazetted public access to the trail head of the track; and
- the existence of suitable access to the site from the Bump Track.

When expanding on those factors, Mr MacLeod said there was no formed track or road from the subject land to the top of the Falls. It was unlikely that a new recreation

construction would have been formed because there was gazetted access to the boundary of the State Forest and then public access to the Falls through the Bump Track. (As noted earlier in these reasons, however, access is not obtained by way of the Bump Track alone. It is necessary to follow the Robbins Track to the Falls.) Mr MacLeod stated that the Bump Track has been in use since about 1877, is part of the national heritage trail and has been maintained because of historical value. Although the Department is concerned that erosion and the steepness of the Track poses a management risk, some of that risk has been shifted to private operators using the Track who must carry public liability insurance.

Although access to the Falls can be obtained by way of the Bump Track and then the Robbins Track, such access is over a much longer distance and is physically more difficult than the route (existing or proposed) from the subject land. According to Mr Wake, it would take about 30 minutes to drive from the subject land down the Rex Range to Spring Creek to the start of the Bump Track. It is more difficult to gain access to the Bump Track from the subject land than from the coast road. The tracks to the Falls then come up on the side opposite to the subject land. Alternatively, one could travel approximately 9 or 10 kilometres from the property to access the track from Black Mountain Road. By contrast, visitors from the subject land could visit the top of the Falls in a few minutes and over a distance measured in hundreds of metres rather than kilometres. Mrs Kuhn acknowledged that people may visit the Falls from the tracks below, but she suggested that visitors prefer a forward journey rather than retracing their steps. There may have been some advantage for people coming to the Falls along those tracks to have continued onto the subject land and the interpretive centre before joining transport to their next destination.

In a practical sense, authorised access along a track between the Falls and the subject land would have been an important factor in the operation of a commercial resort, whether tourists went to the Falls from the subject land or went along the Bump Track and Robbins Track and then from the Falls to the subject land.

In addition to the “major contributors” cited earlier Mr MacLeod nominated safety or the steepness of the proposed track (rather than its length) as a factor which would have been taken into account. Use of the track for the purpose of group or commercial activities would have had the potential for increased risk, and possible State liability for injury to persons using the track. He said that if, in 1992, the Department had become aware of any regular use of the track for such activities, action would have been taken under the *Forestry Act 1959*.

Apparently the Department has taken action under that Act against people conducting commercial operations on State Forest without permission.

I note that parts of the Robbins Track, which was constructed in 1985 and lacks the historical significance of the Bump Track, were said to be steeper than the Bump Track. The Robbins Track is not sustainable and, in places, may not be safe. In key respects it would not seem to comply with the purpose and goal of the strategic plan adopted a decade or so after its construction.

Assuming that the factors mentioned by Mr MacLeod would have been relevant considerations, how would an application in 1992 for a Commercial Activity Permit for access from the subject land to the Falls have been processed? Apparently it would have been referred to the Recreation Advisory Service Branch of the Department in Brisbane. In concluding that such an application would have been refused by the relevant officer, Mr MacLeod relied on a decision made in 1994 by the same officer against approval of an application for the construction of a walking track from a freehold property in south-east Queensland to an adjoining State Forest, and on the recreation policy of 1993.

A critical matter to be borne in mind is that the restrictions about which Mr MacLeod spoke apply to commercial activities but would not apply to a private individual, or individuals, wishing to walk from the subject land to the Mowbray River and along to the Falls. A distinction was drawn between private individuals who were not connected with a commercial tour and those who were. The line became blurred, however, when deciding whether the restriction applied to all people who were accommodated on the subject land. Mr MacLeod understood that if people were not actively directed to the Falls (say by the provision of a map) that would not be a commercial operation. People would be exercising their individual right to walk in the State Forest. If, however, the operators of the accommodation were directing people along a constructed path, that would form a commercial operation.

There was no absolute prohibition on commercial permits of the type which would have been required. Mr MacLeod seemed concerned that a track across the State Forest from the boundary of the subject land to the Falls might have been considered to be for the exclusive use of the land owners and their customers. He thought, however, that if such a track had met a gazetted road the proposal “would be looked on very favourably”. He also agreed that, if such a track were to be approved, the approval could be subject to

conditions that it could be constructed from wood in parts to avoid erosion. The claimants would not have contested the construction of an appropriate boardwalk along a gentler gradient than the present track.

Mr MacLeod conceded that a decision maker would have sought input from the Wet Tropics Management Authority, but it was unclear what the Authority's policy was in 1992 or what its attitude would have been to such an application.

It is apparent from Mr MacLeod's evidence that, at the date of resumption, there was no written Departmental policy which might have guided the relevant officer or prospective purchaser. It is also highly likely that the Department would have initially refused to grant a Commercial Activity Permit for the purpose contemplated. It cannot be said with certainty that further applications and discussions (and possibly applications under s 20 of the *Judicial Review Act* 1991) would have led to the grant of a permit or that the Department would have permitted, or been involved in, the re-routing, upgrading and even construction of a suitable pathway from the subject land to the Falls.

A policy has since been developed which requires all infrastructure constructed on State Forests for the purpose of a Commercial Activity to be built or constructed to departmental standards. The applicant would be required to fund the project either directly or indirectly through advance payment of passenger fees. At all times the Department would own the infrastructure, which would be managed so as to give an equal opportunity to all visitors to the State Forest. Any private infrastructure arrangements would need to consider the cost of maintenance, the remoteness of the area from the closest work centre, and the likelihood of injury (with possible State liability) for persons using the proposed facility. Mr MacLeod outlined the policy and documents dated December 1993, June 1994, August 1995, and June 1996, giving more details of policy development, were tendered (Exhibits 13, 42). The broadly stated Purpose of the Strategic Plan 1995-2000 is "To provide the community with sustainable, safe and environmentally responsible recreational opportunities, attuned to community needs" and the Goal is "To provide nature based opportunities within State Forests and water storages which are safe, sustainable and attuned to community needs".

Despite the development of such policies, Mr MacLeod said that even if an application had been made in late 1996 it almost certainly would have been refused.

The claimants were "astounded" at Mr MacLeod's statement that a permit would almost certainly have been refused. They have been granted permits in the past for other

activities in the State Forest. Mrs Kuhn said that in none of the claimants' discussions with relevant Ministers or departmental officers had anyone mentioned the need for gazetted access, nor had the various publications issued by the Forestry Department mentioned the need for a gazetted access to protected areas. Indeed Mrs Kuhn said she had never seen a policy which would have precluded access along non-gazetted routes. In light of Mr MacLeod's evidence that is not surprising.

It was accepted that similar access arrangements have been made on National Parks elsewhere in the State and that different factors will influence decisions in different places. One cannot conclude that such access would necessarily have been granted in the subject case.

It is clear that the valuers assumed the authorised access would be obtained. Mr Wake noted that, before and since resumption, access to the Falls was controlled by the Department of Forestry. He stated that an "annual permit is all that would have been needed for guests to access the Falls" (Exhibit 6). In his opinion, the claimants had "virtually unimpeded access" to the Falls before the resumption, and the fact that for some years permits had been issued to tour operators (including the claimants) in the immediate district of the subject land suggested that any permits necessary for access to the Falls would have been granted. A properly constructed zigzag track along a gentler slope than the present trail would have been more environmentally appropriate and Mr Wake thought that such a zigzag track would not be a problem so far as the Department was concerned. Consequently a prudent purchaser of the subject land at the date of resumption would not have considered as a detriment the risk that a permit would be refused.

Mr Allan made his valuation on the basis that the purchaser of the land would gain approval for guests at the resort to have legal access to the Falls.

Mr Needham argued that if experienced experts in their fields (particularly those called by the Crown) had failed to consider the possibility that direct legal access from the subject land to the Falls would have been difficult or even impossible to obtain, it could not have been a relevant factor to the valuation of the subject land. I am satisfied, however, that Mr MacLeod's evidence was relevant and persuasive. The oversight by Mr Allan and Mr Weigh does not rule out the prospect that a prudent purchaser of the subject land would have made suitable inquiries.

The evidence about the existing track shows that, for environmental and safety reasons, a person who wanted to develop the subject land for eco-tourism purposes would have sought to have the track re-routed and upgraded. That work may have involved the construction of platforms or an elevated boardwalk in places. Such work could not have been done on the State Forest without the involvement or consent of the relevant Department. Inquiries in relation to that work could have been made at the same time as, or may have given rise to, inquiries about the need for Commercial Activity Permits.

I am satisfied that a properly informed prudent purchaser of the subject land at the date of resumption would not have assumed that a Commercial Activity Permit would have been granted along the existing route, or some other route, between the Falls and the subject land. Given the importance of the Falls to an eco-tourism development on the subject land, however, such a purchaser would have probably pursued all reasonable avenues to obtain permission and an appropriate proposal may eventually have attracted the Department's support.

To what extent would the value of the subject land have been influenced by the availability (or unavailability) of access to Mowbray Falls by patrons of the eco-tourism venture? As noted earlier, the valuer called by each party assumed that access to the Falls would have been permitted and valued the subject land accordingly.

Mr Allan considered that the Falls are one feature that would have contributed to the viability of a resort on the subject land. If access was not available, or would have been difficult to obtain, then the subject land would have been worth less.

I am satisfied that, because permitted access to the Falls was a very important (though not essential) feature of the eco-tourism experience which would have been offered by an eco-tourism venture on the subject land, the risk that access would not be permitted or that permission would have been difficult and possibly expensive to obtain would have influenced the price which an informed prudent purchaser would have paid for the subject land.

Conclusion: The subject land is to be valued having regard to its agreed, but unrealised, potential for eco-tourism purposes:

The claimants, and others assessing the potential of the subject land for eco-tourism purposes, considered that access to Mowbray Falls was an important feature in the development of the land. Although not all visitors to the eco-tourism resort (whether day

trippers or overnight guests) would have taken the opportunity to visit the Falls, the availability of legally permitted access by way of an appropriately constructed trail from the subject land was a significant element in the overall planning for a venture on the subject land. Given the attraction of the Falls, their proximity to the subject land and the absence of a comparable river and falls on the subject land, the need for legal access to the Falls by a direct route from the subject land would have been a factor that a prudent person would have taken into account when deciding whether to purchase the land for eco-tourism purposes and the price which such a purchaser would pay. The eco-tourism potential of the land would not have been enhanced if the resort operator could only provide guests with access to the Falls by vehicle to the Bump Track and then a walk for at least part of the distance along the Bump Track and the Robbins Track. A purchaser would have wanted to be assured that the relevant permit would be granted (and that successive permits would be issued) and, less significantly, would have wanted to know the fee payable for the permit.

Highest and best use of retained land

The two retained areas comprise gentle to moderately sloping land, major areas of which have been cleared in the past. Some parts are subject to wattle regrowth. As Mr Wake pointed out, the retained areas do not have the same diversity of natural features as the subject land, nor do they have the same proximity to the Mowbray Valley, River and Falls. Once the resumed land becomes National Park land, it may be necessary to pay (on a per capita, user pays basis) for access across that land to the Mowbray Falls, as is the case for people entering Undara National Park from Undara Resort. Any such payment will be in addition to the restrictions (if any) on access which the Department of Forestry might have imposed in relation to access to Mowbray Falls. In a similar vein, the claimants have lost free access to walking trails through the resumed land to attractive vegetation including the giant pendas. There is also severance from Kauri Creek, which was a permanent source of natural water for both blocks. Consequently it has been necessary to construct two bores and more energy will be required to pump water from about 60 metres in depth than from a surface supply. That additional requirement is particularly significant as the claimants intend to rely on renewable energy sources (Exhibit 6).

Lot 109: The remainder of Lot 109 has an area of 25.8 hectares (later increased to 26.15 hectares by the addition of land from the State Forest to follow the existing track). It is a

hatchet shaped block with a 21 metres wide access strip running from Pinnacle Road along a ridge line along the north-eastern alignment to an irregularly shaped, but roughly triangular, balance area wedged between the two parts of the resumed Lot 999. Although a tributary of Kauri Creek intersects the area, the Creek is on Lot 998. Lot 109 is undulating vine forest and open to medium woodlands with acacia regrowth adjacent to the cleared areas where the homestead and associated infrastructure are situated. About 5 hectares of the land are cleared. All the improvements on Lot 109 before resumption are located on the balance area after resumption (Exhibit 11).

Because of its shape and the probable cost of development, Mr Allan considered that the highest and best use of the land would be as an improved rural residential site. Accordingly, he valued the land as a rural residential site. In Mr Wake's opinion also, the highest and best use of the remaining part of Lot 109 was as a "secluded, rural residential site with hatchet shape" (Exhibit 6 page 9).

I am satisfied that the highest and best use of Lot 109 was as a rural residential site.

Lot 108: The remainder of Lot 108, with an area of 25.89 hectares, comprises the elevated section of Red Hill, on the western section, falling gently to moderately towards the north-east, east and south-east. The vegetation is predominantly open to medium woodlands, timbered with eucalypt with vine forest in the eastern sections. Distant sea views are available from Red Hill. About 7 hectares of the land are cleared. All the improvements (including rough horse yards and fencing) on Lot 108 before resumption are located on the balance land after resumption (Exhibit 11).

In his written report (Exhibit 6 Annexure D), Mr Rector expressed support for the development of the remaining land for eco-tourism purposes. He confirmed in his oral evidence that the north-east corner had potential for development as an eco-tourism resort, but his assessment was "predicated on the basis that the Kuhns can gain access to the national park to deliver the experience from this location." He recognised that, if access were to be obtained, there would be less flexibility in using the resumed land than was possible before the acquisition. Some upgrading of tracks on the National Park land would be necessary. He thought, however, that if charges were imposed on access to the National Park those charges would not affect the viability of the resort.

Mr Allan stated that the remaining land on Lot 108 "will still have potential for tourism related usage" due to the proximity of bitumen access and sufficient attributes to

enable such ventures to succeed (Exhibit 11). He cited in support of his conclusion the claimants' application and Council's support in February 1993 for Consideration in Principle to use Lot 108 on RP852234 for the establishment of a tourist facility, and the application in April 1995 and Council's approval in June 1995 for rezoning of the land to Special Use (Tourist Resort and Accommodation) Zoning. Mrs Kuhn confirmed that the claimants still hope to construct an enviro-park on the land. Mr Weigh expressed the view that a site of 25.89 hectares which is adjacent to a National Park would have sufficient area to establish an eco-tourism project (Exhibit 15).

Mr Wake considered that after resumption the balance of Lot 108 retained some extra value for tourism purposes. The potential of that land was much less than as part of the subject land. The retained land is a very constricted site. Although it encompasses the major hill it does not include any major rainforest areas or the pendas, and lacks access to Kauri Creek. Direct access is not available from the land to the State Forest and to the Mowbray Falls area. Consequently it would not be possible to have extensive rainforest walks and hiking trails. Any resort development on Lot 108 would be of a lower standard. In particular, it would be necessary to mix day visitors and overnight visitors who desirably could have been catered for on separate areas of the subject land. It would not be able to have a resort (other than a low key type of home stay or something similar) on Lot 108 without access to the National Park to be created on the resumed land. Indeed access to the National Park would be vital to eco-tourism development on the land. Mrs Kuhn also described the restrictions on potential development (as compared with what might have been possible on the subject land) and noted that any agreements about commercial rights of access to the National Park land still seemed to be a long way off.

Mr Wake noted that, even with access to the National Park, the development on Lot 108 would be disadvantaged when compared with the development that was possible on the subject land before resumption. After resumption the resort developer would have to negotiate with two State Government departments to obtain access across the National Park and State Forest to Mowbray Falls. He considered that the charging of entry fees to the neighbouring National Park would influence the price which a prudent purchaser would be willing to pay for the retained land, particularly if there was a risk that costs would continue to rise.

Mr Wake attempted to estimate the extent of the loss to the resort business due to extra overheads. If a per capita charge of \$4.50 were to be imposed (as at Undara National Park), and if there were 60 visitors per day (based on the first year's projections) then the burden on the business would be in the order of \$98,550.00 (Exhibit 6). As noted earlier, Mr Rector considered that if charges were imposed on access to the National Park they would not affect the viability of the resort. I am satisfied that costs of that type would have been a factor in the structuring of the resort business rather than having a significant influence on the value of the land.

Mr Wake noted that, in order to increase the size of the residual resort site to what they consider a minimum level and in order to ensure an adequate water supply, the claimants had contracted to purchase 19 hectares of nearby land including a 10 hectares irrigation licence at a cost of \$250,000.00. There is permanent surface water on that lot. Part of the motivation to purchase the land arose out of the severance of the existing surface water, that is, the loss of the land over which Kauri Creek flows. In Mr Wake's opinion, the purchase of the additional land demonstrates the limited capabilities of the retained Lot 108 (Exhibit 6).

At the time of the hearing there was no resolution of the issue whether commercial access would be granted to the adjoining National Park. Indeed the resumed land had not been declared to be a National Park, apparently pending the finalisation of the compensation matter. Mrs Kuhn said that discussions over the previous year indicated that the claimants were a long way from obtaining commercial rights of access. The delay may have been linked to the development of general guidelines on the development of infrastructure in National Parks but, in this case, was probably as much linked to the delay in the establishment of the neighbouring National Park. Those delays may have influenced the statement in Mr Wake's valuation report that he considered that the highest and best use of the remaining part of Lot 108 was as a rural residential site because, all negotiations for access having been rejected, it would not be an "environmental resort site" (Exhibit 6).

I am satisfied that the highest and best use of Lot 108 is for eco-tourism purposes but that, bearing in mind such factors as the size of the Lot, the restrictions on development of that site, the absence of extensive rainforest areas, the lack of guaranteed access to neighbouring National Park and State Forest land for commercial purposes, the potential cost of obtaining that access, and the apparent desirability (if not need) for additional land to

enhance the viability on Lot 108, the land would not be as commercially attractive as the subject land.

Valuing the land before and after resumption

Before and after method: The valuer for each party assessed the amount of compensation payable by using the before and after method. The contrast in the parties’ positions is evident from the following calculations.

Mr Wake stated that the before and after approach to the valuation need not include the added value of the improvements on the retained areas as they are constant, there being no claim for any aspect of damages in respect of them. In his opinion, the value of the 197 hectares of the subject land immediately prior to resumption was \$2,200,000.00. After resumption each of the remaining parcels had a value of \$150,000.00 as a rural residential site. Consequently, he calculated the loss in value of the asset to be \$1,900,000.00 (Exhibit 6).

Mr Allan considered that the value of the lost land was \$1,100,000.00. His calculations were as follows:

Before valuation

Lots 108 and 109	197.1788 ha @ \$7,500.00/ha	\$1,480,000.00
	Improvements	\$ 62,500.00
	Total	\$1,542,000.00

After valuation

Lot 108	25.89 ha @ \$10,000.00/ha	\$260,000.00
Lot 109	26.15 ha improved site	\$185,000.00
	Total	\$445,000.00

Land value

\$1,542,000.00 less	\$445,000.00	\$1,097,000.00
Adopt	\$1,100,000.00 (Exhibit 11)	

The improvements are on the original Lot 109 and the retained Lot 109. Mr Allan stated in oral evidence that he had allowed \$62,500.00 for improvements in both the before and after valuations.

Evidence of market value: One of the difficulties faced by the parties was the limited amount of relevant sales evidence. In the absence of directly comparable sales, other sales were mentioned to give context to the valuers' estimates. Reference was also made to various valuations of the land, including two which the claimants had commissioned in 1989 and 1990, and to bids at an auction at which the subject land was not sold but was passed in.

To assess the sales and other valuation evidence it is necessary to have an understanding of the market conditions in late 1992.

State of the market: The negative factors influencing the market for tourism properties were the ongoing (but very much reduced) impact of the pilots' strike in 1989 and the signs of the emerging recession.

There was no dispute that the 1989 pilots' strike had a profound and detrimental effect on the tourist industry of the Cairns region. In her written statement, Mrs Kuhn traced the growth of the claimants' tourist enterprises (including tour operations and booking agency business) from 1984, and noted the boost which followed the opening of the Sheraton Mirage at Port Douglas in 1987, to the point where they were "very successful". The pilots' strike "created chaos for the tourism industry in Far North Queensland". The claimants' tours and the nation-wide accommodation program that they had established earlier in 1989 lost a main supply of clients. They had to put off staff, and operated on "very limited budgets with very little turnover" (Exhibit 5).

The pilots' strike, which ended in early 1990, was described by Mr Weigh as the "greatest dislocation to the market place in recent history for the Far North Queensland region". The impact of the dispute was "exacerbated by a sharp escalation in interest rates" which resulted in some property related projects experiencing rises from 12 per cent. to 24 per cent. in under a year. The combined impact was "catastrophic for the tourism industry in Far North Queensland, a largely property based industry with very solid growth projections being touted at the time" (Exhibit 15).

Despite the impact of the strike there was evidence, that by the date of resumption, the tourism market, including the market for tourist accommodation, had recovered or was strengthening to pre-pilots' strike levels. Mr Weigh provided figures to show that, by December 1992, room occupancy rates and the number of rooms occupied had surpassed previous highs. Airlines, both domestic and international, had expanded their services into

Cairns. International arrivals (excluding transit passengers) into Cairns in the 1992 calendar year were 37 per cent. higher than for the previous calendar year (Exhibit 15).

Mr Weigh concluded, on the basis of available information about tourist numbers, available rooms, occupancy rates, that by the date of resumption:

“it is reasonable to regard the overall state of the tourism market in Cairns and Far North Queensland as buoyant and the mood one of expansion and renewed opportunity. The effects of the Pilots Dispute had clearly been overcome and this return to growth in visitor numbers had been achieved while domestically, Australia was still in recession. “ (Exhibit 15)

Mr Weigh cautioned that, despite the growth in numbers of visitors, the levels of room tariffs and hence profitability were not sufficient to have caused a proliferation of new development activity. In other words, the sharply rising visitor numbers and the demand for hotels had not driven the net room rates high enough to economically justify new investment in room capacity, at least in hotels in Cairns. Some large developments that were mooted at the time failed to come to fruition.

Mr Rector suggested that the improvement in tourism figures in 1991-92 would have encouraged a developer who, in any case, would be wanting to be in a strategic position in the tourist resort market well in advance of demand. As it happens, the growth continued after 1992, although it took different forms. From the early 1990s there was a trend away from the Cairns central business district towards the northern beaches of Port Douglas and on up the Daintree. The Silky Oaks resort near Mossman Gorge was extended. The Daintree Eco-Lodge was built and completed. In Port Douglas the planning program for the Tree Tops Resort was in the conceptual stage. That 300 rooms resort has since been built. Other plans were in place for the expansion of existing resorts or the construction of new ones in the Port Douglas-Daintree region.

Mr Weigh also noted that, at that time, the Cairns Region Tourism Strategy was being mooted and may have commenced. The Wet Tropics Management Authority had been established and was openly discussing the increasing pressure on existing resources such as Daintree, Cape Tribulation and Mossman Gorge. Eco-tourism, while poorly understood, was “receiving increasing exposure as an important way of the future”. Around the date of resumption there was “considerable talk of the growth potential of the region and the pressures and impacts on established natural attractions.” As noted earlier, Mr Weigh

thought it reasonable to suggest that eco-tourism as a niche market would develop behind, and might survive because of, the development of mainstream tourism to the region.

By the early 1990s the numbers of people visiting the Daintree/Cape Tribulation area were such that mass tourism was established and it was apparent that the sensitive areas were going to be over-populated and would lose their essential character.

In Mr Weigh's opinion, the major pressure of tourism had been focussed mainly on the Mossman, Daintree and Port Douglas region. He thought that any value premium attributable to tourism would "be much higher in this area than for the subject site", both at the date of resumption and subsequently. In particular, the "quality of the subject site from the perspective of the visitor is also not as attractive as is the Daintree, Mossman and Port Douglas region" (Exhibit 15). In his analysis of the sales evidence, Mr Allan expressed the opinion that the lands north of the Daintree River are substantially superior to the subject having regard to tourism potential and the existing infrastructure for tourism, especially eco-tourism based activities. The sale prices for land north of the Daintree River reflect that superiority (Exhibit 11).

There was, however, a public debate about whether there should be limits on such things as accommodation levels north of the Daintree River. As noted earlier, by 1992 the pressure of tourism north of the Daintree River was such that various planning instruments were being developed and limits were being placed on the number of tour operators working in the area and on the number of tourist accommodation beds. There was no dispute about that. The issue was what implications the changes north of the Daintree may have had on the market value of the subject land at the date of resumption. The claimants submitted that the Mowbray River and Gorge area offered a range of eco-tourism and related activities without the congestion of nearby destinations. Although, in 1992 and later, the pressure of tourism remained focussed primarily on the northern destinations, the claimants submitted that a prudent buyer would have recognised the impact of restrictions north of the Daintree area and may have looked to purchase a suitable site in the Mowbray Falls area.

I am satisfied that, although comparable Daintree properties would have been more valuable than the subject at the date of resumption, the value of the subject land would have been influenced by the scarcity of Daintree properties and the growing demand for rainforest eco-tourism destinations in and around the Daintree region.

It is appropriate to consider the valuations and failed attempted sale before turning to the sales evidence.

Previous valuations: No reliance was placed on the Commercial Forest Valuation prepared by Alarc Consultants Pty Ltd in August 1992 for the Queensland Forest Service (Exhibit 6 Annexure C). It is not relevant to the valuation of the subject land as land with eco-tourism potential and no further mention of that valuation is necessary.

In August 1989, more than three years before the date of resumption, Ballieu Knight Frank valued the subject land at \$2.46 million. The claimants did not rely on the valuation and there are compelling reasons not to place any weight on it. The valuation was not in evidence and there was no evidence about the assumptions and sales (if any) which underpinned the figure. If the valuation had regard to the tourism potential of the subject land, the valuation was made before the pilots' strike when there was considerable investment in tourism sites.

In February 1990, DJ Jones & Co valued the land for mortgage security purposes at \$1.9 million. Again the valuation report was not in evidence. It was not possible to assess the assumptions made or the sales evidence (if any) which supported the figure. The valuation was prepared during the pilots' strike when a recognised slump in demand for tourism sites had occurred.

Mr Allan also referred to a 1990 valuation by Herron Todd White for mortgage security purposes (\$1 million) and a subsequent Department of Lands valuation of the subject land at \$900,000.00 based on rural residential in globo values with subdivisional potential. Neither valuation was in evidence.

No party put any great weight on the past valuations. They were not tendered. There was either no evidence of the basis on which they were prepared or the little information that is available (for example, in relation to the Department of Lands valuation) shows that it was prepared on the basis that the highest and best use of the land was for other than eco-tourism purposes. At least some of them were prepared significantly before the date of resumption and in quite different market conditions. None of the valuations is relevant to the resolution of the issues in this case.

Auction: The subject land was listed with Ballieu Knight Frank (Cairns) Pty Ltd for auction on 28 September 1990, more than two years before the date of resumption. Bids were

received up to \$2 million, but the property was passed in. The claimants submitted that it was a bona fide auction and, even though there was no concluded sale, the auction reflects most of the elements of a sale and provides market evidence. Mr Wake referred to the following factors: exposure to the market, advertising, promotion, inspections by several prospective purchasers (some of whom hired helicopters to better view the land), bidding at auction and a genuine offer to purchase which was refused by the vendor (Exhibit 6).

During the period when the land was marketed and listed for auction, Mr Rector was engaged on a commission basis by Ballieu Knight Frank as the Manager, Hospitality, Tourism & Leisure Division. He prepared the background formal tender promotional sale material that was distributed to interested parties during the marketing period before the auction. The property was marketed in Australia and overseas in a way which described its suitability for a tourist resort facility geared to eco-tourism. Mr Rector was present at the auction which, he recalled, “was very well attended by a number of interested parties who had interests in tourism infrastructure and who were familiar with the property. ... [T]he auction proceeded well with spirited bidding moving the price along with genuine bids reaching \$2.0 million.” (Exhibit 6 Annexure D) Apparently the highest bid was rejected because the claimants’ reserve price was \$2.4 million, the figure nominated in the Ballieu Knight Frank valuation. After the auction, Mr Rector spoke to the highest bidder in an unsuccessful attempt to raise the offer. No evidence was called from the bidder and Mr Rector was satisfied that the bid was genuine. Mr Wake had no direct knowledge of the auction but was satisfied, as a result of his inquiries of Mr Kuhn and Mr Rector, that the auction was conducted properly. Mr Allan also had no direct knowledge of the auction. He said that he had made inquiries of two other people who attended the auction, apparently on behalf of an employer or client, and he was satisfied that the auction was “very questionable”. None of the other named persons was called to give evidence and no written statements were produced. There was no direct evidence about whether the FNQEB was interested in purchasing the land at that time or made a bid. The hearsay evidence and counter assertions from the bar table clouded rather than clarified the issue.

Two questions arise. First, can an offer to purchase at auction be considered as evidence of the value of land? Second, was the highest bid, at least, a genuine indication of the state of the market at the date of the auction?

On the first issue, Mr Griffin submitted that offers to purchase (as contrasted with completed sales) have no probative value. They are relevant to establish that some demand existed for the land but are no evidence of the value of the land. Mr Needham submitted that the bid at auction was not like a mere offer to purchase. Had the offer been accepted the bidder would have been forced to complete the purchase or risk a claim for damages.

The general principle which emerges from leading decisions is that offers to buy and sell land, as distinct from concluded sales, are not evidence which can be applied in determining the value of the same or similar land sold or compulsorily acquired: see decision of the Land Court in *Stanfield v Commissioner of Main Roads* (1968) 35 CLR 192 at 200-1, 21 The Valuer 624 at 627-8, citing the decision of the High Court in *McDonald v Deputy Federal Commissioner of Land Tax* (1915) 20 CLR 231 at 239-40; also *Nardone v South Australian Land Commission* (1978) 40 LGRA 164 at 165 per Jacobs J and cases cited in AA Hyam, *The Law Affecting Valuation of Land in Australia*, 2nd edn, 1995, at pages 70-5. In *Marcus Clark & Co Ltd v Commissioner for Railways* (1949) 29 LVR 98 at 107, Sugerman J stated that the principle in *McDonald's* case is applicable to offers made to the dispossessed owner of the subject land by a third person in relation to the subject land.

The reasons for the principle were explained by Isaacs J in *McDonald's* case. In essence, courts have been concerned that, if there is no concluded bargain, the field is left open to a multitude of considerations and inquiries, including whether the offer was a sham on either side or both sides.

In some cases the issue is whether evidence of an offer to purchase is admissible. It is clear that the general principle does not operate as an absolute bar to such evidence being admitted for limited purposes. The question of admissibility did not arise in these proceedings. There was no objection to evidence about the auction being received. The argument was about whether any weight should be given to it.

In the 4th edition of his textbook *Land Acquisition*, Brown argues strongly that an unequivocal offer in writing made by a genuine and prudent person desirous of purchasing the land is some evidence of the value of the land, even if not conclusive, strong or highly persuasive. He makes particular mention of a bid made at auction which fell below the reserve price set by the owner (at page 179). Mr Needham cited *Frizell v Valuer-General (NSW)* (1979) 26 The Valuer 497 for the proposition that, although offers of purchase and reserve prices set by vendors for the purposes of an auction sale are not regarded as

comparable sales evidence, “evidence of what occurred at a properly advertised auction sale could be a matter not to be overlooked in appropriate circumstances” (at 501. See also AA Hyam, *The Law Affecting Valuation of Land in Australia*, 2nd edn, page 108).

Mr Needham also relied on a passage from the judgment of Wilcox J in *Goold v Commonwealth of Australia* (1993) 79 LGERA 407. That case concerned the compulsory acquisition of land. Objection was made to the admission of evidence about an offer to purchase each of the resumed properties. Wilcox J carefully reviewed the results and the reasoning in previous authorities, including *McDonald’s* case. His Honour stated:

“Of course, before placing reliance upon a mere offer, a court must consider carefully the question of its genuineness. The offer might be a sham, designed to prop up an inflated compensation claim or to reduce rates and taxes; in either case without any cost to the offerer. It might be an attempt to manipulate the market for some other ulterior purpose, perhaps a purpose extraneous to the litigation. If the offer was genuine when made, it might not have led to a concluded contract, even if the resumption had not intervened. The offer might have been withdrawn. The purchaser might have failed to complete the transaction. Because of matters such as these, *even a genuine offer cannot be regarded as direct evidence of value*. But it seems to me that, once the court is satisfied about genuineness, an offer by an arms-length party to purchase the land under valuation is something that the judicial valuer ought to take into account in considering the possibility of a sale price different from that indicated by conventional evidence, such as an analysis of comparable sales, or of a hypothetical development, or a calculation of the capitalised value of the rental return. How much weight should be given to such an offer is a question to be determined by reference to the facts of the particular case. In some cases, the appropriate weight may be minimal; in others considerable.” (at 417, emphasis added)

In light of the judicial decisions just cited, it is appropriate to reject the auction evidence. First, some doubt has been cast on the bona fides of the auction. In the absence of more comprehensive evidence about the auction, no firm finding can be made. I do not doubt that Mr Rector used his best endeavours to market the land as a property suitable for eco-tourism. I also accept that he believed that the auction was properly conducted with genuine bids. Even if the final bid was genuine (and, without making a finding, there is evidence to suggest that it was genuine even if other bids may not have been), there are two other reasons for not relying on it. First, the auction took place more than two years before the date of resumption in the period of recovery immediately after the end of the pilots’ strike. As the

evidence summarised earlier shows, the market then was quite different from that at the date of resumption. The claimants submit that, if anything, the market would have improved and, as the resumed area is smaller than that of the subject land, there is support for a \$1.9 million valuation of the subject land. But that is not sufficient to give the evidence the weight they suggest. Second, the bid was rejected by the claimants. It does not matter why they did so (whether, for example, they relied on a valuation made before the pilot's strike). The fact remains that there was no sale. The market price in relation to the subject land was not established by the bid at auction.

Sales evidence - before resumption: Mr Wake stated that there were no directly comparable sales of land although there had been some sales of improved eco-tourism type resorts. He acknowledged that there had been early failures in respect of some eco-tourism resorts and that there are a number of establishments which claim to be eco-tourism resorts but which are not. In his opinion, however, eco-tourism, outback tourism and experiential tourism "is emerging as a major growth segment of the Australian tourism industry", and interest in this segment of the industry had commenced before the date of resumption (Exhibit 6).

In his valuation report, Mr Wake referred to the sales of various parcels of land which, for ease of identification, are referred to using the descriptions applied during the hearing and in the order listed in his report as:

1. Theiss sale
2. Van der Kwast sale
3. Coconut Beach resort
4. Elgar sale
5. Daintree Heritage Lodge.

He also referred to two sites which are proximate to waterfalls, namely:

- (a) Mungalli Falls site
- (b) Springbrook.

Mr Allan also noted that there were no sales of large tourism related sites in the immediate locality of the subject land around the relevant date (Exhibit 11). In making his valuation, Mr Allan referred to the sale of various parcels of land from Innisfail to Cape Tribulation, namely:

1. Mungalli Falls site
2. Cape Kimberley site

3. Concrete Constructions site
4. Theiss sale
5. Camelot
6. Coconut Beach resort

Five of those properties have (or had) tourism or commercial potential and were purchased for that potential. One is a rural residential site. Mr Allan also referred to sales of three sites in the immediate locality of the subject land which were sold to the one purchaser in late 1988 and early 1989 (before the pilots' strike) for tourism related purposes.

Only three of those sales were mentioned by both parties: Mungalli Falls site, Theiss sale and Coconut Beach resort. Although each sale will be discussed in these reasons for decision, it is clear that the sale of the Mungalli Falls site provides the most assistance in resolving the issues in this case. That sale merits detailed consideration before the others are discussed.

Mungalli Falls site (claimants' waterfall sale (a), Crown's sale 1): The sales on which each party placed most reliance were the two sales in July 1992 of five parcels of land which together are known as the Mungalli Falls site. The land is located at Junction Road and Brooks Road, about 8 kilometres south of Millaa Millaa. The drive from Cairns airport takes almost two hours. The parcels comprising the site have a total area of almost 153 hectares and an extensive frontage to the Beatrice River along the full length of the southern boundary. The 30 metres high falls intersect the property. There is easy access to the falls and views are available at the top and bottom of them. Access to the Mungalli Falls site is along bitumen road. The land is adjacent to the Palmerston National Park, which is within the Wet Tropics World Heritage area. Guests use these rainforest areas for a variety of scenic and interpretive activities. There is potential for the development and use of the land for an eco-tourism lodge. Because parts of the site were logged many years ago no further clearing would be necessary for the proposed development.

The land was sold for \$1.35 million. At the time of sale, two of the lots - with a total area of about 90.7 hectares - were used as a dairy farm. That land cost \$500,000.00. The remaining 62.2 hectares was the Mungalli Falls tourist attraction. Under the Eacham Shire Strategic Plan gazetted in 1989 the area is indicated as a potential Resort site. That land cost \$850,000.00. The land was purchased for development for eco-tourism purposes with associated infrastructure. Both sales were integral to the overall development plan. The

dairy farm land was suitable for building (the proposal contemplates 1,200 beds) and the waterfalls are located on the other land. By the time of the hearing the purchaser had spent \$250,000.00 attaining the approvals necessary for the proposed development. It was looking for a joint venture partner.

Mr Peter Trout, a property developer and principal in the company which purchased the Mungalli Falls site in 1992, said that when he was in the market for a property he looked at a number of sites on the Atherton Tableland region. That was the only site which had the features which he was seeking and hence the potential for the proposed development - easy access by bitumen road, magnificent waterfalls, pristine forest within the title, a wilderness river on its boundary, proximity to (and uninterrupted views of) the Palmerston National Park, and existing permits to use the National Park facilities. The boundary with the Beatrice River is also an attribute as whitewater rafting can be conducted from the Mungalli Falls land and it provides a source of water for any future resort development on the land. Mr Trout considered that the purchaser probably paid a “somewhat inflated price” for the dairy farm land. He thought, however, that the total contract price was reasonable given the then state of the market, the site’s potential and the lack of approvals then in place (Exhibit 14).

Both Mr Wake and Mr Allan considered the Mungalli Falls site to be the sale property that was most comparable to the subject land in features and in the dates of the sales. They and other witnesses compared the features of the sale property with those of the subject land. The evidence was to the following effect.

- (a) The Millaa Millaa area has a much less desirable climate for resort purposes. The area has high rainfall and has, on average, about 250 rainy days, more than the Daintree region. It is in a higher rainfall region of the Tableland than the subject land. In Mr Rector’s opinion, “the killer on the southern area is really rainfall. Tourists like to visit a rainforest but they’d rather do it when it’s not raining and that’s why the gravitation has been to the north.” Mr Weigh nominated the heavy rainfall of the Mungalli Falls area as the “major disadvantage” of the site.
- (b) The Mungalli Falls site has the attractive waterfalls area, which is readily accessible (at the top and bottom of the Falls) and provides a feature which is superior to the subject land. The site does not, however, have the natural features of the subject land. As Mr Peter Hitchcock, Director of the Wet Tropics Management Agency, stated in a letter to Mr Trout in June 1993, the Mungalli property “has the good fortune to

include well developed tropical rainforest contiguous with the World Heritage Area” and “from an ecotourism viewpoint is obviously well placed as a neighbour of the Wet Tropics World Heritage Area.” Mr Hitchcock noted, however, that the property comprises “a transition from the near pristine rainforests on the Beatrice River through various stages of disturbance to extensive cleared land” (Exhibits 30, 31). Aerial photographs clearly demonstrate that there is a much smaller area and proportion of rainforest on the Mungalli Falls site than on the subject land. Mr Allan considered that the present state of the land would permit a diversity of uses, and that was a positive attribute of the site. Mr Rector noted, however, that a guest at Mungalli Falls is not “integrated into the rain forest” in the way that he thought was a “key ingredient” for such a resort, “so that when you go to bed at night and you wake up in the morning you’re in the rain forest”. Rather, the accommodation is in an open area, looking across cleared land or the Beatrice River at rainforest. Mrs Kuhn went further and described the land as “a very pretty property” which is “severely degraded”, with “feral species there so well entrenched”. Because it is a fragmented rainforest there is a reduced habitat for birds and animals, and probably not a morning chorus of the type heard on the subject land.

- (c) The land is not within reasonable proximity of an established resort area to compare with Port Douglas.
- (d) The land is within a lower class of tourism circuit compared with the Kuranda/Port Douglas circuit within which the subject land lies. Although places such as Lake Eacham and Lake Barrine are in the general region, the Mungalli Falls site is not on the tourist circuit route that includes those lakes. In Mr Rector’s opinion, the land is in an inferior tourist area because, apart from visiting waterfalls (and perhaps seeing Palmerston National Park and the Beatrice River), there are no other features for daytrippers from Cairns to do or see along the way. Mr Trout did not disagree. He said that the district has potential to attract visitors but needs a major accommodation centre to give focus to Palmerston National Park. Although Mungalli Falls is not on the popular tourist circuit, the resort provides tours to the Crater Lakes.
- (e) The sale land is more suited to a lower echelon style tourism use such as a home stay, caravaners and backpackers. Indeed the history of the existing tourist venture at Mungalli Falls over about a decade shows that it has attracted primarily adventure

tour groups, then school children (mainly from north Queensland and some overseas countries), rather than the more lucrative part of the market. There are plans to expand the development on the site with a shift in emphasis to attracting “the domestic and international visitor seeking a sophisticated experience within a high quality rainforest environment”. The proposed resort could include various recreation activities, an accommodation hotel, a rainforest lodge, a student village, day visitor facilities, rural experience and a dairy farm (Exhibit 30). The growth in market demand which was demonstrated in the Daintree region over the same period has not been matched in the Mungalli Falls region. The potential market to support a development on that scale has yet to be demonstrated. Although Mr Wake described the possible development of 1,200 beds on the site as “economic suicide”, Mr Trout argued that the site is large enough to accommodate development of that scale. He referred to research showing that small eco-tourism ventures are not viable and that larger projects are better suited to handle problems. Mr Wake tried to demonstrate the difference between the properties by describing the Mungalli Falls site as a 2½ star property compared with four or five stars for the subject land. Mr Trout agreed that it is probably 2½ star development now, but the proposed development is pitched at about 3½ stars. Mr Weigh, who has extensive experience in managing 3½ star properties, would not have rated the Mungalli Falls site more than 3 or 3½ stars. He also did not think that the subject land had the mix of natural attractions that would be warranted for a 5 star development.

- (f) The Mungalli Falls site is not unique in the area in terms of the features it offers for tourist development. There are other sites along the Beatrice River and elsewhere in the region which would have very similar features with escarpments, similar views, bitumen road access and other similar services, and some are within easy walking distance of attractive falls. Although Mr Trout said that the Mungalli Falls site was the only one on the market in 1992 with all the features he was seeking, other properties in the district could offer the same or similar facilities and recreational opportunities in active and passive ways that the Mungalli Falls site offers. At any time there are farms on the market and the availability of properties tends to limit the value of those with resort potential. Although others would also have small waterfalls, the “magnificent” Mungalli Falls are a special feature of the sale land.

By contrast, the subject land is the only site in the Julatten area apart from the Lower Mowbray area where eco-tourism activity could have occurred.

The distinction between what Mungalli Falls offers the visitor and what might be offered by a more precisely or narrowly defined eco-tourism resort was illustrated by Mr Rector's observation that a brochure advertising horse riding on the sale property featured a photograph showing a raspberry bush in the foreground (Exhibit 22). The plant is not indigenous to the rainforest and Mr Rector said he would be surprised that an eco-experience enterprise would have used such a photograph. He suggested that, in the market place on a world basis, such a picture would be noticed and ridiculed because that is not what eco-tourists are looking for.

In Mr Allan's opinion the Mungalli Falls site provided the most appropriate evidence of what a prudent tourist developer would pay for a site suitable and available for development for eco-tourism based activities in the non-coastal areas south of the Daintree River. When valuing the subject land by comparison with the Mungalli Falls site, he considered the important factors to be access from existing tourist infrastructure, rainfall and the day visitor potential of the subject land. As the subject land is closer to the major flow of tourists, it would lend itself more readily to the day visitor market. In that sense it is slightly superior to the Mungalli Falls site. Those factors were offset considerably, in Mr Allan's opinion, by the attributes of the Mungalli Falls site. He concluded that "little difference is seen between the two areas after all factors have been compared". Nevertheless he analysed the Mungalli Falls site (without structures) to \$6,700.00 per hectare and applied a rate of \$7,500.00 per hectare to the subject land to reflect its superiority, including the lower rainfall there and its proximity to Port Douglas. In his opinion, the valuation applied was the upper limit which the market would tolerate for a tourism based site in the Julatten locality - an area where the dominant land uses are rural residential/retreat homesites and small grazing or farming enterprises. The rural village background of the Julatten area is different from the established tourist potential of such places as Kuranda, Cape Tribulation and Port Douglas (Exhibit 11). It needs to be remembered, however, that the subject land is between Julatten and Port Douglas, and is well located for access to a range of other nature based activities in the region as well as to Port Douglas and from there activities on the Great Barrier Reef.

Mr Wake thought that although, having regard to the relevant factors, it was difficult to compare the properties, the subject land was certainly more than 10 per cent. superior to

the Mungalli Falls site. He analysed the Mungalli Falls site sale overall at \$7,322.00 per hectare, a higher rate than that calculated by Mr Allan. Although Mr Wake was not asked about the difference between his and Mr Allan's analyses, Mr Allan suggested that Mr Wake may not have taken into account stock (cows and horses which Mr Allan valued at \$50,000), shares (which he valued at \$6,000.00) and the value of improvements. Mr Wake considered the Mungalli Falls site to be a "much inferior site" when compared with the subject land. More particularly he analysed separately the sale of 62.2299 hectares of land with approval for tourist uses (Lot 1 on RP738710, Lot 2 on RP743910, Lot 267 NR8023). The approval was a consent use under the rural general farming zoning and was for a caravan park, including eight cabin sites, three cabin sites on Lot 267 and a kiosk. The land was sold for \$850,000.00 and Mr Wake analysed the value at \$11,087.00 per hectare. The neighbouring dairy farm had no such approvals in place and Mr Wake agreed that the \$11,087.00 per hectare figure reflected the value of land with tourist approval. He also suggested, consistently with Mr Trout's opinion, that the purchaser of the Mungalli Falls site may have paid a small premium for the dairy farm component of the land.

It is clear from Mr Trout's evidence that the various parcels comprising the Mungalli Falls site were purchased with a view to developing the site as a whole for tourism purposes. There was no suggestion that, at the time of purchase, the purchaser considered that any part of the land was separately suitable and viable for the purpose. It may be that the part with some approvals in place was more valuable for tourism purposes than the dairy farm land. That land is also more comparable to the subject land than much of the dairy land. I accept that the dairy land was sold at a premium in light of the circumstances of the sale. Any premium paid for the dairy farm land, however, may reflect an element of tourism potential (when amalgamated with the adjoining land) as much as an adjoining owner premium for it as dairy farm land. I am satisfied that the price paid for the total area was a reasonable one when the features and potential of the land as a whole are considered, but accept that, to some extent, the land with more rainforest eco-tourism potential, suggests that such land has a higher value than the average rate per hectare for the entire site.

The greater difficulty in valuing the subject land relative to the Mungalli Falls site is determining the true basis of comparison. Both are put forward as sites with eco-tourism potential, but the nature of the potential is quite different. Indeed, if eco-tourism is narrowly defined, it might be argued that much of the Mungalli Falls site might not be so described.

It will be apparent from the comparison of natural features that the subject land (or at least the rainforested area that was resumed) offered the potential of an all encompassing rainforest experience of a type which cannot be enjoyed on much of the Mungalli Falls site. Recognition that the subject land, although affected by human intervention, retained more natural features may lead to the conclusion that the subject land was more valuable for eco-tourism development. But does that make the land more valuable?

On this matter Mr Weigh's evidence was helpful. He stressed the important distinction between the ecological value of a site and its tourism value. As he put it, there are numerous areas of the world, many of which are in Australia, that are ecologically valuable, but their ecological value does not necessarily translate into tourism value. Other components are required before a site can command a premium value for tourism, namely:

- relative ease of access by "source markets"
- the quality of visitor experience, including the range of available activities
- development and infrastructure costs, which may be prohibitive where sites are in remote locations
- provision of staff and visitor accommodation on site
- long term sustainability both in ecological and commercial terms.

When compared by reference to each of those components, the subject land was either on a par with or superior to the Mungalli Falls site.

The subject land was closer to the "source markets" of people arriving in the Cairns-Port Douglas area and ready access was available by road within a significantly shorter period than it takes to reach the Mungalli Falls site from Cairns and Port Douglas. The subject land could also be included more readily in regional day tours from those areas.

The range of available activities may be greater on or near to the Mungalli Falls site (in the sense that there are farm-based activities and more adventure based activities, such as white water rafting) but higher quality and more extensive eco-tourism experiences would have been available on the subject land. As Mr Weigh put it, the Mungalli Falls site is likely to attract a less specialised market than the subject land.

The limited evidence about costs of development indicates that it would have been cheaper to build at the subject land than at sites north of the Daintree which were commercially viable. There was no direct comparison between the costs of similar types of

development on the subject and Mungalli Falls sites. I am willing to assume, without deciding, that the costs would be similar.

Staff for a resort on the subject land would have been recruited locally, and there was evidence that the Julatten area provides suitable staff for resort developments further afield, such as Port Douglas.

The long term ecological sustainability of a project on the subject land would have been highly likely. Although the land was not in a pristine wilderness state, the ecological values which are there provided the basis for an appropriately sensitive development of the type shown in concept plans.

It seems that properly planned and supervised human activity would have little if any long term consequences for the plant environment. Mr Small observed that in general the forest has been heavily impacted by human activity and, with the exception of further clearing or continued logging, there are few remaining activities which would jeopardise the ability of the forest to continue as a recovering forest system. Small scale activities such as bushwalking utilising existing logging roads and trails would have no impact on the current ecological status of the forest. Mr Small identified “only three areas of concern in relation to the protection of forest values”.

- The site of the pendas is the most vulnerable to unacceptable change even if visited by moderate numbers of people. Human activity around the bases of the trees would compromise their existence due to soil compaction. There is no clearly defined trail. The site is within a steep gully in the headwaters of Kauri Creek and any impacts at the site could have repercussions for the ecology of the nearby waterways.
- The general movement of tourists could cause soil erosion, even if people are confined to logging trails. Some trails (such as the one to Mowbray Falls) are steep and prone to erode, even with minimum use. Eroded soil would go into the Mowbray River.
- The problems posed by walkers would be magnified if vehicles are used on existing trails or roads. Particularly vulnerable are tracks on the thin soils of the open woodlands at the top of the eastern escarpment. Soil erosion would result in unacceptable changes to the adjacent ecology of these drier forest systems (Exhibit 33).

Mr Small recommended certain actions to deal with these concerns, including the construction of boardwalks at appropriate locations. Mrs Kuhn shared those concerns. Indeed she said that the design of the infrastructure and the amenities in this eco-tourism development was predicated by environmental considerations. The design had changed in response to a growing understanding of the environment, and the vehicles to be used are tractors with large inflatable tyres to minimise damage. It was important to scientifically monitor the impact of tourism on the environment and limit or stop activities which are shown to have detrimental impacts.

The Mungalli Falls site potentially offers similar (though less extensive) environmental experiences for visitors and, with proper planning, those aspects which are in the rainforest areas would also be considered sustainable in ecological terms.

The long term commercial sustainability of each project remains a matter of speculation. The issue was touched on relatively generally and included such things as the unit cost of construction, the standard of accommodation which might be provided, the cost of sealing roads, and the size and financial potential of the eco-tourism market, and the level of tariffs that might have been levied in 1992 and subsequently. It is clear that the plans and designs in evidence were indicative of the possible development on the subject land. Although the facilities proposed for the site, including on site power generation and some waste disposal, may be similar to developments north of the Daintree River, the costs of construction would be lower on the subject land than on properties north of that River.

There was no evidence of detailed viability research having been undertaken, but it was apparent that the claimants were willing to develop the land in a way which would appeal to a range of possible guests - from day trippers, who might take a couple of hours to visit the interpretive centre and walk a track, through to long stay visitors who would be able to afford good quality accommodation. Attractive plans were made for the subject land and the Mungalli Falls site (for which joint venture partners or purchasers were sought).

It is not possible to say whether either or both enterprises would have proved to be the commercial success for which the proponents' supporters and local councils would have hoped. The existence of other eco-tourism resorts north of the subject land, and the determination and approach taken by the claimants to the proposed development, lends support to an inference that the project would have succeeded. Similarly, the history of the previous and current Mungalli Falls enterprise shows that it is also commercially

sustainable. Witnesses suggested, however, that at least in terms of star ratings, a suitable development on the subject land would be superior to that which is practicable on the Mungalli Falls site.

Mr Weigh also made the assessment that the Mungalli Falls site and the subject land, although comparable, are “quite different types of sites”. He described the Mungalli Falls site as “a more mainstream site” which could be developed for use by day visitors, with cabins around the falls. Bearing those differences in mind, however, he considered the subject land to be superior site. He also agreed that a developer who, at the date of resumption, was unable to purchase land north of the Daintree River but wanted a property with the features of the Daintree about it would look for something as near as possible to the Daintree and would not go down to the Mungalli Falls area. In his opinion the important considerations in this comparison were access, rainfall, and the day visitor potential of the subject land. Its specialised nature meant that the subject land may have commanded a premium of no more than 10 per cent. over the Mungalli Falls site (Exhibit 15).

I am satisfied that the subject land is significantly superior to the Mungalli Falls site. Its value must be determined, however, by reference also to other relevant sales evidence.

The other sales to which the claimants or both parties referred are considered in the order in which they were listed in Mr Wake’s report. Those sales on which only the Crown relied are considered then in the order in which they were listed in Mr Allan’s report.

Thiess sale (claimant’s sale 1, Crown’s sale 4): Lot 11 BS5 in the Parish of Alexandra has an area of 58.9146 hectares. It is an undulating rainforest site rising steeply from the Cape Kimberly Road to a steep rainforest ridge at the rear. Excellent panoramic views over the Daintree estuary, coastline and Snapper Island are available.

The land was purchased as a rural residential site in February 1991 for \$400,000.00, an average of \$6,791.00 per hectare. There was an established benched home site in an elevated position with gravel road access. Both valuers agreed that it is a rural residential site with no tourist potential. Mr Wake placed little weight on the sale other than as an indication of the value of house sites in the Daintree as compared with other sales in the Daintree. Mr Allan did not rely on the sale as a basis of his valuation, but to show the high values of exclusive sites. He included the sale “only as an indication of the base level of value” and described it as inferior to the subject land (Exhibit 11).

The sale is of limited value in the present case, indicating only the base level of value of a rainforest site in the area north of the Daintree River with residential but no tourist potential.

Van der Kwast sale (claimants' sale 2): Lot 2 on Plan SR808134, Parish of Alexandra, comprises 58.27 hectares of land on the Cape Tribulation Road. The land varies from gentle to moderate to steep slopes and has good quality rainforest vegetation. There are no improvements on the property. An adjoining lot has been developed with a tourism venture, but Mr Wake thought that the sale land did not have tourism potential, especially as it is in Douglas Shire. He considered that the land could be developed for a residence. He highlighted the difference between the sale land and the subject land. The sale land is "totally rainforest" and, in his opinion, "its potentiality is far inferior to the subject".

The land was sold to the Queensland Government in about September 1995, nearly three years after the date of resumption. Although Mr Wake introduced the sale into evidence he was mistaken about the purchase price which he said was "rumoured" to be \$650,000.00, an average of \$11,155.00 per hectare. The better evidence of value came from Mr Allan who said that the purchase price was \$320,000.00, comprising \$300,000.00 for the land (an average of about \$5,148.00 per hectare) and approximately \$20,000.00 to pay out a special loan purchase. The forestry valuation of the block was \$14,500.00.

Mr Allan argued that it was a site sale and it is inappropriate to take into consideration a rate per hectare. On that basis this sale was not comparable with the sales on which the Crown relied nor, it follows, the subject land. Mr Wake included the sale to show a level of values for non-beachfront, high value rainforested land with very limited potential for development. He said, however, that he became aware of the sale after he had prepared the valuation and placed "almost no reliance" on it.

The only value which the sale might have is (like the Theiss sale) to give an indication of the base value of a rainforest site in the area north of the Daintree River with residential but no tourist potential. Neither party relied on the sale and, given its features, limited potential and date of sale, it should be disregarded in these proceedings.

Coconut Beach resort (claimants' sale 3, Crown's sale 6): Lots 1-3 on RP740257, with a total area of 88.4 hectares, were purchased by the owner of adjoining land to facilitate expansion of the Coconut Beach Rainforest Resort. The property has approximately 300 metres of beach frontage and comprises easily to moderately sloping, partly cleared rainforest, intersected by the

Cape Tribulation Road and rising generally to the western boundary. Town planning consent was given for accommodation building, 40 units and 24 hotel type units.

Mr Allan described the sale land as superior to the subject land in location and country and tourism potential.

Most of the land, about 84 hectares, is on the western side of the Cape Tribulation Road. Mr Rector commented that the sale land is principally on the edge of the rainforest. The accommodation is on the western part of the land, within the rainforest. In his opinion, Coconut Beach is “such a fine eco-tourism experience” because “you are indeed in the rain forest, you’re surrounded by it”. People wishing to visit the beach have to cross the road and other land to reach it. Mr Rector did not consider that the eco-tourism experience at Coconut Beach is improved by the proximity of the land to the sea. The accommodation is in the rainforest and few guests would go to the beach, preferring to use the resort’s facilities. Thus, while the location of the site at a place where the rainforest meets the reef may be appealing, the presence of a beach is not essential to rainforest eco-tourism.

The land was sold in June 1991 for \$1.6 million, an average of \$18,000.00 per hectare. Mr Allan suggested that because the purchaser needed the land for expansion it had, as an adjoining owner, paid above the market value of the land. He had not compared directly the sale and the subject land. Rather he had compared the two properties on a rate per hectare basis, assuming (on the basis of discussions with the purchaser) that the market value of the land was about \$1 million or \$11,300.00 per hectare. Mr Wake was reluctant to analyse the sale to a rate per hectare, preferring to see it as a small resort for which the purchaser was willing to pay \$1.6 million.

I am satisfied that the sale is relevant to the valuation of the subject land, with appropriate account being taken of the fact that the land is in a superior well-known and well developed eco-tourism area and the fact that the sale to an adjoining owner probably meant that the purchase price exceeded the market value of the land (although not necessarily to the extent nominated by Mr Allan).

Elgar sale (claimants’ sale 4): Lot 35 on Plan SR158, Parish of Alexandra, has an area of 37.56 hectares of unimproved rainforest. The block slopes very steeply. A small part of it is used for the Alexandra Range Lookout, with views over the Daintree estuary, Snapper Island, coastal grazing country and the coastline to the south. Although the lookout may not be characterised as a destination, it is a popular place for visitors to stop briefly and enjoy the view.

Physical access to the lower part of the land was difficult, following an unmade road across a couple of little creeks. It would be expensive to construct proper road access. Practical access to the lookout from Bailey Creek Road is dependent on crossing national park land along a road which has been constructed along a used, rather than a gazetted, route. At the hearing there was uncertainty about the location of the boundary of the land and hence the distance to be travelled across national park land - estimates varying from 30 metres (within the gazetted road reserve) to 180 metres. A survey would be necessary to resolve the issue. In all likelihood, a private purchaser who wanted to use the land for commercial purposes would have had to obtain approval for public access across the national park land to the sale land.

In Mr Wake's opinion, the only part of the land which could be used for a lookout and kiosk is the top section. He said that the strip of level land is too small to accommodate a car park and interpretive centre. He could not see any other part of the property being used, given the difficulty of gaining access from below. A private developer would have had to obtain permission for people to cross the national park into the sale land.

The sale land has closer and more extensive sea views than are available from the subject land, but has much more limited development potential.

The land was sold in April 1993 to the Queensland Government for \$780,000.00, an average of \$20,767.00 per hectare. There were no approvals for development. The Shire Council had indicated that it would permit the Government, but not a private owner, to erect a kiosk. The Council issued a letter stating that it would favour a private development comprising a boardwalk, viewing platform and interpretive centre.

There was no suggestion that the purchase was not an arm's length transaction. Mr Elgar wanted the Government to purchase the land and it had done so. Apparently the issue of obtaining access across the national park land was not a major factor which influenced the price paid for the sale land. That was not surprising given that the State was the purchaser. Rather, the principal factor influencing the price was the commercial potential of the site.

I agree with Mr Allan's evidence and Mr Needham's submission that the sale price of this land indicates a site value. Consequently it is not appropriate to compare the sale land and the subject land on the basis of some calculated average rate per hectare for the sale land. Furthermore, the limited proportion of the site which can be used for commercial purposes, the limited area which further constrains what can be done there, the uncertainty about what commercial activities might be approved for a private owner, and the question about whether

access across national park land for commercial purposes would be permitted, indicate that, even on a site value basis, it is not possible to make an accurate comparison with the subject land. The sale should be disregarded in determining the value of the subject land.

Daintree Heritage Lodge (claimants' sale 5): Lot 236 on RP740951, Parish of Alexandra, has an area of 5.664 hectares. It is located at Turpentine Road, Cooper Creek and has rear access to Cooper Creek. Thornton's Beach is about 2 kilometres away. The land is 20 kilometres north of the Daintree River ferry and 50 kilometres north of Mossman. The main features of the resort are the rainforest vegetation and the series of attractive swimming holes along Cooper Creek leading to a quite spectacular waterfall well upstream from the subject property.

The improvements on the site comprise 16 cabins of timber construction with bathrooms but no kitchen facilities. The cabins are apparently 10 years old and "fairly basic", serviced by septic systems, a central low-grade resort building offering only basic facilities and a small swimming pool, carports and diesel engine power generator.

The property was sold as a going concern in April 1994 for \$1,220,000.00. Mr Wake analysed the sale by deducting for improvements and equipment to reach a land value of \$730,000.00. The sale price showed a site value and Mr Wake did not seek to use the sale on a rate per hectare basis. Indeed he did not rely on the analysed sale to value the subject land. The site is much smaller than the subject land, but Mr Wake included it to demonstrate that people are building resorts away from the beach in rainforest locations adjacent to creeks.

I have accepted that the subject land has potential for eco-tourism development. The sale is not necessary to support that conclusion. The sale has no relevance to the valuation of the subject land.

Springbrook site (claimants' waterfall sale (b)): The land in the Parish of Numinbah comprising Lot 105 WD955, Lot 167 WD 631, Lots 1-3 RP219164, Lots 100 and 106 WD409 and Lot 104 WD2055 has a total area of 380.46 hectares. The land is in south-east Queensland, about 1½ hours drive from Brisbane by bitumen road and 25 kilometres away from the Gold Coast. It adjoins Purling Brook Falls and surrounding National Park. About 30 per cent. of the land was cleared and there was rainforest on the balance. The land had approval for a golf course, which Mr Wake considered to be a rather unlikely use for the property.

The land was sold in October 1989 for \$2,770,000.00 (an average of \$7,280.00 per hectare). It was purchased in January 1995 by the Queensland Government for \$2,400,000.00 (an average of \$6,308.00 per hectare).

Although the property was first mentioned by Mr Wake, most of the evidence about it was provided by the Crown. Mr Allan investigated the later sale of Springbrook which, it seems, was an arm's length transaction under the Regional Open Space System (ROSS) scheme. The land, which abuts Warrie National Park, was considered to fulfil all the relevant criteria namely recreation, scenic value, catchment protection, cultural heritage and nature conservation. Adjoining land with an area of 99.957 hectares was purchased in May 1995 for \$580,000.00 (Exhibits 37-41).

Despite the fact that the sale land is so far removed from the subject land, Mr Allan suggested that a comparison could be made. Part of the sale site was well improved by structures, but most of the area is bushland. There is a waterfall on or very near to one of the Lots. He considered that the sale supports the figure of \$7,500.00 per hectare which he applied to the subject land.

I am satisfied that, given its distance from the subject land and market for eco-tourism properties, the sale of Springbrook can provide limited assistance as a check on the value of the subject land.

Cape Kimberly site (Crown's sale 2): The 67.5623 hectares site comprises Lot 39 SR17 and Lot 41 SR34 in the Parish of Alexandra. It is a beach front site at Cape Kimberly, rising from a near level area along the property's frontage to moderately to steeply sloping foothills of vine forest (or rainforest).

The land is zoned Special Facilities, specifying 50 cabins, 30 bunk-out (?) units and camping area.

Mr Allan described the land as superior to the subject due to its location, zoning and country. Mr Wake acknowledged that it opens onto a beautiful bay, but referred to the uncomfortable camping conditions and the site's poor drainage. Mr Rector described the principal difference between the sale land and the subject is the former's proximity to the beach. Although a premium is paid for beach frontages, he downplayed the significance of a beach frontage for international visitors, most of whom come to far north Queensland between November and March when swimming is inadvisable because of stingers in the water. In Mr Rector's opinion, access to a beach is a "secondary factor" and "not that big an advantage". Mr Wake found it difficult to compare properties with such different potentialities.

The land was sold in February 1987 for \$1,200,000.00, an average of \$17,760.00 per hectare. The sale took place more than 5½ years before the resumption of the resumed land

at the start of the market boom in a buoyant period. In Mr Wake's opinion it is very difficult to compare a sale that old with the market at the date of resumption. Mr Allan acknowledged that the sale was dated but included it "mainly for historical purposes to indicate that the level of values north of the Daintree River has been high for a number of years".

Having regard principally to the date of the sale, but also to factors such as the difference in some of the features of the land and the difficulty in determining the beachfront influence in the value of a site which in other respects is inferior to the subject land, I do not consider that this sale assists in determining the value of the subject land.

Concrete constructions site (Crown's sale 3): The land comprises Lot 27 SR426, Lot 25 BK157146 and Lot 79 SR845; SL09/28261 and has a total area of 251.038 hectares.

Although it is a relatively large property, the separate beach front parcel with tourist development potential comprises only the 2.858 hectares parcel located at the mouth of Bailey Creek and surrounded by National Park. It is linked to the larger balance area by a winding track. The smaller area is zoned Special Facilities (Tourist Resort), specifying 16 cabins with a total of 32 rooms. Apparently an ancillary dining facility may be built also. The large parcel away from the water frontage cannot be developed but provides access to the small block. There would be a considerable cost in upgrading the access route.

Mr Allan described the sale land as superior to the subject due to location and zoning.

The land was purchased in March 1989 apparently for up-market, eco-tourism purposes. The total price was \$2 million, an average of \$7,967.00 per hectare. The beach front area, however, was separately purchased for \$1.5 million (an average of nearly \$525,000.00 per hectare).

This was, as Mr Wake observed, really a purchase of a beach proximity site. Accordingly, he disagreed with the analysis of the entire sale at \$7,967.00 per hectare and concluded that it was not comparable to the subject land. I agree.

Mr Rector suggested that a tourism resort development may not be viable, given the high room rate that would have to be charged.

Again Mr Allan acknowledged that the sale was dated (being 3½ years before the date of resumption). He included it "mainly for historical purposes to indicate that the level of values north of the Daintree River has been high for a number of years" (Exhibit 11). Mr Wake observed that at that date there was a very active market for the purchase of resort type properties.

In addition to its questionable relevance because of the date of the sale, I am not satisfied that the sale land is sufficiently comparable with the subject for the latter to be valued on a site to site comparison or a rate per hectare comparison.

Camelot (Crown's sale 5): Lots 1-3 RP133181 in the parish of Noah comprise 9.032 hectares of gently sloping, partly cleared, low lying beach front land. The property is located just south of Cape Tribulation with Cape Tribulation Road passing along the land's rear boundary. Mr Allan described the sale land as "vastly superior to the subject in situation and tourism potential".

The land was purchased in June 1991 for \$1,300,000.00 an average of \$143,932.00 per hectare. At that time the purchaser considered that the property had significant commercial potential and subsequently spent about \$140,000.00 seeking approvals for a development comprising a restaurant, convenience store and interpretive centre. The necessary approvals were not obtained and the project was abandoned because of concern about the effect of likely development constraints on its viability.

The land was subsequently purchased by the Crown for \$617,000.00 (an average of \$68,313.00 per hectare) after it was offered for sale under the Daintree Rescue Program.

The sale land is much smaller than the subject and there was no suggestion by either party that, on a rate per hectare basis, the subject land was anywhere near the value of that land. Accordingly there seems to be so little comparability in size, location and potential that the sale should be disregarded in these proceedings.

Votraint sales (Crown's Schedule B sales): The three parcels of land situated in the Julatten district - Lot 187 on Plan DA222 Parish of Garioch, Lot 2 on RP721915 Parish of Salisbury, and Lot 2 on RP747078 Parish of Garioch - were purchased by Votraint No 432 Pty Ltd ("Votraint") between November 1988 and March 1989, at the peak of the market, for a total price of \$1,695,000.00, an average of \$6,762.00 per hectare. Although he had not thoroughly investigated the sales, because they were so far out of date, Mr Allan thought that at least two of them were relevant because of the tourist-based nature of their proposed use.

The first parcel, with an area of 89.49 hectares of cleared land, had approval for a group title module home on part and possible subdivision on part for a home site, though there was some dispute about the minimum area of that subdivision. Mr Allan described the sale land as superior to the subject land with regard to access and development costs and inferior in outlook and situation. It was sold in November 1988 for \$590,000.00, an average of \$6,592.00 per hectare.

The second parcel has an area of 92.6 hectares. Part of the land was cleared and the majority is rainforest which has been logged. Votraint proposed a golf course resort for this property. It was sold in March 1989 for \$510,300.00, an average of \$5,510.00 per hectare.

The third parcel, immediately to the north of the second parcel, has an area of 68.6 hectares, most of which is cleared and heavily improved. It adjoins World Heritage listed lands and has a good frontage to the Mossman-Mt Molloy Road. Votraint proposed a golf course resort for the property. It was sold in March 1989 for \$595,000.00, an average of \$8,673.00 per hectare.

The proposed golf course resort development did not proceed and the three properties were resold in June 1992 at auction by the mortgagee in possession for sale prices averaging \$2,793.00 per hectare, \$1,674.00 per hectare and \$3,134.00 per hectare respectively. Although those sales were closer to the resumption date, Mr Allan did not rely on them because the later sales were by a mortgagee in possession, one was purchased for a subdivision and the others as blocks, without showing the tourist market value.

Mr Wake did not know the circumstances of the earlier sales but accepted that the parcels were purchased for a golf course development. He disagreed that the land had tourism potential. Apparently all three parcels are described as rural residential land in the strategic plan for Mareeba Shire. By the time of the hearing, one had subdivisional approval for rural residential purposes. According to Mr Wake, the areas lacked tourism potential because the Council prefers the area to be developed with 2 hectares subdivision and because of the presence of high voltage power lines across them. He also said that the third parcel it had no potential for eco-tourism. It has a lychee farm and is on a limited access road.

I am satisfied that, having regard to such factors as the physical state of the parcels and their potential use other than for eco-tourism purposes, as well as the dates of the sales, these sales provide no assistance in determining the value of the subject land at the date of resumption.

Conclusions concerning market value: The preceding summary of the evidence shows why I consider that the previous valuations of the subject land, the unsuccessful auction of the land, and many of the sales to which reference was made (namely, the van der Kwast sale, the Elgar sale, Daintree Heritage Lodge, Cape Kimberly site, Concrete Constructions site, Camelot, and the Votraint sales) should not be relied upon to determine the value of the subject land at the date of resumption.

The evidence from which assistance may be gained concerns the following sales: the Theiss sale (only to the extent that it provides an indication of the base level of value of a rainforest site with residential but no tourist potential), Coconut Beach resort, Mungalli Falls site, and, as a check, the Springbrook site.

Before expressing my conclusions on the effect of that evidence, I note that Mr Wake's written valuation of the subject land at \$2.2 million proceeded on the bases that the figure was supported by the 1989 valuation by Ballieu Knight Frank, the auction bid in 1990, and the 1990 valuation of DJ Jones & Co, together with the 1989 sale of the Springbrook site and the sale of the Mungalli Falls site. The other five sales to which he referred were stated to be "of some relevance" in support of that valuation. It will be apparent that I have concluded that reliance should not be placed on much of the information offered in support for his written valuation.

Mr Allan's written valuation report noted that the highest and best use of the subject land was as a single large tourism related site. As there were no sales of such sites in the immediate locality of the subject at around the relevant date, he relied on the six sales of land between Innisfail and Cape Tribulation, placing most reliance on the sale of the Mungalli Falls site. For the reasons given earlier, I have concluded that reliance should not be placed on three of the other five sales.

As neither side has presented all the evidence of market value, it is necessary to consider the relevant sales evidence adduced by both parties to determine the value of the subject land at the date of resumption. The determination must be made bearing in mind the conclusions which I have reached concerning other matters relevant to this case. In summary they are that, at the date of resumption the highest and best use of the subject land (that is, the original Lots 108 and 109) was for eco-tourism purposes - a potential, but unrealised, use of the land. Permitted access to Mowbray Falls via a safe and approved route from the subject land would have been an important and attractive (though not essential) feature of any commercial eco-tourism enterprise developed on the subject land. There was no guarantee that the operator of a commercial eco-tourism venture on the subject land would have secured a Commercial Activity Permit for people to walk across the State Forest land between the subject land and Mowbray Falls. The risk that commercial access to Mowbray Falls across State Forest land might not have been permitted would have been a consideration for the properly informed prudent purchaser of the subject land at the date of resumption.

The relevant points of comparison between the Mungalli Falls site and the subject land demonstrate that the subject land is significantly superior to the Mungalli Falls site in what it could offer by way of eco-tourism development, assuming that a Commercial Activity Permit could be secured along an agreed route between the subject land and Mowbray Falls. I consider that, if such a Permit had been assured, the value of the subject land would have been somewhat more than that assessed by Mr Allan. That conclusion is supported by comparing the subject land with those of the other parcels of land which have some relevance in these proceedings, allowing for such factors as a greater value in the market place at the date of resumption for comparable properties north of the Daintree River.

The concerns about how difficult it would have been to obtain a Commercial Activity Permit, and the possibility that a Permit may not have been granted, mean that some discount must be made when assessing the value of the subject land by reference to those other properties which have, or have ready access to, significant natural features.

Taking all relevant factors into account I have concluded that the subject land should be valued as at the date of resumption at \$8,000.00 per hectare, giving a total value of \$1,578,000.00.

Sales evidence - retained land: The evidence concerning the value of the retained parcels of land was much less extensive than that for the subject land and can be summarised briefly.

Lot 108: This parcel has an area of 25.89 hectares and, for the reasons given earlier, its highest and best use is for eco-tourism purposes.

Mr Allan valued the land at the rate of \$10,000.00 per hectare because Lot 108 has most of the prime elevated land for development purposes. The rate per hectare was based on the sales evidence used to value the subject land. Mr Allan also considered that the value was supported by the level of site values as shown by sales of five rural residential sites listed in Schedule C to his valuation report. There was relatively little information about those sales, namely the dates of the sales (between April 1991 and October 1994), the real property descriptions, the areas of land (between 9.709 hectares and 64.75 hectares), the parties and the sale prices (between \$115,000.00 and \$150,000.00). A BLINMAP showed the shape of each of the blocks and their locations relative to each other. There was no description of the relevant features of each property and a detailed comparison cannot be made between those blocks and Lot 108 or Lot 109. The raw figures show values on a rate per hectare basis between \$2,317.00 and \$15,450.00. Any attempt to draw firm conclusions from such little

evidence is attended by considerable risk. I note, however, that the rates per hectare seem to be inversely proportional to the size of the properties. The largest property sold for the lowest rate per hectare, and the smallest property sold for the highest price per hectare. The properties with sizes comparable to Lot 108 (that is 21.3 hectares, 24.28 hectares and 29.59 hectares) sold for rates per hectare in the lower part of the range (\$5,400.00, \$5,148.00 and \$6,083.00 respectively).

In Mr Allan's opinion, the potential of Lot 108 for tourism usage would reflect a considerably higher level of value compared with sites suitable only for rural residential purposes. His calculations were simply 25.8 hectares @ \$10,000.00 per hectare = \$258,000.00 - adopt \$260,000.00.

Mr Wake would have ascribed the value of \$200,000.00 to the land had it been suitable as an environmental resort, but as he considered its highest and best use as at the relevant date to have been a rural residential site, he considered its value to have been \$150,000.00. He acknowledged that the view from the land would have been a significant factor if the land was valued as a rural residential site, but did not concede that the view would have made Lot 108 more desirable than Lot 109. (t 159)

As noted earlier, it is relevant to bear in mind the size of the Lot, the restrictions on development of that site, the absence of extensive rainforest areas, the lack of guaranteed access to neighbouring National Park and State Forest land for commercial purposes, the potential cost of obtaining that access, and the apparent desirability (if not need) for additional land to enhance the viability of Lot 108 for eco-tourism purposes. Accordingly, Lot 108 should be valued at an amount above that for its rural residential potential but consistent with the restrictions on the land's use compared with the potential of the subject land (as shown on a rate per hectare basis). A value of \$200,000.00 is appropriate.

Lot 109: This parcel had an area of 25.8 hectares (it was later increased to 26.15 hectares by the addition of land from the State Forest to follow the existing track) and, for the reasons given earlier, its highest and best use is as a rural residential site.

Mr Allan valued the land having regard to the sales listed on Schedule C to his report which, he said, supported a valuation of \$185,000.00, an average of almost \$7,075.00 per hectare. That valuation was of Lot 109 in an improved state and assumed that the improvements were worth \$62,000.00. Consequently the land value would have been about

\$4,767.00 per hectare. (As noted earlier, Mr Allan had put the same value on those improvements in his before resumption valuation of the subject land.)

Mr Wake considered the value of Lot 109 to be \$150,000.00, an average of about \$5,736.00 per hectare. He was not critical of Mr Allan's approach, including the reliance on the Schedule C sales.

I am satisfied that, as all the improvements are on Lot 109 in the before and after situation and there is no claim for compensation in relation to improvements, the land should be valued at \$150,000.00. That figure is supported by the sales listed in Schedule C to Mr Allan's report.

Disturbance

As noted earlier in these reasons for decision, the parties agreed at the hearing on the amount to be awarded for disturbance. The amount agreed was \$67,150.00 comprising:

construction of alternate water supply to Lots 108 and 109	\$13,180.00
legal, valuation and other consultants' costs	\$53,970.00.

The former amount is for the cost of drilling and equipping bores on the remaining land of Lots 108 and 109. Before the resumption, water for each Lot was drawn from Kauri Creek, which flows through the resumed land.

Conclusions and order

In light of the conclusions reached in these reasons for decision, the amount of compensation for lost land is calculated as follows:

Before resumption

Lots 108 and 109	197.1788 ha @ \$8,000.00/ha	\$1,578,000.00
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After resumption

Lot 108	25.89 ha @ \$7,750.00/ha	\$ 200,000.00
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Lot 109	26.15 ha	\$ 150,000.00
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Land value

\$1,578,000.00 less \$350,000.00 = \$1,228,000.00

Add \$67,150.00 for disturbance

Adopt \$1,295,150.00.

The amount of compensation payable by the Crown to the claimants is determined in relation to the value of the land taken and disturbance in the sum of one million two hundred and ninety five thousand one hundred and fifty dollars (\$1,295,150.00).

The interest payable must have regard to the payment by the Crown to the claimant of advances totalling \$1,236,000.00 (including components for the value of land taken, interest, and amounts for disturbance). The amounts paid and the month on which each payment was made are as follows:

Lot 998	\$370,000.00	April 1993
Lot 999	\$310,000.00	April 1993
	\$139,950.97	June 1993
Aggregation	\$416,049.03	October 1995.

The rate of interest adopted by the Land Court in relation to awards compensation for amounts payable in 1992 is 9.0 per cent.

I will hear submissions from the representatives of each party in relation to the appropriate form of order to reflect the amount of compensation payable having regard to the amounts paid to the claimants to date and the applicable rate of interest.

GJ NEATE
MEMBER