SUPREME COURT OF QUEENSLAND

CITATION:	*State of Queensland v Baker Superannuation Fund Pty Ltd & Anor; Aurizon Operations Limited v Baker Superannuation Fund Pty Ltd & Anor* [2018] QCA 168
PARTIES:	**In Appeal No 3654 of 2017:** **STATE OF QUEENSLAND** (appellant) **v** **MICHAEL VINCENT BAKER SUPERANNUATION FUND PTY LTD** ACN 068 183 228 (first respondent) **AURIZON OPERATIONS LIMITED** ACN 124 649 967 (second respondent) **In Appeal No 3650 of 2017:** **AURIZON OPERATIONS LIMITED** ACN 124 649 967 (appellant) **v** **MICHAEL VINCENT BAKER SUPERANNUATION FUND PTY LTD** ACN 068 183 228 (first respondent) **STATE OF QUEENSLAND** (second respondent)
FILE NO/S:	Appeal No 3654 of 2017 Appeal No 3650 of 2017 SC No 12854 of 2008
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeals
ORIGINATING COURT:	Supreme Court at Brisbane – [2017] QSC 26
DELIVERED ON:	27 July 2018
DELIVERED AT:	Brisbane
HEARING DATE:	19 October 2017
JUDGES:	Morrison and McMurdo JJA and Jackson J
ORDERS:	**In Appeal No 3654 of 2017:** **1. Appeal dismissed.**

2. The appellant pay the respondent's costs of the appeal.

In Appeal No 3650 of 2017:

1. Appeal allowed.

2. The order made for the payment by the appellant to the respondent of damages for nuisance be set aside.

3. The order for costs made against the appellant on 27 April 2017 be set aside.

4. The respondent pay to the appellant its costs of the appeal and of the proceeding in the trial division.

CATCHWORDS: STATUTES – THE *RAILWAY ACT* 1864 (QLD) – INTERPRETATION – GENERAL APPROACHES TO INTERPRETATION – INJURIOUS AFFECTION – REFERENCE TO CONTEXT – where the first respondent owned land bordering a railway – where the railway was over a hundred years old – where culverts were constructed underneath the rail line to allow for the natural flow of water – where over time, an increased flow of water through the culverts caused significant erosion on the first respondent's land – where in 1884, the land for the railway was bought off the previous titleholder to the first respondent's land – where the appellants submitted at trial that the payment given for that land included an additional amount that was on account of injurious affection – where the learned primary judge observed that ss 46 and 94 of the *Railway Act* 1864 told against a conclusion that the compensation was to be considered for all time in respect of any damage or nuisance in the context of the construction of the culverts – whether the learned primary judge erred

STATUTES – ACTS OF PARLIAMENT – INTERPRETATION – PARTICULAR WORDS AND PHRASES – STATUTORY IMMUNITY – where the railway line was owned by the State of Queensland and Aurizon Operations Limited at various times – where both Aurizon and the State of Queensland contended that the terms of the legislation in force when the culverts were originally built in 1956 created statutory protection that inured for the benefit of each of them – where, despite the repeal of each Act over time, the preserving effect of the common law was subject to the *Acts Shortening Act* 1867 (Qld) and the *Acts Interpretation Act* 1954 (Qld) – whether the relevant provisions of the *Railway Act* 1864, the *Railways Act* 1914, the *Transport Infrastructure (Railways) Act* 1991 and the *Transport Infrastructure Act* 1994 created statutory immunity in

respect of all damage caused by the rail line over one hundred years

ENERGY AND RESOURCES – WATER – SURFACE WATER – RIGHTS OF PROPRIETORS OF ADJOINING LAND – IN GENERAL – where the railway line ceased to operate in 1993 and the tracks were removed in 2003 – where the rail line became instead a walking, cycling and horse-riding track – where, despite this, the respondent contended that the appellants had responsibility for the maintenance of the structures on the railway land during their period of ownership and that they had failed to remedy, abate or take steps to prevent the nuisance – where the learned primary judge found that the "mothballing" of the railway did not affect the liability of the appellants for damage caused by remaining structures on the railway land – where the erosion of the respondent's land was the result of increased water flow through the culverts under the railway line – where there was considerable land clearing uphill from the railway line, increasing the volume of water flowing through the culverts – whether the primary judge failed to consider whether the circumstances otherwise constituted a nuisance according to the *Gartner v Kidman* principles

TORTS – NUISANCE – STATUTORY PROVISIONS FOR PREVENTION AND SUPPRESSION OF NUISANCES – where the issue of whether Aurizon and the State of Queensland had an obligation to take steps once the erosion problem was brought to their attention was the subject of debate at the trial – where they submitted they had no legal obligation to do so –where the learned primary judge rejected the application of s 150 of the *Transport Infrastructure Act* 1994 (Qld) but concluded that actionable nuisance had been made out from a breach of the duty to maintain by both appellants – whether the learned primary judge considered the use of the land, by both appellants at the relevant period of time for each, was a "natural use" of the land in the sense described in *Gartner v Kidman*

TORTS – NUISANCE – WHAT CONSTITUTES – PRIVATE NUISANCE – PARTICULAR CASES – where at all relevant times from 2008, the State of Queensland was aware of the erosion and of the respondent's complaint – where there was no evidence that the works on the former railway corridor, which the respondent claimed were required to abate the nuisance, would have compromised the use of this land as the public recreational facility which it has become – where the embankment and the culverts were changes which had been made to the landscape so that the land could be used for a railway – where there was no justification for retaining them apart from saving costs to the State, once the nature of the ongoing use of the land had become clear, and where that use would not be compromised

by their removal – where in short, the use of the culverts within this embankment no longer constituted a use of the State's land "in a reasonable and proper manner", having regard to the damage which they continued to cause to the respondent's land – whether there was an actionable nuisance committed by the State of Queensland

TORTS – NUISANCE – DEFENCES – CAUSATION – where the appellants submitted that a combination of events had caused the erosion of Baker's land and thus the culverts could not be shown to be a material cause of the damage – where two possible causes of the erosion were identified, the first being that the flow of water had been concentrated by the installation of the culverts under the rail line and the second being that the water flow rate had been increased by altered conditions in the nearby catchment – where those altered conditions were a result of land clearing upstream – whether it was sufficient to establish that the alleged wrong was a cause of the harm without establishing that it was the only cause

TORTS – NUISANCE – DEFENCES – FAILURE TO MITIGATE – where the appellant submitted that Baker was under a duty to mitigate its own loss – where the learned primary judge found that Baker did nothing to mitigate its loss – where it was also found below that Aurizon and the State of Queensland provided no suggestion as to how Baker should deal with the erosion – whether the learned trial judge was correct to reject the argument that the respondent had failed to mitigate its own loss

Acts Interpretation Act 1954 (Qld), s 20
Acts Shortening Act 1867 (Qld), s 2
Railway Act 1864 (Qld), s 94, s 46, s 85
Railways Act 1914 (Qld), s 4, s 73
Transport Infrastructure (Railways) Act 1991 (Qld), s 2.3.1, s 6.5, s 7.6
Transport Infrastructure Act 1994 (Qld), s 150, s 214

Allen v Gulf Oil Refining Ltd [1981] AC 1001; [1980] UKHL 9, cited
Bankstown City Council v Alamdo Holdings Pty Ltd (2005) 223 CLR 660; [2005] HCA 46, cited
Burnie Port Authority v General Jones Pty Ltd (1994) 179 CLR 520; [1994] HCA 13, cited
Elston v Dore (1982) 149 CLR 480; [1982] HCA 71, cited
Essendon Corporation v McSweeney (1914) 17 CLR 524; [1914] HCA 7, considered
Gartner v Kidman (1962) 108 CLR 12; [1962] HCA 27, followed
Hargrave v Goldman (1963) 110 CLR 40; [1963] HCA 56, cited
Hazelwood Power Partnership v Latrobe City Council (2016)

218 LGERA 1; [2016] VSCA 129, cited
Manchester Corporation v Farnworth [1930] AC 171; [1929] All ER Rep 90, cited
March v Stramare (E & MH) Pty Ltd (1991) 171 CLR 506; [1991] HCA 12, cited
Marcic v Thames Water Utilities Ltd [2002] QB 929; [2002] 2 WLR 932; [2002] EWCA Civ 64, followed
Melaleuca Estate Pty Ltd v Port Stephens Council (2006) 143 LGERA 319; [2006] NSWCA 31, cited
Rylands v Fletcher (1868) LR 3 HL 330; [1868] UKHL 1, considered
Sedleigh-Denfield v O'Callaghan [1940] AC 880; [1940] 3 All ER 349; [1940] UKHL 2, cited
Warne v Nolan [2001] QSC 53, cited

COUNSEL: J Horton QC, with M Eade, for Aurizon Operations Limited
T Sullivan QC, with D Favell, for the State of Queensland
G Gibson QC, with P Hackett, for Michael Vincent Baker Superannuation Fund

SOLICITORS: Gadens Lawyers for Aurizon Operations Limited
Crown Law for the State of Queensland
Queensland Law Group for Michael Vincent Baker Superannuation Fund

[1] **MORRISON JA:** In 1884 the Commissioner for Railways purchased land in the Esk Valley to build the Brisbane Valley Railway Line. To ensure the line was level an embankment was created, raised higher than the surrounding land on either side.

[2] When the line was constructed the probability that it would affect the natural flow of surface water was recognised. One way adopted to combat that was the installation of open culverts running through the embankment under the railway line.

[3] The railway line adjoins land at Sandy Creek (**Lot 3**), 6 km south of Esk. Lot 3 is on the western side of the railway line. The railway land is Lot 2 and to the south of that was farmland.

[4] In 1884 two culverts were built next to Lot 3.[1] They were wooden box culverts, each 5 feet wide x 2 feet deep, and installed at the site of a gully or channel that drained a 50 acre watershed. The two culverts were about 7 to 8 metres apart.

[5] Years passed and ownership of the surrounding lands changed. In 1956 the culverts were replaced with concrete box culverts of the same dimensions, 1.54 m wide x 0.61 m deep.[2]

[6] The railway embankment acts as a dam wall, and channels the overland water flow into the culverts via table drains.[3] Aerial photographs show that in 1963 there was already an eroded gully or drainage line downstream of the culverts.

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1 The original design drawings locate the culverts at mileage 36 mile 69.5 chains.
2 There are photographs of the concrete culverts at AB 1099 and 1128.
3 AB 1092, survey report of Mr Tannock.

[7] From 1988 the area upstream of the culverts was increasingly cleared, becoming completely cleared by 2009.[4] The clearing of vegetation produces a net increase in both the rate and volume of runoff, as a result of reduced soil permeability.

[8] As well, by 1988 a dam had been built on the land immediately upstream of the culverts. That dam intercepted surface runoff upstream of the entrance to the culverts.[5] The evidence did not show that there was a watercourse upstream of the dam itself.[6] By 2002 a second dam was built upstream of the first dam, and some buildings had been constructed.

[9] Eventually the railway line ceased to operate in 1993. It was later dismantled and in June 2002 the land was declared non-rail corridor land.

[10] More than a hundred years after it was constructed, and generations of owners later, the run off through the two culverts severely eroded Lot 3, owned by the respondent (**Baker**) since November 1995.

[11] Baker commenced proceedings seeking damages for nuisance. He succeeded at trial and Aurizon and the State of Queensland challenge that result.

Grounds of appeal

[12] The notice of appeal in appeal 3654 of 2017 sets out a number of grounds, as follows:

1. The primary judge erred in construing ss 46 and 94 of the *Railway Act* 1864 (Qld) by regarding the construction of culverts by the Commissioner for Railways as precluding a finding that the payment 'additional compensation' could not have been on account of injurious affection.

2. The primary judge erred in failing to hold that the payment of such compensation foreclosed once and for all liability in nuisance for the prospective adverse affect of the construction, maintenance and continuing existence of the railway and culverts.

3. The primary judge erred in finding that the State of Queensland had caused, and was liable for, the harm, for not taking positive steps to remove or mitigate the effect of the culverts on Baker's land, having found (correctly) that:

    (a) the culverts were placed along the line of an existing channel;

    (b) they were installed and maintained pursuant to statutory powers;

    (c) the placement and maintenance of them was reasonably necessary for the use of the rail corridor as a railway line;

    (d) the culverts operated for more than a century without incident or complaint; and

    (e) the only change in circumstances was the lawful clearing of land in the catchment by others.

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4 The extent of the clearing of the upstream land is revealed by comparing the aerial photographs at AB 378-384 which span the years 1963, 1965, 1971, 1988, 2002, 2006 and 2009.

5 AB 1116, report of Dr Shaw, paragraph 4.2.5.

6 AB 1093, survey report of Mr Tannock.

(together, **the main findings**).

4. The primary judge's finding that the State of Queensland had not discharged its onus of disproving negligence and that it was not apparent that the nuisance was an inevitable consequence of the State of Queensland's statutory duty, cannot stand against the main findings.

5. The primary judge erred in failing to construe the *Railway Act* 1864 (Qld), *Railways Act* 1914 (Qld) and *Transport Infrastructure (Railways) Act* 1991 (Qld), as displacing the common law action of nuisance in this case.

6. The primary judge erred in finding that the State of Queensland had failed to discharge its onus to show that Baker had failed to mitigate its loss in circumstances where:

    (a) her Honour found (correctly) that Baker accepted it had done nothing to mitigate its loss;

    (b) there were steps open to Baker to have mitigated its loss; and

    (c) her Honour found the duty not to arise until 'suggestions' were made as to available mitigation measures.

7. If the decision of the primary judge disposed of the Third Party proceeding brought by the State of Queensland, the primary judge erred in failing to:

    (a) address liability as between the State of Queensland and Aurizon;

    (b) find that, pursuant to the terms of the sublease and the indemnity provisions (clause 7.3) contained in the Sublease dated 6 December 1996 (to which the State of Queensland and the Aurizon's predecessor were parties), Aurizon was liable to the State of Queensland for:

        i. any costs, losses, claims and damages arising out of the State of Queensland's claim; and

        ii. costs of the State of Queensland complying with the orders made by her Honour.

[13] In appeal 3650 of 2017 Aurizon raised grounds identical to grounds 1-6 above.

[14] Though the notice of appeal listed seven grounds, Aurizon contended before this Court that the appeal concerned three errors on the part of the learned primary judge:[7]

(a) finding liability despite the operative cause of the harm being the lawful act of a third party; Baker failed to prove that the harm that in fact occurred was any greater than if the culverts had never been installed; it was wrong as a matter of principle to find liability against defendants who had done nothing other than build and maintain culverts that for a century did no harm in circumstances in which the Commissioner had done just as the statutory power required;

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7 Aurizon's appeal outline, paragraph 3.

(b) finding that Aurizon and the State of Queensland had failed to show the absence of negligence in the exercise of the statutory powers in placing the culverts, or that the harm that resulted was the inevitable consequence of doing so; and

(c) failing to find that the payment of compensation was for injurious affection and nullified any claim for nuisance not unreasonably caused.

[15] In oral address that was said to concern two points. The first was that if the Commissioner (a statutory authority) constructed the culverts pursuant to a statutory power, and in a non-negligent way, then liability could not attach at any time thereafter. This was argued to be a form of statutory immunity.

[16] The second was that the payment of compensation to the original landowner was a payment once and for all, and therefore no action could be brought for injurious affection.

[17] I intend to deal with each of the grounds advanced on the appeal, and at the same time the contentions for those grounds.[8]

Ground 1- additional compensation for injurious affection

[18] This ground centred upon the payment of compensation to the original landowner (Mr Abbott) in 1884. The essential issue was whether that payment encompassed "injurious affection" to the land, such as to foreclose any action for damages for nuisance based on the culverts.

Submissions for Aurizon and the State of Queensland

[19] Mr Horton QC, appearing with Mr Eade of Counsel, submitted on behalf of Aurizon[9] that the learned primary judge erred in finding that the additional compensation paid to the original landowner in 1884 did not encompass "injurious affection", and misconstrued s 94 of the *Railway Act* 1864 in finding that it could not do so because otherwise the Commissioner would have been absolved from constructing the culverts.

[20] It was submitted that damages in lieu of "accommodation works" under s 94, and compensation for "injurious affection" are two different heads of compensation under the statute. The fact the culverts were constructed forecloses the possibility of compensation for "accommodation works", but says nothing of "injurious affection". The additional compensation of £3.5.0 could only have been for injurious affection, because it was the only other compensable head under the provision.

[21] It was submitted, as it had been below, that the payment of compensation foreclosed the right to claim for nuisance brought about by the culverts. To hold otherwise would provide an indeterminable number of successors in title with a right to claim compensation in every circumstance where compensation was paid by way of injurious affection.

[22] Further, it was submitted that it did not matter that it could not be shown whether the additional compensation figure was actually for injurious affection or not. As it was put: "The statute contained the remedy … and the remedy was not one that was

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8 Ground 7 was not pressed.

9 The State of Queensland adopted Aurizon's submissions.

overlooked. There was considered correspondence about it, and whatever rights … the predecessor of the title had, were ones that were exercised."[10]

Submissions for Baker

[23] Mr Gibson QC, appearing with Mr Hackett of Counsel for Baker, submitted that the learned primary judge's finding was correct. Section 94(1) of the 1864 Act applied to "works for the accommodation of the owners and occupiers of lands adjoining a railway". By s 94(2) the obligation was imposed to construct and maintain a variety of works (including culverts and drains). The proviso under s 94(3) was imposed by reference to "accommodation works", which refers to any of the kinds of things otherwise required by s 94(2). It provided that the Commissioner was not required to make such works "with respect to which the owners and occupiers have agreed to receive and have been paid compensation in lieu of making them". It had not been established that the original landowner had made any agreement to receive, or be paid, compensation in lieu of "accommodation works".

[24] Further, the learned primary judge did not misconstrue any relevant statutory provisions. Section 46 of the 1864 Act refers to compensation to be assessed having regard to "the damage (if any) to be sustained by the owner of the lands by reason of ... otherwise injuriously affecting such other lands by the exercise of the powers of this Act ...". Several reasons were advanced as to why that did not impinge upon the operation of s 94. First, the culverts were built, and it follows that no agreement was made of the kind identified in the proviso in s 94(3).

[25] Secondly, while s 46 provided for payment in respect of injurious affection, it did so in the context of a statutory regime that required a separate arrangement be made if the Commissioner was to be relieved of an obligation imposed by s 94 in respect of "accommodation works". Compensation was assessable under s 46 to take account of injurious affection, due to the exercise of the powers under the Act. But where the Commissioner wished to be relieved of the obligation to provide or maintain "accommodation works", some separate agreement and payment was required.

[26] Thirdly, injurious affection is a sum compensable for the impacts of the exercise of the statutory power, not the non-exercise of them. The statutory power was one which also required the maintenance of the conveyance of water at all times according to the condition prior to the construction of the railway. There is no basis for concluding that injurious affection was (or should be) assessed on the basis of the exercise of the power to build the culverts but then ignore the obligation which the Act imposed as to the rate of conveyance of water onto Baker's land. A wrong (nuisance) even if committed by the Commissioner is actionable in damages, not part of the compensation for the resumption of the land.[11]

[27] Mr Gibson QC submitted that the amount identified as additional compensation was not identified as compensation for injurious affection, nor was there any other evidence to indicate what that compensation was for. The contention by Aurizon that it was for injurious affection was, at best, speculation.

[28] Further, in response to the submission that it did not matter if the compensation could not be shown to be for injurious affection, Mr Gibson submitted that the compensation that was offered and ultimately accepted was for the value of the land taken, injury by severance and injury to buildings. There was no basis to construe

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10 Appeal transcript T1-25 line 21.

11 Reliance was placed on *Pegoraro v South Burdekin Water Board* [1972] Qd R 306.

s 46 as having the consequence that upon payment of any amount for compensation any cause of action for damages for nuisance was thereby waived. In addition it was questionable that Aurizon is in a position to take the benefit of any such agreement, and whether, in any event, that agreement bound Mr Abbott's successors in title.

Discussion

Purchase of the land from Mr Abbott

[29] In 1885 the Commissioner for Railways resumed about eight acres of land from Mr Abbott.[12] That land became part of Lot 2 (the railway land). The resumption was pursuant to s 11 of the *Railway Act* 1864. The Commissioner obtained a valuation of the land and compensation of £40 was offered to Mr Abbott, and accepted. Additional compensation of £43.5.0 was paid.

[30] The evidence included historical file notes concerning the resumption and agreement for compensation. The material is not as clear as one might hope but some things can be concluded.

[31] A summary file note in 1885[13] records that Mr Abbott claimed £50 for the seven acres specified in the resumption notice. That offer was conveyed in January 1885 by a letter from Mr Vanneck, Mr Abbott's agent,[14] who specified that the £50 was "as compensation for land you are about to take".

[32] A letter to Mr Abbott's agent on 19 June 1885[15] indicates that he was told that a valuation had been obtained "from a competent appraiser", but neither the valuation figure nor any of its component parts were revealed. Instead the letter said "I regret being unable to agree to the full amount claimed but in order to settle the matter I would be happy to offer the sum of £40.0.0".

[33] That offer was accepted by letter from Mr Abbott's agent on 8 July 1885.[16]

[34] The valuation itself was of the original area to be resumed, namely seven acres.[17] It records the value of the seven acres taken as £21.0.0 at £3.0.0 per acre, then sets out:

(a) "Injury by Severance" - £5.0.0;

(b) "Injury to Buildings" - £12.0.0; and

(c) "ten per cent on forced sale" - £2.2.0.

[35] The total of that valuation was £40.2.0. By inference, it formed the basis of the offer of £40.

[36] The summary file note[18] identifies that it was decided that eight acres and one perch were actually to be taken, and "additional compensation £3.5.0" was offered for the extra one acre and one perch. Just when that was decided is unclear, but there can be no doubt it was subsequent to the exchange offering and accepting £40. The additional compensation can be understood as being (i) a little over £3.0.0 for the

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12 AB 469. Mr Abbott was the original owner of the land now held by Baker.
13 AB 469.
14 AB 485.
15 AB 483.
16 AB 482.
17 AB 484.
18 AB 469.

value of the extra one acre and one perch, and (ii) the forced sale component of 10 per cent on the extra £3.0.0. Once those two components are combined, the total is about £3.6.0. Hence, in my view, it is right to infer that the "additional compensation" was merely the extra value of the one acre and one perch.

[37] The "additional compensation" took the total to £43.5.0, which was the amount of compensation paid. The land actually taken was eight acres and one perch.[19]

[38] On the evidence Mr Abbott was offered a gross sum, and agreed. That sum did not include a component for injurious affection, rather it was merely value of the land, severance and damage to buildings.

[39] Section 46 of the 1864 Act regulated the payment of compensation for the resumption of land for the purposes of the Act:[20]

> "In estimating the purchase money or compensation to be paid under any of the provisions of this Act **regard shall be had** by the justices arbitrators jury or surveyor as the case may be **not only to the value of the land purchased or taken by the Commissioner** on behalf of Her Majesty as aforesaid **but also to the damage (if any) to be sustained by the owner of the lands by reason of the severing of the lands taken from the other lands of such owner or otherwise injuriously affecting such other lands by the exercise of the powers of this Act** and they shall assess the same according to what they shall find to have been the value of such lands estate or interest at the time notice was given of such lands being required and without reference to any alteration in such value arising from the establishment of such Railway and other works."

[40] As is plain from s 46, the estimation of the compensation to be paid required that regard be had to: (i) the value of the land purchased or taken by the Commissioner, (ii) any damage to be sustained by the owner of the lands by reason of the severing of the lands taken from the other lands of such owner, and (iii) any damage to be sustained by the owner of the lands by reason of the exercise of the powers under the Act otherwise injuriously affecting such other lands.

[41] Whatever s 46 required to be taken into account in relation to the "estimation of compensation to be paid", in my view the evidence does not permit the conclusion that Mr Abbott was actually compensated for injurious affection. True it is that the value of the land (in respect of the original seven acres) was calculated in the course of working out a value, and that an allowance was made for "Injury by Severance" and "Injury to Buildings", but there is nothing discernible that might go to the question of interference with the flow of surface water from one side of the railway to the other, or the impact of the railway embankment on the watercourses in the area, let alone the impact of the culverts themselves.

[42] In the end Mr Horton QC accepted that the historical documents did not show that the valuer calculated a figure for injurious affection.[21] What one might infer from the fact that such an allowance was not made is that neither party at the time considered that there was injurious affection in respect of Mr Abbott's lands. That

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19 AB 479, 480.
20 Emphasis added.
21 Appeal transcript T1-26 lines 26-29.

they may have had that view does not, of course, mean that there was none, nor that it might not occur in the future.

[43] Aurizon contended that it did not matter that the compensation did not identify a component for injurious affection, as the 1864 Act contained a remedy (compensation) that was exercised by the original landowner and whatever rights the landowner had, were ones that were exercised, thus precluding an action in nuisance by him or any successor in title.

The statutory framework

[44] The **1864 Act** was described in its long title as "An Act to make Provision for the Construction by the Government of Railways and for the Regulation of the same".[22] It gave the State of Queensland power to make and maintain railways.

[45] Section 11 gave the Commissioner power to "enter into and upon the lands and tenements of any person", and to "take and appropriate for the purposes herein mentioned such parts thereof as may be necessary for the … making and using any Railway…". Under s 11 the Commissioner could use the land, and any adjoining lands, for the purposes of making and maintaining a railway, by using an extensive array of powers such as digging up the land and taking such things as earth, stone, gravel and timber. Section 11 also provided:

> "Provided always that in the exercise of the powers by this Act granted the said Commissioner … shall do as little damage as may be and that if required full satisfaction shall be made in the manner herein provided to all persons interested in any lands … which shall have been taken used or injured or prejudicially affected for all damages by them sustained by reason of the exercise of such powers."

[46] The Act then contained provisions for the Governor-in-Council to notify the intended route of a railway, and give an opportunity for the owners of affected land to lodge objections. Section 23 then provided that when the map of the railway line had been confirmed, the Commissioner:

> "… shall give notice of the lands taken … for the said Railway to all the parties interested in such land … and by such notice shall demand from such parties and the said parties are hereby required to deliver to the said Commissioner the particulars of their estate and interest in such lands and of the claims made by them in respect thereof and every such notice shall state the particulars of the lands so taken or required as aforesaid and that the Commissioner is willing to treat as to the compensation to be made to all parties for the lands taken or to be taken and the damage sustained or that may be sustained by them by reason of this Act."

[47] Section 25 provided for a 21 day period after service of the notice by the Commissioner, in which agreement might be reached as to "the amount of the compensation to be paid by the Commissioner for the interest in such lands belonging to such party … or for any damage that may be sustained … by reason of the execution of the

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22 As per a footnote to this title, in 1864, "An Act to amend an Act passed in the last Session of the Parliament of Queensland intituled 'An Act to make provision for the Construction by the Government of Railways and for the Regulation of the same'" was passed. Section 14 of this amending act stated "This [1864 (28 Vic. No. 24)] Act and the [1863 (27 Vic. No. 8)] Act shall be read as one Act and may be known and cited as 'the Railway Act of 1884'."

works". If, after that 21 day period, agreement had not been reached, s 25 provided that "the amount of such compensation shall be settled in the manner hereinafter provided for settling cases of disputed compensation".

[48] Provision was made for the calculation of compensation where the relevant party was absent from the colony. That included the Commissioner's making an application to two justices, and the appointment of a competent surveyor and valuator for determining the compensation.[23]

[49] Section 46 then provided what had to be taken into account when "estimating the … compensation to be paid under any provision of this Act": see paragraph [39] above.

[50] The Act then made provision for the more mechanical aspects of the dealings between the Commissioner and a landowner, such as providing for payment into court in various cases, the form of conveyance, and proceedings where there was a refusal to deliver possession of the land.

[51] Section 85 gave the Commissioner power to "enter upon any lands not being more than two hundred yards distant from the centre of the Railway … and to occupy the said lands so long as may be necessary for the construction or repair of that portion of the Railway or of the accommodation works connected therewith…". The powers of the Commissioner included manufacturing and working on the lands in order to construct the railway, for example, the power to take timber and dig out stone, gravel, sand and other such things. Then there was this proviso:

> "Provided always that nothing in this Act contained shall exempt the Commissioner from an action for nuisance or other injury if any done in the exercise of the powers hereinbefore given to the lands or habitations of any party other than the party whose lands shall be so taken or used for any of the purposes aforesaid."

[52] In the proviso the reference to "the powers hereinbefore given" was a reference to the powers conferred under s 85. They were the powers given to the Commissioner to take temporary possession of lands and make use of them for the purpose of constructing and repairing the railway, or constructing and repairing the accommodation works. The significant aspect of the proviso in s 85 is that there was no exemption from an action for nuisance or other injury to the land of **parties other than** the party whose lands had been temporarily taken or used under s 85. In other words, the party whose lands had been temporarily taken or used under s 85 could not bring an action for nuisance for things done in the exercise of the powers under s 85. There was no similar provision in respect of the case where lands were "taken" (that is to say, resumed) under s 11.

[53] Nor was there any provision in the 1864 Act which, on its face, suggested that once compensation was paid, however it was arrived at, it would be taken to be compensation for all time in respect of any damage or nuisance. Given the way in which the proviso to s 85 was worded, expressly dealing with an exemption from actions for nuisance where land was temporarily taken, had the legislature intended that payment of compensation would exclude any possibility of an action for nuisance in the future, one would have expected to see a clearer expression of that intention than is found in the words of the statute.

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23 Sections 43-45.

[54] There are contrary indications to such a conclusion. Section 11 contained the proviso that the Commissioner was to do as little damage as may be, and make full satisfaction for lands taken, but only "if required". That suggests that a landowner might not include, within the claim for compensation, a component that would cover future nuisance. Further, s 46 does not specify that the compensation paid shall be taken to cover, for all time, the component parts. It merely provides that regard shall be had to certain factors when estimating the compensation. Those factors are the value of the land, any damage sustained by reason of severance from other lands of the landowner, and injurious affection to the other lands of the landowner. The section does not provide that if, for example, a component for injurious affection is omitted or assessed at a nil value that such a claim ceases to exist.

[55] Finally, the obligation to maintain the railway, and the obligations under s 94 to make and maintain accommodation works for landowners adjoining the railway, tells against a construction that the Act operated to exclude any action for nuisance by reason of the payment of compensation. Under the obligations to make and maintain accommodation works, the Commissioner might well be in the position of carrying out works well after the payment of compensation for land taken, but where the works created an actionable nuisance on adjoining land. If it had been intended that compensation would foreclose even that circumstance, one expected to see a clearer expression of that intention.

[56] Furthermore, the likely sequence of events tells against such a construction. The taking of the land by the Commissioner, and consequent agreement to compensation, was always likely to be well in advance of when the construction work was done for the railway itself. Under the 1864 Act the time at which land was notified to be taken was when the line of the railway was notified, identifying the lands to be taken. There is no suggestion at that point that adjoining landowners were made aware of the specifics of how the construction would occur, and in particular in respect of things such as running the railway line upon an embankment which would interfere with the flow of surface water, and create the need for culverts. That being the case, it is difficult to see an underlying legislative intent that payment of compensation accepted in ignorance of the possible impact of the railway should be treated as excluding any right to actionable nuisance from the construction or maintenance of the railway.

[57] The learned primary judge observed that s 94 of the 1864 Act told against a conclusion that Mr Abbott had been compensated in a way that excluded the claim by Baker. It relevantly provides:[24]

> "94 Works for benefit of owners.
>
> The Commissioner shall make and at all times thereafter maintain the following works for the accommodation of the owners and occupiers of lands adjoining the Railway (that is to say)-
>
> > Such and so many convenient gates bridges arches culverts and passages over under or by the sides of or leading to or from the Railway as shall be necessary for the purpose of

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[24] Emphasis added.

> making good any interruptions caused by the Railway to the use of the lands through which the Railway shall be made ...
>
> Also **all necessary** arches tunnels **culverts** drains or other passages either over or under or by the sides of the Railway of such dimensions **as will be sufficient at all times to convey the water as clearly from the lands lying near or affected by the Railway as before the making of the Railway or as nearly so as may be** ...
>
> Provided always that the Commissioner **shall not be required … to make any accommodation works with respect to which the owners and occupiers of the lands shall have agreed to receive and shall have been paid compensation instead of the making them**."

[58] As to that her Honour said:[25]

> "The defendants' argument does not take into account that the Commissioner did install the subject culverts. If the argument were correct the payment in 1884 of compensation to Mr Abbott would have absolved the need for the Commissioner to construct the culverts. The fact the culverts were constructed and maintained allows for the inference that there was no agreement by Mr Abbott with the Commissioner to recover compensation instead of the accommodation works that allowed water from the upstream catchment to flow through the culverts onto the plaintiff's land. As a matter of statutory construction, the proviso to s 94 of the 1864 Act could be given effect only if it were clear either from the manner of calculation of the compensation that specific accommodation works were not required or it were possible to identify from the agreement between the Commissioner and the owner of the resumed land as to what accommodation works were dispensed with."

[59] The first paragraph of s 94 referring to accommodation works is inapplicable here, as it deals with works done to make good any interruption caused by the Railway to the use of adjoining lands. The culverts were not built for that purpose. They were built to convey surface water from one side of the railway to the other, as had happened naturally before the railway embankment was constructed. Therefore the relevant paragraph is that dealing with the making and maintaining of "culverts … as will be sufficient at all times to convey the water as clearly from the lands lying near or affected by the Railway as before the making of the Railway or as nearly so as may be".

[60] As explained earlier, no part of the compensation can be identified as being proposed for this aspect of the works, or agreed as compensation for such works. There being none, the proviso in s 94 has no operation.

[61] However, in any event I would respectfully disagree that s 94 has the effect which the learned primary judge found. The proviso simply specified that the Commissioner cannot be **required** to make any accommodation works for which

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25 *Michael Vincent Baker Superannuation Fund Pty Ltd v Aurizon Operations Limited & Anor* [2017] QSC 26 (**Reasons below**) at [24].

compensation has been paid. That does not mean that the Commissioner was prohibited from doing so if those works were thought to be necessary or desirable. Therefore, without knowing more, the mere fact that the works have been made does tell one way or the other about whether compensation was paid.

[62] Further, it may be noted that the proviso only provided that the Commissioner cannot be required to "make" accommodation works for which compensation has been paid. It does not impinge upon the Commissioner's obligation to "maintain" any accommodation works. The result is that even if compensation has been paid for accommodation works, that payment did not relieve the Commissioner of the obligation to maintain the works. Under s 94 that obligation applied "at all times" after the making of the works, and the extent of the obligation can be seen from the requirement that culverts be sufficient "at all times" to convey the water away.

[63] Aurizon placed reliance upon the decisions in *Sisters of Charity of Rockingham v The King*,[26] *Duke of Buccleuch v The Metropolitan Board of Works*,[27] and *Marshall v Director-General, Department of Transport*.[28] It was said that they stood for three propositions: (i) injurious affection can extend to things such as noise and vibration from a railway line, being things analogous to nuisance;[29] (ii) injurious affection comprehends actual and prospective impacts;[30] and (iii) that where a statute provides for compensation to be assessed and paid, it must be claimed once and for all.[31]

[64] It may be accepted that those propositions can be derived from those cases, but I do not consider that any of them affects the outcome on this issue. No part of the compensation paid to Mr Abbott can be shown to have been for injurious affection: see paragraphs [29] to [42] above.

[65] This ground lacks merit.

Grounds 2 and 5 – statutory immunity

[66] As these grounds were developed in the appeal outlines and in oral argument, they were concerned with the issue whether proceedings against Aurizon and the State of Queensland were prevented because, having paid compensation to the landowner, they were entitled to a form of statutory immunity under the legislation from time to time. To the extent that those grounds might be thought to have raised questions going to the compensation paid, that has been dealt with in the discussion of ground 1 above.

The repealed Acts

[67] Both Aurizon and the State of Queensland contend that the terms of the legislation which was in force when the timber culverts were constructed in 1885, and replaced by concrete culverts in 1956, created statutory protection that inures for the benefit of each of them.

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26 [1922] 2 AC 315.
27 (1871) LR 5 HL 418.
28 (2001) 205 CLR 603; [2001] HCA 37.
29 *Duke of Buccleuch v The Metropolitan Board of Works* (1871) LR 5 HL 418 at 437, 441, 455-456 and 458.
30 *Marshall v Director-General, Department of Transport* (2001) 205 CLR 603; [2001] HCA 37 at [20] and [46]. Reference was also made to *Kettering Pty Ltd v Noosa Shire Council* (2004) 78 ALJR 1022; [2004] HCA 33 at [23].
31 *Sisters of Charity of Rockingham v The King* [1922] 2 AC 315 at 328.

[68] As Aurizon puts it, "the terms of the Railways Acts must be brought to bear"[32] and as the State puts it, "the point in time to ask whether the statutory power to design and construct these culverts had taken place without negligence was at the time of their design and construction in 1885"[33]. In oral submissions, they did not shrink from the proposition that the authority given by the relevant statutes in 1885 conferred a statutory immunity in relation to damage that might be caused by the works 100 years later on.

[69] To an extent, what follows contains some necessary repetition of the history of the legislation.

The 1864 Railways Act

[70] The statute in force at the time when the culvert was first constructed was the 1864 Act. Section 1 authorised the Governor in Council to cause a line of railway with all proper works and conveniences to be made from Ipswich to Toowoomba.[34] The 1864 Act constituted a corporation sole under the name, style and title of the Commissioner for Railways.[35]

[71] The powers under the 1864 Act included power to take land for the railway.[36] The Commissioner was empowered to agree with the owners of any lands authorised to be taken as to the purchase of the land for a consideration in money.[37] The purchase money or compensation to be paid for the land purchased or taken was to be not only the value of the land but also "the damage estimated having regard… to the damage to be sustained by the owner of the lands … otherwise injuriously affecting the other land by the exercise of the powers of the Act".[38]

[72] The Commissioner was authorised to enter into contracts to execute the works and to use and manage the railway.[39] He was empowered to construct embankments and drains as may be necessary.[40]

[73] Those powers were subject to the proviso that the Commissioner was to do as little damage as may be and that if required full satisfaction should be made in the manner provided in the Act to all persons interested in any lands or hereditaments which shall have been taken, used, injured or prejudicially affected for all damages sustained by reason of the exercise of such powers.[41]

[74] The 1864 Act also made express provision for the obligation of the Commissioner in relation towards owners and occupiers of land adjoining the railway. Section 94 is set out above in paragraph [57]. It is convenient to call works carried under s 94, "accommodation works", as they are identified as such in the proviso.

The 1914 Railways Act

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32 Aurizon's appeal outline, paragraph 15.

33 The State of Queensland's appeal outline, paragraph 18; referring to *Essendon Corporation v McSweeney* (1914) 17 CLR 524; [1914] HCA 7.

34 1864 Act, s 1.

35 1864 Act, s 7.

36 1864 Act, ss 11 and 12.

37 1864 Act, s 18.

38 1864 Act, s 46.

39 1864 Act, s 8.

40 1864 Act, s 11.

41 1864 Act, s 11.

[75] The 1864 Act was repealed by the *Railways Act* 1914 (Qld)[42] (**the 1914 Act**).

[76] At that time, the *Acts Shortening Act* 1867 (Qld) provided that where an Act repealed a former Act then, unless the contrary intention appeared, the repeal did not affect the previous operation of the repealed Act or anything duly done or suffered under the repealed Act, or affect any right, privilege, obligation or liability acquired, accrued or incurred under the repealed Act.[43]

[77] Relevantly, a proviso to the repeal of the 1864 Act contained in s 4 of the 1914 Act was that:

> "(i) All State railways, and all lands, structures … and works heretofore constructed, acquired, maintained, worked or used for the purposes of or in connection with any State railway, shall be deemed to have been lawfully constructed, acquired, maintained, worked, and used, and, unless herein otherwise provided, shall be subject to this Act."[44]

[78] The 1914 Act was in force when the timber culverts were replaced by the concrete culverts in 1956.

[79] The Commissioner was authorised to do all acts considered necessary for maintaining, altering and repairing any railway.[45] The specific powers to do those acts included the power to make and construct conduits, drains and other works of whatsoever kind as were considered necessary[46] and as well, from time to time, alter, repair or discontinue any works and substitute others in their stead.[47]

[80] As under the 1864 Act, those powers were subject to the proviso that the Commissioner should do as little damage as may be and that, save as was by that Act or otherwise provided, compensation should be made in the manner thereinafter provided to all persons interested in any land injured or prejudicially affected for all damage by them sustained by reason of the exercise of such powers.[48]

[81] Section 73 provided, in part, for accommodation works, as follows:

> "(1) The following provisions shall apply to works for the accommodation of the owners and occupiers of lands adjoining a railway:-
>
> (2) The Commissioner shall make and at all times thereafter maintain the following works, that is to say,-
>
> (i) Such and so many convenient gates, bridges, arches, culverts, and passages over, under, or by the sides of or leading to or from the railway as are necessary for making good any interruptions caused by the railway to the use of the lands through which the railway is constructed;

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42 *Railways Act* 1914 (Qld), s 4 and 1st sch.
43 *Acts Shortening Act* 1867 (Qld), s 2.
44 1914 Act, s 4, proviso I.
45 1914 Act, s 37(1).
46 1914 Act, s 37(1)(e).
47 1914 Act, s 37(1)(k).
48 1914 Act, s 37(2).

> Such works shall be made forthwith after the part of the railway passing over such lands has been laid out or formed or during the formation thereof;
>
> (ii) Sufficient posts, rails, hedges, ditches, mounds, or other fences for separating the land taken for the use of the railway from the adjoining lands not taken, and protecting such lands from trespass or the stock of the owners or occupiers thereof from straying thereout by reason of the railway, together with all necessary gates made to open towards such adjoining lands and not towards the railway, and all necessary stiles;
>
> Such posts, rails, and other fences shall be made forthwith after the taking of any such lands if the owners thereof so require, and the said other works as soon as conveniently may be;
>
> (iii) Necessary arches, tunnels, culverts, drains, or other passages, either over or under or by the sides of the railway, of such dimensions as will be sufficient at all times to convey the water as clearly from the lands lying near or affected by the railway as before the construction of the railway, or as nearly so as may be;
>
> Such works shall be made from time to time as the railway works proceed.
>
> …"

[82] At that time, the *Acts Interpretation Act* 1954 (Qld) (**AIA**) provided that the repeal of an Act or a provision of an Act did not affect the previous operation of the Act or provision or anything suffered done or begun under the Act or provision or affect a right, privilege, obligation or liability acquired, accrued or incurred under the Act or provision.[49]

The 1991 Railways Act

[83] The *Transport Infrastructure (Railways) Act* 1991 (Qld) (**the 1991 Act**)[50] effected important changes to the legal structure of the ownership and management relating to railways. The previous corporation sole of the Commissioner for Railways was replaced by the body corporate under the name Queensland Railways (**QR**).[51] The body corporate was to be managed by a Board.[52]

[84] The powers of QR were broad,[53] and included power to take the steps and do such acts and things as were necessary or desirable for the purpose of achieving the objects and purposes of the Act or were incidental or ancillary to that purpose.[54] They included powers for purposes connected with the construction, maintenance,

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49 *Acts Interpretation Act* 1954 (Qld), s 20(1)(b) and (c).

50 This act was assented to 5th June 1991. It was reprinted as in force on 27 May 1994 (Reprint No 2) with minor editorial changes including different spelling consistent with current legislative drafting practice and the renumbering of provisions and references. For the sake of consistency with the Reasons below, I will be referring to the numbered provisions of the original Act.

51 1991 Act, s 2.1.

52 1991 Act, s 3.1.

53 1991 Act, s 2.3.

54 1991 Act, s 2.3(m).

alteration, repair or use of a railway, to do acts or things necessary or convenient and reasonable for those purposes and specifically including altering the position of any pipe.[55]

[85] Again, the powers were subject to the proviso that QR was to take all reasonable steps to ensure that in the exercise of the powers as little detriment, inconvenience and damage as is practicable was caused or done.[56]

[86] As well, the 1991 Act also included a specific section applicable to works for the accommodation of the owners and occupiers of land adjoining a railway.[57] In my view, it applied to existing railways as well as those constructed after the commencement of the 1991 Act. By s 6.5(2), QR was to maintain such works, including such works:

> "(c) as will be sufficient at all times to convey the water as clearly from the lands lying near or affected by the railway as before the construction of the railway, or as nearly so as is possible."

[87] Next, s 7.6(1) of the 1991 Act provided that where under s 2.3(1)(j) QR ceased to operate the services on a railway it was not required to maintain the railway.

[88] In 1993, QR ceased to operate services on the railway.[58]

[89] QR's position at that time was regulated by s 2.3(1)(j) of the 1991 Act, which provided that QR had the power to "… reduce or cease any service or operation it provides in the exercise of its powers including the addition of or removal of infrastructure and facilities…". However, that power could not be exercised without the approval of the QR Board, and had to be exercised within limitations set by the Minister: s 2.3(4) of the 1991 Act.

[90] Further, s 7.6 of the 1991 Act applied where the power under s 2.3(1)(j) was exercised by QR. That section relevantly provided:

> "(1) Where under section 2.3(1)(j) Queensland Railways ceases to operate services on a railway, it is not required to maintain that railway and may-
>
> (a) dispose of the railway or any part of it or lift, take up, dismantle and remove it; and
>
> (b) surrender to the Crown or dispose of all or any of the land used in relation to the operation of that railway.
>
> (2) Where Queensland Railways exercises a right under subsection (1), it may make arrangements with the owners and occupiers of lands intersected by that railway releasing Queensland Railways from its obligations, with respect to the maintenance or repair of any bridge or other accommodation works to which section 6.5 applies, made in relation to those lands under this Act.

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55 1991 Act, s 6.2.
56 1991 Act, s 6.4(1).
57 1991 Act, s 6.5.
58 I shall later refer to some further details concerning the timing and process by which that occurred.

> (3) As part of those arrangements Queensland Railways may dispose of, to the owner of any of the intersected or adjoining lands in question, any of the land appurtenant to the railway or the Governor in Council may grant in fee-simple or demise to any such owner any land so appurtenant which has been surrendered by Queensland Railways to the Crown.
>
> …
>
> (5) Where the Governor in Council is satisfied that an owner or occupier of land has refused or failed to make arrangements with Queensland Railways upon just terms, the Governor in Council may release Queensland Railways from the obligations in question upon such terms as the Governor in Council considers appropriate."

[91] For the purposes of s 7.6 the term "railway" means "any part or portion … of any railway … worked under this Act or vested in Queensland Railways … includes all … structures, works … connected therewith or appurtenant thereto a railway …": s 1.3 of the 1991 Act.

[92] In my view, where s 7.6(2) refers to "accommodation works to which section 6.5 applies", that is a different subject matter to the "railway" referred to in s 7.6(1). The accommodation works are works "for the accommodation of the owners and occupiers of land adjoining a railway": s 6.5(1). The definition of railway includes works but only when they are "connected therewith or appurtenant thereto" the railway. Accommodation works might relate to a railway, but are not necessarily "connected with" it, nor appurtenant to it, in the sense of being attached to it. Had the Legislature intended that accommodation works were to be included in the definition of "railway" it would have been an easy thing to say so directly.

[93] Further, that conclusion is fortified by the fact that just because services cease to operate on a railway line does not mean that the impact or interruptions caused by the railway on adjoining lands cease, nor that the drainage issues comprehended by the obligation under s 6.5(2)(c) cease.

[94] Support for the approach above is also derived from the transitional provisions of the *Transport Infrastructure Act* 1994. Section 214(1)-(3) provided that upon commencement of the 1994 Act "existing rail corridor land" became unallocated State land which was leased to the State of Queensland and immediately sub-leased to QR. "Existing rail corridor land" was defined to mean old QR land on or within which "rail transport infrastructure" was situated: schedule 3. "Rail transport infrastructure" was then defined in schedule 3 to mean facilities necessary for operating a railway (such as the track) and included drainage works. Section 214(7) provided that notwithstanding s 214(1), which made the existing rail corridor land unallocated State land, "any structures attached to the land (whether before or after the commencement) are Queensland Rail's property until Queensland Rail disposes of them".

[95] The culverts were structures attached to the land, and therefore remained QR's property. That position sits conformably with the obligation to maintain those works.

[96] The terms of s 7.6(2), (3) and (5) also support that conclusion. Subsections (2) and (5) contemplate that where a railway ceases to operate, the obligations under s 6.5 will only be released upon one of two events. One is that QR has made arrangements with adjoining landowners or occupiers with respect to the maintenance or repair of any accommodation works to which section 6.5 applies. The other is that QR has tried to do so, but the adjoining owners and occupiers have refused or failed to do so on just terms.

[97] The provisions of subsections (2), (3) and (5) are such that QR is, in the situation to which s 7.6 applies, obliged to try to make the arrangements and is only released from the obligations under s 6.5 if it succeeds, or the failure is not QR's fault.

[98] Thus, whilst QR was not "required" to maintain the railway under s 7.6(1), the obligation in respect of accommodation works under s 6.5(2)(c) continued.

[99] The 1991 Act was repealed from 1 July 1995.[59] It was replaced by the *Transport Infrastructure Act* 1994 (Qld) (**the 1994 Act**).

[100] The AIA also applied to the repeal of the 1991 Act.

Transport Infrastructure Act 1994

[101] Section 150 of the 1994 Act, as it was in force on 4 February 2000, also provided as follows:

> "**150 Works for existing railways**
>
> (1) This section applies-
>
> (a) while a railway existing at the commencement (the "existing railway") continues to be operated as a railway; and
>
> (b) to the owners and occupiers of land next to the existing railway (the "neighbouring land").
>
> (2) Queensland Rail must, within a reasonable time, construct and maintain-
>
> (a) works that are necessary to make good any interruptions caused by the existing railway to the use of the neighbouring land; and
>
> (b) works that are necessary to-
>
> (i) separate the existing railway from the neighbouring land; and
>
> (ii) protect the stock straying from the neighbouring land onto the railway; and
>
> (c) sufficient works to ensure the neighbouring land's drainage is as good, or nearly as good, as it was before the existing railway was constructed.
>
> (3) Queensland Rail may satisfy its obligation under subsection (2)(b) by constructing and maintaining a fence of substantially

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59 *Transport Infrastructure Amendment (Rail) Act* 1995 (Qld), s 22.

similar quality to any fence around the neighbouring land when the railway was constructed.

(4) This section does not require Queensland Rail to-

(a) construct or maintain works in a way that would prevent or obstruct the use of the existing railway; or

(b) construct or maintain works for owners or occupiers who agreed to receive, and have paid, compensation in place of the works …"

[102] As can be seen from the terms of s 150(1), s 150 applied to existing railways that continued to be operated as a railway. At the trial, and on appeal, Aurizon relied upon the following facts to contend that s 150 applied:[60]

(a) whilst the railway was mothballed in 1988, and trains ceased in 1993, the question of whether Aurizon would run trains there again was not decided until 2002;

(b) from 1 July 1995 until about 30 June 2003, the State, in conjunction with Queensland Rail, undertook an investigation (required of them by statute) into all railway land in Queensland in order to determine: (i) the boundaries of the existing land; (ii) what land, if any, was not required by Aurizon; and (iii) what land, if any, was of importance to the State;

(c) the period between ceasing to run trains and the land ceasing to be "rail corridor land" under the 1994 Act was extended to permit those discussions;

(d) at the time of Baker's correspondence on 8 February 2000, Aurizon was still in the process of negotiating the ownership and future maintenance responsibilities of the whole of the Brisbane Valley Railway, including the Railway Land, with the State;

(e) on 14 June 2002 the Railway Land was Gazetted as "Non-Rail Corridor Land" under the 1994 Act; and

(f) until 2003 there were railway tracks there; they are "railway transport infrastructure" under the 1994 Act.

[103] There is no definition of "operate" in the 1994 Act. Normally it would connote doing something to conduct the business of a railway. The use of the phrase "continues to be operated" indicates that the section requires that state of operation of the railway before the commencement of the statute is continued afterwards. The use of the phrase "as a railway" qualifies the phrase "continues to be operated" and, in my view, points to the construction that the continued operation is one which involves trains running. Further support for that is gained from the definition of a "railway operator", which means "a person who operates rolling stock on a railway": Schedule 3 of the 1994 Act. Had the legislature intended that s 150 would apply regardless of trains or rolling stock being used on the rail lines, then s 150(1)(a) would have had no need for the words "continues to be operated as a railway".

[104] Just because trains are not running temporarily does not mean that there is no longer an operating railway. But where, as here, the railway had been mothballed and

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60 Trial outline paragraphs 38-40, AB 750-751; appeal outline paragraph 22; appeal transcript T1-10.

trains had ceased to run, it cannot be said that the railway was being operated as a railway. All that Aurizon did was to acknowledge the chance that one day trains might recommence; in other words, that one day the railway may again be operated as a railway.

[105] On that basis, as the learned trial judge correctly held,[61] s 150 was inapplicable. The consequence is that whatever statutory obligations Aurizon had in respect of maintenance ceased as at the commencement of the 1994 Act, 1 July 1995.

Statutory rights and immunities

[106] In *Australand Corporation (Qld) Pty Ltd v Johnson*,[62] Keane JA said:

> "The point of departure for any discussion of the effect of the repeal of a statute upon legal rights and duties is that explained by Dixon CJ in *Maxwell v. Murphy* where his Honour said:
>
> > 'In the first place it must be borne in mind that at common law the repeal of a statute or statutory provision means that the law must be applied as if the provision had never existed. This is subject to an exception, variously expressed, as to past matters. Lord Tenterden CJ used the expression 'transactions past and closed': *Surtees v Ellison*. Lord Campbell CJ said: '... all matters that have taken place under it before its repeal are valid and cannot be called in question': *Reg. v Inhabitants of Denton*. The phrase of Blackburn J was 'transactions already completed under it' – *Butcher v. Henderson*.
> >
> > The general rule of the common law is that a statute changing the law ought not, unless the intention appears with reasonable certainty, to be understood as applying to facts or events that have already occurred in such a way as to confer or impose or otherwise affect rights or liabilities which the law had defined by reference to the past events.'"[63]

[107] The preserving effect of the common law was subject to the interpretation provisions under the *Acts Shortening Act* and the AIA previously mentioned. The relevant provisions preserved an accrued or acquired right or privilege on repeal. "Right" and "privilege" are used in a sense that is informed by the common law doctrine referred to in the extracted passage from *Maxwell v Murphy*[64]. A protection from suit for liability for private nuisance might be described as an immunity. In *Mathieson v Burton*,[65] Windeyer J made the point that an immunity or defence to a claim may be a right or privilege within the meaning of a provision such as s 2 of the *Acts Shortening Act* 1867 (Qld) or s 20 of the AIA.[66]

[108] The question in the present case is whether the Commissioner had any such right or privilege at the times of the relevant repeals.

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61 Reasons below at [59].
62 [2008] 1 Qd R 203; [2007] QCA 302.
63 (2008) 1 Qd R 203, 242 [109]; citations omitted.
64 (1957) 96 CLR 261 at 266-267; [1957] HCA 7.
65 (1971) 124 CLR 1; [1971] HCA 4.
66 (1970) 124 CLR 1, 12; compare *Yorkshire Dyeware and Chemical Co Ltd v Melbourne and Board of Works* [1968] VR 277, 282; (1967) 17 LGRA 36.

[109] Speaking of s 20 of the AIA, the plurality of the High Court in *Chang v Laidley Shire Council*[67] said:

> "Terms like 'right', 'interest', 'title', 'power' or 'privilege' when used in the context of a general interpretation provision like s 20 are to be understood by reference to the statute that has been amended or repealed. They are terms that are not used 'solely in any technical sense derived exclusively from property law or analytical jurisprudence'. But on no view of the 1997 Act, as it stood before the amendments made by IPOLA 2004, could it be said that the appellants enjoyed a 'right' to compensation under s 5.4.2. The statutory right to compensation for which that section provided depended on a particular form of development application having been made and its having been dealt with in a particular way. The appellants had made no development application before IPOLA 2004 came into force and the relevant draft regulatory provisions precluding their proposed development came into force. It follows that no development application (superseded planning scheme) had been dealt with in the manner prescribed by s 5.4.2 as a condition for the allowance of compensation."[68]

[110] The 1864 Act is relevant to whether the culverts were constructed lawfully. The Commissioner owned the land at that time. The construction of the culverts was authorised by the 1864 Act. No damage was then caused by water discharging in a concentrated flow from the culverts.

[111] Had the Commissioner been sued for nuisance for damage caused during the period of operation of the 1864 Act, by the discharge of water flowing out of the culverts in a concentrated way which had been diverted from the path of flow it would have taken absent the railway embankment, the provisions of the 1864 Act would or may have been directly relevant to any liability of the Commissioner in private nuisance.

[112] In *Sifam Electrical Instrument Co Ltd v Sangamo Weston Ltd*,[69] Graham J said:

> "…the giving of a defence by a statute in particular circumstances, the effect of which is that the plaintiff cannot exert his rights in those circumstances, does not mean in the absence of express words that those rights are forever destroyed and cannot ever be revived by an amending statute."[70]

[113] That reasoning was applied in *Vikpro Pty Ltd v Wyuna Court Pty Ltd*.[71] However, it is all a matter of construction of the particular statute under consideration.

[114] In my view, on repeal of the 1864 Act, no greater significance attached to the provisions of that Act than that the culvert was lawfully constructed and used under its provisions, as was expressly provided by s 4(i) of the 1914 Act. No relevant right or privilege, in the form of a statutory immunity, was preserved into the future. Instead, the culverts became subject to the 1914 Act as was also provided in s 4(i).

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67 (2007) 234 CLR 1; [2007] HCA 37.
68 (2007) 234 CLR 1 at 34-35 [117]; [2007] HCA 37; citations omitted.
69 [1971] 2 All ER 1074; [1971] FSR 337.
70 [1971] 2 All ER 1074 at 1079.
71 [2016] QCA 225, [24]-[27].

[115] The 1914 Act is relevant to whether the culverts were replaced lawfully. At the time, the Commissioner still owned the land. The repair of the culverts was authorised by the 1914 Act. No damage was then caused by the discharge of water in a concentrated flow from the culverts. However, on repeal of the 1914 Act, no greater significance attached to the provisions of that Act than that the culverts were lawfully reconstructed and used under its provisions. No relevant right or privilege, in the form of a statutory immunity, was preserved into the future.

[116] Specifically, Aurizon and the State of Queensland rely on s 94 of the 1864 Act and s 73 of the 1914 Act as having an effect upon their liability. I do not consider that compliance with either of those sections affects the answers to the present question, for two reasons. First, those sections create duties; they do not confer immunities or privileges, so there is nothing under them that was preserved on repeal under the *Acts Shortening Act* or the AIA.

[117] Secondly, in any event, the Commissioner's obligation under those sections was to maintain works "as will be sufficient … to convey the water from such lands as clearly from the lands lying near or affected by the railway as before the construction of the railway or as nearly so as may be". That is a drainage obligation from land that might be inundated.[72] It is not a statutory protection against damage caused to lower land by drainage that must be provided or is provided.

[118] The 1991 Act is not particularly relevant. QR owned the land when it came into effect. From 1993, there was no operating railway to maintain, but it was required to maintain the accommodation works. However, no damage was then caused by the discharge of water in a concentrated flow from the culverts. On repeal of the 1991 Act, no greater significance attached to the provisions of that Act than the culverts were lawfully used under its provisions. No relevant right or privilege was preserved into the future.

Ground 3 – causation

[119] This ground concerned findings by the learned primary judge that one cause of the damage to Baker's land was the effect of the culverts in concentrating the flow of water.

Aurizon's submissions

[120] Mr Horton QC submitted that the learned primary judge did not address the question of causation properly, and in particular did not apply the "but for" test required by the second limb of *March v Stramare (E & MH) Pty Ltd*.[73] The question as to causation is: was construction of the culverts "so connected [with the erosion] that, as a matter of ordinary common sense and experience, it should be regarded as a cause of it".[74] That was affected by the statutory immunity conferred under the various Acts since the railway was first constructed.

[121] The relevant question to be asked in respect of causation was: would the damage have been caused without the culverts and embankment; that is, would the land clearing have done the damage anyway. That analysis was not done by her Honour.

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72 *Nalder v Commissioner for Railways* [1983] 1 Qd R 620.

73 *March v Stramare (E & MH) Pty Ltd* (1991) 171 CLR 506; [1991] HCA 12.

74 *March v Stramare (E & MH) Pty Ltd* (1991) 171 CLR 506 at 522 per Deane J. See also per Mason CJ at 515; Toohey and Gaudron JJ concurring.

[122] The approach below was to look at how lawful acts and omissions might, by natural and other causes, become actionable: Reasons [40]. That was to absolve Baker of the need to prove an actionable nuisance absent the statutory protection given to Queensland Rail when the culverts were constructed. The error was compounded because the cases upon which her Honour placed reliance were no support at all for the conclusion that Aurizon ought to have "addressed" the lawful acts of an unrelated third party. The law does not impose such liability in circumstances in which the proponent of the works undertook them in compliance with the specific command, namely to convey the water as clearly from the adjoining lands as may be.

[123] It was submitted that the learned primary judge was wrong to place reliance on *Rudd v Hornsby Shire Council*,[75] which was distinguishable. Further, *Sedleigh-Denfield v O'Callaghan*[76] was inapplicable.

[124] No authority was cited by the learned primary judge or Baker for the imposition of a duty on a statutory authority to take positive steps in circumstances such as this. In accordance with *Gartner v Kidman*[77] and *Allen v Gulf Oil Refining Ltd*,[78] the culverts served the purpose of the railway, then the walking trail, as directed by statute, and Aurizon was immune from suit.

[125] The statutory arrangements did not cease until well after the harm complained of by Baker had commenced. Closure of the Brisbane Valley Railway line in 1993 pursuant to s 2.3(1)(j) of the *Transport Infrastructure (Railways) Act* 1991 relieved Aurizon's predecessor of any duty to maintain the railway. It was not, however, relieved of its duty with respect to accommodation works. The Railway Land remained "rail corridor land" and contained "rail infrastructure" within the meaning of schedule 3 of the *Transport Infrastructure Act* 1994 and was thereby continuing to be operated as a railway until the declaration of the land as non-rail corridor land in June 2002. Aurizon remained obliged to provide accommodation works pursuant to s 150 of the *Transport Infrastructure Act* 1994 until June 2002, and did so.

State of Queensland's submissions

[126] The State adopted Aurizon's submissions.

Baker's submissions

[127] Mr Gibson QC submitted that to the extent that Aurizon contended that there had been a failure to establish that the harm was caused by the culverts, the learned primary judge's findings were based upon the evidence of the experts, particularly that of Dr Johnson and Mr Holland. Those findings were open as the unchallenged evidence established that the effect of the culverts was to concentrate the flows and that this increased the erosion of Baker's land.

[128] It was sufficient to establish that the alleged wrong was a cause of the harm without establishing that it was the only cause.[79] Neither Aurizon nor the State of Queensland was entitled to any express statutory protection. Indeed the statutes imposed obligations on Aurizon to avoid the nuisance. Each of Aurizon and the State (as landowners) had to take steps to remove one of the causes of the erosion, namely

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75 (1975) 31 LGRA 120.
76 [1940] AC 880.
77 (1962) 108 CLR 12 at 44, 48-49; [1962] HCA 27.
78 [1981] AC 1001; [1980] UKHL 9.
79 *Nalder v Commissioner for Railways* [1983] 1 Qd R 620.

the concentration of flows caused by the culverts focusing the run off onto Baker's land at the point of their discharge. Baker accepts that the increase in the upstream flows was the other cause and that that increase was not attributable to Aurizon or the State. But their concentration occurred only on and by reason of the use of the railway land.

[129] The common law imposes an obligation on a landowner (including statutory bodies) to take action to address the consequences of the use of its land where that is a cause of the harm to the neighbour, even if the lawful actions of others is also a cause. Aurizon's submission assumes away the concentration of flows as a causative element despite that finding by the trial judge. Further, the learned primary judge's findings were that the harm commenced before the lawful acts of others (i.e. the land clearing): Reasons [65]-[67] and [74].

Discussion

[130] To the extent that the contentions for Aurizon and the State of Queensland depended upon the issue of statutory immunity, or the question of reasonableness and inevitability arising out of the performance of statutory duties, those issues have been dealt with above.

[131] Two possible causes of the erosion were identified. One was that the flow of water had been concentrated by the installation of the culverts. The second was that the water flow rate had been increased by altered conditions in the nearby catchment.

[132] There was no real dispute about whether the embankment and culverts increased the water flow. As early as 30 June 2000 Queensland Rail said:[80]

> "The existence of the railway formation and provision of the drains has obviously increased the velocity of water flowing from east to west across the railway corridor at this point."

[133] The learned primary judge's findings on causation, adopting the approach in *March v Stramare*,[81] were expressed during an analysis of the expert evidence. The following paragraphs of the Reasons below are sufficient to reveal the position:

> "[65] In the joint statement of experts, Dr Johnson and Mr Holland set out their agreement that "the observed erosion has two fundamental causes, namely the concentration of flow resulting from the installation of the culverts, and the clearing of the local catchment which has led to increased rate and volume of runoff". On the basis of the written statement of Mr Baker, as well as historical aerial photographs, Dr Johnson and Mr Holland also agreed that "the significant erosion observed on site commenced predominantly sometime after clearing of the land took place in the late 1980s".
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> [66] Dr Johnson relied on Mr Baker's evidence that when he first visited the site, the erosion was significantly less than it currently is to conclude (Transcript 2–55) that "there are two potential causes of the erosion, but for at least 100 years after the railway line was constructed, … the concentration of flow

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80 AB 578.

81 *March v Stramare (E & MH) Pty Ltd* (1991) 171 CLR 506.

> … as an effect of the railway line did not appear to have exacerbated the erosion dramatically". Dr Johnson also considered (Transcript 2–58) that the clearing of the plaintiff's land on the north-western side of the railway would have changed the run off characteristics from that part of the site as well, but accepted (Transcript 2–76) that the largest catchment was from the upstream area.
>
> [67] Mr Holland noted (Transcript 2–57) that "without the railway embankment concentrating the flows, the degree of erosion wouldn't have been as high" and "with the clearing of the upper catchment, that the catchment size directing flows to those two culverts has increased, so that two working in concert … have increased the erosion".
>
> …
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> [74] On the basis of the opinions expressed by both Dr Johnson and Mr Holland and the aerial photographs, it is more likely than not that the erosion commenced prior to the clearing of the upstream land, but was exacerbated dramatically by increased surface flow of water from the clearing of that upstream land that was concentrated through the culverts. Those experts also support the conclusion that the clearing of the plaintiff's land and the crossing across the gully made by Mr Baker were minimal contributors to the erosion in the gully."

[134] In my view, there can be no reasonable contention that those findings were not open, indeed compelled, on the evidence. The expert evidence was that the embankment upon which the railway ran intercepted and concentrated the flow of water:

> "The railway embankment has intercepted and concentrated overland flow to a defined discharge point at the culverts. By intercepting the overland flow from the entire catchment upstream of the site and directing it through the culverts and into the head of the gully, the embankment effectively concentrates increased flow into the gully, causing increased erosion."[82]

[135] One of the contributing causes to that was the clearance of land in the catchment upstream of the culverts:[83]

> "Removal of the vegetation in the upstream catchment leads to increased runoff volume, increased flow velocities and destabilisation of the underlying soil material. In the case of this site, extensive land clearing in the catchment upstream of and adjacent to the gully has contributed to accelerated erosion within the gully in our view."

[136] In *March v Stramare* the High Court held that causation, that is, whether the event was the effective cause of the damage, was to be decided as a matter of logic, common sense and experience, not by the application of the "but for" test. That said the "but for" test was useful, applied as a negative criterion, of causation. In

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82 Report of Mr Holland, pages 54-55, with which Mr Johnson agreed: AB 142 lines 3-18.

83 Report of Mr Holland, page 54, with which Mr Johnson agreed: AB 141 lines 43-48.

other words, if it was asked and the answer was that the damage would have occurred in any event.[84]

[137] In my view, the challenge to the learned primary judge's conclusion on causation should be rejected. There were two contributing factors to the erosion on Baker's land. One was the concentrating effect of the culverts, in respect of water captured by the railway embankment; the other was the increased flow of surface water caused by land clearing.[85] An important finding was that in the Reasons below at [74], namely that the erosion "more likely than not … commenced prior to the clearing of the upstream land". On that basis the first cause was the fact that the railway embankment and the culverts concentrated the water onto Baker's land. The land clearing started in about 1988, and progressively increased through to 2009. No doubt that was why the effects became greater as time went on.

[138] Her Honour assessed causation by reference to common sense or logic, albeit expressed in terms of the best evidence she had, the joint expert reports which identified the embankment and culverts as one cause, and the land clearing as the other. One wonders what else her Honour could have done. I do not accept that her Honour's approach was other than orthodox in that regard. So much is evident, in my respectful view from paragraph [75] of the Reasons where her Honour said:

> "[75] Much was made by the defendants in submissions and in cross-examination of witnesses that for 115 of the years after the construction of the culverts, there were no complaints. That does not answer the question, however, as to whether the culverts were a cause of the erosion in the gully. The fact that two causes of the erosion were identified by the experts does not mean the role of the culverts in concentrating the flows that then caused the erosion can be ignored."

[139] To the extent that the learned primary judge had resort to the "but for" test on the issue of causation, this was done by reference to the evidence of Mr Brennan, whose report[86] hydrologically modelled the pre-railway situation and post-railway situation. The effect was, as her Honour found:[87]

> "[78] The details of the modelled peak velocities are set out in the attachments to Mr Brennan's report. A comparison of scenarios 1 and 2 demonstrated reduction in velocities in the eroded gully as it widened over time compared to the assumed natural state. Mr Brennan noted that, in comparing scenarios 2 and 3 for both the one year average interval storm and the 10 year storm, modelling demonstrated a significant increase in velocities caused by concentration of water by the rail formation to the culverts causing increased flows to the gully."

[140] What was reported, and found, was that one could not say that the damage would have occurred in any event.

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84 *March v Stramare*, per Mason CJ at 515-516, Deane J at 522-523, Gaudron and Toohey JJ concurring.

85 One can put to one side the faint suggestions that Baker's own clearing and use of the gully were contributors. They may have been but were minimal by comparison: Reasons below [74].

86 Exhibit 19, AB 615.

87 Reasons below [78]; scenario 3 was the pre-railway scenario.

[141] This ground lacks merit.

Ground 4 – disproving negligence in the exercise of statutory powers

[142] This ground concerned the contention that the learned primary judge erred in finding that Aurizon and the State of Queensland had not discharged the onus of disproving "negligence"[88] in the construction and maintenance of the culverts. More generally characterised, this ground concerned the liability of each in respect of the alleged nuisance.

State of Queensland's submissions

[143] Mr Sullivan QC (appearing with Mr Favell of counsel) submitted that the learned primary judge was in error to characterise separate and cumulative elements for the tort of nuisance as being:

(i) inevitable consequence;

(ii) absence of negligence.

The two concepts are not separate and cumulative but are one single concept.[89] It was submitted that High Court authority established the relevant concept by reference to the statutory body acting without negligence on its part.[90]

[144] In this respect the concept of negligence is used in a special sense, and is founded on the failure to take all reasonable regard for the interest of other persons.[91] It was contended that the question of negligence is to be determined at the time of the construction of the relevant structure, and not according to the present time.[92]

[145] In respect of the culverts it was submitted that they were constructed under the authority of s 94 of the 1864 Act and, as the learned primary judge found, they were built along the line of an existing channel traversing Baker's land that connected to Sandy Creek. It was contended that the learned primary judge erred in paragraph [82] of the reasons below when holding:

> "There can be no challenge to the first defendant's assertion that its actions in the placement and maintenance of the culverts were reasonably necessary for the use of the rail corridor as a railway line at least until the land to the east of the rail corridor was cleared and developed."

[146] It was submitted that the emphasis in the words "at least until the land to the east of the rail corridor was cleared and developed" was indicative of error because the point in time to ask whether there had been negligence in the design and construction was when they were constructed in 1885, not by reference to subsequent facts.

[147] It was submitted that several factors pointed to the conclusion that there had been no negligence in the construction. First, there had been no complaint for 115 years. Secondly, in the joint expert reports the experts agreed that the significant erosion

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88 That word being used in a special sense.

89 Reliance was placed on *Melaleuca Estate Pty Ltd v Port Stephens Council* (2006) 143 LGERA 319 at 333 [49]; [2006] NSWCA 31.

90 *Essendon Corporation v McSweeney* (1914) 17 CLR 524; [1914] HCA 7.

91 Referring to *Allen v Gulf Oil Refining Ltd* [1981] AC 1001 at [1111], and *Melaleuca Estate* at [47] and [57].

92 Referring to *Essendon Corporation v McSweeney*.

observed on Baker's land "commenced predominantly some time after clearing the land took place in the late 1980's". Thirdly, the learned primary judge found that the placement and maintenance of the culverts were reasonably necessary for use of the rail corridor as a railway line. Fourthly, there was evidence that when building railways, the proper practice was to put culverts along the natural drainage line or natural low point where water flow occurred.[93]

[148] It was submitted that the State of Queensland, as a subsequent landholder, inherited the land with the culverts as an existing physical feature. There was no nuisance that could arise from water flowing through the culverts as a result of subsequent events for which the State of Queensland had no control, and which happened over a hundred years after the original construction.

Aurizon's submissions

[149] To a large extent Aurizon adopted the submissions of the State of Queensland on this issue. Some additional points were made.

[150] Aurizon submitted that "inevitability" means that, despite acting with reasonable regard and care for the interests of other persons, the nuisance was inevitable. Reasonableness and inevitability are not what is "theoretically possible but what is possible according to the state of scientific knowledge at the time", requiring a "common sense appreciation … of practical feasibility in view of situation and expense".[94]

[151] It was submitted that the correct way to approach the two questions is by bearing in mind that "absence of negligence in this sense is a reflection of inevitability".[95]

Baker's submissions

[152] For Baker it was submitted that the Acts applicable at the time of the construction of the culverts, and since, imposed a continuing obligation to construct and maintain the works "as will be sufficient at all times to convey the water as clearly from the lands … as before the construction of the railway, or as nearly so as is possible". That obligation continued over time, and at all times. The obligation did not call for an answer applicable by matters as they stood in 1884 when considering what the inevitable consequences of the construction were, and in particular as to the conveying of water under or around the railway.

[153] It was submitted that s 150(2) of the 1994 Act imposed an obligation to construct and maintain "sufficient works to ensure the neighbouring lands drainage is as good, or nearly as good, as it was before the existing railway was constructed". Even though the railway had been closed in 1993, and the track removed, that obligation remained. Further, it was submitted that Parliament imposed that obligation in the 1994 Act at a time after the upstream clearing of the land had taken place.

[154] It was submitted that Baker did not dispute that the culverts were not negligently constructed, but that did not mean that the erosion of Baker's land was an inevitable consequence of the conduct of the statutory works. In any event, it did not answer the need to undertake further works pursuant to s 46 of the 1991 Act, or any analogue since that time. It was submitted that the Commissioner had authority under each of the Acts to carry out the necessary works, and in particular under the

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93 Referring to the evidence of Mr Tannock and Dr Johnson.

94 Referring to *Manchester Corporation v Farnworth* [1930] AC 171 at 183; [1929] All ER Rep 90.

95 Referring to *Melaleuca Estate* at [49].

1991 Act to do so, provided the water was conveyed "as clearly from the lands … as before the construction of the railway, or as nearly so as is possible". It was not established by any evidence that this could not be done. In fact, as it was said, the expert evidence was that the discharge of the water captured or concentrated by the rail embankment could have been disposed of without harm to Baker's land.[96]

[155] It was submitted that while s 94 of the 1864 Act authorised the installation of rail infrastructure including the culverts, that was so only if the culverts were necessary to make good any interruptions caused by the railway to the use of neighbouring land, and if the culverts were sufficient to ensure the neighbouring land's drainage was as good, or nearly as good as it was before the railway was constructed. In light of the expert evidence it could not be said that there was an inevitability that the discharge of the Commissioner's statutory obligations would cause a nuisance to Baker's land.

Discussion

[156] There are a number of facts, as found by the learned primary judge, which are relevant to the discussion of this issue. They are:

(a) in about 1884 the Commissioner purchased land for the railway from Mr Abbott;[97]

(b) the railway line was surveyed, designed and constructed on an embankment in about 1885; two timber box culverts were installed to convey the flow of surface water upstream of the embankment under the railway line, in line with what is now identified by the eroded gully on Baker's land;[98]

(c) the culverts were placed where there was a gully or pre-existing drainage line, which collected and discharged surface run-off across the railway land to Sandy Creek;[99]

(d) the culverts were installed pursuant to ss 11 and 94 of the 1864 Act; s 94 obliged the Commissioner to install and maintain all necessary drainage, including culverts, to "convey the water as clearly from the lands lying near or affected by the Railway as before the making of the Railway or as nearly so as may be …";[100]

(e) the culverts were replaced by concrete box culverts in about 1956, pursuant to ss 37 and 73 of the 1914 Act; s 73(2)(iii) of that Act obliged the Commissioner to convey water "as clearly from the lands lying near or affected by the railway as before the construction of the railway, or as nearly so as may be";[101]

(f) the placement and maintenance of the culverts were reasonably necessary for the use of the rail corridor as a railway line;[102]

(g) the soils on the relevant areas of Baker's land were highly to moderately dispersive and susceptible to sheet and gully erosion;[103]

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96 Reference was made to the evidence of Mr Holland at AB 159, Dr Johnson at AB 159, and Mr Brennan at AB 218-219.

97 Reasons below, [2].

98 Reasons below, [2].

99 Reasons below, [57]-[60].

100 Reasons below, [3] and [21].

101 Reasons below, [3], [26]-[27].

102 Reasons below, [82].

103 Reasons below, [62]-[63].

(h) Baker purchased the land in 1995, at which time one was able to traverse the land around the gully by vehicle;[104]

(i) there was no incident or complaint for approximately 115 years following the construction of the culverts;[105]

(j) the changes in circumstances between 1885 and 1999 included Baker's clearing of its land around the gully,[106] and the upstream clearing of land by non-parties;[107]

(k) the clearing of the land upstream of the culverts dramatically exacerbated the erosion because of increased surface flow of water being concentrated through the culverts;[108]

(l) the evidence of the experts was that the significant erosion on Baker's land commenced predominantly sometime after clearing of the land took place in the late 1980's;[109]

(m) the effect of the construction of the railway embankment and culverts was to concentrate the water to the culverts, causing increased flows into the gully and then on to Baker's land.[110]

[157] On the hearing before this court Baker did not dispute that the culverts were not negligently constructed.[111]

[158] In *Bankstown City Council v Alamdo Holdings Pty Ltd*[112] the plurality of the High Court referred with approval to a line of authority in the English Court of Appeal decision in *Marcic v Thames Water Utilities Ltd*[113], in the course of holding that a body such as the city council is not, without negligence on its part, liable for a nuisance attributable to the exercise of, or failure to exercise, its statutory powers.[114]

[159] The line of authority in *Marcic*[115] drew, in turn, from the decision in *Department of Transport v Northwest Water Authority*[116] in establishing a number of propositions. The propositions included:

(a) in the absence of negligence, a body is not liable for a nuisance which is attributable to the exercise by it of a duty imposed upon it by statute;

(b) in the absence of negligence, a body is not liable for a nuisance which is attributable to the exercise by it of a power conferred by a statute if, by statute, it is not expressly either made liable, or not exempted from liability, for nuisance;

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104 Reasons below, [7]-[8].
105 Reasons below, [75].
106 Reasons below, [1].
107 Reasons below, [10], [74].
108 Reasons below, [74].
109 Reasons below, [65].
110 Reasons below, [78].
111 Respondent's Outline on Appeal, paras 20(1)(i) and 26.
112 (2005) 223 CLR 660; [2005] HCA 46.
113 [2002] QB 929; [2002] 2 WLR 932; [2002] EWCA Civ 64.
114 *Bankstown City Council v Alamdo Holdings Pty Ltd* (2005) 223 CLR 660; [2005] HCA 46 at [16].
115 *Marcic v Thames Water Utilities Ltd* [2002] QB 929 at 988.
116 [1984] 1 AC 336 at 344.

(c) a body is liable for a nuisance by it attributable to the exercise of a power conferred by statute, even without negligence, if by statute it is expressly either made liable, or not exempted from liability, for nuisance; and

(d) the reference to "negligence" was to that word being used in a special sense "so as to require the undertaker, as a condition of obtaining immunity from action, to carry out the work and conduct the operation with all reasonable regard, and care for the interests of other persons".

[160] The explanation of "negligence" being used in the special sense above was derived from the decision in *Allen v Gulf Oil Refining Ltd*[117] where Lord Wilberforce[118] observed that the statutory power (exercised in that case to construct an oil refinery) conferred immunity against proceedings for any nuisance which could be shown by the constructor of the refinery to be the inevitable result of erecting a refinery, "however carefully and with however great regard for the interest of adjoining owners it is sited, constructed and operated".[119]

[161] The decision in *Allen v Gulf Oil* was referred to with approval by the New South Wales Court of Appeal in *Melaleuca Estate Pty Ltd v Port Stephens Council*, where Giles JA[120] said:

> "Absence of negligence in this sense is a reflection of inevitability. If exercise of the statutory power means that the interests of other persons are harmed despite all reasonable regard and care for those interests, there is no right of action. In *Benning v Wong* (1969) 22 CLR 249 Owen J said at 325, after citing from *Fullarton v North Melbourne Electric Tramway & Lighting Co Ltd* (1916) 21 CLR 181-
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> > 'I do not think it has ever been doubted, at least since *Metropolitan Asylum District v Hill*, that where a body purporting to act under statutory authority is sued for committing what is prima facie a nuisance, it is for it to show that its statutory authority could not be carried out without creating that nuisance and the judgments of the Chief Justice and of Barton J in *Fullarton's* Case seem to me to do no more than follow that line of authority.'"[121]

[162] The State of Queensland criticised the learned primary judge in relation to what her Honour said in paragraph [36] of the Reasons below:

> "[36] The elements of the tort of nuisance are:
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> a. a substantial or an unreasonable interference with the use of or enjoyment of the plaintiff's land;
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> b. interference caused by the unreasonable use of the defendant's land;

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117 [1981] AC 1001.
118 With whom Lord Dipplock agreed.
119 *Allen v Gulf Oil Refining Ltd* [1981] AC 1001 at 1004.
120 With whom McColl JA and Hunt AJA agreed.
121 *Melaleuca Estate Pty Ltd v Port Stephens Council* (2006) 143 LGERA 319 at [49].

c. where the act alleged to have caused the nuisance was authorised by statute, a statutory body will only be liable if:

i. the nuisance was not an inevitable consequence of the authorised undertaking; and

ii. the exercise of (or failure to exercise) the statutory powers was negligent."

[163] The criticism was that if the learned primary judge was articulating separate and cumulative elements of inevitable consequence and absence of negligence, that was in error as the concepts were not separate and cumulative but really "semantic articulations of the single concept".[122]

[164] I do not consider that the criticism is well placed, nor is it determinative, even if right. In my view, the learned primary judge did not intend to articulate any proposition different from that which was expressed in *Melaleuca Estate*. Nor, for that matter, am I of the view that Giles JA was extending the proposition articulated in *Allen v Gulf Oil*, in the passage cited above. All that Giles JA was doing was to state the obvious, that if the work in question was carried out with all reasonable regard and care for the interests of other persons, and in strict conformity with private rights, then absence of negligence was a reflection of inevitability of the result.

The case against Aurizon

[165] The case against Aurizon was based on it being aware from 2000 that erosion was occurring and failing from then to abate the nuisance. Any statutory duty to maintain had ceased in July 1995 so that consideration of its liability rests on common law principles.

[166] The evidence as to when the State of Queensland and Aurizon were alerted to the problem of the erosion caused by the culverts was as follows.

[167] On 8 February 2000 Baker wrote to the Commissioner, setting out that the water was concentrated through the culverts, which caused "massive erosion".[123] Aurizon (then Queensland Rail) was invited to inspect, then rectify and repair the damage. A follow-up letter was sent on 1 March.[124]

[168] A site inspection by Aurizon took place on 3 April 2000, and Baker was told on 19 May 2000 that the data from that inspection was to be compared with other data.[125] As well he was told that the issue of "ownership and associate future maintenance responsibilities of the Brisbane Valley decommissioned rail corridor" were then under way with the State of Queensland.

[169] A second site inspection was carried out on 21 June 2000 for the purpose of examining the erosion. Queensland Rail advised their position on 30 June 2000, namely:[126]

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122 State of Queensland's appeal outline, para 6.
123 AB 571.
124 AB 574.
125 AB 575.
126 AB 578-579.

(a) the existence of the railway formation and the provision of the drains "has obviously increased the velocity of the water flowing from east to west across the railway corridor";

(b) however, the erosion was not present at the outlets of the culverts, and therefore did not start on Queensland Rail property;

(c) the gully within Baker's property was a natural feature distributing runoff from the catchment area to Sandy Creek;

(d) the drainage conditions had existed for many years;

(e) there was very little scope for Queensland Rail to improve these conditions;

(f) the gully was eroding back to a sandstone base from Sandy Creek to the Queensland Rail corridor and;

(g) there were other examples of similar erosion occurring in the area, in similar type gullies away from the railway corridor.

[170] Notwithstanding further correspondence from Baker, Aurizon adhered to their position, as advised on 30 June, that "QR had no liability to undertake any works on your property".[127] Resisting further correspondence from Baker, Queensland Rail advised on 7 March 2002 that "to date no claim has been established and … QR does not acknowledge any liability".[128]

[171] Then, on 29 May 2002, Queensland Rail advised that it denied liability in the absence of evidence that it caused the erosion.[129]

[172] The issue is whether Aurizon's response was actionable as an unreasonable failure to abate the nuisance. In that respect I have had the benefit of reading the draft reasons of McMurdo JA, with which I respectfully agree. Aurizon's appeal succeeds.

The case against the State of Queensland

[173] As for the State of Queensland, I respectfully agree that, for the reasons given by McMurdo JA, its appeal fails.

Ground 6 – failure to mitigate

[174] This ground was not pressed in oral argument but Mr Horton QC relied upon Aurizon's written outline.

Aurizon's submissions (adopted by the State of Queensland)

[175] The submission was that Baker was under a duty to mitigate its loss.[130] The learned trial judge found (correctly) that Baker did nothing to mitigate its loss but then erred in finding that Aurizon failed to discharge its onus because: (i) "it was difficult for [Baker] to do anything unilaterally", and (ii) Aurizon's predecessor provided "no suggestion" as to how Baker should deal with the erosion.

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127 AB 585.
128 AB 590.
129 AB 599.
130 *Proprietors of Strata Plan No 14198 v Cowell* (1989) 24 NSWLR 478 at 486.

[176] Aurizon and the State of Queensland were under no legal obligation to advise Baker how to mitigate its loss in order to discharge its onus. Such a proposition is contrary to well-established principles of mitigation and no authority was cited in support of such an obligation. Such a finding was against the weight of the evidence. There is much that Baker could have done. The decision to do nothing disentitles it to damages.

Baker's submissions

[177] Mr Gibson submitted that the learned primary judge found that Aurizon and the State of Queensland had failed to establish a failure to mitigate the loss, but that was not based on a view that Aurizon and the State had an obligation to advise Baker how to mitigate his loss. Rather the trial judge identified a number of factors at Reasons [102]-[103] including some put to Baker, and his response to them.

[178] The fact (as her Honour observed) that no suggestions were made by Aurizon to Baker after the correspondence started in 2000 was relevant. Had Aurizon made suggestions which it was able to prove would have been easily taken up to avoid the loss then that might call for some further explanation from the respondent as to why he did not take them.

[179] The damage to Baker's land comes from the water passing through the culverts, and travelling (and eroding) some distance before it reaches Baker's land (and erodes it). The experts seemingly agreed that the appropriate course was to remediate Baker's land after addressing the cause (on the railway land). Baker had no right to do anything on the railway land.

Discussion

[180] The learned trial judge's conclusion in respect to the failure to mitigate took into account some competing issues. The start point was an acceptance that there was a duty to mitigate, the onus of which fell on Aurizon and State of Queensland.[131] The second accepted point was based on the concession by Baker that nothing was done to mitigate the loss apart from making demands on Queensland Rail to remove the culverts and repair the damage.

[181] The learned primary judge recognised the difficulty on the part of Aurizon and State of Queensland in discharging the onus, illustrated by "the lack of mitigating steps that were suggested to Mr Baker in cross-examination".[132] Those suggestions were as follows:

(a) the placement of hay bales and other things to disperse the water flowing from the culverts on to Baker's land;

(b) the use of a geofabric blanket; and

(c) taking advice from "someone in land management about the steps … to prevent the erosion becoming worse".[133]

[182] Mr Baker responded to those suggestions by pointing out that Aurizon had built a concrete apron about one metre wide, beneath the culverts right up to the fence line

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131 *Wenkart v Pitman* (1998) 46 NSWLR 502 at 523.
132 Reasons below, [102].
133 Reasons below, [102].

between his land and the railway land, and therefore hay bales would not be of any particular use in a heavy downpour, with concentrated water flowing straight through and onto Baker's land.

[183] As the learned primary judge noted, the central difficulty for Baker was that the culverts that discharged the water were on the railway land, and there was a gap between where they discharged the water and the commencement of Baker's land.[134] That distance was approximately five metres.[135] There could not be any doubt about the fact that Baker had no right, absent consent, to enter upon the railway land, let alone do anything in terms of impeding the water flow. That practical difficulty underpinned the learned primary judge's finding that the burden of proof had not been met and onus of showing a failure to mitigate had not been made out. I respectfully agree. Concentrated water flow of the kind to produce the dramatic effects of such a force as would produce the demonstrated erosion on Baker's land would require something more than hay bales or the use of some geofabric blanket. I pause to note that no evidence was caused on the part of Aurizon or the State of Queensland to show that either of the solutions had some prospect of working.

[184] The learned primary judge also pointed out[136] that in the period between when correspondence first commenced, and the institution of the proceedings, there was no suggestion from Aurizon as to how Baker might deal with the problem.

[185] In those circumstances the learned primary judge's finding was unimpeachable. The onus was not met, nor is it likely to be met by the sort of Delphic statement one finds in Aurizon's outline on the appeal, that there was plenty that Baker could do to mitigate. No attempt was made in oral submissions to flesh out that comment, and it can be safely put to one side.

[186] This ground fails.

Form of relief

[187] The orders made by the learned primary judge, apart from awarding damages, included order 1, that the culverts be sealed to prevent the discharge of water. On this appeal no attack was made upon the appropriateness of that order. The case was conducted on the basis that if the appeal failed the orders would stand, that relief would follow. There is therefore no occasion for this court to examine that relief.

Disposition of the appeal

[188] For the reasons above, I agree with the orders proposed by McMurdo JA.

[189] **McMURDO JA:** The State of Queensland owns land which, until 1993, was the Brisbane Valley rail line. The land is now used as a public facility for recreational cyclists, horse riders and walkers, and is called the Brisbane Valley Rail Trail.

[190] Early in the construction of the rail line, in about 1884, a particular embankment was formed to provide a level surface for the track. At the same time, two culverts were

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134 Reasons below, [103].
135 Reasons below, [6].
136 Reasons below, [103].

installed through that embankment, so that surface water could pass underneath the track and follow the line of a pre-existing channel. In about 1956, those culverts were replaced by substantially identical concrete box culverts.

[191] The respondent owns a grazing property which adjoins some of the former rail line, including at the site of this embankment. There is a distance of only some four or five metres between the downstream end of the culverts and the beginning of the respondent's land. From about 1999, the respondent's land at that point has been badly eroded by the passage of surface water flowing towards the rail line from its other side, and then being effectively funnelled through these culverts. Before 1999, there had been no significant damage caused to what is now the respondent's land from the presence of these structures. What changed was an increase in the volume of water flowing towards the embankment, as a result of the actions of other owners in clearing and developing their lands on the uphill side of the rail line.

[192] The respondent sued the appellants in the Trial Division, claiming that by not preventing the flow of water through the culverts during the period of each appellant's ownership of the rail line, it committed an actionable nuisance. After a five day trial, Mullins J found for the respondent and ordered that each appellant pay damages in an amount of $75,000. Her Honour further ordered that the State of Queensland seal up the two culverts, to prevent the discharge of water from them in the direction of the respondent's land.[137] The injunction was stayed by her Honour for a period of six months, to allow for the design and construction of an alternative means of drainage, and that stay has been extended pending the determination of this appeal.

The relevant principles

[193] In *Hargrave v Goldman*,[138] Windeyer J said that, in essence, a nuisance could be defined as an "unlawful interference with a person's use or enjoyment of land, or of some right over, or in connexion with it".[139] Not every use of a person's property which interferes with the use or enjoyment of other land is an unlawful interference. In general, an unlawful interference is an *unreasonable* interference with the use or enjoyment of other land. That criterion of reasonableness has been difficult to apply in some cases, but it is a necessary constraint on the operation of the tort which has been consistently recognised.

[194] Thus, in *Lawrence v Fen Tigers Ltd*,[140] Lord Neuberger of Abbotsbury PSC said:

> "A nuisance can be defined, albeit in general terms, as an action (or sometimes a failure to act) on the part of a defendant, which is not otherwise authorised, and which causes an interference with the claimant's reasonable enjoyment of his land, or to use a slightly different formulation, which unduly interferes with the claimant's enjoyment of his land. As Lord Wright said in *Sedleigh-Denfield v O'Callaghan* [1940] AC 880, 903, "a useful test is perhaps what is reasonable according to the ordinary usages of mankind living in society, or more correctly in a particular society"."

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137 *Michael Vincent Baker Superannuation Fund Pty Ltd v Aurizon Operations Ltd & Anor* [2017] QSC 26 ("the Judgment").

138 (1963) 110 CLR 40; [1963] HCA 56.

139 Ibid at 59, quoting the description of the tort from *Winfield on Tort* (6th ed, 1954) 536.

140 [2014] AC 822 at 830 [3]; [2014] UKSC 13.

That statement by Lord Wright in *Sedleigh-Denfield v O'Callaghan* was described by Gibbs CJ, Wilson and Brennan JJ in *Elston v Dore* as representing "the proper test to apply in most cases."[141] Similarly, in *Cambridge Water Co v Eastern Counties Leather Plc*, Lord Goff of Chieveley said that liability for nuisance is:[142]

> "kept under control by the principle of reasonable user – the principle of give and take as between neighbouring occupiers of land, under which "those acts necessary for the common and ordinary use and occupation of land and houses may be done, if conveniently done, without subjecting those who do them to an action:" see *Bamford v Turnley* (1862) 3 B. & S. 62, 83, per Bramwell B."

And in *Gartner v Kidman*, Windeyer J (with whom Dixon CJ agreed) said:[143]

> "The idea of reasonableness, that is basic to so much of the common law, is firmly embedded in the law of nuisance to-day. Pronouncements concerning the scope of nuisance as a tort avoid stating rights and duties as absolute. In respect of both what a man may do and what his neighbour must put up with, its criteria are related to the reasonable use of the lands in question. In some recent cases there is perhaps a more explicit recognition than there was in some earlier cases that a landowner's duty to his neighbour qualifies his right to do what he likes with his own land and on his own land."

[195] In *Hargrave v Goldman*, Windeyer J compared the torts of nuisance and negligence, by observing that liability in negligence is founded upon the negligent conduct of a person, whereas liability in nuisance "is founded upon a state of affairs, created, adopted or continued by one person (otherwise than in the reasonable and convenient use by him of his own land) …"[144]

[196] In *Sedleigh-Denfield v O'Callaghan*,[145] Viscount Maugham described the ways in which an occupier of land may be liable by "continuing" or "adopting" a nuisance created by another, even a trespasser, as follows:

> "[A]n occupier of land "continues" a nuisance if with knowledge or presumed knowledge of its existence he fails to take any reasonable means to bring it to an end though with ample time to do so. He "adopts" it if he makes any use of the erection, building, bank or artificial contrivance which constitutes the nuisance."

[197] Similarly, in *Torette House Pty Ltd v Berkman*,[146] Dixon J cited with approval the judgment of Scrutton LJ in *Job Edwards Ltd v Birmingham Navigations Proprietors*,[147] who said:

> "In my view it is clear that a landowner or occupier is liable to an action by a private person damaged by a nuisance existing on or

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141 (1982) 149 CLR 480, 488; [1982] HCA 71.
142 [1994] 2 AC 264, 299; [1993] UKHL 12.
143 (1962) 108 CLR 12, 47; [1962] HCA 27.
144 (1963) 110 CLR 40, 62.
145 [1940] AC 880, 894; [1940] UKHL 2.
146 (1940) 62 CLR 637, 657; [1940] HCA 1.
147 [1924] 1 KB 341, 355.

> coming from his land: (1) if he or his servants or agents created the nuisance; (2) or if an independent contractor acting for his benefit created the nuisance, though contrary to the terms of his employment … (3) or if being a tenant, or successor in title, he took the land from his landlord or predecessor with an artificial nuisance upon it …"

Dixon J also cited, again with evident approval, this passage from the judgment of Rowlatt J in *Noble v Harrison*:[148]

> "[A] person is liable for a nuisance constituted by the state of his property: (1) if he causes it; (2) if by the neglect of some duty he allowed it to arise; and (3) if, when it has arisen without his own act or default, he omits to remedy it within reasonable time after he did or ought to have become aware of it."

[198] In *Hargrave v Goldman*,[149] Windeyer J observed that "[g]enerally speaking the term "nuisance" denotes a state of affairs that is either continuous or recurrent." Where a defendant is said to be liable upon the basis that it has continued or adopted the nuisance, there is a tort which is distinct from the original creation of the nuisance.[150]

[199] In *Gartner v Kidman*, Windeyer J distilled from the authorities a number of propositions involving the position between adjoining landowners where surface waters flow from one property to the other:[151]

> "The following propositions concerning surface waters relate only to water which came naturally upon the land from which it flows, as distinct from water artificially brought or concentrated there and allowed to escape as in *Rylands v. Fletcher*.
>
> With the above limitations in mind, the rights and obligations of the proprietors of contiguous closes, one on a higher level than the other, may be stated as follows:-
>
> *The higher proprietor*: He is not liable merely because surface water flows naturally from his land on to lower land.
>
> He may be liable if such water is caused to flow in a more concentrated form than it naturally would.
>
> It flows in a more concentrated form than it naturally would if, by the discernible work of man, the levels or conformations of land have been altered, and as a result the flow of surface water is increased at any particular point.
>
> If a more concentrated flow occurs simply as the result of the "natural" use of his land by the higher proprietor, he is, generally speaking, not liable. What is a natural use is a question to be determined reasonably having regard to all the circumstances, including the purposes for which the land is being used and the manner in which the flow of water was increased: as for example whether it is agricultural land drained in the ordinary course of

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148 [1926] 2 KB 332, 338.
149 (1963) 110 CLR 40, 59.
150 *Sedleigh-Denfield v O'Callaghan* [1940] AC 880, 907 per Lord Wright.
151 (1962) 108 CLR 12, 48-49.

> agriculture, whether it is timbered land cleared for grazing, whether it is a mining tenement, or is used for buildings and so forth.
>
> The proprietor of higher land is not liable for a more concentrated flow from his land if it is the result of work done outside his land by someone else, and for the doing of which he is not responsible, as for example by the paving and guttering of public roads by municipal authorities.
>
> …
>
> *The lower proprietor*: He may recover damages from, or in appropriate cases obtain an injunction against, the proprietor of the higher land who is, for any of the reasons given above, liable to an action because he has concentrated or altered the natural flow."
>
> (Footnotes omitted.)

Windeyer J there referred to the "natural" use of land by the higher proprietor, a term which he had explained earlier in his judgment as follows:[152]

> "It seems appropriate to observe here that the notion of a natural use of land, and the distinction between a natural and a non-natural use seems to have come into the law at this point from Lord Cairns' judgment in *Rylands v. Fletcher*: see the article by Professor Newark in 24 *Modern Law Review*, 557. The concept involved is a difficult one; and in formulations of the law of nuisance it may be better to start with what Bramwell B. said in *Bamford v. Turnley*, that "acts necessary for the common and ordinary use and occupation of land and houses may be done, if conveniently done, without subjecting those who do them to an action". By "conveniently done" the learned Baron meant, no doubt, done in a reasonable and proper manner. He contrasted such user with a use "not unnatural nor unusual, but not the common and ordinary use of land". However, the expression "natural use" has come to be much used in discussions of this topic, and I have adopted it later in this judgment."
>
> (Footnotes omitted.)

[200] The "natural" use of land may therefore involve a use of land as it has been improved by a structure. The question of whether the use of a defendant's land is a natural use is to be answered by reference to the *nature* of that use, understood in the context of the relevant circumstances including the locality of the land, and the *manner* in which the land is used for that purpose. At least in that second respect, a constraint of reasonableness is to be employed.

[201] The question of whether a use is "natural" in this sense must be assessed against the circumstances which are current at the time of the act or omission of the defendant which is the basis of its alleged liability, and more particularly, by reference to the nature and manner of the use of the defendant's land as at that time. This is because there is a distinct tort by the continuation or adoption of a nuisance. Consequently, it is well established that a structure on a defendant's land, which interferes with the

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152 Ibid at 44-45.

flow of water and damages another's land (or interferes with its enjoyment) may involve an actionable nuisance, although it was not a nuisance when originally constructed or for much of its existence. In *Warne v Nolan*,[153] Muir J (as he then was) discussed the authorities on the point and concluded that the mere fact that a levee bank in that case "was not a nuisance when constructed, did not prevent it from becoming one as a result of changes in natural conditions and other causes."[154] Muir J explained that a decision to the contrary, by the English Court of Appeal in *Radstock Co-operative and Industrial Society v Norton-Radstock Urban District Council*,[155] was inconsistent with decisions in England at first instance and in the Court of Appeal, and with statements in the judgments of the High Court and the Privy Council[156] in *Goldman v Hargrave*.

[202] In *Bybrook Barn Centre Ltd & Ors v Kent County Council*,[157] the English Court of Appeal declined to follow *Radstock Co-operative and Industrial Society* v *Norton-Radstock Urban District Council*, in a case where the trial judge had found that a culvert, which was said to have involved an actionable nuisance by causing flooding, had not created a nuisance when it was built, and where at that time it was not foreseeable that the quantity of water which would flow through it would cause a flooding. The defendant in that case, which had not constructed the culvert, was held to be liable for not altering the culvert so that it could accommodate an increased volume of water.

[203] The common law position, of course, may be affected by statute law. In *Bankstown City Council v Alamdo Holdings Pty Ltd*,[158] the plurality endorsed the statement of principles by the English Court of Appeal in *Marcic v Thames Water Utilities Ltd*,[159] which may be summarised as follows:

(a) in the absence of negligence, a body is not liable for a nuisance which is attributable to the exercise by it of a duty imposed upon it by statute, even if by statute it is expressly made liable, or not exempted from liability, for nuisance;

(b) in the absence of negligence, a body is not liable for a nuisance which is attributable to the exercise by it of a power conferred by statute, if by statute, it is not expressly either made liable, or not exempted from liability, for nuisance;

(c) a body is liable for a nuisance which is attributable to the exercise by it of a power conferred by statute if by statute it is expressly made liable, or not exempted from liability, for nuisance;

(d) the condition that a statutory duty or power be exercised "without negligence" means that, as a condition of obtaining immunity from action, the body is required to carry out the work and conduct the operation with all reasonable regard and care for the interests of other persons.

Legislation

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153 [2001] QSC 53, [95]–[106].
154 Ibid at [106].
155 [1968] Ch 605.
156 (1966) 115 CLR 458, particularly at 465; [1966] UKPC 12.
157 [2000] EWCA Civ 299.
158 (2005) 223 CLR 660 at 666; [2005] HCA 46.
159 [2002] QB 929 at 988; [2002] EWCA Civ 64.

[204] In detailed submissions, counsel for the appellant in appeal number 3650 of 2017 (which I will call "Aurizon") traced the history of legislation which provided for the construction and maintenance of railways, from the time when this railway was constructed in about 1884. Reference was made to the *Railway Act* 1864 (Qld) ("the 1864 Act"), the *Railways Act* 1914 (Qld) and the *Transport Infrastructure (Railways) Act* 1991 (Qld) ("the 1991 Act"). This railway line was maintained by the Commissioner for Railways under the first and second of those Acts, and by the corporation called Queensland Railways under the 1991 Act. In 1995, Queensland Railways ceased to exist and was replaced by the government owned corporation known as Queensland Rail.[160] Queensland Rail was privatised in 2010 and changed its name to Aurizon Operations Limited (Aurizon) in 2012. The trial judge found that the railway line itself was closed in 1993 but it was not until June 2002, that the subject land was declared a non-rail corridor land pursuant to s 215 of the *Transport Infrastructure Act* 1994 (Qld) ("the 1994 Act").[161] The land was transferred by Queensland Rail to the State in April 2003.[162]

[205] In the submissions for Aurizon, it is claimed that these four statutes "established a statutory scheme within the principles of *Marcic v Thames Water Utilities Ltd*."[163] Consequently, it is said, the existence of a parallel common law right, whereby an individual might complain about the state of the railway land or some structure within it, "would set at nought the statutory scheme".[164] It is submitted that this statutory scheme did not cease "until well after the harm complained of by the plaintiff had commenced" and that Queensland Rail remained obliged to maintain the structure of these culverts, pursuant to the 1994 Act, until June 2002. It is argued that consequently, at any time which is material for the case against Aurizon, the statutory scheme effectively ousted the right of action under the common law upon which the respondent sued.

[206] The respondent purchased its land in about 1995. It was in 1999 that its principal, Mr Baker, noticed that there was erosion of a gully on the respondent's property where water emerged from the culverts. He first wrote to Queensland Rail to complain about it in February 2000. It was not suggested that Queensland Rail ought to have been aware of that damage to the respondent's land, or to have foreseen it, so as to become liable to abate a nuisance before the complaint was made.

[207] Whether there was an actionable nuisance by Queensland Rail had to be assessed on the facts and circumstances as they then existed and according to any legislation which was then in force. Of the statutes upon which Aurizon's argument relies, all had been repealed save for the 1994 Act so that only that statute could be relevant.

[208] The 1991 Act was repealed from 1 July 1995 by s 22 of the *Transport Infrastructure Amendment (Rail) Act* 1995 (Qld). Certain provisions of the 1991 Act were given an ongoing but temporary operation, by s 221 and s 222 of the 1994 Act. But these did not include s 46 of the 1991 Act, which applied to "works for the accommodation of the owners and occupiers of lands adjoining a railway", and by which Queensland Railways had been obliged to "construct and at all times maintain such works … as will be sufficient at all times to convey the water as

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160 Judgment at [3].
161 See Reprint No. 7B (in force 4 February 2000).
162 Ibid at [3]-[4].
163 [2004] 2 AC 42 at 65 [63]; [2003] UKHL 66.
164 The argument citing the speech of Lord Nicholls of Birkenhead in that case at 58 [35].

clearly from the lands lying near or affected by the railway as before the construction of the railway, or as nearly so as is possible." The repeal of the 1991 Act, of course, did not affect the operation of that Act upon facts or events which had occurred before that repeal.[165] Therefore any immunity which had been conferred by the 1991 Act, in respect of an act or omission which pre-dated its repeal, was not lost. Because the respondent's case against Aurizon arose no earlier than February 2000, the 1991 Act has no present relevance.

[209] It is argued for Aurizon that it remained obliged to provide and maintain works pursuant to s 150 of the 1994 Act. Section 150 was the statutory successor to s 46 of the 1991 Act. By s 150(2), it required Queensland Rail to construct and maintain "sufficient works to ensure the neighbouring land's drainage is as good, or nearly as good, as it was before the existing railway was constructed." But as is submitted for the respondent, had s 150 applied then it would have been adverse to Aurizon's case. This was because, it sufficiently appears, that "the neighbouring land's drainage", namely the drainage on the eroded section of the respondent's land, was not nearly as good as it was before there was a railway next to it.

[210] As the trial judge correctly held, s 150 did not apply, because by s 150(1)(a) the section applied only to "a railway existing at the commencement [of the 1994 Act which] continues to be operated as a railway."[166] Her Honour accepted evidence that the railway line was "mothballed" in 1988 and officially closed in 1993, after which the track was removed in sections.[167] The word "railway" is not defined in the 1994 Act (except for provisions which are not presently relevant). But in no sense could the land be described as a railway which was in continuing operation. Aurizon's argument suggests that there was a railway because the land remained "rail corridor land" and contained "rail transport infrastructure", as those terms are defined in Schedule 3 of the 1994 Act. If the embankment and the culverts were within the definition of rail transport infrastructure and they were part of "rail corridor land" as defined, that did not mean that there was an existing railway in operation, so as to engage s 150.

[211] It is convenient at this point to deal with another argument by Aurizon, and adopted by the State, which is that the appellants are immune from liability because of compensation paid by the Commissioner of Railways to a predecessor in title of the respondent, a man named Abbott, when the land was resumed for the railway line in 1884. Mr Abbott was paid compensation of £40, together with an additional compensation of £3.5.0. The argument for the appellants, as it was before the trial judge, is that the additional compensation was paid for the injurious effect, upon land retained by Mr Abbott, of the activity to be carried out on the resumed land. The compensation paid to Mr Abbott was according to s 46 of the 1864 Act, which was as follows:

> "In estimating the purchase money or compensation to be paid under any of the provisions of this Act regard shall be had by the justices arbitrators jury or surveyor as the case may be not only to the value of the land purchased or taken by the Commissioner on behalf of Her Majesty as aforesaid but also to the damage (if any) to be sustained by the owner of the lands by reason of the severing of the lands taken

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165 *Maxwell v Murphy* (1957) 96 CLR 261 at 266 – 267; [1957] HCA 7.
166 Judgment at [29].
167 Ibid at [32].

> from the other lands of such owner or otherwise injuriously affecting such other lands *by the exercise of the powers of this Act* and they shall assess the same according to what they shall find to have been the value of such lands estate or interest at the time notice was given of such lands being required and without reference to any alteration in such value arising from the establishment of such railway and other works."
>
> (Emphasis added.)

[212] The appellants' argument is that from the terms of that section, it must be inferred that this additional component was paid to Mr Abbott for injurious affection. For present purposes, let that be accepted. The difficulty is in the next step of the argument, under which it is said that "[t]he payment of compensation therefore foreclosed the right to claim for nuisance brought about by the culverts" and that "[t]o hold otherwise would provide an indeterminable number of successors in title the right to claim compensation in every circumstance where compensation is paid by way of injurious affection."

[213] The argument cannot be accepted. The first reason is that the 1864 Act, and s 46 in particular, said nothing about precluding a common law claim by a subsequent owner of the land owned by the person to whom compensation was paid. The second reason is that if that was the effect of s 46 of the 1864 Act, it could not matter once the 1864 Act was repealed. Section 46 provided for the payment of compensation for damage sustained by the owner of lands by that other land being injuriously affected "by the exercise of the powers of this Act". Aurizon was held liable for a failure to abate a nuisance, which had become actionable against it only in 2000. The State's liability dated only from October 2008, because of a limitation period.[168] The respondent was not compensated for something which was done in the exercise of a power under the 1864 Act. In any case, just how the repealed 1864 Act could have affected events and circumstances which occurred and existed only after its repeal was not explained.

[214] It follows that no statute provided an immunity from a liability for nuisance in this case.

The liability of the appellants according to the trial judge's reasoning

[215] The trial judge described the elements of the tort of nuisance as follows:

> "a. a substantial or an unreasonable interference with the use or enjoyment of the plaintiffs land;
>
> b. interference caused by the unreasonable use of the defendant's land;
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> c. where the act alleged to have caused the nuisance was authorised by statute, a statutory body will only be liable if:
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> i the nuisance was not an inevitable consequence of the authorised undertaking; and

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168 Ibid at [85].

> ii the exercise of (or failure to exercise) the statutory powers was negligent."[169]

[216] Her Honour then discussed what was meant by "negligent" in that statement, although she had already rejected the arguments for the appellants which were based upon statute law.

[217] Her Honour continued by setting out relevant legal principles, including a statement that "[l]iability for nuisance may arise out of the continuation or adoption of a nuisance and something which is not initially actionable as a nuisance may become a nuisance over time by reason of natural or other causes", citing *Sedleigh-Denfield v O'Callaghan*.[170] Her Honour referred to *Gartner v Kidman*, and set out the passage from the judgment of Windeyer J which I have set out above at [199].

[218] The judge then discussed the cause or causes of the erosion of the respondent's land. She found that it was more likely than not that the erosion had commenced prior to the clearing of the upstream land, but had been "exacerbated dramatically by increased surface flow of water from the clearing of that upstream land that was concentrated through the culverts."[171] She rejected the appellant's case that work done by the respondent on its land had been a substantial contributor to the erosion.[172] The judge found that there were two causes of the erosion, namely the clearing of the upstream land and the concentration of the flow of water by the culverts. She said that "[t]he fact that two causes of the erosion were identified by the experts does not mean the role of the culverts in concentrating the flows that then caused the erosion can be ignored."[173]

[219] A submission for Aurizon, which is adopted by the State, is that "[t]he plaintiff failed to prove that the harm that in fact occurred was any greater than if the culverts had never been installed." The argument was put in this way: for more than a century, the culverts caused no harm; there was harm only when the upstream owner began to clear its land with, as the judge found, dramatic effect; and the judge did not "confront the question of causation" before moving to consider other questions.

[220] That submission misinterprets the reasoning of the judge, which in my respectful view was clear. As the judge reasoned, it was sufficient for the culverts to be *a* cause of the erosion of the respondent's land. But for the effect of the culverts, in concentrating the flow of surface water upon this small section of the respondent's land, the severe erosion of the respondent's land would not have occurred.

[221] The judge referred to the evidence of one of the experts, Mr Holland, who wrote:

> "The railway embankment has intercepted and concentrated overland flow to a defined discharged point at the culverts. By intercepting the overland flow from the entire catchment upstream of the site and directing it through the culverts and into the head of the gully, the embankment effectively concentrates increased flow into the gully, causing increased erosion".[174]

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169 Ibid at [36].
170 Ibid at [40].
171 Ibid at [74].
172 Ibid.
173 Ibid at [75].
174 Ibid at [64].

[222] The judge also referred to a joint statement of the experts, in which the witnesses had set out their agreement that "the observed erosion has two fundamental causes, namely the concentration of flow resulting from the installation of the culverts, and the clearing of the local catchment which has led to increased rate and volume of runoff".[175]

[223] The balance of the judge's reasons, for concluding that each of the appellants was liable, should be set out in full:

> "[80] The plaintiff has proved the ongoing erosion in the gully that has continued from 1999 and that it is unable to use the paddock around the gully for grazing cattle which is the obvious and reasonable use for the plaintiff's land and has therefore shown that the erosion of the gully has resulted in a substantial or an unreasonable interference with the use or enjoyment of the plaintiff's land. Although the railway land compared to the plaintiff's land is the "higher" land applying the approach in *Gartner* to the rights and obligations of the higher and lower proprietors concerning water flow in a natural watercourse, the defendants cannot take the benefit of being the higher proprietor when they have permitted the water to flow in a concentrated way through the culverts.
>
> [81] There was no evidence called on behalf of the defendants to show that there was no other way to disperse the surface flow of water from the lands upstream of the railway corridor in the vicinity of the culverts by any means other than the culverts. It is not apparent that the nuisance was an inevitable consequence of the first defendant's statutory duty.
>
> [82] The onus is on the first defendant to establish the statutory authority defence, including that it was not negligent in the exercise of its statutory duty or power: *Rudd* at 137. There can be no challenge to the first defendant's assertion that its actions in the placement and maintenance of the culverts were reasonably necessary for the use of the rail corridor as a railway line at least until the land to the east of the rail corridor was cleared and developed. That circumstance resulted in accelerated flows of water through the subject box culverts that is largely the cause of the erosion in the gully. The effect of the concentration of the flows as the upstream land was cleared and developed should have been addressed by the first defendant as that circumstance affected the plaintiff's land in a significant and observable way and certainly upon notification of the erosion. The first defendant has not discharged its onus of disproving negligence.
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> [83] There is an issue as to whether the defendants continued or adopted the nuisance by failing to remedy the nuisance within a reasonable time of knowing of the nuisance or having constructive knowledge of the nuisance. Although the first defendant denied liability for the erosion from the first

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175 Ibid at [65].

> notification by the plaintiff in 2000, it had the relevant knowledge from at least that time. The plaintiff seeks to impute constructive knowledge to the second defendant on the basis of work Mr Kreis may have done for the second defendant in maintaining the rail corridor after 2003. The plaintiff does not need to rely on that route, as it must be a matter of inference that the second defendant had constructive knowledge of the plaintiff's claim of nuisance from the time it became responsible for the rail corridor.
>
> [84] The plaintiff has proved actionable nuisance against both defendants."

[224] I respectfully disagree with some of that reasoning. The judge appears to have excluded the application of *Gartner v Kidman* because the appellants had permitted the water to flow in a concentrated way through the culverts.[176] That correctly described the flow of the surface waters to the respondent's land. But that fact then required the judge to consider the application of the statement by Windeyer J in that case that "if a more concentrated flow occurs simply as the result of the "natural" use of his land by the higher proprietor, he is, generally speaking, not liable." What had to be considered was whether, during the period of time which was relevant for a defendant, its use was a "natural use" in the sense described in that judgment. That question was not considered by the judge.

[225] The judge's references to Aurizon's statutory duty, and to an onus being on Aurizon to make out a defence that it was not negligent in the performance of that duty (or the exercise of a statutory power) was not relevant, where the judge had (correctly) rejected the application of s 150 of the 1994 Act (or any other statute) to the state of affairs as they existed at a relevant time.

[226] It is necessary then to consider the liability of the appellants separately, by reference to that statement in *Gartner v Kidman* and otherwise according to the principles which I have summarised.

The claim against Aurizon

[227] It is necessary to assess the nature of the use of this section of the railway land during the period which is relevant, which in my view commenced no earlier than when the respondent complained of the erosion and concluded no later than in June 2002, when the land was gazetted as "Non-Rail Corridor Land" under s 215 of the 1994 Act.

[228] The claim against Aurizon was that it failed to remedy a nuisance of which it was or ought to have been aware. It does not appear that Aurizon was in that position prior to the receipt of Mr Baker's correspondence in 2000, and that seems to have been accepted by the trial judge.[177]

[229] During that period, the future of the railway land was being reviewed under a process for the rationalisation of Queensland Rail's land holdings, pursuant to ss 214 to 218 of the 1994 Act. Those provisions were inserted in the 1994 Act by the *Transport Infrastructure Amendment (Rail) Act* 1995 (Qld).[178] The Explanatory

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176 Ibid at [80].
177 Ibid at [83].
178 They were originally numbered s 126A to s 126E.

Notes for the relevant Bill[179] explained what was to be a process for the categorisation of "old QR land", as this land was because it was land which had been held by Queensland Railways immediately before the commencement of that Act.[180] According to the Explanatory Notes:

> "[This part of the Bill] details how 'old QR land' is to be categorised and dealt with, upon commencement of this Act …
>
> Generally the categories indicate that the 'old QR land' will become either part of a transport corridor or not. The corridor land may be designated as 'commercial corridor land', 'existing rail corridor land' or 'non-rail corridor land'.
>
> It is intended that Queensland Rail will, during the five (5) year period, confirm its title to old QR land that is not corridor land. …
>
> The intention of this division and subsequent transitional provisions about land, is to retain a degree of public control over strategic rail corridors in a similar manner to control over strategic road corridors".

[230] The new s 126B of the 1994 Act (as s 215 was then numbered) provided that within five years of its commencement, Queensland Rail and the chief executive were required to identify the land constituting existing rail corridor land as well as that which was not existing rail corridor land but which was of "strategic importance to the State as part of a transport corridor". It provided that the identification of a piece of land in that second category was to be notified in the Gazette, at which point the land would then become unallocated State land. The Explanatory Notes acknowledged that costs would be incurred by Queensland Rail, Queensland Transport and the Department of Lands during this "transitionary land rationalisation process, designed to clearly identify the transport corridor land to be held by the State", and that the work was "expected to cost around $11 million over the five (5) year land review period", with yet higher costs to be incurred where a survey was required. The Notes stated that it was anticipated that a substantial portion of those costs could be offset through the sale of surplus land by Queensland Rail.

[231] By s 126B(7), it was provided that a regulation might extend the five year period for this process of categorisation by not more than two years. There was such an extension, with the result that at all material times for the case against Aurizon, the land was held by it (as Queensland Rail) under this "transitionary land rationalisation process". It was held by Queensland Rail pursuant to its statutory obligations under what by then was s 215 of the 1994 Act.[181]

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179 *Transport Infrastructure Amendment (Rail) Bill* 1995.

180 See the definition of "old QR land" in Schedule 3 of the 1994 Act.

181 Section 215 provided:

"215.(1) Queensland Rail and the chief executive must progressively, and within 5 years after the commencement, identify—

(a) the boundaries of existing rail corridor land; and

(b) the parts and boundaries of old QR land (other than existing rail corridor land or commercial corridor land) that—

(i) are mentioned in transport infrastructure strategies; and

(ii) they consider are of strategic importance to the State as part of a transport corridor.

(2) The identification may be done by compilation, survey or another way sufficient to identify the land.

[232] In these circumstances, was Queensland Rail acting unreasonably in not doing what was necessary to abate the nuisance? According to the case advanced by the respondent at the trial, the abatement of the nuisance will require substantial engineering works by which the landscape will be restored , as far as is possible, to the state it was in before the construction of the railway in the 1880s. The cost of that work, on the judge's findings, would be at least of the order of some hundreds of thousands of dollars.[182] Was it reasonable that Queensland Rail have to spend something of that order, to change about 500 metres of the former rail corridor, when the outcome of the categorisation process, which Queensland Rail and the chief executive were bound to undertake, might be that the land became vested in the State because it was regarded as land of strategic importance to the State as part of a transport corridor?

[233] As can be seen from the written submissions on behalf of both appellants which were presented to the trial judge, it was there argued that in the circumstances which I have described, and particularly in the context of s 215, there was no failure by Aurizon to take reasonable means to bring the nuisance to an end. The appellants' argument emphasised the relevance of the "difficulty of the measures to be taken, the amount of work involved and the cost of such works." And a further consideration was this: if the land was to be required by the State for a (non-rail) transport corridor, was it reasonable to require Queensland Rail to substantially change the landscape, so as to abate a nuisance, when that could have compromised the State's potential use of the land?

[234] This argument from the appellants was apparently not considered by the trial judge. In my respectful opinion, it ought to have been considered and accepted. The state of affairs, upon which nuisance was founded had not been created by Queensland Rail. Its ongoing ownership of the land was in doubt whilst the process under s 215 was being completed. The process had to be completed by late 2002. In responding to Mr Baker's correspondence in early 2000, Queensland Rail wrote on 19 May 2000 informing him that it was then in negotiations with Queensland Transport about "the ownership and associated future maintenance responsibilities of the Brisbane Valley decommissioned rail corridor." Queensland Rail was susceptible to being divested of the land, with no compensation at any time. Even the costs of investigating the cause of the erosion, and the means of remedying the situation, would themselves have been considerable, quite apart from the cost of undertaking the works. In these circumstances, Queensland Rail (now Aurizon) could not have been expected to abate the nuisance. The claim against it should have been dismissed.

The claim against the State of Queensland

[235] The position of the State of Queensland was quite different. At all relevant times from 2008, it was aware of the erosion and of the respondent's complaint. Indeed

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(3) The chief executive must notify the boundaries in the gazette.
(4) For land identified under subsection (1)(b), the notice must declare the land to be non-rail corridor land.
(5) On the declaration of the land as non-rail corridor land—
  (a) the land becomes unallocated State land; and
  (b) the Governor in Council must lease the land to the State under the *Land Act 1994*, section 17(b).
(6) The lease is in perpetuity and, if demanded, for a rent of $1 per year.
(7) A regulation made within 5 years after the commencement may extend the period mentioned in subsection (1) by not more than 2 years." (Footnote omitted).

[182] Judgment at [94], where the cost can be approximated by subtracting $198,679 from $514,761.

the present proceeding had been commenced against Aurizon in 2004. By then of course, the land was no longer subject to the review process which had burdened Queensland Rail in the relevant period of its ownership.

[236] There was no evidence, at least as is identified by the arguments, that the works on the former railway corridor, which the respondent claimed were required to abate the nuisance, would have compromised the use of this land as the public recreational facility which it had become. The embankment and the culverts were changes which had been made to the landscape so that the land could be used for a railway. There was no justification for retaining them apart from saving costs to the State, once the nature of the ongoing use of the land had become clear, and where that use would not be compromised by their removal. In short, the use of the culverts within this embankment no longer constituted a use of the State's land "in a reasonable and proper manner", having regard to the damage which they continued to cause to the respondent's land.[183]

[237] Consequently, I agree with the trial judge's conclusion that there was an actionable nuisance committed by the State of Queensland.

[238] The remaining question is whether the judge was correct to reject the State's argument (which was also made by Aurizon) that the respondent had failed to mitigate its own loss.

[239] In his evidence, Mr Baker conceded that the respondent did nothing to mitigate its loss, apart from making demands on Queensland Rail to remove the culverts and repair the damage to the respondent's land.[184] But as the trial judge noted, very few steps, which might have been taken to mitigate the respondent's loss, were suggested to Mr Baker in cross-examination.[185] The judge rejected the appellant's argument in this respect as follows:

> "[103] In light of the gap between where the culverts discharge water and the commencement of the plaintiff s land, it was difficult for the plaintiff to do anything unilaterally on the plaintiff's land about mitigating the effect of the discharge of the water onto the plaintiff's land from the culverts. In the correspondence between the first defendant and the plaintiff's solicitors that took place between 2000 and the commencement of the proceeding, no suggestion came from the first defendant as to how the plaintiff should deal with the problem.
>
> [104] The defendants have failed to discharge the onus they bear to show in the circumstances the plaintiff failed to mitigate its loss by abating the nuisance."

[240] In their written submissions to the trial judge, the appellants argued that the respondent could have done the following to mitigate its loss:

(a) it could have erected barriers to stop or slow the flow of water into its land;

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183 *Gartner v Kidman* (1962) 108 CLR 12, 44.
184 Judgment at [102].
185 Ibid.

(b) it could have sought Aurizon's consent and *if obtained,* undertaken works on the appellants' land, to remove or reduce the flow of surface water on to its land;

(c) it could have asked for Aurizon's consent to use the railway land as a means of vehicular access to its land, when erosion had caused the gully on the respondent's land to be impossible to cross in a vehicle;

(d) it could have installed rocks or other impermeable material in the gully, planted vegetation in and around the gully and "taken advice about what else might have arrested the erosion at an early stage".

[241] Those submissions were and are not persuasive. Some of them were answered by the judge's reasoning which I have set out above, in that there was little which the respondent could have done to mitigate the effect of the discharge of this water from the culverts absent work being done also on the appellants' land. As to the suggestion that the respondent could have sought Aurizon's consent to undertake works on its land, the submission did not suggest that necessarily the consent would have been given. But in any case, the argument appears to have been that the defendant might have mitigated its loss from the nuisance by itself taking the steps which, by law, ought to have been taken by the tortfeasor. As for the suggestion about a consent to use the railway land as a means of vehicular access, this would not have mitigated the respondent's loss, which came from the damage to its land.

[242] Consequently this ground of appeal cannot be accepted.

Conclusions and orders

[243] In my conclusion the claim against Aurizon should have been dismissed, but the judge was correct to hold the State of Queensland liable. There is no challenge to the assessment of damages or to the terms of the injunction.

[244] The reversal of the primary judgment on the claim against Aurizon should not affect the orders made by the trial judge against the State of Queensland. The State was ordered to pay $75,000 in damages upon the basis that that amount represented the respondent's loss from the effect of the nuisance in a period from 2008 until the judgment. Her Honour admitted that there was "an element of arbitrariness" in the assessment of the respective awards of damages,[186] but it is clear that the award against the State of Queensland was not moderated for the fact that damages were also awarded against Aurizon. As far as was possible, the judge assessed the distinct losses which were suffered by the respondent for what happened to its land during distinct time periods.

[245] Therefore I would order as follows:

1. In appeal 3650/17 by Aurizon Operations Limited:

   (a) appeal allowed;

   (b) the order made for the payment by the appellant to the respondent of damages for nuisance be set aside;

   (c) the order for costs made against the appellant on 27 April 2017 be set aside;

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186 Ibid at [105].

(d) the respondent pay to the appellant its costs of the appeal and of the proceeding in the trial division.

2. In appeal 3654/17 by the State of Queensland:

(a) appeal dismissed;

(b) the appellant pay the respondent's costs of the appeal.

[246] **JACKSON J:** This is a case about the rights and liabilities of a higher proprietor of land who concentrates the flow of surface waters coming naturally onto their land onto the adjacent land of a lower proprietor where the concentrated flow damages the lower proprietor's land by erosion.

[247] I have had the advantage of a draft of the reasons of the other members of the court. I agree with them on all points except whether either of the appellants was liable in nuisance for failing to abate the continuation of damage caused to the respondent's land by the discharge of water from the culverts after notice from the respondent of that damage. As I am in dissent, although in the result only upon the liability of the State, I would keep these reasons as brief as may be.

[248] Although framed as a question of causation, the appellants' challenge is not to the causal effect of the discharge of water from the culverts, as a matter of fact. It is a challenge to the finding of the trial judge that the effect of the concentration of the flows should have been addressed by Aurizon (and by implication after that the State) as that circumstance affected the respondent's land in a significant and observable way and, in particular, that the effect should have been addressed upon notification of the erosion (which first occurred on or about 8 February 2000).

[249] The appellants submit that in the circumstances there was no legal obligation to take positive steps to render harmless the consequences of the clearing of uphill land by others. They submit that *Gartner v Kidman*[187] is authority for the proposition that at common law no actionable nuisance arises from a concentration of the flow of overland water that causes damage to lower land that arises from the reasonable and natural use of higher land.

[250] From 1 July 1995, there was no statutory provision that excluded or displaced for the future any liability in nuisance of the proprietor or occupier of the railway land.

[251] The culverts were originally installed in about 1885 and the original wooden structures were replaced by identical or near identical concrete structures in about 1956. No finding was made by the trial judge that, at either of those times, the constructing authority designed or installed the culverts negligently. To contrary effect, the trial judge found that there could be no challenge to the assertion that the actions in placement and maintenance of the culverts were reasonably necessary for the use of the rail corridor as a railway line at least until the uphill land to the east of the rail corridor was cleared and developed.

[252] Statute aside, the rights and responsibilities of proprietors and occupiers of higher and lower lands, inter se, concerning surface waters which come naturally upon the higher land from which they flow, were essayed by Windeyer J in the High Court in

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187 (1962) 108 CLR 12, 44, 48-49.

Gartner v Kidman,[188] including a passage set out by the trial judge in her reasons, as follows:

> "With the above limitations in mind, the rights and obligations of the proprietors of contiguous closes, one on a higher level than the other, may be stated as follows:—
>
> *The higher proprietor:* He is not liable merely because surface water flows naturally from his land on to lower land.
>
> He may be liable if such water is caused to flow in a more concentrated form than it naturally would.
>
> It flows in a more concentrated form than it naturally would if, by the discernible work of man, the levels or conformations of land have been altered, and as a result the flow of surface water is increased at any particular point.
>
> If a more concentrated flow occurs simply as the result of the 'natural' use of his land by the higher proprietor, he is, generally speaking, not liable. What is a natural use is a question to be determined reasonably having regard to all the circumstances, including the purposes for which the land is being used and the manner in which the flow of water was increased: as for example whether it is agricultural land drained in the ordinary course of agriculture, whether it is timbered land cleared for grazing, whether it is a mining tenement, or is used for buildings and so forth.
>
> The proprietor of higher land is not liable for a more concentrated flow from his land if it is the result of work done outside his land by someone else, and for the doing of which he is not responsible, as for example by the paving and guttering of public roads by municipal authorities.
>
> The above statements concerning the concentration of surface waters relate to cases when the increased flow results from work done when the higher land and the lower land were held by separate proprietors. Different considerations apply when the lower land receives a concentrated flow as the result of work which was done when it and the higher land were in the same ownership and possession.
>
> *The lower proprietor:* He may recover damages from, or in appropriate cases obtain an injunction against, the proprietor of the higher land who is, for any of the reasons given above, liable to an action because he has concentrated or altered the natural flow."[189]

[253] From the time of the respondent's acquisition of its land, the appellants were, successively, the proprietor of the railway land answering the description of the higher proprietor within that statement of principle. Through the culverts, they caused water to discharge, in a more concentrated form than it naturally would, onto the respondent's land. Two further considerations remain. Was the more concentrated flow simply the result of the higher proprietor's natural use of its land? Second,

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188 (1962) 108 CLR 12.

189 (1962) 108 CLR 12, 48.

was the more concentrated flow the result of work done outside the land by someone else for which the higher proprietor is not responsible?

[254] The more concentrated flow in the present case was the result of the clearing of the uphill land by third parties for whom neither of the appellants was responsible.

[255] In addition, it may be said that the appellants' use of the railway land was a natural user of the land, in the sense that the land had been acquired for that purpose in 1884 and was used continuously for that purpose until 1993, during which time the placement and maintenance of the culverts was reasonably necessary for the use of the rail corridor as a railway line.

[256] The trial judge did not consider whether those matters established that the appellants were not liable for nuisance for water damage in accordance with the *Gartner* principles. Instead, she reasoned that the effect of the concentration of the flows should have been addressed by Aurizon as that circumstance affected the respondent's land in a significant and observable way and, in particular, that the effect should have been addressed upon notification of the erosion.

[257] Neither the act of installing nor the act of replacing the culverts occurred during the relevant period of the alleged nuisance.

[258] The appellants also rely on *City of Essendon v McSweeney*,[190] as demonstrating that they are not liable for the more concentrated flow. The authority in that case constructed a drain to carry off surface water from an area without negligence. The drain was initially sufficient. Years later, development in an area outside the control of the authority caused the drain to become insufficient to carry off all the water discharged into it. The capacity of the drain was also reduced because of the failure to clear it of obstructions. It was held that the authority was not responsible for flooding caused by the development outside its control but was responsible for flooding caused by failure to clear the drain of obstructions.

[259] Griffith CJ said:

> "When a public body undertakes in the exercise of statutory powers to construct a work of public utility, it is bound to use reasonable care, both as to design and execution, and if from want of such care injury is caused to an individual, he can maintain an action for damages. But in the absence of such negligence the construction of the work is a lawful act, which cannot afterwards become unlawful as against the constructors except by reason of their own subsequent unlawful acts or omissions. They are not liable for mere inaction, or, as it is called, non-feasance, unless the legislature has imposed upon them the duty of action. The remedy, if any, in such a case is to be found in the Statute which authorised the work. If none is to be found there, the persons injuriously affected have no cause of action, whatever other means may be open to them of obtaining redress…"[191]

[260] The point was reiterated in *Shield v Municipality of Huon*.[192]

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190 (1914) 17 CLR 524.
191 (1914) 17 CLR 524, 530.
192 (1916) 21 CLR 109, 113-115.

[261] The trial judge referred to *Sedleigh-Denfield v O'Callaghan*,[193] as authority for the conclusions that liability for a nuisance may arise out of the continuation or adoption of a nuisance and that something which is not initially actionable may become a nuisance over time by reason of natural or other causes. *Sedleigh-Denfield* is accepted as passing into law in England and Australia[194] Scrutton LJ's dictum in *Job Edwards Ltd v Birmingham Navigations*,[195] that:

> "There is a great deal to be said for the view that if a man finds a dangerous and artificial thing on his land, which he and those for whom he is responsible did not put there; if he knows that if left alone it will damage other persons; if by reasonable care he can render it harmless, as if by stamping on a fire just beginning from a trespasser's match he can extinguish it; that then if he does nothing, he has 'permitted it to continue', and become responsible for it. This would base the liability on negligence, and not on the duty of insuring damage from a dangerous thing under *Rylands v. Fletcher*.
>
> I appreciate that to get negligence you must have a duty to be careful, but I think on principle that a landowner has a duty to take reasonable care not to allow his land to remain a receptacle for a thing which may, if not rendered harmless, cause damage to his neighbours."

[262] That principle is accepted as applying in Australia. But it has not been held to qualify the *Gartner* principles. In *Elston v Dore*,[196] the High Court referred to both the *Gartner* principles[197] and *Sedleigh-Denfield*,[198] without any statement that the latter qualifies the former, although consideration of that question was not necessary to decide *Elston v Dore.*

[263] As to *City of Essendon*, the reasoning in that case can be seen to turn on the view that the authority was not under a duty to upgrade the relevant drain, or as it was put was not responsible for non-feasance. The distinction between misfeasance and non-feasance that was important in ascertaining the scope of the responsibilities and liabilities of a public authority may not be seen as so important today.[199] Even so, in a case like the present, it is important to recognise two points. First, from 1 July 1995 onwards, there was no statutory provision that obliged either of the appellants to carry out any upgrading or closure of the culverts as the proprietor of the railway land. Second, nothing done by the appellants, or for which they were responsible, was the cause of the change in water volume or velocity discharging from the culverts that caused the erosion in the gully on the respondent's land, in any sense other than the ownership of and the legal control that they enjoyed of the railway land including the culverts.

[264] In *Gartner*, Dixon CJ agreed with Windeyer J's statement of principle, and Windeyer J recorded in his reasons that it was written after the advantage of discussion with the Chief Justice, so there is no doubt that it represented the common law of Australia.

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193 [1940] AC 880, 904-905.
194 *Goldman v Hargrave* (1966) 115 CLR 458, 466.
195 [1924] 1 KB 341, 357-358.
196 (1982) 149 CLR 480.
197 (1982) 149 CLR 480, 488-489.
198 (1982) 149 CLR 480, 487-488.
199 See *Brodie v Singleton Shire Council* (2001) 206 CLR 512.

At this point in time, however, three further observations should be made about the *Gartner* principles.

[265] First, the very purpose of Windeyer J's statement of principle was to decide in Australia what the true rule was because of the inconsistent dicta and conflicting decisions up to that time.[200] Among the statements from earlier cases that proved important in the final statement of principle for Australia in *Gartner* of the rights and liabilities of the higher proprietor, the following passage from the speech of Lord Dunedin in the Privy Council in *Gibbons v Lenfestey*[201] was significant:

> "The law may be stated thus: Where two contiguous fields, one of which stands on higher ground than the other, belong to different proprietors, nature itself may be said to constitute a servitude on the inferior tenement, by which it is obliged to receive the water which falls from the superior. If the water, which would otherwise fall form the higher grounds insensibly, without hurting the inferior tenement, should be collected into one body by the owner of the superior in the natural use of his property for draining or otherwise improving it, the owner of the inferior is, without the positive constitution of any servitude, bound to receive that body of water on his property…
>
> The right, however, of the superior proprietor is not quite absolute. The limits cannot be defined by definition, but each case must depend on its own circumstances. It would not, for instance, be within his right to introduce water which was foreign to the land – for example by procuring a pipe supply, or draining another watershed – and then insist that all the water so brought should be received by the inferior proprietor to his detriment."

[266] However, as appears from the *Gartner* principles as formulated, although the higher proprietor may be entitled to collect the water in the natural use of their property the High Court did not consider that the lower proprietor was bound to receive the water, unless it was unreasonable to hold it back.[202]

[267] Second, from the cases referred to in *Gartner*, there can be no doubt that the concept of "natural use" is one that has developed in the context of cases preceding and following *Rylands v Fletcher*.[203] In cases decided under the rule in *Rylands v Fletcher*, the distinction between what is a "natural use" and what is a "non-natural use" of land is frequently considered as an element of liability. The term "non-natural use" was coined by Lord Cairns in his reasons in the House of Lords, upon appeal from the judgment of the Court of Exchequer Chamber,[204] where Blackburn J articulated what subsequently became known as the rule in *Rylands v Fletcher*.[205] Blackburn J had said, as part of his formulation:

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200 (1962) 108 CLR 12, 45.

201 (1915) 84 LJPC 158, 160 quoted at (1962) 108 CLR 12, 43. The case concerned Guernsey, not a common law jurisdiction.

202 (1962) 108 CLR 12, 49.

203 (1868) LR 3 HL 330.

204 (1866) LR 1 Exch 265.

205 (1866) LR 1 Exch 265, 279-280.

> "…it seems but reasonable and just that the neighbour, who has **brought something** on his own property **which was not naturally there**, harmless to others so long as it is confined to his own property, but which he knows to be mischievous if it gets on his neighbour's, should be obliged to make good the damage which ensues if he does not succeed in confining it to his own property."[206] (emphasis added)

[268] Lord Cairns said:

> "…if the Defendants, not stopping at the natural use of their close, had desired to use it for any purpose which I may term **a non-natural use**, for the purpose of introducing into the close that which in its natural condition was not in or upon it, for the purpose of introducing water either above or below ground in quantities and in a manner not the result of any work or operation on or under the land, — and if in consequence of their doing so, or in consequence of any imperfection in the mode of their doing so, the water came to escape and to pass off into the close of the Plaintiff, then it appears to me that that which the Defendants were doing they were doing at their own peril…"[207] (emphasis added)

[269] In *Burnie Port Authority v General Jones Pty Ltd*,[208] the High Court held that, under the common law of Australia, any special rule relating to the liability of an occupier for fire escaping from their premises, under the rule in *Rylands v Fletcher*, has been absorbed into and is qualified by the more general rules or principles relating to the law of negligence. In a thorough examination of the cases, decided both before and after *Rylands v Fletcher,* the court considered, inter alia, the operation of the distinction between a natural use and a non-natural use of land in the context of the rule.[209] One observation was that Lord Cairns had converted Blackburn J's qualification "which was not naturally there" in the statement set out above into the requirement of "non-natural use" set out in his own formulation.[210] A possible explanation for the difference is that different arguments were advanced by the appellant in the Court of Exchequer Chamber and in the House of Lords, including reference to cases not apparently cited to the Court of Exchequer Chamber,[211] but the point is not of importance in the present case.

[270] That is because, in *Gartner*, Windeyer J explicitly identified "natural use" as potentially including the owner of higher ground collecting water into one body in the natural use of his property for draining or otherwise improving it[212] and also referred to the importance in starting formulations of the law of nuisance[213] with what had been said by Bramwell B, in *Bamford v Turnley*,[214] namely:

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206 (1866) LR 1 Exch 265, 280.
207 (1868) LR 3 HL 330, 339.
208 (1994) 179 CLR 520.
209 (1994) 179 CLR 520, 537-541.
210 (1994) 179 CLR 520, 537.
211 Inter alia, the important cases of *Bamford v Turnley* (1860) 3 B & S 66; 122 ER 25 and *St Helen's Smelting Co v Tipping* [1865] 11 HLC 642; 11 ER 1483.
212 (1962) 108 CLR 12, 43-44.
213 (1962) 108 CLR 12, 44.
214 (1862) 3 B & S 66; 122 ER 27.

> "…acts necessary for the common and ordinary use and occupation of land and houses may be done, if conveniently done, without subjecting those who do them to an action".[215]

[271] Windeyer J opined that "conveniently done" meant done in a reasonable and proper manner, observed that Bramwell B had contrasted such use with a use "not unnatural nor unusual but not the common and ordinary use of land"[216] and continued:

> "However, the expression 'natural use' has come to be much used in discussions of this topic, and I have adopted it later in this judgment."[217]

[272] Third, the *Gartner* principles do not turn on foreseeability of damage, the existence of a duty of care, or failure to exercise reasonable care in the higher proprietor's use of their land. But that does not mean that some of the factors that would affect those considerations are irrelevant to what is a natural use or ordinary use and occupation of land.

[273] There are other possibly relevant developments of common law principle in this area of discourse, in other jurisdictions. For example, in *Cambridge Water Co v Eastern Counties Leather Plc*,[218] the House of Lords held that in nuisance there is a principle of "reasonable user" in accordance with Bramwell B's statement in *Bamford v Turnley*. According to that principle, if the user is reasonable, the defendant will not be liable. As well it was held that, under the rule in *Rylands v Fletcher*, the "principle" of "natural use" of land performs a "strikingly" comparable role.[219] Another point of interest postulated by Lord Goff was that by introducing a requirement under the rule in *Rylands v Fletcher* that the damage in question must be foreseeable, the courts may feel less pressure to extend the concept of "natural use" in that context.[220]

[274] In New Zealand, the *Gibbons v Lenfestey* formulation set out above was adopted in *Bailey v Vile*.[221] More recently, in *Hamilton v Papakura District Council*,[222] the rule in *Rylands v Fletcher* was accepted as being part of or absorbed into the tort of nuisance, including acceptance that foreseeability is a required element of liability, as has occurred in England and Wales.

[275] In Canada, the rule in *Rylands v Fletcher* still operates,[223] and the *Gartner* principles, or similar, do not appear to have required consideration by the Supreme Court or recent consideration by a provincial appellate court.

[276] In the United States, the relevant principles are organised under the law of torts and as an aspect of the law of private nuisance. The *Restatement (Second) of the Law of Torts* (1979), § 833, deals with interference with the flow of surface waters as a private nuisance. The section refers to unintentional harm from an increase in the flow of water from a change in direction or velocity caused by one person building roads, structures or embankments that cause an alteration of the natural or normal

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215 (1862) 3 B & S 66, 83-84; 122 ER 27, 33.
216 (1962) 108 CLR 12, 44.
217 (1962) 108 CLR 12, 44-45.
218 [1994] 2 AC 264.
219 [1994] 2 AC 264, 299.
220 [1994] 2 AC 264, 309.
221 [1930] NZLR 829 839-840.
222 [2002] 3 NZLR 308; [2000] 1 NZLR 265, 282.
223 For a recent example, see *Smith v Inco Ltd* (2011) 107 OR (3d) 321.

flow of surface waters across their land. It states that when the increase is unintentional the liability of the person harmfully interfering with the flow of surface waters depends on whether their conduct has been negligent, reckless or abnormally dangerous. The United States cases may be conveniently divided between the majority of jurisdictions that recognise that liability of the higher proprietor is negated by a principle of "reasonable use"[224] and those that recognise a possibly stronger exemption from liability rooted in the property rights of the higher proprietor, limited by the condition that the higher proprietor exercises due care in engaging in activities that affect the flow of surface water.[225] Among the United States cases, there are cases of some similarity to the facts in the present case.[226]

[277] It was not argued in this case, but may be arguable, that the *Gartner* principles have been absorbed into a wider principle of the law of nuisance, that will impose liability for nuisance on a higher proprietor for a more concentrated flow from his land if it is the result of work done outside his land by someone else, if it is unreasonable for the higher proprietor not to abate the alleged nuisance. However, in my view, that cannot be said to be established law and any such development would be such a departure from established principle that it is properly a matter for the High Court.

[278] Returning to the question of what constitutes a natural use of the higher proprietor's land for the purposes of the *Gartner* principles, after discussing natural use in depth, including its relationship with the rule in *Rylands v Fletcher*, Windeyer J said of the natural use of land by the higher proprietor in relation to surface waters which come naturally upon the land from which it flows:

> "What is a natural use is a question to be determined reasonably having regard to all the circumstances, including the purposes for which the land is being used and the manner in which the flow of water was increased: as for example whether it is agricultural land drained in the ordinary course of agriculture, whether it is timbered land cleared for grazing, whether it is a mining tenement, or is used for buildings and so forth."[227]

[279] The origin of the first part of that sentence may perhaps be seen in the speech of Lord Porter in *Read v J Lyons & Co Ltd*,[228] as follows:

> "For the present I need only say that each seems to be a question of fact subject to a ruling of the judge as to whether the particular object can be dangerous or the particular use can be non-natural, and in deciding this question I think that all the circumstances of the time and place and practice of mankind must be taken into consideration

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224 For example, Massachusetts: *Tucker v Badoian* 376 Mass 907, 384 NE 2d 1195, 1201 (1978) and Missouri: *Heins Implement Co v Highway & Transportation Commission* 859 SW 2d 681, 689 (1993).

225 For example, Washington: *Currens v Sleek* 138 Wash 2d 858, 983 P 2d 626, 630 (1999) and Florida: *Gus Machado Buick v Westland Skating Center* 523 So 2d 596, 598 approved in 542 So 2d 959 (1989).

226 *Pintar v Houck* 2011 UT App 304, 263 P 3d 1158, 1168; *City of Atlanta v Kleber* 285 Ga 413, 418, 677 SE 2d 134, 141 (2009) and *City of Princeton v Abbott* 792 SW 2d 161, 166 (1990).

227 (1962) 108 CLR 12, 48.

228 [1947] AC 156.

> so that what might be regarded as dangerous or non-natural may vary according to those circumstances."[229]

[280] Among the examples of possible natural use given by Windeyer J in the second part of that sentence is where the land is a mining tenement. In this country, such tenements are generally a matter of grant by statute. However, Windeyer J may have had in mind a case like *Wilson v Waddell*,[230] where, as between the surface workings of a higher proprietor and those of a lower proprietor of an underground mine, Lord Blackburn held that the upper proprietor's working of his tenement was a natural user of the land, in accordance with Lord Cairns' statements in *Rylands v Fletcher*.

[281] In any event, recently, in *Hazelwood Power Partnership v Latrobe City Council*,[231] the Victorian Court of Appeal repeated Windeyer J's passage and said, of urban development:

> "In the case of both catchments and, more particularly, the township catchment, we doubt that a flow increase generated by gradual and orderly urban development over more than a century is necessarily to be described as 'unnatural' in terms of the principles stated in *Gartner*."[232]

[282] I accept that the answer to the question of what is a natural use, in the sense of a common or ordinary use and occupation of the land, in a context like the present case, is disputable.

[283] The example previously mentioned of a mining tenement being a natural use, at least in some cases, shows that the *Gartner* principles accommodate some commercial use or exploitation of land by the higher proprietor that may cause damage to the lower proprietor. This brings an economic dimension into the analysis, as a factor that is to be recognised.

[284] There is or may be an analogy with the public use or exploitation of land for a public purpose. The undertaking of a railway or a road is not necessarily a public as opposed to private or commercial undertaking, but in this country railways were public undertakings until comparatively recently. However, as a matter of economic theory, it is perfectly rational that the cost of damage inflicted as a consequence of the undertaking is one to be borne by the undertaker who is a higher proprietor, not the affected neighbour who is the lower proprietor. This is an area usefully analysed by Judge Posner in his famous work, *Economic Analysis of the Law*, in assessing the underlying reasons for strict liability, on the one hand, and negligence based liability, on the other hand.[233]

[285] Also, in my view, the analysis should recognise that where a use of the land of the higher proprietor may cause damage by a concentrated flow upon the land of the lower proprietor, the ability of the lower proprietor to avoid or restrict the damage by holding back the water, if possible, and reasonable, is accepted by the *Gartner* principles. On the other hand, the effective means to abate what might otherwise be

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229 [1947] AC 156, 176.
230 (1876) 2 App Cas 95, 99.
231 (2016) 218 LGERA 1.
232 (2016) 218 LGERA 1, 54 [228].
233 R Posner, *Economic Analysis of Law* (Aspen Publishers, 7th ed, 2007) 167-171 and 178-182.

a nuisance do not permit the lower proprietor to enter upon the land of the higher proprietor and do appropriate works there. In that sense, the higher proprietor has control of the outcome by the higher proprietor's right to exclusive possession of their land.

[286] Any analysis that has regard to all the circumstances, including the relevant purposes for which the higher land is or may be used, can operate differently from case to case, according to the particular uses in question and what surrounds them. In the context of the rule in *Rylands v Fletcher*, any review of the cases shows that often it was not easy to discern the case when a particular use could be distinguished as "non-natural", unlike the famous metaphorical example of "a pig in the parlor instead of the barnyard".[234] No doubt dissatisfaction as to the application of the distinction contributed to the High Court's statement in *Burnie Port Authority* that the courts have made spectacularly unsuccessful efforts, so far, to resolve the uncertainties of the rule's application.[235]

[287] Nevertheless, in my view, in a context like the present case, the liability of a higher proprietor does turn on whether the use of the land is a natural use, as discussed.

[288] In my view, from 1 July 1995, the use of the railway land, by passively maintaining the embankment and the culverts in place, which drained the overland surface water flow from the higher side of the embankment to the discharge point of the culverts in the line of the gully that crossed onto the respondent's land, is reasonably determined to be a natural use, having regard to all the circumstances, including the long term prior use of the land for the railway embankment and that the flow was increased by the clearing of land uphill of the railway land by third parties.

[289] In reaching that conclusion I have not overlooked *Righetti v Wynn*,[236] *Dubois v District Council of Noarlunga*,[237] *Coulter v TM Burke Pty Ltd*,[238] *Kraemers v Attorney–General*,[239] *Davis v Lethbridge*,[240] *Corbett v Pallas*[241] or the cases referred to in them, including *Hurdman v North Eastern Railway Co*.[242] But it would not assist in reaching the answer to the question of natural use in the present case to deal with them at length. In this area of discourse, cases are fact intensive and conclusions are case specific. That is true even when the *Gartner* principles relating to surface water flows don't apply, as shown in the analogous context of riparian water damage in England and Wales, by comparing *Radstock Co-operative and Industrial Society Ltd v Norton-Radstock Urban District Council*[243] and *Bybrook Barn Garden Centre Ltd v Kent County Council*.[244]

[290] In reaching that conclusion I have not relied on the reasoning of McMurdo JA as to why Aurizon is not liable.

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234 Referred to in *Tock v St John's Metropolitan Area Board* [1989] 2 SCR 1181, 1190 by cross reference to WL Prosser, "The Principle of *Rylands v Fletcher*" in *Selected Topics on the Law of Torts* (1953) 135, 147. The source of the example may be *Village of Euclid v Ambler Realty Co* 272 US 365, 388 (1926).

235 (1994) 179 CLR 520, 540.

236 [1950] St R Qd 231.

237 [1959] SASR 127, 130.

238 [1960] VR 16.

239 [1966] Tas SR 113.

240 [1976] 1 NZLR 689.

241 (1995) 86 LGERA 312.

242 (1878) 3 CPD 168.

243 [1968] 1 Ch 605.

244 [2001] Env LR 543.

[291] It follows, in my view, that the appellants did not commit the tort of nuisance by failing to seal the culverts or by not otherwise altering the discharge of water from the culverts onto the respondent's land, so as to avoid the erosion damage that was suffered by the respondent.