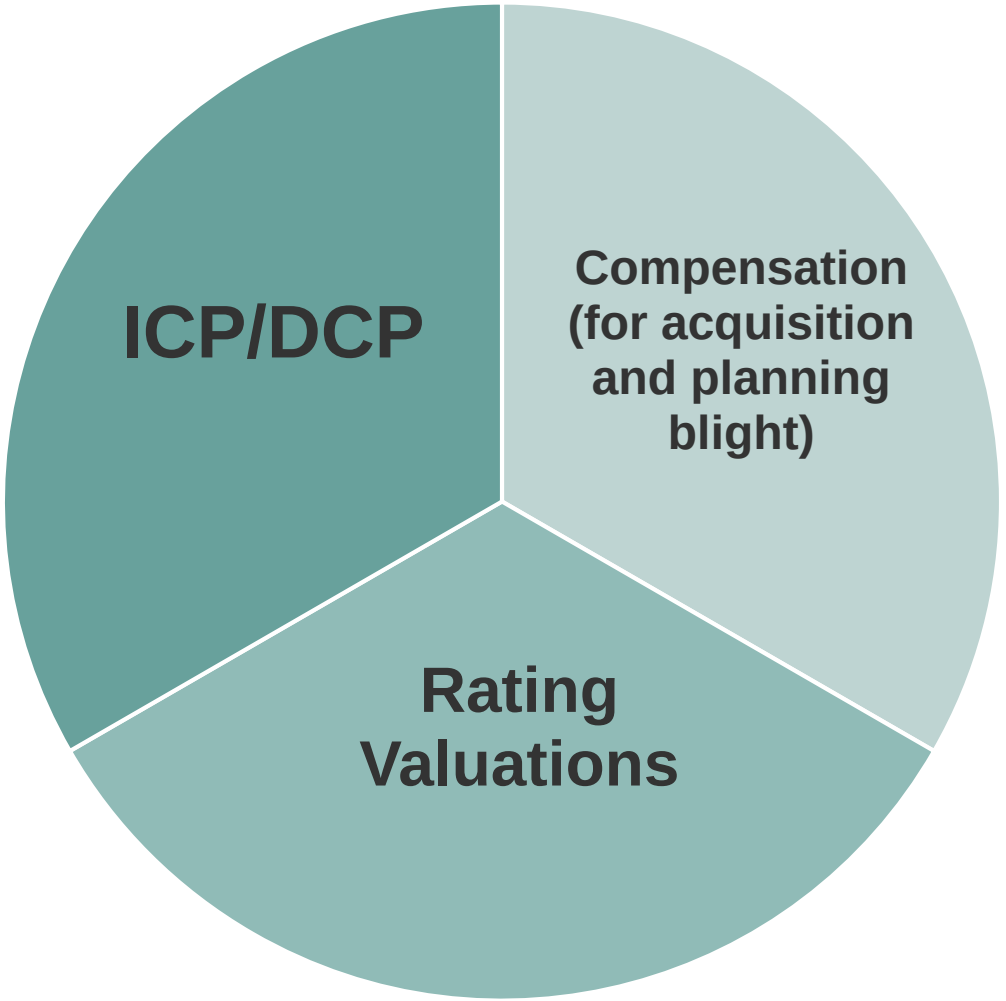
Maddocks Legal Update

- Fixtures and improvements under the VL Act
- Disputes: what proper preparation looks like
- Pointe Gourde: a lesson in compensation law

Law and valuations: Current Drivers



Thursday 17 October 2019

Fixtures, chattels & s 154A(1) of the *Property Law Act 1958*

Presentation By

David Litwin | Associate | Public Law

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Fixtures, chattels & s 154A(1) of the *Property Law Act 1958*

1. Doctrine of fixtures – the common law
2. The provision – s 154A(1)
3. The stamp duty cases: *Vopak & Uniqema*
4. CIV and improvements, *Valuation of Land Act 1960*
5. Applying s 154A(1) to the VL Act 1960: two answers
6. Consequences
7. Next steps

Are all fixtures improvements when assessing Capital Improved Value?

- Related, but distinct concepts
- Fixtures are improvements where:
  - on and for the **benefit** of the land; and
  - increase the **value** of the land
- For CIV, a fixture will be an improvement where it forms part of the **hypothetical estate in fee simple**
- Whether that is the case depends on:
  - the common law; and
  - the operation of statute (including, perhaps, s 154A(1))

The doctrine of fixtures: common law

- **Fixtures**: items attached to the land so as to become, in law, part of the land

- **Chattels**: anything else

Quicquid plantatur solo, solo cedit

‘anything set upon the ground is yielded to the ground’

The modern test

Whether an item has become a fixture depends essentially upon ***the objective intention*** *with which the item was put in place. The two considerations which are commonly regarded as relevant to determining the intention with which an item has been fixed to the land are first, the degree of annexation, and secondly, the object of annexation.*

National Australia Bank Ltd v Blacker [2000] 104 FCR 288 at [10] per Conti J, cited in TEC Desert Pty Ltd v Commissioner of State Revenue (Western Australia) (2010) 241 CLR 576 at [24].

Property Law Act 1958, s 154A

(1) A tenant who at his or her own cost or expense has installed fixtures on, or renovated, altered or added to, a rented premises owns those fixtures, renovations, alterations or additions and may remove them before the relevant agreement terminates or during any extended period of possession of the premises, but not afterwards.

...

(3) This section does not apply to the extent that—

(a) the lease otherwise provides; or

(b) the landlord and the tenant otherwise agree.

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What does this mean? The stamp duty cases

1. **Vopak** (*Vopak Terminals Pty Ltd v Commissioner of State Revenue* [2004] VSCA 10)

2. **Uniqema** (*Commissioner of State Revenue v Uniqema Pty Ltd* [2004] VSCA 82)

** Both decided on s 28(2) of the Landlord and Tenant Act 1958, the **predecessor** to s 154A(1) of the PL Act*

Vopak

1. Section 154A(1) displaces the common law of fixtures
2. Notwithstanding the common law test (object of annexation):
    a) any ‘fixtures’ installed by a tenant (‘tenant’s fixtures’) do not become fixtures, but remain chattels
    b) so, such items do not form part of the estate in the land held by the vendor

Vopak Terminals Pty Ltd v Commissioner of State Revenue [2004] VSCA 10 per Ormiston JA at [21]-[45]

Uniqema

1. Confirmed *Vopak* on the effect of the provision

2. The provision operates **not just** between landlord and tenant, but on third parties, e.g. purchasers.

Commissioner of State Revenue v Uniqema Pty Ltd [2004] VSCA 82 per Ormiston JA at [53]

A unique provision

Vopak (at [39]):

*Though the result may have **unfortunate consequences** in practice, Parliament's desire to protect tenants seems to have been predominant and it is for that body to correct it, if that appears desirable.*

Uniqema (at [52]):

*…in Victoria alone, but nowhere else in Australia, tenant's fixtures do not form part of the realty and are "excised" from the title which a vendor can pass on transfer. Of course that is so, but the consequence follows from the fact that **only in Victoria has there been a section passed in the unusual form which s.28(2) has taken***

CIV: VL Act 1960, s 2(1)

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

- i.e. *CIV requires the assessment of a hypothetical estate in fee simple, unencumbered by any lease (considered in Challenger case, 2011)*

'improvements': VL Act 1960, s 2(1)

- "**improvements**", for the purpose of ascertaining the site value of land, means all work actually done or material used on and for the benefit of the land, but in so far only as the effect of the work done or material used increases the value of the land and the benefit is unexhausted at the time of the valuation…

The question

Are tenant's fixtures per s 154A(1) of the PL Act…

….*nevertheless* 'improvements' for the purposes of s 2(1) of the VL Act?

Answer 1: Yes

- In assessing CIV, must assume land is held in a hypothetical estate in fee simple
- ‘Land’ includes fixtures
- Any lease must be disregarded to the extent it encumbers the value of the land
- Where s 154A(1) excludes from title the ‘tenant’s fixtures’, the lease *does* encumber value
  - ‘tenant’s fixtures’ are ‘improvements’

Answer 1: No

- In assessing CIV, any lease must be disregarded to the extent it encumbers the value of the land
- BUT the fact of the lease is not disregarded
- The fact of the lease means s 154A(1) applies to any ‘tenant’s fixtures’
- So:
  - ‘tenant’s fixtures’ remain chattels
  - chattels do not form part of the hypothetical estate in fee simple
  - tenant’s fixtures are not improvements

Policy consequences

- land containing valuable plant may be undervalued
- shortfalls in revenue – e.g. FSPL
- good practice taxation principles: equity and efficiency
- risk of tax avoidance

Next steps

- No judicial consideration of s 154A(1) in this context
- Issue to be considered by Tribunal in a wind farm case
- Pending the Tribunal's decision, this could be a matter for legislative reform

‘The Parliamentary Draftsman’

I’m the parliamentary draftsman
I compose the country's laws,
And of half the litigation
I’m undoubtedly the cause.

JPC, ‘Poetic Justice’, 1947

Maddocks legal update

Calder Park Raceway Pty Ltd v Brimbank City Council (Land Valuation) (Red Dot) [2016] VCAT 551

Presentation By

Carla Oliva | Lawyer | Public Law

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Calder Park decision

- Background of the land
- Valuation parameters
- Role of the Tribunal in land valuation matters
- 3 challenges faced by Tribunal in Calder Park
- Tribunal’s message for expert valuers

The land

- The review of the Site Value was in relation to the land at 377-877 Calder Freeway Calder Park (land) as at the relevant date of 1 January 2012.
- The land is commonly known as the Calder Park Raceway and Thunderdome.
- Zones:
  - Industrial Zone - Schedule 3 (IN3Z)
  - Special Use Zone – Schedule 1 (SUZ1)
  - (small portion) Farming Zone (FZ)
- Overlays:
  - Melbourne Airport Environs Overlay 1 and 2
  - Public Acquisition Overlay Schedule 4
- Land bisected by Urban Growth Boundary (UGB)
- Encumbrances:
  - electricity easements for overhead powerlines
  - road and construction authority requirements

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Valuation parameters

- The task before the valuers was to assess:

  A single hypothetical sale, valuing the land at highest and best use, still taking into account the fact that the land is in four parcels of land, bisected by the UGB and (largely) in two separate zones and that different parts of the land have different attributes (i.e. varying sizes of earth mounds).

Role of the Tribunal

There is a clear principle that a court (or Tribunal) dealing with a disputed valuation should not itself value the land in question, or introduce a third set of valuation opinions or make its own assumptions about the land, but should decide the matter on the evidence and submissions before it.

The court can nonetheless piece together a valuation from the evidence and submissions before it, and does not simply have to agree wholly with one valuer or another.

Challenge #1 – Highest and Best Use

Section 5A of the VLA requires a valuer to take into account *'the use to which the land is being put at the relevant time'* , as well as the highest and best use to which the land **might** be put.

(1) CPR contends that, as at 1 January 2012, the use of the land as a motor sport and race track complex was no longer a desirable purpose and that a hypothetical purchaser would not buy the land for such a purpose.

(2) Council's valuer considers that the existing zoning is beneficial and supports the current operation, he has nonetheless valuer the land with regard to its most likely alterative GWZ.

- Motor racing track is a prohibited use in a GWZ.

Ultimately, Council proceeded on an assumption that the highest and best use to which the land might be put is something other than its existing use as a motor sports racing track.

Challenge #2 – Attributes of the land

Are the earth mounds ‘improvements’ ?

Section 2 of the VLA definition of site values requires an assumption that a valuer is to assume the
“improvements of the site if any had not ben made”

Need to consider highest and best use of the land.

Challenge #3 – Lack of transparency in comparative sales

VCAT needs to fully understand how each valuer has reached his or her conclusion. There must be a *transparent flow of reasoning* provided by a valuer to support the professional judgment reached on the value of the land.

Example of insufficient transparency in the flow of reasoning as stated by the Tribunal in Calder Park at [47]:

A valuer cannot simply refer to say three comparable sales that demonstrate sales rates of say $500/m², $520/m² and $600/m² and then simply conclude as a matter of professional judgement, taking these into account, that a subject site should be valued at say $400/m².

Tribunal's take-home message: Highest and best use

- VCAT often sees *little analysis about how the highest and best use has been derived* and what specific town planning considerations (if any) or other factors have been properly taken into account
- Be transparent about the factors considered to determine highest and best use
- Important to specify the highest and best use (even if not totally precise)
- An agreement between valuers or a valuer's concession about a single highest and best use without careful analysis results in unintended consequences.
- In cases where 'highest and best use' is itself a matter of dispute, it may be prudent for the expert valuer to consider and present alternative valuations based on alternative scenarios about highest and best use.

Tribunal's take-home message: Assessing attributes (or improvements) of the Land

- In Calder Park the valuers failed 3 interrelated components of the improvements definition:
  - was the work actually done or material used on and for the benefit of the land, **but in so far only as**
  - the effect of the work done or material used increases the value of the land **and**
  - the benefit is unexhausted at the time of the valuation.

- If highest and best use differs from existing use, consider whether the improvements can still satisfy all 3 aspects of this definition. This requires a valuer to consider all the specific permissible uses under the alternative use zoning.

Take-home message:
Ensuring transparency in the analysis of comparable sales

- Clearly articulate the underlying basis where professional judgment
- Provide rationale for adjustments
- Where professional judgement leads a valuer to make substantial adjustments to comparable sales, in the order or 25% to 40% or more, the valuer will need to provide transparent reasoning and demonstrate why the supposedly comparable sale is indeed comparable at all.
- VCAT accepts that directly comparable sales are not always available, however *imperfect comparable sales* are assessed with greater level of scrutiny therefore any professional judgement or adjustments need to be even more clearly and transparently articulated if evidentiary weight is to be applied to the sales.

Pointe Gourde MGV Presentation

Presentation By

Chris Cantor | Partner | Public law

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Pointe Gourde Principle

Recognising the effect of reservation of land upon highest and best use

Pointe Gourde: an introduction

Context:

1. **Compensation for compulsory acquisition;**
2. **Compensation for planning blight**

Starting point

- Before and after method
  - ➢ aka ‘deprival method’
    - Section 41(3) LAC Act
    - Section 104 P&E Act

Comp acq context

LAC Act s43

(1) In assessing compensation, the following matters must be disregarded—

(a) any *increase or decrease* in the market value of the interest in land which is acquired arising from the carrying out, or the proposal to carry out, the purpose for which the interest was acquired

Planning compensation context

P&E Act s.104

Cap on compensation payable

The compensation payable for financial loss must not exceed the difference between—

(a) the unaffected value of the land; and

(b) the value that the land would have had it not been affected

The before scenario: meaning?

- More than just condition of land in ‘the before scenario’ (*alternate reality*)
- Hypothetical scenario assuming reservation and acquisition *never occurred*
  - A bit like improvements in SV?
- What would highest and best use of land then be?

Before scenario: meaning?

- ‘Before’ somewhat misleading
- Disregard the public purpose of the acquisition as if it *never existed*.

Comp acq context

LAC Act s43(1A)

If:

- (c) the decision to impose the zoning boundary was not related to the purpose for which the interest in land was acquired—
- regard may be had to the actual zoning of the land in which the acquired interest subsists and, where relevant, to the actual zoning boundary

Back to the future?! Sort of…

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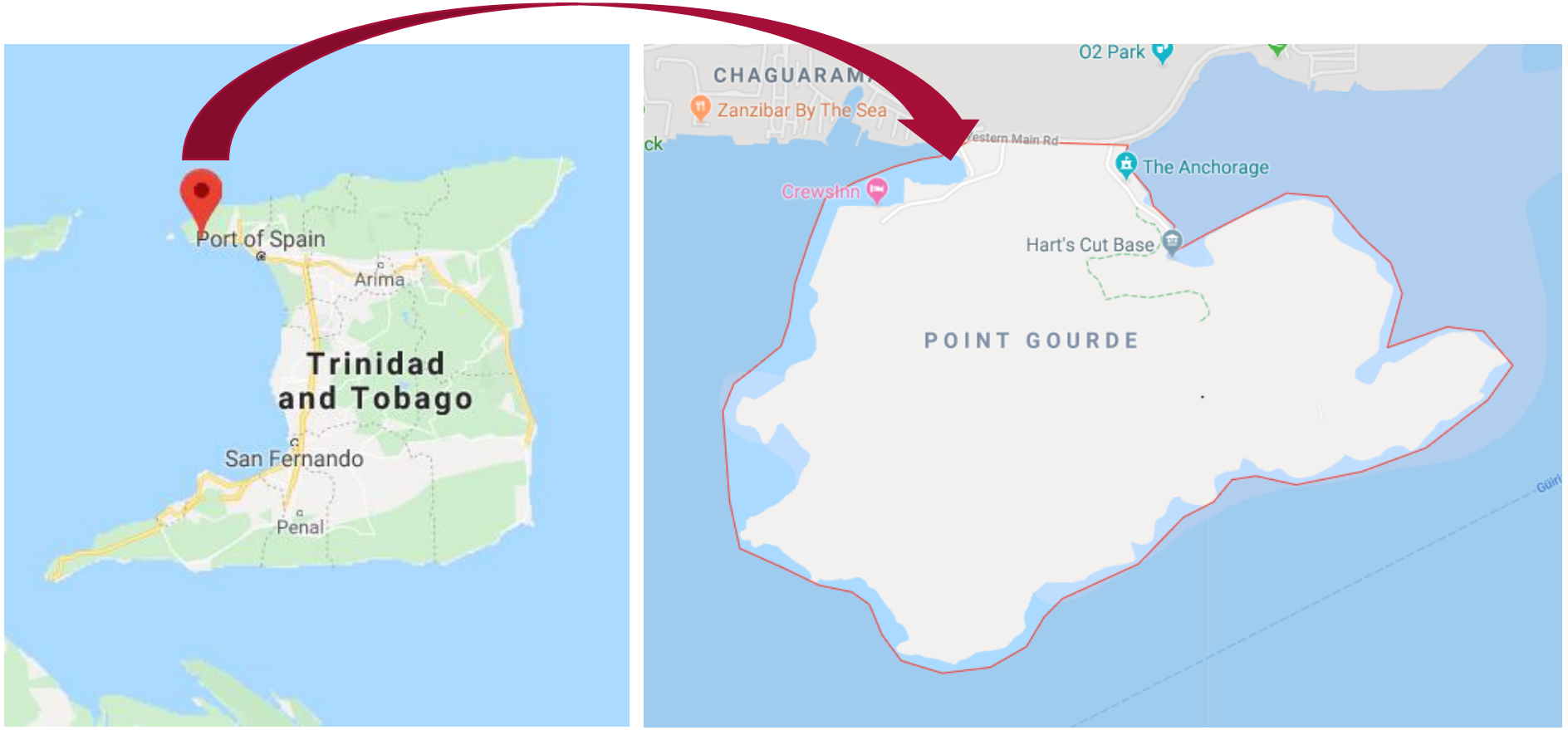
The Pointe Gourde land



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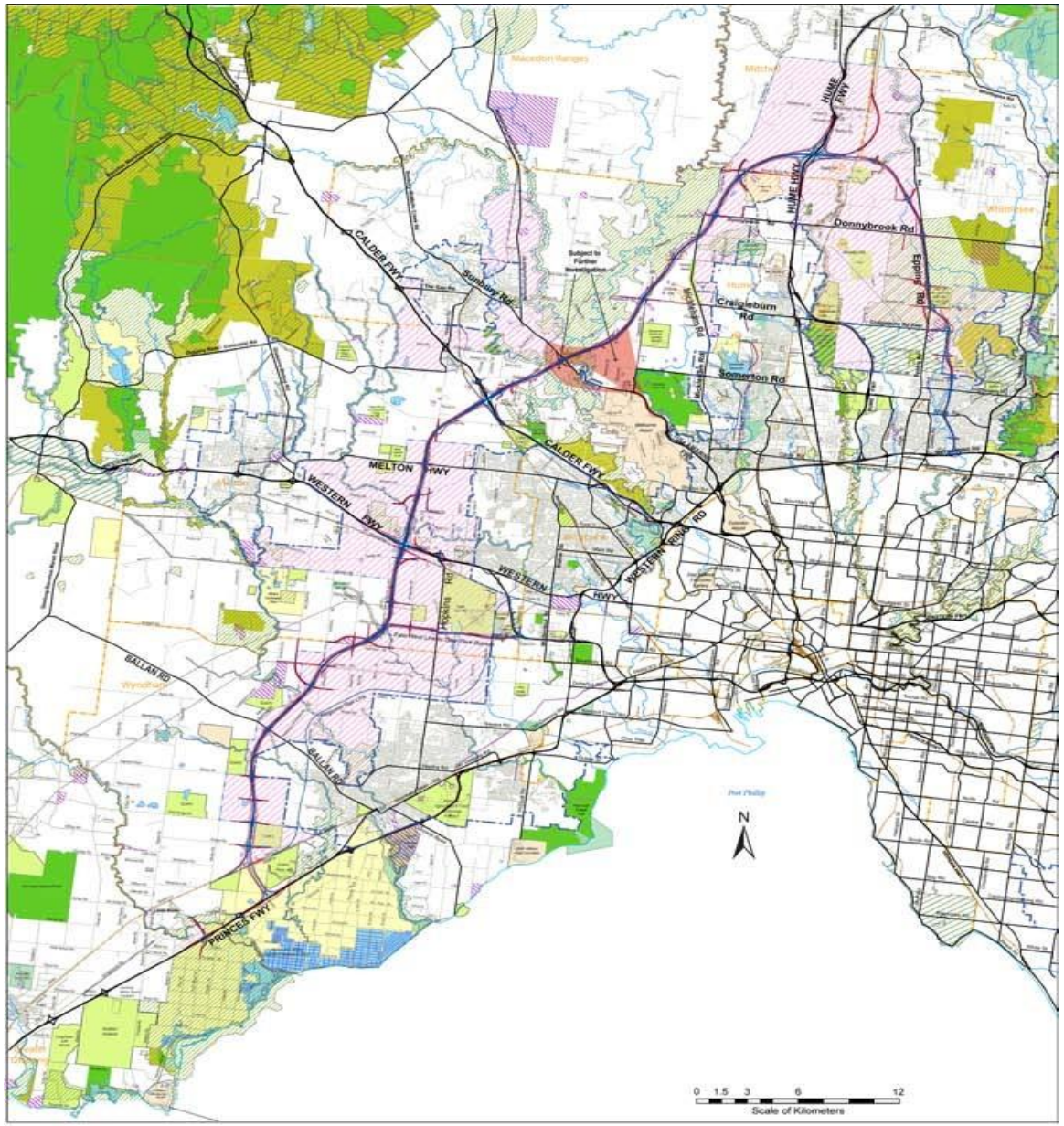
Outer Metro Ring Road



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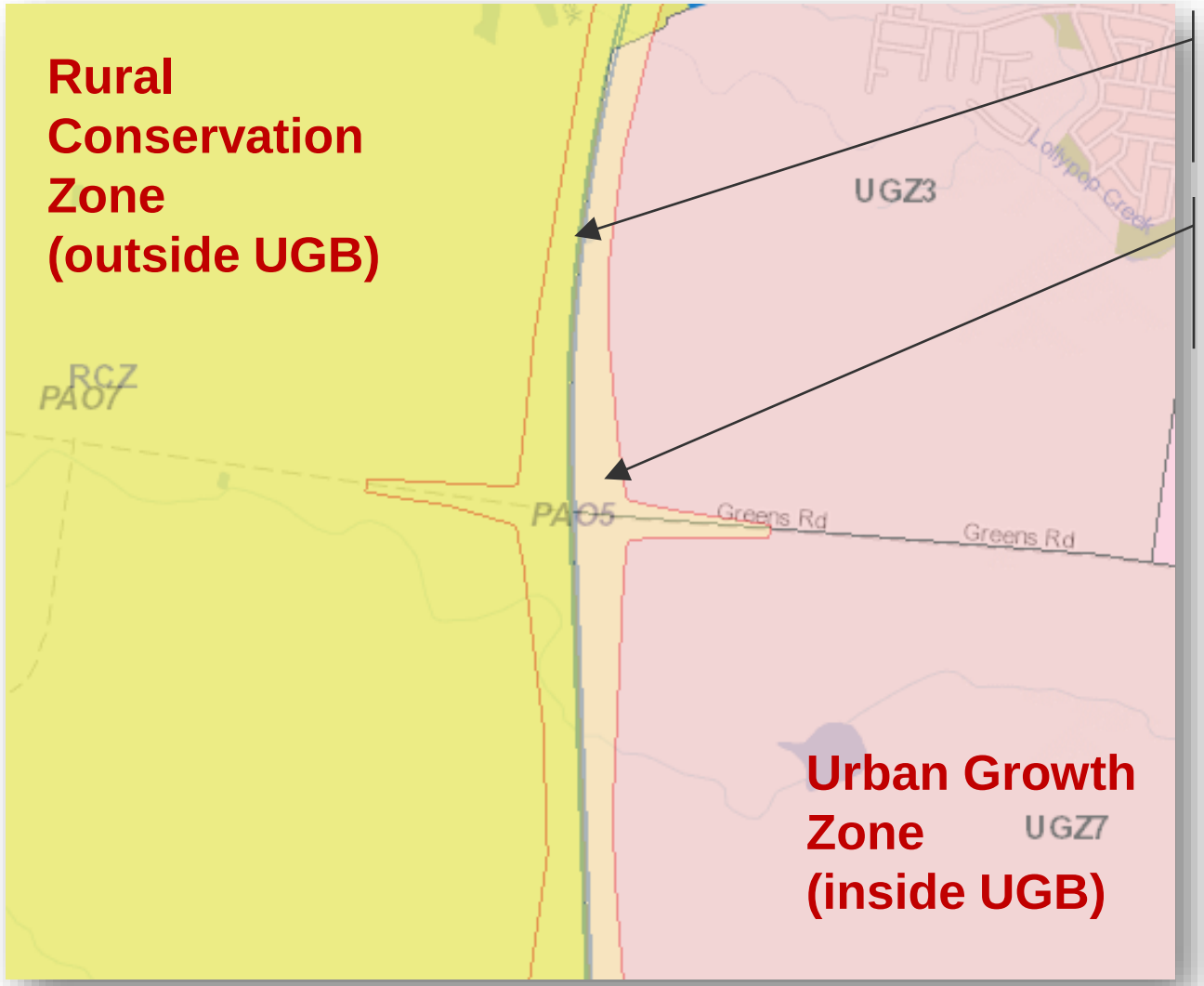

Urban Growth Boundary

OMR/ E6 Reservation

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Questions?

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maddocks.com.au

info@maddocks.com.au

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