CITATION:	*Groote Eylandt Mining Company Pty Ltd v Secretary for Mineral Royalties (NT)* [2019] NTSC 58
PARTIES:	GROOTE EYLANDT MINING COMPANY PTY LTD (ACN 004 618 491) v SECRETARY APPOINTED PURSUANT TO SECTION 49AA OF THE *MINERAL ROYALTY ACT* (NT)
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT exercising Territory jurisdiction in an appeal under s 115 of the *Taxation Administration Act* (NT)
FILE NO:	LCA 32 of 2017 (21733029)
DELIVERED:	25 July 2019
HEARING DATES:	10, 11 and 12 September 2018
JUDGMENT OF:	Grant CJ

CATCHWORDS:

MINING – GENERAL MATTERS – MINERALS AND RIGHTS THERETO – TAXES AND DUTIES

Whether mining security levy paid as condition of Authorisation to carry out mining activities a deductible operating cost for purpose of calculating royalty liability – whether bank guarantee fees for the provision of security required as a condition of Authorisation a deductible operating cost –

whether fees incurred for access to operating system and program a deductible operating cost – appeal allowed in part.

Mineral Royalty Act 1982 (NT) s 4, s 4B, s 10
Mining Management Act 2001 (NT) s 38, s 39, s 44A, s 44B, s 46B
Taxation Administration Act 2007 (NT) s 107, s 109, s 112, s 115, s 116, s 125, s 126, s 127.

BHP Billiton Ore Pty Ltd v National Competition Council (2008) 236 CLR 145, *Bropho v Human Rights and Equal Opportunity Commission* (2004) 135 FCR 105, *Commissioner for Corporate Affairs v Bracht* [1989] VR 821, *Davison v Bathurst City Council* [1966] 1 NSWR 61, *Director of Public Prosecutions v United Telecasters Sydney Ltd* (1990) 168 CLR 594, *Federal Commissioner of Taxation v Dalco* (1990) 168 CLR 614, *Hagipantelis v Legal Services Commissioner of New South Wales* (2010) 78 NSWLR 82, *Inglebrae Coal Pty Ltd v New South Wales Coal Compensation Board & Anor* [2003] NSWCA 285, *International Litigation Partners Pte Ltd v Chameleon Mining NL* (2012) 246 CLR 45, *New South Wales Coal Compensation Board v New South Wales Coal Compensation Review Tribunal & Anor* (NSWCA, unreported, 29 July 1997), *Territory Resources Ltd v Secretary for Mineral Royalties (NT)* [2018] NTSC 12, *Vines v Djordjevitch* (1955) 91 CLR 512, *Zickar v MGH Plastic Industries Pty Ltd* (1996) 187 CLR 310, referred to.

REPRESENTATION:

Counsel:

Appellant:	J Hmelnitsky SC with D Hume
Respondent:	S Kaur-Bains

Solicitors:

Appellant:	Ward Keller
Respondent:	Solicitor for the Northern Territory

Judgment category classification:	B
Judgment ID Number:	GRA1916
Number of pages:	64

IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Groote Eylandt Mining Company Pty Ltd v Secretary for Mineral Royalties (NT) [2019] NTSC 58
LCA 32 of 2017 (21733029)

BETWEEN:

GROOTE EYLANDT MINING COMPANY PTY LTD (ACN 004 618 491)
Appellant

AND:

SECRETARY APPOINTED PURSUANT TO SECTION 49AA OF THE *MINERAL ROYALTY ACT* (NT)
Respondent

CORAM: GRANT CJ

REASONS FOR JUDGMENT

(Delivered 25 July 2019)

[1] The appellant mines manganese ore on Groote Eylandt in the Gulf of Carpentaria. Royalty is payable to the Territory on the net value of the mineral commodity obtained from the production unit, calculated on the basis of gross realisation less operating costs and other eligible deductions and expenses. This appeal concerns whether certain expenses incurred by the appellant between 2012 and 2015 are deductible for the purpose of calculating the appellant's royalty liability under s 10 of the *Mineral Royalty Act 1982* (NT) (**MRA**).

Procedural history

[2] By letter dated 16 July 2016, the respondent advised the appellant that default royalty assessments had been made for the production unit pursuant to s 19 of the MRA for the 2012-13, 2013-14 and 2014-15 royalty years. Those assessments resulted in a further net royalty payable of $3,639,432.21 over the period.

[3] On 12 September 2016, the appellant formally objected to the default royalty assessments pursuant to s 109 of the *Taxation Administration Act 2007* (NT) (**TAA**). Each of the grounds of objection related to the deductibility of certain amounts as eligible operating costs. On 11 May 2017, a delegate of the Secretary allowed the objection in part. On 6 July 2017, the appellant filed a Notice of Appeal from the determination.

Nature and grounds of appeal

[4] The appeal is brought pursuant to s 115 of the TAA. The nature of this type of appeal is described in *Territory Resources Ltd v Secretary for Mineral Royalties (NT)*.[1] In short, the appellant bears the burden of establishing that the respondent's decision on the objection was "wrong";[2] the parties are not limited to the grounds on which the objection was made or determined;[3] this Court may admit any evidence that was not before the respondent when making the decision if

1 *Territory Resources Ltd v Secretary for Mineral Royalties (NT)* [2018] NTSC 12 at [1]-[4].

2 TAA, s 116.

3 TAA, s 125(1), (2).

satisfied the new evidence is material to the decision;[4] intervention by this Court is contingent on the appellant identifying some legal, factual or discretionary error in the respondent's decision on the objection; and the Court's dispositive powers extend to confirming or varying the decision, or substituting another decision that would have been available to the respondent.[5]

[5] The grounds set out in the Notice of Appeal dated 6 July 2017 are:

1. The respondent erred in concluding that the mining security levy pursuant to section 44A of the *Mining Management Act* ("MMA") incurred annually by the appellant in relation to its Authorisation to carry out mining activities at its Groote Eylandt Production Unit in the 2013-14 and 2014-15 royalty years, was not an operating cost as defined under section 4B MRA and therefore was to be disallowed for the purposes of calculating the appellant's royalty liability under section 10 MRA for those royalty years.

2. The respondent erred in concluding that the mining security guarantee fee incurred by the appellant in order for a bank guarantee to be provided to satisfy the security requirement imposed on it by section 43 MMA, in relation to its Authorisation to carry out mining activities at its Groote Eylandt Production Unit in the 2012-13, 2013-14 and 2014-15 royalty years, was not an operating cost as defined under section 4B MRA and therefore was to be disallowed for purposes of calculating the appellant's royalty liability under section 10 MRA for those royalty years.

3. The respondent erred in concluding that management fees incurred by the appellant in relation to the operation of its Groote Eylandt Production Unit in the royalty years 2013-14 and 2014-15 were not operating costs as defined under section 4B MRA and therefore were to be disallowed for purposes of calculating the appellant's royalty liability under section 10 MRA for those royalty years.

---

4 TAA, s 126.

5 TAA, s 127.

Operating costs

[6] Section 10 of the MRA fixed the rate of royalty payable at 20% of the "net value" of a saleable mineral commodity calculated in accordance with the following formula:[6]

> **GR – (OC + CRD + EEE + AD)**
>
> where:
>
> **GR** is the gross realisation from the production unit in the royalty year; and
>
> **OC** is the operating costs of the production unit for the royalty year; and
>
> **CRD** is the capital recognition deduction; and
>
> **EEE** is any eligible exploration expenditure, if any; and
>
> **AD** is the additional deduction, if any, under section 4CA.

[7] Section 4B(1) of the MRA defined "operating costs", so far as is relevant for these purposes,[7] in the following terms:

> **4B Interpretation of operating costs**
>
> (1) In this Act ***operating costs***, in relation to a production unit in respect of a royalty year for the purposes of a deduction under section 10(2), means:
>
> (a) expenditure which was reasonable in amount and which is directly attributable to, the production, or maintenance for the purposes of production, or the sale or marketing of the saleable mineral commodity of a production unit,
>
> and includes:

---

6 The structure of s 10 of the MRA was amended by the *Revenue Legislation Amendment Act 2018* (NT), but the MRA as in force immediately before the commencement of those provisions continues to apply for the purposes of this appeal.

7 The *Revenue Legislation Amendment Act 2013* (NT) commenced with effect from 1 July 2013 and inserted ss 4B(1)(za) and (zb) into the definition of "operating costs" in the MRA. The consequences of that amendment for these purposes are discussed later in these reasons.

(g) office expenses that:
  (i) relate to an office of the royalty payer that is in the Territory; and
  (ii) are directly attributable to the operation of the production unit; and
  (iii) in the case of expenses for work or services – are for the work or services performed solely in the Territory; and

(h) reasonable fees for management services that:
  (i) are performed solely in the Territory; and
  (ii) are directly attributable to the operation of the production unit; and

(k) fees and charges imposed under a law in force in the Territory; and

(p) other matters which were necessary for the proper administration of the production unit;

but does not include:

(r) taxes on income or profits; or

(za) an office expense where:
  (i) the criteria mentioned in paragraphs (g)(i) and (iii) are not met; and
  (ii) if those criteria were met, the expense would ordinarily be classified by the Secretary as being of a kind mentioned in paragraph (g);
(whether or not the expense might also be classified as being expenditure of a kind mentioned in any other paragraph); or

(zb) fees for management services where:
  (i) the criterion in paragraph (h)(i) is not met; and
  (ii) if that criterion were met, the fees would ordinarily be classified by the Secretary as being of a kind mentioned in paragraph (h);
(whether or not the fee might also be classified as being expenditure of a kind mentioned in any other paragraph).

Mining security levy

[8] The first category of expense at issue in the appeal is the mining security levy paid by the appellant in the 2013-14 and 2014-15 royalty

years as a condition of the authority to mine granted under ss 37(2) and 44A of the *Mining Management Act 2001* (NT) (**MMA**). The appellant contends that the levy is properly characterised as an "operating cost" within the general definition in s 4B(1)(a), and within the specific inclusions of fees and charges under s 4B(1)(k) and other matters necessary for the proper administration of the production unit under s 4B(1)(p) of the MRA.

[9] The essence of the respondent's determination on the objection for both the mining security levy and the mining security guarantee fee (discussed further below), was that an expense must be "directly attributable" to the production, or the maintenance for the purposes of production, or the sale or marketing of the mineral commodity in order to qualify as an operating cost within the meaning of s 4B(1)(a) of the MRA. That was said to require a "proximate and immediate connection" between the expense and the production of the mineral commodity, in the sense that the production of that commodity must have been "immediately caused by, or immediately due to" the expenditure. In the application of that test, it was said that the mining security levy did not have the requisite proximate or immediate connection to production.

[10] The respondent's determination on the objection also went on to conclude that the mining security levy was a tax rather than a "fee" or "charge" imposed under a Territory law within the meaning of

s 4B(1)(k) of the MRA, and not a matter related to the "proper administration of the production unit" within the meaning of s 4B(1)(p) of the MRA.

[11] Section 35 of the MMA provides that the operator for a mining site may carry out mining activities on the site only if the Minister has granted the operator an Authorisation to do so. Section 37(2)(b) of the MMA provides:

> (b) unless the Authorisation relates to the Ranger Project Area – the operator must:
>
> (i) provide a security of the amount, in the form, and on the terms, specified in the condition; and
>
> (ii) pay a levy of an amount specified in the condition;

[12] That provision is then picked up in s 44A of the MMA, which provides:

> **Requirement for and purpose of levy**
>
> (1) An operator who carries out mining activities under an Authorisation must pay an annual levy in accordance with the condition of the Authorisation mentioned in section 37(2)(b)(ii).
>
> (2) A levy is a tax in relation to mining activities that is levied for the purpose of providing revenue:
>
> (a) for the Fund; and
>
> (b) for the effective administration of this Act in relation to minimising or rectifying environmental harm caused by mining activities.

[13] The essential features of that scheme are as follows. Mining activity may only be lawfully carried out where there is an Authorisation in place. It is a condition of an Authorisation that the mining operator

must provide a security and pay a levy of 1% of the security amount.[8] A failure to do so is a criminal offence,[9] and might reasonably be grounds for revocation of the Authorisation.[10] The purpose of the levy is for the effective administration of the MRA in relation to minimising or rectifying environmental harm caused by mining activities.[11] Levies are paid into the Mining Remediation Fund established under the *Financial Management Act 1995* (NT) to be applied to the minimisation or rectification of environmental harm caused by unsecured mining activities.[12] The levy paid by the appellant in each of the 2013-14 and 2014-15 royalty years was in the amount of $976,242 based on the security calculated by the responsible Minister.

[14] Against that background, the issue for determination is whether the levy is properly characterised as an "operating cost" within the general definition in s 4B(1)(a), or within the specific inclusions of fees and charges under s 4B(1)(k) and/or other matters necessary for the proper administration of the production unit under s 4B(1)(p) of the MRA. That draws attention in the first instance to the structure of the provision, which uses "means" with reference to a general definition, followed by "includes" and "but does not include" with reference respectively to a number of more specific descriptors. By that

8 MMA, s 44B.

9 MMA, s 39.

10 MMA, s 38.

11 MMA, s 44A(2).

12 MMA, s 46B.

structure the legislature has signified that the term "operating costs" has the limited meaning set out in paragraph (a), but that in order to either extend or restrict the scope of the general definition, or to avoid doubt, certain specific items or categories of expenditure are to be taken to fall within or without the scope of the designated meaning.[13] Some of those specific inclusions are subject to express requirements of reasonableness in amount and direct relationship or attributability. No question of reasonableness in amount arises in this context for the obvious reason that the levy is fixed by legislation.

[15] The matter of operating costs is dealt with in Royalty Guideline *RG-MRA-005 Operating Costs*, published under s 4E of the MRA. That section provides that the Secretary may issue guidelines about any act, matter or thing, and to the extent that it complies with the guideline it is taken to comply with the MRA. The effect of that provision is that while the guidelines are not conclusive of the proper interpretation of the MRA, where a royalty payer has attended to some act, matter or thing in compliance with a guideline it has presumptively satisfied the requirements of the MRA in relation to that act, matter or thing.[14] The Guideline makes the following provision in relation to direct attributability:

---

13 *Zickar v MGH Plastic Industries Pty Ltd* (1996) 187 CLR 310 at 329-330; *BHP Billiton Ore Pty Ltd v National Competition Council* (2008) 236 CLR 145 at [32]; *International Litigation Partners Pte Ltd v Chameleon Mining NL* (2012) 246 CLR 45 at [26].

14 That presumption is subject to the qualification that a guideline does not affect the exercise by the Secretary of a power under the MRA.

Meaning of "directly attributable"

16. To be an allowable operating cost, the expenditure must be directly attributable to the production, maintenance for the purposes of production, or sale and marketing of the saleable mineral commodity of the production unit.

17. The nexus between the expenditure and production, maintenance for the purposes of production, or sale and marketing must be material and close. This degree of necessary connection is generally determined using a commonsense approach, where a reasonable person, applying commonsense, would conclude that the expenditure was necessarily incurred in the production, maintenance for the purposes of production, or sale and marketing of a saleable mineral commodity of the specific production unit.

18. An expenditure that is only remotely, tenuously or insubstantially connected with the requisite activity is not an allowable operating cost of the production unit.

[16] The requisite nexus is there described as "material and close", and one for which a reasonable person applying a common sense approach would conclude was necessarily incurred in the production, *et cetera* of the production unit. A nexus of that sort is contrasted with a remote, tenuous or insubstantial one. There would appear to be a qualitative difference between that expression of the concept in the Guideline, and the delegate's conclusion that an "immediate connection" was required between the expense and the production of the mineral commodity, in the sense that the production of that commodity must have been "immediately caused by, or immediately due to" the expenditure.

[17] The approach described in the Guideline accords generally with the authorities which have dealt with the meaning of the term, albeit in other contexts. By way of example, in *New South Wales Coal*

Compensation Board v New South Wales Coal Compensation Review Tribunal & Anor,[15] the New South Wales Court of Appeal considered whether the need to acquire and pay for new surface rights was a pecuniary loss "directly attributable" to the compulsory acquisition of a coal lease. Stein JA (with whom Handley JA and Grove AJA agreed) said:

> [Question 3] involves examining the meaning of "directly attributable". In a different context Lord Reid examined the meaning of "attributable" in *Central Asbestos Co Ltd v Dodd* [1972] 2 All ER 1135. His Lordship said:
>
> > That means capable of being attributed. "Attribute" has a number of cognate meanings; you can attribute a quality to a person or thing, you can attribute a product to a source or author, or you can attribute an effect to a cause. The essential element is connection of some kind. (at 1141)
>
> In *Walsh v Rother District Council* [1978] 1 All ER 510 Donaldson J considered the meaning of "attributable" in an employment context. After referring to Lord Reid in *Central Asbestos* he remarked:
>
> > Suffice it to say that these are plain English words involving some causal connection between the loss of employment and that to which the loss is said to be attributable. However, this connection need not be that of a sole, dominant, direct or proximate cause and effect. (at 514)
>
> In my opinion "directly" in cl 9(2) should not be construed to mean solely, which is in effect the submission of the appellant. What is required is a causal connection, but this need not be the sole or even dominant cause. In this instance there is no doubt that there exists a direct causal connection. The loss to Bloomfield was attributable to its need to acquire and pay for new surface rights and this loss was a direct result of the termination of the leases.

---

15 *New South Wales Coal Compensation Board v New South Wales Coal Compensation Review Tribunal & Anor* (NSWCA, unreported, 29 July 1997).

[18] That formulation was subsequently endorsed in *Inglebrae Coal Pty Ltd v New South Wales Coal Compensation Board & Anor*.[16] In that later case, the New South Wales Court of Appeal considered whether a capital gains tax liability was a pecuniary loss "directly attributable" to the compulsory acquisition of a coal title. The Court concluded that the CGT liability was "directly attributable" to the acquisition because the acquisition was a disposal which in the language of the taxation legislation resulted in a capital gain.

[19] As is apparent from the chapeau to the definition in s 4B(1) of the MRA, "operating costs" must relate to the production unit, and on the more natural reading of the provision the test is whether the expenditure is "directly attributable" to: the production of the saleable mineral commodity of the production unit; the maintenance for the purposes of the production of the saleable mineral commodity of the production unit; or the sale or marketing of the saleable mineral commodity of the production unit. The "production unit" for these purposes is the "mining tenement" on which the appellant conducted its mining activities.[17]

---

16 *Inglebrae Coal Pty Ltd v New South Wales Coal Compensation Board & Anor* [2003] NSWCA 285.

17 See definition of "production unit": MRA, s 4. Although the appellant held a number of other tenements or licences to which the Authorisation, security and levy related, it is agreed between the parties that no apportionment need be made because the proportion of the levy attributable to those other tenements or licences is minimal.

[20] Subject to the requirement for an Authorisation, the mining tenement confers the right to carry out mining activities to obtain the minerals from the land.[18] As the term "production unit" is defined by reference to the right to obtain minerals, it extends to authorisations necessary for the exercise of that right. The Authorisation is required to carry out mining activities on the "mining site", which is defined to mean the area of land in respect of which mining activities are being carried out. In this case that area was the tenement constituting the production unit. The levy is payable as a condition of the exercise of the right to obtain minerals from that production unit. It matters not in that analysis that the "operator of a mining site" to whom the Authorisation is granted may be different to the owner of the mining tenement. If the levy is not paid, there is no lawful entitlement to obtain the saleable mineral commodity from the production unit, and the Authorisation might be revoked. That characterisation is not displaced by the fact that the purpose of the levy is to fund the minimisation of rectification of environmental harm caused by unsecured mining activities.

[21] The payment of the levy, and its place in the chain of production, may be distinguished from payments such as taxes or levies on income, mineral output or profits, and payments made pursuant to the mineral resources rent tax and carbon tax schemes, which are subject to

18 See definition of "mining tenement": MRA, s 4. Also see the stipulation in s 35 of the MMA that an operator may carry out mining activities on the site only if an Authorisation has been granted.

specific exclusions in the definition of "operating costs". Payment of the security levy is a precondition to the conduct of mining activity and the production of the saleable mineral commodity. On the other hand, and as the responsible Minister observed in the Second Reading Speech for the *Revenue Legislation Amendment Act 2013* (NT) (**RLAA**) (discussed further below), "[p]ayments in the nature of a tax or levy on output, value, or income and profits are not considered to be essential for production as they are generally incurred after the minerals have been produced and sold".[19]

[22] Nor are "operating costs" properly restricted to costs incurred in the physical operations of the production, *et cetera* of the production unit in order to be directly attributable. So much is apparent from the fact that Royalty Guideline *RG-MRA-005 Operating Costs* states that the specific inclusions in the definition are also subject to the requirement of direct attributability, and those specific inclusions extend to items such as accounting and legal fees, insurance premiums and tenement rentals. That statement is consistent with the notion that on a proper construction of the definition those specific inclusions are for the avoidance of doubt, rather than an extension of the general definition.[20] While it may be accepted that an indirect connection does not engage

---

19 Northern Territory, *Parliamentary Debates*, Legislative Assembly, 15 May 2013, 1620–1623 (Mr Tollner MLA, Treasurer).

20 *International Litigation Partners Pte Ltd v Chameleon Mining NL* (2012) 246 CLR 45 at [26]; *Hagipantelis v Legal Services Commissioner of New South Wales* (2010) 78 NSWLR 82 at [20].

s 4B(1)(a) of the MRA, a direct nexus between expenditure and production may arise as much from the requirements of the statutory framework governing the exercise of the right as it may arise from the relationship to fixed plant and infrastructure.

[23] In the application of an objective and common sense approach, the relationship between the payment of the levy and the production, *et cetera* of the production unit may properly be characterised as "material and close". At the very least, there is a direct causal connection between the requirement to pay the levy and the production of the production unit. Without that payment there could be no production. Conversely, the relationship could not be characterised as remote, tenuous or insubstantial. That characterisation is unaffected by the fact that the direct cause of the impost might be said to be the provisions of the MMA rather than the production of the production unit. The relevant provisions of the MMA form part of the statutory environment in which the production unit operated. The liability to pay the statutory levy was an expense directly related to the operation of the production unit, and no less so because it was imposed under legislation or formed part of the regulatory framework.[21]

21 See, by way of analogy, the analysis in *Inglebrae Coal Pty Ltd v New South Wales Coal Compensation Board & Anor* [2003] NSWCA 285 at [45] dealing with the proposition that the direct cause of the loss was the operation of the taxation legislation rather than the acquisition of the coal title.

[24] The same conclusion would be drawn even if the nexus test in s 4B(1) of the MRA requires, as the appellant contends, that the expenditure must be "directly attributable" to: the production of a production unit; maintenance for the purposes of the production of a production unit; or the sale or marketing of the saleable mineral commodity of a production unit. On that construction also, there is a direct causal connection between the payment of the levy and the production of the production unit.

[25] It would follow from what has been said about the nature of the levy, the statutory scheme, and the relationship between the requirement to pay the levy and the operation of the production unit, that even if the payment of the levy fell outside s 4B(1)(a) of the MRA, it was expenditure on another matter which was necessary for the proper administration of the production unit under s 4B(1)(p) of the MRA. As already seen, the production unit is defined to mean the mining tenement, which is defined in turn to mean the right to obtain minerals from the land. The concept of expenses incurred in the "proper administration" of the production unit naturally extends to payments necessary to comply with the specific statutory framework within which the production unit is operating, at least where that payment is referable to the production unit rather than to some general obligation. The levy in this case was payable as a condition of the production unit's right to mine. That payment was in that sense directly

facilitative in the administration of the production unit (mining tenement).

[26] That conclusion makes it strictly unnecessary to consider whether the expense falls within the specific inclusion of "fees and charges" under s 4B(1)(k) of the MRA. However, it is instructive to give some attention to the specific inclusions, and the structure of the definitional provision generally, in terms of their bearing on whether the levy can be said to fall within the general definition of "operating costs" in s 4B(1)(a) of the MRA. It may be noted in this respect that "payroll tax" is specifically included. On the other hand, "taxes on incomes or profits" and other payments in the nature of "a levy on mineral output, value, profits, income or export" are specifically excluded.

[27] Section 44A of the MMA provides expressly that the levy "is a tax in relation to mining activities". Even if that statutory characterisation is accepted as determinative of the nature of the levy, the specific inclusion of "payroll tax" within the scope of the definition does not require the exclusion from the general definition of any other form of tax. As was observed in *Zickar v MGH Plastic Industries Pty Ltd*, "there is no rule of construction which requires inclusive words to be read as exclusive of any elements which otherwise fall within the meaning of the word or expression being defined".[22] Again, the

22 *Zickar v MGH Plastic Industries Pty Ltd* (1996) 187 CLR 310 at 330 per Toohey, McHugh and Gummow JJ.

inclusion of payroll tax is best seen as for the avoidance of doubt, rather than an extension of the general definition.[23] On the other hand, the specific exclusion of certain forms of taxes and levies suggests a legislative intention to remove costs of that nature which would otherwise fall within the scope of the general definition,[24] or one of the specific inclusions.

[28] Turning then to the formulation "fees and charges" under s 4B(1)(k) of the MRA, there is no doubt that the levy is imposed under a law in force in the Territory. As already described, the MMA expressly characterises the levy as a tax. Quite apart from that statutory characterisation, it meets that general description by reason of the fact that it is a compulsory contribution to a public body for a public purpose which is imposed by the authority of the legislature. However, that does not necessarily preclude its dual characterisation as a "fee" or "charge" under the MRA.

[29] While both of those terms are protean in meaning, they are most commonly used to describe a payment made in exchange for services or a price levied for goods or services. It may be accepted that those terms may also, depending upon the context, extend beyond amounts paid for the provision of services to include such things as moneys paid

---

23 *International Litigation Partners Pte Ltd v Chameleon Mining NL* (2012) 246 CLR 45 at [26]; *Hagipantelis v Legal Services Commissioner of New South Wales* (2010) 78 NSWLR 82 at [20].

24 See, for example, *BHP Billiton Ore Pty Ltd v National Competition Council* (2008) 236 CLR 145 at [32]-[33].

as part of a special transaction or for a privilege, or a liability to pay moneys generally. In the present context, however, and given the particular treatment given to other forms of tax in the specific inclusions and exclusions, the better view is that the terms "fees" and "charges" are used in conjunction in the distinct sense of a liability or levy to pay money for goods or services.[25] That conclusion does not deny the levy characterisation as an operating cost given the findings already made in relation to the operation of ss 4B(1)(a) and (p) of the MRA.

Mining security guarantee fee

[30] The second category of expense at issue in the appeal is the cost to the appellant of providing the security required by s 43(1) of the MMA as a condition of carrying out mining activities under the authority to mine. The appellant says that it provided that security by way of bank guarantee in the 2012-13, 2013-14 and 2014-15 royalty years, and incurred a fee for the provision of the guarantee. The appellant contends that the cost incurred by it in providing that security is properly characterised as an "operating cost" within the general definition in s 4B(1)(a), and within the specific inclusion of other matters necessary for the proper administration of the production unit under s 4B(1)(p) of the MRA.

---

25 See, for example, *Davison v Bathurst City Council* [1966] 1 NSWR 61 at 64.

[31] The respondent's determination on the objection for the mining security guarantee fee was made largely on the same basis as for the mining security levy. That is, the bank fee for the provision of the guarantee was not "directly attributable" to the production of the mineral commodity, and not a matter related to the "proper administration of the production unit" within the meaning of s 4B(1)(p) of the MRA.[26]

[32] As already described, s 35 of the MMA provides that the operator for a mining site may carry out mining activities on the site only if the Minister has granted the operator an Authorisation to do so. Section 37(2)(b) of the MMA provides that the operator must provide a security of the amount, in the form, and on the terms, specified in the Authorisation. Section 43 of the MMA provides:

> **43 Requirement for and purpose of security**
>
> (1) An operator who carries out mining activities under an Authorisation must provide the Minister with a security in relation to the activities in accordance with the condition of the Authorisation mentioned in section 37(2)(b)(i).
>
> (2) The purpose of the security is to secure any of the following:
>
> (a) the operator's obligation to comply with this Act and the Authorisation;
>
> (b) the payment of costs and expenses in relation to the Minister taking an action to prevent, minimise or rectify environmental harm caused by mining activities:
>
> (i) on the mining site to which the Authorisation relates; or

26 Unlike the royalty payer's contention concerning the mining security levy, s 4B(1)(k) of the MRA was not invoked as the bank guarantee fee was clearly not one "imposed under a law in force in the Territory".

(ii) outside the mining site if the environmental harm results from or may result from a mining activity carried out on the site;

(c) the payment of costs and expenses in relation to the Minister taking an action to complete rehabilitation of the mining site.

[33] Section 43A of the MMA makes it plain that the security is to be a monetary amount. As with the security levy, mining activity may only be lawfully carried out where there is an Authorisation in place; it is a condition of an Authorisation that the mining operator must provide a security; and a failure to do so is a criminal offence and might reasonably be grounds for revocation of the Authorisation.

[34] For the same reasons described above in the context of the levy, there is a direct causal nexus between the requirement to provide the security and the production of the production unit. Without the provision of security there can be no lawful production. As a matter of business efficacy and common practice, the statutory scheme in this respect must necessarily contemplate that a mining operator on this scale may provide security by way of a bank guarantee and that the financial institution will levy a fee for the provision of that security. Accordingly, as a general proposition the fees would properly fall within the ambit of s 4B(1)(a), or in the alternative s 4B(1)(p), of the MRA.

[35] That conclusion is reinforced by the fact that s 4B(1)(u) of the MRA expressly excludes “interest payments or payments in the nature of

interest". That specific exclusion of one particular form of fee paid to a bank for the purpose of obtaining a financial product suggests that other costs of that nature, including fees for the provision of a guarantee, would otherwise fall within the scope of the general definition.

[36] Apart from that question of construction and characterisation, there is an evidentiary issue arising in relation to this head of expenditure. The appellant contends in submission that it provided the required security through the provision of an unconditional bank guarantee in an amount of between AUD43,388,513.20 and AUD58,574,493 in favour of the responsible Minister for the relevant royalty years. As a cost of providing those guarantees, the appellant incurred bank fees of AUD357,955.23 plus goods and services tax in each royalty year. The respondent disputes that contention in relation to the 2012-13 royalty year.

[37] The appellant's evidence in this respect comes from the person who held office as Head of Finance for the Manganese Australia business unit within the BHP Billiton Group during the relevant period. During most of the relevant period, the appellant was an incorporated joint venture between the BHP Billiton Group and Anglo American Plc. The deposition in that respect is that between 1 July 2013 and 26 May 2015 BHP Billiton fulfilled its portion of the appellant's security obligation by maintaining an unconditional guarantee to the value of AUD65,082,769.80 in favour of the responsible Minister. Following

the demerger of South32 Ltd from BHP Billiton on 26 May 2015, between 27 May 2015 and 30 June 2015 South32 fulfilled its portion of the appellant's security obligation by maintaining an unconditional bank guarantee to the value of AUD58,574,493.00 in favour of the responsible Minister. Between 1 July 2013 and 30 June 2015, Anglo American Plc fulfilled its portion of the appellant's security obligation by maintaining unconditional bank guarantees to the total value of AUD43,388,513.20 in favour of the responsible Minister.

[38] For each of the 2013-14 and 2014-15 royalty years the BHP Billiton Group invoiced the appellant the bond guarantee fees charged by the financial institution in the amount of AUD357,955.23 for each year. The appellant paid those fees. However, the Head of Finance for the Manganese Australia business unit is unable to identify or locate any invoice for the bond guarantee fees for the 2012-13 royalty year, or a ledger extract recording payment of any such fees for that royalty year. The appellant points to correspondence from the Department of Mines and Energy dated 28 May 2015 recording the security held. However, that correspondence records the BHP Billiton security to the value of AUD65,082,769.80 as lodged on 22 April 2013. Neither that document nor the delegate's decision on the objection dated 11 May 2017 provides evidence that the appellant itself paid any bond guarantee fees in respect of the 2012-13 royalty year.

Intra-group cost of 1SAP software program

[39] The third category of expense at issue in the appeal is the intra-group cost incurred by the appellant to BHP Billiton Group Operations Pty Ltd for what the appellant describes as "access to and use of the 1SAP software program" for human resources, accounting, supply maintenance and other purposes. That cost was incurred in the 2013-14 and 2014-15 royalty years. The appellant contends that the costs incurred for that access and use are properly characterised as "operating costs" within the general definition in s 4B(1)(a) and/or within the specific inclusion of office expenses under s 4B(1)(g) of the MRA. The respondent says that the software expenses are fees for management services and so specifically excluded by operation of s 4B(1)(zb) of the MRA. In the event it is determined that the software fees were fees for management services, the appellant contends that they fall within s 4B(1)(h) of the MRA.

[40] During the course of the objection proceedings, and as the matter came before the delegate, the claim was styled as one for "Management Fees". Based on the governance structure within the BHP Billiton Group, technology software and infrastructure was managed, deployed and configured by the Group rather than individual subsidiaries such as the appellant. The claim represented a portion of the BHP Billiton Group's global costs for certain categories of management fee charged to the appellant on the basis of what were said to be generally accepted

transfer pricing concepts. The appellant contended that it had adopted a conservative approach to the claim by only including deductions for "IT Costs" and IT Labour", and by excluding the markup applied for intercompany service charges.

[41] The fees claimed were said to relate specifically to information technology charges from the Group's functions that were reasonable in amount and essential to the operation of the production unit. In particular, it was said that the production unit was dependent on information systems supported at Group Function level to ensure production and profit was maximised through plant monitoring technologies, to manage inventory of both ore and supplies used in the production process, and to ensure that transportation was well timed to deliver ore from the production unit to the port. The majority of the costs claimed as IT Costs were said to relate to information technology infrastructure and software expenditure, the largest item of which related to the Group's Enterprise Resources Planning SAP[27] (including licence fees).

[42] The version of the system in use at the material times was designated as "1SAP". It was said that the majority of staff working at the production unit were required to use 1SAP regularly, and that users within the production unit were heavily reliant on information

27 SAP AG is the multinational software corporation which designed and made the enterprise software.

technology infrastructure and labour support provided and maintained by the Group. The appellant contended that software costs incurred in the running of a production unit would ordinarily be deductible as operating costs, and that if the appellant had sourced the technology from a third party provider the costs would have been deductible (and likely greater).

[43] It was contended that the Management Fees for the 2012-13 royalty year were deductible under either the general definition of "operating costs" or as other matters necessary for the proper administration of the production unit under s 4B(1)(p) of the MRA; or in the alternative, as office expenses or reasonable fees for management services under ss 4B(1)(g) and (h) of the MRA respectively. For the 2013-14 and 2014-15 royalty years, it was contended that those parts of the Management Fees attributable to software licensing and the application of the software were not properly characterised as office expenses or fees for office or management services, but qualified as operating costs under ss 4B(1)(a) and (p) of the MRA. This was said to be because software used to enable production-related activities was distinguishable from software used for internal office functions.

[44] The reason for the difference in approach between royalty years arose from the commencement of the RLAA. The RLAA received assent on 28 June 2013, and commenced with effect from 1 July 2013. Amongst its other provisions, the RLAA amended ss 4B(1)(g) and (h) and

inserted ss 4B(1)(za) and (zb) into the definition of "operating costs" in the MRA (extracted above).[28] The effect of those amendments to office expenses and fees for management services was to limit such claims to expenses incurred by an office located in the Territory and for work or services performed in the Territory. Those provisions were complemented by the provisions in ss 4B(1)(za) and (zb) excluding from "operating costs" office expenses and fees for management services for work performed other than solely in the Territory.

[45] The Explanatory Statement for the RLAA described the purpose of those amendments in the following terms:[29]

> Subclause (1) also omits section 4B(1)(g) and inserts new section 4B(1)(g) to limit the deductibility of office expenses to expenses that are incurred by an office that is located in the Territory and for work or services that are performed solely in the Territory. Subclause (1) also clarifies the existing nexus with the production unit by ensuring that office expenses must be directly attributable to the operation of the production unit.
>
> Subclause (1) also omits section 4B(1)(h) and inserts new section 4B(1)(h) to limit fees for management services to fees for services performed solely in the Territory. Subclause (1) also clarifies the existing nexus with the production unit by ensuring that fees for management services must be directly attributable to the operation of the production unit.
>
> ....
>
> Subclause (4) inserts new sections 4B(1)(z), (1)(za) and (1)(zb) into the Mineral Royalty Act to ensure that expenditure that would ordinarily be classified by the Secretary (as is explained by the

28 The RLA inserted a transitional provision into the MRA (Part IX), which provides for operating costs for royalty years ending before 1 July 2013 to be determined in accordance with the MRA as in force at that time, and for an operating cost incurred in a royalty year starting before and ending after the commencement date to be determined in accordance with the MRA as it stood at the time the cost was incurred.

29 Explanatory Statement, *Revenue Legislation Amendment Bill 2013* (NT), 6.

> Secretary by way of guideline) as a labour cost, office expense or fee for management services, but do not meet the geographical nexus with the Territory contained in new paragraphs (f)(i), (g)(i) and (iii) and (h)(i), cannot be allowable as an operating cost under another item of expenditure listed in another paragraph contained in section 4B(1).

[46] That purpose was further described by the responsible Minister in the Second Reading Speech in the following terms:[30]

> Further risk to the Territory's royalty scheme are accounting strategies that shift to the Territory expenses which were incurred by related entities in another jurisdiction. The experience of the Revenue Office suggests these related entities may be based either in other Australian states or overseas, and the external expenses are claimed by the Territory mining operation under the badge of being a deductable operating cost. The bill contains measures to address the risk this type of accounting behaviour poses to the integrity of the royalty base.
>
> This government recognises the crucial role mining companies play in the regional and economic development of the Territory. For this reason, the amendments proposed by the bill are also targeted in encouraging and rewarding those mining companies that genuinely maintain and operate the bulk of their operations in the Territory. An integral component of the Territory's profit-based royalty regime is a royalty payer's ability to claim a deduction for legitimate operating costs which include labour costs, head office expenses, and fees for management and services. Currently, these types of operating costs are claimable if a royalty payer can substantiate the costs are directly attributable to the operation of the individual mining project.
>
> As I have previously outlined, since the introduction of the *Mineral Royalty Act* there have been dramatic advances in communications and technologies which have led to a globalised mining industry. This has made the determination of allowable operating costs increasingly difficult and administratively complex due to an increasing amount of royalty payers also having business interests outside the Territory. The bill introduces measures that will establish a geographical boundary before labour costs, office expenses, and fees for management services can be

30 Northern Territory, *Parliamentary Debates*, Legislative Assembly, 15 May 2013, 1622–1623, (Mr Tollner MLA, Treasurer).

> claimed as an operating cost. The remaining heads of operating costs remain unchanged by this bill.
>
> For a mining operation to continue to claim labour costs, office expenses, and fees for management services as operating costs, it will be necessary that their claim relates directly to expenses incurred by an office located in the Territory or for work or services performed in the Territory. These proposed amendments complement the government's commitment to better ensuring stability and certainty in the collection of the Territory's own-sourced revenue.
>
> … the removal of unnecessary risks that undermine the integrity of the Territory's revenue base is critical. The measures contained within this bill are designed to limit claims for labour costs, head office expenses, and management services to only such claims that have a sufficient nexus to the Territory will assist in protecting the integrity of the Territory's royalty regime by preventing royalty payers from shifting costs that are incurred in overseas or interstate jurisdictions into the Territory to reduce the amount of royalty payable.
>
> Just as the government is focused on assisting and rewarding other Territory based businesses for their contribution to growing the Territory economy by creating local jobs and spending, so too does the government intend that these amendments recognise the efforts of mining companies that have an office in the Territory and engage Territory based workers and service providers.

[47] Against that background, the basis for the respondent's determination on the objection for Management Fees was, in essence, that the delegate considered himself unable to determine that the costs were reasonable in amount and directly attributable to the production, *et cetera* of the production unit having regard to the following matters.

(a) The software program was used globally by the BHP Billiton Group and the expenditure claimed by the appellant as an operating expense for the Australian manganese operation was an estimate based on the Group's global costs for the software

program in relation to the “IT Labour” and “IT Costs” categories, apportioned on a computer count basis (ie that proportion of the Group’s total number of computers which were used by “Manganese Australia”). That apportionment was based on a single fully-worked example for the 2012 financial year.

(b) The apportionment methodology, although potentially acceptable for other purposes and in other contexts, did not of itself demonstrate that the costs were reasonable in amount. Given the parent-subsidiary relationship between the Group and the appellant, neither the existence of a cost sharing or pricing arrangement, nor the preparation of accounts in conformity with international accounting standards, was sufficient to establish reasonableness. There was no evidence of the fair price or value of the software program services received by the appellant from the Group.

(c) The apportionment methodology did not establish that the software program services said to have been provided by the Group to the appellant were used exclusively on the production unit and had not otherwise been claimed as deductible expenses.

(d) The amount the Group charged the appellant for the software program services fluctuated significantly from year to year with no explanation and with no apparent correlation to the value of the

services received or used by the appellant in relation to the production unit.

(e) The materials provided did not allow the respondent to ascertain the precise nature of the software program services provided by the Group to the appellant, and whether those fees had the requisite nexus to the appellant's production unit and mining operations. The difficulty was compounded by the fact that the respondent was unable to discern the basis on which the appellant allocated costs to the "IT Labour" and "IT Costs" categories for the purpose of calculating the apportionment. While those cost categories may have formed part of the Group's corporate and accounting procedures, it did not necessarily follow that the internal categorisation conformed to the requirement of direct attribution under the MRA.

[48] On the basis of those matters, the delegate concluded that the appellant had not discharged the burden under s 112 of the TAA of establishing that the decision under objection was wrong. Having made that determination, the delegate accepted that the production unit would have incurred costs related to information management services and systems, and that the appellant had endeavoured to exclude ineligible operating costs such as intra-group transfer pricing margins. The delegate accepted that some part of the software program services would likely be deductible as an operating cost, but was unable to

quantify the amount of that deduction. In the interests of certainty and finality, and consistently with the principles underlying the proper administration of the MRA and TAA, the delegate determined to allow a deduction equal to half the software program services fees, but only for the royalty years prior to 1 July 2013.

[49] For the 2013-14 and 2014-15 royalty years, and having regard to the amendments introduced in the RLAA, the delegate concluded that notwithstanding the difficulties which presented in ascertaining the precise nature of the services provided to the appellant through the software program, they would ordinarily be classified by the Secretary as office expenses or fees for management services (even allowing for the fact that they might also be classified as expenditure of a kind mentioned in another paragraph of the definition).[31] In the delegate's finding, so much was apparent from the fact that the systems diagrams and job descriptions provided by the appellant indicated that those services were in respect of information technology infrastructure and labour costs. Reference was made in that respect to the Second Reading Speech for the RLAA and Royalty Guideline *RG-MRA-005 Operating Costs*.

[50] For "office expenses", the Guideline provides (examples omitted):

---

31 The delegate considered that the costs might also be characterised as employee remuneration as provided for in s 4B(1)(f) of the MRA, and so excluded by operation of s 4B(1)(z) of the MRA. That characterisation is not pressed by the respondent in the context of this appeal.

Office expenses

32. Office expenses relating to the general day-to-day running of an office are allowable operating costs if they:

    (1) relate to an office of the royalty payer that is located within the Northern Territory;

    (2) are directly attributable to the operation of the production unit; and

    (3) in the case of work or services, the work or services are performed solely in the Northern Territory.

33. Office expenses are administrative and corporate expenses relating to an office of a royalty payer within the Northern Territory. This includes a wide variety of expenditure of which it is not possible to provide a comprehensive or exhaustive list. As a general guide, the expenses that would ordinarily fall within this category include:

    (1) running costs in respect of land and buildings where an office is located (subject to paragraph 59 below);

    (2) utilities expenses;

    (3) telecommunications and Internet expenses;

    (4) office equipment and stationery expenses;

    (5) administrative, human resources and information technology expenses; and

    (6) expenses for the in-house provision of accounting and legal services.

    For any of the above expenses to be allowable operating costs they must satisfy the criteria in paragraph 32 above.

34. Office expenses often include costs that are not directly attributable to the operation of a production unit. For example, an office of a royalty payer can also incur costs in respect of another mine that does not form part of the production unit, or for other activities not directly attributable to the operation of the production unit (such as exploration). In such instances, an apportionment of the costs may be required. For further information on acceptable methods of costs allocation refer to paragraphs 70 to 77 below.

[51] For "fees for management services", the Guideline provides (examples omitted):

Fees for management services

35. Management connotes direction or control. For example, the control that is the responsibility of the "operator" (as defined in sections 4 and 9 of the *Mining Management Act 2001* (NT)) for a mining site.

36. Fees for management services which are performed or incurred solely within the Northern Territory and are directly attributable to the operation of the production unit are allowable operating costs. Fees for services performed or incurred by a person that was not physically present in the Northern Territory during the entire time that service was performed are not allowable operating costs.

37. Fees for management services that are directly attributable to the operation of a production unit may include, but are not limited to, fees for services in respect of the control, direction, influence or strategic management of a production unit.

38. Fees for management services often include costs that are not incurred solely in respect of one mining operation. Also, such fees can relate to activities of a royalty payer that are not directly attributable to the operation of a production unit (for example, exploration activities). In either case, an apportionment of the costs may be required. For further information on acceptable methods of costs allocation refer to paragraphs 70 to 77 below.

39. The requirement that the fees are directly attributable to the operation of the production unit means that fees relating to strategic or higher level policy management may not be allowable.

[52] For the exclusionary provisions introduced under the RLAA, the Guideline provides:

Employee remuneration, office expenses or fees for management services where the work, services or expenses are performed or incurred outside the Northern Territory

63. Any costs which would ordinarily be classified by the Secretary as employee remuneration, office expenses or fees for management services (in the sense described in paragraphs 30 to 39 above) are not eligible to be claimed as

operating costs if the work, services or expenses were performed or incurred outside the Northern Territory.

64. In the event where a cost that may meet the description in paragraph 63 above is claimed as another type of operating cost, sections 4B(1)(z), (za) or (zb) of the MRA require the Secretary to form an opinion as to whether the cost in question would ordinarily or usually be classified under sections 4B(1)(f) (employee remuneration), (g) (office expenses) or (h) (fees for management services) respectively (had the work, services or expenses been performed or incurred within the Northern Territory).

65. The Secretary will take into account, among other matters, the non-exhaustive description in paragraphs 30 to 39 above of expenditure ordinarily classified as employee remuneration, office expenses or fees for management services. Having considered an individual case on its merits, if the Secretary forms the opinion that the cost would ordinarily be classified under any of sections 4B(1)(f) to (h) (had the work, services or expenses been performed or incurred within the Northern Territory), it will not be claimable as an operating cost.

66. A royalty payer may be requested to provide a written explanation and supporting documentary evidence of:

    (1) the nature, character and extent of the expenditure, including the reasons for claiming the expenditure as another type of allowable operating cost; and

    (2) a detailed explanation as to why the expenditure would not ordinarily be claimable under sections 4B(1)(f) to (h) of the MRA (had the work, services or expenses been performed or incurred within the Northern Territory).

    Failure by a royalty payer to establish and substantiate that the expenditure would not ordinarily be claimable under any of sections 4B(1)(f) to (h) (had the work, services or expenses been performed or incurred within the Northern Territory), will generally result in the expenditure not being allowed as an operating cost.

[53] In the application of what was described as the "geographical nexus test", the delegate found that the appellant had not established that the fees related to offices geographically located in the Territory or

services performed solely in the Territory. The application of the "computer-count apportionment methodology" did not demonstrate that the services were performed solely in the Territory and did not disclose the number of computers located in the Territory.

[54] For the purposes of this appeal, the appellant contends there have been two significant changes since the matter was considered by the delegate. First, the appellant has adduced evidence in the proceedings concerning the characterisation of the expenses claimed which was substantially more detailed than the material before the delegate. Secondly, the appellant only claims a portion of the "Management Fees" which were the subject of the objection proceedings, being the 1SAP software fees. For that purpose, the appellant divides those costs into those attributable to computers located on the production unit on Groote Eylandt (which are said to constitute approximately 56% of the invoiced amounts), and those attributable to computers located in the appellant's head office in Brisbane (said to constitute approximately 14% of the invoiced amounts).

[55] The appellant says that the Groote Eylandt costs fall within the general definition of "operating costs". First, the software fees were reasonable in amount as they are based on the price charged by the third party designer and manufacturer of the software, subject to a markup of 7.5%, calculated in accordance with OECD transfer pricing principles. Alternatively, the appellant was a subsidiary of the BHP

Billiton Group and the fees payable were in accordance with the Group's pricing principles. Secondly, the software was integral to the day-to-day activities of the appellant's employees, and fees paid for the right to receive access to and use the software were therefore closely connected to the production, *et cetera* of the production unit.

[56] The appellant says that in addition, or in the alternative, the Groote Eylandt costs are properly characterised as "office expenses" within s 4B(1)(g) of the MRA. That is said on the basis that information technology expenditure is a characteristic expense in and for an office, that the fees were paid as consideration for the use of the software at hand in connection with the Groote Eylandt office, and for the reason described in the immediately preceding paragraph they were closely connected to the production, *et cetera* of the production unit. The appellant says as part of that submission that the software fees were not "for work or services", as that term is used in s 4B(1)(g)(iii) of the MRA, as they were not referable to tangible activities in the sense of the performance of work or a service. However, even if the fees are characterised as a service in the provision of the 1SAP computer program, that service was performed on Groote Eylandt.

[57] For the computers located in the Brisbane head office, the appellant says that the activities were directed to running mining activities on Groote Eylandt and so directly connected to work on that site. Accordingly, the costs attributable to those computers are properly

characterised as "operating costs" within ss 4B(1)(a) and/or (g) of the MRA on the same bases and for the same reasons as the software fees attributable to computers located on the production unit on Groote Eylandt.

[58] So far as the respondent's reliance on s 4B(1)(zb) of the MRA is concerned, the appellant contends that even if the software fees are properly characterised as "fees for management services", the fees attributable to the computers located on Groote Eylandt were for services performed solely in the Territory. For the fees attributable to the computers located both in Brisbane and on Groote Eylandt, it is said that the respondent has failed to establish that the fees would ordinarily be classified as "fees for management services" for a number of reasons. First, there is no evidence from the Secretary personally to that effect. Secondly, there is no established practice as to how the Secretary would classify fees of this nature. Thirdly, on an objective classification conducted in accordance with law, fees of this nature would not properly be classified as for "management services".

[59] In assessing those contentions a number of matters may be accepted at the outset. The appellant bears the burden of establishing that the decision on the objection was wrong, subject of course to a consideration of any new grounds and material evidence. In this context, that resolves to the onus of proving that it was in error to exclude from "operating costs" for the 2013-14 and 2014-15 royalty

years the software fees paid to the BHP Billiton Group for access to and use of the 1SAP software program. To put the matter the other way, however, the onus is on the appellant to establish the facts which demonstrate that the software fees were "operating costs" within the meaning of s 4B(1) of the MRA. As Brennan J said in *Federal Commissioner of Taxation v Dalco*,[32] in a different context but to which the same principle applied:

> It would be inappropriate for a court determining an appeal to make an order altering the tax liability assessed … unless the court were satisfied that the amount to which it proposed to alter the assessment represented the true tax liability of the taxpayer. Although the grounds of objection limit the grounds of appeal, the ultimate question for the court hearing the appeal is not whether the grounds have been made out but whether the amount assessed as taxable income is wrong. The burden which rests on a taxpayer is to prove that the assessment is excessive and that burden is not necessarily discharged by showing an error by the Commissioner in forming a judgment as to the amount of the assessment.

[60] The general proposition in relation to where the burden and onus lies is subject to one possible qualification in this context. As already described, the appellant submits that to the extent the respondent on s 4B(1)(zb) of the MRA, it is incumbent on the respondent to prove that the fees would ordinarily be classified by the Secretary as fees for management services. In making that submission the appellant relies

32 *Federal Commissioner of Taxation v Dalco* (1990) 168 CLR 614 at 621.

on the statement of the High Court in *Vines v Djordjevitch* that where a statute provides:[33]

> an … exclusion which assumes the existence of the general or primary grounds from which the liability or right arises but denies the right or liability in a particular case by reason of additional or special facts, then it is evident that such an enactment supplies considerations of substance for placing the burden of proof on the party seeking to rely upon the additional or special matter …

[61] This question of onus in the context of an exclusionary provision was also considered by the High Court in *Director of Public Prosecutions v United Telecasters Sydney Ltd*.[34] In that case, Brennan, Dawson and Gaudron JJ said that where the scope of a provision is cut down "by way of definition rather than by way of proviso, exception or saving … there is no reason to suppose that … the legislature intended that the subsection should operate without limitation unless an accused brought himself within the terms of [the exclusionary provision]".[35] However, as French J (as his Honour then was) observed in *Bropho v Human Rights and Equal Opportunity Commission*, the question whether an exemption from a statutory liability is to be demonstrated by the person upon whom it is sought to impose the liability is a matter of substantive statutory construction and not a mere matter of form.[36]

---

33 *Vines v Djordjevitch* (1955) 91 CLR 512 at 519-520.

34 *Director of Public Prosecutions v United Telecasters Sydney Ltd* (1990) 168 CLR 594.

35 *Director of Public Prosecutions v United Telecasters Sydney Ltd* (1990) 168 CLR 594 at 601 per Brennan, Dawson and Gaudron JJ.

36 *Bropho v Human Rights and Equal Opportunity Commission* (2004) 135 FCR 105 at [75].

[62] In the conduct of the statutory construction exercise, the term "operating costs" is defined for the purpose of marking out those expenses which are deductible. The exclusionary provision which cuts down the scope of those expenses is incorporated as part of the statutory definition, rather than by way of proviso, exception or saving. In doing so, the definition denies the right in a particular case by reason of special facts such as those stipulated in s 4B(1)(zb) of the MRA. While it may be accepted that in order to establish that the delegate's decision was wrong the onus is on the appellant to demonstrate that the software fees were not "fees for management services" or, if they were, that those services were performed wholly in the Territory, it would seem highly arguable from the wording of the provision that in the event the appellant fails to establish those matters the burden shifts to the respondent to establish that the fees would ordinarily be classified by the Secretary as being of a kind mentioned in s 4B(1)(h) of the MRA. To construe the provision otherwise might encumber the appellant with the impossible burden of proving the negative.

[63] For reasons which will become apparent, the issue of onus in that respect is of little practical significance in the circumstances of this case. As the appellant submits, the initial process of classification must be an objective one in the sense that it must comply with the authority of the MRA. In addition, the respondent has adduced

evidence in relation to the matter, and the determination of ordinary classification is capable of being informed by that evidence and by reference to Royalty Guideline *RG-MRA-005 Operating Costs*.

[64] The appellant's evidence concerning the corporate structure under which the 1SAP fees were charged, and the manner in which those fees were calculated, is largely undisputed. The appellant owns fixed plant and infrastructure on Groote Eylandt, including a crushing, screening, processing and tailings management plan, maintenance facilities, roads and a port. The appellant maintained a corporate head office in Brisbane in which the human resources and finance departments were located, but most of the appellant's employees and functions, including production, maintenance, warehousing environmental and health and safety, were located on Groote Eylandt.

[65] During the 2013-14 royalty year there were 798 personnel located on Groote Eylandt who performed functions solely for the appellant. During the 2014-15 royalty year, there were 859 personnel located on Groote Eylandt performing those same functions. All of the staff located on Groote Eylandt had access to computer and network services as part of their day-to-day functions. Daily tasks and plans were delivered through centralised software for matters such as access permits, drug and alcohol testing, the supply of inventory and products, manganese market movements, the payment of third parties, and the management of port activities. Over those same periods, there were

approximately 60 or 70 personnel located in the corporate head office in Brisbane who provided functional support to both the appellant and the Tasmanian Electro Metallurgical Company (**TEMCO**), a related entity which operated a manganese ore alloy operation based in Tasmania that primarily sourced its ore stock from the appellant.

[66] The 1SAP application is enterprise resource planning software developed by SAP AG, a German multinational software corporation. The software was designed for the specific needs of the BHP Billiton Group. The appellant used the 1SAP software for human resource services, recording invoices and payments, supply maintenance, recording the extraction of mineral resources, financial accounting and production strategy. During the royalty years in question, the appellant relied on the software for its operational, maintenance and financial information. Production was scheduled and tasks were managed using the software.

[67] The 1SAP fees were charged to the appellant under the Intra-Group Services Agreement – Group Function Services (**Intra-Group Services Agreement**), which was amended and restated in June 2013. Under cll 3.1 and 3.5 of the Intra-Group Services Agreement, services were provided in consideration for payment calculated in accordance with cl 4 of the agreement. Under cl 3.2 of the Intra-Group Services Agreement, the services extended to Group Function Services. The Group Function Services included such matters as legal services,

human resources, tax and financial services, and information technology. Information technology constituted the largest cost under those group services. Those services were described in Schedule 2 of the Intra-Group Services Agreement to include Group Information Management, which in turn included the provision of and support for the 1SAP software. Under that function, the appellant also received various Microsoft products, a records management platform and a database management platform licensed under the Intra-Group Services Agreement; and network hardware including decentralised data storage and the physical fibre cable providing internet access to Groote Eylandt and a connection to the BHP Billiton network.

[68] Clause 4.2 of the Intra-Group Services Agreement provided for the allocation of aggregated fees for the various types of services. Service fees were to be determined by a formula involving an Allocation Key numerator and denominator for the type of service provided. Those numerators and denominators were set out in Schedule 3 to the Intra-Group Services Agreement. For Group Information Management, the Allocation Key was the quantity of personal computers. The numerator under that Allocation Key was the quantity of personal computers that the service recipient had during the relevant period, and the denominator was the total quantity of personal computers had by all of the service recipients to which the service provider had provided information management services during the relevant period.

[69] Documentation reports were prepared in relation to the BHP Billiton Group's intra-group service charge transactions for the 2013-14 and 2014-15 financial years for the purpose of meeting the Group's tax obligation that its subsidiaries deal with each other on an arm's-length basis consistent with OECD Transfer Pricing Guidelines. Those reports annex an Intra-Group Services Charging Manual which stipulated the procedures required within the Group and of service providers to ensure that service charges were calculated consistently across the Group.

[70] Deloitte was engaged as an external advisor to the Group to prepare a report in relation to the development and use of the 1SAP system (**the Deloitte report**). The objective of that report was to determine whether service charges by the Group to its members for the use of the 1SAP system (designated in the report as "usage fees") complied with the arm's-length principle for Australian transfer pricing purposes. The Deloitte report was generated in April 2013. In that report, Group members were described as "economic beneficiaries with respect to the 1SAP system" who were charged a service fee for the benefits received. The Deloitte report went on to consider the relevant provisions of the Australian taxation legislation and Taxation Ruling TR 1999/1 in relation to international transfer pricing for intra-group services, with a view to determining whether the charges made in

respect of the services complied with Chapter VII of the OECD transfer pricing guidelines for multinational enterprises.

[71] The right to use the 1SAP system was obtained by payment of a usage fee charged on a six monthly basis to reflect the value to a group member of the benefit from the use of that system over the period. The Deloitte report observed that while data indicating the extent of 1SAP system usage by each group member (principally in the form of login times) would provide a useful approximation of the relative benefits each group member received from the system, reliable data of that sort were not practically available. On that basis, and having reviewed a number of potential allocation keys, it was determined that relative benefit was best approximated by the use of personal computer count because 1SAP was an integrated business tool used by each employee, either in their direct day-to-day activity or indirectly through the functions offered on the 1SAP platform.

[72] For the purpose of conducting the allocation key calculation, a computer count undertaken in or about March 2013 disclosed that within the Manganese Australia business unit, which was responsible for the appellant and TEMCO, approximately 55% were the appellant's computers on Groote Eylandt, approximately 15% were the appellant's computers in Brisbane, and approximately 30% were TEMCO computers. While there is no definitive record for the number and location of the appellant's computers during the royalty years in

question, the Head of Finance for the Manganese Australia business unit at the material times deposed that approximately 70% of Manganese Australia computers were the appellant's computers, and of those approximately 80% were located on Groote Eylandt. On that assessment, approximately 56% of the fee related to the appellant's computers on Groote Eylandt, and approximately 14% of the fee related to the appellant's computers in Brisbane.

[73] During the royalty years in question, the total 1SAP charges for which the appellant was invoiced under the Intra-Group Services Agreement were in the amount of USD9,121,480.05 plus goods and services tax. That resolved to AUD10,799,659.34 over the relevant period. For the purpose of the appellant's royalty returns, Manganese Australia apportioned the intra-group service charge fees incurred, including the 1SAP fees, by attributing 60% to the appellant and 40% to TEMCO in the 2013-14 royalty year; and by treating fees incurred for the provision of 1SAP in ledger account 806095 as deductible and fees incurred in ledger accounts 805000 and 806085 (which included some 1SAP fees) as non-deductible in the 2014-15 royalty year.

[74] In the respondent's contention, the evidence adduced by the appellant does not identify the intra-group service costs charged for 1SAP with sufficient clarity or precision to permit a determination to be made as to the nature and substance of the expense in the manner pressed by the appellant.

[75] The Deloitte report describes the charges as, in essence, a usage fee payable by group members as a share of the amount charged to BHP Billiton Group Operations for "services in the form of the development of the 1SAP System", calculated to reflect the relative expected benefit to the user measured by PC count. The usage fee is said to be charged over an eight year period, representing the estimated economic useful life of the 1SAP Global Template. The Global Template is said to be "a combination of the 1SAP Program and the 1SAP System" used by group members. In turn, "[t]he 1SAP system … is the SAP based technology platform that implements the business processes developed or used as part of the 1SAP Program". It would seem from the materials that the 1SAP System is maintained in a place and by information technology personnel outside of the Territory.

[76] The Deloitte report goes on to provide that "[t]he charges for the services performed in developing the 1SAP system are calculated to ensure that [BHP Billiton] Group Operations recoups exactly the costs it has incurred in providing the 1SAP Development services and that each group member pays a share of the aggregate service charge that is proportionate to the share of the benefits received by that member from the development of the 1SAP system". The assumption underlying the intra-group charges for this service, as expressed in the Deloitte report, is that "the development of the 1SAP system confers multiple and substantial benefits to BHPB Group members and therefore is a

chargeable service". The Deloitte report also observes that the 1SAP arrangements related to the provision of services rather than the development of property for the BHP Billiton Group. The appellant contends on that basis that the charges were for information technology services – being access to the 1SAP Global Template for the purpose of managing the activities of the production unit – and not simply a contribution to costs. In the respondent's contention, the nature and substance of the fees paid by the appellant for the 1SAP Global Template was to defray the costs incurred by BHP Billiton Group Operations for the development of the system and program, and for the provision of support services, by contractors outside the Territory.

[77] When it comes to characterising the nature of the fees paid for the 1SAP system, it can readily be accepted that the quantum of those fees is referable to the cost incurred by BHP Billiton Group Operations in the development and construction of the system and program. That cost is then distributed across the group by reference to PC count. It is also clear that the manner in which those costs are allocated between group members involves intra-group transfer pricing. However, the fact that the costs are referable to the construction and development of the system and program, and that they are allocated in that manner, does not necessarliy deny them characterisation as expenditure "directly attributable" to the production, *et cetera* of the production unit.

[78] The evidence shows that the appellant is part of a larger corporate group which has developed a bespoke system and software for enterprise resource planning. The appellant conducts a resource enterprise constituted almost exclusively by the activities on this particular production unit. Unsurprisingly, the system and software are adapted to its undertaking on the production unit. As consideration for access to and use of the system and software, the appellant pays a service charge to the group principal calculated in the manner already described. Given the nature of the group principal's character as a large diversified natural resource company, and the nature of the calculation and its endorsement by Deloitte, it may be concluded that the cost for the design and construction of the software was commercially rational and that the charge paid by the appellant for access to the system and software was reasonable in the context of this particular corporate structure. It may readily be inferred that had the appellant not had access to the 1SAP system and software, it would have been required to source a similar system and software from elsewhere.

[79] The evidence of the Head of Finance for the Manganese Australia business unit is relatively straightforward as to the use of the 1SAP software in broad terms in the operation of the production unit. That evidence establishes that the 1SAP software was used by the appellant for the purposes of the production unit for human resource services,

recording invoices and payments, supply maintenance, recording the extraction of mineral resources, financial accounting and production strategy. During the royalty years in question, the appellant relied on the software for its operational, maintenance and financial information. Production was scheduled and tasks were managed using the software. For those reasons, it may be concluded that the intra-group costs incurred by the appellant to the BHP Billiton Group for access to and use of the 1SAP software program is properly characterised expenditure directly attributable to the production, *et cetera* of the production unit within the meaning of s 4B(1)(a) of the MRA. That conclusion makes it unnecessary to determine whether those costs qualify as "office expenses" within the meaning of s 4B(1)(g) of the MRA.

[80] It becomes necessary then to consider the operation of s 4B(1)(zb) of the MRA, which excludes from the definition of "operating costs":

> fees for management services where:
> (i) the criterion in paragraph (h)(i) is not met; and
> (ii) if that criterion were met, the fees would ordinarily be classified by the Secretary as being of a kind mentioned in paragraph (h);
>
> (whether or not the fee might also be classified as being expenditure of a kind mentioned in any other paragraph).

[81] The criterion in paragraph (h)(i) is that the services are performed solely in the Territory. The respondent adduced evidence from the Director of Royalties and Assurance within the Department of Treasury

and Finance in relation to the Secretary's ordinary practice concerning the classification of expenses. He has worked for the Territory Revenue Office for approximately 25 years. His roles over that time have included the positions of Assistant Director Royalty and Advisory Services and Assistant Director Compliance, including during the material times. Given that involvement, he is able to give evidence as to how fees would ordinarily be classified by the Secretary. The submission that only the Secretary may give evidence about the performance of a statutory function of that nature should be rejected.

[82] The Director's evidence was that both prior to and following the commencement of the RLAA the Secretary's practice was to classify expenditure as fees for management services where the fees were in respect of the control, direction, influence or strategic management of the operation of a production unit. In undertaking that assessment, the Secretary would first look to how the royalty payer had classified the fee. If the royalty payer had classified the fee as a management fee, the practice was for the Secretary to classify it as such. In the event the royalty payer had not classified the fee as such, consideration would be given to whether the royalty payer was receiving centralised services. That conclusion would be drawn in circumstances where services were provided to one or more related business units or entities and the costs of those services allocated to the various service recipients in accordance with a given methodology. The Secretary's

practice was to classify fees for centralised services as management fees. Information technology was a common form of centralised services.

[83] In making that classification, the Secretary's practice was not to dissect or separate the fees charged for centralised services in order to ascertain the types of activities undertaken to provide the service (such as wages and salaries, travel, office overheads and licence fees). Rather, the practice was to look at the nature and substance of the centralised service arrangement as a whole. If that substance was one of centralised control, direction, influence or strategic management, the practice was to classify the expenditure as fees for management services even if part of the fee could be attributed to one of the other heads of deductible expense in s 4B of the MRA; and even where the expenditure was recorded in separate accounts, some of which could be attributed to one of the other heads of deductible expense in s 4B(1) of the MRA.

[84] The appellant's return for the 2013-14 royalty year did not separately classify the 1SAP fees as management fees. Rather, the return identified ledger account 806095 under which the 1SAP fees were recorded as part of a compendious claim for management fees. In subsequent communications, the appellant classified fees for enterprise resource planning as management fees. The Secretary concluded that the 1SAP service formed part of the BHP Billiton Group's information

management system. The structure by which intra-group services were provided, and by which charges were fixed and levied indicated a high degree of control over group function services, including information management services used to operate the production unit. Accordingly, those costs were classified as management fees.

[85] The appellant's return for the 2014-15 royalty year identified the ledger account 806095 under which the 1SAP fees were recorded as "ERP Usage Fee (1SAP)" as corporate management costs. As a result of that characterisation, the Secretary classified the fees as management fees.

[86] It may be noted in that respect that for both of the financial years in question the appellant had included and reported ledger account 806095 under which the 1SAP fees were recorded as part of its management fees in its financial statements. Those statements were subject to independent audit and certification, and reviewed by the BHP Billiton Group's Finance, Risk and Audit Committee.

[87] The Assistant Director of Royalties and Assurance within the Department of Treasury and Finance also gave evidence in relation to the Secretary's practice concerning the classification of expenses. In her previous roles as a compliance and audit officer and analyst the Assistant Director was involved in the development and implementation of the amendments to Royalty Guideline *RG-MRA-005*

Operating Costs in response to the commencement of the RLAA. Her evidence is that the Secretary's ordinary practice concerning the classification of fees for management services is described at paragraphs [35] to [39] of the Guideline (extracted above).

[88] That practice was to classify expenditure as fees for management services where those fees were charged in respect of the control, direction, influence or strategic management of the operation of a production unit, or where they related to strategical high-level policy management. If the fee was charged by an entity which was providing centralised services and that centralised entity was making decisions in relation to such matters as human resources, finance and accounting, risk and governance, information technology and corporate strategy, then the fees charged by the centralised entity are characterised as the control, direction, influence or strategic management of the production unit. The practice of the Secretary in that respect was not to dissect the fee in an attempt to identify direct and indirect costs. The whole charge was characterised as one for management services.

[89] The Assistant Director was also involved in the audit of the appellant's royalty returns for the 2013-14 and 2014-15 royalty years. That included an analysis of the deductibility of expenses claimed as operating costs. Those returns and related documents identified the PC count allocation key for Group Information Management. The 1SAP fees were recorded in ledger account 806095, which formed part of a

broader claim for "Management fees" across a number of accounts. In the Assistant Director's understanding, the appellant did not dispute the classification of those expenses as fees for management services. Following an analysis of the returns and voluntary disclosure by the appellant, the Assistant Director concluded that the 1SAP fees were properly characterised as fees for management services which were not wholly performed in the Territory.

[90] During the course of cross-examination the Assistant Director conceded a number of matters. First, she did not have possession of the Intra-Group Services Agreement at the time she was making her classification of the 1SAP fees. Secondly, once an expense is classified as a fee for management services in accordance with the considerations described at paragraphs [35] to [39] of the Guideline, the Secretary does not undertake any process of further dissecting that fee to distinguish between direct and indirect costs and whether some part of the expense might be characterised as something other than management services. In particular, where a line item of management fees might include costs referable to services provided both inside and outside the Territory, the Secretary does not undertake any process of dissection. Thirdly, it was accepted that the question whether a fee was charged in respect of the control, direction, influence or strategic management of the operation is quite a different one to whether the fee was charged by a central authority.

[91] The first enquiry is whether the 1SAP fees are properly characterised as "fees for management services". It is not open to the Secretary to classify expenditure as a fee for management services if it cannot be characterised that way within the meaning of the legislation. The fact that the 1SAP fees may have formed part of a compendious claim designated as "management fees" in the royalty return is not determinative of that matter. Paragraphs [35] to [39] of Royalty Guideline *RG-MRA-005 Operating Costs* represent an orthodox statement of what "management" connotes and the operation of the legislation concerning fees for management services. However, those paragraphs do not otherwise address the proper construction of the term "fees for management services". The concept of "management" was described in *Commissioner for Corporate Affairs v Bracht* in the following terms:[37]

> … As a word of the English language its meaning appears to have expanded, at least in its connotations, over the last hundred years or so. None of the meanings given in the Murray Edition of the *Oxford English Dictionary*, the shorter *Oxford English Dictionary, or* the *Macquarie Dictionary* truly reflect the usage adopted in the section. Each gives a primary meaning of an "act(ion) or manner of managing", which in turn requires a consideration of the meanings given to the word "manage". The closest in meaning of the latter word are perhaps meanings 4 and 5 in the *Oxford English Dictionary*, "to control and direct the affairs of …" and "to administer, regulate the use or expenditure of …". In the second volume of the *Supplement to the Oxford English Dictionary*, however, a critical meaning of the word "management" is added as a new meaning 1(e): "the administration of a commercial enterprise": p. 182. One of the

37 *Commissioner for Corporate Affairs v Bracht* [1989] VR 821 at 829-830.

> examples of this meaning given is taken from a work by H. I. Ansoff in 1968 called *Corporate Strategy*, as follows:
> "Management of a business firm is a very large complex of activities which consists of analysis, decisions, communication, leadership, motivation, measurement and control."
>
> …
>
> It may be difficult to draw the line in particular cases, but in my opinion the concept of "management" for present purposes comprehends activities which involve policy and decision-making, related to the business affairs of a corporation, affecting the corporation as a whole or a substantial part of that corporation, to the extent that the consequences of the formation of those policies or the making of those decisions may have some significant bearing on the financial standing of the corporation or the conduct of its affairs.

[92] It follows from that description that management services are services which involve the direction and control of policy and decision-making related to the business affairs of the corporation. The fact that the 1SAP fee might have related to information management does not necessarily mean that it was a fee for management services in the relevant sense. Similarly, the fact that the 1SAP system and program was in use throughout the BHP Billiton Group, that it was shared by members of the Group, and that it was a centralised system is not decisive of whether it is a "management service", or whether charges paid for access to or use of the software, however described, are "fees for management services". That determination involves an examination of the relationship between the appellant and the Group manager, and the nature of the 1SAP services so far as that may be discerned from the materials adduced.

[93] There is no doubt that at the material times BHP Billiton Ltd had primary day-to-day management control over the appellant's operations. The Umbrella Agreement dated 9 February 2001 which governed the joint-venture relationship between BHP Billiton Ltd and Anglo American Plc provided expressly for that. There is also no doubt that in the exercise of that control BHP Billiton Ltd provided management services to the appellant. Clause 8.4 of the Umbrella Agreement provided expressly that the BHP Billiton Group was appointed to provide management consultancy services to its subsidiaries, including the appellant, on a cost plus basis.

[94] The Umbrella Agreement was amended and restated on 19 August 2014. The restated agreement provided that a member of the BHP Billiton Group would continue to exercise management control over the appellant until such time as a successor was appointed. That management and operation was conducted in accordance with the terms of a Management Agreement between BHP Billiton Ltd and the appellant, also dated 19 August 2014. The Management Agreement provided relevantly that the Manager would provide services to the service recipients on the terms and conditions set out in the agreement. Those services are described in an Appendix to the agreement to include the group function areas under the Intra-Group Services Agreement which was amended and restated in June 2013. Clauses 4

and 5 of the Intra-Group Services Agreement stipulates the method of calculation and invoicing for fees for those services.

[95] Those services included Corporate Governance, Strategy, Business and Resource Development, Mineral Resources, Stewardship, Supply, Information Management and Human Resources. Under those group function areas were included such matters as managing documents, correspondence and records in accordance with Group standards; inventory and warehouse management; managing commercial supply relationships; maintaining records and data in respect of vendors, materials and services; providing enterprise-wide information management systems and infrastructure to support the operations and business requirements of service recipients; providing desktop, file storage, communication and network access services; establishing and overseeing Group standards for the development and application of information management systems; and overseeing mine and resource maximisation planning.

[96] Item 10 of the Management Agreement provided for the Manager to receive a service fee equal to the costs of the service with a mark-up of 10% plus disbursements, to be levied in accordance with the Manager's policy in respect of intra-group charges and in compliance with relevant transfer pricing and tax policies. Those costs were defined to include direct or functional costs directly referable to the provision of the service; indirect or overhead costs reasonably referable to the

provision of the service, including information technology overhead costs; and a reasonable allocation of the capital costs incurred for any software, system or other asset used to provide the service.

[97] The Deloitte report describes the background to the 1SAP Project. The subsidiaries in the BHP Billiton Group were supported by Group-wide functions in matters such as finance, development, marketing, transport and logistics. Prior to the initiation of the program, four separate iterations of SAP programs were in use across the Group, with significant process variation. The process variations undermined the Group's ability to deliver those requirements in a cost-effective manner, particularly as between the mining and marketing processes. The Group subsidiaries were also demanding that the SAP systems be expanded to accommodate management of health and safety, reporting, visibility across the business to support decision-making, and more visible management of the product supply chain in the mining, processing and distribution process.

[98] As a consequence of those matters, in 2007 BHP Billiton Ltd determined to change its systems to standardise business processes by the design of the 1SAP system and program. This was described as "an overall business improvement and enhancement project" which was broader in scope than an IT system project. BHP Billiton Marketing Asia Pte Ltd was selected to develop the Global Template in conjunction with the external service providers (Accenture Singapore

and SAP AG). Starting from October 2007, the software system was designed and built using approximately 400 information technology personnel located variously in Singapore, India, Chile and Australia at an initial cost of USD1.3 billion, with additional development costs for new releases after that time. These are the costs recovered from subsidiaries, including the appellant, by way of the charges for the 1SAP services.

[99] The functions and capabilities of the system and program extend across such matters as company information, supply chain management, inventory management, sales and marketing, distribution, reporting and the coordination and control of those activities by BHP Billiton Ltd as Manager. The consolidation of operational functions of the members of the Group using the 1SAP system enables the Manager to align strategies between firms and identify risks across different business units, and allows the management of processes from extraction to sale, including marketing and balancing supply and demand. The reporting function under the system is capable of generating management level information in relation to process stability, compliance, production outcomes and financial performance metrics.

[100] Against that background, the charge levied by the Group manager and paid by the appellant for the use of the 1SAP system and program, although at one level of abstraction capable of description as payment for the use of the software, is on proper characterisation a fee for

management services. At the least, the appellant has failed to discharge the onus of establishing that the charges were not fees for management services. The Deloitte report characterises the charges levied on Group members as for "services in the form of the development of the 1SAP System". The purpose and function of the 1SAP system and program was the provision of a suite of information and process management services to the appellant which were integrally related to the control and decision-making processes of both the appellant and BHP Billiton Ltd as its managing body. The services thereby provided effectively governed the appellant's operations in a manner that had a significant bearing on both the conduct of its affairs and its financial performance. The system was designed and developed by the appellant's principal in the application of that principal's management expertise in resource planning and production, and in the application of the information technology management expertise of its external service providers.

[101] Those services were not performed solely in the Territory, and on the basis already described the fees paid for those services by the appellant would ordinarily be classified by the Secretary as "fees for management services".

Disposition

[102] For those reasons, the appeal is allowed in part and the following orders are made:

1. The decision made by the respondent dated 11 May 2017 is varied to allow the mining security levy paid by the appellant pursuant to s 44A of the *Mining Management Act 2001* (NT) in relation to its Authorisation to carry out mining activities at its Groote Eylandt Production Unit in the 2013-14 and 2014-15 royalty years as an operating cost as defined under s 4B of the *Mineral Royalty Act 1982* (NT) for the purposes of calculating the appellant's royalty liability under s 10 of the *Mineral Royalty Act* for those royalty years.
2. The decision made by the respondent dated 11 May 2017 is varied to allow the bank guarantee fees paid by the appellant in order to satisfy the security requirement imposed on it by s 43 of the *Mining Management Act* in relation to its Authorisation to carry out mining activities at its Groote Eylandt Production Unit in the 2013-14 and 2014-15 royalty years as an operating cost as defined under s 4B of the *Mineral Royalty Act* for the purposes of calculating the appellant's royalty liability under s 10 of the *Mineral Royalty Act* for those royalty years.
3. The decision made by the respondent dated 11 May 2017 is otherwise confirmed.

[103] The Court will hear the parties in relation to any ancillary orders and the question of costs if necessary.
