

Commissioner of Territory Revenue v Alcan (NT) Alumina Pty Ltd
[2008] NTCA 14

PARTIES: COMMISSIONER OF TERRITORY
REVENUE

v

ALCAN (NT) ALUMINA PTY LTD

TITLE OF COURT: COURT OF APPEAL OF THE
NORTHERN TERRITORY

JURISDICTION: CIVIL APPEAL FROM THE SUPREME
COURT EXERCISING TERRITORY
JURISDICTION

FILE NO: AP2 of 2008 (20608545)

DELIVERED: 23 DECEMBER 2008

HEARING DATES: 12 AUGUST 2008

JUDGMENT OF: MARTIN (BR) CJ, ANGEL AND
SOUTHWOOD JJ

APPEAL FROM: SUPREME COURT

CATCHWORDS:

APPEAL -- APPEAL AGAINST JUDGMENT -- TAXES AND DUTIES -
- STAMP DUTIES

Whether acquisition of share capital attracted stamp duty – whether buyback of share capital attracted stamp duty – whether ‘option to renew’ was land for the purposes of Div 8A Pt III of the *Taxation (Administration) Act 1978* (‘the TAA’) – whether the definition of ‘lease’ in s 4 of the TAA limited the definition of ‘land’ in that section – whether there was a ‘contrary intention’ for the purposes of Div 8A of the TAA – appeal allowed.

CROSS CONTENTION

Goodwill – whether the attraction of custom is an essential element of goodwill – cross contention allowed.

Income Tax Assessment Act 1936 (Cth); *Interpretation Act 1978* (NT), s 19 and s 62A; *Law of Property Act* (NT), s 93; *Mining Act 1980* (NT); *Stamp Duty Act 1978* (NT), s 3, sch 1; *Stamp Duty Amendment Act (No 2) 1987* (NT); *Stamp Duty Amendment Act (No 2) 1991* (NT); *Stamp Duty Ordinance 1978* (NT), s 3, s 4, sch 1; *Taxation (Administration) Act 1978* (NT), s 4, s 56C, s 56F, s 56G, s 56H, s 56J, s 56K, s 56M, s 56N, s 56P, s 56Q, s 56R, Div 8A Pt III; *Taxation (Administration) Act 1994* (NT); *Taxation (Administration) Amendment Act 1987* (NT); *Taxation (Administration) Amendment Act 2000* (NT); *Taxation (Administration) Amendment Act (No 2) 1988* (NT); *Taxation (Administration) Amendment Act (No 2) 1991* (NT); *Taxation (Administration) Ordinance 1978* (NT), s 4.

The Commissioner for Taxation (Cth) v Murry (1998) 193 CLR 605, applied.

Alcan (NT) Alumina Pty Ltd v Commissioner of Taxes (2007) 208 FLR 159; *Allianz Australia Insurance Ltd v GSF Australia Pty Ltd* (2005) 221 CLR 568; *Carr v Western Australia* (2007) 239 ALR 415; *CIC Insurance Limited v Bankstown Football Club Limited v Bankstown Football Club Limited* (1997) 187 CLR 384; *Commissioners of Inland Revenue v Muller & Co's Margarine Ltd* [1901] AC 217; *Cooper Brookes (Wollongong) Proprietary Limited v The Commissioner of Taxation of the Commonwealth of Australia* (1981) 147 CLR 297; *Deputy Commissioner of Taxation v Mutton* (1988) 12 NSWLR 104; *FCT v Williamson* (1943) 67 CLR 561; *Haberle Crystal Springs Brewing Co v Clarke* 30 F.2d (2d Cir 1929); *Mercantile Credits Limited v The Shell Company of Australia Limited* (1976) 136 CLR 326; *Minister for Immigration and Multicultural and Indigenous Affairs v Nystrom* (2006) 228 CLR 566; *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355, referred.

REPRESENTATION:

Counsel:

Appellant: M Grant QC, A Slater QC, S Brownhill,
T Anderson
Respondent: D Jackson QC

Solicitors:

Appellant: Solicitor for the Northern Territory
Respondent: Clayton Utz

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

Commissioner of Territory Revenue v Alcan (NT) Alumina Pty Ltd
[2008] NTCA 14
No. AP2 of 2008 (20608545)

BETWEEN:

**COMMISSIONER OF TERRITORY
REVENUE**
Appellant

AND:

ALCAN (NT) ALUMINA PTY LTD
Respondent

CORAM: MARTIN (BR) CJ, ANGEL AND SOUTHWOOD JJ

REASONS FOR JUDGMENT

(Delivered 23 December 2008)

Martin (BR) CJ:

Introduction

- [1] In 2001 the respondent (“Alcan”) acquired 70 per cent of the shares in Gove Aluminium Ltd (GAL). At the same time GAL bought back from AMP Life Ltd (AMP) the shares held in GAL by AMP being the remaining 30 per cent of the share capital. By these transactions Alcan became the sole shareholder in GAL.
- [2] On 16 November 2005 the appellant (“the Commissioner”) assessed stamp duty on the transactions in the amount of \$31,050,000, together with a

penalty of \$16,467,997, making a total assessment of \$47,517,997. Alcan lodged an objection against the assessment. On about 20 March 2006 the Commissioner dismissed Alcan's objection. In a hearing de novo, Alcan successfully appealed to a Judge of the Supreme Court against the Commissioner's dismissal of its objection.

[3] Whether stamp duty was payable, and if so how much, essentially depended upon a valuation of the "land" held by GAL in the Territory for the purposes of Div 8A Pt III of the Taxation (Administration) Act 1978 (NT) ("the TAA") and the Stamp Duty Act 1978 (NT) ("the SDA"). The "land" was held in the form of mineral leases and options to renew those leases. The learned trial Judge determined that the options to renew were excluded from the value of the land held by GAL. The Commissioner appeals against that finding.

[4] Alcan has filed a Notice of Cross Contention alleging errors by the Judge in connection with the assessment of GAL's goodwill. The issues raised by the Notice of Cross Contention are of relevance only if the trial Judge erred in excluding the options to renew from the value of land held by GAL.

Background Facts

[5] The relevant background facts were helpfully summarised by the trial Judge in the following terms:¹

¹ *Alcan (NT) Alumina Pty Ltd v Commissioner of Taxes* (2007) 208 FLR 159 at [6] – [15] and [18] – [20].

“Background facts

[6] Before dealing with the grounds of appeal and the issues in this case it is necessary to provide some relevant background facts.

[7] On 22 February 1968, Nabalco Pty Ltd (hereinafter called Nabalco), now called Alcan Gove Pty Ltd, and the Commonwealth of Australia entered into a written agreement (the Gove Agreement) which provided for the Commonwealth to grant to Nabalco a special mineral lease and special purpose leases over certain land on the Gove peninsula, Arnhem Land in the Northern Territory for the purpose of facilitating the establishment and operation of the Gove bauxite mine and Gove alumina refinery (the Gove Refining Operations).

[8] The Gove Agreement was formally approved by the *Mining (Gove Peninsula Nabalco Agreement) Ordinance 1968* (NT) (the 1968 Gove Ordinance) which was assented to on 16 May 1968 and commenced on 29 May 1968. The Gove Agreement is attached to the 1968 Gove Ordinance as the First Schedule. Under the terms of the Gove Agreement it was provided inter alia that the Minister would grant a special mineral lease for a term of 42 years with a right to renew for a further term of 42 years for the mining of bauxite on the Gove Peninsula and also that the Commonwealth would grant a number of special purpose leases for similar terms for the purpose of establishing a bauxite treatment plant, a township and other associated facilities.

[9] On 22 January 1969, Nabalco assigned to Swiss Aluminium Australia Pty Ltd and GAL all its right, title and interest in the Gove Agreement. Thereafter the rights under the Gove Agreement were held by Swiss Aluminium Australia Pty Ltd as to 70 equal undivided 100th shares and by GAL the remaining 30 equal undivided 100th shares in the Gove Agreement.

[10] On the same day, Swiss Aluminium Australia Pty Ltd and GAL entered into a joint venture agreement, the purpose of which was the progressive development of the rights and obligations under the Gove Agreement and in particular the mining, production, treatment, transportation and shipment of bauxite and alumina. By separate agreement, Nabalco was appointed the manager of the joint venture agreement.

[11] On 22 January 1969 a deed was entered into between Swiss Aluminium Ltd, the Colonial Sugar Refining Company Ltd (CSR), Swiss Aluminium Australia Pty Ltd and GAL (which later changed its name from Gove Alumina Ltd to Gove Aluminium Ltd) known as the Parents and Subsidiaries Deed. Under the terms of this deed certain rights of pre-emption were granted as between the parties in the event of an offer to purchase shares being made to any of the subsidiaries. Swiss Aluminium Ltd was the parent company of Swiss Aluminium Australia Pty Ltd and CSR the parent company of GAL.

[12] In 1969 the Commonwealth granted to Swiss Aluminium Australia Pty Ltd and GAL a special mineral lease and a number of special purpose leases pursuant to the terms of the Gove Agreement. In exercise of its rights under the leases, Swiss Aluminium Australia Pty Ltd and GAL in joint venture continued to operate a mine, port and associated works on the leased land. Subsequently the shareholding in GAL became beneficially owned as to 70% by CSRI and as to 30% by AMP. On 25 January 1999 CSRI entered into a deed with Alusuisse of Australia Ltd, which was now the parent company of Swiss Aluminium Australia Pty Ltd, which was known as the Assumption Deed. By the terms of the Assumption Deed, Alusuisse of Australia Ltd and CSRI each covenanted

with the other that it became a parent under the Parents and Subsidiaries Deed and assumed and agreed to be bound by all the terms, conditions, restrictions, covenants and obligations on the part of respectively Swiss Aluminium Ltd and CSR thereunder, referred to variously as the “Parents and Subsidiaries Deed” and “the Principal Deed” executed between those parties on 22 January 1969.

[13] On 3 July 2000, Billiton Aluminium Australia Pty Ltd (Billiton) made an offer to acquire the share capital held in GAL by CSRI and on 4 July CSRI delivered to Alusuisse of Australia Ltd a complete copy of the offer pursuant to the provisions of the Parents and Subsidiaries Deed. The delivery of the Billiton offer by CSRI to Alusuisse of Australia Ltd constituted an offer by CSRI to sell the share capital that it held in GAL to Alusuisse of Australia Ltd in accordance with cl 3(b)(ii)(B) of the Parents and Subsidiaries Deed. Subsequently, Alusuisse of Australia Ltd accepted the CSRI offer and nominated the appellant Alcan Northern Territory Alumina Pty Ltd to accept the offer as its nominee.

[14] On 30 January 2001 CSRI executed a share sale agreement pursuant to which 70% of the share capital was transferred to the appellant. At the same time GAL entered into an agreement in writing with AMP pursuant to Pt 2.4 of the *Corporations Law* (Cth). In consequence the appellant became the sole shareholder in GAL.

[15] The actual consideration paid by the appellant was US \$275m for the CSRI interest and US \$117.9m for AMP’s shares, totalling US \$392.9m. The acquisition price was adjusted by US \$14.6m for working capital differences. Accordingly, the price paid to purchase CSRI’s interest was US \$285.2m, which at the prevailing Australian dollar/US dollar exchange rates translated to an adjusted Australian dollar acquisition price of AUD \$740.1m. ...

...

Operations of the Gove joint venture

[18] The Gove Alumina refinery and the associated bauxite mine is located near Nhulunbuy on the Gove Peninsula in the Northern Territory. The joint venture has a number of key assets. They are:

- (a) The mine site which is part of Special Mineral Lease 11 (hereinafter called SML 11): this section of the special mineral lease contains an area of approximately 49,466 acres. Assets at the mine site include crushers, workshops, offices and the airport.
- (b) Also as part of SML 11 there is a corridor of land comprising an area of 698 acres for the purpose of establishing, operating and maintaining a bauxite conveyor installation for the transportation of bauxite from the mine site to the bauxite treatment plant area. There is an 18 km conveyor belt which transports crushed bauxite from the mine to the refinery and the bauxite export facilities.
- (c) Third, also as part of SML 11, there is a third area of land containing approximately 600 acres located near the wharf area which is used for the purpose of operating and maintaining the bauxite treatment plant and stock pile area, as well as office buildings and other buildings used or associated with the treatment plant.

[19] In addition there are a number of special purposes leases as follows:

- (a) Special Purposes Lease No 213, which is granted for the special purpose of constructing a bulk cargo wharf with ancillary works and services;

1. Special Purposes Lease No 214, which is for the purpose of establishing, operating and maintaining a township in connection with the mine;
2. Special Purposes Lease No 215, which is for the purpose of establishing, operating and maintaining a construction camp on part of the land and works of sewerage treatment and lagooning, effluent disposal drainage, communications facilities and a premix concrete plant on another part of the land;
3. Special Purpose Lease No 217, for the purpose of constructing a general cargo wharf with ancillary works and services and for use by the lessees as such;
4. Special Purposes Lease No 249, for the purposes of establishing, operating and maintaining foreshore protection works, installations and facilities;
5. Special Purposes Lease No 250, for the purpose of establishing, operating and maintaining an area for industrial operations providing for the establishment, operation, maintenance and servicing of the neighbouring town of Nhulunbuy on Special Purposes Lease No. 214 or for providing services for other operations under the Gove Agreement;
6. Special Purposes Lease No 251, for the purpose of constructing, operating and maintaining communication facilities and supplies of water and electricity to the town reticulation systems and a sewerage treatment plant, etc;
7. Special Purposes Lease No 253, for the purpose of installing, operating and maintaining necessary works, installations and facilities for discharging into Melville Bay of waters from cooling systems within the bauxite treatment plant, runoff from roof and surface catchments and from amenities established within the leased area, etc;
8. Special Purpose Lease No 277, containing an area of a little in excess of one acre, for the purpose of establishing, operating and maintaining necessary works, installations and facilities for the taking and supplying of sea water from Melville Bay for use on other leased land granted to the lessees pursuant to the Gove Agreement, for cooling electrical generating and other plant, for disposing of red mud from the bauxite treatment plant and for cleaning and emergency purposes requiring the said water supply; and
9. Special Purposes Lease No 403 comprising an area of 3,493 acres for the special purpose of disposing of red mud and other effluent and industrial processed waste from the bauxite treatment plant. This lease terminates on 29 May 2011 "or at any earlier time when a further special purposes lease in extension or substitution for the present special purposes lease is granted to the lessees pursuant to the Gove Agreement". This special purposes lease does not contain any option for renewal.

[20] The other leases are granted for a term of 42 years commencing from 30 May 1969 and have a right of renewal for a further 42 years. The only exception is Special Purposes Lease No 215 which is granted for a term commencing on 22 January 1969 and expiring on 21 January 1989. That lease

has a right of renewal for a term not exceeding 20 years. The term of that lease has since been extended to 20 January 2009.”

Statutory Scheme

- [6] The two transactions in respect of which the Commissioner assessed stamp duty were the acquisition by Alcan of 70 per cent of the share capital in GAL and the buy-back by GAL of the remaining 30 per cent of its share capital from AMP. As the trial Judge correctly observed, the ultimate issue for His Honour was whether either or both of those transactions attracted stamp duty and, if they did, the amount of duty payable.
- [7] The statutory scheme pursuant to which stamp duty on transactions of the type under consideration is payable is found in Div 8A Pt III of the TAA and the SDA. Later it will be necessary to examine the history of the legislative scheme that applied to the transactions, but the relevant provisions of the Act in force at the time of the transactions were as follows:

4. Interpretation

(1) In this Act, unless the contrary intention appears –
“dutiable property” means –

(a) land;

...

(h) an option to purchase dutiable property or an interest in dutiable property; and

...

and includes an estate or interest in dutiable property;

“instrument” includes any document;

“land” means land in the Territory and includes –

(a) a lease of land;

(b) a mining tenement under the *Mining Act*, including information relating to the tenement; and

(c) a fixture to land, including a fixture to land comprised in a lease or mining tenement;

“This Act” includes the Stamp Duty Act and the Financial Institutions Duty Act;

“lease” includes a lease granted under an Act, a sub-lease and an agreement for a lease or sub-lease, but does not include –

- (a) an attornment under a mortgage or contract of sale;
- (b) a right granted by a company to a shareholder of the company, by virtue of his being such a shareholder, to occupy or use land owned or held under lease by the company; or
- (c) an option to renew a lease;

...

*“Division 8A – Change of Control of Certain
Land-owning Corporations and Unit Trusts*

56C. Interpretation

- (1) In this Division, unless the contrary intention appears –

“acquire”, in relation to an interest in a corporation to which this Division applies, includes acquire the interest by virtue of –

- (a) the allotment or issue of a share to the person or another person, not being the issue of a share to a member on registration of the corporation;
- (b) the redemption, surrender or cancellation of a share by the corporation or by the person or another person; and
- (c) the variation, abrogation or alteration of a right pertaining to a share, ...

...

“interest” includes a majority interest and a further interest as defined in section 56Q;

56K. When statement to be lodged

- (1) Where by a relevant acquisition a person acquires a majority interest or a further interest in a corporation to which this subdivision applies, that person shall prepare and lodge with the Commissioner a statement in respect of that acquisition. ...

56M. Statement chargeable with duty

- (1) A statement lodged under section 56K is chargeable, in accordance with section 56R, with duty at the rate provided for in item 5 in Schedule 1 to the *Stamp Duty Act* calculated –
- (a) where the statement relates to a relevant acquisition under section 56P(1)(a) – on the dutiable value determined under section 56R(2); and
 - (b) where the statement relates to a relevant acquisition under section 56P(1)(b) –
 - (i) on the dutiable value determined under section 56R(3)(a);
 - (ii) reduced by the amount of duty determined on the dutiable value calculated under section 56R(3)(b). ...

...

56N. Corporations to which this Division applies

- (1) This Division applies to a relevant acquisition of shares in a corporation that is –

- (a) a corporation, other than a corporation shares in the capital of which are listed on a recognized stock exchange within the meaning of the *Securities Industry (Northern Territory) Code*; and
 - (b) a land-holder within the meaning of subsection (2).
- (2) A corporation is a land-holder for the purposes of this Division if, at the time of a relevant acquisition –
- (a) it is entitled to land in the Territory and the unencumbered value of the land is not less than \$500,000 or it is entitled to land in the Territory as a co-owner of the freehold or of a lesser estate in the land and the value of the whole of the freehold or lesser estate is not less than \$500,000; and
 - (b) the value of all land to which the corporation is entitled, whether in the Territory or elsewhere, (other than primary production land) is 60% or more of the value of all property to which it is entitled, other than property directed to be excluded by subsection (4) but
- (3) ... including primary production land. ...
- (4) There shall not be included, for the purpose of calculating the value of property under subsection (2)(b), any property of a corporation or a subsidiary within the meaning of subsection (5) that is –
- (a) cash or money in an account at call;
 - (b) a negotiable instrument or money on deposit with any person;
 - (c) money lent by the corporation or a subsidiary to a person ...

...

56P. Meaning of relevant acquisition

- (1) An acquisition by a person is a relevant acquisition for the purposes of this Division –
- (a) where it –
 - (i) is an acquisition of an interest that alone constitutes a majority interest in the corporation; or
 - (ii) together with acquisitions by the person of interests in the corporation during the 12 months immediately preceding the day on which the acquisition occurs, constitutes a majority interest in the corporation ...
 - (b) ...
- other than an interest acquired –
- (c) before 17 August 1988; or
 - (d) as a result of an agreement entered into before 17 August 1988.

...

56Q. Meaning of “interest”, “majority interest” and “further interest”

- (1) For the purpose of section 56K, a person acquires an interest in a corporation if the person, or the person and a related person, acquires on or after 17 August 1988, otherwise than as a result of an agreement entered into before 17 August 1988, a shareholding in the corporation that would entitle the person, or the person and a related person, if the corporation were to be wound up after the shareholding was acquired, to participate (otherwise than as a creditor or other person to whom the corporation is liable) in a distribution of the property of the corporation.

- (2) For the purpose of section 56K, a person acquires a majority interest in a corporation if the person, or the person and a related person, acquires on or after 17 August 1988, otherwise than as a result of an agreement entered into before 17 August 1988, a shareholding in the corporation that would entitle the person, or the person and a related person, if the corporation were to be wound up after the shareholding was acquired, to participate (otherwise than as a creditor or other person to whom the corporation is liable) in a distribution of the property of the corporation to an extent of 50% or greater of the value of the property distributable to all of the holders of shares in the corporation.

...

56R. How dutiable value determined

- (1) Where section 56M(1) applies, duty is chargeable in accordance with this section on the basis of the unencumbered value (in this section called “the dutiable value”) of the land in the Territory to which the corporation is entitled.
- (2) Where by a relevant acquisition a person acquires a majority interest in a corporation, the dutiable value is the same proportion of the unencumbered value of the land in the Territory to which the corporation is entitled, as provided by subsection (4), at the time of the acquisition, as the proportion of the property of the corporation which the person, or the person and a related person, would be entitled, as provided in subsection (5), after the acquisition.

...

[8] Section 3 of the SDA provides that the SDA “shall be read as one with the [TAA]”. The rate of duty to be paid on an instrument is specified in Sch 1 of the SDA.

[9] The underlying purpose of Div 8A is to ensure that the indirect transfer of land through the transfer of a majority interest in a corporation holding land, often referred to as “land-rich corporation”, is taxed at the same rate as tax is applied to a direct transfer of land rather than at the lower rate otherwise applicable to the transfer of shares in a corporation. The legislative scheme by which this purpose is achieved may be summarised as follows:

- If, by a “relevant acquisition”, a person acquires a majority interest or a further interest in a “corporation to which [Div 8A] applies”, that person is required to prepare and lodge with the Commissioner a statement in respect of the acquisition: s 56K(1). Such a statement is an “instrument” (s 56K(5)) in respect of which stamp duty is payable: s 56M(1).
- An acquisition is a “relevant acquisition” if it is an acquisition of an interest “that alone constitutes a majority interest in the corporation” or, together with acquisitions by the person of interests in the corporation during the previous twelve months, constitutes a majority interest in the corporation (other than an interest acquired before 17 August 1988 or as a result of an agreement entered into before 17 August 1988): s 56P(1).
- A corporation to which Division 8A applies is a corporation that is a “land-holder” within the meaning of s 56N(2): s 56N(1).
- A corporation is a “land-holder” if, at the time of the acquisition, it is entitled to “land in the Territory”, provided the unencumbered value of the land is not less than \$500,000 and the value of all land to which the corporation is entitled, whether in the Territory or elsewhere, is 60 per cent or more of the value of all property to which the corporation is entitled (subject to specified exclusions of property): s 56N(2) and (4).
- A statement required under s 56K is chargeable with duty in accordance with s 56R: s 56M. Duty is chargeable on the “unencumbered value”, called “the dutiable value”, of the “land” in the Territory to which the

corporation is entitled; but where the transaction involves the acquisition of a majority interest in the corporation, the dutiable value is the same proportion of the unencumbered value of the land as the proportionate interest of the majority shareholder: s 56R.

- A statement lodged under s 56K is chargeable, in accordance with s 56R, with duty at the rate specified in item 5 of Schedule 1 to the SDA: s 56M.
- As the written submissions of Alcan put it:

“The statutory scheme ... is one that creates a liability of the acquirer of shares of a corporation which is sufficiently land rich to bring into existence and lodge the statement. The statement has the deemed status of an instrument liable to duty at the rate applicable on a conveyance of dutiable property calculated upon the proportionate entitlement of the acquirer on a notional winding up to the assets of the corporation and the value of the land held in the Territory by the corporation.”

Options to Renew – Trial Judge’s Finding

[10] GAL held a 30 per cent interest in Special Mineral Lease 11 (“SML 11”) as tenant in common with Swiss Aluminium Australia Pty Ltd (now Swiss Aluminium Australia Ltd). The trial Judge found that as a consequence of that interest, and by reason of the same interest in a number of Special Purposes Leases, GAL was entitled to “land in the Territory” for the purposes of s 56N(2). There is no challenge to that finding.

[11] The term of SML 11 was 42 years and the lease contained an option to renew for a further period of 42 years. Options to renew the Special Purposes Leases also existed. The critical question agitated before the trial

Judge and on this appeal is whether the options to renew were part of the “land in the Territory” to which GAL was entitled. This issue was brought into sharp focus because s 4 of the TAA defines “land” as including a “lease of land”, but the definition of “lease” specifically states that “lease” does not include “an option to renew a lease”.

[12] The trial Judge determined that SML 11 was a “lease” within the ordinary meaning of that term. Having referred to the contention of counsel for the Commissioner that SML 11 is “land” because of the definition of “land” in s 4(1) of the TAA, His Honour found that SML 11 falls within the meaning of “land” as that word was defined at the relevant time by s 19 of the Interpretation Act 1978. His Honour also observed that leases “have long been regarded as interests in land” and accepted the submission of counsel for the Commissioner “that a covenant to renew runs with the land and with the reversion and is an incident of the lease which directly affects the nature of the term itself ...”. In the light of the law that a covenant to renew runs with the land and is an incident of the lease, the trial Judge then posed the following question:²

“That being so, why is it that the definition of “land” in s 4(1) of the Act provided that “land” means land in the Territory ... and includes a lease of land?”

² *Alcan (NT) Alumina Pty Ltd v Commissioner of Taxes* (2007) 208 FLR 159 at 175 [61].

[13] His Honour’s answer is found in the immediately following passage of his judgment in which his Honour concludes that an option to renew a lease is not “land” for the purposes of Div 8A:³

“[62] In my opinion, the word “land” in the definition is used in two different senses. The context reveals that in some cases it refers to estates or interests in land and in others it refers to the physical entity itself, e.g. when it refers to a “fixture to land” it must be referring to the physical entity. However, as I have already indicated, the expression “land in the Territory” in the definition refers to interests in land. If so, there would be no need for the definition to include ‘a lease of land’ as plainly a lease of land is already “land”. This is so whether or not the lease is a lease granted under an Act, a sub-lease or an agreement for lease or sub-lease: see the definition of “lease”. The purpose, it seems to me, of these definitions, is to exclude from what is “land” those things which are excluded from the definition of “lease” which, relevantly to this case, means that the options to renew are not part of the lease and must be ignored. Otherwise there is no work to do for the words “includes a lease... but does not include...” etc in the definition of “lease” and no work for the words “includes a lease of land” in the definition of “land”. The structure of the definitions is the same as if it had said, “‘animals’ means animals in the Territory and includes cats but does not include Manx cats.” There is no doubt that in such a case the draftsman intended that, although Manx cats were animals, they were not ‘animals’ for the purposes of the definition: see *Re BHP Billiton Petroleum Pty Ltd and Chief Executive Officer of Customs* (2002) 69 ALD 453 at 472, para [52]. The result is that the option to renew is not “land” as defined. The same conclusion applies to the options to renew the Special Purposes Leases.”

Issue

[14] In written submissions, the Commissioner identified the issue in the following terms:

“The issue on this appeal is whether, for the purposes of Division 8A of Pt III of [the TAA], the covenant for renewal in Special Mining

³ At 175[62].

Lease SML 11 is to be taken to be excised from the lease and treated instead as a separate asset.”

[15] Alcan challenged that description of the issue and, in written submissions, identified the issue as follows:

“The issue is whether the ‘land’ referred to in s 56M(2)(b) of [the TAA], which is required to be valued, includes the options to renew the relevant leases, notwithstanding that, in s 4(1) ‘land’ is defined for the purposes of [the TAA] to include a ‘lease of land’ and ‘lease’ is defined not to include an ‘option to renew a lease’.”

[16] In essence, Alcan contended that there is no ambiguity in the wording of the relevant provisions and definitions. The legislature has evinced a clear intention by defining “land” as including a “lease of land” and, in turn, by specifically excluding an “option to renew a lease” from the meaning of “lease” for these purposes. In the absence of ambiguity there is no occasion for not applying the definition and giving the words their ordinary and natural meaning or for implying a contrary legislative intent.

[17] The Commissioner submitted that the scheme of Div 8A should be viewed in the context of its legislative history and apparent purpose. Viewed in that light, the Commissioner contended that the legislative intent to encompass options to renew leases within the ambit of the stamp duty regime created by Div 8A is apparent and the decision of the Judge leads to “capricious and (in policy terms) inexplicable exception” which “runs contrary to the purpose of parliament in enacting the provisions in issue”

Statutory Construction

- [18] Independently of the words in s 4, “unless the contrary intention appears”, the parties debated the proper approach to statutory construction. The Commissioner emphasised the need to consider first the context in its “widest sense” as discussed by the High Court in *CIC Insurance Limited v Bankstown Football Club Limited*⁴ and *Minister for Immigration and Multicultural and Indigenous Affairs v Nystrom*.⁵ Alcan emphasised that the starting point is still the “statutory text” and not “context” which can only be examined by reference to the immediate text. Counsel urged that a failure to attempt to discern the ordinary meaning of the words before examining the legislative history invites error.
- [19] For reasons which will become apparent, in my opinion the starting point for the construction of Div 8A is not a matter of significance. As Mason J observed in *Cooper Brookes (Wollongong) Proprietary Limited v The Commissioner of Taxation of the Commonwealth of Australia*:⁶

“The fundamental object of statutory construction in every case is to ascertain the legislative intention by reference to the language of the instrument viewed as a whole. But in performing that task the courts look to the operation of the statute according to its terms and to legitimate aids to construction.

The rules, as D C Pearce says in *Statutory Interpretation* P 14, are no more than rules of commonsense, designed to achieve this object. They are not rules of law.”

⁴ (1997) 187 CLR 384.

⁵ (2006) 228 CLR 566.

⁶ (1981) 147 CLR 297, 320.

[20] The ordinary and natural meaning of the words used in provisions to be construed remains important. However, at the outset the court is required to consider the “context” in which the provisions under consideration appear.

[21] The significance of considering “context” at the outset and of “improbability of result” were emphasised in the joint judgment of Brennan CJ, Dawson, Toohey and Gummow JJ, with which Gaudron J agreed, in *CIC Insurance Limited*:⁷

“It is well settled that at common law, apart from any reliance upon s 15AB of the *Acts Interpretation Act 1901* (Cth), the court may have regard to reports of law reform bodies to ascertain the mischief which a statute is intended to cure. Moreover, the modern approach to statutory interpretation (a) insists that the context be considered in the first instance, not merely at some later stage when ambiguity might be thought to arise, and (b) uses ‘context’ in its widest sense to include such things as the existing state of the law and the mischief which, by legitimate means such as those just mentioned, one may discern the statute was intended to remedy. Instances of general words in a statute being so constrained by their context are numerous. In particular, as McHugh JA pointed out in *Isherwood v Butler Pollnow Pty Ltd*, if the apparently plain words of a provision are read in the light of the mischief which the statute was designed to overcome and of the objects of the legislation, they may wear a very different appearance. Further, inconvenience or improbability of result may assist the court in preferring to the literal meaning an alternative construction which, by the steps identified above, is reasonably open and more closely conforms to the legislative intent.” (footnotes omitted)

[22] Similarly, the importance of both the context and purpose of the legislation is apparent in the following passage of the joint judgment of McHugh,

⁷ (1997) 187 CLR 384 at 408.

Gummow, Kirby and Hayne JJ in *Project Blue Sky Inc v Australian Broadcasting Authority*:⁸

“ *Conflicting statutory provisions should be reconciled so far as is possible*

The primary object of statutory construction is to construe the relevant provision so that it is consistent with the language and purpose of all the provisions of the statute. The meaning of the provision must be determined ‘by reference to the language of the instrument viewed as a whole’. In *Commissioner for Railways (NSW) v Agalinos*, Dixon CJ pointed out that ‘the context, the general purpose and policy of a provision and its consistency and fairness are surer guides to its meaning than the logic with which it is constructed’. Thus, the process of construction must always begin by examining the context of the provision that is being construed.

A legislative instrument must be construed on the prima facie basis that its provisions are intended to give effect to harmonious goals. Where conflict appears to arise from the language of particular provision, the conflict must be alleviated, so far as possible, by adjusting the meaning of the competing provisions to achieve that result which will best give effect to the purpose and language of those provisions while maintaining the unity of all the statutory provisions. Reconciling conflicting provisions will often require the court ‘to determine which is the leading provision and which the subordinate provision, and which must give way to the other’. Only by determining the hierarchy of the provisions will it be possible in many cases to give each provision the meaning which best gives effect to its purpose and language while maintaining the unity of the statutory scheme.” (footnotes omitted)

[23] In circumstances where the mischief to which the legislation is aimed is of significance, the legislative history may also be important. This was recognised by Heydon and Crennan JJ in *Nystrom*⁹:

⁸ (1998) 194 CLR 355, [69] and [70].

⁹ (2006) 228 CLR 566 at 599 [98].

“Although Mr Nystrom sought to uphold the view of the majority in the Full Court that s 34 should be construed without reference to extrinsic materials, each party in argument referred to such materials exemplifying the current approach to statutory interpretation which ‘uses ‘context’ in its widest sense to include such things as the existing state of the law and the mischief which ... one may discern the statute was intended to remedy’ and recognises the importance of legislative history in construing amendments.” (footnotes omitted)

[24] These statements of principle are consistent with s 62A of the Interpretation Act which requires that the court prefer a construction that “promotes the purpose or object underlying the act” to a construction that does not promote such purpose or object. However, as Gleeson CJ observed in *Carr v Western Australia*,¹⁰ on occasions this “general rule of interpretation” may be of little assistance. His Honour added:

“Ultimately, it is the text, construed according to such principles of interpretation as provide rational assistance in the circumstances of the particular case, that is controlling.”

[25] Applying these principles, for the reasons that follow in my opinion the trial Judge erred in his construction of the relevant provisions of Div 8A and erroneously concluded that an option to renew a lease is not part of “land” for the purposes of Div 8A.

Statutory Scheme 1978 - 1987

[26] Division 8A of the TAA was added to the stamp duty regime in 1988. The origin of the relevant previous regime is found in a combination of the Stamp Duty Ordinance 1978 (No 48 of 1978) (“the 1978 Stamp Duty Ordinance”) and the Taxation (Administration) Ordinance 1978 (No 49 of

¹⁰ (2007) 232 CLR 138 at 142 [5] and [6].

1978) (“the 1978 Taxation Ordinance”). Section 3 of the 1978 Stamp Duty Ordinance provided that the Taxation Ordinance was “incorporated and shall be read as one with [the Stamp Duty Ordinance]”.

[27] Section 4 of the 1978 Stamp Duty Ordinance provided that stamp duty was imposed on instruments specified in Sch 1. Under the heading, “Conveyance of Real Property”, item 5 of the schedule provided for duty on instruments for the “conveyance or transfer (not being the grant of a lease) of an estate in fee simple in land situated in the Territory”. Duty was applied at a rate determined by the value of the property.

[28] A lease was included in the instruments on which stamp duty was imposed by item 12 of Sch 1. Item 12 was as follows:

“Lease, an agreement for lease, sub-lease, under-lease or the grant of a sub-lease or under-lease of an estate in fee simple in land or a Crown lease for a term exceeding 5 years of land in the Territory.”

[29] By item 12, the rate of duty was determined by the total rent payable during the term of the lease. Other formulae applied for factors such as consideration by way of premium.

[30] The terms “lease” and “conveyance” were not defined in the 1978 Stamp Duty Ordinance, but the definitions in the 1978 Taxation Ordinance applied:

“‘conveyance’ means a lease, a transfer or assignment of a lease, an agreement for a transfer or assignment of a lease, or a transfer, or an agreement for a transfer, of an estate or interest in land in the Territory and includes –

- (a) an assignment, exchange, appointment, settlement, foreclosure or declaration of trust; and
- (b) a decree, judgment or order of a court,

whereby an estate or interest in land in the Territory is transferred to or vested in or accrues to a person;

‘lease’ includes a sub-lease and an agreement for a lease or sub-lease, but does not include –

- (a) an attornment under a mortgage or contract of sale;
- (b) a right granted by a company to a shareholder of the company, by virtue of his being such a shareholder, to occupy or use land owned or held under lease by the company; or
- (c) an option to renew a lease;”

[31] The definition of “conveyance” was amended in 1979 by s 3(1) of the Taxation (Administration) Act 1979. Section 4 of the 1978 Taxation Ordinance was amended by omitting from the definition of “conveyance” the words “a lease” (first occurring). The definition of “conveyance” was thereby limited to the transfer of a lease of “an estate or interest in land” or agreement for such transfer.

[32] The reason for the 1979 amendment is not immediately apparent. In the Second Reading Speech upon the introduction of the 1979 amendments, the Treasurer spoke of bringing about “consistency with the Stamp Duty Act which, in some areas, distinguishes between conveyances and the grant of a lease”. It may be, as the Commissioner submitted, that the legislature

perceived room for conflict between the Taxation and Stamp Duty Ordinances as to whether a grant of a lease was subject to duty as a “conveyance”. However, the reason is not of any significance as the amendment did not alter the substance of the statutory scheme.

[33] As at 1979, the statutory scheme for the imposition of stamp duty imposed duty on instruments for conveyance of an estate or interest in land and conveyance of a lease of an estate or interest in land. In each instance duty was assessed by reference to the consideration paid or the value of the interest transferred, whichever was the higher. This method of assessing duty stood in contrast to assessment of duty on an instrument for a lease, agreement for lease or grant of a lease of an “estate in fee simple in land” upon which duty was assessed by reference to the total rent payable during the term of the lease (and also by reference to any premium paid for the grant of a lease).

[34] Two additional points should be noted:

- First, although the 1978 Ordinances spoke of “land”, and the heading to item 5 of Sch 1 of the 1978 Stamp Duty Ordinance referred to conveyance of “real property”, neither of those terms was defined in the Ordinances. No specific statutory connection was made between a “lease” and “land” or “real property”.
- Secondly, as mentioned, “lease” was defined in the 1978 Taxation Ordinance in the same terms as the current definition. Specifically,

subpara (c) of the definition excluded an option to renew a lease from the term “lease” as used in the 1978 Ordinances.

[35] The presence of the definition of “lease” gives rise to the question as to the role of that definition, if any, in identifying the subject matter that attracted duty. In respect of an instrument for a lease, including a grant of a lease, on which instrument duty was assessed by reference to the total rent payable during the term of the lease, the Commissioner submitted that the definition of “lease” applied to exclude the period of an option to renew. In the Commissioner’s contention, the legislature did not intend duty to be assessed by reference to the rent payable on the renewable term because that term might never come into operation. If the lease was renewed, that renewal would be taxed as if it was a grant of a lease and duty assessed according to the rent payable over the renewed term. This was the specific work the legislature intended for subpara (c) of the definition of “lease” and this work continued to exist when, ten years later, Div 8A was enacted.

[36] What then of an instrument for conveyance of a lease of land? If the definition of “lease” applied to exclude an option to renew a lease in respect of an instrument for a lease, is there any reason why the definition did not apply to an instrument for conveyance of a lease? If an option to renew was excluded, the value of the lease transferred would be reduced.

[37] Alcan submitted that there is nothing in the wording of the relevant provisions or their context to lead to an inference that the legislature intended to apply the definition of lease to an instrument for a lease, but not

to an instrument for conveyance of a lease. Nor, argued Alcan, would the application of the definition lead to any form of capricious or unreasonable result. On the other hand, the Commissioner contended that on a conveyance of a lease, there is no separate transfer of the option to renew the lease. It is a transfer “of a lease entire, including all of its incidents, and the text of the legislation and the operation of the legislation [in 1979 did] not bring those exclusionary provisions into play.” Counsel also contended that as a lease is indivisible, there was no occasion in 1979 to give consideration to the value of the option and duty was assessed in respect of the “transfer of the lease entire.”

[38] A further issue was raised by Alcan in response to the Commissioner’s position. If, as the Commissioner contended, the value of a lease on transfer of the lease included the value of an option to renew, Alcan submitted that when the option is exercised and duty is paid on the renewal as if it was a grant of a lease, in substance double taxation on the option occurred; first by way of duty assessed on the value of the option and, secondly, on the exercise of the option.

[39] The Commissioner’s answer was to draw a distinction between the transactions in respect of which duty is payable. First, upon a transfer of a lease, duty is levied on the transfer of ownership of the lease. There is no separate transfer of the option. To the extent that any part of the value of the lease may be attributed to the option to renew, “tax is levied upon the opportunity to renew and not by reference to any rent that might be payable

over the term of the option to renew”. This tax on transfer of ownership is quite different, contended the Commissioner, from tax levied on a different transaction, namely, the grant of the renewal of the lease pursuant to the option. Upon a grant of renewal, duty is payable on the rent for the renewed term and the “value” is irrelevant. In this way tax is “levied on a different transaction (being the grant rather than a change of ownership), in relation to a different benefit (being the right of occupation rather than the opportunity), and upon a different basis (being rent rather than value).”

[40] In my opinion, no issue of double taxation is involved. The transfer of a lease is a transaction distinct from the renewal of a lease pursuant to an option to renew which is treated, for stamp duty purposes, as the grant of the lease. A transfer having occurred, the option to renew might never be exercised. Notwithstanding that an option to renew may have a role to play in both sets of circumstances, taxation on each of these different transactions does not amount to “double taxation”. From the point of view of the legislature enacting a statutory scheme designed to enhance the fundraising capacity of the Territory, the imposition of duty on each transaction is hardly surprising.

[41] As to the application of the definition of “lease”, at common law an option to renew a lease is an “incident of the lease” and “part of the lessee’s interest” in the land that is the subject of the lease.¹¹ It is readily

¹¹ *Mercantile Credits Limited v The Shell Company of Australia Limited* (1976) 136 CLR 326 per Gibbs J at 344 – 345 and Stephen J at 352.

understandable that on an instrument for a lease in respect of which duty is assessed by reference to the rent payable for the term of the lease, the legislature would intend to exclude an option to renew for the purposes of assessing duty because it might never be exercised. However, it is also readily understandable that the legislature would intend that duty be assessed on the transfer of a lease on the basis of the total value of the lease, determined by reference to all the incidents of the lease. Indeed, it would be surprising if the legislature intended to sever from the lease an incident of the lease which contributes to the value of the lease.

[42] Section 4 of the 1978 Taxation Ordinance applied the meaning of the terms defined “unless the contrary intention appears”. This gives rise to consideration of the proper role of definition provisions in the construction of statutory provisions in the context of the scheme created by those provisions.

[43] The proper approach to definition provisions was discussed by Mahoney JA in *Deputy Commissioner of Taxation v Mutton*.¹² The Court of Appeal was concerned with the construction of the Income Tax Assessment Act 1936 (Cth) and whether the Commissioner was empowered to sue for the recovery of a penalty levied for a failure to pay tax on the due date. The taxpayer relied upon a particular definition of “tax” and limiting the power of

¹² (1988) 12 NSWLR 104.

recovery. Referring to the provision that the definition applied “unless the contrary intention appears”, Mahoney JA said:¹³

“There is, of course, no simple formula for determining what is a “contrary intention” for his purpose. Such an intention may be displayed where the definition provides that one thing shall be done and the Act or section in question provides that another shall be done: But it is not limited to such a case. A definition section and its application must be considered in the context of the Act as a whole: A contrary intention may be inferred from a particular provision if, were the definition to be applied, the provisions of or the procedure established by the section would not appropriately work: *It is, I think, not necessary that what is laid down by the section in question be impossible of operation; it is sufficient if the result of the application of the definition to a section results in the operation of the section in a way which clearly the legislature did not intend. ...*

In the end, what the court does when it decides whether there is a “contrary intention” is to decide whether it was the intention of the legislature that the statutory provision as to interpretation or definition should apply to the particular section:” (authorities omitted) (my emphasis)

[44] The Commissioner also relied upon the observations of McHugh J in

Allianz Australia Insurance Ltd v GSF Australia Pty Ltd:¹⁴

“Significance of definition sections

12. Except in rare cases, definitions are not intended to enact substantive rules of law. Their function is to aid the construction of those substantive enactments that contain the defined term or terms. Moreover, the meaning of the definition depends on the context and object of the substantive enactment. As I pointed out in *Kelly v The Queen* (2004) 218 CLR 216 at 253 [103]:

‘[T]he function of a definition is not to enact substantive law. It is to provide aid in construing the statute. Nothing is more

¹³ (1988) 12 NSWLR 104 at 198.

¹⁴ (2005) 221 CLR 568 at 574 [12]

likely to defeat the intention of the legislature than to give a definition a narrow, literal meaning and then use that meaning to negate the evident policy or purpose of a substantive enactment ... [O]nce ... the definition applies, ... the only proper ... course is to read the words of the definition into the substantive enactment and then construe the substantive enactment – in its extended or confined sense – in its context and bearing in mind its purpose and the mischief that it was designed to overcome. To construe the definition before its text has been inserted into the fabric of the substantive enactment invites error as to the meaning of the substantive enactment ... [T]he true purpose of an interpretation or definition clause [is that it] shortens, but is part of, the text of the substantive enactment to which it applies’.”

[45] In my opinion, the definition of “lease” in s 4 of the 1978 Taxation Ordinance did not apply to the conveyance of a lease. The reason for applying the definition to an instrument for a lease does not exist when a lease is transferred. The application of the definition would result in dissecting from a lease, for the purposes of assessing the value of the lease, an incident of the lease that travels with the lease upon conveyance. Such a dissection would create an air of unreality in relation to the assessment of the value of the lease being conveyed. The legislature intended to apply duty according to the market value of the lease being conveyed and exclusion of an option to renew contained in a lease would distort the value. Exclusion of the option to renew would also reduce the revenue of the Territory. I am unable to discern any sound reason for applying the definition of lease to a conveyance of a lease. For these reasons, in my view a “contrary intention appears” and the definition does not apply to a conveyance of a lease.

[46] In 1987 amendments were made to the statutory stamp duty scheme by the Taxation (Administration) Amendment Act 1987 and the Stamp Duty Amendment Act (No 2) 1987. The definition of “conveyance” found in the 1978 Taxation Ordinance (as amended in 1979) was replaced by the following definition:

“‘conveyance’ includes –

- (a) a transfer or assignment, or an agreement for a transfer or assignment, of a lease of land in the Territory;
- (b) a transfer, or an agreement for a transfer, of an estate or interest in land in the Territory, other than an interest referred to in paragraph (a); and
- (c)(i) an assignment (not being an assignment referred to in paragraph (a)), exchange, appointment, settlement, foreclosure or declaration of trust; or
- (ii) a decree, judgment or order of a court,

whereby an estate or interest in land in the Territory is transferred to or vested in or accrues to a person, but does not include the grant of a lease;”

[47] In conjunction with the change in the definition of “conveyance”, item 5 of Sch 1, as it appeared in the 1978 Stamp Duty Ordinance, was omitted and replaced by the following wording:

“5. Conveyance of Real Property

(1) Conveyance other than a conveyance of a description referred to in paragraph (2), (3) or (4)” (rates omitted)

[48] Paragraphs (2) – (4) of item 5 concerned conveyances to or by joint tenants, partition of land and conveyance in conformity with a duly stamped agreement for which different rates were specified.

[49] Item 12 of Sch 1 was also amended by deleting all the words “Lease, an agreement for lease ... exceeding 5 years of land in the Territory” and replacing it with the words “Lease of the land in the Territory.”

[50] The purpose of the 1987 amendments is not readily discernible. In the Second Reading Speech, the Treasurer initially spoke of clarifying the definition of “conveyance” and of introducing a number of “anti-avoidance provisions” similar to those that existed in other jurisdictions. Later, the Treasurer said:

“The bill amends the definition of ‘conveyance’ to simplify certain sections in order to clarify what is included for the purposes of assessment and to overcome an inconsistency between the Taxation Administration Act and the Stamp Duty Act. All states and the Territory have been concerned about the loss of revenue occasioned by certain avoidance practices. A particular instance of avoidance occurs where a dutiable instrument is held outside the Territory and not produced for assessment. The overall question of avoidance and evasion of Territory and state taxes has been considered in detail by the Territory and the states and a number of steps will shortly be taken by all jurisdictions to minimise revenue loss occasioned by avoidance and evasion. As an initial measure, it has been decided to tighten the act in areas where more blatant avoidance is occurring. The amendment makes it clear that jurisdiction extends to cover the practice mentioned above and sets a limit on the time within which dutiable documents held outside the Territory must be stamped. In addition, in certain circumstances, copies will be made liable to duty where the original has not been duly stamped. Where documents are not lodged as required, a penalty will be incurred.”

[51] As will be seen later in these reasons, the anti-avoidance theme of the statutory scheme and relevant amendments becomes of significance.

1988 – Division 8A

[52] In the content of the statutory scheme I have described, Div 8A was introduced in 1988 by the Taxation (Administration) Amendment Act (No 2) 1988. Prior to the 1988 amendments, a significant amount of stamp duty could be avoided if the interest in land was indirectly transferred through the transfer of shares in a corporation holding that interest. Counsel referred to such entities as “land-rich” corporations. Duty payable on the transfer of shares was significantly lower than the duty payable on a direct conveyance of an interest in land. Avoidance of duty by this methodology was brought to an end by Div 8A. The purpose of preventing such avoidance is readily apparent from the terms of Div 8A and is confirmed in the following passage from the Second Reading Speech of the Treasurer who introduced the 1988 amendments:

“The second category of amendments is directed at overcoming certain avoidance practices which have caused a growing loss of revenue. ... In particular, the amendments will introduce measures to countenance the avoidance of conveyance duty where a company or unit trust is set up temporarily to hold land which is, in effect, then sold by transferring the relevant shares or units. At present, such a transfer can attract a significantly lower level of marketable security duty based on the number of units transferred, rather than the conveyance duty assessed on the value of the land. In many cases, such purchases are commercially artificial and are carried out to avoid stamp duty.”

[53] Division 8A as enacted in 1988 is set out in the schedule to these reasons.

The essential features of the scheme were the same as those features that existed in 2001 and are summarised in para [9] of these reasons. However, the following differences should be noted:

- As in 2001, in 1988 Div 8A applied to a corporation that was a “land-holder”, but in 1988 a corporation was a “land-holder” if it was entitled to “real property” in the Territory of a specified value as opposed to an entitlement in 2001 to “land in the Territory” of a specified value.
- In 1988, although Div 8A applied to a corporation that was a “land-holder”, there was no definition of “land”. Section 56C of Div 8A limited the application of the definition of “Real property” to Div 8A. The specific definition was as follows:

“‘real property’ includes an estate or interest in real property.”

- In 1988 a corporation was a land-holder if it was entitled to “real property” of the unencumbered value of not less than \$1m and the value of all the “real property” to which the corporation was entitled was 80% or more of the value of all property to which the corporation was entitled. These figures stand in contrast to the lower threshold in 2001, namely, an entitlement to “land” in the Territory of the unencumbered value of not less than \$500,000 providing the value of the “land” to which the corporation is entitled is 60% or more of the value of all property to which the corporation is entitled.

- Unlike the position in 2001, as introduced in 1988 Div 8A contained no direct statutory connection between “real property” and “lease”. The word “lease” did not appear in Div 8A. However, both at common law and pursuant to s 19 of the Interpretation Act, a leasehold estate, being an interest in land at law, amounted to both “land” and “real property” for the purposes of the TAA. Further, as I have said, an option to renew a lease is an “incident of the lease” and “part of the lessee’s interest” in the land/real property that is the subject of the lease.

[54] As to the application in 1988 to Div 8A of the definition of “lease”, having regard to Div 8A in its entirety and to the context of the TAA, and in the absence of a specific statutory link between “real property” and a “lease”, in my view the definition of “lease” in s 4 had no role to play in identifying “real property” for the purposes of Div 8A. The definition of “lease” in s 4 continued to have work to do in connection with the application of duty to an instrument for a lease.

[55] It is common ground that Div 8A was concerned with the transfer of “real property” through the mechanism of the transfer of shares in a corporation entitled to “real property”, being “real property” as that term was understood in law in 1988. Bearing in mind that the value of the “real property” determined both whether Div 8A applied and, if it did, the amount of duty payable, I am unable to discern any basis in Div 8A, considered in the context of the TAA as a whole, for inferring that the legislature in 1988 intended to exclude the value of an option to renew a lease from the value of

“real property” in the form of a leasehold interest. That is, I am unable to discern any legislative intention to exclude an option to renew a leasehold interest from the concept of “real property” held by a corporation for the purposes of Div 8A. I did not understand Alcan to suggest that such an intention could be inferred from the terms of Div 8A or from the context of the Act in its entirety.

[56] As I have said, in 1988 the definition of “lease” operated only in respect of an instrument for a lease. It had no role on a direct conveyance of a lease of land and the value of the lease was determined by reference to the lease in its entirety, including the incident of an option to renew. Construed in this way the operation of the provisions concerning direct transfers was consistent with the operation of Div 8A as enacted in 1988. The legislature established a degree of parity between the operation of Div 8A and the operation of those provisions governing the direct transfer of a leasehold interest in land.

[57] Even if I am in error as to the operation of the definition of “lease” in connection with a direct conveyance of a lease in 1988, and contrary to my view the definition of “lease” applied to a direct transfer, I remain of the view that the definition of “lease” had no role to play in the operation of Div 8A as first enacted in 1988. The legislature chose to apply Div 8A to corporations entitled to “real property” of a specified value as “real property” was understood in law at that time and chose not to create a statutory connection between “real property” in Div 8A and the definition of

“lease” in s 4. Construed in this way, the legislature chose to distinguish between direct conveyances and the operation of Div 8A and not to establish the degree of parity to which I referred.

1992 Amendments

[58] Amendments to the statutory scheme after 1988 are of particular importance.

In 1992, amendments were brought about by a combination of the Stamp Duty Amendment Act (No 2) 1991 and the Taxation (Administration) Amendment Act (No 2) 1991 which both came into operation on 1 January 1992. By these amendments the concept of imposing duty on the conveyance of an interest in land was replaced by the imposition of duty on instruments for the conveyance of “Dutiable Property”. The definition of “lease” remained unchanged.

[59] Item 5 of Sch 1 to the SDA was amended to remove reference to “Conveyance of Real Property” and to replace it with the heading “Conveyance of Dutiable Property”. Item 12 of Sch 1 continued to be worded “Lease of the land in the Territory” being the wording inserted in 1987.

[60] In 1992 the definition of “conveyance” was defined as follows:

“‘conveyance’ includes a transfer or assignment (or an agreement to transfer or assign), grant, exchange, appointment, settlement, foreclosure, declaration of trust, a statement under section 83B and a decree, judgment or order of a court, whereby dutiable property is transferred to, vested in or accrues to a person, but does not include the grant of a lease or patent;”

[61] A definition of “dutiabale property” was inserted into the TAA. It included a mining tenement under the Mining Act and extended liability for duty beyond instruments concerned with an interest in land, thereby significantly enlarging the ambit of the stamp duty regime. The relevant parts of the definition of “dutiabale property” for present purposes, and which demonstrate this enlarged ambit, are as follows:

“‘dutiabale property’ means –

- (a) land in the Territory, including
 - (i) a lease of land;
 - (ii) a mining tenement under the Mining Act, including information relating to the tenement; and
 - (iii) a fixture to land (including land comprised in a lease or a mining tenement);
- (b) the goodwill of a business undertaking carried on or to be carried on in the Territory ...
- (c) a right to use in the Territory a business name ...
- (d) a right to use in the Territory a thing, system or process that is used in connection with such a business undertaking and is the subject of a patent ...
- (e) a right to use in the Territory information or technical knowledge connected with such a business undertaking;
- (f) a patent, a registered design or a copyright;

- (g) a statutory licence or permission ... used in or connection with such a business undertaking ...
- (h) an option to purchase dutiable property or an interest in dutiable property; and
- (j) chattels, if part of a transaction in which other dutiable property is conveyed, acquired or created or the beneficial ownership is changed, other than -
...

and includes an estate or interest in dutiable property.”

[62] It is readily apparent that the primary purpose of the 1992 amendments was to render liable to stamp duty a significantly increased range of transactions thereby increasing the capacity of the Territory to raise revenue through stamp duty. This purpose is also apparent from the Second Reading Speech of the Treasurer who introduced the amendments. The Treasurer spoke of the amendments extending duty to “transfers of property in addition to real property”. Having noted that the amendments addressed an area where the Commonwealth Grants Commission had “assessed the Territory with a capacity to raise revenue” and would “bring the Territory conveyancing head of duty into line with similar duties in most states”, the Treasurer said:

“The amendments introduce the concept of dutiable property. As a consequence, while duty will continue to be payable on the conveyances covered by existing provisions – such as those relating to land and leases of land – it will also be payable on conveyances of certain chattels, but only when transferred with other dutiable property, goodwill associated with the sale of business and mining tenements, certain intellectual and industrial property, certain statutory licences, and enhancements of property and options to purchase that property”

[63] Significantly, while increasing the capacity of the Territory to raise revenue through stamp duty on various types of conveyances, the legislature chose not to amend Div 8A. Following the 1992 amendments Div 8A did not contain any reference to the conveyance of “dutiabale property”.

Division 8A remained concerned solely with the acquisition of a majority interest in a corporation entitled to “real property” of a specific value. No statutory link existed in the TAA between “dutiabale property” and “real property” and, in my opinion, no basis has been demonstrated for implying such a link. After the 1992 amendments the definition of “lease” continued to have no application to Div 8A.

[64] As to the application of the definition of “lease” to a direct conveyance of a leasehold interest in land, Alcan submitted that as the legislature had chosen to specifically set out in subpara (a) of the definition of “dutiabale property” that “land in the Territory” includes a “lease of land”, the intention of the legislature to apply the definition of “lease”, including the exclusion of an option to renew, to conveyances of leases of land is apparent.

[65] In my opinion, the situation did not change with the 1992 amendments. As far back as 1978, the definition of “conveyance” not only referred to a transfer of an estate or interest in land, which would include a transfer of a leasehold interest in land, it specifically included the transfer of a lease of an estate or interest in land. The inclusion of a transfer of a lease of an estate or interest in land was unnecessary because an estate or interest in land included a leasehold interest. Similarly, in 1992, the transfer of “land

in the Territory” necessarily encompassed the transfer of a lease of land in the Territory. In order to bring a lease of land into the ambit of “dutiabale property”, it was not necessary to include reference to a lease of land in subpara (a) of the definition of “dutiabale property”, but the specific inclusion of a lease did not herald an intention to alter the scheme. Throughout the history of the scheme the legislature has chosen to specifically include a transfer of a lease rather than rely upon the general law that a transfer of an estate or interest in land necessarily includes the transfer of a leasehold interest.

[66] It may be, as the Commissioner submitted, that the legislature acted out of an abundance of caution and included a lease of land as specifically encompassed by the expression “land in the Territory” in order to ensure that all mineral leases were within the scope of “dutiabale property”.

Whatever be the reason, the specific inclusion in this way merely continued the specific inclusion that began in 1978 and it did not signify any change of intention or policy. In my opinion, it is highly unlikely that the legislature intended to reduce its capacity to raise revenue by applying the definition of lease, including the exclusion of the option to renew, to conveyances of leases of land. Even if I am wrong in this view, in my opinion, following the 1992 amendments, the concept of “dutiabale property” and the definition of lease in s 4 had no application to Div 8A.

1994 Amendments

[67] In 1994 a number of amendments were made to the TAA by the Taxation (Administration) Act 1994 which came into operation on 1 July 1994.

Continuing the theme of enlarging the capacity to raise revenue through stamp duty, the thresholds of \$1m and 80% enacted with the introduction of Div 8A in 1988 were lowered to \$500,000 and 60%. In addition, the percentage holding for the purposes of the majority interest was lowered from “greater than 50%” to “50% or greater”.

2000 Amendments

[68] In 2000, Div 8A was amended by the Taxation (Administration) Amendment Act 2000. In summary, the amendments to Div 8A were as follows:

- Throughout Div 8A, the words “real property” were omitted and were replaced by the word “land”.
- The definition of “real property” was deleted.
- The definition of “dutiable property” (which first appeared in the 1992 amendment) was amended by deleting subpara (a) which contained the extended definition of “land in the Territory” and substituting a new subpara (a) containing the word “land”.
- A separate definition of “land” was inserted into s 4 in terms identical to the old subpara (a) of the definition of “dutiable property”.¹⁵ The

¹⁵ See para [61] of these reasons.

definition of “land” is set out in para [7] of these reasons and includes “a lease of land”.

- [69] The effect of the 2000 amendments in Div 8A was to replace the concept of a corporation holding “real property” with the concept of a corporation holding “land”. In this way a direct statutory connection was created between the word “land” as used in Div 8A and the definition of “land” in s 4. In turn, as “land” is defined in s 4 as including “a lease of land”, a statutory connection was created between Div 8A and the definition of “lease”, which definition excludes an option to renew a lease.
- [70] What was the purpose of the amendments in 2000? The Commissioner submitted that the purpose was to remove any doubt that may have existed as to “whether the operation of Div 8A captured mining tenements within the land rich provisions”. Counsel referred to the Second Reading Speech of the Leader of Government Business who introduced the amendments in the following terms:

“Part 2 of the Bill proposes four – anti avoidance measures. The first measure relates to the stamp duty ‘land rich’ provisions and how they apply to mining tenements and mining information relating to such tenements. ...

The ‘land rich’ provisions provide a mechanism to cause the transfer of the majority interest of shares in a ‘land rich’ corporation or units in a unit trust to be subject to duty at the higher conveyance duty rate. ...

These provisions ensure the indirect transfer of real property by way of an unlisted company or unit trust is taxed as if the ownership of the real property was transferred directly. *A direct conveyance of a mining tenement and mining information is also subject to stamp duty at conveyance duty rates. However, it is arguable as to whether mining tenements and mining information are caught within the ‘land*

rich' provisions. To remove any doubt, the Bill proposes an amendment to ensure mining tenements and mining information relating to such tenements are caught by the 'land rich' provisions."
(my emphasis)

[71] The Commissioner also submitted that, "quite manifestly", there was no intention "to alter the incidence of duty on transactions in land rich companies, by excluding from the scope of land transferred, or real property transferred indirectly, the value of any option to renew." Counsel emphasised that the mischief sought to be remedied was "the possible escape from duty on transactions in which the interest in land was by way of a mining lease"

[72] In support of the construction for which the Commissioner contended, counsel also drew attention to what he described as "textual indications" which he submitted provided support for the Commissioner's contentions:

- As at January 2001, the only time the word "lease" was used in the Act was in relation to the primary grant of a lease. The Commissioner submitted that the single use should lead to an inference that the definition of "lease" is relevant only to that particular use. Reference to the conveyance of a lease through the compendious term "conveyance" does not result in a breakdown according to the definition of "lease".
- The use of the term "land" used in Div 8A does not contemplate a separate consideration of a lease from an option to renew contained in the lease. This, it was said, can be seen by reference to ss 56F, G, H and J.

Broadly speaking, those provisions permit a notice of unpaid duty to be registered on the title of land that is the subject of duty pursuant to Div 8A and provides that such a notice operates as a charge on the land permitting the Commissioner to exercise a power of sale over the land with proceeds to be distributed in accordance with s 93 of the Law of Property Act. It would be “entirely discordant” with the operation of those provisions and unworkable to suggest that the charge operates only in respect of the lease “somehow divested of any option to renew running as an incident particular lease”.

- Thirdly, the construction urged by Alcan would give rise to an anomaly in the treatment of mining interest. Mining tenements are included in the definition of “land”, but there is nothing in Div 8A or elsewhere in the TAA directing that a mining tenement does not include an option to renew a mining tenement. On Alcan’s construction, therefore, the transfer of special mining leases such as those held by GAL would receive different taxation treatment from other mining tenements because, as the trial Judge found, the special purpose mining lease under consideration is not a mining tenement under the Mining Act. The same would apply to other types of mining interest which do not fall within the definition of mining tenement.

[73] Alcan submitted that as a matter of “ordinary meaning”, a lease is “land” for the purposes of Div 8A because the definition of “land” expressly includes a “lease of land”. As “lease” is defined not to include an option to renew a

lease, an option to renew is not “land” for the purposes of Div 8A and is not “dutiabale property” for the purposes of the TAA. Alcan contended that there is nothing in the context of the Act from which it can be found that “the contrary intention appears”. In essence, argued Alcan, the Commissioner “seeks to read down the ordinary meaning and operation of the relevant legislative provisions by reference to extrinsic circumstances.”

[74] As to Alcan’s response, the Commissioner contended it was “based on a very literal and mechanical construction of a legislative formula that came cumulatively into existence in two stages; those stages being unrelated as to purpose ...”. The stages to which counsel was referring were the amendments in 1992 and 2000. The Commissioner argued that the construction advanced by Alcan would have the operation of Div 8A governed and circumscribed by definitions resulting “in the operation of [Div 8A] in a way which clearly the legislature did not intend”.

Conclusion

[75] The critical task is to ascertain the intention of the legislature. In particular, the task is to determine whether the definition of lease does not apply because “the contrary intention appears”.

[76] Over the years since 1978, the legislature has consistently increased its capacity to raise revenue by closing off avoidance practices and increasing the range of transactions attracting duty. It is plain that the legislature has consistently intended to increase its stamp duty revenue. In establishing the

statutory scheme found in Div 8A, the legislature chose to encompass an option to renew a lease within the ambit of “real property” for the purposes of determining the value of “real property” attracting the operation of Div 8A. Following the 1992 amendments, that position remained unchanged. Division 8A continued to operate independently of the definitions in s 4 and an option to renew continued to be part of “real property” held by a corporation for the purposes of Div 8A.

[77] Read literally in isolation from the legislative history, and applying the definitions in s 4 without qualification, the ordinary meaning of the provisions excludes an option to renew from “land” for the purposes of Div 8A and from “dutiabale property”. However, apart from such a literal application of the 2000 amendments, there is nothing in the amendments or the extrinsic material to suggest that, contrary to the consistent history of increasing its capacity to raise revenue through the application of stamp duty, the legislature intended in 2000 to reduce that capacity by excluding options to renew leases from the value of “land” held by a corporation for the purposes of Div 8A. Indeed, the Second Reading Speech plainly supports the contrary view and suggests that the focus of the legislation was on ensuring that the capacity to raise revenue through stamp duty was not diminished by removing any doubt as to whether “mining tenements and mining information” were “caught within the ‘land rich’ provisions” A construction that applies the definition of “lease” to “land” for the purposes of Div 8A would directly undermine the primary purpose of the legislation

and give the definitions a substantive operation and effect which was not intended by the legislature.

[78] For these reasons, in my opinion “a contrary intention appears”. The definition of “lease” does not apply to exclude an option to renew from “land” for the purposes of Div 8A.

Cross Contention – Goodwill

[79] The issues raised in the notice of cross contention centre upon the Judge’s finding that GAL did not possess goodwill in the legal sense. His Honour’s finding in that regard is only of relevance if, as is my view, his Honour erred in excluding the options to renew from the value of the land held by GAL. Alcan submitted that even if the options are included for the purposes of valuing the land held by GAL, nevertheless the value of the goodwill was such that the Judge ought to have found that the value of the land to which GAL was entitled at the date of acquisition was less than 60% of the value of all property to which GAL was entitled. If that contention is correct, GAL was not a “land-holder” for the purposes of Division 8A.

Goodwill as an Asset in Law

[80] The concept of goodwill for legal and accounting purposes was discussed at length in the joint judgment of Gaudron, McHugh, Gummow and Hayne JJ in *The Commissioner for Taxation (Cth) v Murry*.¹⁶ The Court was concerned with the sale of statutory licences to operate taxis together with

¹⁶ (1998) 193 CLR 605.

shares in a taxi cooperative company. One of the licences was leased to a driver who used the licence to operate his own vehicle as a taxi and retained the profits from that operation. The licence leased to the driver was sold together with the shares in the cooperative company. The majority held that the sale of the licence was not a sale of the goodwill of the business operated by the taxi driver. Nor was it a sale of the goodwill of the business of the vendors to the extent that the business of the vendors was concerned with the operation of another taxi and the leasing of the licence that was sold.

[81] In that context, a number of propositions emerged from the joint judgment which are of significance to the circumstances under consideration:

- “Goodwill is inseparable from the conduct of a business”.¹⁷
- Goodwill “may derive from identifiable assets of a business, but it is an indivisible item of property, and it is an asset that is legally distinct from the sources – including other assets of the business – that have created the goodwill”.¹⁸
- “Goodwill does not inhere in the identifiable assets of a business, and the sale of an asset which is a source of goodwill, separate from the business itself, does not involve any disposition of the goodwill of the business”.¹⁹

¹⁷ 608 [4].

¹⁸ 608 [4].

¹⁹ 608 [4].

- “Goodwill includes whatever adds value to a business, and different businesses derive their value from different considerations”.²⁰
- “[T]he attraction of custom still remains central to the legal concept of goodwill. Courts will protect this source or element of goodwill irrespective of the profitability or value of the business”.²¹
- “Goodwill is the right or privilege to make use of all that constitutes ‘the attractive force which brings in custom’”.²²
- “Goodwill is correctly identified as property ... because it is the legal right or privilege to conduct a business in substantially the same manner and by substantially the same means that have attracted custom to it. It is a right or privilege that is inseparable from the conduct of the business”.²³
- “The goodwill of a business is the product of combining and using the tangible, intangible and human assets of a business for such purposes and in such ways that custom is drawn to it”.²⁴
- “It is common to describe goodwill as being composed of elements. However, goodwill is a quality or attribute that derives inter alia from using or applying other assets of the business. ... [M]any of the matters

²⁰ 611 [12] Citing Dixon CJ, Williams, Fullagar and Kitto JJ in *Box v The Commissioner of Taxation* (1952) 86 CLR 387 at 397.

²¹ 614 [20].

²² 615 [23] and see 630 [68]: “For legal purposes, goodwill is the attractive force that brings in custom and adds to the value of the business”.

²³ 615 [23] (footnotes omitted).

²⁴ 615 [24].

that assisted in creating the present goodwill of a business may no longer exist. It is therefore more accurate to refer to goodwill as having sources than it is to refer to it as being composed of elements”.²⁵ (footnote omitted)

- “Care must be taken to distinguish the sources of the goodwill of a business from the goodwill itself. Goodwill is an item of property (44) and an asset in its own right”.²⁶
- It “seems” to be “impossible to achieve a synthesis of the legal and the accounting and business conceptions of goodwill. Accounting and business conceptions of the term emphasise the necessity for the business to have some value over and above the value of the identifiable assets”.²⁷

[82] Notwithstanding the repeated references by the majority in *Murry* to the central role of the attraction of custom in determining whether goodwill, as a separate asset, exists, Alcan submitted that the trial Judge erred in finding that the “attraction of custom is an essential element of the legal concept of goodwill such that if it does not exist legal goodwill cannot exist ...”. Alcan contended that other sources of goodwill existed which “comprised goodwill in the legal sense”.

²⁵ 615 [24].

²⁶ 617 [30] – see footnote (44):

“Moreover, as we have pointed out, goodwill is property because it is the legal right or privilege of the proprietor of a business to conduct the business in a particular way and by particular means”.

²⁷ 614 [21].

[83] It is clear, as submitted by Alcan, that there may be many sources of goodwill in the legal sense. However, as was emphasised by the majority in *Murry*, it is essential to distinguish goodwill as an item of property from its sources. While potential sources of goodwill might exist to the extent that, ordinarily, their presence would establish the existence of goodwill, nevertheless the question must be asked whether the evidence establishes that those sources have attracted custom to the business. Goodwill in the legal sense exists if the use of the assets of the business or the conduct of the business has attracted custom to the business. The “legal right or privilege” that comprises the separate asset known as goodwill is to use the assets of a business “for such purposes and in such ways that custom is drawn to it” or “in substantially the same manner and by substantially the same means that have attracted custom to it”.

Approach of Trial Judge

[84] The trial Judge correctly identified goodwill in the legal sense as “property and an asset in its own right”.²⁸ After reviewing the evidence concerning the value of GAL’s assets and making findings which, for present purposes, are not under challenge, his Honour concluded that there was no goodwill because there was “no evidence that GAL had an attractive force that brought in custom and which added to the value of the business”.²⁹

²⁸ *Alcan (NT) Alumina Pty Ltd v Commissioner of Taxes* (2007) 208 FLR 159 at 187 [113].

²⁹ 185 [106].

[85] While the Judge did not define goodwill by reference to the “legal right or privilege” discussed in *Murry*, nevertheless his Honour correctly identified the relevant question by approaching his determination as to whether goodwill existed on the basis that “attraction of custom still remains central to the legal concept of goodwill”.³⁰ In my opinion, his Honour’s approach was not inappropriately constrained by an unduly narrow view of goodwill in the legal sense.

[86] Once it is accepted that in the absence of attraction of custom through use of the assets goodwill in the legal sense does not exist, a central plank of the challenge by Alcan falls away. However, it remains necessary to consider the other “sources” relied upon by Alcan as demonstrating the existence of goodwill and to determine whether his Honour was correct in concluding that there was no evidence to support a conclusion that GAL possessed “an attractive force that brought in custom and which added to the value of the business”.³¹

The Business

[87] In order to determine whether GAL possessed goodwill in the legal sense, it is necessary to examine the nature of the business conducted by GAL.

[88] The relevant background to the mining and refinery operations began in 1968 when the Commonwealth agreed to grant to Nabalco Pty Ltd, now called Alcan Gove Pty Limited, a Special Mineral Lease and Special

³⁰ 185 [105] quoting *Murry* at [20].

³¹ 185 [106].

Purpose Leases over land on the Gove Peninsula for the express purpose of facilitating the establishment of a bauxite mine and refinery operation.

Nabalco's rights were subsequently assigned to Swiss Aluminium Australia Limited ("SAAL") and GAL.

[89] The Commonwealth granted SML 11 and the Special Purpose Leases to SAAL and GAL. SAAL held a 70% interest while GAL held the remaining 30%.

[90] SAAL and GAL entered into a joint venture agreement for the purposes of developing and operating the mining, refinery and export operations. The mine site is located on SML 11. In a relatively simple operation, bauxite deposits are extracted by bulldozer and the bauxite is transported by truck to the crushing plant. The crushed bauxite is then conveyed by conveyor on SML 11 to the refinery where it is stacked for use.

[91] It is common ground that the Commonwealth insisted on the establishment of a refinery in the immediate locality of the mine. The refinery process by which alumina is extracted from the bauxite involves four stages which it is unnecessary to discuss. The alumina is then conveyed by conveyor belt to the wharf where it is loaded for export.

[92] Against the background of the requirement that a refinery be established at the mining site, as counsel for the Commissioner put it, from the outset it was never contemplated that there would be a mine and a refinery dissociated from each other. In reality, the joint venture was a "single

integrated enterprise” in which the refinery took virtually all of the output of the mine. In substance, the mine only had one customer.

[93] Further, as the trial Judge found, “almost the entire output of the refinery was apparently sold to the joint venture partners’ holding companies or their subsidiaries”.³² Specifically dealing with GAL and its 30% of the alumina produced by the joint venture, the trial Judge found that the alumina was sold to Gove Aluminium Finance Ltd except for “some small sales on the spot market and some swapping to supply Tomago alumina smelter”.³³ The Judge observed that in the 1988 and 1999 Annual Reports of GAL it was said that most of the alumina was committed under “long-term contracts”. His Honour noted that the “long-term” contracts were not in evidence and that a presentation made to the Board of Alcan in 2000, while canvassing the advantages of the acquisition, made no reference to GAL possessing “an attractive force which brought in custom”.

[94] The trial Judge referred to the report of an expert called by Alcan, Mr Bryant, that GAL did not possess goodwill “in the sense of a tendency to attract customers”. The particular passage in the report is found in a section in which Mr Bryant was dealing with “intangible assets” of a value estimated by Mr Bryant to be in the vicinity of \$375m to \$482m. Alcan relied upon the existence of such “intangible assets” to submit that they represented the legal goodwill of the business. In this context, as to

³² 185 [106].

³³ 186 [106].

goodwill in the sense of a tendency to attract customers, Mr Bryant reported as follows:

“382. Little, if any, of the total intangible asset value will have related to the factors that are commonly present in other types of businesses: goodwill in the sense of the tendency to attract customers; sometimes, specifically to the premises at which the business is conducted.

383. These factors do not apply here because:

- the business produces a product, alumina, which is priced on the basis of world market conditions, rather than any intrinsic or competitive features of this particular output;
- the customers do not visit the premises; and
- the business operates in a location which was imposed on it at the outset rather than that which its owners would have chosen.”

[95] The trial Judge also noted that the expert called by the Commissioner, Mr Lonergan, stated in a report of 8 April 2004 that the refined product, alumina, “was basically indistinguishable for practical purposes from the alumina product of the same grade of other producers, so there was no reason for customers to stay loyal to a specific alumina producer”.³⁴

[96] Against this background, it is not surprising that the trial Judge reached the view that there was “no evidence that GAL had an attractive force that

³⁴ 186 [106].

brought in custom and which added to the value of the business”.³⁵ Later in his judgment, his Honour repeated that conclusion by stating:

“[T]here is simply no evidence, or insufficient evidence, to conclude that GAL had any goodwill [in the sense of a tendency to attract customers] in 2001”.³⁶

[97] While it might seem odd that the profitable business of the joint venture could operate without the existence of legal goodwill, in my opinion the trial Judge was correct in concluding that the evidence was incapable of supporting a conclusion that there were sources of goodwill within the business of the joint venture which, individually, or in combination, attracted customers to the business of the joint venture. While the legal right or privilege to conduct the business purchased by Alcan involved the right to do so in the “same manner and by substantially the same means” as the previous owners, there was no evidence that such manner and means had attracted custom to the business. There was no evidence that the combination and use of the “tangible, intangible and human assets” of the business had resulted in custom being drawn to the business. In these circumstances there was no evidence that GAL possessed goodwill in the legal sense.

[98] As mentioned, counsel for Alcan relied upon the evidence of Mr Bryant as to the existence of unidentified “intangible assets” valued by Mr Bryant at approximately \$375m to \$482m which Alcan submitted proved the existence

³⁵ 186 [106].

³⁶ 186 [108].

of legal goodwill. Leaving aside the Commissioner's contention that this gap in figures, which Mr Bryant attributed to "intangible assets", came about because of a flaw in the approach by Mr Bryant, even if the existence of such intangible assets is accepted, there is no evidence to support a conclusion that any part of those assets was goodwill in the legal sense.

[99] Mr Bryant attempted to identify sources of these intangible assets.

Particular reliance was placed upon methodology, know how and expansion possibilities. Mr Bryant referred to the methods of operating the refinery and "know-how" which are not reflected in the values of the fixtures. In addition, he identified the following:

- The avoidance of a delay associated with a construction period.
- The avoidance of the time taken from original capacity to ramp up production to current capacity.
- Expansion and optimisation possibilities.
- Sourcing bauxite after the Gove deposit is exhausted.

[100] As to methods of operating and know how, even if it is assumed that this is an asset separate from the land, as the Judge observed there was no challenge to Mr Lonergan's calculation that, at the most, it was worth \$30.7m and probably considerably less. His Honour noted that regardless of which figure is used, it could not affect the land rich ratio for the purposes of the exercise upon which his Honour was embarked.

[101] The fundamental difficulty facing Alcan's reliance upon the factors identified by Mr Bryant is the absence of any evidence that these factors were sources of goodwill in the legal sense. In other circumstances, methods of operation and know-how could be important sources of goodwill, but there was no evidence that in the operation of the joint venture business these potential sources had a tendency to attract customers. The other factors identified by Mr Bryant might well affect the value of the business from the point of view of a prospective purchaser because of their impact upon future cash flows of the business, but there was no evidence of any potential impact upon the attraction of customers. With respect to expansion and optimisation policies, and cash flows after bauxite was exhausted, as Mr Lonergan reported these were "aspects of the income yielding asset, not separate intangibles".

[102] The trial Judge dealt generally with other criticisms of the approach and report of Mr Bryant. His Honour observed that "the methodology adopted of having to presume that the refinery and mine are two separate businesses when in fact they are not and then calculate a transfer price of the ore by the mine selling the ore to the refinery is one fraught with the potential for significant error". Ultimately the trial Judge was not persuaded that there were any intangible assets "which together or separately have any existence

as property and which need to be accounted for and separately valued”.³⁷ I agree with this Honour.

Conclusion

[103] For these reasons, in my opinion the appeal by the Commissioner should be allowed and the cross contention should be dismissed.

Angel J:

[104] I agree with the Chief Justice that the Supreme Court³⁸ erred in excluding the options to renew from the value of the land held by Gove Aluminium Ltd (“GAL”). I have nothing to add to the reasons of the Chief Justice for reaching that conclusion. However I have reached a different conclusion from that of the Chief Justice as regards the cross-contention.

[105] The issue between the parties is what portion of GAL’s assets comprised land in the Territory as at the date of the respondent’s acquisition of GAL’s share capital. GAL was not a “land-holder” for the purposes of div 8A of the Taxation (Administration) Act (NT) unless more than 60 per cent of GAL’s total property comprised land. The respondent contends that the value of GAL’s land was less than 60 per cent of all its property because it says there existed intangible assets including goodwill which were not land.

³⁷ *Alcan (NT) Alumina Pty Ltd v Commissioner of Taxes* (2007) 208 FLR 159 at 189 [121].

³⁸ *Alcan (NT) Alumina Pty Ltd v Commissioner of Taxes* (2007) 208 FLR 159.

[106] The Judge, having discussed “goodwill in the legal sense” concluded: “I find no such goodwill exists”.³⁹ In reaching that conclusion his Honour said there was “no evidence that GAL had an attractive force that brought in custom and which added to the business”.⁴⁰ His Honour determined there was no goodwill on the basis that “attraction of custom still remains central to the legal concept of goodwill”.⁴¹ His Honour went on to say: “... for the reasons already given I am not persuaded that there are any intangible assets which together or separately have any existence as property ...”.⁴²

[107] I am unable to accept these conclusions. I think they are contrary to the evidence and the law as it relates to goodwill.

[108] His Honour found GAL operated at the relevant time a very successful business which apparently generated significant profit. His Honour said that almost the entire output of the refinery was “apparently” sold to the joint venture partners’ holding companies or their subsidiaries. His Honour referred with apparent approval to the opinion of Mr Lonergan, an expert witness called by the appellant, that the refined product, alumina, “was basically indistinguishable for practical purposes from the alumina product of the same grade of other producers, so there was no reason for customers to stay loyal to a specific alumina producer.” This opinion, which Mr Lonergan confines to his discussion of what he calls “the product aspect of goodwill”, seems inconsistent with any want or need for long term

³⁹ *Alcan (NT) Alumina Pty Ltd v Commissioner of Taxes* (2007) 208 FLR 159 at 186 [109].

⁴⁰ 186 [106].

⁴¹ 185 [105].

⁴² 189 [121].

contracts for the supply of alumina. At all events, it seems to me, with respect, that the identity of customers and whether the product sold is readily available at the same price elsewhere are matters rather beside the point. If A profits more than X Y and Z from selling the same product at the same price, then, or so it seems to me, A has a more valuable business of selling that product than X Y or Z, and this is so regardless of to whom A sells.

[109] Mr Lonergan also says in his report: “Statements to the effect that the Gove facility is an efficient low cost producer of alumina can therefore be substantially attributable to the proximity and characteristics of the bauxite reserves”. He goes on to say that revenue from the facility “is principally due to the particular quantities and qualities of the reserves including the proximity of the refinery to the mine and the proximity of the ore body to a deep water port which ensures the refinery is a low cost producer, plus the specific chemical characteristics of the ore body, and all these benefits should be reflected in the value of the mine and the land”.⁴³ But this fails to segregate goodwill from its sources. They are not to be equated for legal purposes.⁴⁴ It also discounts site goodwill altogether. Gove’s closer proximity to India, China and Japan than South American and Caribbean competitors in the bauxite/alumina world market and Australia’s political stability can not count for nothing.

⁴³ See Report of Mr Lonergan dated 8 April 2004 at [91].

⁴⁴ *Federal Commissioner of Taxation v Murry* (1998) 193 CLR 605 at 617 [30], 619 [33] and [36].

[110] According to published reports referred to in Price Waterhouse Coopers Report of 15 May 2002, Australia is the major producer of bauxite in the world. In 2000 Australia provided 39 per cent of world output. In regional terms output from South America/the Caribbean was the second largest after Australia with 26 per cent of world output. Furthermore Australia is a competitive supplier of bauxite because of the favourable properties of its bauxite deposits and its relative economic competitiveness and political stability. Gove is one of a number of large accessible deposits of bauxite and Australian bauxite mines are relatively large-scale by international standards enabling them to take advantage of economies of scale. Australia also has a comparative advantage in alumina refining stemming from its relatively low cost energy supplies (particularly natural gas) and its relatively low bauxite mining costs due to the availability of in situ bauxite. The Gove alumina refinery is one of six in Australia which are among the largest refineries in the world. These matters were all taken into account by the respondent's expert witness Mr Bryant. They support the existence of substantial goodwill in the business at Gove.

[111] The accounting experts called by the parties agreed that according to ordinary valuation principles there was some significant difference between the purchase price paid for the business and the sum of the individual values of the tangible assets, including land, of the business. This difference Mr Bryant attributed to "intangible asset value" whereas Mr Lonergan called the difference "unallocated residual value", half of which, it seems, at least

for the purposes of argument, he allocated to land value. But Mr Lonergan goes further. He says it is not necessary to calculate separate values for assets. He says that all the value of the business (other than those items comprising vehicles, tools and other loose and unfixated items) should be attributed to land, being the mining lease and the mine and refinery “built into it and onto it”.⁴⁵ Mr Lonergan expressed the opinion, which was accepted by his Honour, that there were no intangible assets in an operation such as that conducted by GAL.

[112] As the majority of the High Court said in *Federal Commissioner of Taxation v Murry*,⁴⁶ the existence of goodwill “depends upon proof that the business generates and is likely to continue to generate earnings from the use of the identifiable assets, locations, people, efficiencies, systems, processes and techniques of the business”. Goodwill “is the one thing which distinguishes an old established business from a new business at its first start”.⁴⁷

[113] The evidence in the present case establishes that the market value of GAL’s business as a growing concern significantly exceeds the sum of the individual values of the identifiable tangible assets of the business. That much appears to be common ground between the experts called by the parties, albeit that the measure of that difference is disputed.⁴⁸ In short, what

⁴⁵ See Report of Mr Lonergan dated 29 September 2006 at [16] and [19].

⁴⁶ *Federal Commissioner of Taxation v Murry* (1998) 193 CLR 605 at 611 [12].

⁴⁷ *Commissioners of Inland Revenue v Muller & Co’s Margarine Ltd* [1901] AC 217 at 224 per Lord Macnaghten.

⁴⁸ See, eg, Report of Mr Lonergan dated 29 September 2006 at [12].

Mr Bryant says is intangible property Mr Lonergan says “is really just added value of the asset used to earn the income”.⁴⁹

[114] The courts have “rejected patronage as the touchstone of goodwill in favour of the ‘added value’ concept”⁵⁰ and treat goodwill as “the valuable right or privilege to use the other assets of the business as a business to produce income ... it is the legal right or privilege to conduct a business in substantially the same manner and by substantially the same means that have attracted custom to it. It is a right or privilege that is inseparable from the conduct of the business”.⁵¹ As the majority went on to say:⁵²

“Once goodwill as property is recognised as the legal right or privilege to conduct a business in substantially the same manner and by substantially the same means which in the past have attracted custom to the business, it follows that a person acquires goodwill when he or she acquires that right or privilege”.

[115] The subject of sale was a business which had ongoing business patronage or support, that is, custom. The business involved, inter alia, exporting alumina to customers for profit. According to Mr Bryant there were forward sales agreements to the year 2011 although the agreements themselves were not in evidence. Given the refinery capacity at the time of acquisition the mine had a life beyond the year 2022. There were plans to increase the refinery capacity. There was the opportunity to earn more profits by both expanding the refinery, and by refining bauxite sourced from outside the Northern

⁴⁹ See Report of Mr Lonergan dated 29 September 2006 at [20(c)].

⁵⁰ *Federal Commissioner of Taxation v Murry* (1998) 193 CLR 605 at 614 [20].

⁵¹ 615 [23].

⁵² 623 [45].

Territory.⁵³ There was no evidence to suggest GAL's sales of alumina were unlikely to continue after the respondent's acquisition of GAL. As I understand the law, the business therefore had goodwill in the legal sense. That alumina was readily available elsewhere at similar prices, as I have said, it seems to me, is beside the point. Nor do I think the identity of the customers is relevant. The purchase price paid by the respondent for the GAL business was that also offered by a subsidiary of BHP–Billiton Ltd. The sale was an arms–length transaction reflecting the true market value of the business. It is apparent that the business sold was profitable and was expected by those seeking to purchase it to continue to be profitable. Apparently “cash flow modelling” confirmed that the respondent “can expect to receive a normal return on its investment, over its life”.⁵⁴

[116] As the majority said in *Federal Commissioner of Taxation v Murry*:⁵⁵

“When a business is profitable and expected to continue to be profitable, its value may be measured by adapting the conventional accounting approach of finding the difference between the present value of the predicted earnings of the business and the fair value of its identifiable net assets. Admittedly this approach can cause problems in valuing goodwill for legal purposes because the identifiable assets need to be valued with precision. Particular assets, as shown in the books of the business, may be under or over valued and may require valuations of a number of assets and liabilities which may be difficult to value. However in a profitable business, the value of goodwill for legal and accounting purposes will often, perhaps usually, be identical”.

⁵³ See Report of Ernst & Young dated 25 September 2006 at [16].

⁵⁴ See Report of Price Waterhouse Coopers at [10.34].

⁵⁵ (1998) 193 CLR 605 at 624 [49].

Mr Bryant's methodology accords with this statement; Mr Lonergan's does not in so far as he dispenses with the necessity to value identifiable assets. So to do, I think, jumbles goodwill with its sources.

[117] The "attraction of custom" includes the maintenance of existing custom.

Applying what the High Court says is "the conventional accounting approach" there is valuable goodwill in the Gove business. I am unable to discern any reason to depart from "the conventional accounting approach" in the circumstances of this case. In my view, contrary to his Honour's conclusions, there was evidence of goodwill in the legal sense. From this it follows that the appellant's assessment needs revision.

[118] The matter needs to be reconsidered by the appellant in light of these reasons.

[119] For these reasons the matter should be remitted to the Commissioner to reassess what proportion of GAL's tangible and intangible property comprises land.

[120] The appeal and the cross-contention should both be allowed. We should hear the parties as to any ancillary orders and as to costs.

Southwood J:

Introduction

[121] I agree with Martin CJ that the judge at first instance erred in excluding the options to renew the leases from the value of the land held by Gove Aluminium Ltd.

[122] I agree with Angel J that the assets of Gove Aluminium Ltd included goodwill. I add the following reasons to the reasons given by his Honour.

The findings of the judge at first instance

[123] The judge at first instance found that the assets of Gove Aluminium Ltd did not include goodwill in the legal sense. His Honour made this finding on the following grounds. There was no evidence that Gove Aluminium Ltd had an attractive force that brought in custom. Almost the entire 30 per cent of the alumina produced by the joint venture, to which Gove Aluminium Ltd was entitled, was sold by Gove Aluminium Ltd to Gove Aluminium Finance Ltd. Both companies were subsidiaries of CSR Investments Pty Ltd. Further, most of Gove Aluminium Ltd's future entitlement to the alumina produced by the joint venture was committed under long term contracts. Further still, the alumina produced by the joint venture was indistinguishable from the alumina produced by other producers and there was no reason for customers to stay loyal to Gove Aluminium Ltd.

[124] His Honour also found that there were no other unallocated residual intangible assets that constituted property and, therefore, such things were

incapable of valuation. He accepted the following evidence of

Mr Lonergan:

Avoidance of a construction period, avoidance of ramping up production, expansion and optimisation possibilities and value of cash flows after the bauxite reserve is exhausted are all different ways of expressing the proposition that "in use" value of an asset calculated on a [discounted cash flow] basis may be more than the [depreciated replacement cost] of the asset. They are aspects of the income yielding asset, not separate intangibles.

[125] His Honour went on to state:

In my opinion, Mr Lonergan is correct in concluding that any difference between the present value of the future cash flows that an asset can generate and its depreciated replacement cost is not an intangible asset, it is simply reflected in the value of the asset. In my opinion it is clear that the value of the plant and equipment used by Mr Bryant in his calculations was its value as depreciated for taxation purposes. Clearly the plant and machinery had a written down value which was much lower than its actual in-use value.

The notice of cross contention

[126] In its notice of cross contention Alcan Northern Territory Alumina Pty Ltd, the respondent, contends that the following matters were erroneously decided against it by the judge at first instance:

- (a) Gove Aluminium Ltd [...] operated a business the assets of which did not include goodwill in the legal sense.
- (b) There was no evidence before the Court to conclude that [Gove Aluminium Ltd] had goodwill in the legal sense on 30 January 2001 or thereafter.

The issues

[127] The two principal questions in relation to the notice of contention are as follows. First, did the business of Gove Aluminium Ltd attract custom? Secondly, did the advantageous circumstances identified by Mr Bryant (avoidance of a construction period, avoidance of ramping up production, expansion and optimisation possibilities and value of cash flows after the bauxite reserve is exhausted) create, maintain, expand or increase the custom of the business or do they have the potential to do so and thereby generate earnings?

[128] Resolution of the two principal issues referred to above avoids the necessity to resolve the following issues which potentially arise for determination of the notice of cross contention: What advantageous circumstances (sources) are to be included in the recognition of goodwill? To be included as a source of goodwill, must the advantageous circumstances directly or indirectly create, maintain, expand or increase favourable customer attitudes? Is it sufficient for a favourable advantageous circumstance to be included as a source of goodwill if it merely increases the income or earnings of a business? Can a business have goodwill if it only has one customer? Is repeat custom a necessary requirement of goodwill?

The arguments of the parties

[129] In the case of *Federal Commissioner of Taxation v Murry*⁵⁶ the majority of the High Court of Australia referred to a United States of America case of *Haberle Crystal Springs Brewing Co v Clarke*.⁵⁷ In that case Judge Swan stated:⁵⁸

A going business has a value over and above the aggregate value of the tangible property employed in it. Such excess of value is nothing more than the recognition that used in an established business that has won the favour of its customers, the tangibles may be expected to earn in the future as they have in the past. The owner's privilege of so using them and his privilege of continuing to deal with customers attracted by the established business are property of value. This latter privilege is known as goodwill.

[130] The remarks of Judge Swan present three ideas that are associated with the nature of goodwill: (1) excess value, (2) favourable customer relations, and (3) the privilege of continuance. The three ideas are presented as distinct and severable ideas. Judge Swan ultimately holds that goodwill is the privilege of continuing to deal with customers attracted by the established business. Goodwill is, in effect, confined to patronage. However, Judge Swan did acknowledge that the privilege of continuance is also property of value.

[131] The appellant, in effect, argues that the effect of the High Court's decision in *Federal Commissioner of Taxation v Murry*⁵⁹ is that, so far as the legal concept of goodwill in Australia is concerned, the second and third ideas

⁵⁶ (1998) 193 CLR 605 at [19].

⁵⁷ 30 F.2d (2d Cir 1929) 219.

⁵⁸ 30 F.2d (2d Cir 1929) 219 at 221 – 222.

⁵⁹ (1998) 193 CLR 605.

referred to by Judge Swan form an integrated whole. Both favourable customer relations and the privilege of continuance are required for goodwill to exist. There was no goodwill in this case as Gove Aluminium Ltd had no attractive force which brought in custom.

[132] Support for the appellant's position that both favourable customer relations and the privilege of continuance are required for goodwill to exist is found in the following statements of the majority of the High Court in *Federal Commissioner of Taxation v Murry*:⁶⁰

[T]he attraction of custom still remains central to the legal concept of goodwill.

From the viewpoint of the proprietors of a business and subsequent purchasers, goodwill is an asset of the business because it is the valuable right or privilege to use the other assets of the business as a business to produce income. It is the right or privilege to make use of all that constitutes "the attractive force which brings in custom". Goodwill is correctly identified as property, therefore, because it is the legal right or privilege to conduct a business in substantially the same manner and by substantially the same means that have attracted custom to it. It is a right or privilege that is inseparable from the conduct of the business.

Once goodwill as property is recognised as the legal right or privilege to conduct a business in substantially the same manner and by substantially the same means which in the past have attracted custom to the business, it follows that a person acquires goodwill when he or she acquires that right or privilege.

For legal purposes, goodwill is the attractive force that brings in custom and adds to the value of the business. It may be site, personality, service, price or habit that obtains custom.

⁶⁰ (1998) 193 CLR 605 at [20], [23], [45] and [68].

[133] Such a conceptual approach potentially creates difficulties where the property and patronage elements of a business, which is a going concern, do not exhaust the intangible value of the business. The conceptual approach arguably makes no room for benefits or positive advantages which may arise from the continuity of organisation of the business such as good relations with suppliers of the business, good industrial relations, the quality of management, the configuration of plant and equipment, the technical skills of management and senior staff, technological skills, credit management and capital raising ability, all of which may add value to the business by reducing costs and increasing profits without necessarily maintaining or increasing custom. A business may be successful and create excess value without substantial customer preference. However, in the circumstances of this case, it is unnecessary to decide if “going value”⁶¹ is another form of parasitic incorporeal property that may be obtained by acquiring the right to conduct the business in substantially the same manner and by substantially the same means.

⁶¹ Various courts in the United States of America have defined “going value” as the value which inheres in an assembled and established plant, doing business and earning money, over one not thus advanced. There is a discussion of this concept in Note, “An Inquiry into the Nature of Goodwill”, *Columbia Law Review*, vol. 53 (1953) 660. The author of the note suggests that on various occasions the courts in the United States of America may have recognized “going value” as a separate incorporeal property right. The cases referred to by the author include: *McCardle v. Indianapolis Water Co.*, 272 U.S. 400, 414 (1926); *Des Moines Gas Co. v. Des Moines* 238 U.S.153, 165 (1915); *Kimball Laundry Co. v. United States*, 138 U.S. 1, 9 (1949); *Vercimak v. Ostoich*, 221 P.2d 602 (Utah 1950); *In re Witkind's Estate*, 167 Misc. 885, 4 N.Y.S. 2d 933 (Surr. Ct. 1938); *Grace Bros. v. Commissioner*, 173 F.2d 170, 176 (9th Cir. 1949); *Commissioner of Corporations & Taxation v. Ford Motor Co.*, 308 (Mass. 558, 571, 33 N.E.2d 318, 321 (1941); *White & Wells v. Commissioner*, 50 F. 2d 120, 121 (2d Cir. 1931); *Floyd D. Akers*, 6 T.C. 693, 699-700 (1946); *Oklahoma Operating Co.*, 17 B.T.A. 1127, 1130 (1929); *Chartiers Creek Coal Co.*, 10 B.T.A. 984, 991 (1928); *Nevada-California Power Co. v. Hamilton*, 240 Fed. 485, 491 (D Nev. 1917), *aff'd*, 264 Fed. 643 (9th Cir. 1920).

[134] The respondent, on the other hand argues, that the judge at first instance erred in finding that the attraction of custom is an essential element of the legal concept of goodwill such that if it does not exist legal goodwill cannot exist. Rather, the respondent contends that the existence of goodwill depends upon proof that the business generates, and is likely to continue to generate, earnings from the use of identifiable assets, locations, people, efficiencies, systems, processes and techniques of the business. Goodwill includes whatever adds value to the business, and different businesses derive their value from different considerations.

[135] Alternatively, the respondent argues that, assuming that both the privilege of established customer relations and the privilege of continuity are required for goodwill to exist, the establishment of repeat custom is not a necessary requirement for the existence of goodwill, at least not in the context of the valuation of a profitable business that is a going concern. What is of most significance in determining if goodwill exists is proof that the business generates earnings. In effect, the existence of goodwill in such circumstances depends upon proof that the business is likely to continue to generate earnings if the business continues to be conducted in substantially the same manner and by substantially the same means.

Goodwill

[136] The leading case on goodwill in this country is the decision of the High Court of Australia in *Federal Commissioner of Taxation v Murry*.⁶² Of relevance, the following propositions arise from that case. Goodwill is an asset that is legally distinct from its sources. The existence of goodwill depends upon proof that the business generates, and is likely to continue to generate, earnings from the use of the identifiable assets, locations, people, efficiencies, systems processes and techniques of the business. It is every positive advantage that has been acquired by the old firm in carrying on its business. The concept of goodwill recognises that, used in an established business that attracts custom, the tangibles may be expected to earn in the future as they have earned in the past. The goodwill of a business is the product of combining and using the tangible, intangible and human assets of a business for such purposes and in such ways that custom is drawn to it. The sources of goodwill may include manufacturing and distribution techniques, the efficient use of the assets of a business, superior management practices or good industrial relations. Goodwill is the legal right to conduct a business in substantially the same manner and by substantially the same means which in the past have attracted custom to the business and generated earnings.

[137] Further, the value of goodwill of a business is tied to the fortunes of the business. It varies with the earning capacity of the business and the value of

⁶² (1998) 193 CLR 605.

other identifiable assets and liabilities. When a business is profitable and expected to continue to be profitable, the value of goodwill may be measured by adopting the conventional accounting approach of finding the difference between the present value of the predicted earnings of the business and the fair value of the identifiable net assets. In a profitable business the value of the goodwill for legal and accounting purposes will often be identical.

Consideration

[138] In circumstances where a company such as Gove Aluminium Ltd has been a going concern and has sold very substantial quantities of alumina and bauxite profitably for 30 years or more, it seems to me to be self evident that the company has an attractive force that brings in custom. Gove Aluminium Ltd has combined and used the tangible, intangible and human assets of its business in such a way that custom has been drawn to its business. The business's attractive force is confirmed by the fact that at the time of the sale of its shares or shortly prior to the sale of its shares most of its alumina was committed under long term contracts. Not only does that demonstrate loyalty on the part of the relevant customer or customers but it recognises there is a demand for Gove Aluminium Ltd's alumina by other consumers of the product. All of the long term contracts were described as competitive and profitable.

[139] Unlike the operations of Queensland Alumina Ltd over the reported period, it is not suggested that Gove Aluminium Ltd was pricing its sales as if the business was providing tolling services, or that the true nature of its business was refining alumina for a fee, or that the company was operated to recover costs not as a profitable business. Nor did the learned trial judge find that Gove Aluminium Ltd simply operated as a division of CSR Investments Pty Ltd.

[140] To determine the nature of goodwill in any given case, it is necessary to consider the type of business and the type of customer which such a business is inherently likely to attract as well as all the surrounding circumstances.⁶³ At the time the respondent purchased the shares of Gove Aluminium Ltd, the alumina industry and the market for alumina was characterised by – the fact that alumina is a specialised intermediate product used in the production of aluminium; a concentrated number of large aluminium smelters, the owners of which were the main consumers of alumina; a concentrated number of large refineries, the owners of which were the main producers of alumina; vertical integration of bauxite mines and alumina refineries; relatively scarce refinery capacity; barriers to entry, which were created in part by the large costs involved in establishing an alumina refinery; long term supply contracts; and relatively price inelastic demand. In the circumstances the sources of any attractive force which brought in custom to a supplier of alumina are likely to have been size of the refinery, access to a cheap and

⁶³ *FCT v Williamson* (1943) 67 CLR 561 per Rich J at 564.

substantial supply of bauxite, location, accessibility, refining capacity (over the short term, medium term and longer term), reliability, consistency, quality (sandy alumina as opposed to floury alumina), the ability to supply the alumina at or competitively with the World price of alumina, ability to negotiate long term supply contracts, and connections with the established large aluminium smelters. The evidence establishes that Gove Aluminium Ltd had significant advantages in all of these areas.

[141] In his evidence Mr Bryant identified that the business of Gove Aluminium Ltd had the following advantageous circumstances or benefits - methods of operating and know how, avoidance of construction period, avoidance of ramping up, expansion and optimisation possibilities and cash flows after the mined bauxite was exhausted. There is no dispute that the advantageous circumstances identified by Mr Bryant exist and that they add value to the business of Gove Aluminium Ltd. In my opinion the advantageous circumstances identified by Mr Bryant are all factors which positively affect the sources of Gove Aluminium Ltd's attractive force that brings in custom. I have referred to these sources in para [140] above.

[142] Further, the advantageous circumstances that are identified by Mr Bryant do not inhere in the tangible assets of the business of Gove Aluminium Ltd. These advantageous circumstances have arisen because of a number of factors. First, they have arisen as a result of the efficient use of a combination of assets which in turn was facilitated by the continuity of the business and the other favourable connections of Gove Aluminium Ltd

including the quality of management, the technical skills and expertise of management, a skilled workforce, good industrial relations, past and existing cash flows and the capital raising ability of the joint venture. Secondly, the advantageous circumstances have arisen because of the following factors - the geographical location of the bauxite mine and the refinery, the configuration of the plant and the equipment, economies of scale and the synergy between the operation of the bauxite mine and the operation of the refinery.

[143] It follows from the above factors that Gove Aluminium Ltd operates a business that has goodwill and that the sources of goodwill add value to the business. In my opinion the grounds pleaded in the notice of cross contention are made out and the value of goodwill should be determined in accordance with the principles enunciated in para [137] above.
