THE TAX INSTITUTE

18th ANNUAL STATES' TAXATION CONFERENCE

Recent decisions on valuations and briefing experts

National Division

26-27 July 2018

Park Hyatt, Melbourne

John Middleton CTA

CONTENTS

1 Introduction 3

2 Recent Cases 7

2.1 GST 7

2.2 The CGT Cases 9

2.3 A miscellaneous valuation decision 11

3 Placer Dome 13

3.1 A digression - Goodwill and Murry's case 14

3.2 Placer in the WA Tribunal and WASCA 16

3.3 Placer in the High Court – a high-level review of the transcript and some thoughts 19

4 RCF IV and V 20

4.1 Overview 21

4.2 The Facts 22

4.3 Division 855 22

4.4 Newmont 31

5 GST withholding issues 33

6 Getting the best out of valuers and other experts in light of recent decisions 34

1 Introduction

Across all Australian jurisdictions, the concepts of "value", "unencumbered value" and "market value" are of core importance to the operation of the duty laws. This is because transfer duty is levied on the higher of consideration paid or market value of the property transferred: see for instance s11(7) of the Queensland Duties Act:

Subject to section 48 , the dutiable value of another dutiable transaction is—

(a) the consideration for the dutiable transaction; or

(b) the unencumbered value of the dutiable property or new right the subject of the transaction if—

(i) there is no consideration for the transaction; or

(ii) the consideration can not be ascertained when the liability for transfer duty arises; or

(iii) the unencumbered value is greater than the consideration for the transaction.

More recently, ever since the decision in *Lendlease*[1] expanded the concept of consideration for stamp duty purposes, it has become increasingly common to have to value the consideration given to determine if the value of the consideration exceeds the value of the dutiable property[2].

Its probably true that "unencumbered value" is functionally equivalent to "market value" and that "value" is simply shorthand for that concept.

Turning to Landholder Duty, it is levied on the proportionate change in ownership in respect of "*the unencumbered value of all Queensland land-holdings of the landholder at the time of the acquisition*"[3].

Land-holdings (or Landholdings) have their own special definition, and this does vary somewhat State to State[4], as does the definition of "land" which these provisions often further turn on[5]. As will be seen, this differs from the common land law and from that imposed by the Federal "landrich" capital gains tax under Division 855 of the Income Tax Assessment Act 1997 (Cth).

It must always be borne in mind that in undertaking a valuation, determining what is being valued is of prime importance.

---

[1] Commissioner of State Revenue v Lend Lease Development Pty Ltd; Commissioner of State Revenue v Lend Lease IMT 2 [HP] Pty Ltd; Commissioner of State Revenue v Lend Lease Real Estate Investments Limited [2014] HCA 51

[2] GST implications in GSTR 2015/2 - query as to effect of this treatment on duty cases and whether the treatment under that ruling is of potentially broader application.

[3] Section 179(1) of the Duties Act 2001 (Qld).

[4] The exact scope of these differences is outside the scope of this paper; however note that effect of s167 of the Qld Act is markedly different to the WA provision, ss.155 and 186 in that WA includes chattels in the duty base.

[5] Note the decision in *Sojitz Coal Resources Pty Ltd v Commissioner of State Revenue* [2015] QSC 9 holding that under the law in force at the relevant time in Queensland a Mining Lease was not "Land" as defined, with the decision noting that the position would be different had the transaction occurred at date of judgement. Conversely, the decision in *Commissioner of State Revenue v Abbotts Exploration Pty Ltd* [2014] WASCA 211 was in respect of facts having limited application but holding that an actual estate or interest in "land" was required before the definition could be satisfied.

Given all of this, what is market value, and what is the valuation process all about?

At this point it is common to set out the classic Australian exposition of how to determine "market value" by quoting Griffith CJ in *Spencer*[6]. This formulation has never been seriously queried.

> 'In my judgment the test of value of land is to be determined, not by inquiring what price a man desiring to sell could actually have obtained for it on a given day, i.e., whether there was in fact on that day a willing buyer, but by inquiring "What would a man desiring to buy the land have had to pay for it on that day to a vendor willing to sell it for a fair price but not desirous to sell?" It is, no doubt, very difficult to answer such a question, and any answer must be to some extent conjectural. The necessary mental process is to put yourself as far as possible in the position of persons conversant with the subject at the relevant time, and from that point of view to ascertain what, according to the then current opinion of land values, a purchaser would have had to offer for the land to induce such a willing vendor to sell it, or, in other words, to inquire at what point a desirous purchaser and a not unwilling vendor would come together.'

On the other hand, this statement deals in concepts ie "*desirous purchaser and a not unwilling vendor"* rather than strict directives as to how to value. It is similar to *Carden's Case*[7] in a way, in that it adopts as relevant the processes of another profession (in Carden's case, accounting, in Spencer, valuation) as being appropriate evidence of or support for a particular result.

Given that, it is interesting to look at various overseas jurisdictions to see how concepts of "market value" are determined under foreign law.

In the New Zealand decision of *Re An Arbitration Between Sun Newspapers Ltd and New Zealand Newspapers Ltd* [1931] NZLR 686 Myers CJ at 701 said:

> "…that the words "at valuation" mean at market value—that is to say, a price which any prudent purchaser would pay for the premises as they stood."

The decision of the Privy Council in *Sir Raja Vyricherla Narayana Gajapatiraju Bahadur Garu v Revenue Divisional Officer, Vizagapatam* [1939] 2 All ER 317 at 322 read:

> "The vendor is to be treated as a vendor willing to sell at the market price, to use the words of s 23 of the Indian Act…There is not in general any market for land, in the sense in which one speaks of a market for shares, or a market for sugar, or any like commodity…In the case of land, its value in general can also be measured by a consideration of the prices that have been obtained in the past for land of similar quality and in similar positions, and this is what must be meant in general by the market value in s 23. Sometimes, it happens, however, that the land to be valued possesses some unusual, and it may be, unique, features as regards its position or its potentialities. In such a case, the arbitrator, in determining its value, will have no market value to guide him, and he will have to ascertain as best he may from the materials before him what a willing vendor might reasonably expect to obtain from a willing purchaser for the land in that particular position and with those particular potentialities…"

[6] Spencer v Commonwealth of Australia [1907] 5 CLR 418 at 432.

[7] cite

This was however a valuation case; which can lead to different approaches to determining value compared to cases undertaken for revenue purposes[8].

In *Montreal v Sun Life Assurance Co. of Canada* [1952] 2 D.L.R. 81 at 82 and 90 it was said:

> "… actual value for taxation purposes means real, or market value, presupposing a willing vendor and purchaser, but where, as here, there is no actual market for the building, the assessor must endeavour to arrive objectively at a supposed exchange or competitive market value…The ultimate object being to find the amount which a willing buyer and seller would agree upon, it by no means follows that the owner, even if regarded as a potential buyer, would pay the price originally expended or, to take another line of approach, that if he had to re-erect the building at the time of the assessment, he would erect one of the same form or incur the same expenditure…
>
> …
>
> Their Lordships would agree that where no sale is contemplated and indeed any sale would be difficult … but nevertheless the ultimate aim is to find the exchange value of the property, i.e., the price at which the property is salable. In reaching their result the appointed Tribunal must take into account not only the amount which a buyer would give but also the sum at which the owner would sell. What that sum would be is, as the authorities have pointed out, best ascertained either by regarding him as one of the possible purchasers or by estimating what he would be willing to expend on a building to replace that which is being valued. But the owner must be regarded like any other purchaser and the price he would give calculated not upon any subjective value to him but upon ordinary principles, i.e., what he would be prepared to pay, if he was entering the market, for a building to meet his requirements, or would be willing to expend in erecting a building in place of that which is being assessed."

Turning to the USA:

U.S. v Miller 317 U.S. 369 (1943)

> "The owner has been said to be entitled to the 'value', the 'market value', and the 'fair market value' of what is taken. The term 'fair' hardly adds anything to the phrase 'market value', which denotes what 'it fairly may be believed that a purchaser in fair market conditions would have given' or, more concisely, 'market value fairly determined'.
>
> It is usually said that market value is what a willing buyer would pay in cash to a willing seller."

U.S. v Certain Parcels of Land in the City of Philadelphia 144 F.2d 626 (1944)

– Indeed, substantially the same definition of market value as defined in *U.S. v Miller* has been adopted by the Pennsylvania Courts in tax assessment cases

Some of the various State cases describe the type of transaction that produces an appropriate price:

Pennsylvania

Re Lehigh & Wilkes-Barre Coal Co.'s Assessment 148 A. 301 (1929)

[8] See for instance Hyam, "The Law Affecting Valuation of Land in Australia" 3rd ed 2014, Federation Press, which has an entire discrete part on compensation for compulsory acquisitions.

> Ordinarily, by 'fair market value' is meant the price which a purchaser, willing but not obliged to buy, would pay an owner, willing but not obliged to sell, taking into consideration all uses to which the property is adapted and might in reason be applied.

Illinois

Springfield Marine Bank v Property Tax Appeal Board 44 Ill.2d 428 (1970)

> "The Revenue Act provides that "Each tract or lot of real property shall be valued at its fair cash value, estimated at the price it would bring at a fair, voluntary sale." (Ill. Rev. Stat. 1967, ch. 120, par. 501(1).) We have consistently construed "fair cash value" to mean "what the property would bring at a voluntary sale where the owner is ready, willing and able to sell but not compelled to do so, and the buyer is ready, willing and able to buy but not forced so to do."

Maryland

Rogan V County Commissioners Of Calvert County 194 Md. 299 (1950)

> – "…the market value of property is the value a willing purchaser will pay for it to a willing seller in open market, eliminating exceptional and extraordinary conditions giving the property temporarily an abnormal value."

It should be tolerably clear, that at least in a common law background, there is a base requirement of willing buyer and seller which is to be used in determining the sale price of the property the subject of the inquiry.

The European Union is not a "common law" jurisdiction. However, it is submitted that the approach taken in Germany (noting however the reference to "orderly disposal") is not so dissimilar to our own, at least at the level of principle:

Germany

BVVG Bodenverwertungs- und -verwaltungs GmbH, 614CJ0039 EU: Case C-39/14

– The first subparagraph of Title II, point 2(a), of the Commission Communication of 10 July 1997

> "Market value" means the price at which land and buildings could be sold under private contract between a willing seller and an arm's length buyer on the date of valuation, it being assumed that the property is publicly exposed to the market, that market conditions permit orderly disposal and that a normal period, having regard to the nature of the property, is available for the negotiation of the sale ...'

Jäger v Finanzamt Kusel-Landstuhl EU: Case C-256/06

Under Paragraph 12(6) of the ErbStG, read in conjunction with Paragraphs 9 and 31 of the Law on Valuation (Bewertungsgesetz, BGBl. 1991 I, p. 0230; 'the BewG'), property consisting of agricultural land and forestry situated outside Germany is to be valued according to its fair market value. Under Paragraph 9(2) of the BewG, that value is defined as the price at which those assets could be sold in the ordinary course of business.

All up, these cases do not add a great deal - if anything- to the classic *Spencer* test. It appears that market value in concept is comparatively simple. In concept is of course doing a great deal of work there.

2 Recent cases

2.1 GST

Despite being a GST decision, the recent Federal Court case of *Decleah*[9] is an instructive read. It shows the vital importance of identifying the statutory question being asked, and then determining what submissions and evidence are required to satisfy the onus of proof in respect of that question.

After a brief look at *Decleah* (and a few others), the recent big valuation cases will be considered, and the implications for instructing valuers and experts considered in detail.

Decleah was a GST margin scheme case[10]. Steward J summarised the matter as follows (with emphasis added):

> 3.The margin scheme is an exception to the usual way of calculating liability under the GST Act. In simple terms, rather than accounting for the gross amount payable for a taxable supply, the scheme provides that the amount of GST on a supply of real property, or like interest, is 1/11 of the "margin" for the supply. The "margin" is the amount by which the consideration for the supply exceeds the consideration for the acquisition of the real property or like interest. To obtain the benefit of the margin scheme, the taxpayer and the purchaser of the land, or like interest, must agree in writing that the scheme applies. Once applicable, the purchase of the land or similar interest is not a creditable acquisition. As such, the scheme is directed at developers selling houses, and the like, for domestic consumption.
>
> 4.The scheme of the GST Act is not to tax increases in the value of land that have taken place before 1 July 2000 upon the land being sold thereafter. Rather, it taxes increases in the value of land that take place after that date and which are realised on the making of a taxable supply. **To achieve this, in general terms, the margin is calculated as being the amount by which the consideration for the supply exceeds an "approved valuation" of the land as at 1 July 2000. Here, the applicant obtained its valuation. The Commissioner obtained his own. The valuers disagreed about the value of the applicant's land. Below, the Tribunal rejected the applicant's valuation in sufficiently striking terms such that it increased the GST payable and, on its own motion, the penalties payable to 50% for recklessness.** The applicant now appeals to this Court.

The taxpayer contended on appeal that once it held an "approved valuation" under the statute, then such valuation is deemed sufficient by the legislation, and the valuation is itself not open to challenge.

This was due to s75-10(3), which reads:

> (3) Subject to section 75-11, if:
>
> > (a) the circumstances specified in an item in the second column of the table in this subsection apply to the supply; and

[9] *Decleah Investments Pty Ltd and Prince Removal and Storage Pty Ltd as Trustees for the PRS Unit Trust v Commissioner of Taxation* [2018] FCA 717
[10] All references in this discussion are to *the A New Tax System (Goods and Services Tax) Act 1999* (Cth).

> (b) an approved valuation of the freehold interest, stratum unit or longterm lease, as at the day specified in the corresponding item in the third column of the table, has been made;

> the margin for the supply is the amount by which the consideration for the supply exceeds that valuation of the interest, unit or lease.

The question then becomes, what is an approved valuation? This is in turn determined by s.75-35 of the GST Act (again, with emphasis added):

> *(1) The Commissioner may, by legislative instrument, determine in writing requirements for making valuations for the purposes of this Division.*
>
> *(2) **A valuation made in accordance with those requirements is an approved valuation**.*

There is then a relevant legislative instruments, MSV 2009/1. That sets out some possible methods, with "Method 1" being valuation by a professional valuer.

For method 1 to apply, the valuation must simply be by a licensed professional valuer, in writing, must determine the market value as at the valuation date, and "*made in a manner which is not contrary to the professional standards recognised in Australia*".

This led Steward J to determine that the issue of valuation was not "at large" - if the valuation was made in accordance with the MSV, it was not open to challenge. Provided it was correctly made in process, the correctness of the valuation was not itself an issue:

> The question for determination is whether the valuation relied upon is an “approved valuation” as defined and not whether that valuation is or is not correct..

The question therefore became whether the valuation was made "in accordance with" these requirements, most notably the professional standards test.

It was found that in accordance with meant in conformity with, rather than the somewhat looser "not inconsistent" test proposed by the taxpayer. Moreover, there had to be substantial compliance with the guidelines, and an administrative law requirement of reasonableness imposed (ie, one so unreasonable that no reasonable valuer could have made it).

Subject to all of that, the legislation and MSV 2009/1 "*contemplate considerable latitude in the formation by valuers of different opinions about the value of a given interest in land*".

It was also noted that it was within the Commissioner's power to amend the guidelines if he so chose.

In fact, in the present case the taxpayer's valuer had used the actual cash flows in its discounted cash flow methodology. This was the subject of considerable criticism from the Commissioner and the Tribunal. But the Court stated:

> How a valuer was to undertake this purely hypothetical exercise in 2009 for the purposes of ascertaining value in 2000 is not readily apparent to me. The valuer cannot, for example, physically inspect the land in its state in 2000 when completing a valuation in 2009. He or she, presumably, may in practice have difficulty in excluding from their analysis the actual trends and movements in value since 2000, in order to re-create what might have been their predictive ability all those years ago. The benefit of hindsight is not easy to resist. But I am no valuer, and a means of valuing land at a historical time is a matter for expert valuation opinion. In that respect, and

> perhaps importantly, the Commissioner's valuer gave evidence that there existed no specific standard for valuing land under the margin scheme

Steward J noted that *Spencer*, for instance, directs one to ignore actual events after the valuation date. But the issue here was one of compliance with professional standards, which was a matter for expert evidence rather than legal principle.

Ultimately the matter went back to the Tribunal for reconsideration: it had ignored evidence from the Commissioner's valuer that the taxpayer's valuation was sufficient in form[11], even if the actual valuation itself might not be correct.

Based on this statement, the Court nearly found for the taxpayer, save for the taxpayer's valuer conceding at one point in his own evidence that he thought that the valuation appeared not to comply with the professional standards identified by the Commissioner's valuer, although in re-examination he said that he thought his valuation was compliant with professional standards. Given that, there was enough doubt for sending the matter back to the tribunal.

Why is this case interesting? Because what it focuses on is the need to focus on the statutory question being asked, and also because artificial requirements may lead to artificial results. These are two significant matters that cannot be overlooked in giving instructions to experts: they need to be asked the right questions to produce the evidence necessary to answer the underlying question posed by the statute the subject of dispute.

2.2 The CGT Cases

The small business CGT concessions[12] are also an area where valuation issues loom large (although comparatively small given the $6,000,000 cap which is usually under consideration). This is because the threshold is an "all or nothing" test which offers significant benefits if you are under it, and none at all if are over it[13].

The test operates "just before" the time of the CGT event, which is formation of the contract of sale of the assets in question.

The assets in question in the case of *Miley*[14] were a one-third parcel of the shares in a company. In ascertaining the value of those shares the taxpayer's valuer applied a 16.7% minority discount to the value (which was derived from the sale price under a contract to sell 100% of the shares together with the other shareholders), with the result the taxpayer could satisfy the statutory test. The Tribunal concurred in this approach.

AT paragraph 33 of its reasons, the Tribunal stated:

> 33. Mr Halligan's [for the taxpayer] reasoning appears to me to be sound and logical. Mr Samuel's reasoning, on the other hand, seems to proceed on an assumption that the enquiry is one directed towards determining the

---

[11] The actual phrase was "does not not comply".
[12] Division 152 of the ITAA 1997.
[13] Subject to a concurrent turnover test not presently relevant.
[14] *Commissioner of Taxation v Miley* [2017] FCA 1396

> market value of Mr Miley's shares subject to special circumstances – namely, that the sale of Mr Miley's shares should contemplate the sale of the shares owned by all the other shareholders. I think that is the wrong enquiry. That is an enquiry that suffers from the problem the High Court warned about in Pioneer Concrete: see [20] of these reasons

In the Federal Court, Wigney J overturned the Tribunal decision.

> 82. In the case of Mr Miley's 100 shares in AJM, the bargain struck between Mr Miley, his fellow shareholders in AJM and the prospective purchaser, EIMCO, was effectively akin to a recent sale at arm's length. There was nothing to suggest that he and the vendors of the other two parcels of 100 shares were not willing and knowledgeable, but not anxious sellers of their shares in AJM. Equally, there was nothing to suggest that the purchaser, EIMCO, was not a willing and knowledgeable, but not anxious, purchaser. There is nothing to suggest that the price that was struck between the parties was not the product of an arm's length negotiation. The purchase price for the three parcels of 100 shares was $17.7 million, from which Mr Miley was to receive $5.9 million. Why, then, was that not relevantly the market value of the shares?
>
> …
>
> 92. Nothing said in Pioneer Concrete warranted or justified the approach taken by the Tribunal to the valuation of Mr Miley's shares. The Tribunal misdirected itself in relation to what was decided in Pioneer Concrete and its relevance to the issues that were before it. That error of law led the tribunal to disregard what was otherwise a relevant consideration: the fact that just before the sale, there was a buyer in the market who was ready and willing to purchase all the shares in AJM, including Mr Miley's shares, for $17.7 million, and that Mr Miley and the other shareholders were ready and willing to sell all their shares for that price. That was not a special circumstance. It was the reality of the market. Once that was accepted, there was no occasion to apply a discount for lack of control.

The Court went on to say that the minority discount cases only concerned a sale of a minority interest, not as here an en globo sale. It also considered the possibility that there was an instance of "special value" in striking the market value in the present case.

The taxpayer's argument was that as the valuation was to be done "just before", all of this was irrelevant to the question. However, that was apparently answered by the evidence:

> In any event, in the circumstances of this case, the time "just before" the CGT event was the "time when one party has already signed the contract and the other party has picked up his pen and is about to sign [and] there was no real uncertainty that the contracts for sale would be entered into": cf. Byrne Hotels at [61]. In the case of the sale of the AJM shares, at that time there was, and was known to be, a purchaser willing to pay $5.9 million for Mr Miley's shares on the basis that the other shareholders were also willing to sell their shares to it, and the purchaser was willing to purchase all the shares. There was no uncertainty that the contract would be entered into. It should also be noted in this context that Mr Miley's expert valuer, Mr Halligan, valued AJM on the basis of the exchange effected by the Agreement because "it [the Agreement] was negotiated, and its terms set, before the valuation date" (see [95] of Mr Halligans's report).

It appears that the valuer's evidence effectively sunk the taxpayer. Without that statement in the valuation, it would in fact have been open to the taxpayer to better argue the point. It is submitted that before the contract is signed, the terms of any proposed sale are irrelevant.

It appears the AAT has not as yet reheard the matter.

A similar result was found in the AAT decision in *Hookey*[15]. This time the assets in question were 5 child care centres sold to ABC in 2008 (just before ABC imploded). Once again the taxpayer argued that the true value of the assets was less than their sale price. It was argued that rather than a case of willing buyer and willing seller, there was a:

> "purchaser [which] was not only willing to purchase but very anxious to do so, and prepared to pay above market value in order to add to its portfolio. The evidence which it calls in aid of that case includes a valuation prepared at the expense of the taxpayer for the taxpayers' bank (the Nelson valuation) dated July 2007, about five months before the 13 December date. In the July valuation, the properties assessed (that is, four of the five centres) are valued at a total of about $3.2 million less than the purchase price stipulated in the contracts of sale. The valuation noted that a premium may be paid by a major chain operator such as ABC Development Learning Centres, Ramsay and Bourne, Macquarie Bank to acquire properties as part of a portfolio, however this had not been taken into account in the valuation. The qualification is important in this matter, because, as was known "just before" the relevant sale, ABC was indeed an interested purchaser. Just why major chain operators were prepared to pay more than others was not explored by any evidence before the Tribunal."

Wigney J's decision in Miley was cited:

> 23.Further, at [91], his Honour wrote:
>
> > Even if the valuation of an asset is to be approached on the basis of hypothetical buyers and sellers, it is necessary to have regard to the realities of the market: "although the sale is hypothetical, there is nothing hypothetical about the open market in which it is supposed to have taken place": Inland Revenue Commissioners v Gray [1994] STC 360 at 372. If there is, or is likely to be, a particular buyer who is likely to be willing to pay more for the asset in question than others because they are in a better position to exploit the particular attributes or potentialities of the asset, that buyer should not be excluded in considering the relevant market or market value.
>
> 24.In my opinion, the taxpayer has failed to establish that the contract price was not the market price of the learning centres. In order to do such a thing, it would have needed to lead evidence that the price paid by ABC was wholly erroneous, and affected by error. The prima facie effect of the negotiated price was to show that the market price was the amount agreed to be paid by ABC, and the taxpayer has not in my opinion displaced that prima facie position. I am not satisfied that ABC paid other than the market value for the properties.

Once again, this becomes a matter of expert evidence - remembering that the taxpayer bears as always the onus of proof.

2.3 A miscellaneous valuation decision

Finally (before moving on the recent big decisions) the case of *Olefines Pty Ltd v Valuer-General of NSW [2018] NSWLEC 18* should be looked at. It considers s6A(2) of the NSW Valuation of Land Act, which preserves existing uses as "lawful" in relation to the use of land which is deemed to be and valued as if it was unimproved. The land in question was the site of a petroleum refinery.

---

[15] Hookey and Commissioner of Taxation [2018] AATA 1509

The landowner's valuer had proceeded as if extensive and expensive remediation of the contaminated land would be required.

This allows taking account of both

> 130. It would be doubly erroneous for the valuer to approach the task pursuant to s 6A(1) alone, that is without a consideration of s 6A(2), and then take into the equation a discount calculated by reference to an allegedly required remediation of the land due to legacy contamination. To approach the exercise in this manner would be inappropriate, costing the disbenefit of contamination (allegedly assessed by reference to the estimated costs of a hypothetical clean-up of the site) whilst ignoring the benefit of a hypothetical continuation of the unique petrochemical plant in situ within the BIP.

Instead, both the benefit and disbenefit had to be considered - the potential for the lawful use of the site as a refinery, together with the costs the site might be pregnant with.

> 138. Having accepted that it would be wrong for the valuer to take into account the costs of a hypothetical clean-up of the contamination, it would nevertheless be the case the hypothetical continuance of the petrochemical plant does require, as indicated above, that both the benefits and disbenefits are taken into account in the valuation of the extant petrochemical plant. The consideration of the disbenefits would include the fact of the land being contaminated but in a context that there is no legislative necessity nor other influence requiring the contamination to be remediated. It would remain a relevant factual circumstance, a benign presence in the land, which ought not be ignored but which does not trigger responsive obligations for as long as the extant petrochemical plant remains. So a prospective purchaser carrying out a due diligence assessment of the extant petrochemical plant would: (a) be taken to be informed that the plant sits on contaminated land; (b) be taken to be informed that their acquisition would not in and of itself trigger a requirement to clean-up the contamination; and (c) be taken to be cognizant of the current legislative regime that requires, normally, the original polluter, if and when remediation is to occur, to be responsible for both the clean-up and the costs thereby incurred.

This case stands for the necessity to determine exactly what is being valued, and also to consider the artificialities involved!

3 Placer dome

Does a mining company have goodwill, and how should a mining company - including its "land" assets - be valued? These are the questions asked by *Placer Dome Inc v Commissioner for State Revenue*[16], currently awaiting judgment from the High Court.

Although dealing with the previous landrich regime, the case is still relevant as landholder duty is calculated by reference to the value of the land in the entity, rather than relying on an on/off switch at 80% (or 60%) as was the case historically.

The core facts are set out in the WASCA decision:

> The acquisition
>
> 5 PDI [Placer Dome Inc] was a Canadian company listed on the stock exchanges of Toronto, New York and Australia, amongst others. In 2005 PDI was the fifth largest global goldmining company assessed by market capitalisation, the third largest assessed by gold reserves, and the fourth largest assessed by gold production. It had over 100 years experience in operating goldmines. As at the time of acquisition, in February 2006, it employed approximately 13,000 people who were responsible for operating 16 goldmines, five development projects and seven exploration projects in North America, South America, Australasia and South Africa. PDI was profitable and had increased its net earnings from over $116 million[3] in 2002 to over $284 million in 2004. It had forecast an increase in its profits for the year 2005.
>
> 6 Barrick was also a Canadian company listed on the Toronto and New York exchanges, amongst others. In 2005 it was the second largest global goldmining company assessed by market capitalisation, also the second largest assessed by gold reserves, and the third largest assessed by reference to gold production. Prior to the acquisition of PDI, Barrick was also a profitable goldmining company with approximately 20,000 employees responsible for the operation of a portfolio of mines and projects in North America, South America, Australia, Africa and Russia.
>
> 7 In October 2005 Barrick announced a hostile share and cash offer to acquire all of the ordinary shares of PDI. In November 2005 the board of directors of PDI recommended to PDI shareholders that they reject Barrick's offer. In December 2005 Barrick agreed to make an increased offer to purchase all of PDI's shares. The board of directors of PDI unanimously recommended that shareholders accept the revised offer. On 4 February 2006 Barrick received acceptances for more than 90% of the shares of PDI, and on 8 March 2006, Barrick acquired the remaining shares in PDI. In May 2006 Barrick and PDI were amalgamated in accordance with Canadian law, with the result that Barrick assumed all of the rights, titles and liabilities of PDI.

In short, the purchaser paid about $10 billion in cash and assumed liabilities of another $5 billion. It then argued that the value of the land assets was such that it was not "landrich" under the relevant 60% test at the time. This turned upon the taxpayer being able to correctly identify and account for "goodwill".

---

[16] [2017] WASCA 165 is the WA Court of Appeal decision. The Transcript of the HCA argument can be found at http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/HCATrans//2018/119.html

The Commissioner took the view that the correct valuation approach was top down - to take the headline price, deduct the known non-land assets, and treat all of the balance as land, on the basis that there was no goodwill.

While the Commissioner was successful before the WA tribunal, the Court of Appeal found for the taxpayer. It is thought that this decision will be overturned by the High Court, possibly as part of the first significant decision on goodwill since *Murry*[17] twenty years ago.

It is perhaps noteworthy that in *Commissioner of Territory Revenue v Alcan (NT) Alumina Pty Ltd* [2008] NTCA 14 - the Court held 2-1 that a mining company could have goodwill; but the point did not come up on appeal to the High Court: *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* [2009] HCA 41.

3.1 A digression - Goodwill and Murry's case

The High Court (by 4-1 majority, with Kirby J giving an experimental dissent) stated that the reason for the difficulty in defining goodwill was that goodwill is something derived from other assets of the business, rather than being an asset of the business itself. Goodwill is dependent upon proof that the business in question is profitable, and has a likelihood of remaining so. However, they recognised that while this was the legal nature of goodwill, accountants and businessmen might well have a different understanding. Adding to the confusion the majority went on to say that the accounting and business notions of goodwill had often proved influential in the valuation of goodwill (at 4,589).

Approved Accounting Standard ASRB 1013 was quoted as an example of the 'excess value' notion of goodwill held in the business community. That standard says that:

> 'Goodwill which is purchased by the company shall be measured as the excess of the cost of acquisition incurred by the company over the fair value of the identifiable net assets acquired.'

It will be noted that this is essentially the process by which the Commissioner sought to value the land - rather than goodwill - in *Placer Dome*.

Turning from the accounting concept of goodwill, the High Court went on to examine the legal nature of goodwill, and cited with approval the decision on *IRC v Muller's Margarine* [1901] AC 217, one of the first cases to consider goodwill.

The result of all this was to distil years of jurisprudence into the simple notion that goodwill is the '*attraction of custom'*. In the eyes of the majority, goodwill has 3 different aspects - property, source and value - which must be united under the auspices of carrying on a business to breathe life into the clay of goodwill.

Having decided that goodwill is a form of property, it becomes necessary to discover exactly what goodwill is. To that end the ingredients of goodwill must be identified and defined.

[17] FCT v. Murry 98 ATC 4585. Kiefel CJ was then in the minority at Full Federal Court level of the decision - 96 ATC 4,703.

Classically, the sources of goodwill have been described in terms of the animal kingdom. In *Whiteman-Smith Motor Co v. Chaplin* [1934] 2 KB 35 Scrutton LJ divided the elements of goodwill into the cat, the rat and the dog on the following basis[18]:

> "The cat prefers the old home to the person who keeps it and stays in the old home though the person who has kept the house leaves. The cat represents that part of the customers who continue to go to the old shop, though the old shopkeeper has gone; the probability of their custom may be regarded as an additional value given to the premises by the tenant's trading. The dog represents that part of the customers who follow the person rather than the place: these the tenant may take away with him if he does not go too far. There remains a class of customer who may neither follow the place nor the person, but drift away elsewhere. They are of benefit neither to the landlord nor the tenant, and have been called 'the rat' for no particular reason except to keep the epigram in the animal kingdom. It is obvious that the division of the customers into 'cat, rat and dog' must vary enormously in different cases and different circumstances ... The 'dog' class will increase with the attractiveness and new accessibility of the tenant; the 'cat' class with the advantages of the site; all sorts of variations may affect the 'rat'" (at 43).

Expanding on this Maughan LJ in the same case introduced a fourth class of customer, the rabbit:

> 'to indicate the customers who come simply from propinquity to the premises and, if this is borne in mind, it will be apparent that the rabbit be much bigger than the cat, who (if indeed it does not wholly vanish) may well shrink to the dimensions of a mouse' (at 50).'

This explanation of the sources of goodwill, while colourful, is also quite sensible and easy to understand[19].

However, it was not mentioned by the High Court in their discussion of the sources of goodwill. In the view of the High Court goodwill is 'the product of combining and using the tangible, intangible and human assets of the business for such purposes and in such ways that the custom is drawn to it' (at 4,591).

In the view of the High Court, many of the sources of goodwill are not property, nor are they assets for accounting purposes. Things such as 'manufacturing and distribution techniques, the efficient use of the assets of a business, superior management practices, and good industrial relations with employees may all be sources of goodwill for a business' (also at 4,591). This is because they are all factors which may attract customers.

Goodwill may also arise from expenditure of money rather than the judicious use of assets or know-how. Examples of this include advertising, wages and money expended on labour relations and customer service.

Finally, it was recognised that goodwill may also be the product of circumstances external to the business or its locality.

[18] In fact, it appears on a close reading that the analogy sprang from Counsel in that case, citing his own textbook on the subject.

[19] Indeed, there is a passage in the High Court Transcript where Nettle J laments the loss of the rats cats dogs and mice, saying he no longer understands goodwill as a result.

The majority took the view that goodwill has a value because it can be purchased and sold (together with the business). However, the value of this goodwill is tied to the fortunes of the business and is rarely constant. In their Honours' view variations in the earning capacity of the business and the value of the other identifiable assets and liabilities of the business will all impact on the value of the goodwill.

In the case of a business with a bright and profitable future, the value of goodwill may be measured in the conventional, accounting sense - the difference between the present value of the predicted earnings of the business and the fair value of its identifiable net assets. In this case, the value of goodwill for legal and accounting purposes will often be identical.

This may be contrasted with a business which is not profitable or trading at less than industry average profitability in which case the legal value of goodwill may differ from the value agreed upon by accountants and businessmen.

The High Court stated at 4,595 that this is because 'goodwill for legal purposes includes everything that adds value to the business'. Thus, a business may have valuable goodwill even where an accountant would conclude that a business has no goodwill, or goodwill of only a nominal value. While recognising the value of such goodwill may be difficult to assess, the High Court stated that goodwill in a non or less than usually profitable business may well be more than nominal, being the difference between the revenues generated by the relevant advantages and the operating expenses incurred in earning those revenues.

In cases where the goodwill of a business depends on the use of one or more identifiable assets, the value of the goodwill itself may be small, as the value is correctly identified as being in the asset.

The majority of the High Court gave the example of a trade mark and stated that the real value of goodwill in such a case is the difference between the going concern value of the business and the true value of the net assets of the business, including the fully-valued trade mark. Further, there is no necessary link between an asset which generates goodwill being disposed and the goodwill of the business also ceasing to exist; as the use of the trademark over time may have built up a favourable reputation for the business which will be retained even though the trade mark asset has been disposed of.

3.2 Placer in the WA Tribunal and WASCA

The Commissioner was successful in the WA State Administrative Tribunal[20], before a Presidential Member[21], with the result that the appeal was to the Court of Appeal rather than the Supreme Court.

Both sets of valuers used a discounted cash flow basis to ascertain the value of the land held by the company. The parties also agreed that same basic valuation principles – as per *Spencer* – were applicable. However from there the valuers differed. It was clear that the difference lay in both the forward looking gold price estimates used in the calculation, and also in the underlying question of

[20] Placer Dome Inc (now an amalgamated entity named Barrick Gold Corporation) and Commissioner of State Revenue [2015] WASAT 141.
[21] Judge T Sharp, Deputy President.

whether or not there was goodwill (as shown in the accounts of the purchaser to have value) in a legal sense. The Commissioner's valuers had treated this goodwill amount as forming part of the value of the land.

The Tribunal discussed the "goodwill" issue, and ultimately decided that there was no evidence of goodwill beyond accounting goodwill used as a balancing charge[22], and accordingly PDI was a landrich as defined. It was not said that a mining company could not have goodwill, despite the Commissioner valuers putting that proposition to the Court (and the landowner leading expert evidence to rebut that as a theory).

In passing, it should be noted that all valuations were done on a "life of mine" basis. This is not relevant for present purposes, but will be discussed in the context of RCF in the next part of this paper.

In the Court of Appeal Martin CJ gave the leading judgement, with Buss P concurring and Murphy JA concurring with some additional observations in relation to goodwill (which will be dealt with later).

The essential point was to distinguish the land from all of the property used to carry on the business – in particular, the tenements from the mining business being carried on:

> 37 There is a distinction in principle between an item of property, such as a piece of land, or a portfolio of pieces of land, and the bundle of rights associated with a business as a going concern. That distinction in principle is made clear by the decision of the High Court in Murry's case. The impact of this distinction in principle upon such things as, for example, the difference between the value of the bundle of rights which comprise a business as a going concern, and the value of a specific item or items of property included within that bundle of rights will, of course, depend upon the particular circumstances of the case. It is therefore apt to now turn to the particular circumstances of this case, for the purpose of distinguishing between the value of the portfolio of land held by PDI at the time of its acquisition, and the value of the bundle of rights which together comprised PDI's business, and which, following the acquisition, conferred upon Barrick the right to continue to conduct that business as a going concern.

In looking at the matter, the Court found the tribunal in error, although it had been led there by a misapplication of s33(1) of the Stamps Act – the *Nisschu* amendment seeking to incorporate mining information into the valuation of the land.

This caused a misapplication of the statutory test.

> 52 At all events, the Tribunal then proceeded to consider the difference in approach between what might be called a 'top down' valuation approach on the one hand, and a 'bottom up' valuation approach on the other. Those terms provide a convenient shorthand description of alternative methodologies considered by the Tribunal. The 'top down' approach involves starting with the value of the total property before subtracting the value of assets which are not land, in order to produce a residual value, which is then attributed to the land. The 'bottom up' approach involves starting with a valuation of the land, and then identifying what may be described as 'balancing items' in order to reconcile the value attributed to the land with the value attributed to all property.
>
> 53 As the Tribunal noted, in EIE Ocean BV v Commissioner of Stamp Duties, in a case concerning the land-rich company provisions of the Stamp Act 1984 (Qld), the Commissioner propounded the top down approach, whereas the taxpayer propounded the 'bottom up' approach. As the Tribunal in this case noted, Macrossan CJ observed

---

[22] At [377]-[380].

> that there was nothing inherently wrong in the top down approach, provided one is satisfied that all non-land assets have been identified and correctly valued. Macrossan CJ also observed that the bottom up approach 'has no greater claim to acceptance than the Commissioner's method'.

In essence, valuation and valuation methodology is a matter for valuers: there is not a single correct procedure laid down by the Courts.

Turning to the goodwill issue, Martin CJ reviewed *Murry* and the Tribunal's analysis of it, ultimately deciding that there was sufficient evidence of goodwill, and indeed that to seek to value goodwill was a distraction from the valuation of the land. It appears that using goodwill as a balancing charge was not of particular concern.

There was also the following said about "synergies":

> 97 Finally, it will be apparent from the reasons I have already given that the Tribunal's final observation in the passage I have set out above, to the effect that synergies arising from the acquisition of PDI's business could not be regarded as an asset of PDI, erroneously confuse the sources of goodwill, and its valuation, and the goodwill itself. As the majority in <u>Murry</u> noted, goodwill may often have a source in things which are neither assets nor property. As goodwill can be realised upon the sale of a business, anything which contributes to the value of the business, assessed in <u>Spencer</u> terms, is properly valued as part of its goodwill, including, in this case, the value which a hypothetical purchaser would attribute to the savings and efficiencies to be derived from the integration of PDI's business into its own, and the price which a hypothetical vendor would therefore expect to receive from such a purchaser.

Based on all of this, the decision supports the proposition that it is perfectly possible for a mining company to possess substantial goodwill.

The Murphy JA concurrence is an analysis of *Murry*, which is then applied to the facts and evidence as follows:

> 242 In this appeal, the Commissioner contended, in effect, that goodwill, for legal purposes, is confined to the attraction of custom. Reference was made to various passages in Murry in which goodwill was referred to as the attractive force which brings in custom. In my view, this involves too narrow a reading of the decision in Murry.
>
> 243 Gross earnings may be generated by increased custom. However, the attraction of custom is not the only thing which adds value to a business. Goodwill includes every positive advantage enjoyed by a business. A business also has goodwill if its value is derived from other considerations, which enable it to generate higher net earnings than its competitors. That is so irrespective of whether their effect is also potentially to create a favourable perception of the business to customers in the market and, as a result, potentially attract additional custom.
>
> 244 In this case, the focus of the relevant statutory inquiry was not the value of the goodwill of a business. It was the value of the land assets of PDI. The Tribunal, with respect, erred in setting its focus on the value of goodwill.
>
> 245 As to the Tribunal's focus on goodwill, it is important to note at the outset that the Tribunal did not find that PDI had no goodwill at the relevant date. Nor did it accept Mr Lonergan's evidence that all mining companies have no material goodwill. Rather, it found that there was no evidence that this company, ie, PDI, had 'goodwill of any materially significant value' (emphasis added). That finding was, with respect, in error. There was evidence that PDI's business had goodwill of significant value. It was the evidence of the appellant's expert witnesses, applying the accounting approach - which is permissible when valuing the goodwill of a business which is profitable and expected to continue to be profitable.

> 246 Also, insofar as the Tribunal meant that there was no evidence of goodwill, in that there was no evidence that the locations, people, efficiencies, systems, processes and techniques of PDI's business attracted custom, the Tribunal, with respect, proceeded upon an erroneous approach. Goodwill is not confined to the attraction of custom. It includes all those considerations which add to the value of the business, including those which tend to give it a competitive edge in the industry in which it operates.

The Commissioner obtained special leave to appeal to the High Court. The argument was heard on 8 June 2018.

3.3 Placer in the High Court – a high-level review of the transcript and some thoughts

In a sense, the arguments of taxpayer and Commissioner were focused on different things. The Commissioner argued that a mining company cannot have legal form goodwill, and therefore the original assessment stands, while the taxpayer argued that the Commissioner's valuation evidence was flawed (and resiled from) and that it was perfectly possible for a mining company to have goodwill in any event.

The Commissner's counsel summarised her case as follows:

> *MR HUTLEY: Yes, I accept that [all experts used a DCF analysis], your Honour, and our case was always – and I will take your Honours through it – there is no goodwill. We can identify every asset in this company, value them all;* what is left has to be the land. *That was our case.*

It appears that the Commissioner had the better of the day in Court. Gordon J in particular appeared to be seeking to develop a new jurisprudence around goodwill and the attraction of custom. She particularly appeared to doubt the possibility of "synergies" giving rise to goodwill.

It will be surprising if the taxpayer's WASCA success is confirmed by the High Court.

4 AP Energy

> 88. As I read RCF FC, apart from emphasising that each asset should be assessed on the basis of an assumed simultaneous sale of all of the assets to the same hypothetical purchaser, the Full Court did not examine the methodology used by the experts to arrive at the market value of SBM that would apply the *Spencer* test, other than to make a brief statement (at [54]). In the Court's supplementary judgment (*Commissioner of Taxation of the Commonwealth of Australia v Resource Capital Fund III LP (No 2)* [2014] FCAFC 54 (at [4])), the Court did note:
> 89.

At [54] of our earlier judgment we noted that all the experts who gave evidence before the primary judge agreed that in the case of a simultaneous sale to the one purchaser, the hypothetical purchaser could expect to acquire the mining information and plant and equipment for less than their re-creation costs with little or no delay. However, we do not accept as a proper basis for valuation in accordance with our earlier judgment **the unsupported and speculative proposition** that market value is to be assessed as the mid-point between the replacement and scrap values of those assets. (emphasis added)

However, while clearly binding on me, this statement did not actually form part of the Court's main judgment. It follows that the main point to take from this supplementary observation is the qualifier emphasised above. Even the Commissioner expressly accepts that a mid-point selection is appropriate where justified. But, in any event, Mr Longworth took the mean or an average, not simply the mid-point.

> 89. The Full Court did not reject or endorse any particular method of valuation by which the *Spencer* test can be applied in valuing a test entity for the purposes of s 855-30(2). Nor did the Court at first instance. It did not hold that the DCF method (preferred by the experts and by the Court at first instance for SBM) was the methodology always to be applied to other test entities for the purposes of ascertaining their market value for the purpose of s 855-30(2). What the Full Court rejected as a proper basis for valuation was the 'unsupported and speculative proposition' that market value of mining information and plant and equipment should be assessed as the mid-point between the replacement and scrap values of those assets. Implicitly, some satisfactory reasoning would be required before adopting such a method of assessment. In this case, reasoning was supplied and the Tribunal was clearly content with the reasoning. The legislature has not seen fit to be prescriptive about the process, presumably being content to allow experts in this complex area to guide decision-makers.

5 RCF IV and V

5.1 Overview

Resource Capital Fund IV LP and Resource Capital Fund V LP were US-based private equity operations established in the Cayman Islands. Investment decisions were made by an Investment Committee meeting in the US, while various management companies conducted the day-to-day operations.

In 2007, those Funds, together with other investors, invested in a WA-based mining company known as Talison Lithium and disposed of their interest in a 2013 scheme of arrangement. The ATO issued special assessments to the Funds for their gains on disposal of Talison shares under Division 855, the "CGT landrich" provisions.

This question turned on whether or not Talison's assets were over 50% taxable Australian real property (**TARP**). Very broadly, TARP comprises all interests in land, mining and exploration interests and certain buildings and improvements. It is not the same test of “land” found in the various Landholder duty provisions from State to State (and Territory). A discussion of the scope of “land” across the various jurisdictions is beyond the scope of the paper – and indeed is fertile ground for a lengthy paper in its own right.

The matter was in one sense a sequel to RCF III[23], in which the taxpayer was initially victorious at trial, only to be reversed on appea[24]l in a difficult judgment.

The matter was heard by Pagone J in what was almost his final judgment prior to retirement from the Federal Court.

This issue required very technical and specialized analysis by appropriately qualified valuation experts. A core aspect of the Funds' valuation evidence was the use of the "Netback method" which was a methodology for separating Talison's mining and processing activities. The Funds' experts found Talison's assets to be less than 50% TARP; the ATO's, more than 50%.

Accepting the Funds' evidence, the Court held that the Funds were not liable to an Australian capital gain:

- the "netback method" used by the Funds' experts, which is a method for separately valuing the mining and processing operations, was acceptable, reasonable and reliable;

[23] cite
[24] Cite both

- certain leases and licences that allow processing, but not mining operations, are not TARP and the value of those leases and licences, as well as processing plant and equipment, are non-TARP;
- value attributable to the period after expiry of the current mining leases should be valued as a non-TARP asset.

There were a plethora of additional income tax and treaty issues to dealt with. Moreover, many of the issues were interlocking. These issues are not relevant to duty issues; only the "VBML" and valuation methodology issues will be considered at further length, although it is also necessary to consider the "land" issue. But it is first necessary to better understand the facts.

5.2 The Facts

Talison Lithium was a lithium mining, processing and exploration company based in WA. It's principle operations were the Greenbushes lithium operations adjacent to the town of Greenbushes, WA. Greenbushes produced 25-30% of annual global lithium production and was the largest global lithium mineral mining operation.

Mining at Greenbushes occurred on land subject to Mining Leases granted under the Mining Act 1978 (WA)(Mining Act). The site also comprised land subject to two General Purposes leases and one Miscellaneous Licence granted under the same. The purpose of General Purpose Leases was for concentrating lithium ore and depositing of lithium ore tailings. The Miscellaneous Licence provided water and irrigation rights.

5.3 Division 855

Division 855 contains five 'Items' of TARP, however, given that the only relevant asset disposed of was shares in Talison, only Item 2 - indirect Australian real property interests was relevant to the analysis. Item 2 provides that shares or units a company are TARP (and disposals cannot be disregarded) if certain tests are passed, namely:

(a) the principal asset test (broadly, 50% of the underlying assets of the test entity must be TARP);

(a) the non-portfolio interest test (broadly, the taxpayer must hold at least 10% of the shares or units in the entity); and

the two tests above were passed at the relevant test times.

The Applicants accepted that they passed the non-portfolio interest test at the relevant times. There was also no controversy about the timing of the principal asset test which was the date of the CGT event. Therefore, the only material controversy regarding the Division 855 issue was whether or not the Applicants passed the principal asset test.

The principal asset test is set out at s855-30 of the ITAA97. Section 855-30(2) provides that:

> A membership interest held by an entity (the holding entity) in another entity (the test entity) passes the principal asset test if the sum of the market values of the test entity's assets that are taxable Australian real property exceeds the sum of the market values of its assets that are not taxable Australian real property.

TARP is defined in s855-20 to be:

real property situated in Australia (including a lease of land, if the land is situated in Australia); or

a mining, quarrying or prospecting right (to the extent that the right is not real property), if the minerals, petroleum or quarry materials are situated in Australia.

A 'mining, quarrying or prospecting right' is defined in 995-1 to be:

an authority, licence, permit or right under an Australian law to mine, quarry or prospect for minerals, petroleum or quarry materials; or

a lease of land that allows the lessee to mine, quarry or prospect for minerals, petroleum or quarry materials on the land; or

an interest in such an authority, licence, permit, right or lease; or

any rights that:

(i) *are in respect of buildings or other improvements (including anything covered by the definition of housing and welfare) that are on the land concerned or are used in connection with operations on it; and*

(ii) *are acquired with such an authority, licence, permit, right, lease or interest.*

Division 855 Issues in Dispute

As well as exploring some nuanced issues of law, this aspect of the case lent itself to some very technical and specialised areas of valuation expertise. Broadly, the valuation issues in dispute were:

(a) separation of mining and processing operations;

(b) the value of any assets beyond the current term of the mining leases;

(c) the treatment of intercompany loans;

(d) the treatment of property, plant and equipment; and

(e) the treatment of goodwill.

Separation of mining and processing operations

<u>Applicants' Submissions</u>

The Applicants started with the proposition that under the Mining Act (WA) a mining lease is required in order to extract the relevant minerals from the ground but then once the minerals are extracted and severed from the ground they become the property of the miner and are chattels.[25] This is important because the definition of TARP includes only real property and a 'mining, quarrying or prospecting right' defined to mean the authority, licence etc. to mine, but not, the Applicants said, anything more. This was consistent with the views of Page Wood V-C in *London and North-Western Railway Co v Ackroyd* who found[26]:

> "[A] licence to work a mine is only a licence to get the minerals, and when you have got them, you have done all you have a right to do, and you have no interest in the land."

Further, Division 855 does not extend the TARP definition to include anything in the nature of chattels earned through an authority, licence etc. to mine. It also does not extend it to anything relating to processing minerals – processing is not mining. Note that lithium in particular requires extensive processing – and in fact two different processes – resulting in different saleable product- were undertaken on the site.

As set out in the background section above, the mining and processing operations were undertaking under different leases/licences: the mining occurred on Mining Leases granted under the Mining Act (WA), while the processing occurred on General Purpose Leases granted under the same.

Therefore, the principal value of a mining lease is the right to extract minerals from the ground. In valuing the relevant mining leases, the Applicants' primary expert determined the value of the lithium ore at the point it is extracted and severed from the ground and became a chattel owned by Talison (the **Valuation Point**).

In determining an appropriate methodology to conduct a valuation at that point the Applicants' primary expert relied on an expert report prepared by another expert titled "Methodology to determine the value of the Greenbushes Lithium Operations Resource immediately after extraction." Such methodology was known as the "netback method." The Applicants submitted that the Netback methodology is a commonly used methodology to determine the value of a resource at a point where one does not observe actual market transactions. Essentially, The netback method:

(a) starts with the sale price of the processed lithium products;

(b) subtracts from the sale price the charges and costs of processing, transport, marketing and other costs that are downstream of the Valuation Point together with a reasonable profit margin which an arm's length producer would expect to make; and

(c) the result is the value of lithium minerals at the Valuation Point, there being no observed market at this point.

To determine the total Greenbushes upstream value i.e., the value of the licences which permit the extraction of the minerals, the Applicants' primary expert assumed that the processing operations (the downstream operations) acquire the raw materials at a price (the upstream price) which represents the market value of the minerals at the Valuation Point, namely the point at which they become the property of Talison.

[25] The Respondent accepted this proposition and gave the same instruction to his expert valuers.

[26] (1862) 31 LJ (NS) Eq 588 at 591. Applied in *TEC Desert Pty Ltd v Commissioner of State Revenue (Western Australia)* (2010) 241 CLR 576, 587.

By valuing the processing operations using a DCF method the value of the whole of the operations to obtain a value for the upstream operations i.e. the mining was deducted. Having a value for the upstream operations based on a life of mine analysis items such as plant and equipment attributable to the upstream operations and mining information were then subtracted to arrive at the value of the mining leases themselves.

The Applicants submitted that the Respondent had overstated TARP by allocating value of the processing activities to the Mining Leases as TARP assets. The Applicants argued that the Respondent's primary expert had made errors in:

(a) characterising the General Purposes Leases as TARP;

(b) failing to recognise that, while the processing of minerals at the particular site was permitted under the general purpose lease the lease was not required to process the minerals. They could have been lawfully processed elsewhere. By contrast the mining leases were required to lawfully extract the minerals from the ground and obtain property in the minerals; and

(c) failing to value the operations consistent with the instruction that that once the minerals are so extracted and severed from the ground they become the property of the miner and are chattels and that the minerals could lawfully be processed without a mining tenement.

Respondent's Submissions

The Respondent's primary expert did not give separate consideration to mining and processing operations, but instead valued the Mining and General Purposes Leases together. The Respondent submitted that the use of the netback methodology was inappropriate for a number of reasons, most notably:

(a) It is not a method that is used frequently or even at all in valuing mining leases sold simultaneously to a single purchaser, and is merely one of a number of methods in applying the *Mineral Rent Resource Tax Act 2011* (Cth).

(b) The Applicants make no attempt to show how the use of the methodology is consistent with the *Spencer* test of an assumed simultaneous sale to a single purchaser for their highest and best use.

(c) The test is inconsistent with the *Spencer* test because it assumes a distinct and separate entity. *Spencer*, the Respondent submits, requires that there be hypothesised a single sale of the test entity’s assets by a single vendor to a single purchaser.

(d) The conclusion that any value arising beyond extraction should not be attributed to the mining leases was the result of instruction only, but this was illogical. To the extent that those assets involved so-called “downstream” processing operations the value of those assets (viz., plant and equipment) has been ascertained. Equally, the value of Talison’s mining information and inventories has been ascertained. The balance of the value is (and can only be) properly attributable to the mining leases.

(e) The value attributed to the "Downstream Residual" was incorrect as this had none of the characteristics of a tangible or intangible asset. It could never be the subject of a hypothetical sale as postulated by the Spencer test.

(f) The artificial allocation of Talison's operations into "upstream" and "downstream" or the concept of the "Valuation" point is not necessitated by s855-30.

The Respondent also submitted that the Applicants' had made a number of technical errors in the calculations applying the netback method. The Applicants' submitted that no such errors existed. Given the highly technical nature of those submissions, they are beyond the scope of this paper.

The value of any assets beyond the current term of the mining leases (VBML)

Applicants' Submissions

The Applicants' noted that Talison's mining leases were due to expire in 2028, though the life of mine model assumed that lithium mining would continue until around 2036. According to the Applicants' primary expert, the value of the mining leases could only be based on discounted cash flows related to the period until the expiry of their current terms. Anything beyond that was a separate asset that could not be TARP an authority, licence etc. to mine for minerals. Instead, there was a separate non-TARP asset which was the value of the expectation of cash flows past the expiry of the mining leases.

The Applicants' criticised an instruction given to the Respondent's primary expert that Talison was entitled to renew the mining leases under the Mining Act 'as of right' as is the case in WA when mining leases are in their first term. That instruction was, the Applicants' said, in error because the mining leases were in their second term and any renewal of the mining leases was subject to the discretion of the Minister.

Respondent's Submissions

The Respondent submitted that the expectation of cash flows beyond the current term of the mining leases was not an asset under accounting principles to which value could be attributed as it was not in the control of the person who held it and could not be treated as an asset.

The Respondent also pointed to an earlier report that The Applicants' primary expert had prepared that included no such asset. The ability to obtain a renewal of mining leases necessarily lies in the holder of the mining leases and thus the value is attributable to the mining lease. The Respondent submitted that, under cross-examination, the Applicants' primary expert gave evidence that it was the "standard assumption" in valuation that mining leases would be renewed and that the expert's written evidence was inconsistent with that assumption.

The treatment of property, plant and equipment

Applicants' submissions

The Applicants' submitted that Talison's property, plant and equipment were non-TARP asset. Their basis was that:

(a) *The High Court decision of TEC Desert*[27] *confirms that things affixed to mining leases do not form part of the realty and maintain their character as the tenement-holders personal property.*

(b) *The definition of 'mining, quarrying or prospecting right' requires "rights in respect of buildings or improvements" to be "acquired with" the relevant authority, licence etc. There was evidence that vast majority of the relevant plant and equipment was not acquired when Talison bought the tenements, but was build some time after that. Therefore, the vast majority of buildings and improvements were not TARP.*

(c) *The Respondent's argument that the tenements gave the holder a "right to use" its property, plant and equipment was clearly incorrect as one cannot say that where one owns assets worth a certain amount, one also has the right to use the same assets worth a similar amount.*

<u>*Respondent's submissions*</u>

The Respondent led oral evidence that the majority of the structures on Talison's site were buildings. The Respondent resisted the Applicants' interpretation of *TEC Desert* and submitted that it is properly confined to its facts and is not authority for the proposition that items affixed to the land by the lessee to whom a mining tenement has been granted are always chattels. The Respondent submitted that this was not a case of determining whether the buildings were fixtures or chattels and preferred the case of *Woodfall, Landlord and Tenant* and endorsed by the House of Lords in *Elitestone Ltd v Morris* [1997] 1 WLR 687 – namely, to classify an object brought onto the land under one of three broad heads: “(a) a chattel; (b) a fixture; or (c) part and parcel of the land itself. Objects in categories (b) and (c) are treated as being part of the land.” In *Elitestone*, the House of Lords held that a building was “part and parcel of the land”.

As to the words "acquired with", the Respondent submitted that the words should mean acquired *because of* the right to mine, quarry or prospect and that The inter-relationship between the rights in question and the right to mine compels the conclusion that rights “are acquired with” the right to mine.

The treatment of goodwill

<u>*Applicants' submissions*</u>

Both parties instructed their primary experts that goodwill can inhere to mining operations as discussed in *Commissioner of Taxation (Cth) v Murry* (1998) 193 CLR 605 at 615. Notwithstanding this instruction, the Applicants' primary valuer was of the opinion that a small amount of goodwill did inhere to Talison's operations given the unique nature of Talison as the world’s largest hard rock lithium miner, the know-how and expertise associated with Talison’s lithium processing activities and the reliance that the purchaser had on Talison as its major supplier of lithium concentrate. Goodwill was then determined to be a non-TARP asset.

<u>*Respondent's submissions*</u>

The Respondent's primary expert concluded that, regardless of whether goodwill *can* inhere to a mining operation, it would nevertheless have to be attributable to something and was unable to identify what this goodwill would relate to. In the context of Talison’s operations, any surplus value

[27] *TEC Desert Pty Ltd v Commissioner of State Revenue (Western Australia)* (2010) 241 CLR 576.

that arises over and above the market value of the identified tangible and intangible assets is primarily a consequence of commodity prices. It did not arise as a consequence of, for example, customer loyalty, management expertise or location. The Respondent's primary expert concluded that those surplus values were attributable to the Mining Leases, a TARP asset.

Pagone J's conclusion on the issues

As will be seen, these issues are all closely interrelated, and indeed these issues were only relevant due to the determination of a host of other issues in the taxpayer's favour (and some in the Commissioner's favour).

For TARP purposes, Pagone J found that the taxpayer applicant's submission as to the General Purpose Leases was correct: they were not TARP as they were not a *'mining, quarrying or prospecting right''* (MQPR) as defined*.*

The leases were for the processing of lithium ore and for depositing tailings, and this was past the point at which "mining operations" had concluded and processing of the ore had begun.

Moreover, the leases were not caught by paragraph (d) of the MQPR definition:

> 98. In the present case there was no suggestion that any of the buildings used under General Purpose Lease 01/1 existed before the grant of the general purpose leases and the miscellaneous licence. The evidence was, rather, that they were constructed for the processing of the lithium ore as the business operations developed over time. The general purpose leases themselves do not purport to give rights in respect of any of the buildings or other improvements but only to permit the activities undertaken in them. The connection required by paragraph (d) of the definition between the "rights" and the "buildings or other improvements" is that the former be "in respect of" the latter. That requires there to be a sufficient or material connection between the two: J & G Knowles & Associates Pty Ltd v Federal Commissioner of Taxation [2000] FCA 196; (2000) 96 FCR 402 at [26]. A connection of that kind requires that rights in respect of the buildings or other improvements flow from the rights granted by, in or under the general purpose leases or miscellaneous licence. A sufficient connection is not established if, as was the case here, the entitlement to the buildings arose independently from any rights granted under the general purpose leases and miscellaneous licence. It is true that Talison Lithium had buildings and other improvements in the area covered by the general purpose leases and the miscellaneous licence, it is also true that Talison Lithium had rights in respect of those buildings and other improvements, but they were not rights given by or under, or in respect of, the general purpose leases or the miscellaneous licence.

Building on this, Pagone J followed *TEC Desert*[28] and held that the buildings on the GP leases were not within the definition of land. Therefore:

> 101. It follows, however, that the value of the assets to be determined for purposes of s 855-20 do not include the value of the general purpose leases, the miscellaneous licence or the plant and equipment used by Talison Lithium in the processing of the minerals after extraction by mining: see also Placer Dome Inc v Commissioner of State Revenue [2017] WASCA 165. The Greenbushes operations carried on by Talison Lithium comprised two distinct sets of operations, namely mining and mineral processing. The first required a mining lease but the second did not. The first set of operations constituted mining for minerals for which a licence was required under the Mining Act, but the second set of operations, constituting the processing of the minerals, did not require a mining licence. Section 85(2)(b) of the

[28] *TEC Desert Pty Ltd v Commissioner of State Revenue (WA)* [2010] HCA 49

> Mining Act expressly provided, subject to the Act and to any conditions to which the mining lease was subject, that the lessee of a mining licence owned all minerals lawfully mined from the land under the mining lease. The ordinary meaning of mining is the "action, process or industry of extracting ores" and that activity was complete upon the recovery of the ore from the earth in the absence of an extended meaning: see Macquarie Dictionary "mining"; Federal Commissioner of Taxation v ICI Australia Ltd [1972] HCA 75; (1972) 127 CLR 529 at 563-4; cf also Collector of Customs v Bell Basic Industries Limited [1988] FCA 371; (1988) 83 ALR 251. It follows that on this basis of assessment of the RCF IV and RCF V partners there is to be excluded from the taxable value of the capital gain, the value attributable to the general purpose leases, the miscellaneous licence and the plants used in the processing operations rather than in the mining.

This importance of this finding was not only that it excluded certain assets from the TARP test which at a glance one might expect to be caught, but also allowed the taxpayer to press their valuation methodology in respect of the Mining Leases – the netback method.

The netback valuation method was used to seek to value out the different mining and processing operations carried on by Talison, the mining operation being TARP and the processing operation not.

Essentially, a value had to determined at the point of extraction of the ore, prior to processing. This was despite the fact there was a market for unprocessed lithium ore. The taxpayer's expert put this view, while the Commissioner's expert instead "*considered the netback method of valuation to be inappropriate in the present case as being "artificial, in that it requires the entity being valued to be separated into two non-existent hypothetical entities and also [to] hypothesise a third entity to determine the value of internal costs"*[29]*.*

Pagone J decided that the netback method was an appropriate methodology (not the only appropriate one, merely one open to a party to use):

> 110. The Full Court did not decide in RCF III that a netback methodology might not be appropriate in the application of the Spencer test. The question in that case had concerned the market value of assets which were ascertained as if they were offered for sale as a bundle, and all of the experts who gave evidence before the primary judge agreed that in the case of a simultaneous sale to the one purchaser the hypothetical purchaser could expect to acquire the mining information and plant and equipment for less than their re-creation cost with little or no delay. Subsequently, McKerracher J explained in Federal Commissioner of Taxation v AP Energy Investments Pty Ltd [2016] FCA 577; (2016) 341 ALR 265 that the decision of the Full Court in RCF III was not to be read as imposing a prescriptive methodology by which the Spencer test was to be applied.
>
> …
>
> 111. The Court is not well placed to resolve theoretical differences between competing experts whose judgments are soundly based and are responsibly held within established disciplines in areas of non-legal expertise: see Bronzel v State Planning Authority (1979) 21 SASR 513, 523. It is common to find different opinions reasonably held in established disciplines, fields of learning, and areas of expertise which cannot be resolved by courts of law, and, as Wells J cautioned in Bronzel at 523, a judge should not be cast in the role of a third valuer. In Riverbank Pty Ltd v Commonwealth (1974) 48 ALJR 438 Stephen J observed at 484 that even the first step of selecting sales of properties thought to be sufficiently comparable may be attended with difficulty explaining why "the stuff of valuation" was "an art, not a science". Ultimately, however, a court needs to be persuaded that one or other of the opinions is to be

[29] At paragraph 109.

> preferred by reference to the explanations and reasons given by the experts for their opinions. [emphasis added]

Turning to the evidence at hand, Pagone J considered that the taxpayer's evidence was cogent. Importantly, he said that the Commissioner's evidence did not in fact attempt to value the mining leases separately from the processing operations. Given this, the taxpayer's evidence was more easily accepted.

Ultimately, the Commissioner's "top-down" approach was not preferred in this case, largely because it did not attempt to value assets which the taxpayer could establish on legal principle existed.

A further example of this is the VBML issue: the Commissioner's valuation proceeded on the basis of "life of mine" (until 2036) while the taxpayer's was on the basis of the life of the current mining leases (which expired in 2028 without a right to renew).

Nonetheless, the taxpayer included as an asset the expected earnings over the life of mine beyond the expiry of the tenements as a "VBML intangible".

Again, this may seem curious at first glance, but remember that the statutory test is asking a specific asset to be valued – in this case the mining tenement. It is not the "mine" being valued, but the particular mining tenement. This has implications for landholder duty – it comes back to the statutory question being asked, and what in fact is being valued.

Here, not only was the VBML not included in TARP, but it was also included as an asset.

In part this was due to the instructions given to the Commissioner's valuer not being correct:

> *119.*
>
> …Mr Samuel [for the Commissioner] explained in the joint report at paragraph 2.10(d) that he had been instructed to assume that, as at the valuation date, Talison Lithium "was entitled as of right to renew each of the mining leases and general purpose leases at the end of their current terms". However, s 78(1)(b) permitted an as of right renewal only for the first renewal of a lease and not thereafter. That instruction weakens the reliability of the conclusions reached by Mr Samuel and strengthens the report of Mr Pendergast who was specifically instructed to value the mining leases on the alternative basis of the mining leases enuring for the full length of the life of the mine, and of the Greenbushes mining leases enuring for the remainder of the life of the mines. The Commissioner's contrary submission, that whether or not the mining leases were renewable at the discretion of the Minister was immaterial, cannot be accepted in light of the terms of s 78. It is true that the legislation makes the general purpose leases and miscellaneous licence renewable by the holder upon application to the Minister but Mr Samuel's valuation was required to assume a legal state of affairs inconsistent with the statutory provision that did not give certainty to renewal upon the expiration of the first period of renewal. All of the mining leases in question had been renewed at the date of valuation and there was no longer an entitlement as of right to the renewed leases.

Simply put, factually incorrect assumptions weaken an expert's evidence. If at all possible, they should be avoided.

The decision is now on appeal, to be heard in August by a Full Bench.

5.4 Newmont

Another Division 855 case is presently before the Federal Court, with the same solicitors and lead Counsel as for the RCF litigation, leading the Commissioner to seek a stay of the matter. On 6 June an interlocutory decision in that matter was handed down by McKerracher J denying the stay application and dealing with the taxpayer's request for particulars.[30]

That decision had a few interesting things to say about the role of expert evidence in a particular case.

> 28. …
> (6) In taxation appeal proceedings, such as these, where Newmont bears the onus of proof under s 14ZZO of the TAA, the deficiencies in the Commissioner's appeal statements mean that Newmont will be required to speculate about and adduce evidence, including expert evidence, to negate various alternative ways in which the Commissioner might ultimately put its case: see also Bailey v Commissioner of Taxation (Cth) [1977] HCA 11; (1977) 136 CLR 214 per Aicken J (at 227), cited by Stone J in BAE Systems Australia (NSW) Pty Ltd v Federal Commissioner of Taxation [2008] FCA 48; (2008) 69 ATR 567 (at [14]). In their present form, the Commissioner's appeal statements are embarrassing in that they are likely to both delay and increase the costs associated with the conduct of these proceedings: Rio Tinto (at [58]); see also Spiteri v Nine Network Australia Pty Ltd [2008] FCA 905 per Edmonds J (at [22]-[23]). By way of example, if the Commissioner does not maintain its concession that items of plant and equipment at Boddington are fixtures, it will be necessary for Newmont to:
>
> - (a) file evidence addressing factual matters such as the purpose and degree of annexation of all the plant and equipment owned by NAPL and its subsidiaries at 30 June 2011; and
> - (b) instruct one or more valuation experts to prepare their valuation reports on the alternative bases that the plant and equipment is either TARP or non-TARP.
>
> …
>
> 32. What is ultimately critical is that the taxpayer and the Court be given a clear and succinct statement of the Commissioner's position well before the parties proceed to the hearing, without, at the same time, imposing any element of burden of proof on the Commissioner. I accept the Commissioner's contention that the practical approach reflected in the judgment of Stone J in BAE Systems (at [19]) also reflects the fact that tax appeals may cover many situations and what is required to satisfy r 33.03 of the Federal Court Rules 2011 (Cth) in one case may differ from that required in another. What will be required will be informed by a number of factors, including the number and complexity of the factual and legal issues, the form of the appeal statement and the identification of issues by the parties in the appeal statements. There is no doubt that in this case that the TARP issue or the Div 855 issue are what have been consistently identified by the parties as the real issues in dispute. There is no doubt that what is for determination is whether or not Newmont's assets, principally comprising assets associated with identified mining operations, do or do not pass the principle asset test by reference to the sum of the market value of Newmont's TARP assets as compared with the market value of Newmont's non-TARP assets. Newmont has already approached the matter on the basis which the Commissioner, again, identifies as being his position, namely, that Newmont is put to proof on all factual matters in this regard.

The particulars the taxpayer sought (including going as to whether certain concession were to be resiled from) were not required to be given.

The Commissioner – whether State or Federal – is entitled to put a taxpayer to proof. This process is then satisfied by the provision of evidence. But as can be seen from RCF, the evidence must be flexible enough to comply with a number of different legal positions to be persuasive to a court. Of

[30] Newmont Canada FN Holdings ULC v Commissioner of Taxation [2018] FCA 958.

course, they may be cases where there is no point providing evidence which is flexible in certain cases: if it required to satisfy a particular factual position in which the case cannot be won, for instance. Such cases will be more common for taxpayers than for the revenue.

6 GST withholding issues

In recent times the Federal Government has introduced a number of withholding requirements in respect of real property dealings. Most recently this has taken the form of a “reversal” of the usual GST rules in relation to the payment of GST under the new provisions introduced by the *Treasury Laws Amendment (2018 Measures No. 1) Act 2018*[31] (TAA).

It must however be noted that even where this applies – generally to sales of new residential premises or of vacant potential residential land by a property developer – the rules do not in fact change the obligation to report and remit GST by the supplier (seller), and consideration still passes in the entire amount to the vendor, by virtue of the “good discharge” provision in the Schedule to the Taxation Administration Act 1953 (Cth)[32]. That provision reads:

> 16-20 Payer discharged from liability to recipient for amount withheld
>
> (1) An entity that:
>
> (a) withholds an amount as required by Division 12; or
>
> (b) pays to the Commissioner an amount as required by Division 12A, 13 or 14;
>
> is discharged from all liability to pay or account for that amount to any entity except the Commissioner.

The price remains unchanged, it is simply that as a mechanical matter the potential tax liability on respect of the receipt is withheld by another party and prepaid on the seller’s behalf.

Some very nice issues may arise where there is a withholding or payment which is not in fact authorized by Division 12 or 14, but it is thought that the primary issue will be the funds themself, not the duty in respect of those amounts.

[31] New Subdivision 14-E to Schedule 1 to the TAA.

[32] This provision also provides protection in respect of so called “Foreign Resident CGT withholding” found in Subdivision 14-D to Sch 1 TAA

7 Getting the best out of valuers and other experts in light of recent decisions

Valuers – and other experts – are simply giving evidence of factual matters or their opinion of a factual matter.

Firstly, it is necessary to consider the purpose to which the evidence is to be put.

If the evidence is simply being used to support submissions made to a revenue office, then subject to satisfying the particular requirements of that office[33] the valuer may be retained by a taxpayer to act on their behalf.

On the other hand, if the matter is a court (or Tribunal) proceeding then the evidence will need to comply with the particular Court rules, including rules as to form. More to the point, the valuer's role is then of an independent expert to assist the Court with expertise rather than to act as an advocate for a party to the matter.

Once briefed to act for a party, an expert cannot usually then be "cleaned up" to act as an independent expert in Court proceedings. It may be possible to seek the consent of the other side to such a course of action if the cost of briefing experts is a significant concern. This consent of course need not be given.

This can be of concern if a particular valuer or expert is associated with a particular accountancy firm which already acts for a taxpayer in another capacity, or indeed in the matter in question.

Secondly, experts need to be asked the correct question: what is the statutory test that requires their input: how can this be proved, or is there a particular element of the question on which a view must be formed which requires evidence or an expert to give expert evidence. While the Commissioner does have latitude to simply form a view in many cases, it is submitted this may be better informed if evidence of facts has been relied upon rather than assumed.

For a taxpayer of course, the requirement to lead evidence is stronger, as the taxpayer's case must prove the assessment is excessive or that a particular decision should or should not have been made. Without evidence of the underlying factual matters, this can be very difficult to prove.

At least in respect of matters which are likely to be contested to a hearing, it is probably best to undertake discussions with Counsel as to what evidence will be required and how that evidential should be sought to be satisfied. Only once that has been ascertained can the content of the instructions to the valuer be considered, and discussed with the expert in draft for their comment prior to finalising the evidence sought.

If there are assumptions which the expert can make, those should be clearly set out. As will be recalled, in RCF at trial the assumptions made by the Commissioner's valuer as to the status of tenements and the life of mine/VBML issue ultimately meant that his evidence was less persuasive. The taxpayer's experts had prepared valuations on a number of alternate bases so that even if certain

[33] See for instance the TRO guidelines in relation to valuations at CG-SD-010, as well as in the Stamp Duty Lodgement Guide.

tenements were TARP, or if the VBML issue had treated the intangible as land, the valuation would still have covered off the inclusion of the value of those “land” assets.

If that had not been done, and both valuations had found to be insufficient, it is quite likely the Commissioner would have been victorious. Arguably this is what happened in *RCF III*, and may also be the basis for a victory for the WA Commissioner in *Placer Dome*. Remember if there is no evidence on a point, this is on net helpful for the Commissioner, as the taxpayer bears the onus of proof to reverse the Commissioner’s view.

Thanks to Phil Bisset, Tax Partner Clayton Utz Brisbane for his input and insight into the RCF litigation. Without his gracious and willing assistance this paper and the accompanying presentation would have been much the lesser.