Alcan (NT) Alumina Pty Ltd v Commissioner of Taxes [2007] NTSC 09

PARTIES:	ALCAN (NT) ALUMINA PTY LTD (ACN: 095 409 260)
	v
	COMMISSIONER OF TAXES
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE TERRITORY EXERCISING APPELLATE JURISDICTION
FILE NO:	LA 12 of 2006 (20608545)
DELIVERED:	15 February 2007
HEARING DATES:	2 to 6 October 2006
JUDGMENT OF:	MILDREN J
APPEAL FROM:	Decision of Commissioner of Taxes

CATCHWORDS:

TAXES AND DUTIES – Stamp duties – acquisition of shares – whether the value of a share buy-back made in conjunction with a purchase of the remaining shares attracts liability to duty – Taxation (Administration) Act (NT) s 56N(1)(b); s 56Q; s 56C(1); s 56R(2)

TAXES AND DUTIES – Stamp duties – whether company whose shares were purchased is a "land-holder" – whether Special Mineral Lease is a "lease" or a mere profit á prendre – whether it is a mining tenement or mining lease – whether demise intended to give exclusive possession

REAL PROPERTY – general principles – whether special mining lease granted under statute is a lease or a mere profit á prendre – four certainties –

right to exclusive possession – whether covenants permitting landlord and others to access the land affect the right to exclusive possession

STATUTORY INTERPRETATION – "land" means land in the Territory and includes a lease of land – "lease" includes a lease granted under an Act but does not include an option to renew – whether an option to renew a lease is "land" – Taxation (Administration) Act, s 4

VALUATION OF PROPERTY – Special Purposes Lease used to deposit waste products of refinery – no right of renewal – refinery lease and lease over mine area renewable – area to deposit waste critical to refinery operation – statutory right to a further lease over unspecified land – effect on valuation of the whole of the leases

VALUATION OF PROPERTY – mining and special purposes leases – covenants to renew – whether enforceable – land held in escrow under Aboriginal Land Rights (NT) Act (Cth) – statutory right to further lease – whether rights are property – whether they are land

REAL PROPERTY – fixtures to land – tenants' fixtures – refinery on Special Mineral Lease – whether a fixture – general principles – effect of statutory obligation to remove improvements – whether obligation applied to the leases in question – Mining Act 1980 (NT) – Mining Ordinance 1939 (NT)

VALUATION OF PROPERTY – goodwill – whether evidence of goodwill exists – unallocated residual assets – whether goodwill – whether has separate legal existence as property – whether capable of separate valuation

TAXES AND DUTIES – Stamp duties – appeal to Supreme Court – powers of Court – power to remit – burden of proof – whether Court should remit

LEGISLATION:

Aboriginal Land Rights (Northern Territory) Act 1976 (Cth), s 4(1), s 10, s 20
Corporations Law, s 257H(3)
Interpretation Act, s 15(1), s 18, s 19
Law of Property Act, s 131
Mining (Gove Peninsula Nabalco Agreement) Ordinance 1968, s 6, s 11
Mining Act 1980, s 4(1), s 191, s 191(9), s 191(12)

Northern Territory (Self-Government) Act 1978, s 69(3), s 56, s 69(4)

Northern Territory (Self-Government) Regulations 1978, reg 4

Taxation (Administration) Act 1978, Division 8A of Part III, s 4, s 4(1), s 54(1), s 56C, s 56C(1), s 56K, s 56K(1), s 56M, s 56M(1), s 56N, s 56N(1), s 56N(1)(b), s 56N(2), s 56N(2)(b), s 56N(4), s 56P, s 56P(1)(d), s 56Q, s 56Q(2), s 56Q(3), s 56R(1), s 56R(2), s 94, s 96(1), s 102, s 105A(1)(b) , s 105A(3), s 105L, s 105M, s 105N(1)

CITATIONS:

Applied

Abrahams v Federal Commissioner of Taxation (1945) 70 CLR 23

Federal Commissioner of Taxation v Murry (1998) 193 CLR 605

Geita Sebea & Ors v The Territory of Papua (1941) 67 CLR 544

March v E & M H Stramare Pty Ltd & Anor (1990-1991) 171 CLR 506

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Radaich v Smith & Anor (1959) 101 CLR 209

Spencer v The Commonwealth (1907) 5 CLR 418

The Wik Peoples v The State of Queensland & Ors (1996) 187 CLR 1

Distinguished

Commissioner of State Revenue v Uniqema Pty Ltd (2004) 56 ATR 19

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Glenwood Lumber Co Ltd v Phillips [1904] AC 405

Kavalee v Burbidge & Ors (1998) 43 NSWLR 422

National Provincial Bank Ltd v Ainsworth [1965] AC 1175

R v Toohey; ex parte Meneling Station Pty Ltd (1984-1985) 158 CLR 327

Re BHP Billiton Petroleum Pty Ltd and Chief Executive Officer of Customs (2002) 69 ALD 453

Street v Mountford [1985] 1 AC 809

The Commissioner of Inland Revenue v Muller & Co's Margarine Ltd [1901] AC 217

Referred to

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Jennings Construction Ltd v Burgundy Royale Investments Pty Ltd (No 2) (1986-1987) 162 CLR 153

Jovista Pty Limited v Pegasus Gold Australia Pty Ltd & Ors (1999) 8 NTLR 171

McIntosh v Goulburn City Council (1985) 3 BPR 9367

Mercantile Credits Ltd v Shell Co of Australia Ltd (1975-1976) 136 CLR 326

National Australia Bank Ltd v Blacker & Anor (2000) 104 FCR 288

National Dairies WA Ltd v Commissioner of State Revenue (2001) 24 WAR 70

Newcrest Mining (WA) Ltd v The Commonwealth (1996-1997) 190 CLR 513

Pegasus Gold (Australia) Ltd v Metso Minerals (Australia) Ltd (2003) 16 NTLR 54

R v Tkacz [2001] 25 WAR 77

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REFERENCES:

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Shorter Oxford English Dictionary (3rd Ed) Vol 11

REPRESENTATION:

Counsel:

Appellant:	D Russell QC with B O'Loughlin
Respondent:	T Slater QC with T Anderson

Solicitors:

Appellant:	Clayton Utz
Respondent:	Department of Justice

Judgment category classification:	A
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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Alcan (NT) Alumina Pty Ltd v Commissioner of Taxes [2007] NTSC 09
No. LA 12 of 2006 (20608545)

BETWEEN:

ALCAN NORTHERN TERRITORY ALUMINA PTY LTD (ACN: 095 409 260)
Appellant

AND:

COMMISSIONER OF TAXES
Respondent

CORAM: MILDREN J

REASONS FOR JUDGMENT

(Delivered 15 February 2007)

Glossary of terms

AMP	AMP Life Ltd
Billiton	Billiton Aluminium Australia Pty Ltd
CSR	Colonial Sugar Refining Company Ltd
CSRI	CSR Investments Pty Ltd
GAL	Gove Aluminium Ltd
Nabalco	Nabalco Pty Ltd
SML	Special Mineral Lease 11
SPL	Special Purposes Lease
The 1968 Gove Ordinance	Mining (Gove Peninsula Nabalco Agreement) Ordinance 1968
The 1980 Act	Mining Act 1980
The Gove Agreement	Written agreement between Nabalco Pty Ltd and the Commonwealth of Australia dated 22 February 1968

The Gove Refining Operations..	Gove bauxite mine and Gove alumina refinery
The LRA	Aboriginal Land Rights (Northern Territory) Act 1976 (Cth)
The Mining Ordinance	Mining Ordinance 1939-1969 of the Territory
The relevant date	January 2001
The Self-Government Act	Northern Territory (Self-Government) Act 1978

Introduction

[1] In this case the appellant appeals from the decisions of the respondent made on or about 20 March 2006 disallowing the objections of the appellant against assessments of stamp duty made by the respondent on 16 November 2005, whereby amounts totalling $47,517,997 were assessed on the acquisition by the appellant of 70 per cent of the shares in Gove Aluminium Ltd (hereinafter called "GAL") from CSR Investments Pty Ltd (hereinafter called "CSRI") and the buy back by GAL of the remaining 30 per cent of the shares in that company held by AMP Life Ltd (hereinafter called "AMP").

[2] An appeal to this Court lies by virtue of s 105A(1)(b) of the Taxation (Administration) Act.

[3] An appeal to this Court is an appeal de novo: s 105A(3). Section 105L of the Act provides:

> "**105L. Grounds of appeal and response**
>
> (1) The taxpayer's grounds of appeal are not limited to the grounds on which the objection was made.

(2) The decision maker's response to the grounds of appeal is not limited to the reasons for disallowing the objection or allowing it in part only."

[4] Section 105M provides:

"**105M. Admissibility of new evidence**

(1) In hearing the appeal, the Court may admit any evidence that was not before the decision maker when making the decision being appealed against if satisfied the evidence is material to the decision.

(2) If the Court admits evidence under subsection (1), the Court must –

(a) adjourn the hearing; and

(b) direct the decision maker to reconsider the objection, having regard to that evidence and any other evidence obtained by the decision maker.

(3) However, subsection (2) does not apply if the decision maker requests the Court to continue to hear the appeal without the decision maker reconsidering the objection.

(4) In reconsidering the matter, the decision maker has the same powers the decision maker had when making the decision being appealed against.

(5) If, on reconsideration, the decision maker amends or varies the decision in the taxpayer's favour, the Court may order the taxpayer to pay all or a specified part of the decision maker's costs in the appeal if satisfied that it is fair to do so, having regard to the nature of the amendment or variation."

[5] The powers of the Court in determining the appeal are set out in s 105N(1). This confers wide powers on the Court to confirm the decision appealed against, to vary the decision appealed against, to substitute another decision that would have been available to the decision maker or the remit the matter to the decision maker for reconsideration.

Background facts

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

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

[8] The Gove Agreement was formally approved by the Mining (Gove Peninsula Nabalco Agreement) Ordinance 1968 ("the 1968 Gove Ordinance") which was assented to on 16 May 1968 and commenced on 29 May 1968. The Gove Agreement is attached to the 1968 Gove Ordinance as the First Schedule. Under the terms of the Gove Agreement it was provided inter alia that the Minister would grant a special mineral lease for a term of 42 years with a

right to renew for a further term of 42 years for the mining of bauxite on the Gove Peninsula and also that the Commonwealth would grant a number of special purpose leases for similar terms for the purpose of establishing a bauxite treatment plant, a township and other associated facilities.

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

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

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

company of Swiss Aluminium Australia Pty Ltd and CSR the parent company of GAL.

[12] In 1969 the Commonwealth granted to Swiss Aluminium Australia Pty Ltd and GAL a special mineral lease and a number of special purpose leases pursuant to the terms of the Gove Agreement. In exercise of its rights under the leases, Swiss Aluminium Australia Pty Ltd and GAL in joint venture continued to operate a mine, port and associated works on the leased land. Subsequently the shareholding in GAL became beneficially owned as to 70 per cent by CSRI and as to 30 per cent by AMP. On 25 June 1999 CSRI entered into a deed with Alusuisse of Australia Ltd, which was now the parent company of Swiss Aluminium Australia Pty Ltd, which was known as the Assumption Deed. By the terms of the Assumption Deed, Alusuisse of Australia Ltd and CSRI each covenanted with the other that it became a parent under the Parents and Subsidiaries Deed and assumed and agreed to be bound by all the terms, conditions, restrictions, covenants and obligations on the part of respectively Swiss Aluminium Ltd and CSR thereunder, referred to variously as the "Parents and Subsidiaries Deed" and "the Principal Deed" executed between those parties on 22 January 1969.

[13] On 3 July 2000, Billiton Aluminium Australia Pty Ltd ("Billiton") made an offer to acquire the share capital held in GAL by CSRI and on 4 July CSRI delivered to Alusuisse of Australia Ltd a complete copy of the offer pursuant to the provisions of the Parents and Subsidiaries Deed. The delivery of the Billiton offer by CSRI to Alusuisse of Australia Ltd

constituted an offer by CSRI to sell the share capital that it held in GAL to Alusuisse of Australia Ltd in accordance with cl 3(b)(ii)(B) of the Parents and Subsidiaries Deed. Subsequently, Alusuisse of Australia Ltd accepted the CSRI offer and nominated the appellant Alcan Northern Territory Alumina Pty Ltd to accept the offer as its nominee.

[14] On 30 January 2001 CSRI executed a share sale agreement pursuant to which 70 per cent of the share capital was transferred to the appellant. At the same time GAL entered into an agreement in writing with AMP pursuant to which GAL bought back the share capital held in it by AMP, pursuant to Part 2.4 of the Corporations Law. In consequence the appellant became the sole shareholder in GAL.

[15] The actual consideration paid by the appellant was US $275m for the CSRI interest and US $117.9m for AMP's shares, totalling US $392.9m. The acquisition price was adjusted by US $14.6m for working capital differences. Accordingly, the price paid to purchase CSRI's interest was US $285.2m and to purchase AMP's interest US $122.3m, making a total of US $407.5m, which at the prevailing Australian dollar / US dollar exchange rates translated to an adjusted Australian dollar acquisition price of AUD $740.1m. This information has been taken from a report of Mr Lonergan, the respondent's valuer and does not actually appear in any of the other documents tendered to the Court as far as I have been able to tell. Nevertheless, the case was argued on the basis that this information was correct and was not challenged by either party and I therefore accept it.

The assessment

[16] By letter to the appellant dated 16 November 2005, the respondent determined that the transaction involved relevant acquisitions by which the appellant acquired a majority and further interest in GAL for the purposes of Division 8A of Part III of the Taxation (Administration) Act 1978. The respondent advised that as the appellant had failed to prepare and lodge statements in relation to the transaction within the period provided by s 56K of the Act, a default assessment of its liability had been made and memoranda of the statements created under s 94 of the Act. Consequently the respondent assessed duty totalling $31,050,000 in respect of the transaction together with a penalty under s 96(1) of the Act in the amount of $16,467,997, a total of $47,517,997 which the respondent required to be paid by the 16 December 2005. On or about that date the appellant paid the amount of the assessed duty and the penalty.

[17] On or about 22 December 2005 the appellant lodged an objection pursuant to s 102 of the Act against the assessment. On or about 20 March 2006, the respondent dismissed the appellant's objection to the assessment and determined that the assessment was payable in accordance with its original terms.

Operations of the Gove joint venture

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

(a) The mine site which is part of Special Mineral Lease 11 (hereinafter called “SML 11”): this section of the special mineral lease contains an area of approximately 49,466 acres. Assets at the mine site include crushers, workshops, offices and the airport.

(b) Also as part of SML 11 there is a corridor of land comprising an area of 698 acres for the purpose of establishing, operating and maintaining a bauxite conveyor installation for the transportation of bauxite from the mine site to the bauxite treatment plant area. There is an 18 kilometre conveyor belt which transports crushed bauxite from the mine to the refinery and the bauxite export facilities.

(c) Thirdly, also as part of SML 11, there is a third area of land containing approximately 600 acres located near the wharf area which is used for the purpose of operating and maintaining the bauxite treatment plant and stock pile area, as well as office buildings and other buildings used or associated with the treatment plant.

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

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

(b) Special Purposes Lease No 214, which is for the purpose of establishing, operating and maintaining a township in connection with the mine;

(c) Special Purposes Lease No 215, which is for the purpose of establishing, operating and maintaining a construction camp on part of the land and works of sewerage treatment and lagooning, effluent disposal drainage, communications facilities and a premix concrete plant on another part of the land;

(d) Special Purpose Lease No 217, for the purpose of constructing a general cargo wharf with ancillary works and services and for use by the lessees as such;

(e) Special Purposes Lease No 249, for the purposes of establishing, operating and maintaining foreshore protection works, installations and facilities;

(f) Special Purposes Lease No 250, for the purpose of establishing, operating and maintaining an area for industrial operations providing for the establishment, operation, maintenance and servicing of the

neighbouring town of Nhulunbuy on Special Purposes Lease No 214 or for providing services for other operations under the Gove Agreement;

(g) Special Purposes Lease No 251, for the purpose of constructing, operating and maintaining communication facilities and supplies of water and electricity to the town reticulation systems and a sewerage treatment plant, etc;

(h) Special Purposes Lease No 253, for the purpose of installing, operating and maintaining necessary works, installations and facilities for discharging into Melville Bay of waters from cooling systems within the bauxite treatment plant, runoff from roof and surface catchments and from amenities established within the leased area, etc;

(i) Special Purposes Lease No 277, containing an area of a little in excess of one acre, for the purposes of establishing, operating and maintaining necessary works, installations and facilities for the taking and supplying of sea water from Melville Bay for use on other leased land granted to the lessees pursuant to the Gove Agreement, for cooling electrical generating and other plant, for disposing of red mud from the bauxite treatment plant and for cleaning and emergency purposes requiring the said water supply; and

(j) Special Purposes Lease No 403 comprising an area of 3,493 acres for the special purpose of disposing of red mud and other effluent and industrial processed waste from the bauxite treatment plant. This lease terminates on 29 May 2011 "or at any earlier time when a further special purposes lease in extension or substitution for the present special purposes lease is granted to the lessees pursuant to the Gove Agreement". This special purposes lease does not contain any option for renewal.

[20] The other leases are granted for a term of 42 years commencing from 30 May 1969 and have a right of renewal for a further 42 years. The only exception is Special Purposes Lease No 215 which is granted for a term commencing on 22 January 1969 and expiring on 21 January 1989. That lease has a right of renewal for a term not exceeding 20 years. The term of that lease has since been extended to the 20 January 2009.

Bauxite mining operations

[21] A good deal of SML 11 consists of a plateau which contains bauxite ore. The term "bauxite" refers to alumina bearing laterites. It is a relatively common material that usually forms blanket type surface deposits and is generally easy to extract. Gove bauxite is of good quality by Australian standards, but not by world export standards because it has a quite high silica content and low alumina content compared to most other bauxite exporters. It is also very high in organic carbon concentrates which

accumulate in the processing liquor during the refining processes and lead to processing problems, productivity losses and added refinery costs.

[22] Mining of the blanket type bauxite deposits at Gove is a simple process which involves the removal of vegetation and top soil and extraction by bull dozer and other machinery of the alumina bearing material. Front end loaders then load the bauxite onto large trucks which cart the bauxite to the crushing plant, consisting of a primary and a secondary crusher. The crushed bauxite is then sent 18.7 kilometres by a conveyor belt to be stacked at the refinery for use. Today, the bauxite is blended to ensure that average grades for silica and alumina are met. This is because even within the same deposit there is variation in the quality of the bauxite and bauxite grades are not homogenously distributed throughout the deposit. However as at the time of the acquisition, there was no attempt to blend the bauxite to produce a target grade.

[23] Bauxite production levels have increased significantly since commercial bauxite mining operations began in 1971.

[24] Based on the refining capacity as at 2001 and assuming that the full export entitlement would be used to 2011 when the entitlement expires, the bauxite was estimated to be exhausted by 2035.

[25] There is no guarantee that the Northern Territory will approve the export of bauxite after the 29 May 2011: see letter from the Minister for Mines and Energy dated 6 September 1990.

[26] Alumina is extracted from the bauxite by a process invented by Carl Joseph Bayer in 1888. The process can be divided into four stages:

(a) Grinding and digestion – the first stage is that the bauxite ore is milled and then mixed with caustic soda causing a chemical reaction. This reaction is conducted at pressure and high temperature. This causes the alumina in the bauxite to dissolve into the liquor to form a solution, which contains the alumina.

(b) Decantation and settling – the second stage is the removal of solids from the liquor. These solids in general terms are sand and red mud, which is the fine waste solid material (primarily sodium aluminium silicate precipitate from digestion, quartz, iron oxide and titanium oxide). This is carried out by first pumping the liquor through a series of tanks to allow the heavier solids to settle out of the liquor. Some filtering is also conducted at this stage.

(c) Precipitation and crystallisation – the remaining liquor is a solution of alumina and caustic soda. This is cooled and seeded with alumina trihydrate crystals to start the precipitation process whereby the alumina precipitates from solution in the form of alumina trihydrate.

(d) Calcination – the alumina trihydrate is washed and filtered prior to calcination. The alumina trihydrate, which is a damp mass of crystals at this stage, is heated to 1100° Celsius to drive off ‘free’ water and also to release chemically bound water. The end product is alumina.

[27] The waste products, including the red mud, undergo a final washing stage which produces a high underflow density mud which is pumped at high pressure to the residue disposal area (red mud ponds). Approximately one tonne of red mud and sand combined (on a dry basis) is generated per tonne of alumina produced. This results in, currently, an annual amount of roughly two million tonnes (dry basis) of red mud and sand which is stored in the residual disposal area. This area is contained within Special Purposes Lease No 403. Obviously the ability to dispose legally of the red mud is critical to the operation of the alumina refinery.

[28] The finished product – the alumina – is then transported from the refinery by conveyor belt to the wharf where it is bulk loaded onto large vessels. Some bauxite is also exported from the wharf area.

The issues

[29] The ultimate issue for the Court is whether the appellant is liable to stamp duty in respect of either or both of the two transactions in 2001 involving the issued capital of GAL and, if so, in what amount. Those transactions were the acquisition of 70 per cent of the issued capital from CSRI and the subsequent buy-back by GAL of the remaining 30 per cent of its shares from AMP, as a result of which it became a company wholly owned by the appellant.

[30] The relevant statutory scheme is to be found in the following provisions of the Taxation (Administration) Act:

"**4. Interpretation**

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

"land" means land in the Territory and includes –

(a) a lease of land;

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

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

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

(a) …

(b) …

(c) an option to renew a lease;

56C. Interpretation

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

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

(a) the allotment or issue of a share to the person or another person, not being the issue of a share to a member on registration of the corporation;

(b) the redemption, surrender or cancellation of a share by the corporation or by the person or another person; and

(c) the variation, abrogation or alteration of a right pertaining to a share, …

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

56K. When statement to be lodged

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

56M. Statement chargeable with duty

(1) A statement lodged under section 56K is chargeable, in accordance with section 56R, with duty at the rate provided for in item 5 in Schedule 1 to the *Stamp Duty Act* calculated …

56N. Corporations to which this Division applies

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

(a) a corporation, other than a corporation shares in the capital of which are listed on a recognized stock exchange within the meaning of the *Securities Industry (Northern Territory) Code*; and

(b) a land-holder within the meaning of subsection (2).

(2) A corporation is a land-holder for the purposes of this Division if, at the time of a relevant acquisition –

(a) it is entitled to land in the Territory and the unencumbered value of the land is not less than $500,000 or it is entitled to land in the Territory as a co-owner of the freehold or of a lesser estate in the land and the value of the whole of the freehold or lesser estate is not less than $500,000; and

(b) the value of all land to which the corporation is entitled, whether in the Territory or elsewhere, (other than primary production land) is 60% or more of the value of all property to which it is entitled, other than property directed to be excluded by subsection (4) but including primary production land. …

(4) There shall not be included, for the purpose of calculating the value of property under subsection (2)(b), any property of a corporation or a subsidiary within the meaning of subsection (5) that is –

(a) cash or money in an account at call;

(b) a negotiable instrument or money on deposit with any person;

(c) money lent by the corporation or a subsidiary to a person …

56P. Meaning of relevant acquisition

(1) An acquisition by a person is a relevant acquisition for the purposes of this Division –

(a) where it –

(i) is an acquisition of an interest that alone constitutes a majority interest in the corporation …

other than an interest acquired –

(c) before 17 August 1988; or

(d) as a result of an agreement entered into before 17 August 1988.

56Q. Meaning of "interest", "majority interest" and "further interest"

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

Relevant acquisition

[31] The appellant contends that the transactions occurred within the framework of contractual rights which existed before 17 August 1988. It was submitted that s 56P excludes from the definition of a relevant acquisition for the purposes of Division 8A an acquisition of an interest acquired as a result of an agreement entered into before 17 August 1988. It was submitted that the words "as a result of" in s 56P(1)(d) of the Act should be construed as taking up the common law practical or commonsense test of causation explained by the High Court in *March v E & M H Stramare Pty Ltd & Anor* (1990-1991) 171 CLR 506. Counsel for the respondent did not submit otherwise. Both counsel submitted that it was not sufficient that "but for" the 1969 deeds the parties to the 1999 deed would not have adopted burdens expressed in the terms of the 1969 deed. On the other hand I accept the argument of counsel for the appellant that the expression "as a result of" does not mean that the acquisition of the interest must be solely the result of

an agreement entered into before 17 August 1988. As was observed by Mason P in *Kavalee v Burbidge & Ors* (1998) 43 NSWLR 422 at 433, "it should not be overlooked that the expression is 'as a result', not 'the result'."

[32] The question whether or not the acquisition of the shares is as a result of an agreement entered into before 17 August 1988 is a question of fact to be determined by applying commonsense to the facts of each case. In my opinion the interest was not acquired as a result of an agreement entered into before 17 August 1988, but rather it was acquired as a result of the invocation of rights under the 1999 Assumption Deed by which the parties to that Deed bound themselves to new rights and obligations which incorporated by reference the terms of the earlier Deed, but which were first created in 1999 and not in 1969. Moreover, the appellant was not bound to acquire the interests under either the 1969 Deed or the 1999 Assumption Deed. The appellant was not even a party to the 1999 Assumption Deed, but was merely the nominee of another party. Neither it nor the party which nominated it were bound to acquire the shares; Alusuisse Group Ltd which nominated the appellant and invoked the rights to have the appellant acquire the capital of GAL merely exercised a right; it was under no obligation to exercise that right. Even if it could be said that the appellant acquired the shares as a result of the 1999 Deed (and I do not think it can be so said) it is clear beyond argument that it did not acquire the shares as a result of 1969 Deed. I would therefore reject the first of the appellant's contentions.

The share buy-back

[33] The next question is whether for the purposes of s 56N(1)(b) as a consequence of the share buy-back, the appellant acquired a further interest in GAL.

[34] The appellant contends that this transaction does not attract stamp duty because it was not an "acquisition of a further interest" and therefore was not a "relevant acquisition".

[35] The respondent contends that the purchase of the CSRI shares and the buy-back of AMP shares were elements of a single acquisition by the appellant which resulted in the appellant becoming the sole shareholder in GAL with the consequence that the whole transaction attracted stamp duty.

[36] Duty is chargeable under s 56R(1) on the unencumbered value of the land in the Territory to which the corporation is entitled where s 56M(1) applies. I assume that this is the provision relied upon by the respondent, there being no other provision which would enable an assessment to be based upon the whole of the unencumbered value of the land. Section 56M(1) provides that "a statement lodged under s 56K is chargeable …" etc. Section 56K requires the lodging of a statement in respect of an acquisition "where by a relevant acquisition a person acquires a majority interest or a further interest in a corporation to which this subdivision applies …".

[37] Assuming that GAL is a "corporation to which this subdivision applies", the appellant clearly became liable to lodge the statement under s 56K(1)

because it acquired a majority interest of the shares in GAL by the purchase from CSRI. It is not to the point whether or not it also acquired a further interest in GAL by the share buy-back, as far as s 56K(1) is concerned. For the purposes of s 56K a person acquires a majority interest in a corporation if the person acquires a shareholding in the corporation that would entitle the person to a distribution of the property of the corporation to an extent of 50 per cent ***or greater*** of the value of the property distributable to all of the holders of shares in the corporation on a winding up: see s 56Q(2).

[38] If the appellant acquired a shareholding which entitled it to a distribution to the extent of 100 per cent of the value of the property on a winding up, it still acquired a "majority interest".

[39] Counsel for the respondent submitted that it is not the acquisition of shares held by AMP that attracted the liability to pay duty; it was the acquisition of the shares held by the appellant at the conclusion of the transaction that meets the test in s 56Q. In his submission, the purchase of the CSRI shares and the buy-back of the AMP shares were elements of a single acquisition by the appellant, which resulted in the appellant being the sole shareholder in GAL; it thereby acquired a shareholding which entitled it to sole participation in a distribution of the property of GAL.

[40] The definition of "acquire" in s 56C(1) includes the redemption, surrender or cancellation of a share or the variation, abrogation or alteration of a right to a share. In January 2001, the Corporations Law s 257H(3) provided that

where shares have been bought back, they are cancelled immediately after registration of the transfer.

[41] There is no doubt that the buy-back is an integral part of the acquisition of GAL's shares by the appellant: see clauses 3.1, 2.1(d), 6.5 and the definitions of "AMP Completion" and "Buy-Back Agreement" in clause 1.1 of the share sale agreement between CSRI and the appellant; and clause 6.1 of the Buy-Back Agreement. I agree with counsel for the respondent that this is one transaction which resulted in the acquisition of the entire ownership in the company by (1) an acquisition of CSRI's shares and (2) an acquisition of AMP's shares by the cancellation of its shares as a result of the buy-back.

[42] The submission of counsel for the appellant rested upon the argument that the buy-back was a separate transaction which did not amount to the acquisition of a further interest in GAL. The appellant's argument drew attention to s 56Q(3) which relevantly provides that:

> "… a person acquires a further interest in a corporation if the person, or the person and a related person –
>
> (a) has a majority interest in the corporation;
>
> (b) in acquiring that majority interest became subject to section 56K; and
>
> (c) acquires a further shareholding in the corporation …"

[43] Section 56C(1) relevantly provides that:

> "… "share" means a share in the share capital of a corporation … and "shareholding" has a corresponding meaning."

[44] I accept the argument of counsel for the appellant that the appellant has not acquired a further shareholding in GAL within the meaning of s 56Q(3), but, in my opinion, that does not matter. On the assumptions made, the transaction falls within s 56R(2) of the Act and the relevant proportion for the purposes of s 56R(2) is 100 per cent of the distributable value. This ground of appeal is therefore dismissed.

Is GAL a corporation to which Division 8A of the Act applied?

[45] It is not in contention that GAL was a "corporation" within the meaning of the Corporations Law (see s 56C(1) definition of "corporation"). The question is, however, whether, in terms of s 56N(1), GAL is a "land-holder" within the meaning of subsection (2). If it is, the answer is 'Yes'. If not, Division 8A does not apply to it.

[46] In order for GAL to be land-holder there must be proof that:

(a) GAL was entitled at the relevant time to "land in the Territory" as a co-owner of the freehold or of a lesser estate in the land.

(b) The value of the freehold or lesser estate was not less than $500,000.00.

(c) The value of all land to which GAL was entitled is 60 per cent or more of the value of all property to which it is entitled except property excluded by s 56N(4).

Was GAL entitled to "land in the Territory" as a co-owner of a lesser estate in the land?

[47] At the relevant time, GAL held a 30 per cent interest in SML 11 as a tenant in common with Swiss Aluminium Australia Pty Limited (now Swiss Aluminium Australia Ltd, ACN 000 520 249). It also held as a tenant in common with Swiss Aluminium Australia Pty Limited a 30 per cent interest in each of the Special Purposes Leases.

[48] It was submitted by counsel for the appellant that the Special Purposes Leases are "land in the Territory" but that SML 11 is not. I have previously set out the definitions of "land" and "lease". First, it was contended that SML 11 is not "a mining tenement" under the Mining Act. It was not contended by the respondent otherwise, but it is still necessary to consider whether this contention is correct. According to paragraph 6(k) of SML 11:

> "the provisions of the Ordinance and of the Regulations so far as they relate to special mineral leases granted under the Ordinance and are not inconsistent with this Agreement and/or this lease shall apply to this lease as if those provisions were incorporated in this lease."

[49] Clause 7(1) of SML 11 provides that "the Ordinance" means the Mining Ordinance 1939-1969 of the Territory (hereinafter called "the Mining Ordinance"). Clause 7(4) provides that "any reference to an Ordinance means that Ordinance as amended from time to time or any

Ordinance in substitution for that Ordinance". The heading to Special Mining Lease No 11 refers to both the Mining (Gove Peninsula Nabalco Agreement) Ordinance 1968 and to the Mining Ordinance 1939-1967. The words of the demise on page 6 of the Lease also provide:

> "… but in respect of the whole of the leased land upon and subject to the Agreement and to the Ordinance except in so far as the provisions of the Ordinance are inconsistent with the Agreement …"

[50] Section 6 of the 1968 Gove Ordinance provides that the Minister may grant (to Nabalco) such leases "… as are required to be granted to the Company for the purposes of giving effect to clause 4 of the Agreement" (clause 4 of the Agreement requires the Minister to grant the special mineral lease).

[51] Section 11 of the 1968 Gove Ordinance provides that:

> "Subject to this Ordinance and the provisions of the Agreement –
>
> (a) the provisions of the Mining Ordinance 1939-1967 and regulations made under that Ordinance apply to and in relation to a special mineral lease granted pursuant to the Agreement as if it were a special mineral lease granted under that Ordinance."

[52] The clear inference from these provisions is that SML 11 was granted pursuant to the Agreement and pursuant to the powers conferred upon the Minister by s 6 of the 1968 Gove Ordinance and not pursuant to any powers conferred in the Mining Ordinance, although SML 11, once granted, was subject to the provisions of the Mining Ordinance to the extent provided by s 11 of the 1968 Gove Ordinance. This inference is confirmed by an

examination of the provisions of Division 2A of the Mining Ordinance which provided for a procedure for and circumstances under which the Minister might grant a special mineral lease. It would not have been necessary for the passage of a special ordinance if the procedures in Division 2A of the Mining Ordinance had been followed.

[53] The Mining Ordinance was repealed by the Mining Act 1980 (the 1980 Act) which came into force on 1 July 1982. Section 191 of the 1980 Act is a savings and transitional provision which continues in force mining interests granted under the Mining Ordinance. However, s 191 does not specifically deal with the special mineral lease granted under the 1968 Gove Ordinance: s 191(12) deals with special mineral leases "granted under the repealed Act", the definition of which in s 4(1) does not include that Ordinance. It is true that by the terms of the special mineral lease, paragraphs 6(k) and 7(1) (see above), the provisions of the 1980 Act apply to SML 11 because the 1980 Act is an Act in substitution for the 1939 Ordinance. However, for reasons which are dealt with below (paras [85] to [86]) in my opinion s 191(9) of the 1980 Act continued SML 11 as if the 1980 Act had not come into operation.

[54] In those circumstances, SML 11 is not a mining tenement granted under the 1980 Act; nor is it a mining tenement which is deemed to have been granted under the 1980 Act. The question then is whether it is nevertheless "a mining tenement under the Mining Act", even though not granted or deemed to have been granted under it, if otherwise the terms of the Act

apply to it by force of the provisions of SML 11 itself (I note in this respect that these provisions are contractual only as s 11 of the 1968 Gove Ordinance does not apply any Act in substitution for the 1939 Ordinance in the same way as paragraph 7(1) of SML 11 does). The word "under" has a variety of possible meanings: "in accordance with"; "pursuant to"; "by virtue of"; "by": see *Energy Resources of Australia Ltd v Federal Commissioner of Taxation* (2003) ATC 4024; 52 ATR 120 at [37] per Lindgren J. In *R v Tkacz* [2001] 25 WAR 77 at [24] Malcolm CJ said:

> "While the word 'under' has a primary meaning in the sense of denoting a position beneath or below something which is overhead or above or covered by it, it also has a meaning as an adverb implying covered by or in accordance with some regulative power or principle: *Shorter Oxford English Dictionary* (3rd Ed) Vol 11, 2290".

[55] Whilst it might be said that SML 11 is "covered by" the 1980 Act, in the sense that as a matter of contract certain provisions of the 1980 Act apply to it, I do not think it can be said it is "covered by" the 1980 Act itself, as plainly SML 11 is "under" the 1968 Gove Ordinance. Alternatively, the contractual provision no longer applies because of s 191(9) of the 1980 Act. In those circumstances I consider that both counsel are correct: the SML is not within para (b) of the definition of "land" in s 4(1) of the Taxation (Administration) Act, i.e. it is not "a mining tenement under the Mining Act".

[56] Secondly, counsel for the appellant submitted that SML 11 was "a lease of land" within the meaning of the definition of "land" and that therefore only

the original term of 42 years applied, the right to renew being excluded by the definition of "lease". Section 54(1) of the Act defines "lease": "'lease' includes a lease granted under an Act …". If SML 11 is a 'lease' it is clearly "a lease granted under an Act" in that SML 11 was granted pursuant to s 6 of the 1968 Gove Ordinance ("Act" includes a Northern Territory Ordinance, vide s 18 of the Interpretation Act).

[57] The question then is whether SML 11 is a "lease". Although mining leases are not always leases as that term is understood (see *Newcrest Mining (WA) Ltd v The Commonwealth* (1996-1997) 190 CLR 513 at 616 per Gummow J), and may only be a profit à prendre, whether or not a particular instrument is a lease over the surface of the land as well as a profit à prendre is a matter of the construction of the terms of the grant. The four essentials for the creation of a lease are (1) the premises must be sufficiently defined; (2) there must be the grant of a right to exclusive possession of the premises; (3) the lease must be for a certain duration; and (4) the requisite formalities must have been observed. SML 11 certainly sufficiently defines the premises, there is no question of uncertainty of duration and there is no question that the relevant legal formalities have been complied with. Clearly the draftsman of SML 11 has used words of demise which confer possession over the whole area of the surface of the land and, in the case of "the land firstly described" in the lease, there has also been a demise of "all those mines, veins, seams, lodes and deposits of bauxite and other ores…". The only question is whether there has been a grant of a right of exclusive

possession. First, the grant is subject to certain reservations to the Commonwealth which are set out in the lease which include the following:

(1) the right of the Commonwealth, its servants and agents to enter and maintain and do work upon the air strip or any public roads subsisting over the land;

(2) certain rights of ingress, egress and regress which have been reserved to the Commonwealth, its servants and agents and to members of the staff of the Mission at Yirrkala (as defined) to enter the leased land (except parts which are designated as 'restricted areas') in respect of 'the land first described'; and

(3) certain rights to require the lessees to grant easements in connections with future uses of adjacent land.

[58] Secondly, the lease includes a covenant by the lessees to grant to certain Aboriginals the right to enter, leave and move across the land. Thirdly, the lease contains a covenant to permit the Commonwealth, its servants and agents to enter the land secondly and thirdly described for certain specific purposes. Fourthly, the lease contains a covenant to provide certain points under the bauxite conveyor installation to allow persons, vehicles and animals to cross over "the land secondly described".

[59] It is clear from an examination of those provisions that the demise intends to give exclusive possession of the land to the lessees. In *Glenwood Lumber Co*

Ltd v Phillips [1904] AC 405 at 408, Lord Davey, delivering the advice of the Privy Council, said:

> "If the effect of the instrument is to give the holder an exclusive right of occupation of the land, though subject to certain reservations or to a restriction of the purposes for which it may be used, it is in law a demise of the land itself".

[60] So far as the covenants to allow certain persons including the Commonwealth's own servants and agents access to parts of the land for certain defined purposes are concerned, it is clear that these covenants do not effect the demise of exclusive possession to the lessees, being, as they are, mere covenants to be landlord: see also *Radaich v Smith & Anor* (1959) 101 CLR 209 at 222 per Windeyer J; *Street v Mountford* [1985] 1 AC 809; *The Wik Peoples v The State of Queensland & Ors* (1996) 187 CLR 1 at 73-76 per Brennan CJ. Further, the use of the expression "demise" and "lease" and the obligation not to part with possession of the lease contained in paragraph 16 of the lease, all point to exclusive possession of the leased area being granted to the lessees (with the possible exception of those areas which are defined as public roads and the air strip).

[61] I conclude therefore that subject to these possible exceptions SML 11 is a "lease" within the ordinary meaning of that term. Mr Slater QC for the respondent did not contend otherwise. His contention is that irrespective of whether or not it is a lease, it is "land" and because the definition of "land" in s 4(1) "means land in the Territory and includes a lease of land…" it is not necessary to rely on the extension to meaning affected by the inclusory

paragraphs of the definition. I accept that SML 11 falls within the meaning of "land" as that word is defined by s 19 of the Interpretation Act: see also *Jennings Construction Ltd v Burgundy Royale Investments Pty Ltd (No 2)* (1986-1987) 162 CLR 153 at 162-163; *Jovista Pty Limited v Pegasus Gold Australia Pty Ltd & Ors* (1999) 8 NTLR 171 at pp 204, 207. Even though leases are in law personalty, they have long been regarded as interests in land: see Megarry & Wade, *The Law of Real Property*, 4th edn, p 11. I accept also the submission of Mr Slater QC that a covenant to renew runs with the land and with the reversion and is an incident of the lease which directly affects the nature of the term itself: *Mercantile Credits Ltd v Shell Co of Australia Ltd* (1975-1976) 136 CLR 326 at 336, 337-338, 339, 334-345, 352. That being so, why is it that the definition of "land" in s 4(1) of the Taxation (Administration) Act provided that "'land' means land in the Territory… and includes a lease of land…"?

[62] In my opinion, the word "land" in the definition is used in two different senses. The context reveals that in some cases it refers to estates or interests in land and in others it refers to the physical entity itself, e.g. when it refers to a "fixture to land" it must be referring to the physical entity. However, as I have already indicated, the expression "land in the Territory" in the definition refers to interests in land. If so, there would be no need for the definition to include 'a lease of land' as plainly a lease of land is already "land". This is so whether or not the lease is a lease granted under an Act, a sub-lease or an agreement for lease or sub-lease: see the definition of

"lease". The purpose, it seems to me, of these definitions, is to exclude from what is "land" those things which are excluded from the definition of "lease" which, relevantly to this case, means that the options to renew are not part of the lease and must be ignored. Otherwise there is no work to do for the words "includes a lease… but does not include…" etc in the definition of "lease" and no work for the words "includes a lease of land" in the definition of "land". The structure of the definitions is the same as if it had said, "'animals' means animals in the Territory and includes cats but does not include Manx cats." There is no doubt that in such a case the draftsman intended that, although Manx cats were animals, they were not 'animals' for the purposes of the definition: see *Re BHP Billiton Petroleum Pty Ltd and Chief Executive Officer of Customs* (2002) 69 ALD 453 at 472, para [52]. The result is that the option to renew is not "land" as defined. The same conclusion applies to the options to renew the Special Purposes Leases.

What is the consequence of the exclusion of the options from "land"?

[63] First, it seems to me that the exclusion of the options from what is "land" will affect the land-rich ratio in s 56N(2) of the Act, as clearly the options and other rights to renew have a value.

[64] Further, it seems to me that the dutiable value is affected. Section 56R(1) provides that "duty is chargeable… on the basis of the unencumbered value… of the land in the Territory to which the corporation is entitled".

It is my opinion that "land" in s 56R(1) means "land" as defined by s 4(1) notwithstanding the use of the expression "land in the Territory".

There is no right to renew Special Purposes Lease 403

[65] An alternative argument advanced by the appellant was that because there was no right to renew SPL 403, the land in fact had a limited or lesser value. I will consider this argument in case I am wrong in my conclusions so far.

[66] By its terms SPL 403 expires on 29 May 2011. There is no covenant for renewal of this lease contained in the lease itself. This lease is granted for the purpose of receiving the residue and waste products from the refinery. It is critical to the refinery's operations. Without a place to deposit the waste products the refinery could not operate. There is no other land which the appellant has which permits the deposit thereof, apart from SPL 277 which is only a little over one acre in area and of no commercial use for this purpose. If there is no right to renew SPL 403, the value of the leases (assuming contrary to my finding that the value includes the options to renew) must be affected, because all that would be able to be done after 2011 is to mine and export bauxite. There is also a difficulty with the right to export bauxite which I will also need to consider later.

[67] The Nabalco Agreement contains a provision (clause 4(4)) as follows:

> "The Minister shall grant to the Company, upon and subject to appropriate terms and conditions, Special Purposes Leases of such land as is reasonably required by the Company to establish a township and to dispose of red mud on the Gove Peninsula in connexion with its mining operations under this agreement."

[68] Assuming that this provision is enforceable, it is submitted that the Commonwealth cannot now provide a replacement lease and the Territory is under no obligation to do so. It is important to note that the uncontested evidence, which I accept, is that the existing capacity of SPL 403 to receive waste products will become exhausted by 2011, so that a new lease located near the vicinity of the refinery will become necessary.

[69] The matter is further complicated by the fact that all of the land surrounding the appellant's land is Aboriginal land granted under s 4(1) and s 10 of the Aboriginal Land Rights (Northern Territory) Act 1976 (Cth) (the LRA) (see Schedule 1 "Arnhem Land (Mainland)). By s 10(2) and s 10(3), the land which comprises the appellant's leases has been granted to the relevant Land trust to be held in escrow until the appellant's interests have come to an end. This obviously makes the granting of new leases whether inside or outside of the present leased areas something which cannot be achieved unilaterally by executive grant (whether by the Commonwealth or by the Northern Territory). However, for the reasons discussed below, the position so far as special purposes leases are concerned is now governed by s 20 of the LRA. The result is that after SPL 403 expires, to the extent that the appellant has the right to a Special Purposes Lease for waste products under clause 4(4) of the Nabalco Agreement, the appellant can now enforce those rights against the relevant Land Trust. In the case of SPL 403 the statutory right to the grant of a lease in the future over unspecified land cannot, per se, be land

(in the broader sense), as the right does not run with any particular interest in land or with any definable area of land.

[70] However, the fact that the appellant has what appears to be a legally enforceable right to a further lease to enable it to continue its refining operations means that, if I am wrong about the effect of the definition of "land" under s 4(1) of the Act and "land" includes the options to renew, the fact that SPL 403 is not renewable and the appellant's statutory rights are not land in the broader sense must affect the valuations to be given to the leases.

Are the rights to renew the leases still enforceable?

[71] A further alternative argument submitted by the appellant was that the rights of renewal contained in the leases were no longer enforceable. I will consider this argument also in case the conclusions I have reached so far are wrong. The argument was that since the grant of self-government by the Northern Territory (Self-Government) Act 1978 (the Self-Government Act), the covenant to renew amounts only to a contractual right against the relevant Commonwealth Minister which he is unable to perform. If that be so (notwithstanding s 131 of the Law of Property Act) so far as the special purposes leases are concerned, the appellant has a statutory right to a further lease or leases from the relevant Land Trust under s 20 of the LRA which provides as follows:

"20. (1) Where an agreement entered into by the Commonwealth before the commencement of this section gives a person an entitlement, in certain circumstances, to the grant of a lease under the *Special Purposes Leases Ordinance* 1953 of the Northern Territory, as amended from time to time, of land in Schedule 1, that agreement shall be taken to provide that, after the vesting in a Land Trust of an estate in fee simple in the land, the lease to which the person is to become so entitled in those circumstances shall be a lease granted by that Land Trust in accordance with this section, being a lease under which that person and the Land Trust have rights and obligations that are as near as practicable the same as the rights and obligations that would have been applicable to that person and the Crown, respectively, under a lease from the Crown granted in accordance with the agreement.

(2) Where a person, who by virtue of sub-section (1), has become entitled to the grant of a lease of land by a Land Trust has informed the Land Council for the area in which the land is situated that he requires the lease, the Land Council shall –

(a) negotiate with him with respect to the terms and conditions of the lease; and

(b) if agreement is reached on terms and conditions, direct the Land Trust to grant the lease on those terms and conditions;

and the Land Trust shall comply with that direction.

(3) Where the Minister is satisfied that –

(a) a Land Council has refused, or is unwilling, to negotiate with respect to the terms and conditions of a lease to which a person has become entitled by virtue of sub-section (1); or

(b) the Land Council and that person cannot agree on the terms and conditions of the lease;

the Minister, may, after consultation with the Land Council and with the person, appoint an Arbitrator, being a person whom the Minister considers to be in a position to deal with the matter impartially, to determine terms and conditions of the lease that, in the opinion of the Arbitrator, should be acceptable to the Land Council and the person.

(4) Where the Arbitrator has determined terms and conditions of a lease under sub-section (3) and the person entitled to the lease is willing to enter into that lease on those terms and conditions, the Land Council shall direct the Land Trust in which the land is vested to grant the lease on those terms and conditions.

(5) Where the Minister is satisfied that a Land Council has refused, or is unwilling, to give a direction in compliance with sub-section (2) or (4) or a Land a Trust has refused, or is unwilling, to comply with such a direction, the Minister may, in the name of, and behalf of, the Land Trust, grant a lease in accordance with the direction that should have been, or has been, given."

[72] In my opinion so far as the special purposes leases other than SPL 403 are concerned, the right conferred by s 20 of the LRA is a right to property and is not a mere personal right. In order to be property, it must satisfy the four criteria expressed by Lord Wilberforce in *National Provincial Bank Ltd v Ainsworth* [1965] AC 1175 at 1247-1248 approved by Mason J in *R v Toohey; ex parte Meneling Station Pty Ltd* (1984-1985) 158 CLR 327 at 342-343:

> "Before a right or an interest can be admitted into the category of property, or of a right affecting property, it must be definable, identifiable by third parties, capable in it nature of assumption by third parties, and have some degree of permanence or stability."

[73] Statutory rights have been held to be property: see, for example, *Commonwealth of Australia v Western Mining Corporation* (1996) 136 ALR 353. Although in this case the right conferred by s 20 is a right which is 'as near as practicable' the same as the rights and obligations that would have been applicable to that person and the Crown, in the case of a right to renew the lease on the same terms for a further term there would appear to be no lack of definition. The other criteria appear to have been met. In my opinion, the right to renew contained in the leases is not a mere personal right as the appellant contends and therefore it is an incident of the special purposes leases which directly affects the nature of the terms itself and are therefore land in the broader sense.

Is the right to renew SML 11 enforceable?

[74] However, the position with respect to SML 11 is different because it is not a lease under the Special Purposes Leases Ordinance 1953 and there is no provision in the LRA, the equivalent of s 20 of the LRA which applies to it.

[75] It was further submitted by counsel for the appellant that the right to renew SML 11 was no longer enforceable. In view of the conclusion I have reached in para [62] that the right to renew is not "land" as defined it is not strictly necessary to consider this argument, but I will deal with it in case the conclusions I have so far reached are wrong.

[76] In my opinion, the option to renew SML 11 is enforceable. Section 69(3) of the Self-Government Act provides that "all interests in land in the Territory

held from the Commonwealth immediately before the commencing date are, by force of this section, held from the Territory on and after that date on the same terms and conditions as those on which they were held from the Commonwealth". Section 56 of that Act defines "interest" extremely broadly. I have no doubt that SML 11 is an interest in land and clearly the covenant to renew is an interest in land for the reasons previously discussed. Consequently, notwithstanding that the fee simple is held in escrow for the relevant Land Trust under s 10(2) of the LRA, the estate or interest of the appellant would continue upon renewal, notwithstanding that in legal theory a new lease comes into being, because the option is itself an interest in land in the broader sense and therefore not all of the estates or interests in the land have come to an end within the meaning of s 10(2) of the LRA. As s 69(4) of the Self Government Act also transferred the Commonwealth's interests in the minerals to the Territory, there is no substance to this submission.

The effect of non-renewability of SPL 403 on the valuations

[77] A further argument put by counsel for the appellant concerns the effect on the valuations of the non-renewability of SPL 403. I have already pointed out that the appellant has a statutory right to a new lease under s 20 of the LRA. I acknowledge however that s 20 is not free from difficulties. Assuming that these difficulties can be overcome, there is no evidence that there is any land in the surrounding land near the refinery suitable for the deposit of waste products. It is not a purpose of any of the other special

purposes leases (except the very small SPL 277) as a place to dispose of red mud.

[78] In those circumstances, it cannot be assumed that refinery operations are able to be continued past 2011. There is no evidence that, as at 2001, there was any particular degree of likelihood that those problems could be overcome. At best, there was (and still is) no more than a hope, based on the consideration that unless the problem is solved, the refinery will have to close and there is likely to be an effort made to prevent that from happening. In these circumstances, the only value that can be placed on the possibility that the refinery could still be in business after 2011 is the value of that chance. The evidence led so far does not enable me to arrive at a value of that chance, assuming it has a value at all.

The right to export bauxite

[79] If the refinery were to close, the mine itself could still continue to operate and, subject to market forces, export the bauxite elsewhere. However, the right to export bauxite also expires in 2011 with no right of renewal: see para [26] above. It therefore cannot be assumed that even mining operations will continue beyond that time. In order for bauxite exports to continue beyond that date, the appellant would need to obtain the approval of the relevant Minister under clause 1(o) of SML 11. I note in this regard that it is clear that as at 2001 the relevant Minister having Ministerial responsibility for the 1968 Gove Ordinance was the Minister responsible for mining and

minerals in the Northern Territory vide reg 4 of the Northern Territory (Self-Government) Regulations 1978. Nevertheless, there is still a question whether "the Minister" referred to in clause 1(o) of SML 11 is the relevant Territory Minister because, to the extent that the rights and obligations of the parties to SML 11 are purely contractual, there is doubt as to whether the Commonwealth's powers have been transferred to the Territory. There has been no such transference occasioned by the Northern Territory (Self-Government) Regulations 1978. It is not necessary to decide this question. There is no **right** to export bauxite past 2011 which runs with the land and it is therefore not "land" as defined by the Taxation (Administration) Act.

Conclusions as to the options

[80] I accept the argument of the appellant that, to the extent that a value is able to be put on the possibility of mining and refinery operations continuing past 2011, the land value must take into account the matters to which I have referred. This could well effect the calculation of the land-rich ratio (see above).

Fixtures

[81] It was contended by counsel for the appellant that the property, plant and equipment items (PPE) on the SML and SPLs are, for the most part, capable of separate removal and sale as an economic proposition, were always intended to be so removed and retained their character as chattels. It was contended by counsel for the respondent that the PPE, except for loose items

and motor vehicles not fixed to the soil, were fixtures and therefore part of the land. So far as the buildings which are situated on the Special Purposes Leases are concerned, it was submitted by the appellant that these Leases were not worth anything because neither valuer who gave evidence had attributed any value to these leases; and therefore whether any buildings on these Leases (including SPL 214 which comprises the Town of Nhulunbuy) is or is not a fixture is of no importance.

[82] The question of what is or is not a fixture, whether on a mining lease or any other kind of lease is a question of fact which depends, inter alia, upon the intention of the joint venturers looked at objectively at the time when the items were placed or fixed into position: see for example *McIntosh v Goulburn City Council* (1985) 3 BPR 9367 at 9374; *Eon Metals N L v Commissioner of State Taxation (WA)* (1991) ATC 4841, per Ipp J, applied by the Court of Appeal in *Pegasus Gold (Australia) Ltd v Metso Minerals (Australia) Ltd* (2003) 16 NTLR 54.

[83] However, as the authorities show, although the intention of the parties and particularly of the party when affixing the chattels to the land is an important and relevant consideration, if that intention is able to be discerned objectively, it is not the only consideration. All of the circumstances of the case must be considered including the purpose of annexation, the degree of annexation, the cost and difficulty of removal, whether removal would damage the land or buildings to which the item is attached and, in the case particularly of mining equipment, whether the equipment has any real value

if severed from the land and the likely life of the mine: see generally *National Australia Bank Ltd v Blacker & Anor* (2000) 104 FCR 288 at 292-296 per Conti J; *Pegasus Gold (Australia) Ltd v Metso Minerals (Australia) Ltd* (supra) at 61-62. The emphasis is at all times on what might be objectively capable of being known by a third party such as a mortgagee or transferee when entering into a contract dealing with the land.

[84] Counsel for the appellant submitted that s 185 of the Mining Act which imposes an obligation on the holder of a "mining tenement" to remove "all plant, machinery, engines and other equipment…" within three months after the tenement has expired, applies to SML 11. The Mining Act applies to SML 11 only by virtue of the provisions of the Gove Agreement to which I have referred previously. It is clear that s 185 does not apply to SML 11 bys its own terms. "Mining Tenement" is defined by s 4(1) of the Mining Act to mean:

> "… a mineral lease, mineral claim …and includes an area of land the right to occupation of which is conferred by section 61(2) or 104(2) or is continued by or under section 191(19) or (20)."

[85] "Mineral lease" is defined by s 4(1) of the Mining Act to mean "a mineral lease granted under Division 2 of Part VI or a mining lease continued in force by virtue of s 191(5). Section 191(5) provides:

> "Where a mining lease (other than a mining lease in respect of Aboriginal land) under the repealed Act was in force immediately before the commencement of this Act, the lease shall, on and from the commencement of this Act, be deemed to be a mineral lease

> granted under Part VI for the remainder of the term for which that lease was to remain in force under the repealed Act."

[86] However, "Aboriginal land" is defined by s 4(1) to have the same meaning as in the LRA and the definition of "Aboriginal land" in s 3(1) of the LRA includes "land the subject of a deed of grant held in escrow by a Land Council". It is clear that the land the subject of SML 11 falls within that description: see LRA s 4(1), s 10(2) and Schedule 1 (the description of "Arnhem Land (Mainland)"). Consequently s 191(5) does not apply to SML 11. In my opinion, s 191(9) of the Mining Act continues SML 11 as if the Mining Act had not come into operation (this disposes of a further alternative argument based on s 15(1) of the Interpretation Act (which in my opinion did not run for other reasons as well, but it is not necessary to canvas this matter now).

[87] It might be argued that s 185 of the Mining Act applied because of the provisions of paras 6(k) and 7(l) of SML 11: see paras [48] and [49] above. But para 6(k) applied the Mining Ordinance (and therefore the Mining Act) only in so far as those provisions were not inconsistent with the Gove Agreement and SML 11. The provisions of the SML 11 provide for a right to remove fixtures, whereas s 185 of the Mining Act converts that right into an obligation. In my opinion, s 185 is inconsistent with the terms of SML 11.

[88] However, even if s 185 did apply to SML 11, it did not apply at the time most of the improvements were attached to SML 11 and there is no equivalent provision in either the Mining Ordinance 1939 or the 1968 Gove

Ordinance. SML 11 has two provisions which bear on this question: clauses 3(g) and 4(f) (which apply respectively to the conveyor belt corridor area and the bauxite treatment plant area). They are in virtually identical terms. It is sufficient if I refer to clause 3(g):

> "3. The Lessees for themselves and for their successors and permitted assigns covenant with the Commonwealth in relation to the land secondly described – …
>
> (g) to maintain, manage and operate the bauxite conveyor and other buildings and installations on the leased land in good and proper order and condition fair wear and tear and damage by fire, flood, lightning, storm or tempest and the right of the Lessees to severe, remove, relocate, demolish, alter or rebuild excepted."

[89] I note that there is no obligation to insure the buildings and installations or the bauxite treatment plant under the terms of the lease or under the relevant Ordinances in force at the time. These provisions give to the Lessees a **right** of severance only. That is quite different from the obligation to remove imposed by s 185 of the Mining Act. The fact that a lessee has a right of severance is not, by itself, determinative of the question of whether or not the items concerned are fixtures: see for example the tenants' fixtures cases discussed by Murray J and referred to, with apparent approval, by the Court of the Appeal in *National Dairies WA Ltd v Commissioner of State Revenue* (2001) 24 WAR 70 at 76, para [26]. In fact the existence of a right of severance might suggest that the parties acknowledged that chattels affixed to the land were no longer chattels. However, depending on the terms of the lease, there may be an independent contractual obligation to deliver up the

premises in good and tenantable repair and that may mean, in the case of vacant land, that there is an obligation to remove tenants' fixtures: see *Wincant Pty Ltd v South Australia* (1997) 69 SASR 126. There is no such provision in SML 11.

[90] On the other hand, clause 6(m) of SML 11 provides:

> "That in the event of any part of the leased land being resumed by the Commonwealth under the last proceeding paragraph, the lessees shall be entitled to compensation on just terms for the loss of bauxite and other minerals designated in this lease in, and improvement on or to, the land resumed and for any loss in value to the lessees of any improvements on or to the leased land (other than the resumed part)."

[91] No submissions were made by either party as to the significance, if any, to be attached to this clause. It might have been argued that this clause was inconsistent with a finding that the parties intended that the improvements not become fixtures; alternatively it might have been argued that it was consistent only with the appellants' right of severance and not inconsistent with the items being fixtures. I do not think it is possible to draw any conclusions from this provision.

[92] There is some old authority which suggests that chattels affixed to the land and which fall into the category of trade fixtures do not form part of the land unless the tenant fails to remove them prior to the end of the term: see *Registrar of Titles v Spencer* (1909) 9 CLR 641 at 651 per Barton J; at 654 per O'Connor J. Griffiths CJ said, at 647, that "trade fixtures do not, or may not, become part of the land". An application for leave to appeal that

decision was dismissed by the Privy Council: see *Spencer v Registrar of Titles (Third Appeal)* (1910) L T Rep 647 at 648. However, although that case has not been directly overruled, later decisions of the High Court have maintained the distinction between chattels affixed to the soil which remain chattels and trade fixtures, which although severable, are nevertheless fixtures and part of the soil until the tenant severs them from the land. In *Northshore Gas Co Ltd v Commissioner of Stamp Duties (NSW)* (1939-1940) 63 CLR 52, two of the Justices went so far as to hold that even though property in the gas pipes there in question remained with the gas company, the pipes were nevertheless part of the land (which the gas company did not own): see Rich J at 62, Dixon J at 68-70. I note also the observation of Dixon J at 68, that removable tenant's fixtures are part of the soil unless and until removed; see also *Geita Sebea & Ors v The Territory of Papua* (1941) 67 CLR 544 at 553-554 per Starke J; 558-559 per Williams J. It must be remembered also that the question in *Spencer's* case was what compensation should be paid for the issue by the Registrar of a title which wrongfully issued for an estate in fee simple instead of for a life tenancy, the action being brought by the former owner of the estate in fee simple which gave rise to special considerations not present in the appeal before this Court.

[93] It follows from the above discussion that I am unable to find on the evidence presently before the Court whether or not the plant and equipment making up the refinery is a chattel or a fixture and different answers may be given to individual items depending on the facts as they relate to those items.

Counsel for the respondent submitted that as the onus of proof on this question rested with the appellant, I should not allow the appeal on this ground. It is clear that s 105A(4) of the Act casts the burden of proof on the appellant. At the commencement of the hearing, counsel for the appellant sought to lead further evidence bearing on this question from the witness Colin Hannah. Objection was taken to the evidence on a number of grounds (see Tr pp 36-37 – unfortunately the names of counsel have been wrongly transcribed). Subsequently the tender of that affidavit was withdrawn (see Tr pp 64-66). However, the appellant then made clear that the reason for not pressing that affidavit (and also a further affidavit not filed in Court) was because in that event I would have had no choice but to remit the matter to the respondent pursuant to s 105M(2)(b) of the Taxation (Administration) Act, as the respondent had indicated that no request under s 105M(3) for the Court to consider that fresh material would be made. That matter was further agitated in the appellant's written submission (at paras 151-153) and by counsel at Tr pp 312-313.

[94] In view of the fact that the matter must be remitted anyway for the reason that neither valuer has provided a valuation based on a term expiring in 2011 and ignoring the rights to renew; and that both valuations have assumed that the right to sell bauxite will continue past 2011; it seems to me to be just that the question of whether any of the plant and, if so, which were fixtures should also be remitted, having regard to the circumstances under which the question has up to now been litigated. That is, however, subject to one

further consideration, which is whether or not, on the basis of the valuation evidence I have heard, I can conclude that the land-rich ratio is less than 60 per cent, even assuming that the issues I have so far decided in favour of the appellant have been incorrectly decided.

Is the land-rich ratio less than 60 per cent?

[95] The task is to determine whether or not, in January 2001 (the relevant date) the value of the interest in land in the Territory to which GAL was entitled, was 60 per cent or more of the value of all of the non-excluded property to which it was then entitled, wherever situated.

[96] In my opinion, the starting point is to ascertain the total value of GAL's assets as at the relevant date. The standard test is "… the price which a willing but not anxious vendor could reasonably expect to obtain and a hypothetical willing but not anxious purchaser could reasonably expect to have to pay for the shares if the vendor and the purchaser had got together and agreed on a price in friendly negotiations…" (per Williams J in *Abrahams v Federal Commissioner of Taxation* (1945) 70 CLR 23 at 29; *c.f. Spencer v The Commonwealth* (1907) 5 CLR 418 at 432; 441).

[97] The best evidence of that value in the circumstances of this case is the actual sale price of the shares at the relevant time which on the evidence amounted to $740.1m (see para [15]; Bryant Report AB 1042 para 257; Lonergan Report AB 1402 and 1412. There is a slight difference between the Bryant and Lonergan figures of $0.9m, but it is not statistically significant).

After allowing for other adjustments, Mr Lonergan arrived at a final total gross value of AUD $757.8m (see AB 1413). Subsequently, Mr Lonergan "added back" AUD $5m (approximately) in relation to a current tax liability not previously identified resulting in a figure (rounded off) of $752m for the total gross value of all shares in GAL as at the relevant date. There is now no disagreement between the experts on that figure, except that Mr Bryant would add $25m for future tax provisions. Counsel for the respondent submitted this would result in a total consideration paid of $777m (see AB 1044). According to the evidence, there was in fact an adjustment of $19.21m on completion for the value of deferred tax liability (AB 1141-1142). Notwithstanding Mr Lonergan's opinion to the contrary (AB 1413), I think the correct starting point is $752m plus $19.21m or $772m in round figures because that is the gross value of what was paid for the shares, bearing in mind that the purchaser acquired GAL's liabilities (on the approach taken by the valuers it does not matter whether the correct figure is $752m, $772m or $777m).

[98] On the facts relating to the actual sale, there is nothing to suggest that the sale was other than a normal arms-length transaction between a willing buyer and a willing seller in the sense explained in *Abraham's* case (supra). Mr Bryant, when asked about this in cross examination, said (Tr 155) that the price had been negotiated between Billiton, CSRI and AMP, who would have known about the rights of pre-emption and this may have affected the price. I am unable to see how this could be so unless the original offer by

Billiton was inflated in the hope that it might ward off the exercise of any pre-emption rights. It is therefore reasonable to do a check valuation using some other acceptable method, which was the course adopted by Mr Lonergan. The alternative methods he arrived at produced a range which, in his opinion, showed that the price negotiated for the 30 per cent interest in the Gove Joint Venture was consistent with his estimate of the market value (AB 1416). I accept this opinion and note that, in any event, even according to Mr Bryant's method, the actual price paid is not demonstrably inconsistent with this value. Therefore, the starting point to the calculation of the "non-excluded property" is $772m. From this sum, it is common ground that the sum of $10.8m (rounded to $11m) should be deducted to arrive at the total value of all the non-excluded property (AB 1417; AB 1044 para 281):

Accepted purchase price	$772m
Less excluded assets	$ 11m
Total value of non-excluded property	$761m

[99] The next step in the calculation is to deduct the "non-land" assets. Some of these assets are clearly identified and not subject to dispute. They are (AB 1560):

Chattels	$13.3m
Working capital and other assets	$53.7m
Total	$67.0m

[100] To these figures Mr Lonergan would now add a possible further approximately $31m for intellectual property and "know how", resulting in a total of $98m. This latter sum is a matter of considerable disagreement

between the parties and I note that Mr Lonergan's opinion was that it was not worth anything (AB 1598). However, on Mr Lonergan's approach, if the total sum of $98m is deducted from the figure of $761m, there resultant difference of $663m is the value of the appellant's interest in land in the Territory, as, in his opinion, there are no other assets left to be accounted for. Mr Lonergan's conclusion at AB 1420 and 1560 was in fact $680m (the difference in the calculations is brought about by the allowances made for $19m for the adjustment on completion for deferred tax liability, $31m for intellectual property and know how and $5m for the current tax liability not previously identified). On Mr Lonergan's calculations the land-rich ratio was 91 per cent; based on a ratio of $683m : $761m, the ratio is 87 per cent. If this is correct the land-rich ratio is clearly more than the 60 per cent required by s 56N(2)(b) of the Taxation (Administration) Act.

[101] However, the appellant submits that this approach is faulty because the assumption that there are no other assets to be accounted for is incorrect, because there is in fact a large value to be placed on "unidentifiable intangible" assets. This was a fundamental difference of opinion between the two experts. Mr Bryant was of the opinion that the value of unidentifiable intangible assets amounted to between AUD $375m to AUD $482m. Counsel for the respondent submitted that it is inherently implausible that Billiton and Alcan were prepared to outlay some 48-55 per cent of their purchase price, some $380-400m above the value of the mine and refinery, to acquire something which was "not an asset and was unidentifiable, unrealisable and

intangible". There is considerable force in this submission. Before dealing with the differences between the experts, it is necessary to deal with a difference of opinion as to whether or not, as a matter of law, there can be value to intangible unidentifiable assets other than goodwill and what is meant by the notion of goodwill.

Goodwill

[102] Counsel for the respondents submitted that there is a difference between the legal notion of "goodwill" and "goodwill" as accountants see it. It was submitted that the latter define "goodwill" as "the excess of the cost of acquisition incurred by (a purchaser) over the fair value of the identifiable net assets acquired", whereas the legal notion is summed up by Lord MacNaughten in *The Commissioner of Inland Revenue v Muller & Co's Margarine Ltd* [1901] AC 217 at 223-224, as:

> "the benefit and advantage of the good name, reputation and connection of a business. It is the attractive force which brings in custom".

[103] These notions are discussed in detail in *Federal Commissioner of Taxation v Murry* (1998) 193 CLR 605. At 630 [68], Gaudron, McHugh, Gummow and Hayne JJ said:

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

[104] At pp 608-609 [4], their Honours also said:

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

[105] What is very clear from that judgment is that the "attraction of custom still remains central to the legal concept of goodwill" (*Murry* (supra) at 614 [20]) whereas, from an accounting point of view, it is not necessarily related to the attraction of custom at all.

[106] On the facts of the present case, whilst GAL operated at the relevant time a very successful business which apparently generated significant profits, almost the entire output of the refinery was apparently sold to the joint venture partners' holding companies or their subsidiaries. In the case of GAL, it received 30 per cent of the alumina produced by the joint venture which was sold by GAL to Gove Aluminium Finance Ltd (see Annual Report 1998, AB 788; Annual Report 1999, AB 817; Annual Report 2000, AB 846). Apart from supply of alumina to Gove Aluminium Finance Ltd, there were some small sales on the spot market and some swapping to supply the Tomago alumina smelter. In the 1998 and 1999 Annual Reports, it is stated that GAL "has most of its alumina committed this year under long-term contracts". In other words, there is no evidence that GAL had an attractive force that brought in custom and which added to the value of the business. It is to be noted that nowhere in GAL's balance sheets is there reference to

goodwill as an asset of the business. Mr Lonergan in his report dated 8 April 2004, pointed out at para 85 that the refined product, alumina, was basically indistinguishable for practical purposes from the alumina product of the same grade of other producers, so there was no reason for customers to stay loyal to a specific alumina producer.

[107] So far as GAL's "long-term" contracts are concerned, they are not in evidence. According to a power-point presentation presented in late 2000 by Ms Cynthia Carroll to the board of Alcan Inc on 30 November 2000 GAL had "bauxite and alumina contracts, most of which expire in 2003. All are competitive and profitable" (AB 1627). The Board's resolution to exercise its right of first refusal is in evidence at AB 1711 and refers to the 'strategic rationale' for the acquisition, 'particularly the long-term cost advantage'. The factors which are referred to in the presentation as the 'strategic fit' are at AB 1635. I will not set them out here, as they are sensitive, but in no case is there reference to GAL having an attractive force which brought in custom and adding value to the business nor to any of the usual factors often referred to in the context of goodwill in the legal sense, although there is reference to a number of factors which indicate the existence of special value to Alcan Inc.

[108] Nowhere in the reports relied upon by the appellant or in the submissions of counsel for the appellant is it asserted that GAL had any goodwill in the legal sense explained in *Federal Commissioner of Taxation v Murry* (supra). Indeed Mr Bryant, in his report AB 1058, found that there was no goodwill

in the sense of a tendency to attract customers. In my opinion, there is simply no evidence, or insufficient evidence, to conclude that GAL had any goodwill in that sense in 2001. There is an assertion by the appellant that there is no difference between the value of goodwill for accounting and legal purposes, relying on a passage in *Federal Commissioner of Taxation v Murry* (supra) at 624, but in my opinion that passage does not support this contention. The Court there said that "in a profitable business, the value of goodwill for legal and accounting purposes will often, perhaps usually, be identical", but that does not mean that their Honours intended to depart in any way from the point that it is the attraction of custom which is fundamental to that concept.

[109] Mr Russell QC relied upon the decision of the Court of Appeal of Victoria in *Commissioner of State Revenue v Uniqema Pty Ltd* (2004) 56 ATR 19. The very learned judgment of Ormiston JA (with whom Phillips and Callaway JJA agreed), does not, in my opinion, support a conclusion that there is evidence of goodwill in the legal sense in this case. I find that no such goodwill exists.

Unallocated residual assets

[110] However, that does not necessarily dispose of the appellant's principal argument that there existed "goodwill" in the accounting sense and that the same principles apply to such goodwill as goodwill in the legal sense, with the result that the items or features which lead to the existence of this kind

of goodwill, are not land. The respondent's position is that (a) no such items or features exist; and (b) the items or features relied upon are part of the land and not a separate asset.

[111] I remind myself that I am not dealing in this case with a statutory provision which, as in *Murry's* case provided an exemption for taxation purposes for "goodwill". Nor is this a case which like *Uniqema's* case, there was a sale of a business which clearly had a component for goodwill in the legal sense. Neither side referred me to any authority directly on this point, except for the discussion in *Murry's* case. So far as the difference between goodwill in the legal sense and goodwill in the accounting or business sense their Honours said in *Murry's* case (at 612 [13]-[14]):

> "[13] Goodwill is also an accounting and business term as well as a legal term. The understanding of accountants and business persons as to the meaning of the term differs from that of lawyers. That has added to the difficulty of achieving a uniform legal definition of the term, particularly since accounting and business notions of goodwill have proved influential in the valuation of goodwill for legal purposes.
>
> [14] Australian accounting standards describe goodwill as comprising "the future benefits from unidentifiable assets which, because of their nature, are not normally individually brought to account." Some accounting theorists see goodwill as representing the difference between the present value of the future earnings of the business and the normal return on its identifiable assets. Business people see goodwill as concerned with the notion of excess value, a notion colourfully expressed in the statement of an American funds manager that "[i]f you pay $450 million for a TV station worth $2.5 million on the books, the accounts call the extra $447.5 million 'goodwill'." Accountants adopt a similar approach in the case of purchased goodwill. Approved Accounting Standard ASRB 1013 states 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.""

[112] At least in the case of a TV station there are customers in the form of viewers (where ratings are important to the viability of the business) and also in the form of advertisers. Therefore, it would not be surprising if a TV station had goodwill in the legal sense.

[113] But, what is clear is that only goodwill in the legal sense is property and an asset in its own right: see *Murry* at 615 [23]; 617 [38]. Many of the sources of goodwill will often not be property either; nor will they be assets for accounting purposes, e.g. the efficient use of the assets of the business, superior management practice and good industrial relations: *Murry* at 616 [27]. Other sources of goodwill may be the result of expenditure on advertising and promotions or on labour relations and customer services: *Murry* at 616 [27]. Goodwill derived from an identified asset or assets may have little or no value because the earning power of the business will largely be commensurate with the earning power of the asset or assets: *Murry* at 625 [51].

[114] It follows from this discussion that even if I were to accept the validity of Mr Bryant's approach to the identification of "unallocated residual assets", they are not goodwill in the legal sense and it necessarily follows that they are not, as an homogenous group severed from their sources, property and are incapable of separate valuation.

[115] Mr Bryant, in his reports, identified some of the sources of these supposed assets. First, in para 16.4.2 of his report [AB 1058] he identifies 'the method of operating and know-how that permit the business to operate'. Secondly, in para 16.4.3 [AB 1061] he refers to expansion and optimisation possibilities. Thirdly, in para 16.4.4 [AB 1061] he refers to the value of cash flows after the Gove bauxite has become exhausted. He expresses the opinion that none of these sources are part of the value of the land. It will be necessary to consider whether any of these 'sources' are property.

Methods of operating and know-how that permit the business to operate

[116] In para 384 of his report (AB 1058) Mr Bryant says:

> "We are instructed that Nabalco as the operator of the refinery employs all the personnel who have knowledge that is used in the operation of the refinery; and that the GJV participants own all of the manuals, computer programs and other proprietary information. In addition to their own information, the GJV participants are entitled, under a Technical Assistance Agreement with SAL [Swiss Aluminium Ltd], to use information and a number of items of intellectual property. All of these rights are legally enforceable and (we are instructed) are property for the purposes of our valuation. Any remaining value arising from the possession of knowledge by GJV and Nabalco, which is not proprietary in nature might nonetheless have been a source of goodwill and contributed to its value. However, we are instructed to proceed on the basis that all relevant information was property."

[117] There is evidence that such "assets", rights or knowledge existed. Counsel for the respondent submitted that the evidence disclosed that the appellant has, as observable property, "a quantity of knowledge or know-how (not strictly an asset) and records on or in which that knowledge depended or was recorded, none of which was "land" or attached to land notwithstanding that

it was peculiar to the Gove mine and refinery (*Commissioner of State Taxation (WA) v Nischu Pty Ltd* (1991) 4 WAR 437), together referred to for convenience as "the IP". The value of this property was assessed by Mr Lonergan, upon receipt of the appellant's lay evidence, at some $30.7m; Mr Bryant refused to accept that valuation although saying "I'm not sure that I'm able to say how I would do Mr Lonergan's calculation differently," (T158.2) and agreeing that he had not himself undertaken the task.

[118] Mr Lonergan's calculation is at AB1595 (para 17(a)). I do not understand Mr Lonergan's evidence to be that he accepted that this was an asset separate from the land (Tr 239-40). Further, Mr Lonergan in his report at AB 1596 rejects completely that the IP had any value at all. Mr Lonergan's opinion is that (1) the IP had no value to the buyer in this case because the acquirer of a 30 per cent interest in the joint venture would obtain for no consideration all the benefits of the IP because the plant etc would continue to operate on an uninterrupted basis; and (2) the actual acquirer of the 30 per cent interest in this case already had all benefit of all of the IP and therefore would not pay for something it already had. That is because (and this may not have been made clear so far) the acquirer of the 30 per cent interest was a subsidiary of the owner of the 70 per cent interest. Nevertheless, it must be the case that GAL acquired a share in a valuable asset and it would therefore seem to me to be proper for it to be valued. There is no challenge to Mr Lonergan's calculation so that, at the most, it was worth $30.7m and probably considerably less (Mr Lonergan calculates a

figure of $7m). Regardless of which figure is used it will not affect the land-rich ratio for the purposes of this exercise.

Expansion and optimisation possibilities/Cash flows after bauxite exhausted

[119] In my opinion, these items are not property and have no separate value.

Mr Lonergan in his report of 20 September 2006 says (at para 53):

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

[120] Mr Lonergan explains his reasoning at some length in his report of 29 September 2006, especially at paras 33-58. I accept his opinions. In my opinion, Mr Lonergan is correct in concluding that any difference between the present value of the future cash flows that an asset can generate and its depreciated replacement cost is not an intangible asset, it is simply reflected in the value of the asset. In my opinion it is clear that the value of the plant and equipment used by Mr Bryant in his calculations was its value as depreciated for taxation purposes. Clearly the plant and machinery had a written down value which was much lower than its actual in-use value.

Other criticisms of Mr Bryant's reports

[121] Mr Lonergan makes a number of other criticisms of Mr Bryant's reports upon which the appellant relies. It is not necessary to refer to all of them,

but I make the observation that the methodology adopted of having to presume that the refinery and the mine are two separate businesses when in fact they are not and then calculate a transfer price of the ore by the mine selling the ore to the refinery is one fraught with the potential for significant error. The calculations are particularly sensitive to the transfer price and what a reasonable hypothetical buyer would be prepared to pay for the ore from a reasonable hypothetical seller. The sensitivity of the transfer price is affected by (a) the fact that the bauxite/alumina/aluminium refinery market is vertically integrated to a very high degree; (b) what inferences can be drawn from the respective bargaining positions of the parties; and (c) the fact that there is in any event no way of accurately determining **a** price, and the best that can be said is that there is a range. There is also sensitivity in the interest rate chosen for the calculations. When dealing with large figures small variations can have a significant effect on the outcome. It is unnecessary to resolve these difficulties. Suffice it to say that for the reasons already given I am not persuaded that there are any intangible assets which together or separately have any existence as property and which need to be accounted for and separately valued. In conclusion I reject the appellant's argument that the land-rich ratio is, on any view of the respondent's case, less than 60 per cent.

Conclusions

[122] Finally I should deal with a submission by counsel for the respondent that, because the appellant has not proven the amount by which the assessment is

excessive, the appeal should be dismissed. In my opinion, s 105N(1)(d) of the Act confers a discretion upon the Court to remit the matter to the Commissioner even if the appellant has not shown the precise amount by which the assessment is excessive. Section 105A(4) which provides that the burden of proving that a decision or assessment is incorrect or that the assessment is excessive is cast in a different form from its predecessor (prior to amendments made by the Taxation (Administration) Amendment (Objections and Appeals) Act 2005). The appeal is not limited to whether the assessment is excessive. Further, s 105A(4) does not specifically require the taxpayer to prove the precise amount by which the assessment is excessive. In *Tourism Holdings Australia Pty Ltd v Commissioner of Taxes* (2005) 15 NTLR 80 at 132 [140-141], I referred to the fact that on appeal the question for the Court is not whether the grounds have been made out, but whether the amount of tax has been wrongly assessed. The Act has been significantly modified since then. Nevertheless, the appellant has demonstrated in this case that the assessment is excessive. If it had been necessary for the appellant to prove by how much, if anything, the assessment was excessive, the evidence would have had to have canvassed a number of alternative scenarios which would have made the appeal complicated and unwieldy. I am satisfied that it is just and appropriate to exercise my discretion in favour of the taxpayer and remit the matter to the Commissioner.

[123] The appeal is allowed. The matter is remitted to the Commissioner of Taxes for reconsideration in the light of these reasons. I will hear the parties as to the formal orders required and as to costs.