HIGH COURT OF AUSTRALIA

GUMMOW, KIRBY, HAYNE, CRENNAN AND KIEFEL JJ

ASCIANO SERVICES PTY LTD APPELLANT

AND

CHIEF COMMISSIONER OF STATE REVENUE RESPONDENT

Asciano Services Pty Ltd v Chief Commissioner of State Revenue
[2008] HCA 46
25 September 2008
S211/2008

ORDER

Appeal dismissed with costs.

On appeal from the Supreme Court of New South Wales

Representation

S J Gageler SC with J O Hmelnitsky for the appellant (instructed by Clayton Utz Lawyers)

A H Slater QC with R L Seiden for the respondent (instructed by Crown Solicitor for New South Wales)

CATCHWORDS

Asciano Services Pty Ltd v Chief Commissioner of State Revenue

Taxes and duties – Duty payable on lease instrument – Lease defined as agreement "by which" a right to use land is conferred on or acquired by a person – Appellant entered into rail access agreement with Rail Access Corporation giving appellant access rights to rail lines and rail infrastructure facilities – Statute provided party to access agreement with right to access land in or on which rail infrastructure facilities situated – Whether access agreement dutiable as agreement "by which" a right to use land is conferred on or acquired by a person – Whether statute imposing duty refers to source of rights to use land or directs attention to what is received by grantee – Interrelationship between statute conferring right to access land and access agreement.

Taxes and duties – Duty payable on lease instrument – Whether rail lines and rail infrastructure facilities themselves land in which grantee under access agreement acquired rights.

Statutes – Construction – Statute vests rail lines and rail infrastructure facilities in grantor and land in or on which rail lines and rail infrastructure facilities lie in another statutory body – Whether grantor under access agreement able to grant rights to access land owned by other body.

Statutes – Construction – Relevance of general law principles of property to rights with respect to land created by statute for statutory purposes.

Words and phrases – "by which", "conferred on or acquired by", "right to use land".

Duties Act 1997 (NSW), ss 164, 164A(b), 166(1)(a).
Transport Administration Act 1988 (NSW), Sched 6A, cl 5(1).

1 GUMMOW, KIRBY, HAYNE, CRENNAN AND KIEFEL JJ. Chapter 5 of the *Duties Act* 1997 (NSW) ("the Duties Act") in force at the relevant time charged duty on a "*lease instrument*"[1]. A lease was defined in s 164A(a)[2] of the Act to mean a lease or an agreement for a lease of land in New South Wales. Paragraph (b) of the section extended the notion of a lease, for the purposes of the imposition of duty, to:

> "an agreement (such as a licence) *by which a right to use land* in New South Wales at any time and for any purpose *is conferred on or acquired by a person* (who is taken, for the purposes of this Chapter, to be a lessee of the land)" (emphasis added)[3].

2 On 1 July 1996 a Rail Access Agreement ("the Agreement") was entered into between National Rail Corporation Limited and Rail Access Corporation ("RAC"). National Rail was subsequently called Pacific National (ACT) Limited and was referred to by this name in the proceedings below. In these reasons it will continue to be so referred to, as a party to the Agreement, although it is now called Asciano Services Pty Ltd, the appellant in these proceedings. Subsequent to the Agreement the Rail Infrastructure Corporation was constituted as the amalgamation of RAC and Rail Services Australia[4].

3 The Agreement was expressed to grant to Pacific National "Access Rights" to railway lines and associated rail infrastructure facilities which formed part of the New South Wales rail network and were owned by RAC. The

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1 Duties Act, s 164. The duty charged by the Chapter has been abolished, on and from 1 January 2008: *Duties Amendment (Abolition of State Taxes) Act* 2006 (NSW), s 3, Sched 1, item 17.

2 Sections 163 and 164 were renumbered as ss 164 and 164A on 10 November 2004 by the *Duties Amendment (Land Rich) Act* 2004 (NSW), s 3, Sched 1, item 5.

3 Paragraph (c) deals with a franchise arrangement, which is not relevant to this matter.

4 *Transport Administration Act* 1988 (NSW), s 19C, Sched 7, cl 89, inserted by *Transport Administration Amendment (Rail Management) Act* 2000 (NSW), s 3, Sched 2.1, items 10 and 42.

Transport Administration Act 1988 (NSW) ("the TA Act")[5] provided for access to rail infrastructure facilities, by a person who was a party to an access agreement, even if such facilities were situated in or on land which was owned by the State Rail Authority ("SRA")[6].

4 The Chief Commissioner of State Revenue for New South Wales assessed Pacific National as liable to duty on the Agreement[7] in the sum of $567,283.85 plus interest thereon, that sum having been assessed on payments made by Pacific National, totalling $162,080,764.20, between 1 July 2000 and 31 December 2003 by way of access charges under the Agreement. An objection to that assessment was disallowed and Pacific National sought a review of that decision in the Supreme Court of New South Wales[8]. Gzell J ordered that the assessment be revoked[9]. The Court of Appeal of that Court (Hodgson, Ipp and Basten JJA) allowed an appeal from his Honour's orders and ordered that the summons be dismissed with costs[10].

5 The question arising in the appeal to this Court is whether the Agreement is an agreement by which a right to use land is conferred on or acquired by Pacific National. Determination of that question requires the identification of how, and by what means, such a right arises, there being no dispute that the use of land is involved in Pacific National's use of the rail infrastructure facilities for the purpose of its freight operations. The appellant contends that no such right was granted by RAC pursuant to the Agreement; that the nature of the right is statutory; and that its sole source is the TA Act.

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5 Unless otherwise noted, references to the TA Act are to the Act as it stood at 1 July 1996. Subsequent amendments to the provisions referred to do not bear upon the question on the appeal.

6 TA Act, Sched 6A, cl 5(1).

7 Under s 8(1) of the *Taxation Administration Act* 1996 (NSW).

8 *Taxation Administration Act*, s 97.

9 *Pacific National v Chief Commissioner of State Revenue* [2007] NSWSC 332.

10 *Chief Commissioner of State Revenue v Pacific National (ACT) Ltd* [2007] NSWCA 325.

The rail legislation, access regime and the Agreement

6 The Agreement is to be understood in the setting of the legislation in New South Wales concerned with the commercial use of railway infrastructure.

7 The TA Act constituted SRA[11]. In addition to its operation of railway passenger services[12], its functions included the construction of stations, passenger service facilities and rolling stock maintenance facilities and the acquisition and development of land[13]. The *Transport Administration Amendment (Rail Corporatisation and Restructuring) Act* 1996 (NSW) amended the TA Act, in implementing the Competition Principles Agreement reached between the Commonwealth, the States and the Territories concerning the structural reform of public monopolies and the introduction of competition into the market. RAC was established[14] and the NSW Rail Access Regime created[15]. The principal functions of RAC were stated, in s 19E(2) of the TA Act, to be:

> "(a) to hold, manage and establish rail infrastructure facilities on behalf of the State; and
>
> (b) to provide persons with access as rail operators to the NSW rail network".

In carrying out its functions and in providing that access, RAC was required to act in a manner consistent with the NSW Rail Access Regime[16] in its pricing policies, timetabling and other systems.

8 The "NSW rail network" was defined to mean "the railway lines vested in or owned by [RAC] (including passing loops and turnouts from those lines and

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11 s 4.

12 s 5(1) and (2) and s 4A(1).

13 s 8(1)(a) and (c), s 90(1).

14 TA Act, s 19C.

15 s 19B.

16 s 19E(3), (5).

loops and associated rail infrastructure facilities that are so vested or owned)"[17]. "Rail infrastructure facilities"[18] were defined as a term which:

> "(a) includes railway track, associated track structures, over track structures, cuttings, drainage works, track support earthworks and fences, tunnels, bridges, level crossings, service roads, signalling systems, train control systems, communication systems, overhead power supply systems, power and communication cables, and associated works, buildings, plant, machinery and equipment, and …
>
> (b) does not include any stations, platforms, rolling stock maintenance facilities, office buildings or housing, freight centres or depots, private sidings and spur lines connected to premises not vested in or owned by [RAC]".

9 The powers of RAC relating to rail infrastructure facilities and land were contained in Sched 6A to the TA Act[19]. The provisions of that Schedule, which assume importance on the appeal, recognised that SRA owned land and buildings but that the rail infrastructure facilities were owned by RAC. Clause 2(1) of Sched 6A provided that:

> "RAC is the owner of all rail infrastructure facilities installed in or on land, in or on rivers and other waterways and in or on the beds of rivers and waterways by RAC and of all rail infrastructure facilities vested in or transferred to RAC (whether or not the place on which the facilities are situated is owned by RAC)".

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17 s 19A(1).

18 s 19A(1).

19 s 19F.

10 RAC had the power to acquire land[20] and the Minister could direct that SRA's assets be transferred to a Rail Corporation[21], but there is no evidence of such actions. The parties agreed the following facts before the primary judge[22]:

> "The parties agreed that at all relevant times the NSW rail network was owned by or vested in [RAC], that the NSW rail network was attached to, rested upon or was supported by the surface of the land and at all material times the owner of the fee simple in that supporting land was not [RAC]. With respect to this last concession, the Chief Commissioner reserved the right to argue that the effect of the *Transport Administration Act* 1988, Sch 6A, cl 2 was to vest an interest in a stratum of the supporting land in [RAC]."

Further, argument has proceeded upon the basis that RAC's rail infrastructure facilities, in the main, rested upon or were embedded in SRA's land[23].

11 Schedule 6A, cl 2(2) provided that RAC could, subject to the Act, carry out inspections and works such as the replacement, repair, maintenance, alteration, improvement or extension of any of its rail infrastructure facilities that were situated on SRA land or on or in an SRA building. By cl 3(1) RAC could enter upon and occupy SRA land or buildings for the purpose of its functions. To this end RAC could authorise its officers or employees to issue certificates of authority for the purposes of entry[24].

12 Provision was made, in Sched 6A, for RAC to compensate SRA in the event of SRA suffering any damage to its buildings or structures on the land, caused by the exercise of RAC's functions[25]. In turn, cl 8 provided that SRA's

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20 Sched 6A, cl 13(1).

21 Section 19J; "Rail Corporation" was defined to mean RAC or Freight Rail Corporation: s 3(1).

22 *Pacific National v Chief Commissioner of State Revenue* [2007] NSWSC 332 at [11].

23 And see *Chief Commissioner of State Revenue v Pacific National (ACT) Ltd* [2007] NSWCA 325 at [7] per Hodgson JA.

24 Sched 6A, cl 4.

25 cl 7(2).

land and buildings, in or upon which rail infrastructure facilities were installed, were taken to be subject to a covenant in favour of RAC, pursuant to which SRA was required to ensure that the facilities were not destroyed or damaged or their operation affected. Any person who destroyed, damaged or interfered with RAC's rail infrastructure facilities was liable to compensate RAC[26].

13 "NSW Rail Access Regime" was defined in s 19B of the TA Act as an access regime established by the Minister and approved by the Premier for the purpose of implementing the Competition Principles Agreement in respect of third party access to the NSW rail network by persons as rail operators, including the use of facilities that were vested in or owned by RAC. The NSW Rail Access Regime[27] repeated the statutory definitions of "NSW rail network" and "rail infrastructure facilities". "Access" was defined to mean access to the NSW rail network by rail operators, including the use of the rail infrastructure facilities listed in Sched 1, Table 1 (the railway track owned by RAC) together with the benefit of signalling, communications and other ancillary services provided by RAC by means of the rail infrastructure facilities listed in Sched 1, Table 2 (those facilities (excluding railway track) owned, controlled or operated by RAC). The reference to "rail operations" included the movement of rolling stock on the NSW rail network.

14 The recitals to the Agreement stated that RAC is the owner of, or has vested in it, the NSW rail network; and that it agreed to grant access to Pacific National, which agreed to accept those access rights subject to the terms of the Agreement. Clause 2.4(a) provided that "[RAC] grants to [Pacific National] the Access Rights on the terms of this Agreement". Clause 2.4(b) stated that the rights so granted were non-exclusive contractual rights and further described the rights by reference to a Train Specification scheduled to the Agreement. The Dictionary to the Agreement defined "Access Rights" as rights of access to or usage of the "NSW Rail Network". That network and the rail infrastructure facilities were defined in the same way as in the TA Act. Access charges payable by Pacific National were provided for in cl 2.6 and Sched C.

15 At this point it is necessary to return to Sched 6A of the TA Act, in which cl 5 provided:

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26 cl 9.

27 Dated 21 August 1996: *New South Wales Government Gazette*, No 97, 23 August 1996 at 4948.

"(1) A person who is a party to an access agreement is authorised to have access to the rail infrastructure facilities to which the access agreement relates, even if the facilities are situated in or on SRA land, if access is exercised in accordance with and as permitted by the access agreement.

(2) A person to whom this clause applies does not require a certificate of authority under this Schedule to enter the SRA land concerned.

(3) In this clause, ***access agreement*** means an agreement, entered into by RAC pursuant to the NSW Rail Access Regime, that permits a person to operate rolling stock on the NSW rail network."

The decision of the primary judge and of the Court of Appeal

16 Before Gzell J, Pacific National submitted that all RAC had power to do, and all it did under the Agreement, was to confer on a party to an access agreement the right to use the physical items that comprise the NSW rail network. Insofar as that use involved the use of the space occupied by those items, the right of use was not conferred or acquired under the Agreement, but by or under the TA Act, Sched 6A, cl 5(1).

17 The Duties Act defined "land" to include a stratum. The Chief Commissioner argued that the railway track comprised the surface of the land on which the ballast, sleepers and rails were laid; and the cuttings, drainage works, track support earthworks, tunnels, bridges, track crossings, service roads and buildings, referred to in the definition of "rail infrastructure facilities", were land. Pacific National was entitled to use tracks over the surface of the land on which the infrastructure facilities were constructed and to use the facilities embedded in the stratum, which were vested in RAC, by reason of the Agreement. Section 164A(b) did not require the right of a user to arise solely from the Agreement. The word "by" invoked some causal connection. Without the Agreement Pacific National would have no right of access to the ambient land under the TA Act, Sched 6A, cl 5(1).

18 Gzell J rejected the Chief Commissioner's argument[28]. His Honour referred to *Commissioner of Main Roads v North Shore Gas Co Ltd*[29] and *Newcastle-under-Lyme Corporation v Wolstanton Ltd*[30] which, he said, did not recognise the rights in utilities affixed to or embedded in soil as comprising land or amounting to an interest in land. The right was a special one, to occupy some part of the land in a limited way[31]. In his Honour's view, the purpose and effect of the TA Act was to vest ownership of all rail infrastructure facilities in RAC, regardless of whether it owned the land to which they were affixed or in which they were embedded[32]. The vesting of the facilities in RAC carried with it no interest in land and it had no legal right to grant a right to use land for the purposes of the definition of the term "lease" in s 164A(b) of the Duties Act[33]. If RAC had an interest in that land it would have the power to grant access to it and Sched 6A, cl 5(1) would be superfluous[34].

19 The Chief Commissioner argued before his Honour that a right to use land arose, for the purposes of the Duties Act, from the Agreement in conjunction with Sched 6A, cl 5(1) of the TA Act. However, in Gzell J's view, s 164A(b) of the Duties Act was directed to the legal source of the right to use the land and Sched 6A, cl 5(1) was that legal source[35], not the Agreement. This is the principal focus of the arguments on the appeal.

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28 *Pacific National v Chief Commissioner of State Revenue* [2007] NSWSC 332 at [21].

29 (1967) 120 CLR 118; [1967] HCA 41.

30 [1947] Ch 92.

31 *Pacific National v Chief Commissioner of State Revenue* [2007] NSWSC 332 at [15]-[16].

32 *Pacific National v Chief Commissioner of State Revenue* [2007] NSWSC 332 at [18]-[20].

33 *Pacific National v Chief Commissioner of State Revenue* [2007] NSWSC 332 at [24].

34 *Pacific National v Chief Commissioner of State Revenue* [2007] NSWSC 332 at [18].

35 *Pacific National v Chief Commissioner of State Revenue* [2007] NSWSC 332 at [27]-[28].

20 In the Court of Appeal, Hodgson JA considered that some of the rail infrastructure facilities could be regarded as having the character of land and others could not[36]. More important to his Honour's reasons was what might be drawn from *North Shore Gas Co*. It did not establish that the space occupied by the pipes was not land, in his Honour's view, and the reasons of Windeyer J in that case[37] made plain that it was[38]. The right to use the rail infrastructure facilities in situ carried with it a right to use the space they occupy, the land[39]. RAC was given the power by the TA Act to deal with that land by granting such rights. The fact that that power arose by statute did not mean that the rights were not conferred on or acquired by Pacific National "by" the Agreement, within the meaning of s 164A(b) of the Duties Act[40]. Ipp JA agreed[41] and added that, by reason of Sched 6A, cl 5(1) of the TA Act, the legal effect of the Agreement was to authorise Pacific National to have access to, and thereby use, the SRA land[42]. The Agreement may not confer such a right but its legal effect was such that Pacific National acquired it[43].

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36 *Chief Commissioner of State Revenue v Pacific National (ACT) Ltd* [2007] NSWCA 325 at [26]-[29].

37 (1967) 120 CLR 118 at 131-134.

38 *Chief Commissioner of State Revenue v Pacific National (ACT) Ltd* [2007] NSWCA 325 at [24].

39 *Chief Commissioner of State Revenue v Pacific National (ACT) Ltd* [2007] NSWCA 325 at [30].

40 *Chief Commissioner of State Revenue v Pacific National (ACT) Ltd* [2007] NSWCA 325 at [32]-[33].

41 *Chief Commissioner of State Revenue v Pacific National (ACT) Ltd* [2007] NSWCA 325 at [49].

42 *Chief Commissioner of State Revenue v Pacific National (ACT) Ltd* [2007] NSWCA 325 at [43].

43 *Chief Commissioner of State Revenue v Pacific National (ACT) Ltd* [2007] NSWCA 325 at [45]-[48].

21 Basten JA did not consider that *North Shore Gas Co*, and its predecessor[44], provided an answer to the question on the appeal. Rather, his Honour considered that the better approach was to identify the nature of the power or interest conferred by the statute on RAC as a statutory authority. It should not be assumed that the legal consequences of the statutory scheme were analogous to those flowing from interests recognised by the general law, his Honour said[45]. There could be no doubt, in his Honour's view, that RAC, having ownership of all rail infrastructure facilities, had a right of occupation of land, not only for the purpose of holding and maintaining the facilities but also to allow for their use by rolling stock[46]. It was not necessary to determine the extent of RAC's interest and whether it amounted to an interest in land[47]. It followed from the contractual licence provided by the Agreement that Pacific National had a right to use land for the purposes of s 164A(b) of the Duties Act[48].

22 Basten JA did not accept that the TA Act was the source of Pacific National's right to use land. Schedule 6A, cl 5(1) did not confer such a right, in his Honour's opinion. Whilst the rights acquired by Pacific National were defined and limited both by principles of the general law and by statute, it was the Agreement which provided the power to exercise the right, the scope of which was defined, in part, by statute[49].

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44 *North Shore Gas Co Ltd v Commissioner of Stamp Duties (NSW)* (1940) 63 CLR 52.

45 *Chief Commissioner of State Revenue v Pacific National (ACT) Ltd* [2007] NSWCA 325 at [68].

46 *Chief Commissioner of State Revenue v Pacific National (ACT) Ltd* [2007] NSWCA 325 at [72].

47 *Chief Commissioner of State Revenue v Pacific National (ACT) Ltd* [2007] NSWCA 325 at [78].

48 *Chief Commissioner of State Revenue v Pacific National (ACT) Ltd* [2007] NSWCA 325 at [78].

49 *Chief Commissioner of State Revenue v Pacific National (ACT) Ltd* [2007] NSWCA 325 at [81]-[82].

The Duties Act

23 The references to statutory and contractual provisions for access should not divert attention from the provisions of the Duties Act, which are central to the appeal.

24 The obvious purpose of the Act was to create and charge a number of duties and this is stated in s 3. It did so by identifying transactions – those concerning particular property – as subject to duty[50] and nominating the hiring of goods[51] and the payment of premiums on insurance policies[52] as attracting duty. It charged duty on certain instruments, such as leases[53] and mortgages[54]. Section 164 stated that Ch 5 "charges duty on a ***lease instrument***, being an instrument that evidences or effects a lease (as defined in section 164A)". "Lease" was defined by s 164A(b) in such a way as to include an agreement which confers a right to use land at any time and for any purpose. The right may be non-exclusive. This would not be considered to amount to a lease or an agreement for a lease in the strict sense under the general law[55]. The definition required that the agreement confer upon a person the right to use land, or that the person acquire the right to use land by the agreement. The connection between the instrument in question and the right is created by the words "by which". They replace the word "whereby" in the previous Act[56], but mean the same thing.

25 Duty was said to be chargeable on a lease instrument, as so defined, by s 165. Duty was charged on the cost of the instrument, which s 166(1)(a) explained to be "the rent payable during the term of the lease or in advance of the lease and any amount paid or payable for the right to use land under the lease".

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50 Ch 2.

51 Ch 6.

52 Ch 8.

53 Ch 5.

54 Ch 7; see also Ch 10 (miscellaneous duties).

55 *Mena House Ltd v Commissioner of Stamp Duties* (1964) 64 SR (NSW) 290 at 293 per Else-Mitchell J.

56 *Stamp Duties Act* 1920 (NSW), s 76.

Paragraph (a) of s 166(1) picks up both elements in pars (a) and (b) of the definition of "lease" in s 164A. In particular, the expression "any amount paid or payable for the right to use land" must be taken to apply to the sums paid under an agreement of the kind referred to in s 164A(b).

RAC's rail infrastructure facilities and its rights with respect to land

26 On this appeal the Chief Commissioner placed little reliance upon the characterisation of the list of things comprising the rail infrastructure facilities as land, and upon the right of use of those facilities, given by the Agreement, as extending to the land in which they are embedded. The Chief Commissioner said that members of the Court of Appeal had accepted, but did not rest their decision upon, the proposition that some of the rail infrastructure facilities were inherently land. The appellant submitted that, in any event, nothing was to be gained from a consideration of RAC's rights to use land upon or in which the facilities were constructed or embedded, by reference to principles relevant to land under the general law. This point was made by Basten JA, by reference to *North Shore Gas Co*[57]. It is clearly correct.

27 *North Shore Gas Co* concerned the resumption of certain public streets, beneath which gas mains and pipes had been laid by the gas company, exercising statutory powers and functions. The gas company's claim for compensation failed because the pipes were held not to be land and its rights in them not an interest in land within the meaning of the statute authorising resumption and requiring the payment of compensation. It was said that, at its highest, the exercise of the right to lay pipes conferred a right to occupy some part of the land "in a very limited and special way"[58]. This would appear to be a reference to a right of occupation for statutory purposes. Relevantly, for present purposes, their Honours said[59]:

> "[W]hy should it be assumed that the exercise of a specific statutory right to lay and maintain pipes, as in the present case, operates to vest in the donee of the power an interest in the land in which the pipes have been

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57 *Chief Commissioner of State Revenue v Pacific National (ACT) Ltd* [2007] NSWCA 325 at [64].

58 (1967) 120 CLR 118 at 127 per Barwick CJ, McTiernan, Kitto and Taylor JJ.

59 (1967) 120 CLR 118 at 127 per Barwick CJ, McTiernan, Kitto and Taylor JJ.

> laid? The conclusion that it does seems to us to result from a lawyer's inherent tendency to assimilate such a right to some category known to the common law. It is, of course, a very special right."

Their Honours went on to refer to *Newcastle-under-Lyme Corporation v Wolstanton Ltd*[60], where Evershed J said that no greater rights or interests should be taken as conferred upon the undertakers of a statutory right or duty than are necessary for the fulfilment of the object of the statute. Whilst it was competent for Parliament to confer or create interests in land, the absence of a reference in the statute to incidents normally associated with them suggested that the creation of such interests was not intended[61].

28 Windeyer J in *North Shore Gas Co* considered that it was futile to attempt to classify and describe the gas company's rights with respect to the pipes according to the traditional categories and terminology of the law of real property[62]. Acknowledging that Parliament can confer rights and call them what it pleases[63], his Honour said[64]:

> "But it need not give them any name. If it does not, there is no need for lawyers to insist on finding an old name for them, when they are in fact sui generis."

(His Honour went on to adopt what Evershed J had said in *Newcastle-under-Lyme Corporation*.)

29 The property owned and vested in RAC, and the rights it has with respect to land in connection with its functions, were provided by the TA Act. The Act disclosed no intention that the vesting of the rail infrastructure facilities in RAC was to carry with it rights or legal consequences other than those identified in the scheme of the Act. That scheme provided for RAC's ownership of the facilities,

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60 [1947] Ch 92.

61 [1947] Ch 92 at 103-104.

62 (1967) 120 CLR 118 at 131.

63 Referring to *Taff Vale Railway v Cardiff Railway* [1917] 1 Ch 299 at 317 per Scrutton LJ.

64 (1967) 120 CLR 118 at 133.

some of which, under the general law, might have been classified as fixtures and therefore part of the land to which they were attached or in which they were embedded. It is a distinct and separate feature of the scheme that SRA may, as here, be the owner of the lands on or in which the facilities are constructed or embedded. It was on account of SRA's ownership of that land, that it was necessary that statutory authority be provided, which permitted RAC to use the land in connection with its functions. The listing of the various facilities in the definition of "rail infrastructure facilities" does not indicate that they were to be held by RAC as land, even if some might have the characteristics of land. They merely constituted part of the railway network which vested in it. Their identification was necessary to show the extent of the infrastructure spoken of, to distinguish it from the land ownership of SRA, and to nominate the subjects of the protective provisions of Sched 6A, cl 8.

30 The functions and powers of RAC extended to the provision of access to the rail network to others. They did not extend to the giving of interests in the land of SRA. The TA Act made provision for access to and consequential use of that land by others. RAC's rights to use that land were stated to be for purposes connected with the rail infrastructure facilities referred to in Sched 6A, cl 2. The certificates of authority its authorised officers or employees could give to other persons, to enter and occupy SRA land, were limited to these purposes[65].

Pacific National's right to access and use land

31 When RAC granted access rights, to the rail network and rail infrastructure facilities, it was not conferring an interest in land. It did not hold such an interest under the provisions of the TA Act by reason of its ownership of the facilities. Pacific National did acquire a right to use SRA's land because it was a party to an access agreement. Schedule 6A, cl 5(1) provided that such a person "is authorised" to have access to the rail infrastructure facilities to which the access agreement relates "even if the facilities are situated in or on SRA land", so long as access is exercised "in accordance with and as permitted by the access agreement".

32 Central to the appellant's argument on the appeal is its contention, following the reasoning of Gzell J, that the legal source of the right to use land, in association with the use of the rail lines and rail infrastructure facilities, was Sched 6A, cl 5(1) of the TA Act. It puts the making of an access agreement as a

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65 Sched 6A, cll 3 and 4.

pre-condition to the statutory conferral of the right or authority to access and use the land. By this means the appellant sought to distinguish the agreement to which s 164A(b) referred, which was one "by which" the right to use land was conferred or acquired. It follows, from its submissions, that something more than some causal connection was required between the access agreement and the right. The right must be sourced in the access agreement.

33 The appellant's argument places an importance upon the access agreement, as the source of the right to use land, which the words of s 164A(b) and Ch 5 of the Duties Act do not bear out. The provision refers to an agreement, which it calls a lease, by which a right to use land is conferred on or acquired by the lessee. Like the definition in *Chief Commissioner of Stamp Duties (NSW) v Buckle*[66], the provision[67]:

> "directs attention not to that which moved from the conveyor but to that which was received or acquired by the conveyee by reason of transfer to, vesting in or accrual to that person".

34 The appellant also submitted that the Chapter can be seen to be concerned with the agreement as the source of the right because s 166(1)(a) provides that the amount paid or payable for the right to use land "under the lease" is to be taken into account in assessing duty. These words again draw attention to the agreement, it was submitted, as did the statutory provision considered in *Federal Commissioner of Taxation v Sara Lee Household & Body Care (Australia) Pty Ltd*[68]. There a provision of the *Income Tax Assessment Act* 1936 (Cth), concerned with capital gains on assets, provided that where an asset was acquired or disposed of under a contract, the asset should be taken to have been acquired or disposed of at the time of the making of the contract[69]. It was held that the words "under a contract" direct attention to the source of the obligation which was performed by the transfer of assets which constituted the relevant disposal[70].

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66 (1998) 192 CLR 226; [1998] HCA 4.

67 (1998) 192 CLR 226 at 240 [32] per Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ.

68 (2000) 201 CLR 520; [2000] HCA 35.

69 *Income Tax Assessment Act*, s 160U(3).

70 (2000) 201 CLR 520 at 537 per Gleeson CJ, Gaudron, McHugh and Hayne JJ.

And in *Chan v Cresdon Pty Ltd*[71] it was said that the word "under" appearing in a covenant to pay rent "under this lease" referred to an obligation created by, in accordance with, pursuant to or under the authority of the lease[72].

35 Section 164A(b) does not refer to rights acquired under a lease; it refers to an agreement having the effect that ("by which") a right to use land is conferred on or acquired by a person. The reference in s 166(1)(a) is to the amount paid or payable, which is for the right and which obligation to pay arises "under the lease". The provision is not concerned with the definition of a lease, but with how duty is to be assessed upon it, by reference to amounts payable under it.

36 It is neither necessary nor appropriate to resort to the language of causation to construe the meaning and effect of the words "by which" appearing in s 164A(b). The provision is best explained by the construction given in *Buckle* to s 65 of the *Stamp Duties Act* 1920 (NSW). That section defined a "conveyance" to include a transfer, lease and other instruments and every decree or order of a court "whereby any property in New South Wales is transferred to or vested in or accrues to any person". It was said that, in its ordinary meaning, "whereby" "identifies the means by which or owing to which a certain result or effect is obtained"[73]. "[B]y which" in s 164A(b) has the same meaning.

37 Neither Sched 6A, cl 5(1) of the TA Act nor cl 2.4(a) of the Agreement was, by itself, effective to create the right in question. Neither had a legal consequence, considered separately. Clause 5(1) recognised that a party to an access agreement had the right ("is authorised") to have access to, and therefore the use of, the facilities and SRA land. It did not itself confer that right, nor did it confer power on RAC to grant such a right by agreement. It provided an authority which could be availed of, if an agreement for access with RAC to the rail infrastructure facilities were made. The phrase "in accordance with and as permitted by the access agreement" in cl 5(1) recognises that the agreement may allow the rail operator to take up the access rights referred to in cl 5 and may

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71 (1989) 168 CLR 242; [1989] HCA 63.

72 (1989) 168 CLR 242 at 249 per Mason CJ, Brennan, Deane and McHugh JJ.

73 (1998) 192 CLR 226 at 240 [32] per Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ; see also *Commissioner of Stamp Duties v Permanent Trustee Co Ltd (Trustee for Anzareno Dal Bon and Silvanio Dal Bon)* (1987) 9 NSWLR 719 at 727 per Kirby P, 729 per Priestley JA.

condition or otherwise limit them. The statute provided the authorisation to access and use the infrastructure and SRA land. It intended RAC to determine, by the access agreement, whether, and the extent to which, those rights could be availed of.

38 It is not correct to describe the operation of Sched 6A, cl 5(1) as conferring a power or giving a statutory right. Any right of access, capable of enforcement as such, did not come into existence until there was a rail operator who was a party to an access agreement and that agreement gave permission to use the rail infrastructure facilities. It was at that point, and by means of the Agreement, that the right vested in Pacific National.

Conclusion: the Agreement is dutiable

39 It is not correct to describe Sched 6A, cl 5(1) of the TA Act as the "legal source" of the right to use land. A concentration upon the authority there provided diverts attention from the question on the appeal which arises under s 164A(b) of the Duties Act, namely whether the Agreement was an agreement by which the right was acquired. Clearly it was. Pacific National had no such right prior to its entry into the Agreement. It was the making of the Agreement, and the grant of permission under it, "by which" Pacific National acquired the right provided in Sched 6A, cl 5(1).

Orders

40 The conclusion reached by the Court of Appeal was correct. The appeal should be dismissed with costs.