HIGH COURT OF AUSTRALIA

KIEFEL CJ,
BELL, GAGELER, NETTLE AND GORDON JJ

COMMISSIONER OF STATE REVENUE APPELLANT

AND

PLACER DOME INC (NOW AN AMALGAMATED ENTITY NAMED BARRICK GOLD CORPORATION) RESPONDENT

Commissioner of State Revenue v Placer Dome Inc
[2018] HCA 59
5 December 2018
P6/2018

ORDER

1. *Appeal allowed.*

2. *The Order of the Court of Appeal of the Supreme Court of Western Australia made on 11 September 2017 be set aside and, in its place, it is ordered that the appeal to that Court be dismissed with costs.*

3. *The respondent pay the appellant's costs of this appeal.*

On appeal from the Supreme Court of Western Australia

Representation

N C Hutley SC with B L Jones for the appellant (instructed by State Solicitor's Office (WA))

N J Young QC with A C Willinge for the respondent (instructed by Ernst & Young Law Pty Ltd)

CATCHWORDS

Commissioner of State Revenue v Placer Dome Inc

Stamp duties – Land-holding corporations – Acquisition of controlling interest – Whether corporation a "listed land-holder corporation" within meaning of Pt IIIBA of *Stamp Act* 1921 (WA) – Whether value of land to which corporation entitled 60 per cent or more of value of property to which it was entitled – Valuation methodologies – Whether corporation had legal goodwill – Meaning of legal goodwill – "Added value" approach to goodwill considered – Going concern value and goodwill distinguished.

Words and phrases – "acquisition", "assessment", "controlling interest", "custom", "discounted cash flow methodology", "going concern value", "goodwill", "listed land-holder corporation", "net asset value multiple", "property", "sources of goodwill", "stamp duty", "synergies", "top down".

Stamp Act 1921 (WA), Pt IIIBA.
Taxation Administration Act 2003 (WA), ss 34, 37, 40.
State Administrative Tribunal Act 2004 (WA), s 29.

1 KIEFEL CJ, BELL, NETTLE AND GORDON JJ. Part IIIBA of the *Stamp Act* 1921 (WA) was introduced to prevent duty on transfers of land being avoided through schemes that involved the use of corporate structures and share sales. The purpose of the Part is to equalise duty in relation to conveyances of land so that the duty is the same whether the land is conveyed directly or as a result of a transfer of shares[1]. The Part ensures that the buyer of an entity will be subject to ad valorem duty if the entity's underlying *value* is principally derived from land.

2 This appeal concerns one aspect of Pt IIIBA, Div 3b, which deals with "listed land-holder corporations". A listed land-holder corporation is an entity[2] entitled, at the time of acquisition, to land in Western Australia with an unencumbered value of not less than A$1 million *and* where 60 per cent or more of the *value* of all of its property[3] is land (regardless of the location of that land)[4].

3 Placer Dome Inc ("Placer") was a substantial gold mining enterprise[5] with land and mining tenements around the world, including in Western Australia. In 2005, Barrick Gold Corporation ("Barrick") was the second largest global gold mining enterprise[6] assessed by market capitalisation and gold reserves, and the

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1 *Commissioner of State Taxation v Nischu Pty Ltd* (1991) 4 WAR 437 at 439-440, 448-449, 457; *Commissioner of State Revenue v OZ Minerals Ltd* (2013) 46 WAR 156 at 179 [108], 207 [286].

2 The entity must be a body corporate that is registered or incorporated outside Western Australia and is listed on a recognised financial market: s 76ATI(1) of the Stamp Act.

3 Other than excluded property, being property defined in s 76ATI(4) of the Stamp Act as including, amongst others: cash or money in an account at call; negotiable instruments; rights or interests under a sales contract; money lent by the corporation or a trustee or a related corporation referred to in s 76ATI(6) to various defined persons; licences, patents or other intellectual property relating to, relevantly, the exploitation of minerals; stores, stockpiles or holdings of minerals or primary products (whether processed or unprocessed) produced by the corporation or a related person; and future tax benefits.

4 s 76ATI(2) of the Stamp Act.

5 Placer was listed on the Toronto, New York and Australian Stock Exchanges, amongst others.

6 Barrick was listed on the Toronto and New York Stock Exchanges, amongst others.

third largest by gold production. Barrick announced a hostile, and ultimately successful, takeover of Placer. The acquisition was the largest transaction of its kind in the gold industry. When Placer and Barrick were amalgamated in May 2006, the amalgamated entity became the world's largest gold mining business.

4 After Barrick acquired a controlling interest in Placer[7], the Commissioner of State Revenue ("the Commissioner") issued an assessment to Barrick under the Stamp Act which stated, relevantly, that Placer was a "listed land-holder corporation" and ad valorem duty of A$54,852,300 was payable. Barrick objected[8], the Commissioner disallowed the objection, and Barrick applied to the State Administrative Tribunal[9] for a review of the Commissioner's decision to disallow the objection.

5 Whether Placer was a "listed land-holder corporation" caught by Div 3b of Pt IIIBA of the Stamp Act turned on a single issue – did the *value* of all of Placer's *land*, regardless of its location, meet or exceed 60 per cent of the *value* of all of Placer's *property*, namely 60 per cent of $12.8 billion ($7.68 billion)[10].

6 Section 76ATI(2)(b) of the Stamp Act required a comparison to be drawn, at the date of acquisition, between the *value* of all the *land* to which Placer was entitled and the *value* of all the *property* to which Placer was entitled, other than certain excluded property. The statutory purpose for which the values were to be determined was to ascertain whether Placer's underlying *value* was principally in its land or non-land assets.

7 In undertaking that statutory valuation exercise, the parties did not agree on the valuation methodology to be used or whether the value of all of Placer's land met or exceeded the 60 per cent threshold. A key question was whether Barrick was correct to contend that the property of Placer, prior to its acquisition by Barrick, included goodwill with a value of $6.506 billion. If it did, then the value of Placer's land was less than the 60 per cent threshold.

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7 Within the meaning of s 76ATK(2) of the Stamp Act.

8 Under s 34(1) of the *Taxation Administration Act* 2003 (WA).

9 Under s 40(1) of the *Taxation Administration Act* 2003 (WA).

10 All references are to US dollars except where noted.

8 The Commissioner contended that a "top down" valuation method should be adopted. A "top down" approach is a shorthand description of a valuation methodology which starts with the value of the total property, before subtracting the value of assets which are not land, in order to produce a residual value which is then attributed to land[11]. Adopting that methodology, the Commissioner contended that immediately before Placer's acquisition by Barrick, Placer had no material *property* comprising goodwill with the inevitable result that the *value* of Placer's *land* exceeded the 60 per cent threshold.

9 Barrick disagreed. It contended that Placer's land should be valued directly, using a discounted cash flow ("DCF") methodology, and that the resulting valuation of Placer's land was less than the 60 per cent threshold. Barrick further contended that even if a "top down" approach were adopted, the result would be no different because, immediately before the acquisition, Placer owned *property* being goodwill with a value of more than $6 billion.

10 The Tribunal dismissed Barrick's review application. The Tribunal concluded that, for the purposes of the Stamp Act, the value of Placer's land should be determined by adopting the "top down" method[12]; that the value of Placer's land was the residual of calculating the value of all of Placer's property less the value of its non-land assets[13]; and, further, that Placer's assets did not include any material legal goodwill[14].

11 Barrick appealed to the Court of Appeal of the Supreme Court of Western Australia. The Court of Appeal allowed Barrick's appeal on the basis that the Tribunal had failed to distinguish between the value of Placer's land and the value of its business as a going concern. The Court of Appeal held that Placer's land should be valued using the *Spencer*[15] valuation principles; that the "top down" method was unsuitable because Placer's non-land assets, including

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11 See *EIE Ocean BV v Commissioner of Stamp Duties* [1998] 1 Qd R 36 at 38, 44-45.

12 *Placer Dome Inc (Now an amalgamated entity named Barrick Gold Corporation) and Commissioner of State Revenue* [2015] WASAT 141 at [256]-[262], [265].

13 *Placer* [2015] WASAT 141 at [265].

14 *Placer* [2015] WASAT 141 at [377], [379].

15 *Spencer v The Commonwealth* (1907) 5 CLR 418; [1907] HCA 82.

goodwill, could not be valued with any accuracy; and, further and in any event, that Placer had a substantial amount of legal goodwill[16].

12 For the reasons that follow, the Commissioner's appeal should be allowed. A "top down" method was appropriate. At the date of acquisition by Barrick, Placer had no material property comprising legal goodwill. Placer was a land rich company. For the purposes of the statutory valuation exercise, Barrick did not establish that the value of all of Placer's *land*, as a percentage of the value of all of Placer's *property*, did not meet or exceed the 60 per cent threshold. Moreover, Barrick's contention that goodwill for legal purposes was or should be treated as synonymous with what it described as the "added value" concept of goodwill or "going concern value" should be rejected.

Statutory framework

13 In assessing value, the starting point is the particular statutory scheme. That scheme provides the legal context in which the valuation exercise is to be undertaken and that context determines the relevant principles of valuation to be applied[17].

14 Where a person acquires a controlling interest in a listed land-holder corporation, the corporation is obliged under the Stamp Act to lodge a dutiable statement with the Commissioner in respect of that acquisition[18]. A dutiable statement is chargeable with duty at a specified rate[19] – here, on the basis of the

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16 *Placer Dome Inc v Commissioner of State Revenue* (2017) 106 ATR 511 at 526 [57], 527 [60], 533 [91], 534 [95].

17 *Federal Commissioner of Taxation v Resource Capital Fund III LP* (2014) 225 FCR 290 at 302 [47] citing *Walker Corporation Pty Ltd v Sydney Harbour Foreshore Authority* (2008) 233 CLR 259; [2008] HCA 5 and quoting *Leichhardt Council v Roads and Traffic Authority (NSW)* (2006) 149 LGERA 439 at 447 [35]-[36].

18 s 76ATG(1) of the Stamp Act. Section 76AB(1) provides that a person may, within two months after making an acquisition, request the Commissioner to determine whether a dutiable statement is required to be lodged. Placer made such a request and the Commissioner made a determination under s 76AB(3).

19 s 76ATH of the Stamp Act.

unencumbered *value* of the land and chattels in Western Australia to which the relevant corporation was entitled at the time of the acquisition[20].

15 The statutory valuation exercise requires a comparison to be drawn, at the date of acquisition, between the *value* of all the *land* to which the corporation is entitled and the *value* of all the *property* to which the corporation is entitled, other than certain excluded property[21].

16 A number of aspects of that statutory valuation exercise should be noted. The statutory context, and the purpose for which the values are to be determined, is directed to ascertaining whether an entity's underlying *value* is principally in its land or non-land assets. The valuation must take into account, and be consistent with, the relevant statutory definition of "land". That definition includes mining tenements, and also includes any interest or estate in land, or anything fixed to the land "including anything that is, or purports to be, the subject of ownership separate from the ownership of the land"[22].

17 Next, in determining the value of all land and all property to which a corporation is entitled[23], the "ordinary principles of valuation" are to be applied[24]. There was no dispute that the "ordinary valuation principles" were those stated in *Spencer*: the value is the price which a hypothetical willing but not anxious seller could reasonably expect to obtain and a hypothetical willing but not anxious buyer could reasonably expect to pay after proper negotiations between them have concluded and without overlooking any ordinary business consideration[25].

18 And there was no dispute that those ordinary valuation principles required both the seller and the buyer to be taken to be "perfectly acquainted with the land, and cognizant of all circumstances which might affect its value, either advantageously or prejudicially, including its situation, character, quality,

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20 s 76ATL of the Stamp Act.

21 s 76ATI(2)(b) of the Stamp Act.

22 s 76(1) of the Stamp Act.

23 For the purposes of s 76ATI(2)(b) of the Stamp Act.

24 s 33(1)(c) of the Stamp Act.

25 (1907) 5 CLR 418 at 441.

proximity to conveniences or inconveniences, its surrounding features, the then present demand for land, and the likelihood, as then appearing to persons best capable of forming an opinion, of a rise or fall for what reason soever in the amount which one would otherwise be willing to fix as the value of the property"[26].

19 However, the Stamp Act modified the application of the ordinary valuation principles to the valuation of both land and property in two important respects. First, when applying the ordinary valuation principles, s 33(1)(c) of the Stamp Act stated that specific assumptions were to be adopted – relevantly, that:

> "(i) … a hypothetical purchaser would, when negotiating the price of the land or other property, have knowledge of all existing information relating to the land or other property; and
>
> (ii) no account is to be taken of any amount that a hypothetical purchaser would have to expend to reproduce, or otherwise acquire a permanent right of access to and use of, existing information relating to the land or other property."

20 Second, the Stamp Act stated that particular property was *not* to be included in the statutory valuation exercise[27]. One category of excluded property was "a licence or patent or other intellectual property (including knowledge or information that has a commercial value) relating to any process, technique, method, design or apparatus to … locate, extract, process, transport or market minerals"[28].

21 In the valuation of both land and property for the purposes of the Stamp Act, there were therefore two interconnected requirements – an assumption that a hypothetical purchaser knew how to exploit the land and property *and* that the value of knowledge comprising intellectual property was excluded. It will be necessary to return to consider these requirements later in these reasons.

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26 *Spencer* (1907) 5 CLR 418 at 441.

27 s 76ATI(4) of the Stamp Act.

28 s 76ATI(4)(f)(i) of the Stamp Act.

Earlier authorities

22 Before turning to the particular circumstances of this appeal, it is necessary to say something further about the significance of the statutory context.

23 Consistently with a number of decisions of this Court[29], the Tribunal correctly stated that ordinary principles of valuation suggest "true value" is that which lies between the most the buyer is willing to pay and the least the seller is willing to accept – the price which a hypothetical willing but not anxious vendor could reasonably expect to obtain and a hypothetical willing but not anxious purchaser could reasonably expect to pay after proper negotiations between them have been concluded[30]. However, this Court has recognised the need for caution when taking valuation principles identified in one context and seeking to apply them to a different context[31].

24 *Spencer* concerned a valuation dispute in the context of the compulsory acquisition of the plaintiff's land by the Commonwealth; the statutory context and focus was on the need to compensate the plaintiff for his loss[32]. The seminal passage from Isaacs J's judgment has already been cited[33].

25 The approach in *Spencer* was applied by the High Court in *Abrahams v Federal Commissioner of Taxation*[34], which concerned the valuation of shares for the purposes of estate duty. However, in a subsequent case, *Commissioner of*

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29 *Spencer* (1907) 5 CLR 418 at 441; *Perpetual Trustee Co (Ltd) v Federal Commissioner of Taxation* (1942) 65 CLR 572 at 579; [1942] HCA 4; *Abrahams v Federal Commissioner of Taxation* (1944) 70 CLR 23 at 29; [1944] HCA 32; *Commissioner of Succession Duties (SA) v Executor Trustee and Agency Co of South Australia Ltd* (1947) 74 CLR 358 at 367; [1947] HCA 10; *Executors of Estate of Crane v Commissioner of Taxation (Cth)* (1974) 49 ALJR 1 at 2; 5 ALR 38 at 41.

30 *Placer* [2015] WASAT 141 at [156]-[157].

31 See *Commissioner of Succession Duties (SA)* (1947) 74 CLR 358 at 361, 370, 373-374.

32 (1907) 5 CLR 418 at 435, 441-442.

33 *Spencer* (1907) 5 CLR 418 at 441. See [17] above.

34 (1944) 70 CLR 23 at 29.

Succession Duties (SA) v Executor Trustee and Agency Co of South Australia Ltd, the Court sounded a note of caution[35]. Dixon J expressed it in these terms[36]:

> "[T]here is some difference of purpose in valuing property for revenue cases and in compensation cases. In the second the purpose is to ensure that the person to be compensated is given a full money equivalent of his loss, while in *the first it is to ascertain what money value is plainly contained in the asset so as to afford a proper measure of liability to tax*. While this difference cannot change the test of value, it is not without effect upon a court's attitude in the application of the test. In a case of compensation doubts are resolved in favour of a more liberal estimate, in a revenue case, of a more conservative estimate." (emphasis added)

26 That passage was cited with approval in 1974 by Stephen J in *Executors of Estate of Crane v Commissioner of Taxation (Cth)*[37], which also concerned the valuation of shares for the purposes of estate duty. His Honour said that the task of valuation in that appeal was "no more than to ascertain 'a proper measure of liability to tax' in respect of [the] shares"[38] and that that involved "the postulating of a hypothetical sale to a purchaser as at the date of death and in circumstances in which neither party is anxious but each is willing to become a party to such a sale; the value will be the price at which such a sale would, after proper negotiation between the parties, have been concluded"[39].

27 The position under Pt IIIBA of the Stamp Act is analogous – the task is to determine if the entity's underlying *value* is principally derived from land, for the purpose of ascertaining liability to tax. It is in the specific statutory context of Div 3b of Pt IIIBA that the facts and the statutory valuation exercise in fact undertaken must be considered.

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35 (1947) 74 CLR 358 at 361, 370, 373-374.

36 *Commissioner of Succession Duties (SA)* (1947) 74 CLR 358 at 373-374.

37 (1974) 49 ALJR 1; 5 ALR 38.

38 *Crane* (1974) 49 ALJR 1 at 4; 5 ALR 38 at 45 citing *Commissioner of Succession Duties (SA)* (1947) 74 CLR 358 at 373.

39 *Crane* (1974) 49 ALJR 1 at 2; 5 ALR 38 at 41.

Facts and the statutory valuation exercise in fact undertaken

Placer

28 Before it was acquired by Barrick, Placer was the fifth largest global gold mining company assessed by market capitalisation, the third largest by gold reserves and the fourth largest by gold production. At the time of acquisition, it operated 16 gold mines, five development projects and seven exploration projects in North America, South America, Australasia and South Africa and employed approximately 13,000 people. It had land-holdings, including mining, development and exploration interests, around the world. Placer's only material revenue was from the sale of gold, which it sold as refined elemental metal[40].

The acquisition

29 In October 2005, Barrick made an offer to acquire all of the ordinary shares of Placer.

30 Barrick's offer represented, approximately, a 27 per cent premium to the average closing stock price of Placer. Mr Sokalsky, at the time of the acquisition the Executive Vice President and Chief Financial Officer of Barrick (later appointed the Chief Executive Officer and President of Barrick), put forward the following points to the Barrick Board about the Placer acquisition (in the order they appeared in the slide presentation):

> "– Transaction makes Barrick largest gold company with a political risk profile better able to handle subsequent acquisitions
>
> – Considerable synergies make the deal accretive and provides a stronger development pipeline for growth".

In evidence before the Tribunal, Mr Sokalsky agreed that the ordering of these points ahead of the remaining points on the slide reflected the strongest aspects of the takeover for Barrick and that those matters had value not able to be precisely quantified. These matters are significant. It will be necessary to consider them further in the context of Barrick's contention that the property of Placer, prior to its acquisition by Barrick, included goodwill with a value of $6.506 billion.

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40 Placer also produced and sold copper, though to a much lesser extent.

31 In November 2005, Placer's Board recommended to Placer shareholders that they reject Barrick's offer. Mr Tomsett, then President and CEO of Placer, said:

> "We have 16 operations in seven countries. We are truly global – possessing the skills and expertise required to operate around the world.
>
> Our mines are located in some of the world's most prolific gold-producing areas. You can't replicate a portfolio that includes the Red Lake and Timmins Districts in Canada, South Carlin trends in the US, the Mara shear in Tanzania, and Kalgoorlie greenstone belts in Australia amongst others.
>
> We've been building significant land positions around all our mines. It's been our quiet but determined strategy for the last five years. Those land positions have significantly contributed to reserve growth of 60% since 2001. Those land positions and talented people have made us the only senior gold-mining company to have replaced reserves from our operating mines in each of the last four years. And I'm confident that 2005 will mark the fifth consecutive year.
>
> *Quality land is what this business is all about, and we have lots of it. We also have growth – significant development projects – Cortez Hills, Pueblo Viejo, Donlin Creek, Mt Milligan and Sedibelo. Most companies are lucky to have one development project*." (emphasis added)

32 In December 2005, Barrick agreed to make an increased offer to purchase all of Placer's shares. On 4 February 2006 ("the acquisition date"), Barrick acquired a controlling interest in Placer within the meaning of s 76ATK(2) of the Stamp Act, upon receiving acceptances of its revised offer in relation to at least 90 per cent of Placer's common shares. On 8 March 2006, Barrick became the sole shareholder of Placer by acquiring the remaining common shares of Placer. The price Barrick paid to acquire Placer (grossed up for liabilities) was $15.346 billion.

Statutory valuation exercise – areas of agreement and dispute

33 In undertaking the statutory valuation exercise – namely, ascertaining whether the *value* of all of Placer's *land*, regardless of its location, met or exceeded 60 per cent of the *value* of all of Placer's *property*, for the purposes of Pt IIIBA of the Stamp Act – the parties *agreed* that:

(1) the value of all of the property to which Placer was entitled at the acquisition date was $15.3 billion, being the price Barrick paid to acquire Placer;

(2) Placer was entitled to land in Western Australia with an unencumbered value of not less than A$1 million;

(3) the value of all property directed to be excluded by s 76ATI(4) of the Stamp Act was $2.5 billion;

(4) the capitalised value of the "synergies" to be derived from combining Placer's and Barrick's operations (expected to arise from savings in administration and the cost of operating various global offices, exploration, operations and technical services and from arrangements with respect to finance and tax) was between $1.6 billion and $2 billion (between $200 million and $250 million annually); and

(5) the ordinary principles of valuation were those set out in *Spencer*.

34 In order to understand the dispute about whether the value of all of Placer's land, regardless of its location, met or exceeded the 60 per cent threshold as well as why, in the circumstances of this appeal, the direct land valuation approach using a DCF methodology was inappropriate, it is necessary to understand Barrick's accounting for its acquisition of Placer.

Acquisition accounting

35 As a listed entity on the New York Stock Exchange and registrant, and as a Canadian foreign filing entity, Barrick was required to comply with the United States generally accepted accounting principles ("US GAAP").

36 Financial Accounting Standards Board ("FASB") standards establish US GAAP for financial accounting. The FASB Statement of Financial Accounting Standard ("FAS") No 141 – "Business Combinations" – applied to Barrick[41]. It applied because FAS No 141 contained the required basis of acquisition accounting for Barrick's acquisition of Placer – "the purchase accounting technique".

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41 FAS No 141 (and FAS No 142) applied by force of the *Securities Exchange Act of 1934*, 15 USC (especially §78m) and the applicable regulations, *Commodity and Securities Exchanges*, 17 CFR (especially §210.4-01).

37 The application of this technique entails the need, in every acquisition, for a purchase price allocation exercise to be undertaken, in which the *identifiable* assets and liabilities of the acquired business are ascribed their fair market value with the excess of purchase consideration over the net *fair value* of assets acquired being ascribed to goodwill. The operative definition of fair value, as identified by Barrick's expert, was "[t]he amount at which an asset (or liability) could be bought (or incurred) or sold (or settled) in a current transaction between willing parties, that is, other than in a forced or liquidation sale".

38 Mr Patel of Ernst & Young LLP ("EY") was engaged by Barrick in 2006 (following the acquisition) to perform a "valuation analysis" to provide a "fair value" of Placer's tangible and intangible assets as at the time of the acquisition, for the purposes of Barrick's financial reporting obligations. EY's valuation work culminated in EY's purchase price allocation report dated 19 February 2007 ("the EY PPA Report"). The EY PPA Report was undertaken in accordance with US GAAP and, in particular, in accordance with FAS No 141.

39 The EY PPA Report valued the *total property* of Placer at $15.346 billion, the purchase price. Using a DCF methodology, EY valued Placer's *land assets* at $5.694 billion. EY valued Placer's assets in total at $8.84 billion[42]. To reconcile the amount of $8.84 billion with the amount of the purchase price ($15.346 billion), Mr Patel included in Placer's assets an item called "goodwill" with a value of $6.506 billion. That item was a "derivative" amount representing the residual amount of the purchase consideration after identification of the fair value of the acquired *identifiable* tangible and intangible assets or, in other words, the excess of the cost after deduction of all of the identified assets acquired. That approach to goodwill was in accordance with the requirements of the FASB and, in particular, the definition of goodwill in FAS No 141.

40 The EY PPA Report was then used as the basis for the value of goodwill reported in Barrick's 31 December 2006 financial statements, which were filed with the US Securities and Exchange Commission ("the US SEC"). On 8 November 2006, in a letter to the US SEC, Barrick explained the allocation of goodwill as follows:

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42 Those assets were identified as property, plant and equipment, mining interests, development projects, exploration projects and "intangibles".

> "In conclusion the amount of value not captured in tangible and identifiable intangible assets on acquisition of a gold mining company is initially presumed to be captured in goodwill, *the principal elements of which are the ability to sustain and grow reserves and the ability to realize synergies from the business combination*. Barrick believes that the elements of goodwill described above in relation to the acquisition of [Placer] are most closely associated with the management of portfolios of mines and exploration properties. Barrick believes that the allocation of goodwill should reflect this association and the manner in which goodwill arises." (emphasis added)

41 Two matters should be noted about the fact that the letter records that the $6.506 billion allocated to goodwill reflected, at least in part, the *expectation of future events*: namely, the ability to "sustain and grow reserves" and "the ability to realize synergies from the business combination". First, the letter was consistent with the views expressed by Mr Sokalsky to the Barrick Board in October 2005 to which reference has been made[43] – that there was value in the synergies arising out of, or as a consequence of, the acquisition. Second, and no less significantly, Mr Sokalsky agreed in evidence that the fact that the transaction made Barrick the largest gold mining company with a political risk profile better able to handle subsequent acquisitions had a "tremendous amount of value". Thus, the $6.506 billion goodwill allocation included a value reflecting the *expectation of these future events*, which events did not exist prior to the acquisition date. Critically, there was a value in the goodwill allocation that was not value which *inhered in Placer*. It will be necessary to return to these matters later in these reasons when addressing Barrick's contention that those events were sources of goodwill to be included in the statutory valuation exercise.

42 Not only did the "goodwill" in the EY PPA Report, and in Barrick's financial statements, include the value of these future events, but the "goodwill" in the EY PPA Report was the single highest valued item, comprising more than 40 per cent of the total purchase price of Placer ($6.506 billion as a percentage of $15.346 billion) and more than 50 per cent of the value of all property to which Placer was entitled, for the purposes of s 76ATI(2)(b) of the Stamp Act ($6.506 billion as a percentage of $12.8 billion). As the Court of Appeal noted, such a result for a land rich company was surprising.

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43 See [30] above.

The DCF valuations

43 Barrick's contention that, immediately before its acquisition by Barrick, Placer owned property comprising goodwill with a value of $6.506 billion was a significant issue.

44 As stated earlier, the Commissioner contended that if the goodwill allocation did not represent goodwill at law then, a priori, the value of all land of Placer exceeded the statutory threshold and Placer was a "land-holder" within the meaning of s 76ATI(2) of the Stamp Act. On the other hand, Barrick contended that the sole statutory issue was whether the value of the *land assets* held by Placer at the time it was acquired by Barrick exceeded the statutory threshold in s 76ATI and that the appropriate valuation methodology was a DCF methodology. The difficulty for Barrick was that the DCF methodology of valuing the land assets, as applied by its experts, yielded a large gap between the valuation of Placer's land assets and the purchase price paid. That gap necessarily raised a question about the reliability of the DCF valuations and, in turn, a question about the content of the $6.506 billion allocated to goodwill in Barrick's accounts.

45 It is therefore necessary to consider the DCF valuations relied upon by the parties' experts to understand the need for, and significance of, a "top down" approach in addressing the statutory valuation question in the circumstances of this appeal.

46 Each valuer estimated the fair market value of the land assets based on the after-tax cash flows that the asset could be expected to generate over an appropriate remaining useful life, discounted to their present value – a DCF calculation – and each valuer used Placer's strategic business plans in their DCF calculations.

47 A critical integer in generating the cash flows was the estimated gold prices, which are set by transactions on international metals exchanges to which the identity of the parties – whether as vendor or as purchaser – is irrelevant[44]. Gold miners are price takers, not price makers; the reputation or capability of the

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44 An expert for Barrick explained that "[i]n any commodity-based business it would be difficult to assert that value belonged to trademarks or trade names and similarly to customer relationships because no product differentiation exists in the marketplace".

miner, smelter or vendor is irrelevant. And the gold price is difficult to predict[45]. As one of Barrick's experts acknowledged in evidence before the Tribunal, estimates of future gold prices could be "quite dramatically wrong", predictions could be pretty unreliable and, as a result, his reports could turn out quite inaccurate.

48 Further, when a gold mining company is sold, the market price at which the company is sold is *often* a multiple, described as the "net asset value multiple" (or the "NAV multiple"), of the DCF value of the assets of the company. As Mr Patel stated in evidence, "[i]n the gold mining space this is likely to happen [but it] doesn't mean your [DCF] is wrong" if there are identifiable bases for the NAV multiple. Put in different terms, the DCF valuation may still yield a reliable estimate of value if the gap can otherwise be explained. Here, the gap could not be explained.

49 Of course, there may be instances where a DCF analysis of a gold mining company's assets, cross-checked against the market value of the entity, could yield a reliable estimate of value where the gap between those values could be explained. One example might be where the gold mining company was generating above-market returns. This was not such a case. After Barrick's acquisition of Placer, it was required to prepare and lodge consolidated financial statements. It adopted the conventional *accounting* practice of allocating to Placer's assets amounts nominated as their "fair value", and allocating the residual of the purchase price, $6.506 billion, to "goodwill".

50 When Barrick came to address the statutory valuation of Placer's land for the purposes of the Stamp Act, Barrick contended that the DCF calculation directed to valuing each mining tenement according to its best potential use was the standard, and not an inappropriate, methodology and that the residual accounting amount – the gap of $6 billion – *was attributable to and equal to the value of Placer's legal goodwill*. Barrick identified a number of "sources" for Placer's goodwill: personnel; technological capabilities; innovative mining techniques; management; size, structures and systems; ability to harvest efficiencies and economies of scale; ability to expand its business; "synergies"; and going concern value.

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45 The gold prices used by (and therefore the DCF calculations of) the valuer called by the Commissioner were discredited in the Court of Appeal and may be put to one side.

51 Barrick's contention that, in undertaking the statutory valuation exercise, the appropriate approach was directly valuing the land (with the residual allocated to goodwill) should be rejected on one or more of the following bases: the $6 billion was not legal goodwill; a number of the identified "sources" were excluded by the Stamp Act from the statutory valuation exercise; a number were of no material value separate from the land; and a number were of no material value. In undertaking the statutory valuation exercise in the circumstances of Barrick's acquisition of Placer, the direct valuation approach of valuing Placer's land using a DCF analysis was inappropriate. It was not a reliable method of valuing *Placer's* assets.

Goodwill

52 "'Goodwill' is notoriously difficult to define"[46]. It is a legal term as well as an accounting, or business, term[47]. That the legal definition of goodwill differs from that adopted by accountants and business persons[48] is not surprising.

53 As has been stated, "[g]oodwill, to accountants, clearly means something different than goodwill to lawyers. There is no concept of negative goodwill in law. Goodwill for accounting purposes is essentially subjective, reflecting the excess that a purchaser is willing to pay for a business or the discount a seller is willing to accept for the same. In this sense, it is essentially a balancing item. However, as a matter of law, the existence or otherwise of goodwill is objectively ascertained"[49].

54 The approach to goodwill adopted in the EY PPA Report was that of the accountants – a "derivative" amount representing the residual amount of the purchase consideration after identification of the fair value of the acquired *identifiable* tangible and intangible assets, or the excess of the cost after deduction of all of the identified assets.

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46 *Hepples v Federal Commissioner of Taxation* (1992) 173 CLR 492 at 519; [1992] HCA 3 quoted in *Federal Commissioner of Taxation v Murry* (1998) 193 CLR 605 at 611 [12]; [1998] HCA 42.

47 *Murry* (1998) 193 CLR 605 at 612 [13]. See generally Leake, *Commercial Goodwill*, 2nd ed (1930), Ch 1.

48 *Murry* (1998) 193 CLR 605 at 612 [13].

49 Bridge et al, *The Law of Personal Property*, 2nd ed (2018) at 196 [9-014] (footnote omitted).

55 By way of contrast, courts define, and identify, goodwill in differing *factual* and *legal* contexts. The definition in one context is more often than not inappropriate in another context. As the majority said in *Federal Commissioner of Taxation v Murry*[50], "the nature of goodwill as property may be the focus of the legal inquiry", "the value of the goodwill of a business may be the focus of the inquiry", or "identifying the sources or elements of goodwill may be the focus of the inquiry". That list is not exhaustive. Of particular significance in seeking to define goodwill as a legal term has been the importance of the varying statutory contexts in which the legal question has arisen[51]. This appeal is no different. The factual and legal context is both particular and specific.

56 There is no dispute that the foundations of goodwill for legal purposes rested on patronage. In the early English cases, goodwill was understood as a kind of customer loyalty[52]. As Lord Eldon LC said in *Cruttwell v Lye*[53], goodwill was "nothing more than the *probability*, that the old customers will resort to the old place" (emphasis added). The significant implication was, and remains, that goodwill is "intangible and ephemeral rather than tangible and permanent"[54].

57 In *Inland Revenue Commissioners v Muller & Co's Margarine Ltd*[55], Lord Lindley said:

> "Goodwill regarded as property has *no meaning except in connection with some trade, business, or calling*. In that connection *I understand the word to include whatever adds value to a business by*

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50 (1998) 193 CLR 605 at 611 [12].

51 See, eg, *Minister for Home and Territories v Lazarus* (1919) 26 CLR 159; [1919] HCA 12; *The Commonwealth v Reeve* (1949) 78 CLR 410; [1949] HCA 22; *Murry* (1998) 193 CLR 605.

52 See *Murry* (1998) 193 CLR 605 at 612 [15]. See also Osborn, "Rethinking Goodwill: The *Murry* Legacy", (2012) 7(2) *Journal of Applied Research in Accounting and Finance* 31 at 33-34.

53 (1810) 17 Ves Jun 335 at 346 [34 ER 129 at 134].

54 Hey, "Goodwill – Investment in the Intangible", in Currie, Peel and Peters (eds), *Microeconomic Analysis: Essays in Microeconomics and Economic Development*, (1981) 196 at 197.

55 [1901] AC 217 at 235.

> *reason of situation, name and reputation, connection, introduction to old customers, and agreed absence from competition, or any of these things, and there may be others which do not occur to me*. In this wide sense, goodwill is inseparable from the business to which its [sic] adds value, and, in my opinion, exists where the business is carried on. Such business may be carried on in one place or country or in several, and if in several there may be several businesses, each having a goodwill of its own." (emphasis added)

58 In that same case, Lord Macnaghten gave another key definition of goodwill[56]:

> "It is the benefit and advantage of the good name, reputation, and connection of a business. *It is the attractive force which brings in custom.* It is the one thing which distinguishes an old-established business from a new business at its first start. The goodwill of a business must emanate from a particular centre or source. However widely extended or diffused its influence may be, *goodwill is worth nothing unless it has power of attraction sufficient to bring customers home to the source from which it emanates*." (emphasis added)

59 However, in subsequent years, the idea that goodwill rested on patronage – attracting customers through the door – came to be seen as too confined, but not irrelevant.

60 That can be most readily seen in the decision of the High Court in *Box v Commissioner of Taxation*[57]. The issue was whether a payment in relation to a restrictive covenant constituted goodwill for the purposes of the *Income Tax Assessment Act* 1936 (Cth). The plurality recognised that although at first the tendency was to place upon goodwill the limited meaning of nothing more than the probability that the customers would resort to the old place of business, a wider view then prevailed[58].

61 The wider view was – and, as will be seen, remains – that "the real value of the goodwill *had nothing to do with any particular site but consisted in the*

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56 *Muller* [1901] AC 217 at 223-224.

57 (1952) 86 CLR 387; [1952] HCA 61.

58 *Box* (1952) 86 CLR 387 at 395-396.

formation of a personal connection with a large number of purchasers"[59] (emphasis added). Custom was now recognised to encompass more than patronage, in the sense of customers frequenting a particular premises. The way in which business was conducted and custom was attracted now was far more sophisticated. As the plurality said in *Box*, those personal connections extended to "every positive advantage that has been acquired by the old firm in carrying on its business, whether connected with the premises in which the business was carried on, or with the name of the firm, or with other matter carrying with it the benefit of the business"[60].

62 In relation to Lord Lindley's description of goodwill as "whatever adds value to a business"[61], the plurality recognised that "different businesses derive their value from different considerations"; that "[t]he goodwill of some businesses is derived almost entirely from the place where they are carried on, ... and partly from the reputation built up around the name of the individual or firm or company"; that "some goodwills are purely personal"; and that "some goodwills derive their value partly from the locality where the business is carried on"[62]. The plurality clearly did not suggest that "custom" was irrelevant to goodwill – rather, that the notion of custom as being confined to a customer resorting to the old site of a business had become too narrow.

63 Thus, the notion of custom encompassed connections between a business identity and customers, however those connections were made. This expansion of the view of goodwill from being sourced in a *place* of business to recognising that there were other sources – such as the personality of those that ran the business or the way it was conducted – did *not* diverge from the idea that custom was central to goodwill. Custom was and remains central. What had occurred was that the law now recognised that custom could be generated by and from different sources.

64 That expansion of what might generate custom was addressed even before the decision in *Box*, by Rich J in *Federal Commissioner of Taxation v*

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59 *Box* (1952) 86 CLR 387 at 399.

60 (1952) 86 CLR 387 at 396 citing *Trego v Hunt* [1896] AC 7 at 17. See also *Churton v Douglas* (1859) Johns 174 at 188 [70 ER 385 at 391].

61 *Muller* [1901] AC 217 at 235.

62 *Box* (1952) 86 CLR 387 at 397. See also Leake, *Commercial Goodwill*, 2nd ed (1930) at 14.

Williamson[63]. His Honour discussed the "cats, dogs, rats and rabbits" categorical analysis of goodwill as follows:

> "The cat prefers the old home to the person who keeps it, and stays in the old home although the person who has kept the home leaves, and so it represents the customer who goes to the old shop whoever keeps it, and provides the local goodwill. The faithful dog is attached to the person rather than to the place; he will follow the outgoing owner if he does not go too far. The rat has no attachments, and is purely casual. The rabbit is attracted by mere propinquity. He comes because he happens to live close by and it would be more trouble to go elsewhere. *These categories serve as a reminder that the goodwill of a business is a composite thing referable in part to its locality, in part to the way in which it is conducted and the personality of those who conduct it, and in part to the likelihood of competition, many customers being no doubt actuated by mixed motives in conferring their custom.*" (emphasis added)

The value of that categorical analysis of goodwill has been questioned as potentially misleading[64]. But there are two points to be made about that categorical analysis. First, neither in *Box* nor in *Williamson* was there divergence from the idea that custom was central to goodwill; and, second, those decisions (and the analysis) emphasise that goodwill – custom – could be generated from a number of sources.

Murry

65 The decision of this Court in *Murry* in 1998 marked a watershed. It is therefore necessary to address the decision in some detail. It cannot, and should not, be understood by taking a few isolated passages out of their context and treating those passages as a comprehensive summary of what was decided. Moreover, the legal and factual context of the decision is significant.

66 The legal issue was whether, under the *Income Tax Assessment Act* 1936, by reason of an exempting provision, the capital gain from a disposal of a business or an interest in a business was deemed to be reduced by half because the disposal included the goodwill of the business. Goodwill was not defined in the Act. The factual context was the disposal of a licence to operate a taxi.

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63 (1943) 67 CLR 561 at 564; [1943] HCA 24 citing *Whiteman Smith Motor Co v Chaplin* [1934] 2 KB 35 at 42, 49.

64 See, eg, *Whiteman* [1934] 2 KB 35 at 49-50 per Maugham LJ.

The majority held that the taxpayer (and her husband) did not dispose of a business within the meaning of the exempting provision and nor did they dispose of an interest in a business which included the goodwill of the business.

67 In addressing that legal and factual context, the majority considered the nature of goodwill, goodwill as property, the sources of goodwill, and then the value of goodwill. It is instructive to consider the majority's reasons by reference to those matters.

Nature of goodwill[65]

68 In considering the nature of goodwill, the majority stated that although goodwill is notoriously difficult to define, its existence "depends upon proof that the business generates and is likely to continue to generate earnings from the use of the identifiable assets, locations, people, efficiencies, systems, processes and techniques of the business"[66].

69 Second, the majority restated that which had been addressed by the Court in *Box* and *Williamson*, that the legal definition of goodwill that emphasised patronage – that old customers will resort to the old place – had been expanded, and included that which Lord Lindley had described as "whatever adds value to a business by reason of situation, name and reputation, connection, introduction to old customers, and agreed absence from competition, or any of these things, and there may be others"[67].

70 Third, and of importance to understanding the reasoning in *Murry*, "the attraction of custom still remain[ed] central to the legal concept of goodwill"[68]. Fourth, it seemed "impossible to achieve a synthesis of the legal and the accounting and business conceptions of goodwill"[69]. And, finally, the legal concept of goodwill has three different aspects – property, sources and value – and what unites those aspects is the "conduct of a business"[70]. It was each of

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65 *Murry* (1998) 193 CLR 605 at 611-615 [12]-[22].

66 *Murry* (1998) 193 CLR 605 at 611 [12].

67 *Muller* [1901] AC 217 at 235 quoted in *Murry* (1998) 193 CLR 605 at 613 [16].

68 *Murry* (1998) 193 CLR 605 at 614 [20].

69 *Murry* (1998) 193 CLR 605 at 614 [21].

70 *Murry* (1998) 193 CLR 605 at 614-615 [22].

these aspects that the majority then addressed. As will become evident, for each aspect, the attraction of custom remained the critical focus of, and central to, the legal concept of goodwill.

Goodwill as property[71]

71 The majority accepted that goodwill for legal purposes is property because "*it is the legal right or privilege to conduct a business in substantially the same manner and by substantially the same means that have attracted custom to it*", being a "right or privilege that is inseparable from the conduct of the business"[72] (emphasis added). In other words, the law would seek to protect those rights or privileges in order to preserve the custom attracted to that business.

The sources of goodwill[73]

72 In seeking to identify the sources of goodwill, the starting point for the majority was, again, custom[74]: "[t]he goodwill of a business is the product of combining and using the tangible, intangible and human assets of a business *for such purposes and in such ways that custom is drawn to it*" (emphasis added). And, significantly, goodwill was identified as having sources, not elements[75]. That distinction was and remains important because the sources of goodwill have a unified purpose and result – to generate or add value (or earnings) to the business by attracting custom. And the sources of goodwill of a business were recognised as not being static: "[t]he sources of the goodwill of a business may change and the part that various sources play in maintaining the goodwill may vary during the life of the business"[76].

73 Critically, the majority addressed what they described as the "[t]ypical sources of goodwill" – "manufacturing and distribution techniques, the efficient use of the assets of a business, superior management practices and good

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71 *Murry* (1998) 193 CLR 605 at 615 [23].

72 *Murry* (1998) 193 CLR 605 at 615 [23] (footnote omitted).

73 *Murry* (1998) 193 CLR 605 at 615-624 [24]-[47].

74 *Murry* (1998) 193 CLR 605 at 615 [24].

75 *Murry* (1998) 193 CLR 605 at 616 [24].

76 *Murry* (1998) 193 CLR 605 at 623 [45].

industrial relations with employees"[77]. The reason given for why they were "typical sources" was that "*they motivate service or provide competitive prices that attract customers*"[78] (emphasis added).

74 In addressing the sources of goodwill for legal purposes, the majority also recognised that in some businesses, price and service may have little effect on attracting custom. The goodwill may instead derive from custom being attracted because of location, statutory monopolies including patents and trademarks and expenditure such as advertising[79].

75 Thus, recognising that there will be sources of goodwill that generate custom, and that there is a need to identify those sources[80], the majority reinforced the idea that goodwill for legal purposes is property and that "[t]o the extent that the proprietor of a business has the right or privilege to conduct the business *in the manner and by the means which have attracted custom to the business*, the courts will protect the sources of the goodwill of the business, so far as it is legally possible to do so"[81] (emphasis added).

76 Next, the majority recognised that goodwill has no existence independently of the conduct of a business and goodwill cannot be severed from the business which created it[82]. Thus, the sale of an asset of a business does not involve any sale of goodwill unless the sale of the asset is accompanied by or carries with it the right to conduct the business[83].

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77 *Murry* (1998) 193 CLR 605 at 616 [25].

78 *Murry* (1998) 193 CLR 605 at 616 [25].

79 *Murry* (1998) 193 CLR 605 at 616 [26]-[27].

80 *Murry* (1998) 193 CLR 605 at 617-618 [30].

81 *Murry* (1998) 193 CLR 605 at 617 [29].

82 *Murry* (1998) 193 CLR 605 at 620 [36] citing *Muller* [1901] AC 217, *Bacchus Marsh Concentrated Milk Co Ltd (In liq) v Joseph Nathan & Co Ltd* (1919) 26 CLR 410; [1919] HCA 18, *Box* (1952) 86 CLR 387, *Geraghty v Minter* (1979) 142 CLR 177 at 193; [1979] HCA 42 and *Hepples* (1992) 173 CLR 492.

83 *Murry* (1998) 193 CLR 605 at 618 [31].

The value of goodwill[84]

77 As custom is central to the nature and sources of goodwill, the majority recognised that the *value* of the goodwill of a business varies with the earning capacity of the business and the value of the other identifiable assets and liabilities[85]. Unsurprisingly, the methodologies used to value goodwill vary between businesses and, further, the methodology adopted to value goodwill is fact specific.

78 So, for example, the majority suggested that where a business is profitable and expected to continue to be so, goodwill may be valued by adopting the accounting approach[86]. But it is critical to understand the "accounting approach" being addressed. The accounting approach in *Murry* was described as "the difference between the present value of the predicted earnings of the business and the fair value of its identifiable net assets"[87]. That methodology is not the same as comparing *the fair value of Placer's identifiable net assets to the purchase price of the business*, the accounting approach adopted by Barrick.

79 The matter may be tested by reference to the facts in this appeal. Goodwill based on the *Murry* accounting approach would be valued by reference to the difference between the present value of the predicted earnings of Placer (a DCF calculation) and the fair value of Placer's identifiable net assets. That is *not* the same as valuing goodwill by ascertaining the difference between Placer's identifiable tangible and intangible assets and its purchase price.

80 Not only is the *Murry* accounting approach different from that adopted by Barrick in relation to Placer, but the majority in *Murry* advised caution in adopting the *Murry* accounting approach. The cautions were multilayered. First, although it might be appropriate to value goodwill in a profitable business as the difference between the projected earnings of the business and its net assets, it is essential that the net assets are not only properly identified but properly valued[88].

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84 *Murry* (1998) 193 CLR 605 at 624-625 [48]-[52].

85 *Murry* (1998) 193 CLR 605 at 624 [48].

86 *Murry* (1998) 193 CLR 605 at 624 [49].

87 *Murry* (1998) 193 CLR 605 at 624 [49].

88 *Murry* (1998) 193 CLR 605 at 624 [49].

81 The caution may be explained in these terms. Adopting the *Murry* accounting approach, goodwill is valued through a subtractive method: subtracting the value of the net assets from the projected earnings. If the net assets are not correctly identified and valued, then as a matter of logic, goodwill will not be properly valued. So, for example, if there are other intangible assets which are not goodwill, such as a trademark, and they are not properly identified and valued, there will be a failure to properly value the goodwill[89].

82 The second caution concerned businesses trading at a loss. In that situation, the *Murry* accounting approach was not appropriate for valuing goodwill[90]. That conclusion necessarily followed from the integers of the *Murry* accounting approach. Where a business is trading at a loss, there will be no gap between predicted earnings and the fair value of the net assets. But the absence of a gap does not necessarily mean there is no goodwill. For example, there may be goodwill derived from advertising in an unprofitable business. The question which then arises is how that goodwill is to be valued. *Murry* suggests that the value of the goodwill may be the difference between the revenues generated by the custom brought in from the advertising and the operating expenses (other than a share of fixed costs) incurred in earning those revenues, namely the price of the advertising[91].

83 A third, and related, caution was expressed in *Murry* in relation to the valuation of goodwill for legal purposes. Without being prescriptive (and, as this analysis demonstrates, that is impossible given the varying legal and factual contexts and the varying nature of the businesses being considered), the majority cautioned against attributing a value to goodwill which actually inhered in an asset which was a *source* of goodwill. As the majority stated, a purchaser of a business does not wish to pay twice for the same source of earning power[92].

84 In considering the specific issue in *Murry* – whether a taxi licence was a source of goodwill (and it was not) – the majority recognised that goodwill distinguishes an established business from a new business. That is, once a business is operating, the business may develop certain advantages: the business might attract a regular clientele, it might enjoy a reputation for reliability or

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89 See *Murry* (1998) 193 CLR 605 at 625 [51].

90 *Murry* (1998) 193 CLR 605 at 624-625 [50].

91 *Murry* (1998) 193 CLR 605 at 625 [50].

92 *Murry* (1998) 193 CLR 605 at 625 [51].

service, or it might employ highly skilled employees able to generate above-average earnings. These advantages will constitute goodwill *because they will generate custom greater than the industry average*[93]. If the business is selling goods and services which are virtually indistinguishable from others sold in that same market, above-average earnings will be difficult to achieve. But if above-average earnings are achieved, it suggests the existence of goodwill; it suggests that the business has attracted custom greater than the industry average. The measure of value of that goodwill is how much the earnings exceed the norm[94]. That is, the business is getting more value out of the assets than its competitors *because the business is bringing in more custom*. That is not the same as going concern value, another concept or approach, which exists as an intangible separate from goodwill *even where there is no custom*[95].

Added value approach

85 Since *Murry*, a debate has ensued as to there being a distinction between what has been described as the "broad" and "narrow" views of what comprises goodwill for legal purposes. Dicta in a number of later decisions[96], as well as academic writings[97], have suggested that *Murry*, or at least some isolated passages in the majority's reasons in *Murry*, not only recognised, but adopted,

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93 *Murry* (1998) 193 CLR 605 at 627-628 [61].

94 *Murry* (1998) 193 CLR 605 at 627-628 [61].

95 See, eg, *Omaha v Omaha Water Co* 218 US 180 at 202-203 (1910); *Des Moines Gas Co v Des Moines* 238 US 153 at 164-165 (1915); *Haberle Crystal Springs Brewing Co v Clarke* 30 F 2d 219 at 221-222 (2nd Cir 1929); *Tele-Communications Inc v Commissioner of Internal Revenue* 95 TC 495 at 521-522 (1990); *Ithaca Industries Inc v Commissioner of Internal Revenue* 97 TC 253 at 264 (1991); *Corpus Juris Secundum* (2008 ed), vol 38A, "Goodwill", §4.

96 *Commissioner of Territory Revenue v Alcan (NT) Alumina Pty Ltd* (2008) 24 NTLR 33 at 68 [112], 69 [114]; see also at 66-67 [106]-[107]; *Placer* (2017) 106 ATR 511 at 532 [83], 535 [97], 562 [231], 563 [237], 564 [242]-[243], [246]. See also *Hepples* (1992) 173 CLR 492 at 542; cf *Murry* (1998) 193 CLR 605 at 614 [21]. See generally *Transalta Corporation v The Queen* 2012 DTC 5041 at 6758 [5], 6765-6766 [51]-[55], 6766-6767 [62]-[63].

97 See, eg, Osborn, "Rethinking Goodwill: The *Murry* Legacy", (2012) 7(2) *Journal of Applied Research in Accounting and Finance* 31.

a broader concept of goodwill which has been described as the added value approach. That debate was central to Barrick's contentions in this Court.

86 Barrick contended that in *Box*[98], *Hepples v Federal Commissioner of Taxation*[99] and *Murry*[100] the High Court had rejected the narrow conception of goodwill founded on patronage in favour of a broader added value concept which included every positive advantage, and whatever adds value, including privileges or advantages that differentiate an established business from a business just starting out. Under the added value approach to goodwill, goodwill is conceptualised as a bundle of rights and privileges to use the assets of the business to produce income; and goodwill is everything that adds value to a business and every possible advantage[101]. This debate has been identified as the "patronage" approach versus the "added value" approach[102]. Under the added value approach, sources of goodwill are said to exist separate to those which attract custom[103]. The contention that the added value approach has been or should be adopted as the definition of goodwill for legal purposes is rejected.

87 *Murry* did not broaden the legal concept of goodwill to include sources which did *not* generate or add value (or earnings) to the business *by attracting custom*. The "typical sources" of goodwill acknowledged in *Murry*[104] were "typical sources" because "*they motivate service or provide competitive prices that attract customers*"[105] (emphasis added). And *Murry*[106] and the decision

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98 (1952) 86 CLR 387.

99 (1992) 173 CLR 492.

100 (1998) 193 CLR 605.

101 Osborn, "Rethinking Goodwill: The *Murry* Legacy", (2012) 7(2) *Journal of Applied Research in Accounting and Finance* 31 at 32, 37.

102 Osborn, "Rethinking Goodwill: The *Murry* Legacy", (2012) 7(2) *Journal of Applied Research in Accounting and Finance* 31 at 43-44.

103 Osborn, "Rethinking Goodwill: The *Murry* Legacy", (2012) 7(2) *Journal of Applied Research in Accounting and Finance* 31 at 44.

104 See [73] above.

105 (1998) 193 CLR 605 at 616 [25].

106 (1998) 193 CLR 605 at 612 [15].

which preceded it, *Box*[107], recognised that in the modern world, patronage – in the sense of customers through the door – was no longer the sole means of generating or adding value (or earnings) to a business by attracting custom. But, in both decisions, the recognition that there were other sources of goodwill was itself considered in terms of *the ability of those other sources to attract custom*[108].

88 In support of the contention that the added value approach to goodwill now should be adopted, Barrick relied upon the decision of the Court of Appeal of the Supreme Court of the Northern Territory in *Commissioner of Territory Revenue v Alcan (NT) Alumina Pty Ltd*[109]. A majority of the Court of Appeal held that a mining company had goodwill by reference to, among other things, its geographic location – its proximity to Asia. The majority disagreed on what constituted goodwill for legal purposes[110]. Southwood J analysed the identified sources of goodwill in terms of an attractive force which brings in custom[111]. Angel J, on the other hand, held that the patronage concept of goodwill had been rejected in favour of the added value approach and that goodwill was what distinguished an established business from a new business[112].

89 *Alcan* does not assist Barrick. The majority did not adopt the added value approach. Angel J proceeded on a misunderstanding of what had been decided in *Murry* and in the other authorities. The patronage concept of goodwill, to which custom was central, has not been rejected. Instead, the sources of goodwill have been *widened* to include those sources which generate or add value (or earnings) to a business *by attracting custom*. Goodwill at law does not extend to include every fact or matter that adds value to a business. For the reasons given below, the assumption upon which Angel J proceeded, that goodwill was what

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107 (1952) 86 CLR 387 at 395-397.

108 See *Box* (1952) 86 CLR 387 at 396; *Murry* (1998) 193 CLR 605 at 615-624 [24]-[47].

109 (2008) 24 NTLR 33.

110 *Alcan* (2008) 24 NTLR 33 at 66 [104], 67 [107], 68 [112], 69 [114], 70 [120] per Angel J, 70 [122], 73 [133], 74-76 [136]-[143] per Southwood J; cf at 62 [83], 63 [85]-[86], 66 [103] per Martin (BR) CJ.

111 *Alcan* (2008) 24 NTLR 33 at 74-76 [136]-[143].

112 *Alcan* (2008) 24 NTLR 33 at 68 [112], 69 [114].

distinguished an established business from a new business, cannot be accepted as correct.

90 Barrick also placed reliance upon a case decided in Canada[113], and a case decided in Hong Kong[114], in support of its added value approach to goodwill. Neither decision is determinative of goodwill for legal purposes. Each was decided in a specific and particular legal and factual context. The Canadian case concerned the existence and valuation of goodwill for income tax purposes, in a statutory context requiring both regulatory and industry practice, as well as auditing and valuation standards and practices, to be taken into account[115]. The Hong Kong decision was an appeal which only briefly discussed the nature of goodwill in the context of considering the tort of passing off[116].

Conclusion on goodwill for legal purposes

91 Goodwill for legal purposes does *not* extend to every positive advantage, and *whatever adds value*, including privileges or advantages that differentiate an established business from a business just starting out. Goodwill for legal purposes *does* extend to those sources which generate or add value (or earnings) to the business *by attracting custom*, whether that be from the use of identifiable assets, locations, people, efficiencies, systems, processes, or techniques of the business, or from some other identifiable source. And those sources of goodwill for legal purposes have a unified purpose and result – to generate or add value (or earnings) to the business by attracting custom.

Economic view of goodwill

92 That legal view of goodwill is reinforced by, and is not inconsistent with, the economic view of goodwill. In economic terms, goodwill acts on demand[117].

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113 *Transalta* 2012 DTC 5041.

114 *Tsit Wing (Hong Kong) Co Ltd v TWG Tea Co Pte Ltd (No 2)* (2016) 19 HKCFAR 20.

115 *Transalta* 2012 DTC 5041 at 6758 [7]; see also at 6767-6768 [65]-[70], 6769 [75].

116 *Tsit Wing* (2016) 19 HKCFAR 20 at 33-34 [25]-[26].

117 Foreman, "Economies and Profits of Good-Will", (1923) 13 *The American Economic Review* 209 at 209, 215. See also Foreman, "Conflicting Theories of Good Will", (1922) 22 *Columbia Law Review* 638 at 638; Commons, *Legal*

(Footnote continues on next page)

93 Economists recognise that goodwill increases demand for a business' goods or services, which, in turn, enables the business benefiting from the goodwill to sell more, increase its price, or both, whilst at the same time recognising that demand may be increased by any number of factors which would not qualify as goodwill, such as product differentiation[118].

94 The basic underlying principle of goodwill for economists has been described as "reciprocity"[119], where the attention is focused on the things that the buyer receives from the seller but which the buyer cannot demand as part of the transaction and on the things which the seller receives from the buyer which the seller cannot demand as part of the transaction[120]. The premise underlying "reciprocity" is that the provision of these items by one party to the other party "builds up in the mind of the receiving party some goodwill felt towards the other party. The greater the provision, the greater the increase in the stock"[121].

Foundations of Capitalism, (1924) at 206; Robinson, *The Economics of Imperfect Competition*, (1961) at 75, 89. See generally Hey, "Goodwill – Investment in the Intangible", in Currie, Peel and Peters (eds), *Microeconomic Analysis: Essays in Microeconomics and Economic Development*, (1981) 196.

118 Genser, "The Economic Case for the Coexistence of Monopoly Power and Goodwill in the Cable Television Industry", (1994) 16 *Hastings Communications and Entertainment Law Journal* 265 at 273. See also Robinson, *The Economics of Imperfect Competition*, (1961) at 89-90.

119 Commons, *Legal Foundations of Capitalism*, (1924) at 271. See also Commons, *Industrial Goodwill*, (1919) at 19 quoted in Foreman, "Economies and Profits of Good-Will", (1923) 13 *The American Economic Review* 209 at 216; Hey, "Goodwill – Investment in the Intangible", in Currie, Peel and Peters (eds), *Microeconomic Analysis: Essays in Microeconomics and Economic Development*, (1981) 196 at 204.

120 Hey, "Goodwill – Investment in the Intangible", in Currie, Peel and Peters (eds), *Microeconomic Analysis: Essays in Microeconomics and Economic Development*, (1981) 196 at 204.

121 Hey, "Goodwill – Investment in the Intangible", in Currie, Peel and Peters (eds), *Microeconomic Analysis: Essays in Microeconomics and Economic Development*, (1981) 196 at 205.

95 This underlying principle of goodwill for economists – that of "reciprocity"[122] or factors that increase demand – is analogous to that which underpins goodwill for legal purposes, namely "custom". As Commons, a leading economist in the 1920s, explained, "goodwill can be seen and felt – *seen* not in commodities, but *in the transactions of business*; and *felt*, not in consumption and production, *but in the confidence of patrons, investors and employees*"[123] (emphasis added).

Going concern value not goodwill

96 It is then necessary to address Barrick's contention that the $6.506 billion identified as "goodwill" in Barrick's financial statements lodged with the US SEC was goodwill or going concern value and that goodwill for legal purposes and going concern value were interchangeable. That contention also should be rejected.

97 Goodwill for legal purposes is different from, and is not to be confused with, the "going value" or the going concern value of a business. These terms are not separate methods of valuing the same intangible[124]. The distinction between them is clear and, in the context of this appeal, important. As seen earlier, goodwill represents a pre-existing relationship arising from a continuous course of business – to which the "attractive force which brings in custom" is central. Without an established business, there is no goodwill because there is no custom. A collection of assets has no custom[125].

98 Going concern value, on the other hand, is the ability of a business to generate income without interruption even where there has been a change in ownership[126]. It has been recognised as a property right by the Supreme Court of

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122 Commons, *Legal Foundations of Capitalism*, (1924) at 271.

123 Commons, *Legal Foundations of Capitalism*, (1924) at 273 quoted in Hey, "Goodwill – Investment in the Intangible", in Currie, Peel and Peters (eds), *Microeconomic Analysis: Essays in Microeconomics and Economic Development*, (1981) 196 at 226-227.

124 *Corpus Juris Secundum* (2008 ed), vol 38A, "Goodwill", §4.

125 See, eg, *Murry* (1998) 193 CLR 605 at 627 [60].

126 *Corpus Juris Secundum* (2008 ed), vol 38A, "Goodwill", §4; *Ithaca Industries* 97 TC 253 at 264 (1991).

the United States[127]. In general terms, in a number of US decisions, it has been described as what differentiates an established business from one just starting; and, importantly, is present even when there is no goodwill[128].

99 For present purposes, the difference is best understood in the terms identified and discussed in *Murry*. Goodwill is property in the nature of the right or privilege to conduct the business by "*means which have attracted custom to the business*"[129] (emphasis added). The courts will protect that property – those means of attracting custom to the business – irrespective of the profitability or value of the business, so far as it is legally possible to do so[130]. Going concern value is not of that nature: it is not the right or privilege to conduct the business by means which have attracted custom to the business and, thus, going concern value does not comprise the means of attracting custom to the business which the courts will or can protect.

100 Barrick contended that two decisions of the US Supreme Court[131] "recognise[] that the value of a profitable going concern business will differ significantly from the aggregate value of its identifiable assets … even if the business is a regulated utility which cannot claim to have any goodwill in the narrow sense that it possesses an attractive force that brings in … custom". So much may be accepted. But going concern value treats goodwill, if it exists, as no more than a component of going concern value[132]. The two concepts are not synonymous and should not be confused with each other[133]. Once that is

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127 *Des Moines Gas Co* 238 US 153 at 165 (1915).

128 See *Omaha Water Co* 218 US 180 at 202 (1910); *Des Moines Gas Co* 238 US 153 at 164-165 (1915); *Haberle* 30 F 2d 219 at 221-222 (2nd Cir 1929); *Tele-Communications Inc* 95 TC 495 at 521-522 (1990); *Ithaca Industries* 97 TC 253 at 264 (1991).

129 *Murry* (1998) 193 CLR 605 at 617 [29].

130 *Murry* (1998) 193 CLR 605 at 614 [20], 617 [29].

131 *Omaha Water Co* 218 US 180 (1910); *Des Moines Gas Co* 238 US 153 (1915). See also *Tele-Communications Inc* 95 TC 495 (1990).

132 *Corpus Juris Secundum* (2008 ed), vol 38A, "Goodwill", §4 citing *Gaydos v Gaydos* 693 A 2d 1368 (Pa 1997).

133 *Corpus Juris Secundum* (2008 ed), vol 38A, "Goodwill", §4 citing *Los Angeles Gas & Electric Corp v Railroad Commission of California* 289 US 287 (1933).

recognised, it will be seen that in the context of the legal and factual issues raised in the present appeal, the notion of going concern value as the difference between an established plant and one just starting up has no impact on the valuation of Placer's property for the purposes of the land rich provisions of the Stamp Act.

101 Part IIIBA of the Stamp Act was introduced to prevent duty on transfers of land being avoided through schemes that involved the use of corporate structures and share sales. The purpose of the test in s 76ATI(2)(b) is to determine whether an entity's underlying value is principally in its land or non-land assets. The statutory valuation exercise in s 76ATI(2)(b) thus requires a comparison between the value of "all land to which the *corporation* is entitled" (emphasis added) and "all property to which [the *corporation*] is entitled". There are four things about that which are to be noted.

102 First, the statutory valuation exercise looks to the land and property of the corporation. Hence, as the Commissioner in effect submitted, in the case of a corporation which is a going concern, the statutory valuation exercise requires comparison of the value of land *as part of the going concern* with the total property of the going concern. It follows that, if and insofar as the going concern value of the corporation may inhere in the value of the land, there is no statutory or other warrant for stripping going concern value out and attributing it with a value separate from the land. It is part of the value of the land.

103 Second, the statutory valuation exercise requires assumptions that the hypothetical purchaser knew how to exploit the land[134], and that the value of intellectual property and knowledge is to be excluded from the calculation[135]. These statutorily prescribed assumptions mandate that Barrick be given the attributes of an *established business owner* (namely, that Barrick knew how to exploit the property already).

104 Third, and relatedly, given that in Placer's case the vast bulk of any going concern value would necessarily have been attributable to that knowledge and intellectual property, any assessment of the difference in value between what would differentiate Placer, as an established business, from a mining company just starting out would not only not be warranted but would also run counter to the statutory assumptions and, thus, contrary to the requirements of the statutory valuation exercise.

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134 s 33(1)(c) of the Stamp Act.

135 s 76ATI(4)(f) of the Stamp Act.

105 Fourth, and in any event, while it is possible that there may have been factors other than knowledge and intellectual property which, to some extent, contributed to Placer's going concern value, the evidence left it totally unclear how any such residual going concern value could be identified, valued, and then distributed between Placer's land and property for the purpose of the statutory valuation exercise. The difficulty is demonstrated by the fact that all valuers used Placer's strategic business plans in the valuations of Placer's land assets using a DCF model. As observed by the Court of Appeal, that methodology valued an operating business, not just the land. No comprehensive attempt was made to differentiate between the value of the business using the DCF methodology and the value of the land other than an incomplete attempt to assess the costs which would have been incurred by a purchaser recreating the mining business. None of Barrick's valuers in their DCF calculations attempted to sever the value of Placer's land assets from its business.

106 In support of the contention that the $6.506 billion identified as "goodwill" in Barrick's accounts comprised going concern value, Barrick placed reliance upon several United States decisions[136]. Those decisions do not assist Barrick's argument. Each was decided in a specific context. They recognise that there is value in a going concern as opposed to a collection of assets. As a matter of common sense that is unsurprising. But they also confirm that going concern value is *separate* from legal goodwill.

107 The decision in *Haberle Crystal Springs Brewing Co v Clarke*[137] is sufficient to make the point. Haberle's taxes were computed without allowing any deduction for obsolescence – meaning the shortening of the useful economic or commercial life of an asset before the end of its physical life[138] – of its goodwill. The issue was whether Haberle could deduct for the obsolescence of goodwill. The court held that a going business has a value over and above the aggregate value of the tangible property employed in it; and such excess of value was nothing more than the recognition that, used in an established business that has won the favour of its customers, tangibles may be expected to earn in the future as they have in the past[139]. The court recognised that the owner's privilege

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136 *Omaha Water Co* 218 US 180 (1910); *Des Moines Gas Co* 238 US 153 (1915); *Haberle* 30 F 2d 219 (2nd Cir 1929); *Tele-Communications Inc* 95 TC 495 (1990).

137 30 F 2d 219 (2nd Cir 1929).

138 *Haberle* 30 F 2d 219 at 220 (2nd Cir 1929).

139 *Haberle* 30 F 2d 219 at 221-222 (2nd Cir 1929).

of so using those assets, *and* the privilege of continuing to deal with customers attracted by the established business, was property of value[140]. In short, the owner of a going concern business enjoyed two privileges stemming from ownership: continuing to use the assets to generate income; and continuing to deal with customers (the latter being goodwill). The second was said to depend on the first.

108 As has been recognised, as an established business, Placer may have had some residual going concern value over and apart from the information and intellectual property required to be excluded from the statutory valuation exercise by s 76ATI(4)(f). But, in the context of the statutory valuation exercise required to be, and in fact, undertaken, Barrick did not establish, and could not establish, going concern value as a source of goodwill for legal purposes.

"Sources" identified by Barrick

109 It is then necessary to address Barrick's further contention that even if goodwill for legal purposes did not extend to include sources which added value regardless of whether the identified source generated or added value (or earnings) to the business by attracting custom, at the date of acquisition there was "ample evidence" that Placer had goodwill for legal purposes with a value of $6.506 billion.

110 The objective "sources" of goodwill identified by Barrick were:

(1) Placer's personnel, who were said to have proven capacity to develop and expand the business ("Personnel");

(2) the technical capacity of the personnel ("Technical Capability");

(3) Placer's innovative mining techniques, which were said to have enabled Placer to extract lower-grade ores, giving it a competitive advantage over other miners ("Techniques");

(4) the strong and experienced project group and mine managers ("Management");

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140 *Haberle* 30 F 2d 219 at 222 (2nd Cir 1929). See also Osborn, "Rethinking Goodwill: The *Murry* Legacy", (2012) 7(2) *Journal of Applied Research in Accounting and Finance* 31 at 47.

(5) the size, structures and systems that enabled Placer to harvest efficiencies and economies of scale ("Systems");

(6) the synergies ("Synergies"); and

(7) the going concern value comprising "the value of all the rights and privileges to conduct Placer's business".

The last – the going concern value – has been addressed[141], but it remains necessary to address whether the other identified "sources" generated or added value (or earnings) to the business *by attracting custom* and thereby comprised goodwill for legal purposes.

111 As will be seen, none of these matters taken individually or collectively is of that character. Some of the "sources" are expressly excluded from the statutory valuation exercise. For some of the "sources", there is no evidential basis that they in fact exist. And none of the "sources" could generate goodwill of any material value because Barrick could not and did not establish that any of the "sources" could generate or add value (or earnings) *by attracting custom* to Placer's business.

112 Before turning to consider each "source" in turn, it is important to restate that the analysis of each source is for the purpose of the statutory valuation exercise and in the context of the facts at the date of acquisition.

Personnel and Management

113 The Court of Appeal found that Placer's personnel had demonstrated the capacity to develop the business through an exploration program and their technical capability. Barrick relied on this finding. In relation to Management, Barrick further contended that Placer's project group and mine managers could constitute a material source of Placer's goodwill. These sources overlap and may be considered together.

114 These sources were not capable of generating any goodwill of any material value. There was nothing to suggest that these sources generated or added value (or earnings) to Placer's business *by attracting custom*. In fact, the evidence was to the contrary. Witnesses for both the Commissioner and Barrick accepted that Placer's workforce was not unique and that another mining company could have competently operated the mines. And that evidence was

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141 See [96]-[108] above.

consistent with Barrick's internal view of Placer's personnel. As seen earlier, a major driver of Barrick's acquisition of Placer was the prospect of synergies. As much as 25 per cent of the synergies arose from savings in administration from closing redundant offices and eliminating duplication. The capitalised value of the synergies was accepted by the parties to lie between $1.6 billion and $2 billion. Thus, the savings in administration and the use of global offices were of real value. Indeed, not only did Barrick think that it could better manage Placer's assets but there was an expectation that Placer's executive team would leave post-acquisition.

115 The proposition that a material source of Placer's $6 billion in goodwill was the ability of Placer's personnel to develop and expand Placer's business or its project group and mine managers is implausible in the face of evidence that a major driver of Barrick's acquisition was streamlining the operations of the amalgamated entity, which meant redundancies and office closures.

Technical Capability

116 Barrick contended that Placer had a technically competent workforce who had a proven record of their ability to develop innovative mining techniques.

117 Again, this source was not capable of generating any relevant goodwill or any goodwill of any material value.

118 There was a legal and factual difficulty with Barrick's contention. As explained earlier, the statutory valuation exercise excluded[142]:

> "(f) a licence or patent or other intellectual property (including knowledge or information that has a commercial value) relating to any process, technique, method, design or apparatus to —
>
> (i) locate, extract, process, transport or market minerals; or
>
> (ii) grow, rear, breed, maintain, produce, harvest, collect, process, transport or market primary products".

119 Much of the value attributed to technical capability would fall within one or more elements of this provision.

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142 s 76ATI(4)(f) of the Stamp Act.

120 Further, s 33(1)(c) of the Stamp Act provides that, when determining the value of land or property for the purposes of the Stamp Act, it is to be assumed that a hypothetical purchaser would, when negotiating price, have knowledge of all existing information relating to the land; and no account is to be taken of any amount that a hypothetical purchaser would have to expend to reproduce, or otherwise acquire a permanent right of access to and use of, existing information relating to the land. Thus, the technical capabilities of Placer employees as to how to exploit the relevant mines were excluded from the statutory valuation exercise.

121 However, Barrick contended that this "source" was not excluded or removed as a source of goodwill just because the Stamp Act excluded technical capability which comprised, or was sufficiently developed to constitute, intellectual property. That is, Barrick contended that there was technical capability which was not intellectual property but which comprised a source of goodwill.

122 Barrick's contention should be rejected. As the preceding section explains, there was nothing to suggest that Placer's personnel had any unique expertise or abilities. Moreover, there was nothing to suggest that the abilities of Placer's personnel (separate from that which would be captured by s 76ATI(4)(f)) could constitute a material source of Placer's alleged goodwill and, moreover, even if Placer's personnel had those abilities or that information, those attributes would have been excluded under s 33(1)(c) of the Stamp Act.

Techniques

123 The Court of Appeal also relied on technology, by referring to innovative mining techniques used by Placer, to justify its finding that Placer had substantial goodwill. Given the terms of s 76ATI(4)(f) and the EY PPA Report, that was an error.

124 Under the Stamp Act, any knowledge with a commercial value related to exploiting minerals held by Placer was excluded from the statutory valuation exercise by s 76ATI(4)(f). And, factually, the EY PPA Report stated that based on EY's discussions with management, EY had concluded that no significant value existed in the technology intangibles of Placer with the exception of the "Hot Cure" process. The Hot Cure process was valued at approximately $17 million. That is a long way from contributing to goodwill of $6.506 billion.

Systems

125 Barrick then submitted that Placer's management structures and systems were utilised for the purpose of enhancing profitability and efficiency in the context of a large global business and included the strategic business plans at each operating mine and a recent redesign of business processes. In addition, Barrick submitted that Placer's size, global structure and management systems and the skills and expertise of its personnel enabled it to harvest *efficiencies and economies of scale*, and created the capacity to expand and develop the business by identifying new projects as existing mines were depleted.

126 The Court of Appeal found Placer had developed systems including strategic business plans at each mine. The Court of Appeal also found that in the year preceding the acquisition, Placer had commenced a redesign of its business processes and referred to evidence of "efficiencies and economies of scale"[143].

127 These sources also were not capable of generating any relevant goodwill or any goodwill of any material value.

128 Personnel and management have been addressed in the preceding sections, which included aspects of Placer's management structures and systems. Indeed, not only did Barrick consider that it could better manage Placer's assets but, post-acquisition, many of Placer's offices were closed.

129 Moreover, as noted earlier, in the presentation to the Barrick Board prior to its acquisition of Placer, Barrick's focus was that the transaction would make Barrick the largest gold mining company with a political risk profile better able to handle subsequent acquisitions and, further, that the transaction would create the largest gold mining company in terms of market capitalisation, reserves and production. Placer's management structures and systems were not mentioned, let alone an identified focus.

130 As a matter of common sense, Placer's size would have allowed it to take advantage of economies of scale. However, what is unclear is how size alone can be a source of legal goodwill. As the Commissioner submitted, the mere fact that a property-owning company has land which is rezoned does not of itself add to the company's goodwill. Moreover, Placer's size was inexorably linked to the size of its land-holdings. As Mr Tomsett reminded Placer shareholders when urging them to reject the Barrick offer, quality land (and lots of it), which

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143 *Placer* (2017) 106 ATR 511 at 523 [45].

included significant development projects, was what Placer's business was all about[144].

131 To say that Placer's size was a source of its goodwill is only to identify a question: what was it about the size that attracted custom and generated value? The answer must be, in large part, the size of the land-holdings. There was nothing to suggest that the answer, or even a material part of the answer, lay in Placer's management, structures or systems.

Synergies

132 Barrick further submitted that "[t]he scale, structure and features of Placer's business offered synergies … and those benefits would be equally available to any large international gold mining company or consortium". Barrick described the synergies as "potentialities to improve margin and profitability" that were a "function of the right to conduct the Placer business". The Commissioner submitted that the synergies were not a source of Placer's goodwill but cost savings to Barrick. The Commissioner's contention should be accepted.

133 The synergies were described in the November letter Barrick sent to the US SEC to which reference has already been made[145]. The letter stated that in Barrick's evaluation of the potential acquisition of Placer, Barrick identified potential synergies in large part realisable due to the proximity of the Barrick and Placer operations and also due to the regional business structure followed by Barrick. The letter described where the synergies would come from, and their percentage value, as follows:

(1) Administration and offices globally: "Barrick expects this area to contribute about 25% of the total synergies based on the closure of redundant offices around the world. Savings in general and administrative expenses are expected to come from shared business practices, and the elimination of duplication in offices and overheads in all regions."

(2) Exploration: "This area contributes about 25% of the total synergies. In Exploration, Barrick plans to consolidate land positions in each region on the most prospective belts and prioritize the combined pipeline of exploration projects in each region."

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144 See [31] above.

145 See [40] above.

(3) Operations and technical services: "This area comprises about 30%. In Operations, Barrick plans to optimize and share mining and processing infrastructure in Nevada, Australia and Tanzania; reduce energy costs and inventory levels through joint infrastructure; and reduce operating costs through implementation of combined best practices at all locations. In procurement, Barrick expects to generate significant savings from improved purchasing power of the combined company through its global and regional supply chain groups."

(4) Finance and tax: "Barrick sees opportunities for debt consolidation, reduced fees and costs, and tax planning, which comprise about 20% of the total synergies. With finance and tax, Barrick expects to realize jurisdictional tax synergies and enjoy both debt optimization and a lower overall cost of capital."

(5) Capital project: "Barrick also expects to realize capital project synergies. Through the sequential development of the combined project pipeline, Barrick expects to be able to transfer development teams, equipment and a comprehensive knowledge base from one project to the next. The increased scale of the pipeline after the acquisition of [Placer] should also enable in-house management of engineering, procurement and contract management."

134 Barrick concluded in these terms:

"In conclusion the amount of value not captured in tangible and identifiable intangible assets on acquisition of a gold mining company is *initially* presumed to be captured in goodwill, the principal elements of which are *the ability to sustain and grow reserves and the ability to realize synergies from the business combination.* Barrick believes that the elements of goodwill described above in relation to the acquisition of [Placer] are most closely associated with the management of portfolios of mines and exploration properties. Barrick believes that the allocation of goodwill should reflect this association and the manner in which goodwill arises." (emphasis added)

As these extracts reveal, at least in Barrick's eyes, the $6.506 billion was attributable to the potential of Placer's reserves and the potential for synergies. A few points must be made.

135 The reserves were property of Placer that existed prior to the acquisition date. In contrast, the synergies were *not* property of Placer. The synergies were an asset of the amalgamated entity. The synergies reflected that Barrick planned

to do things as an amalgamated entity to strip out cost. The synergies arose on or after amalgamation; they were a *reason* for the amalgamation. Placer could not achieve any of the synergies on its own because they did not exist absent the amalgamation. In the context of the statutory valuation exercise in issue in this appeal, the synergies were *not* part of Placer's property and were thereby excluded from the statutory valuation exercise.

136 The intellectual property synergies referred to in Barrick's October Board presentation were also irrelevant. Not only were the intellectual property synergies an asset of the *amalgamated entity* and not part of Placer's property but s 76ATI(4)(f) excluded intellectual property as an item of property from the statutory valuation exercise.

137 Moreover, there is no legal foundation to support the contention that an asset that arises *post-acquisition* – after the character, reputation, mode of operating, and all other intangible characteristics and positive attributes of the business have been amalgamated – can or should be construed as a positive attribute of the original business, or an aspect of its goodwill. And, if it matters (and it does not), the synergies would not even comprise a source of going concern value because, again, they arise post-acquisition.

138 The Court of Appeal found that the synergies were a source of goodwill because "anything which contributes to the value of the business, assessed in [*Spencer*] terms, is properly valued as part of its goodwill, including, in this case, the value which a hypothetical purchaser would attribute to the savings and efficiencies to be derived from the integration of [Placer's] business into its own"[146]. That analysis is wrong, legally and factually. It proceeds on an incorrect understanding of what constitutes goodwill for legal purposes and it considers facts and matters which did not exist at the date by reference to which the statutory valuation exercise was to be undertaken – the acquisition date.

Conclusion

139 The preceding analysis of the "sources" relied upon by Barrick to support the allocation of $6 billion to goodwill reinforces a number of matters identified by the majority in *Murry*.

140 First, any valuation exercise must be undertaken in the legal and factual context in which it arises. The statutory valuation exercise in s 76ATI(2)(b) requires a comparison between the value of "all land to which the corporation is

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146 *Placer* (2017) 106 ATR 511 at 535 [97].

entitled" and "all property to which [the corporation] is entitled". That statutory context is one which requires comparison of the value of land as part of the going concern with the total property of the going concern at the acquisition date.

141 Second, at the acquisition date, there were no sources of goodwill that could explain the $6 billion gap which was attributed by Barrick to goodwill. That unexplained gap suggests that the DCF calculations used by Barrick's valuers to value Placer's land, its principal asset, were wrong. Put in different terms, the danger identified by the majority in *Murry* of attributing a value to goodwill which actually inheres in an asset was readily apparent[147].

142 Third, goodwill has sources, not elements, and the sources of goodwill for legal purposes are those which generate or add value (or earnings) to the business by attracting custom. But, in seeking to identify the sources that generate the custom of the business, it is important to recognise that goodwill has no existence independently of the conduct of that business; goodwill cannot be severed from the business which created it.

143 At the acquisition date, Placer was a land rich company which had no material *property* comprising legal goodwill. Barrick has not demonstrated that the value of all of Placer's land, as a percentage of the value of all of Placer's property, did not exceed the 60 per cent threshold. There is, however, a remaining issue to be determined about the form of the orders to be made.

Value of the land in Western Australia and remitter

144 The Commissioner sought to have the orders of the Court of Appeal set aside and, in their place, an order dismissing the appeal to that Court. The effect of that order would be to reinstate the orders of the Tribunal, which did not disturb the Commissioner's assessment.

145 In the assessment made on 8 April 2013, the Commissioner determined both that Placer was a listed land-holder corporation within the meaning of s 76ATI(2) of the Stamp Act and that the amount of duty payable was A$54,852,300. That assessment was based on a value of land and chattels in Western Australia to which Placer was entitled, at the acquisition date, of A$1,015,900,000.

146 Both in this Court, and in the Court of Appeal, Barrick put in issue the valuation of the land in Western Australia used to calculate the amount of duty

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147 See [83] above.

payable. Barrick contended that because the Tribunal erred in accepting the estimated gold prices relied upon by an expert retained by the Commissioner, and those gold prices were fundamental not only to the question of whether duty was payable, but also to the amount of duty, the decision of the Tribunal cannot stand. Thus, according to Barrick, if the Commissioner were to succeed in other respects (as she has), it would remain appropriate to order, as the Court of Appeal did, that the matter be remitted to the Tribunal (differently constituted).

147 The Commissioner rejected that contention. She submitted that Barrick challenged the assessment on the basis that it was not a land-holder and that the assessment should be set aside entirely, and that if the Commissioner were successful, then Barrick had failed to discharge its onus of proving the assessment was incorrect and thus there was no need for the matter to be remitted to the Tribunal.

148 The matter should not be remitted to the Tribunal. First, Barrick has not identified any fact or matter which suggests that, let alone demonstrates why, the Commissioner's valuation of the Western Australian land was wrong. Simply pointing to the fact that the Commissioner's valuation of the Western Australian land was affirmed before the Tribunal by reference to expert evidence from the Commissioner (which is no longer relied upon) does not demonstrate that the valuation itself was wrong.

149 Second, and no less significantly, the DCF methodology of valuing the land assets as applied by Barrick's experts yielded a large gap between the valuation of Placer's land assets and the purchase price paid. That gap necessarily raised a question about the reliability of the DCF valuations and, in turn, a question about the content of the $6.506 billion allocated to goodwill in Barrick's accounts. Barrick did not and could not explain the large gap as representing the value of an asset which *inhered in Placer* at the acquisition date.

150 In those circumstances, Barrick has not discharged the onus it bore of demonstrating that the assessment was invalid or incorrect[148]. The matter should not be remitted to the Tribunal.

Conclusion and orders

151 The appeal should be allowed with costs.

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148 s 37(2) of the *Taxation Administration Act* 2003 (WA).

152 The orders of the Court of Appeal of the Supreme Court of Western Australia made on 11 September 2017 should be set aside and, in their place, it should be ordered that the appeal to that Court be dismissed with costs.

153 GAGELER J. This appeal is concerned with the application of the "land rich" corporation regime in Pt IIIBA of the *Stamp Act* 1921 (WA) to the acquisition by Barrick Gold Corporation ("Barrick") in an on-market takeover in 2006 of a controlling interest in Placer Dome Inc ("Placer"), a publicly listed corporation which owned gold mining and exploration tenements in Western Australia and elsewhere throughout the world.

154 The statutory question at the heart of the appeal is whether, as at the time of the acquisition, "the value of all land to which [Placer was] entitled, whether situated in Western Australia or elsewhere, [was] 60% or more of the value of all property to which it [was] entitled" other than certain excluded property[149]. If that question is answered in the affirmative, Barrick was liable to pay stamp duty calculated by reference to the unencumbered value of "the land and chattels situated in Western Australia to which the corporation [was] entitled"[150].

155 Although I reject central tenets of the argument of the Commissioner of State Revenue as to the identification of the property to which Placer was entitled and as to the appropriateness of adopting a "subtractive" or "top down" approach to determining the value of the land to which Placer was entitled, I conclude that the appeal from the judgment of the Court of Appeal of the Supreme Court of Western Australia[151] should be allowed and that the decision of the State Administrative Tribunal[152], affirming the decision of the Commissioner to disallow an objection to an assessment of stamp duty, should be reinstated.

156 The basis for that conclusion is my opinion that Barrick failed to discharge the onus placed on it as taxpayer of showing on the material before the Tribunal that the statutory question should be answered in the negative.

The "land rich" ratio

157 Application of the "land rich" ratio involves determining, as at the time of the acquisition of a controlling interest in a corporation, the ratio of "the value of all land to which the corporation is entitled" to "the value of all property to which it is entitled". Two uncontroversial aspects of the requisite determination set the context for considering aspects of the statutory numerator and of the statutory denominator that are in contest.

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149 Section 76ATI(2)(b) of the *Stamp Act*.

150 Section 76ATL(1) of the *Stamp Act*.

151 *Placer Dome Inc v Commissioner of State Revenue* (2017) 106 ATR 511.

152 *Placer Dome Inc and Commissioner of State Revenue* [2015] WASAT 141.

158 First, the reference to "value" invokes the well-settled and well-understood principle of valuation that value is to be determined as the price that would be negotiated in an arm's length transaction between a hypothetical willing but not anxious seller and a hypothetical willing but not anxious purchaser, each having knowledge of all existing information bearing on the value of the subject matter of the transaction[153].

159 Invocation of that principle is confirmed by the statutory instruction that, "when applying the ordinary principles of valuation", "it is to be assumed that a hypothetical purchaser would, when negotiating the price of the land or other property, have knowledge of all existing information relating to the land or other property", to which it is added that "no account is to be taken of any amount that a hypothetical purchaser would have to expend to reproduce, or otherwise acquire a permanent right of access to and use of, existing information relating to the land or other property"[154]. The latter part of the instruction makes clear that all of the existing information which the hypothetical purchaser of the land or other property is assumed to have when negotiating a price for that land or other property pre-acquisition is also to be assumed to remain available to the purchaser at no cost so as to enable that purchaser to put the land or other property to its highest and best use post-acquisition. But the latter part of the instruction does not go beyond requiring the information assumed to be available to the purchaser post-acquisition to be information which actually existed at the time of the hypothesised sale.

160 Second, though the seller and the purchaser are hypothetical, the subject matter of the hypothesised transaction is the actual subject matter to be valued and the context of the hypothesised transaction is the actual market for that subject matter[155]. The land and other property relevant to the application of the statutory ratio being statutorily identified as that "to which the corporation is entitled", the identification and valuation of that land and other property must in each case be on the basis of the hypothetical seller selling and the hypothetical purchaser purchasing an entitlement to land or other property of the same nature and in the same condition as the land or other property which the corporation has

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153 See *Spencer v The Commonwealth* (1907) 5 CLR 418 at 440-441; [1907] HCA 82; *Deputy Federal Commissioner of Taxation v Gold Estates of Australia (1903) Ltd* (1934) 51 CLR 509 at 515; [1934] HCA 41; *Commissioner of Succession Duties (SA) v Executor Trustee and Agency Co of South Australia Ltd* (1947) 74 CLR 358 at 367, 373-374; [1947] HCA 10.

154 Section 33(1)(c) of the *Stamp Act*.

155 Eg *Federal Commissioner of Land Tax v Duncan* (1915) 19 CLR 551 at 554-556; [1915] HCA 12; *The Commonwealth v Arklay* (1952) 87 CLR 159 at 170-171; [1952] HCA 76.

at the time of the acquisition of a controlling interest in it. That is important to determining both the statutory numerator and the statutory denominator in ways which will need to be explained.

The denominator

161 The statutory denominator is set as "the value of all property to which [the corporation] is entitled" other than "property" within a category that is directed to be excluded.

162 Identification and valuation of property that is the subject matter of the transaction hypothesised by the statutory denominator must proceed on the assumption that, where the corporation has an entitlement to conduct a business as a going concern, the hypothetical seller and the hypothetical purchaser of all of the property of the corporation transact for an entitlement to conduct the same business as a going concern.

163 "Property" is not "a monolithic notion of standard content and invariable intensity"[156]. "Accordingly, to characterise something as a proprietary right ... is not to say that it has all the indicia of other things called proprietary rights. Nor is it to say 'how far or against what sort of invasions the [right] shall be protected, because the protection given to property rights varies with the nature of the right'"[157]. Statutory use of the term "property" correspondingly invokes a protean concept, the content of which is informed by the statutory context[158].

164 That "property" has a broad meaning in this statutory context is indicated by the scope of the "property" statutorily excluded. For most legal purposes, information alone is not treated as proprietary in character unless it is confidential[159]. Yet amongst the categories of "property" directed to be excluded

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156 *Yanner v Eaton* (1999) 201 CLR 351 at 366 [19]; [1999] HCA 53, quoting Gray and Gray, "The Idea of Property in Land", in Bright and Dewar (eds), *Land Law: Themes and Perspectives*, (1998) 15 at 16.

157 *Zhu v Treasurer of New South Wales* (2004) 218 CLR 530 at 577 [135]; [2004] HCA 56, quoting Carpenter, "Interference with Contract Relations", (1928) 41 *Harvard Law Review* 728 at 733.

158 Eg *Kennon v Spry* (2008) 238 CLR 366 at 396-398 [89]-[92], 408 [126]; [2008] HCA 56; *Willmott Growers Group Inc v Willmott Forests Ltd (Receivers and Managers Appointed) (In liq)* (2013) 251 CLR 592 at 603-604 [35]-[38], 615 [76]; [2013] HCA 51.

159 *Smith Kline & French Laboratories (Aust) Ltd v Secretary, Department of Community Services and Health* (1990) 22 FCR 73 at 121.

in this statutory context is "intellectual property (including knowledge or information that has a commercial value) relating to any process, technique, method, design or apparatus to ... locate, extract, process, transport or market minerals"[160]. Knowledge or information that has a commercial value is thereby treated for this statutory purpose as "property" whether or not it is confidential.

165 More important for present purposes is that the content of the term "property" is informed in this statutory context by the amplified reference to "all property" to which the corporation is entitled, a reference which encompasses all property of a corporation which has an entitlement to conduct a business as a going concern.

166 An entitlement to conduct a business as a going concern has never been doubted to be capable of being conveyed by a seller to a purchaser[161]. When conveyed to the purchaser, an entitlement of that nature has long been protected by injunction from derogation by the seller[162] by reference to the principle that "[a] vendor of any form of property incurs an implied obligation not to destroy, defeat or impede the enjoyment by the purchaser of the subject of the sale"[163].

167 Thus, *Federal Commissioner of Taxation v Murry*[164] explained that "the legal right or privilege to conduct a business in substantially the same manner and by substantially the same means which in the past have attracted custom to the business" is recognised as "property" – traditionally described as "goodwill" – which can be conveyed by a seller to a purchaser, so as to remain the property of the purchaser within the protection of the law for so long as the purchaser in fact conducts substantially the same business in substantially the same manner. "Goodwill" was explained to be "an indivisible item of property", "inseparable from the conduct of a business" yet "legally distinct from the sources – including other assets of the business – that have created the goodwill"[165].

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160 Section 76ATI(4)(f)(i) of the *Stamp Act*.

161 *Bacchus Marsh Concentrated Milk Co Ltd (in Liquidation) v Joseph Nathan & Co Ltd* (1919) 26 CLR 410 at 438-439; [1919] HCA 18.

162 *Federal Commissioner of Taxation v Murry* (1998) 193 CLR 605 at 617 [29]; [1998] HCA 42; *Labouchere v Dawson* (1872) LR 13 Eq 322 at 325-326; *Trego v Hunt* [1896] AC 7 at 25.

163 *Reid v Moreland Timber Co Pty Ltd* (1946) 73 CLR 1 at 11; [1946] HCA 48.

164 (1998) 193 CLR 605 at 623 [45].

165 (1998) 193 CLR 605 at 608-609 [4].

168 Not raised on the facts in *Murry* and left open by the reasoning in that case is whether "goodwill" is confined to what has traditionally been described as "the attractive force which brings in custom"[166] or extends more generally to "whatever adds value to a business"[167]. Historically, and as reiterated in *Murry*, "attractive force" has been seen to be "central" to the legal concept of goodwill[168], and Australian cases before *Murry* in which the more general meaning was alluded to were all cases in which the value that was added to a business was the value of the favourable disposition of customers[169]. But it does not follow that attractive force is essential to goodwill or, if it is, that goodwill is exhaustive of the value that inheres in an entitlement to conduct a business as a going concern.

169 To treat attractive force as essential to goodwill and then to go on to treat goodwill as exhaustive of the value that inheres in an entitlement to conduct a business as a going concern would, as Southwood J pointed out subsequent to *Murry*, fail to give legal recognition to the obvious fact that "[a] business may be successful and create excess value without substantial customer preference"[170]. Amongst the "positive advantages which may arise from the continuity of organisation of the business", and which may therefore add value to an entitlement to conduct the business as a going concern, his Honour usefully instanced "good relations with suppliers of the business, good industrial relations, the quality of management, the configuration of plant and equipment, the technical skills of management and senior staff, technological skills, credit management and capital raising ability, all of which may add value to the

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166 *Inland Revenue Commissioners v Muller & Co's Margarine Ltd* [1901] AC 217 at 224, quoted in *Murry* (1998) 193 CLR 605 at 613 [17].

167 *Inland Revenue Commissioners v Muller & Co's Margarine Ltd* [1901] AC 217 at 235, quoted in *Murry* (1998) 193 CLR 605 at 613 [16].

168 (1998) 193 CLR 605 at 614 [20].

169 *Bacchus Marsh Concentrated Milk Co Ltd (in Liquidation) v Joseph Nathan & Co Ltd* (1919) 26 CLR 410 at 438; *Box v Commissioner of Taxation* (1952) 86 CLR 387 at 396-397, 399; [1952] HCA 61; *Federal Commissioner of Taxation v Connolly* (1953) 90 CLR 483 at 486-487, 488; [1953] HCA 50; *Hepples v Federal Commissioner of Taxation* (1992) 173 CLR 492 at 519-520, 542-543; [1992] HCA 3.

170 *Commissioner of Territory Revenue v Alcan (NT) Alumina Pty Ltd* (2008) 24 NTLR 33 at 73 [133].

business by reducing costs and increasing profits without necessarily maintaining or increasing custom"[171].

170 Whilst "[t]he books abound in definitions of good will", Cardozo J observed in the Court of Appeals of New York nearly a century ago, "[m]en will pay for any privilege that gives a reasonable expectancy of preference in the race of competition"[172]. In the same vein and at around the same time, delivering the unanimous decision of the United States Court of Appeals for the Second Circuit, of which Learned Hand J was a member, Swan J said[173]:

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

The latter privilege, Swan J noted, "is known as good will"[174]. The former privilege, which he had also referred to as "property of value", he had no occasion to name.

171 The two elements of the privilege of a business-owner to which Swan J referred are reflected in the distinction then recognised and still recognised in taxation and regulatory contexts in the United States between: the "goodwill" of a business, comprising "that element of value which inheres in the fixed and favorable consideration of customers, arising from an established and well-known and well-conducted business"[175]; and the "going concern value" of a business, comprising that element of value which inheres in "the ability of a business to generate income without interruption, even though there has been a change in ownership"[176] and encompassing the value of an assembled

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171 *Commissioner of Territory Revenue v Alcan (NT) Alumina Pty Ltd* (2008) 24 NTLR 33 at 73 [133].

172 *In re Brown* 150 NE 581 at 582 (1926).

173 *Haberle Crystal Springs Brewing Co v Clarke* 30 F 2d 219 at 221-222 (1929).

174 *Haberle Crystal Springs Brewing Co v Clarke* 30 F 2d 219 at 222 (1929).

175 *Des Moines Gas Co v City of Des Moines* 238 US 153 at 165 (1915).

176 *Ithaca Industries Inc v Commissioner of Internal Revenue* 97 TC 253 at 264 (1991); affirmed 17 F 3d 684 (1994).

workforce[177] as well as the value of an assembled plant[178]. "The difference between a dead plant and a live one is a real value", the Supreme Court of the United States has said, "and is independent of ... any mere good will as between such a plant and its customers"[179]. "That there is an element of value in an assembled and established plant, doing business and earning money, over one not thus advanced", the Supreme Court has opined, is "self-evident"[180]. Going concern value, no less than goodwill, the Supreme Court has recognised as "property"[181].

172 Australian courts have not "thrown the protection of an injunction around all the intangible elements of value, that is, value in exchange, which may flow from the exercise by an individual of his powers or resources whether in the organization of a business or undertaking or the use of ingenuity, knowledge, skill or labour"[182]. We have not treated as property all that can be monetised.

173 However, I see no reason why an Australian court should not recognise the entitlement of a business-owner to continue to use the organisation of an existing business without interruption as a proprietary aspect of what was referred to in *Murry* as "the legal right or privilege to conduct a business in substantially the same manner and by substantially the same means which in the past have attracted custom to the business"[183]. In that respect, I see no reason why an Australian court might not in an appropriate case protect that entitlement by injunction against derogation by the former owner, for example by enjoining the former owner from soliciting suppliers in the same way and on the same basis as it might enjoin the former owner from soliciting customers[184]. And in the

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177 *Ithaca Industries Inc v Commissioner of Internal Revenue* 97 TC 253 at 264 (1991).

178 *Des Moines Gas Co v City of Des Moines* 238 US 153 at 165 (1915).

179 *City of Omaha v Omaha Water Co* 218 US 180 at 202 (1910).

180 *Des Moines Gas Co v City of Des Moines* 238 US 153 at 165 (1915).

181 *Des Moines Gas Co v City of Des Moines* 238 US 153 at 165 (1915); *Los Angeles Gas & Electric Corp v Railroad Commission of California* 289 US 287 at 313 (1933).

182 *Moorgate Tobacco Co Ltd v Philip Morris Ltd [No 2]* (1984) 156 CLR 414 at 444-445; [1984] HCA 73, quoting *Victoria Park Racing and Recreation Grounds Co Ltd v Taylor* (1937) 58 CLR 479 at 509; [1937] HCA 45.

183 (1998) 193 CLR 605 at 623 [45].

184 *Murry* (1998) 193 CLR 605 at 617 [29].

event of a business-owner suffering an interference to the conduct of an existing business as a consequence of the tortious conduct of a third party, I see no reason why an award of damages by an Australian court might not in an appropriate case compensate for injury to the organisation of the business in the same way and on the same basis as it might compensate for injury to customer relations[185].

174 Whether or not such protection or compensation for injury would be available to a business-owner under the general law in Australia, however, I see no reason why the ability of a corporation, at the time of acquisition of a controlling interest in it, to continue to use the organisation of its own existing business should not be included within the statutory reference to "all property" to which the corporation is entitled at that time, given the self-evident contribution of that entitlement to the price which a willing but not anxious purchaser could be expected to pay to a willing but not anxious seller.

175 With reference to *Murry*, the Canadian Federal Court of Appeal has taken the view in the context of examining the taxation consequences of the acquisition of a business as a going concern that "efficient management" and "the potential for new business opportunities" flowing from business can be viewed as goodwill[186].

176 The view which I prefer, and which I consider to be consonant with the reasoning in *Murry* so far as that reasoning went, is that an entitlement to conduct a business as a going concern is a single item of property the value of which (if any) in a given case might be found to lie in either or both of two sources that might be found to be more or less distinct. One is the continuity of relationships with customers. The second is the continuity of organisation of the business. The traditional label "goodwill" is appropriately applied to the first of those sources of value. The label "going concern value" is appropriately applied to the second.

177 There is no question that Placer lacked goodwill in that sense at the time of the acquisition of a controlling interest in it by Barrick. Materially, its only product was gold – an undifferentiated product which it sold into a world market at a world price. Whether Placer could be inferred to have had at that time any material going concern value is a topic on which the Tribunal and the Court of Appeal took different views. Consideration of that topic is best deferred until after consideration of the statutory numerator.

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185 *Murry* (1998) 193 CLR 605 at 618 [30].

186 *Transalta Corporation v The Queen* 2012 DTC 5041 at 6766 [56].

The numerator

178 The statutory numerator is set as "the value of all land to which the corporation is entitled" at the time of acquisition of a controlling interest in it. The meaning of the term "land", not unlike the meaning of the term "property", is context dependent[187].

179 The meaning here is informed by specific statutory instructions that extend the definition of "land" to include both a "mining tenement" and "anything fixed to the land" and that define "mining tenement" to include "the specified piece of land in respect of which the mining tenement is ... granted or acquired"[188].

180 Two aspects of the inquiry into value required to determine the statutory numerator are significant.

181 First, it follows from the extended definition of "land" that, in its application to mining tenements on which mining operations are occurring at the time of acquisition of a controlling interest in the corporation, the land to be valued includes all structures located on the land which is the subject of those mining tenements in the working condition in which the structures exist at that time. The fact that a mining plant is assembled and "live" on the tenement at that time is a fact which contributes to the value of the tenement itself. The notion that an individual mining tenement could be valued using a "restoration valuation methodology" so as to reflect what was described in the valuation evidence as the value of "an idle mine with plant and equipment in 'care and maintenance' mode" was rightly rejected by the Tribunal[189].

182 Second, it follows from the requirement for "the value of all land" to be compared with "the value of all property" that all of the land to which the corporation is entitled is to be treated as a bundle. Just as the denominator is determined by inquiring into the price that would be negotiated in an arm's length transaction between a hypothetical willing but not anxious seller and a hypothetical willing but not anxious purchaser for the totality of the property to which the corporation is entitled, so the numerator must be determined by inquiring into the price that would be negotiated in an arm's length transaction between a hypothetical willing but not anxious seller and a hypothetical willing

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187 Section 76(1) of the *Stamp Act* (definition of "land").

188 Section 76(1) of the *Stamp Act* (definition of "mining tenement"), read with s 8(1) of the *Mining Act* 1978 (WA). Cf *Epic Energy (Pilbara Pipeline) Pty Ltd v Commissioner of State Revenue* (2011) 43 WAR 186 at 192 [19]-[20].

189 [2015] WASAT 141 at [282].

but not anxious purchaser for the totality of the land to which the corporation is entitled. If "the value of all property" is determined on the basis that the totality of the property would be sold together, but "the value of all land" is determined on the basis that the land would be sold piecemeal, the resultant ratio would be distorted to the extent that the assembling of the property or land might result in a price greater than the sum of the prices of the component items of property or parcels of land.

183 For reasons I will explain, in my opinion, that second aspect of the inquiry into value required to determine the statutory numerator is ultimately determinative of the appeal.

Determining the integers in this case

184 Despite the fact that Barrick appears to have paid a premium of 25 per cent above the prevailing market price of Placer's shares, Barrick and the Commissioner agreed before the Tribunal that the amount Barrick paid to acquire those shares represented the best evidence of the price that would be negotiated in an arm's length transaction between a hypothetical seller and a hypothetical purchaser for the totality of the property to which Placer was then entitled. Adjusted to account for the liabilities which Placer then had, the purchase price indicated that the value of all property to which Placer was then entitled was $15.3 billion[190].

185 For the purpose of determining the denominator of the statutory ratio, Barrick and the Commissioner also agreed before the Tribunal the value of the excluded property to which Placer was then entitled. Although it emerged on the hearing of the appeal that there was a difference between them as to the scope of what was encompassed within the excluded category of knowledge or information that has commercial value relating to any process, technique, method, design or apparatus to locate, extract, process, transport or market minerals, the amount of all excluded property was agreed to be $2.5 billion.

186 The result was that Barrick and the Commissioner were agreed before the Tribunal that the value of all property other than excluded property to which Placer was entitled at the time of the acquisition of the controlling interest in it by Barrick was $12.8 billion. Ostensibly, at least, the value of the statutory denominator was uncontentious.

187 The contest before the Tribunal and on appeal to the Court of Appeal was focused on the determination of the statutory numerator. The contest was as to whether the value of all of the land in Western Australia and elsewhere throughout the world to which Placer was entitled at the time of the acquisition

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190 All references are to US dollars.

of the controlling interest in it by Barrick was at least 60 per cent of $12.8 billion, being $7.68 billion. Other than gold mining and exploration tenements, the value of the land to which Placer was then entitled was implicitly accepted by both parties to be immaterial.

188 As issue was joined before the Tribunal, Barrick, as taxpayer, accordingly assumed the evidentiary and persuasive onus of establishing on the material before the Tribunal that the value of the gold mining and exploration tenements in Western Australia and elsewhere throughout the world to which Placer was entitled was less than $7.68 billion.

189 To discharge that onus, Barrick relied on expert valuations of Placer's gold mining and exploration tenements. The two principal valuations on which Barrick relied (ignoring a valuation based on restoration valuation methodology) were those of Mr Lee and Mr Patel, who valued the tenements at $5.3 billion and $5.7 billion respectively. Those valuations were met with competing expert valuations on which the Commissioner relied. The principal valuation on which the Commissioner relied was that of Mr Lonergan, who valued the tenements at between $11.8 billion and $12.3 billion.

190 Understanding the methodology employed in those valuations is important. On the common understanding that the highest and best use of Placer's gold mining and exploration tenements lay in the continued exploitation of mineral resources and that a hypothetical willing but not anxious seller and a hypothetical willing but not anxious purchaser of a mining or exploration tenement would each adopt the same methodology to ascribe a value to that use, the valuers agreed that the gold mining and exploration tenements were to be valued by reference to the discounted cash flow forecast to be generated from mining operations on those tenements. Treating each existing mining project as a separate "enterprise", the valuers each determined the present value of the projected cash flow from sales of gold mined from proven and probable reserves over the projected life of the project. Each calculated the total value of the gold mining and exploration tenements simply as the sum of the present values of the individual mining projects.

191 Discounted cash flow methodology is, of course, reliant on predictions. The principal difference between the valuations of Mr Lee and Mr Patel, on the one hand, and that of Mr Lonergan, on the other hand, lay in their predictions of the long-term prices of gold. Mr Lee and Mr Patel based their predictions on management and industry consensus forecasts at the time of acquisition of future spot prices. Mr Lonergan based his prediction on prices assessed by reference to gold futures contracts at the time of acquisition.

192 The Tribunal preferred the approach of Mr Lonergan[191]. In an aspect of the Court of Appeal's reasoning that is unchallenged in this appeal, the Court found Mr Lonergan's reliance on prices assessed by reference to gold futures contracts to have been erroneous[192]. The valuation at which Mr Lonergan arrived must therefore be treated for the purpose of this appeal as an unreliable guide to the value of the statutory numerator.

193 The obvious difficulty with the remaining valuations, those of Mr Lee and Mr Patel, is that they left a very large difference between the value of the gold mining and exploration tenements as indicated by their valuations and the value of all of Placer's property which it was agreed was indicated by the price Barrick paid to acquire Placer. How could it be said of a gold mining company, whose only material source of revenue was from the mining of gold, that barely a third of the value of the total property to which it was entitled lay in its gold mining and exploration tenements?

194 Mention was made before the Tribunal of an industry practice or rule of thumb according to which a multiplier, referred to as the "net asset value multiple" or the "gold premium", is applied to reconcile that value with the market value of a gold mining company. The multiplier was in the range of 1.2 to 2.5 times the value of mining tenements derived through the application of discounted cash flow methodology. The basis for the application of such a multiplier was unexplored before the Tribunal beyond brief reference in the cross-examination of Mr Patel to him considering three reasons why its application would be appropriate: the possibility of finding more gold in the existing tenements or in new tenements; the possibility of the gold price exceeding consensus forecasts; and the option available to the operator of the mine of varying production levels in response to changes in the gold price. Neither Barrick nor the Commissioner relied on the multiplier before the Tribunal and experts on both sides specifically rejected its application on the basis that it lacked intellectual rigour. The Tribunal in those circumstances put the multiplier to one side[193]. The practice of applying a multiplier can nevertheless be taken as recognition within the gold mining industry that the business of a gold mining company ordinarily has value beyond that revealed by the application of a standard discounted cash flow analysis to its existing mining operations.

195 To the extent to which it was incumbent on Barrick to explain the difference between the value of the gold mining and exploration tenements to

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191 [2015] WASAT 141 at [381].

192 (2017) 106 ATR 511 at 535 [98], 547-549 [157]-[164], 553 [185], 559 [217].

193 [2015] WASAT 141 at [347]-[353].

which Placer was entitled (a task which Barrick steadfastly refused to embrace as part of its persuasive burden), Barrick attributed that difference to "goodwill", corresponding to what I have referred to as going concern value. The Commissioner disputed that any such going concern value, even if it could be treated as property of Placer, was shown on the material before the Tribunal to be substantial.

196 Quite properly, Barrick did not seek to gain direct support for the existence of substantial going concern value from accounting practice. Barrick did, however, place reliance on the reasons it had advanced to justify recording as "goodwill", in financial statements required by the United States Securities and Exchange Commission to be prepared in accordance with United States generally accepted accounting principles[194], an amount of $6.5 billion, being the difference between the price it paid for the shares in Placer and the fair value which it attributed to Placer's net assets. The reasons there advanced, Barrick argued, similarly supported recognition of Placer having had substantial going concern value at the time of acquisition.

197 Barrick explained in its financial statements:

> "In a gold mining context, the current and future product is gold, and the depletion of the existing portfolio of reserves and mineralized materials does not usually define the economic end of the mining company. The going concern value of a mining business will be indefinite to the extent that there is an expectation that management will be able to locate attractive investment opportunities in the future at either its existing mineral properties or by locating other prospective mineral properties, ie, find additional mineral reserves. The existence of this component of goodwill in the acquisition of Placer Dome can be inferred because the historic market capitalization of Placer Dome reflected a premium to the underlying [net asset value]."

198 Barrick further explained in its financial statements that the amount of $6.5 billion recorded as "goodwill" in the acquisition of Placer was contributed to by "synergies" from the combination of Barrick's mining operations with those of Placer in the form of cost savings and economies of scale which, at the time of purchase of Placer, Barrick expected to realise. The capitalised value of those synergies was uncontroversially in the range of $1.6 billion to $2 billion.

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194 Financial Accounting Standards Board, Statement of Financial Accounting Standards No 141: Business Combinations (2007); Financial Accounting Standards Board, Statement of Financial Accounting Standards No 142: Goodwill and Other Intangible Assets (2001).

199 Evidence given before the Tribunal by Barrick's Chief Financial Officer at the time of the acquisition was to similar effect. He explained that the amount recorded as "goodwill" in Barrick's financial statements represented, in addition to "the fair value of the expected synergies and other benefits which could be realised upon the integration of Placer Dome's business into Barrick's", "the fair value of the going concern element of Placer Dome's business – including the value attributable to the ability of management to integrate the business and ensure that existing revenue streams and the value of the assets working together were maintained, sustained and grown by locating attractive investment opportunities in the future at either its existing mineral properties or by locating additional mineral reserves".

200 Mr Lee in his evidence advanced a more general justification for that approach. Having posed the question, "Why should goodwill arise on a mining transaction?", Mr Lee answered it as follows:

> "In a mining context such as the acquisition of Placer Dome, goodwill represents the avoided cost of having to assemble a portfolio of operating mines, mines that are generating cash flow, with the management teams in place, the anticipation of synergies expected to arise from the combination of the Placer Dome business with the Barrick business and at least in part, the expectation, that the management team will be able to keep the company in operation, long after the existing mines are depleted."

Mr Lee elsewhere in his evidence explained that savings in production costs, economies of scale and reductions in risk were available to a mining company which had what he again referred to as a "portfolio" of mines and development projects, and that those advantages would not be available to a company which had only a single mine.

201 Barrick emphasised in other evidence and submissions before the Tribunal that, at the time of acquisition, Placer had an ongoing profitable business which had been operating for more than 100 years, was the fifth largest publicly listed gold producing company in the world, employed a workforce of some 13,000 employees worldwide, held proven and probable gold reserves which had increased by 60 per cent over the previous five years, operated 16 existing mining projects in seven countries and had an additional seven exploration areas which it had identified as of interest, and had a demonstrated capacity to develop and expand its gold mining operations by identifying and developing new mining projects as the resources of existing mines were depleted.

202 Barrick drew attention to the overview of Placer's business strategy contained in Placer's 2004 annual report, its last annual report before its acquisition by Barrick. The annual report explained that Placer had a strategy of "continuing to build upon its high-quality portfolio of gold producing assets". Amongst the ways in which Placer went about implementing that strategy were:

investing in personnel and systems, "[b]uilding land positions near current infrastructure and in geological systems where gold discoveries have been repetitive" and "[e]xploring aggressively on these land packages". The result was that Placer had a "longer-term expectation" of having a "high-quality, geographically balanced portfolio of operations".

203 Barrick also drew attention to its own strategic goal in acquiring Placer. The acquisition was justified in a proposal adopted by its Board as providing a "stronger development pipeline for growth".

204 Without expressing a view on whether going concern value is proprietary in nature, the Tribunal went so far as to deny that there was evidence before it sufficient to establish that Placer had going concern value of any significance. The Tribunal found that there was none[195].

205 The Tribunal's finding that Placer had no going concern value at the time of acquisition by Barrick appears to have fed into another strand of reasoning on which the Tribunal relied to reject the value of the statutory numerator indicated by the valuations of Mr Lee and Mr Patel. That strand of reasoning began with the Tribunal adopting the view that the value of the statutory numerator could be derived by the "simple arithmetical calculation" of taking the agreed value of the statutory denominator and deducting from it the value of all property that could be shown not to be land[196]. Finding, in the absence of any significant going concern value, that Barrick had failed to prove that Placer held significant property which was not land, the Tribunal concluded that the statutory numerator was not substantially less than the statutory denominator[197].

206 Taking the view that going concern value where it exists is proprietary in character[198] – a view which for reasons already given I consider to be correct – the Court of Appeal found the Tribunal to have been wrong in fact to conclude that the evidence before it was insufficient to establish that Placer had significant going concern value[199] and wrong as a matter of valuation principle to apply a

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195 [2015] WASAT 141 at [377]-[379].

196 [2015] WASAT 141 at [265].

197 [2015] WASAT 141 at [382].

198 (2017) 106 ATR 511 at 524 [47].

199 (2017) 106 ATR 511 at 524-525 [49], 534 [95].

subtractive or top down approach in the circumstances of the case[200]. In both respects, I consider the reasoning of the Court of Appeal to be sound.

207 As to the facts, the Court of Appeal in my opinion was correct to conclude from the evidence that the synergies available to and expected to be realised by Barrick would be available to and expected to be realised by a hypothetical purchaser of Placer's business and, on that basis, to treat the capitalised value of those synergies as a component of going concern value[201]. I reject the submission of the Commissioner that such synergies could not have added to the value of the entitlement to conduct Placer's business as a going concern because they represented inefficiencies in the conduct of that business in respect of which a hypothetical purchaser would benefit from changing the business rather than from continuing to conduct the business in substantially the same way as it had been conducted before. Accepting that synergies can in one sense be characterised as having been inefficiencies in the conduct of Placer's business, it is sufficient that the availability of the synergies from which the hypothetical purchaser could be expected to benefit added to the price which the hypothetical purchaser could have been expected to pay for the entitlement to continue to conduct that business.

208 The Court of Appeal, in my opinion, was also correct to infer from the scale and scope of Placer's gold mining operations that substantial value inhered in its continuing business operations beyond the value of its existing portfolio of mining and exploration tenements[202]. I reject the submission of the Commissioner that all of the value of those continuing business operations necessarily inhered in its existing portfolio of mining and exploration tenements because gold production from those tenements was Placer's only material source of revenue, or that any significant additional value is necessarily attributable to the statutorily excluded category of property constituted by knowledge or information that has commercial value relating to processes, techniques and methods, and designs to locate, extract, process, transport or market gold. The submission in both respects conflates the value of presently existing property (Placer's portfolio of mining and exploration tenements, or its relevant knowledge or information of commercial value) with the value of the capacity to develop that property and to use it in such a way as to generate additional property in the future.

209 As to the valuation methodology, there can be nothing inherently wrong with a subtractive approach to the determination of the statutory numerator in a

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200 (2017) 106 ATR 511 at 526 [56]-[57], 533-534 [91]-[92].

201 (2017) 106 ATR 511 at 523-524 [45], 524 [48].

202 (2017) 106 ATR 511 at 523 [41]-[44].

case where it is possible to identify and to value property other than land with reasonable precision[203]. The approach, however, is problematic where the property other than land that can be identified cannot readily be valued with reasonable precision. More fundamentally, the approach is mathematically nonsensical where the property other than land that can be identified includes an entitlement to carry on a business having going concern value and where a part of that going concern value might lie in the existence of a portfolio of land. To subtract the total going concern value from the total value of "all property" to which the business-owner is entitled would not in such a case yield a result equivalent to the value of "all land". Tellingly, although the Commissioner argued for application of the subtractive methodology in closing submissions before the Tribunal, the Commissioner did not suggest that anything contained in the extensive valuation evidence before the Tribunal supported its application in the circumstances of the case.

210 To accept the soundness of the Court of Appeal's criticism of the Tribunal, however, is not to accept that Barrick is to be taken by reason of the evidence of Mr Lee and Mr Patel to have discharged its evidentiary onus before the Tribunal, or that (if not) the order of the Court of Appeal remitting the matter to the Tribunal for reconsideration was appropriate.

211 As the evidence of Mr Lee spelled out, at least a substantial part of the going concern value of Placer, including some part of the $1.6 billion to $2 billion in synergies available to and expected to be realised by a hypothetical purchaser of Placer's business, was attributable to the fact of Placer's gold mining and exploration tenements forming an assembled portfolio rather than being sold separately. Indeed, Placer's annual report described the goal of its business strategy in terms of having a high-quality, geographically balanced portfolio of mining operations.

212 On Barrick's own case, therefore, a substantial part of the going concern value of Placer's business was attributable to the assembled whole of Placer's portfolio of mining assets being more valuable to a hypothetical purchaser than the sum of the values of the individual mining operations were those mining operations to be acquired separately.

213 Yet the evidence of Mr Lee and Mr Patel on which Barrick relied to value Placer's gold mining and exploration tenements in the range of $5.3 billion to $5.7 billion valued those tenements only as the sum of the values of the individual mining operations each treated as a separate enterprise. Left entirely out of account was such additional amount as might be expected to have been paid by a hypothetical purchaser in order to purchase the assembled whole.

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203 Cf *EIE Ocean BV v Commissioner of Stamp Duties* [1998] 1 Qd R 36 at 38.

Whether the hypothetical purchaser would have been inclined to adopt the industry practice of applying a "gold premium" in the form of a multiple in the range of 1.2 to 2.5 to Mr Lee's and Mr Patel's discounted cash flow calculations, it is inappropriate to speculate.

214 The extent to which a hypothetical purchaser would have attributed value to the assembled whole of Placer's portfolio of gold mining and exploration tenements was not explored in the evidence on which Barrick relied. That gap in the evidence is enough for the appeal to be decided in favour of the Commissioner.

215 That the going concern value of the entitlement to carry on a business as a going concern must be included in the denominator of the "land rich" ratio does not mean that the whole of the going concern value must be excluded from the numerator. The numerator, as has been explained, must be determined by inquiring into the price that would be negotiated in an arm's length transaction between a hypothetical seller and a hypothetical purchaser for the totality of the land to which the corporation in question was entitled at the time of acquisition.

216 The question required to be addressed in determining the statutory numerator was as to the value of the entire portfolio of Placer's gold mining and exploration tenements treated as a portfolio. The flaw in Barrick's case before the Tribunal was that Barrick failed to address that question.

Conclusion

217 The *State Administrative Tribunal Act* 2004 (WA)[204] read with the *Taxation Administration Act* 2003 (WA)[205], as the Court of Appeal held in an important aspect of its reasoning unchallenged in the appeal[206], placed on Barrick as taxpayer the onus of establishing that the assessment to which its objection related was "invalid or incorrect"[207].

218 Having contended that the assessment was incorrect in its entirety on the basis that Placer did not meet the "land rich" ratio, and having failed on the material placed before the Tribunal to establish that ground of objection, Barrick has not demonstrated any basis for an order of remitter which would provide another opportunity for it to attempt to make out that ground. It is also too late

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204 Section 29(1).

205 Section 37(2).

206 (2017) 106 ATR 511 at 553-558 [188]-[214].

207 Section 37(2) of the *Taxation Administration Act*.

for Barrick now to complain that the assessment was incorrect for the reason that it proceeded on an incorrect determination of the unencumbered value of the land and chattels situated in Western Australia to which Placer was entitled.

219 For these reasons, I agree with the orders proposed by the plurality.