IN THE HIGH COURT OF AUSTRALIA **No. B61 of 2012**
BRISBANE REGISTRY

BETWEEN: **COMMISSIONER OF TAXATION**

Applicant

AND **UNIT TREND SERVICES PTY LTD**
ACN 010 382 242

Respondent

RESPONDENT'S SUBMISSIONS

Part I: Internet publication

1. The respondent certifies that these submissions are in a form suitable for publication on the internet.

Part II: Issues

2. The applicant seeks to have the court decide what nexus was required under s 165-5 of the *A New Tax System (Goods and Services Tax) Act* 1999 (Cth) ("the GST Act"), as that Act stood before the insertion of s 165-5(3), between a benefit an "avoider" got from a scheme, and the making of a choice, election, application or agreement (a "choice") that was expressly provided for by the GST Act, for Division 165 not to "operate"; that is to say, the applicant asks the court to determine the meaning of s. 165-5(1)(b) of the GST Act before the insertion of s 165-5(3).

Part III: *Judiciary Act* 1903

3. The respondent certifies that it has considered whether any notice should be given in compliance with s 78B of the *Judiciary Act* 1903, and has concluded that no such notice should be given.

Part IV: Material facts

4. The respondent does not contest any material facts set out in the applicant's narrative of facts or chronology, but adds to the chronology the relevant dates relating to:

   (a) the "choices" by the respondent's predecessor as representative member of the relevant GST group to apply to the applicant under the former s 48-5 of the GST Act for approval of the group, and to apply under the former s 48-70 for the substitution of the respondent as representative member of the group, viz.:

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(i) 2000 – Application by Rapcivic Contractors Pty Ltd under s 48-5 of the GST Act for approval of a GST group including, inter alia, Simnat, of which Rapcivic was nominated as representative member: TR Ex 12;

(ii) 2/10/2000 – Approval by the applicant of the above GST group with GST Registration Number 91079314122: TR Ex 12;

(iii) 2000 - Application by Rapcivic under s 48-70 of the GST Act for approval of the replacement of Rapcivic by the respondent as representative member of the group: TR Ex 13;

(iv) 13/11/2000 – Approval by the applicant of the replacement of Rapcivic by the respondent as representative member of the group: TR Ex 13.

(b) the respondent's "choices" to apply to the applicant under the former s 48-70 for his approval of the interposed developers Blesford and Mooreville as additional members of the group, viz:.

(i) 15/06/2004 – Application by the respondent under s 48-70 of the GST Act for approval of Blesford as an additional member of the GST group: ST337;[1]

(ii) 12/07/2004 – Approval by the applicant of Blesford as an additional member of the group with the date of effect being 01/03/2004: ST340;

(iii) 22/07/2004 – Application by the respondent under s 48-70 of the GST Act for approval of Mooreville as an additional member of the GST group: ST341;

(iv) 20/08/2004 – Approval by the applicant of Mooreville approved as as an additional member of the GST group with the date of effect being 01/07/2004: ST342.

Part V: Applicable statutory provisions

5. The applicant's statement of applicable statutes and regulations is accepted.

Part VI: Argument

The schemes

6. At all material times, s 165-5(1)(b) has provided that Division 165 does not operate where the GST benefit is "attributable to the making ... of a choice, election, application or agreement that is expressly provided for by" the GST Act.

7. The contracts to end purchasers that Simnat assigned to Blesford and Mooreville already contained a choice by Simnat under the then s 75-5(1) [2] to apply the margin scheme.[3]

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[1] ST for Supplementary T documents before the Administrative Appeals Tribunal

[2] Under the current provision, substituted by Act 78 of 2005 s 3 and Sch 6 item 10, an agreement in writing between the supplier and the recipient is now required

8. Ordinarily, by s 7-1 (GST and input tax credits) and 9-70 (The amount of GST on taxable supplies), the amount of GST on a taxable supply is 10% of the value of the taxable supply. However, by s 75-10, as it stood at the time of the subject transactions:[4]

> **"75-10 The amount of GST on taxable supplies**
>
> (1) If a *taxable supply of *real property is under the *margin scheme, the amount of GST on the supply is 1/11 of the *margin for the supply.
>
> (2) The ***margin*** for the supply is the amount by which the *consideration for the supply exceeds the consideration for your acquisition of the interest, unit or lease in question.
>
> (3) ... ."

9. In other words, if the margin scheme applies, the GST is calculated by reference to the increase in value between acquisition and supply of the thing supplied, rather than by reference to the whole value of the thing supplied.

10. So if no scheme had been entered into, the respondent would have paid GST under the margin scheme on the supplies to end purchasers, on the margin between a base figure, being the apportioned value of the land at 1 July, 2000, and the end sale price.

11. It was necessary, in order for the respondent to obtain the uplift in that base figure that was the source of the relevant GST benefit, for Blesford and Mooreville to be interposed in the chain of supply between Simnat and the end purchasers, so that there was a supply from Simnat to each of Blesford and Mooreville ("the first supply") and a supply from Blesford or Mooreville to each end purchaser ("the second supply").

12. But (subject to paragraph 13 below) if Blesford and Mooreville had been interposed, but Simnat on the one hand and Mooreville and Blesford had not chosen to apply the going concern provisions,[5] there would have been no GST benefit, because the total of the GST on the first and second supplies would have been the same as if no scheme had been entered into.

13. Likewise, subject to paragraph 12 above, if Blesford and Mooreville had been interposed, but the respondent had not made the choices referred to in paragraph 4(b) above, there would have been no GST benefit, because the total of the GST on the first and second supplies would likewise have been the same as if no scheme had been entered into.

The "taken discretely" formulation does not assist the applicant

(a) The going concern choice

14. Section 38-325 provides, relevantly:

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[3] See [2010] AATA 497 [11], [102].

[4] S 75-10 has been amended by Act 78 of 2005, s 3 and Sch 6

[5] There was initially an issue whether there was truly a supply of a going concern, but ultimately the applicant accepted that there was: [2010] AATA 497 [18], [2012] FCAFC 112 [67], [76]

"**38-325 Supply of a going concern**

(1) The *supply of a going concern is ***GST-free*** if:

...

(c) the supplier and the recipient have agreed in writing that the supply is of a going concern."

15. The applicant submits:

"39 The Commissioner's argument does not require that for the sub-section to operate the scheme must consist of a statutory choice and nothing else. But it does contemplate that there will need to be a close connection between the statutory choice and the GST benefit."

16. Here, simultaneously with the interposition of Blesford and Mooreville, in the document (the sale contract) by which they were interposed, the choice was made to apply the going concern provision. It is submitted that the GST benefit of the supplies from Simnat to Blesford and Mooreville being GST free, flowing from each agreement in writing that the supplies to Blesford and Mooreville were supplies of going concerns must be said to flow from the choice, taken discretely, to apply the going concern provisions, and from that choice alone. Without that choice, there would have been no GST benefit. That agreement achieves directly the GST saving on the first transfer that comprises the relevant GST benefit. There is no need to pray in aid the group provisions (discussed below).

(b) The GST group provisions

17. Section 48-40, as it stood at the time of the subject transactions,[6] included:

"**48-40 Who is liable for GST**

(1) GST that is payable on any *taxable supply an entity makes and that is attributable to a tax period during which the entity is a *member of a *GST group:

(a) is payable by the *representative member; and

(b) is not payable by the entity that made it (unless the entity is the representative member).

...

(2) However:

(a) A supply that an entity makes to another *member of the same *GST group is treated as if it were not a *taxable supply ... "

18. So (apart from the going concern choice), but for the choice to make Blesford and Mooreville members of the GST group, that choice being the step immediately preceding the supplies to them by Simnat, there would have been

[6] S 48-40 has been amended by Act 74 of 2010, s 3 and Sch 1

no GST benefit. It is submitted that that also satisfies the applicant's "close connection" test.

Interpretation of the former s 165-5

(a) Overview

19. In any event, it is submitted that:

(a) the proper (that is to say, text-based) approach to statutory construction, as explained, for example, in *Certain Lloyds Underwriters v Cross*,[7] does not permit a departure from the ordinary meaning of "attributable to" as explained by this Court in *Federal Commissioner of Taxation v Sun Alliance Investments Pty Ltd (In Liquidation)*;[8] and adopted by the Full Court at [182]-[189],[9] in which this court adopted the following passage from *Walsh v Rother District Council*:[10]

> "[T]hese are plain English words involving some causal connection between the loss of employment and that to which the loss is said to be attributable. However, this connection need not be that of a sole, dominant, direct or proximate cause and effect. A contributory causal connection is quite sufficient"; or

(b) if the narrow construction of the meaning of the words "*attributable to*" suggested by the applicant had been intended, it would have been easy for Parliament so to provide, in particular as (see below) there was a conscious departure from the narrower exception in s 177C of the *Income Tax Assessment Act* 1936;

(c) there is no basis for excluding the presumption enacted by s. 23 of the *Acts Interpretation Act* 1901 (Cth) that the singular reference to "choice" etc in s 165(1)(b) includes the plural.

(b) Origin of the section

20. The current sub-s 165-5(1)(b) and 165-5(3) of the GST Act are based on sub-s 177C(2)(a)(i) and (ii) respectively of the *Income Tax Assessment Act* 1936,[11] but differ from them in that:

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[7] (2012) 293 ALR 412, 417-420, 430-432, 436, [2012] HCA 56 [23]-[31], [68]-[70], [88]-[89]; see also *Federal Commissioner of Taxation v Consolidated Media Holdings Ltd* (2012) 293 ALR 257; [2012] HCA 55 [39]; *Australian Education Union v Department of Education and Children's Services* (2012) 285 ALR 27; [2012] HCA 3 [26]-[29]; *Alcan (NT) Alumina Pty Ltd* v *Commissioner of Territory Revenue* (2009) 239 CLR 27; [2009] HCA 41 [55]-[57];

[8] (2005) 225 CLR 488 at [182] – [188] of the Joint Reasons; AB139-141.

[9] (2012) 205 FCR 29, 72-74; [2012] FCAFC 29

[10] [1978] ICR 1216, 1220; [1978] 1 All ER 510, 514.

[11] The explanation for the curious repetition of "agreement" and "choice" in the ComLaw version of s 177C(2)(a)(i) would seem to be that the compilers of one of the ComLaw compilations between 24 October 2008 and 24 May 2010 (due to what appears to be a corruption of the relevant versions, we have been unable to access compilations in this period, other than the last) appear to have incorporated the amendments made by item 6 in Schedule 6 to the *Taxation Laws Amendment Act (No. 1)* 1998 (No.

(a) (by way of background) for there to be a GST benefit, the tax saving must be "from" rather than "in connection with" the putative avoidance scheme;

(b) in order to accommodate differences in the "choices" provided for by the different legislation:

(i) s 165-5 refers, among other things, to an "application", while s 177C does not; and

(ii) s 177C refers, among other things, to a "declaration", a "selection", the "giving of a notice", and the "exercise of an option", which s 165-5 does not;

(c) more importantly:

(i) s 177C accommodates such choices etc by excluding from the definition of "obtaining a tax benefit in connection with a scheme", such benefits as are *attributable* to a statutory choice but *not attributable* to a scheme that was entered into "for the purpose of creating" the opportunity to make such a choice;

(ii) in contrast, the present s 165-5(3) (inserted after, and not applicable to, the present transactions) achieves the analogous limitation by modifying the meaning of "attributable to" in the primary exclusion in s 165-5(1)(b), and modifying it by reference to benefits got "*from*" a scheme (rather than attributable to the "choice" etc) where the relevant state of affairs was created to enable the relevant choice etc to be made; and

(d) with s 177C(2)(a)(ii) the test is whether the scheme was entered into for *the* purpose of creating the circumstances giving rise to the choice, while for s 165-5(3), one looks to the scheme *or part of* the scheme, and it is a *sole or dominant* purpose that is required for the matter to be taken outside the scope of "attributable to".

21. However, the drafter of the original s 165-5 (applicable in the present case) deliberately omitted the s 177C exclusion of schemes entered into "for the purpose of creating" the opportunity to make such a choice. Effect should be given to that deliberate exclusion.

22. As mentioned above, that omission has been reversed by s 165-5(3)[12], the purpose of which was said in the Explanatory Memorandum to the *Tax Laws Amendment (2008 Measures No. 3) Bill* 2008, in words that appear to be directed to a scheme such we have here, to be:

16, 1998) and item 16 in Schedule 1 to the *Taxation Laws (Technical Amendments) Act* 1998 (No. 41, 1998) in the new subparagraph (i) that was substituted by item 404 in Schedule 2 to the *Tax Law Improvement Act (No. 1)* 1998 (No. 46, 1998), and the error has been repeated in all subsequent ComLaw compilations.

[12] By Act No 145 of 2008, s 3, Schedule 1, Item 11 with effect from 9 December 2008; cf. . *Grain Elevators Board (Vic) v Dunmunkle Shire* (1946) 73 CLR 70, 86, *Hunter Resources Ltd v Melville* (1984) 164 CLR 234, 254-5, *Commissioner of State Revenue v Pioneer Concrete (Vic) Pty Ltd* (2002) 209 CLR 651, 669 [52]; Pearce and Geddes *Statutory Interpretation in Australia*, 7th ed., paras [3.34] – [3.35].

> "1.20 ... These amendments will ensure that a GST benefit is not attributable to the making of a choice, election, application or agreement if the scheme was entered into for the sole or dominant purpose of creating a circumstance or state of affairs necessary to enable the choice, election, application or agreement to be made... ."

23. So Div 165 could operate in the present case only if, relevantly, the GST benefit was *not* attributable to the making, by any entity, of a choice, election, application or agreement that was expressly provided for by the GST Act[13].

(c) An example

24. Consider a situation where A is a manufacturer selling through its subsidiary B, and paying GST on its supplies to B. A wishes to take advantage of the grouping provisions so as to defer its liability to GST on its supplies to its sales entity until the sales entity onsells the goods, without subjecting itself to the risk of becoming personally liable for past transactions of B under s 444-90 in Schedule 1 to the *Taxation Administration Act* 1953,[14] should some issue subsequently arise in relation to them. So it incorporates a new subsidiary C to be the new group sales entity. Pursuant to the current s 48-5, A and C agree in writing to the formation of a GST group, and A notifies the Commissioner of the formation of the group and that A is the representative member of the group. Those actions form a GST group. They also constitute a scheme.[15] But there is no immediate saving of GST.

25. Then A makes a supply to C of goods which it has manufactured, which C does not on sell immediately, as it is building up its inventory. Those actions also constitute a scheme. There is also a scheme comprising the formation of the GST group and the manufacture by A and supply to C. No choice expressly provided for by the GST Act is, or could be, made at the point of supply from A to C, in that s 48-40 has the effect,[16] without any choice being made in respect of the particular supply, that the supply is treated as not being a taxable supply. So A obtains a GST benefit, in that, at the least, it delays the incurring of GST, and thus comes within s 165-10(1)(d). But to be consistent with its approach in the present case, the applicant would have to argue that there is an insufficiently close connection between the choice to form a GST group and the benefit, and that the benefit flows from the sale between members of the previously formed group, rather than from the choice. So on the applicant's argument, despite the "choice" to form a group, Division 165 applies to negate the tax benefit, and A must continue to pay GST on its sales to its sales entity.

26. Indeed, since by s 165-5(1)(d) a GST benefit is obtained whenever the payment of GST is deferred to a later date, it is hard to imagine any formation of a GST group that would not be caught by Div 165 if the applicant's interpretation were correct.

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[13] Section 165-5(1)(b) GST Act.

[14] S 444-90 makes members of a group jointly and severally liable for the GST debts of other members of the group

[15] S 165-10(2)

[16] See s 165-5(1)(c)(ii)

(d) Reasons why special leave should not be granted

27. The present matter does not raise special leave questions for the following reasons:

(a) the meaning of the expression "*attributable to*", where it appears in s 165-5(1)(b) of the GST Act, has been materially affected by the insertion of s 165-5(3) of the GST Act;[17] s 165-5 is based on s 177C(2)(a)(ii) of the *Income Tax Assessment Act* 1936,[18] but (see above) is materially different from it in a certain respects, so the questions posed as special leave questions may well be answered differently in future litigation in light of the new s 165-5(3);

(b) this matter involved a "scheme"[19] in which the applicant took advantage of now superseded legislation, and the only live issue on the proposed appeal is that of *pre-17 March 2005* supplies to end-purchasers pursuant to contracts entered into by Simnat Pty Ltd ("Simnat")[20] *before April 2004*; so the amount involved in this part of the matter is only a part of the amount originally involved in the dispute between the parties;

(c) quite apart from the amendment to s 165-5, as a result of amendments to the GST Act by the *Tax Laws Amendment (2005 Measures No 2) Act* 2005 (Cth) ("the 2005 Act"); the GST benefit obtained under the subject scheme could not be obtained after 17 March, 2005, so there was no Division 165 (Anti-avoidance) issue before the Full Court in relation to supplies after 17 March 2005, as no tax benefit had been obtained for that period;

(d) the applicant is wrong to suggest that s 165-5(3) does not affect the meaning of the phrase "attributable to" in s 165-5(1)(b): on orthodox principles of a section should not be construed paragraph by paragraph or sub-section by sub-section, but as a whole;[21]

(e) further, in interpreting the current section, a court should not adopt the applicant's construction, as:

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[17] Inserted by the *Tax Laws Amendment (2008 Measures No 5) Act* 2008 No 145 of 2008 (the "2008 Act"), section 3 in Schedule 1 Item 11; with effect from 9 December 2008; applicable to choices, elections, applications and agreement made on or after 9 December 2008.

[18] See paragraph 1.56 of the Explanatory Memorandum to the 2008 Act

[19] The Commissioner's formulation of the scheme may be found at [2010] AATA 497 [85]

[20] The Administrative Appeals Tribunal found that supplies in contracts entered into by Blesford and Mooreville were not caught by Division 165; the Commissioner did not appeal against that finding

[21] see the judgment of Lord Hoffmann NPJ in *Commissioner of Inland Revenue (Hong Kong) v Tai Hing Cotton Mill (Development) Ltd* [2007] HKCFA 78 [15], (2007) 10 HKCFAR 704; [2008] 2 HKLRD 40; see also, e.g., *K &S Lake City Freighters Pty Ltd v Gordon and Gotch Ltd* (1985) 157 CLR 309, 312, 315; *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 389, 408; Pearce & Geddes *Statutory Interpretation in Australia* 7th ed para [4.2]

(i) on the applicant's interpretation of s 165-5(1)(b), s 165-5(3) is otiose, and a construction that renders part of legislation otiose should be avoided where another construction is available;[22] and

(ii) that interpretation is contrary to the assumption that Parliament made when enacting s 165-5(3);[23]

(f) the fact that the legislature has chosen not to make a corresponding amendment to Division 75 of the *Fuel Tax Act* 2006 (Cth) does not mean that a decision in the present case would have utility for the differently structured provisions of that Act; Parliament may have had particular political reasons for choosing not to amend that provision at the time that section 165-5 (3) was added to the GST Act; in any event, it would be more appropriate to await an application for special leave in respect of that legislation before deciding this question in relation to that Act;

(g) the Commissioner has not suggested that there are any other taxpayers likely to be affected by the decision of the Full Court[24];

(h) in any event, the decision of the majority is not attended with sufficient doubt to warrant the grant of special leave;

(i) in summary, this matter is not an appropriate vehicle to determine the true construction of the present s 165-5, in general, and s 165-5(1)(b), in particular.

Part VII – Any special order for costs sought by the respondent

28. No special order for costs is sought by the respondent.

Part VIII – Table of the authorities, legislation or other material on which the respondent relies, identifying the pages at which the relevant passages appear

Authorities

29. *Commissioner of Taxation v Sun Alliance Investments Pty Ltd* (2005) 225 CLR 488 at [77], [80], [81] and [82].

30. *Walsh v Rother District Council* [1978] ICR 1216 at 1220; [1978] 1 All ER 510 at 514.

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[22] see *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 [71] at 382 (McHugh, Gummow, Kirby and Hayne JJ) citing *Commonwealth v Baume* (1905) 2 CLR 405 at 414 (Griffith CJ) and 419 (O'Connor J) and *Chu Kheng Lim v Minister for Immigration Local Government & Ethnic Affairs* (1992) 176 CLR 1 at 12–13 (Mason CJ)

[23] See generally *Grain Elevators Board (Vic) v Dunmunkle Corp* (1946) 73 CLR 70, 86, Pearce & Geddes, *Statutory Interpretation in Australia*, 7th ed, paras [3.33], [3.34], *Hunter Resources Ltd v Melville* (1984) 164 CLR 234, 254-5, *Commissioner of State Revenue v Pioneer Concrete (Vic) Pty Ltd* (2002) 209 CLR 651, 669 [52]; *Commissioner of Taxation v Anstis* (2010) 241 CLR 443; [2010] HCA 40 [24]

[24] This is not a test case.

31. *Certain Lloyds Underwriters v Cross* (2012) 293 ALR 417-420, 430-432, 436, [23]-[31], [68]-[70], [88]-[89].

Legislation

32. *Income Tax Assessment Act* 1936 (current) s 177C;

33. *A New Tax System (Goods and Services Tax) Act* 1999 (Cth) (as at 28 February 2005), ss 38-325, 48-5, 75-1, 75-5, 75-10, 165-1, 165-5, 165-10, 165-40;

34. *Tax Laws Amendment (2005 Measures No 2) Act* 2005 (Cth), s 3, Schedule 6, Items 10 to 16;

35. *Tax Laws Amendment (2008 Measures No 5) Act* 2008 (Cth), s 3, Schedule 1, Item 11;

36. *Tax Laws Amendment (2008 Measures No 5) Bill* 2008 Explanatory Memorandum, Chapter 1, paragraphs 1.1 and 1.2; paragraphs 1.20 to 1.21 and paragraphs 1.52 to 1.60;

37. *A New Tax System (Goods and Services Tax) Act* 1999 (current as at 5 October 2012), ss 75-10, 75-11, 165-5(3);

Dated: 11 February 2013

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COMMISSIONER OF TAXATION OF THE COMMONWEALTH OF AUSTRALIA..... APPELLANT AND CROSS-RESPONDENT;

RESPONDENT,

AND

SUN ALLIANCE INVESTMENTS PTY LIMITED (IN LIQUIDATION)..... RESPONDENT AND CROSS-APPELLANT.

APPLICANT,

[2005] HCA 70

ON APPEAL FROM THE FEDERAL COURT OF AUSTRALIA

HC of A 2005

Aug 4; Nov 17 2005

Gleeson CJ, Gummow, Kirby, Callinan and Heydon JJ

Income Tax (Cth) — Capital gains tax — Capital loss — Company shares — Calculation of capital loss on disposal — Reduction of capital loss by amount of distributions of profits derived by company — Investments of company — Fluctuations in value — Value recorded annually in group accounts — Dividend declared and paid — Rebate of tax — Disposal of investments — Disposal of shares — Whether distribution of profits derived by company — Whether distribution reasonably attributable to such profits — Income Tax Assessment Act 1936 (Cth), ss 160Z, 160ZH(3), 160ZK(1B), (5).

Sections 46 and 46A of the *Income Tax Assessment Act 1936* (Cth) provided for a rebate of tax for certain dividends paid by one company to another. Part IIIA (ss 160AX to 160ZZU) of that Act provided for the inclusion of certain net capital gains in taxpayers' assessable income. Section 160ZC provided, amongst other things, that net capital gains in an income year were to be reduced by any net capital losses arising in that year and, if any losses exceeded any gains, the difference was to be carried forward as a net capital loss for the next year. Section 160Z provided, amongst other things, that a net capital loss resulted from the disposal by a taxpayer of an asset acquired by that taxpayer on or after 20 September 1985 if the asset's "reduced cost base" exceeded certain consideration received for that disposal. Section 160ZH(3) provided that an asset's reduced cost base was the sum of the "reduced amount" of certain consideration given by a taxpayer for its acquisition plus certain costs paid for or in relation to it. Section 160ZK(1) provided that the reduced amount was that consideration and those costs less: (a) any part allowable as a deduction to the taxpayer; and (b) any amount included in the taxpayer's assessable income, otherwise than by Pt IIIA, as a result of the asset's disposal and which was attributable to the amounts allowable as a deduction. If the disposed asset was a share in a company, s 160ZK(1B) provided that any "rebatable dividend adjustment" was also to be deducted in calculating a reduced amount. Section 160ZK(5) provided that, if a company made a distribution in respect of a share to a

company that: (a) was a controlling shareholder; and (b) to the extent that the distribution was a dividend, was entitled to a rebate under s 46 or s 46A, a rebatable dividend adjustment was the amount being the whole or a part of that distribution that could reasonably be taken to be attributable to profits that were derived by the company before that holder acquired that share.

The parent company of an insurance group (RIP) owned all the shares in a subsidiary (RIH). The parent company of another insurance group (SAH) wholly owned a subsidiary (RSA) which wholly owned two further subsidiaries that it had acquired before 20 September 1985. One subsidiary (S) owned real property with a historical cost of $29.5 million. The other (P) conducted an equity investment business. For the calendar years 1986 to 1991, the SAH group accounts stated changes in the value of the assets of S and P, which were carried to asset revaluation reserves. On 8 October 1992, RIP and SAH entered into an agreement to merge the two groups under which RIP sold its shares in RIH to RSA for $125 million plus an issue of shares representing 40 per cent of RSA's issued capital. At that time, RSA was deemed for the purposes of Pt IIIA to have acquired its shares in S for $98 million consideration and in P for $28 million consideration. RIP wished to avoid risks associated with S's property. Hence, it was agreed that upon the sale of the property another wholly owned subsidiary of SAH would pay any shortfall between $57 million attributed as the value of the properties by the agreement but be paid any excess above that amount. In consequence of that agreement, after certain adjustments, S recorded in its accounts an unrealised profit of $21 million. On 30 October 1992, S declared and paid a rebatable dividend of $50 million and P declared and paid a rebatable dividend of $12 million. In 1995, S sold its property for $38 million; hence, S realised the $21 million profit recorded as unrealised in 1992. In 1996, S paid a rebatable dividend of $36 million to RSA from that profit and other profits realised after 1992. From 1994 to 1996, P progressively sold its investments and paid dividends in excess of $23 million. In December 1996, S bought back all but two of its shares issued to RSA for $11 million. In its income tax return for that year, RSA claimed a $28 million net capital loss on the disposal of the shares in S, calculated by deducting that amount and $9.5 million of the $50 million dividend as a rebatable dividend adjustment from their deemed acquisition value. Under s 160ZP it transferred, amongst other amounts, $3 million of that loss to another group company. On P's liquidation in December 1997, RSA received $5.8 million in respect of its shares. RSA claimed a net capital loss of $10.6 million calculated by deducting that amount and the $12 million dividend as a rebatable dividend adjustment from their deemed acquisition value. It transferred $25 million of losses to the same group company. The Federal Commissioner of Taxation disallowed those losses on the ground that the whole of P's profit and a further $9 million of S's profits were profits derived before the merger agreement.

Held, (1) that whether profit had been derived should be established by an ascertainment of whether a gain had arisen by a process of computation and comparison and was not to be conflated with a derivation of income.

Federal Commissioner of Taxation v Thorogood (1927) 40 CLR 454

and *Commissioner of Taxes (SA) v Executor Trustee & Agency Co of South Australia Ltd* (1938) 63 CLR 108, distinguished.

(2) That a quality of permanence was not necessarily inherent in the nature of a profit as fluctuations in the value of an unrealised gain gave rise to questions of causation rather than source since they affected only the extent to which a subsequent distribution might be reasonably attributed to that gain.

Read v The Commonwealth (1988) 167 CLR 57 and *QBE Insurance Group Ltd v Australian Securities Commission* (1992) 38 FCR 270, distinguished.

Evans v Deputy Federal Commissioner of Taxation (SA) (1936) 55 CLR 80, explained.

Industrial Equity Ltd v Blackburn (1977) 137 CLR 567 at 576, referred to.

Hence the assessment should be confirmed.

Per curiam. The mischief sought to be prevented was a claim by a company for a capital loss arising from a disposal of shares without the incurring of an equivalent economic loss. That concept does not necessarily distinguish between realised and unrealised gains and losses.

Decision of the Federal Court of Australia (Full Court): *Sun Alliance Investments Pty Ltd (In liq) v Federal Commissioner of Taxation* (2004) 134 FCR 102, reversed.

APPEAL from the Federal Court of Australia.

A company incorporated in England, Royal Insurance Plc (RIPLC) owned all the shares in Royal Australia Holdings Ltd (RAHL), an insurance group. A company Sun Alliance Holdings Ltd (SAH) owned all the shares in Sun Alliance Australia Ltd, later called Royal Australia Insurance Australia Holdings Ltd (RSA), another insurance group. On 8 October 1992, RIPLC entered into a "merger agreement" with RSA (then called Sun Alliance Australia Ltd) by which it agreed to transfer the shares in RAHL to RSA in consideration of $125 million plus an allotment of shares by RSA that would, after the issue, represent 40 per cent of RSA's issued capital. Since a date before 20 September 1985 RSA had owned all the shares in two companies, Phoenix Securities Pty Ltd (Phoenix) and Sun Alliance Insurance Ltd (SAIL). An effect of the merger agreement was to change the "majority underlying interests" for the purposes of s 160ZZS of the *Income Tax Assessment Act 1936* (Cth), causing RSA to be deemed for the purposes of Pt IIIA of that Act to have acquired the shares in each company at the time the agreement was entered into at their market value of $28,477,898 and $98,728,974 respectively. SAIL conducted a general insurance business. Its assets included real estate at Bridge Street, Sydney, with a historical cost of $29,550,000. RIPLC had a policy of not owning real estate and it considered the real estate held by RSA and its subsidiaries as over-weighting its risk within the group's asset portfolio. The merger agreement provided that if the Bridge Street properties were sold before 1 October 1999 for an amount less than their valuation upon the merger, $57 million, a company owned by SAH and

incorporated for that purpose, Bridge Street Buildings Pty Ltd (BSB), would make up any shortfall or be paid any excess. At the time of the merger, the difference of $21,345,000 between that amount and the historical cost was recorded in an unrealised profits reserve. On 30 October 1992, SAIL declared and paid a rebatable dividend of $50 million. On 31 August 1995, the Bridge Street properties were sold for $38,623,500, causing a profit of $21,435,000 to be realised. In September 1996, SAIL declared and paid a rebatable dividend of $36,337,176 including that profit. On 11 December 1996, SAIL bought back all but two of the issues shares held by RSA for $11,108,952. In its income tax return for the 1996 year, it claimed a capital loss of $28,058,022 deducting from the reduced cost base, as a rebatable dividend adjustment, the whole of the 1992 dividend plus $9,562,000 of the 1996 dividend. It transferred $2,958,296 to Sun Alliance Investments Pty Ltd (SAI). Phoenix conducted a business of investing in publicly listed companies. It had no formal accounts, although the value of its assets was reflected in the management accounts of the Sun Alliance group at historical cost in the financial years prior to the year ended 31 December 1986 and at their market value on an annual basis thereafter until the merger. On 30 October 1992, Phoenix declared and paid a rebatable dividend of $12 million sourced only from its retained profits and gains realised before the declaration of the dividend. Phoenix declared rebatable dividends in the 1994 financial year of $650,000, in the 1995 financial year of $3,100,000, and in the 1996 financial year of $20,891,449. On 30 December 1997, Phoenix was liquidated and RSA received $5,835,661 in respect of its shares. RSA deducted that amount as well as the October 1992 $12 million dividend as a rebatable adjustment amount under s 160ZK(5) in calculating a capital loss of $10,642,237. In its income tax return for the 1997 financial year, it claimed a net capital loss of $10,416,262, deducting from its reduced cost base the 1992 dividend. RSA transferred $25,179,297 to SAI. A liquidator was then appointed to SAI. SAI claimed a net capital loss of $698,788 in its preliquidation income tax return to 31 July 1997 and of $24,485,501 in its post-liquidation return to 31 December 1997. On 24 December 1998, the Federal Commissioner of Taxation issued notices of amended assessments to it attributing as rebatable dividend adjustments: (a) $14,522,291 of the rebatable dividends paid by Phoenix after 1992, thereby eliminating RSA's capital loss transferred in 1996; and (b) a further amount of $8,128,000 of the 1996 dividend as attributable to SAIL's profits before its deemed acquisition by RSA, reducing RSA's capital loss in 1997 to $17,080,523. SIA was removed from liquidation by court order. Its objections to the amended assessments having been wholly disallowed, it appealed to the Federal Court (Stone J), which upheld the disallowance (1). A Full Court of the Federal Court (Lee, Sundberg

(1) *Sun Alliance Investments Pty Ltd (In liq) v Federal Commissioner of Taxation* (2003) 52 ATR 27; 2003 ATC 4171.

and Conti JJ) allowed an appeal in part on the ground that increases in value of the share investments were not of a permanent character but that increases in value of the property investments were fixed or accrued at the date of the merger (2). The Commissioner appealed and SAI cross-appealed from the judgment of the Full Court to the High Court, by special leave granted by Gleeson CJ and Gummow and Callinan JJ.

G J Davies QC (with him *R L Hamilton* and *S H Steward*), for the appellant/cross-respondent. Surplus assets of a company not required to make good share capital are relevantly profits derived. "Derived" does not mean "realised". A concept of "profit" is not limited to realised profits (3). At the merger date, the share investments were surplus assets that were immediately realisable although unrealised (4). They were subsequently realised save that some shares fell below their market value at the merger date. That is a question of reasonable attribution. The market value is to be used to determine profits derived. That is the ordinary and natural meaning of those words and their meaning in the context of s 160ZK(5). Determining profit of a business involves a comparison of value between two dates (5). "Derived" connotes the source or origin of income not its immediate receipt (6). In *Evans v Deputy Federal Commissioner of Taxation (SA)* (7), ordinary concepts of "profits" and "derived" were applied to provisions concerned with dividends. Nothing in s 160ZK(5) requires the term "profits that were derived" to be construed narrowly (8). The section is not concerned with the creation of a liability (9). The words "attributable" import a causal connection qualified by the words "could reasonably be taken to be" (10). The distribution must carry a rebate, which involves recourse to s 44 or s 46 and therefore s 44, which assesses dividends. It was not intended the words "profits" and "derived" in s 160ZK(5) had a more limited meaning than in s 44. The purpose of the section was to prevent a capital loss where there was no equivalent economic loss. That is clear from the explanatory memorandum. The losses were not taken into account in determining the market value consideration under s 160ZZS; hence, it was not intended that they not be taken into account in s 160ZK(5).

(2) *Sun Alliance Investments Pty Ltd (In liq) v Federal Commissioner of Taxation* (2004) 134 FCR 102.
(3) *Federal Commissioner of Taxation v W Angliss & Co Pty Ltd* (1931) 46 CLR 417 at 494.
(4) *Dickson v Federal Commissioner of Taxation* (1939) 62 CLR 687 at 743.
(5) *Re Spanish Prospecting Co Ltd* [1911] 1 Ch 92 at 98-99.
(6) *Kemp v Minister of Natural Revenue* [1948] DLR 65.
(7) (1936) 55 CLR 80 at 101-102 per Rich, Dixon and Evatt JJ; contra per Starke J at 107-108.
(8) *Federal Commissioner of Taxation v Orica Ltd* (1998) 194 CLR 500 at 539.
(9) cf *Read v The Commonwealth* (1988) 167 CLR 57.
(10) *Repatriation Commissioner v Tuite* (1993) 39 FCR 540 at 541, 544.

B J Shaw QC (with him *M M Gordon* SC and *M T Flynn*), for the respondents/cross-appellant. The profit was not derived. The meaning of "derived" depends on the context (11). Section 160ZKL was concerned with unrealised profits; s 160ZK(5) with realised profits. The ascertained position was an account reconstructed at the query of the tax office. It was not prepared at the time. The balance sheet of the accounts relating to the merger do not include asset revaluation reserves, they were excluded from profits. The unrealised gains and profits for share investments were never recognised. "Attribution" imports causation (12). Here, the existence of profits was necessary. No profit came home (13). As only some profits with an unidentified source, no attribution was possible. *Evans v Deputy Federal Commissioner of Taxation (SA)* (14) is unhelpful; it required a profit to be ascertained by proper account (15). That position is now accepted (16). *Read v The Commonwealth* (17) followed income tax authorities relating to dividend which required profit to be ascertained (18). There was no economic loss. That requirement of the explanatory memorandum was not at large but limited to circumstances where profits were derived prior to the date on which the share was required. There was no anomaly in the provisions. Section 160ZZS had a different purpose.

G J Davies QC, in reply for the cross-respondent. *Evans v Deputy Federal Commissioner of Taxation (SA)* (19) is neither contrary to nor inconsistent with *Industrial Equity Ltd v Blackburn* (20) which was concerned with distributable profits for company law, not taxation, purposes.

B J Shaw QC, in reply.

(11) *Read v The Commonwealth* (1988) 167 CLR 57.
(12) *Repatriation Commission v Law* (1980) 47 FLR 57 at 68; affirmed in *Repatriation Commission v Law* (1980) 147 CLR 635.
(13) *Russell v Town and Country Bank* (1888) 13 App Cas 418 at 424; *Re Spanish Prospecting Co Ltd* [1911] 1 Ch 92; *Evans v Deputy Federal Commissioner of Taxation (SA)* (1936) 55 CLR 80; *Commissioner of Taxes (SA) v Executor Trustee & Agency Co of South Australia Ltd (Carden's Case)* (1938) 63 CLR 108; *Dickson v Federal Commissioner of Taxation* (1939) 62 CLR 687; *Australasian Oil Exploration Ltd v Lachberg* (1958) 101 CLR 119; *Federal Commissioner of Taxation v Slater Holdings Ltd* (1984) 156 CLR 447; *Read v The Commonwealth* (1988) 167 CLR 57; *QBE Insurance Group Ltd v Australian Securities Commission* (2004) 38 FCR 270.
(14) (1936) 55 CLR 80 at 101-102.
(15) *Evans v Deputy Federal Commissioner of Taxation (SA)* (1936) 55 CLR 80 at 101-102 per Rich, Dixon and Evatt JJ; contra Starke J at 107-108.
(16) *Dimbula Valley (Ceylon) Tea Co Ltd v Laurie* [1961] Ch 353 at 372; *Industrial Equity Ltd v Blackburn* (1977) 137 CLR 567.
(17) (1988) 167 CLR 57.
(18) *Federal Commissioner of Taxation v Slater Holdings Ltd* (1984) 156 CLR 447.
(19) (1936) 55 CLR 80 at 101-102 per Rich, Dixon and Evatt JJ; contra Starke J at 107-108.
(20) (1977) 137 CLR 567.

Cur adv vult

17 November 2005

THE COURT delivered the following written judgment: —

1 The respondent (Sun Alliance) appealed to the Federal Court (21) from the disallowance by the appellant (the Commissioner) of its objection to an amended income tax assessment in respect of Sun Alliance's year of income ending 31 December 1997. The amendment reduced by more than $17 million certain capital losses claimed by Sun Alliance and consequently increased its taxable income. The losses in question had been incurred by Royal and Sun Alliance Insurance Australia Holdings Ltd (RSA) and, as permitted by the legislation, had been transferred to Sun Alliance. Sun Alliance was a wholly owned subsidiary of RSA. The losses were incurred in circumstances to which it will be necessary to refer in some detail.

2 The primary judge (Stone J) upheld the disallowance of the objection by Sun Alliance (22). An appeal by Sun Alliance to the Full Court (Lee, Sundberg and Conti JJ) was largely successful (23) and the matter was remitted to the Commissioner for redetermination. The Full Court delivered a joint judgment. There is an appeal to this Court by the Commissioner and a cross-appeal by Sun Alliance.

3 Before turning further to consider the facts, something should be said of the provisions respecting capital losses upon which the litigation turns.

4 Part IIIA of the *Income Tax Assessment Act 1936* (Cth) (the 1936 Act) is headed "CAPITAL GAINS AND CAPITAL LOSSES" and comprises ss 160AX-160ZZU. The stated object of Pt IIIA is to provide for the inclusion in assessable income of net capital gains (ss 160AX, 160ZO(1)). Net capital losses are taken into account in accordance with s 160ZC but are not otherwise allowable as deductions (s 160ZO(2)). It is significant for this litigation that the application of Pt IIIA is confined to disposals of assets acquired on or after 20 September 1985 (s 160L(1)).

5 The present appeal and cross-appeal concern the treatment for income tax purposes of capital losses. The determination of the existence and amount of a capital loss requires a comparison between the reduced cost base of the asset (the disposal of which by the taxpayer has given rise to the claimed loss) and the consideration received in respect of that disposal (s 160Z). The advantage to the taxpayer in establishing such a loss lies, not only in reduction to the taxpayer's net capital gain for the relevant year of income, but also in its availability, provided for in s 160ZC, for the loss to be carried forward to the immediately following year of income, to be absorbed by capital gains or to increase the net capital loss for that year.

(21) Under s 14ZZ of the *Taxation Administration Act 1953* (Cth).
(22) (2003) 52 ATR 27; 2003 ATC 4171.
(23) (2004) 134 FCR 102.

6 Sections 160Z and 160ZC have been rewritten in ss 104-10 and 102-5 of the *Income Tax Assessment Act 1997* (Cth) (the 1997 Act) respectively. This development is of no significance for the instant proceedings. The reason for this is to be found in s 1-3(2) of the 1997 Act, which provides that, where the 1997 Act appears to express in a simpler and clearer style the ideas in the 1936 Act, those ideas are not, for that reason alone, to be taken to be different.

7 The notion of "reduced cost base" is critical to the determination of a capital loss. As defined in s 160ZH(3) of the 1936 Act (24), the reduced cost base of an asset is the sum of:

> "(a) the *reduced amount* of any consideration in respect of the acquisition of the asset;
>
> (b) the *reduced amount* of the incidental costs to the taxpayer of the acquisition of the asset;
>
> (c) the *reduced amount* of any expenditure of a capital nature incurred by the taxpayer to the extent to which it was incurred for the purpose of enhancing the value of the asset and is reflected in the state or nature of the asset at the time of disposal of the asset;
>
> (d) the *reduced amount* of any expenditure of a capital nature incurred by the taxpayer to the extent to which it was incurred in establishing, preserving or defending the taxpayer's title to, or a right over, the asset; and
>
> (e) the *reduced amount* of the incidental costs to the taxpayer of the disposal of the asset."

(Emphasis added.)

Each reference in this definition to a "reduced amount" was explained in s 160ZK(1), as enacted, as being a reference to the sum of:

> "(a) the amount of the consideration, the amount of the costs or the amount of the expenditure, as the case may be, reduced by any part of the consideration, of the costs or of the expenditure that has been allowed or is allowable, or would but for section 61 be allowable, as a deduction to the taxpayer in respect of any year of income; and
>
> (b) any amount that, as a result of the disposal of the asset by the taxpayer, is included in the assessable income of the taxpayer of any year of income by virtue of a provision of this Act other than this Part and is attributable to the part of the consideration, the part of the costs or the part of the expenditure, as the case may be, that was allowed or is allowable as a deduction."

(24) The rewritten and reformulated rules for determining the reduced cost base of an asset which attracts capital gains tax may be found in subdiv 110-B of the 1997 Act.

Section 160ZK(5)

8 At issue in these proceedings is the proper construction of amendments made to s 160ZK by s 68 of the *Taxation Laws Amendment Act (No 2) 1994* (Cth) (the Amending Act) (25). The objective of those amendments was described as follows in the Explanatory Memorandum on the Bill for the Amending Act:

> "4.2 The amendment will prevent a controller of a company or an associate of a controller from being able to generate a capital loss on the disposal of shares in the company in circumstances *where the controller or associate does not suffer an economic loss to the extent of that capital loss.*
>
> 4.3 Under the current law, a capital loss could be generated in relation to the disposal of shares in a company where there is no equivalent economic loss. This could arise where the shares are sold after the pre-acquisition profits of the company have been distributed in the form of rebatable dividends. [(26)] Pre-acquisition profits, in relation to a shareholding in a company, are profits retained in the company at the time the shareholding was acquired."

(Emphasis added.)

9 The references to "*economic* loss" are significant. The objective so stated was pursued through the introduction into the 1936 Act of a new s 160ZK(1B). That sub-section, to which s 160ZK(1) is now expressed to be subject, provides:

> 'If the asset is a share, the amount worked out under subsection (1) is to be reduced by any rebatable dividend adjustment that arises in relation to the share (see subsection (5)).'

Sub-section (5) (27), in turn, provides that a rebatable dividend adjustment arises in relation to a share (the RDA share) if four criteria specified in paras (a)-(d) are satisfied. It is the construction of para (b) which is critical for the present litigation. The paragraphs state:

> "(a) under an arrangement, a company makes a distribution to the holder of the RDA share; and
>
> (b) an amount (the '*attributable amount*'), being the whole or a part of the distribution, *could reasonably be taken to be attributable to profits that were derived by the company before the holder acquired the RDA share*; and
>
> (c) the holder of the RDA share is entitled to a rebate of tax (the

(25) These changes came into force on 23 June 1994, before the formulation of the 1936 Act appearing in Reprint No 9.

(26) Sections 46 and 46A of the 1936 Act set out the circumstances in which a company, being a resident within the meaning of the 1936 Act and the recipient of a dividend from another resident company, may be entitled to a full or partial rebate of tax payable on that dividend. As was noted in the Explanatory Memorandum (para 4.10), "[a] full rebate has the effect of freeing the dividend from tax while a partial rebate reduces the tax payable on that dividend".

(27) A rewritten form of this provision appears as s 110-55(7) of the 1997 Act.

'*dividend rebate*') in the holder's assessment for a year of income under section 46 or 46A in respect of an amount (the '*dividend amount*') being so much of the distribution as is a dividend; and

(d) the holder of the RDA share is, at any time during the period in which the arrangement is made or carried out, a controller [(28)] of the company or an associate (29) of a controller of the company."

(Emphasis added.)

Sub-section (6) then sets out diagrammatically the formula by which the amount of the rebatable dividend adjustment is calculated:

$$\text{Attributable amount} \times \frac{\text{Amount of the dividend rebate}}{\text{Dividend amount}} \times \text{General company tax rate.}$$

10 In the judgments both of the primary judge and of the Full Court reference was made, for the purpose of assisting in the construction of s 160ZK(5), to an example provided in the Explanatory Memorandum of a situation in which that sub-section was to be engaged. That example is worth setting out at length:

"Company X acquired all the shares of company Y for their market value of $10,000. At the time of acquisition of the shares, the balance sheet of company Y was as follows:

Share capital	$ 2,000
Retained profits	$ 8,000
	$10,000
Assets	$10,000

Company Y continued business operations over the next four years. During this period, it distributed all of its current earnings as well as the retained profits. Company X then disposed of the shares in company Y for $2,000.

4.5 The dividends paid by company Y to company X qualified for the dividend rebate under section 46 of [the 1936 Act]. Consequently, no company tax was paid on those dividends. Moreover, company X has recovered the full amount of its investment of $10,000 in company Y in the form of dividends ($8,000) and disposal consideration ($2,000). *Nevertheless, under the current law, company X may claim a capital loss of $8,000. This is the difference between the cost of the shares ($10,000) and the disposal consideration ($2,000).*

(28) The term "controller" is defined in s 160ZZRN(1) of the 1936 Act. There is no dispute in these proceedings as to the application of that definition.

(29) The persons who may be described as "associates" for the purposes of s 160ZK(5) are identified in s 318.

4.6 The anti-avoidance provisions of Part IVA of [the 1936 Act] could apply where there is a scheme by way of or in the nature of dividend stripping or a scheme having substantially the effect of a scheme by way of or in the nature of dividend stripping. *However, it should be the general rule that a capital loss should not be able to be claimed where the result of the course of action is that there is no economic loss to the taxpayer.*

4.7 The amendments to the law will have the effect that a capital loss cannot be claimed by company X in the circumstances shown in the example."

(Emphasis added.)

11 The contrast between the above example and the facts which have given rise to the present litigation discloses the main points of contention between the parties. The most salient of these is a dispute concerning the meaning of the phrase in para (b) of s 160ZK(5), "profits that were derived by the company". That dispute revolves around the question whether a profit can be said to have been derived at a time before the acquisition of the relevant shares by the taxpayer if, at the date of acquisition, a gain to the company (specifically an accretion in the value of some part, or all, of its asset portfolio) remained unrealised, albeit ascertained. The submissions by the Commissioner that the question should be answered "yes" should be accepted. To explain why that should be the outcome of the dispute it is convenient first to return to the facts.

The merger

12 Royal Insurance Plc (RIPLC) was a company incorporated in England and the beneficial owner of all the issued shares in Royal Australia Holdings Ltd (RAHL). In an agreement (the Merger Agreement) dated 8 October 1992 (the merger date), RIPLC agreed to sell its entire shareholding in RAHL to RSA (then styled Sun Alliance Australia Ltd). As consideration, RSA agreed both to pay RIPLC a sum of $A125 million and to issue to it an allotment of fully paid ordinary shares in RSA. This would, after issue, represent 40 per cent of the issued ordinary share capital in that company. Prior to the Merger Agreement, the beneficial owner of all of the issued shares in RSA had been Sun Alliance Holdings Ltd (SAHL).

13 The Royal and Sun Alliance Group (the RSA Group), which represented a merger between the Royal Group and the Sun Alliance Group, was thus formed, with RSA as its Australian holding company.

14 As at the merger date, Phoenix Securities Pty Ltd (Phoenix) and Sun Alliance Insurance Ltd (SAIL) were wholly owned subsidiaries of RSA. The shareholding of RSA in these companies pre-dated 20 September 1985. However, the 40 per cent change in ownership of RSA that was contemplated in the Merger Agreement, coupled with various other developments that had occurred between 1985 and the merger date, resulted in a change in the majority underlying interests in RSA. As a result of this, the shares held by RSA in both Phoenix and

SAIL were, by operation of s 160ZZS of the 1936 Act (30), deemed to have been acquired by RSA after 19 September 1985 (specifically, on 8 October 1992) for a consideration equal to their market value on that date. The market value of the shares in Phoenix on 8 October 1992 was $28,477,898, and that of the shares in SAIL $98,728,974.

15 The present appeal by the Commissioner and cross-appeal by the taxpayer relate to capital losses claimed by RSA upon its disposal of shares in both Phoenix and SAIL. As already noted, these losses were subsequently, in part, transferred to the taxpayer, which was itself a wholly owned subsidiary of RSA (31). It is important to note, for purposes of what follows, that RSA's years of income ended on 31 December.

Phoenix

16 Until its dissolution in 1997, Phoenix conducted a business of equity investments. This was consistent with the practice of insurance groups holding equities in separate vehicles to attract a tax rebate under s 46 of the 1936 Act. Phoenix held shares in companies listed on the Australian Stock Exchange. Prior to 1992, no formal accounts were prepared at the entity level for companies then in the Sun Alliance Group, of which Phoenix was one.

17 However, after the merger, shifts in the value of the shares held by Phoenix were reflected in its accounts, in accordance with Australian Accounting Standards Review Board requirement AASB 1010, as increments and decrements in its asset revaluation reserve. The affidavit evidence of Mr Harold Bentley, the Chief Financial Officer of RSA, suggests that it was the practice of the RSA Group to value those shares on a monthly basis and that these valuations disclosed significant monthly fluctuations in the value of Phoenix's portfolio of investments.

18 In this Court, the Commissioner contended that, as at the merger date, the shares held by Phoenix were valued at cost at $8,928,016. They were then revalued at the time of the merger to a market value of $20,728,138, reflecting what was said to be an unrealised gain in Phoenix's asset revaluation reserve of $11,800,122.

19 However, to accept this particular description of the method by which the accretions in the value of Phoenix's share portfolio were recorded is to misunderstand the accounting systems that had been

(30) Section 160ZZS(1) of the 1936 Act provides: "For the purposes of the application of this Part in relation to a taxpayer, an asset acquired by the taxpayer on or before 19 September 1985 shall be deemed to have been acquired by the taxpayer after that date unless the Commissioner is satisfied, or considers it reasonable to assume, that, at all times after that date when the asset was held by the taxpayer, majority underlying interests in the asset were held by natural persons who, immediately before 20 September 1985, held majority underlying interests in the asset."

(31) Section s 160ZP(7) contemplates the possibility of loss transfer agreements entered into by member companies of the one corporate group.

adopted by the Sun Alliance Group before the merger date. Prior to the financial year ended 31 December 1986, investments were stated in the accounts of the Sun Alliance Group at their historical cost. Thereafter, in the period between 31 December 1986 and 31 December 1992, assets were revalued and increases or decreases in value were taken to an asset revaluation reserve on an annual basis. In other words, at the merger date (8 October 1992) and reflected in its management accounts, Phoenix's investments had last been revalued at 31 December 1991.

20 The figures upon which the Commissioner relies were taken from an analysis of Phoenix's investments that had been undertaken subsequently by Arthur Andersen upon instructions from the Australian Government Solicitor. However, it is also true that a reconstructed balance sheet for Phoenix as at the merger date had been prepared in response to an information request from the Commissioner.

21 In any event, Phoenix's investments were progressively realised during the period from 1994 to 1996 inclusive for an aggregate sum of $30,159,729. This yielded a realised profit of $21,231,714.

22 On 30 October 1992, less than a month after the merger date, Phoenix declared and paid a dividend of $12 million to RSA, sourced only from its retained profits and gains on investments realised prior to the declaration of the dividend. Subsequent to this, as at 31 December 1992, the retained profits of Phoenix were $438,842, and the balance in its investment realisation reserve was $2,621,991.

23 Phoenix's after-tax operating profit for the financial year ended 31 December 1993 came to $1,103,542. Given that there was no distribution made to RSA in 1993, it began the financial year ended 31 December 1994 with retained profits amounting to $1,542,384. This, when added to its after-tax operating profit for that financial year of $4,313,187 and allowing for the transfer from this sum of $3,235,228 to its investment realisation reserve, left sufficient from which to declare and pay to RSA a dividend of $650,000 on 25 May 1994. The retained profits of Phoenix at the end of the financial year ended 31 December 1994 thus amounted to $1,970,343.

24 For the financial year ended 31 December 1995, Phoenix's after-tax operating profit was $2,774,904, with $1,604,683 transferred to its investment realisation reserve. Taking into account its retained profits from the previous financial year, the total sum available to Phoenix for appropriation was $3,140,564, of which $3,100,000 was paid on 28 December 1995 as a dividend to RSA and $40,564 kept as retained profits.

25 In the following financial year, that ended 31 December 1996, Phoenix reported an after-tax operating profit of $18,897,352 and transferred from its investment realisation reserve a sum of $7,461,902. It was thus able early in September 1996 to pay to RSA a dividend of $20,891,449.

26 There is no dispute that the dividends paid by Phoenix attracted the rebate provided for in s 46 of the 1936 Act. However, in the present appeal, Sun Alliance submitted that the facts outlined above were sufficient to establish that the dividends paid to RSA after 30 October 1992 were attributable to profits derived by Phoenix *after* the merger date; it followed that para (b) of s 160ZK(5) was not satisfied.

27 Phoenix was liquidated on 30 December 1997. RSA received $5,835,661 in respect of its Phoenix shareholding. In estimating the capital loss incurred as a result of this, RSA reduced the cost base of its shares in Phoenix by attributing only the dividend of $12 million paid on 30 October 1992 to profits derived before the merger date. The capital loss claimed by RSA thus came to $10,642,237. It will be necessary later to return to this in detailing the substance of the Commissioner's response to RSA's self-assessment.

SAIL

28 SAIL carried on the business of general insurance. Prior to the introduction of AASB 1023 (32), which took effect for the RSA Group during the financial year ended 31 December 1992, SAIL's accounts were prepared in accordance with the above-described practice and policy of the Sun Alliance Group. Put simply, there was not at the merger date a formal balance sheet available in respect of SAIL. However, in the period subsequent to the merger, it was the practice of the RSA Group, in accordance with AASB 1023, to recognise changes in the value of its investments as revenue or expenses in the profit and loss account; unrealised gains were transferred to an asset revaluation reserve known as the unrealised profits reserve.

29 At the time of the merger which resulted in the formation of the RSA Group, SAIL's assets included land and buildings located in Bridge Street, Sydney (the Bridge Street properties). The evidence of Mr Bentley suggests that RIPLC (heading the Royal Group) had a policy of not owning land and buildings, and that it considered the real estate investments contributed by RSA and its subsidiaries to the assets of the RSA Group to be an over-weighted risk within the RSA Group's asset portfolio. Therefore, in order to protect RIPLC from any risks and costs associated with holding the Bridge Street properties, all the potential gains and risks attendant upon that continued holding were acquired or assumed by a new company, Bridge Street Buildings Pty Ltd (BSBPL). This was wholly owned by SAHL.

30 The potential gains and risks thus identified were passed to BSBPL through, among other things, the Merger Agreement. The combined effect of cl 14 and Sch 10 of that instrument was that, if before 1 October 1999 the Bridge Street properties were sold for a price less

(32) This accounting standard requires an insurer to value investments integral to its insurance business on a "mark to market value basis" and to reflect those valuations in its profit and loss statements.

than the valuation pertaining at the merger date, then BSBPL would make up the shortfall. Conversely, were the sale price to exceed the valuation pertaining at the merger date, then the excess would be paid to BSBPL. It should also be noted that, on 2 November 1992, SAIL, RIPLC, BSBPL and SAHL entered into an agreement under the terms of which SAIL granted a sale option over the Bridge Street properties to BSBPL.

31 As at the merger date, the Bridge Street properties were valued at $57,050,000. The historical cost of the properties was $29,550,000. So it was that, after providing for deduction of certain unrealised losses, a balance of $21,345,000 was recorded in the unrealised profits reserve in the Special Purpose Financial Report for SAIL for the financial year ended 31 December 1992.

32 On 31 August 1995, the Bridge Street properties were sold to a third party for a sum of $38,623,500. The difference between this amount and the $57,050,000 valuation pertaining on the merger date was thus met, pursuant to cl 14 and Sch 10 of the Merger Agreement, by BSBPL. As a result, there was realised the sum of $21,345,000, already identified as the unrealised gain at the time of the merger on the Bridge Street properties.

33 On 30 October 1992, SAIL declared and paid to RSA a dividend of $50 million.

34 The realised profits retained by SAIL at the merger date amounted to $9,562,000. Much of this was used to meet an operating loss of $7,732,000 incurred in the financial year ending 31 December 1993. Subsequently, in the years ending 31 December 1994 and 31 December 1995, SAIL earned after-tax operating profits of $11,896,000 and $1,266,000 respectively. These sums, combined with the balance of the profits retained at the merger date and the above-mentioned sum of $21,345,000, amounted to $36,337,176. In September 1996, the whole of that amount was distributed by SAIL to RSA as a rebatable dividend.

35 Thereafter, by an agreement dated 11 December 1996 and for a sum of $11,108,952, SAIL bought back from RSA all but two of the issued shares in SAIL held by RSA. In calculating the amount of the capital loss thus incurred by it, RSA applied s 160ZK(1B) and (5) and deducted from the reduced cost base of those shares a sum comprising the whole of the $50 million dividend paid on 30 October 1992 and $9,562,000 of the $36,337,176 dividend paid in September 1996. The capital loss claimed by RSA came to $28,058,022.

Transfer of losses

36 In its tax return for the year ended 31 December 1996, RSA claimed $28,216,603 in net capital losses, of which a sum in the amount of $10,416,262 was the subject of capital loss transfer agreements. In particular, an amount of $2,958,296 was transferred to the taxpayer.

37 For the year ended 31 December 1997, RSA claimed a net capital loss of $34,558,733. Of this, an amount of $25,179,289 was transferred to the taxpayer, Sun Alliance, pursuant to s 160ZP(7), as explained earlier in these reasons.

38 Proceedings were instituted to liquidate Sun Alliance during the course of that year. It lodged two returns of income covering 1 January to 31 July 1997 and the liquidation period 1 August to 31 December 1997. In the first of these returns, it claimed a capital loss of $693,788 transferred from RSA and, in the second, it claimed the balance of the capital losses transferred, namely a sum in the amount of $24,485,501. Sun Alliance since has been reinstated under a court order and with the approval of the Australian Securities and Investments Commission.

The amended assessment

39 On 24 December 1998, a notice of amended assessment in respect of the taxpayer was issued. In relation to the capital loss returned by RSA following the liquidation of Phoenix, the Commissioner attributed an additional $14,522,391 of the rebatable dividends paid to RSA after 30 October 1992 to profits derived before the deemed acquisition by RSA of its shares in Phoenix. This had the result of eliminating entirely the capital loss claimed by RSA. As for the capital loss incurred as a result of RSA's disposal of shares in SAIL, the Commissioner treated as attributable to profits derived before the deemed acquisition by RSA of those shares a further amount of $8,128,000 of the dividend paid in September 1996. The net effect of these adjustments was a $17,080,524 reduction in the net capital loss that had been available for transfer by RSA to the taxpayer.

40 On 22 December 1999, the taxpayer lodged a notice of objection to the amended income tax assessment. This objection was disallowed, with written reasons, by the Commissioner on 23 February 2000.

The proceedings

41 As already noted, the Commissioner was successful before Stone J. In its decision allowing the taxpayer's appeal, the Full Court held that the accretions in the value of Phoenix's share portfolio as at the merger date did not have a sufficiently "permanent character" to be accorded the status of "profit" (33). The Full Court also held that no error was made by the Commissioner in attributing to profits derived by SAIL before the merger date the amount of $17,688,000 of the total dividend of $36,337,000 paid to RSA (34). It is against this part of the decision of the Full Court that the taxpayer now cross-appeals.

"Profits that were derived"

42 The process of construing s 160ZK(5) of the 1936 Act begins with the recognition that the meaning of the word "derived", as it appears in

(33) (2004) 134 FCR 102 at 133.
(34) (2004) 134 FCR 102 at 133-134.

that provision, cannot be ascertained without at least some reference to the thing being said to be derived, namely the profits of a company. The need for this first step is explained by the circumstance that the concept of profits is all too easily conflated in this field of discourse with that of income.

43 Such conflation should be avoided. A distinction is drawn in income tax law between the case where a taxpayer in relation to an item is treated as on a cash basis of tax accounting and that where the taxpayer is on an accruals basis. But "[f]or the most part, the law expresses an ordinary usage notion of derivation of a receipt" (35). Thus the notion of income directs one's attention to "receipts" (36) by a taxpayer – or, as Lord Macnaghten put it, "what goes into his pocket" (37). This quality may not so readily be attributed to "profits", as that concept is generally understood. This much is apparent from a reading of what was said in an oft-cited passage from the judgment of Fletcher Moulton LJ in *Re Spanish Prospecting Co Ltd* (38). That case concerned the construction of a provision in a service agreement that a salary was to be drawn "only out of profits (if any) arising from the business of the company which may from time to time be available for such purpose". His Lordship said (39):

> "'Profits' implies a comparison between the state of a business at two specific dates usually separated by an interval of a year. The fundamental meaning is the amount of gain made by the business during the year. This can only be ascertained by a comparison of the assets of the business at the two dates.
>
> For practical purposes these assets in calculating profits must be valued and not merely enumerated. An enumeration might be of little value. *Even if the assets were identical at the two periods it would by no means follow that there had been neither gain nor loss, because the market value – the value in exchange – of these assets might have altered greatly in the meanwhile.*"

(Emphasis added.)

These words have since been described by Gibbs CJ as setting down a "guide" rather than a "dictum ... of universal application" (40). Nonetheless, the notion that a profit may be revealed or disclosed by a revaluation even where the composition of the assets held by a business does not change (41) appears at odds with the focus, naturally attendant upon discussions of the "ordinary usage" concept of income, on receipts coming into a taxpayer's hands.

(35) Parsons, *Income Taxation in Australia* (1985), §2.10.
(36) *Scott v Federal Commissioner of Taxation* (1935) 35 SR (NSW) 215 at 219.
(37) *Tennant v Smith* [1892] AC 150 at 164.
(38) [1911] 1 Ch 92.
(39) [1911] 1 Ch 92 at 98-99.
(40) *Federal Commissioner of Taxation v Slater Holdings Ltd* (1984) 156 CLR 447 at 460.
(41) See also the judgment of Latham CJ in *Dickson v Federal Commissioner of Taxation* (1939) 62 CLR 687 at 705, 712.

44 It is for this reason that little assistance is to be found, for present purposes, in statements in cases such as *Federal Commissioner of Taxation v Thorogood* (42) and *Carden's Case* (43). There, the question was whether the return of income on a cash basis or an earnings basis better discovered the gains which during the period of account have "come home to the taxpayer in a realised or immediately realisable form" (44). This well-known statement by Dixon J in *Carden's Case* should not be taken, as it was in this case by the Full Court (45), as providing a test for determining the applicability in a given case of s 160ZK(5) (46).

45 The taxpayer rightly submitted in this appeal that the word "derived" in that sub-section takes its meaning from its context. There is, as a consequence, some danger in seeking to rely upon those past authorities which have considered the content of the words "profits" and "derived" in isolation from each other.

46 One example of this may be found in the reliance by both the Full Court and the taxpayer in submissions on this appeal upon the decision of Lockhart J in *QBE Insurance Group Ltd v Australian Securities Commission* (47). His Honour held that a particular accounting standard did not convert into profits that which was incapable of the conversion and was not inconsistent with the prohibition in company law upon payment of dividends except out of profits. The standard was designed to require companies carrying on the business of general insurance to bring into account unrealised gains or losses on investments. However, *QBE* was taken by the Full Court (48) as authority for the general proposition that an unrealised accretion to the value of an asset may constitute a profit only where it is "of a permanent character" (49). It will be necessary to return to the matter of the correctness and width of this proposition later in these reasons. Presently, something should be said about the decisions of this Court in *Evans v Deputy Federal Commissioner of Taxation (SA)* (50) and *Read v The Commonwealth* (51). Both involved some consideration of the compound concept "profits derived".

(42) (1927) 40 CLR 454 at 458.
(43) *Commissioner of Taxes (SA) v Executor Trustee & Agency Co of South Australia Ltd* (1938) 63 CLR 108 at 155.
(44) *Carden's Case* (1938) 63 CLR 108 at 155; cf *Henderson v Federal Commissioner of Taxation* (1969) 119 CLR 612 at 646-647.
(45) (2004) 134 FCR 102 at 133.
(46) Other examples in which the term "derived" was considered in relation to the return of income include *Federal Commissioner of Taxation v Clarke* (1927) 40 CLR 246 at 261; *Tindal v Federal Commissioner of Taxation* (1946) 72 CLR 608 at 624; *Brent v Federal Commissioner of Taxation* (1971) 125 CLR 418 at 427-428.
(47) (1992) 38 FCR 270.
(48) (2004) 134 FCR 102 at 133.
(49) (1992) 38 FCR 270 at 287.
(50) (1936) 55 CLR 80.
(51) (1988) 167 CLR 57.

Evans and Read

47 It is convenient to deal first with what was said in *Read*. That case concerned the construction of s 18 of the *Social Security Act 1947* (Cth). This defined the term "income" as follows:

> "'income', in relation to a person, means any personal earnings, moneys, valuable consideration or profits earned, derived or received by that person for his own use or benefit by any means from any source whatsoever."

The question was whether the issue of additional units in a unit trust to the appellant unit holder constituted "income" for the purpose of determining her pension entitlements under the *Social Security Act*. Noting that the gain represented by the additional units was an unrealised gain in the hands of the appellant, Mason CJ, Deane and Gaudron JJ said (52):

> "In our opinion a mere increase in the value of an asset does not amount to a capital profit. A profit connotes an actual gain and not mere potential to achieve a gain. Until a gain is realised it is not 'earned, derived or received'. A capital gain is realised when an item of capital which has increased in value is ventured, either in whole or in part, in a transaction which returns that increase in value."

48 Counsel for the taxpayer in this appeal sought, during the course of oral argument, to call this statement in aid, submitting that, though *Read* was a decision ultimately concerned with social security and therefore coloured by the considerations arising in that particular context, the authorities cited therein related, in the words of the Full Court (53), "to relevant concepts of income". However, to the extent that the decision in *Read* did refer to concepts of income, this manifested itself only in an assumption, apparent in the reasoning of Mason CJ, Deane and Gaudron JJ, that, in applying s 18 of the *Social Security Act*, the notion of capital profits is to be equated with that of capital gains, in the sense of realised capital gains (54).

49 This assumption may be contrasted with the proposition, established in a series of cases dealing with the prohibition against the payment of dividends by companies except out of profits (55), that the concept of profits in the context of company law is sufficiently broad to embrace unrealised capital profits. The meaning here of "profits" was said by Higgins J in 1910 not to be "rigid and absolute" and to be dependent upon the context in which it is being deployed (56). There is nothing in the text of s 160ZK(5) to suggest that an equation similar to that drawn

(52) (1988) 167 CLR 57 at 67.
(53) (2004) 134 FCR 102 at 121.
(54) (1988) 167 CLR 57 at 66-67.
(55) *Dimbula Valley (Ceylon) Tea Co Ltd v Laurie* [1961] Ch 353 at 371; *Marra Developments Ltd v BW Rofe Pty Ltd* [1977] 2 NSWLR 616 at 629; *Hancock Family Memorial Foundation Ltd v Porteous* (2000) 156 FLR 249 at 277.
(56) *Webb v Australian Deposit and Mortgage Bank Ltd* (1910) 11 CLR 223 at 241.

in *Read* should be adopted in construing that sub-section. The present utility of the statements made in the course of deciding *Read* may therefore be doubted. Whether similar doubt attends what was earlier said in *Evans* is the subject of what follows.

50 At issue in *Evans* were the construction and application of s 16(b)(i)(1) of the *Income Tax Assessment Act 1922* (Cth) (the 1922 Act). Subject to a presently immaterial proviso, that provision included within the assessable income of any resident shareholder in a company those dividends, bonuses or profits paid or distributed by the company to the shareholder out of profits derived by the company from any source. The relevant dividend in this case was a distribution made among its shareholders by Guinea Gold NL (Guinea Gold) which consisted, in part, of shares in another company, New Guinea Goldfields Ltd (NGGL). Those shares had been acquired by Guinea Gold as part of the consideration for which it sold to NGGL certain gold mining leases it owned in respect of land in New Guinea. The total value of that consideration was exceeded by the amount which had been expended by Guinea Gold in connection with the leases.

51 The taxpayer was an Australian resident and a shareholder in Guinea Gold. On appeal to this Court, he submitted that, as the shares in NGGL did not contain any profits, their market value should not have been included in his assessable income. This submission was rejected by Rich, Dixon and Evatt JJ. In a statement upon which the Commissioner relied, their Honours said (57):

> "In the first place, the fact that the shares contain no profit on the sale of the leases does not mean that they represent capital and not profit of the company. Actually they represented surplus assets, that is, assets not required to make good issued share capital. This appears from the last preceding balance-sheet. In the second place, s 16(b)(i)(1) brings into charge all dividends and distributions out of profit, whatever be the nature of the profit. The word 'derived' does not connote that the profit must be a realised profit. *It is enough at least if it is an ascertained profit, ascertained by a proper account.* Under the articles [of Guinea Gold], the 5s 6d contained in the share could not lawfully be distributed, except as a dividend satisfied by specific assets, and the dividend must be out of profits. The meaning of profits in s 16(b)(i)(1) is no narrower, and the state of the company's affairs, as disclosed by its balance-sheet, permitted such a dividend. It follows that the whole amount of the 5s 6d per share should be included in the appellant's assessable income."

(Emphasis added.)

52 Two points may be made about this passage. First, contrary to the submission advanced by the Commissioner, their Honours' reference to the "surplus assets" of a company was not intended as a definition of the term "profits". It was directed instead towards demonstrating the

(57) (1936) 55 CLR 80 at 101.

error in the taxpayer's contention that the shares distributed by Guinea Gold were somehow representative of a sum on its capital account. However, as will later appear, the reference in the emphasised sentence to ascertainment by a proper account does assist the Commissioner.

53 Secondly, the provision in the 1922 Act which was construed and applied in *Evans* was the precursor to s 44 of the 1936 Act. That section provides in broadly similar terms to s 16(b)(i)(1) of the 1922 Act. This leads one to ask: if, for the purpose of defining a component of assessable income, the 1936 Act contemplates the possibility of dividends being paid out of unrealised profits, then why, for the purpose of prescribing the rules by which a capital loss is to be calculated, should the application of the statute be confined to distributions reasonably attributable to, as distinct from distributions paid out of, profits that have been realised? In other words, what is there in the 1936 Act to limit the scope in s 160ZK(5) of the compound concept "profits derived" so that it is narrower there than in s 44?

54 This question is all the more significant for the fact that, in the Explanatory Memorandum on the Bill for the Amending Act, it was made very clear that the mischief towards which s 160ZK(5) was directed was a situation in which the controlling shareholder in a company could claim a capital loss on disposing of its shares in that company, despite not having incurred an equivalent economic loss. It suffices presently to say that, prima facie, the concept of economic loss does not respect the distinction between realised and unrealised gains and losses.

Section 160ZLA

55 In its submissions before this Court, the taxpayer argued that the answer to the question posed above lies in s 160ZLA(4) of the 1936 Act, which was enacted at the same time as s 160ZK(5) (58).

56 The essence of the taxpayer's submission is that, in referring expressly to a situation where rebatable dividends are paid out of revaluation reserves, s 160ZLA(4) operated to exclude from the ambit of the general terms in s 160ZK(5) the payment of such dividends.

57 It is unnecessary to set out the text of s 160ZLA(4). It was made clear in sub-s (1) of s 160ZLA that the rebatable dividend adjustments provided for in that section were intended only to bear upon the application of ss 160ZA and 160ZL of the 1936 Act. The first of these sections addresses the capital gains tax consequences where a capital gain has accrued to a taxpayer because of the disposal of an asset, but where, as a result of that disposal, an amount (the included amount) will also be included in the taxpayer's assessable income under a provision of the 1936 Act other than Pt IIIA. For the purposes of that

(58) By s 70 of the Amending Act, Section 160ZLA was repealed by the *Taxation Laws Amendment Act (No 3) 1995* (Cth), Sch 1, Item 32; that Act introduced s 46H as one of a number of provisions dealing with disallowance of the rebate for certain dividends.

section, the amount of a rebatable dividend adjustment in relation to a share was taken not to be able to constitute an included amount (s 160ZA(4A)(b)). In contrast, as to s 160ZL, a rebatable dividend adjustment in relation to a share is taken, for the purposes of determining the capital gains tax consequences of a return of capital by a company to its shareholders, to be a non-dividend payment by the company to the taxpayer.

58 Neither provision touched then upon the calculation, for the purposes of Pt IIIA, of the reduced cost base of an asset. It cannot be said then that s 160ZLA(4), as enacted, was intended in any way to affect the construction of s 160ZK(5). These two sub-sections had, as the Commissioner rightly contended before the Full Court, "distinct and separate fields of operation" (59). Accordingly, the submissions advanced by the taxpayer, both on this point and in relation to the wider proposition that s 160ZK(5) is engaged only where a company's profits are realised, must be rejected.

The Merger Agreement

59 It should also be observed that the unrealised gains in the value, both of the shares held by Phoenix and the Bridge Street properties, were, in a sense, turned to account on the date of the merger between the Royal and Sun Alliance Groups. Contributions to the capital of the merged RSA Group were made by the Royal Group as to 40 per cent, and by the Sun Alliance Group as to 60 per cent, based on valuations of their respective assets as at the merger date. These valuations were required, pursuant to the terms of the Merger Agreement, to be reflected in a consolidated balance sheet for each of the Royal Group and the Sun Alliance Group as at 30 September 1992 (the Completion Accounts), where, following a series of adjustments, they would supply the basis for determining the monetary amounts of the contributions to be made. It was in this sense that value was given for the assets, both of Phoenix and of SAIL.

60 To say this, however, is not to dispose fully of the taxpayer's contentions.

Unrealised accretions in value "of a permanent character"

61 As was noted by Fletcher Moulton LJ in *Spanish Prospecting*, the word "profits", as it is generally understood, implies a gain made by a business and disclosed by a comparison between the state of that business at one point in time and its state at another. In a passage in *Evans* which has been set out earlier in these reasons, Rich, Dixon and Evatt JJ indicated that it was sufficient to establish the derivation of a profit that it be ascertained by a proper account (60). It might be said then that at the very least, in contexts other than s 160ZK(5) of the

(59) (2004) 134 FCR 102 at 130.
(60) (1936) 55 CLR 80 at 101. See also the remarks of Lord Herschell in *Russell v Town and Country Bank* (1888) 13 App Cas 418 at 424.

1936 Act, the compound concept of "profits derived" suggests an amount revealed by some process of computation or accounting.

62 However, the taxpayer submitted that more is required in order to establish "profits" than the process of comparison and computation described above: it is necessary also that one be able to ascribe a quality of permanence to the gain represented by the amount so calculated. This was accepted by the Full Court and provided the basis for its holding that the "[i]ncrements in value emerging from the valuations for the time being of the Phoenix share portfolio cannot realistically be characterised as having been derived pending ultimate realisation" (61).

63 The "permanent character" requirement thus adopted was said to have originated from a dictum of Lockhart J in *QBE* (62). His Honour gave extended consideration in that case to the concept of profits (63). However, as already noted, this was in the context of a discussion of s 201(1) of the *Corporations Law*, which provided that "[n]o dividend shall be payable to a shareholder of a company except out of profits or under section 191". The basis for the prohibition against the payment of dividends except out of profits was explained by Mason J in *Industrial Equity Ltd v Blackburn* in the following terms (64):

> "The principle, which was certainly designed to protect creditors and, I think, shareholders, more particularly where there is more than one class of shareholder in a company, inhibits the payment by way of dividends out of a company's capital. It is founded on the proposition recognised in *Trevor v Whitworth* (65) that a reduction of capital can only be effected in accordance with the statutory procedure and that there can be no return of capital except in accordance with that procedure – *In re Exchange Banking Co (Flitcroft's Case)* (66). The rule is frequently expressed, as here, in the form of a prohibition against dividends being payable except out of profits."

64 It should also be noted, given the use of the word "payable", as distinct from "paid", in s 201(1), that the prohibition therein set down was directed to the declaration of a dividend, and not merely its payment (67). This may account, in large measure, for Lockhart J's adoption in *QBE* of a requirement, where an unrealised accretion to the value of a company's assets is sought to be treated as a profit against which dividends may be declared, that that accretion in value be "of a permanent character". For, to repeat what was said by Mason J in

(61) (2004) 134 FCR 102 at 133.
(62) (1992) 38 FCR 270 at 287. See also *Dimbula Valley (Ceylon) Tea Co Ltd v Laurie* [1961] Ch 353 at 372.
(63) (1992) 38 FCR 270 at 284-289.
(64) (1977) 137 CLR 567 at 576.
(65) (1887) 12 App Cas 409.
(66) (1882) 21 Ch D 519 at 533.
(67) See *Industrial Equity Ltd v Blackburn* (1977) 137 CLR 567 at 578.

Industrial Equity, just as it "would be productive of confusion and uncertainty if companies were to declare dividends against the possibility that profits not in existence at the time of declaration would or might be earned or received by the time the dividend was paid" (68), so would it be productive of confusion and uncertainty if companies were to declare dividends against profits that are subject to constant fluctuations.

65 But this is not to say that like considerations should be taken as providing a guide for the purpose of construing s 160ZK(5) of the 1936 Act. After all, that sub-section speaks of distributions which "could reasonably be taken to be attributable to profits", rather than "dividend[s] ... payable ... out of profits", suggesting that the confusion and uncertainty contemplated above do not here constitute so pressing a concern as they do in the area of company law.

66 In *MacFarlane v Federal Commissioner of Taxation* (69), in construing the phrase "dividends paid to him by the company out of profits derived by it from any source" in s 44(1)(a) of the 1936 Act, Beaumont J said there was "no reason, of logic or of experience, to import the technical requirements of the company law".

67 Moreover, as has already been demonstrated, there is nothing in the 1936 Act, not even in s 160ZLA(4), to render presently inapposite the notion, articulated in *Evans*, that the derivation of a profit may be established where such profit is ascertained. It might therefore be said that the application of para (b) of s 160ZK(5) in any given case requires the fulfilment of two key tasks: first, the ascertainment, by a process of computation and comparison, of a gain made by a company; and, secondly, the making of a determination as to whether a distribution by that company may reasonably be attributed to the ascertained gain. During the course of oral argument, counsel for the Commissioner submitted that ascription to an unrealised gain of the quality of permanence is more appropriately seen as going to the second of these tasks. It is not inherent in the nature of a profit, as that concept is employed in s 160ZK(5), that it should be of a permanent character.

68 In other words, fluctuations in the value of an unrealised gain would affect only the extent to which a subsequent distribution may reasonably be attributed to that gain. The Commissioner submitted that if, following the merger date, the unrealised gains as at that date in the value of the shares owned by Phoenix fluctuated, in the sense that they were constantly being eroded and restored, before being realised and distributed to RSA, then the amount of that distribution which would reasonably be attributable to profits derived before the merger would

(68) (1977) 137 CLR 567 at 579.
(69) (1986) 13 FCR 356 at 376.

be the lowest point in the value of the gains between the merger date and the date of realisation. This proposition should be accepted as correct.

69 Nonetheless, the taxpayer contended that, even if this were so, an ascertained profit had not accrued to Phoenix at the time of the merger. To this contention we now turn.

Ascertainment of profits

70 In its submissions, the taxpayer gave significant emphasis to the circumstance first that there were no formal separate accounts for either Phoenix or SAIL at the merger date and, secondly, that Phoenix's investments had last been revalued at 31 December 1991 in its management accounts. It was conceded that those investments had been recorded at their market value as at the merger date in the consolidated Completion Accounts of the Sun Alliance Group, but this was said to be of little, if any, import. The reason given by the taxpayer was that the concept of profits directs attention to the circumstances of each individual company, specifically the manner in which that company, as distinct from any corporate group of which it is a member, keeps its accounts.

71 Cited as providing authoritative support for this last proposition was a statement by Higgins J in *Webb v Australian Deposit and Mortgage Bank Ltd* (70), to which reference already has been made. His Honour said (71):

> "The truth is, that the meaning of 'profits' is not rigid and absolute; it is flexible and relative – relative to each company; and in ascertaining the meaning of the word in any context, we must consider the whole context."

When these words are themselves read in context, it is apparent that Higgins J was saying no more than that there is no universal legal meaning of the term "profits" applicable in every circumstance for every purpose. Nothing in this statement is to be taken as linking the concept of profits to the individual accounts of a given company. Perhaps realising this, the taxpayer relied also upon the observation by Mason J in *Industrial Equity* that (72): "in all the cases it has been assumed the principle [concerning the payment of dividends out of profits] refers exclusively to the profits of the company declaring and paying the dividend." However, Mason J was concerned with the prohibition on the payment of dividends except out of profits. It must be recalled that Rich, Dixon and Evatt JJ in *Evans* referred to the ascertainment of profits "by a proper account". There is nothing to suggest that accounts are any less proper for being consolidated.

72 In light of this, the circumstance that as at the merger date the unrealised increases in value of both Phoenix's share portfolio and the

(70) (1910) 11 CLR 223.
(71) (1910) 11 CLR 223 at 241.
(72) (1977) 137 CLR 567 at 577.

Bridge Street properties were recorded, not in separate accounts for Phoenix and SAIL respectively, but in the consolidated Completion Accounts of the Sun Alliance Group did not mean that those gains were not ascertained profits. (It will be necessary to return to the matter of whether those gains, in so far as they concerned the Bridge Street properties, were profits at all.) In any event, as the Commissioner contended, the fact that the reconstructed balance sheet for Phoenix was not produced until after the merger date is of minimal relevance: both the cost of acquisition and the market value of Phoenix's shares as at that date were known, giving an ascertained unrealised profit.

73 The same might be said, on the assumption that the unrealised accretion to the value of the Bridge Street properties had the character of a profit before the merger date, in respect of SAIL's ownership of those properties. Whether this assumption can be made good is a matter we now consider.

The Bridge Street properties

74 The primary submissions advanced by the taxpayer on the cross-appeal may be reduced to the following three propositions. First, in order to be treated as profit for the purposes of s 160ZK(5) of the 1936 Act, an unrealised increase in the value of an asset must be of a permanent character. Secondly, s 160ZK(5) speaks of profits that were derived before, as distinct from contemporaneously with, the acquisition by a taxpayer of the relevant shares. And thirdly, because the unrealised increase in the value of the Bridge Street properties did not assume a quality of permanence until the entry by members of both the Royal and the Sun Alliance Groups into the Merger Agreement, it cannot be said that SAIL derived any profit until the merger date at the earliest – that is, on the date on which RSA was deemed to have acquired its shares in SAIL. As a result, the taxpayer contended, s 160ZK(5) had no application in respect of the distribution made by SAIL to RSA in September 1996.

75 There is, however, an immediate answer to these submissions. As has already been explained in these reasons, the first of the propositions outlined above does not hold true. Nonetheless, it is upon the basis of this first proposition that the third proposition rests. It necessarily follows that that third proposition must similarly be rejected. In other words, to say that there was no profit accruing from the increased value of the Bridge Street properties until the merger date is to fall into error.

76 A profit had accrued to SAIL, and for the reasons already given, it was an ascertained profit. All that cl 14 and Sch 10 of the Merger Agreement did was to ensure that subsequent fluctuations in the value of the Bridge Street properties would not affect the process of reasonably attributing to that profit any distributions made by SAIL to RSA after the merger date.

"Could reasonably be taken to be attributable to"

77 It remains then to engage in that process of attribution required by para (b) of s 160ZK(5) in respect of the distributions made by Phoenix and SAIL. In doing so, several points should be noted. The first is that para (b) presents a question of characterisation of an amount which is the whole or a part of the distribution made by a company to the holder of the RDA share, as identified in para (a). Secondly, para (b) presents an inquiry as to the existence of a sufficient link between that whole or part of the distribution and profits derived by the company before a specified event (acquisition of the RDA share). Thirdly, that link may be described in terms of necessary causation but, as with all questions of causality, the starting point is the identification of the purpose (here the legislative purpose) to which the question is directed (73). Fourthly, here, the legislative purpose of s 160ZK(5) is to ensure that a capital loss not be claimed where the result of the course of action described in the sub-section is that there has been no economic loss to the taxpayer. Finally, the criterion of linkage in para (b), an attribution that is reasonable, is to be read and applied accordingly.

78 The evidence of Mr Robert Hardy, the Taxation Manager of RSA, indicates that it was the policy and practice of companies within the RSA Group to declare dividends from retained profits and realised gains on the sale of investments. As was previously adverted to in these reasons, the dividends paid by Phoenix and SAIL to RSA after 30 October 1992 were sourced in the retained and operating profits of both companies. As a consequence, the taxpayer submitted, those dividends could not reasonably be attributed to the unrealised gains which have been the focus of this litigation.

79 However, unlike s 44 of the 1936 Act, s 160ZK(5) speaks, not of "dividends paid ... out of profits derived" by a company, but of a distribution that "could reasonably be taken to be attributable to profits that were derived by the company" before the taxpayer's acquisition of shares in it. The inquiry contemplated by that provision is therefore not directed exclusively towards the identification of the source of funds from which a dividend is paid.

80 It is the concept of causation, rather than source, with which s 160ZK(5) is concerned. In determining whether the plaintiff's loss of employment was "attributable to" the provisions of the *Local Government Act 1972* (UK), Donaldson J in *Walsh v Rother District Council* said (74):

> "[T]hese are plain English words involving some causal connection between the loss of employment and that to which the loss is said to be attributable. However, this connection need not be that of a sole, dominant, direct or proximate cause and effect. A

(73) *Allianz Australia Insurance Ltd v GSF Australia Pty Ltd* (2005) 221 CLR 568 at 586 [54]-[55], 596-598 [95]-[103], 605 [126].

(74) [1978] 1 All ER 510 at 514.

contributory causal connection is quite sufficient."

Nothing, either in the text of s 160ZK(5) or in its objects as expressed in the Explanatory Memorandum on the Bill for the Amending Act, indicates that a narrower meaning should be presently ascribed to that phrase.

81 As explained above, the phrase "could reasonably be taken to be" indicates that in order for s 160ZK(5) to be enlivened the relevant pre-acquisition profits need not actually be a contributory cause to a subsequent distribution: it would suffice that those profits may reasonably be capable of being seen as such.

82 The taxpayer submitted, rightly, that s 160ZK(5) requires an answer to the question whether a distribution is attributable to pre-acquisition profits, not whether profits realised subsequently to the acquisition of the relevant shares are attributable to pre-acquisition unrealised gains. Nevertheless, given the breadth of the nexus contemplated by the words "attributable to", where a pre-acquisition unrealised gain is a contributory cause to a post-acquisition realised profit, then that unrealised gain would, failing some break in the proverbial chain of causation, reasonably be capable of being taken to be a contributory cause to any distribution sourced in the subsequent realised profit.

83 The accretions in value of the shares held by Phoenix that occurred prior and up to the merger date, accretions which may be understood as profits derived by Phoenix before that date, were, in part, a cause of the dividends paid to RSA after 30 October 1992. The dividend paid by SAIL to RSA in September 1996 may similarly, and reasonably, be seen as being, in part, attributable to what was at the merger date the unrealised increase in the value of the Bridge Street properties.

Orders

84 The appeal by the Commissioner should be allowed with costs. The orders of the Full Court of the Federal Court dated 9 March 2004 should be set aside and in place thereof the appeal to that Court should be dismissed with costs.

85 The cross-appeal by the taxpayer should be dismissed with costs.

1. *Appeal allowed with costs.*
2. *Set aside the orders of the Full Court of the Federal Court dated 9 March 2004 and, in their place, order that the appeal to that Court be dismissed with costs.*
3. *Cross-appeal dismissed with costs.*

Solicitor for the appellant, *Australian Government Solicitor.*

Solicitors for the respondent, *Maddocks.*

MYB

Walsh v Rother District Council

QUEEN'S BENCH DIVISION
DONALDSON J
31st MAY, 17th JUNE 1977 514

Local government – Officer – Compensation for loss of employment – Loss of employment attributable to reorganisation of local government – Attributable to – Causal connection between reorganisation and loss of employment – Applicant town clerk of a borough council due to disappear under reorganisation – Applicant appointed to office of chief executive of a district council created under reorganisation – District council reviewing its management structure after one year of being in operation – District council deciding to abolish post of chief executive because of economic conditions – Applicant's employment as chief executive terminated – Whether loss of employment 'attributable to' reorganisation of local government – Whether sufficient causal connection between reorganisation and loss of employment – Local Government Act 1972, s 259(1) – Local Government (Compensation) Regulations 1974 (SI 1974 No 463), reg 4(1).

Prior to 1973 the applicant was the town clerk of a borough council. Pursuant to the reorganisation of local government under the Local Government Act 1972, the borough council was to disappear and a new district council was to be created. The local councillors set up a committee to decide, inter alia, the management structure of the new council. The committee recommended, following the recommendations of a study group on the management structure of new councils, that the district council should have a chief executive without departmental responsibilities and certain other officers. The applicant applied for and, as from July 1973, was appointed to the post of chief executive of the district council. Under the 1972 Act the district council had a wide discretion as to the management structure it would adopt. After the council had been in operation for one year it decided to review its management structure. As a result of the review and because of economic conditions the district council decided to abolish the post of chief executive. Accordingly, in April 1976 it terminated the applicant's employment as chief executive. The district council refused his claim, under reg 4(1)[a] of the Local Government (Compensation) Regulations 1974, for compensation for loss of employment. The applicant therefore applied to an industrial tribunal for compensation under reg 4(1) on the ground that the loss of employment was 'attributable to' the provisions of the 1972 Act. The tribunal held that the loss of employment was not so attributable and dismissed the application. The applicant appealed.

Held – Loss of employment was 'attributable to' the provisions of the 1972 Act, within s 259(1)[b] of the 1972 Act and reg 4(1) of the 1974 regulations, if there was some causal connection between those provisions and the loss of employment, although it was sufficient if the provisions of the 1972 Act were a contributory cause of the loss

a Regulation 4(1), so far as material, provides: '... any person to whom these regulations apply and who suffers loss of employment ... which is attributable to any provision [of the Local Government Act 1972] shall be entitled to have his case considered for the payment of compensation under these regulations ...'

b Section 259(1), so far as material, provides: 'The appropriate Minister shall by regulations provide for the payment by such body or such Minister as may be prescribed by or determined under the regulations of compensation to or in respect of persons who are, or who but for any such service by them as may be so prescribed would be, the holders of any such office or employment as may be so prescribed and who suffer loss of employment ... which is attributable to any provision of this Act or of any instrument made under this Act.'

of employment and they did not have to be the sole, dominant, direct or proximate cause of the loss of employment. Whilst there was a sufficient causal connection between the provisions of the 1972 Act and the applicant's employment as chief executive of the district council, since without the 1972 Act the council would not have existed, there was no sufficient causal connection between the provisions of the 1972 Act and the applicant's loss of his employment as chief executive, for the sole cause of that was the district council's change of policy as to its management structure. It followed that the tribunal's decision had been correct and that the appeal would be dismissed (see p 514 *d* to *h*, post).

Dictum of Lord Reid in *Central Asbestos Co v Dodd* [1972] 2 All ER at 1141 applied.

Mallet v Restormel Borough Council p 503, ante distinguished.

Notes

For the compensation of local government officers for loss of employment, see 24 Halsbury's Laws (3rd Edn) 507-510, paras 937-939.

For the Local Government Act 1972, s 259, see 42 Halsbury's Statutes (3rd Edn) 1083.

Cases referred to in judgment

Central Asbestos Co Ltd v Dodd [1972] 2 All ER 1135, [1973] AC 518, [1972] 3 WLR 333, [1972] 2 Lloyd's Rep 413, HL, Digest (Cont Vol D) 618, *2022Ae*.

Mallet v Restormel Borough Council p 503, ante.

Case also cited

Sneddon v Glasgow Coal Co Ltd (1905) 42 SLR 365.

Appeal

This was an appeal by Nicholas Christopher Walsh against the decision of an industrial tribunal sitting at Ashford, Kent (chairman J H Humphreys Esq) made on 22nd June 1976 dismissing Mr Walsh's claim, under reg 4(1) of the Local Government (Compensation) Regulations 1974, for compensation for the loss of his employment by Rother District Council ('the district council') as chief executive of the district council. The facts are set out in the judgment.

I O Griffiths QC and *Colin Hilner Smith* for Mr Walsh.

Patrick Medd QC and *Charles Gibson* for the district council.

Cur adv vult

17th June. **DONALDSON J** read the following judgment: Mr Walsh was the chief executive of the district council from 30th July 1973 until April 1976. His employment came to an end because, in December 1975, the district council decided to reorganise its establishment of officers and to dispense with the post of chief executive.

Mr Walsh was very naturally aggrieved with this decision and claimed compensation for loss of employment under the provisions of the Local Government Act 1972 and the Local Government (Compensation) Regulations 1974. The district council rejected his claim and Mr Walsh applied for relief to an industrial tribunal sitting at Ashford, Kent. That tribunal unanimously dismissed Mr Walsh's application on the ground that he had not suffered any loss of employment or loss or diminution of emoluments which was attributable to any provision of the Local Government Act 1972. That decision was published on 8th July 1976.

Now, nearly a year later, Mr Walsh appeals to this court. On his behalf counsel submits that the tribunal misdirected itself as to the meaning of the words 'attributable to' in the 1972 Act and the regulations and, in consequence of that misdirection, reached a wrong conclusion.

The 1972 Act involved a radical reorganisation of local government in England,

substituting new county and district councils for most of the pre-existing local authorities of more than parish status. The district council is such a new authority and operates in the area which was previously the concern of the Battle, Bexhill and Rye authorities. It came into existence on 1st April 1974.

The widespread abolition of employing local authorities left a number of local government officers without jobs, but of course the new local authorities had a large number of posts to fill. Nevertheless, it was anticipated that in the ensuing 'local authority musical chairs' some officers would find themselves without a seat and others would find seats which were less remunerative than those which they had previously occupied. Provision was accordingly made to compensate those who suffered financial loss.

The relevant statutory provisions are s 259(1) of the 1972 Act and regs 3, 4, 7 and 11 of, and Schs 2 and 3 to, the 1971 regulations. I need not set out these provisions in this judgment, since it is common ground that Mr Walsh is within the class of person who is entitled to compensation if he suffers loss of employment 'attributable to any provision' of the 1972 Act not later than ten years after 1st April 1974.

Counsel for Mr Walsh submits that Mr Walsh's loss of employment was attributable to ss 1, 2 and 112(3) of the 1972 Act. Sections 1 and 2 provide the new local government areas and the constitution of the new principal councils in England. Section 112(3) abrogated various statutory provisions which required councils to appoint specified officers such as a clerk, treasurer or borough surveyor. It thus opened the way to, although it did not require, the adoption of a new management structure of the type recommended in what has come to be known as the Bains report, the report of the study group on the New Local Authorities' Management and Structure published in 1972. For present purposes the essence of the study group's recommendations was that there should be a chief executive who should be without departmental responsibilities and who should be the alter ego of the authority at officer level.

The Borough of Lewes in Sussex was one of the authorities which was due to disappear as a result of the 1972 Act. Mr Walsh was the town clerk and if he had suffered loss as a result of the abolition of his office, he would without doubt have been entitled to compensation. It appears that he in fact suffered no such loss. In anticipation of the formation of the new district council, the councillors of Battle, Bexhill and Rye set up a district joint committee to give consideration to matters which would require to be decided by the district council as soon as it was formed. One such matter was its departmental structure. The committee accepted the recommendations in the Bains report, although, as I have already said, it was not obliged to do so. It recommended that there should be a chief executive, a principal chief officers' management team and heads of departments. Mr Walsh applied for and was appointed to the post of chief executive. No doubt he welcomed the change and the challenge. Today he probably feels differently.

No complaint is made of the way in which Mr Walsh discharged his duties. He assisted to the full in setting up the new district council's management structure in accordance with the Bains report recommendations and the wishes of the elected members of the district council. Unfortunately, this period was short-lived, and in January 1975 the staff and general purposes committee resolved that a complete review of the establishment be carried out after the district council had been in operation for one year. This was done and, in December 1975, committees of the council recommended a restructuring of its central administration which included the abolition of the post of chief executive. This recommendation was accepted by the district council and Mr Walsh's employment was terminated.

The industrial tribunal found as a fact that the cause of the dismissal of Mr Walsh was—

> 'the need of the [district council] to cut back the costs of its administration

> because of the national economic climate and the particular economic conditions which confronted the [district council] in 1975 . . .'

and that this cause operated in circumstances which had been created by the 1972 Act. Counsel for Mr Walsh submits that if the tribunal had correctly directed itself in law it would have found that a further cause was that, in the light of experience, the district council found that its functions were not as extensive as had at first been anticipated, that it did not need the elaborate Bains management structure and in particular that it did not need to have a chief executive without departmental responsibilities.

The industrial tribunal considered the authorities on the meaning of 'attributable' and their conclusion is expressed in the following paragraph of their reasons:

> 'We prefer the argument which is based upon the need for a chain of causation to be established between the alleged cause of the loss i e the 1972 Act or one of its provisions and the dismissal of the applicant. We find as a fact that in any event the chain was broken when the structure of administration was completed in 1973. [Mr Walsh] was then in post and his position and terms of employment were settled. The [district council] carried on its administration with the structure which had been settled, until early in 1975 when the structure came up for review in the light of the circumstances which prevailed at that time.'

Counsel for Mr Walsh criticises this conclusion insofar as it suggests that once an officer accepts employment with a new authority and takes up that position, his subsequent dismissal can never be attributed to the 1972 Act or any of its provisions. I am far from sure that this is what the tribunal intended to decide. However, if it was, it was plainly wrong because regs 7 and 11 of the 1971 regulations contemplate that a dismissal giving rise to a claim for compensation may take place as long as ten years after the old authority has gone out of existence. However, in fairness to the tribunal, I should point out that the members may only have been considering Mr Walsh's position on the facts as they found them. On any view of the matter, the tribunal's conclusion is one which is open to review in this court.

I confess that until I saw regs 7 and 11 I think that I should have assumed that loss of employment as a result of the provisions of the 1972 Act would inevitably occur at the latest by 1st April 1974, when the old authorities disappeared. The draftsman of the regulations was more far sighted and one of the circumstances which he may have had in mind is illustrated by the judgment of Griffiths J in *Mallet v Restormel Borough Council*[1]. In that case the applicant, Mr Mallet, was the manager of the St Mawgan airport for which the Newquay council was responsible. That council disappeared in the reorganisation and its responsibility was assumed by the new Restormel Borough Council. The latter council offered Mr Mallet re-employment as manager of the airport from 1st April 1974, but in December of that year decided to abolish the post and to employ British Midland Airways to manage the airport. The reason for the change was financial. If the council had continued to manage the airport themselves, it would have cost them £5,000 a year. British Midland Airways were prepared to pay £2,000 a year for the privilege. Mr Mallet maintained that he could show that if Newquay council had remained in existence, it would, despite the financial burden, have continued to manage the airport itself and that he would still have been the airport manager. Accordingly, he submitted that the loss of his job was attributable to the provisions of the 1972 Act, i e the local government re-organisation. Griffiths J held that this was indeed correct, given that Mr Mallett could establish the facts which he alleged.

Counsel for the district council had said that similar situations may arise where it can be shown that a deceased council employed staff to perform functions for other

1 Page 503, ante

authorities, such as a county council, and would have continued to do so indefinitely, that the staff were re-employed by a new council and that the new council, within ten years, terminated the agency and dismissed the staff concerned.

Unfortunately for Mr Walsh, his case is quite different. He was not re-employed by the district council having previously been employed in the same place by one of its predecessors. His post was entirely new. This may not be fatal, but it does rob *Mallet's* case[1] of any relevance to his.

The fundamental problem is whether Mr Walsh's loss of employment was 'attributable to' any provision of the 1972 Act, ie the April 1974 reorganisation. These words have been considered in a number of cases and I do not wish to add to the explanations and definitions which have been given. Counsel for Mr Walsh submits that it is a wider concept than 'directly caused by', or 'caused by or resulting from', but he accepts that it involves some nexus between the effect and the alleged cause. He suggests that 'owing to' or 'a material contributory cause' or 'a material cause in some way contributing to the effect' may be synonyms. Lord Reid in *Central Asbestos Co v Dodd*[2] said:

> '... "attributable". That means capable of being attributed. "Attribute" has a number of cognate meanings; you can attribute a quality to a person or thing, you can attribute a product to a source or author, you can attribute an effect to a cause. The essential element is connection of some kind.'

Suffice it to say that these are plain English words involving some causal connection between the loss of employment and that to which the loss is said to be attributable. However, this connection need not be that of a sole, dominant, direct or proximate cause and effect. A contributory causal connection is quite sufficient.

Mr Walsh's problem is that whilst he can show abundant connection between the provisions of the 1972 Act and his employment as chief executive (without the 1972 Act there would have been no Rother District Council and no such post) he can show no connection between those provisions and his loss of employment. Counsel for Mr Walsh seeks to escape from this dilemma by submitting that the district council's adoption of the Bains management structure was experimental and evolutionary and that its abandonment so soon after the council's birth was all part and parcel of the local government reorganisation itself. Whether or not circumstances can arise in which both the creation of the job itself and its disappearance can be attributable to the 1972 Act, I am quite clear that that is not this case. The district council was created by the 1972 Act. The terms of that Act gave it wide discretion on the management structure which it should adopt. It adopted one structure, worked it for a year and then decided to adopt another. The sole cause of Mr Walsh's loss of employment was a change of policy by the council. It was in no sense attributable to any of the provisions of the 1972 Act.

It follows that I consider that the industrial tribunal's decision was correct and that this appeal should be dismissed.

Appeal dismissed. Leave to appeal granted.

Solicitors: *J G Haley* (for Mr Walsh); *John G Millward* (for the district council).

K Mydeen Esq Barrister.

1 Page 503, ante
2 [1972] 2 All ER 1135 at 1141, [1973] AC 518 at 533

CERTAIN LLOYD'S UNDERWRITERS SUBSCRIBING TO CONTRACT No IH00AAQS v CROSS (Matter No S417/2011)

CERTAIN LLOYD'S UNDERWRITERS SUBSCRIBING TO CONTRACT No IH00AAQS v THELANDER (Matter No S418/2011)

CERTAIN LLOYD'S UNDERWRITERS SUBSCRIBING TO CONTRACT No IH00AAQS v THELANDER (Matter No S419/2011)

HIGH COURT OF AUSTRALIA

FRENCH CJ, HAYNE, CRENNAN, KIEFEL and BELL JJ

15 August, 12 December 2012 — Canberra

[2012] HCA 56

Practice and procedure — Costs — Maximum costs in personal injury damages matters — Meaning of claim for "personal injury damages" — Claim for damages for intentional tort within meaning — (NSW) Civil Liability Act 2002 ss 3, 9 — (NSW) Legal Profession Act 1987 ss 198C, 198D.

Words and phrases — "intentional tort" — "personal injury damages".

The respondents alleged that they had been assaulted by hotel security staff, and sued the appellants in their capacity as insurers of the company that employed those staff. The action was for trespass to the person claiming damages for personal injuries allegedly inflicted intentionally and with intent to injure. At issue was whether a claim for personal injury damages based on an intentional tort falls within the meaning of the phrase "claim for personal injury damages", in so far as it incorporates the phrase "personal injury damages" as used in s 198D(1) of the Legal Profession Act 1987 (NSW) (the LP Act) and Pt 2 of the Civil Liability Act 2002 (NSW) (the CL Act).

Held, per French CJ and Hayne J (Kiefel J agreeing, Crennan and Bell JJ dissenting), allowing the appeal, setting aside the orders of the Court of Appeal and, in lieu thereof, ordering that the appeal to the Court of Appeal be dismissed:

(i) Per French CJ and Hayne J: The claims which the respondents made are claims for damages that relates to personal or bodily injury suffered by them, such that the claims are "claims for personal injury damages" within the meaning of s 198D(1) of the LP Act: at [33]–[42].

(ii) Per Kiefel J: It does not follow from the identification of a broader purpose beyond the more immediate objects of the LP Act and the CL Act, nor from the limited connection between them, that they are interdependent in any meaningful way, such that the two statutes operate independently of each other, and the proper construction of the phrase "personal injury damages" is those damages relating to the death of or injury to a person: at [90]–[104].

(iii) Per Crennan and Bell JJ (dissenting): The mischief with which Div 5B of the CL Act was intended to deal (that is, the perceived crisis involving negligence claims), and the express language of s 198C(1) of the LP Act, weigh against interpreting that provision as merely picking up the words of the definition in s 11 of the CL Act, such that a claim for personal injury suffered as the result of an act done with intent to cause injury or death is not a claim for "personal injury damages" within the meaning of the LP Act or the CL Act: at [68]–[75].

Appeal

This was an appeal against the decision of the Court of Appeal of the Supreme Court of New South Wales (Hodgson and Basten JJA and Sackville AJA): *Cross v Certain Lloyds Underwriters* [2011] NSWCA 136. See also *New South Wales v Williamson* [2012] HCA 57.

R J H Darke SC and *M J Stevens* instructed by *Riley Gray-Spencer Lawyers* for the appellant in all matters (Certain Lloyd's Underwriters Subscribing to Contract No IH00AAQS).

R T McKeand SC and *A C Casselden* instructed by *G H Healey & Co Lawyers* for the respondents in all matters (John Cross, Mark George Thelander and Jill Maria Thelander).

[1] **French CJ and Hayne J.** These three appeals were heard together with *New South Wales v Williamson.*[1] All four appeals concern the construction of provisions of New South Wales statutes that limit the costs that a court may order one party to pay another if the amount recovered on a claim for personal injury damages does not exceed a specified amount. The reasons in these appeals should be read with the reasons in *Williamson (No 2).*

The issue

[2] New South Wales legislation regulated claims for "personal injury damages" and awards of "personal injury damages". The expression "personal injury damages" was defined to mean "damages that relate to the death of or injury to a person caused by the fault of another person". The respondents alleged that they had been assaulted by hotel security staff. They sued the appellants,[2] as the insurers of the company that employed those staff, for trespass to the person claiming damages for personal injuries allegedly inflicted intentionally and with intent to injure. Were these claims for "personal injury damages" within the meaning of the relevant New South Wales Acts?

[3] Answering this question requires consideration of Div 5B of Pt 11 (ss 198C–198I) of the Legal Profession Act 1987 (NSW) (the 1987 Legal Profession Act) as inserted by the Civil Liability Act 2002 (NSW) (the Liability Act).[3] Later forms of the relevant legislation are discussed in *Williamson (No 2).*

The relevant provisions

[4] Section 198D(1) of the 1987 Legal Profession Act fixed the maximum costs for legal services provided to a party in connection with "a claim for personal injury damages", "[i]f the amount recovered on [the claim] does not exceed $100,000". A lawyer and client could contract out of this limitation[4] by a "costs agreement" complying with Div 3 of Pt 11 of the 1987 Legal Profession Act. But s 198D(4)(b) provided that, subject to some exceptions which need not be considered, when the maximum costs for legal services provided to a party were fixed by Div 5B, "a court or tribunal cannot order the payment by another party to the claim of costs in respect of those legal services in an amount that exceeds that maximum".

1. [2012] HCA 57 (*Williamson (No 2)*).
2. How and why the appellants were joined in the actions need not be examined.
3. Section 8, Sch 2, item 2.2[2].
4. Section 198E.

[5] Section 198C(2) of the 1987 Legal Profession Act provided that Div 5B did not apply to certain costs, namely, costs payable to an applicant for compensation under Pt 2 of the Victims Support and Rehabilitation Act 1996 (NSW) and costs for legal services provided in respect of certain other identified forms of statutory claim: claims under the Motor Accidents Act 1988 (NSW) or the Motor Accidents Compensation Act 1999 (NSW), claims for work injury damages as defined in the Workplace Injury Management and Workers Compensation Act 1998 (NSW) and claims for damages for dust diseases brought under the Dust Diseases Tribunal Act 1989 (NSW). The respondents' claims did not fall within any of these expressly excluded classes of claim.

[6] Section 198C(1) defined terms used in Div 5B. In particular, it provided that "personal injury damages has the same meaning as in the Civil Liability Act 2002".

[7] The Liability Act provided[5] *that*, in that Act, "*personal injury damages* means damages that relate to the death of or injury to a person caused by the fault of another person". The Liability Act further provided[6] that:

> *injury* means personal or bodily injury, and includes:
> (a) pre-natal injury, and
> (b) psychological or psychiatric injury, and
> (c) disease.

And it provided[7] that "*fault* includes an act or omission".

[8] Read together with the definitions of "injury" and "fault", the Liability Act's definition of "personal injury damages" can thus be expressed as follows. In the Liability Act:

> ... personal injury damages means damages that relate to the death of or personal or bodily injury (including pre-natal injury, psychological or psychiatric injury and disease) to a person caused by the fault (including an act or omission) of another person.

[9] Section 198C and the other provisions of Div 5B of Pt 11 of the 1987 Legal Profession Act were introduced by the Liability Act as amendments connected with and consequential upon the enactment of the Liability Act. The two Acts did not, however, have identical areas of operation. The costs limiting provisions of Div 5B of Pt 11 of the 1987 Legal Profession Act applied to a "claim" for personal injury damages whereas Pt 2 of the Liability Act applied to an "award" of personal injury damages. And there were some similarities, but most importantly some differences, in the exclusions that were made from the operation of each Act.

[10] Part 2 of the Liability Act regulated the amount recoverable as an "award of personal injury damages". As enacted, s 9(1) of the Liability Act provided that Pt 2 of the Act "applies to and in respect of an award of personal injury damages, except an award that is excluded from the operation of this Part". Section 9(2) excluded several kinds of awards of damages. The first of these exclusions[8] was "an award where the fault concerned is an intentional act that is done with intent to cause injury or death or that is sexual assault or other sexual misconduct". Other exclusions included awards of damages for death or injury resulting from

5. Section 3.
6. Section 3.
7. Section 3.
8. Section 9(2)(a).

a motor accident to which either Pt 6 of the Motor Accidents Act 1988 (NSW) or Ch 5 of the Motor Accidents Compensation Act 1999 (NSW) applied,[9] awards of damages for death or injury to a worker to which Div 3 of Pt 5 of the Workers Compensation Act 1987 (NSW) applied[10] and awards of damages for dust diseases brought under the Dust Diseases Tribunal Act 1989 (NSW).[11]

[11] Some, but not all, of these excluded awards would be made following claims for personal injury damages that were expressly excluded from the operation of the costs limiting provisions of Div 5B of Pt 11 of the 1987 Legal Profession Act. Thus, particular kinds of award made under the Motor Accidents Act 1988, the Motor Accidents Compensation Act 1999 and the Dust Diseases Tribunal Act 1989 were excluded from the operation of Pt 2 of the Liability Act and claims for those kinds of awards were excluded by s 198C(2) from the application of Div 5B of Pt 11 of the 1987 Legal Profession Act. Likewise, an "award comprising compensation under" the Victims Support and Rehabilitation Act 1996 (NSW) was excluded[12] from the operation of Pt 2 of the Liability Act and the costs payable to an applicant for compensation of that kind were excluded by s 198C(2)(a) from the operation of Div 5B of Pt 11 of the 1987 Legal Profession Act.

[12] Although there was thus some similarity in the express exclusions that were contained in the 1987 Legal Profession Act and the Liability Act, there were also some differences between them. For example, the Liability Act also excluded[13] from the operation of Pt 2 of that Act awards comprising compensation under certain Acts other than the Victims Support and Rehabilitation Act 1996, but none of those other Acts was mentioned in s 198C(2) of the 1987 Legal Profession Act. And, of greatest significance for the present appeals, the Liability Act excluded[14] from the operation of Pt 2 "an award where the fault concerned is an intentional act that is done with intent to cause injury or death or that is sexual assault or other sexual misconduct" but there was no equivalent exclusion in Div 5B of Pt 11 of the 1987 Legal Profession Act.

The parties' arguments

[13] The central point of difference between the parties in this court was whether the definition of "personal injury damages" in the 1987 Legal Profession Act (it "has the same meaning as in" the Liability Act) was to be construed by reference only to the words of the definition of that expression in s 3 of the Liability Act or by reference to both the words of the definition and the limited operation which the Liability Act had in respect of awards of personal injury damages as a result of the exclusions in s 9(2) of the Liability Act.

[14] The appellants submitted that s 198C(1) of the 1987 Legal Profession Act required reference only to the definition given in the Liability Act and that, as there defined, personal injury damages extended to any and every form of damages that relate to the death of or personal or bodily injury to a person caused by the fault of another person. In particular, the appellants submitted that "personal injury damages" included damages for trespass to the person and that,

9. Section 9(2)(b).
10. Section 9(2)(c).
11. Section 9(2)(d).
12. Section 9(2)(e).
13. Section 9(2)(e).
14. Section 9(2)(a).

in the District Court, Garling DCJ had been right to declare, in effect, that s 198D of the 1987 Legal Profession Act was engaged.

[15] The respondents submitted that the costs limiting provisions of Div 5B of Pt 11 of the 1987 Legal Profession Act applied only to those claims for personal injury damages where the award of damages was regulated by Pt 2 of the Liability Act. They submitted that it follows that awards of the kind in issue in these appeals — "where the fault concerned is an intentional act that is done with intent to cause injury"[15] — were not awards of personal injury damages because awards of damages resulting from an intentional act were not regulated by the Liability Act. On its face, that submission ignored the differences that have been noted between the provisions which each Act made for its own area of application. The Liability Act expressly excluded intentional torts. The 1987 Legal Profession Act did not. And yet, on the respondents' construction, the costs limiting provisions of the 1987 Legal Profession Act were not to apply to claims for personal injury damages for an intentional tort.

[16] The respondents sought to surmount the obstacle of this textual difference, and thus justify their preferred construction, by reference to notions of "context" and "purpose". The respondents submitted that it is necessary to look not only to the words of the definition of "personal injury damages" in the Liability Act but also to the "context" provided by the other provisions of the Liability Act that define the scope of that Act's application to an "award of personal injury damages". This was said to follow, in particular, from the words "meaning" and "as in" in the definition of "personal injury damages" in s 198C(1) of the 1987 Legal Profession Act (it "has the same meaning as in" the Liability Act). And they submitted that the two Acts were intended to have the same sphere of operation because the relevant provisions were made at a time when there was concern about the costs associated with claims for damages for personal injuries caused by negligence.

The appeals to the Court of Appeal and this court

[17] The Court of Appeal (Hodgson and Basten JJA and Sackville AJA) held[16] unanimously that the present respondents' construction should be adopted. Sackville AJA described[17] the preferred construction as being that the definition of "personal injury damages" in s 198C(1) of the 1987 Legal Profession Act "meant personal injury damages *of the kind to which Part 2* of [the Liability Act] *applied*". [Emphasis added.] Basten JA, who gave the principal reasons of the court, concluded[18] that there was "no basis", either in extrinsic material or "in terms of the policy underlying the legislation, to impose the cost-capping regime on all claims for personal injury damages, however they might arise, without reference to the carefully crafted exclusions in s 9(2)" of the Liability Act. Accordingly, Basten JA decided[19] that the definition of "personal injury damages" in the relevant costs limiting provisions should be construed by "reference not merely to the definition of that expression in the source statute, but also to the scope of its application in the specified Part" of the Liability Act.

15. Section 9(2)(a).
16. *Cross v Certain Lloyds Underwriters* [2011] NSWCA 136 (*Cross*).
17. *Cross* at [71].
18. *Cross* at [49].
19. *Cross* at [59]; see also at [1] per Hodgson JA, at [79] per Sackville AJA.

[18] By special leave, the appellants appeal to this court. These reasons will show that the appellants' construction of the costs limiting provisions should be adopted, not the construction favoured by the Court of Appeal.

Which costs limiting legislation?

[19] The costs limiting provisions of the 1987 Legal Profession Act were repealed, with effect from 1 October 2005, by the Legal Profession Act 2004 (NSW) (the 2004 Legal Profession Act). The 2004 Legal Profession Act contained[20] costs limiting provisions in generally similar, but not identical, terms to those in the 1987 Legal Profession Act. Whether the earlier or the later provisions applied to the present cases depended upon the application of transitional provisions made by the 2004 Legal Profession Act. Those transitional provisions[21] provided, in effect, that the new Act applied only to "a matter" in which the client had first given instructions on or after 1 October 2005.

[20] In the Court of Appeal, some consideration was given[22] to what was the relevant "matter" in these cases. Much of the reasons of Basten JA proceeded by reference to the costs limiting provisions of the 2004 Legal Profession Act rather than the 1987 Legal Profession Act because he concluded[23] that the relevant "matter" was the respondents' claim for costs, not their claim for damages.

[21] There was limited argument on this issue in this court. The appellants submitted that the relevant "matter" was the claim for damages, not the claim for costs, and that the respondents first gave instructions in that matter before 1 October 2005. The respondents submitted that the "matter" was the claim for costs. But the respondents' submissions noted that "[i]t is agreed that the question of whether the provisions of the [earlier] or the [later Act applies] does not affect the determination of the principal issue in the appeal[s]".

[22] The reasons in *Williamson (No 2)* examine the differences between the costs limiting provisions of the two Acts and the amendments that had been made to the Liability Act by the time the 2004 Legal Profession Act was enacted. As those reasons show, the same answers should be given to the questions which arise about the construction of the later provisions as the answers to be given about the construction of the earlier provisions. Because no different answer should be given, the application of the transitional provisions need not be examined. Attention can and should be confined in these appeals to the resolution of the issue of construction of the 1987 Legal Profession Act that has been identified.

Some basic principles

[23] It is as well to begin consideration of this issue by re-stating some basic principles. It is convenient to do that by reference to the reasons of the plurality in *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* (at [47]):[24]

> [47] This Court has stated on many occasions that the task of statutory construction must begin with a consideration of the text itself.[25] Historical considerations and

20. Part 3.2 Div 9.
21. Section 737, Sch 9, cll 3 and 18.
22. *Cross* at [2] and [13]–[23].
23. *Cross* at [23].
24. (2009) 239 CLR 27; 260 ALR 1; [2009] HCA 41 at [47].
25. *Roy Morgan Research Centre Pty Ltd v Commissioner of State Revenue (Vic)* (2001) 207 CLR 72; 181 ALR 307; [2001] HCA 49 at [9] per Gaudron, Gummow, Hayne and

extrinsic materials cannot be relied on to displace the clear meaning of the text.[26] The language which has actually been employed in the text of legislation is the surest guide to legislative intention.[27] The meaning of the text may require consideration of the context, which includes the general purpose and policy of a provision,[28] in particular the mischief[29] it is seeking to remedy.

[24] The context and purpose of a provision are important to its proper construction because, as the plurality said in *Project Blue Sky*,[30] "[t]he primary object of statutory construction is to construe the relevant provision so that it is consistent with the language and purpose of *all* the provisions of the statute".[31] [Emphasis added.] That is, statutory construction requires deciding what is the legal meaning of the relevant provision "by reference to the language of the instrument viewed as a whole",[32] and "the context, the general purpose and policy of a provision and its consistency and fairness are surer guides to its meaning than the logic with which it is constructed".[33]

[25] Determination of the purpose of a statute or of particular provisions in a statute may be based upon an express statement of purpose in the statute itself, inference from its text and structure and, where appropriate, reference to extrinsic materials. The purpose of a statute resides in its text and structure.[34] Determination of a statutory purpose neither permits nor requires some search for what those who promoted or passed the legislation may have had in mind when it was enacted. It is important in this respect, as in others,[35] to recognise that to speak of legislative "intention" is to use a metaphor. Use of that metaphor must not mislead. "[T]he duty of a court is to give the words of a statutory provision

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Callinan JJ, at [46] per Kirby J; *Stevens v Kabushiki Kaisha Sony Computer Entertainment* (2005) 224 CLR 193; 221 ALR 448; 65 IPR 513; [2005] HCA 58 at [30] per Gleeson CJ, Gummow, Hayne and Heydon JJ, at [167]–[168] per Kirby J; *Carr v Western Australia* (2007) 232 CLR 138; 239 ALR 415; [2007] HCA 47 at [6] per Gleeson CJ; *Director of Public Prosecutions (Vic) v Le* (2007) 232 CLR 562; 240 ALR 204; [2007] HCA 52 at [85] per Kirby and Crennan JJ; *Northern Territory v Collins* (2008) 235 CLR 619; 249 ALR 621; 78 IPR 225; [2008] HCA 49 at [99] (*Collins*) per Crennan J.

26. *Nominal Defendant v GLG Australia Pty Ltd* (2006) 228 CLR 529; 225 ALR 643; 45 MVR 133; [2006] HCA 11 at [22] per Gleeson CJ, Gummow, Hayne and Heydon JJ, at [82]–[84] per Kirby J. See also *Combet v Commonwealth* (2005) 224 CLR 494; 221 ALR 621; [2005] HCA 61 at [135] per Gummow, Hayne, Callinan and Heydon JJ; *Collins* at [99] per Crennan J.
27. *Hilder v Dexter* [1902] AC 474 at 477–8 per Earl of Halsbury LC.
28. *Commissioner for Railways (NSW) v Agalianos* (1955) 92 CLR 390 at 397; [1955] ALR 645 at 649; [1955] HCA 27 (*Agalianos*) per Dixon CJ, quoted with approval in *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355; 153 ALR 490; [1998] HCA 28 at [69] (*Project Blue Sky*) per McHugh, Gummow, Kirby and Hayne JJ.
29. *Re Heydon's Case* (1584) 3 Co Rep 7a at 7b; 76 ER 637 at 638.
30. *Project Blue Sky* at [69].
31. See *Taylor v Public Service Board (NSW)* (1976) 137 CLR 208 at 213; 10 ALR 211 at 214–15; [1976] HCA 36 per Barwick CJ.
32. *Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation* (1981) 147 CLR 297 at 320; 35 ALR 151 at 169; [1981] HCA 26; *Project Blue Sky* at [69].
33. *Agalianos* at CLR 397; ALR 649 per Dixon CJ; *Project Blue Sky* at [69].
34. *Lacey v Attorney-General (Qld)* (2011) 242 CLR 573; 275 ALR 646; [2011] HCA 10 at [44] (*Lacey*).
35. *Zheng v Cai* (2009) 239 CLR 446; 261 ALR 481; 54 MVR 427; [2009] HCA 52 at [28]; *Momcilovic v R* (2011) 245 CLR 1; 85 ALJR 957; 280 ALR 221; [2011] HCA 34 at [146(v)], [258], [315] and [321].

the meaning that the legislature *is taken to have intended* them to have".[36] [Emphasis added.] And as the plurality went on to say[37] in *Project Blue Sky* (at [78]):

> [78] Ordinarily, that meaning (the legal meaning) will correspond with the grammatical meaning of the provision. But not always. The context of the words, the consequences of a literal or grammatical construction, the purpose of the statute or the canons of construction[38] may require the words of a legislative provision to be read in a way that does not correspond with the literal or grammatical meaning.

To similar effect, the majority in *Lacey*[39] said (at [43]):

> [43] Ascertainment of legislative intention is asserted as a statement of compliance with the rules of construction, common law and statutory, which have been applied to reach the preferred results and which are known to parliamentary drafters and the courts. [Footnote omitted.]

The search for legal meaning involves application of the processes of statutory construction. The identification of statutory purpose and legislative intention is the product of those processes, not the discovery of some subjective purpose or intention.

[26] A second and not unrelated danger that must be avoided in identifying a statute's purpose is the making of some a priori assumption about its purpose. The purpose of legislation must be derived from what the legislation says, and not from any assumption about the desired or desirable reach or operation of the relevant provisions.[40] As Spigelman CJ, writing extra-curially, correctly said:[41]

> Real issues of judicial legitimacy can be raised by judges determining the purpose or purposes of Parliamentary legislation. *It is all too easy for the identification of purpose to be driven by what the particular judge regards as the desirable result in a specific case.* [Emphasis added.]

And as the plurality said in *Australian Education Union v Department of Education and Children's Services*:[42]

> In construing a statute it is not for a court to construct its own idea of a desirable policy, impute it to the legislature, and then characterise it as a statutory purpose. [Footnote omitted.]

Context

[27] Because "context" loomed large in argument in this court, particularly in the submissions of the respondents in these appeals, it is necessary to say something more about the use of "context" in statutory interpretation.

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36. *Project Blue Sky* at [78].
37. *Project Blue Sky* at [78].
38. For example, the presumption that, in the absence of unmistakable and unambiguous language, the legislature has not intended to interfere with basic rights, freedoms or immunities: *Coco v R* (1994) 179 CLR 427 at 437; 120 ALR 415 at 418–19; [1994] HCA 15.
39. *Lacey* at [43].
40. See *Palgo Holdings Pty Ltd v Gowans* (2005) 221 CLR 249; 215 ALR 253; [2005] HCA 28 at [28]; *Byrnes v Kendle* (2011) 243 CLR 253; 279 ALR 212; [2011] HCA 26 at [97].
41. Spigelman, "The intolerable wrestle: Developments in statutory interpretation" (2010) 84 *ALJ* 822, p 826.
42. (2012) 86 ALJR 217; 285 ALR 27; [2012] HCA 3 at [28]. See also *Miller v Miller* (2011) 242 CLR 446; 275 ALR 611; [2011] HCA 9 at [29].

[28] It is not to be doubted[43] that the relevant provisions must be construed in context, and the contrary was not suggested in argument. But there was some debate about what use could be made of provisions of the Liability Act in construing the definition of "personal injury damages" in the 1987 Legal Profession Act.

[29] In construing the definition of "personal injury damages" contained[44] in the Liability Act (damages that relate to the death of or injury to a person caused by the fault of another person) it is no doubt necessary to have regard not only to the words of the definition but also to the context in which the definition was set. So much follows from what has been said about statutory construction in the cases to which reference has been made.

[30] Nothing said in *Producers' Co-operative Distributing Society Ltd v Commissioner of Taxation (NSW)*[45] in this court or on appeal to the privy council[46] denies the general proposition that regard must be had to context, or requires that a definition which is picked up from one statute (the source Act) and applied in another be construed by reference only to its words without regard to the context provided by the source Act. Indeed, in the *Producers' Co-operative* case, Dixon J expressly acknowledged[47] the need to consider the context provided by the other provisions of the source Act when considering a definition provided for in that Act and picked up and applied by another.

[31] It may be accepted that there are some limitations to the use that can properly be made of other provisions of the source Act when construing a definition in the source Act that is picked up and applied by another Act. As both Latham CJ[48] and the privy council pointed out[49] in the *Producers' Co-operative* case, if the definition that is picked up is to be applied in the source Act only "unless the context or subject-matter otherwise indicates or requires", the particular meaning that the term in question may have in any particular provision of the source Act will not elucidate the meaning of the general definition of the term. But it by no means follows from this observation that a definition should be construed without regard to its context. That is why the privy council in the *Producers' Co-operative* case treated[50] the activities which the source Act in question permitted as explaining "the general meaning and application of the definition" in question.

[32] Resolution of these appeals ultimately does not depend upon examining when or to what extent it is necessary to consider the context of the definition of "personal injury damages" in the Liability Act in construing that expression in the 1987 Legal Profession Act. Although the respondents' arguments were couched in terms of "context", upon analysis they sought to go further than elucidate the meaning of the expression "personal injury damages" as it was used in the 1987 Legal Profession Act by consideration of its statutory context in the

43. *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384 at 408; 141 ALR 618 at 635; [1997] HCA 2.
44. Section 3.
45. (1944) 69 CLR 523 at 531–2; [1944] HCA 39 (*Producers' Co-operative*) per Latham CJ, at 536 per Dixon J.
46. *Producers' Co-Operative Distributing Society Ltd v Commissioner of Taxation (NSW)* (1947) 75 CLR 134 at 137; [1948] AC 210 at 213 (*Producers' Co-Operative Distributing Society*).
47. *Producers' Co-operative* at 536.
48. *Producers' Co-operative* at 531–2.
49. *Producers' Co-Operative Distributing Society* at CLR 137; AC 213.
50. *Producers' Co-Operative Distributing Society* at CLR 137; AC 213.

Liability Act. Rather, they sought to treat s 198C(1) of the 1987 Legal Profession Act as providing that "personal injury damages" means personal injury damages of the kind to which Pt 2 of the Liability Act applied. It is more useful to focus attention on that proposed construction than to investigate, in the abstract, the use of "context" in statutory interpretation.

Construing s 198C(1)

[33] The construction favoured by the Court of Appeal and supported in this court by the respondents must be rejected. The text of the provisions at issue in these appeals readily yields the construction which the appellants urged: that the expression "personal injury damages" when used in the costs limiting provisions of Div 5B of Pt 11 of the 1987 Legal Profession Act extended to any and every form of damages that relate to the death of or personal or bodily injury to a person caused by the fault of another person. In its terms, the definition of "personal injury damages" contained in the Liability Act and picked up by the 1987 Legal Profession Act neither required nor permitted any different application according to whether the "fault" which founded the claim was a failure to take reasonable care or the commission of an intentional act with intent to injure. And s 198C(1) of the 1987 Legal Profession Act, by providing that "personal injury damages" has the same *meaning* as in the Liability Act, naturally and immediately directed attention to the definition of that expression in the Liability Act, which used the cognate word "means": "personal injury damages *means*". [Emphasis added.] It did not refer to the operation or application of the Liability Act. It did not direct attention to whatever was identified as being the legal effect or consequence which the Liability Act produced by using that defined expression in its various provisions.

[34] At least in this court, if not also in the courts below, the respondents' argument for confining the application of the costs limiting provisions by reference to the operation or application of the Liability Act depended upon a false premise. The respondents focused attention on the expression "personal injury damages" as if that expression was the hinge on which both the 1987 Legal Profession Act and the Liability Act turned. Hence, their argument was that "personal injury damages" in the 1987 Legal Profession Act is to be confined to those "personal injury damages" regulated by the Liability Act.

[35] The premise underlying this argument is not sound. Each Act used the defined expression "personal injury damages" as part of a larger composite phrase: "*award* of personal injury damages" in the Liability Act and "*claim* for personal injury damages" in the 1987 Legal Profession Act. [Emphasis added.] The hinge on which the relevant operation of each Act turned was the larger composite phrase and not the defined expression "personal injury damages". None of the statutory provisions that depended on the composite expressions "claim for personal injury damages" or "award of personal injury damages" affected the sense in which the defined expression "personal injury damages" was used in the relevant Acts. There is no textual reason to limit the expression "personal injury damages" in the 1987 Legal Profession Act to those *claims* for personal injury damages the award of which was regulated by the Liability Act.

[36] There is an additional problem with the respondents' argument. It assumed that the costs limiting provisions of the 1987 Legal Profession Act and the Liability Act were to have coextensive operation. For example, the respondents submitted that "the Civil Liability Act and the costs limitation provisions of the Legal Profession Act were introduced as a single package of reforms in the Civil

Liability Act and were clearly intended to work in harmony". From this premise, the argument continued that because the Liability Act regulated some but not all forms of *awards* of "personal injury damages", the only *claims* for "personal injury damages" to which the costs limiting provisions of the 1987 Legal Profession Act applied were those claims for personal injury damages the award of which was regulated by the Liability Act. Again, the premise underpinning this argument is not right.

[37] The use of the defined expression "personal injury damages" in both composite phrases provides no *textual* basis for reading the defined expression (when it is used in the 1987 Legal Profession Act) as confined by reference to the Liability Act's field of operation once due regard is paid to the wider, and different, composite expressions that are central to the relevant provisions of each Act. Further, as has already been noted, the two Acts expressly identified circumstances in which their respective provisions were not to apply, some of which were the same but some of which were different. In their very terms the relevant provisions of the two Acts demonstrate that each had, and was intended to have, a different area of operation.

[38] Considerations of context do not support the conclusion that the two Acts are to be read as having coextensive fields of operation. The Liability Act's exclusion of intentional torts done with intent to injure from the application of its operative provisions (all of which were originally to be found in Pt 2 of the Act) demonstrates that the mischiefs to which *that* Act was directed were identified as arising in connection with claims for damages for personal injury *other* than claims in respect of intentional torts. It by no means follows, however, that the mischiefs to which Div 5B of Pt 11 of the 1987 Legal Profession Act was directed were confined to mischiefs arising in respect of only those classes of claims for personal injury damages the award of which was regulated by the Liability Act. Particularly is that so when intentional torts were not expressly excluded from the operation of Div 5B, as they might so easily have been.

[39] The only circumstance which can be identified as suggesting that the "purpose" or "intention" of Div 5B should be read as confined in the manner described is that it was the Liability Act which introduced the relevant provisions into the 1987 Legal Profession Act. But when it is observed that the provisions of the two Acts were not connected, as they might so easily have been, by express reference in the 1987 Legal Profession Act to the *operation* of the Liability Act, it is apparent that the supposed limitation by reference to "purpose" or "intention" is not soundly based. The text of the relevant provisions provides no support for confining Div 5B to those claims for personal injury damages the award of which was regulated by Pt 2 of the Liability Act. The statutory text reveals no "intention" so to confine Div 5B.

[40] The reasons of the Court of Appeal illustrate the dangers of reasoning from legislative "intention" that is not based, as it must be, in the text of the relevant legislation. The Court of Appeal stated[51] that there was "no basis" in "the policy underlying the legislation" (presumably both the provisions of the Liability Act and the provisions which it introduced into the 1987 Legal Profession Act) for imposing the costs limiting provisions of the latter Act "without reference to the carefully crafted exclusions in s 9(2)" of the Liability Act. No foundation for making such an assumption about "the policy underlying the legislation" was

51. *Cross* at [49].

identified, whether in the reasons of the Court of Appeal or in argument in this court. Neither the paragraphs from extrinsic material quoted[52] by the Court of Appeal nor the Court of Appeal's earlier decision in *Newcastle City Council v McShane (No 3)*[53] founded the asserted assumption. To say, as the Court of Appeal did,[54] that there was "no basis" in extrinsic material or "in terms of the policy underlying the legislation" for imposing the costs limiting provisions on all claims for personal injury damages is to assume the answer to the question of construction and then ask whether the assumed answer is falsified.

[41] It is not legitimate to identify a legislative purpose not apparent from the text of the relevant provisions (or in this case even expressed in some extrinsic material), to examine extrinsic material and notice that there is nothing positively inconsistent with the identified purpose, and then to answer the question of construction by reference to the purpose that was initially assumed. That reasoning is not sound. It is reasoning of the kind of which Spigelman CJ rightly disapproved in the extra-curial writing set out earlier in these reasons. Statutory "purpose" and "intention" are to be identified according to the principles that were described earlier under the heading "Some basic principles". Once that is done, it becomes apparent that the text and context of the relevant provisions point towards the construction supported by the appellants in these appeals: a claim for personal injury damages includes any and every form of claim for damages that relate to the death of or personal or bodily injury to a person caused by the fault of another person whether it be a failure to take reasonable care or the commission of an intentional act with intent to injure.

Conclusion and orders

[42] The claims which the respondents made were claims for damages that related to personal or bodily injury suffered by them. Contrary to the conclusions reached by the Court of Appeal in each matter, the claims that each respondent made were "claims for personal injury damages" within the meaning of s 198D(1) of the 1987 Legal Profession Act.

[43] Each appeal should be allowed. In each appeal paras (4) and (5) of the orders of the Court of Appeal made on 1 June 2011 should be set aside and in their place there should be orders that the appeal to that court is dismissed. In accordance with the appellants' undertaking proffered and accepted when special leave to appeal was granted, the appellants should in each case pay the respondent's costs of the appeal to this court.

[44] **Crennan and Bell JJ.** In New South Wales, the statute that regulates the legal profession imposes a restriction on the maximum costs that one party may recover from another in connection with a claim for personal injury damages in which the amount recovered on the claim does not exceed $100,000 (small claims). The scheme was introduced as Div 5B of Pt 11 of the Legal Profession Act 1987 (NSW) (the 1987 LP Act) in a Schedule to the Civil Liability Act 2002 (NSW) (the Liability Act). The 1987 LP Act was repealed by the Legal Profession Act 2004 (NSW) (the 2004 LP Act) and the costs restrictions are now found in Ch 3, Pt 3.2, Div 9 of that Act. The question raised by these appeals is whether the restrictions apply to a small claim for damages for personal injury

52. *Cross* at [41]–[48].
53. (2005) 65 NSWLR 155; [2005] NSWCA 437, referred to at *Cross* at [39]–[40].
54. *Cross* at [49].

suffered as the result of an act done with intent to cause injury or death. The answer turns on the meaning of the words "personal injury damages" contained in s 198C(1) of the 1987 LP Act (now s 337(1) of the 2004 LP Act).

Factual background

[45] The respondents were assaulted at the Narrabeen Sands Hotel by security guards who had been engaged to provide security services at the hotel. The respondents brought proceedings in the District Court of New South Wales claiming damages for the injuries suffered by them in the assaults. In July 2005, AVS Australian Venue Security Services Pty Ltd (AVS), the employer of the security guards, was joined as a defendant to the proceedings. AVS later went into liquidation and the appellants, AVS's insurers, were joined as defendants to the proceedings. Following a trial lasting in the order of 22 days, judgment was entered for the respondents. The damages awarded in each case were for an amount less than $100,000. On 22 April 2010, Garling DCJ ordered that the appellants were to pay the respondents' costs. His Honour made a declaration that the costs were subject to s 198D of the 1987 LP Act.

Division 5B of Pt 11 of the 1987 LP Act

[46] Section 198D[55] is the central provision in Div 5B. Section 198D(1)(a) provides that if the amount recovered on a claim for personal injury damages does not exceed $100,000, the maximum costs for legal services provided to a plaintiff are fixed at 20% of the amount recovered or $10,000, whichever is greater. Sections 198E and 198F provide exceptions to the cap in the case of solicitor and own client costs that are the subject of an agreement that complies with the statute, and costs incurred after the date of a reasonable offer of compromise that is not accepted by the other party. Section 198G permits the court to exclude from the cap costs for legal services provided in response to actions taken by the other party that were not reasonably necessary for the advancement of that party's case. As noted, Div 5B is a scheme that restricts the recovery of costs in connection with claims for "personal injury damages". That expression is described for the purposes of Div 5B in s 198C(1) as follows: "*personal injury damages* has the same meaning as in Part 2 of the [Liability Act]".

[47] The Liability Act defines "personal injury damages" for the purposes of Pt 2 in s 11:

> In this Part:
> *injury* means personal injury and includes the following:
> (a) pre-natal injury,
> (b) impairment of a person's physical or mental condition,
> (c) disease.
> *personal injury damages* means damages that relate to the death of or injury to a person.

[48] The heading of Pt 2 is "Personal injury damages". Part 2 applies in respect of awards of personal injury damages except those that are excluded from its operation by s 3B.[56] Section 3B(1)(a) in Pt 1 of the Liability Act states that the provisions of the Liability Act "do not apply to or in respect of civil liability (and awards of damages in those proceedings)" in the case of liability for an

55. Section 338 of the 2004 LP Act makes provision in substantially the same terms as s 198D of the 1987 LP Act.
56. Section 11A(1) of the Liability Act.

intentional act done by a person with intent to cause injury or death or with respect to a sexual assault or other sexual misconduct. This is one of a number of exclusions for which s 3B(1) provides.

Procedural history

[49] Garling DCJ reasoned that the respondents' claims were for "personal injury damages" for the purposes of s 198D because each was a claim for damages relating to injury to a person within the meaning of s 11 of the Liability Act, as picked up by s 198C(1).

[50] The New South Wales Court of Appeal (Hodgson and Basten JJA and Sackville AJA) allowed the respondents' appeals against that part of the costs orders which declared that the costs were subject to s 198D. The Court of Appeal interpreted the words "has the same meaning as in Part 2 of the [Liability Act]" as applying the words of the definition in s 11 by reference to their application in Pt 2 of the Liability Act.[57] The Court of Appeal made a declaration that the legal costs incurred by the respondents were not subject to s 198D of the 1987 LP Act, nor to s 338 of the 2004 LP Act.

[51] On 9 December 2011, the appellants were given special leave to appeal from the order of the Court of Appeal. Their appeals were heard together with the appeal in *New South Wales v Williamson*,[58] which raised the same constructional question. These reasons should be read with those in *Williamson (No 2)*.

[52] For the reasons that follow, we would dismiss the appeal.

The 1987 LP Act or the 2004 LP Act?

[53] The costs orders were made by Garling DCJ on 22 April 2010. The 1987 LP Act was repealed by the 2004 LP Act, which commenced on 1 October 2005. Transitional provisions provided for the continued application of Div 5B of Pt 11 of the 1987 LP Act to a matter if the client first instructed the law practice in the matter before 1 October 2005.[59] Garling DCJ applied the 1987 LP Act. The appellants submitted that his Honour was correct to do so. This had been a common position below. Basten JA thought that the "matter" under the transitional provisions was the claim for party and party costs and that the 2004 LP Act applied. The respondents adopted Basten JA's analysis and in their written submissions asserted that the question should be determined by reference to the 2004 LP Act. The operative provisions of the two Acts are identical in their application to the appeals. Little attention was devoted to the operation of the transitional provisions on the hearing of the appeals. There are differences between the two schemes that are not raised by these appeals,[60] which make it appropriate to leave consideration of the effect of the transitional provisions to an occasion when it is in point.

[54] The appellants' submissions were based on Div 5B of Pt 11 of the 1987 LP Act and the Liability Act as enacted. In their submission, the meaning of the expression "personal injury damages" had not been affected by later amendments

57. *Cross v Certain Lloyds Underwriters* [2011] NSWCA 136 at [49] (*Cross*) per Basten JA (Hodgson JA agreeing at [1]), at [71] per Sackville AJA.
58. [2012] HCA 57 (*Williamson (No 2)*).
59. Schedule 9, cl 18(1) of the 2004 LP Act.
60. Under s 338A of the 2004 LP Act, there is provision for the maximum costs fixed under Div 9 of Pt 3.2 to be increased in the case of certain claims heard in the District Court. No equivalent provision was made under Div 5B of Pt 11 of the 1987 LP Act.

including those introduced in December 2002 by the Civil Liability Amendment (Personal Responsibility) Act 2002 (NSW) (the Personal Responsibility Act). There is no reason to consider that the meaning of "personal injury damages" has changed as the result of any of the amendments that have been made to the Liability Act, although the relationship between the two Acts may be clearer as a result of the amendments.

The legislative history

[55] Division 5B of Pt 11 was inserted into the 1987 LP Act by Sch 2 to the Liability Act. As enacted, s 198C(1) provided that "*personal injury damages* has the same meaning as in the [Liability Act]". At the time, the Liability Act consisted of two Parts. Part 1 was headed "Preliminary" and contained a definition section. Part 2 was headed "Personal injury damages" and contained provisions imposing restrictions of various kinds on the award of damages in claims for personal injury damages whether the claim was in tort, contract or otherwise. The expression "personal injury damages" was defined in s 3 to mean "damages that relate to the death of or injury to a person caused by the fault of another person". "Fault" was defined to include an act or omission. "Injury" was defined to mean "personal or bodily injury" and to include "pre-natal injury", "psychological or psychiatric injury" and "disease". Under s 9(2), statutory schemes governing compensation for motor accidents, work injuries, dust diseases, victims support and rehabilitation, discrimination and sporting injuries, together with sums paid under superannuation schemes or insurance policies or under the Industrial Relations Act 1996 (NSW), were excluded from the operation of Pt 2 of the Liability Act. Importantly, s 9(2)(a) excluded from the operation of Pt 2:

> ... an award where the fault concerned is an intentional act that is done with intent to cause injury or death or that is sexual assault or other sexual misconduct.

[56] The Liability Act was assented to on 18 June 2002. It operated with retrospective effect from 20 March 2002.[61] This was the date on which the Premier of New South Wales released a Ministerial statement, titled "Public liability insurance", announcing the measures to be enacted in the proposed civil liability legislation. An extract from the statement is set out in Basten JA's reasons. The Premier referred in the statement to "the number of small claims that are argued in a way that drives up legal costs and makes insurance more expensive". One way to address that problem was said to be "to cap legal costs for small claims to a proportion of the claim".[62]

[57] The restrictions on the recovery of party and party costs inserted into the 1987 LP Act by the Liability Act also operated with retrospective effect. They applied to legal services provided on or after 7 May 2002. On that date, the Premier announced the release of the draft Civil Liability Bill 2002[63] (the Liability Bill).

[58] In his second reading speech for the Liability Bill, the Premier described it as implementing "stage one of the Government's tort law reforms". The need for reform was said to be "vital to the survival of our community" in light of "the damage that the public liability crisis is doing to our sporting and cultural

61. Section 2 of the Liability Act.
62. *Cross* at [41].
63. New South Wales Hansard, Legislative Assembly, 28 May 2002, p 2085.

activities, small businesses and tourism operators, and our local communities". The second stage of the tort law reform program was proposed to be introduced in the next session of the parliament and to address "broad-ranging reforms to the law of negligence".[64] Reference was made to the "cap on fees" under the amendments to the 1987 LP Act. This, it was said, would "promote efficiency on the part of the legal profession and help to contain claims costs".[65] In conclusion, the Liability Bill was said to "build[] on the Government's work with the insurance industry and other jurisdictions to find solutions for people affected by the public liability crisis".[66]

[59] The second stage of the reforms initiated by the Liability Act was effected by the Personal Responsibility Act.[67] It was enacted not long after the final report of the Commonwealth Committee chaired by Justice Ipp was published.[68] The amendments introduced by the Personal Responsibility Act included Pt 1A, which contains a statement of the principles governing the determination of civil liability for the negligent infliction of harm. Provisions were also introduced dealing with mental harm,[69] proportionate liability,[70] the liability of public and other authorities,[71] intoxication,[72] self-defence and recovery by criminals,[73] good samaritans,[74] volunteers[75] and apologies.[76] These provisions were not confined to civil liability for personal injury or death. The award of "personal injury damages" continued to be governed by Pt 2. The definitions of "personal injury damages" and "injury" were removed from Pt 1 and inserted into Pt 2 in s 11. The definition of "personal injury damages" no longer contained reference to fault. "Personal injury damages" was now defined to mean "damages that relate to the death of or injury to a person".

[60] The Personal Responsibility Act effected a consequential amendment to the 1987 LP Act.[77] The description of "personal injury damages" in s 198C(1) was omitted and a new description was inserted. Section 198C(1) now provided "*personal injury damages* has the same meaning as in Part 2 of the [Liability Act]". Section 9 of the Liability Act was repealed. In its place, s 3B was inserted into Pt 1. Section 3B excluded the provisions of the Liability Act from applying to or in respect of civil liability under statutory schemes for compensation which largely corresponded to the exclusions under the former s 9. Relevantly, s 3B(1)(a) excluded from the provisions of the Liability Act the civil liability of a person "in respect of an intentional act that is done with intent to cause injury or death or that is sexual assault or other sexual misconduct".

64. New South Wales Hansard, Legislative Assembly, 28 May 2002, p 2085.
65. New South Wales Hansard, Legislative Assembly, 28 May 2002, p 2087.
66. New South Wales Hansard, Legislative Assembly, 28 May 2002, p 2088.
67. The relevant provisions of the Personal Responsibility Act commenced on 6 December 2002.
68. *Review of the Law of Negligence: Final Report*, Commonwealth of Australia, Canberra, 2002.
69. Part 3 of the Liability Act.
70. Part 4 of the Liability Act.
71. Part 5 of the Liability Act.
72. Part 6 of the Liability Act.
73. Part 7 of the Liability Act.
74. Part 8 of the Liability Act.
75. Part 9 of the Liability Act.
76. Part 10 of the Liability Act.
77. Schedule 4, cl 4.5 of the Personal Responsibility Act.

[61] The Liability Act has been further amended in respects to which it is not necessary to refer, save to note the insertion in Pt 2 of s 15B and the amendment to s 18(1) in 2006.[78] Section 15B makes provision for the award of damages for the loss of capacity to provide domestic services. The amendments made to s 18(1) were to preclude the award of interest on damages under s 15B. The exclusion of the provisions of the Liability Act with respect to the civil liability of a person for an intentional act done with intent to cause injury or death under s 3B(1)(a) was now subject to an exception in the case of ss 15B and 18(1) (in its application to the award of s 15B damages).[79] The effect of the 2006 amendments is that Pt 2 now applies to the award of damages with respect to the loss of capacity to provide domestic services that relate to the death of or injury to a person arising from an intentional act done with intent to cause injury or death.

The Court of Appeal

[62] Basten JA gave the leading judgment in the New South Wales Court of Appeal, with which Hodgson JA agreed. His Honour considered that the words in s 198C(1) "*personal injury damages* has the same meaning as in Part 2 of the [Liability Act]" admitted of a "broader inquiry" than if the provision read "personal injury damages as defined in".[80] In ascertaining that meaning, his Honour took into account the context of the definition in the source statute[81] and that "the cost-capping provisions were seen as part of a single package, having the same justification as the controls being imposed on awards of damages".[82] The incorporation of the meaning of "personal injury damages" in the Liability Act indicated a legislative intention that the scope and operation of the expression derive from the source statute.[83] His Honour concluded that the description of "personal injury damages" in s 198C(1) of the 1987 LP Act picks up the words of the definition in the Liability Act in their application under that Act[84] with the result that a party injured by intentional tortious conduct is not subject to the costs cap.[85]

[63] Sackville AJA also concluded that the description of "personal injury damages" in s 198C(1) means personal injury damages of the kind to which Pt 2 of the Liability Act applied.[86] His Honour, too, took into account that Div 5B of Pt 11 of the 1987 LP Act was enacted as "part of a broader statutory scheme for limiting the costs of personal injury claims" and that the scheme did not apply to awards of damages for personal injuries caused by intentional acts.[87] His Honour characterised claims in negligence for personal injury as "high volume litigation conducted or capable of being conducted along largely standardised lines", and which are usually brought against insured defendants.[88] This was by way of

78. Civil Liability Amendment Act 2006 (NSW).
79. Schedule 1, [1]–[4] of the Civil Liability Amendment Act 2006 (NSW).
80. *Cross* at [35].
81. *Cross* at [32]–[33] citing *Producers' Co-Operative Distributing Society Ltd v Commissioner of Taxation (NSW)* (1947) 75 CLR 134 at 137; [1948] AC 210 at 213.
82. *Cross* at [49].
83. *Cross* at [59].
84. *Cross* at [49].
85. *Cross* at [59].
86. *Cross* at [71].
87. *Cross* at [73].
88. *Cross* at [74].

contrast with claims arising from the intentional infliction of injury.[89] This contrast highlights a rationale for capping costs in claims in negligence for personal injury which does not readily apply to claims arising from intentional torts.

[64] Five weeks after judgment was delivered in these appeals, a differently constituted New South Wales Court of Appeal (Hodgson, Campbell and Macfarlan JJA) gave judgment in *New South Wales v Williamson*.[90] The claim in *Williamson* was for damages for personal injury sustained in an assault and damages for false imprisonment. The latter included claims for the loss of liberty, loss of dignity and exemplary damages. The claim was settled and judgment entered for the plaintiff by consent for an undifferentiated sum. Costs were to be assessed or agreed.[91] Resolution of the present question was not determinative on the view that any of the judges took in *Williamson*. However, Campbell and Macfarlan JJA both doubted the correctness of the construction adopted by the Court of Appeal in these proceedings. Hodgson JA, who sat on each appeal, adhered to his earlier agreement with Basten JA[92] and gave additional reasons for that conclusion. His Honour took into account that s 198C was introduced into the 1987 LP Act as part of "a single package, addressing a perceived crisis in public liability insurance". He considered that the phrase "'the same meaning as in the [Liability Act]' ... could be understood as directing attention to the meaning *effectually* given in the [Liability Act], and thus as incorporating the limitations" on its application.[93]

[65] Campbell JA made much the same point as Sackville AJA in these appeals respecting the distinction between small claims in negligence, which fit a "fairly common pattern", and small claims for damages for assault, which do not.[94] His Honour viewed the enactment of the costs restrictions as part of a single scheme and remarked that the imposition of a cap on costs in claims for assault did not appear to come within the mischief to which the Liability Act was principally aimed,[95] which he identified as the increasing costs of insurance premiums. He noted that insurance for intentional torts will usually be unprocurable.[96] His Honour went on to say this (at [29]):[97]

> [29] ... However, it is the words of the statute that are the starting point in statutory construction. While those words are to be construed in their context (which includes the objective of the legislation in question), clear words in the statute will prevail.

[66] Macfarlan JA agreed with Campbell JA. His Honour recognised the "contextual and policy arguments" favouring the views expressed by the Court of Appeal in the present case but considered the text of the 2004 LP Act to be clear. His Honour said that the meaning of "personal injury damages" is found in the definition, but the scope of the application of the expression is a separate question.[98] His Honour considered that (at [119]):[99]

89. *Cross* at [75].
90. [2011] NSWCA 183 (*Williamson*).
91. *Williamson* at [16].
92. *Williamson* at [3].
93. *Williamson* at [4] (emphasis in original).
94. *Williamson* at [29].
95. *Williamson* at [29] and [79].
96. *Williamson* at [29].
97. *Williamson* at [29].
98. *Williamson* at [118].

> [119] ... the literal meaning of the text of a statutory provision must prevail unless it can be disregarded upon the ground that that literal meaning gives rise to an absurdity or the text is sufficiently tractable to accommodate the meaning suggested by contextual or policy considerations.

The submissions

[67] The parties' submissions mirrored the differing views of the members of the Court of Appeal in these appeals and in *Williamson*. The appellants contended that "the ordinary meaning of [the statutory language] plainly indicated that the Legal Profession Acts were employing the meaning of an expression found (and clearly defined) in another Act". The appellants were critical of the Court of Appeal's recourse to extrinsic materials "to discern an intended meaning other than the ordinary meaning conveyed by the statutory language". The respondents contended that the Court of Appeal was correct to take into account that Div 5B of Pt 11 of the 1987 LP Act had been enacted as part of a scheme with the Liability Act and to give a purposive construction to the provision.

Construing s 198C(1)

[68] Statutory construction involves the identification of the purpose of a statute or a statutory provision. A court undertaking that task is concerned with the assignment of the legal meaning to the words of the text, a task that will usually, but not always, correspond with the ordinary grammatical meaning of the text. In the joint reasons in *Project Blue Sky Inc v Australian Broadcasting Authority*,[100] it was said (at [78]):

> [78] However, the duty of a court is to give the words of a statutory provision the meaning that the legislature is taken to have intended them to have. Ordinarily, that meaning (the legal meaning) will correspond with the grammatical meaning of the provision. But not always. The context of the words, the consequences of a literal or grammatical construction, the purpose of the statute or the canons of construction may require the words of a legislative provision to be read in a way that does not correspond with the literal or grammatical meaning.

[69] In the last-mentioned respect, their Honours referred with approval to the statement in Mr Bennion's text:[101]

> Furthermore there needs to be brought to the grammatical meaning of an enactment due consideration of the relevant matters drawn from the context (using that term in its widest sense). Consideration of the enactment in its context may raise factors that pull in different ways. For example the desirability of applying the clear literal meaning may conflict with the fact that this does not remedy the mischief that Parliament intended to deal with.

99. *Williamson* at [119] citing *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252; 267 ALR 204; 115 ALD 493; [2010] HCA 23 at [27]–[33] (*Saeed*); *Catlow v Accident Compensation Commission* (1989) 167 CLR 543 at 550; 87 ALR 663 at 668; [1989] HCA 43.
100. (1998) 194 CLR 355; 153 ALR 490; [1998] HCA 28 at [78] (*Project Blue Sky*) per McHugh, Gummow, Kirby and Hayne JJ (footnote omitted).
101. *Project Blue Sky* at [78] per McHugh, Gummow, Kirby and Hayne JJ citing F Bennion, *Statutory Interpretation*, 3rd ed, Butterworths, London, 1997, pp 343–4 (footnotes omitted).

[70] While consideration of extrinsic materials should not displace the clear meaning of the text of a provision,[102] the purpose of a provision may be elucidated by appropriate reference to them.[103] It has often been said that the clear meaning of the text of a statute or a statutory provision is the surest guide to the meaning of "the intention of the legislature",[104] an expression used metaphorically.[105] Nevertheless, it is uncontroversial that in determining the meaning of the text of a statute or provision a court may take into account the general purpose and policy of a provision and, in particular, the mischief that it is intended to remedy.[106] It was for the latter purpose that the Court of Appeal had recourse to the extrinsic materials. This did not involve error.[107] The extrinsic materials indicated that the Liability Act was enacted to deal with a perceived problem involving the high cost of *negligence* claims and the impact of such claims on the cost of insurance. This conclusion is uncontroversial.[108] Was it right to conclude that Div 5B of Pt 11 of the 1987 LP Act was enacted to remedy the same problem? The extrinsic materials suggest that it was. So does the retrospective operation of the Division. The latter is a strong indication that the scheme was enacted as part of the legislative response to the perceived crisis involving negligence claims. The enactment of Div 5B in a Schedule to the Liability Act and the choice to describe "personal injury damages" by reference to the meaning of the expression in the Liability Act support that conclusion. The definition of "personal injury damages" in the Liability Act is not elaborate and

102. *Saeed* at [33]–[34] per French CJ, Gummow, Hayne, Crennan and Kiefel JJ. See also *R v Bolton; Ex parte Beane* (1987) 162 CLR 514 at 518; 70 ALR 225 at 228; [1987] HCA 12 per Mason CJ, Wilson and Dawson JJ.
103. *Lacey v Attorney-General (Qld)* (2011) 242 CLR 573; 275 ALR 646; [2011] HCA 10 at [44] per French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ.
104. *Sovar v Henry Lane Pty Ltd* (1967) 116 CLR 397 at 405; [1967] ALR 609 at 614; [1967] HCA 31 per Kitto J; *Byrne v Australian Airlines Ltd* (1995) 185 CLR 410 at 459; 131 ALR 422 at 456–6; [1995] HCA 24 per McHugh and Gummow JJ; *Purvis v New South Wales* (2003) 217 CLR 92; 202 ALR 133; 77 ALD 570; [2003] HCA 62 at [92] per McHugh and Kirby JJ; *Dossett v TKJ Nominees Pty Ltd* (2003) 218 CLR 1; 202 ALR 428; [2003] HCA 69 at [10] per McHugh J; *Singh v Commonwealth* (2004) 222 CLR 322; 209 ALR 355; 79 ALD 425; [2004] HCA 43 at [19]–[20] per Gleeson CJ; *Director of Public Prosecutions (Vic) v Le* (2007) 232 CLR 562; 240 ALR 204; [2007] HCA 52 at [29] per Gummow and Hayne JJ; *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* (2009) 239 CLR 27; 260 ALR 1; [2009] HCA 41 at [47] (*Alcan*) per Hayne, Heydon, Crennan and Kiefel JJ.
105. *Zheng v Cai* (2009) 239 CLR 446; 261 ALR 481; 54 MVR 427; [2009] HCA 52 at [28].
106. *Re Heydon's Case* (1584) 3 Co Rep 7a at 7b; 76 ER 637 at 638; *Commissioner for Railways (NSW) v Agalianos* (1955) 92 CLR 390 at 397; [1955] ALR 645 at 649; [1955] HCA 27 per Dixon CJ; *Bropho v Western Australia* (1990) 171 CLR 1 at 20; 93 ALR 207 at 216; [1990] HCA 24 (*Bropho*) per Mason CJ, Deane, Dawson, Toohey, Gaudron and McHugh JJ; *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384 at 408; 141 ALR 618 at 635; [1997] HCA 2 (*CIC Insurance*) per Brennan CJ, Dawson, Toohey and Gummow JJ; *Alcan* at [47] per Hayne, Heydon, Crennan and Kiefel JJ.
107. *Bropho* at CLR 20; ALR 216 per Mason CJ, Deane, Dawson, Toohey, Gaudron and McHugh JJ referring, inter alia, to s 15AB of the Acts Interpretation Act 1901 (Cth) and the equivalent provision under s 19 of the Interpretation Act 1984 (WA). The equivalent provision in New South Wales is s 34 of the Interpretation Act 1987 (NSW). See also *CIC Insurance* at CLR 408; ALR 635 per Brennan CJ, Dawson, Toohey and Gummow JJ; *Newcastle City Council v GIO General Ltd* (1997) 191 CLR 85 at 99; 149 ALR 623 at 631; [1997] HCA 53 per Toohey, Gaudron and Gummow JJ.
108. *Harriton v Stephens* (2006) 226 CLR 52; 226 ALR 391; [2006] HCA 15 at [134]–[135] per Kirby J; *Roads and Traffic Authority (NSW) v Dederer* (2007) 234 CLR 330; 238 ALR 761; 48 MVR 288; [2007] HCA 42 at [265] per Callinan J; *Insight Vacations Pty Ltd v Young* (2011) 243 CLR 149; 276 ALR 497; [2011] HCA 16 at [14].

the scope and operation of the Liability Act is clearly stated in s 3B. Something more than economy may be discerned in the choice to incorporate the meaning of the expression in the Liability Act into Div 5B.

[71] The Liability Act deals with the award of personal injury damages by courts and tribunals and Div 5B of Pt 11 of the 1987 LP Act deals with claims for personal injury damages. Observing this circumstance does not suggest a reason for concluding that each is not directed to addressing the same problem involving the reduction of the cost of negligence claims. There are features of the conduct of personal injury negligence claims which provide a rationale for the imposition of a cap on legal costs in such claims. They are the features noted by Sackville AJA and Campbell JA to which reference has been made earlier in these reasons. These features are also noted by Mason P in *Newcastle City Council v McShane (No 3)* with particular reference to the conduct of personal injury litigation by specialist members of the profession in New South Wales.[109]

[72] If, as urged by the appellants, the presumed legislative intent of Div 5B is the achievement of some wider purpose than restricting recovery of costs in small negligence claims, what sensible reason could be advanced for confining the scheme to small claims in which damages for personal injury are sought? The facts in *Williamson* highlight the irrationality of a cap that applies to an action based on an intentional tort in which a claim is made for personal injury but not to the same action when no such claim is made.

[73] Consideration of the mischief with which Div 5B was intended to deal and the express language of s 198C(1) weighs against interpreting that provision as merely picking up the words of the definition in s 11 of the Liability Act. The appellants' construction requires that s 198C(1) be read as if it provided "personal injury damages means 'personal injury damages' as defined in s 11 of the Liability Act". That method of expressly incorporating a definition from another Act is used in s 198C(2)(c), which provides that "work injury damages" is "as defined" in the Workplace Injury Management and Workers Compensation Act 1998 (NSW). A different formulation is employed in the same section with respect to the expression "personal injury damages". It is a formulation that expressly directs attention to the meaning of the expression as in Pt 2 of the Liability Act. In its terms, the definition in s 11 applies to Pt 2. The meaning of the expression "personal injury damages" in Pt 2 is plainly circumscribed by s 3B of the Liability Act. The clear purpose of s 198C(1), so expressed, is to confine "personal injury damages" to damages relating to the death of or injury to a person (in the extended way injury is defined) to which Pt 2 of the Liability Act applies. The rationale for such confinement has already been explained. This construction of s 198C(1) reflects the evident purpose for which Div 5B was enacted, gives full effect to the statutory language of s 198C(1) and avoids unintended, if not potentially capricious, results.

[74] One further submission needs to be mentioned. Section 198C(2) of the 1987 LP Act provides that Div 5B does not apply with respect to costs under various statutory schemes: Pt 2 of the Victims Support and Rehabilitation Act 1996 (NSW); the Motor Accidents Act 1988 (NSW) or Motor Accidents Compensation Act 1999 (NSW); the Workplace Injury Management and Workers Compensation Act 1998 (NSW) and the Dust Diseases Tribunal Act 1989 (NSW). The exclusions in s 198C(2) overlap but are not co-extensive with those

109. *Newcastle City Council v McShane (No 3)* (2005) 65 NSWLR 155; [2005] NSWCA 437 at [28].

in s 3B(1) of the Liability Act. The appellants submit that had it been the intention to exclude small claims for personal injury damages resulting from acts done with intent to cause injury or death from the operation of Div 5B, it might be expected that an exclusion in the same terms as s 3B(1)(a) of the Liability Act would have been included in s 198C(2). The submission does not advance the argument either way. If the correct meaning of s 198C(1) is as the respondents contend, there was no occasion to expressly exclude claims involving intentional torts.

[75] What function do the exclusions serve? Division 5B applies to the recovery of party and party costs where the amount recovered on the claim does not exceed the threshold, whether the amount is recovered following trial or by way of compromise. At the time it was enacted, s 198C(2) operated to exclude from the regime of Div 5B the recovery of costs under statutory schemes that make discrete provision for the recovery of party and party costs.[110] The Motor Accidents Compensation Act 1999 (NSW) made such provision, although it may be noted that its predecessor did not. Basten JA's conclusion that the exclusions were provided by way of abundant caution to meet any argument of implied repeal should be accepted.[111] So should the Court of Appeal's conclusion that for the purposes of s 198C(1) of the 1987 LP Act (now s 337(1) of the 2004 LP Act) the meaning of "personal injury damages" in Pt 2 of the Liability Act was not changed by a sidewind by the 2006 amendments to that Part respecting damages for the loss of capacity to provide personal services.[112]

Orders

[76] For the reasons given, the three appeals should be dismissed with costs.

[77] **Kiefel J.** The facts, statutory materials and legislative history relevant to these appeals are comprehensively surveyed in the judgments of French CJ and Hayne J and of Crennan and Bell JJ and it is not necessary for me to repeat them all. Each of the respondents suffered injuries as a result of an assault. Each received an award of damages of less than $100,000. An order for costs was made in favour of each respondent on 22 April 2010 in the District Court of New South Wales. The question posed by these appeals is whether the orders for costs are subject to the limitation imposed by s 198D of the Legal Profession Act 1987 (NSW) (the LP Act). That question turns upon the meaning to be given to the term "personal injury damages" for the purposes of the LP Act.

110. See s 35 of the Victims Support and Rehabilitation Act 1996 (NSW) and the Victims Support and Rehabilitation Rule 1997 (NSW); s 149 of the Motor Accidents Compensation Act 1999 (NSW) and the Motor Accidents Compensation Regulation (No 2) 1999 (NSW) (replaced in 2005 by the Motor Accidents Compensation Regulation 2005 (NSW)); s 337 of the Workplace Injury Management and Workers Compensation Act 1998 (NSW) and the Workers Compensation (General) Regulation 1995 (NSW) (now contained in the Workers Compensation Regulation 2010 (NSW)); s 29(2) of the Dust Diseases Tribunal Act 1989 (NSW) (s 29 was repealed in 2005 and the Act does not presently restrict the recovery of costs).

111. *Cross* at [59].

112. *Cross* at [56] per Basten JA, at [80] per Sackville AJA.

The legislation in summary

[78] At the outset it is necessary to mention that the LP Act was repealed by the Legal Profession Act 2004 (NSW),[113] which provides for restrictions on legal costs in terms similar to the LP Act. The determination of these appeals is properly conducted by reference to the LP Act, for the reasons given in the joint judgments.[114]

[79] The LP Act dealt with a number of subjects affecting the conduct and the practice of legal practitioners. Part 11 dealt with legal fees and other costs. Upon its enactment,[115] the Civil Liability Act 2002 (NSW) (the Liability Act) contained provisions concerning the assessment of damages in cases involving personal injuries. At the same time, the Liability Act inserted Div 5B, entitled "Maximum costs in personal injury damages matters", into Pt 11 of the LP Act.[116] By s 198C(2), the Division was not to apply to costs payable under or pursuant to certain specified legislation, to which reference will be made later in these reasons.[117]

[80] Section 198D(1) in Div 5B fixed the maximum costs for legal services provided to a party in connection with a claim for personal injury damages where the amount recovered on the claim did not exceed $100,000. The costs were fixed at 20% of the amount recovered or $10,000, whichever was greater. Subsection (4) provided that a legal practitioner was not entitled to be paid an amount for legal services in excess of the maximum stipulated, a court or tribunal could not order the payment of costs in an amount more than the maximum, and a costs assessor could not determine an amount in excess of the maximum.

[81] By s 198E(1), Div 5B did not apply to the recovery of costs as between a solicitor or barrister and the solicitor or barrister's client, if recovery was provided for by a costs agreement which complied with Div 3 of Pt 11 of the LP Act. Section 198F(1) provided that Div 5B did not prevent an award, on an indemnity basis, of costs incurred after the date when a reasonable offer of compromise was made if the offer was not accepted. Section 198G allowed a court to order that legal services provided to a party be excluded from the operation of the Division, if they were provided in response to any action on the claim by the other party that was not reasonably necessary.

[82] For the purposes of Div 5B, the term "personal injury damages" was defined in s 198C(1) of the LP Act to have "the same meaning as in the [Liability Act]". "Personal injury damages" was defined in s 3 in Pt 1 of the Liability Act to mean "damages that relate to the death of or injury to a person caused by the fault of another person". "Injury" was further defined, as were "damages" and "fault".[118]

[83] Part 2 of the Liability Act was entitled "Personal injury damages" and contained provisions regulating the assessment of damages associated with actions for personal injuries caused by negligence, including damages for economic and non-economic loss. By s 10, a court could not award damages, or interest on damages, to a claimant contrary to Pt 2. Section 9(1) had the effect that

113. Section 735 and Sch 1 of the Legal Profession Act 2004 (NSW), as enacted.
114. Reasons of French CJ and Hayne J at [19]–[22], reasons of Crennan and Bell JJ at [53].
115. The Civil Liability Act 2002 (NSW) was assented to on 18 June 2002, but is taken to have commenced on 20 March 2002: s 2.
116. Section 8, Sch 2, item 2.2 [2] of the Civil Liability Act 2002.
117. At [91].
118. Section 3 of the Civil Liability Act 2002.

Pt 2 did not apply where an award of personal injury damages was excluded from the operation of the Part. The first of the eight classes of award excluded by s 9(2) was "an award where the fault concerned is an intentional act that is done with intent to cause injury or death or that is sexual assault or other sexual misconduct".

[84] The Civil Liability Amendment (Personal Responsibility) Act 2002 (NSW) (the Personal Responsibility Act) effected substantial amendment to the Liability Act by expanding the operation of the Liability Act, although not in such a way as to affect its terms or operation so far as is relevant to these appeals. The amendments retained Pt 2 as the Part dealing with personal injury damages. The definition of "personal injury damages" was moved into Pt 2 in s 11 and amended to read "personal injury damages means damages that relate to the death of or injury to a person". The reference to fault was excluded. The definition of "injury" changed, but not in any presently material respect. Section 11A applied Pt 2 to an award of personal injury damages, except where an award was excluded from the operation of Pt 2 by s 3B, which appeared in Pt 1. Section 3B(1)(a) excluded civil liability in respect of intentional acts and sexual assaults, in substantially the same terms as s 9(2)(a) had done. The Personal Responsibility Act also amended the definition of "personal injury damages" in s 198C(1) of the LP Act to read "personal injury damages has the same meaning as in Part 2 of the [Liability Act]".

The issue

[85] Because the injuries suffered by the respondents were caused by intentional acts, a court's assessment of damages arising from the injuries is not subject to the Liability Act, by reason of the express exclusion in s 3B(1)(a). However, the LP Act did not expressly exclude from the application of Div 5B costs for legal services provided to a party in connection with a claim for personal injury damages in respect of intentional acts. The question is whether the LP Act may be taken, nevertheless, to have intended to exclude such costs because of its reference in the definition in s 198C(1) to personal injury damages as having "the same meaning as in" the Liability Act or, more particularly, Pt 2 thereof.

[86] "Personal injury damages" as defined in the Liability Act were damages relating to the death of or injury to a person. Without more, Div 5B of Pt 11 of the LP Act would apply to the costs for the legal services provided to the respondents in connection with their claims. So much was conceded by Basten JA in the Court of Appeal.[119] However, if the words in s 198C(1) of the LP Act, "the same meaning as in", encompassed the application of the Liability Act, which is to say that the Liability Act did not apply to personal injuries caused by intentional acts, then it may be that Div 5B of Pt 11 of the LP Act would not apply to limit the costs that the respondents could recover.

[87] In the Court of Appeal, Basten JA, with whom Hodgson JA and Sackville AJA agreed,[120] held that the definition in s 198C(1) extended beyond the definition of the expression "personal injury damages" in the Liability Act to the scope of its application in Pt 2.[121] The matter which appears to have been most influential to the conclusion reached by their Honours was that the costs

119. *Cross v Certain Lloyds Underwriters* [2011] NSWCA 136 at [25] (*Cross*).
120. *Cross* at [1] and [80].
121. *Cross* at [59].

limiting provisions of the LP Act were part of a "broader scheme"[122] or a "single package"[123] in conjunction with the Liability Act, that scheme being directed to a perceived crisis in public liability insurance and being one from which awards of damages for personal injuries by intentional acts were excluded.

Approaches to statutory construction

[88] The fundamental object of statutory construction is to ascertain legislative intention, understood as the intention that the courts will impute to the legislature by a process of construction, by reference to the language of the statute viewed as a whole.[124] The starting point for this process of construction is the words of the provision in question read in the context of the statute. Context is also spoken of in a broader sense as including the general purpose and policy of the legislation, in particular the mischief to which the statute is directed and which the legislature intended to remedy.[125]

[89] It is legitimate to resort to materials outside the statute, but it is necessary to bear in mind the purpose of doing so and the process of construction to which it is directed. That purpose is, generally speaking, to identify the policy of the statute in order to better understand the language and intended operation of the statute. An understanding of legislative policy by these means does not provide a warrant for departing from the process of statutory construction and attributing a wider operation to a statute than its language and evident operation permit.

The LP Act — Language, context and purpose

[90] The reference in s 198C(1) of the LP Act to the term "personal injury damages" as having the same meaning as in the Liability Act obviously directs attention to the definition of that term in the Liability Act. The words "as in" may be read as "as given in". Section 198C(1) did not refer to the "meaning and effect" of the Liability Act,[126] which may have encompassed the operation of that Act. Without more, the words in s 198C(1) conveyed that the term was to have the meaning given to it in the Liability Act by way of definition. A construction which is consistent with the ordinary meaning and grammatical sense of the words used in s 198C(1) has a strong advantage over other possible constructions.[127]

[91] The LP Act also identified the circumstances in which the fixing of maximum costs would not apply, as has been previously mentioned.[128] Not all legal costs payable in connection with claims for personal injury damages were subject to Div 5B. Section 198C(2) of the LP Act specifically provided that Div 5B did not apply so as to limit the costs payable under certain statutes. There

122. *Cross* at [73] per Sackville AJA.
123. *Cross* at [49] per Basten JA.
124. *Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation* (1981) 147 CLR 297 at 304; 35 ALR 151 at 156; [1981] HCA 26 (*Cooper Brookes*) per Gibbs CJ, at CLR 320; ALR 169 per Mason and Wilson JJ; *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355; 153 ALR 490; [1998] HCA 28 at [69].
125. *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384 at 408; 141 ALR 618 at 635; [1997] HCA 2; *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* (2009) 239 CLR 27; 260 ALR 1; [2009] HCA 41 at [47].
126. See *New South Wales v Williamson* [2011] NSWCA 183 at [4(2)] per Hodgson JA, where his Honour understood the words of s 198C(1) to direct attention to the "meaning *effectually* given" in the Civil Liability Act 2002.
127. *Cooper Brookes* at CLR 321; ALR 170.
128. At [79].

were four statutes identified, including the Victims Support and Rehabilitation Act 1996 (NSW) and the Workplace Injury Management and Workers Compensation Act 1998 (NSW).

[92] The most likely explanation for the presence of the four exclusions in s 198C(2) is that they identified existing legislative costs regimes so as to avoid any doubt about whether those regimes would continue to have effect following the introduction of Div 5B.[129] So understood, the exclusion of legal costs associated with claims arising from intentional acts is explicable. It remains the case, however, that legal costs charged in connection with such claims have not been excluded from the operation of Div 5B.

[93] The evident purpose of the LP Act was to contain and limit the legal costs which may have been charged on recovered claims for personal injury damages. The limit imposed by Div 5B would have applied to orders for costs made by a court following upon an award of damages, but it was not limited to that circumstance. It would also have applied to legal costs associated with claims which had not been subjected to court processes. It applied to any legal costs charged for services in connection with a claim for personal injury damages where the amount recovered did not exceed $100,000. In all these instances, the amount recovered was the essential criterion.

The LP Act — Part of a broader scheme?

[94] The evident purpose of the Liability Act is to control, in the sense of limit, the amount of damages which may be awarded in personal injury claims. So much was confirmed by the second reading speech to the Liability Act,[130] to which the Court of Appeal referred.[131] In the second reading speech, it was also pointed out that awards for personal injuries caused by intentional acts, or acts involving sexual assault, were deliberately excluded from the purview of the Liability Act because compensation for injuries arising from serious criminal acts should not be subject to limitation.[132] So much may be inferred from the very fact of the exclusion.

[95] The second reading speech also identified a wider common purpose for the controls effected by the Liability Act and the limits placed on costs by the LP Act. The Liability Act was enacted, and the LP Act amended, in response to what was perceived to be a crisis in the affordability of public liability insurance,[133] which was adversely affecting many bodies and small businesses in the community. The crisis had been brought about by substantial increases in premiums charged for insurance of that kind. Premiums are directly affected by the sums insurers are required to pay by way of indemnity for awards of damages and legal costs following upon claims for personal injuries caused by negligence.

[96] The Court of Appeal clearly considered that the identification of a broader purpose meant that the two statutes formed part of a statutory scheme. In one sense that is correct, as they were both directed to that common purpose. The statutes were also connected by their terms. The drafting means chosen effected amendments to the LP Act via the medium of the Liability Act, and the LP Act referred to the Liability Act for the definition of "personal injury damages".

129. As Basten JA observed in the Court of Appeal: *Cross* at [59].
130. New South Wales Hansard, Legislative Assembly, 28 May 2002, p 2086.
131. *Cross* at [46]–[48].
132. New South Wales Hansard, Legislative Assembly, 28 May 2002, p 2086.
133. New South Wales Hansard, Legislative Assembly, 28 May 2002, p 2085.

[97] The scheme identified by the Court of Appeal contained the particular element of excluding awards of personal injury damages for injuries resulting from an intentional act. However, that element is found only in the Liability Act. For a scheme to be identified, it must involve two statutes not just having a wider common purpose and some connection, but operating together. If the operation of each statute could be said to depend upon the other, there would be a warrant for construing them together in this way.[134] In that event, it might be said that the definition in s 198C(1) of the LP Act should be read to encompass the operation of the Liability Act.

[98] It does not follow from the identification of a broader purpose beyond the more immediate objects of each of the two statutes, nor from the limited connection between them, that they were interdependent in any meaningful way. It is necessary to consider each of the statutes and the means by which they are intended to achieve their respective objectives, in order to determine whether they form part of a single scheme. There are a number of indicia which tell against the LP Act and the Liability Act operating in this way.

[99] When it is said that statutes form part of a legislative scheme such that they should be read together, the statutes usually deal with the same subject matter. Here the LP Act and the Liability Act each had its own sphere of operation by reference to different subject matter: the Liability Act was concerned with the calculation of awards of damages; the LP Act's concern was with legal costs associated with all claims for personal injury damages where the sum recovered was no more than $100,000.

[100] The LP Act may have operated on orders for costs made following awards assessed in accordance with the Liability Act, but it was not limited in its operation to that circumstance. The size of the sum recovered was the only criterion identified by the LP Act, apart from the existence of a claim for personal injury damages and legal costs payable in connection with it, for the application of Div 5B. That criterion was not connected with any matter in the Liability Act.

[101] Further, there was no symmetry between the exclusions effected by each of the statutes. There were many more statutes and types of awards excluded by s 3B of the Liability Act than there were statutes excluded from the costs regime of Div 5B of Pt 11 of the LP Act. In the LP Act, the evident intention was to exclude only costs provided under existing legislative costs regimes. No intention is evident to exclude costs in other areas or to align the exclusion of costs to the awards excluded by the Liability Act.

[102] These indicia confirm that the two statutes operated independently of each other and provide no warrant for reading the LP Act by reference to the application of the Liability Act. Whether a claim resulted in an award of damages which was, or was not, calculated by reference to the Liability Act had no bearing upon the operation of Div 5B of Pt 11 of the LP Act. Division 5B was concerned with the proportion between the amount of the damages recovered and the legal costs associated with the claim that resulted in recovery. Division 5B operated universally with respect to legal costs where a claim resulted in recovery of damages of no more than $100,000.

[103] The operation of Div 5B read in this way is nevertheless consistent with the broader purpose of reducing the cost of public liability insurance. Division 5B sought to achieve this purpose by means which differed from those employed by

134. See, for example, *Sweeney v Fitzhardinge* (1906) 4 CLR 716 at 726; [1906] HCA 73.

the Liability Act. Nevertheless, in so far as the two statutes were both directed to that purpose, it may be expected that they would not operate inconsistently with each other. Division 5B of Pt 11 of the LP Act, applied universally, was not inconsistent with the purpose underlying the exclusion of awards of damages for personal injuries resulting from intentional acts, namely that compensation for such damages not be limited. So far as concerns the costs of legal services in seeking an award, subject to the exceptions in Div 5B, a claimant's lawyer could not charge more than the maximum amount specified except by agreement with the claimant and the other party could not recover more than that amount in the event that the claimant was unsuccessful.

[104] There is no basis for construing the term "personal injury damages" other than by reference to the definition given in the Liability Act.

[105] I agree with the orders proposed by French CJ and Hayne J.

Orders

In each appeal:

(1) Appeal allowed.

(2) Set aside paras 4 and 5 of the order of the Court of Appeal of the Supreme Court of New South Wales made on 1 June 2011, and, in their place, order that the appeal to that court be dismissed.

(3) Appellants to pay the respondent's costs of the appeal to this court.

JUSTIN CARTER
BARRISTER

Income Tax Assessment Act 1936

Act No. 27 of 1936 as amended

This compilation was prepared on 11 September 2012
taking into account amendments up to Act No. 115 of 2012

Volume 3 includes: Table of Contents
Sections 124ZM – 202G

The text of any of those amendments not in force
on that date is appended in the Notes section

The operation of amendments that have been incorporated may be affected by application provisions that are set out in the Notes section

Part III—Liability to taxation

more purposes of which that particular purpose is the dominant purpose.

177B Operation of Part

(1) Nothing in the following limit the operation of this Part:
  (a) the provisions of this Act (other than this Part);
  (b) the *International Tax Agreements Act 1953*;
  (c) the *Petroleum (Timor Sea Treaty) Act 2003*.

(2) This Part does not affect the operation of Division 393 of the *Income Tax Assessment Act 1997* (Farm management deposits).

(3) Where a provision of this Act other than this Part is expressed to have effect where a deduction would be allowable to a taxpayer but for or apart from a provision or provisions of this Act, the reference to that provision or to those provisions, as the case may be, shall be read as including a reference to subsection 177F(1).

(4) Where a provision of this Act other than this Part is expressed to have effect where a deduction would otherwise be allowable to a taxpayer, that provision shall be deemed to be expressed to have effect where a deduction would, but for subsection 177F(1), be otherwise allowable to the taxpayer.

177C Tax benefits

(1) Subject to this section, a reference in this Part to the obtaining by a taxpayer of a tax benefit in connection with a scheme shall be read as a reference to:
  (a) an amount not being included in the assessable income of the taxpayer of a year of income where that amount would have been included, or might reasonably be expected to have been included, in the assessable income of the taxpayer of that year of income if the scheme had not been entered into or carried out; or
  (b) a deduction being allowable to the taxpayer in relation to a year of income where the whole or a part of that deduction would not have been allowable, or might reasonably be expected not to have been allowable, to the taxpayer in relation to that year of income if the scheme had not been entered into or carried out; or

(ba) a capital loss being incurred by the taxpayer during a year of income where the whole or a part of that capital loss would not have been, or might reasonably be expected not to have been, incurred by the taxpayer during the year of income if the scheme had not been entered into or carried out; or

(bb) a foreign income tax offset being allowable to the taxpayer where the whole or a part of that foreign income tax offset would not have been allowable, or might reasonably be expected not to have been allowable, to the taxpayer if the scheme had not been entered into or carried out;

and, for the purposes of this Part, the amount of the tax benefit shall be taken to be:

(c) in a case to which paragraph (a) applies—the amount referred to in that paragraph; and

(d) in a case to which paragraph (b) applies—the amount of the whole of the deduction or of the part of the deduction, as the case may be, referred to in that paragraph; and

(e) in a case to which paragraph (ba) applies—the amount of the whole of the capital loss or of the part of the capital loss, as the case may be, referred to in that paragraph; and

(f) in a case where paragraph (bb) applies—the amount of the whole of the foreign income tax offset or of the part of the foreign income tax offset, as the case may be, referred to in that paragraph.

(2) A reference in this Part to the obtaining by a taxpayer of a tax benefit in connection with a scheme shall be read as not including a reference to:

(a) the assessable income of the taxpayer of a year of income not including an amount that would have been included, or might reasonably be expected to have been included, in the assessable income of the taxpayer of that year of income if the scheme had not been entered into or carried out where:

(i) the non-inclusion of the amount in the assessable income of the taxpayer is attributable to the making of an agreement, choice, declaration, agreement, election, selection or choice, the giving of a notice or the exercise of an option (expressly provided for by this Act or the *Income Tax Assessment Act 1997*) by any person, except one under Subdivision 126-B, 170-B or 960-D of the *Income Tax Assessment Act 1997*; and

(ii) the scheme was not entered into or carried out by any person for the purpose of creating any circumstance or state of affairs the existence of which is necessary to enable the declaration, agreement, election, selection, choice, notice or option to be made, given or exercised, as the case may be; or

(b) a deduction being allowable to the taxpayer in relation to a year of income the whole or a part of which would not have been, or might reasonably be expected not to have been, allowable to the taxpayer in relation to that year of income if the scheme had not been entered into or carried out where:

(i) the allowance of the deduction to the taxpayer is attributable to the making of a declaration, agreement, election, selection or choice, the giving of a notice or the exercise of an option by any person, being a declaration, agreement, election, selection, choice, notice or option expressly provided for by this Act or the *Income Tax Assessment Act 1997*, except one under Subdivision 960-D of the *Income Tax Assessment Act 1997*; and

(ii) the scheme was not entered into or carried out by any person for the purpose of creating any circumstance or state of affairs the existence of which is necessary to enable the declaration, agreement, election, selection, choice, notice or option to be made, given or exercised, as the case may be; or

(c) a capital loss being incurred by the taxpayer during a year of income the whole or part of which would not have been, or might reasonably be expected not to have been, incurred by the taxpayer during the year of income if the scheme had not been entered into or carried out where:

(i) the incurring of the capital loss by the taxpayer is attributable to the making of a declaration, agreement, choice, election or selection, the giving of a notice or the exercise of an option (expressly provided for by this Act or the *Income Tax Assessment Act 1997*) by any person, except one under Subdivision 126-B, 170-B or 960-D of the *Income Tax Assessment Act 1997*; and

(ii) the scheme was not entered into or carried out by any person for the purpose of creating any circumstance or state of affairs the existence of which is necessary to

enable the declaration, agreement, election, selection, notice or option to be made, given or exercised, as the case may be; or

(d) a foreign income tax offset being allowable to the taxpayer the whole or a part of which would not have been, or might reasonably be expected not to have been, allowable to the taxpayer if the scheme had not been entered into or carried out, where:

(i) the allowance of the foreign income tax offset to the taxpayer is attributable to the making of a declaration, agreement, election, selection or choice, the giving of a notice or the exercise of an option by any person, being a declaration, agreement, election, selection, choice, notice or option expressly provided for by this Act; and

(ii) the scheme was not entered into or carried out by any person for the purpose of creating any circumstance or state of affairs the existence of which is necessary to enable the declaration, agreement, election, selection, choice, notice or option to be made, given or exercised, as the case may be.

(2A) A reference in this Part to the obtaining by a taxpayer of a tax benefit in connection with a scheme is to be read as not including a reference to:

(a) the assessable income of the taxpayer of a year of income not including an amount that would have been included, or might reasonably be expected to have been included, in the assessable income of the taxpayer of that year of income if the scheme had not been entered into or carried out where:

(i) the non-inclusion of the amount in the assessable income of the taxpayer is attributable to the making of a choice under Subdivision 126-B of the *Income Tax Assessment Act 1997* or an agreement under Subdivision 170-B of that Act; and

(ii) the scheme consisted solely of the making of the agreement or election; or

(b) a capital loss being incurred by the taxpayer during a year of income the whole or part of which would not have been, or might reasonably be expected not to have been, incurred by the taxpayer during the year of income if the scheme had not been entered into or carried out where:

(i) the incurring of the capital loss by the taxpayer is attributable to the making of a choice under Subdivision 126-B of the *Income Tax Assessment Act 1997* or an agreement under Subdivision 170-B of that Act; and

(ii) the scheme consisted solely of the making of the agreement or election.

(3) For the purposes of subparagraph (2)(a)(i), (b)(i), (c)(i) or (d)(i) or (2A)(a)(i) or (b)(i):

(a) the non-inclusion of an amount in the assessable income of a taxpayer; or

(b) the allowance of a deduction to a taxpayer; or

(c) the incurring of a capital loss by a taxpayer; or

(ca) the allowance of a foreign income tax offset to a taxpayer;

is taken to be attributable to the making of a declaration, election, agreement or selection, the giving of a notice or the exercise of an option where, if the declaration, election, agreement, selection, notice or option had not been made, given or exercised, as the case may be:

(d) the amount would have been included in that assessable income; or

(e) the deduction would not have been allowable; or

(f) the capital loss would not have been incurred; or

(g) the foreign income tax offset would not have been allowable.

(4) To avoid doubt, paragraph (1)(a) applies to a scheme if:

(a) an amount of income is not included in the assessable income of the taxpayer of a year of income; and

(b) an amount would have been included, or might reasonably be expected to have been included, in the assessable income if the scheme had not been entered into or carried out; and

(c) instead, the taxpayer or any other taxpayer makes a discount capital gain (within the meaning of the *Income Tax Assessment Act 1997*) for that or any other year of income.

(5) Subsection (4) does not limit the generality of any other provision of this Part.

A New Tax System (Goods and Services Tax) Act 1999

Act No. 55 of 1999 as amended

This compilation was prepared on 28 February 2005
taking into account amendments up to Act No. 10 of 2005

The text of any of those amendments not in force
on that date is appended in the Notes section

The operation of amendments that have been incorporated may be affected by application provisions that are set out in the Notes section

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(2) However, a supply of water is *not* GST-free under this section if it is:

(a) supplied in a container; or

(b) transferred into a container;

that has a capacity of less than 100 litres or such other quantity as the regulations specify.

(3) It does not matter whether or not the amount of water supplied or transferred fills the container.

38-290 Sewerage and sewerage-like services

(1) A supply of sewerage services is ***GST-free***.

(2) A supply that consists of removing waste matter from *residential premises is ***GST-free*** if:

(a) the premises are not serviced by sewers; and

(b) the waste matter is of a kind that would normally be removed using sewers if the premises were serviced by sewers.

(3) A supply that consists of servicing a domestic self-contained sewage system is ***GST-free***.

38-295 Emptying of septic tanks

A supply of a service that consists of the emptying of a septic tank is ***GST-free***.

38-300 Drainage

A supply of a service that consists of draining storm water is ***GST-free***.

Subdivision 38-J—Supplies of going concerns

38-325 Supply of a going concern

(1) The *supply of a going concern is ***GST-free*** if:

*To find definitions of asterisked terms, see the Dictionary, starting at section 195-1.

(a) the supply is for *consideration; and
(b) the *recipient is *registered or *required to be registered; and
(c) the supplier and the recipient have agreed in writing that the supply is of a going concern.

(2) A *supply of a going concern* is a supply under an arrangement under which:
(a) the supplier supplies to the *recipient all of the things that are necessary for the continued operation of an *enterprise; and
(b) the supplier carries on, or will carry on, the enterprise until the day of the supply (whether or not as a part of a larger enterprise carried on by the supplier).

Subdivision 38-K—Transport and related matters

38-355 Supplies of transport and related matters

The third column of this table sets out supplies that are *GST-free*:

Supplies of transport and related matters

Item	Topic	These supplies are GST-free ...
1	Transport of passengers to, from or outside Australia	the transport of a passenger: (a) from the last place of departure in Australia to a destination outside Australia; or (b) from a place outside Australia to the first place of arrival in Australia; or (c) from a place outside Australia to the same or another place outside Australia.
2	Transport of passengers on domestic legs of international flights	the transport of a passenger within Australia by air, but only if: (a) the transport is part of a wider arrangement, itinerary or contract for transport by air involving international travel; and (b) at the time the arrangement, itinerary or contract was entered into, the transport within Australia formed part of a ticket for international travel, or was cross referenced to such a ticket, issued at that time.

*To find definitions of asterisked terms, see the Dictionary, starting at section 195-1.

Subdivision 48-A—Approval of GST groups

48-5 Approval of GST groups

(1) The Commissioner must approve 2 or more entities as a *GST group if:

(a) the entities jointly apply, in the *approved form, for approval as a GST group; and

(b) each of the entities *satisfies the membership requirements for that GST group; and

(c) the application nominates one of the entities to be the *representative member for the group; and

(d) the entity so nominated is an *Australian resident.

A group of entities that is so approved is a ***GST group***.

(2) If 2 or more entities would *satisfy the membership requirements of that *GST group, the application need not include all those entities.

Note: Refusing an application for approval under this section is a reviewable GST decision (see Division 7 of Part VI of the *Taxation Administration Act 1953*).

48-10 Membership requirements of a GST group

(1) An entity ***satisfies the membership requirements*** of a *GST group, or a proposed GST group, if the entity:

(a) is:

(i) a *company; or

(ii) a *partnership, trust or individual that satisfies the requirements specified in the regulations; and

(b) is, if the entity is a company, a company of the same *90% owned group as all the other members of the GST group or proposed GST group that are also companies; and

(c) is *registered; and

(d) has the same tax periods applying to it as the tax periods applying to all the other members of the GST group or proposed GST group; and

*To find definitions of asterisked terms, see the Dictionary, starting at section 195-1.

Division 75—Sale of freehold interests etc.

75-1 What this Division is about

This Division allows you to use a margin scheme to bring within the GST system your taxable supplies of freehold interests in land, of stratum units and of long-term leases.

75-5 Choosing to apply the margin scheme

(1) If you make a *taxable supply of *real property by:
  (a) selling a freehold interest in land; or
  (b) selling a *stratum unit; or
  (c) granting or selling a *long-term lease;
you may choose to apply the *margin scheme in working out the amount of GST on the supply.

(2) However, you cannot choose to apply the *margin scheme if you acquired the freehold interest, *stratum unit or *long-term lease through a *taxable supply on which the GST was worked out without applying the margin scheme.

75-10 The amount of GST on taxable supplies

(1) If a *taxable supply of *real property is under the *margin scheme, the amount of GST on the supply is 1/11 of the *margin for the supply.

(2) The ***margin*** for the supply is the amount by which the *consideration for the supply exceeds the consideration for your acquisition of the interest, unit or lease in question.

(3) However, if:
  (a) the circumstances specified in an item in the second column of the table in this subsection apply to the supply; and

*To find definitions of asterisked terms, see the Dictionary, starting at section 195-1.

(b) a valuation of the freehold interest, *stratum unit or *long-term lease, as at the day specified in the corresponding item in the third column of the table, has been made that complies with any requirements determined in writing by the Commissioner for making valuations for the purposes of this Division;

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

Use of valuations to work out margins

Item	When valuations may be used	Days when valuations are to be made
1	The supplier acquired the interest, unit or lease before 1 July 2000, and items 2, 3 and 4 do not apply.	1 July 2000
2	The supplier acquired the interest, unit or lease before 1 July 2000, but does not become *registered or *required to be registered until after 1 July 2000.	The date of effect of your registration, or the day on which you applied for registration (if it is earlier)
2A	The supplier acquired the interest, unit or lease on or after 1 July 2000, but the supply to the supplier: (a) was *GST-free under subsection 38-445(1A); and (b) related to a supply before 1 July 2000, by way of lease, that would have been GST-free under section 38-450 had it been made on or after 1 July 2000.	1 July 2000

*To find definitions of asterisked terms, see the Dictionary, starting at section 195-1.

Use of valuations to work out margins		
Item	When valuations may be used	Days when valuations are to be made
3	The supplier is *registered or *required to be registered and has held the interest, unit or lease since before 1 July 2000, and there were improvements on the land or premises in question as at 1 July 2000.	1 July 2000
4	The supplier is the Commonwealth, a State or a Territory and has held the interest, unit or lease since before 1 July 2000, and there were no improvements on the land or premises in question as at 1 July 2000.	The day on which the *taxable supply takes place

(3A) If:

(a) the circumstances specified in item 4 in the second column of the table in subsection (3) apply to the supply; and

(b) there are improvements on the land or premises in question on the day on which the *taxable supply takes place;

the valuation is to be made as if there are no improvements on the land or premises on that day.

(4) This section has effect despite section 9-70 (which is about the amount of GST on taxable supplies).

Note: Section 9-90 (rounding of amounts of GST) can apply to amounts of GST worked out using this section.

75-15 Subdivided land

For the purposes of section 75-10, if the freehold interest, *stratum unit or *long-term lease you supply relates only to part of land or premises that you acquired, the *consideration for your acquisition of that part is the corresponding proportion of the consideration for the land or premises that you acquired.

*To find definitions of asterisked terms, see the Dictionary, starting at section 195-1.

Division 165—Anti-avoidance

Table of Subdivisions

165-1 What this Division is about

The object of this Division is to deter schemes to give entities benefits by reducing GST, increasing refunds or altering the timing of payment of GST or refunds.

If the dominant purpose or principal effect of a scheme is to give an entity such a benefit, the Commissioner may negate the benefit an entity gets from the scheme by declaring how much GST or refund would have been payable, and when it would have been payable, apart from the scheme.

This Division is aimed at artificial or contrived schemes. It is not, for example, intended to apply to:

- an exporter electing to have monthly tax periods in order to bring forward the entitlement to input tax credits; or
- a supplier of child care applying to be approved under the *A New Tax System (Family Assistance) (Administration) Act 1999* (this would make the supplies of child care GST-free); or

*To find definitions of asterisked terms, see the Dictionary, starting at section 195-1.

- a supplier choosing under section 9-25 of the *A New Tax System (Wine Equalisation Tax) Act 1999* to use the average wholesale price method for working out the taxable value of retail sales of grape wine; or
- a bank having its car fleet serviced earlier than usual, and before 1 July 2000, so that the servicing does not, at least initially, bear the GST.

Subdivision 165-A—Application of this Division

165-5 When does this Division operate?

General rule

(1) This Division operates if:

(a) an entity (the *avoider*) gets or got a *GST benefit from a *scheme; and

(b) the GST benefit is not attributable to the making, by any entity, of a choice, election, application or agreement that is expressly provided for by the *GST law, the *wine tax law or the *luxury car tax law; and

(c) taking account of the matters described in section 165-15, it is reasonable to conclude that either:

(i) an entity that (whether alone or with others) entered into or carried out the scheme, or part of the scheme, did so with the sole or dominant purpose of that entity or another entity getting a *GST benefit from the scheme; or

(ii) the principal effect of the scheme, or of part of the scheme, is that the avoider gets the GST benefit from the scheme directly or indirectly; and

(d) the scheme:

(i) is a scheme that has been or is entered into on or after 2 December 1998; or

*To find definitions of asterisked terms, see the Dictionary, starting at section 195-1.

(ii) is a scheme that has been or is carried out or commenced on or after that day (other than a scheme that was entered into before that day).

Territorial application

(2) It does not matter whether the *scheme, or any part of the scheme, was entered into or carried out inside or outside Australia.

165-10 When does an entity get a *GST benefit* from a scheme?

(1) An entity gets a ***GST benefit*** from a *scheme if:

(a) an amount that is payable by the entity under this Act apart from this Division is, or could reasonably be expected to be, smaller than it would be apart from the scheme or a part of the scheme; or

(b) an amount that is payable to the entity under this Act apart from this Division is, or could reasonably be expected to be, larger than it would be apart from the scheme or a part of the scheme; or

(c) all or part of an amount that is payable by the entity under this Act apart from this Division is, or could reasonably be expected to be, payable later than it would have been apart from the scheme or a part of the scheme; or

(d) all or part of an amount that is payable to the entity under this Act apart from this Division is, or could reasonably be expected to be, payable earlier than it would have been apart from the scheme or a part of the scheme.

What is a scheme?

(2) A *scheme* is:

(a) any arrangement, agreement, understanding, promise or undertaking:

(i) whether it is express or implied; and

(ii) whether or not it is, or is intended to be, enforceable by legal proceedings; or

*To find definitions of asterisked terms, see the Dictionary, starting at section 195-1.

(b) any scheme, plan, proposal, action, course of action or course of conduct, whether unilateral or otherwise.

GST benefit can arise even if no economic alternative

(3) An entity can get a *GST benefit from a *scheme even if the entity or entities that entered into or carried out the scheme, or a part of the scheme, could not have engaged economically in any activities:

(a) of the kind to which this Act applies; and

(b) that would produce an effect equivalent (except in terms of this Act) to the effect of the scheme or part of the scheme;

other than the activities involved in entering into or carrying out the scheme or part of the scheme.

165-15 Matters to be considered in determining purpose or effect

(1) The following matters are to be taken into account under section 165-5 in considering an entity's purpose in entering into or carrying out the *scheme from which the avoider got a *GST benefit, and the effect of the scheme:

(a) the manner in which the scheme was entered into or carried out;

(b) the form and substance of the scheme, including:

(i) the legal rights and obligations involved in the scheme; and

(ii) the economic and commercial substance of the scheme;

(c) the purpose or object of this Act, the *Customs Act 1901* (so far as it is relevant to this Act) and any relevant provision of this Act or that Act (whether the purpose or object is stated expressly or not);

(d) the timing of the scheme;

(e) the period over which the scheme was entered into and carried out;

(f) the effect that this Act would have in relation to the scheme apart from this Division;

*To find definitions of asterisked terms, see the Dictionary, starting at section 195-1.

(g) any change in the avoider's financial position that has resulted, or may reasonably be expected to result, from the scheme;

(h) any change that has resulted, or may reasonably be expected to result, from the scheme in the financial position of an entity (a ***connected entity***) that has or had a connection or dealing with the avoider, whether the connection or dealing is or was of a family, business or other nature;

(i) any other consequence for the avoider or a connected entity of the scheme having been entered into or carried out;

(j) the nature of the connection between the avoider and a connected entity, including the question whether the dealing is or was at arm's length;

(k) the circumstances surrounding the scheme;

(l) any other relevant circumstances.

(2) Subsection (1) applies in relation to consideration of an entity's purpose in entering into or carrying out a part of a *scheme from which the avoider gets or got a *GST benefit, and the effect of part of the scheme, as if the part were itself the *scheme from which the avoider gets or got the GST benefit.

Subdivision 165-B—Commissioner may negate effects of schemes for GST benefits

165-40 Commissioner may negate avoider's GST benefits

For the purpose of negating a *GST benefit the avoider mentioned in section 165-5 gets or got from the *scheme, the Commissioner may make a declaration stating either or both of the following:

(a) the amount that is (and has been at all times) the avoider's *net amount for a specified tax period that has ended;

(b) the amount that is (and has been at all times) the amount of GST on a specified *taxable importation that was made (or is stated in the declaration to have been made) by the avoider.

Note: A declaration of the Commissioner under this section is a reviewable GST decision (see Division 7 of Part VI of the *Taxation Administration Act 1953*).

*To find definitions of asterisked terms, see the Dictionary, starting at section 195-1.

- a supplier choosing under section 9-25 of the *A New Tax System (Wine Equalisation Tax) Act 1999* to use the average wholesale price method for working out the taxable value of retail sales of grape wine; or
- a bank having its car fleet serviced earlier than usual, and before 1 July 2000, so that the servicing does not, at least initially, bear the GST.

Subdivision 165-A—Application of this Division

165-5 When does this Division operate?

General rule

(1) This Division operates if:

(a) an entity (the ***avoider***) gets or got a *GST benefit from a *scheme; and

(b) the GST benefit is not attributable to the making, by any entity, of a choice, election, application or agreement that is expressly provided for by the *GST law, the *wine tax law or the *luxury car tax law; and

(c) taking account of the matters described in section 165-15, it is reasonable to conclude that either:

(i) an entity that (whether alone or with others) entered into or carried out the scheme, or part of the scheme, did so with the sole or dominant purpose of that entity or another entity getting a *GST benefit from the scheme; or

(ii) the principal effect of the scheme, or of part of the scheme, is that the avoider gets the GST benefit from the scheme directly or indirectly; and

(d) the scheme:

(i) is a scheme that has been or is entered into on or after 2 December 1998; or

*To find definitions of asterisked terms, see the Dictionary, starting at section 195-1.

Tax Laws Amendment (2005 Measures No. 2) Act 2005

No. 78, 2005

An Act to amend the law relating to taxation, and for related purposes

Note: An electronic version of this Act is available in SCALEplus (http://scaleplus.law.gov.au/html/comact/browse/TOCN.htm)

2 Commencement

This Act commences on the day on which it receives the Royal Assent.

3 Schedule(s)

Each Act that is specified in a Schedule to this Act is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to this Act has effect according to its terms.

Schedule 6—Goods and services tax and real property

A New Tax System (Goods and Services Tax) Act 1999

1 Section 17-99 (after table item 11)

Insert:

11A	Sale of freehold interests etc.	Division 75

2 After subsection 40-75(2)

Insert:

(2A) A supply of the premises is disregarded as a sale for the purposes of applying paragraph (1)(a):

(a) if it is a supply by a member of a *GST group to another member of the GST group; or

(b) if:

(i) it is a supply by the *joint venture operator of a *GST joint venture to another entity that is a *participant in the joint venture; and

(ii) the other entity acquired the interest, unit or lease for consumption, use or supply in the course of activities for which the joint venture was entered into.

3 After subsection 48-55(1)

Insert:

(1A) If:

(a) while you were not a *member of any *GST group, you acquired or imported a thing; and

(b) you become a member of a GST group at a time when you still hold the thing;

then, when the *representative member of the GST group applies section 129-40 for the first time after you became a member of the GST group, the *intended or former application of the thing is the extent of *creditable purpose last used to work out:

(c) the amount of the input tax credit to which you were entitled for the acquisition or importation; or

(d) the amount of any *adjustment you had under Division 129 in relation to the thing;

as the case requires.

4 Paragraph 48-115(1)(a)

Repeal the paragraph, substitute:

(a) either:

(i) while you were a *member of a *GST group (the ***first GST group***), you acquired a thing (other than from another member of that group) or imported a thing; or

(ii) you acquired or imported a thing while you were not a member of any GST group, and you subsequently became a member of a GST group (the ***first GST group***) while you still held the thing; and

5 Subsection 48-115(1)

Omit ", under section 48-55".

6 Paragraph 48-115(1)(c)

After "to which", insert "you or".

7 Paragraph 48-115(1)(d)

After "*adjustment", insert "you or".

9 Section 75-5 (heading)

Repeal the heading, substitute:

75-5 Applying the margin scheme

10 Subsection 75-5(1)

Repeal the subsection, substitute:

(1) The *margin scheme applies in working out the amount of GST on a *taxable supply of *real property that you make by:

(a) selling a freehold interest in land; or

(b) selling a *stratum unit; or

(c) granting or selling a *long-term lease;

if you and the *recipient of the supply have agreed in writing that the margin scheme is to apply.

(1A) The agreement must be made:

(a) on or before the making of the supply; or

(b) within such further period as the Commissioner allows.

Note: Refusing to allow, or allowing, a further period within which to make an agreement is a reviewable GST decision (see Division 7 of Part VI of the *Taxation Administration Act 1953*).

11 Subsection 75-5(2)

Repeal the subsection, substitute:

(2) However, the *margin scheme does not apply if you acquired the entire freehold interest, *stratum unit or *long-term lease through a supply that was *ineligible for the margin scheme.

Note: If you acquired part of the interest, unit or lease through a supply that was ineligible for the margin scheme, you may have an increasing adjustment: see section 75-22.

(3) A supply is ***ineligible for the margin scheme*** if:

(a) it is a *taxable supply on which the GST was worked out without applying the *margin scheme; or

(b) it is a supply of a thing you acquired by *inheriting it from a deceased person, and the deceased person had acquired all of it through a supply that was ineligible for the margin scheme; or

(c) it is a supply in relation to which all of the following apply:

(i) you were a *member of a *GST group at the time you acquired the interest, unit or lease in question;

(ii) the entity from whom you acquired it was a member of the GST group at that time;

(iii) the last supply of the interest, unit or lease by an entity who was not (at the time of that supply) a member of the GST group to an entity who was (at that time) such a member was a supply that was ineligible for the margin scheme; or

(d) it is a supply in relation to which both of the following apply:

(i) you acquired the interest, unit or lease from the *joint venture operator of a *GST joint venture at a time when you were a *participant in the joint venture;

(ii) the joint venture operator had acquired the interest, unit or lease through a supply that was ineligible for the margin scheme.

(4) A reference in paragraph (3)(b), (c) or (d) to a supply that was ineligible for the margin scheme is a reference to a supply:

(a) that was ineligible for the margin scheme because of one or more previous applications of subsection (3); or

(b) that would have been ineligible for the margin scheme for that reason if subsection (3) had been in force at all relevant times.

12 Subsection 75-10(2)

Omit "The ***margin***", substitute "Subject to subsection (3) and section 75-11, the ***margin***".

13 Subsection 75-10(3)

Omit "However", substitute "Subject to section 75-11".

14 Paragraph 75-10(3)(b)

Omit "a valuation", substitute "an *approved valuation".

15 Paragraph 75-10(3)(b)

Omit "that complies with any requirements determined in writing by the Commissioner for making valuations for the purposes of this Division".

16 After section 75-10

Insert:

75-11 Margins for supplies of real property in particular circumstances

Margin for supply of real property acquired from fellow member of GST group

(1) If:

(a) you acquired the interest, unit or lease in question at a time when both you and the entity from whom you acquired it were *members of the same *GST group; and

(b) on or after 1 July 2000, there has been a supply (an ***earlier supply***) of the interest, unit or lease that occurred at a time when the supplier was not a member of the GST group; and

(ba) the *recipient was at that time, or subsequently became, a member of the GST group;

the ***margin*** for the supply you make is the amount by which the *consideration for the supply exceeds:

(c) the consideration for the last such earlier supply, if the supplier and the recipient were not *associates at that time; or

(d) the *GST inclusive market value of the interest, unit or lease at that time, if the 2 entities were associates at that time.

(2) If:

(a) you acquired the interest, unit or lease in question at a time when both you and the entity from whom you acquired it were *members of the same *GST group; and

(b) subsection (1) does not apply;

the ***margin*** for the supply you make is the amount by which the *consideration for the supply exceeds an *approved valuation of the interest, unit or lease as at 1 July 2000.

Margin for supply of real property acquired from joint venture operator of a GST joint venture

(2A) If:

(a) you acquired the interest, unit or lease in question at a time when you were a *participant in a *GST joint venture and the entity from whom you acquired it was the *joint venture operator of the joint venture; and

(b) you acquired the interest, unit or lease for consumption, use or supply in the course of activities for which the joint venture was entered into; and

(c) on or after 1 July 2000, there has been a supply (an ***earlier supply***) of the interest, unit or lease to the entity from whom you acquired it (whether or not that entity was the joint venture operator of the joint venture at the time of that acquisition);

the ***margin*** for the supply you make is the amount by which the *consideration for the supply exceeds:

(d) the consideration for the last such earlier supply, if the supplier and the *recipient were not *associates at the time of the earlier supply; or

(e) the *GST inclusive market value of interest, unit or lease at that time, if the 2 entities were associates at that time.

(2B) If:

(a) you acquired the interest, unit or lease in question at a time when you were a *participant in a *GST joint venture and the entity from whom you acquired it was the *joint venture operator of the joint venture; and

(b) you acquired the interest, unit or lease for consumption, use or supply in the course of activities for which the joint venture was entered into; and

(c) subsection (2A) does not apply;

the ***margin*** for the supply you make is the amount by which the *consideration for the supply exceeds an *approved valuation of the interest, unit or lease as at 1 July 2000.

Margin for supply of real property acquired from deceased estate

(3) If:

(a) you acquired the interest, unit or lease in question by *inheriting it; and

(b) none of subsections (1) to (2B) applies; and

(c) the entity from whom you inherited the interest, unit or lease (the ***deceased***) acquired it before 1 July 2000;

the ***margin*** for the supply you make is the amount by which the *consideration for the supply exceeds:

(ca) if you know what was the consideration for the supply of the interest, unit or lease to the deceased and you choose to use that consideration to work out the margin for the supply—that consideration; or

(d) if paragraph (ca) does not apply and, immediately before the time at which you inherited the interest, unit or lease, the deceased was neither *registered nor *required to be registered—an *approved valuation of the interest, unit or lease as at the latest of:

(i) 1 July 2000; or

(ii) the day on which you inherited the interest, unit or lease; or

(iii) the first day on which you registered or were required to be registered; or

(e) if paragraph (ca) does not apply and, immediately before the time at which you inherited the interest, unit or lease, the deceased was registered or required to be registered—an

approved valuation of the interest, unit or lease as at the later of:

(i) 1 July 2000; or

(ii) the first day on which the deceased registered or was required to be registered.

(4) If:

(a) you acquired the interest, unit or lease in question by *inheriting it; and

(b) none of subsections (1) to (2B) applies; and

(c) the entity from whom you inherited the interest, unit or lease (the ***deceased***) acquired it on or after 1 July 2000;

the ***margin*** for the supply you make is the amount by which the *consideration for the supply exceeds:

(d) if you know what was the consideration for the supply of the interest, unit or lease to the deceased and you choose to use that consideration to work out the margin for the supply—that consideration; or

(e) if paragraph (d) does not apply—an *approved valuation of the interest, unit or lease as at the day on which the deceased acquired it.

Margin for supply of real property acquired from associate

(7) If:

(a) you acquired the interest, unit or lease in question from an entity who was your *associate at the time of the acquisition; and

(b) none of the other subsections of this section apply;

the ***margin*** for the supply you make is the amount by which the *consideration for the supply exceeds:

(c) if your acquisition was made before 1 July 2000—an *approved valuation of the interest, unit or lease as at 1 July 2000; or

(d) if your acquisition was made on or after 1 July 2000—the *GST inclusive market value of the interest, unit or lease at the time of the acquisition.

(8) Subsection (7) applies to an acquisition through a supply made by:

(a) a *GST branch; or

(b) a *non-profit sub-entity; or

(c) a *government entity of a kind referred to in section 72-95 or 72-100;

as if Subdivision 72-D affected the operation of subsection (7) in the same way that it affects the operation of Division 72.

75-12 Working out margins to take into account failure to pay full consideration

In working out the *margin for a *taxable supply of *real property you make (the ***later supply***), if:

(a) you had acquired the interest, unit or lease in question through a supply (the ***earlier supply***); and

(b) the *consideration for:

(i) if your acquisition was not an acquisition from a *member of a *GST group of which you were also a member at the time of the acquisition—the earlier supply; or

(ii) if your acquisition was such an acquisition—the last supply of the interest, unit or lease at a time when the supplier of that last supply was not, but the *recipient of that last supply was, a member of the GST group;

had not been paid in full at the time of the later supply;

treat the amount of the consideration as having been reduced by the amount of unpaid consideration referred to in paragraph (b).

Note: If you subsequently pay more of the consideration for the earlier supply, you may have a decreasing adjustment: see section 75-27.

75-13 Working out margins to take into account supplies to associates

In working out the *margin for a *taxable supply of *real property you make to an entity who is your *associate at the time of the supply, treat the *consideration for the supply as if it were the same as the *GST inclusive market value of the interest, unit or lease at the time of the supply.

75-14 Consideration for acquisition of real property not to include cost of improvements etc.

(1) To avoid doubt, in working out the *consideration for an acquisition for the purposes of applying the *margin scheme to a *taxable supply of *real property, disregard:

(a) the cost or value of any other acquisitions that have been made by you, or any work that has been performed, in relation to the real property; and

(b) the cost or value of any other acquisitions that are intended to be made by you, or any work that is intended to be performed, in relation to the real property after its acquisition;

including acquisitions or work connected with bringing into existence the interest, unit or lease supplied.

(2) This section does not affect what constitutes *consideration for a purpose not connected with applying the *margin scheme.

17 Section 75-15

Omit "section 75-10", insert "sections 75-10 to 75-14".

18 After section 75-20

Insert:

75-22 Increasing adjustment relating to input tax credit entitlement

(1) You have an ***increasing adjustment*** if:

(a) you make a *taxable supply of *real property under the *margin scheme; and

(b) an acquisition that you made of part of the interest, unit or lease in question was made through a supply that was *ineligible for the margin scheme; and

(c) you were, or are, entitled to an input tax credit for the acquisition.

The amount of the increasing adjustment is an amount equal to the *previously attributed input tax credit amount for the acquisition.

(2) You have an ***increasing adjustment*** if:

(a) you make a *taxable supply of *real property under the *margin scheme; and

(b) you acquired all or part of the interest, unit or lease in question by inheriting it; and

(c) the entity from whom you inherited (the *deceased*) had acquired part of the interest, unit or lease that you inherited through a supply that was *ineligible for the margin scheme; and

(d) the deceased was entitled to an input tax credit for that acquisition.

The amount of the increasing adjustment is an amount equal to the *previously attributed input tax credit amount for the acquisition.

19 After section 75-25

Insert:

75-27 Decreasing adjustment for later payment of consideration

(1) You have a *decreasing adjustment* if:

(a) section 75-12 applied to working out the *margin for a *taxable supply of *real property that you made; and

(b) after you made the supply, a further amount of the *consideration was paid for the earlier supply referred to in that section.

(2) The amount of the decreasing adjustment is an amount equal to 1/11 of the further amount of the *consideration paid.

20 At the end of Division 75

Add:

75-35 Approved valuations

(1) The Commissioner may, by legislative instrument, determine in writing requirements for making valuations for the purposes of this Division.

(2) A valuation made in accordance with those requirements is an *approved valuation*.

21 Savings provision—determinations under paragraph 75-10(3)(b)

A determination by the Commissioner, for the purposes of paragraph 75-10(3)(b) of the *A New Tax System (Goods and Services Tax) Act 1999*, that was in force immediately before the commencement of this Schedule:

(a) continues in force on that commencement as if it had been made under section 75-35 of that Act as amended by this Act; and

(b) may be revoked or amended by the Commissioner in the same way as a determination under section 75-35.

22 Section 195-1

Insert:

approved valuation has the meaning given by subsection 75-35(2).

23 Section 195-1 (note at the end of the definition of *consideration*)

After "sections", insert "75-12, 75-13, 75-14,".

24 Section 195-1 (after table item 4 of the definition of *decreasing adjustment*)

Insert:

4AA	Section 75-27	Payments of further consideration for supplies relating to supplies of *real property under the *margin scheme

25 Section 195-1 (after table item 4 of the definition of *increasing adjustment*)

Insert:

4AAA	Section 75-22	Input tax credit entitlements for acquisitions relating to supplies of *real property under the *margin scheme

26 Section 195-1

Insert:

ineligible for the margin scheme has the meaning given by subsections 75-5(3) and (4).

26A Section 195-1

Insert:

inherit: you inherit a freehold interest in land, a stratum unit or a long-term lease if you become an owner of the interest, unit or lease:

(a) under the will of a deceased person, or that will as varied by a court order; or

(b) by operation of an intestacy law, or such a law as varied by a court order; or

(c) because it is appropriated to you by the legal personal representative of a deceased person in satisfaction of a pecuniary legacy or some other interest or share in the deceased person's estate; or

(d) under a deed of arrangement if:

(i) you entered into the deed to settle a claim to participate in the distribution of the deceased person's estate; and

(ii) any *consideration given by you for the interest, unit or lease consisted only of the variation or waiver of a claim to one or more other assets that formed part of the estate.

27 Section 195-1 (definition of *margin*)

Omit "subsection 75-10(2)", substitute "sections 75-10 and 75-11".

27A Section 195-1 (definition of *margin scheme*)

Omit "you choose, under section 75-5, to use the margin scheme in working out the amount of GST on the supply", substitute "subsection 75-5(1) applies".

Taxation Administration Act 1953

27B Subsection 62(2) (after table item 37A)

Insert:

37AA	refusing to allow, or allowing, a further period within which to make an agreement that the margin scheme is to apply	paragraph 75-5(1A)(b)

28 Application

(1) The amendments made by this Schedule (other than items 3 to 7, 9 and 10) apply, and are taken to have applied, in relation to supplies made on or after the day the Bill for this Act was introduced into the Parliament.

(2) The amendments made by items 3 to 7 apply, and are taken to have applied, in relation to adjustments arising under Division 129 of the *A New Tax System (Goods and Services Tax) Act 1999* on or after the day the Bill for this Act was introduced into the Parliament.

(3) The amendments made by items 9 and 10 apply only in relation to supplies that:

(a) are made under contracts entered into on or after the day on which this Act receives the Royal Assent; and

(b) are not made pursuant to rights or options granted before that day.

Tax Laws Amendment (2008 Measures No. 5) Act 2008

No. 145, 2008

An Act to amend the law relating to taxation, and for related purposes

Note: An electronic version of this Act is available in ComLaw (http://www.comlaw.gov.au/)

2 Commencement

This Act commences on the day on which it receives the Royal Assent.

3 Schedule(s)

Each Act that is specified in a Schedule to this Act is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to this Act has effect according to its terms.

Schedule 1—Goods and services tax and real property

A New Tax System (Goods and Services Tax) Act 1999

1 After subsection 75-5(1A)

Insert:

(1B) A supply that you make to your *associate is taken for the purposes of subsection (1) to be a sale to your associate whether or not the supply is for *consideration.

2 At the end of subsection 75-5(3)

Add:

; or (e) it is a supply in relation to which all of the following apply:

(i) you acquired the interest, unit or lease from an entity as, or as part of, a *supply of a going concern to you that was *GST-free under Subdivision 38-J;

(ii) the entity was *registered or *required to be registered, at the time of the acquisition;

(iii) the entity had acquired the entire interest, unit or lease through a taxable supply on which the GST was worked out without applying the margin scheme; or

(f) it is a supply in relation to which all of the following apply:

(i) you acquired the interest, unit or lease from an entity as, or as part of, a supply to you that was GST-free under Subdivision 38-O;

(ii) the entity was registered or required to be registered, at the time of the acquisition;

(iii) the entity had acquired the entire interest, unit or lease through a taxable supply on which the GST was worked out without applying the margin scheme; or

(g) it is a supply in relation to which all of the following apply:

(i) you acquired the interest, unit or lease from an entity who was your *associate, and who was registered or required to be registered, at the time of the acquisition;

(ii) the acquisition from your associate was without *consideration;

(iii) the supply by your associate was not a taxable supply;

(iv) your associate made the supply in the course or furtherance of an *enterprise that your associate *carried on;

(v) your associate had acquired the entire interest, unit or lease through a taxable supply on which the GST was worked out without applying the margin scheme.

3 After subsection 75-5(3)

Insert:

(3A) Subparagraphs (3)(g)(iii) and (iv) do not apply if the acquisition from your *associate was not by means of a supply by your associate.

4 After subsection 75-11(4)

Insert:

Margin for supply of real property acquired as a GST-free going concern or as GST-free farm land

(5) If:

(a) you acquired the interest, unit or lease in question from an entity as, or as part of:

(i) a *supply of a going concern to you that was *GST-free under Subdivision 38-J; or

(ii) a supply to you that was GST-free under Subdivision 38-O; and

(b) the entity was *registered or *required to be registered, at the time of the acquisition; and

(c) none of subsections (1) to (4) applies;

the ***margin*** for the supply you make is the amount by which the *consideration for the supply exceeds:

(d) if that entity had acquired the interest, unit or lease before 1 July 2000 and on that day was registered or required to be registered:

(i) if you choose to apply an *approved valuation to work out the margin for the supply—an approved valuation of the interest, unit or lease as at 1 July 2000; or

(ii) if subparagraph (i) does not apply—the *GST inclusive market value of the interest, unit or lease as at 1 July 2000; or

(e) if that entity had acquired the interest, unit or lease on or after 1 July 2000 and had been registered or required to be registered at the time of the acquisition:

(i) if the entity's acquisition was for consideration and you choose to apply an approved valuation to work out the margin for the supply—an approved valuation of the interest, unit or lease as at the day on which the entity had acquired it; or

(ii) if the entity's acquisition was for consideration and subparagraph (i) does not apply—that consideration; or

(iii) if the entity's acquisition was without consideration—the GST inclusive market value of the interest, unit or lease as at the time of the acquisition; or

(f) if that entity had not been registered or required to be registered at the time of the entity's acquisition of the interest, unit or lease (and paragraph (d) does not apply):

(i) if you choose to apply an approved valuation to work out the margin for the supply—an approved valuation of the interest, unit or lease as at the first day on which the entity was registered or required to be registered; or

(ii) if subparagraph (i) does not apply—the GST inclusive market value of the interest, unit or lease as at that day.

Margin for supply of real property acquired from associate

(6) If:

(a) you acquired the interest, unit or lease in question from an entity who was your *associate, and who was *registered or *required to be registered, at the time of the acquisition; and

(b) the acquisition from your associate was without *consideration; and

(c) the supply by your associate was not a *taxable supply; and

(d) your associate made the supply in the course or furtherance of an *enterprise that your associate *carried on; and

(e) none of subsections (1) to (5) applies;

the ***margin*** for the supply you make is the amount by which the consideration for the supply exceeds:

(f) if your associate had acquired the interest, unit or lease before 1 July 2000 and on that day was registered or required to be registered:

(i) if you choose to apply an *approved valuation to work out the margin for the supply—an approved valuation of the interest, unit or lease as at 1 July 2000; or

(ii) if subparagraph (i) does not apply—the *GST inclusive market value of the interest, unit or lease as at 1 July 2000; or

(g) if your associate had acquired the interest, unit or lease on or after 1 July 2000 and had been registered or required to be registered at the time of the acquisition:

(i) if your associate's acquisition was for consideration and you choose to apply an approved valuation to work out the margin for the supply—an approved valuation of the interest, unit or lease as at the day on which your associate had acquired it; or

(ii) if your associate's acquisition was for consideration and subparagraph (i) does not apply—that consideration; or

(iii) if your associate's acquisition was without consideration—the GST inclusive market value of the interest, unit or lease at the time of the acquisition; or

(h) if your associate had not been registered or required to be registered at the time of your associate's acquisition of the interest, unit or lease (and paragraph (f) does not apply):

(i) if you choose to apply an approved valuation to work out the margin for the supply—an approved valuation of the interest, unit or lease as at the first day on which the entity was registered or required to be registered; or

(ii) if subparagraph (i) does not apply—the GST inclusive market value of the interest, unit or lease as at that day.

(6A) Paragraphs (6)(c) and (d) do not apply if the acquisition from your *associate was not by means of a supply by your associate.

(6B) To avoid doubt, you cannot be taken, for the purposes of paragraph (5)(f) or (6)(h), to be *registered or *required to be registered on a day earlier than 1 July 2000.

5 Subsection 75-11(7) (heading)

Repeal the heading.

6 Subsection 75-11(8)

Omit "Subsection (7)", substitute "Subsection (6) or (7)".

7 Subsection 75-11(8)

Omit "subsection (7)", substitute "that subsection".

8 Section 75-13

After "for the supply", insert "(whether or not the supply was for consideration)".

9 After section 75-15

Insert:

75-16 Margins for supplies of real property acquired through several acquisitions

(1) If:

(a) you make a *taxable supply of *real property under the *margin scheme; and

(b) the interest, unit or lease in question is one that you acquired through 2 or more acquisitions (***partial acquisitions***); and

(c) one of the following provisions (a ***margin provision***) applies in relation to such a partial acquisition, or would so apply if the partial acquisition had been an acquisition of the whole of the interest, unit or lease:

(i) section 75-10;

(ii) subsection 75-11(1), (2), (2A), (2B), (3), (4), (5), (6) or (7);

the margin provision applies, in working out the margin for the supply you make, only to the extent that the supply is connected to the partial acquisition.

(2) The application of a margin provision in relation to one of the partial acquisitions does not prevent that margin provision or a different margin provision applying in relation to another of the partial acquisitions.

10 At the end of section 75-22

Add:

(3) You have an ***increasing adjustment*** if:

(a) you make a *taxable supply of *real property under the *margin scheme; and

(b) an acquisition that you made of part of the interest, unit or lease in question was made through a supply that was *ineligible for the margin scheme because of paragraph 75-5(3)(e), (f) or (g); and

(c) the entity from whom you made the acquisition had been entitled to an input tax credit for its acquisition.

(4) You have an ***increasing adjustment*** if:

(a) you make a *taxable supply of *real property under the *margin scheme; and

(b) the acquisition that you made of the interest, unit or lease in question:

(i) was made through a supply that was *GST-free under Subdivision 38-J or Subdivision 38-O; or

(ii) was made through a supply (other than a taxable supply) from your *associate without *consideration and in the course or furtherance of an *enterprise that your associate *carried on; or

(iii) was made from your associate but not by means of a supply from your associate; and

(c) the entity from whom you acquired the interest, unit or lease:

(i) acquired part of the interest, unit or lease through a supply that would have been *ineligible for the margin scheme if it had been a supply of the whole of the interest, unit or lease; and

(ii) had been entitled to an input tax credit for its acquisition; and

(iii) was *registered or *required to be registered, at the time of your acquisition of the interest, unit or lease.

(5) The amount of the *increasing adjustment under subsection (3) or (4) is an amount equal to 1/11 of:

(a) if you choose to apply an *approved valuation to work out the amount—an approved valuation of the part of the interest,

unit or lease referred to in paragraph (3)(b) or subparagraph (4)(c)(i) as at the day on which the entity had acquired it; or

(b) otherwise—the *consideration for the entity's acquisition of that part of the interest, unit or lease.

11 At the end of section 165-5

Add:

Creating circumstances or states of affairs

(3) A *GST benefit that the avoider gets or got from a *scheme is not taken, for the purposes of paragraph (1)(b), to be attributable to a choice, election, application or agreement of a kind referred to in that paragraph if:

(a) the scheme, or part of the scheme, was entered into or carried out for the sole or dominant purpose of creating a circumstance or state of affairs; and

(b) the existence of the circumstance or state of affairs is necessary to enable the choice, election, application or agreement to be made.

12 Section 195-1 (definition of *margin*)

Omit "and 75-11", substitute ", 75-11 and 75-16".

13 Application

(1) The amendments made by items 1 to 10 and 12 of this Schedule apply in relation to supplies that are supplies of things that the supplier acquired through a new supply to the supplier.

(2) Division 75 of the *A New Tax System (Goods and Services Tax) Act 1999* as in force immediately before the commencement of this Schedule continues to apply in relation to supplies that are not supplies of things that the supplier acquired through a new supply to the supplier.

(3) The amendment made by item 11 of this Schedule applies in relation to choices, elections, applications and agreements made on or after the commencement of this Schedule.

(4) In this item:

new supply means a supply that:

(a) is made on or after the commencement of this Schedule; and

(b) is not made:

(i) under a written agreement entered into before that commencement; or

(ii) pursuant to a right or option granted before that commencement;

that specifies in writing the consideration, or a way of working out the consideration, for the supply.

2008

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

TAX LAWS AMENDMENT (2008 MEASURES No. 5) BILL 2008

EXPLANATORY MEMORANDUM

(Circulated by the authority of the
Treasurer, the Hon Wayne Swan MP)

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Glossary

The following abbreviations and acronyms are used throughout this explanatory memorandum.

Abbreviation	*Definition*
ADIs	authorised deposit-taking institutions
AEST	Australian Eastern Standard Time
AIFRS	*Australian equivalents to International Financial Reporting Standards*
Commissioner	Commissioner of Taxation
Corporations Act	*Corporations Act 2001*
FBT	fringe benefits tax
FBTAA 1986	*Fringe Benefits Tax Assessment Act 1986*
GST	goods and services tax
GST Act	*A New Tax System (Goods and Services Tax) Act 1999*
ITAA 1936	*Income Tax Assessment Act 1936*
ITAA 1997	*Income Tax Assessment Act 1997*
IWT	interest withholding tax
NAB case	*National Australia Bank Ltd v FC of T* 93 ATC 4914

Chapter 1
GST and the sale of real property — integrity measure

Outline of chapter

1.1 Schedule 1 to this Bill amends the *A New Tax System (Goods and Services Tax) Act 1999* (GST Act) to maintain the integrity of the goods and services tax (GST) tax base by ensuring that the interaction between the margin scheme provisions (see paragraph 1.4) and the going concern, farmland and associates provisions does not allow property sales to be structured in a way that results in GST not applying to the value added to real property on or after 1 July 2000 by an entity registered or required to be registered for GST.

1.2 These amendments:

- ensure that where the margin scheme is used after certain GST-free or non-taxable supplies, the value added by the registered entity which made that supply is included in determining the GST subsequently payable under the margin scheme;
- ensure that eligibility to use the margin scheme cannot be reinstated by interposing a GST-free or non-taxable supply; and
- confirm that the GST general anti-avoidance provisions can apply to contrived arrangements entered into to avoid GST.

Context of amendments

1.3 GST is intended to be payable on the value added, including capital appreciation, to real property on or after 1 July 2000 (the date that GST commenced) by an entity registered for GST.

1.4 For real property, special rules exist that allow taxpayers an alternative means of calculating GST. These rules are known as the margin scheme.

1.5 As a result, under the GST Act, registered businesses can calculate GST payable on supplies of new residential property or commercial property under the basic rules (GST is 1/11th of the GST-inclusive price) or, subject to certain conditions, under the margin scheme (GST is 1/11th of the margin).

1.6 The margin scheme was designed to ensure that GST is payable only on the incremental value added to land by each registered party in a series of transactions. The margin scheme is generally used for new residential property developments.

1.7 Under the margin scheme GST is generally payable only on the value added to property on or after 1 July 2000. It levies GST only on the *margin* by which the value of the property increases each time it is sold by a registered entity on or after 1 July 2000.

1.8 Ordinarily, the margin is calculated as the difference between the sale price of the property, and the consideration paid for its acquisition. However, where the property was acquired before 1 July 2000, an approved valuation as at 1 July 2000 may be used. This ensures that the property's value prior to the introduction of the GST is not taxed.

1.9 Purchasers of real property supplied under the margin scheme are not entitled to claim input tax credits for GST remitted by the supplier. This ensures that each registered supplier in a series of transactions remits the GST applicable to the value added by them. To ensure that the full amount of GST is payable, the margin scheme does not apply where the property has been acquired under the basic rules for the calculation of tax payable, as an input tax credit would generally have been claimed on the purchase of the property (and GST would effectively not have been collected).

1.10 However, an entity that would otherwise be prevented from applying the margin scheme, on the basis that it acquired the property as a taxable supply under the basic rules, can reinstate eligibility for the margin scheme by interposing certain GST-free or non-taxable supplies prior to selling the property under the margin scheme.

1.11 This arises generally where property has been acquired as a GST-free or non-taxable supply and the margin scheme is available to calculate the GST payable on a subsequent supply of the property. In these circumstances there is no requirement to take into account whether the sale before the GST-free or non-taxable supply would have been eligible for the margin scheme.

1.12 These amendments aim to ensure that an otherwise ineligible supply cannot become 're-eligible' for supply under the margin scheme as a result of interposing certain GST-free or non-taxable supplies.

1.13 The interaction of the margin scheme provisions (Division 75) of the GST Act with certain other provisions — such as the going concern (Subdivision 38-J) and farmland (Subdivision 38-O) provisions — has resulted in GST not being applied to the full margin of value added to real property within the GST system. Similarly, GST is not calculated on the full margin of value added when real property has been acquired from an associate for no consideration.

1.14 This occurs because, under the margin scheme provisions, GST is only paid on the value added by the supplier of a taxable supply of real property. However, real property may be acquired GST-free under the going concern or farmland provisions, or acquired from a registered associate without consideration. When it is later sold under the margin scheme, GST would not have been applied to the full value added while the property was in the GST system.

1.15 The GST-free treatment assigned to going concerns (under section 38-325) and farmland (under section 38-480) is not granted with a view to removing value added by the supplier from the tax base. Rather it is to relieve the recipient of the burden of obtaining additional funds to cover the GST included in the price of a going concern, when ordinarily they would be able to claim an input tax credit.

1.16 However, where such a GST-free supply includes real property that is later sold under the margin scheme, the effect is that the value added to the real property before the GST-free supply is excluded for GST purposes. This is contrary to the policy intent that GST be collected on the value added to real property by registered owners on or after 1 July 2000. This deficiency arises irrespective of whether an entity is motivated by a desire to avoid tax.

1.17 These amendments aim to ensure the appropriate amount of GST is collected on supplies of real property consistent with the policy intent of the GST system.

1.18 These amendments will also remove an unintended outcome that was created by the *Tax Laws Amendment (2005 Measures No. 2) Act 2005*. A technical deficiency in this amendment allowed an entity to eliminate or substantially reduce the amount of GST payable on a sale of real property it intended to make to a third party, by first supplying the property to a registered associate for no consideration. This supply would not attract any GST. The associated entity would then supply the property to a third party under the margin scheme, paying GST on a margin that

would be much less than the margin that the original entity would have faced.

1.19 The general anti-avoidance provisions in the GST law provide the Commissioner of Taxation (Commissioner) with broad powers to cancel GST benefits that arise from contrived schemes.

1.20 The GST general anti-avoidance provisions may only operate if the GST benefit obtained from a scheme is not attributable to the making of a choice, election, application or agreement that is expressly provided by the GST law. These amendments will ensure that a GST benefit is not attributable to the making of a choice, election, application or agreement if the scheme was entered into for the sole or dominant purpose of creating a circumstance or state of affairs necessary to enable the choice, election, application or agreement to be made.

1.21 This measure will apply prospectively so that arrangements already entered into will not be impacted.

Summary of new law

1.22 Schedule 1 ensures that a supply that is ineligible for the margin scheme continues to be ineligible for the margin scheme after it is supplied as part of a GST-free sale of a going concern, as GST-free farmland, or it is supplied to a registered associate for no consideration.

1.23 This is achieved by specifying that a supply is ineligible for the margin scheme if the previous supplier acquired the entire interest through a taxable supply on which the GST was worked out without applying the margin scheme. This limited eligibility applies to supplies that are supplies of things that the supplier acquired through a *new supply* to the supplier.

1.24 This Schedule also provides that where real property is acquired GST-free as part of a going concern, GST-free farmland, or from a registered associate for no consideration, the calculation of GST on the subsequent sale of that property under the margin scheme should also account for the value added by the previous owner. The new calculation rules apply to supplies that are supplies of things that the supplier acquired through a *new supply* to the supplier.

1.25 *New supplies* are supplies made on or after the commencement of this Bill and are not made under a written agreement entered into before commencement or pursuant to a right or option granted before

commencement, where consideration or a way of working out the consideration is specified.

1.26 Finally, this Schedule amends the GST general anti-avoidance provisions to avoid any doubt that those provisions can apply to schemes that were entered into with the sole or dominant purpose of creating a circumstance or state of affairs that enable a choice, election application or agreement to be made that gives rise to a GST benefit.

1.27 This provision brings the GST general anti-avoidance provisions into line with similar provisions for income tax. These amendments apply to a choice, election, application or agreement made on or after the commencement of this Bill.

Comparison of key features of new law and current law

New law	*Current law*
A supply of real property continues to be ineligible for the margin scheme if the previous supplier acquired the entire interest through a supply that was ineligible for the margin scheme.	Eligibility to sell a property under the margin scheme can be reinstated by interposing a GST-free supply of a going concern or farmland or a supply from an associate for no consideration prior to selling the property under the margin scheme.
A registered entity that supplies real property in the course or furtherance of its enterprise, as part of a GST-free going concern, as GST-free farmland, or as a non-taxable supply to a registered associate for no consideration does not pay GST on its value added. However, if the entity that acquires the real property later sells it under the margin scheme, it pays GST both on its own value added, and the value added to the property by the registered entity from which it acquired the property.	A registered entity that supplies real property as part of a GST-free going concern, as GST-free farmland, or as a non-taxable supply to a registered associate for no consideration does not pay GST on its value added. If the entity that acquires the real property later sells it under the margin scheme, it only pays GST on its own value added in these circumstances. The value added by the entity from which it acquired the property is not taxed.

New law	*Current law*
A GST benefit is not attributable to the making of a choice, election, application or agreement if the scheme was entered into for the sole or dominant purpose of creating a circumstance or state of affairs necessary to enable the choice, election, application or agreement to be made.	The GST general anti-avoidance provisions may only operate if the GST benefit obtained from a scheme is not attributable to the making of a choice, election, application or agreement that is expressly provided by the GST law.

Detailed explanation of new law

1.28 GST cannot be minimised by interposing certain GST-free or non-taxable supplies prior to a sale under the margin scheme. It is necessary to *look through* certain GST-free sales or non-taxable supplies when determining how to apply the margin scheme.

Eligibility for the margin scheme

1.29 A supply is ineligible for the margin scheme if it was purchased under the basic rules (ie, not using the margin scheme). This is because the purchaser would already have been entitled to claim an input tax credit, and should not be entitled to further relief under the margin scheme. This principle should apply whether or not there has been an interposed GST-free sale or non-taxable supply (of the kind to which these amendments apply).

1.30 A supply of real property that would have been ineligible for the margin scheme, cannot become re-eligible for the margin scheme because it was acquired as part of a GST-free going concern or as GST-free farmland or from an associate for no consideration. ***[Schedule 1, item 2]***

1.31 This reflects the same treatment that applies to real property that has been inherited from a deceased person (paragraph 75-5(3)(b) of the GST Act), supplied from a member of a GST group (paragraph 75-5(3)(c) of the GST Act) or from a joint venture partner (paragraph 75-5(3)(d) of the GST Act). However, one main difference between the new eligibility provisions and the current provisions is that the new provisions only require an entity to *look back* through one transaction to determine eligibility.

1.32 It is recognised that limiting the *look through* test to determine eligibility to the preceding acquisition may enable eligibility for the margin scheme to be reinstated in instances where a sale of property made

under the basic rules is followed by two or more interposed GST-free sales of a going concern or farmland or two or more interposed sales from an associate for no consideration. However, limiting the requirement to *look through* one transaction seeks to achieve a balance between the risks to revenue and the complexity and compliance costs that would be involved in tracing back through a number of transactions between unrelated parties.

1.33 The general anti-avoidance provisions may be applied to contrived arrangements that seek to benefit from the opportunity to reinstate eligibility for the margin scheme by, for example, artificially interposing two or more GST-free sales before a supply under the margin scheme.

1.34 It is also recognised that an acquisition from an associate may not be by means of a supply, for example, some acquisitions by government entities may be made without a supply. New subsection 75-5(3A) specifies that the requirements in subparagraphs 75-5(g)(iii) and (iv) will not apply where the acquisition by an associate for no consideration is not by means of a supply. This means that new paragraph 75-5(3)(g) will also apply where property is acquired for no consideration from an associate regardless of whether the associate makes a supply. ***[Schedule 1, item 3]***

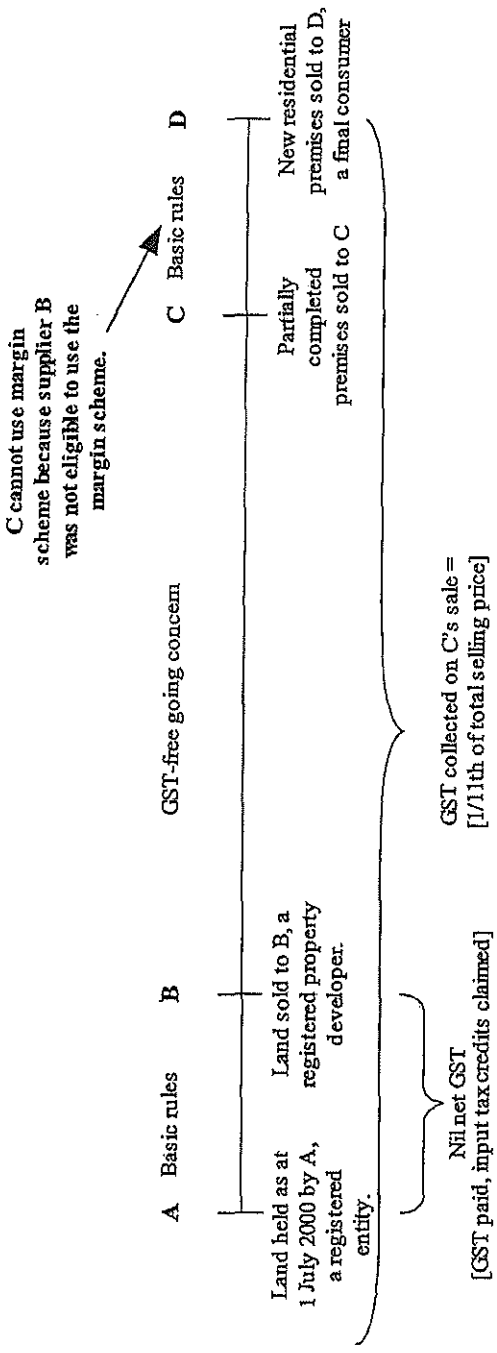
Example 1.1: Ineligibility for the margin scheme following supply of going concern

A is registered for GST, and held vacant land before 1 July 2000. A sells the property to B, a property developer who is also registered for GST. This sale is made under the basic rules. A and B do not use the margin scheme, because B wishes to be eligible to claim an input tax credit on the purchase.

B begins construction of a unit complex on the vacant land. Before completing construction, B sells the partly constructed unit development to C, along with the necessary arrangements for C to carry on its construction. B and C have agreed that this is a supply of a going concern. Therefore B does not remit GST, nor is C entitled to an input tax credit.

C finishes the development, and sells a unit to D, who is a private individual not registered for GST. This is a taxable supply of new residential premises. C cannot make the sale to D under the margin scheme, because B acquired the property under the basic rules, and would therefore also have been ineligible to apply the margin scheme.

This example can also be followed using this diagram:



If B had purchased the property under the margin scheme then the margin scheme could have been applied to C's sale to D.

Example 1.2: Ineligibility for the margin scheme following supply to a registered associate for no consideration

Kit Holdings is registered for GST. It acquires land in Sandy Bay under the basic rules. Later, Kit Holdings transfers the land for no consideration to an associated company, Kit Homes. When Kit Homes sells the land, it will be ineligible to use the margin scheme.

Alternatively, if Kit Holdings had acquired the land under the margin scheme, then the GST payable on the sale by Kit Homes could have been calculated under the basic rules or under the margin scheme.

Eligibility and partial supplies

1.35 Under existing subsection 75-5(2), where real property is acquired partly through a supply that is ineligible for the margin scheme, and partly through a supply that is eligible for the margin scheme, the margin scheme can be used for the subsequent supply. However, in these circumstances, the existing section 75-22 requires an increasing adjustment, reflecting the input tax credit entitlement for that part of the acquisition that is ineligible for the margin scheme.

1.36 Subsection 75-22(1) does not apply in relation to the scenarios described in new paragraphs 75-5(3)(e) to (g) as the supplier in these circumstances is not entitled to an input tax credit for the acquisition. Instead, it is the previous supplier that had the input tax credit entitlement.

1.37 Similarly, subsection 75-22(1) does not apply where property is supplied GST-free as part of a going concern or GST-free farmland or as a non-taxable supply to a registered associate for no consideration, where the entity making the GST-free or non-taxable supply acquired part of the property through a supply that was ineligible for the margin scheme.

1.38 For an increasing adjustment to apply in these circumstances, new subsections 75-22(3) and (4) have been inserted. ***[Schedule 1, item 10]***

1.39 New subsection 75-22(5) specifies the amount of the increasing adjustment. In recognition that there may be difficulties for the supplier in obtaining the information to determine the input tax credits to which the previous supplier was entitled, the provision allows an adjustment to be calculated using an approved valuation.

1.40 Where an entity chooses to use an approved valuation, the amount of the increasing adjustment is equal to 1/11th of an approved valuation of the part of the real property that either, was ineligible for the margin scheme, or would have been ineligible for the margin scheme at the time of the previous supplier's acquisition. Alternatively, the

increasing adjustment will be 1/11th of the consideration provided by the previous supplier to acquire that part of the real property. ***[Schedule 1, item 10]***

Calculating the margin for a supply of real property after certain GST-free or non-taxable supplies

1.41 Where property has been supplied GST-free as part of a going concern, as GST-free farmland, or as a non-taxable supply to a registered associate for no consideration, the entity making the GST-free or non-taxable supply does not have a GST liability for the value they have added to the property. Instead, the calculation of the margin on a subsequent sale of such properties under the margin scheme only takes into account the value added by the supplier under the margin scheme.

1.42 The approach is to *look through* the prior GST-free sale or non-taxable supply in order to calculate the margin for supplies of property under the margin scheme. The margin is based on the consideration paid by the previous entity for their acquisition, or on a valuation of the property when the previous entity acquired the property or first become registered on or after 1 July 2000. In this way, the overall GST liability cannot be reduced by *resetting* the margin by way of a GST-free supply or a non-taxable supply to a registered associate for no consideration. ***[Schedule 1, item 4]***

1.43 As stated, a valuation of a property may be required in order to calculate the margin. In particular, where an entity acquired land before 1 July 2000 and was required to be registered for GST at the commencement of GST, a 1 July 2000 valuation applies for the purposes of determining the margin.

1.44 Where an entity acquired real property on or after 1 July 2000 and was registered at the time of acquisition, a valuation of the property at the time of acquisition or the consideration for the acquisition may be used for the purposes of determining the margin.

1.45 Where real property is acquired by an entity on or after 1 July 2000 and the entity was not registered or required to be registered for GST at the time of acquisition, the value of the property at the time that the entity is first registered or required to be registered applies for the purposes of determining the margin.

1.46 New subsection 75-11(6A) recognises that an acquisition from an associate may not be by means of a supply, for example some acquisitions by government entities may be made without a supply.

Example 1.3: Calculation of the margin following a GST-free sale

A is registered for GST, and held land before 1 July 2000 valued at $110,000. A sells the land to B for $165,000. The margin scheme is applied to this sale. A's GST liability is based on A's value added.

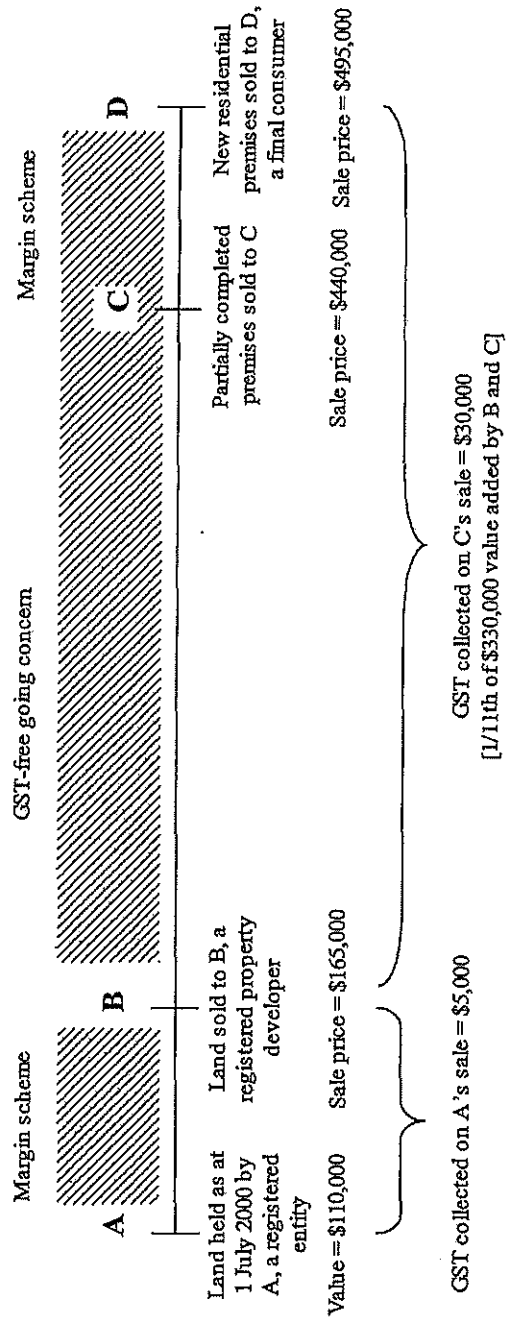
B begins operating an enterprise of construction and sale of a unit complex, and later sells the construction site as part of a going concern to C. Because B and C agree to treat the supply as a GST-free going concern, B pays no GST on the sale price of $440,000 for the site.

By interposing a GST-free sale, the tax on B's value added becomes payable on C's sale. This potential tax liability was contemplated by the parties when they negotiated the GST-free sale price. At the time of the GST-free sale, C could ensure that the necessary documentation evidencing B's acquisition price of the real property was obtained.

C completes the construction and sells it to D for $495,000, applying the margin scheme. In calculating the margin for the sale, C *subtracts* B's acquisition price of $165,000 from C's final sale price of $495,000. This results in a margin of $330,000 for this supply. C pays $30,000 in GST to the Australian Taxation Office.

This is equivalent to the outcome that would have been obtained had B sold the property to C under the margin scheme. In this case B would have paid GST of $25,000, based on B's margin of $275,000 ($440,000 – $165,000). C would have paid $5,000 GST, based on C's margin of $55,000 ($495,000 – $440,000). The total GST collection from B and C would still have been $30,000.

This example can also be followed using this diagram:



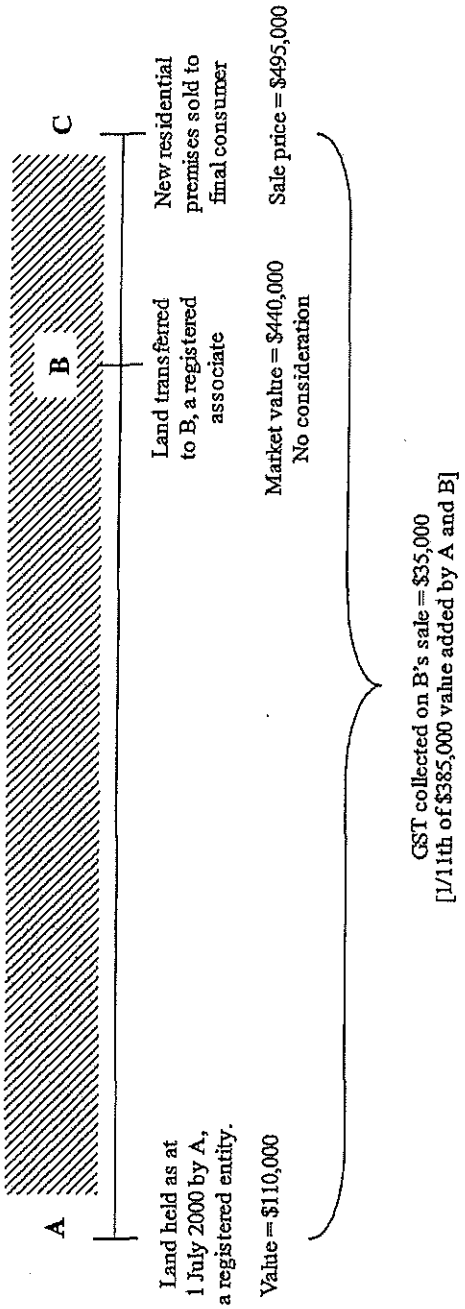
Example 1.4: Calculation of the margin following supply to a registered associate for no consideration

A is registered for GST, and held land before 1 July 2000 valued at $110,000. A begins construction of a unit complex on the land. The property is transferred to its associate B, for no consideration. A is not liable to pay any GST on the transfer because B is registered for GST and acquires the property solely for a creditable purpose. The market value of the property at the time of the transfer is $440,000.

B completes construction, and sells new residential premises to C for $495,000, under the margin scheme. The margin for this sale includes the value added by B of $55,000 ($495,000 – $440,000) as well as the value added by A on or after 1 July 2000 of $330,000 ($440,000 – $110,000). The total margin is therefore $385,000 ($495,000 – $110,000), upon which $35,000 GST is payable.

This is equivalent to the outcome that would have been obtained had A sold the property to B under the margin scheme for its market value of $440,000. In this case A would have paid GST of $30,000, being 1/11th of A's value added of $330,000. B would then have paid only $5,000 GST based on B's value added of $55,000. The total GST collection would still have been $35,000.

This example can also be followed using this diagram:



Example 1.5: GST-free farmland

Jack is a farmer who is registered for GST. Jack owned property near Bendigo valued at $440,000 on 1 July 2000. Jack farms sheep on this land until 2010, when he sells the land to Toby for $550,000, another farmer who is registered for GST. Because Toby intends that a farming business be carried on, on the land Jack's supply to Toby is GST-free.

Toby is later approached by a developer that offers to buy the land in order to build residential premises. If Toby sells the property under the margin scheme, the margin would be the difference between the sale price and the value of the property as at 1 July 2000. Toby would have to remit GST on this margin, but the purchaser would not be entitled to an input tax credit.

Example 1.6: Land acquired on or after 1 July 2000 by an unregistered entity, that later becomes registered for GST

Land is acquired in 2002 by an unregistered entity. In 2010, the entity becomes registered for GST. In 2012, the property is supplied as GST-free farmland, then later sold under the margin scheme. The margin for the later sale is based on an approved valuation or the GST-inclusive market value of the property when the entity became registered in 2010, not the consideration paid for the property in 2002.

Supplies between associates for no consideration

1.47 Division 75 applies to the sale of a freehold interest in land, a stratum unit or granting or selling a long term lease. As a result, under the current law, Division 75 does not apply in relation to supplies between associates for no consideration.

1.48 To ensure that Division 75 can apply, new subsection 75-5(1B) specifies that a supply of real property to an entity who is your associate is taken to be a sale to your associate whether or not the supply is for consideration. ***[Schedule 1, item 1]***

1.49 Existing section 75-13 applies in relation to working out the margin for a supply to an associate. A consequential amendment is made to section 75-13 to ensure that it applies where there is a supply between associates for no consideration. ***[Schedule 1, item 8]***

Calculating the margin for the supply of real property acquired through several acquisitions

1.50 There may be circumstances where more than one of the following provisions applies to the calculation of the margin for the

taxable supply of real property; section 75-10 and subsections 75-11(1) to (7). This may occur where there have been several acquisitions of real property which may later be combined or amalgamated.

1.51 New section 75-16 specifies that where real property has been acquired through two or more acquisitions (partial acquisitions) the calculation of the margin under a particular provision is determined only to the extent that the supply is connected to the partial acquisition. *[Schedule 1, item 9]*

Example 1.7: The margin for supply of real property acquired through several acquisitions

Bob acquired an interest as a GST-free supply of farmland. Bob acquired a second interest from an unregistered vender. The two interests are merged as part of a development and sold under the margin scheme.

Section 75-16 provides that the calculation of the margin under subsection 75-11(5) should only apply to the extent that the interest was acquired pursuant to the GST-free supply of farmland.

GST general anti-avoidance provisions

1.52 The general anti-avoidance provisions in Division 165 of the GST Act apply to artificial or contrived schemes that are entered into or carried out for the sole or dominant purpose of getting a GST benefit. Through entering into or carrying out a scheme, an entity may create a circumstance or state of affairs that is necessary to make a choice, election, application or agreement allowed under the GST Act. In this case, the GST benefit is not attributable to the choice, election, application or agreement.

1.53 In particular, the provisions of this Schedule apply to tax the value added to real property by *looking back* through certain GST-free or non-taxable supplies. However, in order to minimize complexity and record-keeping requirements for taxpayers, the taxpayer is required only to *look back* through one GST-free sale or non-taxable supply. Taxpayers attempting to circumvent these provisions by contriving a string of GST-free sales may be subject to the application of the GST anti-avoidance provisions.

1.54 The reduction in the margin that arises because of the interposition of a GST-free or non-taxable supply is not attributable to, for instance, the agreement to apply the margin scheme or that a supply is a supply of a going concern, but rather to the overall arrangement, including

the interposing of the intermediate supply, of which the choice or agreement is but one part.

1.55 Part IVA of the *Income Tax Assessment Act 1936* (ITAA 1936), subparagraph 177C(2)(a)(ii) provides:

> '...the scheme was not entered into or carried out by any person for the purpose of creating any circumstance or state of affairs the existence of which is necessary to enable the declaration, agreement, election, selection, choice, notice or option to be made, given or exercised, as the case may be...'.

1.56 For the avoidance of doubt, new subsection 165-5(3) introduces into the GST Act a concept that is already found in subparagraph 177C(2)(a)(ii) of the ITAA 1936, so that if a GST benefit is attributable to the making of a choice, election, application or agreement, then consideration needs to be given to the purpose of creating any circumstance or state of affairs which enable such a choice, election, application or agreement. ***[Schedule 1, item 11]***

1.57 This exception is not limited to schemes involving real property and the margin scheme and applies to other schemes to which the GST general anti-avoidance provisions may apply.

1.58 Division 165 is intended to apply to artificial or contrived schemes and not, for example, where parties merely take advantage of concessions, such as the margin scheme and grouping provisions in accordance with the objects of the provision.

Example 1.8: When Division 165 will not apply

> A vendor and purchaser initially instruct their solicitors to draft a contract of sale for a taxable supply. Prior to the contract being executed the parties instruct their solicitors to amend the contract to reflect their agreement that the supply is of a going concern.
>
> In amending the contract, the parties have not entered into an artificial or contrived arrangement to obtain an unintended benefit contrary to the object of the GST Act. They have merely taken advantage of the concession for a supply of a going concern. There is no additional benefit involved. Thus Division 165 does not apply.

1.59 However, where entities take steps to create a circumstance where a statutory choice may be exercised, as part of an artificial or contrived scheme to defeat the object of the GST Act or particular provisions of the Act — such as schemes that seek to use multiple applications of the going concern concession to avoid GST on the value

added by registered entities — the new provision may be relevant to the application of Division 165.

1.60 This new provision requires a conclusion to be drawn as to the purpose of creating the requisite circumstance or state of affairs consistent with the exception contained in Part IVA of the ITAA 1936. The purpose must be the sole or dominant purpose. This standard limits the potential application of the provision to those arrangements that are artificial or contrived in nature. *[Schedule 1, item 11]*

Example 1.9: A string of going concern sales

A is registered for GST and acquires real property on 1 July 2008 for $660,000. The property is acquired under the margin scheme. A partly completes a residential development on the property. On 17 June 2009 the market value of the property is $3.3 million. If A were to sell this property under the margin scheme at its market value of $3.3 million, the GST payable would be $240,000, based on A's margin of $2.64 million.

Instead, A transfers the property to B, as part of a GST-free going concern for $3.3 million. If B were to sell the property under the margin scheme for the same amount, the GST payable would still be $240,000, as B is also required to account for the value added prior to A's supply as a GST-free going concern.

A has arranged with B to transfer the property back to them on 18 June 2009. The property is still valued at $3.3 million. However, A is later able to sell the property to C under the margin scheme for $3.4 million. Because A had acquired the property from B as part of a GST-free going concern, A calculates the margin based on the difference between the final sale price ($3.4 million) and B's acquisition cost ($3.3 million). However, A is not required to look back further, hence A's original margin of $2.64 million is not taxed.

This transaction is brought to the attention of the Commissioner, who seeks to apply the GST general anti-avoidance provisions. Although the agreement to make a GST-free supply of a going concern is expressly provided for by Subdivision 38-J of the GST Act, this does not mean that any GST benefit received by A was attributable to the agreement, because the agreement was but one step in the arrangement. Also, under the amendments, the exclusion of GST benefits attributable to agreements provided for under the Act does not apply as the creation of the circumstances or state of affairs was for the purpose of enabling the agreement to be made.

Application and transitional provisions

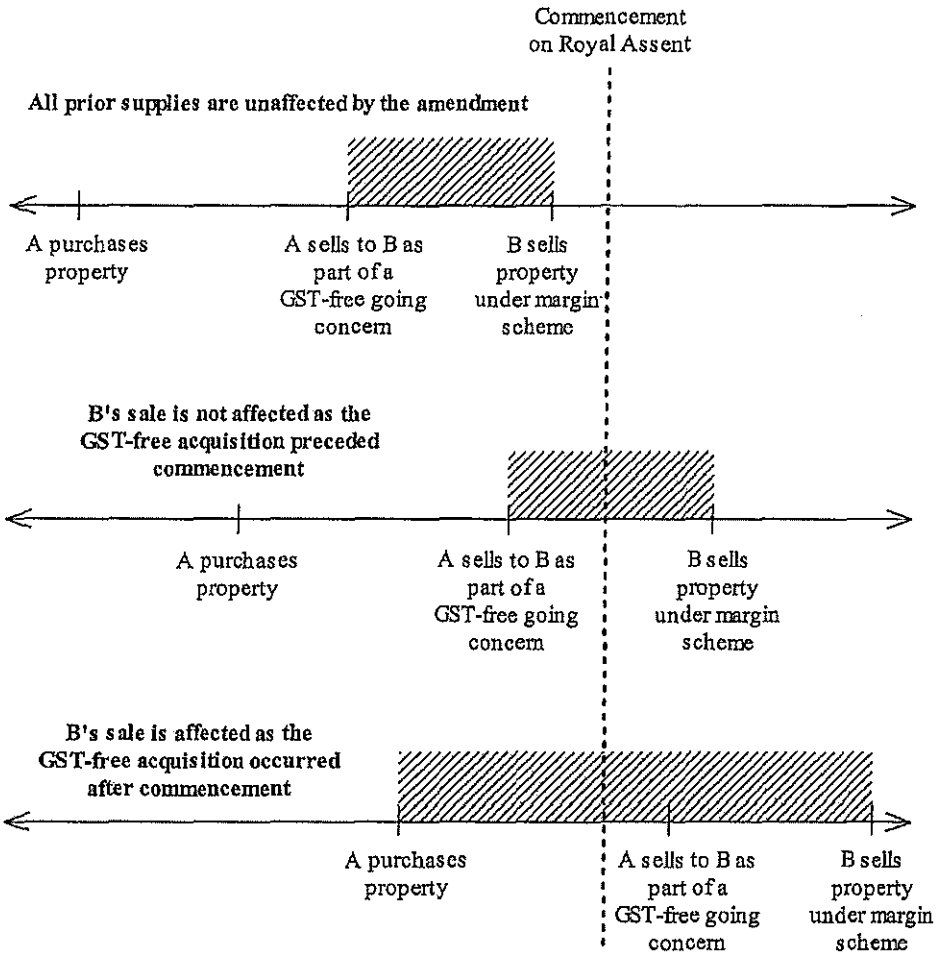
1.61 The amendments to Division 75 relating to eligibility to apply the margin scheme and dealing with the calculation of the margin for a sale under the margin scheme apply in relation to supplies that are supplies of things that the supplier acquired through a *new supply* to the supplier. *New supplies* are supplies made on or after the commencement of this Bill and are not made under a written agreement entered into before commencement or pursuant to a right or option granted before commencement, where consideration or a way of working out the consideration is specified.

1.62 If a supply is made under a written agreement prior to the commencement of this Schedule, the supply of real property under that written agreement is not affected. This means that where parties have already entered into a written agreement that specifically identifies the supply and identifies the consideration in money or a way of working out the consideration in money for the supply of real property, the law as it stood prior to these amendments continues to stand.

1.63 The new rules apply only to parties entering into written agreements on or after the commencement of this Bill. This ensures that when negotiating the terms of a supply of real property, the parties have the opportunity to negotiate the contract price based on any potential liability under these provisions, and have the opportunity to obtain evidence of consideration paid or relevant valuations.

1.64 The sale of a property that was acquired as part of a going concern, or from an associate, prior to the date of commencement will be subject to the existing rules. This is illustrated in Diagram 1.1.

Diagram 1.1: Application of Schedule 1 to the calculation of the margin



If B had purchased the property from A under a written agreement entered into before commencement, that specified in writing the consideration or a way of working out the consideration, the existing rules would apply. If B had similarly purchased the property from A under a right or option granted, that specified in writing the consideration or a way of working out the consideration for the supply before commencement, the existing rules would apply.

1.65 The amendments to the GST anti-avoidance provisions apply to a choice, election, application or agreement made on or after the commencement of this Bill. *[Schedule 1, item 13]*

Consequential amendments

1.66 There are also amendments reorganising assorted headings, notes and other things that need to be removed or changed because of the introduction of the new provisions. ***[Schedule 1, items 5 to 7 and item 12]***

A New Tax System (Goods and Services Tax) Act 1999

Act No. 55 of 1999 as amended

This compilation was prepared on 5 October 2012
taking into account amendments up to Act No. 142 of 2012

The text of any of those amendments not in force
on that date is appended in the Notes section

The operation of amendments that have been incorporated may be affected by application provisions that are set out in the Notes section

Prepared by the Office of Parliamentary Counsel, Canberra

(ii) the entity was registered or required to be registered, at the time of the acquisition;

(iii) the entity had acquired the entire interest, unit or lease through a taxable supply on which the GST was worked out without applying the margin scheme; or

(g) it is a supply in relation to which all of the following apply:

(i) you acquired the interest, unit or lease from an entity who was your *associate, and who was registered or required to be registered, at the time of the acquisition;

(ii) the acquisition from your associate was without *consideration;

(iii) the supply by your associate was not a taxable supply;

(iv) your associate made the supply in the course or furtherance of an *enterprise that your associate *carried on;

(v) your associate had acquired the entire interest, unit or lease through a taxable supply on which the GST was worked out without applying the margin scheme.

(3A) Subparagraphs (3)(g)(iii) and (iv) do not apply if the acquisition from your *associate was not by means of a supply by your associate.

(4) A reference in paragraph (3)(b), (c) or (d) to a supply that was ineligible for the margin scheme is a reference to a supply:

(a) that was ineligible for the margin scheme because of one or more previous applications of subsection (3); or

(b) that would have been ineligible for the margin scheme for that reason if subsection (3) had been in force at all relevant times.

75-10 The amount of GST on taxable supplies

(1) If a *taxable supply of *real property is under the *margin scheme, the amount of GST on the supply is 1/11 of the *margin for the supply.

*To find definitions of asterisked terms, see the Dictionary, starting at section 195-1.

(2) Subject to subsection (3) and section 75-11, the ***margin*** for the supply is the amount by which the *consideration for the supply exceeds the consideration for your acquisition of the interest, unit or lease in question.

(3) Subject to section 75-11, if:

(a) the circumstances specified in an item in the second column of the table in this subsection apply to the supply; and

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

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

Use of valuations to work out margins

Item	When valuations may be used	Days when valuations are to be made
1	The supplier acquired the interest, unit or lease before 1 July 2000, and items 2, 3 and 4 do not apply.	1 July 2000
2	The supplier acquired the interest, unit or lease before 1 July 2000, but does not become *registered or *required to be registered until after 1 July 2000.	The date of effect of your registration, or the day on which you applied for registration (if it is earlier)

*To find definitions of asterisked terms, see the Dictionary, starting at section 195-1.

Use of valuations to work out margins

Item	When valuations may be used	Days when valuations are to be made
2A	The supplier acquired the interest, unit or lease on or after 1 July 2000, but the supply to the supplier: (a) was *GST-free under subsection 38-445(1A); and (b) related to a supply before 1 July 2000, by way of lease, that would have been GST-free under section 38-450 had it been made on or after 1 July 2000.	1 July 2000
3	The supplier is *registered or *required to be registered and has held the interest, unit or lease since before 1 July 2000, and there were improvements on the land or premises in question as at 1 July 2000.	1 July 2000
4	The supplier is the Commonwealth, a State or a Territory and has held the interest, unit or lease since before 1 July 2000, and there were no improvements on the land or premises in question as at 1 July 2000.	The day on which the *taxable supply takes place

(3A) If:

(a) the circumstances specified in item 4 in the second column of the table in subsection (3) apply to the supply; and

(b) there are improvements on the land or premises in question on the day on which the *taxable supply takes place;

the valuation is to be made as if there are no improvements on the land or premises on that day.

(4) This section has effect despite section 9-70 (which is about the amount of GST on taxable supplies).

Note: Section 9-90 (rounding of amounts of GST) can apply to amounts of GST worked out using this section.

*To find definitions of asterisked terms, see the Dictionary, starting at section 195-1.

75-11 Margins for supplies of real property in particular circumstances

Margin for supply of real property acquired from fellow member of GST group

(1) If:

(a) you acquired the interest, unit or lease in question at a time when both you and the entity from whom you acquired it were *members of the same *GST group; and

(b) on or after 1 July 2000, there has been a supply (an ***earlier supply***) of the interest, unit or lease that occurred at a time when the supplier was not a member of the GST group; and

(ba) the *recipient was at that time, or subsequently became, a member of the GST group;

the ***margin*** for the supply you make is the amount by which the *consideration for the supply exceeds:

(c) the consideration for the last such earlier supply, if the supplier and the recipient were not *associates at that time; or

(d) the *GST inclusive market value of the interest, unit or lease at that time, if the 2 entities were associates at that time.

(2) If:

(a) you acquired the interest, unit or lease in question at a time when both you and the entity from whom you acquired it were *members of the same *GST group; and

(b) subsection (1) does not apply;

the ***margin*** for the supply you make is the amount by which the *consideration for the supply exceeds an *approved valuation of the interest, unit or lease as at 1 July 2000.

Margin for supply of real property acquired from joint venture operator of a GST joint venture

(2A) If:

(a) you acquired the interest, unit or lease in question at a time when you were a *participant in a *GST joint venture and the entity from whom you acquired it was the *joint venture operator of the joint venture; and

*To find definitions of asterisked terms, see the Dictionary, starting at section 195-1.

(b) you acquired the interest, unit or lease for consumption, use or supply in the course of activities for which the joint venture was entered into; and

(c) on or after 1 July 2000, there has been a supply (an ***earlier supply***) of the interest, unit or lease to the entity from whom you acquired it (whether or not that entity was the joint venture operator of the joint venture at the time of that acquisition);

the ***margin*** for the supply you make is the amount by which the *consideration for the supply exceeds:

(d) the consideration for the last such earlier supply, if the supplier and the *recipient were not *associates at the time of the earlier supply; or

(e) the *GST inclusive market value of the interest, unit or lease at that time, if the 2 entities were associates at that time.

(2B) If:

(a) you acquired the interest, unit or lease in question at a time when you were a *participant in a *GST joint venture and the entity from whom you acquired it was the *joint venture operator of the joint venture; and

(b) you acquired the interest, unit or lease for consumption, use or supply in the course of activities for which the joint venture was entered into; and

(c) subsection (2A) does not apply;

the ***margin*** for the supply you make is the amount by which the *consideration for the supply exceeds an *approved valuation of the interest, unit or lease as at 1 July 2000.

Margin for supply of real property acquired from deceased estate

(3) If:

(a) you acquired the interest, unit or lease in question by *inheriting it; and

(b) none of subsections (1) to (2B) applies; and

(c) the entity from whom you inherited the interest, unit or lease (the ***deceased***) acquired it before 1 July 2000;

the ***margin*** for the supply you make is the amount by which the *consideration for the supply exceeds:

*To find definitions of asterisked terms, see the Dictionary, starting at section 195-1.

(ca) if you know what was the consideration for the supply of the interest, unit or lease to the deceased and you choose to use that consideration to work out the margin for the supply—that consideration; or

(d) if paragraph (ca) does not apply and, immediately before the time at which you inherited the interest, unit or lease, the deceased was neither *registered nor *required to be registered—an *approved valuation of the interest, unit or lease as at the latest of:

(i) 1 July 2000; or

(ii) the day on which you inherited the interest, unit or lease; or

(iii) the first day on which you registered or were required to be registered; or

(e) if paragraph (ca) does not apply and, immediately before the time at which you inherited the interest, unit or lease, the deceased was registered or required to be registered—an approved valuation of the interest, unit or lease as at the later of:

(i) 1 July 2000; or

(ii) the first day on which the deceased registered or was required to be registered.

(4) If:

(a) you acquired the interest, unit or lease in question by *inheriting it; and

(b) none of subsections (1) to (2B) applies; and

(c) the entity from whom you inherited the interest, unit or lease (the ***deceased***) acquired it on or after 1 July 2000;

the ***margin*** for the supply you make is the amount by which the *consideration for the supply exceeds:

(d) if you know what was the consideration for the supply of the interest, unit or lease to the deceased and you choose to use that consideration to work out the margin for the supply—that consideration; or

(e) if paragraph (d) does not apply—an *approved valuation of the interest, unit or lease as at the day on which the deceased acquired it.

*To find definitions of asterisked terms, see the Dictionary, starting at section 195-1.

Margin for supply of real property acquired as a GST-free going concern or as GST-free farm land

(5) If:

(a) you acquired the interest, unit or lease in question from an entity as, or as part of:

(i) a *supply of a going concern to you that was *GST-free under Subdivision 38-J; or

(ii) a supply to you that was GST-free under Subdivision 38-O; and

(b) the entity was *registered or *required to be registered, at the time of the acquisition; and

(c) none of subsections (1) to (4) applies;

the ***margin*** for the supply you make is the amount by which the *consideration for the supply exceeds:

(d) if that entity had acquired the interest, unit or lease before 1 July 2000 and on that day was registered or required to be registered:

(i) if you choose to apply an *approved valuation to work out the margin for the supply—an approved valuation of the interest, unit or lease as at 1 July 2000; or

(ii) if subparagraph (i) does not apply—the *GST inclusive market value of the interest, unit or lease as at 1 July 2000; or

(e) if that entity had acquired the interest, unit or lease on or after 1 July 2000 and had been registered or required to be registered at the time of the acquisition:

(i) if the entity's acquisition was for consideration and you choose to apply an approved valuation to work out the margin for the supply—an approved valuation of the interest, unit or lease as at the day on which the entity had acquired it; or

(ii) if the entity's acquisition was for consideration and subparagraph (i) does not apply—that consideration; or

(iii) if the entity's acquisition was without consideration—the GST inclusive market value of the interest, unit or lease as at the time of the acquisition; or

*To find definitions of asterisked terms, see the Dictionary, starting at section 195-1.

(f) if that entity had not been registered or required to be registered at the time of the entity's acquisition of the interest, unit or lease (and paragraph (d) does not apply):

(i) if you choose to apply an approved valuation to work out the margin for the supply—an approved valuation of the interest, unit or lease as at the first day on which the entity was registered or required to be registered; or

(ii) if subparagraph (i) does not apply—the GST inclusive market value of the interest, unit or lease as at that day.

Margin for supply of real property acquired from associate

(6) If:

(a) you acquired the interest, unit or lease in question from an entity who was your *associate, and who was *registered or *required to be registered, at the time of the acquisition; and

(b) the acquisition from your associate was without *consideration; and

(c) the supply by your associate was not a *taxable supply; and

(d) your associate made the supply in the course or furtherance of an *enterprise that your associate *carried on; and

(e) none of subsections (1) to (5) applies;

the ***margin*** for the supply you make is the amount by which the consideration for the supply exceeds:

(f) if your associate had acquired the interest, unit or lease before 1 July 2000 and on that day was registered or required to be registered:

(i) if you choose to apply an *approved valuation to work out the margin for the supply—an approved valuation of the interest, unit or lease as at 1 July 2000; or

(ii) if subparagraph (i) does not apply—the *GST inclusive market value of the interest, unit or lease as at 1 July 2000; or

(g) if your associate had acquired the interest, unit or lease on or after 1 July 2000 and had been registered or required to be registered at the time of the acquisition:

(i) if your associate's acquisition was for consideration and you choose to apply an approved valuation to work out

*To find definitions of asterisked terms, see the Dictionary, starting at section 195-1.

the margin for the supply—an approved valuation of the interest, unit or lease as at the day on which your associate had acquired it; or

(ii) if your associate's acquisition was for consideration and subparagraph (i) does not apply—that consideration; or

(iii) if your associate's acquisition was without consideration—the GST inclusive market value of the interest, unit or lease at the time of the acquisition; or

(h) if your associate had not been registered or required to be registered at the time of your associate's acquisition of the interest, unit or lease (and paragraph (f) does not apply):

(i) if you choose to apply an approved valuation to work out the margin for the supply—an approved valuation of the interest, unit or lease as at the first day on which the entity was registered or required to be registered; or

(ii) if subparagraph (i) does not apply—the GST inclusive market value of the interest, unit or lease as at that day.

(6A) Paragraphs (6)(c) and (d) do not apply if the acquisition from your *associate was not by means of a supply by your associate.

(6B) To avoid doubt, you cannot be taken, for the purposes of paragraph (5)(f) or (6)(h), to be *registered or *required to be registered on a day earlier than 1 July 2000.

(7) If:

(a) you acquired the interest, unit or lease in question from an entity who was your *associate at the time of the acquisition; and

(b) none of the other subsections of this section apply;

the ***margin*** for the supply you make is the amount by which the *consideration for the supply exceeds:

(c) if your acquisition was made before 1 July 2000—an *approved valuation of the interest, unit or lease as at 1 July 2000; or

(d) if your acquisition was made on or after 1 July 2000—the *GST inclusive market value of the interest, unit or lease at the time of the acquisition.

*To find definitions of asterisked terms, see the Dictionary, starting at section 195-1.

Subdivision 165-A—Application of this Division

165-5 When does this Division operate?

General rule

(1) This Division operates if:

(a) an entity (the ***avoider***) gets or got a *GST benefit from a *scheme; and

(b) the GST benefit is not attributable to the making, by any entity, of a choice, election, application or agreement that is expressly provided for by the *GST law, the *wine tax law or the *luxury car tax law; and

(c) taking account of the matters described in section 165-15, it is reasonable to conclude that either:

(i) an entity that (whether alone or with others) entered into or carried out the scheme, or part of the scheme, did so with the sole or dominant purpose of that entity or another entity getting a *GST benefit from the scheme; or

(ii) the principal effect of the scheme, or of part of the scheme, is that the avoider gets the GST benefit from the scheme directly or indirectly; and

(d) the scheme:

(i) is a scheme that has been or is entered into on or after 2 December 1998; or

(ii) is a scheme that has been or is carried out or commenced on or after that day (other than a scheme that was entered into before that day).

Territorial application

(2) It does not matter whether the *scheme, or any part of the scheme, was entered into or carried out inside or outside Australia.

Creating circumstances or states of affairs

(3) A *GST benefit that the avoider gets or got from a *scheme is not taken, for the purposes of paragraph (1)(b), to be attributable to a

*To find definitions of asterisked terms, see the Dictionary, starting at section 195-1.

choice, election, application or agreement of a kind referred to in that paragraph if:

(a) the scheme, or part of the scheme, was entered into or carried out for the sole or dominant purpose of creating a circumstance or state of affairs; and

(b) the existence of the circumstance or state of affairs is necessary to enable the choice, election, application or agreement to be made.

165-10 When does an entity get a *GST benefit* from a scheme?

(1) An entity gets a ***GST benefit*** from a *scheme if:

(a) an amount that is payable by the entity under this Act apart from this Division is, or could reasonably be expected to be, smaller than it would be apart from the scheme or a part of the scheme; or

(b) an amount that is payable to the entity under this Act apart from this Division is, or could reasonably be expected to be, larger than it would be apart from the scheme or a part of the scheme; or

(c) all or part of an amount that is payable by the entity under this Act apart from this Division is, or could reasonably be expected to be, payable later than it would have been apart from the scheme or a part of the scheme; or

(d) all or part of an amount that is payable to the entity under this Act apart from this Division is, or could reasonably be expected to be, payable earlier than it would have been apart from the scheme or a part of the scheme.

*What is a **scheme**?*

(2) A ***scheme*** is:

(a) any arrangement, agreement, understanding, promise or undertaking:

(i) whether it is express or implied; and

(ii) whether or not it is, or is intended to be, enforceable by legal proceedings; or

(b) any scheme, plan, proposal, action, course of action or course of conduct, whether unilateral or otherwise.

*To find definitions of asterisked terms, see the Dictionary, starting at section 195-1.