IN THE HIGH COURT OF AUSTRALIA
PERTH REGISTRY **No. P 6 of 2018**

BETWEEN: **COMMISSIONER OF STATE REVENUE**
Appellant

and

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

RESPONDENT'S SUBMISSIONS

Part I: Publication

1. We certify that this submission is in a form suitable for publication on the internet.

Part II: Issues

2. The sole statutory issue is whether the value of the land assets held by Placer at the time it was acquired by Barrick exceeded the statutory threshold in s 76ATI of the *Stamp Act* 1921 (WA). The acquisition price fixed the value of Placer's total property at US$15.3 b. It was agreed that Placer's excluded property had a value of US$2.5 b. Therefore, the specific issue that arose under s 76ATI was whether the value of Placer's land was greater than or equal to 60% of US$12.8 b (US$7.68 b).

3. On that issue, each side relied upon direct land valuations prepared by expert valuers[1]. All the valuers agreed that the critical difference between them was the choice of gold prices to be used in their valuations.[2]

---

[1] Tribunal [284] (Core Appeal Book (CAB) 78), [308] (CAB 82-83), [315] (CAB 84) and Court of Appeal (CA) [181] (CAB 181) and [184] (CAB 182).
[2] Tribunal [323] (CAB 86); and CA [14] (CAB 128), [181] (CAB 181) and [185] (CAB 182).

Filed on behalf of the Respondent by: Document dated: 4 May 2018

Ernst & Young Law Pty Ltd
Level 2 EY Building
11 Mounts Bay Road
Perth WA 6000

Contact: Scott Grimley
Telephone: +61 8 9429 2222
Fax: +61 8 9429 2433
Email: scott.grimley@au.ey.com

4. The Court of Appeal rejected the gold price estimates used by the Appellant's expert, Lonergan, in his valuations and this was sufficient to set aside the Tribunal's decision. The Appellant no longer seeks to defend her land valuations.

5. Both the Tribunal and the Court of Appeal accepted that no provision of the Act requires the attribution of any value to goodwill.[3]

6. In this Court, the Appellant now seeks to contend that the critical issue is whether Placer owned property comprising goodwill with a value exceeding US$6.5 b.[4] The Appellant argues that, if it did not, then whatever the value of the land owned by Placer that value was more than the threshold figure.[5] Aside from the fact that this mischaracterises the true issue, there is a question whether the Appellant's contention is maintainable. The Respondent contends that it is not because it is contradicted by the evidence, it is a departure from the way in which the case was mounted below, and it is unsound in principle.

Part III: Judiciary Act 1903

7. It is certified that notice is not required under s78B of the *Judiciary Act* 1903 (Cth).

Part IV: Material facts

8. The principal facts are not in issue, but the Appellant's summary of the facts is erroneous and incomplete.

9. The Respondent acquired Placer as a going concern. The acquisition price reflected the arm's length value of Placer's total property, both real and personal, tangible and intangible, which together conferred on the Respondent the right to continue to operate Placer as a going concern and to merge Placer's continuing business operations into its own business operations.[6]

---

[3] Tribunal [354] (CAB 92); CA [74] (CAB 148-149), [181] (CAB 181) and [244] (CAB 198).
[4] The figure of US$6.5 billion appears to be an approximate reference to the goodwill figure in Barrick's accounts, but that figure cannot be translated into the statutory test.
[5] Appellant's submissions, [11].
[6] CA [36] (CAB 136).

10. At the time of the acquisition, Placer was an ongoing, profitable, going concern business which had operated for more than 100 years and had 13,000 employees in a variety of different countries, with sophisticated systems and experienced personnel which enabled it to operate efficiently and gave it a competitive advantage over its competitors.[7]

11. Barrick's post-acquisition financial statements were not simply the outcome of "conventional accounting practice" based on amounts "nominated" as the "fair value".[8] Those financial statements were required by the United States Securities and Exchange Commission (US SEC)[9] to be prepared in accordance with US generally accepted accounting principles (US GAAP) and recorded as goodwill the premium that Placer's going concern business as a whole commanded over and above the sum of the fair value of its individual assets.[10] The amount that Barrick recorded as goodwill in its statutory accounts was based on Patel's valuation which determined the fair value of the assets in accordance with *Spencer's* case.[11] That valuation was further supported by the later valuation by Lee, again in accordance with *Spencer's* case[12].

12. Barrick followed a rigorous process in preparing its financial statements, including detailed scrutiny by Barrick's audit committee and external auditors, and the US SEC[13].

13. The Appellant does not record the Court of Appeal's factual findings as to the sources and extent of Placer's goodwill. They included findings that Placer's size, global structure, management systems and the skills and expertise of its personnel enabled it to harvest

---

[7] CA [5] (CAB 126), [41]-[43] (CAB 138).
[8] Appellant's submissions at [7].
[9] Attachment TC-1 to witness statement of Tyrone Carlin (within exhibit 27) at [5] footnote 10 (Respondent's Further Materials (RFM) 8).
[10] The governing accounting standards were Financial Accounting Standards 141 and 142. The former standard provided that the capacity of a combination of assets to produce future cash flows constituted an asset that was to be designated goodwill, and its value was reflected by the premium that an entity as a whole commands in comparison to the sum of the fair values of its component parts: Attachment GEB-14 to the witness statement of Julie Robertson (within exhibit 33) at section 2.1 (RFM 37-39).
[11] *Spencer v Commonwealth* (1907) 5 CLR 418. See the definition of "fair market value" in Attachment JP-1 to the witness statement of Jay Patel (within exhibit 14) at 4 (RFM 43).
[12] See the definition of "fair market value" in Attachment EL-1 to the witness statement of Edward Lee (within exhibit 17) (RFM 59).
[13] Tribunal [59] (CAB 31-32) and [78]-[90] (CAB 37-40); see also Tribunal Transcript (Sokalsky) at 525-526 (RFM 74-75).

efficiencies and economies of scale, and created the capacity to expand and develop the business by identifying and developing new mining projects as the resources of existing mines were depleted.[14]

Part V: Applicable provisions

14. The Appellant has referred in a global way to the provisions in Part IIIBA of the *Stamp Act* (1921) (WA). However, the relevant definitions, including for "land" need to be considered, as does section 74C.

Part VI: Respondent's argument

The statutory test

10 15. The Appellant's submissions fail to engage with the statutory text and its purpose. Part IIIBA was introduced to prevent duty on transfers of land being avoided through schemes that involved the use of corporate structures and share sales. The purpose of the Part is to equalize duty in relation to conveyances of land so the duty is the same whether the land is conveyed directly or as a result of a transfer of shares.[15] This purpose is reflected in the statutory provisions which make liability to duty, and the amount of any duty, dependent on the value of land.

16. Consistent with the statutory purpose, the value of "land" is fundamental to the operation of Part IIIBA. Before any duty is payable, the land holder must have land within Western Australia (WA) valued at $1 million, and the value of all land must be 60% or more of the
20 value of total property less excluded property[16]. If these criteria are satisfied, and duty is payable, the amount of duty is assessed by reference to the value of land and chattels situated in WA[17].

---

[14] CA [38] (CAB 137), [42]-[49] (CAB 138-141), [68] (CAB 146-147), [225]-[226] (CAB 194) and [245] (CAB 198).
[15] *Commissioner of State Taxation v Nischu* (1991) 4 WAR 437 at 438-439, 448-449 and 457; *Epic Energy (Pilbara Pipeline) Pty Ltd v Commissioner of State Revenue* (2011) 43 WAR 168 at [21], [138] and [206]; *Commissioner of State Revenue v OZ Minerals Ltd* (2013) 46 WAR 156 at [108], [271] and [286] final sentence.
[16] *Stamp Act* 1921 (WA) ss 76ATI(2)(a) and 76ATI(2)(b) The effect of these provisions is summarised in the judgments below: Tribunal [210]-[213] (CAB 65-66); CA [16] (CAB 129) and [27] (CAB 134).
[17] *Stamp Act* 1921 (WA) s 76ATL(1).

17. In accordance with the statutory text and purpose, what must be assessed is the value of the land; not the land coupled with additional, intangible value that inheres in Placer's entire going concern business and which must be legally recognized as the separate asset, goodwill. The definition of "land" in Part IIIBA is clear. It includes mining tenements. It does not include a business. When the statute requires the going concern or goodwill value of a business to be assessed to duty, it so provides[18].

18. The only integer in the statutory formula which has been in issue is the value of land.[19] Unless the value of land was greater than or equal to the threshold ($7.68 b), no duty was payable.

10 19. It has also been common ground throughout that the valuation of land is to be conducted in accordance with *Spencer's* case, on the basis of its value in exchange, not its value in use.[20]

20. Both sides addressed this issue by valuing the land directly by means of expert valuations. The valuers agreed that the appropriate method to capture the full commercial value of the producing properties was a DCF analysis.[21] The issue that separated the experts was the appropriate long-term gold price estimates to use in their DCF analyses of the mining properties[22]. The Court of Appeal rejected the Appellant's case on gold price estimates, for the detailed reasons it gave; and the Appellant does not challenge those findings.

21. In this Court, the Appellant seeks to rely on a top-down approach to valuing the land, which starts with the value of the entire business, assumes there is no material goodwill or
20 other intangible value within Placer's going concern business, and treats the residual as land. There are numerous problems with this methodology. As the Court of Appeal pointed out, the method is dependent on it being possible to accurately identify and value each and

---

[18] *Stamp Act* 1921 (WA) s 74C.
[19] Tribunal [210] (CAB 65) and [212] (CAB 65); CA [16] (CAB 129), [27] (CAB 134), [35] (CAB 136), [215] (CAB 190), [219] (CAB 191-192).
[20] Tribunal [155] (CAB 55) and [157] (CAB 55-56); CA [15] (CAB 129).
[21] Tribunal [279] (CAB 77); CA [184] (CAB 182).
[22] The values of all properties were those that would be arrived at by willing but not anxious buyers and sellers in accordance with *Spencer*. The producing properties were valued by reference to their income producing potential via a DCF analysis. Development and exploration properties were valued by various methods, including by reference to comparable sales.

every tangible and intangible non-land asset, right, privilege or advantage; but such an approach is neither practical nor feasible on the facts of this case and having regard to the attributes that constitute goodwill.[23]

22. The Appellant's current argument is to be contrasted with the case it presented below. In the Tribunal, the Appellant based her case on direct land valuations. The Appellant's expert, Lonergan, made a statement in evidence to the effect that "it is generally conceptually illogical that a mining company will have material goodwill" but the Appellant did not contend for such an absolute proposition.[24] The Appellant's position was that the DCF valuations should conform closely to the market value of the underlying equity.[25]

23. In any event, the Tribunal based its decision upon its acceptance of Lonergan's land valuations and considered that it was unnecessary for it to make any finding on the correctness or otherwise of Lonergan's statement that a mining company will not have any material goodwill.[26] The Tribunal found that there was no evidence supporting a conclusion that Placer had any materially significant goodwill, but that factual finding was overturned by the Court of Appeal and at an evidentiary level there is no challenge to that finding, and no basis for challenging it.[27]

24. In the Court of Appeal, the Appellant maintained her reliance on Lonergan's land valuations as establishing the value of Placer's land, although the Appellant also relied on the contention that Placer had no material goodwill.

Direct land valuations and gold prices[28]

25. As mentioned above, each valuer used a DCF analysis, and the critical difference between

---

[23] CA [57] (CAB 142-143).
[24] Tribunal [355] (CAB 92).
[25] Tribunal [287] (CAB 79) and [347] (CAB 91).
[26] Tribunal [378] (CAB 96).
[27] Tribunal [377]-[379] (CAB 96).
[28] The competing gold price estimates are set out by the Court of Appeal at [129] (CAB 163), and its reasons are at [123]-[179] (CAB 162-181), with a summary at [178] (CAB 180-181).

them was the estimated long-term gold prices used in their analysis[29] to calculate future cash flows for the sale of gold products from the land.

26. The Respondent's valuers relied on consensus and management estimates of long-term future gold prices at the time of the acquisition. The Tribunal accepted the evidence of the Appellant's expert, Lonergan, who opined that the appropriate input in a DCF valuation was a price for gold assessed by reference to gold futures contracts and, for the period beyond the fifth year when such contracts were not available, those prices should be escalated on an annual basis of 2% (real).

27. The Court of Appeal found that there were many flaws in Lonergan's evidence.

10 28. Gold futures are financial instruments in which the price is fixed by reference to the current spot price of gold, plus interest and a risk premium. As such, they do not provide an estimate of the future spot price of gold.[30] It follows that they cannot validly be used in a DCF calculation.[31]

29. Before the Court of Appeal, the Appellant conceded that the prices fixed in gold futures contracts are not an estimate of the likely price at which gold will be sold in the future. As the Court of Appeal correctly observed,[32] this means that the Tribunal's conclusion that gold futures prices could be used as an acceptable basis for assessing the value of a gold mine was unsound.

30. The Court of Appeal also found that Lonergan's methodology was unsound because it
20 ignored the fact that the futures market is thin, illiquid and incapable of absorbing all of a company's gold production, and also that it is not the usual practice for any company to hedge its entire production.[33]

---

[29] Tribunal [152] (CAB 54) and [154] (CAB 55); CA [14] (CAB 128), [110] (CAB 159), [181] (CAB 181), [185] (CAB 182).
[30] CA [141]-[147] (CAB 168-170).
[31] CA [168] (CAB 178).
[32] CA [148] (CAB 170-171) and [168] (CAB 178).
[33] CA [162] (CAB 175).

31. The gold futures price was the price fixed by a financial instrument on one day for the delivery of gold on a future date, ordinarily within twelve to eighteen months of the date of the contract and virtually none beyond five years from the date of the contract.[34] For this reason, Lonergan's methodology involved escalating the prices realised after the fifth year by an assumed 2% (real), which effectively assumed ever-increasing gold prices (in real terms). Given the history of volatility in the gold market and the long-term trend of decreasing prices in the period until shortly prior to the Placer acquisition,[35] this situation demonstrated the contrived nature of Lonergan's valuation.

32. Lonergan's long-term gold-price estimates were also entirely out of step with the contemporaneous market information. There was evidence that neither Barrick nor Placer used the prices of gold futures for the purpose of assessing the price which should be paid or accepted for Placer's shares; rather their separate valuations were undertaken by reference to a forecast future gold price based upon the consensus forecasts of a number of leading goldmining analysts.[36] Placer's internal strategic business plans prepared in respect of each operating mine were based on long term gold price forecasts.[37] More generally in its business, Barrick always relied upon forecast gold prices derived from an average or consensus of the forecast gold price assessed by leading gold analysts; and it never used gold futures prices as a mechanism for forecasting gold prices in a valuation context.[38] Other industry participants also used consensus prices or other analysis; and not the gold futures price.[39]

33. The upshot from Lonergan's erroneous use of gold futures prices was that his DCF valuations used long-term gold price estimates of $639 per ounce, which he then increased by a further 2% (real), year on year, for every year of expected future production after five years.[40] This was contrary to the historical price of gold at the time of the transaction, and

---

[34] CA [130] (CAB 164).
[35] CA [157] (CAB 173), [185] (CAB 182) and [248] (CAB 199).
[36] CA [124] (CAB 162).
[37] CA [128] (CAB 163).
[38] CA [134] (CAB 165).
[39] CA [134]-[136] (CAB 165-166) and [140] (CAB 167-168).
[40] CA [129] (CAB 163).

involved perpetual year on year increases in the price of gold contrary to the previous 172 years.[41]

34. In contrast, when considering what to pay for the acquisition, Barrick used a long-term gold price estimate of $375-$450 per ounce.[42] Placer, which initially opposed the acquisition, used a long-term gold price estimate of $375 per ounce and did not oppose the acquisition on the basis that Barrick's estimated future gold price was too low.[43] The median long-term gold price estimates of other industry participants at the time of the transaction was $450 per ounce.[44] This contemporaneous information supported the long-term gold price estimates of $450 per ounce relied on by the Respondent's valuers.

10 35. In view of these and other problems that Martin CJ listed at [178], the Court of Appeal held that Lonergan's evidence should be rejected and for that reason alone it allowed the appeal.

The Appellant's top-down approach

36. In an attempt to avoid the rejection of her case on gold price estimates, the Appellant now seeks to rely exclusively on a top-down approach to valuing the land. However, there are numerous problems with that course and the Respondent submits that it should fail.

37. First, it was not the approach contended for below. Below, the Appellant's case relied on land valuations[45], and the Appellant sought to justify the gold prices that Lonergan used in his valuations by contending that the DCF values for the land assets should compare closely with the market value of the underlying equity.[46] The Appellant now seeks to rely
20 solely on a methodology that starts with the transaction price, and then deducts non-land items, other than goodwill that it assumes to be non-existent, in an attempt to avoid the gold price issue and any need to rely on land valuations.

---

[41] CA [132]-[133] (CAB 164-165) and [158] (CAB 173-174).
[42] CA [125]-[126] (CAB 162). All gold prices are in US$.
[43] CA [125]-[126] (CAB 162); and Document 141.14 (within exhibit 4) at 2, footnote (2) (RFM 79).
[44] CA [133] (CAB 165).
[45] CA [181] (CAB 181) and [185] (CAB 182).
[46] Tribunal [287] (CAB 79); CA [108] (CAB 158).

38. Secondly, and as the Court of Appeal correctly observed[47], the Appellant's approach is a diversion from the statutory question.

39. Thirdly, it is not necessary to resort to a top down approach, as the land could be and was valued directly. The Appellant's top down approach is also inherently circular because it depends on assumptions about non-land value in order to determine the value of land. The predicate for the argument is that a gold mining company can have no legal goodwill but that predicate was not accepted at either level below, and it was contrary to the evidence.[48] If any reconciliation of the kind mentioned by the Tribunal[49] is to be attempted, then the value of land that the Appellant derives under her top down approach cannot be reconciled with the direct land valuations after the gold price issue was resolved against the Appellant[50].

40. Fourthly, the Appellant's proposed method is inappropriate in this case because it depends on each and every tangible and intangible asset of Placer being able to be identified and valued with precision in circumstances where, as the Court of Appeal found, this was neither practical nor feasible[51]. The Court of Appeal's analysis conformed with the High Court's observation in *Murry's* case[52] that many sources of goodwill are not themselves assets that are capable of separate valuation, citing as examples manufacturing and distribution techniques, the efficient use of the assets of a business, superior management practices and good industrial relations with employees.[53] The Appellant now seeks to sidestep these matters by conflating the value of Placer's land and the value of Placer's mining going concern business, and then justifying that course by asserting that there could be no legal goodwill for a mining business such as that conducted by Placer. However,

---

[47] CA [91] (CAB 153), [92] (CAB 153-154), [181] (CAB 181), [225] (CAB 194), [226] (CAB 194) and [244] CAB 198).
[48] CA [40] (CAB 137-138), [57] (CAB 142-143), [60] (CAB 144) and [225] (CAB 194).
[49] Tribunal [260]-[262] (CAB 73-74), referencing *EIE Ocean BV v Commissioner of Stamp Duties* [1998] 1 Qd R 36 at [38]. The need for any such reconciliation was rejected by the Court of Appeal: CA [53]-[59] (CAB 142-144).
[50] CA [181] (CAB 181), [185] (CAB 182) and [248] (CAB 199).
[51] CA [57] (CAB 142-143), [59] (CAB 144), [60] (CAB 144), [90] (CAB 153), [91] (CAB 153) and [225] (CAB 194).
[52] *FCT v Murry* (1998) 193 CLR 605.
[53] *Murry* at [12] and [30]; see also CA [82] (CAB 151), [86] (CAB 152) and [95] (CAB 155).

once it is recognised that Placer's going concern business has some material intangible value attaching to it that is distinct from the value of its land assets, the top down method is untenable.

41. Fifthly, the Appellant's top down approach treats land as the residual, which is difficult to reconcile with *Murry's* case, and with the evidence, both of which indicate that the accepted way and probably the only way to value goodwill given its nature is as a residual.[54] There can only be one residual on a top down methodology, and in accordance with *Murry's* case and the evidence, the residual should be goodwill not land.

42. Sixthly, there was no evidence that any *Spencer* purchaser deciding what to pay for land in accordance with its value in exchange would adopt a top down valuation method. That would be an indirect approach destined, or at least prone, to error. Instead, the evidence was that Barrick, Placer and other industry participants valued the land directly, by reference to the estimated future price of gold.

43. Lastly, the Appellant's top down approach does not answer the second part of the statutory test which is the value of land and chattels in WA. When valuing the land for that purpose, each of the valuers (including Lonergan) relied in their DCF analyses on their preferred long-term gold price estimates. Accordingly, the top down method did not, and cannot, avoid the adverse outcome for the Appellant on the gold price issue.

44. For all these reasons, the Court of Appeal was right not to accept the Appellant's top down method and, as a result, the appeal must fail.

Substantial goodwill was established

45. The Tribunal treated goodwill as an evidentiary issue; its significance being that the apparent incongruity of Lonergan's land valuations and his reliance on gold price futures would be lessened or removed if there were no evidence of substantial goodwill. On this

[54] CA [88]-[90] (CAB 152-153); Attachment JP-2 to the witness statement of Jay Patel (within exhibit 14) at [18] (RFM 83); Attachment EL-2 to the witness statement of Edward Lee (within exhibit 17) at [98] (RFM 87).

issue, the Tribunal held that, apart from goodwill for accounting purposes, there was no evidence that Placer had a substantial amount of goodwill.[55]

46. The Court of Appeal overturned this finding, holding that there was much more to Placer's business than interests in land, and that there was ample evidence that Placer had goodwill of substantial value.[56] The outcome of the gold price issue itself supports there being considerable non-land, intangible value.[57]

47. The Court of Appeal's findings included the following:

(a) Placer's business was a very substantial going concern which had attributes to which potential purchasers might well attribute value, above and beyond the value of Placer's interests in land.

(b) Placer's 13,000 personnel had demonstrated the capacity to develop and expand the business through a program of exploration, the application of technical capabilities and the business's global operating structure.

(c) Placer had developed innovative mining techniques, including through its research and development laboratory, that enabled Placer to viably extract lower grade ores from certain mine sites giving it a competitive advantage over other miners.

(d) Placer employed a strong project group that was experienced in designing and constructing mines, and also employed mine managers who took a lean, focused approach to operations performance.

(e) Placer's management structures and systems were utilised for the purpose of enhancing profitability and efficiency in the context of a large global business with capital intensive mining processes, exploration operations and development projects, and included the strategic business plans at each operating mine and a recent redesign of business processes so as to achieve standardised systems.

---

[55] Tribunal [378] (CAB 96).
[56] CA [95] (CAB 155), [96] (CAB 155), [226] (CAB 194), [245] (CAB 198) and [246] (CAB 198).
[57] CA [226] (CAB 194), [248] (CAB 199).

(f) Placer's size, global structure, management systems and the skills and expertise of its personnel enabled it to harvest efficiencies and economies of scale, and created the capacity to expand and develop the business by identifying and developing new mining projects as the resources of existing mines were depleted.

(g) The scale, structure and features of Placer's business offered synergies that could be realised if the business were to be sold and those benefits would be equally available to any large international gold mining company or consortium seeking to acquire Placer's business.[58]

48. On the Appellant's case, the hypothetical *Spencer* purchaser would pay essentially the same amount for the various mining tenements in countries around the world, without any of the other assets or attributes of the business, as it would for the entire proven, profitable, successful going concern business from which it could immediately generate revenue and profit.[59]

49. This is uncommercial and nonsensical. It also ignores the fact that an important aspect of going concern value (reflected here in the takeover price paid for Placer) is Placer's proven ability to explore for, find and then successfully develop new mining reserves to replace its existing reserves. That element of going concern value relates to future properties and cannot possibly be captured by valuations of Placer's existing mining reserves. However, the evidence established it was part of the intangible value[60] recorded in Barrick's accounts under the heading goodwill.

---

[58] CA [38] (CAB 137), [42]-[49] (CAB 138-141), [68] (CAB 146-147), [226] (CAB 194) and [245] (CAB 198); Attachment GEB-14 to the witness statement of Julie Robertson (within exhibit 33) at section 2.1 (RFM 37-39); Attachment GEB-21 to the witness statement of Julie Robertson (within exhibit 33) at 18 and 83 (RFM 119-120); witness statement of Jamie Sokalsky (within exhibit 35) at [7]-[41] (RFM 125-140); witness statement of Mark Fisher (within exhibit 1) at [7]-[23] (RFM 91-97); Tribunal Transcript (Sokalsky) 429-436, 487-489, 525-526 (RFM 63-75); Tribunal Transcript (Fisher) 77-83 (RFM 101-107).

[59] This was also illustrated by the evidence that significant time and cost would be involved in restoring 8 of the 16 mining tenements to an operational state: Attachment EL-3 to the witness statement of Edward Lee (within Exhibit 18) at [28] (RFM 111); witness statement of David Tutton (within Exhibit 32) at 6 (RFM 115).

[60] Attachment EL-1 to the witness statement of Edward Lee (within exhibit 17) at 53 (Appellant's Further Materials (AFM) 45); Attachment GEB-14 to the witness statement of Julie Robertson (within exhibit 33) at section 2.1 (RFM 37-39); Attachment GEB-21 to the witness statement of Julie Robertson (within exhibit 33) at 18 and 83 (RFM 119-120); witness statement of Jamie Sokalsky (within exhibit 35) at [29], [35] (RFM 135, 138); Tribunal Transcript (Sokalsky) 526 (RFM 75).

Murry and the concept of goodwill

50. The Appellant argues that Placer did not have any legal goodwill that had material value and that the Court of Appeal erred in concluding otherwise. The central basis for this contention is that goodwill consists of the attractive force that brings in or retains custom, and that Placer's business had no such attractive force because it sells goods that are indistinguishable from the goods of others in the same market.

51. These submissions misunderstand and misconstrue the decision in *Murry's* case. In *Murry*, the majority contrasted an older narrow view of goodwill, based on patronage, with the wider view that soon prevailed, which was that goodwill consisted of every positive advantage and everything that added value to a business, and included what differentiated an established business from a business just starting out.[61] The majority also observed, as Martin CJ pointed out at [82], that the existence of goodwill "depends upon proof that the business generates and is likely to generate earnings from the use of the identifiable assets, locations, people, efficiencies, systems, processes and techniques of the business".[62] This passage, and other passages in *Murry*, illustrate that many sources of goodwill are not themselves property or assets capable of separate valuation, and that the existence and extent of goodwill will always depend on the particular circumstances of the case.

52. There is a helpful line of cases in the US Supreme Court that recognises that the value of a profitable going concern business will differ significantly from the aggregate value of its identifiable assets. That will be so even if the business is a regulated utility which cannot claim to have any goodwill in the narrow sense that it possesses an attractive force that brings in or retains custom. Regardless, such a business will have an intangible going concern value because the whole has greater value than the separately identifiable assets within the business, including the ability to continue to function and to generate income as a going concern.[63]

---

[61] *Murry* at [15]-[20], [48], [50] and [61].
[62] *Murry* at [12].
[63] See *Des Moines Gas Co v Des Moines* 238 US 153 (1915) at 164-166 "That there is an element of value in an assembled and established plant, doing business and earning money, over one not thus advanced, is self-evident." and *Omaha v Omaha Water Co* 218 US 180 (1910) at 202-203. See also *Telecommunications Inc v Commissioner*

53. The Appellant's contention that goodwill is always confined by notions of patronage and repeat custom has been rejected in other cases. In *Commissioner of Territory Revenue v Alcan (NT) Alumina Pty Ltd*[64], the Court of Appeal of the Northern Territory accepted that a mining company can have valuable goodwill as goodwill is not confined by notions of patronage or custom.[65] In *TransAlta Corporation v The Queen*[66], the Canadian Federal Court of Appeal rejected the Revenue's contention that no goodwill can exist in a regulated industry. In doing so, the Court pointed out that the concept of goodwill had evolved considerably since the beginning of the 20th century when concepts of patronage and repeat custom tended to figure prominently. The Court accepted that TransAlta had valuable goodwill as a result of factors such as its efficient management, its ability to attract and develop new or strategic business opportunities, and other attributes of its going concern business that founded an expectation of future earnings. The Court also endorsed a residual approach to the valuation of goodwill.[67]

54. Further, none of the Appellant's arguments in respect of the existence or value of goodwill are supported by the theoretical literature,[68] or empirical evidence,[69] on the subject. The Appellant's narrow construction of goodwill incorrectly precludes ascribing any value to the inherent and significant going concern element of Placer's business.[70]

55. Here, the Court of Appeal's factual findings established that Placer had significant goodwill as at the date of the acquisition, sourced in things such as Placer's technical capabilities, its global operating structure, its innovative mining techniques, its experienced project group, its management structures and systems that enhanced its profitability and

---

of Internal Revenue 95 T.C. 495 (1990) at 521-522 and *Commissioner of Territory Revenue v Alcan (NT) Alumina Pty Ltd* (2008) 24 NTLR 33 at [133] and the authorities cited therein.

[64] (2008) 24 NTLR 33.

[65] Angel J at [106]-[107] and [113]-[117]; and Southwood J at [133] and [136]-[143].

[66] (2012) FCA 20.

[67] Ibid at [5], [6], [51]-[56], [62], [63] and [68]-[71].

[68] Attachment TC-1 to the witness statement of Tyrone Carlin (within exhibit 27) at [1]-[109], [143]-[160] (RFM 7-25, 31-34).

[69] Attachment TC-1 to the witness statement of Tyrone Carlin (within exhibit 27) at [110]-[142], [143]-[160] (RFM 25-34).

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

efficiency, and its capacity to expand and develop the business by identifying and developing new mining projects as the resources of existing mines were depleted.

56. *Murry* is authority for the proposition that goodwill is an asset of the business because it is the valuable right or privilege to use the other assets to conduct a profitable business. Barrick acquired the right and privilege to conduct the profitable Placer business, and to access all of its sources of goodwill, including the advantages of its scale and size, the location of its mines, its workforce, innovative mining processes and its research and development capabilities[71]. The attributes of the Placer business meant that it had the capacity to find and develop new mining properties and that it was likely to continue to be profitable. The value of these intangible rights and privileges are reflected in the transaction price that Barrick paid to acquire Placer as a going concern, and those intangible elements of value are captured in the entry for goodwill that appears in Barrick's accounts.

57. The goodwill value that appears in Barrick's accounts reflected the value of an asset that Barrick was legally obliged to enter in its financial statements as goodwill in order to give a true and fair view of the value of all of its assets.[72] That asset was arrived at by finding the difference between the present value of the predicted earnings of the business (as measured by the price paid on sale of the going concern business) and the fair value of its identifiable net assets[73].

58. In its written submissions, the Appellant also relies on several minor or incidental matters in support of her goodwill contention. Those matters lack substance.

---

[71] *Murry* at [24]-[28].

[72] This is the combined effect of Financial Accounting Standards 141 and 142 which applied to Barrick by force of the US *Securities Exchange Act* and Regulations, esp. section 13 and regulation 210.4-01; Attachment GEB-21 to the witness statement of Julie Robertson (within exhibit 33) at 77 (RFM 121). Much the same legal framework applies in other jurisdictions, including Australia. Relevant Australian accounting standards are referred to in Attachment TC-1 to the witness statement of Tyrone Carlin (within exhibit 27) at footnote 25 (RFM 11), and see ss 296 and 297 of the *Corporations Act* 2001.

[73] This aligns with the observation in *Murry* at [49]: "When a business is profitable and expected to continue to be profitable, its value may be measured by adopting the conventional accounting approach of finding the difference between the present value of the predicted earnings of the business and the fair value of its identifiable net assets."; see also CA [90] (CAB 153), [91] (CAB 153) and [239] (CAB 197).

59. The Appellant seeks to draw a comparison with a business where the value is essentially derived from a trademark; an example posited in *Murry*. However, the example is inapposite here. Placer's present and future capacity to generate returns derived, *inter alia*, from its people and the capabilities provided by its proven systems and processes; not branding.

60. The Appellant asserts that Placer had no special advantages over its competitors. However, the Court of Appeal made express findings about various efficiencies and competitive advantages enjoyed by Placer[74].

61. The Appellant seeks to diminish the significance of Placer's profitability, however that profitability, especially when combined with Placer's people, systems and other advantages, provided strong indications of goodwill, consistent with *Murry*.

62. The Appellant also refers to an assessment by Patel of the cost of replacing part of Placer's workforce of 13,000 employees. However, that assessment did not value all the workforce,[75] and nor did it value Placer's technical and managerial expertise, its efficient and innovative systems, or its going concern value. A business without employees, systems and processes cannot mine gold, or derive revenue from the gold produced, or find and develop new gold mines.

63. The Appellant also refers to synergies. Synergies were a source of goodwill and a product of what was being acquired, namely the right and privilege to conduct the Placer business. Moreover, the evidence was that the synergies would be available to the likely *Spencer* purchasers[76]. The Appellant's argument about synergies confuses the distinction between sources of goodwill, and goodwill itself. The synergies were potentialities to improve margin and profitability. They were a function of the right to conduct the Placer business,

---

[74] CA at [42] (CAB 138), [45] (CAB 139), [95] (CAB 155) and [96] (CAB 155); see also Tribunal [71] (CAB 35), [75] (CAB 37) and [77] (CAB 37).
[75] Mr Patel's assessment was directed to the recruitment costs that would have been incurred in replacing only approximately 6100 employees and 1000 contractors located at the 12 Placer mines retained by Barrick: Attachment JP-1 to the witness statement of Jay Patel (within exhibit 14) at 88 (AFM 93) and page 2 of each of Schedules 2 to 13 (RFM 44-55).
[76] CA [45] (CAB 139) and [48] (CAB 140).

and could have been achieved in various ways. The synergies were available to prospective purchasers of Placer because of various features of the Placer business which a purchaser of Placer could enjoy as a result of the acquisition of the right to conduct the Placer business, consistent with the conception of goodwill as explained in *Murry*[77].

The Appellant's suggestion that goodwill "enhances" the value of the land

64. The real thrust of the Appellant's submission that goodwill enhances the value of land is that the Appellant is attempting to equate land and goodwill, or to say that goodwill can be added to the value of land for the purpose of the statutory test in Part IIIBA.

65. The submission is fallacious for the following reasons. In the first place, it was common ground below that the land value that had to be determined was the value in exchange, and not the value in use.[78] While this required reference to the potential use of the land, the value of the land was not to be conflated with the value of Placer's going concern business.

66. Secondly, goodwill is a separate item of property and an asset in its own right[79]. Goodwill may derive from identifiable assets of a business or from more intangible rights, privileges or sources, but it is an indivisible item of property. Accordingly, goodwill does not inhere in the identifiable assets of a business[80]. It is erroneous to add it to the value of another item of property such as land. To do so would also depart from the statutory test which directs attention to the value of land, and requires the value of land to be kept separate and distinct from the value of total property and excluded property.

67. Thirdly, the cases to which the Appellant refers in support of her argument, *Lazarus*[81] and *Reeve*[82], are compensation cases under different statutory schemes[83], and pre-date the

---

[77] CA [45]-[48] (CAB 139-140); note also Tribunal [76]-[77] (CAB 37).
[78] Tribunal [155]-[157] (CAB 55-56); and CA [15] (CAB 129).
[79] *Murry* at [30].
[80] *Murry* at [4].
[81] *The Minister for Home and Territories v Lazarus* (1919) 26 CLR 156.
[82] *The Commonwealth v Reeve and Another* (1949) 78 CLR 410.
[83] As to the need for care in considering compensation and revenue cases, see, for example, *Commissioner of Succession Duties (S.A) v Executor Trustees and Agency Co of South Australia (Clifford's case)* (1947) 74 CLR 358 at 370.

decision in *Murry*. Each decision was considered and explained in *Murry*[84]. The Appellant's submissions at [25] omit the important concluding words of paragraph [43] in *Murry*.

Other cases relied upon by the Appellant

68. *RCF*[85] concerned the capital gains tax legislation and the text and purpose of the provisions in issue was very different from the provisions of Part IIIBA in the *Stamp Act* 1921 (WA). It is also noteworthy that the court in *RCF* did not perceive any analogy with the provisions of Part IIIBA in the *Stamp Act* 1921 (WA) as it declined an invitation to consider *Nischu*[86] on the grounds that it did not apply[87].

10 69. The purpose of the test in *RCF* was to determine whether a capital gain made by a foreign resident on a disposal of shares, otherwise subject to capital gains tax, was to be disregarded. This depended on whether the entity's value was principally derived from its Australian real property, which involved considering the entity's underlying value (as a whole) by comparing its 'TARP' and 'non-TARP' assets. The statutory purpose, terms and approach differ from Part IIIBA.

70. Based on three English cases, the Appellant also contends that there may be occasions when a bundle of assets should be valued as if sold together if that would achieve a more favourable price.[88] Those cases do not advance the Appellant's argument. They related to estate duty or, in one case, capital gains tax imposed on the basis of a hypothetical sale of
20 all of the property of an estate at the time of the deceased's death. In each case, the Court merely held that in applying the relevant legislation it may be necessary to assume that certain assets would be sold together, or that certain assets would be sold separately.[89] Here, the *Stamp Act* 1921 (WA) required a value to be determined for land, not for a

---

[84] *Murry* at [38]-[43].
[85] *FCT v Resource Capital Fund III LP* (2014) 225 FCR 290.
[86] *Commissioner of State Taxation (WA) v Nischu Pty Ltd* (1991) 4 WAR 437.
[87] *FCT v Resource Capital Fund III LP* (2014) 225 FCR 290 at [46]-[47] and [53].
[88] Appellant's submissions at [45].
[89] See, for example, *Inland Revenue Commissioner's v Gray (Lady Fox's case)* [1994] Simon's Tax Cases 360, Hoffman LJ at 371f-g and 372h-373f.

bundle of assets including land, and each valuer attempted to value the land by reference to a DCF valuation which was critically dependent on the input for future gold prices.

Orders sought by the Appellant

71. The Appellant seeks orders that the appeal be allowed and the orders of the Court of Appeal be set aside and in lieu thereof the appeal to that Court be dismissed. The effect of those orders would be to reinstate the orders of the Tribunal with the consequence that the original assessment of duty stands. However, as the Court of Appeal found, the Tribunal erred in accepting the Appellant's estimated gold prices. Those gold prices were fundamental not only to the question of whether duty was payable, but also to the amount of duty. The duty assessed was based on Lonergan's gold prices which have since been rejected. Accordingly, the decision of the Tribunal cannot stand.

72. In these circumstances, if the Appellant were to succeed in other respects, it would remain appropriate to order, as the Court of Appeal did, that the matter be remitted to the Tribunal but differently constituted.

Part VII:

73. Not applicable.

Part VIII: Estimate of hours

74. The estimate of hours required for the presentation of the Respondent's oral argument is 2.5 hours

Dated 4 May 2018

Neil J Young QC
Tel: (02) 9151 2078
Fax: (02) 9233 1850
njyoung@vicbar.com.au

AC Willinge
Tel: (08) 9220 0521
Fax: (08) 9325 9854
awillinge@francisburt.com.au