FEDERAL COURT OF AUSTRALIA

Commissioner of Taxation v AP Energy Investments Pty Ltd [2016] FCA 577

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| File number: | WAD 367 of 2013 |
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| Judge: | **MCKERRACHER J** |
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| Date of judgment: | 25 May 2016 |
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| Catchwords: | **ADMINISTRATIVE LAW** – preliminary issue – scope of s 44 of the *Administrative Appeals Tribunal Act 1975* (Cth) – whether grounds of appeal stated question or questions of law – whether appeal competent  **TAXATION** – components of the asset ‘mining information’ for the purposes of Div 855 of the *Income Tax Assessment Act 1997* (Cth)  **TAXATION** – market valuation of ‘mining information’ undertaken for the purposes of s 855-30(2) of the *Income Tax Assessment Act 1997* (Cth) – test in *Spencer v Commonwealth* (1907) 5 CLR 418 – whether the sunk cost methodology is the appropriate basis for ascertaining the market value of ‘mining information’  **TAXATION –** Administrative Law – whether the Administrative Appeals Tribunal failed to exercise its decision-making power by failing to adequately set out the basis of its reasoning and the findings of fact, evidence or law on which its decision is reached |
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| Legislation: | *Administrative Appeals Tribunal Act 1975* (Cth) s 44  *Income Tax Assessment Act 1997* (Cth) ss 40-730(8), 102-5, 108-5, 855A, 855-5(2)(b), 855-10(1)(a), s 855-15, 855-30(2), 855-30(3)(b) |
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| Cases cited: | *Abrahams v Federal Commissioner of Taxation* (1944) 70 CLR 23  *AP Energy Investments Limited and Commissioner of Taxation* [2013] AATA 626  *Boland v Yates Property Corporation Pty Ltd* (1999) 167 ALR 675  *Civil Aviation Safety Authority v Central Aviation Pty Ltd* [2009] FCA 49  *Commissioner of State Taxation (WA) v Nischu Pty Ltd* (1991) 4 WAR 437  *Commissioner of Taxation v Dalco* (1990) 168 CLR 614  *Commissioner of Taxation v Haritos* [2015] HCATrans 337  *Commissioner of Taxation v Resource Capital Fund III LP* (2014) 225 FCR 290  *Commissioner of Taxation of the Commonwealth of Australia v Resource Capital Fund III LP (No 2)* [2014] FCAFC 54  *Dornan v Riordan* (1990) 24 FCR 564  *Gauci v Commissioner of Taxation (Cth)* (1975) 135 CLR 81  *Haritos v Commissioner of Taxation* (2015) 233 FCR 315  *Nischu Pty Ltd v Commissioner of State Taxation (WA)* (1990) 21 ATR 391  *Osland v Secretary to the Department of Justice* (2010) 241 CLR 320  *Repatriation Commission v O’Brien* (1985) 155 CLR 422  *Resource Capital Fund III LP v Commissioner of Taxation* [2013] FCA 363  *Spencer v Commonwealth* (1907) 5 CLR 418 |
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| Date of hearing: | 16 March 2015 |
|  |  |
| Date of last submissions: | 19 February 2016 |
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| Registry: | Western Australia |
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| Division: | General Division |
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| National Practice Area: | Taxation |
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| Category: | Catchwords |
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| ORDERS | |
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|  | WAD 367 of 2013 |

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| BETWEEN: | COMMISSIONER OF TAXATION  Applicant |
| AND: | AP ENERGY INVESTMENTS PTY LTD  Respondent |

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| JUDGE: | MCKERRACHER J |
| DATE OF ORDER: | 25 MAY 2016 |

1. The respondent’s objection to competency be dismissed.

2. The applicant’s appeal be dismissed.

3. The applicant is to pay 85% of the costs of the respondent, to be assessed if not agreed.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

**REASONS FOR JUDGMENT**

# MCKERRACHER J:

# THE APPEAL

1 How do you value information?

2 The **Commissioner** appeals from a decision of the Administrative Appeals **Tribunal** made on 2 September 2013 by which the Tribunal allowed **AP Energy** Investments Pty Ltd’s application for review of the Commissioner’s objection decision (dated 11 May 2010). The Tribunal allowed (in part) AP Energy’s objection relating to the tax year ended 30 June 2008 (*AP Energy Investments Limited and Commissioner of Taxation* [2013] AATA 626). The Tribunal found that AP Energy was not liable to pay capital gains tax (**CGT**) on the sale of part of its shares in the mining company, **Abra** Mining Limited ACN 110 233 577. The debate before the Tribunal turned, essentially, on the method of valuation of those shares, in particular, the value to be attributed to **mining information**.

3 The Commissioner contends on this appeal that the Tribunal followed the first instance decision in *Resource Capital Fund III LP v Commissioner of Taxation* [2013] FCA 363(**RCF**) as to the method of valuation. RCF was relevantly partly reversed on appeal by the Full Court in *Commissioner of Taxation v Resource Capital Fund III LP* (2014) 225 FCR 290 (**RCF FC**). AP Energy rejects on this appeal the contention that the Tribunal impermissibly followed RCF.

4 A preliminary jurisdictional question arose. The parties requested that I defer delivery of judgment until determination of an application for special leave to appeal from *Haritos v Commissioner of Taxation* (2015) 233 FCR 315 (**Haritos FC**) in the High Court of Australia. That has now occurred.

5 The complexity of the questions, grounds and evidence may mislead. The real question is whether the Tribunal’s overall valuation method departed from established legal tests. That is a question of law. If the Tribunal did not, the Court should not second guess minute detail within the Tribunal process.

# THE QUESTIONS OF LAW

6 The questions of law raised by the Commissioner are as follows:

(1) When undertaking a market valuation of assets that are taxable Australian real property (**TARP**) and assets that are non-taxable Australian real property (**non-TARP**) for the purposes of Div 855 of the *Income Tax Assessment Act 1997* (Cth) (**ITAA 1997**), what is to be included as comprising the asset ‘mining information’?

(2) How does the definition of market value in *Spencer* *v Commonwealth* (1907) 5 CLR 418 apply to a valuation undertaken for the purposes of s 855-30(2) of the ITAA 1997?

(3) In determining the market value of the asset ‘mining information’ for the purposes of s 855-30(2) of the ITAA 1997, is the sunk cost methodology the appropriate basis of ascertaining value?

(4) Has the Tribunal failed to exercise its decision-making power in accordance with law by reason of a failure to adequately set out (a) the basis of its reasoning, and (b) the findings of fact, evidence or law on which its decision is reached?

# STATUTORY PROVISIONS

7 A taxpayer’s assessable income generally includes any net capital gain made by the taxpayer in the relevant year pursuant to s 102-5 ITAA 1997, subject to exceptions contained in ITAA 1997. One of the exceptions in relation to liability for taxation on capital gains is to be found in s 855-10(1) ITAA 1997, which provides that foreign residents are not required to pay CGT in Australia if the CGT asset (defined in s 108-5(1) ITAA 1997 as any kind of property or a legal or equitable right that is not property) is not taxable Australian property (**TAP**). The categories of CGT assets that are TAP are set out in s 855-15 ITAA 1997. The legislative definition of TAP includes various types of property, including TARP and an indirect Australian real property interest: s 855-15 (item 1), s 855-20 ITAA 1997.

8 The relevant provisions of Divs 40, 104, 855, 960 and 995 ITAA 1997 and the definitions as they stood at the time of the CGT event on 3 December 2007 provided as follows:

40-730(8) ***Mining, quarrying or prospecting information*** is geological, geophysical or technical information that:

(a) relates to the presence, absence or extent of deposits of minerals or quarry materials in an area; or

(b) is likely to help in determining the presence, absence or extent of such deposits in an area.

…

104-10(1) CGT event A1 happens if you dispose of a CGT asset.

104-10(2) You dispose of a CGT asset if a change of ownership occurs from you to another entity, whether because of some act or event or by operation of law. ...

104-10(3) The time of the event is:

(a) when you enter into the contract for the disposal; or

(b) if there is no contract — when the change of ownership occurs.

…

855-10(1) **Disregard a capital gain or capital loss from a CGT event if**:

(a) **you are a foreign resident**, or the trustee of a foreign trust for CGT purposes, just before the CGT event happens; and

(b) the CGT event happens in relation to a CGT asset that is not taxable Australian property.

…

855-15 There are 5 categories of CGT assets that are ***taxable Australian property***. They are set out in this table.

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| **CGT assets that are taxable Australian property** | |
| **Item** | **Description** |
| 1 | Taxable Australian real property (see section 855-20) |
| 2 | A CGT asset that: |
|  | (a) is an indirect Australian real property interest (see section 855-25); and |
|  | (b) is not covered by item 5 of the table |
| 3 | A CGT asset that: |
|  | (a) you have used at any time in carrying on a business through a permanent establishment (within the meaning of section 23AH of the *Income Tax Assessment Act 1966*) in Australia; and |
|  | (b) is not covered by item 1, 2 or 5 of this table |
| 4 | An option or right to acquire a CGT asset covered by item 1, 2 or 3 of this table |
| 5 | A CGT asset that is covered by subsection 104-165(3) (choosing to disregard a gain or loss on ceasing to be an Australian resident) |

855-20 A CGT asset is ***taxable Australian real property*** if it is:

(a) real property situated in Australia; or

(b) a mining, quarrying or prospecting right (to the extent that the right is not real property), if the minerals, petroleum or quarry materials are situated in Australia.

855-25(1) A membership interest held by an entity (the ***holding entity***) in another entity (the ***test entity***) at a time is an ***indirect Australian real property*** ***interest*** at that time if:

(a) the interest passes the non-portfolio interest test (see section 960-195):

(i) at that time; or

(ii) throughout a 12 month period that began no earlier than 24 months before that time and ended no later than that time; and

(b) the interest passes the principal asset test in section 855-30 at that time.

…

855-30(1) The purpose of this section is to define when an entity’s underlying value is principally derived from Australian real property (see paragraph 855-5(2)(b)).

855-30(2) **A membership interest held by an entity (the *holding entity*) in another entity (the *test entity*) passes the principal asset test if the sum of the market values of the test entity’s assets that are taxable Australian real property exceeds the sum of the market values of its assets that are not taxable Australian real property**.

855-30(3) For the purposes of subsection (2), treat an asset of an entity (the ***holding entity***) that is a membership interest in another entity (the ***other entity***) as if it were instead the following 2 assets:

(a) an asset that is taxable Australian real property (the ***TARP asset***);

(b) an asset that is not taxable Australian real property (the ***non‑TARP asset***).

…

960-61(1) Subsection (2) applies if:

(a) you are a foreign resident; and

(b) a CGT event happens in relation to a CGT asset that is an indirect Australian real property interest for you; and

(c) the sole or predominant currency in which you keep your accounts at the time of the CGT event is a currency other than Australian currency.

…

960-195 **An interest held by an entity (the *holding entity*) in another entity (the *test entity*) passes the non-portfolio interest test at a time if the sum of the direct participation interests held by the holding entity and its associates in the test entity at that time is 10% or more**.

…

995-1(1) … ***mining, quarrying or prospecting right*** is:

(a) an authority, licence, permit or right under an Australian law to mine, quarry or prospect for minerals, petroleum or quarry materials; or

(b) a lease of land that allows the lessee to mine, quarry or prospect for minerals, petroleum or quarry materials on the land; or

(c) an interest in such an authority, licence, permit, right or lease; or

(d) any rights that:

(i) are in respect of buildings or other improvements (including anything covered by the definition of ***housing and welfare***) that are on the land concerned or are used in connection with operations on it; and

(ii) are acquired with such an authority, licence, permit,

right, lease or interest.

…

(emphasis added)

9 The effect of the foregoing is that liability to pay CGT will arise in the following circumstance:

(a) where there is a disposable CGT asset (a matter not in issue in the present proceedings);

(b) by a person who is a foreign resident just before the CGT event happened (again, not in issue in these proceedings); and

(c) the CGT asset is TARP, being, relevantly, an indirect real property interest, meaning the interest passes:

(i) the non-portfolio interest test (which is not in issue in these proceedings); and

(ii) the principal asset test (**PAT**).

10 Further, as the cited provisions establish, a foreign resident will pass the PAT if the sum of the market values of the test entity’s TARP assets exceed the sum of the market values of the test entity’s non-TARP assets. Abra is the test entity in the present case. Whether AP Energy passed the PAT is the ultimate issue in this appeal.

11 This involves consideration of the taxation legislation as it was deemed to apply at the time of the CGT event, and the method of valuation now deemed to be correct.

12 The CGT event date is 3 December 2007, when the share acquisition agreement was executed between AP Energy and **Hunan** Nonferrous Metals Holding Group Co Ltd for the purchase by Hunan of 15,046,420 shares in Abra from AP Energy.

13 The amount of tax in issue, which has already been paid by AP Energy to the Commonwealth, is $1,406,781.

# CORRECT APPROACH TO VALUATION

14 In RCF FC, the Full Court (Middleton, Robertson and Davies JJ) noted (at [40]) that the primary judge in RCF had held that it was clear from the text of s 855-30(2) that the PAT requires a separate determination of the market value of each of the entity’s assets; not the determination of the market value of all its TARP assets as a class and the determination of the market value of all its non-TARP assets as a class ‘and certainly not the determination of the market value of all its assets on a going concern basis’: RCF (at [96]). The Full Court also noted (at [41]) that it was held at first instance (at [96]) that the PAT requires the classification of the company’s assets into TARP and non-TARP assets and, finally, the ‘summing’ of the values in each class to determine whether the sum of the market value of the entity’s TARP assets exceeds the sum of the market value of the entity’s non-TARP assets; only ‘if it does, is the [PAT] passed’.

15 The Full Court noted (RCF FC at [43]) that the primary judge had assessed the market value of each of the assets on the basis that:

 as each asset must be valued for the purpose of s 855-30(2), each asset should be valued as if only that asset was offered for sale; and

 the test laid down in *Spencer* required the market values of those assets to be determined on the assumption that the hypothetical purchaser would be able to use those assets in a manner consistent with their ‘highest and best use’, that is, in a business of mining the reserves on the mining tenements of St Barbara Mines Limited (**SBM**) (the test entity in that case) so that, in the case of the mining information and plant and equipment, it was to be assumed that the hypothetical purchaser was the owner and would be able to use those assets.

16 For the purpose of valuing the assets, the primary judge (RCF (at [105]-[107(a)]) had valued:

 the mining rights on the basis of the discounted cash flow (**DCF**) of SBM’s mining operations:

 the mining information on the basis of the cost of the hypothetical purchaser of re-creating that information and the value of loss of cash flow suffered to re-create it; and

 the plant and equipment on the basis of replacement costs of that plant and equipment.

17 In RCF it was considered that such an approach was consistent with the decision of Malcolm CJ, Wallace and Pidgeon JJ in *Commissioner of State Taxation (WA) v* ***Nischu*** *Pty Ltd* (1991) 4 WAR 437, in which it was held (at 446) that ownership of the mining tenements does not include a right of access to the information.

18 The Full Court, after considering various authorities, noted (at [47]) that the starting point was to consider the statutory context of s 855-30, including the purpose of the PAT, being:

 the objects of Div 855 are to improve Australia’s status as an attractive place for business and investment and the integrity of Australia’s CGT base, which is to be achieved by aligning Australia’s tax laws with international practice and ensuring interest in an entity remains subject to Australia’s CGT laws if the entity’s underlying value is principally derived from Australian real property (s 855-5); and

 the main focus of s 855-30 is to define when an entity’s underlying value is principally derived from Australian real property (s 855-30(1).

19 Thus, the Full Court observed (at [49]) that s 855-30 requires the identification of two figures:

(1) the sum of the market values of the test entity’s TARP assets; and

(2) the sum of the market values of the test entity’s non-TARP assets.

20 The principal question for consideration by the Full Court in RCF, insofar as CGT was concerned, was whether the market value of each asset was to be determined under s 855-30(2) as if each asset was the only asset offered for sale (as held at first instance) or on the basis of an assumed simultaneous sale of the assets to the same hypothetical purchaser (as the Commissioner contended on appeal in that case). The Full Court had recourse to the statutory context by reference to the statutory purpose for which the values are to be determined and concluded (at [51]) that it was implicit that to determine the underlying value (where the underlying resides in the bundle of assets), the market values of the individual assets making up that bundle were to be ascertained as if they were offered for sale as a bundle, not as if they were offered for sale on a stand-alone basis. It followed (at RCF FC [52]) that assets should be valued on the basis of an assumed simultaneous sale of the test entity’s assets to the same hypothetical purchaser, not as stand-alone separate sales. The Full Court said (at [53]) that it was erroneous to follow *Nischu*, where the market value of the mining tenement was determined as a stand-alone asset.

21 Obiter, the Full Court continued to accept that the *Spencer* test was to be applied and that all the experts who had given evidence agreed that in the case of an simultaneous sale to the one purchaser, the hypothetical purchaser could expect to acquire the mining information and plant and equipment for less than their re-creation costs with little or no delay (at [54]).

# THE TRIBUNAL DECISION

22 In a detailed decision, the Tribunal considered the position of AP Energy, a non-resident of Australia, which had made a part disposal of shares in Abra on 3 December 2007, giving rise to a capital gain. The Tribunal, on review, decided AP Energy did not pass the PAT in s 855-30(2) ITAA 1997 and it was thus entitled to disregard the capital gain.

23 In summary, the Tribunal relevantly foundthat:

 Abra’s TARP assets with a market value of $18,266,434 did not exceed the market value of Abra’s non-TARP assets of $23,866,700;

 AP Energy did not pass the PAT; and

 there was no assessable capital gain on AP Energy’s disposal of Abra shares on 3 December 2007,

with the result that the Commissioner’s assessment for the year ended 30 June 2008 was excessive.

24 The material difference between AP Energy and the Commissioner’s valuation of Abra’s assets was the ‘market value’ of Abra’s mining information.

25 It is certainly clear, as the Commissioner contends, that the Tribunal considered RCF (at [67]-[84] and [159]-[167]). Noting that there was no judicial authority or Tribunal decision on the interpretation and application of Div 855 ITAA 1997 and, in particular, the PAT in s 855-30 at the time of the hearing, the Tribunal referred to the decision in RCF that was delivered subsequently. In relation to that decision, the Tribunal noted (at [70]) that the primary matter which determined the outcome in RCF was the United States/Australia Double Taxation Convention, rather than the PAT. Accordingly, the Tribunal noted that the Court’s findings as to the application of Div 855 of the ITAA in RCF were obiter and not binding on the Tribunal.

26 Nonetheless, the Tribunal did note that in RCF the primary judge (at [95]), referred to s 855-30(1) ITAA 1997 and spoke of the purpose of the section as being to define when an entity’s *underlying value is principally derived from Australian real property*. The Tribunal noted that the primary judge in RCF found that the subsection is concerned to measure, not the value (singular) of the test entity or all of the assets of its business as a going concern, but the values (plural) of its underlying assets, whether or not used in the business and to define when the sum of the values of its underlying assets are principally derived from Australian real property. Then the primary judge stated (at [95]) that subs (2) provides the criterion for passing the PAT as when the sum of the *market value* *of the entity’s assets that are TARP* exceeds the sum of the market value *of its assets that are non-TARP*.

27 The Tribunal observed that the primary judge in RCF said (at [96]) that it was clear from the text of s 855-30(2) that the PAT requires separate determination of the market value of each of the entity’s assets, not the determination of the market value of all its TARP assets as a class and the determination of the market value of all its non-TARP assets as a class. The Tribunal also recorded that (at [101]-[102]) the primary judge in RCF accepted Resource Capital’s formulation - that an ‘asset is to be valued by reference to the hypothetical price it would be agreed between the parties on a stand-alone basis as if no other asset were offered for sale’ - as being the correct starting point.

28 However, the Tribunal then cited the statement of the primary judge in RCF (at [102]) that the formulation needs to go further and incorporate the further assumption that in the case of hypothetical transactions involving mining information or plant equipment, the hypothetical purchaser is the owner of the mining rights and, as such, is able to use the relevant asset mining information or plant equipment in a manner consistent with the most advantageous purpose for which it is adopted or its ‘highest and best use’. All the experts had agreed in RCF that this was to be considered in a business of mining the reserves in SBM’s mining tenements (see RCF at [102]). After citing the primary judge’s rejection of the Commissioner’s contention that s 855-30(2) requires that the test entity be valued on a combined asset market value, the Tribunal went on to consider what RCF said in relation to the valuation of mining rights (at [105]-[106] and [108]). At [82]-[83], the Tribunal discussed the mid-point approach taken by the Court to arrive at the market value of SBM’s mining information:

82. In *RCF*, the Court accepted the cost of re-creating mining information method and rejected book values as a proxy for the “market value” of “mining information”: see *RCF* at [129], [131], [133], [141], [142], [151] and [153].

83. The Court took a midpoint of the negotiating range to arrive at the “market value” of SBM’s “mining information” as follows:

156. For the purpose of valuing SBM’s mining information on the hypothesis that it is the only asset offered for sale and on the further assumption referred to in [102] above, the hypothetical price of the mining information, as the determinant of its market value, would be negotiated in a range somewhere between a low point, being the amount to be realised by the hypothetical vendor if no transaction is done (zero), or an equivalent nominal amount on its sale to a purchaser not being the owner of the mining rights, and a high point, being the cost, time delay as well as outlay, to the hypothetical purchaser of re-creating the mining information.

157. While there is an upper and lower point to the hypothetical negotiation range, there is no logical intermediate point guided by any business or financial principle. It follows, that if the task were to predict the outcome of such an actual negotiation, as a question of fact, the Court has no assistance and no evidentiary basis for doing so. But that is not the task here: the task under s 855-30(2) is to ascertain a market value, and the hypothetical sale transaction is no more than a useful and conventional method for doing so. I agree with RCF’s submission that an appropriate basis for ascertaining market value in such a case is one which fairly arrives at a value, and that the fair valuation is one which shares equally between the holder, and the potential user, of the relevant asset the benefit to the user of immediate acquisition of the asset. That value is ascertained by dividing the notional “bargaining zone” equally. In this way, the hypothetical price of the mining information, as the determinant of its market value, is arrived at as a mid-point between the maximum that the hypothetical purchaser, as the owner of the mining tenements, might pay to acquire the information (being the amount of outlay and the value of loss of cash flow suffered to re-create it) and the maximum the hypothetical vendor of the information could realise from any other disposal of the information.

29 The Tribunal did not consider RCF again in its reasons until [159]-[167] where it compared the similarities and differences between SBM in RCF and Abra in the present case. This passage was important. I discuss it below.

30 The Tribunal examined and compared:

 the ‘Limited Scope Valuation of Abra’ using the ‘residual method’ to ascertain the ‘market capitalisation’ of Abra prepared by Mr Shaun Lonergan of the Australian Valuation Office (**AVO Valuation**), which the Commissioner relied upon in the assessment and objection decision;

 the independent valuation prepared by **Xstract** Mining Consultants Pty Ltd at the request of BDO Corporate Finance (WA) Pty Ltd (**BDO Valuation**); and

 the ‘MKT Valuation Expert Witness Report’ prepared by Mr Mathew Longworth of Xstract (**MKT Valuation Report**) at the instance of AP Energy (through its lawyers, MKT-Taxation Advisors), including the MKT Brief.

31 The Tribunal (at [132]) noted AP Energy’s submissions that the AVO Valuation of $10,000,000 for Abra’s ‘mining information’ relied upon by the Commissioner in the assessment and objection decision should be rejected by the Tribunal for the following reasons (in summary form only):

 the AVO Valuation of $10,000,000 for Abra’s ‘mining information’ is not a ‘fair market value’ of Abra’s ‘mining information’, nor is it a suitable proxy for a ‘fair market value’;

 the AVO Valuation of $10,000,000 for Abra’s ‘mining information’ is not a reasonably and objectively determined ‘market value’ but, rather, is a perfunctory valuation of Abra’s ‘mining information’ using a balance sheet historical cost number;

 at the time of the AVO Valuation of $10,000,000 for Abra’s ‘mining information’ the officer who prepared the AVO Valuation (Mr Lonergan) had no specialised expertise (including the senior valuer who countersigned Mr Lonergan’s work) or guidelines in relation to the valuation of mineral assets. The AVO’s valuation of Abra’s ‘mining information’ comprehends and engages only what the author (Mr Lonergan) considered obvious, ‘informed by his own very limited knowledge and experience of mineral asset valuation’;

 at the time of the AVO Valuation of $10,000,000 for Abra’s ‘mining information’ Mr Lonergan’s valuation of Abra’s ‘mining information’ was not assisted by specialised knowledge as to the nature of mining information, the market for mining information and the use of mining information by prospective purchasers;

 Mr Lonergan offered no reasonable explanation for not seeking specialised assistance when preparing the AVO Valuation of $10,000,000 for Abra’s ‘mining information’, nor before providing his adverse commentary on Mr Longworth’s valuation to the Tribunal;

 Mr Lonergan’s assertion that the VALMIN Code was not relevant to his limited scope valuation of Abra’s mineral asset and eschewing any suggestion that the AVO Valuation of Abra’s mineral asset was not best practice as an Associate of the Securities Institute of Australia, an organisation that *‘*supports the Code as indicative of best practice for independent experts preparing valuations and assessments in relation to specialist mining reports’; and

 actual and/or the perception of lack of independence by Mr Lonergan and his advocacy for the respondent.

32 The Tribunal also recorded (at [133]), that AP Energy noted that in cross-examination:

 Mr Lonergan, the author of the AVO Valuation, stated that the level of confidence he was expressing in the AVO Valuation was not determined using AVO guidelines which set out objective measures to use for assessing confidence in a value ascertained for a mineral asset;

 Mr Lonergan’s confidence was subjective and intuitively arrived at on Mr Lonergan’s assessment of what he expected someone would pay for mining information that is publicly available from the Department of Mines and what proportion of a mining company’s value such publicly available mining information ought attract;

 Mr Lonergan dealt with suggestions that he was now unable to weigh matters independently and objectively from another perspective, by asserting that the ATO had no position and no view in relation to relevant aspects of Div 855 ITAA 1997 and the valuation of mining assets; and

 Mr Lonergan said on a number of occasions that if he had unlimited funds he would have done things differently.

33 Dealing with the Commissioner’s arguments, the Tribunal observed (at [137]) that the Commissioner accepted neither the expertise of AP Energy’s witness, Mr Longworth, nor the appropriateness of the methodology on which he relied. The Commissioner contended before the Tribunal that AP Energy’s expert reports failed to meet the Tribunal’s Guidelines on Opinion and Expert Evidence for a number of reasons (recorded at [138]), including:

 whilst ‘valuation’ is a recognised area of specialist knowledge on which opinion evidence would ordinarily be admissible, nothing had been provided which substantiates the claim that Mr Longworth has valuation expertise. His knowledge, education and expertise identified him as a geologist with expertise in mine management, costing, budgeting and related fields, not valuation;

 Mr Longworth was directed by the Commissioner to use a cost-based methodology. He ignores the legislation which requires a market valuation and a summation approach, and he did not undertake a market valuation;

 paragraphs 10(b) and (c) of the Tribunal’s Guidelines of Expert and Opinion Evidence had not been complied with; and

 the tests, calculations and other investigations that had been carried out were poorly explained and were not transparent.

34 The Tribunal noted (at [139]) that, according to the Commissioner, the MKT Valuation Report ought be accorded little weight by the Tribunal for the reasons set out above and also because, amongst other things:

 there was no basis for the use of the methodology adopted in the MKT Valuation Report, other than being directed to do so by the client;

 no attention was paid in the MKT Valuation Report to the concept of ‘market value’, as required by the ITAA 1997;

 no valuation of the total value of Abra was undertaken in the MKT Valuation Report;

 no valuation was given for the mining rights; indeed mining rights were not considered;

 Mr Longworth was not able to give an opinion as to the meaning of various provisions in the *Mining Act 1978* (WA), as he sought to; and

 the wide range of the ‘values’ ascribed by Mr Longworth typically speak of a lack of confidence in the value ascribed, a criticism of his report identified by Mr Lonergan.

35 The Tribunal referred (at [140]) to the Commissioner’s submissions that:

 doubt must be cast on the reliability of the MKT Valuation Report when comparison is made between it and the BDO Valuation; and

 Mr Longworth knew about the BDO Valuation at the time of drafting the MKT Valuation Report.

36 The Tribunal recorded (at [141]) that, according to the Commissioner:

 the cost-based approach used in the MKT Valuation Report was used in the BDO Valuation as a cross-check, but no cross-check was used in preparing the MKT Valuation Report;

 despite having looked at the BDO Valuation in the preparation of the MKT Valuation Report, and despite Mr McKibben being satisfied as to consistency of approach between the two reports, Mr Longworth failed to explain in the MKT Valuation Report why raw data for the same periods from the same source differs so markedly between the two reports. This discrepancy could have been explained in the course of preparation of the MKT Valuation Report through the peer review process, but not in cross-examination; and

 the ranges adopted in the BDO Valuation (at [40] and [43]), are far narrower than the range in the MKT Valuation Report.

37 The Tribunal set out, in detail, further submissions of the Commissioner (particularly at [142]-[145] and [147]):

142 The Commissioner notes that whilst Mr Longworth in the MKT Valuation Report, and the authors of paragraphs 3.6.3 and 3.7.2 of the BDO Valuation, have adopted the same method of calculating the replacement or replication value in those two reports, the application of that method and the results obtained are inconsistent between them. This demonstrates an inconsistent approach to the same valuation task, i.e. calculating a cost based replacement value of the data: Commissioner’s Submissions at p 14 at [40]. That is, according to the Commissioner (see Commissioner’s Submissions at pp 14-15 at [41]), in calculating the value of Abra’s “mining information” in the MKT Valuation Report, Mr Longworth took the base data, escalated it (i.e. increased it) for inflation, using CPI and the further figures of 3.5% and 5.8%, so as to calculate its “present value”, and then discounted that figure by the selected percentages of 12.5% and 25% for publicly available information: MKT Valuation Report at pp 8 - 9.

143 In contrast, the Commissioner asserts (see Commissioner’s Submissions at p 15 at [42]), in the BDO Valuation (at p39 at [3.6.3] and pp 42-43 at [3.7.2]):

 the same sourced base data has been obtained (albeit, the actual numbers are different; and

 those source figures have been escalated, by different inflation amounts to those used in calculating the value in the MKT Valuation Report: compare the BDO Valuation at p 40 at [3.6.3] first, third and fourth dot points;

 discounted, to account for the fact that the data would be quicker to obtain with the benefit of hindsight: BDO Valuation at p 40 at [3.6.3], second dot point;

 discounted by 15%, to “*reflect the affect of age on the usefulness of old data in the mineral estimate process*”: BDO Valuation at p 40 at [3.6.3], second last dot point; and

 discounted, to also “*account for the proportion of the work which would be reproduced with the benefit of hindsight*”: BDO Valuation at p 40 at [3.6.3], last dot point; and

[sic] because much of the prior expenditure is associated with target generation and initial reconnaissance assessment and hence is unlikely to be replicated: BDO Valuation at p 43.

144 As a result, the Commissioner [sic] assertion is that in the MKT Valuation Report (as amended by Mr Longworth’s January 2013 Witness Statement) the range of values starts with a low value of $15,229,763, which is only slightly below the calculated actual expenditure (the “Total nominal” figure of $15,839,468 on the annexed “corrected spreadsheet”), and ranges upwards to a value of $29,209,723, which is almost double the actual expenditure, and calculates a preferred value as the mid-point between these two already over-inflated figures. By contrast, in the BDO Valuation the value range is substantially lower than the total actual expenditure of $22,134,292 at both the bottom and top ends, which reach values between $11.51 million and $14.16 million. Consequently the preferred mid-point value of $12,830,000 is also substantially lower than the total actual expenditure. Whilst the actual figures are not directly comparable because of the different timeframes for the valuations, the methodology used and the type of results reached ought to have been, but are not, consistent: see Commissioner’s Submissions at pp 15-15 [sic] at [43].

145 Finally, the Commissioner contends that there is no basis to suggest, as submitted by AP Energy, that Mr Lonergan adopted an “ATO view” in his approach to the AVO Valuation. To the contrary, documents S4 – S8 show Mr Lonergan seeking to not follow the “ATO view”, as expressed in *Taxation Ruling* TR98/3, which he had concerns about. Ultimately, the ATO did accept Mr Lonergan’s alternative approach. According to the Commissioner, there is no basis for any suggestion that Mr Lonergan was not entirely independent when he wrote the AVO Valuation: see Commissioner’s Submissions at p 16 at [44].

…

147 According to the Commissioner, for AP Energy to succeed, the Tribunal must be satisfied that the assessment is excessive. To do that, it must be satisfied that Mr Longworth’s preferred valuation of $21,158,707 for “mining information” is reliable as the market value of the mining information at 3 December 2007. This satisfaction must be reached despite:

 no consideration having been given to market value;

 no consideration having been given to the value of Abra as a whole or the mining rights;

 the striking inconsistency between Mr Longworth’s approach and that of the AVO;

 the striking inconsistencies between Mr Longworth’s approach in the MKT Valuation Report and the approach taken by Xstract in the BDO Valuation; and

 Mr Longworth’s lack of demonstrated valuation qualifications and expertise: see Commissioner’s Submissions at p 17 at [46].

38 Importantly, by way of demonstrating that it had considered these detailed arguments, the Tribunal then explained why it preferred the approach of Mr Longworth (at [149]-[158]). The Tribunal concluded (at [149]) that Abra did not pass the PAT in s 855-30 ITAA 1997 and AP Energy could disregard its capital gain on the part disposal of its share in Abra on 3 December 2007.

39 The Tribunal noted (at [150]) that Mr Longworth was not required by the MKT Brief to do anything other than provide a ‘market value’ for Abra’s ‘mining information’ as at 3 December 2007, and that is exactly what he did. Based on the evidence before the Tribunal, Mr Longworth was not briefed by MKT to undertake a valuation of the total value of Abra’s assets as at 3 December 2007 for the reason that AP Energy accepted the ‘residual method’ used in the AVO Valuation to ascertain the market value of each of Abra’s assets, as well as the total market value attributed to Abra by the AVO as at 3 December 2007 of $42,133,134 – the main exception being the value given by the AVO to Abra’s ‘mining information’ (of $10,000,000). For that reason, no valuation of the total value of Abra was undertaken by Mr Longworth.

40 The Tribunal (at [151]) disagreed with the Commissioner’s assertion that Mr Longworth lacked the requisite qualifications and expertise to value Abra’s ‘mining information’. The Tribunal (at [152]) considered that the evidence before it established that Mr Longworth possessed the necessary specialised knowledge to perform the task requested of him in the MKT Brief, being to value Abra’s ‘mining information’ as at 3 December 2007, noting that Mr Longworth refers to his experience as encompassing ‘evaluation’, which word is a synonym for ‘valuation’. The Tribunal (at [152]) also noted that Mr Longworth’s expertise, work and conclusions in valuing Abra’s ‘mining information’ were not challenged by the Commissioner in its cross-examination of Mr Longworth. Mr Longworth was simply asked by counsel for the Commissioner to confirm the steps he had taken in valuing Abra’s ‘mining information’.

41 The Tribunal (at [153]) concluded that having read and considered all of Mr Longworth’s evidence (comprising the MKT Valuation, Mr Longworth’s supporting data, Mr Longworth’s September 2012 witness statement, Mr Longworth’s January 2013 witness statement and Mr Longworth’s oral evidence), the method by which Mr Longworth reached his valuation of Abra’s ‘mining information’ as at 3 December 2007 was, contrary to the Commissioner’s contentions, on a fair and objective reading, clear and transparent.

42 More specifically, the Tribunal noted (at [154]) that, as submitted by AP Energy, to obtain a fair snapshot of Abra’s underlying TARP as at 3 December 2007 for the purposes of the PAT, the cost to a prospective arm’s length purchaser of regenerating ‘mining information’, discounted for the use of relevant ‘mining information’ publicly available, ought to be divorced from the intangible which may arise from ‘mining information’ and attach to the mining right or real property. The Tribunal considered that this is what Mr Longworth’s valuation enabled.

43 The Tribunal (at [155]) agreed with AP Energy’s contention that Mr Longworth’s valuation of Abra’s ‘mining information’ provided a reliable, conservative and independent expert assessment of the replication cost of Abra’s ‘mining information’ as at 3 December 2007 and that the residual of Abra’s enterprise value picks up all the intangible value attracted to Abra’s mining rights or real property by its exploration activity.

44 The Tribunal (at [156]) disagreed with the Commissioner’s assertion that Mr Longworth did not properly consider the ‘market value’ of Abra’s ‘mining information’ as at 3 December 2007 and that he ‘ignored the legislation’. The Tribunal (at [156]) was of the view, based on the evidence before it, that Mr Longworth provided an expert opinion of the ‘market value’ of the ‘mining information’ component of Abra’s mineral asset as at 3 December 2007. That is, Mr Longworth did ascertain a ‘market value’ for Abra’s ‘mining information’, the sunk cost methodology being an acceptable proxy for ‘market value’. The Tribunal noted that Mr Longworth had stated that *‘*an arm’s length transaction of the Mining Information alone would be AUD21.6 M at [3 December 2007]’. The Tribunal considered that Mr Longworth’s approach to valuing Abra’s ‘mining information’ as at 3 December 2007 was consistent with the Explanatory Memorandum and the case law on the meaning of ‘market value’, referring to [61]-[66] of its reasons, which I expressly note do not refer to RCF.

45 The Tribunal (at [157]) disagreed with the Commissioner’s assertion that ‘[t]here is no basis for the methodology adopted [by Mr Longworth] other than being directed to do so by [AP Energy]’. The Tribunal (at [157]) was of the view that based on a fair and objective consideration of all of the evidence before it, there was nothing to suggest that Mr Longworth was ‘directed’ as to what method he should use to value Abra’s ‘mining information’.

46 The Tribunal (at [158]) also referred to the Commissioner’s submissions that pointed to various alleged inconsistencies between Mr Longworth’s valuation approach in the MKT Valuation Report and the valuation approach in the BDO Valuation, both reports having been prepared by Xstract but authored by different people within Xstract. The Tribunal (at [158]) was of the view that it was a pointless exercise to draw comparisons between the two reports since, as contended by AP Energy, they were ‘not measuring like with like’. The BDO Valuation valued Abra’s mineral asset in its entirety, including mining and prospecting information optimised for the purpose of resource estimation. In contrast, in the MKT Valuation Report, Mr Longworth was valuing all of Abra’s mining and prospecting information, using a method which starts from the basic premise that the data does not exist or may never have existed.

47 Importantly, after already having decided to prefer Mr Longworth’s valuation and methodology, the Tribunal then came back to consider RCF (at [159]-[167] saying:

159. *RCF* is similar to Abra in that:

(i) the only material tangible asset of SBM (and Abra) which is TARP is SBM’s (and Abra’s) “mining rights”: see *RCF* at [110]; and

(ii) SBM’s (and Abra’s) “mining information” and plant and equipment are non-TARP assets: see *RCF* at [113].

160. **However, *RCF* is different to Abra since**:

(i) Abra is an explorer: see Ex A3 at pp 2-5 at [3] and p11 at [6]; Ex A1 at p 150ff and p 203ff (being Abra’s 2007 financial statements and 2008 annual report respectively) and Ex R1 at pp i-ii and p 2 at [1.1];

(ii) SBM is a producer. In *RCF*, the Court states (at [14]-[15] ):

14. SBM at all relevant times conducted a gold mining enterprise on mining tenements in Australia owned by it, using plant, equipment, mining information and other assets held by it...

15. At all relevant times, SBM’s fully paid ordinary shares had been listed on the Australian Securities Exchange (“ASX”). The key assets of SBM in the year of income were its Southern Cross and Leonora operations, both of which are located in Western Australia. SBM’s Southern Cross operations primarily comprised the Marvel Loch underground mine. SBM’s Leonora operations primarily comprised the Gwalia underground mine.

161. The Tribunal agrees with the submission made by AP Energy, that this **distinction (i.e. that SBM is a producer and Abra is an explorer) has some important ramifications in this case.**

162. In the present case, “market capitalisation” is the accepted starting point of both parties to value Abra, based on the listed share price of Abra as at 3 December 2007, with a control premium (of 25%) added. The Tribunal notes that in *RCF*, Edmonds J (at [116]) did not reject outright the “market capitalization” method as inappropriate but found the DCF method was to be preferred as reliable. As obiter dicta, **his Honour’s preference in RCF for the DCF method being used to value SBM (a producer) does not, in the Tribunal’s opinion, undermine using “market capitalisation” as an acceptable starting point to value Abra (an explorer)**.

163. Indeed, while the DCF method using the net present values of future cash flows might be suitable for a producer like SBM, the DCF method may be unreliable and inappropriate in assessing the market value of an explorer like Abra, where there is no defined orebody of assessed economic significance: see the BDO Valuation at p 17 (Overall Opinion) and p 36 at [3.5]) which notes in April 2011 that there is no information available to reliably forecast the future cash flow, Mr Longworth’s January 2013 Witness Statement, where he states (at p 7 at [1]) that: “*...the tenements in question did not host a defined orebody of economic significance as at the assessment date ...*” and Mr Longworth’s comments in the MKT Valuation at p 10 at [6].

164 As set out above, the methodology the Court refers to in *RCF* (in 156] [sic] to [157]) determines a market value for “mining information” by **taking a mid-point** of a bargaining zone between SBM realising nothing by no transaction to the maximum for a hypothetical purchaser of the cost, time delay as well as outlay, of re-creating the mining information. As submitted by AP Energy, sharing *“equally between the holder, and the potential user, of the relevant asset the benefit to the user of immediate acquisition of the asset”*, **does not necessarily transfer readily to the situation of an explorer company like Abra where presently the “highest and best use” is not established to be “a business of mining the reserves in mining tenements**”. That is, in an explorer company like Abra, where the viability of any mining is still unassessed, the value of the “mining information” is in a sale to a buyer who would have to recreate the “mining information” in order to continue exploration to identify an ore body of economic significance. In *RCF,* the Court had a full valuation of the mining asset of SBM (a producer) where discounted cash flows were available for ongoing feasible mining operations. **That is not the case here. Consequently, the Tribunal considers that the approach taken by the primary judge (at [157]) in *RCF* to determining the “market value” of “mining information” cannot automatically be said to apply to an explorer, such as Abra**.

165 Further, the Tribunal notes Edmond J’s acceptance of the **expert evidence given by Mr Eshuys whose qualifications and specialised knowledge are not dissimilar to Mr Longworth’s**. At [84] in *RCF*, the Court states that:

Mr Eshuys is currently Executive Chairman of Drummond Gold Limited. Between 24 July 2004 and 9 March 2009, he was Managing Director and Chief Executive Officer of SBM. He holds a Bachelor of Science majoring in Geology from the University of Tasmania. He is a fellow of the Institute of Mining and Metallurgy (Aus/MM). He has over 40 years experience in the resource industry in Australian [sic] and in 1996 was awarded the Geology Society of Australia’s Joe Harms Medal for distinction in exploration success and project development.

166 The Court’s reasons at [84] to [91], concerning Mr Eshuys’ evidence, are apposite in rejecting the Commissioner’s submissions about Mr Longworth’s expertise and reports. In particular, in *RCF* (at [84]) the primary judge makes the following comment regarding Mr Eshuys’ evidence:

Having regard to the whole of Mr Eshuys’ affidavit evidence...,; his evidence in cross-examination....; and his evidence in re-examination...., I am satisfied that **Mr Eshuys has requisite “specialised knowledge** based on [his].....study or experience”.....regarding the creation of mining information – how long it would take to undertake the drilling and subsequent analysis to acquire it and the costs associated therewith – and, it follows, the recreation of such information.....

167 In conclusion, the Tribunal is informed by the Court’s decision in *RCF* as follows:

 an appropriate basis for ascertaining “market value” for the purposes of the PAT in s 855-30 of the ITAA 1997 is one which fairly arrives at a value;

 **the use of “market capitalization” [sic] and the “residual method” were not rejected outright by the Court in *RCF* and provide an acceptable valuation methodology in the present case (Abra being an explorer and not a producer like SBM** in *RCF*);

 **Mr Longworth is appropriately qualified** to assist the Tribunal with his specialized [sic] knowledge and experience;

 Mr Longworth’s valuation of Abra’s “mining information” as at 3 December 2007 is consistent with the reasons for judgment in *RCF*, and is a reliable specialist valuation of the fair “market value” of Abra’s “mining information” asset at 3 December 2007;

 the **sunk cost methodology as adopted by Mr Longworth is acceptable** in **determining the “market value” of “mining information”**.

 Mr Longworth’s valuation as stated the MKT Valuation Report (at pp 9-10) and in his conclusion in Mr Longworth’s January 2013 Witness Statement is **a fair mid-point market valuation of Abra’s “mining information” as at 3 December 2007**; and

 the residual intangible or “marriage value” of the “specialised assets” - mining information, mining rights and plant and equipment, is not a TARP asset.

(emphasis added)

48 The similarities referred to in [159] may be disregarded as they are no more than the basic common ground. The balance of the content of [160]-[167] require closer analysis in order to determine whether or not the Tribunal did, in fact, take an approach later the subject of disapproval in RCF FC.

# THE GROUNDS OF APPEAL

49 The grounds relied upon by the Commissioner in the Further Amended Notice of Appeal are that:

(1) The Tribunal erred in failing to identify the components of the asset ‘mining information’, which was required to be identified prior to any market valuation of that asset being undertaken for the purposes of ascertaining the sum of the market values of the test entity's TARP and non-TARP as required by s 855-30 ITAA 1997.

(2) The Tribunal should have held that ‘mining information’, for the purposes of a market valuation done for s 855-30 ITAA 1997 comprises those elements set out in s 40‑730(8) ITAA 1997 plus data concerning surface and in-pit and in-shaft drill holes, core samples, 3D block modelling, life of mine plans, definitive feasibility studies, bankable feasibility studies, and actual mining results, but it does not extend to include expenditures for tenement rent or rates, mining activities (development and production), administration and overheads, land access/native title and aboriginal heritage surveys.

(3) The Tribunal erred in failing to find that the definition of market value in s 855-30(2) required that the value of each of the whole of the assets had to be ascertained in accordance with *Spencer*, which in this case meant having regard to:

(a) the fact that the assets should be valued on the basis of an assumed simultaneous sale of all of the assets to the same hypothetical purchaser;

(b) the contribution that the mining rights made to Abra's underlying value in accordance with subsection 855-30(1) ITAA 1997;

(c) the highest and best use of the assets to be sold, including the mining rights, namely, for use in the business of mining the reserves located in the mining rights simultaneously with all other assets of Abra, having been purchased by a purchaser with the capacity to use those assets in combination in a mining operation;

(d) the mining information, including the utility, nature, extent and availability of mining information in the public domain, was relevant to ascertaining the market value of the mining rights; and

(e) the evidence that, in the absence of the mining rights, the mining information had little or no value, so that a willing but not anxious seller would supply the mining information to the purchaser of the mining rights at no cost,

with the result that the value of Abra was to be found not in the mining information, but in the mining rights.

(4) The Tribunal ought to have found that the correct approach to the valuation exercise required by s 855-30 was to ascertain the sum of the market values of the TARP assets and the sum of the market values of the non-TARP assets.

(5) The Tribunal ought to have found that all of the assets would be sold simultaneously to the same hypothetical purchaser and not as stand-alone separate sales, with the result that the mining information would be sold at less than its sunk costs.

(6) The Tribunal erred in finding that the sunk cost methodology was appropriate for determining the market value of mining information.

(7) The Tribunal ought to have found that relying on sunk costs to ascertain market value overstated the value of mining information and understated the value of mining rights.

(8) The Tribunal erred in accepting a figure which was the mid-point between a range of figures as the proper basis for assessing the market value of mining information.

(9) The Tribunal erred in:

(a) failing to provide any analysis or reasoning as to why it preferred the evidence of Mr Longworth over that of Mr Lonergan;

(b) failing to provide any analysis or reasoning as to why the BDO report was rejected as a comparator of value of Abra mining information;

(c) failing to provide any analysis or reasoning as to why the sunk cost methodology was appropriate; and

(d) failing to provide any analysis of the crucial contention as to the content of the asset mining information, so that it is impossible to ascertain what expenditures are within the definition of the asset and which are not,

so that, the reasons as a whole do not provide:

(e) a foundation for the conclusion that the respondent did not meet the PAT in Div 855 of the ITAA 1997; or

(f) findings on material questions of fact and evidence, as required by s 43(2B) if the *Administrative Appeals Tribunal Act 1975* (Cth) (**AAT Act**).

# PRELIMINARY ISSUE

50 AP Energy objects to the competency of the appeal. It asserts that the Commissioner’s appeal does not raise a question of law within the meaning of s 44 of the AAT Act. Accordingly, there is a preliminary issue as to whether or not the Commissioner has raised a question of law for the purposes of s 44 of the AAT Act.

51 First, there was an issue raised for the Commissioner about whether the objection to competency was raised within time. My conclusion on competency does not turn on that question. It is unnecessary to address it. For reasons discussed below, I consider that the appeal is competent as raising questions of law.

52 In Haritos FC, the Full Court (Allsop CJ, Kenny, Besanko, Robertson and Mortimer JJ) reconsidered the question of the meaning of a question of law under s 44 of the AAT Act. Summarising its views, the Full Court said (at [62]):

…

(1) The subject matter of the Court’s jurisdiction under s 44 of the AAT Act is confined to a question or questions of law. The ambit of the appeal is confined to a question or questions of law.

(2) The statement of the question of law with sufficient precision is a matter of great importance to the efficient and effective hearing and determination of appeals from the Tribunal.

(3) The Court has jurisdiction to decide whether or not an appeal from the Tribunal is on a question of law. It also has power to grant a party leave to amend a notice of appeal from the Tribunal under s 44.

(4) Any requirements of drafting precision concerning the form of the question of law do not go to the existence of the jurisdiction conferred on the Court by s 44(3) to hear and determine appeals instituted in the Court in accordance with s 44(1), but to the exercise of that jurisdiction.

(5) In certain circumstances it may be preferable, as a matter of practice and procedure, to determine whether or not the appeal is on a question of law as part of the hearing of the appeal.

(6) **Whether or not the appeal is on a question of law is to be approached as a matter of substance rather than form**.

(7) A question of law within s 44 is not confined to jurisdictional error but extends to a non-jurisdictional question of law.

(8) The expression “may appeal to the Federal Court of Australia, on a question of law, from any decision of the Tribunal” in s 44 **should not be read as if the words “pure” or “only” qualified “question of law”. Not all so-called “mixed questions of fact and law” stand outside an appeal on a question of law**.

(9) In certain circumstances, a new question of law may be raised on appeal to a Full Court. The exercise of the Court’s discretion will be affected not only by *Coulton v Holcombe* (1986) 162 CLR 1 considerations, but also by considerations specific to the limited nature of the appeal from the Tribunal on a question of law, for example the consideration referred to by Gummow J in *Federal Commissioner of Taxation v Raptis* (1989) 20 ATR 1262 that there is difficulty in finding an “error of law” in the failure in the Tribunal to make a finding first urged in this Court.

(10) **Earlier decisions** of this Court to the extent to which they hold contrary to these conclusions, especially to conclusions (3), (4), (6) and (8), **should not be followed** to that extent and are overruled. Those cases include *Birdseye v Australian Securities and Investments Commission* (2003) 38 AAR 55; *Australian Securities and Investments Commission v Saxby Bridge Financial Planning Pty Ltd* (2003) 133 FCR 290; *Etheridge; HBF Health Funds* and *Hussain v Minister for Foreign Affairs* (2008) 169 FCR 241.

(emphasis added)

53 As noted at the outset, the parties requested that I defer delivery of judgment in this matter pending the outcome of the Commissioner’s application for special leave to appeal from the Full Court decision in Haritos FC. Special leave was refused by the High Court in *Commissioner of Taxation v Haritos* [2015] HCATrans 337. Accordingly, the objection to competency should be determined on the basis of Haritos FC.

54 AP Energy submits that it is a question of fact or of mixed law and fact for the Tribunal whether in the circumstances of Abra at 3 December 2007 the valuations did or did not satisfy s 855-30(2). AP Energy also submits that the findings by the Tribunal as to the market value of the non-TARP assets of Abra involve questions of fact or of mixed law and fact where:

 non-TARP assets are described in s 855-30(3)(b) as assets which are not ‘taxable Australian real property’, the latter being defined in s 855-20  ITAA 1997; and

 the words ‘mining information’ are not expressed or implied in Div 855 ITAA 1997.

55 AP Energy contends there is no error of law affecting the Tribunal’s valuation findings for the purpose of s 855-30(2) to be corrected by the Court. The Further Amended Notice of Appeal invites consideration of the evidential and factual matrix, and involves a second-guess of the Tribunal’s findings as to the market value of Abra.

56 The underlying theme of Haritos FC is that the Court should look at the substance, rather than the form of the question. In my assessment, while the first three questions, in particular, do raise questions of fact, that is not the end to the matter. It is clear from Haritos FC(at [192]) that it is not the case that a right of appeal under s 44 of the AAT Act may never extend to a mixed question of fact and law or as requiring that the question of law be a ‘pure’ law question as may have been previously thought. As noted (at [192]), it may more accurately be said that the right of appeal does not extend to mere questions of fact.

57 The question really is whether the Court is being asked to usurp the fact-finding function of the Tribunal, as discussed by French CJ, Gummow and Bell JJ in *Osland v Secretary to the Department of Justice* (2010) 241 CLR 320 (at [19]), citing *Repatriation Commission v O’Brien* (1985) 155 CLR 422 per Gibbs CJ, Wilson and Dawson JJ (at 430). It follows from Haritos FC (at [192]), that the right of appeal does not extend to mixed questions of fact and law where, in order to decide the question at law, the Court must positively determine a question of fact itself, rather than judicially review the Tribunal’s fact finding. Legally erroneous fact-finding may be found on appeal on a question of law. The purpose of limiting an appeal to questions of law is to ensure that the merits of cases are dealt with not by the Federal Court, but by the Tribunal. This is a distribution of function, which is critical to the correct operation of the administrative review process.

58 In relation to question 1, AP Energy submits that it requires consideration of what ‘mining information’ is comprised of. In this regard, AP energy refers to Haritos FC (at [195]), in which the Full Court adopted what Hill J said in *Sharp Corporation of Australia Pty Ltd v Collector of Customs* (1995) 59 FCR 6 (at 16), being:

…where the facts found are capable of falling within or without the description used in the statute, the decision which side of the line they fall on will be a decision of fact and not law. Such a decision will generally involve weight being given to one or other element of the facts and so involve matters of degree.

However, my view of the substance of question 1 is that it is (properly) directed to whether the Tribunal erred in failing to identify the correct approach at law to the process of evaluating ‘mining information’ rather than whether the facts are capable of founding a decision that particular assets are ‘mining information’.

59 The same may be said of question 2 and question 3. In particular, question 2 and question 3 focus on the difference between the RCF approach, the RCF FC approach and the approach taken by the Tribunal, as illustrated by the Further Amended Notice of Appeal and submissions of both parties. These are questions of law, or put in another way, has the Tribunal failed to adopt an overall approach which conforms with established legal tests. I agree though with AP Energy that the grounds of appeal do go very close to seeking review of the merits. The fourth question (discussed below) has necessitated a closer examination of the detail of the Tribunal’s reasons than might usually be expected.

60 In relation to question 4, AP Energy points to Haritos FC (at [213]) where the Full Court said (citations omitted):

A conclusion that a decision involves **a lack of reason or logic** sufficient to amount to an error of law is not to be lightly drawn, and **not every lapse in logic is sufficient to constitute an error of law**.

(emphasis added)

61 However, as to ground 4, it is clear that a broader, almost fundamental, failure to set out adequate reasons, findings, evidence or law **may** constitute a failure to exercise jurisdiction. Whether or not this has occurred is a question of law. Whilst there is some debate on the question, in my opinion, the better view is that a failure to provide adequate reasons may be an error of law: *Dornan v Riordan* (1990) 24 FCR 564 per Sweeney, Davies and Burchett JJ (at 573)**.** The question of whether the Tribunal failed to adequately set out the *basis* of reasoning and the findings of fact, evidence or law on which the decision is based may be distinct from an assertion that there has been a particular ‘lapse of logic’.

62 The appeal conforms with s 44 of the AAT Act.

# QUESTION 1 – WHEN UNDERTAKING A MARKET VALUATION OF ASSETS THAT USE TARP AND ASSETS THAT ARE NON-TARP FOR THE PURPOSES OF DIV 855 ITAA, WHAT IS TO BE INCLUDED AS COMPRISING THE ASSET ‘MINING INFORMATION’?

63 The Commissioner relies on ground 1 and ground 2 in relation to this question. (See presently [49]).

64 It was common ground before the Tribunal that ‘mining information’ is a non-TARP asset.

65 The Commissioner complains that, although the essential steps of identifying the asset classes of the test entity and classifying each asset class as either TARP or non-TARP were undertaken by the Tribunal, the Tribunal did not go on to identify what the components of each asset class were, notwithstanding that submissions had been made by the Commissioner as to the legal definition of the component parts.

66 The Commissioner contends that the definition of mining information in s 40-730(8) TAA 1997 does not apply to Div 855. Rather, the Commissioner contends, as he did before the Tribunal, that a wider definition than that in s 40-730(8) applies, so as to:

 include data concerning surface and in-pit and in-shaft drill holes, core samples, 3D block modelling, life of mine plans, definitive feasibility studies, bankable feasibility studies, actual mining results, and so on; and

 exclude expenditures under the headings of tenement rent or rates, mining activities (development and production), administration and overheads, land access, native title and aboriginal heritage surveys or data arising from these expenditures.

67 Therefore, the Commissioner says that to the extent any excluded items have been included in any calculations relied on by AP Energy, they must be excluded from the value of ‘mining information’. It must follow from the binary nature of the test that any data thus excluded must form part of the value of ‘mining rights’, which is a TARP asset.

68 The Commissioner argues that it is imperative that the definition of ‘mining information’ be clearly identified and articulated, given the potential to impact the test entity passing or failing the PAT by the incorrect allocation of data and consequently market value to the non-TARP asset ‘**mining information**’, rather than the TARP asset ‘**mining rights**’ (emphasis added).

69 There is no statutory provision in the ITAA 1997 that relevantly defines or governs the nature, composition and valuation of the multifarious types of test entity assets that may be identified as non-TARP assets for the purposes of s 855-30(2), including ‘mining information’. Unsurprisingly, in both RCF and RCF FC, no definition or meaning of mining information as an asset was approved or discussed by the Court.

70 The Tribunal took into account the content of Abra’s mining information asset in weighing up the evidence on the subject from Mr Longworth and Mr Lonergan and the Commissioner’s comparisons with the BDO Valuation and accepted that Mr Longworth was qualified to describe and assess the nature, composition and valuation of Abra’s mining information asset. The Tribunal did not accept the alternate views about the valuation of ‘mining information’ in Mr Lonergan’s criticism of Mr Longworth’s MKT Valuation Report (see generally the Tribunal’s reasons at [149]-[158])).

71 In my view, Abra’s ‘mining information’ asset is to be given content by reference to Abra’s own business operations as a minerals exploration company. Its meaning in that context is a question of fact for the Tribunal. As the content of mining information is not specified in the relevant statutory provisions, there was no obligation on the Tribunal to specifically address this point in its reasons for decision.

72 The Commissioner’s brief submissions as to this question of law are unsupported by reference to judicial authority or specialised knowledge and experience on the meaning of ‘mining information’ either broadly or in the context of Abra’s business operations as a minerals exploration company.

73 What is to be included as comprising the asset ‘mining information’ in an analysis under Div 855 ITAA 1997 will depend on the circumstances of the case, including the activities of the company concerned and also including whether in those circumstances, the definition in s 40-730(8) ITAA 1997 should apply or be taken into account in Div 855.

74 Accordingly, in my view, there is no error of law in the Tribunal’s findings in relation to Abra’s mining information asset.

75 Ground 1 and ground 2 are not made out.

# QUESTION 2 – HOW DOES THE DEFINITION OF MARKET VALUE IN *SPENCER* APPLY TO THE VALUATION UNDERTAKEN FOR THE PURPOSE OF S 855-30(2) ITAA 1997

76 Grounds 3, 4 and 5 relate to this question (see presently **[49] TO BE CONFIRMED**).

77 The relevant valuation methodology adopted by Xstract and accepted by the Tribunal was as follows:

Xstract's valuation methodology arrives at a range of figures for the value of Abra's mining information at the key dates.

As at 3 December 2007, Xstract estimates the value of Abra's mining information lies in the the range AUD13,195,572 to AUD25,417,282.

As at 11 September 2008, Xstract estimates the value of Abra's mining information lies in the range AUD17,413,260 to AUD30,956,484.

In determining its preferred value, Xstract has adopted the mean of the defined value range. Xstract considers the mean of the value range to be the most appropriate method to establish a preferred value, as the median would not apply to such a small dataset.

Xstract notes that application of both the 3.5% and 5.8% escalation factors results in higher values than CPI. The 5.8% escalation factor however, comes from drilling data, which accounts for only a part of any exploration program. There are a number of mineral exploration costs that have decreased over the time period under analysis (1983 to 2008), particularly those that relate to remote site management, communications, geophysics and survey. Since 1983, advances in GPS and satellite communication have reduced the cost of those aspects of exploration programs, which is applicable to take into account given the nature of project for which we are valuing the mining information. Given that some costs for an exploration program since the 1980s will have decreased and others will have increased, Xstract considers a simple average of the discounted values to be a suitable technique to determine a preferred value. Thus, the preferred value is the average of the six discounted values below; the CPI figures represent the lowest inflation range (inflation of money value only) and the 5.8% escalator represent the highest inflation range (that of drilling cost escalation). The 0% discounted figures are not included in Xstract's average calculation as Xstract (and Revaluate) considers that a public discount should apply in the instance of this valuation exercise.

78 The Commissioner submits that, pursuant to RCF FC, the market value of the test entity’s assets are to be valued as a whole on the premise of a hypothetical simultaneous sale. Separate asset values (within the ascertained total entity market value) may be allocated to each asset type, with the entire value of the test entity to be allocated within the binary classification of TARP and non-TARP.

79 The Commissioner submits that the Tribunal relied on precisely the approach of the primary judge in RCF when it reached its decision that AP Energy had discharged its onus of proving, on the balance of possibilities, that the Commissioner’s assessment was excessive. This, the Commissioner says, is evident from the Tribunal decision (at [74]-[77], [154] and [168]) where the Tribunal said:

74. Importantly, at [95] to [96] Edmonds J [in RCF] makes the following observations concerning the PAT in s 855-30 of the ITAA 1997:

95. Sub-section (1) speaks of the purpose of the section as being to define when an entity’s u*nderlying* value is principally derived from *Australia* [sic] real property. What the section is concerned to measure is not the value (singular) of SBM or all the assets of its business as a going concern, but the values (plural) of its underlying assets (whether or not used in the business) and to define when the sum of the values of its underlying assets (what it calls the “entity’s underlying value”) is principally derived from Australian real property. Sub-section (2) provides the criterion for passing the “[PAT]”: when the sum of the market values of the entity’s assets that are TARP exceeds the sum of the market values of its assets that are non-TARP.

96. It is clear from the text of s 855-30(2) that the “[PAT]” requires separate determination of the market value of each of the entity’s assets; not the determination of the market value of all its TARP assets as a class and the determination of the market value of all its non-TARP assets as a class (although where an entity has only two or three assets in a particular class, such a determination may be tempting as a surrogate short-cut); and certainly not the determination of the market value of all its assets on a going concern basis. The test further requires that the classification of these assets into TARP or non-TARP. Finally it requires the summing of the values in each class to determine whether the sum of the market values of the entity’s TARP assets exceed the sum of the market values of the entity’s non-TARP assets; only if it does; is the “[PAT]” passed.

75. At [101] to [102], Edmonds J accepted RCF’s formulation that an “asset is to be valued by reference to the hypothetical price that would be agreed between the parties on a stand-alone basis as if no other asset were offered for sale” as the correct starting point.

76. However, according to his Honour (at [102]):

... the formulation needs to go further and incorporate the further assumption that, in the case of hypothetical transactions involving mining information or plant or equipment, the hypothetical purchaser is the owner of the mining rights and, as such, is able to use the relevant asset, mining information or plant and equipment, in a manner consistent with the most advantageous purpose for which it is adopted or, its “highest and best use”. All the Experts agreed that this was in a business of mining the reserves in SBM’s mining tenements.

77. At [103] and [153], the Court rejected as wrong and as finding no support in the statute, the Commissioner’s contention that s 855-30(2) requires the entity be valued on a combined asset market value (i.e. is concerned with the determination of all of SBM’s assets as a “going concern”) and then the value be allocated into the categories of TARP and non-TARP asset values. [Edmonds J] said (at [103]) that s 855-30(2) “is concerned with the determination of the individual market values of SBM’s assets, at least before the summing and comparison of the dual classification of those assets”.

…

154. As submitted by AP Energy, to obtain a fair snapshot of Abra’s underlying TARP as at 3 December 2007 for the purposes of the PAT, the cost to a prospective arm’s length purchaser of regenerating “mining information”, discounted for the use of relevant “mining information” publicly available, ought to be divorced from the intangible which may arise from “mining information” and attach to the mining right or real property. The Tribunal considers that this is what Mr Longworth’s valuation enables.

…

168. For the above reasons, the Tribunal:

(i) finds that AP Energy has discharged its burden of proving, on the balance of probabilities, that the Assessment was excessive; and

(ii) sets asides the Objection Decision and substitutes it with the decision that the Objection should be allowed in full.

80 It follows, the Commissioner says, that the approach taken by the Tribunal to the application of the test in *Spencer* to the task required by s 855-30 ITAA 1997, which was reliant on a single asset valuation proffered by AP Energy, was also wrong.

81 The Commissioner argues that, in accordance with *Spencer*, on the particular facts of this case, the correct approach to ascertaining the market value requires regard to:

 a valuation on the basis of an assumed simultaneous sale of all of the assets to the same hypothetical purchaser;

 the contribution that the mining rights made to Abra’s underlying value in accordance with s 855-30(1) ITAA 1997;

 the highest and best use of the assets, including the mining rights to be sold, namely for use in the business of exploring mineral reserves located in the mining rights, which, in turn, required the assumed simultaneous sale of all of the assets to a hypothetical purchaser with a capacity to continue to use those assets in the business of mineral exploration;

 the mining information, including the utility, nature, extent and availability of mining information in the public domain, which was relevant to ascertaining the market value of the mining rights;

 the evidence that, in the absence of the mining rights, the mining information had little or no value so that a willing but not anxious seller would supply the mining information to the purchaser of the mining rights at little or no cost; and

 the fact that any hypothetical simultaneous sale of all of the assets of Abra would therefore mean that the mining information would be sold for an amount less than its sunk cost (which, in turn, involves consideration of question 3 below).

82 In my view, although the Tribunal did rely upon RCF for certain limited propositions (which it clearly identified), the question is whether its approach to the methodology of valuation, particularly in accepting Mr Longworth’s approach and valuation, conflicted with RCF FC.

83 The experts in RCF used two broad bases to assess the market value of SBM’s total assets, the DCF method and the market capitalisation method. Only one of the experts preferred the market capitalisation method for SBM. The other experts considering the DCF method more reliable. At [116] of RCF the Court agreed that ‘… the market capitalisation method is unreliable and the DCF method is to be preferred in assessing the market value of SBM’s total assets.’ To calculate the market value of SBM’s TARP assets, the experts started with a measure of the market value of SBM’s total assets and proceeded to the value of the mining rights as a residual item after deducting the assessed value of the non-TARP assets (including ‘mining information’ and plant and equipment) (at [114]).

84 It is from that approach taken at first instance to the interpretation of s 855-30(2) ITAA 1997, being to assess the individual market values of SBM’s assets on the basis that each is the only asset being offered for sale, that the primary judge in RCF noted at [103]:

Fundamentally, the Commissioner’s submission, which mirrored the approach of those of the Experts he called, in particular Axiom, is wrong. It is contrary to the statutory criterion mandated by s 855-30(2) as outlined in [95] to [97] above. As previously noted, s 855-30(2) is not concerned with the determination of the market value of all of SBM’s assets as a going concern; it is concerned with the determination of the individual market values of SBM’s assets, at least before the summing and comparison of the dual classification of those assets.

85 At [127], the primary judge in RCF noted that there was no agreement between the experts in the valuation methodologies to be adopted in valuing SBM’s mining information and its plant and equipment, both in relation to calculating a derived market value for SBM’s mining rights (its principal TARP asset), as well as in valuing those particular assets for inclusion in the non-TARP asset class. This disagreement, the primary judge said (at [127]), was apparent from the tables in the joint report.

86 As noted, in relation to the valuation of the ‘mining information’ of SBM at first instance, the primary judge in RCF said (at [156]-[157]):

156 For the purpose of valuing SBM’s mining information on the hypothesis that it is the only asset offered for sale and on the further assumption referred to in [102] above, the hypothetical price of the mining information, as the determinant of its market value, would be negotiated in a range **somewhere between a low point**, being the amount to be realised by the hypothetical vendor if no transaction is done (zero), or an equivalent nominal amount on its sale to a purchaser not being the owner of the mining rights, and **a high point**, being the cost, time delay as well as outlay, to the hypothetical purchaser of re-creating the mining information.

157 While there is an upper and lower point to the hypothetical negotiation range, there is **no logical intermediate point guided by any business or financial principle**. It follows, that if the task were to predict the outcome of such an actual negotiation, as a question of fact, the Court has no assistance and no evidentiary basis for doing so. But that is not the task here: the task under s 855-30(2) is to ascertain a market value, and the hypothetical sale transaction is no more than a useful and conventional method for doing so. I agree with RCF’s submission that **an appropriate basis** for ascertaining market value in such a case is **one which fairly arrives at a value, and that the fair valuation is one which shares equally** between the holder, and the potential user, of the relevant asset the benefit to the user of immediate acquisition of the asset. That value is ascertained by dividing **the notional “bargaining zone”** equally. In this way, the hypothetical price of the mining information, as the determinant of its market value, is arrived at as a mid-point between the maximum that the hypothetical purchaser, as the owner of the mining tenements, might pay to acquire the information (being the amount of outlay and the value of loss of cash flow suffered to re-create it) and the maximum the hypothetical vendor of the information could realise from any other disposal of the information. This is depicted in the table below for each of EY and LEA at the relevant dates:

|  |  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- | --- |
|  | **EY** | | **LEA** | **EY** | | **LEA** |
|  | **July**  **$M** | **July**  **$M** | | **January**  **$M** | **January**  **$M** | | |
| Cost to re-create mining information including time delay costs (A) | 164 | 178 | | 257 | 356 | | |
| Mid-point between 0 and figure (A) | 82 | 89 | | 129 | 178 | | |
|  | | | | | | | |

(emphasis added)

87 In my view, the valuation of Abra’s ‘mining information’ asset accepted by the Tribunal was not acceptedon ‘precisely’ the same mid-point basis as in RCF. Rather, the value accepted by the Tribunal was that provided by an expert with a specialised expertise, Mr Longworth, whose evidence, expertise and explanation for adopting that value, the Tribunal preferred. Mr Longworth used a cost-based method, which he and his peers considered to be appropriate in order to determine the market value placed on the mining information of Abra as a minerals exploration company.

88 As I read RCF FC, apart from emphasising that each asset should be assessed on the basis of an assumed simultaneous sale of all of the assets to the same hypothetical purchaser, the Full Court did not examine the methodology used by the experts to arrive at the market value of SBM that would apply the *Spencer* test, other than to make a brief statement (at [54]). In the Court’s supplementary judgment (*Commissioner of Taxation of the Commonwealth of Australia v Resource Capital Fund III LP (No 2)* [2014] FCAFC 54 (at [4])), the Court did note:

At [54] of our earlier judgment we noted that all the experts who gave evidence before the primary judge agreed that in the case of a simultaneous sale to the one purchaser, the hypothetical purchaser could expect to acquire the mining information and plant and equipment for less than their re-creation costs with little or no delay. However, we do not accept as a proper basis for valuation in accordance with our earlier judgment **the unsupported and speculative proposition** that market value is to be assessed as the mid-point between the replacement and scrap values of those assets. (emphasis added)

However, while clearly binding on me, this statement did not actually form part of the Court’s main judgment. It follows that the main point to take from this supplementary observation is the qualifier emphasised above. Even the Commissioner expressly accepts that a mid-point selection is appropriate where justified. But, in any event, Mr Longworth took the mean or an average, not simply the mid-point.

89 The Full Court did not reject or endorse any particular method of valuation by which the *Spencer* test can be applied in valuing a test entity for the purposes of s 855-30(2). Nor did the Court at first instance. It did not hold that the DCF method (preferred by the experts and by the Court at first instance for SBM) was the methodology always to be applied to other test entities for the purposes of ascertaining their market value for the purpose of s 855-30(2). What the Full Court rejected as a proper basis for valuation was the ‘unsupported and speculative proposition’ that market value of mining information and plant and equipment should be assessed as the mid-point between the replacement and scrap values of those assets. Implicitly, some satisfactory reasoning would be required before adopting such a method of assessment. In this case, reasoning was supplied and the Tribunal was clearly content with the reasoning. The legislature has not seen fit to be prescriptive about the process, presumably being content to allow experts in this complex area to guide decision-makers.

90 I do not consider that the valuation method actually accepted and adopted by the Tribunal was the same as the method in RCF, nor did it purport to be. In that regard, the following is apparent:

 the Tribunal observed (at [73]) that the decision of the primary judge in RCF concerning the application of Div 855 was obiter dicta and not binding on the Tribunal;

 the Tribunal did not adopt the interpretation of s 855-30(2) held in RCF, nor accept the value of Abra’s mining information and other assets as if they were offered for sale on a stand-alone basis, as contended by the Commissioner;

 the Tribunal had before it a market capitalisation for Abra on 3 December 2007. That market capitalisation reflected the market value of Abra’s assets in combination and was accepted by the valuers as though it were an assumed simultaneous market sale of Abra’s assets. The market capitalisation value $42,133,134 has been derived by the AVO;

 the Tribunal (at [162]-[163]) did accept that the DCF method of valuation of SBM in RCF was appropriate where there was no operating mine and mineral reserves identified and assessed for ongoing feasible mining operations. Its use was, however, deemed inappropriate for Abra, which was a minerals exploration company. At 3 December 2007, there were no identified mineral reserves assessed for a feasible mining operation upon which any reliable DCF could be formulated. Quite understandably, the Tribunal regarded this as an important difference from RCF/SBM;

 the Tribunal also noted (at [80]) the statements by the primary judge in RCF (at [114]) that the experts had started with a measure of the market value of SBM’s total assets, namely, the DCF method, and proceeded to the market value of the mining rights (the only significant TARP aspect of SBM) as a residual item after deducting the market value of the non-TARP assets of SBM, which included mining information and plant and equipment. The Tribunal further noted (at [81]) that, following an analysis of the two broad bases used – the market capitalisation and DCF methods – the primary judge in RCF agreed with the majority of experts that the market capitalisation method is unreliable and the DCF method is to be preferred;

 the Tribunal, in order to ascertain the non-TARP and TARP components of Abra’s market capitalisation value, accepted Abra’s balance sheet values for non-TARP assets. But there was no consensus, either in the present appeal or in RCF as to the valuation methodology to be adopted in valuing ‘mining information’. The Tribunal did not accept the use of Abra’s balance sheet historical cost value for mining information. It also noted (at [82]) that in RCF the book value was rejected as indicative of the market value of SBM’s mining information; and

 neither did the Tribunal accept the basis on which the AVO had assessed the market value of Abra’s mining information asset at $10,000,000. The reasons for rejecting this value which are apparent from the decisions of the Tribunal (at [97]-[99]) are:

o the first source for the figure was said to be the Department of Mines EMITS with a total lodged expenditure of $6,755,013 but no working papers were provided to show how that number was calculated and it was at odds with the exploration costs reported on Abra’s balance sheet; and

o the second source figure was AVO’s non-specific allocation of a further $1,500,000, said to be a generous but reasonable assumption based on past expenditure.

91 The Tribunal did accept (at [149]) Mr Longworth’s valuation of Abra’s mining information $21,158,707 as at 3 December 2007. It was entitled to do so. Mr Longworth was a person with specialised expertise accepted by the Tribunal and his informed valuation of the market value of Abra’s mining information was ascertained using the sunk cost methodology, which he assessed was the appropriate method to determine the value the market had placed on the mining information of Abra as a minerals exploration company as at 3 December 2007.

92 I accept the submissions for AP Energy that, on a fair reading and assessment of Mr Longworth’s valuation method and report, Mr Longworth did not arrive at an ‘unsupported and speculative’ value of Abra’s mining information. In deciding to accept Mr Longworth’s assessment of Abra’s data and his conclusion as to a figure of $21,158,702, the Tribunal weighed the MKT Valuation Report against the AVO valuation, Mr Lonergan’s evidence and the BDO Valuation, which were all before the Tribunal for comparison.

93 It is common ground that the *Spencer* test was to be applicable to a valuation of Abra. The Tribunal in rejecting the DCF method as inappropriate to the valuation of assets of Abra, accepted the market capitalisation values at 3 December 2007 as a suitable method for the application of the *Spencer* test to ascertain Abra’s market value on the hypothesis of a simultaneous sale to a purchaser with the capacity to use Abra’s assets in combination as a mineral exploration company. The Tribunal’s findings assume a simultaneous assets sale value and the use of the residual method. The Tribunal did not apply *Nischu Pty Ltd v Commissioner of State Taxation (WA)* (1990) 21 ATR 391. Although there is reference to *Nischu* in the Tribunal’s reasons, it is only in the context of examining RCF in a series of quotations from the reasons of the RCF judgment.

94 Most significantly, and practically, it is apparent that the Tribunal was alive to the differences between Abra and SBM for valuation purposes. The Tribunal made clear (at [167]) what it could take from RCF. None of the statements by the Tribunal, taken alone, or in conjunction suggest that it applied the judgment and fell into legal error as a result.

95 Grounds 3, 4 and 5 are not made out.

# QUESTION 3 - IN DETERMINING THE MARKET VALUE OF THE ASSET ‘MINING INFORMATION’ FOR THE PURPOSES OF S 855-30(2) OF THE ITAA 1997, IS THE SUNK COST METHODOLOGY THE APPROPRIATE METHOD OF ASCERTAINING VALUE?

96 Grounds 6, 7 and 8 relate to this question (see presently [49]).

97 The approach adopted by AP Energy was to calculate the sunk cost of creating the mining information, less a discount for the availability of the information in the public domain, plus an escalation factor to account for the time delay between incurring the sunk costs and the time or re-creating the mining information, taking into account the increase in exploration costs over the relevant period, assuming it is re-created at the valuation date. The Commissioner complains that the Full Court’s approach in RCF FC was to reject the very methodology adopted for by AP Energy and accepted by the Tribunal (at [155] and [167]).

98 Re-creation cost in the present context means the sunk cost of creating the mining information, less a discount for the availability of the information in the public domain, plus an escalation factor to account for the timing delay between the incurring of the sunk costs, and the time of recreating the mining information, taking into account the increase in exploration costs over the relevant period, assuming it is recreated at the valuation date. The term ‘replacement cost’ was used in the Tribunal in this matter, however there is no relevant difference between that term and ‘re-creation cost’.

99 The sunk cost method is described by Mr Longworth at pp 7-9 of his valuation report as follows:

4. Valuation approach

Xstract has adopted a sunk cost method to determine the value of Abra’s mining information as at the key dates. The premise of this method relies upon the determination of the company’s exploration expenditure over the period of existence of the tenements and then inflating to the valuation dates requests (i.e. 3 December 2007 and 11 September 2008). This methodology is considered sound for determining the value of mining information as it essentially depicts the approximate dollar value of replicating all the known information about the tenement as at the relevant date. Furthermore, to maintain its holding in the relevant tenements, Abra was required to submit annual reports outlining activities and incurred expenditures to the Western Australian Department of Industry and Resources (now the Department of Mines and Petroleum). This data is available and within the public domain.

Xstract’s method to determine the nominal expenditure amounts incurred by Abra at its respective projects included:

 Sourcing a listing of Abra’s tenements which were owned as at the two key dates (refer to Table 2.1 for Abra’s tenements as at 11 September 2008), which was sourced from Abra’s annual reports.

 The list was compiled into a table and grouped by the various projects per locations.

 A search of the DMP of Western Australia, WAMEX website for Annual Reports on the listed tenements.

 A download of the reports from 1983 onwards. The 1983 annual report detailed the exploration work carried out in 1982, including the discovery drillhole at the Abra deposit.

 Annual reports were used to verify tenement numbers of the exploration and mining tenements and the work completed. Tenement numbers were checked as the shape of the tenements changed over the years. Old tenement numbers were added to the Table of Tenements.

 Search [sic] the MTO website for expenditure details for each tenement from 1983 to 2008. List the expenditure data in a table of expenditure for each exploration project.

 Where available, the expenditure details from the MTO website were checked against the expenditure details detailed in the annual reports and some Form 5 Operational Reports on Tenement Expenditure (provided by MKT).

These nominal figures were then inflated using various factors, including the Consumer Price Index (“CPI”) and several Producer Price Indices (“PPI”), to determine an appropriate proxy for costs in the exploration and mining industry. CPI data was obtained from the Reserve Bank of Australia website and the appropriate period ending CPI factor was applied per year.

The ABS data was cross-referenced to determine if the CPI provides an appropriate inflationary measure. Importantly, the ABS does not capture early stage exploration cost data, relying more on engineering and mining construction cost data. For the purposes of this report, Xstract analysed data for metals production, surveying and mapping and expenditure per metre drilled (excluding oil and gas). The annualised rate of inflation from 1985 to 2011 (the limit of the available data) for metals production (iron and steel, copper and zinc) is approximately 3.5%, surveying and mapping is 3.85% and drilling is 5.8% (from ABS data). Xstract therefore considers that early stage exploration costs are likely to have increased at an average annual rate of between 3.5% to 5.8% over the period 1985 to current.

Importantly, drilling cost information suggests that over the period 1980 to 2000 that mining and exploration costs were either at or below CPI and that costs only began to rise significantly after 2000.

The CPI inflated numbers were then compared against the inflationary figures selected by Xstract from the ABS data.

In addition to the inflation factors applied, Xstract has also applied a discount to account for the use of public information. It is widely acknowledged in the industry that publically available data is not as rich in content as the data held by the creator. A potential purchaser of the tenements is likely to apply such a discount when valuing such publicly available mining information, for some of the following reasons:

 Relevance and timeliness: information is perishable

 Accessibility: ease of location and retrieval

 Usability: ability to manipulate and analyse

 Utility: suitability for multiple applications

 Quality: accuracy, reliability, credibility and validation

 Customisation: filtered, targeted, subsetted

 Re-useability: ability for others to access and use

For example, the mining company creating the data would have it contained in a database which could be interrogated swiftly and in a sophisticated way for rigorous analysis, however a potential purchaser would only have access to paper-based reports from the public domain.

To our knowledge, there is no industry standard or rules of thumb for applying such a discount for the use of public data. Xstract has taken into consideration the type and style of exploration activity carried out by Abra on the properties, the resulting mineralisation discovered and the activities required to reproduce the mining information. Xstract considers that the market is likely to apply a discount of between 0% and 25% (depending on the relevant information) to any publicly available information relating to pre-development exploration assets.

Thus, in combination, Xstract expects the market would apply a discount of between 0% and 25% to account for the use of publicly available information and an average annual inflation rate of between CPI and 5.8% to account for the increase in exploration costs over the period 1983 to 2008. In this instance, Xstract has selected a public data discount range of 12.5% to 25% and used these values with CPI and annual escalation of 3.5% and 5.8% to triangulate a valuation range.

Xstract arrived at several Real (inflated or escalated) figures for the value of mining information for Abra and have tabled these and calculated a preferred value.

100 The Tribunal accepted Mr Longworth’s approach and method. At [156] and [158], the Tribunal said:

156. The Tribunal disagrees with the Commissioner’s assertion that Mr Longworth did not properly consider the “market value” of Abra’s “mining information” as at 3 December 2007 and that he “ignored the legislation”. The Tribunal is of the view, based on the evidence before it, that Mr Longworth provides an expert opinion of the “market value” of the “mining information” component of Abra’s mineral asset as at 3 December 2007. That is, Mr Longworth did ascertain a “market value” for Abra’s “mining information”, the sunk cost methodology being an acceptable proxy for “market value” ... The Tribunal considers that Mr Longworth’s approach to valuing Abra’s “mining information” as at 3 December 2007 is consistent with the EM and the case law on the meaning of “market value”...

…

158. The Commissioner’s Submissions … point to various alleged inconsistencies between Mr Longworth’s valuation approach (i.e. in the MKT Valuation Report) and the valuation approach taken by Xstract in the BDO Valuation, both reports having been prepared by Xstract but authored by different people within Xstract. The Tribunal is of the view that it is a pointless exercise to draw comparisons between the two reports since, as contended by AP Energy, they are “not measuring like with like”. The BDO Valuation values Abra’s mineral asset in its entirety, including mining and prospecting information optimized [sic] for the purpose of resource estimation ... In contrast, in the MKT Valuation Report Mr Longworth is valuing all of Abra’s mining and prospecting information, using a method which starts from *“the basic premise....is the data does not exist or may never have existed”*... That is, Mr Longworth is not valuing Abra’s mining and prospecting information optimized [sic] for resource estimation.

101 The Commissioner contends that the Full Court in RCF FC (at [54]) rejected the proposition that re‑creation cost of an asset would be an acceptable method of valuation noting that all of the valuers had agreed that if there is a simultaneous sale of all of the assets, to one purchaser as required by the application of *Spencer* in accordance with the statute, the mining information would be acquired for less than its re-creation cost, with little or no delay.

102 The Commissioner stresses that he does not contend that the mid-point in the range of possible values will inevitably be inappropriate as a valuation proposition in all cases.

103 In this case, however, the Commissioner says that AP Energy used the mean value, being the average of the values in the very wide range of possible values from approximately $13,000,000 to approximately $29,000,000, with the only justification being that the median would not apply to such a small dataset (MKT Valuation Report at 9). The Commissioner argues this is not a proper justification for the selection of the figure of $21,158,702 as the market value of the mining information. Additionally, while it was the mean value that was proposed by AP Energy, what the Tribunal actually accepted was the mid-point on the basis that that had been accepted by the primary judge in RCF.

104 Once again, in my view, there is a distinction between the approach taken in the Full Court in RCF FC on the one hand, and prohibiting for all purposes particular methodologies on the other. It is true that the Full Court accepted that in a simultaneous sale of SBM’s assets the hypothetical purchaser would expect to acquire the mining information and plant and equipment for less than their re-creation costs, with little or no delay. It did not, however, go so far as to reject any particular methodology for ascertaining the market value of mining information, including a method which used the costs of mining information and other factors. It does not follow from the Full Court’s reasoning that it rejected the use of the re‑creation cost of an asset as an acceptable method of valuation. It was open to the Tribunal to compare the evidence from the experts and to choose a market value of Abra’s mining information on a sunk cost methodology. It accepted the expertise and evidence of Mr Longworth in adopting that approach on the basis that reliance could be placed on Abra’s exploration expenditure over the period of the existence of the tenements, which depicted the approximate value of replicating all of the known information about the tenements as at the relevant date. Although Mr Lonergan was, indeed, critical of this approach, Mr Longworth’s explanation was that there is no clear, transparent, or open market place for ‘mining information’ (particularly for an explorer, not a producer). He selected an approach which he regarded (and the Tribunal accepted) was more objective by adopting actual re-creation costs and then applying an absolute discount. Mr Longworth’s concern was that the AVO approach involved applying subjective estimates to exploration costs, which he described would ‘be highly subjective and significantly distort the value of the mining information by selecting the peak price point for valuing the mining information’. Reference was made to the fact that, at the date in question, the pre-GFC mining boom and exploration costs were exceptionally high.

105 Further, as AP Energy contends, by applying an absolute discount in the range of 12.5% and 25% to a range of re-creation cost values defined by indices for money inflation and drilling cost escalation and then adopting the mean, Mr Longworth arrived at a value for Abra’s mining information of $21,158,702, when the lower estimate of the cost of re-creation was $15,229,763 and the higher estimate of the cost of re-creating the mining information at that date, with no specific factor for delay, was $29,209,723.

106 Mr Longworth’s approach as adopted by the Tribunal also accorded (on the evidence) with the preferred approach by industry standards. The Valmin Code being an industry code for independent expert reports provides at cl 59:

*To the extent that it may affect the Valuation and if the available data permits, a range (high/low) of values should be determined and stated, reflecting any uncertainties in the data and the interaction of the various assumptions made. However, the range should not be so wide as to render the valuation meaningless.*

*Similarly, the Report should include a sensitivity analysis showing the effects of changing the most significant assumptions.*

*In all cases, a preferred Value should be identified. If there are cogent reasons for not doing so, they should be stated in the Report.*

107 There are, of course, significant differences between the market value of mining information as a producer, compared with the market value of mining information as an explorer, or at the very least, it was open to the Tribunal to accept the expert advice that this was so, such that the approach taken to SBM would be different from the approach taken by the experts to Abra.

108 In my view, it is not apparent that the Tribunal transgressed any prohibition which might be seen as flowing from RCF FC.

109 In my view, the Tribunal was at pains to avoid using an ‘unsupported and speculative’ mid-point calculation and explained why it would not necessarily adopt the same approach as adopted in RDF at first instance.

110 Grounds 6, 7 and 8 are not made out.

# QUESTION 4 – HAS THE TRIBUNAL FAILED TO EXERCISE ITS DECISION-MAKING POWER IN ACCORDANCE WITH THE LAW BY REASON OF A FAILURE TO INADEQUATELY SET OUT (A) THE BASIS OF ITS REASONING, AND (B) THE FINDINGS OF FACT, EVIDENCE OR LAW ON WHICH ITS DECISION IS REACHED?

111 The Commissioner relies upon ground 9 (see presently [49]).

112 The Commissioner submits that whilst the challenge to Mr Longworth’s expertise was analysed by the Tribunal (at [153]) and is not the subject of any question on appeal, having accepted Mr Longworth was an expert, the Tribunal did not address the question of why Mr Longworth’s expert opinion was preferred to the AVO’s limited scope valuation opinion. The Commissioner says this is particularly significant, given that the:

 the Commissioner bears no onus in the Tribunal to show that the assessment is reasonable to supported by evidence: *Gauci v Commissioner of Taxation (Cth)* (1975) 135 CLR 81 (at 89);

 the Commissioner does not have to support his decision on the basis set out in the objection statement; and

 it is not sufficient to discharge the onus for a taxpayer to show that the Commissioner made an error in forming a judgement as to the amount of the assessment: *Dalco* (1990) (at 621).

113 There is no analysis, the Commissioner complains, as to what, if any, impact the differences between SBM and Abra had on the approach to the valuation question. There was a failure, the Commissioner says, to address the problem that the BDO report was not measuring like with like. And while at [156] and [168], the Tribunal accepted that AP Energy’s sunk cost methodology as being an acceptable proxy for market value in accordance with the Explanatory Memorandum and case law, that case law does not support that conclusion. The Commissioner says the case law referred to by the Tribunal, set out at [61]-[65] specifically *Spencer*, *Boland v Yates Property Corporation Pty Ltd* (1999) 167 ALR 675 (which included the concept of highest and best use into the market value test derived in *Spencer*), and *Abrahams v Federal Commissioner of Taxation* (1944) 70 CLR 23, being the formulation of *Spencer* prior to the highest and best use criteria. None of these authorities, the Commissioner says, suggest that sunk cost is an appropriate methodology of any asset, much less this asset in the specific statutory context in which the obligation arises. The question of ‘highest and best use’ is simply not addressed in the reasons, despite specific reliance on the relevant passage from *Bolland*. The reasoning at [168], the Commissioner says, should not have been relied upon as it was the reasoning in first instance in RCF. The totality of these failings leads to a conclusion that there was an inadequacy of reasoning, according to the Commissioner.

114 I am unable to accept this complaint. The Tribunal was required to assess complex expert valuation evidence and, in order to determine which approach to methodology of valuation was preferable (either in whole in or in part) needed to record the content of the valuation approaches and argument as to why one should be preferred to the other, in whole or in part. In a lengthy and careful decision, all these matters where recorded and examined. It was clear that the Tribunal preferred the approach for AP Energy and the expert for AP Energy.

115 The Tribunal concluded that it was *not* bound by RCF and, as there were fundamental material differences between Abra and SBM, this would affect the valuation approach. Secondly, in this case, sunk cost methodology was the better method (not rejected in RCF FC in all cases) and, thirdly, the mid-point/average was suitable in this instance at least for the reasons advanced and recorded above.

116 The Tribunal decision is lengthy and, in my assessment, carefully considered. I do not consider there is any failing by the Tribunal in its examination of the evidence and its reasoning as to why it preferred Mr Longworth’s evidence over that of Mr Lonergan in this instance only. The Tribunal (at [98]-[99], [149], [152], [158], and [167]) gave sufficiently transparent reasoning as to why it preferred the specialised knowledge of one expert over another. It may or may not have been correct in doing so, but there is little doubt and ample explanation as to the reasoning it took in relation to that approach.

117 The Commissioner cannot be in doubt as to why the Tribunal took the view it did as to the appropriate approach as to valuation.

118 On the specific topic of the Tribunal’s supposed failure to explain the ‘like for like’ submission, the Tribunal did not so fail. The Tribunal observed (at [158]) that while:

[t]he Commissioner’s Submissions point to various alleged inconsistencies between Mr Longworth’s valuation approach (i.e. in the MKT Valuation Report) and the valuation approach taken by Xstract in the BDO Valuation, both reports having been prepared by Xstract but authored by different people within Xstract. The Tribunal is of the view that it is a pointless exercise to draw comparisons between the two reports since, as contended by AP Energy, they are “not measuring like with like”. **The BDO Valuation values Abra’s mineral asset in its entirety, including mining and prospecting information optimized for the purpose of resource estimation. In contrast, in the MKT Valuation Report Mr Longworth is valuing all of Abra’s mining and prospecting information, using a method which starts from “*the basic premise....is the data does not exist or may never have existed*”. That is, Mr Longworth is not valuing Abra’s mining and prospecting information optimized [sic] for resource estimation**.

(emphasis added)

119 For the reasons set out above in relation to question 3, ground 9(1) of the Further Amended Notice of Appeal fails. Similarly, for the reasons set out above in relation to question 1, ground 9(1) of the Further Amended Notice of Appeal also fails.

120 On a fair reading of its reasons as a whole, it has properly considered the issues and the case of each party thoroughly. It has evaluated the materials and the explanations given and has applied an independent mind to its decision-making. Most importantly, if there are omissions or errors, they are certainly not so substantial or material so as to amount to a failure by the Tribunal to exercise its jurisdiction. The Tribunal satisfied its obligation under s 43(2) and s 43(2B) of the AAT Act.

121 This ground fails.

## Notice of contention

122 In light of my views as to the appropriate disposition of the appeal, namely, its dismissal, it is unnecessary to further consider the notice of contention.

# CONCLUSION

123 The answer to the opening question is that the value is what the *Spencer* type purchaser will pay for it as a whole.

124 As no ground of appeal has succeeded, AP Energy’s objection to competency will be dismissed, but the Commissioner’s appeal will also be dismissed. The issues as to competency consumed only a relatively small portion of the time involved in this appeal. I consider that because the Commissioner succeeded on that argument, the appropriate disposition on costs is that the Commissioner pay 85% of the costs of AP Energy, to be assessed if not agreed.

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| I certify that the preceding one hundred and twenty-four (124) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice McKerracher. |

Associate:

Dated: 25 May 2016