IN THE HIGH COURT OF AUSTRALIA
PERTH REGISTRY

No P6 of 2018

BETWEEN:

Commissioner of State Revenue
Appellant

and

Placer Dome Inc (now an amalgamated entity named Barrick Gold Corporation)
Respondent

APPELLANT'S SUBMISSIONS

Part I: Publication

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

Part II: Issues

2. The critical issue is whether the Respondent had any goodwill of material value.

Part III: Judiciary Act 1903

3. The Appellant certifies that it considers that notice is not required pursuant to s 78B of the *Judiciary Act 1903* (Cth).

Part IV: Reports of reasons

4. The judgment of the Court of Appeal of the Supreme Court of Western Australia ([2017] WASCA 165) is yet to be reported.

5. The decision of Judge Sharp at first instance ([2015] WASAT 141) is yet to be reported.

Filed on behalf of the Appellant

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Part V: Relevant facts

(a) The business of Placer

6. The principal facts are not disputed. Placer Dome Inc ("Placer") was a substantial Canadian gold mining enterprise with land holdings (mining tenements) around the world, including Western Australia.[1] In October 2005 Barrick Gold Corporation Inc ("Barrick") made an offer to acquire all of Placer's common shares. On 4 February 2006, after having varied its offer, Barrick was successful in its takeover of Placer for a price that ascribed a value to the total property of Placer at $15.3 billion.[2]

7. In its consolidated financial statements Barrick adopted the conventional accounting practice of allocating to the tangible assets of Placer amounts nominated as the "fair value" of the tangible assets of Placer and allocating the residual balance of the purchase price ($6.5 billion) to "goodwill".[3] The Respondent contended, before the Tribunal and the Court of Appeal, that this residual accounting amount of $6.5 billion was attributable to the value of Placer's legal goodwill.[4]

8. Placer's only material revenue was that from the sale of gold and, to a much lesser extent, copper,[5] both of which were sold as refined elemental metal. The evidence of Placer's experts, which is not disputed, was that the prices of gold are set by transactions on international metals exchanges, to which the identity of the parties – whether as vendor or as purchaser – are irrelevant.[6] There is no premium (or discount) on the

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1 [2015] WASAT 141 at [2] (Core Appeal Book ("CAB") 11), [12] (CAB 12-14)

2 [2015] WASAT 141 at [3] (CAB 11), [7] (CAB 11-12), [211] (CAB 65)

3 [2015] WASAT 141 at [83] (CAB 38), [86] (CAB 39)

4 [2015] WASAT 141 at [192] (CAB 62), [373] (CAB 95); [2017] WASCA 165 at [17] (CAB 129)

5 Copper yielded less than 23% of production and less than 20% of reserves of Placer: Attachment GEB-1 to witness statement of Jamie Sokalsky (within exhibit 35) at 16-17 (Appellant's Further Materials ("AFM") 22-23)

6 "In any commodity-based business it would be difficult to assert that value belonged to trademarks or trade names and similarly to customer relationships because no product differentiation exists in the marketplace.": Attachment EL-1 to witness statement of Edward Gerald Lee (within exhibit 17) at 53 (AFM 45); Tribunal transcript (Patel, Lee) at 247 (AFM 52)

traded price according to the reputation or capability of the miner, smelter or vendor; gold miners – such as Placer and Barrick – are price takers, not price makers.[7]

(b) The decisions below

9. The Tribunal concluded, consistently with the Queensland Court of Appeal decision in *EIE Ocean BV v Commissioner of Stamp Duties* [1998] 1 Qd R 36, that the value of the Respondent's land could be determined as a residual by adopting the 'top down' method.[8] That is, the value of the land was determined as the residual of the value of all the Respondent's property less the value of all non-land assets. The Tribunal also concluded that the Respondent's assets did not include any material goodwill.[9]

10. The Court of Appeal allowed the Respondent's appeal on the basis that by adopting the approach it did the Tribunal failed to distinguish between the value of Placer's land and the value of its business as a going concern.[10] The Court held the land should be valued using conventional *Spencer* principles, which precluded the top down approach because all of Placer's non-land assets, including goodwill, could not be valued with accuracy.[11] The Court also concluded that there was ample evidence to support Placer having a substantial amount of goodwill.[12]

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7 Supply and demand is not a material factor in the price to producers, as "gold producers will simply aim to produce as much gold as possible and to sell that gold at the prevailing price because even large gold producers are not price setters in the gold market.": Independent Expert Report by Sumner Hall Associates Pty Ltd into takeover offer of Leviathan Resources (within exhibit 40) at 20 (AFM 55)

8 [2015] WASAT 141 at [256]-[262] (CAB 73-74,) [265] (CAB 74-75)

9 [2015] WASAT 141 at [377], [379] (CAB 96)

10 [2017] WASCA 165 at [68] (CAB 146-147), [72] (CAB 148), [98] (CAB 155)

11 [2017] WASCA 165 at [91] (CAB 153)

12 [2017] WASCA 165 at [95] (CAB 155), see also [5] (CAB 126), [48]-[49] (CAB 140-141), [97] (CAB 155) for explanation as to evidence said to support material goodwill

Part VI: Appellant's argument

(a) Appellant's submissions in summary

11. The critical issue in the appeal is whether, immediately before its acquisition by Barrick, Placer owned *property* comprising goodwill with a value exceeding US$6.5 billion.[13] If it did not, then whatever the value of the land owned by Placer, that value was more than 60% of the value of its total *property*, and Placer was a "land-holder" (s 76ATI(2)).

12. The Appellant submits that the Tribunal correctly concluded that Placer owned no property being goodwill to which there could on the evidence be ascribed any value.[14] The only attractive force that brought in custom was the gold produced from Placer's mining tenements, that is, its land.

13. The proposition that Placer had property comprising goodwill worth $6.5 billion - a value greater than the value of the mines[15] from which its only product was extracted and from which its only revenue emerged – is unsustainable.

(b) Statutory context

14. In summary, the land rich provisions in Part IIIBA of the *Stamp Act 1921* (WA) apply to impose duty on the acquisition of a majority interest in a corporation (a relevant acquisition)[16] that owns land in Western Australia, provided that certain thresholds as to the value of its underlying landholdings are met.

15. The relevant statutory provisions are set out by the Court of Appeal.[17] Materially for the purposes of this application, s 76ATI(2)(b) provides that a corporation is a "land-holder" if, at the relevant date, "the value of all land to which [it] is entitled ... is

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13 Placer's experts valued its goodwill at US$6.506 billion (Patel: [2015] WASAT 141 at [312] (CAB 83)) and US$6.651 (Lee: [2015] WASAT 141 at [319] (CAB 84)) as a residual according to the accounting standards.

14 [2015] WASAT 141 at [376]-[379] (CAB 95-96)

15 Placer's experts valued its land at US$5.694 billion (Patel: [2015] WASAT 141 at [314] (CAB 84)) and US$5.945 billion (Lee: [2015] WASAT 141 at [318] (CAB 84))

16 See ss 76A, 76AJ, 76AQ, 76ATC, 76ATJ

17 [2017] WASCA 165 at [25]-[26] (CAB 131-134)

60% or more of the value of all property to which it is entitled," other than certain excluded property.[18] Value is to be ascertained in accordance with s 33.

16. There is no dispute that the relevant value of all Placer's property for the purposes of s 76ATI(2)(b) was $12.8 billion and that to be a landholder the value of its land had to equal or exceed $7.68 billion.[19]

(c) Placer had no legal goodwill of material value

17. Placer did not have any legal goodwill that had material value and the Court of Appeal erred in concluding otherwise. If that proposition is accepted it follows, *a priori*, that the value of all land of Placer exceeded the statutory threshold and the Respondent has failed to discharge its onus of proving otherwise.

18. Goodwill as property is "the right or privilege to make use of all that constitutes the '*attractive force which brings in custom*'."[20] The attraction of custom is central to the conception of goodwill as property, which the law will protect whether or not the property has value, and is repeatedly stated in the judgment.[21]

19. However, the existence of goodwill as property[22] does not inexorably lead to a conclusion that it has material value.[23] This is unsurprising because, as this Court made clear in *Murry*, legal goodwill has three different aspects: property, sources and value.[24] Further "care must be taken to distinguish the sources of the goodwill from the goodwill itself".[25] In failing to appreciate this distinction the Court of Appeal fell into error.

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18 There was no dispute that the value of Placer's 'excluded property' at that date was $2.5 billion: [2015] WASAT 141at [212] (CAB 65).

19 [2017] WASCA 165 at [16] (CAB 129)

20 *FCT v Murry* (1998) 193 CLR 605 ("*Murry*") at 615 [23] (emphasis added), 623 [45]. The origin of the expression "the attractive force that brings in custom" to describe goodwill is the decision of Lord MacNaughton in *Inland Revenue Commissioners v Muller & Co Margarine* [1901] AC 217 at 224 ("*Muller*")

21 *Murry* at 613 [16], 614 [20], 615 [23], 623 [45], 630 [68]

22 *Murry* at 615 [23]; 617 [30]

23 *Murry* at 614 [20-21], 625 [51]

24 *Murry* at 614 [22]

25 *Murry* at 617 [30]

20. A business such as Placer's, which sells goods that are indistinguishable from the goods of others in the same market, where sales are not driven by customer relationships and where the price for its products are outside its control, enjoys no special advantages over its competitors which would enable it to achieve either above average industry custom or earnings "[a]nd in the end, the value, as opposed to the existence, of goodwill for legal and commercial purposes is governed by the extent to which the earnings of a business exceed the norm".[26] It was never contended (nor was there any evidence) that Placer had above average industry custom or earnings.

21. Further, *Murry* made it clear that goodwill of a business may be of small value (or as here, no value) "where the goodwill of a business largely derives from using an identifiable asset or assets".[27] In Placer's case the only source of any goodwill derived from its use or exploitation of its land (mining tenements), for the reasons described below.

(d) The source of any goodwill was referable only to land

22. There is considerable authority for the proposition that where land is a source of the goodwill of a business carried out upon the land, the goodwill does not have an independent value but rather *adds value to the land* when it is sold with the business (as was the present case). In *Muller*, in a passage cited with approval in *Murry,* Lord Lindley said:[28]

> That in some cases and to some extent goodwill can and must be considered as having a distinct locality, is obvious, and was not in fact disputed. The goodwill of a public-house or of a retail shop is an instance. **The goodwill of a business usually adds value to the land** or house in which it is carried on if sold with the business. (emphasis added)

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[26] *Murry* at 627-628 [61]

[27] *Murry* at 625 [51]

[28] *Muller* at 235

23. The foregoing proposition was accepted by this Court in *Minister for Home and Territories v Lazarus*[29] and *The Commonwealth v Reeve*,[30] both of which concerned the valuation of land compulsorily acquired by the Commonwealth. It was held that in determining the value of the land, regard must be had to "all the potentialities" of the land, including the business which may be conducted on it.[31]

24. It was further held that where the goodwill of the business is attributable wholly or partly to the land upon which it is carried on, it *enhances the value of the land* for which the landowner is to be compensated, not as goodwill but as part of the value of the land.[32]

25. In *Murry*, it was said that *Lazarus* and *Reeve* "establish that, although the value of the site goodwill of a business may be a persuasive guide to the value of land on which a business is conducted, it is the potential use of the land and not the goodwill deriving from the use of the land that is valued.".[33] This proposition holds *a fortiori* where the highest and best use of the land is a business of mining that directly exploits the properties of the land itself. Further, and importantly, any sale of a mining tenement necessarily carries with it the legal right to conduct the business of mining and the uncontested evidence was that the only potential purchasers were large mining companies,[34] which could competently operate the gold mines.[35]

26. The only attractive force of such a business, selling as it does an undifferentiated product the price of which is outside the control of the producer and for whom customer relationships are immaterial, is the gold produced from the land not any particular qualities of the producer. Consequently, and consistently with the foregoing

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29 (1919) 26 CLR 159 ("*Lazarus*")

30 (1949) 78 CLR 410 ("*Reeve*")

31 *Lazarus* at 164 per Barton J, cf Isaacs & Rich JJ at 167; *Reeve* at 419-420 per Latham CJ, at 425, 428 per Dixon J. So much was consistent with the hypothesis in *Spencer v Commonwealth* (1907) 5 CLR 418 (itself a compensation case), as the price that a "hypothetical prudent purchaser would entertain, if he desired to purchase it for the most advantageous purpose for which it was adapted": Isaacs J at 440-441. More recently this has been described as determining value according to the "highest and best use" of the land: *Boland v Yates Property Corporation Pty Ltd* (1999) 74 ALJR 209 at [271] per Callinan J

32 *Lazarus* at 166-167 per Isaacs & Rich JJ, cited with approval by Dixon J in *Reeve* at 427-428

33 *Murry* at 623 [43]

34 Tribunal transcript (Sokalsky) at 439 (AFM 59)

35 Tribunal transcript (Fisher) at 81.6 and 82.2 (AFM 63-64); Tribunal transcript (Lonergan) 556.10 (AFM 67)

observations in *Muller*, *Lazarus* and *Reeve*, as the right to conduct a mining business effectively passes with the sale of the mining tenements so does the source of any goodwill – the value of the land is thereby enhanced.

27. There was no dispute that all the cash flow and revenue of Placer came from the sale of gold (and to a lesser extent copper), and came from the extraction of the metal from the land over which Placer had mining rights. The then President of Placer accurately put the position in October 2005 when he recommended against Barrick's initial offer: "Quality land is what this business is all about, and we have lots of it."[36] Placer is a paradigm example of the goodwill of a business being derived from the use of identifiable assets – in this case its land.

28. The observation in *Murry* relied upon by the Court of Appeal[37] – that "in a profitable business, the value of goodwill for legal and accounting purposes will often, perhaps usually, be identical" – is not a statement of law or principle, but an *obiter* observation about what "will often, perhaps usually" be the case. Moreover, it is prefaced by the warning that it will not be the case where "particular assets, as shown in the books of the business, [are] under valued," as is the case in the present matter.

29. It is self-evident that the inherent difficulty of valuing gold mining companies using a discounted cash flow ("DCF") is that it depends upon the valuer's opinion regarding unknown future events, namely, the future price of gold.[38] Like all matters involving the unknowable future this prediction can only be an educated guess, which Placer's gold price expert accepted can be "quite dramatically wrong" and "pretty unreliable".[39] Indeed the inherent unreliability of using a DCF to value gold mines is recognised by the practice of valuers, including the experts relied upon by Placer, to routinely increase their valuations by a 'net asset value' ("NAV") multiple (or 'gold premium').[40]

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36 Attachment GEB-9 to witness statement of Jamie Sokalsky (within exhibit 35) at 3 (AFM 71)

37 [2017] WASCA 165 at [88]-[90] (CAB 152-153); at [245] per Murphy JA (CAB 198)

38 Tribunal transcript (Hall) at 318.1 (AFM 75)

39 Tribunal transcript (Christian) at 279-280 (AFM 79-80), 289-292 (AFM 83-84). Mr Christian gave his evidence concurrently with the other experts when he accepted these propositions, none demurred

40 As Placer's valuation expert Mr Patel explained, a DCF valuation does not bring into account the possibilities of: finding more gold (something Placer's witness Mr Fisher was confident would happen: Tribunal transcript (Fisher) at 78 (AFM 89)), an increase in the gold price, or reducing operations if a drop in the gold price made production uneconomic: [2015] WASAT 141 at [348]-[350] (CAB 91-92); Tribunal transcript (Patel) at 244.8-247(AFM 49-52)

30. It follows that Placer cannot rely on the *obiter dicta* in *Murry* to support a contention that, adopting the accounting calculation, it had goodwill of $6.5 billion.

31. The value of all the property of Placer is not in contest: it is revealed by the arm's length price paid to acquire the capital of the company. Nor is the value of the separately identifiable non-land assets of Placer. The remaining assets of Placer, to which the balance of the total value (the residual amount) is attributable, comprise its land and any goodwill. For the reasons outlined above, Placer had no goodwill of any material value unrelated to the use of its land, consequently the residual amount must represent the value of its land.

(e) The errors in the reasons of the Court of Appeal

32. There are two principal errors in the reasoning of the Court of Appeal.

33. First, the Court was wrong to conclude there was ample evidence to support a conclusion that the Respondent had a substantial amount of goodwill (and consequently that the top down method was inapplicable).[41]

34. The 'evidence' relied upon by the Court of Appeal to conclude Placer had material goodwill, while not expressly stated, appears to be founded on the following: (1) it had over 100 years' experience in operating goldmines and employed 13,000 people worldwide; (2) it was profitable;[42] and (3) on merging with Barrick synergies would produce cost savings of between $200 million and $250 million per year (the capitalised value of those savings was estimated to lie between $1.6 billion and $2 billion).[43]

35. None of the foregoing bases withstand scrutiny. The costs of recreating the worldwide workforce at each operating mine was valued by Placer's expert Mr Patel at US$35 million,[44] an immaterial amount in the context of a US$15 billion transaction and a putative goodwill of $6.5 billion. Further, while it may be accepted that Placer had

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41 [2017] WASCA 165 at [95] (CAB 155), see also [5] (CAB 126), [48]-[49] (CAB 140-141), [96]-[97] (CAB 155) for explanation as to evidence said to support material goodwill. The Court's rejection of the top down method appears at [57] (CAB 142-143), [91]-[92] (CAB 153-154)

42 [2017] WASCA 165 at [5] (CAB 126)

43 [2017] WASCA 165 at [13] (CAB 128), [48] (CAB 140), [97] (CAB 155)

44 Tribunal transcript (Patel) at 230.2-230.3,231.6; Attachment JP-1 to witness statement of Jay Patel (within exhibit 14) at 88, 93-94, 96, 100, 103, 106, 109, 112-113, 115, 118, 122, 129, 133 (AFM 93-107) and corresponding references for other mines

technically adept employees there was nothing unique about Placer's workforce; any major mining company could have operated its gold mines and exploited its tenements,[45] indeed Barrick considered it could better manage Placer's assets.[46]

36. That a business is profitable does not inexorably lead to a conclusion that the business has goodwill, nor if it has goodwill that the goodwill has material value. Gold miners such as Placer that produce an undifferentiated product cannot command a premium on the traded price of their product according to the reputation or capability of the miner, matters to which consumers are indifferent. Gold miners are price takers, not price makers. Consequently, in a business of mining and selling gold there is no 'attractive force which brings in custom' other than the gold produced from the mining tenements.

37. The 'synergies' relied upon were not a source of *Placer's* goodwill but cost savings to Barrick, which could only be realised by Barrick and only after the takeover – on no conception did they contribute to 'the attractive force that brings in custom'.

38. The criticism of the Court of Appeal of Mr Lonergan's use of forward prices in his DCF was misplaced and unnecessary for the resolution of the appeal.[47] It was Placer that bore the onus of establishing it was not a landholder and that the assessment was incorrect.[48] The Appellant bore no onus. Once it is accepted that Placer did not have goodwill of material value it follows it failed to discharge that onus and the Court erred in rejecting the Tribunal's use of the top down approach.[49]

39. Second, and no doubt because of its conclusion as to the existence of material goodwill, the Court erred in concluding it was necessary to distinguish "between the value of

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45 Tribunal transcript (Fisher) at 81.6 and 82.2 (AFM 63-64), (Lonergan) at 556-7 (AFM 67-68)

46 Tribunal transcript (Sokalsky) at 486.1 (AFM 115). It was not suggested to Barrick's Board (Tribunal transcript (Sokalsky) at 488.6 (AFM 119); Attachment GEB-1 to witness statement of Jamie Sokalsky (within exhibit 35) (AFM 7-42)) nor to investors (Attachment GEB-3 to witness statement of Jamie Sokalsky (within exhibit 35) (AFM 123-135)) that the acquisition of Placer would bring with it any particular value attributable to the specialist management or operational personnel. In point of fact the executive management of Placer was held in lower regard than Barrick's by institutional investors (Witness statement of Jamie Sokalsky (within exhibit 35) at 4-5 [5] (AFM 139-140)) and many of Placer's senior management team left shortly after the merger: Tribunal transcript (Sokalsky) at 465.5-466.5 (AFM 143-144)

47 As it does before this Court, and did at first instance and on appeal, the Appellant relies on the absence of valuable goodwill as supporting the use of the 'top down method' to determine the value of Placer's land. The Appellant only relied on Mr Lonergan's DCF as a 'check valuation' (CAB 9 line8)

48 [2017] WASCA 165 at [208] (CAB 188)

49 [2017] WASCA 165 at [91]-[92] (CAB 153-154)

[Placer's] interest in land and the value of [Placer's] business as a going concern"[50] and that the 'restoration methodology' was the appropriate method to achieve that distinction.[51] This reasoning should be rejected for two reasons: (1) it confuses the concept of a business with the value of the assets used in the business and (2), it is contrary to the statutory purpose of s 76ATI and the decision of the Full Federal Court in *FCT v Resource Capital Fund III LP*,[52] which was clearly correct.

40. A business is not in itself an asset or 'property', but a course of conduct in which assets are deployed to generate income.[53] It was not disputed that the arm's length purchase price, which can only have been the total value of Placer's business as a going concern, was the value of the company's total property. Once non-land assets are deducted from the total property value, for the reasons outlined above the residual amount is the value of the land, not the business.

41. The statutory purpose of s 76ATI is to determine whether 60% or more of the underlying value of a relevant company[54] resided in its land. So much is apparent from both the text of the provision and its statutory context. Division 3B of Part IIIBA operates to impose duty on "relevant acquisitions" of shares in a corporation that owns land the value of which exceeds 60% of the value of all its property. In that context, the land is to be valued in the context of its ownership as part of the company's total assets used in carrying on its business. Nothing in the text requires the land to be valued as if it were the only property to which the company was entitled; rather, the comparison (between "land to which the corporation is entitled" and "all property to which it is entitled") requires that the land be considered as part of "all property" of the corporation used as a going concern.

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50 [2017] WASCA 165 at [65] (CAB 146), [72] (CAB 148)

51 [2017] WASCA 165 at [66] (CAB 146), [222(d), (f)(ii)-(iii)] (CAB 193)

52 (2014) 225 FCR 290 ("*Resource Capital Fund III*")

53 *Murry* at 626 [54]: "A business is not a thing or things. It is a course of conduct carried on for the purpose of profit and involves notions of continuity and repetition of actions." See also *Spriggs v FC of T* (2009) 239 CLR 1 at 19 [59]

54 See s 76ATI(1)(a)

42. In *Resource Capital Fund III,* which concerned a materially similar statutory context,[55] the Full Court of the Federal Court held that to give effect to the statutory purpose of determining whether the underlying value of the company was principally in its real property, the real property is to be valued "on the hypothesis of a simultaneous sale to the *one purchaser with the capacity to use those assets in combination in a gold mining operation* as their highest and best use".[56]

43. If the hypothetical purchaser has the capacity to use all the assets of Placer in a gold mining operation (i.e. to carry on the business of gold mining), the premise underlying the restoration method falls away, as there are no costs, delays and risks that a hypothetical purchaser would avoid by acquiring the operating mine instead of only the tenements which carry the right to mine.[57]

44. Accordingly, the Court of Appeal erred in concluding, in effect, that the hypothetical transaction involves only a sale of the land alone, after which the purchaser would be required to bring the mines on the land into operation (i.e. recreate the business).[58]

45. Finally, the decision is contrary with the long line of authorities that have rejected the argument that for the purpose of ascertaining a fiscal liability in respect of the assets of a person the assets should be disaggregated and each valued separately.[59]

Part VII – Orders sought

46. The Appellant seeks the following orders:

(a) Appeal allowed.

(b) Set aside the orders of the Court of Appeal made 11 September 2017 in proceeding CACV 4 of 2016, and in place thereof order that the appeal to that Court be dismissed.

(c) The Respondent pay the Appellant's costs.

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55 Division 855 of the *Income Tax Assessment Act 1997* (Cth)

56 *Resource Capital Fund III* at 303 [51]-[54]

57 [2017] WASCA 165 at [66] (CAB 1 46)

58 [2017] WASCA 165 at [68]-[71] (CAB 146-148)

59 *AG (Ceylon) v Mackie* [1952] 2 All ER 775 at 777-778 per Lord Reid; *IRC v Gray* [1994] STC 360 at 373 per Hoffman LJ; *Duke of Buccleuch v IRC* [1967] 1 AC 506 at 546 per Lord Wilberforce

Part VIII – Estimate of hours

47. The estimate of hours required for the presentation of the appellant's oral argument (including reply) is 3 hours.

Dated: 6 April 2018

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