HIGH COURT OF AUSTRALIA

FRENCH CJ,
HAYNE, HEYDON, CRENNAN AND KIEFEL JJ

ALCAN (NT) ALUMINA PTY LTD APPELLANT

AND

COMMISSIONER OF TERRITORY REVENUE RESPONDENT

Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue
[2009] HCA 41
30 September 2009
D7/2009

ORDER

1. *Appeal allowed with costs.*

2. *Set aside orders 1, 3 and 4 of the orders of the Court of Appeal of the Supreme Court of the Northern Territory made on 20 January 2009, and in lieu thereof order that the appeal to that Court be dismissed with costs.*

3. *Respondent to pay the costs of the appellant in the proceedings before Mildren J.*

On appeal from the Supreme Court of the Northern Territory

Representation

D J S Jackson QC with P G Bickford for the appellant (instructed by Clayton Utz Lawyers)

A H Slater QC with T W Anderson for the respondent (instructed by Solicitor for the Northern Territory)

CATCHWORDS

Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue

Taxes and duties – Stamp duty – Transactions resulted in acquisition of all shares in corporation which held Crown leases containing options to renew – Section 56N(2)(b) of *Taxation (Administration) Act* (NT) ("Act") requires valuation for assessment of duty of "all land" to which corporation is entitled at time of acquisition – Section 4(1) of Act provides "land" includes "a lease of land" but that "'lease' … does not include … an option to renew a lease" – Whether "land" in s 56N(2)(b) includes option to renew lease.

Leases – Definition – Whether lease includes option to renew.

Statutes – Interpretation – Definitions – Whether definition contained in general definition provision displaced by contrary intention.

Words and phrases – "land", "lease".

Interpretation Act (NT), ss 62A, 62B.
Taxation (Administration) Act (NT), Pt III Div 8A, ss 4(1), 56N, 56R.

FRENCH CJ.

Introduction

1 In November 2005, the Commissioner of Territory Revenue ("the Commissioner") assessed for stamp duty two transactions by which Alcan (NT) Alumina Pty Ltd ("Alcan") acquired all of the shares in Gove Aluminium Ltd ("GAL"). The assessment was based in part upon the value of a Special Mineral Lease and Special Purpose Leases ("the Leases") held by GAL and the value of its goodwill. In making the assessment the Commissioner relied upon s 56N of the *Taxation (Administration) Act* (NT) ("the Act")[1], which renders the acquisition of shares in a corporation dutiable by reference to the value of its landholdings where that value exceeds 60% of the value of all of its property. Section 56R provides for the dutiable value of the shares acquired to be assessed by reference to the same proportion of the unencumbered value of the corporation's land as the proportion of the corporation's shares acquired. The Court of Appeal of the Northern Territory held, contrary to the conclusion of the primary judge[2], that the value of the Leases should be assessed by taking into account options to renew them[3]. The definition of "lease" in s 4(1) of the Act expressly excludes "an option to renew a lease". The factual and procedural history and the provisions of the relevant legislation are set out in the joint judgment[4]. I agree, for the reasons expressed in that judgment and the reasons that follow, that the options to renew the Leases should not have been taken into account by the Commissioner. I agree with the proposed orders allowing the appeal.

The constructional questions

2 The issue which is determinative of the appeal is whether the assessment of the dutiable value of the Leases requires that the Commissioner take into account options to renew contained in them.

3 The two constructional questions raised are:

1. Whether, properly construed, ss 56N and 56R in their application to leases as a species of land pick up the definition of "lease" in s 4(1).

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1 Which has been subsequently renamed the *Stamp Duty Act* (NT). See fn 29 below.

2 *Alcan (NT) Alumina Pty Ltd v Commissioner of Taxes* (2007) 19 NTLR 153.

3 *Commissioner of Territory Revenue v Alcan (NT) Alumina Pty Ltd* (2008) 156 NTR 1 at 25 [78] per Martin (BR) CJ, 30 [104] per Angel J, 34 [121] per Southwood J.

4 See [18]-[27] and [30] below.

2. Whether, properly construed, the exclusion of "an option to renew a lease" in the definition of "lease" in s 4(1) precludes consideration of such an option in assessing the value of a lease as land for the purposes of s 56N(2) and s 56R(2).

The resolution of the first question involves determination of the question whether the definitions of either or both "land" and "lease" in s 4(1) are displaced in ss 56N and 56R by a contrary intention. The resolution of the second question involves the application, in those sections, of the exclusion of renewal options from the definition of "lease".

Whether the statutory definitions of "land" and "lease" are displaced

4 The starting point in consideration of the first question is the ordinary and grammatical sense of the statutory words to be interpreted having regard to their context and the legislative purpose. That proposition accords with the approach to construction characterised by Gaudron J in *Corporate Affairs Commission (NSW) v Yuill*[5] as:

> "dictated by elementary considerations of fairness, for, after all, those who are subject to the law's commands are entitled to conduct themselves on the basis that those commands have meaning and effect according to ordinary grammar and usage."

In so saying, it must be accepted that context and legislative purpose will cast light upon the sense in which the words of the statute are to be read. Context is here used in a wide sense referable, inter alia, to the existing state of the law and the mischief which the statute was intended to remedy[6].

5 The provisions of the *Interpretation Act* (NT) ("the NT Interpretation Act") as they stood at the time of the relevant transactions have to be taken into account. Section 62A of the NT Interpretation Act requires a construction promoting the purpose or object underlying the statute to be preferred to a construction that does not do so[7]. Section 62B authorises recourse to extrinsic materials in the interpretation of statutes[8]. The NT Interpretation Act has no

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5 (1991) 172 CLR 319 at 340; [1991] HCA 28.

6 *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384 at 408 per Brennan CJ, Dawson, Toohey and Gummow JJ, particularly authorities referred to in fns 46 and 47; [1997] HCA 2.

7 See also *Acts Interpretation Act* 1901 (Cth), s 15AA.

8 See also *Acts Interpretation Act* 1901 (Cth), s 15AB.

equivalent of s 15AB(3) of the *Acts Interpretation Act* 1901 (Cth) ("the Commonwealth Interpretation Act"), which requires regard to be had to "the desirability of persons being able to rely on the ordinary meaning conveyed by the text of the provision taking into account its context in the Act and the purpose or object underlying the Act". Despite the lack of such a provision in the NT Interpretation Act, the established common law approach, which begins with the ordinary grammatical meaning of the text having regard to context and purpose, applies to like effect. The Court of Appeal in this case construed the Act by reference to an imputed legislative intention reflecting a revenue-maximising approach to taxing statutes[9] which paid insufficient regard to the clear words of the Act.

6 In the present case the displacement of the definitions in s 4(1) of the Act is expressly conditioned upon the appearance of a "contrary intention". This kind of provision, like that in the present s 18 of the NT Interpretation Act[10], has been described as "a standard device to spare the drafter the embarrassment of having overlooked a differential usage somewhere in his [or her] text"[11]. The ninth edition of *Craies on Legislation* calls it[12]:

> "a general gloss of a kind that would have to be inferred in any event, where a provision elsewhere in the legislation to which the definition purported to apply showed by express provision or necessary implication that the definition was not intended to apply there."

The exclusion of a particular definition where a "contrary intention" appears would be implied in any event[13]. A contrary intention may appear from context or legislative purpose. But, as Pearce and Geddes observe[14]:

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9 (2008) 156 NTR 1 at 17 [45], 22 [66], 24 [76]-[77] per Martin (BR) CJ, Angel J agreeing at 30 [104], Southwood J agreeing at 34 [121].

10 Which provides: "Definitions in or applicable to an Act apply except so far as the context or subject matter otherwise indicates or requires."

11 *M v Secretary of State for Work and Pensions* [2006] QB 380 at 407 [84] per Sedley LJ.

12 Greenberg (ed), *Craies on Legislation*, 9th ed (2008) at 732 [24.1.5.1].

13 *In the Matter of The Fourth South Melbourne Building Society* (1883) 9 VLR(E) 54 at 58 per Holroyd J; *Buresti v Beveridge* (1998) 88 FCR 399 at 401 per Hill J.

14 Pearce and Geddes, *Statutory Interpretation in Australia*, 6th ed (2006) at 196 [6.1].

"A good drafter will indicate 'the contrary intention' clearly."

7 If the definition of "land" in s 4(1) was displaced in ss 56N and 56R, then the definition in s 19 of the NT Interpretation Act as it stood at the relevant time would apply, namely:

> "'land' includes all messuages, tenements and hereditaments, corporeal and incorporeal, of any tenure or description and whatever may be the estate or interest therein".

That definition dates back to Lord Brougham's Act[15] and was included in the *Interpretation Act* 1889 (Imp)[16]. It found its way into colonial interpretation statutes in Australia[17], and into s 22(c) (now s 22(1)(c)) of the Commonwealth Interpretation Act. It includes "freehold and leasehold, corporeal and incorporeal interests of every description."[18] It is to be read with the definition of "estate" in s 19 which "includes any estate or interest, charge, right, title, claim, demand, lien or encumbrance at law or in equity". It would no doubt pick up, within the meaning of "leasehold interests", options to renew incorporated in the grant of such interests.

8 At common law an option to renew a lease is "an incident of the lease"[19]. It is a present interest running with the land and is "intertwined with the lease itself", which, it has been suggested, is probably why it did not attract the rule against perpetuities at common law[20]. A lease obtained by the exercise of an

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15 13 & 14 Vict c 21, s 4.

16 52 & 53 Vict c 63.

17 See, for example, *Interpretation Act* 1897 (NSW), s 21(e).

18 *Re Lehrer and the Real Property Act 1900-1956* [1961] SR (NSW) 365 at 370 per Jacobs J. It was described as being in "wide and general terms" in *Goldsworthy Mining Ltd v Federal Commissioner of Taxation* (1973) 128 CLR 199 at 215 per Mason J; [1973] HCA 7. See also *Jennings Construction Ltd v Burgundy Royale Investments Pty Ltd [No 2]* (1987) 162 CLR 153 at 163 per Brennan, Deane, Dawson and Toohey JJ; [1987] HCA 10.

19 *Mercantile Credits Ltd v Shell Co of Australia Ltd* (1976) 136 CLR 326 at 344 per Gibbs J; see also at 337-338 per Barwick CJ, 351-352 per Stephen J; [1976] HCA 9. That case dealt with the priority accorded under the Torrens system to an unregistered, executed extension in registrable form granted pursuant to an option to renew in a registered lease.

20 Butt, *Land Law*, 5th ed (2006) at 192 [1276].

option to renew is a new lease and the option is "merely an irrevocable offer, but beyond that there is no contract for a further term, unless and until the offer is duly accepted, by exercising the option."[21] That characterisation was relied upon by Hill in commentary on the definition of "lease" in s 76 of the *Stamp Duties Act* 1920 (NSW)[22]:

> "Where a lease for a term grants to the lessee the option for a further term, the term of the lease does not include the term of the renewal and hence duty is charged without reference to the rent payable during the renewal. See *Hand v Hall* (1877) 2 Ex D 355. The option for renewal is not itself stampable as a lease within the definition since until exercise it does not amount to an agreement for lease, nor does it confer upon the tenant the right to use property. It is considered that an option for renewal of a lease is subsidiary to the main object of the instrument and thus covered by the stamp on the lease itself … In practice such options are not separately stampable."

And in the seventh edition of *Sergeant and Sims on Stamp Duties and Capital Duty*, published in 1977, the following observation was made[23]:

> "A lease for a definite term of *x* years, with an option to the tenant to renew for a further *y* years, is chargeable as a lease for *x* years not as a lease for *x* + *y* years; see *Hand v Hall* (1877) 2 Ex D 355".

These commentaries are indicative of legal opinion at the time of the making of the Taxation (Administration) Ordinance 1978 (NT), enacted in identical terms in the Act, which contained the exclusions in the definition of "lease" relevant to this case[24]. Those exclusions were themselves derived from the *Australian*

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21 *Gerraty v McGavin* (1914) 18 CLR 152 at 163-164 per Isaacs J; [1914] HCA 23, citing *Hand v Hall* (1877) 2 Ex D 355 at 357-358 per Lord Cairns LC and *Woodall v Clifton* [1905] 2 Ch 257 at 271 per Stirling LJ (in argument) and 274 per Romer LJ (in argument). See also *Mercantile Credits Ltd v Shell Co of Australia Ltd* (1976) 136 CLR 326 at 345-346 per Gibbs J.

22 Hill, *Stamp, Death, Estate and Gift Duties*, (1970) at 136 [76/7(a)].

23 Sims and Tavaré (eds), *Sergeant and Sims on Stamp Duties and Capital Duty*, 7th ed (1977) at 155. This passage remains in the current edition: Quinlan (ed), *Sergeant and Sims on Stamp Duties and Stamp Duty Reserve Tax*, 12th ed (1998) at 317.

24 See the legislative history reproduced from the Commissioner's submissions in the joint reasons at [44] below.

Capital Territory Taxation (Administration) Act 1969 (Cth)[25]. The Explanatory Memorandum for the Bill that became that Act contained no explanation of why options to renew had been excluded[26]. By way of contrast, when a leasehold interest is valued for the purpose of determining compensation for its compulsory acquisition, valuation practice and authority (sparse as it is) indicate that the value of such an option would be taken into account[27].

9 On the face of it, there is nothing in the text of ss 56N and 56R which indicates an intention to displace the definition of "land" in s 4(1) so as not to apply to the word as used in those provisions. There is no textual indicator of such an intention in the other provisions of the Act. Neither the context in the wide sense nor legislative purpose suggests such an intention. There is nothing to indicate any basis upon which the term "lease" as used in the definition of "land" in s 4(1) should not take its meaning from the definition of "lease" in that section.

10 It was common ground that the purpose of Div 8A of Pt III of the Act was to tax transactions involving the sale of shares in corporations which had the effect of indirectly transferring ownership, or a share in the ownership, of land in the Territory. The "mischief" to which that purpose was directed arose out of[28]:

- the much lower rate of marketable security duty payable on transfer of shares than on transfer of land;
- the calculation of the duty payable on transfer of shares by reference to the consideration for the transfer or by reference to the value of the shares;
- the relief from payment of duty enjoyed in respect of the indirect transfer of the shares in the company holding the subject land to the new shareholder.

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25 *Australian Capital Territory Taxation (Administration) Act* 1969 (Cth), s 4.

26 Australia, House of Representatives, Australian Capital Territory Taxation (Administration) Bill 1969 et al, Explanatory Memorandum at 10.

27 Jacobs, *The Law of Resumption and Compensation in Australia*, (1998) at 178 [12.5.5.3]-[12.5.5.4]; *Bogg v Midland Railway Co* (1867) LR 4 Eq 310; *In re A Proposed Sale, Public Trustee to Mitchell* [1947] NZLR 697 at 702 per Archer J. See also Fricke, *Compulsory Acquisition of Land in Australia*, 2nd ed (1982) at 340.

28 See Northern Territory, Legislative Assembly, *Parliamentary Record*, 24 August 1988 at 3883.

So it was submitted by the Commissioner and not contested by Alcan that "by the device of transferring shares in a landholding company and winding it up all but minimal duty could be avoided". But, as Alcan submitted, to identify the purpose of Div 8A as providing a remedy for the mischief so described does not answer the constructional question.

11 That submission should be accepted. The ultimate purpose of Div 8A was to impose stamp duty on the transactions to which it applied. Its purpose says nothing about the extent of that imposition, which must be determined by reference to its terms. The terms are not to be read by reference to some general principle that requires taxing statutes to be construed so as to maximise the recovery of revenue. In my opinion, no contrary intention was disclosed which would warrant displacing the definitions of "land" and "lease" in s 4(1) so as to render them inapplicable in ss 56N and 56R.

Whether exclusion of options to renew affects dutiable value

12 The negative answer to the first constructional question leaves open the possibility that, even though the definition of "lease" for the purposes of ss 56N and 56R excludes an option to renew, the existence of an option to renew can be taken into account in valuing the lease and therefore arriving at the dutiable value attaching to the relevant share acquisition. That possibility fell within the broad sweep of the Commissioner's submission. The Commissioner argued that the words "does not include … an option to renew" in the definition of "lease" in s 4(1) did not require that the *value* added to a leasehold estate by inclusion in the grant of an option to renew should be excised. The submission appeared to focus upon the proposition that the words "does not include" simply meant "not adding" and did not mean "deducting". Division 8A was said to manifest an intention contrary to any exclusion of the value added by an option.

13 The possible construction for which it seemed the Commissioner was contending can be judged by transposition of the relevant definitions into ss 56N and 56R of the Act. A necessary condition for the application of Div 8A is that the corporation whose shares are the subject of acquisition be a landholder. Making the transposition into s 56N(2)(b), that condition relevantly reads:

> "the value of all leases (not including options to renew) to which the corporation is entitled, whether in the Territory or elsewhere, … is 60% or more of the value of all property to which it is entitled …"

Under a like transposition, s 56R(2) would provide that the dutiable value is the same proportion of the unencumbered value of the leases (not including options to renew) in the Territory to which the corporation is entitled as the proportion of the corporation's shares acquired.

14 This reading demonstrates that the exclusion of renewal options is directly related to the determination of whether a corporation is a corporate landholder and the dutiable value of the acquired interest by reference to the unencumbered value of the corporation's leaseholdings. The exclusion of the options cannot be detached from the determination of the value of the land held by the corporation and the relevant dutiable value.

15 The second constructional question is therefore also answered adversely to the Commissioner.

Conclusion

16 The appeal should be allowed and orders made as proposed in the joint judgment.

17 HAYNE, HEYDON, CRENNAN AND KIEFEL JJ. This appeal from the Court of Appeal of the Northern Territory concerns a disputed assessment of stamp duty by the Commissioner of Territory Revenue ("the Commissioner") for Alcan (NT) Alumina Pty Ltd ("Alcan") under the *Taxation (Administration) Act* (NT) ("the Act")[29]. The assessment relates to two transactions by which Alcan acquired 100% of the shares in Gove Aluminium Ltd ("GAL").

18 The parties brought two issues before this Court in two separate appeals. The first appeal, brought by the Commissioner, raises the question of whether the property of GAL to be assessed for stamp duty included "goodwill" as that term is understood in *Federal Commissioner of Taxation v Murry*[30]. The second appeal, brought by Alcan, raises the question of whether, as a matter of statutory interpretation, the "land" held by GAL, within the meaning of s 56N(2)(b) of the Act[31], included options to renew particular Crown leases held by GAL. In these reasons for judgment, it will be explained that the "land" held by GAL for the purposes of s 56N(2)(b) did not include the options to renew the leases. It is common ground that this decision renders it unnecessary to address the issue of goodwill, the subject of the first appeal. Hereafter these reasons relate to the second appeal.

The transactions

19 GAL is a joint venturer in the business enterprise of operating a bauxite mine and alumina refinery near Nhulunbuy on the Gove Peninsula, Arnhem Land, in the Northern Territory. On 30 January 2001, CSR Investments Pty Ltd executed a share sale agreement pursuant to which 70% of the share capital in GAL was transferred to Alcan. At the same time, GAL entered into a share buy-back agreement with AMP Life Ltd ("AMP") for the remaining 30% of its shares. By these two transactions, Alcan became the sole shareholder in GAL.

20 The prices agreed to be paid for the two acquisitions were US$275 million for the 70% share interest and US$117.9 million for the share buy-back, totalling

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29 The Act has subsequently been renamed the *Stamp Duty Act* (NT) by s 7 of the *Revenue Law Reform (Stamp Duty) Act* 2007 (NT). The Act referred to later in this judgment (at [26]) as the *Stamp Duty Act* (NT) is a different Act, which was repealed by s 3 of the *Revenue Law Reform (Stamp Duty) Act* 2007 (NT).

30 (1998) 193 CLR 605; [1998] HCA 42.

31 The section is set out below at [25].

US$392.9 million. After adjustments, the total Australian dollar equivalent of the acquisition prices was A$740.1 million.

Joint venture assets

21 The "land" to which GAL was entitled at the relevant date comprised leases granted under statute[32] for the purposes of establishing and operating the bauxite mine and alumina refinery, a township and associated facilities.

22 One of these leases, Special Mineral Lease 11, included land on which the joint venture has a number of key assets, namely:

(a) the mine site comprising 49,466 acres;

(b) a corridor of land comprising an area of 698 acres for the purpose of establishing, operating and maintaining a bauxite conveyor installation for the transportation of bauxite from the mine site to the bauxite treatment plant area; and

(c) a third area of land containing approximately 600 acres located by the wharf area which is used for the purpose of operating and maintaining the bauxite treatment plant and stockpile area, as well as office buildings and other buildings used or associated with the treatment plant.

In addition, the joint venture has a number of special purpose leases which relate to associated facilities, including the township. All but two of the leases were granted for a term of 42 years commencing in 1969 and contain an option to renew for a further 42 years.

The assessment

23 On 16 November 2005, the Commissioner determined that the transactions involved relevant acquisitions for the purposes of Div 8A of Pt III of the Act. Division 8A operates to charge the acquirer of shares in a corporation with stamp duty as if the acquirer had acquired the same proportionate interest in the land of the corporation that the shares represent[33]. The Commissioner assessed stamp duty on the transactions in the amount of $31,050,000, together with a penalty of $16,467,997, making Alcan's total liability $47,517,997.

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32 Mining (Gove Peninsula Nabalco Agreement) Ordinance 1968 (NT).

33 See ss 56M and 56R(2) of the Act.

Relevant legislation

24 In 1988, the *Taxation (Administration) Amendment Act (No 2)* 1988 (NT) inserted into Pt III of the Act a new Div 8A (ss 56C-56U) entitled "Change of Control of Certain Land-owning Corporations and Unit Trusts". Part III is headed "Liability to Duty or Tax". Following the insertion of Div 8A and prior to the transactions under consideration here, the Act had been relevantly amended on four occasions, in 1992[34], 1994[35], 1999[36] and 2000[37].

25 On the occasion of the Second Reading Speech the Treasurer, Mr Perron, explained that the amendments which became Div 8A were directed to a specific mischief. He said[38]:

> "[T]he amendments will introduce measures to counter the avoidance of conveyance duty where a company or unit trust is set up temporarily to hold land which is, in effect, then sold by transferring the relevant shares or units. At present, such a transfer can attract a significantly lower level of marketable security duty based on the number of units transferred, rather than the conveyance duty assessed on the value of the land. In many cases, such purchases are commercially artificial and are carried out to avoid stamp duty."

Relevantly, the statutory scheme in Div 8A for levying duty on the acquisition of "land rich" companies is contained in the following provisions of the Act, which, at the date of the relevant transactions, provided as follows:

> "**4. Interpretation**
>
> (1) In this Act, unless the contrary intention appears –

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34 *Taxation (Administration) Amendment Act (No 2)* 1991 (NT), which came into operation on 1 January 1992.

35 *Taxation (Administration) Amendment Act* 1994 (NT).

36 *Taxation (Administration) Amendment Act* 1999 (NT).

37 *Taxation (Administration) Amendment Act* 2000 (NT).

38 Northern Territory, Legislative Assembly, *Parliamentary Record*, 24 August 1988 at 3883.

…

'dutiable property' means –

(a) land;

…

and includes an estate or interest in dutiable property;

…

'instrument' includes any document;

…

'land' means land in the Territory[39] and includes –

(a) a lease of land;

(b) a mining tenement under the *Mining Act*, including information relating to the tenement; and

(c) a fixture to land, including a fixture to land comprised in a lease or mining tenement;

'lease' includes a lease granted under an Act, a sub-lease and an agreement for a lease or sub-lease, but does not include –

(a) an attornment under a mortgage or contract of sale;

(b) a right granted by a company to a shareholder of the company, by virtue of his being such a shareholder, to occupy or use land owned or held under lease by the company; or

(c) an option to renew a lease;

…

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39 "The Territory" was defined at the relevant date in s 18 of the *Interpretation Act* (NT) relevantly as "the geographical area constituting the Northern Territory of Australia".

56K. When statement to be lodged

(1) Where by a relevant acquisition a person acquires a majority interest or a further interest in a corporation to which this subdivision applies, that person shall prepare and lodge with the Commissioner a statement in respect of that acquisition.

…

56M. Statement chargeable with duty

(1) A statement lodged under section 56K is chargeable, in accordance with section 56R, with duty at the rate provided for in item 5 in Schedule 1 to the *Stamp Duty Act …*

56N. Corporations to which this Division applies

(1) This Division applies to a relevant acquisition of shares in a corporation that is –

(a) a corporation, other than a corporation shares in the capital of which are listed on a recognized stock exchange within the meaning of the *Securities Industry (Northern Territory) Code*; and

(b) a land-holder within the meaning of subsection (2).

(2) A corporation is a land-holder for the purposes of this Division if, at the time of a relevant acquisition –

…

(b) the value of all land to which the corporation is entitled, whether in the Territory or elsewhere, … is 60% or more of the value of all property to which it is entitled, other than property directed to be excluded by subsection (4) …

(4) There shall not be included, for the purpose of calculating the value of property under subsection (2)(b), any property of a corporation or a subsidiary within the meaning of subsection (5) that is –

(a) cash or money in an account at call;

(b) a negotiable instrument or money on deposit with any person;

(c) money lent by the corporation or a subsidiary to a person …

56P. Meaning of relevant acquisition

(1) An acquisition by a person is a relevant acquisition for the purposes of this Division –

(a) where it –

(i) is an acquisition of an interest that alone constitutes a majority interest in the corporation …

other than an interest acquired –

(c) before 17 August 1988; or

(d) as a result of an agreement entered into before 17 August 1988.

…

56Q. Meaning of 'interest', 'majority interest' and 'further interest'

(1) For the purpose of section 56K, a person acquires an interest in a corporation if the person, or the person and a related person, acquires on or after 17 August 1988, otherwise than as a result of an agreement entered into before 17 August 1988, a shareholding in the corporation that would entitle the person, or the person and a related person, if the corporation were to be wound up after the shareholding was acquired, to participate (otherwise than as a creditor or other person to whom the corporation is liable) in a distribution of the property of the corporation.

…

56R. How dutiable value determined

…

(2) Where by a relevant acquisition a person acquires a majority interest in a corporation, the dutiable value is the same proportion of the unencumbered value of the land in the Territory to which the corporation is entitled, as provided by subsection (4), at the time of the acquisition, as the proportion of the property of the corporation which the person, or the

person and a related person, would be entitled, as provided in subsection (5), after the acquisition."

26 The *Stamp Duty Act* (NT) ("the Stamp Act") is incorporated into, and to be read as one with, the Act[40]. A statement lodged under s 56K(1) is deemed to be an instrument[41] and is chargeable with stamp duty payable at the rate set out in item 5 in Sched 1 to the Stamp Act[42], which is the rate applicable to an instrument of conveyance of dutiable property.

27 It is relevant to note that the definition of "lease", by reference to exclusions (a), (b) and (c) set out above, has been in that form in the legislation since 1978. The definition of "dutiable property" was inserted by the *Taxation (Administration) Amendment Act (No 2)* 1991 (NT). It is also necessary to note that the definition of "land" was inserted into the Act in 2000 by the *Taxation (Administration) Amendment Act* 2000 (NT) ("the 2000 amendments").

The issue

28 The ultimate issue was identified correctly by the primary judge as whether Alcan is liable to stamp duty in respect of either or both of the transactions involving the issued capital of GAL and, if so, in what amount[43]. As is evident from the terms of s 56N(2)(b), set out above, if there is to be liability for stamp duty the value of the "land" to which GAL was entitled, whether in the Northern Territory or elsewhere, must comprise 60% or more of the value of all property to which it was entitled (other than property directed to be excluded). It is common ground that without the inclusion of the value of the options to renew in the leases this 60% threshold would not be met. It is therefore agreed by the parties that Alcan's liability for stamp duty turns on whether "land" referred to in s 56N(2)(b) includes an option to renew a lease.

29 The resolution of that issue requires consideration of the definitions in s 4(1) of the Act. The definition of "land" includes a "lease of land" but the definition of "lease" expressly states that "'lease' … does not include … an option

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40 Section 3 of the Stamp Act.

41 Section 56K(5) of the Act.

42 Section 56M(1) of the Act.

43 *Alcan (NT) Alumina Pty Ltd v Commissioner of Taxes* (2007) 19 NTLR 153 at 160 [29].

to renew a lease". Those definitions apply "unless the contrary intention appears". The Court of Appeal of the Northern Territory found a contrary intention with the effect that "land" was interpreted by the Court of Appeal to include "an option to renew a lease", notwithstanding the abovementioned definitions[44].

The proceedings below

30 Alcan lodged an objection against the Commissioner's assessment pursuant to s 100 of the Act. The Commissioner dismissed Alcan's objection and determined that the assessment was payable according to its terms. Alcan successfully appealed from the Commissioner's dismissal of the objection to the Supreme Court of the Northern Territory and the assessment was set aside[45]. The Court of Appeal allowed the Commissioner's appeal against the order of the Supreme Court setting aside the assessment[46].

Construction of "land" by the primary judge

31 There were two hearings and two sets of reasons for judgment given by the primary judge. In the first set of reasons[47], his Honour held that both "land" in s 56N(2)(b) and "lease" took their defined meanings in s 4. The result was that "land" did not include an option to renew a lease.

32 The starting point for the primary judge was that even though leases are in law personalty, they have long been regarded as land. So much was uncontroversial. His Honour also accepted a submission on behalf of the Commissioner that a covenant to renew runs with the land and with the reversion and is an incident of a lease.

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44 *Commissioner of Territory Revenue v Alcan (NT) Alumina Pty Ltd* (2008) 156 NTR 1 at 25 [78] per Martin (BR) CJ, 30 [104] per Angel J, 34 [121] per Southwood J.

45 *Alcan (NT) Alumina Pty Ltd v Commissioner of Taxes* (2007) 19 NTLR 153 and *Alcan (NT) Alumina Pty Ltd v Commissioner of Taxes (No 3)* (2007) 67 ATR 664.

46 *Commissioner of Territory Revenue v Alcan (NT) Alumina Pty Ltd* (2008) 156 NTR 1.

47 *Alcan (NT) Alumina Pty Ltd v Commissioner of Taxes* (2007) 19 NTLR 153.

33 His Honour found that there was therefore no need for the definition of land in s 4 to include a lease "as plainly a lease of land is already 'land'"[48]. This observation influenced and informed his Honour's consideration of the text and structure of the legislation when he said[49]:

> "The purpose, it seems to me, of these definitions [ie of 'land' and 'lease'], is to exclude from what is 'land' those things which are excluded from the definition of 'lease' which, relevantly to this case, means that the options to renew are not part of the lease and must be ignored. Otherwise there is no work to do for the words 'includes a lease … but does not include …' etc in the definition of 'lease' and no work for the words 'includes a lease of land' in the definition of 'land'. … The result is that the option to renew is not 'land' as defined."

34 In the second set of reasons[50], the primary judge held that the value of GAL's leases, excluding the options to renew the leases, was less than 60% of the value of all the property to which it was entitled, and therefore that GAL was not a "land-holder" within the meaning of s 56N(2)(b).

Reasoning in the Court of Appeal

35 The Court of Appeal found error in the reasoning and conclusions of the primary judge and set aside his judgment. The Court of Appeal decided that the word "land" in Div 8A did not take its defined meaning in s 4, at least to the extent that an option to renew a lease was thereby excluded. That conclusion depended mainly on an analysis of the history of the legislation from 1978 to 2000.

36 The Court of Appeal accepted submissions from the Commissioner to the effect that a contrary intention is manifest and the common law definition of a lease (which includes, as an incident, an option to renew a lease) should be preferred to the definition of lease in the text of the Act. The contrary intention was said to be evinced by the context and legislative history, particularly as the latter suggested that the purpose of the relevant amendments was to increase the

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48 *Alcan (NT) Alumina Pty Ltd v Commissioner of Taxes* (2007) 19 NTLR 153 at 171 [62].

49 *Alcan (NT) Alumina Pty Ltd v Commissioner of Taxes* (2007) 19 NTLR 153 at 171-172 [62].

50 *Alcan (NT) Alumina Pty Ltd v Commissioner of Taxes (No 3)* (2007) 67 ATR 664.

capacity of the Northern Territory to raise revenue through the imposition of stamp duty. The primacy given to these considerations is exemplified in the following extracts from the judgment of Martin (BR) CJ[51] (with whom Angel and Southwood JJ agreed[52]):

> "It is readily understandable that on an instrument for a lease in respect of which duty is assessed by reference to the rent payable for the term of the lease, the legislature would intend to exclude an option to renew for the purposes of assessing duty because it might never be exercised. However, it is also readily understandable that the legislature would intend that duty be assessed on the transfer of a lease on the basis of the total value of the lease, determined by reference to all the incidents of the lease. Indeed, it would be surprising if the legislature intended to sever from the lease an incident of the lease which contributes to the value of the lease.
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> …
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> The application of the definition [of 'lease' in s 4(1)] would result in dissecting from a lease, for the purposes of assessing the value of the lease, an incident of the lease that travels with the lease upon conveyance. Such a dissection would create an air of unreality in relation to the assessment of the value of the lease being conveyed. The legislature intended to apply duty according to the market value of the lease being conveyed and exclusion of an option to renew contained in a lease would distort the value. Exclusion of the option to renew would also reduce the revenue of the Territory. I am unable to discern any sound reason for applying the definition of lease to a conveyance of a lease. For these reasons, in my view a 'contrary intention appears' and the definition does not apply to a conveyance of a lease.
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> …
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> Over the years since 1978, the legislature has consistently increased its capacity to raise revenue by closing off avoidance practices and increasing the range of transactions attracting duty. …

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51 *Commissioner of Territory Revenue v Alcan (NT) Alumina Pty Ltd* (2008) 156 NTR 1 at 15 [41], 17 [45], 24 [76]-[77].

52 *Commissioner of Territory Revenue v Alcan (NT) Alumina Pty Ltd* (2008) 156 NTR 1 at 30 [104] per Angel J, 34 [121] per Southwood J.

> Read literally in isolation from the legislative history, and applying the definitions in s 4 without qualification, the ordinary meaning of the provisions excludes an option to renew from 'land' for the purposes of Div 8A and from 'dutiable property'. However, apart from such a literal application of the 2000 amendments, there is nothing in the amendments or the extrinsic material to suggest that, contrary to the consistent history of increasing its capacity to raise revenue through the application of stamp duty, the legislature intended in 2000 to reduce that capacity by excluding options to renew leases from the value of 'land' held by a corporation for the purposes of Div 8A."

37 This reasoning led the Court of Appeal to overturn the primary judge's decision and to hold that, for the purposes of valuing the land to which GAL was entitled at the time of the relevant acquisitions, the value of the options to renew the leases should be included.

Submissions on the appeal

38 Alcan sought to restore the decision of the primary judge, relied on the natural and ordinary meaning of the definitions of "land" and "lease" in s 4(1) of the Act and contended that no contrary intention appears in s 56N(2)(b).

39 Alcan accepted that a contrary intention might be discerned, not only in the text of legislation, but also by reference to the purpose and operation of relevant parts of the legislation[53] or the general character of the legislation[54]. However, Alcan contended that generally a contrary intention to the effect that a definition in an Act is not to apply might be expected to be manifested in the Act itself[55].

40 Adopting the approach to statutory definitions explained by McHugh J in *Allianz Australia Insurance Ltd v GSF Australia Pty Ltd*[56], Alcan sought to insert

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53 *Aussie Vic Plant Hire Pty Ltd v Esanda Finance Corporation Pty Ltd* (2008) 232 CLR 314 at 322-327 [11]-[26] per Gleeson CJ, Hayne, Crennan and Kiefel JJ; [2008] HCA 9.

54 *Pfeiffer v Stevens* (2001) 209 CLR 57 at 73-74 [56] per McHugh J; [2001] HCA 71.

55 *Pfeiffer v Stevens* (2001) 209 CLR 57 at 65 [25] per Gleeson CJ and Hayne J.

56 (2005) 221 CLR 568 at 574-575 [12]; [2005] HCA 26.

the definition into the substantive text of s 56N(2)(b) to show that no real question of construction of the meaning of the provision arose. It was contended that the natural and ordinary meaning of the provision was clear and unambiguous.

41 Next, it was contended that the Court of Appeal erred in not closely considering the text, preferring instead to focus on the context of the Act. It was submitted that in focussing on the context, particularly the legislative history, the Court of Appeal concentrated erroneously on a general legislative intention to amend the legislation to increase revenue and on extrinsic materials dealing with the mischief of avoidance of stamp duty, to the exclusion of the text. Alcan also pointed out that a person who did not appreciate the meaning of s 56N(2)(b), as discerned by the Court of Appeal, would be liable to penalties[57] and be guilty of an offence[58]. To the extent that it retains force, Alcan relied on the principle of construction expressed in *Anderson v Commissioner of Taxes (Vict)*[59] that clear and unambiguous language is required in taxing legislation. Alcan also relied on the principle (perhaps of last resort) that ambiguity in a penal statute may be resolved in favour of an accused[60]. Finally, it was submitted that no contrary intention was discernible either in s 56N(2)(b) or elsewhere to the effect that "land" was not to be construed in accordance with the definition provisions of the Act and that the contrary intention discerned by the Court of Appeal arose from a non-textual and contestable historical analysis of the Act and amendments made to it prior to the 2000 amendments.

42 The Commissioner sought to affirm the interpretation of Div 8A given by the Court of Appeal with two main arguments. The first was a semantic argument. The second propounded a contrary intention in respect of the definition of "land" as it occurred in s 56N(2)(b) which in turn depended on the definition of "lease" in the Act.

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57 See s 96(1) and (2) of the Act.

58 See s 56K(6) of the Act.

59 (1937) 57 CLR 233 at 243 per Rich and Dixon JJ; [1937] HCA 24. See also *Hepples v Federal Commissioner of Taxation* (1992) 173 CLR 492 at 510-511 per Deane J; [1992] HCA 3.

60 *Waugh v Kippen* (1986) 160 CLR 156 at 164; [1986] HCA 12 adopting the reasons for judgment of Gibbs J in *Beckwith v The Queen* (1976) 135 CLR 569 at 576; [1976] HCA 55.

43 First, the Commissioner contended that, as a matter of ordinary meaning, the words "'lease' … does not include … an option to renew a lease" do not mean excluding from a lease the value attributable to an option to renew the lease. It was suggested that the words mean "do not add the value of an option to renew to a lease" or, more simply, that they mean "an option to renew is not a lease".

44 Secondly, in propounding a contrary intention in respect of the definition of "land", the Commissioner relied on the context of Div 8A in the "widest sense"[61] and on the history of the legislation as evincing a legislative intention that despite the definitions of "land" and "lease" in the Act, "land" for stamp duty purposes included an option to renew a lease. In broad terms, the Commissioner contended that if the interpretation of words in a definition section is inconsistent with an ascertained legislative purpose, the definition should be disregarded or read down. It was contended that the Court of Appeal construed s 56N(2)(b) consistently with the purpose and language of the whole Act[62], especially as that was elucidated by the history of the legislation. The critical submission of the Commissioner on this branch of the argument involved the following steps:

- the definition of "lease"[63] in the Act, as enacted[64], contained the same exclusions (a), (b) and (c) as the definition set out above, which applied to this case; in particular, "lease" was defined to exclude "an option to renew a lease";

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61 *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384 at 408 per Brennan CJ, Dawson, Toohey and Gummow JJ; [1997] HCA 2. See also *Minister for Immigration and Multicultural and Indigenous Affairs v Nystrom* (2006) 228 CLR 566 at 599 [98] per Heydon and Crennan JJ; [2006] HCA 50.

62 *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 381-382 [69]-[70]; [1998] HCA 28.

63 The definition was derived from the *Australian Capital Territory Taxation (Administration) Act* 1969 (Cth): see Northern Territory, Legislative Assembly, *Parliamentary Record*, 15 June 1978 at 1482.

64 The Act was enacted as the Taxation (Administration) Ordinance 1978 (NT) immediately prior to self-government. The Ordinance was assented to on 30 June 1978 and commenced operation on 1 July 1978. Self-government commenced on 1 July 1978.

- in 1979[65], the statutory scheme for the imposition of stamp duty imposed duty on instruments for conveyance of a lease of an estate or interest in land which was assessed by reference to the consideration paid on the value of the interest transferred. Duty was also payable on an instrument for a lease, agreement for a lease or grant of a lease of an estate in fee simple and duty was assessed by reference to the total rent payable during the term;

- in respect of the latter, the legislature did not intend to assess duty payable on an option to renew a lease because that term might never come into operation. If a lease were renewed, the renewal would be treated for stamp duty purposes as a grant of a lease. The exclusion of an option to renew a lease from the definition of "lease" was intended to apply to the grant of a lease, not the conveyance of a lease;

- in Div 8A, as enacted in 1988, the criterion for liability was entitlement to "real property", which was defined in s 56C to include an estate or interest in real property, so that the definition of "lease" was wholly irrelevant to Div 8A;

- the purpose of the 2000 amendments, which inserted a new definition of "land" and which substituted that term for "real property" in Div 8A, was to remove doubt as to what was in the tax base[66]; and

- the successive amendments to the Act after 1988 up to and including the 2000 amendments precluded any inference that the new definition of "land" inserted by the 2000 amendments had, as its purpose, the reduction of revenue.

Conclusions on the construction of "land"

45 It was common ground that giving s 56N(2)(b) its natural and ordinary or literal meaning, once the relevant definitions from s 4(1) were inserted into the substantive text, did not lead to an absurd result of the kind referred to in *Cooper*

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65 The Act was amended in 1979 by the *Taxation (Administration) Act* 1979 (NT).

66 The definition is set out at [25] above. It can also be noted that the *Interpretation Act* (NT) at the relevant date defined land in s 19: "'land' includes all messuages, tenements and hereditaments, corporeal and incorporeal, of any tenure or description and whatever may be the estate or interest therein".

Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation[67]. At issue were competing constructions of the definition of "lease" and whether there was a contrary intention which displaced the natural and ordinary or literal meaning of the definition and consequentially affected the definition of "land".

46 It was also common ground that the Act fastened on particular aspects of the bundle of rights created in connection with land[68].

47 This Court has stated on many occasions that the task of statutory construction must begin with a consideration of the text itself[69]. Historical considerations and extrinsic materials cannot be relied on to displace the clear meaning of the text[70]. The language which has actually been employed in the text of legislation is the surest guide to legislative intention[71]. The meaning of the text may require consideration of the context, which includes the general

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67 (1981) 147 CLR 297; [1981] HCA 26.

68 As to which see *Yanner v Eaton* (1999) 201 CLR 351 at 366 [17] per Gleeson CJ, Gaudron, Kirby and Hayne JJ; [1999] HCA 53. See also *The Commonwealth v Yarmirr* (2001) 208 CLR 1 at 38-39 [13]-[14] per Gleeson CJ, Gaudron, Gummow and Hayne JJ; [2001] HCA 56.

69 *Roy Morgan Research Centre Pty Ltd v Commissioner of State Revenue (Vict)* (2001) 207 CLR 72 at 77 [9] per Gaudron, Gummow, Hayne and Callinan JJ, 89 [46] per Kirby J; [2001] HCA 49; *Stevens v Kabushiki Kaisha Sony Computer Entertainment* (2005) 224 CLR 193 at 206 [30] per Gleeson CJ, Gummow, Hayne and Heydon JJ, 240-241 [167]-[168] per Kirby J; [2005] HCA 58; *Carr v Western Australia* (2007) 232 CLR 138 at 143 [6] per Gleeson CJ; [2007] HCA 47; *Director of Public Prosecutions (Vic) v Le* (2007) 232 CLR 562 at 586 [85] per Kirby and Crennan JJ; [2007] HCA 52; *Northern Territory v Collins* (2008) 235 CLR 619 at 642 [99] per Crennan J; [2008] HCA 49.

70 *Nominal Defendant v GLG Australia Pty Ltd* (2006) 228 CLR 529 at 538 [22] per Gleeson CJ, Gummow, Hayne and Heydon JJ, 555-556 [82]-[84] per Kirby J; [2006] HCA 11. See also *Combet v The Commonwealth* (2005) 224 CLR 494 at 567 [135] per Gummow, Hayne, Callinan and Heydon JJ; [2005] HCA 61; *Northern Territory v Collins* (2008) 235 CLR 619 at 642 [99] per Crennan J.

71 *Hilder v Dexter* [1902] AC 474 at 477-478 per Earl of Halsbury LC.

purpose and policy of a provision[72], in particular the mischief[73] it is seeking to remedy.

48 The Commissioner's first argument must be rejected. The construction given by the Commissioner to the words "'lease' … does not include … an option to renew a lease" was strained and contrary both to the natural and ordinary meaning of the words and to considerations of grammar and syntax. The construction was tantamount to excising the ordinary adverb of negation "not", as it occurs in the phrase "does not include", so as to give the words a meaning quite different from their ordinary and natural meaning such that "lease" would include an option to renew.

49 As to the Commissioner's second argument, propounding a contrary intention, the steps in that argument set out above reveal that the critical issue of statutory construction is whether the definition of "lease" to be found in s 4(1) of the Act was irrelevant to Div 8A as enacted in 1988 and whether it continued to be irrelevant when the 2000 amendments inserted the new definition of "land" into s 4(1).

50 In the Court of Appeal, Martin (BR) CJ (with whom Angel and Southwood JJ agreed) observed that over the years the Northern Territory legislature had consistently increased its capacity to raise revenue. Such considerations underpinned his Honour's conclusion that Div 8A operates independently of the definitions in s 4(1) because there is no reason to suppose that the legislature intended to reduce its capacity to raise revenue by excluding an option to renew a lease from the definition of "land".

51 Fixing upon the general legislative purpose of raising revenue carried with it the danger that the text did not receive the attention it deserves. This danger was adverted to by Gleeson CJ in *Carr v Western Australia*[74] when he said:

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72 *Commissioner for Railways (NSW) v Agalianos* (1955) 92 CLR 390 at 397 per Dixon CJ; [1955] HCA 27, quoted with approval in *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 381 [69] per McHugh, Gummow, Kirby and Hayne JJ.

73 *Heydon's Case* (1584) 3 Co Rep 7a at 7b [76 ER 637 at 638].

74 (2007) 232 CLR 138 at 143 [6].

> "[I]t may be said that the underlying purpose of an Income Tax Assessment Act is to raise revenue for government. No one would seriously suggest that s 15AA of the *Acts Interpretation Act* has the result that all federal income tax legislation is to be construed so as to advance that purpose. Interpretation of income tax legislation commonly raises questions as to how far the legislation goes in pursuit of the purpose of raising revenue. In some cases, there may be found in the text, or in relevant extrinsic materials, an indication of a more specific purpose which helps to answer the question. In other cases, there may be no available indication of a more specific purpose. Ultimately, it is the text, construed according to such principles of interpretation as provide rational assistance in the circumstances of the particular case, that is controlling."

52 There is nothing express in the text of relevant parts of the Act, as enacted, or in amendments made to the Act in 1979[75] or in 1987[76] which supports the Commissioner's contention, upheld in the Court of Appeal, that the definition of "lease" in the legislation did not apply when dealing with a "conveyance" of a lease. As can be seen from the extracts set out above, essentially the Court of Appeal's reasoning was not based on the text, but on an inference that the text would not apply because it would be surprising if the legislature intended to sever from a lease something which contributed to its value on a conveyance[77]. However, in terms, the definition of "lease" in the Act, as amended over time, was always capable of applying both to the grant of a lease and to the conveyance of a lease. Relevant amendments to the Act up to and including the 2000 amendments were all assessed by the Court of Appeal by reference to a generally ascertained intention to amend the legislation to increase the revenue rather than by reference to the express terms of the Act. The effect of that approach is to impute erroneously a statutory intention which destroys the effect of a clearly expressed definition.

53 In conclusion, "land" in s 56N(2)(b) takes its defined meaning so that it includes "lease of land" and the words "'lease' … does not include … an option to renew a lease" bear their natural and ordinary meaning, which is not displaced or reversed by contextual or historical considerations. The general purpose of the Act to raise revenue is insufficient to support an intention to exclude a clearly

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75 *Taxation (Administration) Act* 1979 (NT).

76 *Taxation (Administration) Amendment Act* 1987 (NT).

77 *Commissioner of Territory Revenue v Alcan (NT) Alumina Pty Ltd* (2008) 156 NTR 1 at 15 [41] per Martin (BR) CJ.

expressed definition and to substitute a quite different meaning. Accordingly, the value attributable to an option to renew a lease should be excluded in making relevant calculations for stamp duty purposes under s 56N(2)(b) of the Act.

Other arguments

54 There are consequences for a corporation which fails to lodge a statement as required by the Act. First there is a direct offence under s 56K(6) of the Act and secondly under ss 94 and 96 of the Act the Commissioner may apply a penalty when making a default assessment. A power to remit penalties is to be found in s 96(6).

55 Alcan submitted that if, contrary to its main argument, the definitions of "land" and "lease" in the Act were found to be ambiguous, after applying the current principles of statutory interpretation referred to above, then it could rely on *Anderson*[78] for the proposition that the imposition of a tax must be in plain terms. Alcan also relied on the principle that penal statutes should be construed strictly, as exemplified in *Waugh v Kippen*[79]. An attempt was made to draw an analogy with the American "rule of lenity" in resolving ambiguity in relation to the coverage of penal statutes[80].

56 The Commissioner contended that *Anderson* cannot stand with the purposive approach to statutory interpretation which has emerged and is now well settled.

57 Given the basis on which this appeal is to be allowed, it is not necessary to deal with these arguments beyond the making of two points. First, tax statutes do not form a class of their own to which different rules of construction apply; they are to be construed by application of the settled principles referred to above. Secondly, the fact that a statute is a taxing Act, or contains penal provisions, is part of the context and is therefore relevant to the task of construing the Act in accordance with those settled principles. Whether or when "rules" of the kind

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78 (1937) 57 CLR 233 at 243 per Rich and Dixon JJ.

79 (1986) 160 CLR 156 at 164; see also *R v Lavender* (2005) 222 CLR 67 at 95-97 [87]-[93]; [2005] HCA 37.

80 *United States v Thompson/Center Arms Co* 504 US 505 (1992). See also *Crandon v United States* 494 US 152 (1990) and *Muscarello v United States* 524 US 125 (1998).

considered in *Anderson*[81] and *Waugh v Kippen*[82] may be relied upon need not be decided.

Orders

58 The appeal should be allowed with costs. Orders 1, 3 and 4 of the Court of Appeal should be set aside. In place of those orders the appeal to the Court of Appeal should be dismissed with costs. This has the effect of restoring the judgment of the primary judge. The Commissioner should pay Alcan's costs of the proceedings before Mildren J.

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81 (1937) 57 CLR 233 at 243.

82 (1986) 160 CLR 156 at 164-165.