Taxing Goodwill after *Placer Dome*

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What is goodwill?

The answer to the question "What is goodwill" in the world of taxation is surprisingly important. Goodwill is an often-valuable intangible asset and the term broadly refers to the value of a business that is not attributable to its identifiable assets. Some might be so crass as to call it the "balancing figure" representing the portion of the price of a business when it is sold and that cannot be explained in any other way.

Tax requires greater precision than that because goodwill has such a significant role to play in taxation of transactions. It is a Capital Gains Tax (CGT) asset;[1] it can affect valuation of commercial land in cases involving (stamp) duty;[2] and it is possibly a significant indicator of the existence of a going-concern for the purposes of the relevant exemption under the Goods and Services Tax (GST).[3] Helpfully the High Court decision in *CSR (WA) v Placer Dome* Inc [2018] HCA 59 has provided us with guidance and has cleared up some of the quibbles concerning the legal meaning of goodwill that were left over from the decision in the case of *Murry*.[4] This paper discussing the concept is based on a paper previously delivered to the West Australian Annual Convention of the Tax Institute.[5] In that paper I approached the question by a series of steps drawn from the disciplines that contribute to tax as a theoretical and practical concept – namely Accounting; Economics; and Law. I repeat that process (occasionally verbatim) below but now with the benefit of the final High Court decision and reasons.

The accounting concept

In AASB 3 "goodwill" is defined as:

"An asset representing the future economic benefits arising from other assets acquired in a business combination that are not individually identified and separately recognised."[6]

This aligns closely with the layperson's concept of goodwill as a balancing figure. AASB 138 reiterates this and sheds a little further light on the matter with the following statement:

"The future economic benefits may result from synergy between the identifiable assets acquired or from assets that, individually, do not qualify for recognition in the financial statements."[7]

It is very clear from a reading of paragraphs 11 and 12 of AASB 138 that for the purposes of the accounting standard an intangible asset requires it to be identifiable in order to distinguish it from goodwill and that an asset is identifiable either by means of its being capable of separation from the

[1] Section 102-5(3) *Income Tax Assessment Act 1997*.
[2] See *CSR (WA) v Placer Dome* Inc [2018] HCA 59, the subject of this paper.
[3] Section 38-325 goodwill is possibly one of the things necessary for the continued operation of an enterprise after transfer of the enterprise to a buyer.
[4] *FCT v Murry* (1998) 193 CLR 605, 612.
[5] M. Walpole "Taxing goodwill and taxing Scotch Mist" 51st WA State Convention, Taxation Institute, 16-17 August 2018.
[6] Australian Accounting Standard AASB 3 *Business Combinations*, (2015) Appendix A "Defined terms".
[7] Australian Accounting Standard AASB 138 *Intangible Assets*, (2015) Paragraph 11.

entity and of being transferrable separately; or by reason of the fact that it arises from contractual or legal rights even if those rights are not themselves separable from the entity.

Once an intangible has such properties – it apparently cannot be goodwill. This creates a definitional boundary in accounting between goodwill, and intangible assets that are capable of separate identification and recognition. This places pressure on the invisible boundary between goodwill and other intangible assets that might give rise to "synergy" represented by goodwill value.

To place a practical light on the accounting concept of goodwill – at least you know you have it if you have paid something for it.

The legal concept

In law, especially in light of what the High Court has now said in the *Placer Dome*[8] case (see below), the meaning of goodwill can be traced through a series of cases to a high point of certainty as a result of the High Court's decision in *Murry*[9]. In *Murry* the High Court indicated that it regards goodwill as the attractive force of a business and that goodwill is incapable of being separated from the business. I have analysed the *Murry* decision at length elsewhere[10] and I extract from that analysis here.

In *Murry* the High Court referred[11] to Lord Lindley's definition of goodwill in *Muller & Co's Margarine Ltd*[12], which emphasised the property aspect of goodwill:

> Goodwill regarded as property has no meaning except in connection with some trade, business, or calling. In that connection … [it] include[s] whatever adds value to a business by reason of situation, name and reputation, connection, introduction to old customers, and agreed absence from competition, or any of these things, and there may be others which do not occur to me. In this wide sense, goodwill is inseparable from the business to which it adds value, and … exists where the business is carried on. Such business may be carried on in one place or country or in several, and if in several there may be several businesses, each having a goodwill of its own.[13]

Their Honours in *Murry* also noted the words of Lord MacNaghten:

> What is goodwill? It is a thing very easy to describe, very difficult to define. It is the benefit and advantage of the good name, reputation, and connection of a business. It is the attractive force which brings in custom. It is the one thing which distinguishes an old-established business from a new business at its first start. The goodwill of a business must emanate from a particular centre or source. However widely extended or diffused its influence may be, goodwill is worth nothing unless it has power of attraction sufficient to bring customers home to the source from which it emanates. Goodwill is composed of a variety of elements. It differs in its composition in different trades and in different businesses in the same trade.[14]

[8] *CSR (WA) v Placer Dome* Inc [2018] HCA 59.
[9] *FCT v Murry* (1998) 193 CLR 605, 612.
[10] M. Walpole *Proposals for the reform of the taxation of goodwill in Australia*, ATRF 2009.
[11] *FCT v Murry* (1998) 193 CLR 605, 612.
[12] [1901] AC 217.
[13] Id 235.
[14] Id 223-224.

In relation to whether goodwill is property or not the High Court in *Murry* recalled[15] that Lord MacNaghten had said that '[i]t is very difficult … to say that goodwill is not property…'.[16] Lord MacNaghten's reasons included the fact that goodwill is routinely acquired in the same way as property and, once obtained, may be protected and disposed of in the same way as property.[17]

In the *Placer Dome* decision, the High Court affirmed these aspects of the *Murry* decision reinforcing five aspects which the plurality identified in the "Nature of goodwill", namely that goodwill:

Is difficult to define but relies on proof that a business generates and will "…generate earnings from identifiable assets, locations, people, efficiencies, systems processes and techniques…"[18];

Was expanded from the former emphasis on patronage to include "...whatever adds value to a business by reason of…[an open list of factors and features of the business]";[19]

Nevertheless, bore at its conceptual centre "the attraction of custom";[20]

Seemed impossible to synthesise conceptually with the accounting concept of goodwill;[21] and

"[H]as three different aspects – property, sources and value – and what unites those aspects is the 'conduct of a business'.[22]

In its review of the nature of goodwill as expounded in *Murry* the High Court has stressed that "the attraction of custom remained the critical focus of, and central to, the legal concept of goodwill".[23]

Thus, there is a set of principles that can be relied upon, coming out of *Murry* and *Placer Dome* that relate to goodwill.

Goodwill exists in law whenever it can be said that the business has 'attractive force' and the business owner has a right to protect it from unlawful competition for customers. This emphatic view of the High Court expressed in *Murry*[24] relying principally on the established understanding of goodwill to be found in the *Muller & Co's Margarine Ltd*[25] case remains – but the attraction of custom, it has been stressed in *Placer Dome*, remains central. This seems to suggest that if a business has a right to sue, for example for 'passing off', the business has goodwill, provided the right has a bearing on its ability to attract and presumably compete for customers. It is conceivable that a business might have goodwill in law (through the existence of this right) where they might not have any goodwill for accounting purposes (because you would not pay anything for the goodwill) but the *Placer Dome* emphasis on a link to the existence of customers makes that less likely than before;

[15] *FCT v Murry* (1998) 193 CLR 605, 613.
[16] *IRC v Muller & Co's Margarine Ltd* [1901] AC 217, 223.
[17] Ibid.
[18] *CSR (WA) v Placer Dome* Inc [2018] HCA 59 at para 68 quoting *Murry* (1998) 193 CLR 605, at 611.
[19] Id at para 69, quoting *Murry* at 613 in which the plurality were in turn quoting the *Muller's Margarine* case [1901] AC 217 at 235.
[20] Id at 70, quoting *Murry* at 614.
[21] Id at 70.
[22] Id at 70, quoting *Murry* at 614-615.
[23] Id at 70.
[24] (1998) 193 CLR 605.
[25] [1901] AC 217.

A new business cannot have goodwill the instant it is established. Whereas it was possible to understand from *Murry* that even a new business can have goodwill because it could protect itself from competition for customers, this now seems unlikely because the link to attraction of custom means it would need to be able to demonstrate that attraction. The business must be functioning and attracting customers. In *Placer Dome* the High Court has said "…goodwill represents a pre-existing relationship arising from a continuous course of business – to which the "attractive force which brings in custom" is central. Without an established business, there is no goodwill because there is no custom. A collection of assets has no custom[26]."[27]

This means the legal meaning of goodwill is somewhat less likely to be at odds with the idea in accounting that goodwill is identified by the quantifiable capacity of the business to earn profits;

Goodwill has multiple sources, but it does not have 'parts' nor does it consist of 'types' of goodwill – it consists of one indivisible whole. This view emphatically put in the *Murry*[28] case precluded the opportunity, which some taxpayers might have seen, to split a business up into component parts each with an attendant portion of goodwill that might have benefited from the small business CGT concession for disposals of goodwill. Sources of goodwill can include such aspects of the business as a name, a site, a licence (*Krakos*[29]) or other monopoly. This has not changed save that the *Placer Dome* decision has emphasised the role of such sources in attracting customers.[30] In reference back to the majority in *Murry* and their description of the "typical sources of goodwill" the majority in *Placer Dome* said that such sources are typical because "*they motivate service or provide competitive prices that attract customers* (emphasis added)";[31]

Goodwill can exist even where no one would pay for the goodwill and the value of the business does not exceed the identifiable assets. This point follows from the reasoning in *Murry* that it is not value that identifies goodwill for legal purposes but the existence of an attractive force of a business. It follows too from the view that if a business has a right to protect itself from unlawful competition for customers it has goodwill, irrespective of what someone might be prepared to pay for it. This point has potential for a fundamental departure from the accounting approach to identifying goodwill, but because the *Placer Dome* decision has corrected our understanding of *Murry* it is less likely that this will occur because the link to customer attraction means a departure of the two approaches seems less likely. It is nevertheless possible, and the High Court has reiterated in *Placer Dome* that the absence of a gap between predicted earnings and the fair value of the net assets (e.g in the case of a loss-making business) "does not necessarily mean there is no goodwill";[32]

There seems to be no strict rule for valuing goodwill in law because, unlike in accounting, it is identified by a process that is not solely based on what a purchaser is prepared to pay. The

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[26] "See, eg, *Murry* (1998) 193 CLR 605 at 627 [60]."
[27] *CSR (WA) v Placer Dome* Inc [2018] HCA 59 at para 97.
[28] (1998) 193 CLR 605.
[29] (1995) 61 FCR 489 (Hill J).
[30] *CSR (WA) v Placer Dome* Inc [2018] HCA 59 at 73.
[31] Ibid.
[32] Id para 82.

majority in *Placer Dome* did note (from *Murry*) however that "the value of the goodwill of a business varies with the earning capacity of the business and the value of other identifiable assets and liabilities".[33] Thus "…the methodologies used to value goodwill vary between businesses and, further, the methodology adopted to value goodwill is fact specific".[34] This might be seen as unhelpful in terms of taking away from the jurisprudence any general rule. The lack of guidance on this might be cured, of course, by a statutory or established common law directive as to how to value in certain situations; and

Goodwill can exist even where it has not been recognised in the books of account. On this point accounting and law can agree, because accounting refuses to acknowledge the existence of goodwill, in the books, until it has been identified through having been purchased. Logically, for it to be purchased it must first exist - even if it has not yet been recognised.

Working from the principle that '…goodwill as property…[is] the legal right or privilege to conduct a business in substantially the same manner and by substantially the same means which in the past have attracted custom to the business…',[35] the High Court said that a person acquires goodwill '…when he or she acquires that right or privilege.'[36]

The High Court has now stressed "the law would seek to protect those rights or privileges in order to preserve the custom attracted to that business".[37] So, in law, goodwill appears to be property, it is indivisible from the business that it relates to and it is the "attractive force" found in the business provided (now stressed after *Placer Dome*) that the link between custom and this attractive force is clear.

We get to this in law by taking a rather different angle to that taken in accounting and there seems to be a particular difference between the two. This is that it was said in *Murry* and has been recognised in *Placer Dome* that a business might have goodwill even if you paid nothing for it.

The question that the *Placer Dome* analysis possibly raises is what are the tax consequences (if any) of a situation where a purchaser has paid for something on the transfer of a business but what has been paid for is neither attributable to identifiable assets nor to goodwill. This question will be considered later in the paper.

The economics approaches

Tax sits at the cross roads of law accounting and economics and so it is valuable to triangulate our understanding of goodwill by reference to what has unfairly been called "the dismal science".[38] The approach used in economics to identify what is meant by goodwill has always seemed slightly more

[33] Id para 77.
[34] Ibid.
[35] *FCT v Murry* (1998) 193 CLR 605, 623.
[36] Ibid.
[37] *CSR (WA) v Placer Dome* Inc [2018] HCA 59 at para 71.
[38] The term for Economics as the dismal science is attributed to 19th Century Scottish writer and historian Thomas Carlyle in "Occasional discourse on the negro question" 1849 – he was referring to the Malthusian theory that humanity was trapped in a world where population growth would always strain natural resources (and food). See Jodie Beggs "Economics as the 'Dismal Science'" *ThoughtCo"* 22 June 2018. ThoughtCo.com/economics-as-the-dismal-science-1147003.

difficult because economics seems less concerned about or focussed on the definition of the concept than lawyers and accountants are. Work I have published elsewhere concluded that economists also recognise the concept of goodwill and have placed it in a theoretical context.[39]

The economic concept of goodwill I set out emphasizes the potential in the business, particularly that afforded by the combination of assets in the business. Goodwill is a manifestation of this potential and its valuation recognises the future returns that it will generate.[40]

Goodwill in the economics literature I found thus recognises the value of combining assets and accepts that goodwill exists in conjunction with other assets.[41]

One economics writer emphasises this idea of goodwill as part of a combination of assets.

> "Goodwill in the economic sense is another word for organization…. To be more specific, the value of goodwill is derived from the economic benefits that a 'going concern' may enjoy as compared with a new firm from (1) established relations with all the markets - both output and input, (2) established relations with government departments and other noncommercial bodies, and (3) personal relationships…. These relationships cannot be separated from the business and they are sold with the business just like plant and machinery.[42]

More importantly for the purposes of the present paper goodwill seems to be valued in this version of economic theory on the basis of the future returns that it will generate.

In my earlier research I stated that goodwill, as a representation of the potential for earning found in the productive combination of assets, is something that can only be demonstrated once the combination has taken place. In other words, that economic approach to goodwill heavily emphasises the 'going concern' value of the business. There is a link here with the legal concept to the extent that the legally recognised asset of goodwill is inseparable from the active business.[43]

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[39] M. Walpole *Proposals for the reform of the taxation of goodwill in Australia*, ATRF 2009.

[40] A M Parkman, 'A Systematic Approach to Valuing the Goodwill of Professional Practices' in R L Brown (ed) *Valuing Professional Practices & Licenses* (3rd ed, 1998) Ch 6-1—6-18, 7. Parkman observes that from an economic perspective:
…goodwill is an asset, whose value - as with all other assets - depends upon the future returns that it will generate … For example, a share of common stock has a value based on the dividends that it will produce, while a house has a value based on the services that it will provide its occupants. … things that will provide no returns in the future have no value…. An asset has value not because it can be exchanged for money, but because it will provide a stream of future returns. An interesting aside made by Parkman is that '…[c]ases such as *In re the Marriage of Lukens*, 16 Wash. App. 481, 558 P.2d 279 (1976), which hold that professional goodwill should be measured by arriving at a present value based upon past results and not by accounting for the postmarital efforts of the professional spouse thereby contradicting the financial framework for valuing assets, illustrate the problems when the courts recognize a concept from another field, in this case goodwill, and then establish an inappropriate method for its valuation.' It could be said that the problems that arise when courts recognise a concept from another field are precisely the topic of this dissertation. (Parkman's areas of expertise include Economic Theory, Economic History and Institutions, Labor Economics, and Public Finance.)

[41] A M Parkman, above n 40, 7.

[42] A M Parkman, above n 40, 7.

[43] NASDAQ, *Glossary of Economic Terms* (1999) National Association of Securities Dealers Automated Quotation System **http://www.nasdaq.com/reference/glossary.stm**. This links 'goodwill' and 'going concern value' as follows:

going-concern value

It seems, however, that following that dimension through, that particular economic approach, as with accounting and unlike law, 'defines' goodwill by reference to its value. If one acquisition has a greater value than another, because of the potential inherent in the business that is acquired, then that business has goodwill. The business without any value greater than the sum of its assets seemingly lacks goodwill. This is not the case in law as a business that does not have any 'added' or 'extra' value may, in light of the *Murry*[44] decision, nevertheless have goodwill provided, in light of the *Placer Dome* decision there is a discernible link to the attraction of custom.

The difference in approach is problematic because in tax a legal meaning for goodwill usually must be applied to the accounting and economic aspects of a business. A possible explanation for the difference between the legal approach on the one hand and this economic theory and the accounting approach is that 'goodwill' and 'going concern value' are actually different things. This is the strong view of the High Court in its reasoning in *Placer Dome* and is suggested by the work of Dimbath.[45]

The High Court has said that

"Goodwill for legal purposes is different from, and is not to be confused with, the 'going value' or the going concern value of a business. These terms are not separate methods of valuing the same intangible. The distinction between them is clear…"[46]

Dimbath previously '…demonstrated that goodwill depended on the existence of economic profits',[47] which is not a requirement for going concern value. Dimbath explains that by combining assets productively, the firm or entrepreneur adds value, with the result that '[t]he whole entity has a value greater than the sum of its parts. Value has been added.'[48] Thus,

> Going concern value is an intangible value that attaches to the tangible inputs. It only exists as a result of inputs being combined into an economically productive unit. There is no going concern value separate from the inputs or assets of the going concern. The tangible assets may be sold or dispersed separately; however going concern value may not.
>
> Going concern value is directly related to the start-up costs and assets of the firm. Goodwill may develop later if the firm has excess earnings or economic profits.[49]

The value of a company as an operating business to another company or individual. (See 'goodwill.')

goodwill

The going-concern value of a company in excess of its asset value; goodwill is considered an intangible asset. Generally, it is the value of the business' good name, its customer relations, high employee morale, and other factors that might translate into earning power. NASDAQ's calculation of net tangible asset value excludes goodwill. (See 'going-concern value.').

[44] (1998) 193 CLR 605.

[45] M F Dimbath, 'The Theory And Practical Determination Of Going Concern Value' (1994) 7(2) *Journal of Forensic Economics* 171 - 173.

[46] *CSR (WA) v Placer Dome* Inc [2018] HCA 59 at para 97.

[47] M F Dimbath, 'The Theory and Practical Determination of Going Concern Value' (1994) 7(2) *Journal of Forensic Economics* 171 - 173.

[48] Id 173.

[49] Ibid.

Accordingly, for Dimbath, going concern value and goodwill may co-exist but they need not necessarily do so, and a firm may have going concern value without having goodwill.[50]

The distinction recognised by the High Court between going concern value and goodwill value assists greatly in reconciling the legal and the economic/accounting approaches, although there remains the challenging concept that a business, even an unprofitable one, may have goodwill if there is a link to patronage. In light of what the High Court has now said in *Placer Dome* one should, for our purposes, accept Dimbath's view that goodwill and going concern value are different, with the former representing the power of the business to attract repeat trade and the latter representing the power of the business to attract initial trade by reason of the unique combination of assets and skills organised to conduct business. This is a significant refinement of the goodwill concept that steps close to a reconciliation between disciplinary approaches.

The reconciliation is possibly accounted for by the fact that the majority in *Placer Dome* also reviewed economic theory in the course of its reasons. It explained its understanding of the approach in economics as follows:

> "The basic underlying principle of goodwill for economists has been described as 'reciprocity', where the attention is focused on the things that the buyer receives from the seller but which the buyer cannot demand as part of the transaction and on the things which the seller receives from the buyer which the seller cannot demand as part of the transaction. The premise underlying 'reciprocity' is that the provision of these items by one party to the other party "builds up in the mind of the receiving party some goodwill felt towards the other party. The greater the provision, the greater the increase in the stock".[51]

The majority in the *Placer Dome* case then explained that reciprocity is analogous to the legal underpinning of goodwill – namely custom. This they illustrated in a quote:

> "As Commons, a leading economist in the 1920s, explained, 'goodwill can be seen and felt – *seen* not in commodities, *but in the transactions of business*; and *felt*, not in consumption and production, *but in the confidence of patrons, investors and employees*' (emphasis added)."[52]

This outcome in *Placer Dome* was not really a surprise because there were hints from at least some on the High Court of Australia that the prevailing legal view from the *Murry* decision was about to be clarified in this respect. The transcript of the appeal in the case of *CSR v Placer Dome Inc* suggests that at least Gordon J if not others had concerns about the inclusion in "goodwill" of "going concern value".[53] This was also the view of the Western Australia Supreme Court of Appeal in P*lacer Dome Inc v CSR*.[54]

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[50] Id 171-172. This is noticeably different to the former meaning in Australian law, which seemed to merge 'going concern' and 'repeat business' considerations as a single 'attractive force'.
[51] *CSR (WA) v Placer Dome* Inc [2018] HCA 59 at para 94.
[52] Id at para 95.
[53] See *CSR v Placer Dome Inc* 2018 High Court Transcript 119 especially Gordon J at note 625; 995; 1630; 1940; 1955 Gageler J at 1045; Nettle J at 1835; Kiefel CJ at 3220.
[54] *Placer Dome Inc v CSR* [2017] WASCA 165 (11 September 2017).

The idea that the legal approach based on *Murry*, perhaps, confused goodwill with other aspects of the business, thankfully enables us to better reconcile the legal approach with the economic and accounting one.

In instances where the legal accounting and economic concepts of goodwill continue to misalign, where do we stand in tax? The answer appears to be that we accept there is a difference and we live with it. That seems to be borne out by the statement of the Western Australian Supreme Court in *Placer Dome Inc v Commissioner of State Revenue*[55] which frequently refers to the legal concept of goodwill as distinguishable from the concept in accounting.[56]

The *Placer Dome* case in more detail

CSR v Placer Dome [2018] HCA 59 is more fully cited as *Commissioner of State Revenue (Western Australia) v Placer Dome Inc (Now an amalgamated entity named Barrick Gold Corporation).* The case was an appeal from the Western Australian Supreme Court decision in *Placer Dome Inc v Commissioner of State Revenue.*[57]

Its journey to the High Court has been long and interesting. The case commenced in the Western Australian State Administrative Tribunal. It was concerned with duty payable on an acquisition of an interest in land in Western Australia (WA) when Barrick Gold Corporation acquired a controlling interest in Placer Dome Inc on 4 February 2006. The sale was potentially subject to duty, not on the shares but on the value of the land underlying the shares. Such assessments to duty rely on the entity in which the shares are sold being a “listed land-holder corporation” within the meaning of s76ATI of the *Stamp Act 1921* (WA) (the Act). All states in Australia have these rules which are often referred to in the short hand of “land-rich provisions” by practitioners in duty law.

In WA a “listed landholder corporation” is one where the value of all the land to which it is entitled, wherever situated, is 60% or more of the value of all the property to which it is entitled, other than property excluded from consideration under s 76ATI(4).

In Placer Dome Inc’s (PDI’s) case the Commissioner and the Tribunal both concluded that PDI was a listed land-holder corporation and the value of its interest in land situated in WA was $1,015,900,000. The Commissioner assessed the duty payable under the Act as $54,852,300. The matter on appeal focussed on the conclusion that Placer Dome Inc was a listed land-holder corporation, and on the value placed on its interests in land in Western Australia. The decision is of importance in the context of goodwill because the value of goodwill in the company might affect the percentage of value represented by land.

The majority decision in the WA Supreme Court of Martin CJ and Buss P was a detailed analysis of the Tribunal’s findings and broke those down into component parts each of which their Honours subjected to critique. The Tribunal had noted that the parties to the case agreed that the value of the synergies (from administrative savings including: consolidation of offices; rationalised exploration operations and technical services; and from “arrangements which were to be made with respect to

[55] *Placer Dome Inc v Commissioner of State Revenue* [2017] WASCA 165 (11 September 2017).
[56] See for example para 234, also see the Supreme Court seeking approval of the State Administrative Tribunal recognition of the unique concept of goodwill in para 89, and para 103.
[57] *Placer Dome Inc v Commissioner of State Revenue* [2017] WASCA 165 (11 September 2017).

finance and tax")[58] to be achieved by combining the operations of PDI and of Barrick were estimated to be cost savings of $200 million to $250 million per annum which therefore had a capitalised value of between $1.6 billion and $2 billion. All the valuers involved used a discounted cash flow methodology which was critically reliant on inputs such as estimated revenues from future mining which was itself reliant on estimates of future gold prices.[59]

The respective approaches to valuation led to marked differences - such that the value of PDI's land was asserted by the appellant to be between $5.3 billion and $5.7 billion and thus PDI was not a land holder corporation subject to the duty in issue. This was because the difference between the value of the property within the purview of s76ATI of the Act at $12.8 billion[60] and the land component of that property was attributable to goodwill.[61] On the other hand the Commissioner asserted that the land was worth either between $8.3 billion and $8.5 billion on one set of valuations or between $11.8 billion and $12.3 billion on another set. In either case PDI was a landholder corporation.

As regards valuation, the Tribunal had determined that the correct inclusion in a discounted cash flow model for valuing the land was the future price of gold based on gold futures contracts for periods when prices of these were available and where these are not available – then based on the escalation of these on an annual basis of 2%. This approach had been taken by one of the expert witnesses, a Mr Lonergan.[62]

The Tribunal accepted Lonergan's valuation of the appellant's land assets and as a result the land value exceeded 60% of its total assets and they thus agreed with the Commissioner's assessment.

The WA Supreme Court on appeal was at pains to point out that there is a distinction, as was made clear in the *Murry* case, between the land or a portfolio of land, and the bundle of rights associated with a going concern.[63] Their Honours considered it necessary to consider the particular circumstances so as to distinguish between the value of the land portfolio "…and the value of the bundle of rights which together comprised PDI's business, and which, following the acquisition, conferred upon Barrick the right to continue to conduct that business as a going concern."[64] On this point the Tribunal accepted that PDI was an immense going concern and Barrick had acquired a vast business with 13,000 employees, and profits of $300 million.[65] This was to be valued on the basis of an arm's dealing between a willing but not anxious buyer and seller.[66] The difficulty identified by the Tribunal was how to identify the attributes of such a vast enterprise so as to assess its value at the agreed price. It would probably be impossible "…to exhaustively identify each and every component or attribute of PDI's business which contributed to the value of PDI's business as a whole."[67] A significant attribute of the business was its land portfolio but there were other attributes.

[58] Id 13.
[59] Id 14.
[60] This meant that to be subject to duty PDI required to have land worth 60% or more of $12.8 billion viz $7.68 billion or more.
[61] See para 16 – 17.
[62] Id 20.
[63] Id at 37.
[64] Id 37.
[65] Id 38.
[66] Id 39.
[67] Id 40.

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There was evidence that there were more than 13,000 skilled staff which had a track record of developing and expanding the business.[68] There was also evidence of innovative mining techniques that PDI had developed through Research and Development based in Vancouver.[69] This led to PDI finding low grade ore sites viable where competitors could not. Other evidence demonstrated a competitive edge through mine design and construction and superior operational management and strategic planning using a standardised approach.[70] Any purchaser would benefit from the considerable economies associated with this structure and the various synergies it embodied.[71]

The Commissioner had argued that many of these features were not property or were not PDI's property as they would only exist as a synergistic whole after the acquisition had occurred. In other words, they were an advantage of the new entity.[72] The Supreme Court and seemingly the Tribunal dismissed this submission on the basis that the synergistic advantages referred to were inherent in the bundle of rights to carry on the business which bundle was acquired, and these rights were property of PDI.[73]

> "It was that bundle of rights which Barrick acquired through its acquisition of all the shares in PDI. So, the value of PDI's property to which the value of PDI's land has to be compared in order to determine whether PDI was a listed land-holder corporation is the value of all the rights which together conferred the right to carry on PDI's business upon PDI, and, after the acquisition, upon Barrick."[74]

It was entirely appropriate to attempt to value this bundle of rights disposed of by this vendor to a purchaser such as Barrick. The task was to value this bundle of rights, which conferred the right to carry on the going concern, to the extent that it had value "above and beyond" the value of the land.[75] For the Supreme Court one of its tasks was to determine whether the Tribunal properly distinguished between the value of the land and the value of PDI's business.[76] It will become evident below that the Commissioner and the valuer used by the Commissioner considered that there was no material difference between the two, and the Tribunal had effectively agreed.

This was the aspect of the Tribunal's decision that the Supreme Court found to contain error. It had identified two possible approaches to valuation. One that it called "top down" was to identify and value all the non-land assets of the sale and having done so to arrive at a value for the land. The other "bottom up" approach was to value the land correctly and then to reconcile the values of the other items passing to the overall price. In a relevant Queensland case, *EIE Ocean BV v Commissioner of Stamp Duties*[77] concerning the land-rich provisions in the *Stamp Act 1984 (Qld),* Macrossan CJ had

[68] Id 42.
[69] Ibid.
[70] Id 43-44.
[71] Id 45.
[72] Id 46.
[73] Id 47.
[74] Ibid.
[75] Id 49.
[76] The Tribunal considered the implications of the *Nischu* case and certain consequential amendments to 33(1)(c) of the Act. These considerations were essentially ignored by the Supreme Court and have been treated in similar fashion in this paper. The Supreme Court was of the view that "…the section [had]…no significant bearing upon the issues which had to be resolved in this case, other than to require that PDI's mining tenements be valued on the assumption that a purchaser of those tenements had, and would continue to have, a right to all information pertaining to those tenements." (at 61).
[77] *EIE Ocean BV v Commissioner of Stamp Duties* [1996] QCA 524.

indicated that neither approach had greater claim to acceptance than the other. But it seems this view was subject to the proviso that all non-land assets had been identified and valued.[78] This was a point with which the WA Supreme Court emphatically agreed.[79]

The WA Supreme Court, having considered the Tribunal's reasoning, inferred that the Tribunal had concluded:

> "…that in every case it was necessary to attribute values to each and every item comprising the individual assets making up the total of the corporation's property" and this, their Honours concluded, was an error."[80]

It was an error because in PDI's case it was neither practicable nor feasible "…to identify each and every asset held by a corporation, and allocate values to each such asset, including its land assets, which, together, equal the price paid for all the corporation's assets."[81] PDI it seems, was too complex an organisation and the passing of the business included passing over of valuable features that were not identifiable assets to which value could be attributed.

> "…all the property to which PDI was entitled was all the rights which together conferred the right to conduct a business as a going concern, and the attributes or components which add value to that business do not necessarily correspond to identifiable assets."[82]

The Supreme Court found the Tribunal's error in other statements it had made. It found that the Tribunal had adopted

> "…a methodological approach to the resolution of the issues posed by s 76ATI which does not involve any valuation of the land held by the relevant corporation. To the contrary, the Tribunal has taken the view that the 'correct approach' is to start with the value of all of the corporation's property, calculated by reference to the price paid for that property, and then subtract the value of identified assets of the corporation which are not land, leaving a residual value which is then attributed to the assets which are land. According to the Tribunal, if that residual is more than 60% of the total value, the question posed by the section is answered, and the corporation is a listed land-holder corporation.
>
> [60] With respect, that approach does not accord with the natural and ordinary meaning of the words used in the section. Those words require the relevant decision maker to ascertain the value of all the land to which the relevant corporation is entitled. While there may be cases in which that value can be derived through the process of deduction proposed by the Tribunal, there will be other cases in which it cannot. This is one of the latter class of cases…"[83]

The WA Supreme Court found that the Tribunal had also rejected a proposition by the appellant to the effect that PDI's land should be distinguished from the value of its business. This revealed a "fundamental misconception" of the task expected by the wording of s76ATI of the Act. What was really required, according to their Honours, was that "…[t]he value of PDI's land had to be determined,

[78] *Placer Dome Inc v Commissioner of State Revenue* [2017] WASCA 165 at 53.
[79] Id 57.
[80] Id 56.
[81] Id 57.
[82] Ibid.
[83] Id 59 – 60.

and compared to the value of all PDI's property (in effect PDI's business) in order to determine whether PDI was a listed land-holder corporation."[84]

Further error was found in the Tribunal's failure to distinguish between the value of an operating mine and the value of a mining tenement per se. Their Honours believed it reasonable

> "…to infer that a hypothetical purchaser would pay more and a hypothetical vendor expect a purchaser to pay more for the right to continue to employ the personnel responsible for the operation of the mine and continue to use the equipment and business structures in place, rather than suffer the costs and delays necessarily involved in hiring personnel and setting up new operations."[85]

In other words, the value of a going concern is very different to the value of the identifiable assets underlying it.

This erroneous reasoning (in the opinion of the Supreme Court) was also evident in how the Tribunal dealt with submissions concerning the value of the goodwill of PDI's business. The Supreme Court found that the Tribunal's top down approach made it necessary to identify and value all non-land assets including goodwill. This, their Honours said, placed significance on the valuation of the goodwill which is not supported by the Act.[86]

Both the Tribunal and the Supreme Court considered the *Murry* decision. The Supreme Court seems to have stressed that the *Murry* decision required a consideration of goodwill by reason of the statute under which *Murry* was decided. The legislation before the Tribunal and Supreme Court did not do so. The High Court in *Murry* had identified that goodwill is inseparable from the conduct of a business; may derive from identifiable assets but is itself an identifiable and separate asset; and does not follow any asset when that asset is disposed of separately. The Supreme Court found it significant that the Tribunal had not included this observation from *Murry* in its reasons.[87]

The Tribunal and the Supreme Court both seemed acutely aware of the differences between goodwill for accounting purposes and goodwill for legal purposes. They both noted that in profitable businesses "…the value of goodwill for legal and accounting purposes will often, perhaps usually, be identical."[88] The Tribunal had noted the difficulty in valuing goodwill and the Supreme Court observed that it is this difficulty that causes accountants to value it "… using the bottom up method of deducting the value of identifiable assets from the value of the business and, … this methodology will usually provide a reliable means of valuing legal goodwill."[89] But the Supreme Court explained that this approach is inconsistent with the "top down" method that the Tribunal had favoured in valuing PDI. It was impractical in the circumstances to use a method requiring the valuation of all PDI's assets with precision in order to identify the residual value of the land if goodwill itself is usually valued by a similar residual process.[90] In any case the valuation of goodwill was in the opinion of the Supreme Court a distraction from the primary task of valuing the land.

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[84] Id 65.
[85] Id 68.
[86] Id 74.
[87] Id 81.
[88] Id 88, noting the quoted words from *Murry*.
[89] Id 89.
[90] Id 90.

The other respect in which the Supreme Court concluded that the Tribunal had erred was that it had found there was no evidence to support the view that PDI's business included a substantial amount of goodwill – in fact the Tribunal had concluded that the value of the business was pretty much the same as the value of the identifiable assets of the business. Contrary to this the Supreme Court was satisfied that "[t]here was ample evidence of the intangible aspects of PDI's very substantial business which contributed to its profitability."[91] These features such as the synergies associated with a business of this scale, the management skills and strategic decision-making structures are discussed above.

The findings in the WA Supreme Court

There was a difference in value between land and business

The Supreme Court concluded in light of the arguments above that the Tribunal had failed to distinguish between the value of PDI's land and the value of PDI's business.[92] This was the first ground of appeal and the appellant succeeded on this point.

Gold price futures were inappropriate

The was a second general ground of appeal – that the Tribunal had erred in accepting the valuer Mr Lonergan's use of a discounted cash flow method which made use of the price of gold futures at the date of acquisition – escalating them indefinitely at 2% per annum where they were not available. It was argued by the appellant that gold futures do not provide a reasonable estimate of the future price of gold and to then escalate them by a uniform 2% per annum where the information on gold futures runs out is unjustified by gold price patterns and is simply arbitrary.[93]

In its decision the Supreme Court noted that the valuer Mr Lonergan had repeatedly expressed the view in various reports provided to the Commissioner that any goodwill that PDI had would not be likely to have significant value given that it was "a commodity producer of a homogenous product."[94] Mr Lonergan equated the value of land with the value of a mining tenement. The Supreme Court dwelled on the fact that this valuer had cautioned that any large deviation between the discounted cash flow value and the price was suggestive of the fact that the discounted cash flow value may be incorrect. The reader might reflect on whether the difference may be accounted for by goodwill – but that may be a stretch.

That aside, Mr Lonergan consistently took the view that there was little difference between a mining tenement and a mining business. The Supreme Court observed that:

> "The combined effect of the Tribunal's 'top down' approach and Mr Lonergan's valuation approach, must inevitably and inexorably lead to the conclusion that the value of PDI's land assets was approximately equal to the value of PDI's enterprise as a going concern,

[91] Id 95.
[92] Id 98.
[93] Id 99.
[94] Id 104 quoting Lonergan.

consistently with Mr Lonergan's hypothesis. Put more bluntly, the approach taken by Mr Lonergan, and which was accepted by the Tribunal, inevitably resulted in a self-fulfilling prophecy."[95]

As to the use of the price of gold futures, the Supreme Court found there was ample evidence that Barrick, in its pricing, had repeatedly used forecast gold prices.[96] There was evidence from several sources that gold price futures are financial instruments and not reliably predictive of the future price of gold.[97] They were not used by Barrick for this purpose, and as the Court would conclude, they should not be used by anyone for this purpose.

In conclusion, the Supreme Court found that this approach was not realistic nor appropriate.[98] Nor could these gold futures prices be defensibly escalated by 2% annually indefinitely.[99]

The Supreme Court upheld the appellant's second ground of appeal also. It is notable that the Commissioner had challenged the ground of appeal on the basis that the price of gold used in a discounted cash flow method was irrelevant because whatever price was used the value of the goodwill would be reflected in the revenues to be derived from mining. The Supreme Court said that the focus actually had to be the value of PDI's land – that was all s76ATI was concerned with. As the valuers had used discounted cash flow methodology to value the land assets the price of gold used for those purposes was critical, so the ground of appeal could not be dismissed.[100]

The price was based on more than future prospects – discounted cash flow values more than land

The Supreme Court considered the Commissioner's view of goodwill to be too narrow. It said that "Goodwill can be manifest in revenues derived from operations but it can also be found in anything which adds value to an ongoing business enterprise, including value that can be realised at the time of the sale of that enterprise."[101] So, it seems the Court was of the view that a price had been paid for something more than the prospect of revenues – the price had been paid for other things too. And yet what was wanted was value of the land assets alone.

The Court tried to put this another way by saying that "…s 76ATI requires … a conventional assessment of the prices at which the land held by PDI would have been sold…". But it said that all the valuers involved had used a discounted cash flow "as a surrogate for the assessment of that price" and that this would overstate the price because a discounted cash flow method values an operating business and not just land.[102]

As a result, the Supreme Court set aside the Tribunal's decision and remitted the matter back to the Tribunal (subject to several constraints as to what issues might be argued and what agreements on

[95] Id 109.
[96] Id 124 – 127.
[97] For example, the evidence of Sokalsky at 134.
[98] Id 145.
[99] Id 164.
[100] Id 180 -181.
[101] Id 182.
[102] Id 184.

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issues should be maintained) to be determined once again. In particular and importantly the Tribunal was required to base its decision on:

> "…(ii) evidence of the value PDI's land to be derived from the value of PDI's mining operations assessed by the discounted cash flow method;
>
> (iii) evidence of any adjustments in value required to allow for the fact that the discounted cash flow method of valuation assesses the value of mining operations as a going concern, rather than the value of the land; [and]
>
> (iv) evidence concerning the reconciliation of or relationship between the value properly attributed to all of PDI's land assets at the time of its acquisition by Barrick and the price paid by Barrick;…"[103]

It is noticeable that at this point of final determination of the appeal, goodwill itself is not mentioned.

[103] Id 222.

The High Court's view of the appeal

Given the amount of duty involved and the level of legal disagreement discernible in the parties' respective positions the *Placer Dome* case went on appeal to the High Court and a final decision was handed down on 5 December 2018, the matter having been argued on 18 June 2018. The transcript of the arguments is highly instructive for goodwill enthusiasts.[104] The decision handed down has been a long-awaited clarification and refinement of the principles established by the High Court in the original *Murry* decision.

The matter was argued before a bench of Kiefel CJ, Bell, Gageler, Nettle, and Gordon JJ. None of their Honours was on the bench in *Murry* however the Chief Justice was a dissenting judge in the Full Federal Court in the *Murry* case. The decision was unanimously in favour of the Commissioner of State Revenue, but Gageler J issued a judgment that differed in its reasons from the plurality (Kiefel CJ, Bell, Nettle and Gordon JJ).

The question to be determined by the High Court was whether the respondent was correct to contend that the property of PDI at the time of acquisition by Barrick included goodwill with a value of $6.506 billion. If the respondent was correct, then the value of the land was below the 60% threshold imposed by the statute. The parties had been unable to agree on the valuation methodology to be used in the circumstances. The Commissioner argued for a "top down" approach that starts with the value of the total property, before subtracting the value of assets which are not land, in order to reach a residual value which is then attributed to land. In so arguing, the Commissioner contended that immediately before PDI's acquisition by Barrick, PDI had no material property comprising goodwill. Therefore, the value of PDI's land exceeded the 60%. The respondent (Barrick) argued that PDI's land should be valued using a discounted cash flow ("DCF") method with the result that its land was less than the threshold. In any event the respondent argued that even under a "top down" approach PDI owned property being goodwill with a value of more than $6 billion and thus the 60% threshold could not be reached. By the time of the appeal, the acceptability of using of gold futures in a DCF calculation to value the gold bearing land and associated rights had been abandoned.

In the High Court reasons it was made clear at the outset that it considered a "top down" method appropriate in the circumstances. It also stated that PDI had had no material property comprising legal goodwill and thus it was a land rich company. Under the valuation exercise imposed by the statute Barrick had not established that the value of all of PDI's land as a proportion of all of its property met or exceeded 60%. It also rejected the respondent's contention that goodwill in law is synonymous with "going concern value".

Valuation

The High Court stated that the valuation required in context was a comparison between the value of all the land the company was entitled to and all the property the company was entitled to -except for property excluded by the statute. Land in the statutory context also includes mining tenements, interests or other estates in land, fixtures and other things purporting to be the subject of ownership

[104] See [2018] HCA Trans 119, Commissioner of State Revenue v Placer Dome Inc (Now an Amalgamated Entity Named Barrick Gold Corporation). Perth Registry High Court of Australia P6 of 2018.

separate from the ownership of the land.[105] In this process “ordinary principles of valuation” were to be applied and those were stated in *Spencer*[106] to be

> “…the price which a hypothetical willing but not anxious seller could reasonably expect to obtain and a hypothetical willing but not anxious buyer could reasonably expect to pay after proper negotiations between them have concluded and without overlooking any ordinary business consideration.”[107]

Further principles relevant to the matter were that the parties would be taken to be aware of all material features and circumstances that might affect the value of the land (this assumption being embodied in the *Spencer* principles and in the statute)[108] and that amounts a purchaser might have to expend to acquire a permanent right of access to the land or to use information relating to the land or property were to be ignored.[109]

Another required exclusion imposed by the *Stamp Act* was the value of knowledge comprising intellectual property.[110]

In acknowledging these valuation principles and constraints the plurality was at pains to point out that valuation principles established in one statutory context should be applied with great caution in another statutory context. They observed that the *Spencer* valuation was made in the context of a compensation dispute in which the focus was on the need to compensate the plaintiff for loss. Such cases might be resolved in favour of a liberal estimate whereas in revenue cases a conservative estimate might better suit a court’s attitude.[111]

The parties to the dispute in *Placer* had agreed that:

“(1) the value of all of the property to which Placer was entitled at the acquisition date was $15.3 billion, being the price Barrick paid to acquire Placer;

(2) Placer was entitled to land in Western Australia with an unencumbered value of not less than A$1 million;

(3) the value of all property directed to be excluded by s 76ATI(4) of the Stamp Act was $2.5 billion;

(4) the capitalised value of the ‘synergies’ to be derived from combining Placer's and Barrick's operations (expected to arise from savings in administration and the cost of operating various global offices, exploration, operations and technical services and from arrangements with respect to finance and tax) was between $1.6 billion and $2 billion (between $200 million and $250 million annually); and

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[105] *CSR (WA) v Placer Dome* Inc [2018] HCA 59 at para 16.
[106] *Spencer v The Commonwealth* (1907) 5 CLR 418; [1907] HCA 82.
[107] *CSR (WA) v Placer Dome* Inc [2018] HCA 59 at para 17.
[108] See *CSR (WA) v Placer Dome* Inc [2018] HCA 59 at para 18 and *Spencer v The Commonwealth* (1907) 5 CLR 418 at 441 and s33(1)(c)(i) of the *Stamp Act.*
[109] Section 33(1)(c)(ii) of the *Stamp Act.*
[110] Section 76ATI(4)(f)(i) of the *Stamp Act.*
[111] This they based on a dictum of Dixon in *Commissioner of Succession Duties (SA)* (1947) 74 CLR 358 at 373-374.

(5) the ordinary principles of valuation were those set out in *Spencer*."[112]

The High Court found that in the circumstances the use of a DCF method of valuing Placer's land was inappropriate because it was not a reliable method of valuing Placer's assets. This was evidenced by the fact that the DCF method used by its own experts revealed a large gap between the valuation of PDI's land assets and the purchase price Barrick paid.

The DCF's limitations revealed the need for a "top down" valuation approach. The divergent valuers used by the respondent had estimated the present value of the land based on after-tax cash flows expected to be generated by the land assets and this was done recognising Placer's strategic plans in their calculations. Integral in the cash flow calculation were estimated gold prices in circumstances where:

> "Gold miners are price takers, not price makers; the reputation or capability of the miner, smelter or vendor is irrelevant. And the gold price is difficult to predict…. As one of Barrick's experts acknowledged in evidence before the Tribunal, estimates of future gold prices could be 'quite dramatically wrong', predictions could be pretty unreliable and, as a result, his reports could turn out quite inaccurate."[113]

Added to this, the High Court recognised that gold mining company sale prices are often a multiple of the DCF value of the company.

In some cases gaps between the market value of a gold mining company and the DCF analysis of its assets can be explained and the DCF value might be regarded as reliable. For example where the entity generates above-market returns – but this was not such a case. What had happened was that when it lodged its consolidated financial statements it had "…adopted the conventional *accounting* [emphasis added by the High Court] of allocating to Placer's assets amounts nominated as their "fair value", and allocating the residual of the purchase price, $6.506 billion, to 'goodwill'."[114] The High Court was unsympathetic to the view that the goodwill identified by Barrick was attributable to such sources as:

> "…personnel; technological capabilities; innovative mining techniques; management; size, structures and systems; ability to harvest efficiencies and economies of scale; ability to expand its business; "synergies"; and going concern value."[115]

Which accounted for the gap as these were the source of the value represented by Placer's goodwill.

These the High Court set aside as not being goodwill because they could not generate goodwill of any value "…because Barrick could not and did not establish that any of the 'sources' could generate or add value (or earnings) by *attracting custom* [emphasis added by the High Court] to Placer's business."[116]

The High Court went on to analyse each of these sources and demonstrated in each case that they were, variously: not a valuable acquisition (in cases where the alleged skills of staff were to be lost after the take-over); or were know-how excluded by statute from the valuation; or were (importantly for the purposes of our understanding of legal goodwill) not capable of generating material valuable

[112] *CSR (WA) v Placer Dome* Inc [2018] HCA 59 at para 33.
[113] *CSR (WA) v Placer Dome* Inc [2018] HCA 59 at para 47.
[114] *CSR (WA) v Placer Dome* Inc [2018] HCA 59 at para 48.
[115] Id para 50.
[116] Id para 111.

goodwill in the form of the attraction of custom; or were (as in the case of expected operational and organisational synergies) not existent at the time of acquisition.

Going concern value the High Court was at pains to reject the contention that goodwill for legal purposes and going concern value were interchangeable. The terms are not, according to the High Court, "…separate methods of valuing the same intangible".[117] The plurality explained (as has already been noted) that "…goodwill represents a pre-existing relationship arising from a continuous course of business – to which the 'attractive force which brings in custom' is central. Without an established business, there is no goodwill because there is no custom. A collection of assets has no custom".[118] Going concern value, the High Court noted, has been recognised as property in cases in the United States and can be present even when there is no goodwill.

Turning back to *Murry* the High Court explained:

> "For present purposes, the difference is best understood in the terms identified and discussed in *Murry*. Goodwill is property in the nature of the right or privilege to conduct the business by '*means which have attracted custom to the business*' (emphasis added). The courts will protect that property – those means of attracting custom to the business – irrespective of the profitability or value of the business, so far as it is legally possible to do so. Going concern value is not of that nature: it is not the right or privilege to conduct the business by means which have attracted custom to the business and, thus, going concern value does not comprise the means of attracting custom to the business which the courts will or can protect."[119]

One might think that if the going concern value can be seen as property (as in the US cases mentioned) then it might be subtracted from the overall value so as to leave the value of the land separate but the plurality stated that in this statutory context

> "…the statutory valuation exercise requires comparison of the value of land as *part of the going concern* with the total property of the going concern. It follows that, if and insofar as the going concern value of the corporation may inhere in the value of the land, there is no statutory or other warrant for stripping going concern value out and attributing it with a value separate from the land. It is part of the value of the land."[120]

The statutory context also meant that the purchaser would have the same knowledge of how to exploit the land and any intellectual property was to be removed from the calculation. Furthermore, in the factual context the vast bulk of any going concern value would have been attributable to such knowledge and intellectual property.[121]

In any case it was evident that the use of the DCF method by the respondent's valuers meant that none of the valuers used by Barrick "attempted to sever the value of Placer's land assets from its business."[122]

[117] *CSR (WA) v Placer Dome* Inc [2018] HCA 59 at 97.
[118] Ibid.
[119] Id at 98.
[120] Id at 102.
[121] Id at 103 – 104.
[122] Id at 105.

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Sources of goodwill

The Repondent had argued that there was evidence that Placer had many sources of legal goodwill that explained why it had such value attributable to its legal goodwill.

These included personnel; technical capacity; innovative mining techniques; strength in management capability; systems leading to economies of scale; and synergies as well as the going concern value. The plurality in the High Court found that none of these was helpful to the respondent's case because they variously: were statutorily excluded; were not based on sound evidence; and most importantly "…none … could generate goodwill of any material value because Barrick could not and did not establish that any of the 'sources' could generate or add value (or earnings) by *attracting custom* to Placer's business."[123]

Conclusions from *Placer Dome*

It is the last of these points concerning sources of goodwill that is the most significant aspect of this High Court decision in its relationship with the *Murry* decision. It is this emphasis on the link to custom that refines a wider view of goodwill that seemed to have been suggested by part of what was said in *Murry* and it means that the High Court has now narrowed the goodwill concept.

By tying the existence of goodwill back to the attractive force of a business for customers it cannot be said that nearly every business will have goodwill by reason of its ability to protect itself from competition – which was an extreme proposition that seemed to be supported by some of the statements in the *Murry* case. The business must have customers and thus a business producing an indistinguishable product that is marketed based a price determined by an exchange – such as gold cannot easily be seen to have goodwill. This will be so no matter how desirable such a business may be as an acquisition target by reason of its management potential, intellectual property or "synergies".

It remains to be seen then how this case will impact tax considerations in future matters. One wonders whether it has implications for sales of large farming enterprises where the price of product is determined by market forces more than by quality – although agricultural produce may have a quality component that influence some customers. There may be implications too for small businesses providing a product that is not influenced by how customers react to the identity of management, quality of service or of the product.

There are no doubt also points that need to be considered regarding the treatment of payments made for things that are not goodwill when a business changes hands. They will need to be allocated to something. Perhaps it will suffice that they be simply regarded as the purchaser having paid too much.

[123] *CSR (WA) v Placer Dome* Inc [2018] HCA 59 at 97 111.