STATE TAXES LITIGATION:
SOME OBSERVATIONS FROM THE BENCH

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TLC TAX & EQUITY 6TH ANNUAL SEMINAR 2022 - FRIDAY 18 MARCH 2022

1 The topic of this paper is "State Taxes Litigation – Some Observances from the Bench". Given the Covid pandemic, and the fact there has been a steady stream of cases dealing with NSW State taxes over the "lockdown" periods, I have addressed those Supreme Court cases decided in 2020 and 2021.

2 I will address those developments in the following order:

(1) Land tax under the *Land Tax Management Act 1956* (NSW);

(2) Payroll Tax under the *Payroll Tax Act 2007* (NSW);

(3) Duties under the *Duties Act 1997* (NSW); and

(4) Costs in revenue cases.

3 In summarising these decisions, I will try and draw some threads together and seek to identify some trends. Finally, I will return to the title of this address and provide some observations about the conduct of tax litigation in the Supreme Court.

Land tax

Chief Commissioner of State Revenue v McIntosh Bros Pty Ltd (in liq) [2021] NSWCA 221 (Meagher JA, Payne JA, White JA)

4 The respondent company owned land which was assessed for land tax for the calendar years ended 31 December 2014, 2015 and 2016. Those assessments were set aside by the Civil and Administrative Tribunal on the basis that for each of those years the land was exempt under s 10AA of the *Land Tax Management Act 1956* (NSW) as land used for primary production. That provision relevantly reads:

10AA Exemption for land used for primary production

…

(2) Land that is not rural land is exempt from taxation if it is land used for primary production and that use of the land:

(a) has a significant and substantial commercial purpose or character, and

(b) is engaged in for the purpose of profit on a continuous or repetitive basis (whether or not a profit is actually made).

(3) For the purposes of this section, ***land used for primary production*** means land the dominant use of which is for:

(a) cultivation, for the purpose of selling the produce of the cultivation, or

(b) the maintenance of animals (including birds), whether wild or domesticated, for the purpose of selling them or their natural increase or bodily produce, or

(c) commercial fishing (including preparation for that fishing and the storage or preparation of fish or fishing gear) or the commercial farming of fish, molluscs, crustaceans or other aquatic animals, or

(d) the keeping of bees, for the purpose of selling their honey, or

(e) a commercial plant nursery, but not a nursery at which the principal cultivation is the maintenance of plants pending their sale to the general public, or

(f) the propagation for sale of mushrooms, orchids or flowers.

5 The subject land was informally divided into two parts. The Denbigh (west) side was controlled by Jim McIntosh, who used the land to graze his own cattle and to agist cattle of third parties; the Bangor (east) side was controlled by Ron McIntosh, who conducted a beef cattle operation on the land as part of a wider farming business, and was also used for a cattle grazing business.

6 Meagher JA (Payne and White JJA agreeing) held that as a matter of construction, each activity on s 10AA(3)(a)–(f) constitutes a use for "primary production". As such, when undertaken on the land each contributes to its character as "land used for primary production". Where there are multiple activities, each separately undertaken by an independent user, they can be aggregated so as to collectively contribute to the character of the land. It is not

necessary that the activities be undertaken by a single user or single cohesive group in order to be considered collectively.

7 The Court also held that whether the commerciality or profit purpose tests are satisfied must be determined objectively, in the sense that regard is to be had to the fact and nature of the activities, how and why they are undertaken and their outcomes. To the extent that the purpose for which an activity is engaged in has a subjective element, that element may be taken into account but is not determinative. Also, where the dominant use of the land consists of more than one independent use, the "use of the land" which must satisfy the purpose tests falls to be assessed as a whole, taking into account the independent uses constituting that dominant use.

8 In assessing the commercial purpose or character of the use of land, regard may also be had to activities conducted on other land, where those activities are integrated with the use of the subject land, for example where the subject and other land are used as part of an overall grazing or farming venture.

Young v Chief Commissioner of State Revenue (NSW) [2020] NSWSC 330 (Payne JA)

9 The plaintiff, as trustee for the Spencer Young Family Trust, is the owner of adjoining parcels of land at Arcadia. The plaintiff sought review of the land tax assessments issued for the 2016 and 2017 land tax years. The plaintiff contended that the land was exempt from taxation as it was "land used for primary production" within the meaning of s 10AA(1)(a) of the *Land Tax Management Act 1956* (NSW). The relevant form of primary production was "the maintenance of animals [in this case horses] … for the purpose of selling them or their natural increase or bodily produce": s 10AA(3)(b).

10 The Court observed that s 10AA affords an exemption to "land used for primary production" which is defined as "land the dominant use of which is for" one of six matters identified in s 10AA(3), including relevantly a use carried on for the purpose of sale. In construing s 10AA(3) the statutory language should not be broken up: there are no separate tests to determine the "dominant use of the

land" and the "purpose of sale". The "use" of land relevant to s 10AA(3) is one of physical use of the land in pursuance of one of the identified purposes. Purpose is to be objectively ascertained, although subjective purpose may be taken into account.

11 The Court found that although there were six horses maintained on the property over the relevant time period, they were not maintained for the dominant purpose, ascertained subjectively or objectively, of selling either the horse or its natural increase or bodily produce. Whilst the Court accepted that the owner subjectively intended to sell three of the horses or their progeny, that was not the dominant purpose of maintaining them on the land. Nor did the evidence establish any business of maintaining horses on the land.

12 The objective character of the physical activities taking place on the land determined the "use" of the land in each of the tax years. The task is not one of ascertaining the "purpose" of maintaining animals on the land, but rather whether, as an objective matter, the dominant use of the land was that described in s 10AA(3)(b). The activities taking place on the land (clearing, excavation, demolition and construction works) did not establish that the dominant use of the land was for the maintenance of horses for the purpose of selling them or their natural increase or bodily produce.

Antegra Pty Ltd v Chief Commissioner of State Revenue (NSW) [2021] NSWSC 107 (Payne JA)

13 In 2007, the plaintiffs purchased land which had been approved in 2006 for redevelopment as a manufactured home estate. After the plaintiffs purchased the land, various modifications to the 2006 development consent were approved, and approval was also given for the site to be subdivided. The land was accordingly subdivided, and manufactured homes constructed on the subdivided lots. The completed homes were not sold to residents, but instead leased under 99 year leases. This was to ensure that the entirety of the land would remain under the plaintiff's ownership, with fragmentation on paper only, to provide flexibility for potential future redevelopment.

14 Until repeal of that statute on 1 November 2015, the plaintiff's land was subject to the *Residential Parks Act 1988* (NSW) (**RP Act**) and was entered on the residential parks register maintained under that Act. From 1 November 2015, the land was then taken to be registered under the register of communities required to be kept under s 14 of the *Residential (Land Lease) Communities Act 2013* (NSW) (**RLLC Act**), which replaced the RP Act, by the operation of transitional provisions: see cl 4(1) of Sch 2 of the RLLC Act. However, the land was expressly excluded from the operation of the RLLC Act, being land which "is wholly subject to a … community scheme": RLLC Act, s 8(1)(b).

15 In the land tax assessments for the years 2016, 2017 and 2018 (i.e. after repeal of the RP Act and commencement of the RLLC Act), a separate land tax value was identified for each subdivided parcel for the purpose of calculating an aggregated taxable land value.

16 The plaintiffs challenged those three assessments. They argued that they were entitled to an exemption from land tax under s 10Q of the *Land Tax management Act 1956* (NSW). That section provides:

> **10Q Low cost accommodation—exemption/reduction**
>
> (1) Land is exempted from taxation under this Act leviable or payable in respect of the year commencing on 1 January 1995 or any succeeding year if—
>
> (a) the land is used and occupied primarily for low cost accommodation, and
>
> (b) application for the exemption is made in accordance with this section, and
>
> (c) the Chief Commissioner is satisfied that the land is so used and occupied in accordance with guidelines approved by the Treasurer for the purposes of this section.
>
> (2) The guidelines may include provisions with respect to the following—
>
> (a) the circumstances in which accommodation is taken to be low cost accommodation,
>
> (b) the types and location of premises in which low cost accommodation may be provided,

(c) the number and types of persons for whom the accommodation must be provided,

(d) the circumstances in which, and the arrangements under which, the accommodation is provided,

(e) maximum tariffs for the accommodation,

(f) periods within which tariffs may not be increased,

(g) the circumstances in which the applicant is required to give an undertaking to pass on the benefit of the exemption from taxation (or, if subsection (4) applies, the reduction in taxation) to the persons for whom the accommodation is provided in the form of lower tariffs.

(3) A guideline may—

(a) apply generally or be limited in its application by reference to specified exceptions or factors, or

(b) apply differently according to different factors of a specified kind,

or both.

(4) If the Chief Commissioner is satisfied that part only of land or premises is used and occupied primarily for low cost accommodation in accordance with the Treasurer's guidelines, the land value of the land is to be reduced for the purposes of land tax in accordance with the principles in section 10R (3)–(3C).

(5) This section does not apply to an owner of land in respect of a tax year unless—

(a) the owner applies to the Chief Commissioner for the exemption or reduction, in the form approved by the Chief Commissioner, and

(b) the owner furnishes the Chief Commissioner with such evidence as the Chief Commissioner may request for the purpose of enabling the Chief Commissioner to determine whether there is an entitlement to the exemption or reduction.

(6) Without limiting the other ways in which this section may cease to apply to a person, it ceases to apply to a person if the person breaches an undertaking given as referred to in subsection (2) (g).

17 There are three potentially relevant guidelines in play. Revenue Ruling LT 071 (**guideline version 1**), effective to 31 December 2015, provided that certain residential parks to which the RP Act applies are entitled to exemption under s 10Q. Revenue Ruling LT 071 v2 (**guideline version 2**) and its replacement

Revenue Ruling LT 071 v3 (**guideline version 3**) (the two guidelines are relevantly identical for present purposes and were issued to reflect the repeal of the RP Act and commencement of the RLLC Act) are addressed to a "community or residential community" within the meaning of the RLLC Act.

18 A key issue was whether guideline 1, or guideline 2 and guideline 3, applied in the 2016, 2017 and 2018 tax years.

19 The Court accepted that ordinary principles of statutory interpretation should be applied in construing not only s 10Q of the *Land Tax Management Act*, but also any guideline approved by the Treasurer for the purposes of s 10Q(1)(c). Therefore, a guideline is to be construed according to its text and purpose as evident from the document itself in the context of the legislative scheme in which the guidelines are required to be applied.

20 In relation to the construction of s 10Q, the Court found that the purpose of the guidelines is to limit the availability of the exemption to, and to thereby encourage, *particular types* of "low cost accommodation outcomes". In determining whether certain land falls within the requirements of the guidelines, it is not appropriate to ask whether the land meets the objective criterion under s 10Q(1)(a) that it is "low cost accommodation".

21 The Court found that in the 2016, 2017 and 2018 tax years, the plaintiff's land was not land covered by an applicable guideline:

(1) Guideline version 1 did not apply. Although that guideline was effective until 31 December 2015 (the relevant taxing date for the 2016 tax year), the statute to which it applied – the RP Act – had already been repealed and replaced by midnight of that date, and guideline version 2 was issued on 17 December 2015 (although not effective until 1 January 2016) to address the new legislative regime.

(2) Guideline version 2 (and later guideline version 3) also did not apply. Although they were the applicable guidelines for the relevant tax years,

the guidelines did not cover plaintiff's land. The land was not a "community or residential community" within the meaning of the RLLC Act, as it was land which was "wholly subject to a community scheme" and therefore excluded in accordance with s 8.

22 Since the plaintiff's land was not used and occupied in accordance with a guideline for the purposes of s 10Q(1)(c), accordingly there was no entitlement to exemption from land tax in the years 2016, 2017 and 2018.

23 The Court also made some observations as to the scheme for the levying of land tax. The Court noted that:

> "[125] … the appropriate characterisation of the taxing point of midnight on 31 December is that it is the first instant of the tax year which commences at that time. Liability for land tax does not arise at the end of a tax year. Because land tax is levied at the beginning of the year, it is not a tax that arises at the end of the year: ss 7 and 8. Section 8 is expressed in years, starting on 1 January and by referring to the instant of midnight on 31 December."

Payroll tax

Chief Commissioner of State Revenue (NSW) v Downer EDI Engineering Pty Ltd (2020) 103 NSWLR 772; [2020] NSWCA 126 (Bathurst CJ, Macfarlan JA, Meagher JA)

24 The respondent (**Downer**) was engaged by FOXTEL Management Pty Ltd (**Foxtel**) under a contract described as a "Service Provider Installation Agreement". To fulfil its obligations under that Agreement, Downer engaged various subcontractors to deliver and install Foxtel equipment to Foxtel customers. Pursuant to the subcontracts, Downer would procure equipment from Foxtel, which it would supply to the subcontractors to complete installation orders. Title to the equipment remained vested in Foxtel and the subcontractors acknowledged that they were sub-bailees of the equipment from Downer.

25 Downer was assessed as liable for payroll tax on a portion of its payments to the subcontractors under the subcontracts. The Commissioner had determined that the subcontracts were "relevant contracts" within the meaning of s 32 of

the *Payroll Tax Act 2007* (NSW), so that amounts paid under the relevant contracts were taken to be wages per s 35 which may be subject to taxation.

26 Downer argued that it was not liable for payroll tax as the subcontracts fell within one of two exceptions to the definition of a "relevant contract" at sub-ss 32(2)(a) or (d)(i). Section 32, which sets out the definition and exclusions thereto of a "relevant contract", relevantly provides:

> **32 What is a relevant contract?**
>
> (1) In this Division, a ***relevant contract*** in relation to a financial year is a contract under which a person (the ***designated person***) during that financial year, in the course of a business carried on by the designated person:
>
> (a) supplies to another person services for or in relation to the performance of work, or
>
> (b) has supplied to the designated person the services of persons for or in relation to the performance of work, or
>
> (c) gives out goods to natural persons for work to be performed by those persons in respect of those goods and for re-supply of the goods to the designated person or, where the designated person is a member of a group, to another member of that group.
>
> (2) However, a relevant contract does not include a contract of service or a contract under which a person (the designated person) during a financial year in the course of a business carried on by the designated person:
>
> (a) is supplied with services for or in relation to the performance of work that are ancillary to the supply of goods under the contract by the person by whom the services are supplied or to the use of goods which are the property of that person, or
>
> …
>
> (d) is supplied with:
>
> (i) services ancillary to the conveyance of goods by means of a vehicle provided by the person conveying them …

27 In relation to the exception at s 32(2)(a), this essentially requires the Court to answer the question:

> "Were the … services supplied by the subcontractor [to the contractor (i.e. the party assessed for payroll tax)] ancillary to the supply of goods by the subcontractor under the subcontract?"

28 The Court in this case found that the question should be answered in the affirmative, such that the relevant subcontracts fell within the exception provided at s 32(2)(a).

29 The "supply of goods" by the subcontractor need not involve any transfer of legal title to the goods supplied. Nor must the goods be supplied to the contractor, as opposed to some other third party. In order to constitute a supply, all that is required is a transfer of the right to possession. That was satisfied in this case – although Foxtel at all times remained owner of the equipment, the subcontractor (as sub-bailee from Downer) supplied those goods by passing lawful possession on behalf of Foxtel to the Foxtel customer.

30 Next, that supply of goods was a supply "under the subcontract". The word "under" is construed broadly to cover any instance where the subcontract could properly be seen as the source of the obligation to effect the disposal. It should not be read narrowly only to cover circumstances where supplier and recipient are both parties to the contract providing for the supply. Here the subcontractor had a contractual obligation to Downer to deliver the equipment, and supply occurred in fulfilment of that obligation.

31 Finally, the services provided by the subcontractor were "ancillary" to the supply of goods. The question whether one activity is ancillary to another is a question of fact and degree. In this case, the goods supplied would provide no benefit to the customer until they were installed; the provision of installation services was something which tended to assist, or naturally went with, the supply of the goods. It is the purpose of the services (i.e. whether they assist or naturally go with the achievement of the supply of goods) which is determinative, and not their extent or nature (i.e. whether they are "weighty and substantial" or "mechanical and menial", or the time taken performing the services).

32 In relation to the exception at s 32(2)(d)(i) the Court relied on the primary judge's finding that the installation services were of a "repetitive mechanical nature" and so, given the lack of complexity, could be seen as ancillary to conveyance of the goods.

33 Since the subcontracts were excluded from the definition of "relevant contracts", amounts paid under those subcontracts were not taken to be wages on which payroll tax might be levied.

E Group Security Pty Ltd v Chief Commissioner of State Revenue [2021] NSWSC 1190 (Ward CJ in Eq)

34 E Group Security provides security and event services to various clients. Those services are performed by a combination of E Group Security's own employees and security guards sub-contracted from third parties. With one qualification which was not material to the issue at hand,[1] E Group Security is the only entity that enters into contracts to supply security guarding services to clients, and into sub-contracts to obtain security guards from third parties. However, payroll functions are performed by various wholly-owned subsidiaries of E Group Security.

35 The Commissioner assessed E Group Security for payroll tax in respect of wages paid to the sub-contracted security guards.

36 The primary issue for determination was whether the arrangements between E Group Security and its clients are "employment agency contracts" within the meaning of s 37 of the *Payroll Tax Act*. The definition is as follows:

> (1) For the purposes of this Act, an ***employment agency contract*** is a contract is a contract, whether formal or informal and whether express or implied, under which a person (an ***employment agent***) procures the services of another person (a ***service provider***) for a client of the employment agent.

[1] From July 2017 such contracts were also entered into by Vital Security Group in relation to security services provided to the hospitality industry.

(2) However, a contract is not an employment agency contract for the purposes of this Act if it is, or results in the creation of, a contract of employment between the service provider and the client.

(3) In this section—

contract includes agreement, arrangement and undertaking.

37 It was not disputed that each of E Group Security's clients met the statutory description of a "client", or that the client "procures" the services of the security guards in question. Instead, E Group Security contended that it does not procure the services of the security guards "for" its clients so as to meet the statutory definition of an employment agency contract at s 37.

38 A further issue was whether the arrangements between E Group Security and its wholly-owned subsidiaries (who performed payroll functions for E Group Security) are "employment agency contracts" such that E Group Security is jointly and severally liable for the unpaid payroll tax of the related entities on the payments to the workers. E Group Security's contention is that its subsidiaries do not "procure" the services of security guards for it, and it is not a "client" of its subsidiaries in the relevant sense.

39 In determining the primary issue, her Honour applied the "in and for" test propounded by White J in *UNSW Global Pty Ltd v Chief Commissioner of State Revenue* [2016] NSWSC 1852 (in the sense that an employment agent procures services "for" a client if those services are procured "in and for the conduct of the business of" the client), noting that the test requires an analysis as to whether the workers in question were integrated into the client's business (or added in effect to its workforce), and not whether the workers or the provision of their services were integral or essential (as opposed to ancillary) to the client's business or workforce, nor whether the client could itself have performed the relevant tasks.

40 Further, while the capacity to direct or control the tasks that are performed or the manner in which they are performed is a relevant consideration, this factor alone will not necessarily be determinative in all cases.

41 Her Honour found that in this case the arrangements by which E Group Security provided security guards to its clients do not constitute employment agency contracts so as to give rise to any payroll tax liability. E Group Security did not procure security services "for" its clients in the relevant sense. While its security guards were required to perform their tasks at the client's premises, they did so subject to the direction and instruction of their E Group Security supervisors; the security guards were required to comply with E Group Security's instructions and to report back to E Group Security. The nature of their services and the manner in which they were performed also did not readily give rise to the appearance that they were an integrated part of the client's workforce.

42 As to the further issue, her Honour also found that the arrangements between E Group Security and its subsidiaries were not employment agency contracts within the meaning of s 37. Her Honour stated that the word "client" in the statutory definition of an employment agency contract should be given its ordinary common parlance meaning – someone with whom there is some form of relationship whereby, for reward or otherwise, one party does something on behalf of or at the request of another at least where that is in a professional or business context. However, the conduct of the subsidiaries in performing invoicing services for E Group Security was more akin to compliance by the subsidiary with a direction from its parent company, rather than a "client" arrangement.

43 Furthermore, it could hardly be said that the subsidiaries "procured" the services of the security guards for E Group Security. The guards were procured by E Group Security, albeit they were paid via the subsidiaries. Accordingly, the subsidiaries merely facilitated E Group Security's provision of services to its clients and did not procure any security guards for E Group Security in the relevant sense.

44 Her Honour allowed E Group Security's application for review of the Commissioner's assessment for payroll tax and ordered that the assessment be revoked.

45 The 16 plaintiffs in these proceedings are all companies of which Mr Glenn Norman Willis is a director (indeed sole director of all but the first plaintiff company). They are all ultimately owned by Elanor Investors Ltd (**Elanor Investors**), a publicly listed company that was not a party to the proceedings. The plaintiff companies all fulfil different functions within various managed investment funds. The plaintiff companies asserted that they are properly organised into five groups of companies (one administrative group, and four groups corresponding with four separate managed investment schemes) within the overall corporate structure of the group as follows:

(1) The "Elanor Investors sub-group", consisting of Elanor Investors and its wholly owned subsidiaries who serve administrative or business development functions within Elanor Investors' business model. That business model involves acquiring and improving investment assets, selling the improved asset to a newly established fund which, in turn, sells units to passive investors while retaining a minority interest in the assets and maintaining them for an ongoing fee;

(2) The "Elanor Hospitality and Accommodation Fund companies", which were incorporated in connection with the establishment of the EHAF Fund, and which are all wholly owned by EHAF Management Pty Ltd (in turn ultimately owned by Elanor Investors);

(3) The "Bell City Fund companies", which are two companies associated with a fund established to hold two adjacent hotel businesses. The shares in the companies are "stapled" to units in corresponding property trusts whose trustee is Elanor Funds Management Ltd;

(4) The "193 Clarence Hotel Fund" which consists of a single company, whose shares are also stapled to units in a corresponding property trust. The trustee of the trust is also Elanor Funds Management Ltd;

(5) The "Elanor Metro and Prime Regional Hotel Fund companies", which were incorporated in connection with the establishment of the EMPR Fund, and which are wholly owned by EMPR Management Pty Ltd (seemingly in turn ultimately owned by Elanor Investors Ltd).

46 The Commissioner determined that, in accordance with the grouping provisions under Part 5 of the *Payroll Tax Act*, the plaintiff companies formed a single "group" for payroll tax purposes. The plaintiffs did not challenge that decision. Instead, the plaintiffs contended that they are entitled to an exemption under s 79 of the *Payroll Tax Act* from the operation of the Part 5 grouping provisions. In effect, the plaintiffs asserted that each of the five groups should be separated from the single group as assessed by the Commissioner.

47 Section 79 relevantly provides:

> **79 Exclusion of persons from groups**
>
> (1) The Chief Commissioner may, by order in writing, determine that a person who would, but for the determination, be a member of a group is not a member of the group.
>
> (2) The Chief Commissioner may only make such a determination if satisfied, having regard to the nature and degree of ownership and control of the businesses, the nature of the businesses and any other matters the Chief Commissioner considers relevant, that a business carried on by the person, is carried on independently of, and is not connected with the carrying on of, a business carried on by any other member of that group.
>
> (3) The Chief Commissioner cannot exclude a person from a group if the person is a body corporate that, by reason of section 50 of the *Corporations Act 2001* of the Commonwealth, is related to another body corporate that is a member of that group.
>
> (4) This section extends to a group constituted by reason of section 74 (Smaller groups subsumed by larger groups). …

48 Section 74 of the Act relevant provides:

> **74 Smaller groups subsumed by larger groups**
>
> (1) If a person is a member of 2 or more groups, the members of all the groups together constitute a group.

(2) If 2 or more members of a group have together a controlling interest in a business (within the meaning of section 72), all the members of the group and the person or persons who carry on the business together constitute a group.

49 Her Honour noted that the Commissioner's discretion to exclude a person from a group is enlivened subject to fulfilment of sub-ss 79(2) and (3). Her Honour also noted that the purpose of the grouping provisions in the *Payroll Tax Act* is to counter tax avoidance through the splitting of business activities by the use of additional entities each attracting a threshold, citing the High Court in *Tasty Chicks Pty Ltd v Chief Commissioner of State Revenue of the State of NSW* (2011) 245 CLR 446; [2011] HCA 41. Accordingly the relevant question is whether, objectively having regard to the nature of connections between group businesses, the business of each plaintiff is carried on independently of, and not in a way that is connected with the carrying on of, a business carried on by another plaintiff.

50 This is a question of fact and degree, and no single factor is determinative. Regard should be had to matters such as the nature and degree of ownership and control of the businesses, and the nature of the relevant businesses. The fact that there are connections between the businesses is not determinative: the connections must be material connections, and the assessment must be made with regard to the purpose of the grouping provisions noted above.

51 Her Honour found that the Commissioner should have exercised his discretion to de-group the plaintiffs into the 5 sub-groups (but retaining the grouping within each sub-group). This was based on the following considerations:

(1) The degree of control that Elanor Investments can legitimately exercise over the businesses of the other companies is "much constrained". Although the plaintiff companies share a common director such that there is some capacity to influence, Elanor Investors does not have a majority shareholding in any of the entities in the underlying funds.

(2) The respective funds largely have discreet groups of investors, and there is force in the submission that investors in one managed investment

scheme would not be expected to be liable for payroll tax liabilities of discrete managed investment scheme entities.

(3) While the plaintiff companies all have the same registered office, the day to day operation of their respective businesses is at various different locations.

(4) Although a number of entities have their key personnel supplied by Elanor Operations (part of the Elanor Investors sub-group described above), the function of those personnel is restricted largely to oversight and they perform that function for various separate clients (i.e. each discrete managed investment fund), each of whom would expect individual consideration.

Duties

Chief Commissioner of State Revenue v Benidorm Pty Ltd (2020) 104 NSWLR 232; [2020] NSWCA 285 (Meagher JA, Leeming JA, Payne JA)

52 The respondent (**Benidorm**) was incorporated in Australia for the purpose of purchasing an apartment in Sydney. Mr Robinson, a resident of Guernsey on whose instructions Benidorm had been incorporated, provided the whole of the purchase money.

53 Benidorm declared by deed that it held the property on trust for Mr Robinson. After his death, Benidorm executed a deed entitled "Declaration of Trust by Nominee" by which it acknowledged and declared that it held the property on trust for the sole executor and beneficiary under Mr Robinson's will, Mr Stubbs, "absolutely in place of and as successor to" Mr Robinson, and that Mr Stubbs would indemnify Benidorm against all liabilities it might incur in respect of the apartment.

54 The Chief Commissioner assessed ad valorem duty upon the "Declaration of Trust by Nominee" on the basis that it was a "declaration of trust" dutiable under the *Duties Act 1997* (NSW). Benidorm applied for review of the assessment. The primary judge revoked the assessment of ad valorem duty on the basis

that it merely acknowledged the existing position and did not evidence a dutiable transaction. The Chief Commissioner appealed.

55 The question on appeal was whether the document amounted to a "declaration of trust" within the meaning of the definition of that term in s 8(3) of the *Duties Act* and was therefore a "dutiable transaction". Section 8(3) provides:

> **8 Imposition of duty on certain transactions concerning dutiable property**
>
> …
>
> (3) In this Chapter—
>
> ***declaration of trust*** means any declaration (other than by a will or testamentary instrument) that any identified property vested or to be vested in the person making the declaration is or is to be held in trust for the person or persons, or the purpose or purposes, mentioned in the declaration although the beneficial owner of the property, or the person entitled to appoint the property, may not have joined in or assented to the declaration.

56 The Court of Appeal (Leeming JA; Meagher and Payne JJA agreeing) dismissed the appeal, holding that, on its proper construction, the "Declaration of Trust by Nominee" merely acknowledged the existing legal position. By the grant of probate and resealing of Mr Robinson's will, the entirety of his equitable interest under the trust had already vested in Mr Stubbs as his sole executor, effective from the time of Mr Robinson's death, and the indemnity went no further than an existing obligation to indemnify the trustee.

57 The Court held that unlike the former *Stamp Duties Act 1920* (NSW), the *Duties Act* imposes duty on transactions, not instruments. Section 8(1) charges duty on a transfer of dutiable property and certain specified "dutiable transactions", including a "declaration of trust" defined exhaustively in s 8(3). Each of the specified transactions denotes something which alters legal or equitable rights or obligations concerning property. A document which does not effect a transaction but merely acknowledges an existing legal position cannot be a dutiable "transaction" and is not liable to duty under the *Duties Act*.

58 The Court further held that it would be inconsistent with the legislative policy of the *Duties Act* for duty to be charged on documents which effect no transaction.

59 The Chief Commissioner's application for special leave to appeal to the High Court was refused.

SPIC Pacific Hydro Pty Ltd v Chief Commissioner of State Revenue [2021] NSWSC 395 (Payne JA)

60 The Chief Commissioner assessed SPIC Pacific Hydro Pty Ltd (**SPIC**) as being liable for landholder duty under Ch 4 of the *Duties Act 1997* (NSW) in the amount of $12,394,573.37 plus interest. The assessment arose from the acquisition by SPIC on 12 May 2016 of "Sale Securities" being:

(1) 100% of the units in the Taralga Holding Land Trust (**Holdco Land Trust**);

(2) 100% of the shares in Taralga Holding Nominees 1 Pty Ltd (**THN1**), the trustee of the Holdco Land Trust;

(3) 100% of the units in the Taralga Holding Operating Trust (**Holdco Operating Trust**); and

(4) 100% of the shares in Taralga Holding Nominees 2 Pty Ltd (**THN2**), the trustee of the Holdco Operating Trust.

61 At the time of the acquisition, THN1 as trustee of the Holdco Land Trust indirectly held certain freehold land and leasehold interests in land in New South Wales. The combined registered value of the freehold properties at the time of the acquisition was $454,900. The combined estimated market value was $750,000. Each of the leases was for a term of 30 years. The leased land was used, before and after the acquisition, to operate the Taralga Wind Farm (the **Wind Farm**) by the group of entities the subject of the acquisition. There was also a lease of wind farm plant and equipment.

62 As at the time of the acquisition, there were 51 wind turbine generators (**WTGs**) which captured energy from the wind in order to generate electricity at the Wind Farm. Each WTG comprised a concrete foundation (300-400 cubic metres of concrete and 35-50 tonnes of steel reinforcement, 15m wide and 3m deep), the tower sections (80m in height, custom designed and built for each project and connected to the concrete foundation by two rows of bolts cast into the concrete), the nacelle (which housed the transformer, generator and gearbox) and the hub and blades (42 tonnes). Each WTG had a design life of 20 years, but the foundations and the tower sections would likely last longer. A concrete hardstand was situated next to each WTG. There was 28km of underground cabling at the site which would be damaged and only have scrap value if removed from the ground. Among other things, there was also a switchyard, switchroom building, earthing grid, substation, control building and 23km of access roads across the site providing vehicular access to the WTGs. The access roads were constructed as part of the development of the site as a wind farm.

63 It was an agreed fact that the total unencumbered value of the plant and equipment assets situated at the Wind Farm as at 12 May 2016 was $227,182,500.

64 The Commissioner argued that the Holdco Land Trust was, at the time of the acquisition, a "landholder" for the purposes of s 146(1) of the *Duties Act* with the consequence that the acquisition of the units in the Holdco Land Trust by SPIC triggered a liability for duty. SPIC contested the conclusion that the Holdco Land Trust was a landholder and argued, in the alternative, that the valuation of its land holdings of $223.6 million relied upon by the Commissioner in the calculation of duty was incorrect. In the further alternative, SPIC sought an exercise of the power in s 163G of the *Duties Act* to disregard the value of goods in determining the duty payable.

Issue 1: what (if any) of the plant and equipment installed on the leased land was a fixture?

65 Section 146(1) provided:[2]

> **146 Meaning of "landholder"**
>
> (1) For the purposes of this Chapter, a ***landholder*** is a unit trust scheme, a private company or a listed company that has land holdings in New South Wales with an unencumbered value of $2,000,000 or more.

66 For the purposes of considering whether the unencumbered value of the land holding was $2,000,000 or more, it was first necessary to consider whether the plant and equipment affixed to the land comprised chattels or fixtures, by reference to the degree of their annexation to the land and the purpose or object of that annexation (including whether the purpose or object of the annexation was to better enjoy the items annexed or to better enjoy the land).

67 The Court found that the plant and equipment affixed to the land at the Wind Farm (WTGs and met masts, together with the infrastructure affixed to the land necessary to send generated electricity to the National Electricity Market) were fixtures at the time of the acquisition. They were strongly affixed to the land. Each item was fixed in place for the better enjoyment by the tenant of the land as an integrated wind farm. The plant and equipment were tenant's fixtures because none of the items were so permanent, immovable or incapable of being removed without causing irremediable damage to the land so as to constitute landlord's fixtures. Development costs, construction-related costs, furniture and fittings, spare parts and those parts of the electronic control system not affixed to land were not fixtures. The roads and tracks on the land were fixtures.

68 The site was an integrated whole, chosen for its suitability and designed to harness the wind to produce electricity. The central feature of the Wind Farm was the 51 WTGs affixed to the land.

[2] Section 147A (entitled "what does 'land' include?") was not in force at the relevant time.

Issue 2: to the extent that any plant and equipment installed on the leased land was a fixture, to what, if any, interest in land did this give rise on the part of the Holdco Land Trust (through its linked entities)?

69 Secondly, it was necessary to consider whether the interests in land acquired by the Holdco Land Trust through its linked entities had a value of over $2,000,000 such that it was a "landholder" as defined by the *Duties Act*.

70 The Chief Commissioner argued that landholder duty was payable on the basis that a tenant who has installed fixtures on leased premises has two relevant "land holdings", being (a) a legal interest, comprising the leasehold interest in the land; and (b) a separate equitable interest in the land, which was said to arise from the tenant's right to sever and remove fixtures installed by it on the premises, exercisable during or at the end of the lease.

71 The Court held that a tenant's interest in unsevered leasehold improvements is a purely legal interest in land which arises from and is governed by the terms of the particular lease and rights under the common law. Legal title to a tenant's fixture is in the landlord until the tenant chooses to exercise the power to sever it. Where a tenant brings chattels onto leased land, and the chattels become fixtures under accepted general law tests, they become part of the realty and hence the property of the landlord: *TEC Desert Pty Ltd v Commissioner of State Revenue (WA)* (2010) 241 CLR 576; [2010] HCA 49 at [25]. The landlord's legal ownership of a tenant's fixture is qualified by the tenant's common law right of severance and removal in the case of fixtures installed by the tenant or, in this case, trade purposes, as well as any contractual right to remove the fixtures allowed for under the terms of the lease: *Vopak Terminal Darwin Pty Ltd v Natural Fuels Darwin Pty Ltd (Subject to Deed of Company Arrangement)* [2009] FCA 742; (2009) 258 ALR 89 at [67].

72 The Court held that the tenant's interest is a leasehold estate or interest in the land, including the fixtures. The tenant is the owner of this leasehold estate or interest, legally and beneficially. It is not correct to say that the tenant holds separate legal and equitable interests in the land or any part of it. The Chief Commissioner's submission was inconsistent with the decision of the High

Court in *DKLR Holding Co (No 2) Pty Ltd v Commissioner of Stamp Duties (New South Wales)* (1982) 149 CLR 431; [1982] HCA 14 at 442-443, 463 and 474.

Issue 3: was the Holdco Land Trust a "landholder" for the purposes of the relevant provisions of the *Duties Act*?

73 Thirdly, it was necessary to value the leasehold interests in the land. The Court accepted the evidence of SPIC's valuer, who valued the leasehold interests in the land on the correct assumption that the plant and equipment installed at the Wind Farm constituted fixtures which could be removed at any time by the leaseholder and were required to be removed at the conclusion of the leases. He valued the Holdco Land Trust's interests in land, limited to the leasehold interests, on this basis as over $100 million; well over the $2,000,000 threshold. The Court concluded that the Holdco Land Trust was a "landholder" within the meaning of s 146(1) of the *Duties Act*.

Issue 4: how are any interests in land on account of the fixtures to be valued?

74 The Court held that the transaction that the *Duties Act* required to be valued was a sale of the Holdco Land Trust's land holding. In the context of the *Duties Act*, the relevant valuation task is to be conducted on the basis that an interest in land is to be valued in the context of a hypothetical sale of the land holding as part of a going concern where the hypothetical purchaser will also have access to and receive the benefit of other assets of the landholder (and its linked entities) which affect land value. As the going concern value of the enterprise (of which the land formed an integral part) may inhere in the value of the land, there was no statutory or other warrant for stripping going concern value out. It was part of the value of the land.

75 The Court was satisfied that SPIC demonstrated that the amount of $223.6 million, which was the value of the interests in land forming the basis of the Commissioner's assessment, was excessive. SPIC was entitled to an amended assessment on the basis that the relevant interests in land were correctly valued at $201,621,227.

Issue 5: is the power under s 163G of the *Duties Act* available and, if so, should it be exercised?

76 Section 163G of the *Duties Act* provides:

> **163G Significant holdings in goods**
>
> If the Chief Commissioner is satisfied that the unencumbered value of all goods in New South Wales of a landholder comprises not less than 90% of the total unencumbered value of all land holdings and goods in New South Wales of a landholder, the Chief Commissioner may disregard the value of the goods in determining the duty chargeable under this Chapter.

77 The Court concluded that on the facts found, s 163G had no relevant application. The basis of SPIC's claim was that the Holdco Land Trust owned goods which could be disregarded under s 163G of the Act in determining the duty chargeable. The items that SPIC characterised as "goods" were, however, fixtures. The characterisation of those items as tenant's fixtures did not mean that they were "goods". Section 163G was not applicable.

78 Note that in *Valuer-General v AWF Prop Co 2 Pty Ltd* [2021] VSCA 274; (2021) 395 ALR 155 the Victorian Court of Appeal disagreed with the essential conclusion of this decision as they related to the characterisation of fixtures, preferring an "above the ground" and "below the ground" analysis.

YWCA Australia v Chief Commissioner of State Revenue (NSW) [2020] NSWSC 1798 (Payne JA)

79 The Young Women's Christian Association was established with the initial object of providing safe hostel accommodation for female immigrants arriving by ship. By the relevant events forming the subject of these proceedings, it had evolved into a secular organisation for the provision of benevolent relief to people (in particular, women and children) experiencing poverty, homelessness, violence or disadvantage. When first established in Australia, the Association was organised on a state by state basis.

80 Prior to May 2018 YWCA NSW, the NSW branch of the Association, operated two "Song Hotels" which generated profit used to support YWCA NSW's charitable activities. In May 2018 pursuant to a scheme of arrangement

intended to amalgamate the interests of YWCA's state and territory organisations, the assets and liabilities of each organisation, including the Song Hotels, were transferred to the newly incorporated YWCA Australia.

81 The Chief Commissioner refused YWCA Australia's application to be approved as an "exempt charitable or benevolent body" as defined in s 275(3)(a) of the *Duties Act 1997* (NSW) and assessed duty and interest on the transfer of the Song Hotels and other properties at over $3.3 million. YWCA Australia commenced proceedings in the Supreme Court after the Chief Commissioner disallowed its objections to the assessments.

82 The principal issue in the proceedings was whether the resources of YWCA Australia were used predominantly for the relief of poverty and/or the promotion of education pursuant to an exemption from duty under s 275(3)(a) of the *Duties Act*:

> **275 Charitable and benevolent bodies**
>
> (1) Duty under this Act is not chargeable on the following—
>
> (a) a transfer, or an agreement for the sale or transfer, of dutiable property to an exempt charitable or benevolent body,
>
> (b) a declaration of trust over dutiable property held or to be held on trust for an exempt charitable or benevolent body,
>
> (c) a surrender of an interest in land in New South Wales to an exempt charitable or benevolent body,
>
> (d) a vesting of dutiable property in an exempt charitable or benevolent body,
>
> (e) a lease of dutiable property to an exempt charitable or benevolent body,
>
> (f) a mortgage given by or on behalf of an exempt charitable or benevolent body.
>
> (1A) Duty under section 58 (Establishment of a trust relating to unidentified property and non-dutiable property) is not chargeable on an instrument that declares a trust over property held or to be held on trust for an exempt charitable or benevolent body.
>
> (2) (Repealed)

(2A) Landholder duty is not chargeable on the acquisition of an interest in a landholder by an exempt charitable or benevolent body.

(3) In this section—

exempt charitable or benevolent body means—

(a) any body corporate, society, institution or other organisation for the time being approved by the Chief Commissioner for the purposes of this paragraph whose resources are, in accordance with its rules or objects, used wholly or predominantly for—

(i) the relief of poverty in Australia, or

(ii) the promotion of education in Australia, or

…

83 The Court found that the resources of YWCA Australia were used predominantly for the relief of poverty and the promotion of education and that YWCA Australia was thus entitled to an exemption from duty pursuant to s 275(1) on the transfer of dutiable property.

84 In arriving at that conclusion, the Court found that:

(1) the objects of YWCA as expressed in its Constitution fell comfortably within the purposes identified in s 275(3)(a);

(2) "the relief of poverty in Australia" in the statutory context includes at least the provision of the necessities of life, both directly and indirectly, but is not so limited. The modern concept encompasses assistance given to benefit persons whose lot needs improvement or who are "subject to some degree of financial necessity". Programs focused on providing housing solutions for people who are facing a real risk of homelessness or providing relief to women fleeing family violence are programs to "benefit persons whose lot needs improvement" and are thus ones "for the relief of poverty";

(3) the promotion of education is a very broad concept which extends to information or training provided in a structured manner to advance the

knowledge or abilities of the recipients. It includes structured programs that involve imparting skills to women and girls to enable them to become better functioning members of society;

(4) for resources to be used "predominantly" for specified purposes, the purpose must be "the most dominant of the purposes of the institution or organisation". The "use" of resources draws attention to how financial resources are expended. There is no requirement that the "use" be the direct and immediate use of the resources;

(5) YWCA Australia carried out the objects in its Constitution by using its financial resources on numerous programs which were carried out for the relief of poverty and/or the promotion of education. A significant source of funding for those programs was the operation of the profit-for-purpose Song Hotels. The Song Hotels were financial resources "used" by YWCA Australia for the relief of poverty and/or the promotion of education. The expenditure on the Song Hotels was a cost of funding YWCA Australia's charitable activities for the relief of poverty and/or the promotion of education; and

(6) assets held in separate legal entities, YWCA Housing and YWCA National Housing, which were controlled by YWCA Australia, were not resources used by YWCA Australia.

85 The Court revoked the assessments, set aside the determination and allowed YWCA Australia's objections.

Costs

YWCA Australia v Chief Commissioner of State Revenue (No 2) [2021] NSWSC 102 (Payne JA)

86 After successfully challenging the Chief Commissioner's assessments that YWCA Australia was liable to pay transfer duty on certain transactions (*YWCA Australia v Chief Commissioner of State Revenue* [2020] NSWSC 1798), YWCA Australia sought an order that the Chief Commissioner pay its costs on

the ordinary basis up to and including 11 May 2020 (the day on which YWCA Australia's solicitors provided the Chief Commissioner with an offer of compromise, to which the Commissioner did not respond) and thereafter on an indemnity basis.

87 In its offer of compromise of 11 May 2020, YWCA Australia proposed that in exchange for YWCA Australia discontinuing its proceedings in the Supreme Court, the Chief Commissioner would withdraw the assessments sought to be impugned in those proceedings and issue one or more compromise assessments not exceeding the specified amount of $380,653.68. Section 12(1)(b) of the *Taxation Administration Act 1996* (NSW) empowers the Commissioner to make a compromise assessment "for the purpose of settling a dispute between the Chief Commissioner and a person concerning the person's tax liability". Section 12(2) further provides that the Chief Commissioner "may, with the agreement of the taxpayer, assess liability in an amount specified in, or determined in accordance with, the agreement."

88 As noted above, the Chief Commissioner did not give any substantive response to YWCA Australia's offer of compromise, which lapsed in accordance with its express terms.

89 YWCA Australia submitted that its offer complied with r 20.26 of the Uniform Civil Procedure Rules 2005 (NSW) (**UCPR**), and that the usual costs result as set out in UCPR r 42.14 should follow as the judgment was no less favourable to YWCA Australia than the terms of its offer.

90 In answer, the Commissioner submitted that he was not in a position to accept and implement YWCA Australia's offer because the offer required the Commissioner to issue a compromise assessment which would not have represented a valid and bona fide exercise of his power to make an assessment under s 12 of the *Taxation Administration Act*. The value of the assessment specified in YWCA Australia's offer, albeit substantially lower than the amount of the impugned assessments, was greater than zero and would not have been properly available by applying the relevant law (namely ss 275 and/or 275A of

the *Duties Act 1997* (NSW) which, in creating an exemption to liability, can only operate to provide for a nil amount) to the facts.

91 The Court gave a broad interpretation to the power to issue a compromise assessment under s 12(1)(b). The grant of wide powers pursuant to s 12 should not be read down or limited unless it is necessary to do so. The extent of the Commissioner's power of general administration of the tax legislation permits him to compromise litigation, and it should not readily be found that making an assessment as part of accepting an offer of settlement is not a valid and bona fide exercise of the Commissioner's power to make assessments.

92 YWCA Australia's offer was an offer within the meaning of UCPR r 20.26, and the Commissioner was empowered to issue a compromise assessment in the amount the subject of YWCA Australia's settlement offer. Furthermore, the outcome achieved by the Commissioner was less favourable than the terms of the offer.

93 However, the Court determined that the peculiar facts of this case warranted the exercise of its discretion under UCPR r 42.14(2) to "otherwise order", such that Commissioner should not be required to pay YWCA Australia's costs on the indemnity basis from the date of its offer. This is because, accepting that the Commissioner had the power to make a compromise assessment in the amount specified by YWCA Australia in its offer, the taxable facts bore no relation to one warranting an assessment in that amount. The Court found that it would amount to an exceptional circumstance warranting its "otherwise ordering" for the Commissioner, as the officer responsible for enforcement and collection of revenue in NSW, to be forced, on pain of an indemnity costs award, to make an assessment which in no way reflected a view of the taxable facts which may be established in litigation. The issues in the trial essentially involved an all or nothing result, and there was no contention that the proper application of the law gave rise to taxable facts from which an assessment in the amount suggested in YWCA Australia's offer could be made.

94 Accordingly, the Court dismissed YWCA Australia's application that the Commissioner pay its costs on the indemnity basis from the date of its offer of compromise.

SPIC Pacific Hydro Pty Ltd v Chief Commissioner of State Revenue (No 2) [2021] NSWSC 486 (Payne JA)

95 In the substantive proceedings (*SPIC Pacific Hydro Pty Ltd v Chief Commissioner of State Revenue* [2021] NSWSC 395), although SPIC failed in a "good deal" of its attack upon the Chief Commissioner's assessment of its liability for land tax, SPIC succeeded in a number of its principal arguments and was overall successful in demonstrating that the assessment was excessive. Given the unnecessary complexity in severing the individual issues such that a set off in relation to costs could be made, the Court therefore proposed an order that the Chief Commissioner pay SPIC's costs.

96 The Court also proposed an order remitting the matter to the Chief Commissioner for determination in accordance with the Court's reasons, namely that the assessment of duty is based upon a valuation of $201,621,227 of the interests in land.

97 In these proceedings, concerning the final form of orders the Court should make, SPIC sought that the remitting order be varied to require an assessment based upon the lower valuation of $177,292,527. The Court accepted that this was the correct valuation of the interests in the land, and that the earlier valuation of $201,621,227 erroneously failed to take into account certain of the Court's findings.

98 As to the proposed costs order, the Court affirmed its conclusion in the substantive proceedings that this was not a case that lends itself to treating the issues as separable such that a set off in relation to costs would be appropriate. Although the subsidiary question of whether the plant and equipment were fixtures was an important one, the critical question was always whether SPIC had succeeded in demonstrating that the Commissioner's assessment was excessive such that it should be revoked. In this, SPIC succeeded. Its

entitlement to costs was bolstered by the fact that, in these further proceedings, SPIC was further successful in achieving a downward adjustment of the valuation of its interests in land upon which the new assessment should be based.

99 The Court therefore ordered that the Commissioner pay SPIC's costs.

E Group Security Pty Ltd v Chief Commissioner of State Revenue (No 2) [2021] NSWSC 1296 (Ward CJ in Eq)

100 In the substantive proceedings E Group Security successfully challenged the Chief Commissioner's determination as to its liability for payroll tax (*E Group Security Pty Ltd v Chief Commissioner of State Revenue* [2021] NSWSC 1190). In these proceedings, E Group Security sought an order that the Commissioner pay its costs on the ordinary basis until 15 December 2020, and thereafter on the indemnity basis. It relied on an offer dated 15 December 2020 expressed to be made pursuant to the *Calderbank* principles, by which it offered to settle the proceedings in the sum of $1,800,000 which E Group Security would pay to the Commissioner.

101 The Commissioner rejected E Group Security's offer and made a counter-offer, also expressed to be in accordance with the *Calderbank* principles, in the amount of $3,206,106.82.

102 The Court applied the usual principles relating to *Calderbank* offers, namely that the making of a *Calderbank* offer better than the result ultimately obtained does not automatically result in an indemnity costs order, unless the party seeking the order demonstrates that rejection of the offer was "unreasonable" in all the circumstances of the case. That is an evaluative judgment to be made by reference to the terms of the offer and all the relevant surrounding circumstances.

103 The Court found that, on balance, it was not unreasonable for the Commissioner to refuse E Group Security's offer. The offer gave only 14 days for acceptance which was not sufficient time for the Commissioner to consider

the implications of foreshadowed amendments by E Group Security to its appeal statement. Further factors indicating that it was not unreasonable for the Commissioner to refuse E Group Security's offer were the complexity of the issues, and the inconsistency raised by the proposed amended appeal statement with the evidence served to that point. (Indeed as it turned out, at least some of the evidence that ultimately played a determinative role in the substantive proceedings only emerged after the offer had expired, and some not even until the hearing itself). No weight was placed on factors such as the absence of certainty as to the terms of the proposed deed of release or as to the mechanics of issuing any reassessments, since these matters could have been explored and clarified.

104 Since it was not unreasonable for the Commissioner to have refused E Group Security's *Calderbank* offer, the Court ordered simply that the Commissioner pay E Group Security's costs on the ordinary basis.

Conclusion

105 To return to the topic of this address, I can make some overall observations from the bench.

106 All tax cases, including NSW State tax cases, are essentially cases which commence, and usually end, with the correct statutory construction. Whilst the results of decided cases provide a useful prism through which to view issues of statutory construction, it is easy to fall into the trap of applying the "lore" to the facts rather than seeking to address the correct construction of the particular statute you are confronted with.

107 In the case of the revenue authority, for good reason certainty is sought without resort to litigation by publishing rulings and making known the approach of the Chief Commissioner to particular difficult issues. It is well to remember, however, that for most purposes when it comes to litigation the views expressed in rulings or other notifications to the profession will have little role to play. Cf: Guidelines which inform the statutory task, as in *Antegra* discussed above.

108 Which leads me conveniently to my most important observation. The importance of the facts.

109 All cases, including tax cases, are ultimately decided on facts, not the imagination of creative types on either side of the record. In properly addressing statutory construction it should be clear what conclusions you need the Court to draw for your team to succeed; and set about gathering evidence that would lead a Court to draw the conclusions you need to win.

110 The most effective taxation case is one where the parties have a clear understanding of the construction of the section and the Act they wish to advance, and the evidence led is aimed at supporting a closing submission persuading the Court to draw conclusions favourable to the party in the light of that construction.

111 Can I say something about expert evidence. Some general observations. Do not let the case be taken over by the expert. Even eminent experts are only as good as the assumptions they are asked to make. Do not let them expressly or impliedly assume away problems that the client faces. A second plea: do not let the experts become ships in the night. The assumptions the experts are asked to make must respond to the facts as they fall out; and be responsive to the possible alternative constructions. A well put together case, on either side of the ledger, will adduce expert evidence that provides assistance to the Court whatever of 2 (or even more) possible constructions of the legislation are adopted.

112 A final observation: neither party should get too hung up on the onus. It is true that there are tax cases decided simply on the onus of proof, but they are comparatively rare. Taxpayers must obviously approach tax litigation bearing in mind that the onus of proof lies on them, but it is a truism of tax litigation that in a case where the Commissioner relies upon the onus but not much else the taxpayer is likely to succeed.