JUD/*2019*AATA5981 -

Administrative Appeals Tribunal

DECISION AND REASONS FOR DECISION

ACN 154 520 199 Pty Ltd (In Liq) and Commissioner of Taxation (Taxation) [2019] AATA 5981 (20 December 2019)

Division:	TAXATION AND COMMERCIAL DIVISION
File Number(s):	**2016/6242**
Re:	**ACN 154 520 199 Pty Ltd (In Liq)**
	APPLICANT
And	**Commissioner of Taxation**
	RESPONDENT

DECISION

Tribunal:	**Deputy President Bernard J McCabe** **Ms G Lazanas, Senior Member**
Date:	**20 December 2019**
Place:	**Sydney**

The Tribunal affirms the decisions under review.

...............................[SGD]...

Deputy President Bernard J McCabe

Ms G Lazanas, Senior Member

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CATCHWORDS

TAXATION – GST – input tax credits – gold industry – creditable acquisition – whether applicant made first supply of that precious metal after its refining – meaning of precious metal – meaning of refining – whether ordinary or trade meaning – interpretation of word in statutory context – general anti-avoidance provisions – whether taxpayer engaged in scheme – whether taxpayer obtained a GST benefit – whether an entity that entered into or carried out the scheme or part of the scheme did so with the sole or dominant purpose of the taxpayer getting a GST benefit from the scheme – whether the principal effect of the scheme or of part of the scheme is that the taxpayer gets the GST benefit from the scheme – round robin arrangement – objection decision regarding assessments of net amount of GST affirmed

TAXATION – ADMINISTRATION – administrative penalty – recklessness – failure to take reasonable care – objection decision regarding rates of penalty and decision not to remit penalty affirmed

LEGISLATION

Administrative Appeals Tribunal Act 1975 (Cth) ss 33, 43

A New Tax System (Goods and Services Tax) Act 1999 (Cth), 4-1, 4-5, 4-10, 7-1, 9-5, 9-30, 9-40, 9-70, 9-75, 11-1, 11-5, 11-10, 11-15, 11-20, 11-25, 17-5, 29-70, 38-1, 38-385, 40-1, 40-100, 165-1, 165-5, 165-10, 165-15, 165-40, 182-1, 182-10, 195-1

Income Tax Assessment Act 1936 (Cth) s 177C

Tax Administration Act 1953 (Cth) ss 14ZZE, 14ZZJ, 14ZZK, Sch1 ss 284-75, 284-90, 284-145, 284-220, 298-20

CASES

Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue (2009) 239 CLR 27

Attorney-General v Colonial Sugar Refining Company Ltd (1900) 26 VLR 83

BRK (Bris) Pty Ltd v Commissioner of Taxation (2001) 46 ATR 347

Caltex Australia Petroleum Pty Ltd v Commissioner of Taxation [2008] FCA 1951

Collector of Customs v Agfa Gevaert Ltd (1996) 186 CLR 389

Federal Commissioner of Taxation v ACN 154 520 199 Pty Ltd (in Liq) (formerly EBS & Associates Pty Ltd) [2018] FCA 1140

Federal Commissioner of Taxation v Consolidated Press Holdings (2001) 207 CLR 235

Federal Commissioner of Taxation v Hart (2004) 217 CLR 216

Federal Commissioner of Taxation v Lenzo (2008) 167 FCR 255

Federal Commissioner of Taxation v Ludekens (2013) 214 FCR 149

Federal Commissioner of Taxation v Macquarie Bank Ltd (2013) 210 FCR 164

Federal Commissioner of Taxation v Peabody (1994) 181 CLR 359

Federal Commissioner of Taxation v Sleight (2004) 136 FCR 211

Federal Commissioner of Taxation v Spotless Services Limited (1996) 186 CLR 404

Federal Commissioner of Taxation v Trail Bros Steel & Plastics Pty Ltd (2010) 186 FCR 410

Federal Commissioner of Taxation v Zoffanies (2003) 132 FCR 523

General Crude Oil Company v Department of Energy (1978) 585 F.2d 508

Grinding Balls Inc v Director, Division of Taxation (1980) 424 A.2d 470, 176 N.J. Super. 620

Herbert Adams Proprietary Limited v Federal Commissioner of Taxation (1932) 47 CLR 222

Mayes, Internal Revenue Collector v Paul Jones and Co (1921) 270 F. 121

Orica Limited v Federal Commissioner of Taxation [2015] FCA 46

Pepsi Seven-Up Bottlers Perth Pty Ltd v Commissioner of Taxation [1995] FCA 1655

P&N Beverages Australia Pty Ltd v Commissioner of Taxation [2007] NSWSC 338

The Queen v A2; The Queen v Magennis; The Queen v Vaziri [2019] HCA 35

Saga Holidays Ltd v Commissioner of Taxation [2005] FCA 1892

Saga Holidays Ltd v Commissioner of Taxation [2006] FCAFC 191

Very Important Business Pty Ltd and Commissioner of Taxation [2019] AATA 1120

Vincent v Commissioner of Taxation (2002) 50 ATR 20

Zeroz Pty Ltd v Deputy Commissioner of Taxation [1997] FCA 199

SECONDARY MATERIALS

Explanatory Memorandum to the A New Tax System (Goods and Services Tax) Bill 1998 (Cth)

Goods and Services Tax Ruling: GSTR 2003/10: Goods and Services Tax: What is 'precious metal' for the purposes of GST?

Practice Statement Law Administration, PSLA 2012/5: Administration of penalties for making false or misleading statements that result in shortfall amounts

REASONS FOR DECISION

Deputy President Bernard J McCabe and Ms G Lazanas, Senior Member

20 December 2019

INTRODUCTION

1. Alchemy was a medieval pseudoscience in which the forerunners of modern chemists (and more than a few charlatans) attempted to conjure gold out of a variety of other substances. This case involves a form of fiscal alchemy. It arises out of an arrangement, in which the applicant played an integral role, that exploits features of the *A New Tax System (Goods and Services Tax) Act 1999* (Cth) (***GST Act***) to conjure input tax credits out of dealings in gold.

2. At the heart of this case lies a dispute over the applicant's entitlement to $122,112,065 worth of input tax credits in relation to acquisitions of scrap gold made during the monthly tax periods from 1 February 2012 to 30 June 2014 (the ***Relevant Period***). The applicant, a refiner of precious metal, says it is entitled to the input tax credits under Div 11 of the GST Act because it paid a GST-inclusive price when it acquired scrap gold for the refinery from third-party suppliers. The applicant says it processed the scrap gold into investment-grade bullion with a metallic fineness of at least 99.5%. It then made what it claimed were GST-free supplies of precious metal to bullion dealers, relying on Div 38 (specifically s 38-385) of the GST Act. The applicant then claimed input tax credits in the ordinary way under Div 11 with respect to the GST that was paid on the acquisition of the scrap gold. But was the applicant right to treat its supply of precious metal to the dealers as GST-free supplies under Div 38? If the applicant does not satisfy Div 38 and its supplies of precious metal were instead regarded as input taxed supplies under Div 40, the applicant is not entitled to claim input tax credits on the scrap gold it acquired and used in the manufacture of the bullion.

3. As we shall see, the Commissioner's primary argument is that the applicant did not make creditable acquisitions within the meaning of s 11-5 of the GST Act – and, therefore, it has no entitlement to input tax credits – because the applicant cannot satisfy the requirements of Div 38. Relevantly, s 11-5 says there can be no creditable acquisition without a creditable purpose. So far as relevant, s 11-15 says there is no creditable purpose with

respect to the acquisition of a thing if the acquisition relates to making supplies that would be input taxed: s 11-15(2)(a).

4. Specifically, the Commissioner says the applicant in this case cannot satisfy the requirement in s 38-385(a) that the supply of precious metal would be GST-free if *"it is the first supply of that precious metal after its refining by, or on behalf of, the supplier"* because the applicant was not refining the scrap gold it acquired. The Commissioner says the scrap gold in question had already been refined to the requisite standard before it was delivered to the applicant's refinery. The scrap gold which was already of 99.99% fineness was effectively being recycled through the refinery in the course of a manufacturing process that did not include any meaningful refining. If there was *no refining* within the meaning of s 38-385(a), the gold bullion that was manufactured and sold was necessarily input taxed pursuant to s 40-100 – and therefore no entitlement to input tax credits arises under Div 11.

5. We are satisfied the Commissioner should succeed in relation to what we will refer to as the '**no refining issue**'. We reach that conclusion for several reasons. In any event, our conclusion on that issue disposes of the applicant's claim with respect to the disputed input tax credits. But the Commissioner put a second argument that we need only consider if we concluded the applicant was able to satisfy the requirements in Divs 11 and 38. The Commissioner had made declarations under Div 165 disallowing or negating $72,953,611[1] worth of input tax credits arising out of transactions involving a sub-set of suppliers. Division 165 contains the anti-avoidance provisions in the GST Act.

6. Broadly, it transpired that a number of the third-party suppliers were pocketing the GST they should have remitted to the Commissioner after making taxable supplies of scrap gold to the applicant. The applicant shrugs at this, saying any loss to the revenue is a matter between the Commissioner and the rogue suppliers who have failed to comply with their GST obligations. The applicant says it claimed its input tax credits in the usual way, and that it paid GST to the rogue suppliers in the GST-inclusive prices for the scrap gold.

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[1] The declaration issued by the Commissioner on 8 April 2016 in respect of the tax periods ending 29 February 2012 to 30 June 2012 recorded an incorrect total figure of $3,178,221. The correct total was $3,178,838 and the parties operated on the basis that $72,953,611 properly reflected the total amount of input tax credits disallowed by the Commissioner.

The Commissioner does not allege the applicant was a party to any fraud by third-parties, but he says Div 165 was applicable because:

(a) the applicant had obtained a GST benefit in the form of the input tax credits from a scheme; and

(b) one or more entities (including the third-party suppliers) entered into or carried out the scheme for the dominant purpose of giving the applicant the GST benefit, or the principal effect of the scheme was that the applicant got the GST benefit.

7. In light of our views on the application of Divs 11 and 38 of the GST Act, it follows there is no GST benefit for the purposes of Div 165. However, if we are wrong about Divs 11 and 38, we adopt the position set out below in relation to '**the Div 165 issue**'.

8. The Commissioner also imposed administrative penalties totalling $58,059,829.75. We do not see any basis for disturbing those assessments.

9. We will begin by setting out the legislative framework including the general policy underpinning the different GST treatments of 'precious metal'. That discussion will be of particular assistance to anyone who is unfamiliar with the ways that supplies of precious metal are handled under the GST Act. We will then set out the background facts, including the history of the applicant and a description of the way in which it conducted its business, as well as an explanation of its dealings with (a) the third-party suppliers of scrap gold and (b) the dealers of precious metal to whom the applicant supplied the investment-grade bullion.

10. That factual background necessarily entails a detailed consideration of the voluminous evidence that was before us. Much of that evidence was uncontroversial. Against that background, we then turn to an analysis of the substantive GST issues, namely, the no refining issue and the Div 165 issue, followed by a brief analysis of administrative penalties.

11. We note, at the outset, that the Tribunal's documents lodged by the Commissioner (***T-Documents***) in this matter exceeded 44,000 documents with more than 60,000 pages in total. However, the parties adopted a pragmatic approach and tendered an agreed hearing book at the start of the hearing comprising 10 folders of materials. By the

conclusion of the hearing, some 13 days later, the hearing book had expanded to 13 folders, and we were also presented with 29 exhibits. Documents that were not relied on by the parties were, by consent, removed from the final form of the hearing book. The references to page numbers in our decision are to the pages of the hearing book, unless otherwise specified.

12. We should also note that the hearing was conducted in private at the applicant's request pursuant to s 14ZZE of the *Taxation Administration Act 1953* (Cth) (***TAA 1953***). As the hearing drew to a close, we discussed with the parties how we would manage our related obligation (in s 43 of the *Administrative Appeals Tribunal Act 1975* (Cth) (the ***AAT Act***) as modified by s 14ZZJ of the TAA 1953) to publish the reasons in a way that preserved the anonymity of the applicant. The applicant's counsel acknowledged that would be practically impossible to achieve given the unusual factual circumstances. It was agreed we would publish our reasons without an attempt to obscure the identity of the applicant.

THE LEGISLATIVE FRAMEWORK

13. Under the GST Act, an entity is liable to pay GST on any 'taxable supply' and is entitled to an input tax credit on any 'creditable acquisition': s 7-1. Relevantly, amounts of GST are set off against amounts of input tax credits to produce a net amount for each tax period applicable to the entity: s 17-5. The assessed net amount is the amount which the entity must pay to the Commonwealth if the amount is greater than zero, or which the Commonwealth must pay to the entity if the amount is less than zero.

Division 11 of the GST Act and creditable acquisitions

14. We have already pointed out the applicant's entitlement to claim input tax credits on certain acquisitions of scrap gold, namely, where it was of at least 99.5% fineness, is the essential issue in this dispute. Division 11 of the GST Act is concerned with 'creditable acquisitions'. Section 11-1 relevantly states what Div 11 is about, including that an entity is entitled to input tax credits for its creditable acquisitions and that Div 11 defines 'creditable acquisitions'.

15. 'Input tax credit' is relevantly defined in s 195-1 (the 'Dictionary' of the GST Act) to mean an entitlement arising under s 11-20.

16. Section 11-20 of the GST Act provides "*you are entitled to the input tax credit for any *creditable acquisition that you make".*[2] Section 11-25 explains the amount of the input tax for a 'creditable acquisition' is an amount equal to the GST payable on the supply of the thing acquired. However, the amount of the input tax credit is reduced if the acquisition is only partly creditable.

17. Section 11-5 provides that you make a 'creditable acquisition' if:

> *(a) you acquire anything solely or partly for a *creditable purpose; and*
>
> *(b) the supply of the thing to you is a *taxable supply; and*
>
> *(c) you provide, or are liable to provide, *consideration for the supply; and*
>
> *(d) you are *registered, or required to be registered.*

18. An acquisition is "*any form of acquisition whatsoever*": s 11-10(1).

19. Subsections 11-15(1) and (2) deal with 'creditable purpose' as follows:

> *(1) You acquire a thing for a creditable purpose to the extent that you acquire it in *carrying on your *enterprise.*
>
> *(2) However, you do not acquire the thing for a creditable purpose to the extent that:*
>
> *(a) the acquisition relates to making supplies that would be *input taxed; or*
>
> *(b) the acquisition is of a private or domestic nature.*

20. 'Input taxed', according to the definition in s 195-1, has the meaning given by s 9-30(2) and Div 40 of the GST Act. So far as relevant, s 9-30(2) states that a supply is input taxed if it is input taxed under Div 40 of the GST Act. Division 40 of the GST Act specifies the supplies that are input taxed. If a supply is input taxed, then no GST is payable on the supply and there is no entitlement to an input tax credit for anything acquired or imported to make the supply: s 40-1. One of the kinds of supplies that is input taxed under Div 40 is the supply of 'precious metal', as explained below.

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[2] The presence of an asterisk before a term in the GST Act indicates that the term is defined for the purposes of the GST Act, but once a term has been identified by an asterisk, the term is not usually asterisked if it appears later in the same subsection and some basic terms are not identified with an asterisk: s 3-5.

The GST treatments of precious metal: the principal provisions

21. Sections 38-385 and 40-100 of the GST Act are the principal provisions regulating the GST treatment of supplies of precious metal.

22. Section 38-385 of the GST Act provides:

> *A supply of *precious metal is GST-free if:*
>
> *(a) it is the first supply of that precious metal after its refining by, or on behalf of, the supplier; and*
>
> *(b) the entity that refined the precious metal is a *refiner of precious metal; and*
>
> *(c) the *recipient of the supply is a *dealer in precious metal.*
>
> *Note: Any other supply of precious metal is input taxed under section 40-100.*[3]

23. A 'refiner of precious metal' is defined in s 195-1 as "*an entity that satisfies the Commissioner that it regularly converts or refines precious metal in carrying on its enterprise*". A 'dealer in precious metal' is "*an entity that satisfies the Commissioner that a principal part of carrying on its enterprise is the regular supply and acquisition of precious metal*": s 195-1.

24. Section 40-100 provides:

> *A supply of *precious metal is **input taxed**.*
>
> *Note: If the supply is the first supply of precious metal after refinement, the supply is GST-free under section 38-385.*

25. The apparent conflict between s 38-385 and s 40-100, which both deal with precious metal in different ways, is resolved by s 9-30(3), the effect of which is that where a supply would be both GST-free and input taxed, the supply is GST-free.

26. On any view of the GST Act, the best GST outcome for a supplier is the making of GST-free supplies. This is because if a supply is GST-free, then no GST is payable on the supply *and* an entitlement to an input tax credit for anything acquired to make the supply is not affected: s 38-1.

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[3] The "notes" at the base of each of ss 38-385 and 40-100 help to explain the interaction of ss 38-385 and 40-100. See ss 4-1, 4-5 and 4-10 as to the status of notes. Broadly, they form part of the Act but are non-operative material.

27. As we have explained, the applicant's entitlement to claim certain input tax credits, which is the essential issue in this proceeding, depends upon whether it was making GST-free supplies or input taxed supplies of precious metal.

28. A supply of metal that does not meet the definition of 'precious metal' will be a taxable supply if the provisions of s 9-5 are satisfied. It is unnecessary in the present case to set out the requirements of a 'taxable supply' as it was not in dispute, at least before the Tribunal, that the relevant supplies of scrap gold *to* the applicant by the third-party suppliers were taxable supplies.

29. Section 195-1 of the GST Act defines 'precious metal' to mean:

> *(a) gold (in an investment form) of at least 99.5% fineness; or*
> *(b) silver (in an investment form) of at least 99.9% fineness; or*
> *(c) platinum (in an investment form) of at least 99% fineness; or*
> *(d) any other substance (in an investment form) specified in the regulations of a particular fineness specified in the regulations.*

30. It follows gold will only be considered to be 'precious metal' if it is in the requisite form (namely, investment form) and is of the requisite metallic purity, namely, at least 99.5% fineness. The phrase 'investment form' is not defined by the GST Act. In the absence of a statutory definition, the Commissioner articulated a definition in *GSTR 2003/10: Goods and Services Tax; What is 'precious metal' for the purposes of GST?* at [29], as follows:

> *… for gold, silver or platinum to be in an investment form for the purposes of the GST Act, it must be in a form that:*
>
> - *is capable of being traded on the international bullion market, that is, it must be a bar, wafer or coin;*
> - *bears a mark or characteristic accepted as identifying and guaranteeing its fineness and quality; and*
> - *is usually traded at a price that is determined by reference to the spot price of the metal it contains.*

31. It is common ground that the above view was generally accepted. The parties agreed that absent a recognised mark and indication of fineness, a gold bar will not be 'precious metal' irrespective of its degree of metallic purity.

32. As noted above, there is no dispute that the gold bars produced by the applicant were 'precious metal'. It is accepted they were of a fineness of at least 99.5% and they were in

an investment form, so they satisfied two of the fundamental criteria. Nor is it in dispute between the parties that a precious metal bar in an investment form ceases to be in an investment form when it is cut, defaced or otherwise damaged (even though its 99.5% fineness may be unaffected).

33. Where the requirements of s 9-5 are met, supplies of metal other than 'precious metal', such as gold that is not in investment form (referred to as 'scrap gold' in this decision), are taxable supplies on which GST is payable by the supplier under s 9-40 of the GST Act. It follows that, where a supplier made a taxable supply of scrap gold to the applicant, GST was included in the purchase price paid for the scrap gold, regardless of whether the supplier remitted the GST to the Commissioner: ss 9-70 and 9-75.

34. We set out the statutory provisions relevant to the discussion of the Div 165 issue and to the issue of administrative penalties further below.

35. We should lastly refer to s 14ZZK(b) of the TAA 1953. The operation of that section is well understood. It requires the taxpayer to establish the Commissioner's assessments were excessive, and persuade us what were the correct (or more nearly correct) assessments. It also places an obligation on the taxpayer to establish the decisions regarding non-remission of administrative penalties should not have been made, or should have been made differently.

BACKGROUND FACTS

The applicant

36. To understand the applicant's business, one must know more about how it was formed, the individuals behind it and their ambitions for the applicant.

37. The applicant was registered as a company on 29 November 2011. At all material times, Jane Simpson and her father, Francis Gregg, were two of the four directors of the applicant. Ms Simpson and Mr Gregg controlled a company named Fraja Pty Ltd that owned 50% of the applicant. Ms Simpson and Mr Gregg were also directors of Australian Bullion Company (NSW) Pty Ltd (***ABC NSW***). It is not in dispute that ABC NSW was a 'dealer in precious metal': see above at [23]. The trading name of ABC NSW was at all relevant times 'ABC Bullion'.

38. The other two directors of the applicant were the brothers Phillip Cochineas and Andrew Cochineas who, together with their associates, indirectly owned 50% of the applicant through interposed entities including Chryso Capital Pty Ltd. Mr Phillip Cochineas and his associates also owned and controlled Palloys Pty Ltd and its related entities (***Palloys***). The Palloys group was involved in jewellery production and included AGS Metals Pty Ltd (***AGS Metals***), which had a Brisbane office; and a Melbourne based business, PJ Williams and Associates (***PJ Williams***).

39. The applicant registered for GST on 1 December 2011 and accounted for GST on a monthly basis. It lodged its first Business Activity Statement (***BAS***) for the monthly tax period ended 29 February 2012. As already noted above, the monthly tax periods that are the subject of this dispute are the monthly tax periods February 2012 to June 2014, inclusive.

40. From February 2012, the applicant traded as 'EBS & Associates' and described its business to the Commissioner as involving the acquisition and refining of scrap and other metal in order to produce precious metal for sale to dealers.

The applicant's business and key personnel

41. Mr Phillip Cochineas was the managing director of the applicant's business from 29 November 2011 (the date of its incorporation) to 31 August 2015, when the applicant ceased trading.

42. Mr Phillip Cochineas was the applicant's principal witness and provided two affidavits as well as oral evidence at the hearing. He was cross-examined at length. The cross-examination included several testy exchanges that reflected his confidence in the applicant's GST position and opposition to the Commissioner's position. Much of his evidence is uncontroversial, although we will have a good deal more to say about it and the applicant's decision not to call some other witnesses in due course. We will refer to Mr Phillip Cochineas as ***Mr Cochineas*** throughout these reasons and we will identify his brother, Mr Andrew Cochineas, using his full name.

43. Mr Cochineas has been employed in the gold industry for over 10 years and, more recently, he served on 'The Gold Industry Group' board of directors, a group which represents the interests of gold producers, explorers, prospectors and service providers in

Australia. He holds a Bachelor of Commerce (Accounting) and Bachelor of Laws as well as a Masters of Business Administration. He was well positioned to recognise and capitalise on, along with his associates, a business opportunity in the gold industry.[4] He said, in 2011, he and his associates saw the need for a new business that consolidated various stages of the production and marketing of precious metal. They hoped to establish a "*fully vertically integrated refining and bullion dealing model*" that brought together a refiner capable of processing large amounts of scrap metal and a recognised precious metal hallmark with which to stamp the bullion.[5] They saw an opportunity to work with *secondary refining material* (that is, existing material such as scrap gold, consisting of jewellery and recycled gold from various users) as opposed to *primary refining material* (gold that was sourced directly from mines). Mr Cochineas explained there were many small players in the secondary refining sector of the market. We are satisfied that explanation of their purpose is incomplete. We will have more to say below about the significance of the GST treatment of precious metals to the joint venturers' business plans for the applicant.

44. The applicant was formed as a joint venture between ABC NSW and Palloys to acquire an existing assaying, refining and precious metals' manufacturing business known as the 'JSPL Business'. Mr Cochineas explained that business had hitherto operated as a toll refinery. A toll refinery refines scrap metal for other businesses on contract. It charges a fee for its refining services. The toll refiner does not acquire the metal it refines, nor does it sell the output. It provides a service and delivers the refined product back to the owner. The JSPL Business was attractive to the applicant because it possessed:

- strong assay and analytical capability;
- significant capacity to refine silver and gold accompanied with relevant know-how (Mr Cochineas referred to its experience in two refining techniques as a particular asset);
- a history of providing assay and refining services to existing bullion dealers; and
- good brand recognition in the Australian scrap metals market.[6]

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[4] Hearing Book, Volume 3, pp 2,038-2,039; Affidavit of Phillip George Cochineas sworn 8 December 2017 (***First Cochineas Affidavit***), [34].

[5] Hearing Book, Volume 3, pp 2,038-2,039; First Cochineas Affidavit, [34]-[35].

[6] Hearing Book, Volume 3, p 2,037; First Cochineas Affidavit, [31].

45. Mr Cochineas and his associates proposed a different business model for the applicant. Their model combined the assets of the existing JSPL Business and elements of their other Palloys' businesses, together with their industry contacts, experience, access to capital and know-how.

46. The arrangement between ABC NSW and Palloys was contemplated as early as 20 May 2011, according to minutes of a meeting titled 'Project Goldfinger' held on that day (***the Goldfinger Minutes***). The meeting was attended by Ms Simpson, Mr Gregg and Messrs Andrew and Phillip Cochineas. The Goldfinger Minutes recorded that a special purpose company (ultimately the applicant), owned equally by ABC NSW and Palloys, would be incorporated to acquire the JSPL Business. ABC NSW would provide the applicant with an interest-bearing gold and silver loan, and Palloys would provide daily management services for a fee. According to the Goldfinger Minutes, the applicant would develop an advanced assaying laboratory with the industry's fastest turnaround. The plan contemplated ABC NSW and Palloys directing all their refining work to the applicant. It was also anticipated the applicant would exclusively produce ABC hallmarked bullion bars and own the intellectual property in the ABC hallmark. The applicant would focus on refining scrap of at least 18 karats (that is, metal with a fineness of at least 75%). It would send all other scrap metal with lesser fineness to different refiners. One of these refiners was Produits Artistiques Métaux Précieux (***PAMP***), which is a London Bullion Market Association (***LBMA***) accredited Swiss refiner. ABC NSW was at all relevant times the exclusive Australian distributor of PAMP bars.

47. The distinction between primary refining material and secondary refining material looms large in these proceedings. The joint venturers expected it would be easier to enter and disrupt, if not dominate, the secondary refining sector of the gold market given their business model, existing relationships with third parties who would become key suppliers of the refinery, and experience in the precious metal industry. Mr Cochineas said there were more significant barriers to entry into the sector of the market that dealt with primary refining material. He insisted it was always intended the applicant would move into that sector in due course, although it was unclear what steps were taken to that end by the applicant.

48. Attached to Mr Cochineas's first affidavit was the 'Project Goldfinger Term Sheet' dated 1 September 2011 which, amongst other things, set out the services to be provided by the

applicant after it was established. The document stated the applicant was to develop a state-of-the-art assaying laboratory with the fastest turnaround in the industry, and was "*to perform refining services in its own right and also for ABC and Palloys*". It was also stated that, generally, *"[the applicant] is to assay only and send all melted scrap to PAMP or other refinery*" with ABC NSW to arrange preferential rates for the applicant. "*Only 18ct+ scrap to be refined at [the applicant]*", it explained.[7]

49. As noted above, the applicant was incorporated on 29 November 2011 to give effect to the joint venture plans. ABC NSW and Palloys entered into a Shareholders' Agreement on or about 30 November 2011 that explained how the whole business was to work. Curiously, we were not provided with a final copy of the Shareholders' Agreement even though Mr Cochineas deposed that it was executed on 30 November 2011. Instead we were given a copy of a draft which we assume captures the agreement of the parties. We know the draft was apparently prepared by Mr Andrew Cochineas, one of the applicant's directors, when he was working at a law firm. We also know the Shareholders' Agreement was extensively discussed with Ms Simpson and that Ms Simpson sought her own independent legal advice for ABC NSW from another law firm, as revealed from the following extracts of a lawyer's email to Ms Simpson dated 17 October 2011:

> *…my understanding of the EBS Palloys deal is as follows (please let me know if I have any of this wrong);*
>
> *EBS currently operates a gold refining business. There are other aspects to the EBS business but you are only interested in the assaying/refining/barring aspects ("Business").*
>
> *You [ABC NSW] and Palloys (in partnership, on a 50/50 basis) wish to acquire the Business and have already established "Newco" to conduct the Business. A significant motivation is to obtain the benefit of the current GST-free "first supply from a refinery" exemption.*
>
> *In other words, you will be able to have gold refined and barred by Newco with the "ABC Refining" mark. Those bars (I assume) will then be marketed by you and/or your network of distributors under your standard distribution agreement.*
>
> *Similarly, Palloys will channel all its assaying/refining/barring business through Newco.*
>
> *…*
>
> *6. Under clause 6.3, ABC is obliged to "loan" precious metals to the Group pursuant to "Loan Agreements". You didn't mention anything about gold loans. Not*

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[7] Hearing Book, Volume 3, p 2,133.

sure what this is all about?? It's one thing for the Company to be providing services; it's another for it to be "owning" gold??[8]

50. Ms Simpson replied to the above email on the same day, in relation to the abovementioned query (amongst many others raised by the lawyer), as follows:

> *Newco has to have the use of gold to conduct the refinery – that is the whole basis for the business model we are proposing. In most instances, Newco will only be assaying gold – the actual refining will be occurring in Switzerland at PAMP. What will happen is that Newco will assay a client's gold and then pay out on the basis of the assay i.e. Newco will not wait for the actual refining to have taken place. In this regard, the gold provided as the gold loan will be used to pay out the customer.*[9]

51. The applicant acquired the JSPL Business on 1 February 2012 and says it commenced operations as a general refiner on or about that date.

52. The Commissioner did not dispute the applicant was a 'refiner of precious metal' as defined in s 195-1. Accordingly, we find the applicant did commence refining operations. We make that finding notwithstanding the initial plans for a more limited operation. The documents above suggested the early focus was on assaying while the actual refining occurred at PAMP.

53. While we accept the eventual scope and scale of the refining operations evolved beyond what was contemplated in the foundational documents we have described, those documents are significant for another reason. They make clear the features of the GST Act were squarely in the mind of the joint venturers from the beginning. As a general refiner (as distinct from a toll refiner), the applicant acquired scrap gold on its own account. The scrap gold was converted into precious metal, that is, gold bullion in investment form, that the applicant planned on selling GST-free to dealers in precious metal – including to ABC NSW, which was involved in the joint venture. As noted above, the lawyer for ABC NSW highlighted *"[a] significant motivation is to obtain the benefit of the current GST-free 'first supply from a refinery' exemption."*

54. Mr Cochineas confirmed the investors in the new business were conscious from the outset of the importance of adhering to the requirements of the GST Act for the making of

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[8] Hearing Book, Volume 7, pp 5,802-5,803.

[9] Hearing Book, Volume 7, p 5,803.

GST-free supplies. Mr Cochineas annexed a document to his first affidavit that was described as a 'Policy Document' prepared in early 2012 in conjunction with Ms Simpson, amongst others.[10] The Policy Document explained the applicant's plans to ensure the new venture was able to be classified as a 'refiner' pursuant to the GST Act to be able to deliver GST-free supplies of bullion onto the market. We will have more to say about those practices and strategies in the course of our discussion of the application of Div 165. For present purposes, it suffices to note the Policy Document relevantly canvassed whether the applicant was a refiner under the GST Act by reference to the definition of the term 'refiner of precious metal' in s 195-1 of the GST Act and the meaning of 'precious metal', also defined in s 195-1. It also separately canvassed whether the applicant was "*a recycler according to the [GST] Act*" – although we note there is no such term in the GST Act. The Policy Document recorded that the applicant acquired material which is "*essentially unuseable by jewellers*" (sic) and "*reworks this material into useable form*". It was not clear what the authors meant by that statement. In any event, the authors of the Policy Document reached the following conclusion:

> *…[the applicant] is therefore a recycler of precious metals, as well as a refiner in a technical, meticulous and literal way…*[11]

55. This brings us to the acquisitions of scrap gold made by the applicant. We were told the applicant initially expected to source its material from local suppliers of scrap gold, even though there were many potential foreign suppliers of relatively pure secondary refining material, especially in Asia. Mr Cochineas explained offshore suppliers would be approached to "*fulfil latent capacity and subject to funding*".[12] We were told the Shareholders' Agreement between the joint venturers anticipated they would direct any of their individual refining needs (or those of their subsidiaries) to the applicant, and – to the extent the joint venturers were in the business of acquiring precious metal from a refiner – they would acquire that precious metal from the applicant. As already noted above, one of the joint venturers was ABC NSW, a dealer in precious metal.

56. Mr Cochineas said the applicant also invested heavily in the refining operations.[13] He said the applicant acquired new plant and equipment and hired more staff with experience and

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[10] Hearing Book, Volume 3, pp 2,040 and 2,189-2,192; First Cochineas Affidavit, [40].

[11] Hearing Book, Volume 3, p 2,190.

[12] Hearing Book, Volume 3, p 2,041; First Cochineas Affidavit, [44].

[13] Hearing Book, Volume 3, p 2,043; First Cochineas Affidavit, [51(e)].

expertise. The applicant "*became the largest private assaying and refining business in Australia, second only in output to the Perth Mint*".[14] The applicant was also accredited on 13 August 2014 by various industry bodies and aimed to comply with relevant Australian Standards for the analysis of gold, silver and their alloys.[15]

57. The detail of this investment – and its consequences – is interesting. Philip Williams, a chemist who had sold his Melbourne-based business named 'P J Williams' to AGS Metals (see [38] above), was engaged by the applicant (and other entities in the Palloys group) to provide metal consultancy services. Mr Williams gave evidence for the applicant. He explained he had been engaged by the applicant to review the JSPL Business operations when they were acquired by the applicant. He recommended upgrades to the existing plant to make it an all-service refinery. He also recommended the acquisition of plant including additional furnace capacity, fume cupboards and scrubbers.[16] Mr Williams recalls those recommendations being made in mid-2012. He said improvements were made over time. He referred, in particular, to the acquisition of a new, much larger furnace which would enable the refinery to melt material more efficiently.[17] Mr Williams said the capacity of the aqua regia[18] plant was increased between early 2012 and April 2013 with the addition of fume cupboards. He also recalled up to 30 employees were working in the refinery by April 2013. The workforce comprised a chief chemist and an assistant, one to two people working in the aqua regia area, three to four people in the furnacing and smelting area, ten people in the barring area and three to four people in the vault. There were another six to eight people in administration.[19]

58. While there appears to have been significant investment in plant and equipment after the refinery was acquired by the applicant, Mr Cochineas explained in his statement that annualised production staff wages (crudely speaking, labour costs) more than tripled

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[14] Hearing Book, Volume 3, p 2,044; First Cochineas Affidavit, [52].

[15] Hearing Book, Volume 3, pp 2,044 and 2,196-2,197; First Cochineas Affidavit, [52]. The applicant did not obtain LBMA accreditation, although a successor entity did in December 2015.

[16] Transcript p 360.

[17] Transcript p 360.

[18] Aqua reqia refining is a process by which scrap gold is melted and cast into flaky granules, which are then dissolved in a mixture of nitric and hydrochloric acids. The dissolved mixture is then reacted with sodium sulphite to selectively precipitate pure gold as a fine powder, which is filtered, washed, dried, melted and granulated. This process is used for batches of combined refining material with less than 12% silver contaminants to 99.99%+ metallic purity gold; Hearing Book, Volume 3, p 2,069; First Cochineas Affidavit, [140(b)].

[19] Transcript pp 376-377.

between 2012 and 2015. Yet he also acknowledged *"the annual gold refining capacity did not increase markedly as a result of these improvements, remaining largely static at approximately 30 tonnes of fine gold per annum"* notwithstanding all this investment.[20]

59. That is puzzling, at least at first glance. What was the point of all that investment if it did not yield an increase in output? We have formed the view that much of the evidence about investment in plant and staff was a red herring, at least for present purposes. To understand why that is so, one must appreciate the full import of the applicant's business model and the decision to focus on secondary refining material that was already substantially pure. As we will explain, the majority of the scrap gold supplied to the applicant during the Relevant Period was already at least of 99.99% fineness. It follows some of the refinery processes were not engaged, or not engaged to the same extent as they would have been if the applicant had been refining scrap gold that was less than 99.99% fineness. As Mr Williams explained, a refiner of material that was already at or close to 99.99% fineness could rely on a pyrometallurgical process (like smelting and fluxing) rather than having to resort to other processes (like aqua regia refining or chlorination) that were typically used to achieve an increase in the fineness of gold that was less than 99.5% fineness.[21]

60. Put simply, it is quicker, easier and cheaper for the refinery to work with material that has already been refined to the point of fineness expected of investment-grade bullion. That is just as well given the evidence from Mr Williams that the plant and equipment available when the refinery was acquired by the applicant at the start of 2012 was not capable of processing large amounts of low-grade material.[22] But that capacity did not appear to be substantially increased even after the investment in plant and staff resources that occurred in 2012-2013. Mr Williams referred, for example, to the (we would interpolate *ongoing*) difficulties of dealing with 9 karat jewellery that included lots of silver. It seems at least some of *that* material was diverted to PAMP in Switzerland which had the capacity to do more complex refining jobs and deal with lower grade scrap. We note that evidence is consistent with the Goldfinger Minutes (see [46] above), the email exchange between Ms Simpson and the lawyer for ABC NSW (see [49] above) as well as the 'Project Objectives'

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[20] Hearing Book, Volume 3, p 2,043; First Cochineas Affidavit, [51(e)].
[21] Transcript pp 363-364.
[22] Transcript p 364.

identified in the Shareholders' Agreement which also suggest the refinery would only assay material, while melted scrap would be diverted to PAMP (see [50] above).

61. Mr Cochineas confirmed, under cross-examination, that low-grade scrap was diverted to PAMP. Mr Cochineas acknowledged PAMP was an "*overflow or external refiner*" that could be (and was) used for all types of scrap material.[23] He also agreed, under cross-examination, that the applicant preferred to send PAMP low-grade material. He said that was because of the prohibitive cost of transporting higher grade scrap.[24] His evidence on this point was consistent with the evidence given by Mr Williams and another metallurgist, Stephen Lowden. Mr Lowden was also employed by AGS Metals. He assisted the applicant as a metallurgist from time to time. Mr Lowden, who gave evidence for the applicant, said the applicant was unable to refine jewellery that included three or more metals in the amalgam. For those jobs, he explained, one needed to use a "*full metal refiner*" like PAMP rather than a "*two metal refiner*" like the applicant.[25] That evidence appears to be consistent with the plan foreshadowed in the Goldfinger Minutes, but it does not assist in determining how much low-grade scrap was actually diverted to PAMP (or any other refiner, for that matter). One reason for the uncertainty lies in the fact low-grade scrap was not necessarily sent directly to PAMP by the applicant. Mr Cochineas stated it was provided to ABC NSW, which had the business relationship with PAMP. ABC NSW would then deliver the scrap gold to PAMP. But mystery remains over the extent to which PAMP was used.[26] Ultimately, whatever business activities were going on with PAMP are irrelevant as the input tax credits in dispute concerned the applicant's acquisitions of scrap gold of at least 99.99% fineness and not acquisitions of low-grade scrap gold.

62. Given what we know of the applicant's business model, it makes sense that the applicant would divert low-grade scrap to PAMP so the applicant was free to concentrate on scrap that was already pure, and thus quicker, easier and cheaper to process. We are satisfied the speed, difficulty and cost of the refinery processes were important variables affecting the applicant's profitability. The applicant's gross margin in respect of its refining business

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[23] Transcript p 260.

[24] Transcript pp 260-261.

[25] Transcript p 470.

[26] We acknowledge there is material included in the T-documents which hints at the extent of the relationship with PAMP. Most obviously, there are emails from Mr Cochineas foreshadowing the applicant's plan to send 60kg of metal directly to PAMP in September 2012. One of the emails said this "*will become a regular thing*"; Hearing Book, Volume 7, p 6,241.

was primarily derived from the difference between the price at which it bought the fine metal content in scrap from its suppliers and the price at which it sold the finished product as precious metal, namely, investment-grade bullion, to dealers. It also earned some fees from refining, assaying and barring. There was no suggestion the applicant had other income sources, and it did not make a significant amount from toll refining. The fact the refinery process could be made more efficient by economising on processes calibrated to deal with relatively pure scrap surely worked to the benefit of the applicant and its joint venturers who were interested in capturing more of the value of the production process. Creating a vertically integrated supply process allowed the applicant and ultimately the joint venturers to capture value that might otherwise be diverted to an outside refiner.[27]

63. There were other benefits to this model. Mr Cochineas explained one of the principal risks in the business was the volatility of the gold price. If the refining process was delayed while small lots went through the refinery, the applicant was exposed to the risk of a significant variation in the gold price between when the scrap was acquired and the time when the finished bars were sold to dealers.[28] The dealers, for their part, were also concerned about the reliability of the refiner. Could the applicant quickly fill orders for gold bars as required? Whilst the vertically integrated supply chain and scale were important responses to those challenges, we are satisfied it was the increase in turnover (turnover being a function of volume *and* speed) that was ultimately crucial. The applicant's turnover increased dramatically in the Relevant Period, as discussed further below. An increase in turnover meant the applicant was able to reduce the time lag between receipt of the scrap gold and payment for the finished product. It thereby reduced its own exposure to movements in the gold price. It also meant the applicant was able to fill orders more quickly, and it could plan better in response to anticipated fluctuations in demand. That benefitted the applicant and the joint venturers who valued a secure, flexible and stable supply of refined material.

The applicant's funding and payment arrangements

64. The applicant's funding arrangements were an integral feature of its business model. Whereas the former refining business it acquired had operated as a toll refiner, the

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[27] Hearing Book, Volume 3, p 2,039; First Cochineas Affidavit, [35].

[28] Hearing Book, Volume 3, p 2,042; First Cochineas Affidavit, [49]-[50].

applicant was in the business of acquiring scrap gold and then selling the finished product. Quite apart from any capital required to effect process improvements by hiring staff and acquiring and upgrading plant and equipment, it needed working capital to fund its trading. To that end, the joint venturers agreed in the Shareholders' Agreement to provide metal and general finance loans to assist the applicant to make acquisitions of scrap. The applicant also obtained an overdraft facility from a bank that initially provided $3 million in credit. The facility was extended to $10 million by June 2013.[29] But the increase in turnover and the stable relationships with suppliers of scrap gold and dealers in precious metal also created a kind of virtuous cycle. Mr Cochineas pointed out the applicant's ability to acquire scrap gold from a regular supplier and sell the finished product to a regular dealer almost simultaneously reduced the risk associated with volatility and *"acted as a natural hedge against pricing risk inherent in precious metal trading"*. That innovation eliminated the need for costly external hedging facilities and improved cashflow.[30]

65. That brings us to the payment arrangements the applicant was offering to suppliers. The essence of those arrangements was described by Mr Cochineas as follows:

> *A key strategy to drive Refining Material to [the applicant] rather than its Australian competitors was to institute a system of fast payment to suppliers of Refining Material based upon preliminary testing of that Refining Material by [the applicant] or sometimes by the supplier itself. I was aware that this system was a common international industry practice but prior to the advent of [the applicant] I had formed the view based on my investigations of the Australian gold refining industry that it was not widely practised by Australian refiners.*[31]

66. Mr Cochineas said that strategy was essential to the applicant's success because it gave the refinery's clients "*a significant cashflow advantage and a point of difference compared to doing business with [the applicant's] Australian competitors*".[32] He said the payment practices were common overseas, so he knew the plan was workable, but it was not common in Australia in 2012. Mr Cochineas explained the applicant's principal competitor at the time took up to three weeks to make financial settlement with its clients. The applicant, in contrast, paid a supplier once the scrap was in the physical possession of the applicant or in the physical possession of its supplier (also referred to as a client of the applicant). That practice was important because many suppliers (or clients) would not ship

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[29] Hearing Book, Volume 3, p 2,041; First Cochineas Affidavit, [46].

[30] Hearing Book, Volume 3, p 2,041; First Cochineas Affidavit, [45].

[31] Hearing Book, Volume 3, p 2,044; First Cochineas Affidavit, [53].

[32] Hearing Book, Volume 3, p 2,044; First Cochineas Affidavit, [54].

the scrap to the applicant until they were paid. The ongoing relationships between the applicant and various suppliers meant it was easier to adjust a supplier's account if there was variation between the results of the preliminary analysis and the results returned from the more detailed assay and laboratory testing.

The applicant's turnover

67. The applicant's turnover increased dramatically during the Relevant Period. In the last five months of the 2012 financial year when the applicant took over the JSPL Business, Mr Cochineas said the turnover was $63,278,865. In the 2013 financial year, turnover surged to $594,838,536, an eye-watering 392% increase on the previous financial year. In the 2014 financial year, turnover increased by a further 25% to $745,785,032, although the growth was affected by attention from the authorities during that period, as explained below. Turnover decreased by 12% to $654,159,601 in the 2015 financial year.

The warrants, the audits and the assessments

68. While the applicant's turnover began to swell, there were some early warning signs of trouble ahead. Mr Cochineas said the Australian Federal Police (***AFP***) executed search warrants at the applicant's premises as well as the premises of ABC NSW on 29 October 2013. He told us the warrants were issued in connection with an investigation of third parties. Documents were seized from the applicant and the contents of some of its computer systems were also downloaded. More importantly, Mr Cochineas said some of the applicant's suppliers of scrap gold had their bank accounts frozen by the Commissioner. It became impossible to continue dealing with those entities. Mr Cochineas added the applicant voluntarily ceased dealing with some suppliers that were unwilling or unable to supply declarations to the applicant confirming their compliance with the GST laws. The investigation and other regulatory activity also created bad publicity which started to affect the applicant's trade.[33]

69. The Commissioner began to conduct more GST compliance activity in relation to the applicant's business, which impacted on its operations and relationships. The Commissioner retained refunds claimed in the applicant's BASs for October and November 2013 for verification. The questions over the claims for input tax credits and the

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[33] Hearing Book, Volume 3, p 2,047; First Cochineas Affidavit, [64].

delay in paying the GST refund caused the applicant to become more cautious in its payment strategies. That new-found caution appears to have caused some of the suppliers to move their business away from the applicant.[34] While Mr Cochineas said the Commissioner completed the audit of those particular BASs and paid a GST refund to the applicant on 13 December 2013, further GST audits followed. In particular, a more detailed and extensive audit was launched by the Commissioner on 8 July 2014. Mr Cochineas said the applicant's business did not change in any substantive way during the periods covered by the GST audits, and it continued to claim input tax credits of over $40 million during the 2015 financial year.[35]

70. On 8 April 2016, the Commissioner issued notices of assessment and notices of amended assessment of net amount disallowing certain input tax credits claimed by the applicant in its BASs in the Relevant Period totalling $122,112,065. The Commissioner also issued declarations and issued alternative notices of assessment negating input tax credits claimed by the applicant in its BASs in the Relevant Period totalling $72,953,611. On the same day, the Commissioner also issued notices of assessment of administrative penalties totalling $58,059,829.75 in relation to the GST shortfall for the Relevant Period.[36] The applicant objected on 28 April 2016[37] and the Commissioner disallowed the applicant's objections in their entirety on 21 September 2016.[38] The applicant applied to the Tribunal for review of the objection decisions on 18 November 2016.

71. Mr Cochineas's evidence suggested he was puzzled by the Commissioner's decision to issue the abovementioned assessments given the behaviour of the ATO's audit team. He recounted the gist of a number of conversations with the leader of the audit team, and he also referred to correspondence and file notes of dealings with taxation officers.[39] Mr Cochineas said the applicant was given the clear impression by the Commissioner's staff that all was in order. He said the applicant expected it would receive a clean bill of health. In particular, he said the head of the audit team had opined on 17 March 2014 in a meeting with various persons present that refining material which was already 99.99%

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[34] Hearing Book, Volume 3, p 2,047; First Cochineas Affidavit, [64].
[35] Hearing Book, Volume 3, p 2,048; First Cochineas Affidavit, [69].
[36] Hearing Book, Volume 1, pp 21-30.
[37] Hearing Book, Volume 3, pp 1,842ff.
[38] Hearing Book, Volume 1, pp 4ff.
[39] Hearing Book, Volume 3, pp 2,048-2,050; First Cochineas Affidavit, [70]-[73].

fineness when acquired could still lead to the making of GST-free supplies of precious metal and give rise to creditable acquisitions.[40] That advice goes to the heart of the issue in dispute. While we have no reason to doubt Mr Cochineas's account of the meeting, a statement from an officer in those circumstances cannot on any view be construed as binding the Commissioner in relation to any GST shortfall. It was not a private binding ruling for the purposes of the TAA 1953.

The supply of refinery material to the applicant

72. That brings us to a more detailed discussion of the supply of scrap material to the applicant, and the refining processes that followed. We will have more to say in the context of our discussion of the application of Div 165 about some of the main suppliers that dealt with the applicant during the Relevant Period. For now, it is enough to say the applicant entered ongoing relationships with a few entities that regularly supplied large quantities of scrap gold. Mr Cochineas deposed that the applicant went through a process of due diligence and 'on-boarding' with each of the suppliers and negotiated terms on an individual basis. We note that some of the suppliers had previously dealt with one of the joint venturers, but it was agreed amongst the joint venturers that those entities should be encouraged to deal with the applicant after 2012.

73. We have already explained the applicant decided to focus – at least initially – on suppliers of secondary refining material. Mr Cochineas explained the material came in a number of different forms, including precious metal bars that were hallmarked and in investment form. Mr Cochineas said very few bars in the form of investment-grade bullion were acquired and, when they were, the applicant did not claim any input tax credits because the supplies to the applicant were not taxable supplies.[41]

74. Mr Cochineas confirmed the applicant was supplied with a larger number of damaged or defaced precious metal bars. These bars bore a hallmark, but they were cut, melted or otherwise damaged in a way that made them untradeable as 'precious metal'. Some of the bars had been previously produced and hallmarked by the applicant, but many of them were hallmarked by somebody else, including PAMP. Mr Cochineas said these bars

[40] Hearing Book, Volume 3, p 2,049; First Cochineas Affidavit, [71].
[41] Hearing Book, Volume 3, pp 2,051-2,052; First Cochineas Affidavit, [76].

were sold to the applicant by the third-party suppliers as taxable supplies on the basis they were not in investment form. That meant the applicant paid GST-inclusive prices for these acquisitions of scrap gold. Mr Cochineas added the applicant claimed input tax credits in the usual way, just as it did for other acquisitions of things acquired for carrying on its enterprise. The applicant took the same approach to claiming input tax credits when it acquired other scrap gold including:

- metal blobs or slugs;
- metal granules;
- jewellery, jewellery scrap and jewellery by-products; and
- metal industrial by-products.

75. We were provided with samples of many of these items to inspect. Subsequently, photos were substituted for the purposes of the Tribunal's records.[42] The samples we were shown all weighed the same and we were told they were all at least 99.99% fineness gold. That meant each of the samples was of the requisite degree of fineness expected of 'precious metal'. But they did not all look the same.

76. The precious metal bar we were shown was instantly recognisable by its shape and hallmark. The bag of gold granules was also distinctive. The blob or slug was a curiosity. It was the size of a misshapen cricket ball, its surface was pitted (compared to the precious metal bar, which was smooth) and it appeared to have flecks of debris embedded within it. We were also shown what appeared to be a bag of dirt. The dirt was in fact an ore containing 99.5% gold. The gold in the ore was invisible to the naked (or perhaps untutored) eye. It was, to us, indistinguishable from the silicon and other rock material. We were told some Australian gold mines produce gold that is already 99.5% fineness as it emerges from the earth – but the pure gold still needs to be separated from the material in which it is found.

77. The applicant's records do not permit us to determine the form of the refining material supplied to the applicant in every case. There was an extensive discussion of job sheets during the hearing. Those sheets included some detail about each acquisition. In the latter

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[42] Exhibit A1.

part of the relevant period, some of the job sheets were accompanied by a photograph. Mr Cochineas pointed out the job sheets were ultimately used for calculating how much money should be paid to the supplier, which depended on the quantity of pure metal. They were not intended to keep a detailed record of the form of the material acquired.[43]

78. Some of the refining material was relatively impure in the sense the scrap gold included numerous other metals which had to be separated during the refining process to create metal that was of 99.5% fineness or better. For example, we were told a lot of the gold jewellery was combined with silver or palladium, and some of the other material might include other metals so the percentage of pure gold in the sample was substantially less than 99.5%. But it turns out the greater portion of the secondary refining material supplied during the Relevant Period, and the acquisitions to which the Commissioner's assessments related, were actually at least 99.99% fineness. According to the applicant's laboratory analyses, around 22% of the material supplied during the period was less than 99.99% fineness gold.[44] That means *on the applicant's calculations* around 78% of the scrap it acquired was already refined to the level of metallic purity that was expected of precious metal. We accept some of that material – perhaps a great deal of it, like the metal blobs with visible flecks of dirt – was contaminated with non-metallic impurities like silicon. In some cases, we accept those contaminants were introduced, perhaps unintentionally, by the suppliers.

79. Mr Cochineas said some of the suppliers might have melted down gold bars or other material that was 99.99% fineness using primitive equipment in uncontrolled conditions. That process could introduce non-metallic contaminants (like silicates and borates) into the melted product.[45] Those non-metallic contaminants had to be eliminated by the applicant as part of its processes, even if the product already had a high level of *metallic* purity.

80. That evidence was tested during cross-examination, but we do not understand there to be a dispute that 78% of the scrap gold was already at 99.99% fineness when it arrived in the

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[43] Hearing Book, Volume 3, pp 2,062-2,063; First Cochineas Affidavit, [115].
[44] Hearing Book, Volume 3, pp 2,053 and 2,060; First Cochineas Affidavit, [79] and [107].
[45] Hearing Book, Volume 3, pp 2,061-2,062; First Cochineas Affidavit, [110].

applicant's refinery.[46] As noted above, it is in respect of those acquisitions of scrap gold that the Commissioner disallowed the applicant's input tax credits. We will return to that evidence below, but first we should pause to describe in more detail what happened when the material was delivered to the refinery.

The applicant's refining processes

81. When material was delivered to the refinery, it was handled by the inventory team who completed a job sheet recording the weight and a basic description of the material and the name of the supplier. After October 2013, a photograph was taken of the material upon delivery as well. A preliminary analysis of the metallic content was done at that point using an XRF (x-ray fluorescence) gun, a hand-held device, and recorded on the job sheet.[47] The XRF gun is designed to read the characteristic fluorescent x-rays emitted by particular metals. It is a quick and non-intrusive method for assessing the metallic content of the sample.[48] The material would then be placed on a trolley which was wheeled to the vault with the job sheet attached to await the melting process.

82. Mr Cochineas insisted *every* piece of scrap gold received was melted down and subjected to the smelting and fluxing processes. He said that was the invariable practice, even where the scrap in question was defaced or damaged precious metal bars that bore a recognised hallmark confirming the bar was of 99.99% fineness. The motivation behind that practice was clear from the evidence. No refinery, and certainly not the applicant, was prepared to accept anybody else's word for the purity of the product it acquired. Every refinery was worried about fraud. We were told there were well known examples of apparently intact bullion bars being touted for sale that, when cut or melted, revealed less valuable substances like tungsten inside. Mr Cochineas also referred to an example of a bar that was hallmarked as being of 99.99% fineness but analysis showed it was, in fact,

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[46] Hearing Book, Volume 3, p 2,060; First Cochineas Affidavit, [107].

[47] Hearing Book, Volume 3, p 2,062; First Cochineas Affidavit, [114]. There was evidence that refinery staff would occasionally examine scrap proffered for sale using the XRF gun *before* it was delivered. That analysis was used to calculate the amount of any advance payment that would be made to the supplier. Nothing turns on this evidence for present purposes, although it did tend to underline the importance which the applicant attached to fast turnaround for established suppliers.

[48] Hearing Book, Volume 3, p 2,055; First Cochineas Affidavit, [87].

only at 99.98% fineness.[49] He insisted nothing could be accepted at face value. The material received always had to be melted and analysed for quality control purposes.[50]

83. Fraud was not the only risk. It seems a number of the suppliers melted down material they had on hand into blobs in an effort to conceal the source of that material. We were told by Mr Cochineas that suppliers were concerned that if they revealed the sources who supplied them, the refiner might approach those sources directly and cut the supplier out of the process. That attempt to cover tracks had consequences, however. The melting often occurred in uncontrolled conditions and introduced impurities into the blobs that were not present before. Mr Cochineas pointed out material which had been inexpertly melted might also include an amalgam of different metals that were not spread consistently throughout the sample. Smelting and fluxing ensured all of the material supplied in a particular batch could be reduced to a homogenous amalgam that could then be properly sampled for its metallic purity.[51]

84. It was clear from the evidence that the primary objective of the initial smelting and fluxing process was to provide quality assurance. This aim was corroborated by Mr Williams.[52] Having melted the material, there was an opportunity to eliminate any non-metallic impurities that might be present, like silicates, borates, carbides, sulphides and other compounds of these materials. The initial melt also permitted the refiner to identify and remove low-melting-point alloy metal like lead, zinc or tin. Mr Williams pointed out in his oral evidence that the very act of melting the gold in controlled circumstances in and of itself caused the gold to become purer. Every time gold was melted, it increased its metallic fineness as silver and other metals were volatilised.[53] Mr Cochineas said the next steps taken beyond that point were determined by the nature of the material.

85. Mr Cochineas described a few common processes that the refinery was capable of undertaking to reduce or eliminate metallic impurities and to remove non-metallic contaminants.[54] Apart from primary smelting and fluxing, these processes include

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[49] Hearing Book, Volume 3, p 2,063; First Cochineas Affidavit, [119].
[50] Hearing Book, Volume 3, p 2,063; First Cochineas Affidavit, [117].
[51] Hearing Book, Volume 3, p 2,063; First Cochineas Affidavit, [120].
[52] Transcript p 369.
[53] Transcript p 366.
[54] Hearing Book, Volume 3, p 2,064-2,065; First Cochineas Affidavit, [122].

oxidation, dross extraction, and silver drenching. He explained these processes were carried out in a dedicated area of the refinery which was serviced by exhaust systems called scrubbers that collected fumes. Mr Cochineas said quantities of volatilised gold and silver were collected by the scrubbers over time. That material was fed back into the refining process in due course.[55]

86. While the metal was still in a molten state, Mr Cochineas said it was standard practice to collect a dip sample that could be analysed by the metallurgical laboratory attached to the refinery. The dip sample was collected using a small glass pipette. We were told the laboratory took four assays of every dip sample. The assay result was recorded in the laboratory and the dip samples were kept for three months. The assay result was also recorded on the job sheet, which could then be used to determine the final financial settlement with the supplier.[56] This settlement was also known as the 'out-turn'.

87. Mr Cochineas explained that, at the time of out-turn, the applicant was taken to purchase the total number of grams of fine metal content of the material supplied (that is, the number of grams of 99.99% fineness gold or other investment-grade metal that existed within the batch of molten material). The purchase price was determined by the terms agreed with each supplier but was generally calculated with reference to the prevailing spot price for the metal, less a discount and less any fees payable to the applicant by the supplier under the terms. The price was recorded in a tax invoice created by the supplier in question or in a recipient-created tax invoice (a kind of tax invoice recognised by s-29-70(3) of the GST Act) prepared by the applicant. That was the usual practice, at any rate. In some cases, Mr Cochineas explained, the grams of gold were simply credited to the supplier's fine metal account with the applicant. In either event, the molten gold sitting in the refinery became the property of the applicant at that point.

88. Once the metal had passed into the applicant's ownership, the applicant was free to subject the molten product to such other refining and manufacturing processes as it saw fit in order to extract the pure metal. Refinery employees were responsible for deciding what further refining processes should be used.[57] Mr Cochineas said the options included

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[55] Hearing Book, Volume 3, p 2,065-2,066; First Cochineas Affidavit, [125].

[56] Hearing Book, Volume 3, pp 2,066-2,067; First Cochineas Affidavit, [127]-[132].

[57] Hearing Book, Volume 3, p 2,071; First Cochineas Affidavit, [141].

further smelting and fluxing, aqua regia refining, chlorination refining, electrolytic refining, and electro-parting refining.[58] As we understand the evidence, these processes were undertaken selectively depending on the characteristics of the particular batch of molten material. It is not clear from the evidence which processes were actually undertaken in each case.

89. It stands to reason that the applicant's processes would have been made somewhat easier (or at least less costly and time consuming) if the refining material had already been refined and was reliably at least of 99.99% fineness when received. Mr Cochineas's evidence certainly left the impression – we think by design – that all of the classic refining processes were available to be used on all of the scrap received into the refinery. But that seems unlikely given the ongoing limitations on the refinery's capacity and the fineness of the scrap gold the applicant was dealing with. The evidence of Mr Williams was that pyrometallurgical processes alone – that is, smelting and fluxing – were usually sufficient to increase the metallic fineness of gold by a few decimal points from, say, 99.8% or even 99.5% to at least 99.99%.[59]

90. We note Dr Stewart Murray, a metallurgist called by the applicant as an independent expert witness, made essentially this point during cross-examination. He explained smelting and fluxing were a more efficient way to achieve small increases in fineness if that was all that was required compared to alternative approaches, like aqua regia refining.[60] It also seems unlikely the applicant would do more than what was required given what we understand to be its business model which prized quick turnaround, especially as Mr Cochineas emphasised the business worked with very tight margins.[61]

91. As the molten material was processed, the batches might be combined and subject to further assays and (if the batch included lower grade material) refining processes until the applicant was left with batches of 99.99% fineness gold. Once the laboratory gave its approval, the material was granulated and placed into 5kg bags. Those bags of fine granule stock were undifferentiated in the sense it was no longer possible to determine the original source of the material. When the applicant was ready, the fine granules were

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[58] Hearing Book, Volume 3, pp 2,069-2,071; First Cochineas Affidavit, [140].

[59] Transcript pp 363-365.

[60] Transcript p 418.

[61] Transcript pp 280-281.

melted, poured into moulds and cast into bars that were inspected, hallmarked and readied for sale to dealers in precious metal.

92. During the relevant period, the applicant supplied most of its precious metal to two companies, ABC NSW and Ainslie (***Dealers***), each being a 'dealer in precious metal', as defined in s 195-1. In respect of the 2013 calendar year, approximately 63% of the applicant's customer receipts were from ABC NSW, with 30% of customer receipts from Ainslie.[62] As noted above, ABC NSW was associated with the applicant as Ms Simpson and Mr Gregg were at all relevant times two of the applicant's directors and indirectly owned 50% of the applicant. Ainslie was not related to the applicant. All of the bullion sold by the applicant to the Dealers was on the basis it was GST-free. That means the applicant did not charge GST to the Dealers and, significantly, for present purposes, it claimed to be entitled to its input tax credits for the GST charged to it by the third party suppliers with respect to its acquisitions of scrap gold.

93. We will explore the relationship between the applicant and ABC NSW in more detail in the course of our analysis of Div 165. For present purposes, it is enough to say they had interests in common. The applicant depended on ABC NSW to place orders for precious metal as it was one of very few dealers to which the applicant sold its precious metal. ABC NSW relied on the applicant to manufacture and supply it with investment-grade bullion so that ABC NSW could make supplies to its customers. The closeness of the relationship and the predictability of their interaction helped smooth the operation of the applicant's business.

Summary of Findings

94. In summary, the evidence we have discussed above comes to this: we accept the applicant was a refiner of precious metal and that it acquired a large volume of scrap gold from a relatively small pool of suppliers as part of a business strategy which targeted suppliers of secondary refining material. The applicant and or its joint venturers were familiar with many of the main suppliers. Indeed, some of the main suppliers were directed to the applicant by one of its founding investors, ABC NSW, in order to increase turnover at the refinery. We accept the applicant did not always know where the suppliers sourced

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[62] Hearing Book, Volume 5, p 4,224; Expert Report of Dawna Wright dated 13 March 2018 (***Wright First Report***), [7.4.6].

their material because suppliers tended to be secretive for reasons of their own. Having said that, we do know the applicant knew a few of its main suppliers were sourcing material from ABC NSW in particular, and that a proportion of the material delivered to the applicant was in the form of damaged bars or in other forms which were likely to have been comprised of gold that had been in investment form but which had been melted to disguise its provenance. We set out below our further findings in relation to a few of the main suppliers in the course of our analysis of the application of Div 165 of the GST Act.

95. We accept at least 78% of the material acquired by the applicant from the suppliers was 99.99% fineness at the time of acquisition. However, we also accept some of that material – we cannot say how much – might have been supplied in a form that included non-metallic contaminants that had to be removed before the material was transformed into investment-grade bars that were hallmarked and ready for sale by the applicant to its dealers, ABC NSW and Ainslie. We should note, at this point, that the Commissioner accounted for the different provenance and nature of scrap gold, and the final assessments and objection decisions were only in respect of the 78% of the material at 99.99% fineness.[63]

96. We are also satisfied, and accordingly find, the applicant invariably subjected the material it received from its suppliers to smelting and fluxing processes as part of its quality-control process – but this pyrometallurgical process was *not* conducted for the purpose of making material it knew had a metallic purity of at least 99.99% into a product that was *more* than 99.99% fineness. We accept the very act of melting the scrap in controlled circumstances by the applicant might incidentally increase the metallic purity of the material, but we do not accept that was the purpose of the initial melt in every case. Instead, the purpose was to provide quality assurance and facilitate the efficient production of investment-grade bullion, namely, gold bars of at least 99.5% fineness, *in an investment form,* for supply to the dealers in precious metal.

97. It is unclear how much of the scrap material identified as being of at least 99.99% fineness was subjected to additional refining processes (such as aqua regia refining) as opposed to merely processing the molten material into standardised batches that could be granulated and cast into precious metal bars. We are satisfied the applicant had the incentive and

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[63] Hearing Book, Volume 2, pp 1,676-1,677.

intention to limit the time-consuming, finicky and costly refining processes (like aqua regia refining) as opposed to the routine pyrometallurgical and manufacturing processes that could be used to create the finished product.

98. So much for the production process. We now turn to what the applicant did with its output.

DID THE APPLICANT MAKE CREDITABLE ACQUISITIONS?

99. The applicant's ability to make GST-free supplies – and thus its entitlement to claim input tax credits on the acquisitions of scrap gold of at least 99.99% fineness that went into the manufacture of the end product said to be GST-free – depends on whether it can satisfy s-38-385 of the GST Act and, therefore, make creditable acquisitions under s 11-5. The requirements in s 38-385 (b) and (c) have been satisfied because it is uncontroversial the applicant was a 'refiner of precious metal' and the Dealers were 'dealers in precious metal'. (Those paragraphs are not without significance for the present discussion. As arises from a consideration of the relevant statutory context, it is important to observe that not *all* first supplies of precious metal are GST-free.) The only part of s 38-385 which is in dispute in these proceedings is s 38-385(a) which requires us to ask whether the supply of the finished product to the Dealers:

> *…is the first supply of that precious metal after its refining by, or on behalf of, the supplier[?]*

100. The Commissioner says that question is resolved against the applicant because it was not engaging in 'refining', whereas the applicant insists it was. The argument about the meaning of the word 'refining' was framed as follows: the Commissioner argued 'refining' is properly regarded as a process that is solely concerned with increasing the metallic fineness or purity of the gold, whereas the applicant argued it might also include processes that are about (or *also* about) eliminating non-metallic impurities and contaminants.

101. With that approach in mind, the parties provided a good deal of evidence about the applicant's operations to assist us in determining whether the applicant was 'refining' the scrap gold it acquired. We also heard from people in the industry to ascertain their understanding of the term. But in analysing the interpretation of the word 'refining', it is vital to remember the word does not appear in a vacuum. The word must be read in the context of the GST Act as a whole, beginning with the text of s 38-385(a). That approach

makes sense given we are not simply trying to interpret and apply a word. We are trying to answer a question posed by s 38-385. In doing so, the plain meaning of the word 'refining' must be considered, although any established trade or industry usage of the word is likely to be important in a case like this where the legislative provisions are addressed to a particular sector of business or commerce.

102. As we will explain, the precise scope of the word 'refining' becomes tolerably clear after one has regard to the expert evidence concerning trade usage. Ultimately, though, the true meaning of the word 'refining' is shaped by the language of s 38-385(a) read in its context – a context which includes ss 38-385 and 40-100 and the definition of 'precious metal' in s 195-1. To put it differently, the meaning of 'refining' becomes clear when one has regard to the context and the way in which all the words in the relevant provisions inform and interact with each other. But, as we shall also explain, the answer to the question posed in s 38-385(a) – and thus the outcome of this case – does not solely depend on whether we adopt the interpretation preferred by the applicant or the Commissioner.

Defining 'refining'

103. The High Court has made clear one does not approach the interpretation of a statute by guessing at parliament's objective and thereafter treating the language as if it said what parliament is taken to have meant the statute to say notwithstanding the words actually used: see, for example, *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* (2009) 239 CLR 27 at 47. As the High Court warned in *The Queen v A2; The Queen v Magennis; The Queen v Vaziri* [2019] HCA 35 at [35], one must not lose sight of the words actually used in the provision in the process of construction. Judges (and decision-makers) are not artisans who hammer language into shape and smooth over irregularities to achieve a collector's design, and they cannot assume parliament meant something completely different to what it actually said. The best guide to parliament's purpose will always be found in the language of the statute *in its context*: see *Magennis* at [32]-[33]. The challenge is to work out what that language means in a given case. That is a challenge precisely because words often have a variety of meanings. Where a word has more than one possible meaning, the purpose of the statute, properly understood from the context, helps us to select the (available) interpretation of the word which best achieves what parliament intended.

104. In *Magennis*, Kiefel CJ and Keane J (who were part of the plurality and with whom the minority judges did not disagree as to the principles) explained the process in these terms, at [32]-[33] (citations omitted):

> *The method to be applied in construing a statute to ascertain the intended meaning of the words used is well settled. It commences with a consideration of the words of the provision itself, but it does not end there. A literal approach to construction, which requires the courts to obey the ordinary meaning or usage of the words of a provision, even if the result is improbable, has long been eschewed by this Court. It is now accepted that even words having an apparently clear ordinary or grammatical meaning may be ascribed a different legal meaning after the process of construction is complete. This is because consideration of the context for the provision may point to factors that tend against the ordinary usage of the words of the provision.*
>
> *Consideration of the context for the provision is undertaken at the first stage of the process of construction. Context is to be understood in its widest sense. It includes surrounding statutory provisions, what may be drawn from other aspects of the statute and the statute as a whole. It extends to the mischief which it may be seen that the statute is intended to remedy. "Mischief" is an old expression. It may be understood to refer to a state of affairs which to date the law has not addressed. It is in that sense a defect in the law which is now sought to be remedied. The mischief may point most clearly to what it is that the statute seeks to achieve.*

105. In its written submissions, the applicant discussed the ordinary settled meaning of the word 'refining'. It is a plain English word. We were referred to dictionary definitions, including the Macquarie Dictionary which defines the expression 'to refine' as including "*to bring by purifying to a finer state or form*". But that definition does not offer a useful guide in the circumstances of this case. In particular, that definition does not shed any light on the distinction (if there is one) between removing metallic and non-metallic impurities. Nor does the dictionary definition concern itself with degrees of purification.

106. The Commissioner attempted to assist by referring us to a number of cases where courts have opined on the meaning of the word 'refining' in various legislative contexts. We were referred in particular to the decision of the Victorian Supreme Court in *Attorney-General v Colonial Sugar Refining Company Ltd* (1900) 26 VLR 83. In that case, Madden CJ, the judge at first instance, was required to consider what amounted to 'refining' in a sugar refinery where a variety of processes were undertaken in the course of processing molasses, the raw material that becomes sugar. The issue arose because refined and unrefined molasses were subject to different rates of duty under the relevant Victorian customs' legislation. Madden CJ explained (at 84):

The evidence shows that the process which 'molasses' undergoes at the defendant company's works practically amounts to a straining, by which foreign matters, debris, and rubbish are extracted, and nothing more.

107. His Honour found those processes should be contrasted with the further processes which were undertaken on the molasses, that included (at 84):

> *...passing it over charcoal beds, so as to eliminate from it substances naturally in it, that is intrinsic as distinguished from extrinsic impurities…This passing over charcoal is the test which constitutes refinement as distinguished from straining and other processes.*

108. Interestingly, his Honour referred to gold refining in the course of his reasons to illuminate the distinction he was making. He observed (at 85-86):

> *Nobody speaks of the refinement of the gold when only separating the quartz and other like substances in which it is found, but which form no inherent part of it, from the metal. One only refines when one comes to retort the gold and the inherent alloys, silver, copper etc, are extracted from it.*

109. Two things should be noted about the judgment. First, his Honour emphasised the importance of ascertaining the meaning of the word in the scheme of a particular Act. As his Honour explained (at 85):

> *The word 'refined' may mean, in ordinary language, any degree of purification, complete or otherwise; but when one looks at an Act of Parliament, one must treat such a word in the same sense throughout.*

110. Second, the judgment was set aside on appeal by the Full Court. The judges on the Full Court did not go as far as Madden CJ in defining the word 'refined'. Justice Holroyd explained (at 87):

> *Nothing is harder to define than the meaning of a word, particularly in the English language, which comes to be applied in different senses to different substances. As, for instance, when this particular word 'refined' is applied to sugar and to beer, it denotes two entirely different processes. We speak of this same 'refining' in relation to gold, and we there indicate a process of an entirely different nature from other refining. Without therefore attempting to define this word 'refined' in general, we feel confident that it can mean, as used in the schedules of these Acts of Parliament, but one thing, and that the article which the Customs authorities seek to tax is properly taxable under the name of 'molasses refined'.*

111. Notwithstanding those remarks, the Commissioner points out the approach of Madden CJ found favour with Sundberg J in *Caltex Australia Petroleum Pty Ltd v Commissioner of Taxation* [2008] FCA 1951, a case that dealt with oil refining. After reflecting on cases like

Colonial Sugar Refining where the meaning of the term was considered, his Honour concluded (at [96]):

> *...some form of purification – in the sense of removing intrinsic impurities – was central to the concept of 'refinement'…*

112. The Commissioner also referred to a number of American authorities where the meaning of the word 'refining' had been considered. In *Mayes, Internal Revenue Collector v Paul Jones and Co* (1921) 270 F. 121, for example,[64] the Sixth Circuit Court of Appeals was asked to consider whether processes designed to remove charcoal contaminants from distilled spirits amounted to 'purifying' or 'refining' within the meaning of the legislation in question. The Court explained [at 132]:

> *'Purifying' or 'refining', as used in these statutes, undoubtedly means the removal, chemical change, or modification of objectionable soluble matter, held in solution in the distilled spirits, united therewith and forming a constituent and integral part thereof, so that its removal, chemical change, or modification will change or alter, in some degree, at least, the character or quality of the entire volume of the distilled spirits.*

113. We agree with the Commissioner that context is important, but that is rather the point. Citing cases that use the word 'refine' in *different* legislative contexts does not necessarily assist us in divining the meaning of that word when it is used in s 38-385(a) of the GST Act. To put it differently, one does not ordinarily determine the meaning of a word in the context of an Act as a whole by having regard to a different Act. But the discussion in those cases tends to confirm the ordinary usage of the word in this provision is attended by some ambiguity – especially the comparatively recent decision in *Caltex* that cited the obiter remarks of Madden CJ in *Colonial Sugar Refining*.

114. It is particularly important in a case like this to consider whether the language in s 38-385 has a trade or technical meaning that may not be apparent to those outside the relevant industry. Courts and tribunals typically construe trade or technical terms in a statute consistent with the way those terms are used in the industry to which the statute applies. That is because, as Dixon J explained in *Herbert Adams Proprietary Limited v Federal Commissioner of Taxation* (1932) 47 CLR 222 at 227:

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[64] See also *General Crude Oil Company v Department of Energy* (1978) 585 F.2d 508; and *Grinding Balls Inc v Director, Division of Taxation* (1980) 424 A.2d 470, 176 N.J. Super. 620.

> *A revenue law directed to commerce usually employs the descriptions and adopts the meanings in use among those who exercise the trade concerned.*

115. The decision in *Herbert Adams* arose out of a dispute over whether a particular item was exempt from sales tax. Sales tax cases – and cases about the concessional treatment of particular items described in the sales tax, customs and GST legislation – provide a rich vein of authority on the interpretation of trade and technical language: see, for example, *Collector of Customs v Agfa Gevaert Ltd* (1996) 186 CLR 389; *Pepsi Seven-Up Bottlers Perth Pty Ltd v Commissioner of Taxation* [1995] FCA 1655; *Zeroz Pty Ltd v Deputy Commissioner of Taxation* [1997] FCA 199; *P&N Beverages Australia Pty Ltd v Commissioner of Taxation* [2007] NSWSC 338. Revenue provisions often employ technical language because the provisions are intended to be understood by people in the industry who apply the legislation and for whom such terms are common-place. Justice Conti explained this approach in *Saga Holidays Ltd v Commissioner of Taxation* [2005] FCA 1892 at [29]:[65]

> *A contextual consideration involved in construing the GST Act is that GST is traditionally a tax on 'businessmen', to be assessed and paid by businessmen, and to be administered and interpreted in accordance with the understanding of businessmen. This is in contrast to other forms of taxation, such as income tax, which is ordinarily assessed by the Commissioner.*

116. Where it is apparent from the context that language may have a trade or technical usage, courts (or the Tribunal in this case) are able to receive expert evidence from those in the industry to assist in ascertaining the meaning of words: see, for example, *Agfa Gevaert Ltd* at 399-402; *Pepsi Seven-Up Bottlers* at [34]; see also *Herbert Adams* at 227.

117. To that end, the applicant relied on the expert evidence of Dr Murray, a metallurgist with extensive experience in the gold industry. He was also a senior officer of an international industry association for over a decade. He provided two expert reports on behalf of the applicant and gave evidence at the hearing. We have no reason to doubt his expertise. He was asked to comment on the meaning of the term 'refining'. He addressed himself to that issue in his first statement and was asked about his understanding of the term during cross-examination.[66]

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[65] Affirmed on appeal *Saga Holidays Ltd v Commissioner of Taxation* [2006] FCAFC 191 at [29] per Stone J and [70] per Young J.

[66] Hearing Book, Volume 4, p 3,092.

118. Dr Murray claimed "*most people have a general understanding of the concept*" but went on to acknowledge the word 'refining' might be used in different ways in a gold refinery compared to, say, a gold mine. He was asked to comment, in particular, on the definition of 'refining' contained in 'A Guide to the London Precious Metals Markets' published by the LBMA and LPPM (London Platinum & Palladium Market) in 2008.[67] The glossary refers to 'refining' as "*the separation and purifying of precious metals* ***from other metals***" [emphasis added].[68] That definition is consistent with the Commissioner's narrow view of the 'refining' concept. Dr Murray agreed that definition remained current in the industry publication and acknowledged it replicated the definition in another older industry publication. As it happens, Dr Murray had some involvement in the publication of the 2008 volume. He was asked whether he accepted the definition; he explained he regretted it. He said:

> *I don't like it, and if I'd thought hard enough about it at the time [the document was published] I would not just have allowed it to be included…I don't like the definition because its more the type of refining that occurs when gold is extracted from bores. In that sense, it is the first part of the refining that we were looking at a minute ago [i.e., the separation of different metallic impurities].*[69]

119. Dr Murray elaborated on this response in an exchange with Deputy President McCabe:

> *[Deputy President] One of the issues of this case may well be, if some of the gold that's coming in is already four nines, there is not really much more separation from other metals to be done; the question is whether it's being separated from other non-metallic impurities, whether that also constitutes refining?*
>
> *[Dr Murray] I prefer the concept of removing impurity metals from the bullion, which I think is what refining is in refineries, rather than the removal of the precious metal from other metals, which I think is what happens at the mine.*
>
> *[Deputy President] Is it also about removing and separating the metals from other non-metallic material, is that also refining?*
>
> *[Dr Murray] Yes.*

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[67] Hearing Book, Volume 6, p 5,276.

[68] Hearing Book, Volume 6, p 5,321.

[69] Transcript p 419.

[Deputy President] Here I notice it says, "The separation and purifying of precious metals from other metals." You are suggesting, am I right, that it goes further than that, and it is actually separating precious metals from other materials?

[Dr Murray] Yes.

[Deputy President] Metals and non-metals alike?

[Dr Murray] I think so, yes. [70]

120. We are not satisfied Dr Murray's evidence establishes a common industry-wide or established trade usage of the word 'refine' that is consistent with the broad interpretation preferred by the applicant. While Dr Murray's evidence suggests he may be personally sympathetic to such an interpretation, he acknowledged in cross-examination that the word might be used differently in different contexts within the wider industry. We acknowledge he said he had come to regret the categorical definition of the word in the glossary to the Guide extracted at [118] above, but the publication of that narrower definition in a recognised refining industry guide does not suggest a different, more expansive interpretation is in common usage throughout the industry. On the contrary, the definition in the glossary suggests that if there is a trade or industry usage that applies to the manufacturing process under consideration in this case, it is consistent with the meaning preferred by the Commissioner.

121. We think the Commissioner has the better of the argument for an additional reason which is apparent from the text of the legislation. The definition of 'precious metal' in s 195-1 focuses on the metallic fineness of the product. While there are also requirements as to form (that is, that it must be in 'investment form', see above at [30]), the very definition of precious metal suggests that processes which are not directed towards increasing the metallic purity of the gold above the requisite standard of fineness (99.5% in the case of gold) should not be regarded as 'refining'. We also take comfort from the fact the definition of 'refiner of precious metal' in s 195-1 references an entity that "converts or refines" which suggests the GST Act distinguishes refining from other manufacturing processes. We will have more to say about the implications of this definition below.

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[70] Transcript p 420.

122. Ultimately, of course, it is unnecessary for us to exhaustively or conclusively define the word 'refining'. We only need decide whether we are satisfied on the evidence before the Tribunal that the activities carried on by applicant in this case are properly regarded as 'refining' for the purposes of s 38-385(a). We do not need to resolve tricky questions over whether similar activities carried on in different contexts – at a mine, for example, or in a refinery manufacturing precious metals from primary refining material that consisted of ore containing gold that was already naturally 99.99% fine gold when it came out of the ground – would be regarded as 'refining'. Those are questions for another day.

123. Yet the complexity of those questions might be more illusory than real. At this point in our analysis, it is helpful to recall that focusing exclusively on the meaning of the word 'refining' may not entirely capture (let alone answer) the question we are required to ask in this case pursuant to s 38-385(a). Even if we accepted 'refining' comprehends a wider variety of processes designed to convert the scrap gold into precious metal as the applicant contends, it remains for us to answer the statutory question that governs the outcome of this case.

Answering the question posed by s 38-385

124. As *Magennis* reminds us, our interpretation of particular words in a statute must be informed by context and purpose. The immediate context of the word 'refining' is s 38-385, but we should also be conscious of s 40-100 and the definition of 'precious metal' in s-195-1. We will address the text of those provisions below but we should first remind ourselves of parliament's purpose. That purpose is evident from the language and scheme of the legislation.

125. We have already discussed the operation of the GST legislation earlier in these reasons. We explained there that both ss 38-385 and 40-100 create exemptions to the ordinary rules that impose liability to GST on taxable supplies. These special arrangements in respect of dealings in gold came about because gold refined in Australia is sold into what is effectively a world-wide market. Australian businesses dealing in gold would be at a commercial disadvantage if they had to pay GST on supplies of precious metal in circumstances where their international rivals are able to sell without the GST being embedded in the price: see *Very Important Business Pty Ltd and Commissioner of Taxation* [2019] AATA 1120 at [29]. Sections 38-385 and 40-100 are the means by which Parliament achieved the

effect of a level playing field in the market for precious metals. The two provisions have separate but complimentary roles to play in that endeavour.

126. Section 40-100 is, in effect, the default position in relation to supplies of 'precious metal', an expression defined in s 195-1. Section 40-100 says supplies of precious metal will be input taxed. That means those supplies do not attract GST. It follows that precious metals can be supplied from one dealer to another without the burden of the GST falling on either party to the transaction, or on future parties. The parties to those transactions do not need the ability to claim input tax credits because there is no GST being passed along the supply chain. But refiners who make the first supply after manufacturing the precious metals have a problem. They will typically have paid a GST-inclusive price for the scrap gold and other products (like chemicals) acquired for use in the manufacturing process. If the subsequent supplies of precious metals are input taxed, the refiners will be unable to claim input tax credits in respect of the GST paid on the prices for the scrap gold. The refiners would be forced to bear the burden of the tax since it is not transmitted to the end user. That is where s 38-385 comes in. It creates an exception for refiners from the default rule contained in s 40-100. It allows refiners to make GST-free supplies in certain circumstances but does not affect their entitlement to claim input tax credits. That exception to the more general rule in s 40-100 ensures Australian refiners will not be disadvantaged in the market for precious metal. But the exception is only available in the limited circumstances identified in s 38-385. If *all* the requirements of that section are not satisfied, the exception to s 40-100 is not engaged. In that event, the supplies will be input taxed and there will be no entitlement to claim input tax credits.

127. The focus of our enquiry is on s 38-385(a) which refers to "the first supply of *that* precious metal *after its refining*". The clear objective in using the word 'that' in reference to 'precious metal' and 'after its refining' is to confine the application of the exception to the output of processes which culminate in the production of a physical item – a particular ingot or bar – that meets the definition of 'precious metal' in s 195-1. Once the scrap gold has been refined to become precious metal, the first supply of *that* precious metal thereafter will be (subject to the satisfaction of other requirements in s 38-385) GST-free. However, subsequent supplies of that precious metal will be input taxed. We reject the applicant's argument that the phrase '*that* precious metal' refers to a precious metal bar not previously in existence. Nothing in the relevant paragraph suggests that is the meaning of that phrase.

128. Properly applied, ss 40-100 and 38-385 work so that recycled gold that was already at least 99.5% fineness when acquired by the refiner (whether it is supplied to the refiner in the form of defaced bars, or melted slugs which may be comprised of defaced bars, or in any other form which is comprised of gold *that has previously been refined into precious metal*) will be input taxed pursuant to s 40-100 when it is melted down and then returned to precious metal form and supplied to dealers. This is because it is not the first supply of that precious metal after its refining to a fineness of 99.5%. A refiner cannot transform a supply of bullion that has already been treated as GST-free into further GST-free supplies through the simple expedient of melting down the bullion, subjecting it to routine smelting and fluxing processes and re-casting it. The refiner's position does not improve because it must treat the material to eliminate extraneous matter introduced into the gold in the course of the recycling process. That would be fiscal alchemy. Parliament plainly responded to the risk of that occurring by including the limitation in s 38-385(a) which ensured a refiner could not repeatedly 'pass go' with the same product and collect the metaphorical $200 in input tax credits. To find otherwise would frustrate the logic of the GST Act.

129. We stress that our analysis of the statutory question we identified stands regardless of whether the word 'refining' is given the meaning contended for by the Commissioner, or the more accommodating meaning preferred by the applicant. Even if other processes were regarded as refining as the applicant contends, s 38-385(a) effectively requires that a line be drawn under the refining once the scrap gold has been refined to the requisite 99.5% fineness standard. Thereafter, processing of those precious metals back through the refinery should be regarded as recycling, not refining. Interestingly, that is exactly how the applicant itself described what it was doing in the Policy Document that described its original business plan.

130. We are reinforced in our views by the definition of 'refiner of precious metal' in s 195-1 which, relevantly, refers to an entity that regularly "*converts or refines *precious metal*". We understand from the evidence the conversion of precious metal entails the changing of precious metal into another kind of precious metal, for example, larger investment-grade bullion bars are transformed into smaller bars or vice versa. On the evidence before us, all gold would be subjected to smelting and fluxing processes, including that which

was being converted.[71] Significantly, however, s 38-385 of the GST Act does not confer GST-free supply status to the first (or any) supply made by a refinery when it *converts* 'precious metal', as s 38-385(a) is limited to the first supply after "*its refining*". The production of new investment-grade bars after their conversion are, therefore, not GST-free supplies, notwithstanding they are new 'precious metal'. They are instead input taxed under s 40-100.

131. In those circumstances, we are satisfied the answer to the question posed by s 38-385(a) in this case must be 'No'. Consequently, the applicant is not entitled to claim input tax credits totalling $122,112,065 pursuant to s 11-5, in respect of its acquisitions of scrap gold of at least 99.99% fineness made during the Relevant Period. The applicant has failed to discharge the burden of proving the assessments of net amount issued to it were excessive.

DOES DIVISION 165 OF THE GST ACT APPLY?

132. As explained above, while it is strictly unnecessary for us to consider the application of Div 165 of the GST Act having regard to our conclusion that the applicant is not entitled to claim input tax credits under Div 11 of the GST Act, it is appropriate that we do so as Div 165 was canvassed in considerable detail. There is limited guidance from the courts and the Tribunal as to the operation of Div 165 and, specifically, none that addresses 'missing trader' or 'carousel fraud' arrangements of which the present arrangement is an example, albeit with some differences.

133. Broadly, Div 165 of the GST Act allows the Commissioner to make a declaration negating the benefits obtained from a scheme where the Division applies. For Div 165 to apply it is necessary that there is a scheme, that there is a GST benefit from the scheme, and either the sole or dominant purpose of any of the participants who entered into or carried out the scheme was to obtain the GST benefit or that the principal effect of the scheme was the obtaining of the GST benefit from the scheme. The requisite conclusion must be arrived at after consideration of a list of factors set out in the Division.

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[71] Transcript p 289.

134. The total amount of input tax credits negated by the Commissioner pursuant to Div 165 is $72,953,611.[72] The Commissioner contended as a back up to the no refining issue that, in each monthly tax period during the Relevant Period, the applicant got a GST benefit from a scheme to which s 165-5 applied, as a result of claiming input tax credits for its acquisitions of scrap gold of 99.99% fineness from certain suppliers referred to as ***the Division 165 Supplying Entities***. The details of these suppliers and supply chains are set out further below.

135. The following findings in relation to the Div 165 Supplying Entities and their dealings with the applicant are based, in part, on the lay evidence presented by the Commissioner. This was not challenged by the applicant, except that the applicant broadly submitted the evidence about what the Division 165 Supplying Entities had done was irrelevant to the applicant's GST position. However, as evident from the discussion below, this evidence was clearly relevant to our consideration. We also refer to several T-Documents contained in the hearing book, as identified below and, in addition, to the expert reports of Dawna Wright, a chartered accountant and senior managing director and leader of the Australian Forensic Accounting and Advisory Services practice of FTI Consulting.

136. Ms Wright produced three expert reports dated 13 March 2018, 28 March 2018, and 21 September 2018. Amongst other matters, Ms Wright was initially instructed by the Commissioner to comment on the volume of fine gold (gold with at least 99.99% fineness) received by the applicant during the 2013 calendar year and to identify the quantity of gold received from certain entities which she referred to as Intermediaries[73] and Supplying Intermediaries[74] and which, relevantly for the proceedings, included the Division 165 Supplying Entities. Ms Wright was also asked to comment on any features, trends or discrepancies observable from the documents recording the supply to the applicant of gold by the Intermediaries and Supplying Intermediaries as well as from bank statements reflecting payments made for the gold supplied to the applicant by the Intermediaries and the Supplying Intermediaries. Ms Wright was specifically asked to review the documents

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[72] Hearing Book, Volume 1, pp 120-121.

[73] Hearing Book, Volume 5, pp 4,176-4,177; Wright First Report, [3.5.2]-[3.5.3]. ***Intermediaries*** is defined to mean those entities to which the Dealers sold gold bars, being the IPJ Group, Ceylon, the Majid Group, Gold Buyers, YPP, MAK, ABC(A), USH, Focus and GMA.

[74] Hearing Book, Volume 5, p 4,177; Wright First Report, [3.5.4]. ***Supplying Intermediaries*** is defined to mean a subset of the Intermediaries, being IPJ Group, Gold Buyers, Majid Group, MAK, Focus, GMA and Goldborough.

and identify sources of gold supplied to the applicant by reference to the various supply chains involving the Intermediaries and the Supplying Intermediaries, of which the Division 165 Supplying Entities were a subset.

137. Ms Wright was provided with approximately 44,000 documents including bank statements, invoices, job sheets recording the receipt of refining material by the applicant, GST ledgers and other records of the applicant as well as some records of other entities. We were told Ms Wright confined her analysis to the 2013 calendar year because the records obtained by the Commissioner covering the Relevant Period were most comprehensive for that period. We have no reason to doubt that was so, in circumstances where we know the applicant's premises were searched and documents seized pursuant to warrants executed on 29 October 2013. Also, after that date, the applicant's business with some suppliers ceased.

138. Ms Wright was extensively cross-examined by counsel for the applicant notwithstanding that counsel did not have any great disagreement with the reports prepared by Ms Wright.[75] We formed the view that Ms Wright's reports were reliable, comprehensive and based on careful analysis, even though we accept Ms Wright did not detect all manner of trends as discerned by the applicant. For example, she did not comment on the fact the GST paid on the sale of the scrap gold (as part of the price paid by the applicant) was split 70/30 between one of the Division 165 Supplying Entities (the Majid Group) and one of the Intermediaries, Ceylon Exchange Pty Ltd (***Ceylon***). Ms Wright particularly impressed us as having undertaken an objective and detailed forensic analysis of the data, drawing conclusions based on the empirical data. She expressly refrained from adopting any views about the transactions or opinions about compliance with the GST Act. She also made appropriate concessions, including when cross-examined about her observations regarding the very high correlation between sales in certain supply chains. She accepted she had not sought to identify any correlation for purchases from different entities besides the applicant and, further, that the correlations reveal only that the volumes are moving in the same direction, but that the correlations say nothing about the actual volumes sold or whether the same gold was sold.[76] Ms Wright also readily conceded there were gaps and

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[75] Transcript pp 505 and 538-607.
[76] Transcript pp 553-556.

inconsistencies in the documents she was required to review which, of course, made her task more difficult. We accept her reports were, overall, sound and reliable.

139. Ms Wright's summary conclusions and her specific conclusions with regards to the respective Division 165 Supplying Entities are set out below, which we accept, subject to some further comments. In summary, Ms Wright made the following estimates in relation to gold of at least 99.99% fineness supplied to the applicant in the 2013 calendar year:

(a) The applicant received approximately 21,178,722 grams of gold of which 19,161,363 grams (90%) and possibly up to 20,697,651 grams (97%), was already of at least 99.99% fineness.

(b) Of the 21,178,722 grams of gold that the applicant received, approximately 19,631,057 grams (93%) of it was received from Intermediaries and Supplying Intermediaries which included the Division 165 Supplying Entities.

(c) Of the 19,631,057 grams received from Intermediaries and Supplying Intermediaries, 94% was gold of at least 99.99% fineness (but possibly up to 99% was gold of at least 99.99% fineness). Of the 1,547,665 grams received from Non-Intermediaries (namely, suppliers to the applicant that were not Intermediaries or Supplying Intermediaries and, therefore, not Division 165 Supplying Entities), 38% was gold of at least 99.99% fineness (but possibly up to 73%).

(d) Of the 1,547,665 grams received from Non-Intermediaries, 26% was gold purchased in non-fine gold form, that is not being at least 99.5% fineness. Of the 19,631,057 grams received from Intermediaries and Supplying Intermediaries, 0.4% was gold purchased in non-fine gold form.

140. With respect to the conclusion in [139(a)] above, Mr Cochineas calculated the total volume of fine gold received by the applicant as 23,098,513 grams.[77] His number was higher than Ms Wright's figure, because it seems Ms Wright did not take into account the material received by the applicant for toll refining. We accept the figure provided by Mr

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[77] Hearing Book, Volume 6, pp 4,771 and 5,070; Affidavit of Phillip George Cochineas sworn 18 May 2018 (***Second Cochineas Affidavit***), [55].

Cochineas is likely to be more accurate but do not consider that to affect Ms Wright's analysis, which focused on acquisitions and supplies of gold. Separately, Mr Cochineas pointed out Ms Wright's reliance on the various invoices as being indicative of the metallic purity of material received by the applicant was incorrect because the applicant did not purchase the material at the time or in the physical form in which it was received. Rather, the applicant purchased the fine gold content of that refining material as determined after it had undertaken its relevant processes. This was a point Mr Cochineas also repeatedly made at the hearing.[78] Subsequently, Ms Wright addressed this issue where she made further calculations without relying on the invoices.[79] Regardless, we note that on Mr Cochineas' own calculations, 99.5% of the material received by the applicant was of 99.99% fineness from the 'Relevant Suppliers' which included the Division 165 Supplying Entities.[80]

141. We now turn our attention to a more detailed analysis of the Division 165 Supplying Entities, followed by the statutory provisions and our analysis.

The Division 165 Supplying Entities

The IPJ Group

142. The Division 165 Supplying Entities included the following 5 related entities, all controlled by Mr Adrian Catanzariti: Italian Prestige Jewellery Pty Ltd (***IPJ***), Premium Metal Service Pty Ltd (***PMS***), Antel Metals Pty Ltd (***Antel***), 4 Nines Pty Ltd (***4 Nines***), and A1 Metals Pty Ltd (***A1 Metals***). These entities were identified as the '***IPJ Group***' for the purposes of these proceedings. Mr Cochineas stated he understood the IPJ Group operated businesses involving jewellery wholesale, scrap dealing and bullion dealing (gold and silver).[81]

143. IPJ, which had been incorporated in August 2005, was one of the applicant's first major customers. Prior to IPJ selling scrap gold to the applicant, IPJ was a customer of ABC NSW. IPJ had acquired approximately $30,000 worth of precious metal from ABC NSW in

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[78] Hearing Book, Volume 6, p 4,770; Second Cochineas Affidavit, [51]; Transcript pp 54-55.

[79] Exhibit R12, Supplementary Report of Dawna Wright dated 21 September 2018.

[80] Hearing Book, Volume 3, p 2,075; First Cochineas Affidavit, [161] and [163]. ***Relevant Suppliers*** is defined to mean the IPJ Group, the Majid Group, Gold Buyers, MAK, Goldborough, Focus and GMA.

[81] Hearing Book, Volume 3, p 2,078; First Cochineas Affidavit, [168].

2006 and approximately $21,000,000 worth of precious metal from ABC NSW in the period July 2011 to January 2012.[82] That is, in the period immediately preceding the start of the applicant's operations, the IPJ Group and ABC NSW were doing considerable business together. Before that the IPJ Group had made only minor purchases.

144. On or about 30 January 2012, Mr Cochineas and Mr Catanzariti met to discuss their future business together. Mr Cochineas deposed he told Mr Catanzariti that, provided the applicant had the necessary funds and demand from its own bullion dealer clients, the applicant could take as much refining material as IPJ could send.[83] Subsequently, on 7 February 2012, Mr Catanzariti sent an email to Mr Cochineas attaching *"the templates as requested"* which comprised a form for completion by companies for customer identification purposes, as well as a blank tax invoice showing the supply of "*gold granules*". Both documents were on IPJ letterhead but blank as to relevant details such as quantity and prices.[84] No explanation was provided as to why the applicant was seeking guidance as to pro-forma basic documents from the IPJ Group.

145. We know, however, that not long after that lunch meeting there was an arrangement made between the applicant and ABC NSW that ABC NSW would purchase the gold the applicant would acquire from IPJ and others. This was evident from an email sent on 9 February 2012 by Steve Lowden (the Chief Executive Officer of AGS Metals, a Palloys business) to Mr Cochineas and Ms Simpson, as well as others in the Palloys group. Mr Lowden set out the following in that email which contained the subject heading 'Process for Purchase from Italian Prestige & others':[85]

> 1. *Delivery of goods to [the applicant]*
> 2. *Refinery receipt given to client for goods received*
> 3. *Material assessed by [the applicant] staff and assay of goods at [the applicant's] discretion*
> 4. *After assessment and confirmation of purity, Tax invoice received from customer for sale of metal at spot gold price less 2% (not RCTI, unless signed by both parties)*
> 5. *Spot gold price calculated based on Kitco Live US gold bid divided by Aussie Dollar as converted into AUD per gram less 2% (margin)*

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[82] Hearing Book, Volume 3, p 2,445-2,447.

[83] Hearing Book, Volume 3, p 2,080; First Cochineas Affidavit, [175].

[84] Hearing Book, Volume 7, pp 5,844-5,846.

[85] Hearing Book, Volume 7, p 5,857.

6. *[The applicant] raises Tax invoice to [ABC NSW] to sell metal at prevailing spot gold price*
7. *Same day payment made by [ABC NSW] to [the applicant] for Invoiced Metal*
8. *Metal is credited to [ABC NSW] metal account at [the applicant]*
9. *[The applicant] transfer funds by same day EFT to client*

146. On the same day, in a reply email to all, including Ms Simpson and Mr Lowden, Mr Cochineas relevantly stated it was his understanding the volumes will start low for IPJ but will ramp up to 20kg per week.[86] In a reply email from Ms Simpson to Mr Lowden and Mr Cochineas, amongst others, Ms Simpson replied *"yes no probe – if it goes up to 250kg per day we may have to on sell some!"*[87] In a separate email addressed to Ms Simpson only with the same subject heading on 9 February 2012, Mr Cochineas stated *"I also propose starting small with the first transaction … and going through the WHOLE process (even though the numbers will be small) then we can iron out all the bugs."*[88]

147. Within days of that email correspondence, from 14 February 2012, IPJ was acquiring precious metal from ABC NSW on an almost daily basis and the applicant also commenced acquiring scrap gold from IPJ on an almost daily basis.[89] As already noted in [143] above, IPJ was acquiring precious metal from ABC NSW, but now the applicant was also involved and receiving scrap gold from IPJ.

148. During the Relevant Period, IPJ acquired $100,970,890 worth of precious metal from ABC NSW and made sales of scrap gold to the applicant totalling $82,198,766.[90] It was not in dispute that approximately 99.95% of the scrap gold the applicant acquired from IPJ was of 99.99% fineness but was nevertheless scrap gold as it was not in investment form.[91]

149. The second relevant IPJ Group entity, PMS, was incorporated on 2 November 2011. PMS commenced purchasing precious metal from ABC NSW on the same day IPJ commenced trading with the applicant (14 February 2012) and it commenced making sales to the applicant two days later on 16 February 2012. Similar to IPJ, PMS proceeded to acquire

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[86] Hearing Book, Volume 7, p 5,856.
[87] Hearing Book, Volume 7, p 5,856.
[88] Hearing Book, Volume 7, p 5,847.
[89] Hearing Book, Volume 7, pp 6,076-6,099.
[90] Hearing Book, Volume 3, pp 2,448-2,477 and 2,429.
[91] Hearing Book, Volume 3, pp 2,053 and 2,300; First Cochineas Affidavit, [79] and EBS Spreadsheet.

precious metal from ABC NSW and make sales to the applicant on an almost daily basis throughout the Relevant Period. During the Relevant Period, PMS acquired $86,656,507 worth of precious metal from ABC NSW and made sales to the applicant totalling $56,593,830.[92] It was not in dispute that approximately 99.95% of the scrap gold the applicant acquired from PMS was of 99.99% fineness.[93]

150. The position with the other IPJ Group entities, Antel, 4 Nines and A1 Metals, was similar, except they were incorporated later and, consequently, started delivering scrap gold to the applicant later. Antel began delivering scrap gold in July 2012. 4 Nines began delivering in August 2012 and A1 began delivering in February 2013.[94] The evidence suggests Antel, 4 Nines and A1 Metals were established to purchase additional investment-grade bullion from ABC NSW and, like IPJ and PMS, also engaged in selling at least some of that precious metal to the applicant as scrap gold. No cogent explanation was ever provided to us as to why different entities were introduced, nor did the applicant appear to have any concerns with dealing with different entities, with limited (if any) trading history.

151. It was not in dispute that the gold acquired by the IPJ Group from ABC NSW was in precious metal form and the gold sold by the IPJ Group to the applicant was scrap gold even though it was at least 99.99% fineness. This led us to the conclusion that the IPJ Group altered the precious metal in some way between its acquisition and on-sale, in order to deliver it to the applicant in fine gold granule form. As explained below, there is no other credible explanation for how the IPJ Group was able to source scrap gold that was, virtually in its entirety, of at least 99.99% fineness to supply to the applicant in the volumes and with the frequency that it did.

152. An example of the virtually contemporaneous nature of what appears to be a circular flow of transactions is provided by the applicant's first acquisition from A1 Metals on 19 February 2013. On that same day, A1 Metals acquired a 1kg ABC Bullion hallmarked bar from ABC NSW for $50,444.30[95] and sold 989.4g of fine gold granules as a taxable supply to the applicant for $53,825.87.[96] The first significant activity on A1 Metal's bank account

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[92] Hearing Book, Volume 3, pp 2,478-2,505 and 2,429.

[93] Hearing Book, Volume 3, pp 2,053 and 2,300; First Cochineas Affidavit, [79] and EBS Spreadsheet.

[94] Hearing Book, Volume 3, p 2,084; First Cochineas Affidavit, [193].

[95] Hearing Book, Volume 7, p 6,294.

[96] Hearing Book, Volume 7, p 6,301.

statement is a payment from the applicant of $53,825.87 on 19 February 2013 and a subsequent payment on the same day of $50,444.30 to ABC NSW.[97] The bank account statement shows subsequent payments in from the applicant and payments out to ABC NSW on an almost daily basis. Those payments coincide with the purchases from A1 Metals. The bank account statement for A1 Metals also shows regular withdrawals of cash.

153. A review of the applicant's GST detail reports[98] and the statements of sales made by ABC NSW to Antel and 4 Nines[99] shows similar patterns of trading. There were also email exchanges between Mr Cochineas and Ms Simpson which demonstrate the pattern of trading and close communications between the applicant and ABC NSW about the IPJ Group's trading activities. For example, on 5 September 2012, Mr Cochineas wrote to Ms Simpson that the applicant was acquiring approximately 10kg of gold a day for four days of the week from the IPJ Group.[100] By mid-2013, the applicant was regularly acquiring over $1 million a day of mostly fine gold granules (weighing approximately 20kg) from the IPJ Group entities for at least four days a week.

154. Over the Relevant Period, the IPJ Group acquired $295,682,857 in total worth of precious metal from ABC NSW and made sales to the applicant of scrap gold totalling $243,082,723.[101] Sales made to other refiners by the IPJ Group are not relevant to these proceedings although referenced in the Wright First Report.

155. The following transactions on 14 June 2013 are an example of the transactions that occurred between ABC NSW, the IPJ Group and the applicant during the Relevant Period:

    (a) At 9:18am, orders were placed by Mr Sandro Cantanzariti with Ms Baker (Relationship Manager at ABC NSW) for various gold bars for each of the IPJ Group entities (30 orders in aggregate).[102]

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[97] Hearing Book, Volume 8, pp 6,363-6,364 and Volume 3, p 2,506.
[98] Hearing Book, Volume 7, pp 6,075-6,099.
[99] Hearing Book, Volume 3, pp 2,513-2,529 and 2,530-2,544.
[100] Hearing Book, Volume 7, p 6,242.
[101] Hearing Book, Volume 3, p 2,429.
[102] Hearing Book, Volume 8, p 6,668.

(b) Between 9:21am and 9:53am, ABC NSW issued invoices to each of the IPJ Group entities totalling $1,399,582.20.

(c) At some time before 12:14pm, the IPJ Group entities rendered invoices to the applicant for the supply of 29,427 grams of fine gold granules totalling $1,475,279.82.[103]

(d) Between 12:14pm and 12:16pm, the applicant paid the invoices by electronic funds transfer.

(e) At 12:19pm, Mr Sandro Catanzariti (the brother of Mr Adrian Catanzariti) confirmed with ABC NSW that all stock had been paid.

(f) The bank accounts for each of the IPJ Group entities show a payment received from the applicant on 14 June 2013 (matching the invoice rendered by that entity) and a subsequent payment out to ABC NSW (matching the invoice rendered by ABC NSW).

156. Ms Wright concludes in respect of the 2013 calendar year, as follows:

(a) 86.1% of total payments made by the IPJ Group were to ABC NSW;[104]

(b) she has not identified any significant sources for the purchase of the gold by IPJ Group that was scrap gold to enable them to, in turn, sell scrap gold to the applicant without melting down the investment-grade gold themselves;[105]

(c) the applicant was the IPJ Group's key customer representing 74.6% of its total receipts;[106]

(d) when A1 Metals and Antel received funds from the applicant, the receiving company paid ABC NSW between 93% and 96% of the funds received from the applicant on

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[103] Hearing Book, Volume 10, pp 8,495-8,522.
[104] Hearing Book, Volume 5, p 4,245; Wright First Report, [7.10.5(b)].
[105] Hearing Book, Volume 5, p 4,246; Wright First Report, [7.10.5(c)].
[106] Hearing Book, Volume 5, pp 4,246 and 4,313; Wright First Report, [7.10.5(d)] and [12.2.6(c)].

the same day for purchases of investment-grade bullion. This trend occurred in 68% of transactions for Antel and in 66% of transactions for A1 Metals;[107]

(e) the IPJ Group purchased gold from ABC NSW at a higher price (spot price plus a premium) than the GST-exclusive price at which it sold gold to the applicant (spot price less 1.4% discount). The price at which it bought gold did not include GST (as that was an input taxed supply by ABC NSW) and the price at which the IPJ Group sold gold to the applicant was inclusive of GST (as that was a taxable supply). Based on those pricing observations, the IPJ Group would have made a loss on gold that it purchased from ABC NSW and on-sold to the applicant had the IPJ Group entities remitted the GST to the Commissioner, as required under the GST Act.[108] (We interpolate that the IPJ Group did not remit the GST to the Commissioner and was engaged in tax evasion as we explain further below.)

157. Mr Cochineas deposed that he and, therefore, the applicant were aware the IPJ Group were acquiring investment-grade bullion from ABC NSW during the Relevant Period.[109] He said this did not give him any cause for concern and he provided various explanations. Initially, he said it confirmed the business model of the IPJ Group explained to him by Mr Catanzariti at their first meeting, which was that the IPJ Group secured its supply of scrap gold by exchanging investment-grade bullion for the scrap gold of its clients.[110] On another occasion, in a compulsory examination, being under an obligation to tell the truth under oath, Mr Cochineas said it was generally his understanding that persons in the industry engaged in barter transactions because they were wary of carrying cash in the sums of $50,000 or $40,000 and a bullion bar which has the equivalent value is much more transportable.[111] Mr Cochineas also said the IPJ Group were refining the scrap gold they acquired as part of the barter to gold of 99.99% fineness and delivering it in granule form to the applicant for further refining. When Mr Cochineas was asked about the refining capacity of the IPJ Group, he said they were doing some refining themselves (although he had never seen their refinery operations) and that they also used other people for refining

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[107] Hearing Book, Volume 5, p 4,247; Wright First Report, [7.10.5(g)].
[108] Hearing Book, Volume 5, p 4,315; Wright First Report, [12.3.6].
[109] Hearing Book, Volume 3, p 2,085; First Cochineas Affidavit, [199].
[110] Hearing Book, Volume 3, p 2,085; First Cochineas Affidavit, [199].
[111] Hearing Book, Volume 10, p 8,694.

and were possibly also buying the gold granules.[112] When asked on one occasion in a compulsory examination why the IPJ Group would bother refining before presenting the material in granule form to the applicant for refining, Mr Cochineas stated he didn't know *"the inner workings of their business".*[113] However, before us Mr Cochineas suggested the IPJ Group would do this to limit the refining fees paid to the applicant.[114] Mr Cochineas suggested the way the IPJ Group make money is as follows: "*obviously their business is to buy [the scrap gold] at a lower rate than the market place and not what they're going to sell it to me"*.[115]

158. The Commissioner told us there was no evidence of the IPJ Group having refinery operations at their premises or of barter transactions occurring with investment-grade bullion purchased from the Dealers being swapped for supplies of scrap jewellery. Indeed, we gleaned from numerous T-Documents and evidence, as outlined below, that the claimed arrangements of the IPJ Group with so-called third-party jewellers and scrap dealers were entirely fabricated. We infer the IPJ Group did this for several reasons including to obscure what was otherwise a 'round robin' arrangement (at least in relation to some of the gold) between Dealers, including ABC NSW, the IPJ Group and the applicant, and to also conceal the IPJ Group's tax evasion. To be clear, the tax evasion that the IPJ Group was engaged in (and that was not in dispute before us) was the non-remittance by the IPJ Group to the Commissioner of the GST on its taxable supplies of scrap gold. The IPJ Group were in that sense the 'missing traders' in the supply chain. We were informed that following the execution of the abovementioned AFP search warrants, the Commissioner issued the IPJ Group with assessments for GST net amounts. The total of the GST shortfalls for the IPJ Group was $21,703,185.[116] We were also told by the Commissioner and accept the IPJ Group have subsequently been wound up, which is a common trait of 'missing trader' and 'carousel' GST fraud.

159. We infer and accordingly also find the IPJ Group interposed certain entities to disguise the circularity of the arrangements between the IPJ Group, the applicant and ABC NSW by

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[112] Hearing Book, Volume 10, pp 8,633-8,634.

[113] Hearing Book, Volume 10, pp 8,633 and 8,635.

[114] Transcript pp 144-145.

[115] Hearing Book, Volume 10, p 8,694.

[116] Hearing Book, Volume 4, pp 3,394-3,397; Affidavit of Aris Zafiriou sworn 2 March 2018 (***First Zafiriou Affidavit***), [7] to [16].

giving the impression there were barter transactions with jewellers and scrap dealers in order to conceal the melting of the purchased investment-grade bullion into scrap gold. Some specific examples of this obfuscation were provided in uncontested evidence adduced on behalf of the Commissioner. For example, the evidence of John Smith, a former refugee who had changed his name to assist in finding work in Australia, is that he met a man called 'Ahmad' who offered to assist him in obtaining a loan for his business.[117] Ahmad persuaded Mr Smith to turn over his licence, Medicare card and tax file number and to sign a document which Mr Smith was unable to identify. A week later, Ahmad told Mr Smith he had encountered some problems and Mr Smith did not hear from him again. Subsequently, Mr Smith discovered he was recorded on ASIC records as the sole director and shareholder of Shaheen Jewellery Pty Ltd – a company registered on 4 December 2012. Documents were also created to give the appearance that transactions had taken place between Shaheen Jewellery Pty Ltd and 4 Nines involving the sale of scrap gold to 4 Nines. Mr Smith categorically denied having ever engaged in any transaction, agreement or having any contact with 4 Nines, Mr Adrian Catanzariti or his brother, Mr Sandro Catanzariti, in relation to the sale of scrap jewellery or receipt of gold bullion.

160. Another example was provided in the uncontested evidence of Haider Khraibt and his twin brother, Naji Khraibt, both jewellers by occupation. Haidar Khraibt gave evidence that he was approached by a 'Mr Mark Mandwee' and offered $500 per week to establish a company and sign various documents.[118] Mr Haidar Khraibt provided Mr Mandwee with his driver's licence and Medicare card. Two companies, Pearls Jewellers Pty Ltd and Emerald Wholesaler Jewellery Pty Ltd, were established with Mr Haidar Khraibt as sole director and shareholder. Further documents were signed by Mr Haidar Khraibt that gave the appearance that transactions had taken place between those companies and PMS involving the sale of scrap gold to PMS. Similar evidence was given by Mr Naji Khraibt, but in Mr Naji Khraibt's case, the companies established were Antique Jewellers Pty Ltd and Gallery Jewellery Pty Ltd.[119] Further documents were signed by Mr Naji Khraibt that gave the appearance that transactions had taken place between those companies and PMS involving the sale of scrap gold to PMS. Both of the Khraibt brothers denied having

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[117] Hearing Book, Volume 5, pp 3,767-3771; Affidavit of John Smith affirmed 5 March 2018 (***Smith Affidavit***).

[118] Hearing Book, Volume 5, pp 3,841-3846; Affidavit of Haidar Khraibt affirmed 8 March 2018 (***H Khraibt Affidavit***).

[119] Hearing Book, Volume 5, pp 4,060-4066, Affidavit of Naji Khraibt affirmed 8 March 2018 (***N Kraibt Affidavit***).

ever spoken to Mr Sandro Catanzariti or Mr Adrian Catanzariti. Both denied any knowledge of PMS. Both of the Khraibt brothers also denied having sold any scrap jewellery to PMS or to the Catanzariti brothers and, additionally, stated they had never dealt with any gold bullion or bars. The evidence of Mr Smith and of the Khraibt brothers supports our conclusion that the IPJ Group entities were not in fact engaging in any trading of scrap metal or barter transactions with jewellers and scrap dealers.

161. Our finding in relation to the circular flow of some gold between ABC NSW, the IPJ Group and the applicant is supported by numerous email exchanges about the IPJ Group which also demonstrate the applicant's awareness of the arrangement. For example:

(a) on 9 August 2012, Ms Simpson sent Mr Cochineas an email stating IPJ were purchasing around 60kg of 1kg ABC bars a week from ABC NSW;[120]

(b) on 26 April 2013, Ms Simpson sent Mr Cochineas a detailed breakdown of all of ABC NSW's 1kg gold bar sales by customer including to the IPJ Group;[121]

(c) on 29 May 2013, Ms Simpson forwarded to Mr Cochineas an internal ABC NSW email stating Mr Catanzariti would like to order an additional 30kgs per week of ABC 1kg bars for the next three weeks starting from 3 June 2013 and which also stated *"please ensure that [the applicant is] informed and we have sufficient bars to supply them"*;[122]

(d) on 13 June 2013, Ms Camilla Baker (Relationship Manager at ABC NSW) emailed Mr Sandro Catanzariti stating "*[w]e actually only have 24 bars here… You can either collect the remaining 6 tomorrow or collect from [the applicant]. Sorry for the inconvenience."*[123]

(e) on 13 June 2013, Mr Sandro Catanzariti emailed Mr Cochineas directly expressing a concern about the unavailability of bars to collect from ABC NSW;[124]

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[120] Hearing Book, Volume 7, p 6,113.
[121] Hearing Book, Volume 7, Tab 6.
[122] Hearing Book, Volume 8, p 6,597B.
[123] Hearing Book, Volume 8, p 6,629.
[124] Hearing Book, Volume 8, p 6,628.

(f) on 19 August 2013, Ms Ronaldson (Operations Manager at ABC NSW) sent an email to Mr Cochineas and Ms Simpson which relevantly stated *"I've been reviewing the demand for both Pamp and ABC 1 kg bars … Below is a breakdown of the basic requirements – this does not take into account any other sales i.e. investment or retail clients …"* The table in the email relevantly listed 'IPJ' and indicated IPJ Group required 28 bars per day, four days a week, 112 bars per week;[125] and

(g) on 16 September 2013, Ms Ronaldson emailed Ms Terina Hooper who was responsible for inventory and despatch at ABC NSW stating "*Ok, had a chat with Phil [Cochineas] and he says [IPJ] aren't sure how many they will need, will be UP to 40 per day but could be less, Can you make sure you order a minimum of 55 from [the applicant] daily and Phil [Cochineas] will try to cover the increase for us"*.[126]

162. Nevertheless, the applicant's position was that it was ignorant of the IPJ Group's GST evasion. The applicant argued it was a complete stranger to the alleged round robin arrangements involving the IPJ Group. Mr Cochineas deposed that, during the Relevant Period, neither he, nor as far as he was aware, the applicant nor any of its management was aware of IPJ Group's source of the refining material.[127] He claimed that at no time did Mr Catanzariti or anyone else from the IPJ Group inform him nor did he become aware of the identity of the suppliers to the IPJ Group. He also deposed that other than conducting the due diligence enquiries and seeking declarations from its clients, *"[the applicant] (like any other refiner) was unable to guarantee with certainty either the original source of that Refining Material received by it or whether the supplier had correctly accounted for GST to the Commissioner"*.[128] He specifically attempted to distance Ms Simpson and Mr Gregg from the applicant and to suggest to us that neither of them were involved in the executive management of the applicant and, therefore, could not have known about the applicant's purchases from the IPJ Group.[129]

163. The proposition that Ms Simpson and Mr Gregg were unaware of the applicant's purchases from the IPJ Group was contrary to various emails, including the one

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[125] Hearing Book, Volume 8, p 6,930.
[126] Hearing Book, Volume 8, pp 6,979-6980.
[127] Hearing Book, Volume 3, p 2,085; First Cochineas Affidavit, [197].
[128] Hearing Book, Volume 3, p 2,058; First Cochineas Affidavit, [100].
[129] Hearing Book, Volume 3, pp 2,039 and 2,086, First Cochineas Affidavit, [38] and [200].

specifically outlining the 'Process for Purchase from IPJ and others' dated 9 February 2012 (see [145] above) which suggested there was some planning and co-ordination between the applicant and ABC NSW as regards purchases from IPJ and others, to the point where ABC NSW and the applicant had to synchronise their dealings in order to meet the "basic requirements" of the suppliers (see [161](f) and (g) above). Ms Simpson, it will be recalled, had said that ABC NSW would be able to purchase the precious metal produced by the applicant (following deliveries of scrap gold by the IPJ Group) provided it did not exceed 250kg per day. No explanation was provided to us about that statement.

164. In a compulsory examination on 20 November 2013, approximately a month after the abovementioned AFP search warrants were executed, Mr Cochineas told the examiner under oath that he was "shocked" and "concerned" his clients including IPJ were issued with massive tax assessments.[130] He said his response when he was told the bank accounts controlled by Mr Catanzariti had been frozen was that he needed to catch up with him to understand what was going on and what the problems were. In a further compulsory examination on 13 March 2014, Mr Cochineas said he did not know the details of the trading relationship between ABC NSW and the IPJ Group[131] and he was not suspicious (in August 2013) about the activities of the IPJ Group and any round robin arrangement. Mr Cochineas also attempted to explain the email referred to in [161(f)] above from Ms Ronaldson of ABC NSW to him listing the orders of ABC NSW's customers, including the number of bars required by IPJ, on the basis it was a "whinge" because the applicant was not able to supply the needs of ABC NSW. Mr Cochineas said he never ordinarily received this sort of detail from ABC NSW.[132]

165. This is against a background where we know the applicant did not insist on the IPJ Group satisfying the applicant's various verification processes notwithstanding Mr Cochineas's statements to the contrary. For example, Mr Cochineas deposed[133] that at all relevant times including during the Relevant Period, the applicant conducted a due diligence investigation in respect of all its potential suppliers before it accepted any refining material and the applicant required "all clients" to complete a refining application form which was

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[130] Hearing Book, Volume 10, p 8,566.
[131] Hearing Book, Volume 10, p 8,715-8,716.
[132] Hearing Book, Volume 10, p 8,716.
[133] Hearing Book, Volume 3, p 2,056; First Cochineas Affidavit, [92].

set out as an attachment to his affidavit.[134] The form included detailed questions as to the source of refining material. Mr Cochineas stated that each IPJ Group entity was subject to the applicant's standard account opening, and due diligence procedures suggesting the IPJ Group completed that form.[135] But the applicant did not produce any refining application form completed by the IPJ Group. The applicant produced a single client trading account application form for IPJ dated 14 February 2012, apparently completed by Mr Adrian Catanzariti, with an attached ABN lookup record dated 13 February 2012 and copies of various forms of personal identification. Significantly, that document does not contain any declarations as to the source of the material to be supplied. The applicant did not produce any due diligence documentation in relation to the remaining IPJ Group entities. The applicant also did not produce any declarations from the IPJ Group that they complied with their GST obligations.

166. The applicant also adopted other lax procedures as regards the IPJ Group. In particular, the job sheets for the receipt of scrap gold from the IPJ Group tended to show minimal testing and, generally, the receipts for the scrap gold issued by the applicant showed the barest details, namely, the quantity of fine gold.[136] This implied a confidence on the applicant's part that the scrap gold it was receiving from the IPJ Group was already of 99.99% fineness. As already noted above, this suited the applicant which prized quick turnaround in its operations as it could send that scrap gold straight to its fine gold stock in its refinery operations with minimal further processing. Mr Cochineas deposed he did not consider there to be anything unusual with the IPJ Group providing material that was of approximately 99.99% fineness because it confirmed Mr Catanzariti's claim that the IPJ Group had the capabilities to refine to that level.[137]

167. One explanation for the applicant's relaxed approach to the IPJ Group was the special relationship between Mr Cochineas and Mr Catanzariti. Mr Cochineas confirmed under cross-examination he had a close working relationship with Mr Catanzariti.[138] Mr Cochineas and his associates went to social functions with Mr Catanzariti and his associates including dinners in Sydney, as well as attending an itinerary of events in

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[134] Hearing Book, Volume 3, pp 2,377-2,387.
[135] Hearing Book, Volume 3, p 2,082; First Cochineas Affidavit, [181].
[136] Hearing Book, Volume 8, p 6,523
[137] Hearing Book, Volume 3, p 2,085; First Cochineas Affidavit, [195].
[138] Transcript p 146.

Macau and Hong Kong, around the time of them having separately arranged to attend the jewellery trade fair in Hong Kong.[139] Mr Cochineas relevantly stated in his emails to event organisers in Macau that he had *"a VIP client from Australia"*; he "*wanted to go overboard on this trip"* to impress them; and *"[t]hese clients are very important and I want them to have whatever they want"*.[140] The applicant had also given Mr Catanzariti business cards with his name and the applicant's name on them,[141] as well as an email account with the applicant to permit Mr Catanzariti to represent himself as part of the applicant, at least in relation to ostensibly obtaining refining work from potential primary sources – which never came to fruition.[142]

168. One of the more interesting email exchanges in the hearing book[143] which piqued our interest with respect to the relationships between the IPJ Group, ABC NSW and the applicant, and their transactions, is reproduced below. The first email was sent by Ms Camilla Baker to Ms Kim Ronaldson (the Operations Manager of ABC NSW) at 2.27pm on 27 July 2012. It is set out to provide the contextual background to the email that follows.

> *Hi Kim*
>
> *Just letting you know I am really unhappy with the conversation we just had regarding Phil [Cochineas] and Frank.*
>
> *Being the Relationship Manager, I regard my position as one of developing and growing the business, which I have significantly proved already.*
>
> *My understanding was that part of that role involves me gleaning from clients the products they need in order to service them better, and hence increasing turnover for ABC. I am aware that there is a large amount of privacy involved, and I certainly disagree that my line of questioning was not appropriate. However, I have noted our discussion and will refrain from such conversations in future.*
>
> *I feel like I have had a slap on the wrist for a conversation I had with a client which was both jovial, and professional.*
>
> *I'm not asking anything from you, I'm just letting you know I am really upset about it.*
>
> *Camilla*

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[139] Hearing Book, Volume 8, pp 6,537-6,542 and 7,052-7,053.

[140] Hearing Book, Volume 8, p 6,541-6,542.

[141] Hearing Book, Volume 10, pp 8,668-8,669.

[142] Hearing Book, Volume 10, p 8,654.

[143] Hearing Book, Volume 7, pp 6,107-6,108.

169. Ms Ronaldson replied, as follows, at 2.38pm on the same day and, afterwards, forwarded both emails to her boss, Ms Simpson, for her information.

> *Hi Camilla*
>
> *I appreciate that you are upset about it, however this is a part of the relationship with the clients that you have to learn to manage. In this case the client has felt that you have stepped over the line and I am just passing on this information to you. As I said, whilst you may have a more relaxed and friendly relationship with them you also need to understand that at the end of the day business is business. They have felt that you overstepped the mark and I have to relay this to you.*
>
> *As I also said Adrian [Catanzariti] was very insistent that you give them excellent service and they have no complaint with the way you look after their orders. He did not want this blown out of proportion and was very insistent that it remained quiet. … You just need to know where the boundaries are and those types of questions are completely off bounds. When you start talking about GST loopholes etc and this gets passed onto our refining partner its not great for any of the relationships.*
>
> *Just take it on the chin and learn from the experience. I did not hear the conversation at all and was not aware of it until Phil [Cochineas] called me, as such I have to follow it up and ensure that it is dealt with.*
>
> *All staff will be briefed on this as we need to be clear that we cannot ask what clients do with their product unless they are forthcoming with the information – its got nothing to do with us and we don't need to know. We have done our checks and that's all that is required.*
>
> *Please lets not blow this out of proportion, I expect you to continue to develop your relationship with them.*
>
> *Let me know if you want to talk further.*
>
> *Thanks*
> *Kim*

170. The applicant did not put on any evidence to explain the incident canvassed in the above emails, notwithstanding that the emails refer to Mr Cochineas having specifically discussed the issue with Ms Ronaldson, and it was also escalated for Ms Simpson's attention. Ironically, Ms Ronaldson's email records enough to portray a compromising picture for ABC NSW and the applicant as to the extent of their knowledge of the IPJ Group's exploitation of the GST provisions. Furthermore, Ms Ronaldson expressly stated, that all staff at ABC NSW will be briefed on this *"to be clear that we cannot ask what clients do with their product … its got nothing to do with us and we don't need to know…"* She said *"[w]hen you start talking about GST loopholes etc and this gets passed onto our refining partner its not great for any of the relationships".*

171. Having regard to the abovementioned emails, we were interested to also read in the hearing book a transcript of a compulsory examination of Mr Cochineas on 25 March 2014, where Mr Cochineas insisted, under oath, he was unaware of any "GST fraud" and had never been queried about IPJ being involved in some sort of GST scheme in around June 2012.[144] Moreover, Mr Cochineas maintained in that examination (which took place after the assessments had issued to the IPJ Group and before the applicant's own GST audit in respect of the Relevant Period had commenced) that he was "supremely confident" each of the applicant's clients were GST compliant.[145]

172. Mr Cochineas did not take any steps before us to correct answers he had previously given in compulsory examinations that appeared to be incomplete or inaccurate and that were inconsistent with his affidavit evidence. Mr Cochineas is disingenuous in denying in his affidavit the existence of any suspicions about the fraudulent activities of the IPJ Group entities. The email correspondence set out at [168] – [169] above contradicts Mr Cochineas's claims that he and the applicant were entirely ignorant of any GST-related mischief by the IPJ Group entities. We infer Mr Cochineas and the applicant were aware the scrap gold (or at least some of it) being sold to the applicant by the IPJ Group for refining was being sourced from ABC NSW and, further, the barter transactions with jewellers and scrap dealers were likely a charade. We are also of the opinion Mr Cochineas and the applicant were, at a minimum, on notice the IPJ Group entities were not paying the GST to the Commissioner on their taxable supplies to the applicant. This is because, in circumstances where the IPJ Group's acquisitions were being made from ABC NSW at spot price plus a premium, the price at which the IPJ Group were then on-selling some of the gold to the applicant (spot price less discount plus GST) would not have been commercially feasible if GST was remitted. We think it highly unlikely Mr Cochineas, an astute businessman, was unaware that the IPJ Group was somehow exploiting 'GST loopholes' in circumstances where the GST issues were a topic of special interest to Mr Cochineas and the applicant from, at the latest, early 2012. At that time, it will be recalled, he and his associates prepared the Policy Document analysing whether the applicant was a recycler or a refiner (see [54] above). Based on the evidence before us, the preparation of the Policy Document coincided with the start of the applicant's business arrangements with the IPJ Group in early 2012. It will also be recalled the IPJ

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[144] Hearing Book, Volume 10, p 8,746.
[145] Hearing Book, Volume 10, p 8,858.

Group was the applicant's first 'client' and it proffered its templates to the applicant, including a tax invoice form. We consider Mr Cochineas and the applicant were aware of facts and circumstances which, at a minimum, put them on notice of the IPJ Group's fraudulent activities. These include the large value and frequency of gold transactions, the high purity of the gold delivered by the IPJ Group to the applicant, the pricing of the gold, the coincidences of timing of payments and deliveries of precious metal followed by deliveries of scrap gold, the readiness of ABC NSW to buy precious metal produced by the applicant following deliveries by the IPJ Group, and the special friendship between the Cochineas brothers and the Catanzariti brothers.

173. Our conclusion with respect to the above is, so far as relevant for present purposes, that the applicant was, at a minimum, on notice the IPJ Group entities were engaging in conduct that involved the evasion of GST, as well as the exploitation of provisions in the GST Act (the latter being the subject of these proceedings), but didn't want that fact to be known. Importantly, the applicant could and did take advantage of the situation by making creditable acquisitions. As discussed in further detail below, the exploitation of the provisions of the GST Act involved the IPJ Group making acquisitions of investment-grade bullion, then melting the gold bars such that they were no longer in precious metal form and, in turn, selling the scrap gold (or some of it) to the applicant as taxable supplies. In this way, the IPJ Group created a matching entitlement to an input tax credit for the GST payable for the applicant which was essential to perpetuate the round robin arrangement. We accept the IPJ Group was also selling some of the scrap gold to other refiners and, further, that the IPJ Group was also sourcing precious metal from other bullion dealers so that it was not necessarily always the *same gold* that was being sold by it in the arrangement. However, we are concerned with the IPJ Group's supplies of scrap gold of at least 99.99% fineness to the applicant.

174. We find that, effectively, both the applicant and the IPJ Group directly benefited from the GST not being paid by the IPJ Group to the Commissioner. For the IPJ Group, the price paid to them was attractive, but *only* if the GST was not remitted by them to the Commissioner – a simple case of tax evasion. On the other hand, the price paid was attractive to the applicant *only* if the GST included in the price paid could be claimed by it as an input tax credit. In simple terms, if the applicant was unable to claim the GST as an input tax credit, it would not have paid *that* price to the IPJ Group. This is because the price at which the applicant was selling precious metal to the Dealers would have been

less than the GST-inclusive price at which it bought the scrap gold and this would not have been economically feasible.

175. It was *those* input tax credits that propped up the arrangement and made it beneficial. If the claims for input tax credits had not been made by the applicant or if GST had been remitted by the IPJ Group, the arrangement would have fallen over. It is also worth noting that while it is true the applicant and ABC NSW were not the perpetrators, they were beneficiaries of the IPJ Group's fraudulent conduct. The applicant directly benefited by claiming the input tax credits and the applicant and ABC NSW also indirectly benefited from the margins made on the increased turnover in the sale of precious metal in an artificial market.

176. The applicant did not call Ms Simpson, Mr Adrian Catanzariti, Mr Gregg, Ms Ronaldson or Ms Baker to give evidence and also did not provide any explanation as to why it could not have done so. Mr Cochineas deposed that neither Ms Simpson nor her father, Mr Gregg, were involved in the executive management or day-to-day operations of the applicant's business even though they were directors of the applicant. We do not accept that demarcation of responsibilities means they were not knowledgeable about the applicant's activities relevant to this proceeding. As referenced at [49] above, Ms Simpson had sought independent legal advice in respect of the establishment of the applicant and so had taken a keen interest in its setup. She undoubtedly had an ongoing interest in the applicant's undertakings as she was not only a director but indirectly vested in the applicant. In any event, Ms Simpson and Mr Gregg were also directors of ABC NSW, one of the main customers of the applicant, with which the applicant, through Mr Cochineas, was in frequent communication, especially as regards production demands of certain customers. We would have expected to hear from Ms Simpson given the close relationship between the applicant and ABC NSW and the fact ABC NSW was also a key entity in the relevant supply chains. Similarly, Mr Catanzariti, Ms Ronaldson, Ms Baker and Mr Gregg would have undoubtedly provided some assistance to the Tribunal in explaining some of the emails and other documents referenced throughout this decision. Ms Baker had responsibilities for business development and customer relations, including with respect to the IPJ Group and was interested in the IPJ Group's background activities. We infer their evidence would have shed light on relevant transactions and events including filling gaps in Mr Cochineas's evidence.

177. There did not appear to be any insuperable obstacle to those witnesses appearing; we certainly were not given any convincing explanation why they were unavailable and should not be called when it seemed their evidence would likely assist us. In written submissions, the applicant discussed the applicability of the rule in *Jones v Dunkel* to argue we should not draw any adverse inferences against the applicant as a result of the failure to call witnesses. While those submissions were instructive, it must be recalled "*the Tribunal is not bound by the rules of evidence and may inform itself on any matter in such manner as it thinks appropriate*": s 33(1)(c) of the AAT Act. The rules of evidence are a useful guide as we undertake the fact-finding process. That is particularly true in a case like this which was conducted in a more 'court-like' way. In those circumstances, we are mindful that the rules of evidence embody the wisdom of the courts which have carried on forensic processes over a long period. Ultimately, though, our obligation is not to apply a rule of evidence – like the so-called rule in *Jones v Dunkel* – uncritically. In order to discharge our obligation to give reasons for our decision, we must make findings on material questions of fact and refer to the evidence on which those findings are based: s 43(2B) of the AAT Act. That requires us to review and objectively weigh cogent, relevant evidence in a way that is procedurally fair.

178. When one approaches the task on that basis, it becomes apparent that the rule in *Jones v Dunkel* is ultimately a short-hand reference to an underlying proposition that reflects common sense. If a party advances a factual matrix but elects not to lead apparently relevant evidence (whether in the form of witness testimony or documents or otherwise) that one would naturally expect the party to produce to substantiate what is claimed, then – in the absence of some satisfactory explanation – one is entitled to be suspicious about what that witness or document would have said and why they or it are not produced. In a case like this where the applicant bears the onus of proof, a decision not to lead relevant evidence in the applicant's possession or control without proper explanation will certainly not assist the applicant in proving their case. The Tribunal may also, in appropriate cases, draw an adverse inference from a failure to lead evidence that was presumptively relevant and available to the applicant in the absence of a proper explanation.

179. We do not infer the uncalled witnesses would necessarily have given adverse evidence in this case, but the surprising failure to call those witnesses without an adequate explanation has consequences for the applicant even so. The applicant bears an evidentiary burden. It relies in particular on the evidence of Mr Cochineas. In doing so, it

has placed all of its evidentiary eggs in the one basket – a risky strategy in a case where some of the evidence is contentious and credit is an issue. As it happens, for reasons we have explained, we have concerns about the evidence of Mr Cochineas. It has been found wanting. The applicant's failure to call the identified witnesses to corroborate his evidence and fill any gaps underlines those shortcomings, and prevents us from being satisfied the applicant has discharged its onus on this issue.

The Majid Group

180. The Division 165 Supplying Entities included the Majid Group which was constituted by various entities on whose behalf Mr Majid Faraj purported to act. The Majid Group entities had the following trading names: Majid Jewellers (***Majid***), Najaf Jewellers (***Najaf***), Elmas Jewellers (***Elmas***), Menas Jewellery (***Menas***), KLM Jewellery (***KLM***), Blue Heaven Jewellery (***Blue Heaven***), Kais Jewellery (***Kais***), Mazin Jewellery, Sahara Jewellery (***Sahara***) and Mario B Jewellery (***Mario B***).

181. Mr Faraj purported to represent each of those entities in respect of its dealings with the applicant. The applicant's witnesses, including Mr Cochineas, considered Mr Faraj to be a "courier" for the Majid Group entities, but we got the distinct impression Mr Faraj was a key player in the transactions with the applicant and, moreover, the applicant knew this. The applicant produced 'Letters of Confirmation' on the applicant's letterhead which were apparently signed by Mr Faraj confirming he was authorised to act on behalf of some of the Majid Group, including Menas, Najaf and Elmas. The following exchange occurred between Deputy President McCabe and Mr Cochineas in relation to the first of these letters and the onboarding process for new suppliers:[146]

> *[Deputy President] I'm sorry, can I just ask one question in relation to page 2565. Perhaps I missed this, but I think I need to ask. It's on EBS & Associates letterhead?*
>
> *[Mr Cochineas] Yes, that's correct. It was done for our insurance purposes, because they were goods being carried by that person, and we had an insurance*

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[146] Transcript p 165.

policy in place which we had to ensure that if goods were delivered, they were actually under our coverage.

[Deputy President] Okay, but then there's Mr Faraj. He's effectively asked, "So are you an authorised representative? Are you making a representation of authority to act on behalf of Menas Jewellers?" Surely you actually wanted a statement from Menas Jewellers that he was authorised to act?

[Mr Cochineas] Possibly so. This was considered acceptable for us.

[Deputy President] Considered by whom, do you recall?

[Mr Cochineas] By compliance team at the time.

[Deputy President] How actively were you involved in that process, the onboarding process?

[Mr Cochineas] To be honest, Deputy President, I don't recall exact detail, but I definitely sat with our compliance team and was involved with them, yes.

[Deputy President] Was that routine that you were involved with the compliance team?

[Mr Cochineas] Yes, I think generally because of the oversight of the managing director for any onboarding of clients.

[Deputy President] So it was a priority for you as managing director to have the compliance team, and be aware of what they were doing in relation to this sort of thing?

[Mr Cochineas] Absolutely, yes.

182. Mr Cochineas did not adequately explain to us why he thought it sufficient for the ostensible agent of the Majid Group (said to be their courier) to confirm the agency relationship rather than the principals themselves. There were other troubling aspects of

the arrangements with the Majid Group. Mr Cochineas gave evidence that, at or around the time when Mr Faraj delivered gold to the applicant, Mr Faraj generally spoke to Mr Cochineas to fix the price at which the applicant agreed to purchase gold from the relevant Majid Group entity.[147] Also, the bulk of the material delivered to the applicant by Mr Faraj on behalf of the suburban jewellers comprised defaced or melted bullion bars of 99.99% fineness.[148] Mr Cochineas said there were various explanations for defacing bars. Mr Cochineas told us it *"is quite common in the marketplace"* and "*where the provenance is unknown of the material, the easiest way of determining the ability for that metal not to have been tampered with in some way is to actually cut the bar"*.[149] He also said the fact that the Majid Group was selling the applicant large volumes of defaced bars did not surprise him because he said it coincided with a volatile period of pricing of gold in Australian dollars, namely, a high of approximately AUD55,551 per kilogram on 2 October 2012 and a low of approximately AUD42,937 on 16 April 2013, closing in December 2013 at approximately AUD44,500 per kilogram.[150] He said it was his experience in the industry that periods of high volatility in the gold price coincide with increases in volume of scrap gold trading as compared to less volatile periods.[151] We were not persuaded that this explanation accounted for the very high volume of scrap gold being delivered to the applicant by the Majid Group.

183. During the Relevant Period, the applicant acquired $101,031,623 worth of precious metal from the Majid Group. From Elmas alone, the applicant purchased around $34,000,000 worth of fine metal.[152] Mr Mohammad Qahtani, a sole trader in Victoria, operated Elmas with an email address that was a 'Gmail' account. His business description is "Design Jewellery and Wedding Band" and the details on the invoices were generally handwritten.[153] That description was very unusual for a business said to be delivering to the applicant vast amounts of scrap gold for refining. Also, the fact of handwritten invoices looked out of place for such a large business. Invoices for other Majid Group entities were also rudimentary. The invoices for Najaf, another jeweller in Victoria, from whom the

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[147] Transcript p 166.
[148] Transcript p 167; Hearing Book, Volume 3, p 2,089-2,090; First Cochineas Affidavit, [214]-[217] and [224].
[149] Transcript p 167.
[150] Hearing Book, Volume 3, p 2,077; First Cochineas Affidavit, [166(a)].
[151] Hearing Book, Volume 3, p,2,078; First Cochineas Affidavit, [166(a)].
[152] Hearing Book, Volume 3, p 2,087, First Cochineas Affidavit, [205(c)].
[153] Hearing Book, Volume 10, pp 7,821, 7,824, 7,826 and 7,829.

applicant purchased approximately $34,200,000 worth of fine metal states "*[w]e sell-buy repair-exchange*" and the template provides for the supply of, among other things, rings, earrings, necklaces, chains, bangles and bracelets.

184. Mr Cochineas deposed that each Majid Group entity was subject to the account opening procedures described in [165] above, suggesting the Majid Group entities completed the refining application form. However, as with the IPJ Group, no such documents were produced by the applicant which contained declarations by the Majid Group in respect of the source of the refining material. Rather, the applicant produced only client trading account application forms for Menas, Najaf, Elmas, Kais, KLM and Majid. These forms contained only basic information in relation to the entities. Moreover, the public information available on the 'ABN Lookup' shows these entities had limited trading histories. For example, the ABN Lookup record for Najaf shows its sole proprietor was only registered for GST on 24 February 2012. As the Commissioner pointed out, this is not what one would expect from businesses trading in the volumes of gold the applicant was acquiring from them. Ordinarily, one would expect the applicant to pause before dealing with newly established companies claiming to have the financial means to engage almost immediately in gold dealings of such large volumes and values, but it appears the applicant was not at all concerned.

185. Ms Wright's First Report records the Majid Group entities mostly acquired the gold which they sold to the applicant from a third party known as Ceylon, a bullion dealer located in Western Sydney. In 2013, 84.5% of Ceylon's identified customer base comprised of the Majid Group. The data relied on by Ms Wright also reveals Ceylon's main supplier was ABC NSW. Payments made by Ceylon to ABC NSW represented 66.3% of all its identified supplier payments.[154] Ms Wright accepted in cross-examination her reports were based on the records for the sources of gold provided to her by the Commissioner.[155] The applicant pointed out one of the Majid Group entities, Mr Haqiqi trading as Najaf, had acquired approximately $264,000,000 worth of precious metal in 2013 from another dealer in precious metal. Mr Haqiqi had also sold scrap gold to an entity called Gold Merchants International Australia Pty Ltd. The applicant submitted this information was known to the

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[154] Hearing Book, Volume 5, pp 4,238-4,241; Wright First Report, [7.8].

[155] Transcript p 571.

Commissioner, because he had audited and issued GST assessments to Mr Haqigi,[156] but was not provided by the Commissioner to Ms Wright. Ms Wright accepted, under cross-examination, that it was not possible for her to say whether the scrap gold sold by Najaf to the applicant during 2013 was sourced from Ceylon and ABC NSW, or whether it was from some other source. Notwithstanding, we accept Ms Wright's conclusion in her First Report that *"the gold that flows via the Majid supply chain is likely to contain gold that originated from [the applicant] throughout".*[157] We consider Ms Wright's conclusion is apt because she recognised in the First Report, in the immediately following sentences, as follows: "*However, it is not the only source of gold, with other sources possibly being… There is a potential limitation to my analysis because the Majid Group bank accounts may be incomplete…"*[158]

186. Mr Cochineas deposed that, during the Relevant Period, the extent of his knowledge about Ceylon was, relevantly, that it was a bullion dealer located in Western Sydney which bought precious metal from ABC NSW, but that he was not aware of the exact volumes or values of such purchases because he did not have access to ABC NSW's computer system.[159] Before us, he acknowledged that during the Relevant Period, he knew it was an important client – because it had a long and established reputation as one of the larger bullion dealers – but he said he did not know what proportion of business it represented for ABC NSW and he denied having any communications with representatives of Ceylon.[160]

187. Mr Cochineas's attempts to downplay what he knew about Ceylon are problematic in light of various emails between Ms Simpson and Mr Cochineas that concerned Ceylon. For example, an internal email from Ms Simpson dated 2 July 2013 at 1.09pm to her ABC NSW staff reveals that a representative from Ceylon had contacted Mr Cochineas to complain about the service provided by ABC NSW. Ms Simpson expressly states *"they [Ceylon] have told Phil [Cochineas] the service is poor at [ABC NSW] … Phil might be able to give you some more details".*[161] Ms Kim Ronaldson (Operations Manager at ABC

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[156] Hearing Book, Volume 4, pp 3,398 and 3,516; First Zafiriou Affidavit, [19] and Annexure AZ-7.
[157] Hearing Book, Volume 5, p 4,309; Wright First Report, [11.6.1(f)].
[158] Hearing Book, Volume 5, p 4,309; Wright First Report, [11.6.2].
[159] Hearing Book, Volume 3, p 2,093, First Cochineas Affidavit, [236] and [237].
[160] Transcript p 171.
[161] Hearing Book, Volume 8, p 6,707.

NSW) emailed Ms Simpson and copied Mr Cochineas on 2 July 2013 at 1.28pm stating *"I'm Intrigued … they order online (have placed 4 orders today) … I know they are pushing us more and more to deliver larger quantities … we have a limit on our insurance".*[162] Mr Cochineas noted in a response email on the same day at 1.30pm that *"[Ceylon] have the potential to be a HUGE client, if we just can give them the service and volumes … Let's talk through options and I am sure we can sort it out".*[163] In another email Ms Ronaldson sent to Mr Cochineas and Ms Simpson dated 19 August 2013 listing a breakdown of how many bars were required (see [161(f)] above), Ceylon was also listed in the table. Ms Ronaldson noted Ceylon required 10 bars per day, five days a week, with a total of 50 bars per week. We note Ms Ronaldson described the orders in the table, including those of IPJ and Ceylon, as *"basic requirements"* which "*does not take into account any other sales i.e. investment or retail clients".*[164] No evidence was provided to us about the meaning of *"basic requirements"* and, in particular, why they were different to *"any other sales ie investment or retail clients"*.

188. Mr Cochineas said that during the Relevant Period, he was not aware Ceylon sold precious metal to any entity in the Majid Group and he only became aware of this after the Relevant Period.[165] Notwithstanding that assertion, the financial records of ABC NSW and the applicant reveal a link between the applicant's payment of the Majid Group entities for the supply of refining material and the purchases of gold bullion by Ceylon from ABC NSW. For example, between 25 March 2013 and 28 March 2013, payments from Ceylon to ABC NSW were matched by supplies of gold from the Majid Group entities to the applicant. Specifically, the evidence comprising those financial records consists of the following:

(a) invoices from ABC to Ceylon for the purchase of ABC 1kg bullion bars issued on dates between 25 and 28 March 2013, inclusive;[166]

(b) Ceylon's Westpac bank account for 2013, as summarised by Ms Wright in her First Report report showing purchases from ABC NSW and sales to the Majid Group entities;[167]

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[162] Hearing Book, Volume 8, p 6,706.
[163] Hearing Book, Volume 8, p 6,706.
[164] Hearing Book, Volume 8, p 6,930.
[165] Hearing Book, Volume 3, p 2,094; First Cochineas Affidavit, [239].
[166] Hearing Book, Volume 12, tab 27.

(c) Majid Group entities' bank accounts, as summarised by Ms Wright, showing purchases by those entities from Ceylon and sales by those entities to the applicant;[168] and

(d) Majid Group entities' receipts and Majid Group entities' bank accounts, as analysed by Ms Wright, which represented approximately 84.5% of the identified customer receipts of Ceylon.[169]

189. That evidence demonstrates the following supply chain payment circle which was not disputed by the applicant:

(a) the applicant made payments to Majid Group entities for supplies of gold which included an amount on account of GST as they were taxable supplies of scrap gold;

(b) the Majid Group entities made payments to Ceylon for supplies of gold bullion which were exempt from GST as they were input taxed supplies; and

(c) Ceylon made payments to ABC NSW for gold bullion which were exempt from GST as they were input taxed supplies.

190. Payments from the applicant to the Majid Group entities and payments by the Majid Group entities to Ceylon occurred on an almost daily basis and were, in most cases, the main activity on each Majid Group entity's bank account. An example of regular, similar and substantially matching supplies to the applicant and acquisitions from Ceylon via a Majid Group entity is shown in the bank statement of Najaf covering the period from 15 March 2013 to 20 April 2013, when read together with tax invoices prepared by Najaf and bank statements of the applicant. Those documents record for 25 March 2013 the following transactions:

(a) a tax invoice of Najaf addressed to the applicant for $102,572.83;

(b) a transfer of $102,572.83 by the applicant to Najaf's account;

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[167] Hearing Book, Volume 5, pp 4,238 and 4,423; First Wright Report, [7.8.4].

[168] Hearing Book, Volume 5, pp 4,249 and 4,444; First Wright Report, [7.11.5].

[169] Hearing Book, Volume 5, p 4,240; First Wright Report, [7.8.5(c)].

(c) a credit to Najaf's account in the amount of $102,572.83, which amount was paid by the applicant;

(c) a withdrawal from Najaf's account in the amount of $96,012.00; and

(d) a deposit to the Ceylon account in the amount of $96,012.00.[170]

191. We were presented with numerous similar examples for Najaf for other days, as well as numerous examples for other Majid Group entities for a multitude of days. It suffices to observe the patterns were relevantly the same. That is, they involved regular, substantially matching (at least as to value and quantity), supplies of scrap gold to the applicant and acquisitions from Ceylon, via a Majid Group entity, recorded in the same kinds of documentary records. We infer the same gold (or at least some of it) was being recycled in these supply chains.

192. The Commissioner's counsel pointed out a striking feature of the transactions with the Majid Group entities: the invoicing by those entities did not match the receipt of the gold as recorded in the applicant's job sheets and its metal movement account. The Commissioner prepared an aide mémoire (MFI1) for the Tribunal comparing the Majid Group entity invoices with entries in the applicant's metal movement account and payments by the applicant to the Majid Group entities. The aide mémoire illustrated discrepancies between the applicant's invoices for, and its records of receipts of, metal from the Majid Group entities, including the following:

(a) all of the invoices rendered by Elmas in the week beginning 5 August 2013 total exactly 15,000 grams;

(b) all of the invoices rendered by Menas in the week beginning 5 August 2013 total exactly 9,000 grams;

(c) all the invoices for Najaf in the week beginning 5 August 2013 total exactly 15,000 grams;

(d) the three invoices rendered by Elmas, Menas and Najaf on 7 August 2013 total exactly 9,000 grams of gold;

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[170] Hearing Book, Volume 12, tabs 30, 37 and 38.

(e) in contrast, the applicant's job sheet for the same date (7 August 2013) does not record separate weights for each of the Majid Group entities; and

(f) the same pattern of individual Majid Group entities' deliveries adding to round totals occurred on each day set out in the aide mémoire.

193. Ms Wright observed in the First Report that invoices for the purchases from the Majid Group entities did not comprise weights in round numbers, but there were instances where invoices from the Majid Group entities dated with consecutive days are grouped together, and the grouped total weights are in round number quantities. Ms Wright stated:

(a) this occurred across 309 invoices (totalling 812,000 grams);

(b) when considered in 'groups of days' (consecutive or up to four days), there are 72 occasions where the total across all entities equates to round number volumes. For example, five transactions with Elmas between 23 September and 27 September 2013 are for amounts of gold between 3,003.90 and 4,001.60 grams, but when considered together, the total gold sold to the applicant in this period is 17,000 grams.[171]

194. Mr Laurence Bell, an accountant with more than 40 years' experience, who was the inventory manager of the applicant from 1 November 2012, gave evidence on behalf of the applicant about how he dealt with deliveries of metal.[172] He said his responsibilities during the Relevant Period included receiving all incoming metal and giving it a description, weighing the metal, recording the weights on the refining job sheet and maintaining the register of incoming jobs and pure metal stock after refining. However, Mr Bell was unable to explain under cross-examination the discrepancies (and coincidences) in the tax invoices issued by the Majid Group entities as regards the deliveries of refining material to the applicant. For example, Mr Bell was unable to satisfactorily explain why the invoices across the Majid Group entities for a single day added up to a round number, and the invoices for a single Majid Group entity across a week also added up to a round number.

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[171] Hearing Book, Volume 5, p 4,211; Wright First Report, [6.7.15].

[172] Hearing Book, Volume 4, pp 3,178-3,188; Affidavit of Laurence Gregory Bell sworn 12 December 2017 (***Bell Affidavit***).

195. Mr Bell's evidence of his procedure for measuring deliveries of gold from the Majid Group entities was additionally somewhat confusing and is not accepted. In his affidavit, he said that although the jobs came from different companies, he would often only record only one of the companies rather than writing out the name of every company.[173] It was unclear to us how he was then able to separately weigh and record the weights of gold delivered by each of the entities making up the Majid Group. Mr Bell then said any "split" of the materials delivered by the Majid Group entities was not his responsibility but that of the applicant's accounts department. Mr Bell also said he recorded the weights of gold deliveries on handwritten sheets but none were produced by the applicant in relation to the Majid Group. Additionally, no-one from the applicant's accounts department who might have been responsible for paying the invoices gave evidence to explain the anomalies or to explain the processes which occurred after Mr Bell had taken receipt of the metal. Mr Bell's explanation that he accumulated material received from various Majid Group entities before processing them as a single job also failed to clarify the situation and, on the contrary, suggested an expectation that the deliveries would ultimately add up to an even weight. As already noted above, Mr Bell's evidence is not persuasive.

196. The following evidence given on behalf of the Commissioner by persons trading as the Majid group entities, including Mrs Wafa Zamil,[174] Mr Mazin Mahdi[175] and Mr Mithaq Nahid[176] as to the supply chain and payment cycle was unchallenged (except generally as to its relevance) and provides some insights as to the machinations of Mr Faraj and the Majid Group entities:

(a) at Mr Faraj's direction Mrs Zamil, a co-owner of the business trading as Blue Heaven, transferred money which had been transferred into Blue Heaven's account into another account;

(b) Mr Faraj then required Mrs Zamil to sign and stamp with the name "Blue Heaven" blank tax invoices which contained no details of the date of the invoice, the addressee of the invoice; or the description of the goods the subject of the invoice;

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[173] Hearing Book, Volume 4, p 3,186; Bell Affidavit, [46].

[174] Hearing Book, Volume 4, pp 3,245-3,249; Affidavit of Wafa Zamil sworn 21 February 2018.

[175] Hearing Book, Volume 4, pp 3,294-3,296; Affidavit of Mazin Mahdi sworn 21 February 2018.

[176] Hearing Book, Volume 4, pp 3,307-3,312; Affidavit of Mithaq Nahid affirmed 23 February 2018.

(c) Blue Heaven never purchased gold bullion bars from Ceylon (although it occasionally purchased amounts of gold not exceeding 100g), despite the existence of receipts issued by Ceylon to Blue Heaven for the exchange of Australian dollars in gold;

(d) neither Mrs Zamil nor her husband, Mr Mahdi, the other co-owner of Blue Heaven, has met any person from the applicant, nor have they bought from or sold gold to the applicant;

(e) Mr Nahid, the owner of the business trading as Sahara Jewellery, was offered an opportunity by Mr Faraj to retain an amount of between $3,000 and $3,500 per transfer of money from the account of Sahara to an account as directed by Mr Faraj;

(f) on three occasions, Mr Faraj asked Mr Nahid to deposit moneys into an account number which he wrote on a piece of paper for Mr Nahid, and which was that of Ceylon;

(g) despite the existence of invoices purporting to show supplies of gold bullion bars by Ceylon to Sahara, Mr Nahid did not purchase or receive any deliveries of such bars from Ceylon; and

(h) Mr Faraj required Mr Nahid to sign and stamp the name “Sahara Jewellery” on blank tax invoices which he told Mr Nahid he would fill out later.

197. The evidence outlined above leads us to the conclusion Mr Faraj was taking delivery of investment-grade bullion from Ceylon, then altering or defacing the bullion and on-selling it to the applicant, on behalf of the Majid Group, as scrap gold. The interposition of the Majid Group was a façade to conceal the round robin arrangement between ABC NSW, Ceylon, and the applicant. We were told the Majid Group did not remit GST to the Commissioner in respect of the taxable supplies of scrap gold made to the applicant and so were ‘missing traders’ in the supply chain. We were also informed that, following the execution of the abovementioned AFP search warrants, various entities in the Majid Group were assessed for GST net amounts in respect of transactions during the Relevant Period. The total of the GST shortfalls for the Majid Group was $32,273,306.[177] Mr

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[177] Hearing Book, Volume 4, pp 3,398-3,403; First Zafiriou Affidavit, [19]-[36].

Cochineas specifically deals with the Blue Heaven business in his affidavit and said that when the applicant became aware Blue Heaven's proprietors (which included Mrs Zamil) were not registered for GST, the applicant procured the return of the GST component of the price.[178] We are satisfied Mrs Zamil's evidence is still relevant as it explains the related arrangements, especially the fact of Mr Faraj being the conduit between jewellers and the applicant. Mrs Zamil's evidence also references the seriousness of the GST issue for the applicant. That is, the applicant was not prepared to pay a price for scrap gold referable to the spot price less discount plus 10% (ostensibly on account of GST, until the proprietors of Blue Heaven were found to not be registered for GST) unless it could claim an input tax credit for the 10% component of the price.

198. We agree with counsel for the Commissioner that it must have been evident to Mr Cochineas from the quantities being traded and other peculiar circumstances surrounding the involvement of Mr Faraj that the massive amounts of defaced gold being delivered to the applicant by Mr Faraj was not the result of dishoarding of gold jewellery due to the volatility in pricing of gold. No plausible explanation was given for how the Majid Group was able to source scrap gold that was, virtually in its entirety, damaged bars of at least 99.99% fineness to supply to the applicant in the volumes and with the frequency that it did. The profound implausibility of the evidence given by Mr Cochineas as to the Majid Group's sources of gold means it cannot be accepted by us.

199. We infer and accordingly find Mr Cochineas and, therefore, the applicant knew the scrap gold the applicant was buying from the Majid Group was investment-grade bullion that had been mostly sourced from Ceylon, which was an important and major customer of ABC NSW. As already noted above, ABC NSW was a joint venturer with Palloys in the applicant and the directors of ABC NSW were also directors of the applicant. We also infer and find precious metal had been deliberately damaged or defaced so as to be supplied (at least to some extent) by the Majid Group as taxable supplies of scrap gold to the applicant for refining. The applicant then sold the precious metal to ABC NSW which, in turn, sold precious metal to Ceylon. The same gold, or at least some of it, after being altered was passed through the various Majid Group entities via Mr Faraj, to the applicant to be recycled.

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[178] Hearing Book, Volume 6, pp 4,765-4,767; Second Cochineas Affidavit, [18]-[28].

200. We were informed the Commissioner issued most of the Majid Group entities with assessments for GST net amounts in respect of transactions they entered into during the Relevant Period and some had been issued with assessments for transactions entered into after the Relevant Period. Furthermore, most of the corporate entities in the Majid Group were placed into liquidation and some of the individuals were bankrupted.[179]

201. Although Mr Cochineas acknowledged having spoken to Mr Faraj about the proceedings, the applicant did not call Mr Faraj to give evidence. That decision was surprising given Mr Faraj's evidence was likely to be of assistance in corroborating the evidence of Mr Cochineas. The failure to call Mr Faraj was not adequately explained. If he had been called and given evidence, he may have been able to corroborate and fill gaps in the evidence of Mr Cochineas, whose evidence has been found wanting in a number of respects, as we have explained. The unexplained omission, coming on top of the shortcomings in the evidence that was led, prevents us from being satisfied the applicant has discharged its onus on this issue.

Gold Buyers

202. Another Division 165 Supplying Entity was Australian Gold Buyers International Pty Ltd (***Gold Buyers***) which, according to Mr Cochineas, was a company operated by Rami Askary, a bullion and scrap dealer based in New South Wales. Mr Cochineas stated that Gold Buyers utilised the services of Mr Faraj, who played a similar role to the one he played on behalf of the Majid Group entities. Mr Faraj negotiated prices on behalf of Gold Buyers with Mr Cochineas and delivered scrap gold on behalf of Gold Buyers to the applicant for refining.[180]

203. Mr Cochineas deposed that during the Relevant Period neither he nor the applicant or any of its management was aware of the source of scrap gold presented by Mr Faraj on behalf of Gold Buyers.[181] He said he was aware Gold Buyers bought precious metal from ABC

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[179] Hearing Book, Volume 4, pp 3,398–3,403; First Zafiriou Affidavit, [19]-[36] and Exhibit R18 – Further Affidavit of Aris Zafiriou sworn on 21 September 2018, [12]-[16].

[180] Hearing Book, Volume 3, p 2,094; First Cochineas Affidavit, [241]; Transcript p 179.

[181] Hearing Book, Volume 3, p 2,096; First Cochineas Affidavit, [252]-[254].

NSW but this did not surprise him because as a bullion dealer Gold Buyers bought precious metal to resell to its customers.[182]

204. Mr Cochineas deposed that during the Relevant Period, he was not aware of the exact volume or value of purchases of precious metal acquired from ABC NSW because, amongst other things, he did not have access to ABC NSW's computer system. He also said that given Gold Buyers had advised ABC NSW it was both a bullion dealer and a scrap metal dealer, the fact ABC NSW had referred Gold Buyers to the applicant as a refining client did not strike him as unusual.[183] The introduction is referenced in an email which Ms Kim Ronaldson sent to Mr Cochineas and Ms Simpson dated 15 July 2013 where she states "*I am going to need as much as I can get from [the applicant] to supply IPJ, Ceylon and Gold Buyers. Actually Rami (Gold Buyers) called today and asked for your contact details – they will be taking up to 25 bars per day*."[184] In a separate internal email dated 9 August 2013, Ms Ronaldson advised *"Rami [Askary] has also advised us and Phil [Cochineas] that he is going to be ramping up his orders in September, potentially an additional 100kgs per week there too"*.[185] These email exchanges show that, contrary to what Mr Cochineas claimed, he did have considerable knowledge of the volume and value of purchases of investment-grade bullion acquired by Gold Buyers from ABC NSW. Also, Gold Buyers was an important client of ABC NSW, along with the IPJ Group and Ceylon. This fact is reinforced by Ms Ronaldson's statement to Mr Cochineas that she was *"going to need as much as I can get"* in terms of investment-grade bullion to meet their orders. We infer Mr Cochineas did not raise any queries in response because he knew Gold Buyers was a key client of ABC NSW.

205. The evidence reveals a pattern of trading between Gold Buyers and the applicant and Gold Buyers and Ceylon according to which, on the same day, the applicant acquired metal from Gold Buyers and Ceylon made a sale to Gold Buyers. The pattern is evident in the bank statement of Gold Buyers covering the period from 28 February 2013 to 28 March 2013 when read together with receipts created by Ceylon, and with bank statements of Ceylon. For example, those categories of documents record the following occurring on 25 March 2013:

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[182] Hearing Book, Volume 3, p 2,096; First Cochineas Affidavit, [255].

[183] Hearing Book, Volume 3, pp 2,094 and 2,096; First Cochineas Affidavit, [240] and [255].

[184] Hearing Book, Volume 8, pp 6,783-6,784.

[185] Hearing Book, Volume 8, p 6,920.

(a) a tax invoice of Gold Buyers was addressed to the applicant for $106,675.75;[186]

(b) a transfer of $106,675.75 was made by the applicant to Gold Buyers' bank account;[187]

(c) a payment was made by Gold Buyers to Ceylon in the amount of $99,852.00;[188] and

(d) a receipt was created by Ceylon to Gold Buyers for the sale of gold in the amount of $99,852.00.[189]

206. Ms Wright stated that Gold Buyers sold approximately $8,600,000 worth of scrap gold to the applicant in the 2013 year and Gold Buyers acquired approximately $51,000,000 worth of precious metal from ABC NSW. Ms Wright determined that ABC NSW was the major supplier of precious metal to Gold Buyers but it was unlikely its only supplier as Gold Buyers also acquired gold from Ceylon. Furthermore, the applicant was not Gold Buyers' only customer. Ms Wright appropriately qualified her conclusion regarding Gold Buyers, stating that the gold that flows via the Gold Buyers supply chain to the applicant may contain some gold that originated from the applicant throughout.[190]

207. The Commissioner had issued Gold Buyers with assessments for GST net amounts in respect of transactions it entered into during the Relevant Period. It had been placed into liquidation in June 2013 even though documents record it was still making sales in August 2013.[191]

208. As already noted above, the applicant did not ask Mr Faraj to give evidence or explain why his evidence was unavailable or would not assist us when it was presumptively relevant. The same observation can be made about the applicant's failure to call Mr Askary. For reasons we have already explained, that omission calls attention to the fragility of the applicant's case, relying as it does on the evidence of Mr Cochineas. That evidence is unpersuasive.

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[186] Hearing Book, Volume 12, Tab 40.
[187] Hearing Book, Volume 12, Tab 41.
[188] Hearing Book, Volume 12, Tab 41.
[189] Hearing Book, Volume 12, Tab 39.
[190] Hearing Book, Volume 5, p 4,330; Wright First Report, [13.6.1]-[13.6.2].
[191] Hearing Book, Volume 5; p 4,330; Wright First Report, [13.6.1(a)].

MAK

209. The largest supplier to the applicant during the Relevant Period, which was also a Division 165 Supplying Entity, was M.A.K. Precious Metals Pty Ltd (***MAK***), which had been incorporated in January 2013. MAK was a bullion dealer and scrap metal dealer with offices in Melbourne and Brisbane. MAK's sole director and shareholder was Mr Michael Kukulka. Prior to the incorporation of MAK, Mr Kukulka traded under the name "Cash for Old Gold". MAK supplied the applicant with approximately 30% of its scrap gold, equivalent to $459,357,055 worth of scrap gold.

210. The evidence demonstrates Mr Kukulka, through MAK, acted as an intermediary between the applicant and the late Robert Bourke (or his company, Your Privacy Policy Pty Ltd - ***YPP***) and Rocco Calabrese (or his company, United Soul Holdings Pty Ltd – ***USH***).

211. Mr Cochineas was aware when scrap gold had been sourced from Mr Bourke as he was referred to as 'the golden goose because the blobs of gold resembled goose eggs. Mr Cochineas also knew when scrap gold was sourced from Mr Calabrese as his metal was referred to as 'Rocco jobs'. However, Mr Cochineas asserted that he did not know the identity of Mr Bourke because Mr Kukulka did not want to be "*cut out of a deal*".[192] That explanation did not make sense in circumstances where Mr Cochineas was aware Mr Kukulka was dealing with Mr Calabrese (whom Mr Cochineas had met during the Relevant Period), yet Mr Cochineas did not seek to cut Mr Kukulka out of his dealings with him. The Commissioner posited that a more credible explanation for why Mr Cochineas wanted to liaise with Mr Kukulka, and give the impression that he did not know Mr Bourke and also did not want to deal with Messrs Bourke and Calabrese directly, is that he preferred to have Mr Kukulka act as an intermediary to distance the applicant from what were clearly suspicious transactions. Mr Cochineas acknowledged he knew Mr Calabrese had a criminal record.[193]

212. We infer and accordingly find Mr Kukulka and his company, MAK, acted as an intermediary or conduit between Mr Bourke/YPP and the applicant and Mr Calabrese/USH and the applicant. We are satisfied Mr Kukulka inserted himself and his company, MAK,

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[192] Transcript p 209.

[193] Transcript p 214.

into the supply chains and that this suited all parties to the arrangement, especially the applicant. This is supported by the fact the applicant paid MAK what MAK paid to each of Mr Bourke/YPP and Mr Calabrese/USH plus a margin of $1,000 per kilogram of fine gold. MAK would issue a separate invoice for the $1,000 per kilogram supplied to the applicant. Additionally, the applicant had agreed favourable trading terms with MAK, such that it generally paid advances to MAK for the scrap material when the material was in the possession of the applicant or MAK, enabling the large volume of acquisitions to occur. This enabled the arrangements to run more efficiently as Mr Kukulka/MAK had the financial backing of the applicant to make the acquisitions of scrap gold.

213. Mr Bourke/YPP, based in Brisbane, was the main source of refining material to MAK. Mr Cochineas confirmed the products received from Mr Bourke (i.e. the goose eggs) looked like they had been melted in an uncontrolled environment as they were contaminated with large amounts of non-metallic impurities. Mr Cochineas also confirmed 'the Rocco jobs', being the scrap gold sourced from Mr Calabrese, based in Melbourne, consisted of melted bars or defaced or sweated or cut precious metal. Mr Cochineas did not offer any explanation as to his understanding of the source of the scrap acquired via Mr Kukulka or MAK. That was perhaps another advantage of interposing Mr Kukulka/MAK. However, Mr Cochineas knew the applicant supplied Ainslie with approximately 60% of its precious metal requirements.[194] Mr Cochineas maintained that during the Relevant Period, he was not aware Mr Bourke and/or YPP bought precious metal from Ainslie because Ainslie was and remains a company wholly unrelated to the applicant or any of its associates.

214. However, the unchallenged affidavit evidence of Glenn Nugent and Malcolm Gray, two jewellers who provided affidavit evidence on behalf of the Commissioner,[195] is that they melted pure gold hallmarked bars (including Ainslie bars) into blobs weighing 1kg each for Mr Bourke. At first, they delivered the gold back to Mr Bourke but, from around July 2013, they started making deliveries directly to MAK's premises. The deliveries started out at around 40kg at a time and grew to between 50kg and 80kg by November 2013. About 10% to 20% of gold in any delivery was made of melted bars and the remainder consisted

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[194] Hearing Book, Volume 3, pp 2,074 and 2,103; First Cochineas Affidavit, [156(b)] and [282]-[283].

[195] Hearing Book, Volume 4, pp 3,353-3,356; Affidavit of Glenn John Nugent sworn 27 February 2018 (***Nugent Affidavit***) and pp 3,372-3,376; Affidavit of Malcolm Peter Gray sworn 27 February 2018 (***Gray Affidavit***).

of unmelted 1kg bullion bars. This evidence is consistent with that of Jacqueline McLean who was formerly employed by MAK in its office.[196]

215. Ms McLean gave affidavit evidence on behalf of the Commissioner as well as oral evidence at the hearing about deliveries she received from Mr Bourke consisting of blobs and 1kg bullion bars that were occasionally not melted, cut or defaced. Ms McLean deposed that representatives of the applicant would then collect the material in that form. We prefer her evidence which showed a better recollection of events to that of Libby Pemberton (a former employee of AGS Metals) who gave both affidavit and oral evidence on behalf of the applicant insisting, in the first instance, that the bars were always cut. Ms Pemberton later clarified to us that by "cut" she meant *"maybe a wee bit of a corner taken or shaved at the side, not always cut down the middle"* and, in her second affidavit, she also stated *"the bars were damaged in some way, including but not limited to cuts and torch marks"*.[197] We make no criticism of Ms Pemberton because, on her own admission, when asked questions by counsel for the Commissioner about particular documents in cross-examination, she acknowledged she could not remember whether the documents were complete, as it was *"a long time ago"*.[198] In any event, the evidence of both Ms McLean and Ms Pemberton leads us to the conclusion it would have been obvious from the nature of the gold that was delivered (or collected), to the extent it comprised cut bars or bars which had been torched or melted into blobs, that suppliers were deliberately altering or defacing the bullion as part of an arrangement.

216. Nikos Kavalis, a director and co-founder of a precious metals consultancy firm based in London, provided an expert report on behalf of the applicant in relation to the global market for gold with a particular focus on the market for secondary materials. We accept his evidence which, in summary, was that refineries play an essential role in the secondary market. They aggregated the secondary material, assayed its purity, upgraded it where necessary, and provide participants in the industry with gold of confirmed metallic purity in a recognisable form.[199] Mr Kavalis also gave oral evidence about cut bars and

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[196] Hearing Book, Volume 4, pp 3,337-3,345; Affidavit of Jacqueline Ann McLean sworn 23 February 2018 (***McLean Affidavit***).

[197] Transcript pp 439-440; Hearing Book, Volume 6, p 4,749; Affidavit of Libby Pemberton sworn on 7 May 2018, [6].

[198] Transcript p 440.

[199] Hearing Book, Volume 4, p 3,209; Expert Report of Nikos Kavalis dated 12 December 2017, [25].

categorically confirmed what we suspected, which is that altering investment-grade bullion, such as virgin bars, does not make any commercial sense and immediately reduces their value because they can only be sold at 'spot minus' rather than 'spot plus a premium'.[200] Of course, the differing Australian GST treatments of precious metal and scrap gold must also be taken into account. Most importantly, the supply of scrap gold is a taxable supply which means the supplier has a GST liability.

217. As already noted, Mr Cochineas deposed that "all clients" of the applicant were subject to the applicant's account opening procedures described in [165] above, suggesting MAK completed the refining application form which contains declarations in respect of the source of the material supplied. None of these documents were produced by the applicant. Rather, the applicant produced a client trading account application form and a recipient created tax invoice agreement for MAK, each of which contained only basic information about the entity. Additionally, a review of the ABN Lookup record at the time would have revealed to the applicant that MAK had only been recently registered for GST and had no trading history. Also, the applicant did not produce any due diligence records relating to Mr Kukulka when he initially traded under the business name 'Cash for Old Gold' before MAK was incorporated.

218. Ms Wright relevantly noted the following in relation to MAK for the 2013 calendar year:

(a) between 91.97% and 99.87% of the gold the applicant acquired from MAK was of 99.99% fineness;[201]

(b) approximately 95% of job sheets record an advance payment made by the applicant to MAK and about $359,000,000 was paid by the applicant to MAK by way of advance payments;[202]

(c) 76.7% of Ainslie's identified customer receipts were from YPP indicating Mr Bourke was arranging substantial acquisitions from that dealer in precious metal based in Brisbane; [203]

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[200] Transcript p 433.
[201] Hearing Book, Volume 5, pp 4,196 and 4,199; Wright First Report, [5.4.4] and [6.3.2(e)].
[202] Hearing Book, Volume 5, p 4,253; Wright First Report, [7.12.14]-[7.12.15].
[203] Hearing Book, Volume 5, p 4,234; Wright First Report, [7.6.5(c)].

(d) 92% of MAK's identified supplier payments were to YPP / Mr Bourke and 3% were to Mr Calabrese/USH;[204] and

(e) 90% of MAK's identified customer receipts were from the applicant.[205]

219. The Commissioner submitted the following set of transactions that occurred on 25 and 26 February 2013 are an example of what occurred during the Relevant Period:

(a) on 25 February 2013, Ainslie sold Mr Bourke seven 1-kilo bars and, on a separate receipt, three 1-kilo bars, five 20-ounce bars, and five 10-ounce bars;[206]

(b) on 26 February 2013, YPP sold 14,666.44 grams of gold of 99.99% fineness to MAK.[207] (That weight is identical to the weight of what is recorded as having been sold by Ainslie to Mr Bourke);

(c) on 26 February 2013, AGS Metals, as agent for EBS, received gold bars in precisely the same weights and quantities identified above;[208]

(d) on 28 February 2013, the applicant issued a recipient created tax invoice for the acquisition of 14,664.97 grams from MAK.[209] The amount of 14,665.97 grams equals 99.99 per cent of what AGS Metals recorded as having received. Mr Cochineas agreed the likely reason for the difference between the amount received and the amount recorded in the recipient created tax invoice of 14,664.97 grams is that the applicant acquired from MAK 99.99 per cent of the gold it had received. The invoice records the acquisition of "Melted Bars".

220. The purchases made by the applicant from MAK on 26 February 2013 total approximately $1,900,000. That total is characteristic of the large purchases made by the applicant from MAK on a regular basis. For example, a purchase exceeding $3,500,000 was made on 27 June 2013 and a purchase of $5.3 million was made on 28 June 2013. Although Mr Cochineas would not concede such volumes of trading were typical between MAK and the

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[204] Hearing Book, Volume 5, pp 4,250-4,252; Wright First Report, [7.12.6].
[205] Hearing Book, Volume 5, pp 4,250-4,252; Wright First Report, [7.12.6].
[206] Hearing Book, Volume 8, pp 6,323-6,324.
[207] Hearing Book, Volume 8, p 6,325.
[208] Hearing Book, Volume 8, pp 6,330-6,331.
[209] Hearing Book, Volume 8, p 6,333.

applicant, Mr Cochineas agreed MAK was the applicant's largest supplier.[210] Furthermore, Ms Wright's First Report confirmed that virtually all of the gold the applicant acquired from MAK was of 99.99% fineness, suggesting it was likely sourced from investment-grade bullion. A review of the applicant's GST detail ledgers discloses the enormous quantities of material the applicant was acquiring from MAK on an almost daily basis up until the abovementioned execution of the search warrants on 29 October 2013. Mr Cochineas deposed that following the execution of the abovementioned warrants, the applicant sought a written declaration from MAK that it was GST compliant. MAK duly signed that declaration and the applicant continued to do business with MAK.[211]

221. Subsequently, the Commissioner assessed MAK for GST net amounts in respect of transactions it entered into during the Relevant Period. The total of the GST shortfalls for MAK was $17,735,043 and, on 2 December 2016, MAK was placed into liquidation.[212] Additionally, the Commissioner relevantly issued assessments to YPP and to USH for GST shortfalls in the amounts of $16,380,652 and $9,221,483 respectively, and neither of those entities lodged objections to those assessments.[213]

222. There were many irregularities in the documents concerning the acquisitions made by the applicant from MAK. For example, many of the recipient created tax invoices created by the applicant for the acquisitions of gold from MAK record a 'weight received' and a 'weight after sampling' that exceed the weight received as recorded on the applicant's job sheets for the same transactions. Neither Mr Lowden nor Mr Bell, whose responsibilities included receiving, weighing and recording metal received on the job sheets, could explain how this discrepancy arose.[214] Separately, many of the recipient created tax invoices created by the applicant do not reconcile with the records of the material the applicant received from MAK. For example, none refers to the supply of "blobs", rather they generally refer to "bars" or "melted bars". The Commissioner invited the Tribunal to infer the representations in the recipient created tax invoices as to what was supplied had been fabricated and that, in issuing the recipient created tax invoices to MAK, the applicant had co-operated with MAK in generating a paper trail that disguised the nature

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[210] Transcript p 207.

[211] Hearing Book, Volume 3, pp 2,101-2,102; First Cochineas Affidavit, [277].

[212] Hearing Book, Volume 4, p 3,403; First Zafiriou Affidavit, [38].

[213] Exhibit R18, [19] and [21] and Exhibit A19, [7].

[214] Transcript pp 461 and 501.

of the material MAK was supplying. While we accept a taxpayer that issues recipient created tax invoices takes more control of the critical paperwork which facilitates the claiming of input tax credits, we are loath to infer on the limited evidence before us (see [214] and [215] above), that the applicant engaged in fabricating descriptions of supplies in its transactions with MAK.

223. On the most beneficial analysis, Mr Cochineas wilfully turned a blind eye to the nature of the business the applicant was transacting with MAK or with Mr Bourke/YPP and Mr Calabrese/USH through MAK. The evidence outlined above compels us to conclude Mr Bourke/YPP and Mr Calabrese/USH were acquiring investment-grade bullion which they or Mr Kukulka melted, cut or defaced in order that, through MAK, some of it could be sold to the applicant as taxable supplies of scrap gold. No other credible explanation was provided as to how Mr Kukulka/MAK was in a position to supply the gold of at least 99.99% fineness in such large volumes and with such frequency as it did.

Further Findings regarding Division 165 Supplying Entities

224. The further findings we make in relation to the Division 165 Supplying Entities are, as follows. We find the applicant was aware these suppliers were acquiring investment-grade bullion from the Dealers (especially in the case of its related entity, ABC NSW). We also find the applicant more than likely knew the Division 165 Supplying Entities were altering the bullion so it no longer satisfied the investment form requirement of precious metal to make taxable supplies to the applicant. We also find the applicant was on notice these suppliers were not remitting the GST because it would have been uneconomic for them to do so. We reach that conclusion, in particular, based on the prices at which they bought the precious metal from the Dealers or other intermediaries, namely, 'spot price plus a premium', and the prices at which the Division 165 Supplying Entities later sold the scrap gold (whether or not it was the same gold) to the applicant for refining. The price paid by the applicant was a GST-inclusive price, namely, 'spot price less a discount plus GST' with the GST liability owed to the Commissioner. However, it was only economically feasible for the suppliers to undertake the transactions if they recovered the GST in the price of the scrap gold from the applicant but did not remit the GST to the Commissioner.

225. The Commissioner made clear he was *not* alleging the applicant was a party to the fraud being perpetrated by the Division 165 Supplying Entities, namely, the tax evasion – but he

insisted the applicant was still a willing and informed beneficiary of the scheme because it received the benefit of input tax credits in connection with its acquisitions of this suspiciously rich and surging taxable supply of scrap gold.

226. We now turn our attention to the legislative framework, and the respective contentions of the applicant and the Commissioner. As already noted above, there is limited guidance as to the application of Div 165. Accordingly, we have found it helpful, as did counsel for both parties, to refer to the jurisprudence relating to the similarly worded general anti-avoidance provisions contained in Part IVA of the *Income Tax Assessment Act 1936* (Cth) (***ITAA 1936***) before that Part was significantly amended in 2013, noting where appropriate the differences in the GST Act.

Division 165 of the GST Act: outline of the anti-avoidance provisions

227. The anti-avoidance provisions are contained in Div 165. Section 165-5 states:

> *(1) The Division operates if:*
>
> *(a) an entity (the **avoider**) gets or got a *GST benefit from a *scheme; and*
>
> *(b) the GST benefit is not attributable to the making, by an entity, of a choice, election, application or agreement that is expressly provided for by the *GST law, the *wine tax law or the *luxury car tax law; and*
>
> *(c) taking account of the matters described in section 165-15, it is reasonable to conclude that either:*
>
> *(i) an entity that (whether alone or with others) entered into or carried out the scheme, or part of the scheme, did so with the sole or dominant purpose of that entity or another entity getting a *GST benefit from the scheme; or*
>
> *(ii) the principal effect of the scheme, or of part of the scheme, is that the avoider gets the GST benefit from the scheme directly or indirectly; and*
>
> *(d) the scheme:*

> (i) *is a scheme that has been or is entered into on or after 2 December 1998; or*
>
> (ii) *is a scheme that has been or is carried out or commenced on or after that day (other than a scheme that was entered into before that day).*

228. So far as relevant, the meaning of 'GST benefit' and 'scheme' are defined in s 165-10, as follows:

> *(1) An entity gets a* ***GST benefit*** *from a *scheme if:*
>
> *…*
>
> *(b) an amount that is payable to the entity under this Act apart from this Division is, or could reasonably be expected to be, larger than it would be apart from the scheme or a part of the scheme; or*
>
> *…*
>
> *(2) A* ***scheme*** *is:*
>
> *(a) any arrangement, agreement, understanding, promise or undertaking:*
>
> *(i) whether it is express or implied; and*
>
> *(ii) whether or not it is, or is intended to be, enforceable by legal proceedings or*
>
> *(b) any scheme, plan, proposal, action, course of action or course of conduct, whether unilateral or otherwise.*

229. Section 165-10(3) makes clear that an entity can get a GST benefit from a scheme even if there is no economic alternative available to the entity. It states:

> *(3) An entity can get a *GST benefit from a *scheme even if the entity or entities that entered into or carried out the scheme, or a part of the scheme, could not have engaged economically in any activities:*

(a) of the kind to which this Act applies; and

(b) that would produce an effect equivalent (except in terms of this Act) to the effect of the scheme or part of the scheme;

other than the activities involved in entering into or carrying out the scheme or part of the scheme.

230. Section 165-15 sets out the matters to be taken into account in determining an entity's purpose in entering into or carrying out a scheme from which an avoider got a GST benefit, and the effect of the scheme. That sub-section provides:

*(1) The following matters are to be taken into account under section 165-5 in considering an entity's purpose in entering into or carrying out the *scheme from which the avoider got a *GST benefit, and the effect of the scheme:*

(a) the manner in which the scheme was entered into or carried out;

(b) the form and substance of the scheme, including;

(i) the legal rights and obligations involved in the scheme; and

(ii) the economic and commercial substance of the scheme;

(c) the purpose or object of this Act, the Customs Act 1901 (so far as it is relevant to this Act) and any relevant provision of this Act or that Act (whether the purpose or object is stated expressly or not);

(d) the timing of the scheme;

(e) the period over which the scheme was entered into and carried out;

(f) the effect that this Act would have in relation to the scheme apart from this Division;

(g) any change in the avoider's financial position that has resulted, or may reasonably be expected to result, from the scheme;

(h) *any change that has resulted, or may reasonably be expected to result, from the scheme in the financial position of an entity (a connected entity) that has or had a connection or dealing with the avoider, whether the connection or dealing is or was of a family, business or other nature;*

(i) *any other consequence for the avoider or a connected entity of the scheme having been entered into or carried out;*

(j) *the nature of the connection between the avoider and a connected entity, including the question whether the dealing is or was at arm's length;*

(k) *the circumstances surrounding the scheme;*

(l) *any other relevant circumstances.*

231. Section 165-15(2) states that: "*subsection (1) applies in relation to consideration of an entity's purpose in entering into or carrying out a part of a *scheme from which the avoider gets or got a *GST benefit, and the effect of part of the scheme, as if the part were itself the *scheme from which the avoider gets or got the GST benefit".*

232. Section 165-40(1)(a) provides that for the purpose of negating a GST benefit, the Commissioner may make a declaration stating: "*the amount that is (and has been at all times) the avoider's *net amount for a specified tax period that has ended".* Statements relating to different tax periods may be included in a single declaration: s 165-60.

233. Section 165-40(2) empowers the Commissioner to take such action as he or she considers necessary to give effect to a declaration made under this section. The Commissioner made two declarations dated 8 April 2016 for the purpose of negating GST benefits under s 160-40. The first declaration covered the months February to June 2012 inclusive and the second declaration was made in respect of the months July 2012 to June 2014 inclusive.[215]

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[215] Hearing Book, Volume 1, pp 118-119.

234. We note s 165-1 of the GST Act sets out what Div 165 is about. Relevantly, s 165-1 states, in part:

> *The object of this Division is to deter schemes to give entities benefits by reducing GST, increasing refunds or altering the timing of payment of GST or refunds.*
>
> *If the dominant purpose or principal effect of a scheme is to give an entity such a benefit, the Commissioner may negate the benefit an entity gets from the scheme by declaring how much GST or refund would have been payable, and when it would have been payable, apart from the scheme.*
>
> *This Division is aimed at artificial or contrived schemes. …*[216]

Scheme

235. First, it is essential to address whether there was a scheme, as defined, and the precise outline of that scheme, having regard to the centrality of the scheme to the Div 165 requirements. As noted at [228] above, the term 'scheme' is given a broad meaning in s-165-10(2)(a) and extends to "*any scheme, plan, proposal, action, course of action or course of conduct, whether unilateral or otherwise"* in s 165-10(2)(b) of the GST Act. It is well established in the income tax context, where there is a similar definition of scheme, that there need be no commercial or other coherence between the various steps that comprise a scheme: *Federal Commissioner of Taxation v Hart* (2004) 217 CLR 216 at [47].

236. The Commissioner relies upon a wider scheme or, in the alternative, a narrower scheme or schemes as detailed below. It is clear, based on the income tax jurisprudence, that it is open to the Commissioner to do so: *Hart* at [9] and [39]-[47].

237. According to the Commissioner's Closing Submissions dated 26 September 2018, the alleged wider scheme consists of the following transactions and course of action:

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[216] See ss 182-1 and 182-10 of the GST Act which explain the rules for interpreting the GST Act. Explanatory sections such as s 165-1, form part of the GST Act but they are not operative provisions. In interpreting an operative provision, an explanatory section may only be considered in certain prescribed circumstances.

(a) *the supply by the applicant to ABC NSW and Ainslie (the **Dealers**) of gold of 99.99% fineness in investment form for an amount roughly equivalent to the prevailing spot price for gold;*

*(b) the purchase by the **Intermediaries**[217] from the Dealers and/or other sources of gold of 99.99% fineness in investment form;*

PARTICULARS

This step consisted of the purchase of precious metal by:

(i) the IPJ Group entities from ABC NSW and/or other sources;

(ii) the Majid Group entities from Ceylon and/or other sources;

(iii) MAK from YPP, USH and/or other sources;

(iv) YPP from Ainslie and/or other sources;

*(v) Australian Bullion Company (Aust) Pty Ltd (**ABC(A)**) from ABC NSW and/or other sources;*

(vii) USH from ABC(A) and/or other sources.

(c) the scratching, melting or altering of the gold referred to in paragraph (b) above such that, while still of 99.99% fineness, the gold was no longer in investment form for the purposes of the definition of 'precious metal' in s 195-1 of the GST Act;

PARTICULARS

This step consisted of the scratching, melting or altering of precious metal by the IPJ Group entities, the Majid Group entities (or Mr Faraj), Gold Buyers (or Mr Faraj), MAK, YPP/ Mr Bourke, USH/Mr Calabrese and/or ABC(A).

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[217] Defined in the Commissioner's Amended Statement of Facts Issues and Contentions dated 16 March 2018 to be the IPJ Group, Gold Buyers, the Majid Group, MAK and ABC(A), which in turn sold gold bars to USH, together with certain other persons to whom one or more of them sold gold, including Focus Metals, Gold Makers and Goldborough.

(d) *the supply of the gold referred to in paragraph (c) by the Division 165 Supplying Entities to the applicant for an amount that was less than the prevailing spot price for gold, before the addition of GST; and*

PARTICULARS

This step consisted of the sales to [the applicant] of non-precious metal by the IPJ Group entities, the Majid Group entities (by Mr Faraj purportedly on their behalf), Gold Buyers (to the extent they were made by Mr Faraj purportedly on their behalf) and MAK. In relation to MAK, the gold it sold to the applicant was obtained by it from YPP/Mr Bourke and USH/Mr Calabrese.

(e) *the refining by the applicant of the gold referred to in paragraph (d) to produce 'precious metal' as defined.*

238. The Commissioner relied in the alternative on a narrower scheme which consists of the transactions and courses of action referred to in paragraphs (b), (c) and (d) of [237] above.

239. Broadly, the Commissioner explained that the scheme required the participation of a refiner, here the applicant, that would acquire the scrap gold to make supplies of precious metal. The refiner could not be a toll refiner (as was the main business of the JSPL Business when it was acquired by the applicant), as toll refining involves the supply of services not the supply of goods. The Commissioner further submitted that the purpose of defacing the precious metal that was acquired from the Dealers into non-investment form precious metal, which was an integral step in both the wider and narrower schemes, was fundamental to the scheme as it enabled the Division 165 Supplying Entities to make taxable supplies to the applicant such that it would pay the higher GST-inclusive prices to the Division 165 Supplying Entities. In this way, the making of taxable supplies to the applicant enlivened the entitlement to claim input tax credits. The Commissioner says it was the GST net amounts paid by the Commonwealth to the applicant that funded the arrangement and that made it attractive to the Division 165 Supplying Entities.

240. The applicant approached the threshold issue of whether there is a 'scheme' for Div 165 purposes by pointing out it was undertaking ordinary commercial dealings and accounting for GST in the usual way. It said it was a refiner and that its day-to-day profit-making

operations involved the acquisition of gold in the form of non-precious metal, including scrap gold with 99.99% fineness, for prices below the prevailing spot price of gold, and then refining that material to produce precious metal. The applicant said it sold the precious metal at around the prevailing spot price of gold to dealers in precious metal. The applicant asserted its profit was due to the difference in the price at which it was able to sell the precious metal and its cost in producing that output. It also said its profit, similar to other gold refiners, was based on very low margins. The applicant argued the GST formed no part of the profit of its business. It said its costs and revenue were both determined on a GST-exclusive basis.

241. More specifically, as to the alleged wider and narrower schemes posited by the Commissioner, the applicant said it did precisely the things which it did in its day-to-day operations, as described immediately above. Its relevant involvement in the purported 'scheme' in its alternative formulations was buying scrap gold, refining it and selling it as precious metal. Secondly, to the extent the alleged 'scheme' involved conduct by other persons, the applicant argued there is no basis for the Commissioner's contention that there was any kind of agreement, arrangement or understanding between those persons and the applicant, its officers or employees as to the existence of such a 'scheme'. Rather, the alleged 'scheme', in its different formulations, is merely a temporal sequence of independent, unplanned and unco-ordinated events.

242. The applicant further pointed out the alleged wider 'scheme' is said to strangely commence with the sale of precious metal by the applicant to the Dealers. The implication is there was some known or fixed starting price at which the material was subsequently bought by the Division 165 Supplying Entities from the Dealers and later supplied to the applicant. Further, the 'same' material was then sold to the applicant for a price that was lower than what the applicant charged the Dealers. The applicant stated that notion is incoherent because the spot price of gold moves. The applicant also argued in its written submissions that *"the price at which gold was bought, whether from rogue suppliers or otherwise, was less than the then-prevailing spot price; and gold would be sold for about the then-prevailing spot price."*[218] The applicant asserted those prices were relative to the market, and there was no greater gain to be made by the applicant from purchasing scrap gold from a rogue supplier than from anyone else. The applicant argued it had the

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[218] Applicant's Closing Submissions dated 26 September 2018, [103].

identical risk exposure to the spot-market price of gold regardless of the source of its feedstock.

243. The applicant added the alleged ‘scheme’ cannot be supported or explained as a circular flow of the ‘same gold’. According to the applicant, the precious metal sold by it was not the product of a circular flow because, plainly, once gold from sources outside the parties to the alleged ‘scheme’ was introduced and melted into the amalgam of fine stock gold, then it could potentially only be said that *some* of the gold which the applicant sold may have once been gold which had previously been sold as precious metal by the applicant. On that basis, the applicant said the refining material was not the same. Additionally, there was, in any event, a fundamentally different product recognised as such by the GST Act, namely, precious metal.

244. We conclude there was a ‘scheme’, as defined, comprised of the steps set out at [239] above, being the so-called wider scheme referred to by the Commissioner. We also conclude, in the alternative, the subset of paragraphs (b), (c) and (d) of [239] above is also a ‘scheme’, as defined, referred to in our decision as the narrower scheme. Our conclusions are based on the very broad meaning of scheme and the evidence set out in [142] – [226] above as regards the nature of the dealings between the Division 165 Supplying Entities, including the applicant, and the Dealers. We rely, in particular, on the incontrovertible conclusions of Ms Wright about the applicant’s dealings with the Division 165 Supplying Entities, including the fact the Division 165 Supplying Entities did not have access to legitimate scrap metal or the ability to fund transactions of that value on a repetitive basis. We are satisfied the Division 165 Supplying Entities mostly acquired investment-grade bullion from the Dealers or from other intermediaries interposed between them and the Dealers, such as Ceylon. They then altered the investment-grade bullion into scrap gold to make taxable supplies to the applicant. We also rely on Ms Wright’s conclusions as to the dealings between the applicant and the Dealers for the wider scheme. Ms Wright concluded approximately 56% of the applicant’s receipts (or approximately 63% of identified customer receipts) in the 2013 calendar year were from ABC NSW, indicating ABC NSW was the applicant’s largest customer.[219] The applicant’s second biggest customer was Ainslie which accounted for 26% of all receipts (or approximately 30% of identified customer receipts) in the 2013 calendar year.

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[219] Hearing Book, Volume 5, p 4,224; Wright First Report, [7.4.6(c)].

Furthermore, in the 2013 calendar year, ABC NSW's main supplier was the applicant and Ainslie's main supplier was the applicant. [220]

245. We agree with the Commissioner that the scheme only works to the extent there is a refiner, here the applicant, that acquires and sells metal on its own account and produces 'precious metal'. That was part of the plan of the joint venturers for the establishment of the applicant to take advantage of the GST-free supply provisions regarding the first supply of precious metal (see [49] above). From the very start of its operations, the applicant set up processes for the acquisition of scrap gold from "IPJ and others" in order to make GST-free supplies of precious metal. To the extent the arrangements involved more elaborate supply chains as, for example, with the IPJ Group and the Majid Group, these were designed to conceal the source of the gold which was acquired as investment-grade bullion from the Dealers and/or give the appearance of bona fide arrangements such as in the case of the IPJ Group ostensibly undertaking barter transactions. But the unchallenged evidence shows the Division 165 Supplying Entities variously engaged in a charade such that many of their transactions with other entities were fabricated to make it appear they were acquiring scrap gold from a variety of sources. The Dealers were also important in the scheme because the applicant had to make the first supply of precious metal to a dealer in precious metal to qualify for the GST-free treatment.

246. We do not accept any of the applicant's submissions that there was no 'scheme'. Contrary to what the applicant submitted about the 'scheme' (in either of its formulations) being merely a temporal sequence of independent, unplanned and unco-ordinated events, the evidence supports a finding there was a level of sophisticated planning and interaction between the parties that were involved in each of the supply chains. In each case, the steps in the scheme represent the various sale and purchase transactions relating to gold that was directly or indirectly sourced from the Dealers, as well as the contrived step of defacing the precious metal to manufacture taxable supplies to the applicant and, consequently, the input tax credits claimed by the applicant. The applicant would undertake certain processes and then sell the precious metal to the Dealers for the transactions to start over again in a synchronised sequence. Some of the supply chains had interposed entities but that did not materially change what was a basic loop or round robin arrangement between the Dealers, the Division 165 Supplying Entities and the

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[220] Hearing Book, Volume 5, pp 4,228 and 4,233; Wright First Report, [7.5.6] and [7.6.5].

applicant with the same, or substantially the same, gold. Moreover, the applicant facilitated the efficiency of the arrangement with its quick out-turn and payment arrangements. The applicant and ABC NSW also co-operated as to production of precious metal to meet the insatiable demand for gold of the participants to the arrangement, including their own.

247. Accordingly, we conclude the ‘scheme’ involved a carousel type arrangement based on supplying gold for refining after deliberately altering its form. This was not plain carousel fraud involving transactions with the Division 165 Supplying Entities not remitting GST on their taxable supplies to the Commissioner. There was an additional feature that was key to the arrangement, being the contrived and artificial defacing of the precious metal to take advantage of the different treatments of metal under the GST Act – the fiscal alchemy we referred to at the outset of these reasons. That was an integral step in both the wider and narrower ‘schemes’.

248. Even if the applicant carried on the refinery in a conventional way, this would not be an answer to the question posed as to the existence of the scheme because the definition of ‘scheme’ is sufficiently broad to capture ordinary commercial arrangements. Irrespective, the applicant was not a long-standing refiner. It was incorporated to acquire a toll refining business and to specifically take advantage of the GST-free exemption for the first supply of precious metal. Another characteristic that sets the applicant apart from what other refiners would do is its pricing. In this regard, the applicant’s submission extracted at [242] above that *“the price at which gold was bought … was less than the then-prevailing spot price”* is inaccurate. The applicant acquired the scrap gold from the Division 165 Supplying Entities at a GST-inclusive price that always exceeded the spot price. No refiner would pay those prices unless they were entitled to claim the input tax credits.

249. The applicant’s further submission that it made a profit *“due to the difference in the price at which it was able to sell the precious metal and its cost in producing that output”* is also inaccurate. It made a profit because of the input tax credits. Without the input tax credits paid by the Commissioner to the applicant for the GST charged by the Division 165 Supplying Entities to the applicant, the transactions with the Division 165 Supplying Entities at just below the spot price *plus GST* would not have been economically feasible for the applicant.

250. Furthermore, it is no answer for the applicant to say it would have paid the *same* prices it paid to the Division 165 Supplying Entities to *other* third-party suppliers for taxable supplies of scrap gold. While that may be true, there was no evidence before us to show the applicant paid higher prices because the supplies made to it were taxable supplies of scrap gold. The reality is that the GST was never factored into the prices charged by the Division 165 Supplying Entities to the applicant because they never intended to pay the GST to the Commissioner, and never did pay it. The applicant made its profit from the input tax credits it claimed in relation to the pricing of scrap gold in an artificial market sustained by the Division 165 Supplying Entities who never paid their GST liability.

251. Finally, as to profitability, there was no evidence before us that the applicant made any profit from fluctuations in the spot price for gold. On the contrary, the evidence points to the prices for supplies of gold being systematically locked and fixed for acquisition and sale within a short time frame so it mitigated any exposure to fluctuations in the spot price, which Mr Cochineas referred to as a natural hedging technique.[221]

252. Our conclusion is that the applicant was not an innocent party in the wider or narrower 'scheme'. The applicant knew it was uneconomic for the Division 165 Supplying Entities to sell scrap gold to it at a price that was effectively less (on a GST-exclusive basis) than that for which the Division 165 Supplying Entities were buying essentially the same gold, in the form of precious metal from the Dealers, unless they were not remitting the GST on those taxable supplies. We also conclude the 'scheme' was perpetuated by the applicant due to the input tax credits it received from the Commissioner. That was the economic benefit being shared amongst the participants to the scheme. It is unnecessary for us to find whether the applicant had a role in orchestrating the scheme and in procuring the Division 165 Supplying Entities to carry out their part, including the defacing of the precious metal before presenting it for refining to the applicant.

GST benefit

253. Section 165-10(1) sets out the circumstances in which an entity gets a GST benefit from a scheme. Only s 165-10(1)(b) is relevant, as extracted at [228] above. Therefore, an entity obtains a GST benefit from a scheme if, relevantly, an amount that is payable to the entity

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[221] Hearing Book, Volume 3, p 2,041; First Cochineas Affidavit, [45].

under the GST Act, apart from Div 165 is, or could reasonably be expected to be, larger than it would be apart from the scheme or part of the scheme: s 165-10(1)(b) – see [228] above. Notably, s 165-10(1) expressly provides that the GST benefit may arise from only part of the scheme.

254. The amount of a GST benefit which an entity gets is the difference between what is payable to the entity under the GST Act (as the net amount refundable) and what is payable *apart from the scheme*. In the case of the applicant, the aggregate amount of the GST benefit is the aggregate of the input tax credits for the creditable acquisitions from the Division 165 Supplying Entities. Over the Relevant Period, the relevant aggregate amount was $72,953,611. It follows the amounts payable to the applicant under the GST Act for the monthly tax periods during the Relevant Period are larger than they would be apart from the scheme: s 165-10(1)(b).

255. The Commissioner submitted s 165-10(1)(b) does not appear to require a prediction as to events which did not occur but which might reasonably be expected to have occurred if the scheme had not been entered into or carried out.[222] However, if, contrary to the above, s 165-10(1)(b) does require a consideration as to what might reasonably be expected if the scheme had not been entered into in the present case, the Commissioner says such a consideration does not assist the applicant. In this regard, the Commissioner referred us to *Federal Commissioner of Taxation v Peabody* (1994) 181 CLR 359 in relation to the meaning of the expression in s 177C of the ITAA 1936, where the High Court stated at 385:

> *A reasonable expectation requires more than a possibility. It involves a prediction as to events which would have taken place if the relevant scheme had not been entered into or carried out and the prediction must be sufficiently reliable for it to be regarded as reasonable.*

256. In *Federal Commissioner of Taxation v Lenzo* (2008) 167 FCR 255, again in the context of the application of Part IVA of the ITAA 1936, it was held by Sackville J (at [128]), that the task is to:

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[222] This is in contrast with the income tax test in s 177C of the ITAA 1936.

> *… consider, in the absence of the scheme, what activity the taxpayer would have undertaken. The taxpayer can satisfy the onus of showing that he or she has not obtained a tax benefit in connection with a scheme if:*
>
> - *he or she would have undertaken or might reasonably be expected to have undertaken a particular activity in lieu of the scheme; and*
>
> - *the activity would or might reasonably be expected to have resulted in an allowable deduction of the same kind as the deduction claimed by the taxpayer in consequence of the scheme.*

257. The Part IVA income tax cases also establish the taxpayer bears the onus of identifying what would have happened – the so called counterfactual or alternative postulate: *Federal Commissioner of Taxation v Trail Bros Steel & Plastics Pty Ltd* (2010) 186 FCR 410 at [34]-[35]. Unless the counterfactual is so obvious as to be inevitable, the taxpayer may need to lead evidence it would have undertaken a particular activity or adopted a particular course absent the scheme actually undertaken: *Trail Bros Steel & Plastics Pty Ltd* at [36]. See also *VCE and Commissioner of Taxation* [2006] AATA 821 at [60].

258. The applicant argued the Commissioner does not state what, on his hypothesis, the applicant could reasonably be expected to have done apart from the scheme, except that it would not have been entitled to the input tax credits. On the other hand, the applicant did not put on evidence to suggest what it would have done apart from the scheme. Accordingly, that left us to infer it is unlikely it would have made the same number of acquisitions of scrap gold as it did, or at all. That seemed to us to be the obvious and inevitable outcome. The applicant surmised the Commissioner's real complaint is the applicant acquired the gold from the Division 165 Supplying Entities and not that it did anything different than it usually did in refining and selling gold; nor, that it did anything to produce a different GST outcome in doing so. The Commissioner argued there is no evidence to support a conclusion that, if the scheme (in either of its formulations) had not been entered into, it might reasonably be expected the amounts payable to the applicant under the GST Act for the Relevant Period would not have been smaller than in fact they were.

259. We agree with the Commissioner's position with respect to s 165-10(1(b) because, apart from the scheme or part of the scheme (for instance, the defacing of the precious metal), in either of its alternative formulations, the net amounts payable by the Commonwealth to the applicant under the GST Act for the Relevant Period would have been smaller as it would not have made the creditable acquisitions. It is unnecessary for us to decide whether a counterfactual is necessary although we note the expression *"could reasonably expected to be larger than it would be apart from the scheme or a part of the scheme"* expressly references what is to be contemplated and appears to invite some comparison. In the present case, absent the scheme or part of the scheme, the arrangement would not have been economically feasible and the applicant would not have acquired scrap gold in that volume and of that quality at those prices. In this regard, we further note s 165-10(3) of the GST Act states an entity can get a GST benefit from a scheme even if the entity or entities that entered into the scheme could not have engaged economically in any activities other than those involved in carrying out the scheme or part of the scheme.

Dominant purpose or principal effect of the scheme

260. At the heart of the application of Div 165 in a case like this is whether the 'scheme', or 'any part of the scheme', was entered into or carried out by any of the participants for the sole or dominant purpose, objectively ascertained, and taking into account the matters in s 165-15, of enabling the applicant to get a GST benefit from the scheme: s 165-5(1)(c)(i). The enquiry directed by this test is whether the sole or dominant purpose of getting a GST benefit from the scheme can be attributed to one of the participants of the scheme or part of the scheme through an analysis of the listed matters. The relevant purpose need not be attributed to the taxpayer; it is sufficient that the purpose can be attributed to any one participant in the scheme: *Federal Commissioner of Taxation v Macquarie Bank Ltd* (2013) 210 FCR 164 at [289]-[290]; *Federal Commissioner of Taxation v Ludekens* (2013) 214 FCR 149 at [243]-[246].

261. It is well established that the term 'dominant' indicates that purpose which is the ruling, prevailing, or most influential purpose: *Federal Commissioner of Taxation v Spotless Services Limited* (1996) 186 CLR 404 at 416.

262. Division 165 also applies where the 'principal effect' of the scheme or part of the scheme is that the taxpayer gets a GST benefit directly or indirectly, taking into account the

matters in s 165-15: s 165-5(1)(c)(ii). The principal effect test requires one to look at the objective outcomes produced by the scheme to see whether it is explicable by some reason beside the GST benefit obtained by the taxpayer. The 'principal effect' is an important effect, as opposed to merely an incidental effect: *Explanatory Memorandum to the A New Tax System (Goods and Services Tax) Bill 1998* (Cth), paragraph 6.345.

263. Under both tests, the subjective intentions of the participants in the scheme must be disregarded, as the tests are expressed in terms of "it is reasonable to conclude". This approach is supported by the income tax jurisprudence: see *Federal Commissioner of Taxation v Zoffanies* (2003) 132 FCR 523 at [53]-[54]; *Federal Commissioner of Taxation v Sleight* (2004) 136 FCR 211 at [67]; *Federal Commissioner of Taxation v Hart* (2004) 217 CLR 216 at 243; *Vincent v Commissioner of Taxation* (2002) 50 ATR 20 at [122]; *Orica Limited v Federal Commissioner of Taxation* [2015] FCA 46 at [19]. Furthermore, while all of the matters identified in s 165-15(1) must be taken into account, the Tribunal is entitled to form a "global assessment of purpose": *Federal Commissioner of Taxation v Consolidated Press Holdings* (2001) 207 CLR 235 at 263. As to the precise matters that must be considered for Div 165 purposes, there are twelve paragraphs set out in s 165-15(1), some of which are different to Part IVA of the ITAA 1936, including the last one which is open-ended and which references "any other relevant circumstances".

264. The Commissioner submitted that, in the present case, in relation to the wider or narrower 'scheme' and taking account of the matters referred to in s 165-15(1), one or more of the following listed entities, whether alone or with others, entered into or carried out the scheme or a part of the scheme. Moreover, these entities entered or carried out the scheme with the sole or dominant purpose of the applicant getting a GST benefit from the scheme which was the input tax credits for its acquisitions and for which the applicant paid the GST-inclusive prices to the Division 165 Supplying Entities:

(i) the applicant;

(ii) the IPJ Group entities;

(iii) the Majid Group entities, Gold Buyers and/or Mr Faraj;

(iv) MAK and/or Mr Kukulka;

(v) YPP and/or Mr Bourke;

(vi) USH and/or Mr Calabrese.

265. Further, or in the alternative, the Commissioner says the principal effect of the scheme is that the applicant got the GST benefit from the scheme, directly or indirectly.

266. The applicant's position was that it is not reasonable to conclude any participant in the alleged scheme (in either of its formulations) entered into or carried out the scheme, or part of the scheme, for the dominant purpose of the applicant getting a GST benefit. The applicant accepted, based on the evidence produced, that certain rogue suppliers altered gold to make taxable supplies to the applicant, collected GST-inclusive prices from the applicant and then fraudulently retained that GST. However, the applicant distanced itself from that fraudulent conduct and argued its dominant purpose, having regard to the listed matters, was not to secure input tax credits but to acquire scrap gold it needed to produce precious metal. It said it is irrational to suggest the dominant purpose of a taxpayer acquiring a taxable supply of goods that are critical to its business is not to obtain the goods themselves but simply to obtain the input tax credits. In any event, the applicant argued the availability of input tax credits to the applicant was an expected and natural incident of the payment of GST-inclusive prices.

267. Further, the applicant submitted it was not the principal effect of the scheme that the applicant received the GST benefit: it submitted the principal effect was to enable the rogue suppliers to sell scrap gold to third-party purchasers including the applicant as a taxable supply, thereby enabling those suppliers to recover GST-inclusive prices and fail to remit that GST to the Commissioner. The applicant says that is the step which cannot be explained other than by reference to tax evasion on the part of the Division 165 Supplying Entities, and the availability of input tax credits to the applicant was irrelevant to the purpose and effect of any scheme participant.

268. The applicant's arguments have a superficial appeal, but the reality is that the applicant's entitlement to the input tax credits was more important to the operation of the scheme than the GST liabilities evaded by the Division 165 Supplying Entities. The input tax credits paid by the Commonwealth to the applicant funded the round-robin arrangements because, in simple terms, it was only economically feasible for the applicant to pay those GST-inclusive prices to the Division 165 Supplying Entities in the knowledge that the applicant would receive the input tax credits. Without the entitlement to the input tax

credits, the applicant would not have paid those prices to the Division 165 Supplying Entities and, consequently, there would have been no acquisition of precious metal by the third-party suppliers (including the Division 165 Supplying Entities) from the Dealers. There would have been no defacing of that precious metal, no taxable supplies in altered form to the applicant, no processing of the metal by the applicant, and no sale of an equivalent amount of precious metal back into the market by the applicant to the Dealers, and so on. In other words, the round robin arrangements would have fallen over if the applicant had not been able to claim the input tax credits. It was the GST benefit in the form of the larger input tax credits payable by the Commonwealth to the applicant, because of the Division 165 Supplying Entities making taxable supplies to the applicant, that underpinned the scheme.

269. We are satisfied that either the applicant or the other entities listed at [264] above entered into the scheme (in either of its formulations) with the dominant purpose of the applicant getting a GST benefit from the scheme. We reach that conclusion after taking account of the matters listed in s 165-15(1). Our analysis in relation to the matters listed in s 165-15 follows.

270. As to s 165-15(1)(a) and the manner in which the scheme was entered into or carried out (in both of its formulations), this involved the acquisition of investment-grade bullion, the deliberate alteration of the bullion and the subsequent supply of scrap gold to the applicant for refining. Those transactions and course of conduct occurred systematically on an almost daily basis over a period of at least 20 months from the start of the applicant's business, with increasing frequency and involving increasingly large volumes and values. The applicant's dealings with the Division 165 Supplying Entities including its lax due diligence procedures, as well as its rapid out-turn and favourable payment terms, facilitated the efficient perpetuation of the scheme. The applicant's supplies of investment-grade bullion to the Dealers (one of which was a related entity) were also instrumental to the ongoing and increasing volume of high-value transactions carried out by the Division 165 Supplying Entities.

271. As we have explained above, Mr Cochineas and Ms Simpson – but especially Mr Cochineas – were on notice (and in some cases had actual knowledge) of the fraudulent activities of the Division 165 Supplying Entities. That state of knowledge must be attributed to the applicant. Further, the Division 165 Supplying Entities created a liability to

GST when making taxable supplies of scrap gold and the Division 165 Supplying Entities passed on the GST to the applicant as part of the price for the scrap gold. There was no commercial reason for the round robin arrangement except for the GST consequences arising from the different treatments of gold. Accordingly, the manner in which the scheme was carried out strongly suggests the dominant purpose of the entities listed at [264] above (including the applicant), was to secure the GST benefit.

272. As to s 165-15(1)(b), the form and substance of each scheme was to create GST liabilities in the Division 165 Supplying Entities and corresponding entitlements to input tax credits in the applicant for which the Commonwealth was liable to make payment to the applicant. There was no economic substance to the wider or narrower scheme as it was not an ordinary commercial arrangement. It was an arrangement for the applicant to claim input tax credits. The form and substance of the scheme points to the conclusion that producing the GST benefit was the dominant purpose of the scheme.

273. As to s 165-15(1)(c), in relation to the purpose or object of the GST Act, it is clear the input tax credits are available to a refiner for acquisitions that relate to it making the first supply of precious metal after its refining, but are not available for acquisitions that relate to input taxed supplies. It is manifestly also clear that, in the present case, the outcomes under the GST Act were manipulated by the contrived step of the deliberate alteration of investment-grade bullion so that it no longer satisfied the definition of ‘precious metal’ and could be sold to the applicant as taxable supplies. The only reason the investment-grade bullion was being repeatedly defaced was in order to create entitlements to input tax credits in the applicant. This factor strongly suggests the dominant purpose of the entities listed at [264] above (including the applicant), was to get the GST benefit.

274. In regard to the timing and period over which the schemes (in either formulation) were carried out (as referred to in paragraphs 165-15(1)(d) and (e)), they commenced shortly after the applicant was incorporated to acquire the existing JSPL Business. The first ‘client’ of the applicant was the IPJ Group – one of the Division 165 Supplying Entities – in respect of which the applicant set up its processes with ABC NSW, a related entity. Further, the schemes entailed the monthly claiming by the applicant of input tax credits, matched by a consistent failure by most or all of the Division 165 Supplying Entities to properly account for GST on their taxable supplies. Other events which ensued and which also reflect on the requisite dominant purpose of the applicant in getting a GST benefit

from the scheme include the fact that after the search warrants were executed, the applicant's trading with the IPJ Group entities and the Majid Group entities (other than Majid Jewellers) ceased. Additionally, the applicant's trading with Majid Jewellers and MAK decreased substantially. Separately, Gold Buyers had previously gone into liquidation. The timing of these events strongly suggests the dominant purpose of the entities listed at [264] above (including the applicant), was to secure the GST benefit.

275. This analysis is premised on the applicant succeeding as to its entitlements to input tax credits under Div 11. In those circumstances, but for the application of Div 165, the effect of the GST Act would be that the applicant would be entitled to input tax credits totalling $72,953,611: s165-15(1)(f).

276. Section 165-15(1)(g) requires consideration of any change in the taxpayer's financial position that resulted or may reasonably be expected to result from the scheme. During the 18 months leading up to July 2014, the applicant's turnover increased from $63,000,000 to $745,785,032 at a time when the spot price for gold was falling,[223] and its profit before tax increased by 6296%. For the reasons explained above in relation to pricing, the high turnover and profit was, in the main, due to the input tax credits that the applicant claimed as part of the scheme. This factor strongly suggests the dominant purpose of the applicant was to secure the GST benefit.

277. While the applicant's financial position was boosted by the scheme, the same cannot be said for the financial position of other 'connected entities' (a reference to entities that had a connection or dealing with the taxpayer). The impact of the scheme on their financial position and any other consequence for the avoider or connected entity must also be taken into account pursuant to s 165-15(1)(h)-(i). While the authors of the fraud benefitted from the tax evasion, that is beside the point for present purposes. The *scheme* (in either of its formulations) had a deleterious impact on their fortunes because they incurred a GST liability which made the transactions uncommercial. Another change that resulted from the scheme in either of its formulations was the substantially increased turnover and, consequently, increased margins and profitability for the Dealers with which the applicant transacted, including the applicant's related entity, ABC NSW. We consider this factor strongly suggests the dominant purpose of the entities listed at [264] above, was to secure

[223] Hearing Book, Volume 6, p 4,730; Supplementary report of Dawna Wright dated 28 March 2018, [5.5.3].

the GST benefit. This is because the adverse economic outcomes for the Division 165 Supplying Entities under the GST Act could not have been the driving force of the scheme. The creation of the matching input tax credits in the applicant lay at the heart of the scheme.

278. As to the nature of the connection between the applicant and other connected entities (referred to in s 165-15(1)(j)), the applicant's primary customer, ABC NSW, was a related entity of the applicant. As noted above, the two directors of ABC NSW, Ms Simpson and Mr Gregg, were also directors of the applicant during the Relevant Period. Ms Simpson and Mr Gregg also indirectly held 50% of the shares in the applicant. Furthermore, the relationship between ABC NSW and the applicant in the scheme (in either of its formulations) was symbiotic in that their businesses were co-dependent. The applicant relied on ABC NSW to place orders for the production of precious metal. On the other hand, the applicant was only in a position to produce precious metal after acquiring scrap metal from the Division 165 Supplying Entities. The Division 165 Supplying Entities had previously acquired the precious metal from, amongst others, the Dealers, including ABC NSW. In relation to the applicant's transactions with the Division 165 Supplying Entities, we have already referred above to the fact that the applicant did not insist on any due diligence regarding the origin of the scrap gold and that it offered favourable trading terms. In relation to the IPJ Group, we also noted the relationship between Mr Cochineas and his associates with the Catanzariti brothers was more than a strictly business relationship. The nature of the connections and the mutual benefits derived from the input tax credits suggests the dominant purpose of the entities listed at [264] above was to secure the GST benefit.

279. Sections 165-15(1)(k) and (l) refer to the circumstances surrounding the scheme and any other relevant circumstances. We are of the view these factors require a holistic consideration of the scheme in either of its formulations to be taken into account. We consider the fact *"a significant motivation [for the establishment of the applicant] is to obtain the benefit of the current GST-free "first supply from a refinery" exemption"* (see [49] above) to be particularly influential in our consideration of the factors, especially when coupled with the fact the applicant commenced its business with IPJ (one of the entities engaged in fraudulent conduct). The early email correspondence between representatives of the applicant and ABC NSW, including as to the processes to be adopted (see [161] above), also suggest there was implicit co-operation between the applicant, IPJ and ABC

NSW as to the arrangement between them. Furthermore, we are satisfied the initial process which Mr Cochineas wanted to test with ABC NSW (albeit involving small quantities) was to be the applicant's roadmap for similar arrangements with other Division 165 Supplying Entities (see [146] above). We conclude the applicant was, at best, wilfully blind to the creation of a contrived market in gold transactions which entitled it to claim input tax credits upon its acquisitions of scrap gold from the Division 165 Supplying Entities. The applicant facilitated and willingly participated in the round robin arrangement and benefited from the input tax credits that were created. The relevant circumstances surrounding the scheme strongly suggest the applicant had the requisite dominant purpose of the applicant getting the GST benefit from the scheme.

280. Further to our conclusion at [269] above, we are satisfied the dominant purpose of the entities listed at [264] above was to create an entitlement to claim input tax credits in the applicant. Without that, the applicant would not pay GST-inclusive prices for the scrap gold. The objective purpose of the Division 165 Supplying Entities was to make sales to the applicant that were taxable supplies by them and creditable acquisitions by the applicant. It was the input tax credits which were critical to the scheme in both of its formulations. The Division 165 Supplying Entities were able to benefit from the payment of those input tax credits by being able to recover GST-inclusive prices from the applicant regardless of the fact they never intended to remit the GST to the Commissioner.

281. Further, or in the alternative, in relation to the wider scheme and/or the narrower scheme, taking account of the maters listed in s 165-15, as discussed above, we conclude the principal effect of the scheme or of part of the scheme in either of its formulations, is that the applicant obtained the GST benefit from the scheme, directly or indirectly. It is significant to note that the Explanatory Memorandum to the A New Tax System (Goods and Services Tax) Bill 1998 (Cth) states at 6.344 that *"[t]his test is different from the purpose test in that it applies specifically to the avoider and the GST benefit obtained by the avoider"*.

282. We are reinforced in our conclusions by s 165-1 which states, by way of an explanatory section, that Div 165 is "*aimed at artificial or contrived schemes*". There was no conceivable commercial justification for the defacement of the investment-grade bullion into scrap gold other than to enable the acquisition of it by the applicant to become creditable acquisitions. Moreover, the applicant's business model was opportunistic in

nature as it was premised on recycling precious metal that was already of 99.99% fineness after it was deliberately defaced and turned into scrap gold. For completeness, this arrangement was not a carousel fraud arrangement involving innocent traders in a supply chain. The applicant was, at least, wilfully blind and enabled the arrangements to continue. It would have been obvious to the applicant that the investment-grade bullion was deliberately defaced to create taxable supplies. Contrary to what the applicant submitted, this is a case about needless refining as there was no legitimate commercial purpose in turning investment-grade bullion into scrap gold of 99.99% metallic fineness and then into precious metal bullion bars and so on. The applicant's submission to the effect that it added value in the supply chain by producing precious metal fails to engage with the indisputable fact that the value of the precious metal was deliberately destroyed, over and over again, so as to create input tax credits in the applicant.

283. It is not determinative, in circumstances where the definition of 'GST benefit' in s 165-10(1)(b) refers to *"an amount that is payable to the [applicant] under this Act apart from this Division is, or could reasonably be expected to be, larger that it would be apart from the scheme"*, that the applicant's input tax credits matched the GST liability of the Division 165 Supplying Entities and, furthermore, that the applicant paid GST-inclusive prices to the Division 165 Supplying Entities. It is also not determinative that the 'scheme' involved tax evasion by the Division 165 Supplying Entities. Irrespective of that conduct, Div 165 has to be applied on its terms.

284. We are satisfied Div 165 does apply to the applicant and the Commissioner was correct to negate the GST benefits in the sum of $72,953,611, in the alternative to the assessments issued to the applicant denying the applicant's input tax credits totalling $122,112,065.

IS THE APPLICANT LIABLE TO AN ADMINISTRATIVE PENALTY? IF SO, SHOULD THE ADMINISTRATIVE PENALTY BE FURTHER REMITTED IN WHOLE OR IN PART?

285. The Commissioner issued the applicant with a notice of assessment of shortfall penalty totalling $58,059,829.75.[224] This was assessed by reference to the greatest GST shortfall amount which arose from the 'no refining' issue.[225] Relevantly, the applicant claimed to have been entitled to input tax credits for acquiring gold of 99.99% fineness and making

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[224] Hearing Book, Volume 1, pp 39-41.

[225] Hearing Book, Volume 3, p 1,818.

GST-free supplies. However, on the basis of our conclusions above, the applicant had a tax shortfall and, consequently, the applicant had made false or misleading statements to the Commissioner as to its net GST amount in its BASs lodged for the Relevant Period: s 284-75 of Schedule 1 to the TAA 1953. Alternatively, scheme penalties would apply pursuant to s 284-145 of Schedule 1 to the TAA 1953 in respect of the scheme shortfall amount.

286. The penalties were imposed at the rate of 50% of the shortfall amount on the basis of the applicant's recklessness as to the operation of the GST law for the tax periods ending 29 February 2012 to 31 October 2013: Item 2 of the table in s 284-90(1). In respect of the tax periods ending 31 November 2013 to 30 June 2014, the penalties were imposed at the rate of 25% of the GST shortfall amount based on the applicant's failure to take reasonable care to comply with the GST law: Item 3 of the table in s 284-90(1).

287. Section 284-220(1) of Schedule 1 to the TAA sets out the circumstances where the base penalty amount is increased by 20%. The circumstance set out in s 284-220(1)(c) applied to the applicant as it had a base penalty amount calculated for the shortfall amount for an earlier BAS, notwithstanding the fact the applicant was issued with the penalty assessments at the same time. However, the 20% uplift in the base penalty amount was remitted by the Commissioner before issuing the notice of assessment of penalty.[226]

288. The Commissioner has a discretion under s 298-20(1) of Schedule 1 to the TAA 1953 to remit all or part of a penalty but decided not to do so on the basis he had already remitted the 20% increase in the base penalty to 0% and because the circumstances did not warrant it. In this regard, the Commissioner adhered to the position in *Practice Statement Law Administration, PSLA 2012/5: Administration of penalties for making false or misleading statements that result in shortfall amounts (**PSLA 2012/5**).* He specifically emphasised the purpose of the penalty regime is to encourage entities to take reasonable care in complying with their tax obligations. It is also stated at paragraph 156 of PSLA 2012/5 that "*remission decisions need to consider that a major objective of the penalty regime is to promote consistent treatment by reference to specified rates of penalty. That objective would be compromised if the penalties imposed at the rates specified in the law were remitted without just cause, arbitrarily or as a matter of course".*

[226] Hearing Book, Volume 3, pp 1,817-1,818.

289. The applicant submitted it is not liable to any administrative penalty because it was not reckless and did not fail to take reasonable care. Furthermore, the applicant argued its position was reasonably arguable. According to the applicant's objection, the assessments of shortfall penalty are excessive in their entirety. Moreover, for each of the tax periods from November 2013 to June 2014, the applicant pointed out the Commissioner was fully aware of the nature of the applicant's business as the applicant disclosed to the Commissioner details of certain scrap gold acquisitions that were of concern to the Commissioner prior to claiming input tax credits for those acquisitions. The applicant also stated the Commissioner, through one of his officers leading the audit of the applicant, informed the applicant that its acquisitions were 'creditable acquisitions' for the purposes of the GST Act.[227]

290. We have decided the administrative penalties were correctly imposed and, further, that the Commissioner was correct in not further remitting all or any part of the administrative penalties. The applicant did not make submissions or adduce any evidence that would persuade otherwise. We acknowledge that at the hearing, Deputy President McCabe indicated that if we considered it necessary we would invite further submissions. In the event, we decided it was unnecessary to accept further submissions because the applicant failed to adduce evidence that discharged the burden of proving the penalties were excessive or incorrect and that the remission decision should have been made differently: s 14ZZK(b)(i) and (ii) of the TAA 1953.

291. In particular, we agree with the Commissioner's viewpoint that the shortfall amounts in the pre-November 2013 tax periods are due to recklessness, which is considered to be more than gross carelessness, as to the operation of the GST law: see *BRK (Bris) Pty Ltd v Commissioner of Taxation* (2001) 46 ATR 347 at 364. We took into account the fact the applicant had identified a significant potential risk as to it claiming input tax credits when it analysed whether it was a refiner or a recycler in early 2012 at the start of its operations and, nevertheless, proceeded to brazenly claim input tax credits with reckless indifference to the GST consequences. Moreover, the GST issues were key to the applicant's business model. We accept the Commissioner's position that the likelihood of the

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[227] Hearing Book, Volume 3, pp 2,048-2,049; First Cochineas Affidavit, [70]-[71].

applicant incorrectly claiming input tax credits was very high and the amount at stake was very large.[228]

292. We are satisfied the shortfall amount from November 2013 onwards was due to the applicant's failure to take reasonable care. The evidence demonstrates the applicant was, at that stage, under scrutiny from the Commissioner and somewhat circumspect in its dealings with third-party suppliers, including adopting more robust due diligence procedures. Mr Cochineas acknowledged that the applicant's onboarding processes were evolving over a period of time, and 'ramped up' after October 2013.[229] The applicant also prepared memoranda explaining its views as to its input tax credit entitlements which it provided to the Commissioner at or about that time.

293. We acknowledge the applicant appeared to have banked on the ATO team leader's views as to its entitlements to claim input tax credits, coupled with the fact the Commissioner proceeded to process GST refunds to the applicant following verification activities. However, as already pointed out above, a taxation officer's personal views do not bind the Commissioner nor did the limited verification actions preclude the Commissioner from undertaking further investigations and issuing assessments for tax shortfalls. We note this outcome is coherent with the conclusion reached by the Federal Court in a similar context: see *Federal Commissioner of Taxation v ACN 154 520 199 Pty Ltd (in Liq) (formerly EBS & Associates Pty Ltd*) [2018] FCA 1140 at [49]. In any event, we think it is appropriate, in all the circumstances, that the Commissioner remitted the 20% increase in the base penalty amount to 0%. We were not persuaded by the applicant that the rates of penalty should be reduced or that the penalties should be further remitted.

CONCLUSION

294. The Commissioner's decisions in respect of the objection to the assessments of net amount of GST are affirmed. The Commissioner's decision in respect of the objection to the assessment and liability to pay administrative penalty are also affirmed.

I certify that the preceding 294

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[228] Hearing Book, Volume 3, p 1,815.

[229] Transcript p 222.

(two hundred and ninety-four) paragraphs are a true copy of the reasons for the decision herein of Deputy President Bernard J McCabe and Ms G Lazanas, Senior Member

................................[SGD].......................................

Associate

Dated: 20 December 2019

Date(s) of hearing:	**3-7, 13-14, 17-18, 24-25, 27-28 September 2018**
Counsel for the Applicant:	**Mr J Hmelnitsky SC** **Mr B Jones**
Solicitors for the Applicant:	**Robinson Legal**
Counsel for the Respondent:	**Mr G Davies QC** **Mr E Wheelahan** **Mr G O'Mahoney** **Ms C Pierce**
Solicitors for the Respondent:	**Australian Government Solicitor**