Federal Court of Australia

SNF (Australia) Pty Ltd v Commissioner of Taxation [2010] FCA 635 (25 June 2010)

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FEDERAL COURT OF AUSTRALIA

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Citation:	SNF (Australia) Pty Ltd v Commissioner of Taxation [2010] FCA 635
Parties:	**SNF (AUSTRALIA) PTY LTD (ACN 050 056 267) v COMMISSIONER OF TAXATION**
File number(s):	VID 132 of 2008
Judges:	**MIDDLETON J**
Date of judgment:	25 June 2010
Catchwords:	**INCOME TAX**- transfer pricing, methodology of transfer pricing, application of Div 13 of Pt III of the *Income Tax Assessment Act* 1936, application of international tax treaties (Double Taxation Agreements), conferral of power by international treaties to impose tax, application of s 136AD(3) and (4), whether more than arm's length consideration was given by the applicant, transfer pricing methods, comparable transactions.
Legislation:	*Evidence Act 1995* (Cth) *Income Tax Assessment Act 1936*
Cases cited:	*Bob Jane T-Marts Pty Ltd v Federal Commissioner of*

Taxation [1999] FCA 1366; (1999) 94 FCR 457
Boland v Yates Property Corporation Pty Ltd [1999] HCA 64; (1999) 167 ALR 575
Cooke v Commissioner of Taxation [2002] FCA 1315; (2002) 51 ATR 223
Commissioner of Taxation v Pacific Dunlop Ltd [1999] FCA 214; (1999) 161 ALR 661
DSG Retail Limited v Commissioners for the Majesty's Revenue and Customs (2009) UKFTT 31 (TC) 1
Estee Lauder v Federal Commissioner of Taxation (1988) 88 ATC 4412
GE Capital Finance v Commissioner of Taxation [2007] FCA 558; (2007) 159 FCR 473
GlaxoSmithKline Inc. v The Queen 2008 TCC 324
ISPT Pty Ltd v Valuer General (NSW) [2009] NSWCA 31
Jango v Northern Territory of Australia (No 2) [2004] FCA 1004
Maurici v Chief Commissioner of State Revenue [2003] HCA 8; (2003) 212 CLR 111
Notaras v Hugh [2003] NSWSC 167
Overton Investments Pty Ltd v Minister Administering the Environmental Planning and Assessment Act 1979 (2001) 113 LGERA 439
Paino v Paino [2008] NSWCA 276
Re Roche Products Pty Ltd v Federal Commissioner of Taxation [2008] AATA 639; (2008) 70 ATR 703
Spencer v The Commonwealth (1907) 5 CLR 418
*Universal Music Australia Pty Ltd v Australian Competition and Consumer C*ommission [2003] FCAFC 193; (2003) 131 FCR 529
WR Carpenter Holdings Pty Ltd v Commissioner of Taxation (2006) 234 ALR 451
WR Carpenter Holdings Pty Ltd v Commissioner of Taxation (2007) 161 FCR 1

Date of hearing:	27, 28, 29, 30 July 2009 and 3 September 2009
Place:	Melbourne
Division:	GENERAL DIVISION
Category:	Catchwords
Number of paragraphs:	173
Counsel for the Applicant:	Mr J de Wijn QC with Mr D McInerney

Solicitor for the Applicant: Middletons

Counsel for the Respondent: Mr D Bloom QC with Mr S Steward SC and Ms K Deards

Solicitor for the Respondent: Australian Government Solicitor

IN THE FEDERAL COURT OF AUSTRALIA
VICTORIA DISTRICT REGISTRY
GENERAL DIVISION **VID 132 of 2008**

BETWEEN: **SNF (AUSTRALIA) PTY LTD (ACN 050 056 267)**
Applicant

AND: **COMMISSIONER OF TAXATION**
Respondent

JUDGE: **MIDDLETON J**
DATE OF ORDER: **25 JUNE 2010**
WHERE MADE: **MELBOURNE**

THE COURT ORDERS THAT:

1. By 4:00 pm on 9 July 2010, the parties confer, and file and serve any proposed orders necessary or appropriate (including orders as to costs).

Note: Settlement and entry of orders is dealt with in Order 36 of the Federal Court Rules.
The text of entered orders can be located using Federal Law Search on the Court's website.

IN THE FEDERAL COURT OF AUSTRALIA
VICTORIA DISTRICT REGISTRY
GENERAL DIVISION **VID 132 of 2008**

BETWEEN: **SNF (AUSTRALIA) PTY LTD (ACN 050 056 267)**
Applicant

AND: **COMMISSIONER OF TAXATION**
Respondent

JUDGE: **MIDDLETON J**
DATE: **25 JUNE 2010**
PLACE: **MELBOURNE**

REASONS FOR JUDGMENT

INTRODUCTION

1. The principal issue to be determined in this proceeding involves the application of Div 13 of the *Income Tax Assessment Act 1936* ('ITAA') in respect of the purchase by SNF (Australia) Pty Ltd ('the taxpayer') from related manufacturers of polyacrylamide products ('the products') during the period 1998 to 2004 (inclusive). More specifically, the question arises as to whether the taxpayer gave more than the 'arm's length consideration' (as defined in s 136AA(3)(d) of the ITAA) in respect of those purchases.
2. The taxpayer is a member of the SNF Group of Companies and is a wholly owned subsidiary of SPMC SA, formerly SNF SA ('SNF France'), a company resident in France. The taxpayer was incorporated in Australia by SNF France in 1990 as part of the global expansion of the SNF group.
3. The taxpayer carries on the business of manufacturing and selling the products, commonly called flocculants and coagulants in Australia, predominantly to end users in the mining, paper and sewage treatment industries.
4. During the relevant period the taxpayer purchased the products from manufacturing subsidiaries of SNF France that were resident in France, the United States of America and the Peoples' Republic of China ('the suppliers').
5. To avoid the inequity of double taxation as well as the prevention of fiscal evasion with respect to taxes on income, in circumstances where a business in one country stands to make a taxable gain or profit in another country, bilateral Double Taxation Agreements ('DTAs') can apply. The 'associated enterprises article' of each of the United States, French and Chinese DTAs is applicable here.
6. On 28 March 2007, the Commissioner made calculations with respect to the profits to be included as taxable income of the taxpayer in each of the years in the relevant period under Art 9 of the US DTA and Art 8 of the French DTA. Further, such calculations with respect to the profits of the taxpayer in the 2003 and 2004 years were made under Art 9 of the Chinese DTA.
7. On the same day, the Commissioner made determinations pursuant to s 136AD(3) and (4) of Div 13 of the ITAA with respect to acquisitions of the products by the taxpayer from the suppliers:

(i) SNF France (then SNF SA) with respect to the 1998 to 2004 years of income;

(ii) Chemtall Inc. ('Chemtall') with respect to the 1987 to 2004 years of income;

(iii) Pearl River Inc. ('Pear River') with respect to the 1998 to 2003 years of income; and

(iv) SNF (China) Flocculant Co. Limited ('SNFCF') with respect to the 2003 and 2004 years of income.

8. The taxpayer acquired all the products from the suppliers or from Eyang Chemical Co Ltd based in Korea in each of the income years in issue. The taxpayer had written price lists and invoices which formed part of each agreement for the purchase of the products.
9.

The relevant acquisitions of the products by the taxpayer were:

Year	SNF SA	Chemtall	Pearl River	SNFCF	Total
1998	$2,912,440	$2,380,121	$1,251,310	Nil	$6,543,871

1999	$4,291,402	$2,023,051	$447,934	Nil	$6,762,387
2000	$6,788,541	$1,309,149	$614,834	Nil	$8,712,524
2001	$5,456,873	$3,223,952	$660,053	Nil	$9,340,878
2002	$8,249,040	$4,319,970	$726,103	Nil	$13,295,113
2003	$7,190,623	$2,106,908	$555,276	$2,924,610	$12,777,417
2004	$4,946,953	$4,498,757	Nil	$4,451,875	$13,897,585
				TOTAL	$71,329,775

10. Notices of assessment in respect of the years of income 1998 to 2000, and 2002 to 2004 were issued by the Commissioner to give effect to the above determinations. No notice of assessment was issued for the 2001 year because the adjustments in that year did not give rise to a positive taxable income for the taxpayer.
11. The taxpayer primarily contended that the evidence demonstrated that one could not reasonably expect an independent party acquiring the products and dealing at arm's length to have paid less for the products than the price paid by the taxpayer. The Commissioner argued that the admissible evidence did not support this contention.
12. The taxpayer accepted that it incurred trading losses despite evidence of good sales performance. Nevertheless, in the years ending 31 December 1994 and 31 December 1996, the taxpayer did make a profit. Commercial reasons given for the trading losses were explained to the Court by Mr Schroeter (Managing Director of the taxpayer), and Mr Pich (director of the taxpayer and President and shareholder of SNF France).
13. These commercial reasons included a combination of intense competition, poor management, defalcations by an employee, excessive stock levels, an insufficiently high level of sales per sales person, and a series of bad debts. The taxpayer claimed that the instatement of an Australian based manager (Mr Schroeter) in 2002 aimed to, and did in fact, address these problems.
14. The Commissioner did not accept these reasons and contended that the taxpayer was in fact a successful and profitable entity in the relevant period, enjoying strong annual sales growth in Australia. It was contended that despite strong sales performance in the Australian market and the fact that the taxpayer received significant equity subscriptions and loans from SNF France, the taxpayer failed to record any profit (other than in the years referred to above), returned a taxable loss, and therefore paid no income tax in Australia.
15. The taxpayer agreed that it had (subject to the result in this proceeding) no income tax liability in Australia between 1991 and 2004.

LAW

Double Tax Agreements (DTAs)

16. The Commissioner submitted that when considering Div 13 of the ITAA, the appropriate starting point for that consideration is the relevant DTA, which requires the determination of the profits which might be expected to have accrued to the taxpayer if the taxpayer had been independent from the suppliers and had dealt with them in a wholly independent way.
17. The relevant paragraph of the 'associated enterprises article' of each of the French DTA, the US DTA and the Chinese DTA is similar. The article provides:

> *(1) Where –*

(a) an enterprise of a Contracting State participates directly or indirectly in the management, control or capital of an enterprise of the other Contracting State; or

(b) the same persons participate directly or indirectly in the management, control or capital of an enterprise of a Contracting State and an enterprise of the other Contracting State,

and in either case conditions exist between the two enterprises in their commercial or financial relations which differ from those which may be expected between independent enterprises dealing wholly independently with one another, then any profits which might, but for those conditions, be expected to accrue to one of the enterprises, but, by reason of those conditions, have not so accrued, may be included in the profits of that enterprise and taxed accordingly.

18. Putting aside whether the starting point for the assessment of the consideration paid for the products is the 'associated enterprises article' of each DTA, the parties were divided as to whether the investigation stops at the DTA. In the Commissioner's submission, the associated enterprises articles themselves empower the Commissioner to assess the taxpayer on profits so included, characterising each DTA as being a stand alone taxing power. However, the taxpayer submitted that the Commissioner's power to assess does not derive from the associated enterprises articles but rather solely from Div 13 of the ITAA.
19. While contesting that point, the Commissioner was content to 'follow' the taxpayer in relying solely on Div 13 of the ITAA without relying on the DTAs, submitting that the result would be no different in this case.
20. In view of this approach, I will proceed on the basis that Div 13 of the ITAA contains the statutory provisions the Court needs to interpret and apply, and the Court needs go no further. I observe a similar approach was taken by Downes J in *Re Roche Products Pty Ltd v Federal Commissioner of Taxation* [2008] AATA 639; (2008) 70 ATR 703.
21. This was the basis the parties presented their respective cases at the hearing, although the written submissions dealt with the operation of each DTA also. The Commissioner accepted in opening submissions that if he could not succeed in this proceeding under Div 13, he could not otherwise succeed under the relevant DTA. The Commissioner submitted that the issue of the stand alone taxing power of each DTA was to be left for another occasion. However, the Commissioner did contend that one must construe Div 13 in the context of the DTA's.
22. I observe, as did Downes J in *Roche* [2008] AATA 639; (2008) 70 ATR 703, that the tests under each DTA are different than that under Div 13. Accordingly, in any given case, the result may be different should the Court be called upon to interpret and apply Div 13 or the relevant DTA.
23. As the stand alone taxing power issue was raised in written submissions, I make the following very brief comment. I do see some force in the argument that by operation of s 170(9B) of the ITAA and the terms 'prescribed provision' and 'relevant provision' as defined in s 170(14) of the ITAA, there is a clear legislative intention (at least from the time of the introduction of s 170 (9B)) that the Commissioner may in amending an assessment, rely on either s 136AD or the relevant associated enterprises article, as conferring upon the Commissioner, as a separate power, a power to amend an assessment. I say this although there is no provision expressly stating that 'the relevant provision' (namely, the associated enterprises article) has been incorporated into the

ITAA. However, it seems to me that the express words in the ITAA necessarily and naturally imply the required incorporation of the relevant associated enterprises article into the ITAA.

24. This could overcome the issue I identified in *GE Capital Finance v Commissioner of Taxation* [2007] FCA 558; (2007) 159 FCR 473. Of course, in *GE Capital Finance* the Court was not dealing with the associated enterprises articles, so the above argument was not raised by the parties nor considered by me.

Legislative Provisions

25. I now turn to consider the legislative provisions relied upon by the parties.
26. Division 13 was introduced into Part III of the ITAA following the introduction of Pt IVA. The Explanatory Memorandum for the Income Tax Assessment Amendment Bill 1982 (Cth) stated (at 4):

> *The revised Division 13, which this Bill will insert into the Principal Act, is designed ... to provide in the international area a general supplement to the new Part IVA of the Principal Act. Because of policy and technical interrelationships between the two, a number of the now proposed provisions draw on the measures contained in Part IVA.*

27. In his Second Reading Speech on the Bill, the then Treasurer described Div 13 as follows (Cth, Parliamentary Debates, HR, 24 March 1982, 1367-8):

> *Although complementary to Part IVA, the proposed measures are not limited in scope to arrangements that have a dominant tax avoidance purpose.*
>
> *In that regard, it is important to recognise that an arrangement to shift profits out of Australia may be entered into for a complex mixture of tax and other reasons.*
>
> *However, ... the fact that tax saving is not a key purpose of a particular arrangement or transaction is no reason why we, as a nation, should not be in a position to counteract any loss of the Australian revenue inherent in it.*
>
> *The main requirements for the application of the revised provisions are that a taxpayer has supplied, or acquired property or services under an 'international agreement', one or more of the parties to which were not dealing at arm's length with each other, and that the supply or acquisition was at prices other than those that might have been expected in a transaction between independent parties dealing independently – that is, at arm's length.*

28. It is to the actual requirements of Div 13, as shall be seen, that the Court must direct its attention in this proceeding. The Court is not concerned generally with arrangements to shift profits out of Australia, other than in the context of an arrangement coming within the scope of Div 13.
29. Division 13 of the ITAA contained the following relevant provisions:

s 136AA

(3) In this Division, unless the contrary intention appears:
...
(d) A reference to the arm's length consideration in respect of the acquisition of property is a reference to the consideration that might reasonably be expected to have been given or agreed to be given in respect of the acquisition if the property had been acquired under an agreement between independent parties dealing at arm's length with each other in relation to the acquisition; and
...
136AD
...
(3) Where:
(a) a taxpayer has acquired property under an international agreement;
(b) the Commissioner, having regard to any connection between any 2 or more of the parties to the agreement or to any other relevant circumstances, is satisfied that the parties to the agreement, or any 2 or more of those parties, were not dealing at arm's length with each other in relation to the acquisition;
(c) the taxpayer gave or agreed to give consideration in respect of the acquisition and the amount of that consideration exceeded the arm's length consideration in respect of the acquisition; and
(d) the Commissioner determines that this subsection should apply in relation to the taxpayer in relation to the acquisition;
then, for all purposes of the application of this Act in relation to the taxpayer, consideration equal to the arm's length consideration in respect of the acquisition shall be deemed to be the consideration given or agreed to be given by the taxpayer in respect of the acquisition.

(4) For the purposes of this section, where, for any reason (including an insufficiency of information available to the Commissioner), it is not possible or not practicable for the Commissioner to ascertain the arm's length consideration in respect of the supply or acquisition of property, the arm's length consideration in respect of the supply or acquisition shall be deemed to be such amount as the Commissioner determines.

Operation of Division 13

30. It is useful to make some preliminary observations on the operation of Div 13.
31. Division 13, when amended, was not intended to override the *Income Tax (International Agreements) Act 1953*. The double taxation agreements which appear as Schedules to that legislation contain their own provisions to deal with profit shifting arrangements, and these provisions are based upon the application of the 'arm's length principle' as generally accepted in an international context.
32. On the other hand, Div 13 will permit adjustments to the assessable income and allowable deductions of a taxpayer where, and only where, the conditions outlined in s 136AD or s 136AE are satisfied.

33. There are a number of 'objectively ascertainable criteria' that must be satisfied to create liability under s 136AD. These criteria were considered by the Full Court in *WR Carpenter Holdings Pty Ltd v Commissioner of Taxation* (2007) 161 FCR 1 per Heerey, Stone and Edmonds JJ.
34. The taxpayer is entitled to challenge the existence of any or all of the criteria but bears the burden of doing so: see *Carpenter Holdings Pty Ltd* [2007] FCAFC 103; (2007) 161 FCR 1 at [28].
35. Where for any reason it is not possible or not practicable for the Commissioner to ascertain the arm's length consideration, the Commissioner is entitled to make a determination under s 136AD(4). It operates similarly to an averment, providing the Commissioner with a means of proof: see *Carpenter Holdings Pty Ltd* [2007] FCAFC 103; (2007) 161 FCR 1 at [32].
36. The Commissioner is not required to put forward a positive case or lead any evidence to support a s 136AD(4) determination. It is for the taxpayer to displace the figure determined by the Commissioner by evidence and argument: see *Carpenter Holdings Pty Ltd* (2007) 161 FCR 1 at [32]-[34]. This would require the taxpayer to prove the actual amount of the arm's length consideration: see *Carpenter Holdings Pty Ltd* at [37].
37. As the Commissioner in this proceeding still relies on determinations made under s 136AD(4), it is necessary for the taxpayer to show that the arm's length consideration was both ascertainable and less then the deemed amount. The fact that the Commissioner seeks to rely upon an expert witness who proposes a different sum which would result in an adjustment in favour of the taxpayer does not necessarily mean the determinations already made by the Commissioner do not stand, or that the taxpayer does not bear the burden of proof in the way explained in *Carpenter Holdings Pty Ltd* (2007) 161 FCR 1. I observe also that the taxpayer's primary position is that the expert evidence relied upon by the Commissioner is inadmissible, or if admissible, is not to be relied upon by the Court.
38. For the purposes of this proceeding, it is important to distinguish between an enquiry directed to the operation of s 136AD(3)(b) and s 136AD(3)(c).
39. A finding reached for the purposes of s 136AD(3)(b) that any two or more of the parties to an agreement were not dealing at arm's length with each other will not necessarily be determinative in considering whether the consideration given or agreed to be given for the purposes of s 136AD(3)(c) was not arm's length consideration. Where it can be concluded that, even though there was an absence of real bargaining, an arm's length consideration was given or agreed to be given, then s 136AD(3)(c) will not be satisfied and s 136AD will have no application. The enquiry under s 136AD(3)(c) is a specific enquiry relating to arm's length consideration.
40. It is also important to recall that arm's length consideration refers to a consideration that may reasonably be expected to have been given or agreed to be given in respect of *the acquisition* if *the property* had been acquired under an agreement between independent parties dealing at arm's length with each other in relation to *the acquisition*: see s 136AA(3)(d).
41. Section 136AD(3)(c) is concerned with the consideration in respect of the acquisition of particular property. The proper application of s 136AD requires that the deemed arm's length consideration be determined in respect of the acquisition of the particular property by considering the arm's length consideration as 'an objective fact in the real world': see *WR Carpenter Holdings Pty Ltd v Commissioner of Taxation* (2006) 234 ALR 451, at [20] per Lindgren J.
42. In applying s 136AD(3)(c) the Court is looking to consider whether the consideration applicable to the particular acquisition was the arm's length consideration. In general terms, this is the consideration that might, on an analysis of all relevant available evidence, reasonably be expected to have passed between independent parties dealing at arm's length with each other in relation to the acquisition of the property.
43. I consider that any reliance on authorities concerning sales tax, such as *Estee Lauder Pty Ltd v Federal Commissioner of Taxation* (1988) 88 ATC 4412, *Bob Jane T-Marts Pty Ltd v Federal Commissioner of Taxation* [1999] FCA 1366; (1999) 94 FCR 457 and *Commissioner of Taxation v Pacific Dunlop Ltd* [1999] FCA 214; (1999) 161 ALR 661 is of little or no assistance, as they deal with a different statutory regime and a differently worded provision.

as they deal with a different statutory regime and a differently worded provision.

44. I do not accept the Commissioner's submission that the test is to determine what consideration an arm's length party in the position of the taxpayer would have given for the products. The essential task is to determine the arm's length consideration in respect of the acquisition. One way to do this is to find truly comparable transactions involving the acquisition of the same or sufficiently similar products in the same or similar circumstances, where those transactions are undertaken at arm's length, or if not taken at arm's length, where suitable adjustment can be made to determine the arm's length consideration that would have taken place if the acquisition was at arm's length. Just as in a valuation, the focus is not on the subjective or special factors of the parties involved in the transaction (eg whether they were financially sound or not), but is on the transaction itself and the consideration paid. In this sense, the task is not dissimilar to that undertaken in a valuation – see eg *Boland v Yates Property Corporation Pty Ltd* [1999] HCA 64; (1999) 167 ALR 575 at [82] to [83] and *Spencer v The Commonwealth* (1907) 5 CLR 418.
45. This is not to say that the relationship between the parties in any comparative transaction chosen is not to be considered. Such is relevant to whether the transaction can assist in arriving at the consideration that might reasonably be expected to have been given in respect of the acquisition of the same or sufficiently similar products between independent parties. If the parties to the comparative transaction are related to each other then such a transaction may be of little or no assistance in determining the arm's length consideration as required by Div 13.
46. The Commissioner in support of the contention that the actual position of the taxpayer forms part of the assumed content of the hypothetical buyer, relied upon the decision of *DSG Retail Limited v Commissioners for the Majesty's Revenue and Customs* (2009) UKFTT 31 (TC) 1. That decision of the Special Commissioners concerned the interpretation and application of s 770 and Sch 28AA of the *Income and Corporation Taxes Act 1988* (UK).
47. In particular, reliance was placed upon paragraphs 76 to 78:

> *We should comment on three differences between the s 770 and sch 28AA provisions. First, the s 770 regime requires the arm's length price to be determined for the facilities actually provided. By contrast para 1 of Sch 28AA requires the identification of a provision between relevantly connected persons and the determination of what provision would have been made between independent persons. That notional provision could be different, not only in price, but in its terms from the actual provision made.*
>
> *Second, the Sch 28AA regime, by virtue of para 2 requires effect to be given to the Transfer Pricing Guidelines as they apply to treaties following the OECD model. The incorporation is not wholesale: it merely requires the schedule as a whole to be interpreted in such a way as secures consistency between para 1 of the schedule and the OECD model in accordance with the Transfer Pricing Guidelines. There is no incorporation of the OECD model in s 770 . But it seems to us that in determining the arm's length price, the approach of the OECD model is a useful aid which we should apply in the absence of any other guidance as they are the best evidence of international thinking on the topic.*
>
> *Third, s 770 requires one to determine the price which would have been paid if the parties "had been independent parties dealing at arm's length". It seems clear to us that those words do not require any adjustment to be made in*

setting the price to the actual characteristics of the parties other than their independence. The actual assets, business and attributes of each party remain constant and may be relevant to the determination of the arm's length price. The language of para 1(2)(a) is different: "differs from the provision which would have been made between independent enterprises". It is at first sight possible that those "independent enterprises" may not be enterprises which do not share the same attributes as the actual parties to the provision. But it is clear to us that that interpretation is not consistent with the OECD model (see in particular the emphasis on comparability in the extracts below which presupposes looking at the actual characteristics of the enterprises between which provision has been made) and therefore that para 1(2)(a) should be interpreted as requiring consideration of what provision independent enterprises sharing the characteristics of the actual enterprises would have made.

48. It is to be noted that reliance was placed in considering the language of paragraph 1(2)(a) in the 'Schedule 28AA regime' (which is the language most closely resembling s 136AD(3)) upon the 'OECD model'. The 'OECD model' was expressly referred to in the regime, and effect was to be given to the 'Transfer Pricing Guidelines'. No such reference is made in Div 13, although I accept that in the Second Reading Speech accompanying the amendment to Div 13 reference was made to the OECD Guidelines for dealing with transfer pricing in various forms.
49. Nevertheless, I do not consider that in interpreting and applying s 136AD(3) I should adopt the approach taken by the Special Commissioners. The wording of s 136AD(3) is, in my view, quite clear. Further, I do not think that in interpreting the provisions as I have, any inconsistency arises with the various methods of calculating arm's length consideration referred to by the parties (to which I will come). I do not consider that the DTA's can be used to alter or impact upon the clear operation and wording of s 136AD(3). As I have said, s 136AD(3) deals with the particular scheme or arrangement concerning transfer pricing, namely supplying or acquiring other than at an arm's length consideration where the conditions outlined in s 136AD are satisfied.
50. The point could be made that the above interpretation will not allow some discretion to be exercised if the use of non-arm's length prices do in reality not result in a shifting of taxable income from Australia. After all, this is the main purpose of this provision, namely to prevent the shifting of taxable income from Australia. However, the provisions do not just make that blanket prohibition. Section 136AD deals with one aspect - acquisition or supply other than at arm's length and arm's length consideration. In other words, the provisions deal with the situation where profits are shifted out of Australia, but only where that occurs through the technique or method of a person carrying on business in Australia purchasing products from an overseas affiliate at an inflated price.
51. Importantly, s 136AD(3)(d) provides the mechanism for the Commissioner to determine whether the provisions should apply. As the Explanatory Memorandum makes clear, the application of the provisions is not mandatory, and "the intent of the condition [s 136AD(3)(d)] is to enable the Commissioner to have regard to whether the use of the non-arm's length prices has resulted in a shifting of taxable income from Australia". So, if the Commissioner considered that the taxpayer could be expected to fix prices for say a legitimate market penetration reason, but nevertheless the prices were inflated, the Commissioner could decide not to make a determination to apply the provisions under s 136AD(3)(d).
52. On the other hand, the mere fact that losses occur (even over a lengthy period) will not necessarily mean that the consideration paid for particular goods is not at arm's length. Genuine losses may occur for many reasons, including the ones relied upon by the taxpayer in this proceeding. It is not to be assumed that losses, even over a lengthy period, are necessarily artificial. So that, even if losses are made over a sustained period where one would not expect an

artificial. So that, even if losses are made over a sustained period where one would not expect an independent company to continue to operate or remain solvent, this may not make s 136AD(3)(c) applicable. For one reason or another, perhaps because of the support of a parent company, the loss-making company could still have acquired goods at an arm's length consideration.

53. The Commissioner did submit that the taxpayer would still not succeed in this proceeding even if it was demonstrated that the prices paid by the taxpayer did not exceed the prices paid by unrelated parties in similar circumstances, if the taxpayer paid prices that generated losses year after year. This is perhaps where the Commissioner calls in aid the submission that the starting point in considering Div 13 is the relevant DTA.
54. I do not accept the submission that if the taxpayer succeeds in satisfying the burden described in *Carpenter Holdings Pty Ltd* (2007) 161 FCR 1, it would otherwise not be entitled to the primary relief it seeks. If losses occurred over many years, this may give rise to a close examination as to whether the prices for the acquisition of the goods were inflated. However, if after analysis and evaluation looking at the evidence and submissions made by the parties, the Court comes to the view that the prices were equivalent to or lower than the arm's length consideration, sustained loses even over a substantial period are not otherwise determinative against the taxpayer in applying Div 13. As I have indicated, genuine losses may be sustained for many reasons, and not necessarily because the transfer prices of the goods were artificially inflated. In any event, the sole enquiry is to consider the arm's length consideration, assuming (as in this proceeding) the other objective criteria in s 136AD are satisfied.

METHODOLOGY

55. Division 13 does not prescribe any particular methodology for the purpose of ascertaining an arm's length consideration. This is a matter for the Court to determine. Any particular methodology chosen is not to be applied rigidly. The process to be undertaken in considering arm's length consideration is one involving evaluation and judgement, and cannot be based upon any strict and inflexible rules. It may well be that in any given case, a number of different methodologies could be employed to arrive at a determination, even if only as a check and balance to ensure the correctness of the analysis initially undertaken.
56. As to methodology, I was referred to the relevant Explanatory Memorandum, which stated as follows:

> *There are a number of methods by which an arm's length consideration might be calculated. The more commonly accepted of these are what are called the "comparable uncontrolled price method", the "cost plus" method and the "resale" method. Which of these or other methods might appropriately be adopted in a particular case, and the way in which it is applied, will depend upon all the circumstances. For example, in relation to a transaction between related parties for the supply of a particular item of property that is traded exclusively within the group, no comparable uncontrolled price may be found. It would therefore be necessary to seek to establish at arm's length consideration for the particular property by some other method. (However, the Commissioner is to have, under sub section 136AD(4), a residual power to determine an arm's length consideration where, for any reason, it is not possible or practicable to calculate an arm's length consideration under either paragraph (c) or (d).)*

57. The parties also referred me to the OECD Report "Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations (1995)" which was a revision of the OECD Report "Transfer Pricing and Multinational Enterprises (1979)". The 1995 guidelines were referred to by Downes J in *Roche* [2008] AATA 639; (2008) 70 ATR 703. Neither party pointed to any

inconsistencies between the 1995 and earlier guidelines. The 1995 guidelines are however more detailed and provide more examples than the earlier version. The preface to the 1995 guidelines sets out that they are "intended to be a revision and compilation of previous reports by the OECD ... addressing transfer pricing. The principal report is [the 1979 OECD guidelines]...".

58. Both the 1979 and the 1995 guidelines have a role in assisting the Court in considering the appropriate methodology and the way in which methodologies are to be applied. I refer to the 1995 guidelines as a convenient reference to the various methods that have been adopted or referred to in determining arm's length consideration. However, the 1995 guidelines do not dictate to the Court any one or more appropriate methods, and are just what they purport to be, guidelines. I treat them effectively as part of the submissions of Counsel as referring to a number of methods by which an arm's length consideration might be calculated.
59. I have not relied upon any of the guidelines for the purposes of interpreting Div 13.
60. A hierarchy of methods that can be used to determine transfer price is set out in the 1995 guidelines. There are three "traditional transaction methods": Comparable Uncontrolled Price ('CUP'), cost-plus, and resale price. The 1995 guidelines provide for two additional methods, one of which is the Transaction Net Margin Method ('TNMM'), which can be used if none of the other three traditional methods is appropriate.
61. These methods are described by the 1995 guidelines as follows:

> *(a) The comparable uncontrolled price ("CUP") method offers the most direct way to determining an arm's length price. The transfer price is set by reference to comparable transactions between a buyer and a seller who are not associated enterprises. Uncontrolled sales may include sales by a member of an MNE to an unrelated party and sales to a member of an MNE by an unrelated party as well as sales in which the parties are not related to each other or to the MNE (though they may themselves be members of other MNEs). Uncontrolled sales are, in short, sales in which at least one party to the transaction is not a member of the taxpayer's affiliated group, but they would include only bona fide transactions and not sales unrepresentative of the market, for example made in a limited quantity at unrealistic prices to an unrelated buyer, for the purpose of establishing an arm's length price on a larger transaction. The method requires the uncontrolled transactions to be carefully reviewed for comparability with controlled transactions.*
>
> *(b) The cost-plus method of estimating an arm's length price is based on the supplier's cost to which an appropriate profit-mark-up is added. It is a method that raised problems both as regards assessing costs and the appropriate mark-up for profit and it is likely to be appropriate as a deterring criterion mostly in specific situations, though it may also be useful as a means of verifying provisionally acceptable prices after other methods have been applied. This method may be helpful in estimating an arm's length price, when semi-finished products are sold...*
>
> *(c) The resale price method ("RPM") begins with the price at which a product which has been purchased from a related seller is resold to an independent purchaser. This price is then reduced by an appropriate mark-up representing the amount out of which the reseller would seek to cover [its] costs and make*

a profit. What is left after subtracting the mark-up can be regarded as an arm's length price of the original sale. This method is probably most useful where it is applied to marketing operations.
(d) The transactional net margin method ("TNMM") examines the net profit margin relative to an appropriate base (e.g. costs, sales, assets) that a taxpayer realizes from a controlled transaction...

62. The guidelines confirm that the ideal approach to determining arm's length prices is to use comparable transactions. In most instances, this is the most appropriate method and in theory the easiest.
63. The 1995 guidelines stress the importance of looking for comparable transactions so long as they are comparable. They also stress the need to strive to make adjustments to create comparability if at all possible, and that more than one method may be considered.
64. The 1995 guidelines list the following as factors determining comparability:

(1) characteristics of property or services, such as the nature of the services;

(2) functional analysis, reflecting the functions that each party performs taking account of assets used and risks assumed;

(3) contractual terms;

(4) economic circumstances, such as the relative competitive positions of the buyers and sellers; and

(5) business strategies such as market penetration schemes.

65. However, not all of the factors referred to in the 1995 guidelines are of the same importance or are to be given the same weight. This will depend upon the evidence presented by the taxpayer in support of its case.
66. In discussing all the factors below, I am not to be taken as imposing on the taxpayer the need to apply with exactness the CUP method as described in the 1995 guidelines in satisfying the burden imposed upon it under Div 13 of the ITAA.

EVIDENCE

67. The question of whether the independent sales are comparable is to be determined by the Court as a question of fact on the admissible evidence before it: see *Overton Investments Pty Ltd v Minister Administering the Environmental Planning and Assessment Act 1979* (2001) 113 LGERA 439 per Stein JA (with whom Powell JA and Ipp AJA agreed) at [46] and *ISPT Pty Ltd v Valuer General* (NSW) [2009] NSWCA 31 at [23].
68. The taxpayer filed evidence of transactions between the suppliers and independent purchasers. Essentially, the taxpayer relied upon the CUP method.
69. The Commissioner agreed that the records show that the majority of purchases made by the taxpayer were made for a consideration that was the same or less than that paid by independent third parties, but did not accept that the third party transactions relied upon by the taxpayer were "truly comparable" to the purchases made by the taxpayer: see *Maurici v Chief Commissioner of State Revenue* [2003] HCA 8; (2003) 212 CLR 111 at [21].
70. The main issue then is whether the taxpayer has on the balance of probabilities displaced the figure determined by Commissioner. More particularly, I need to be satisfied the consideration paid for the products was the same or less than that reasonably expected to be paid by independent third parties.
71. It is necessary to comment on the evidence relied upon by the taxpayer and on certain objections

71. It is necessary to comment on the evidence relied upon by the taxpayer and on certain objections to that evidence taken by the Commissioner.
72. The taxpayer relied upon expert reports prepared by Mr Seve. Mr Seve is the lead partner in KPMG's Global Transfer Pricing Services Practice. Mr Seve has had more than 15 years experience in the taxation consulting division of KPMG, focusing on international tax and transfer pricing. He reviewed the taxpayer's sales information for the relevant period and provided an initial report on the reasonableness of this information to support a initial CUP analysis with respect to the taxpayer's purchase of products from SNF France during this period.
73. Mr Seve also analysed the data provided by the taxpayer to the Commissioner to form a view as to whether they represented comparable sales of comparable products.
74. In particular, Mr Seve reviewed the SNF France sales data for products sold to independent third parties by reference to the same chemical formula and compared those with the products sold to the taxpayer with the same chemical formula having regard to a range of factors. The factors included the characteristics of the property, functions performed, assets or resources contributed, risks assumed by the parties involved, contractual terms, business strategies, and economic market circumstances.
75. Mr Seve concluded that in the vast majority of cases the price paid by the taxpayer was less than that paid by independent third parties buying comparable volumes in comparable markets.
76. Mr Karoudjian, Customer Service Manager of SNF SAS, prepared the initial CUP analysis for the taxpayer, reaching the conclusion that in the majority of cases the price paid by the taxpayer was less than that paid by independent third parties buying comparable volumes in comparable markets. The taxpayer submitted that the customers which it relied upon as independent purchasers in its CUP analysis sold predominantly to end users (as was the case with the taxpayer) and at substantially the same level in the market as the taxpayer.
77. The taxpayer led evidence with respect to the comparisons having been made at three levels, depending on the specificity of the information available:

(i) First, at the *product group level* in respect of sales from SNF SA to the taxpayer and the following five customers ('the customers') and also in respect of sales from Chemtall Inc and Pearl River to the taxpayer and the customers – Akzo-Nobel NV and its subsidiaries, Betz Laboratories Inc and its subsidiaries ('Betz'), Hercules Inc and its subsidiaries, Ashland Inc and its subsidiaries and Buckman Laboratories International Inc and its subsidiaries;

(ii) Secondly, at the *product name level* in respect of sales from Chemtall Inc and Pearl River for sales to the taxpayer and other Australian and New Zealand purchasers of products – Betz's Australian subsidiaries, Ichem Ltd (predecessor to Fernz Chemicals (NZ) Ltd), Fernz Chemicals (NZ) Ltd, Orica Chemnet Ltd (which purchased Fernz in 2002), Nalco Australia Pty Ltd ('Nalco') and Nalco Chemical Co Ltd, who was purchasing products from Chemtall Inc and directing that products be shipped to Australia ('other purchasers'); and

(iii) Thirdly, at *the Code Art level* in respect of sales by SNF SA to customers of that company.

78. I should indicate that there was no direct evidence of comparable arm's length sales to customers from SNFCF in China. The prices paid for the products from SNFCF by the taxpayer were in the same range as those paid to the other suppliers. In light of the evidence and my analysis, the acquisitions of the products from SNFCF can be treated in the same way as the other acquisitions the subject of the proceeding. This is particularly the case because of the view I take that the acquisition of the products by the taxpayer and the customers and other purchasers occurred in the context of a global market.
79. In terms of the first analysis at the product group level in respect of sales from SNF SA to the taxpayer the average prices paid by the customers for each product category in each year were almost always in excess of the average prices paid by the taxpayer for the same product

almost always the effect of the average prices paid by the taxpayer for the same product

categories.

80. In terms of the second analysis at the product name level in respect of sales from Chemtall Inc and Pearl River, a comparison of identical or near identical products sold by Chemtall to each of the other purchasers showed that in nearly all cases the taxpayer paid less for the products.
81. Finally, the further analysis of the purchases by the taxpayer from SNF SA undertaken by Mr Seve identified sales of each individual product as identified by its Code Art. This further analysis was in response to a criticism by the Commissioner's expert (Dr Becker) that the products within the earlier categories were not precisely identical in chemical composition. Mr Seve focused on sales of identical products with precisely the same Code Art description instead of product categories. The Code Art comparables comprised sales by SNF SA to companies in Spain, Germany, France, Finland, Australia, Greece, Belgium, the Netherlands and Italy.
82. Mr Seve identified purchasers (said to be re-sellers of SNF products) who also purchased similar volumes of a number of the products also purchased by the taxpayer in the relevant period. Generally, the taxpayer paid less for the purchase of each individual product as identified by Code Art than other independent purchasers but more than at least one other independent purchaser.
83. Mr Russell Henry Schroeter, Managing Director of SNF Australia, gave evidence in support of the analysis of comparable transactions, as did Mr Mark Schlag, an employee of SNF Inc and Corporate Controller. Mr Schlag was not called to be cross-examined. Mr Schlag provided evidence (which was not objected to) that:

> *5. I have located sales data for the years 1997 to 2003 inclusive ("audit period") relating to customers of Chemtall Incorporated and Pearl River Polymers Inc (as they then were) who purchased the same or similar products to SNF (Australia) Pty Ltd.*

> *6. The customers I selected were Akzo-Nobel NV, Betz Laboratories Inc., Hercules Inc., Ashland Inc. and Buckman Laboratories International Inc. (the Customers). The Customers were selected as they all purchased at least some identical products and they were distributors of these products in their respective marketplaces.*

84. Mr Shroeter also provided evidence (which was not objected to) that:
    33. *Other companies that were distributing flocculants and coagulants in Australia included Stockhausen, Cytec Industries, Akzo-Nobel, Buckman Laboratories and BASF.*
    34. *SNF Australia supplied end-users of the products and local distributors such as CWTS, WTS, Maxwell Chemicals and, from time to time, multi-national companies such as Buckman Laboratories for resale.*
85. The taxpayer also tendered a number of annual reports of various companies which demonstrated that the customers carried on selling operations and were not end users of the products. This supported the evidence which was not objected to of Mr Schlag and Mr Schroeter referred to in par [83] and [84] above.
86. As to other purchasers of SNF SA relied upon by the taxpayer, documentary evidence was led in the form of annual reports, financial reports, company summaries, and Certificates of Registration that demonstrated that these customers were not end users of polyacrylamide product, but like the taxpayer, on sold such products.
87. The Commissioner made a number of attacks upon the approach of the taxpayer and the evidence referred to above relied upon by the taxpayer.

relied to above relied upon by the taxpayer.

88. In the Commissioner's submission there was no evidence before the Court concerning the elements of comparability identified by both Mr Seve and the OECD guidelines, and therefore the taxpayer failed to discharge its burden of demonstrating that its CUP material was sufficiently reliable for it to be used to displace the amounts assessed by the Commissioner.
89. The Commissioner submitted that the evidence of Mr Karoudjian and Mr Schroeter concerning the functional comparability of the taxpayer's CUP counterparties, and the economic circumstances in which each counterparty bought and sold products, was inadmissible hearsay.
90. The Commissioner also objected to the evidence of Mr Seve. It was submitted that Mr Seve's opinion was substantially based upon the work of Messer's Karoudjian and Schroeter, and other employees of the taxpayer, and for that reason was not, as required by s 79 of the *Evidence Act 1995* (Cth) ('the Evidence Act), based substantially on his own specialised field of knowledge. It was further submitted that Mr Seve did not have the required expertise in any event.
91. The Commissioner submitted that the annual reports tendered by the taxpayer of its CUP counterparties did not discharge its burden of making good each required integer of comparability, and that what those annual reports demonstrated was that each proposed CUP counterparty was a vastly different entity from the taxpayer.
92. The Commissioner submitted that the evidence led by the taxpayer regarding allegedly 'comparable' transactions, was not relevant to the exercise of determining what a party in the position of the taxpayer would have given for polyacrylamides in an arm's length transaction. In the Commissioner's submission, the task is not to determine the 'fair value' of the polyacrylamides, a *fortiori*, from the point of view of the seller; rather it is to ask what price an independent buyer in the position of the taxpayer would have agreed to pay.
93. The Commissioner also made reference to the 1995 guidelines. The Commissioner submitted that the factors said to impact on comparability, such as the economic circumstances of the transaction and the business strategies undertaken by the parties, impact on considerations of comparability (referring to *GlaxoSmithKline Inc. v The Queen* 2008 TCC 324).
94. The Commissioner submitted that the ability of SNF France to influence prices by the provision of price rebates, together with the unique features of the Australian market that are not present in other markets, render the CUP evidence relied upon by the taxpayer ultimately unhelpful.
95. The Commissioner submitted that the evidence did not explicate what an independent party dealing at arm's length with the suppliers might reasonably be expected to have paid for the products during the years in question in the Australian market.
96. The taxpayer's CUP evidence was also criticised for not being 'truly comparable' to the acquisitions of the taxpayer in other specific respects. The Commissioner submitted that:

(i) In all but a very small number of cases the transactions occurred in foreign markets, and no evidence was led to demonstrate that these markets were comparable to the Australian polyacrylamide market during the years in question;

(ii) The taxpayer alleged that the Australian market was subject to intense competition and that as a result the real price for polyacrylamides decreased. However, the taxpayer did not contend that the transactions said to be comparable were also subject, to any extent, to these same market conditions;

(iii) The transactions that did take place in Australia were very small in number and do not support, on their own, a CUP analysis, and there is evidence that some of them may have taken place at a different level of the market;

(iv) The taxpayer did not show that the transactions said to be comparable were made by entities which were functionally comparable or similar in any way to the taxpayer. For example, knowing that entities in Germany, the Netherlands or Italy might have been prepared to pay the equivalent of what the taxpayer did pay for polyacrylamide cannot determine the answer to what an Australian entity dealing

taxpayer did pay for polyacrylamide cannot determine the answer to what an Australian entity, dealing at arm's length, might reasonably have given for the same product; and

(v) The establishment of a foothold for SNF products in the Australian market and market penetration was for the benefit of the suppliers and ultimately the parent in France. It is those suppliers, not the taxpayer, who should have borne the costs of establishment and penetration, and that should have been reflected in reduced transfer prices for the polyacrylamides.

97. In further response to the approach taken by the taxpayer, the Commissioner submitted that the evidence led by the taxpayer with respect to what were allegedly 'comparable' transactions in different markets was not relevant to determining what an arm's length party in the position of the taxpayer would have given for the products, relying on *Estee Lauder v Federal Commissioner of Taxation* (1988) 88 ATC 4412 at p 4420; 80 ALR 314 at p 319. Particularly, the Commissioner submitted that it was inconceivable that the taxpayer would not have insisted on a price that would have allowed it to make a profit when dealing with the suppliers.
98.

The Commissioner submitted that the taxpayer:

(i) did not lead sufficient evidence on the way in which the polyacrylamide prices were set by SNF France;

(ii) did not lead evidence of the manufacturing profit mark-up enjoyed by the suppliers;

(iii) provided a 'costing model' presented by Mr Schroeter that failed to detail the underlying data he relied on to produce it. Additionally, that it was unclear how Mr Schroeter concluded from that document that 'the transfer prices paid by [the taxpayer] were either at or below costs of production'; and

(iv) did not led evidence to establish what the taxpayer would have given for the products if it had been dealing with the suppliers at arm's length.

99. In addition to the attack upon the approach of the taxpayer and the evidence relied upon by the taxpayer, the Commissioner led evidence of economics expert Dr Becker. Dr Becker is the President and CEO of Precision Economics, an economic research and consulting firm based in Washington, DC.
100. Dr Becker assessed the taxpayer's financial statements for the relevant period and the pricing of its 'market' transactions or arm's length transactions. Dr Becker expressed the view that the transactions relied on by the taxpayer were not comparable because the customers were at different levels of the market than the taxpayer.
101. Dr Becker also suggested the methodology to be employed should be the profit comparison method TNMM.
102. However, the taxpayer submitted that Dr Becker had no specialised knowledge or experience of the taxpayer's or the customers' marketing operations, nor any specialised knowledge in the market for the products. The taxpayer submitted that the facts upon which Dr Becker relied were only supported by the selective and erroneous use of data from the invoices and sales data that had been provided by the taxpayer. In this respect, it was submitted, Dr Becker did not express an opinion within his area of expertise but rather made a conclusion of fact in an area where he had no relevant expertise.
103. The taxpayer submitted that the further reasons given by Dr Becker for rejecting the taxpayer's original CUP analysis were based on erroneous conclusions of fact made by Dr Becker and the avoidance of meaningful analysis of comparable transactions, which enabled him to attempt to

'value' the products based on the TNMM, used by the Commissioner in the course of its audit.

104. It is first necessary to say something regarding the objections taken to the taxpayer's evidence and the objections taken to the evidence of Dr Becker called by the Commissioner.

105. Both Mr Karoudjian and Mr Schroeter were cross-examined as to the extent of their personal knowledge and to the extent to which their evidence was founded upon documents not otherwise in evidence or upon what they had been told. Neither was purporting to give expert evidence.

106. Mr Karoudjian gave evidence concerning the customers and a number of other companies. He acquired that knowledge from a computer system used in France, and had no access to the internal records of the customers or other companies referred to by him. Mr Karoudjian had no knowledge of the prices charged by various customers nor their direct selling and administration costs, nor their operating profits or business strategies. No internal records of any of the customers or other companies were tendered by the taxpayer.

107. Mr Schroeter at first indicated that his knowledge of the marketing activities of the customers was based on personal experience. He did have personal experience of one company, Nalco, but in the course of cross-examination accepted that otherwise he had no personal knowledge or experience with the marketing activities of the customers or other companies, nor the prices charged by such entities nor their operating profits or business strategies. Mr Schroeter did have access to the annual reports of the customers, but these did not disclose the prices charged for the products, the operating profits from the sale of SNF products, or business strategies.

108.

On the basis of the evidence given in cross examination and express indications made in their affidavits, I accept that any statement of Mr Karoudjian and Mr Schroeter as to the following is hearsay and inadmissible:

(a) the prices charged by various companies (other than Nalco in the case of Mr Schroeter) to which objection has been taken;

(b) any statements which are specifically made on the basis of information supplied by another person;

(c) any conclusionary statements as to comparative markets, the independence of customers, similarity of product or description of market; and

(d) any statements concerning the status of customers, as to whether or not they were end users or distributors of similar products.

109. I also indicate that the 'costing model' presented by Mr Schroeter (which was also objected to by the Commissioner on the basis of relevance) is not relied upon by me in my consideration, and in my view, is irrelevant.

110. I accept both witnesses did have considerable experience and knowledge of the industry, and to a certain extent could give evidence arising from their experience: see eg *Notaras v Hugh* [2003] NSWSC 167 per Sperling J at [17] to [18] and *Jango v Northern Territory of Australia (No 2)* [2004] FCA 1004 per Sackville J at [73] to [74]. However, once a witness (not being an expert) indicates that he or she relied upon another person or document as a basis for the evidence given to the Court and such evidence is specific and not arising from the witness's general knowledge, such evidence is hearsay and inadmissible unless the Court exercises its discretion otherwise.

111. However, putting aside the inadmissible evidence of Mr Schroeter and Mr Karoudjian, there is other evidence which would support some of the factual matters raised by them. I have already referred to some of this evidence, but will return to my factual findings later.

112. To the extent that any reliance was sought to be placed upon s 190 of the Evidence Act, I would not exercise my discretion to allow the evidence to be otherwise admitted into evidence, as the evidence is contested and is central to the consideration I must undertake to determine the primary

issue in this case. The taxpayer has been aware in the preparation of this proceeding that the burden would be upon it to provide evidence in admissible form to the Court. None of the considerations referred to in s 190 would lead me to exercise my discretion to admit the evidence objected to by the Commissioner.

113. In relation to the objections taken to the evidence of Mr Seve, I accept that he was an expert witness, founded upon his experience in and knowledge of transfer pricing. An expert is entitled to rely upon the information of others, and his own assumptions, as long as these are clearly identified, and the opinion expressed is his or hers: see *Paino v Paino* [2008] NSWCA 276. Contrary to the submission of the Commissioner, Mr Seve's reliance upon others did not make his report a joint report of many authors (of the type referred to by Stone J in *Cooke v Commissioner of Taxation* [2002] FCA 1315; (2002) 51 ATR 223), as he was the sole author of the report and presented it as such to the Court.
114. However, and significantly in this proceeding, Mr Seve could not provide evidence as to the primary facts needed to properly undertake a CUP analysis or provide a comparative analysis. Like an economist, Mr Seve may be able to give evidence about markets and market behaviour generally, but in relation to specific markets and the comparable transactions primary evidence would be required.
115. As such, in this case, Mr Seve cannot give evidence of the factual elements of the CUP analysis which relate to economic comparability, comparability of goods, comparability of point in the chain where goods are sold, comparability of functions of the enterprise, comparability of terms and business strategies.
116. As a matter of procedure, pursuant to s 57 of the Evidence Act, the evidence of opinion could be admitted subject to evidence being admitted at a later stage in the proceeding proving the primary facts assumed by the expert. If by the end of the proceeding a fact upon which a particular opinion is based is not established, then the opinion has no weight.
117. Nevertheless, Mr Seve can provide expert evidence (like an economist) to assist the Court on comparability. However, even with this assistance, the Court has the ultimate task of considering the primary facts, and in this proceeding, determining the ultimate issue concerning arm's length consideration in the context of the interpretation and application of Div 13.
118. In this regard, the comments of the Full Court of this Court in *Universal Music Australia Pty Ltd v Australian Competition and Consumer C*ommission [2003] FCAFC 193; (2003) 131 FCR 529 have equal application to the present case:

> *[163] In concluding our findings in relation to s46, something should be said about the use of expert economic evidence in cases such as the present. The primary judge referred to the evidence of witnesses called in the cases, to writings on the topic by economists and lawyers, and to the discussion of economic theory in other judgments. The primary task of the Court, however, is to apply the words of the Act to the facts found on the evidence before it. These words involve some economic concepts and the application of the Act to the facts of a particular case may be informed by economic evidence or argument. But it is the language of the Act which defines the task that the legislature has set for the Court. To the extent that the statutory language conflicts with economic theory, the Court is bound to apply the Act.*

119. Therefore, I regard the evidence of Mr Seve as expert evidence admissible under s 79 of the Evidence Act, but only to be given weight to the extent admissible evidence is otherwise before the Court as to the necessary primary facts. On this basis, the evidence is not unfairly prejudicial to the Commissioner for the purposes of s 135 of the Evidence Act. Mr Seve has set out the information he had relied upon, his assumptions, and the instructions he was given to prepare his

reports. The taxpayer does not rely upon Mr Seve's evidence to prove the primary facts, and no order was required to be given pursuant to s 136 of the Evidence Act.

120. I turn then to the evidence of Dr Becker and the objections of the taxpayer.
121. The Commissioner relied upon the evidence of Dr Becker in the form of three reports and various tables annexed to those reports. The second of those reports supplemented Dr Becker's first report and the third report responded to the report prepared by Mr Seve.
122. Dr Becker commented on comparability, but an important aspect of his evidence was his reliance on the TNMM.
123. What was to be determined by the TNMM was that for every $100 of sales the taxpayer in fact obtained a net selling price of $71.43. Dr Becker then determined how much of that $71.43 an independent party would give to a manufacturer to acquire the products. He resolved this question by determining a 'benchmark operating profit' on $100 of sales, and then subtracting from that $71.43.
124. The benchmark operating profit was determined by Dr Becker by reference to the operating profits of the other functionally comparable distributors. Under that methodology for determining price, unlike in the case of a CUP analysis, he did not compare specific transactions or groups of transactions, with other truly comparable transactions. Instead, Dr Becker sought to identify with a single economically significant category or genus of enterprises other businesses by reference to their functionality and risk profile. The object was then to determine the average, or mean, of profits made by those businesses. Precise comparability was not required by the method, so long as the enterprises being considered exhibit those same economically significant elements that contribute to profitability.
125. It was submitted that in this way, profits earned by enterprises that operate in different jurisdictions and carry on different types of business may be taken into account so long as they exhibit, in each case, substantially the same economic function and risk profile.
126. To achieve the analysis, Dr Becker first searched for independent Australian distributors of polyacrylamides trading between 1997 and 2003, and found 4 independent Australian limited risk distributors, and 7 independent companies in countries with relatively strong economies that distribute products broadly similar to polyacrylamides. Dr Becker took the median point within the range of operating profits, 1.7%, as the appropriate benchmark. This translated to a cost of sale for the taxpayer of $69.74. That is, in order for the taxpayer to make an operating profit of 1.7%, it could pay no more than $69.74 for the products. Dr Becker noted that in order to achieve a profit of 1.7% the taxpayer would have paid a total of $12.3 million less for the polyacrylamides over the whole relevant period than it did in fact pay.
127. The Commissioner submitted that in the context of this proceeding, the TNMM provided a rational basis for determining the profits that might have been expected to accrue to the taxpayer had it dealt with the suppliers at arm's length. TNMM involved a comparison of the net profit margin that the taxpayer realised from the sale of polyacrylamides with the net profit margin realised by the independent companies, which Dr Becker identified as functionally comparable.
128. The Commissioner submitted, consistent with Dr Becker's opinion, that if the taxpayer was independent and dealing wholly independently it would not have returned losses, over the years in dispute, but rather an average operating profit margin of 1.7%.
129. In my view, undertaking the TNMM does not provide a proper basis for determining what consideration it was reasonable to expect that an independent purchaser would pay for the products. The TNMM does not address the issue as is required by Div 13 of the ITAA, as interpreted earlier in these reasons. I reject the use and applicability of the TNMM as contended for by the Commissioner in the context of applying Div 13.
130. Further, one of the very real problems with the TNMM undertaken by Dr Becker is that the analysis focuses on a seven year period, and the need to make a profit of 1.7%. There is no method to divide that period into a relevant year, or to relate the analysis to the requirements of Div 13, focusing on arm's length consideration in relation to the acquisition of particular goods.

131. Another problem with profit based methodologies was referred to by Downes J in *Roche* [2008] AATA 639; (2008) 70 ATR 703:

> *[185] One of the problems of profit based methodology is that, when applied to transfer pricing, it inevitably attributes any loss to the pricing. Where operating expenses are higher these may place some of the emphasis of the cause of the loss on the wrong area. After all, it is certainly true that there are companies which make losses for reasons other than the prices for which they acquire their stock. The Australian operations of multinational companies are not necessarily excluded from this.*

132. The taxpayer also challenged Dr Becker's capacity to give expert evidence due to his lack of specialised knowledge. I am satisfied having regard to matters attested to by Dr Becker that he was suitably qualified to provide an expert opinion on the TNMM profitability analysis and to make economic assessments of the taxpayer's financial statements. He was not qualified to give evidence in valuing the products or describing the markets of such products other than in the same way as Mr Seve. That is, based upon primary facts. Dr Becker can assist the Court on methodology and the elements of comparability, although, as I have said, it is a question of fact for this Court to determine the arm's length consideration based upon the evidence.
133. I now turn to the evidence of Mr Pich. No objections were taken to his evidence, although the Commissioner whilst not attacking the credit of Mr Pich, submitted in many respects that his evidence should not be accepted by the Court.
134. I say at the outset that subject to one qualification I accept the evidence of Mr Pich. As I say, his credit was not attacked, and I consider the evidence he gave logical and in conformity with commercial reality, once one accepts (as I have) that the taxpayer was being supported at all times by its parent in pursuit of Mr Pich's world wide objective.
135. The one qualification relates to evidence given in re-examination. In re-examination Mr Pich did make a reference to losses made by SNF France, based upon calculations made some two or three weeks prior to giving evidence. Those calculations were not produced to the Court, nor were they called for by the Commissioner. No reference was made to these losses in Mr Pich's sworn affidavit. There was some lack of clarity in the exact amount and period of the losses, and I am not prepared to accept the figures given by Mr Pich. However, I am prepared to accept, although I regard it as irrelevant to the main task, that losses were made in the relevant period by SNF France which Mr Pich regarded as creating a 'catastrophic situation' in France. I do not see any inconsistency in this oral evidence with any of the documentation before the Court.
136. There were other important aspects of Mr Pich's evidence, going to the issue of arm's length consideration and the question of 'market', an issue of contention in this case. The taxpayer contends that there was a global market for the products, which the Commissioner submitted the taxpayer has not proved.
137. In my view, there is sufficient evidence to demonstrate that there was a global market, at least for the purposes of considering the issue of an arm's length consideration in the context of Div 13. This is not a proceeding which requires the exactness of market definition in the same way as may be required in considering competition issues: see generally Corones SG, *Competition Law in Australia* (4th ed, 2007) pp.139 *et seq*. Even in that area of discourse, the extent to which the market needs defining will depend upon the circumstances of the case.
138. Mr Pich, on the question of global market, gave the following evidence:

> *My objective for SNF France was, and remains, that it should be the world's pre-eminent manufacturer of acrylamide and its derivatives for the water-soluble polymer market, and to hold 50% market share of the flocculant market globally.*

SNF France and its subsidiaries (collectively, the 'SNF Group') have become a leading producer of flocculants for water treatment and are actively present on four continents. The main manufacturing locations of the group are in France (SNF France), the United States of America (SNF Inc in Riceboro and Perlington), South Korea (Eyang Chemical Co Ltd) and China (SNF (China) Flocculant Co Ltd). The market share of SNF Group globally at this time is approximately 38%.

...

The prices for purchases by SNF Australia from members of the SNF Group were set by SNF France, always having regard to the global market for the products.

139. Mr Pich further indicated that global pricing arrangements were in place, although in the relevant period, not in Australia. This was because negotiations did not occur in Australia, as there were no personnel to undertake such negotiations. The negotiations for price were conducted outside Australia. However, this is of no moment. Whilst the evidence is unclear as to how the global price lists were referenced in terms of the pricing in different countries or geographic regions, what is clear on the evidence is the actual prices paid by the taxpayer and the customers. It does not matter what the basis of setting a global price list was, or whether different considerations applied to global pricing around the world, if, as in this proceeding, the evidence shows consistency of range in the prices of the transactions sought to be relied upon as truly comparable. It is the price paid that is critical, assuming it is a price paid in a truly comparable transaction.
140. All the evidence and surrounding circumstances point to a global market. If a company wished to purchase polyacrylamides from a SNF manufacturer, it would look to France, China or USA. This is not to be confused with the market in which the taxpayer or distributor sells. When analysing the evidence, the relevant evidence is not the prices and terms of the distributor's (including the taxpayer's) own sales. The Commissioner failed to make this distinction in looking at the evidence. In one instance for example, the Commissioner relied upon evidence of Mr Pich where he discussed establishing SNF Australia with a different cost structure from other subsidiaries within the SNF Group because of factors specific to the Australian market to demonstrate that the market in Australia was different from other markets in which the taxpayer was said to rely as comparable to Australia (see par 93(c) of the "Respondent's Revised Outline of Submissions"). However, Mr Pich was clearly not talking of the market relating to the acquisition of the products, but was giving evidence about the taxpayer's sales in Australia and the competitive environment in Australia (see paragraph 23 of Mr Pich's affidavit and Transcript p 133 line 41 and p 134 line 14).
141. Mr Pich also gave evidence that he would not have authorised the sale of products to an independent purchaser at the lower prices charged to the taxpayer during the relevant period. It was submitted that given that the suppliers were already losing money on their sales to the taxpayer, one could not reasonably expect that the suppliers would charge the existing low prices to an independent party. This to me seems correct.
142. Mr Pich also gave evidence going to the explanation for losses incurred by the taxpayer, to which I will return when dealing with that topic.
143. All that the taxpayer needs to put before the Court is sufficient evidence to demonstrate true comparability. Oral testimony, if in admissible form, can be sufficient, even if not fully supported by documentary material. For instance, I am satisfied that there is a global market on the evidence I have referred to, although one could readily anticipate that a great deal more evidence could be placed before the Court to demonstrate this fact.

144. On the available evidence, I make the following observations and findings as to the comparable transactions:

(a) The actual prices paid by the taxpayer for the acquisition of the products were lower than the large majority of prices paid by the purchasers in the comparable transactions over a similar period of time;

(b) The taxpayer sold the large majority of products to end-users, although there were exceptional instances where this did not occur;

(c) The products subject of the comparable transactions relied upon by the taxpayer were the same or similar to the products acquired by the taxpayer;

(d) The essential terms of the comparable transactions were the same or similar to those of the taxpayer including the size of the orders, the terms of payment and delivery, and taking into account currency conversions and isolated rebates; and

(e) Each of the customers and other purchasers were independent, and were trading in an industry similar to the taxpayer and were distributors of product in their respective market places.

145. I make these findings on the bases of the admissible data produced by the witnesses called by the taxpayer, the documentation tendered by the taxpayer relating to the customers and purchasers, and affidavits of Mr Pich, Mr Schroeter, Mr Karoudjian and Mr Schlag to the extent not objected to by the Commissioner. It will be apparent that the matters sought to be proved by the evidence objected to by the Commissioner have been proved by other evidence not otherwise objected to.
146. This evidence relied upon by the taxpayer establishes the true comparable nature of the transactions relied upon. As I have already indicated, the focus is on the market in which the products are acquired by the taxpayer, and any 'unique features' of the market in which the taxpayer sells, is of no importance. In relative terms, the comparable transactions that occurred in Australia were not great. I accept that on their own the transactions relied upon that took place in Australia would not support the CUP analysis undertaken by the taxpayer. However, particularly in view of the fact there is a global market, putting together all the comparable transactions relied upon by the taxpayer; the burden placed upon the taxpayer is satisfied.
147. I accept that no comprehensive evidence was led to explain how prices were set or negotiated by each of the suppliers, or who set the prices. Further, there was no evidence in relation to:

(i) the nature, size, business and operations of the comparable entities in their respective overseas markets;

(ii) the profits made by the so-called comparable entities on sales of polyacrylamides in their respective overseas markets;

(iii) what profit or return was made by each of the suppliers on its sales of polyacrylamides to the taxpayer.

148. I do not consider, in determining the arm's length consideration in the circumstances of this proceeding, that such evidence was necessary.
149. In the present case there was a free market for the products. It was a global market with many participants. The arm's length price as determined by that free market was, on the evidence, almost always in excess of the prices paid by the taxpayer. The data showed that the subsidiaries of the customers commonly paid the same prices regardless of their geographical location.
150. There was also a sufficient volume of sales to independent third parties for almost every comparable product purchased by the taxpayer from its associated companies to enable the Court

to reach a view of comparability on the balance of probabilities.

151. In light of the evidence and the approach I have taken in considering the comparable transactions, the Commissioner's attempt to cast doubt on the price comparison undertaken by the taxpayer on several bases, including the location of the market, functional comparability of the purchaser and the level of the market, fails.
152. I have already indicated that the relevant market is a global market. This finding overcomes the submissions of the Commissioner which related to the comparability of foreign markets and the Australian market. The comparability is to be viewed in the global context.
153. In terms of functional comparability, the evidence is that the customers and other purchasers the subject of the analysis were not end users of the products but, like the taxpayer, on-sold such products.
154. Regarding the level of the market the subject of the analysis, the Commissioner argued that the taxpayer did not show that the independent purchasers of the products operated at the same level in the market as the taxpayer did. The analysis of the taxpayer was based on comparing the prices paid to the suppliers by independent parties with the price paid to those same suppliers by the taxpayer. The result of this analysis was that the taxpayer paid the same amount if not less than the independent purchasers paid for the products. I do not consider it matters for the purposes of applying Div 13 and having regard to the other findings found in this proceeding, that the similarity in the level of the market be established as contended for by the Commissioner.
155. In any event, it appears to me that the taxpayer, the customers and other purchasers were at the same level of the distribution chain. Each purchased from the suppliers, and no difference in price could be said to be attributable to being at a different level in the distribution chain.
156. For the above reasons, the taxpayer has satisfied the burden upon it to satisfy the Court that the consideration the taxpayer paid for the products was the arm's length consideration. The taxpayer has displaced the figure determined by the Commissioner in his determinations under s 136AD(4).

THE REASON FOR THE LOSSES FACED BY THE TAXPAYER

157. As I have indicated, an issue arose in this proceeding as to the reason for the taxpayer incurring trading losses over the relevant period. On the Commissioner's primary approach this enquiry is irrelevant, because the reason for the losses is irrelevant: the only relevant facts relate to the actual position of the taxpayer during the relevant period. The Commissioner then relied upon the subjective differences in the taxpayer's position to that of other independent enterprises dealing wholly independently with each other.
158. In my view, and on the approach I have taken, having found that the taxpayer has satisfied the burden upon it as required by the requirements of Div 13, any potential relevance of this issue disappears. As I have said, sustained losses over an extensive period may be a cause of investigation and enquiry as to whether the prices for the acquisition of goods were inflated. However, genuine losses may be sustained for many reasons, and not necessarily because the transfer prices of the goods were artificially inflated.
159. As the issue was raised, and evidence was led relating to it, it is convenient to make some findings in connection with the reason for the losses faced by the taxpayer.
160. It was submitted by the Commissioner that the losses incurred during the relevant period were wholly attributable to the taxpayer paying the suppliers, from whom it purchased the products, more than 'arm's length consideration,' as defined in s 136AA(3)(d) of the ITAA. I have already found on the evidence that the taxpayer did not pay more than the 'arm's length consideration' in respect of the purchase of the products.
161. The Commissioner submitted that despite the fact that SNF France averaged 7.5% profit over the relevant period the taxpayer reported losses in the same period. The Commissioner submitted the taxpayer reported losses despite the fact that the annual net sales of the taxpayer tripled during the

period between 1997 and 2003. Dr Becker had calculated the growth in sales over the period to be 19.1% per annum, yet the taxpayer's operating margin was -11.5% in the relevant period.

162. It was submitted that by 2002 the taxpayer had captured 18% of the polyacrylamide market in Australia. However, despite its strong sales performance and the fact that the taxpayer received continuous and significant equity subscriptions and loans from SNF France the taxpayer recorded no profit.
163. The Commissioner submitted that the conditions which existed between each of the suppliers and the taxpayer in their commercial or financial relations differed greatly from those which may be expected between independent enterprises dealing wholly independently with one another. These conditions included:

(i) The taxpayer was dependent on the financial assistance provided by SNF France in the form of capital subscriptions and loans and the policy of the SNF group was to support subsidiaries through initial set up periods of up to six years;

(ii) Until April 2002 the taxpayer was under the managerial control of French executives who were directors of SNF France;

(iii) The prices of the products under the agreements between each of the suppliers and the taxpayer were set by SNF France without negotiation by the taxpayer;

(iv) Over the relevant period, for every $100 of sales it made, the taxpayer incurred selling costs of $28.57, and in those circumstances, it agreed to pay $82.88 for the products it purchased from the suppliers, giving rise to a loss of $11.45;

(v) The taxpayer made losses for a period of 13 years; and

(vi) Independent expert evidence suggested that the taxpayer should have made profits in each of the relevant years.

164. In the Commissioner's submission the lack of independence of the taxpayer from its parent, and the fact that it agreed to transfer prices that had to generate a loss in each and every year, gives rise to an inference that the commercial or financial relations between it and its sibling companies, the suppliers, were not those that would be expected between independent enterprises dealing wholly independently with one another.
165. It was submitted that it follows that the profits which might have been expected to accrue to the taxpayer, if it had been free to negotiate its own prices for polyacrylamides, can be included in the profits of the taxpayer and taxed accordingly.
166. I find that the principal cause of the losses suffered by the taxpayer was to be found in an unreasonably low level of sales per salesperson employed by the taxpayer which resulted in a high level of commercial costs expressed as a percentage of sales. I also find that the other issues that contributed to the taxpayer's lack of profitability were competition in the Australian market, excessive stock levels, and poor management. This was the evidence of Mr Pich and Mr Schroeter whose evidence I accept. The credit of neither witness was put in issue. I see no other reason not to accept the evidence. The documentary evidence is not inconsistent with the oral evidence of Mr Pich or Mr Schroeter, although as the Commissioner contended, does not fully document all the reasons put forward by the taxpayer. Nevertheless, I accept the effectively unchallenged oral evidence of Mr Pich and Mr Schroeter.
167. I also find that the policy of the SNF group was to support its subsidiaries through initial set up periods, although in Australia the initial set up period was longer than anticipated. Further, the SNF Group globally was engaged in a market penetration strategy in Australia, which was considered critical to the long-term strategic plans of the SNF group. A continued investment was

considered critical to the long-term strategic plans of the SNF group. A continued investment was made in the form of price support by the SNF group to ensure that the taxpayer could continue to operate in these circumstances. Mr Pich had adopted a long term view of the taxpayer's operations, as his experience had been that initial losses were incurred in every country in which SNF operated.

168. The suppliers supported the taxpayer by charging special reduced prices for the taxpayer's purchases of polyacrylamide that were destined for particular large customers, and also by bearing that currency risk on sales to the taxpayer. The evidence establishes that the reason the suppliers tolerated sales below cost price, and less than the price charged to arm's length purchasers, was that the SNF group was supporting the taxpayer.
169. Further, as I stated previously, the outcome of this price support was that in addition to the losses incurred by the taxpayer in Australia, the SNF group lost some money on its sales to the taxpayer as it was selling to the taxpayer at below the cost of production.
170. I accept that it would be likely that an independent distributor would have exited the marketplace if they made the quantum of losses that the taxpayer had made during the relevant period. Notwithstanding this, the presence of the taxpayer in the Australian marketplace was considered to be critical to the long term strategic plans of the SNF group globally and continued investment was made to ensure that the taxpayer could continue to operate.
171. Therefore, even accepting the primary conditions submitted by the Commissioner, as referred to in paragraph [163] hereof, no inference could be drawn that the prices were artificially inflated. On the facts, I do not accept the submission of the Commissioner that the inference to draw is that the suppliers were in effect receiving a "return" on the SNF Group's investment in the taxpayer in the form of payments for polyacrylamides that exceeded the arm's length consideration. In any event, as I have explained, the evidence relied upon as to comparable transactions satisfied the burden of proof placed upon the taxpayer in this proceeding and has demonstrated the arm's length consideration.

CONCLUSION

172. It seems that the appropriate orders would be that:

(1) The appeals against the respondent's objection decisions dated 7 January 2008 disallowing the applicant's objection dated 6 August 2007 against income tax assessments:

(a) in respect of the year ended 31 December 1997 in lieu of the year of income ended 30 June 1998, dated 19 April 2007;

(b) in respect of the year ended 31 December 1998 in lieu of the year of income ended 30 June 1999, dated 19 April 2007;

(c) in respect of the year ended 31 December 1999 in lieu of the year of income ended 30 June 2000, dated 19 April 2007;

(d) in respect of the year ended 31 December 2001 in lieu of the year of income ended 30 June 2002, dated 27 April 2007;

(e) in respect of the year ended 31 December 2002 in lieu of the year of income ended 30 June 2003, dated 27 April 2007; and

(f) in respect of the year ended 31 December 2003 in lieu of the year of income ended 30 June 2004, dated 27 April 2007;

be allowed.

(2) Each of the objection decisions be set aside and in lieu thereof it be ordered that the objections of the applicant be allowed in full.

173. However, before I pronounce any final orders, I will order that the parties confer, and submit minutes of orders necessary or appropriate including any orders as to costs. If there are matters outstanding which cannot be agreed, (including costs), then the parties should consult with my Associate, and a further hearing will be arranged to consider and determine any outstanding matters.

I certify that the preceding one hundred and seventy-three (173) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Middleton.

Associate:

Dated: 25 June 2010
