

Industry Research & Development Board v Bridgestone Australia Ltd [2001] FCA 954 (23 July 2001)

Last Updated: 24 July 2001

FEDERAL COURT OF AUSTRALIA

Industry Research & Development Board v Bridgestone Australia Ltd

[2001] FCA 954

INCOME TAX - concessional deduction of 150% of expenditure on research and development activities - whether taxpayer's exploitation of the results of activities was otherwise than on "normal commercial terms" - whether contract relating to the exploitation was what one would expect if the contract had been entered into by persons "dealing with each other at arm's length and from positions of comparable bargaining power" within s 39C of *Industry Research and Development Act 1986* (Cth) - meaning of statutory expression - whether question of law - whether "comparable" meant "able to be compared and contrasted by reason of being of the same genus or possessing similar aspects" on the one hand, or "similar", "alike" or "roughly equivalent" on the other hand

STATUTORY INTERPRETATION - statutory language ambiguous - facts found - question which of two meanings was the correct one to be applied to facts - whether question of law or question of fact within s 44(1) of *Administrative Appeals Tribunal Act 1975* (Cth)

WORDS AND PHRASES - "comparable" - "dealing with each other...from positions of comparable bargaining power"

Income Tax Assessment Act 1936 (Cth) s 73B(33)

Industry Research and Development Act 1986 (Cth) ss 39C, 39M

Administrative Appeals Tribunal Act 1975 (Cth) s 44(1)

Collector of Customs v Pozzolanic Enterprises Pty Ltd (1993) 43 FCR 280 discussed

Barnsdall v Federal Commissioner of Taxation (1988) 19 ATR 1352 distinguished

A W Furse No 5 Will Trust (The Trustee for the Estate of) v Federal Commissioner of Taxation 91 ATC 4007 distinguished

Granby Pty Ltd v Federal Commissioner of Taxation 95 ATC 4240 distinguished

Hayes v Federal Commissioner of Taxation [1956] HCA 21; (1956) 96 CLR 47 cited

Collector of Customs v AGFA-Gevaert Ltd [1996] HCA 36; (1996) 186 CLR 389 discussed

Canwest Global Communications Corporation v Australian Broadcasting Authority (1998) 82 FCR 46 distinguished

**INDUSTRY RESEARCH AND DEVELOPMENT BOARD v
BRIDGESTONE AUSTRALIA LIMITED**

S 128 OF 2000

BRANSON, LINDGREN AND MANSFIELD JJ

23 JULY 2001

ADELAIDE

IN THE FEDERAL COURT OF AUSTRALIA

SOUTH AUSTRALIA DISTRICT REGISTRY S 128 OF 2000

**ON APPEAL FROM A JUDGE OF THE FEDERAL COURT OF AUSTRALIA
BETWEEN: INDUSTRY RESEARCH AND DEVELOPMENT BOARD**

APPELLANT

AND: BRIDGESTONE AUSTRALIA LIMITED

RESPONDENT

JUDGES: BRANSON, LINDGREN AND MANSFIELD JJ

DATE OF ORDER: 23 JULY 2001

WHERE MADE: ADELAIDE

THE COURT ORDERS THAT:

1. The appeal be allowed;
2. The respondent pay the appellant's costs of the appeal;
3. The orders made on 10 November 2000 in proceeding N 741 of 1999 be set aside and in lieu of those orders it be ordered that:
 - (a) the decision of the Administrative Appeals Tribunal given on 2 July 1999 in proceeding S 97/121 in that Tribunal be set aside; and

(b) the matter be remitted to the Administrative Appeals Tribunal to be heard and determined according to law; and

(c) the respondent pay the appellant's (then applicant's) costs.

Note: Settlement and entry of orders is dealt with in Order 36 of the Federal Court Rules.

IN THE FEDERAL COURT OF AUSTRALIA

SOUTH AUSTRALIA DISTRICT REGISTRY S 128 OF 2000

ON APPEAL FROM A JUDGE OF THE FEDERAL COURT OF AUSTRALIA

BETWEEN: INDUSTRY RESEARCH AND DEVELOPMENT BOARD

APPELLANT

AND: BRIDGESTONE AUSTRALIA LIMITED

RESPONDENT

JUDGES: BRANSON, LINDGREN AND MANSFIELD JJ

DATE: 23 JULY 2001

PLACE: ADELAIDE

REASONS FOR JUDGMENT

BRANSON J:

INTRODUCTION

1 I have had the advantage of reading in draft the reasons for judgment of Lindgren J. I gratefully adopt his Honour's review of the relevant legislation, the factual background to the appeal, the reasons for judgment of the Administrative Appeals Tribunal ("the AAT") and the learned primary judge, and the issues on the appeal.

CONSIDERATION

2 In my view, the terms of ss 39M and 39P of the *Industry Research and Development Act 1986* (Cth) ("the Act"), and in particular the use of the phrase "*the Board is of the opinion*" in par 39M(1)(b) and subs 39P(3) (see par (f)(i)), strongly suggest that s 39C of the Act is not intended to operate as a definition of the circumstances in which the results of research and development activities "*have been exploited otherwise than on normal commercial terms*" within the meaning of subs 39M(1).

3 Rather, it seems to me that s 39C of the Act is intended to identify a circumstance in which the Industry Research and Development Board ("the Board"), for the purpose of Part IIIA of the Act (in which ss 39C, 39M and 39P are found), is to be of the opinion that a result of a research and development activity

has been, or will be, exploited otherwise than on normal commercial terms. As to the meaning of the phrase "*research and development activities*" in the Act, s 39A(2) of the Act has the effect that the phrase, when used in Part IIIA of the Act, takes the definition of the identical phrase contained in s 73B of the *Income Tax Assessment Act 1936* (Cth) (cf s 4 of the Act). However, as Lindgren J has pointed out, this appeal was conducted on a basis which makes it unnecessary for the issue of whether s 39C of the Act is intended to operate as a definition to be finally determined.

4 A second aspect of s 39C of the Act is, in my view, worthy of notice. The final words of the section (ie "*if the contract or transaction had been entered into by persons dealing with each other at arm's length and from positions of comparable bargaining power*") are in the subjunctive mood; they are not in the past tense. The words are for this reason apt, as Lindgren J has pointed out, to express an hypothesis that is not the fact. That is, in my view, the section requires the Board to form an opinion as to whether any relevant contract or transaction (a) would or would not have been entered into, or (b) contains terms that it would not have contained or that would have been different, if the hypothesis were a reality. Evidence as to the actual negotiating relationship between the persons who entered into the relevant contract or transaction, and as to their respective bargaining powers, may well assist the Board in determining whether it is of the opinion defined by the section. However, the opinion of which the section speaks is, in effect, an opinion as to whether any contract or transaction relating to the exploitation of a result of an activity is consistent with the contractual or transactional outcome to be expected from hypothetical negotiations between persons dealing with each other at arm's length and from positions of comparable bargaining power. It is not an opinion as to whether the taxpayer engaged in arm's length negotiations with another person in which negotiations the taxpayer and the other person held portions of comparable bargaining power.

5 Section 39C of the Act requires the Board to give consideration to any contract or transaction relating to the exploitation of a particular activity on two bases. The first basis, in my view, concerns whether the contract or transaction would have been entered into at all if the hypothesis posited by the section had been reality. That is, if the relevant dealings had been between persons dealing with each other at arm's length and from positions of comparable bargaining power. Having regard to the punctuation of s 39C, the section could, on its face, be seen to require the Board to consider whether any relevant contract or transaction would not have been entered into if the contract or transaction "*had been entered into by persons dealing with each other at arm's length and, from positions of comparable bargaining power*". This construction of the section, however, leads to a logical absurdity and is therefore not lightly to be adopted. It seems plain that the intention of the section would have been better reflected if a comma had been inserted after the words "*had been entered into*" in its penultimate line. As Wilcox CJ pointed

out in *Barlow v Qantas Airways Limited* (1996) 72 IR 194 at 209 in the context of the interpretation of an award:

"It is always dangerous to put much weight on the presence or absence of commas, which are often used loosely."

6 The second basis upon which s 39C requires the Board to give consideration to any contract or transaction relating to the exploitation of a particular result of an activity concerns whether the contract or transaction contains terms that it would not have been contained, or that would have been different, if the contract or transaction had been entered into by persons dealing with each other at arm's length and from positions of comparable bargaining power.

7 If the Board forms the opinion, on either of the above bases, that any relevant contract or transaction is inconsistent with the outcome to be expected from hypothetical bargaining between persons dealing with each other at arm's length and from positions of comparable bargaining power, the exploitation of the relevant result of research and development activity is to be taken, for the purposes of Part IIIA of the Act, to be an exploitation otherwise than on normal commercial terms.

8 The learned primary judge took the view that the phrase "*position of comparable bargaining power*" in s 39C of the Act does not give rise to a question of law. I agree with Lindgren J, for the reasons that he gives, that the proper construction of the phrase does give rise to a question of law.

9 I also agree with his Honour that "*comparable*" in the above phrase means "similar", "like" or "generally equivalent". To the reasons advanced by his Honour I add that, in my view, a careful analysis of s 39C indicates that the exercise of comparison which it requires the Board to undertake would prove in practice to be impossible if the meaning of "comparable" for which Bridgestone contended were adopted. It is implicit in the terms of the section that it is possible to infer whether or not a particular contract or transaction would have been entered into by persons dealing with each other at arm's length and from positions of comparable bargaining power, and that it is possible to infer whether or not particular terms of a contract or transaction would have been contained in, or would have been different in, a contract or transaction entered into by persons so dealing with each other. Inferences of this kind are only able to be drawn where the contract or transaction outcomes to be expected from hypothetical persons "*dealing with each other at arm's length and from persons of comparable bargaining power*" are reasonably predictable. They will not be reasonably predictable where what is required to be hypothesised is persons dealing with each other, albeit at arm's length, with respective bargaining powers that may differ significantly and differ in ways that are not defined.

10 Having regard to the context in which s 39C of the Act is to operate, the broad purpose of the section can be seen to be to prevent expenditures by a taxpayer from receiving highly favourable treatment for taxation purposes where benefits derived from the expenditure have been retained by the taxpayer or otherwise withheld from general commercial exploitation. The section is to be construed in the light of this broad person. In my view, what s 39C requires the Board to hypothesise is the result of negotiations between persons dealing with each other in circumstances which may rarely exist outside of economic theory, namely circumstances in which the result of their negotiations will be dictated purely by commercial or market considerations and not by their relationship one to the other or by appreciable disparities of power between them.

CONCLUSION

11 I would allow the appeal, set aside the orders of the primary judge and in lieu thereof order that the decision of the AAT be set aside and the matter be remitted to the AAT to be heard and determined again by the Tribunal in accordance with law. I would reserve for the consideration of the Tribunal the issue, should it arise, of whether further evidence should be heard.

I certify that the preceding eleven (11) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Branson.

Associate:

Date: 23 July 2001

IN THE FEDERAL COURT OF AUSTRALIA
SOUTH AUSTRALIA DISTRICT REGISTRY S 128 OF 2000

ON APPEAL FROM A JUDGE OF THE FEDERAL COURT OF AUSTRALIA

BETWEEN: INDUSTRY RESEARCH AND DEVELOPMENT BOARD

APPELLANT

AND: BRIDGESTONE AUSTRALIA LIMITED

RESPONDENT

JUDGES: BRANSON, LINDGREN AND MANSFIELD JJ

DATE: 23 JULY 2001

PLACE: ADELAIDE

REASONS FOR JUDGMENT

LINDGREN J:

INTRODUCTION

12 This appeal concerns the construction and application of ss 39M and 39C of the *Industry Research and Development Act 1986* (Cth) ("the Act"). The respondent ("Bridgestone") claimed to be entitled to allowable deductions from its assessable income for the three substituted accounting periods commencing on 1 January 1989 and ending on 31 December 1991 (1989, 1990 and 1991 income tax returns) under s 73B of the *Income Tax Assessment Act 1936* (Cth) ("the ITAA"). Under provisions noted below, the appellant ("the Board") gave the Commissioner of Taxation ("the Commissioner") a certificate as a consequence of which the deductions were not allowable. Bridgestone successfully applied to the Administrative Appeals Tribunal ("AAT") for review of the Board's decision and the Board failed on its subsequent appeal to this Court. The Board now appeals from the primary Judge's dismissal of that appeal.

LEGISLATION

13 Subsection 73B(14) of the *ITAA* provided, relevantly, that where an "eligible company" incurs research and development expenditure during a year of income the amount of that expenditure multiplied by "the deduction acceleration factor" in relation to the company in relation to the year of income is allowable as a deduction from the company's assessable income for that year of income. There has been no issue as to Bridgestone's being an "eligible company". The expression "deduction acceleration factor" was defined in subs 73B(1) of the *ITAA* to mean, relevantly, 1.5. But subs 73B(33) provided, relevantly, that if the Board gives the Commissioner a certificate under s 39M of the Act in respect of particular activities in respect of which expenditure has been incurred by a company, a deduction is not allowable under s 73B for expenditure incurred by that company in respect of those activities.

14 Subsection 39M(1) of the Act provides, relevantly, as follows:

"(1) Where:

(a) expenditure has been incurred by a company registered under section 39J or 39P:

(i) on particular research and development activities; or

(ii) ...; and

(b) the Board is of the opinion that:

(i) any of the results of those research and development

activities **have been exploited otherwise than:**

(A) on normal commercial terms; or

(B) in a manner that is for the benefit of the Australian economy;

...

the Board may, ... , give a certificate in writing to the Commissioner:

(c) stating that it is of that opinion;

(d) specifying the research and development activities concerned;

and

(e) giving the reasons for its opinion." (my emphasis)

15 There has been no issue as to whether the results of the research and development activities of Bridgestone that are in question have been exploited otherwise than "in a manner for the benefit of the Australian economy" for the purpose of s 39M(1)(b)(i)(B). The dispute between the parties relates only to whether those results have been exploited on normal commercial terms for the purpose of s 39M(1)(b)(i)(A).

16 The expressions "on normal commercial terms" and "for the benefit of the Australian economy" are elaborated upon in s 39C and subs 39D(1) respectively of the Act. Section 39C is central to the present case. That section and subs 39D(1) are as follows:

*"39C The exploitation of a particular result of any activity shall be taken for the purposes of this Part to be an exploitation otherwise than on normal commercial terms if, in the opinion of the Board, any contract or transaction relating to that exploitation would not have been entered into, or contained terms that would not have been contained or would have been different, if the contract or transaction had been entered into by persons **dealing with each other** at arm's length and **from positions of comparable bargaining power**.*

39D (1) The exploitation of a particular result of an activity shall be taken for the purposes of this Part to be an exploitation otherwise than in a manner that is for the benefit of the Australian economy if, in the opinion of the Board, the profits or gains to residents of Australia accruing directly from the exploitation of a significant aspect of that result are not **commensurate** with the amount expended in the carrying on of that activity in Australia." (my emphasis)

I have set out subs 39D(1) because of a submission by Bridgestone, referred to later, that the word "commensurate" in subs 39D(1) means "equal" or "approximately equal" and that the word "comparable" in s 39C must signify

something different, otherwise the legislature would have used "commensurate" in s 39C also.

17 The parties have proceeded on the basis that the notion of exploitation otherwise than on normal terms is "defined" in s 39C and subs 39D(1), or, at least, that it would make no difference if s 39C did not describe the entire field of the circumstances in which, for the purpose of s 39M(1)(b)(i)(A), an exploitation of the results of research and development activities was not "on normal commercial terms". I am content to proceed similarly, that is, as if the words "and only if" occurred after the word "if" where that word first occurs in s 39C, without, however, deciding that that is the proper construction of s 39C.

FACTUAL BACKGROUND

18 In 1949 Bridgestone, then called "SA Rubber Holdings Ltd", was listed on the stock exchange of Adelaide. The business that is now conducted by Bridgestone was carried on by that company's subsidiary, which was called at one stage "SA Rubber Mills Ltd" and later "SA Rubber Mills Pty Ltd". The United States Rubber Company, which later changed its name to "Uniroyal Inc", acquired an interest in the holding company in 1963. That interest increased over the years, until, in 1980, it amounted to an approximately 60 per cent interest in the issued shares of the holding company. By that time, the operating subsidiary, SA Rubber Mills Pty Ltd, had changed its name to "Uniroyal Pty Ltd", while the holding company, SA Rubber Holdings Ltd, had changed its name to "Uniroyal Holdings Ltd". In 1980, Uniroyal Inc sold its 60 per cent interest in Uniroyal Holdings Ltd to Bridgestone Tyre Co Ltd, a Japanese tyre and rubber company ("Bridgestone Japan").

19 In about 1981, as a result of a corporate restructuring, Uniroyal Pty Ltd became a public company and changed its name to "**← Bridgestone Australia Ltd →**". It is the respondent, Bridgestone. At about the same time, Bridgestone Japan changed its name from "Bridgestone Tyre Co Ltd" to "Bridgestone Corporation". (At some stage the intermediate holding company, Uniroyal Holdings Ltd, changed its name to "Bridgestone Holdings Ltd".)

20 Of importance in the present case are the commercial circumstances in which Bridgestone found itself in 1981 and, in particular, a "Technical Assistance and Licence Agreement" ("TALA") entered into by Bridgestone and its ultimate holding company, Bridgestone Japan, on 21 August 1981. It is common ground that the TALA is a contract relating to the exploitation of the results of Bridgestone's research and development activities for the purposes of ss 39M and 39C of the Act.

21 I will discuss the TALA later. It suffices at present to say that it was a contract by which Bridgestone Japan undertook to provide to Bridgestone, know-how and other technical information in relation to the commercial production of certain

classes of automotive tyres and tubes (called in the TALA, and in these reasons, "Rubber Products"). Three matters are noteworthy at this stage. First, the TALA recited that Bridgestone Japan was willing to provide the technical assistance in question to Bridgestone as long as Bridgestone Japan held more than 50 percent of the issued shares in Bridgestone Holdings Ltd and also as long as that company held not less than 75 percent of the shares in Bridgestone. Article 10.4 of the TALA, in more elaborate form, gave Bridgestone Japan a right to terminate the TALA if either of those conditions ceased to be fulfilled. Secondly, by Article 7 Bridgestone undertook to furnish to Bridgestone Japan any technical information it had or might acquire during the term of the TALA with respect to the Rubber Products or their manufacture (except to the extent that the furnishing of the information might be contractually prohibited). It is this Article which is particularly relevant to the present case, since it provides for the exploitation of the results of Bridgestone's research and development. Thirdly, the term of the TALA was ten years from its effective date which was 27 April 1981.

22 On 22 July 1993, the Commissioner referred to the Board Bridgestone's claim to be entitled to a deduction for research and development expenditure under s 73B of the *ITAA* for the three substituted accounting periods mentioned earlier. On 13 March 1997, the Board's Tax Concession Committee decided to give a certificate under s 39M of the Act to the Commissioner in respect of some of the results of Bridgestone's activities (the particular results in question were identified by reference to specified "projects"). (The Board had delegated to the Tax Concession Committee the power to issue certificates under s 39M of the Act, but, for convenience, I will continue to refer simply to "the Board".)

23 On 2 April 1997 the Board gave the Commissioner its certificate under s 39M of the Act. On the same day the Board wrote to Bridgestone advising it of the issue of the certificate and Bridgestone received that notification on 7 April 1997.

24 On 28 April 1997, Bridgestone applied to the AAT under s 39T of the Act for review of the Board's decision. The AAT gave its decision favourable to Bridgestone on 2 July 1999 and his Honour dismissed the Board's appeal on 10 November 2000.

REASONS FOR DECISION OF THE AAT

25 The AAT reviewed the provisions of the TALA. It set out, *inter alia*, Article 7 which was as follows:

"7.1: During the term of this Agreement the Licensee [Bridgestone] shall furnish to the Licensor [Bridgestone Japan] any technical information which it has or may acquire during the term of this Agreement with respect to the Rubber Products or its [sic - their] manufacture, except to the extent that the same may be contractually prohibited. The Licensee hereby grants to the Licensor a non-exclusive,

irrevocable, worldwide royalty free license (except to the extent the same may be contractually prohibited) with the right to grant sub-licenses thereunder except, in Australia, New Zealand and Papua New Guinea to use and cause to be used any information supplied under this Article-7.

7.2: During the term of this Agreement the Licensor shall have the right to send, at its own expense, a reasonable number of representatives to the plant or plants of the Licensee engaged in the manufacture of the Rubber Products for a reasonable period and at mutually convenient times who shall have access to all premises, goods, and documents of the Licensee relevant to the manufacture of the Rubber Products.

7.3: The Licensee shall have the right to seek patent or other industrial property rights of its original inventions, with respect to the Rubber Products or its manufacture, as long as the Licensee shall not breach its obligation of secrecy under Article-8 hereinbelow.

7.4: The Licensee also grants to the Licensor a non-exclusive, worldwide royalty free license except to the extent that the same may be contractually prohibited with the right to grant sub-licenses except in Australia, New Zealand, and Papua New Guinea, under any patents or industrial property rights relating to the Rubber Products or its manufacture which the Licensee may own, acquire or apply for during the term of this Agreement."

26 The AAT summarised the evidence of three expert witnesses on the question whether the terms of the TALA were what one would expect of a contract for the provision of technological assistance entered into between parties dealing with each other at arm's length and from positions of comparable bargaining power. The first expert thought they were. He said he assumed that "comparable bargaining power" referred to levels of some bargaining power which, though not necessarily equal, were "capable of being compared". The second expert thought they were not. He, however, said he assumed that the expression "from positions of comparable bargaining power" referred to positions of equivalent bargaining power. The third expert also asserted, giving reasons, that particular clauses of the TALA would not have been included, or would have been different, if the parties had been dealing at arm's length and from positions of comparable bargaining power. He said he assumed that s 39C required "a static rather than a dynamic approach".

27 The AAT summarised lay evidence before it, including that of Ian Russell Whitrod who had been the Factory Manager of the Salisbury plant of Bridgestone when the TALA was negotiated and entered into in 1981. Mr Whitrod said that while Bridgestone under its former name had become the market leader for passenger car tyres in Australia, it had suffered badly in relation to truck tyres because overseas competitors had successfully developed an "all steel radial" truck

(TBR) tyre. He said that the truck tyres produced by Bridgestone's competitors, Dunlop and Goodyear, were far more successful in the market and that there was also substantial competition from imports, especially from Michelin. He stated, in addition, that in the tyre industry it was very important to change tyre design every couple of years, in particular, the tread and side pattern design. According to Mr Whitrod, the Uniroyal TBR designs produced in the late 1970s were old and out of date and were not well regarded in the market. He said they suffered from poor performance in the field and from a significant number of warranty claims in respect of such problems as rapid shoulder wear and belt separations.

28 The AAT set out par 6 of Mr Whitrod's statement as follows:

"6. Accordingly, [the applicant's predecessor] badly needed new TBR tyre technology. In or around 1978 or 1979, my colleagues and I at [the applicant's predecessor] therefore attempted to obtain technology on TBR tyres from both [the applicant's predecessor] in the USA and [the applicant's predecessor] Europe. However, our parent company, [the applicant's predecessor] did not have suitable technology available for the Australian production or market conditions. We did not try to obtain technology from other sources as TBR technology was only available from a small number of other tyre manufacturers who were our competitors in the Australian marketplace."

Mr Whitrod's statement continued to the effect that in consequence of the market problem mentioned, he and his colleagues were "quite grateful" for the sale to Bridgestone Japan, which, they knew, had "substantial truck tyre know-how". He said they understood that Bridgestone Japan's very successful TBR technology was equal to or better than that of the market leader, Michelin.

29 Mr Whitrod said he was involved in the negotiation of some of the terms of the TALA. The AAT set out par 12 of his statement as follows:

"12. I considered that the Technical Assistance and Licence Agreement was very fair and reasonable to [the applicant] because it gave us ongoing access to some of the best tyre technology available in the world. Further, the fee was the same as that paid to [the applicant's predecessor]. It was essential for [the applicant] to enter into the Technical Assistance and Licence Agreement as technical advances in tyre construction and tyre compounds were being made at a rapid rate by the big overseas tyre manufacturers and we, in Australia, with a very much smaller market place, could not afford to invest the huge amounts of money into R&D invested by those other companies. For example [the parent company] employed over 1,000 engineers and rubber chemists on R&D."

30 After noting other lay testimony which was before it and the parties' submissions, the AAT proceeded to its discussion and findings. It found that at the time the TALA was entered into:

- * it was essential for Bridgestone's "predecessor" to obtain the relevant technology;
- * it had no option but to get that technology from its ultimate parent, Bridgestone Japan; and
- * if it had not acquired the technology from Bridgestone Japan, it is more likely than not that it would have gone out of business.

31 The AAT considered the course of negotiation in relation to articles 3.2, 7.1, 7.4 and 18 of the TALA (referred to below) and concluded that this showed that:

"a clear bargaining process was occurring between the applicant and the parent company in relation to the TALA"

and the AAT so found.

32 In relation to the question whether the parties were negotiating "at arm's length", the AAT concluded, declaring itself to be in agreement with the reasoning in *Barnsdall v Federal Commissioner of Taxation* (1988) 19 ATR 1352, that the expression went "not so much to the relationship between the parties, but...the question of fact as to whether the evidence of the bargaining process supports a conclusion that the parties **were treating each other as if at arm's length**" (my emphasis). The AAT reached that conclusion, taking into account again the fact that changes occurred between the draft and final versions of the TALA and the fact that they "resulted from a clear bargaining process". The AAT was satisfied, and found, that the negotiations were conducted at arm's length.

33 The AAT next dealt with the expression "comparable bargaining power" and concluded that it meant "able to be compared" or "capable of comparison" on the basis that this was the "ordinary English meaning of the phrase". It is clear from its reasons that by "able to be compared" and "capable of comparison" the AAT meant "able to be compared and contrasted by reason of being of the same genus or possessing similar aspects", in contradiction to "similar", "alike" or "roughly equivalent". The AAT found support for its construction in the use of "commensurate" in s 39D as distinct from the use of "comparable" in s 39C. For the AAT, the expression "comparable bargaining power" referred to "some", not necessarily "equivalent" bargaining power, which would necessarily result in, and therefore be evidenced by, a power to effect changes to the terms of an agreement which was being negotiated.

34 The AAT found that Bridgestone negotiated changes to articles 3.2, 7.1, 7.4 and 18 of the TALA, of which it said the first three represented changes of real and tangible, as distinct from merely "marginal", benefit to Bridgestone (the AAT thought the change to article 18 of only a marginal kind).

35 The AAT's treatment of the first three changes is instructive in demonstrating the outworking of its "some bargaining power" test.

36 First, in Bridgestone Japan's draft, Article 3.2 provided that to the extent it deemed necessary, Bridgestone must at its own expense, procure licences from, and pay royalties and other charges to, the owners of "patented and unpatented information" incorporated and used in Bridgestone's production and testing equipment or relating to the Rubber Products produced by it, whether the information was furnished under the TALA or not. Bridgestone's lawyers submitted that Bridgestone Japan should bear or contribute to the expense of obtaining licences from third persons. The parent company altered Article 3.2 to provide that Bridgestone would not enter into any agreement relating to the Rubber Products with a third party similar to the TALA without the prior approval of Bridgestone Japan. The new provision was more favourable to Bridgestone than the original draft, but, in substance, it deferred resolution of the question until a problem arose, at which time Bridgestone would be subject to its parent's will in the matter.

37 The second change was to Article 7.1. In the draft, Article 7.1 provided that Bridgestone undertook to furnish to Bridgestone Japan any technical information it had or might acquire in relation to the Rubber Products or their manufacture, and granted to Bridgestone Japan a non-exclusive, irrevocable, royalty free licence (unless such a grant was contractually prohibited) to use such information and cause it to be used. Bridgestone's solicitors suggested that the licence granted by Bridgestone to Bridgestone Japan should not be assignable and should not be in respect of Australia, New Zealand and Papua New Guinea. Bridgestone Japan's response was not to agree to the former amendment but to agree to the latter. Indeed, it inserted in Article 7.1 "with the right to grant sub-licences" just to make the position clear in its own interests, as well as expressly excepting Australia, New Zealand and Papua New Guinea as requested by Bridgestone. (This latter amendment was in fact ambiguous: it could mean that Bridgestone Japan's licence to use the technical information excluded Australia, New Zealand and Papua New Guinea or only that its right to grant sub-licences excluded those countries.)

38 Thirdly, Article 7.4 of the draft provided that Bridgestone granted to Bridgestone Japan a non-exclusive, irrevocable royalty free licence under any patents or industrial property rights relating to the Rubber Products or their manufacture which Bridgestone might own or acquire during the term of the TALA, for the life of those patents or rights and any extensions or renewals of them. Bridgestone's solicitors questioned whether such an undertaking or the performance of it would breach contracts with the owners of the patents or other industrial property rights. Bridgestone Japan amended Article 7.4 by inserting the words "except to the extent that the same may be contractually prohibited".

39 The AAT asked itself whether the respective positions of the parties upon the commencement of negotiations, and, in particular, Bridgestone's need for the technology and its dependence for its survival in business on obtaining that technology from its Japanese parent:

"preclud[ed] the possibility that [Bridgestone] would be able to assert its bargaining power,..."

The AAT answered this question "no", based again on its finding that Bridgestone had in fact negotiated changes of real and tangible benefit to itself.

40 Finally, the AAT said that s 39C posed two tests and that if the first was satisfied the second need not be applied. The first was whether the parties had dealt with each other at arm's length and from positions of comparable bargaining power. The second was whether the contract or transaction would not have been entered into, or contained terms it would not have contained or that would have been different, if the contract or transaction had been entered into by parties dealing with each other in that way. Although the AAT found the first test satisfied, it did compare certain terms of the TALA with those of other technology assistance agreements which were in evidence and concluded that the terms of the TALA, when considered separately and in their entirety, were not so dissimilar to the terms and the entirety of those other agreements, that they pointed to an agreement which would not have been entered into by unrelated parties.

41 In the result, the AAT set aside the decision under review and determined, relevantly, that for the purposes of s 39M(1)(b)(i)(A) of the Act, the results of Bridgestone's research and development activities under review had been exploited on normal commercial terms.

REASONS FOR JUDGMENT OF THE PRIMARY JUDGE

42 The primary Judge reviewed the terms of the TALA and the relevant legislative provisions. He rejected a submission by the Board that the AAT had erred by failing to address the terms and conditions of the TALA because of its findings that the TALA had been entered into by persons who were dealing with each other at arm's length and from positions of comparable bargaining power. His Honour described the Board's submission in this respect as one that the AAT should not have looked at the antecedent dealings or negotiations and should have considered only the terms of the TALA.

43 His Honour also noted the Board's submission that the effect of the AAT's decision was that any change in the terms of a proposed contract or transaction that was implemented at the request of one party, would indicate that the parties were in "positions of comparable bargaining power". His Honour agreed that such a proposition would be incorrect but did not think it fairly reflected the reasoning of

the AAT. He said that the view to be taken of the negotiation of any particular change was a question of fact for the AAT to investigate and that the only general statement that could be made was that the greater the effect of changes obtained, the more those changes pointed to "positions of comparable bargaining power".

44 The primary Judge next noted a submission of the Board that was critical of the AAT's reliance on the contents of the other agreements received into evidence before it. His Honour viewed the criticism as a "derivative of the Board's principal argument that s 39C strikes down those contracts and transactions where a supplicant Australian company must have the technology that is in the hands of the licensor". He did not accept the argument because he thought it wrongly assumed that the need of the supplicant could be determinative of, rather than merely a factor relevant to, the question whether the parties were dealing with each other from positions of comparable bargaining power.

45 The primary Judge considered that the AAT was correct to examine the evidentiary material relating to the course of negotiation and to the comparison between the TALA and other agreements between unrelated parties. In substance, he considered that the AAT had formed an opinion on relevant factual evidence that was reasonably open to it.

46 His Honour thought the word "comparable" in s 39C meant "able to be compared" in the sense I identified earlier, rather than "approximately equivalent". He agreed with the AAT that a distinction was to be drawn between the word "commensurate" in s 39D, which did have the latter meaning, and the word "comparable" in s 39C, which did not.

47 The learned primary Judge concluded that the AAT had engaged in its fact finding exercise in an appropriate manner and that the appeal should be dismissed with costs.

REASONING ON THE APPEAL

48 The Board's notice of appeal contained four grounds but two of them are closely related. In its submissions the Board identified three issues in the case. Bridgestone responded to those three issues. It is convenient to address the grounds of appeal by reference to those three issues.

Issue 1

"Whether the construction of the phrase "dealing with each other...from positions of comparable bargaining power" in s 39C of the Act gives rise to a question of law.

49 The Board submits that it does. Bridgestone submits that it is not in issue between the parties that they dealt with each other "from positions of ... bargaining power" and that their dispute relates only to the word "comparable". Bridgestone submits that this word is an ordinary English word rather than a term of art and that its construction posed a question of fact, not a question of law, with the result that no appeal lay to the Court from the AAT's decision, because subs 44(1) of the *Administrative Appeals Tribunal Act 1975* (Cth) provides for appeals only "on a question of law".

50 In my opinion, the proper construction of the provision concerned raised a question of law.

51 Any attempt to divide up the section so as to reach a conclusion that the parties' dispute is as to the meaning of only one word, is artificial. The minimum expression which can be severed out as giving rise to the present dispute is "dealing with each other...from positions of comparable bargaining power". While this expression is composed of ordinary English words, none of which is used as a technical term or as a term of art, the expression is ambiguous. In particular, the words "comparable bargaining power" might or might not refer to bargaining power which is "roughly equivalent", "alike" or "similar".

52 Dictionary definitions can be found to support both this meaning and that favoured by the AAT. A choice must be made in the light of the purpose or object underlying the legislation. Section 15AA of the *Acts Interpretation Act 1901* (Cth) provides as follows:

"In the interpretation of a provision of an Act, a construction that would promote the purpose or object underlying the Act (whether that purpose or object is expressly stated in the Act or not) shall be preferred to a construction that would not promote that purpose or object."

53 The learned primary Judge referred to the following five general propositions which a Full Court of this Court identified in *Collector of Customs v Pozzolanic Enterprises Pty Ltd* (1993) 43 FCR 280 ("*Pozzolanic*") at 287 (like his Honour, I omit references to authorities):

"1. The question whether a word or phrase in a statute is to be given its ordinary meaning or some technical or other meaning is a question of law.

2. The ordinary meaning of a word or its non-legal technical meaning is a question of fact.

3. The meaning of a technical legal term is a question of law.

4. *The effect or construction of a term whose meaning or interpretation is established is a question of law.*

5. The question whether facts fully found fall within the provision of a statutory enactment properly construed is generally a question of law."

The Full Court added a qualification to the fifth proposition to the effect that when a statute uses words according to their ordinary meaning and the question is whether the facts as found fall within those words, if it is reasonably open to hold that they do, the question whether they do or not is one of fact (the Court referred to *Hope v Bathurst City Council* [1980] HCA 16; (1980) 144 CLR 1 at 8 per Mason J). But later (at 288-289) their Honours stated:

"Although the words of the statute are construed according to their ordinary English meaning, that does not mean that their application to a set of facts is simply described as the matching of that set of facts with a factual description. There is necessarily a selection process involved. The range of relationships to which the words apply for the purpose of the Act depends upon a judgment about that purpose. The selection process involved is analogous to that used in determining what causal relationships between conduct and loss attract liability for the purpose of s 82 of the Trade Practices Act(1974) (Cth): see Elna Australia Pty Ltd v International Computers (Aust) Pty Ltd (No 2) [1987] FCA 230; (1987) 16 FCR 410 at 418-419; Munchies Management Pty Ltd v. Belperio [1988] FCA 413; (1988) 84 ALR 700 at 712-713. In the end this is not a process of fact finding. The facts are found. What is left is a value judgment about the range of the Act and that is a question of law."

And see, to a similar effect, *Hayes v Federal Commissioner of Taxation* [1956] HCA 21; (1956) 96 CLR 47 at 50-52 per Fullagar J.

54 In the present case, the facts have been found and what is left is a choice as to which of two suggested meanings of the words of the statute is to be applied to those facts. That choice is not a matter of discretion; the statute truly bears only one of the two suggested meanings; the choice made will be correct or incorrect in law. According to the choice made, an expenditure may or may not be an allowable deduction. These considerations show that a question of law is involved.

55 In *Collector of Customs v AGFA-Gevaert Ltd* [1996] HCA 36; (1996) 186 CLR 389 ("*AGFA-Gevaert*"), the High Court considered the distinction between questions of fact and questions of law. In their joint judgment, Brennan CJ, Dawson, Toohey, Gaudron and McHugh JJ expressed the view that general expositions of the law of the kind stated by the Full Court in *Pozzolanic* are helpful in many circumstances but lose a degree of their utility when, as in *AGFA-Gevaert* itself, the phrase or term in issue is complex or the inquiry that the primary decision-maker embarked upon is not clear. The expression at the heart of

that case was "silver dye bleach reversal process". Their Honours remarked that the expression was "not easily pigeon-holed in terms of the general rules summarised in *Pozzolanic*".

56 Bridgestone submits that the expression "silver dye bleach reversal process" is, because complex and technical, of a different kind from that in question in the present case. The individual words constituting the expression "silver dye bleach reversal process" are ordinary English words, but I agree that in order to understand what the legislature meant by them, one would need to have some background understanding of special technical processes with which an ordinary person would not be familiar.

57 In *AGFA-Gevaert*, their Honours thought that the distinction between the second and fourth of the five propositions formulated in *Pozzolanic* created difficulties in the case before them and, more generally, that the supposed distinction between meaning (a question of fact) and construction (a question of law) is "artificial, if not illusory" (at 396). Their Honours said (at 396-397):

"The meaning attributed to individual words in a phrase ultimately dictates the effect or construction that one gives to the phrase when taken as a whole and the approach that one adopts in determining the meaning of the individual words of that phrase is bound up in syntactical construction of the phrase in question. In R v Brown [[1996] 1 AC 543 at 561], a recent House of Lords decision, Lord Hoffmann said:

'The fallacy in the Crown's argument is, I think, one common among lawyers, namely to treat the words of an English sentence as building blocks whose meaning cannot be affected by the rest of the sentence... This is not the way language works. The unit of communication by means of language is the sentence and not the parts of which it is composed. The significance of individual words is affected by other words and the syntax of the whole.'

If the notions of meaning and construction are interdependent, as we think they are, then it is difficult to see how meaning is a question of fact while construction is a question of law without insisting on some qualification concerning construction that is currently absent from the law."

58 In my opinion, Bridgestone's submission is infected by the fallacy identified by Lord Hoffmann in the passage set out by their Honours.

59 Further indications that a question of law is involved in the present case are to be found in submissions made by Bridgestone itself in support of the meaning urged by it. Bridgestone distinguishes between the use of "comparable" in s 39C and the use of "commensurate" in s 39D, suggesting that "commensurate" means "equivalent" and that the legislature must have meant something different when it

chose to use "comparable" in s 39C. Further, it refers to *Barnsdall v Federal Commissioner of Taxation* (1988) 19 ATR 1352 ("*Barnsdall*") per Davies J at 1356, *The Trustee for the Estate of A W Furse No 5 Will Trust v Federal Commissioner of Taxation* 91 ATC 4007 per Hill J at 4014-4015 ("*Furse*") and *Granby Pty Ltd v Federal Commissioner of Taxation* 95 ATC 4240 per Lee J at 4243-4244 ("*Granby*"), in support of the proposition that the expression "dealing with each other at arm's length and from positions of comparable bargaining power" invokes a dynamic notion rather than a static one. That is to say, it requires due recognition to be given to the dynamic notion of "dealing with each other" as distinct from the static one of the mere existence of the relationship between Bridgestone and Bridgestone Japan and the degrees of bargaining power they respectively possessed. In these ways Bridgestone accepts, correctly in my view, that the meaning of the expression may be properly illuminated by resort to "legal" argument.

60 Bridgestone relies on *Canwest Global Communications Corporation v Australian Broadcasting Authority* (1998) 82 FCR 46 ("*Canwest*") at 85. In that case, the relevant question was as to the meaning of "secure" in the expression "...in a position to...appoint or secure the appointment of...at least half of the board of directors of...". Beaumont J, with whom Black CJ and Lockhart J agreed, distinguished *AGFA-Geveart* as a case which concerned a composite phrase. His Honour said that the verb "secure" had "obtain" as one of its primary dictionary meanings and added that when the Australian Broadcasting Authority understood the verb in that sense and applied it to the facts as it found them, it could not be said that its conclusion was not open as a matter of fact and no question of law arose.

61 *Canwest* is quite different from the present case. Indeed, it does not seem to have been in issue that in the statutory provision in question, "secure" meant "obtain". It was not suggested that the word was ambiguous and Beaumont J's statement about the word was not made in resolution of a matter of controversy. If the Australian Broadcasting Authority had understood "secure" to mean something other than "obtain", it would have erred in law.

62 Like the expression "membership of a particular social group" in Article 1A(2) of the *Convention Relating to the Status of Refugees* (cf *Minister for Immigration & Ethnic Affairs v Respondent A* [1995] FCA 1305;(1995) 57 FCR 309 (FC) at 315-316), the meaning of the expression "dealing with each other...from positions of comparable bargaining power" gives rise to a question of law.

Issue 2

"Whether the phrase "dealing with each other...from positions of comparable bargaining power" in its statutory context requires that the bargaining power of

the two parties be similar and is not satisfied merely by the weaker party achieving real changes to its benefit in the course of the negotiation."

63 Bridgestone submits that the word "comparable" in s 39C means simply "able to be compared" in the narrow sense mentioned earlier, not "equivalent". The AAT thought the section referred to bargaining power that was able to be compared, and required only that each party have **some** bargaining power. The primary Judge agreed that "comparable" did not mean "equivalent", but, as noted above, did not think that the interpretation of the expression "positions of comparable bargaining power" gave rise to a question of law.

64 The purpose or object of ss 39M and 39C is to ensure that a taxpayer is entitled to a deduction for no more than what the legislature regards as an appropriate amount of expenditure on research and development activities. It is important to appreciate that the amount of expenditure on a research and development activity may be an allowable deduction under subs 51(1) of the *ITAA* and that the question arising under the provisions of present concern is whether a taxpayer should be entitled to a special concessional deduction for 150 per cent of that amount. Therefore, it should not be a matter of surprise if the legislature should be found to have laid down stringent conditions directed to ensuring that there is a benefit to Australia from the expenditure.

65 The provision for the 150 per cent concessional deduction for expenditure on a research and development activity was introduced by the *Income Tax Assessment Amendment (Research and Development) Act 1986* (No 90 of 1986) which came into force on 25 June 1986. That Act inserted s 73B in the *ITAA*. By subs 73B(33), the concessional deduction under s 73B was denied if the Board (established by the *Industry Research and Development Act 1986* (No 89 of 1986)) gave a certificate to the Commissioner that in its opinion any of the results of the research and development activities funded by the expenditure had been exploited otherwise than on normal commercial terms or in a manner that was not for the benefit of the Australian economy.

66 Shortly afterwards, the *Research and Development Legislation Amendment Act 1988* (No 59 of 1988), introduced the present régime, part of which was expressed in s 73B of the *ITAA* and part in the Act. In particular, subs 39M(1) of the Act empowered the Board to give the Commissioner the certificate described in the subsection and s 39C elaborated on the meaning of the expression "otherwise than...on normal commercial terms" used in that subsection, while s 73B of the *ITAA* provided for effects of various certificates, including a certificate under subs 39M(1), given by the Board to the Commissioner. The Explanatory Memorandum which accompanied the Bill for the amending Act stated (at par 2) that the Bill would increase the efficiency of administration of the concession by transferring to the Act those powers and functions of the Board which were provided for in the *ITAA*, and stated (at par 5):

"The Bill also tightens up existing provisions which are designed to enable the Board to cause the loss of tax benefits where a company fails, in any significant way, to exploit the results of revenue subsidised R&D on normal commercial terms and to the benefit of the Australian economy."

67 The purpose or object of ss 39M and 39C are made clear in the same Explanatory Memorandum. In relation to the then proposed s 39M, the Explanatory Memorandum stated:

*"Proposed section 39M, which transfers and strengthens the provision currently in section 73B of the Income Tax Assessment Act, enables the Board to give a certificate that the results of research and development activities have not been exploited on normal commercial terms or for the benefit of the Australian economy or that the activities do not have an adequate Australian content. The phrases 'exploited on normal commercial terms' and 'benefit of the Australian economy' are defined in proposed sections 39C and 39D. Before a certificate is given the Board is required to afford the company concerned an opportunity (90 days) of showing that the results have been **appropriately exploited** or that the Australian content of the activities is adequate. The taxation consequence of a certificate under section 39M, which is set out in clause 5 of this Bill (proposed subsection 73B(33)), is that a deduction will not be allowed in respect of expenditure incurred on that activity."* (my emphasis)

In relation to the then proposed s 39C, the Explanatory Memorandum stated:

"Proposed section 39C defines the expression 'exploitation otherwise than on normal commercial terms'. The expression applies to the situation where the terms of a contract or transaction are different from those that would have been included if the parties had been dealing at arm's length and from provisions [sic - positions] of comparable bargaining power. This provision will prevent the loss of the return that should result from successful research and development. The taxation consequence of exploitation of an activity otherwise than on normal commercial terms is set out in proposed section 39N of the IR&D Act and clause 5 of this Bill (proposed subsection 73B(33) of the ITAA)."

The notion of "appropriate exploitation" illuminates, as much as anything in the Explanatory Memorandum does, the object and purpose of s 39C.

68 Section 39M(1)(b)(i)(A) speaks of the results of the research and development activities having been exploited on "normal commercial terms". Section 39C describes, in substance, "abnormal commercial terms". Terms are abnormal if, in the opinion of the Board, a contract or transaction relating to the exploitation would not have been entered into, or contained terms which it would not have contained or which would have been different, if "the contract or transaction" had been entered into by persons dealing with each other at arm's length and from

positions of comparable bargaining power. Accordingly, the Board had to ask itself whether the TALA would not have been entered into, or whether it contained terms which it would not have contained or which would have been different, if "the contract or transaction" had been entered into by persons dealing with each other at arm's length and from positions of comparable bargaining power. Accordingly, the Board was required to ask how hypothetical persons would have conducted themselves towards each other and to compare their conduct with that of Bridgestone and Bridgestone Japan.

69 It is difficult to conceive of a contract or transaction entered into by parties, one of whom has no bargaining power at all. After all, the party in the stronger bargaining position will wish the other to enter into the contract or transaction. Accordingly, the weaker party's capacity to refuse to do so, even at the peril of its own commercial survival, indicates that it has **some** bargaining power. To attribute to the word "comparable" a narrow meaning of "able to be compared and contrasted by reason of being of the same genus or possessing similar aspects" is not apt to further the purpose or object of the provision.

70 The AAT excluded what it described as "inconsequential bargaining power", apparently in order to avoid the extreme results of the meaning it was embracing, but it is not obvious on what basis the exclusion can properly be supported. The AAT supported it by reference to the fact that the statute predicated the possession by each party of some "power" of bargaining, but any party able to decline to enter into a contract or transaction possesses some such power of bargaining, as mentioned above. Consistently with the underlying purpose or object of the provisions, the statutory hypothesis invoked in s 39C seems to require more than this.

71 In my opinion, there is no necessary distinction between "able to be compared" and "similar" as dictionary meanings of "comparable". The reason is that the former immediately raises the question of the meaning of the transitive verb "compare" and its first meaning given in the *Oxford English Dictionary* is:

"I trans. To speak of or represent as similar; to liken. Const. to. (With negative, in such phrases as not to be compared to, usually implying great inferiority in some respect."

Similarly, *The Macquarie Dictionary* gives as its first meaning:

"I to represent as similar or analogous; liken (fol. by to)."

Accordingly, "able to be compared" is well able to bear the dictionary meaning "seen to be similar or alike", or, more directly and simply, "similar" or "alike".

72 I acknowledge immediately that both dictionaries also give as their second meanings, the neutral noting of similarities and differences between things, but what is presently important is that "able to be compared" is at least equally capable of invoking the first, as it is the second, dictionary meaning of "compare". And in my opinion, it does mean "seen to be similar or alike" or, more directly and simply, "similar" or "alike" in s 39C. Comparable with "comparable" in this respect is "preferable", which is often used to mean, not "able to be preferred" in a narrow sense, but "seen to be preferred" or, more directly and simply, "preferred".

73 The meaning of "comparable" in s 39C which I have identified as the correct one is consistent with the meaning which has been expressly or implicitly attributed to the word in other contexts in other cases: cf *De Iacovo v Lacanale* (No 2) [1958] VicRp 3; [1958] VR 7 at 9-11 ("comparable premises"); *Hume Investments Pty Ltd v Zucker* [1958] VicRp 97; [1958] VR 623 at 626 ("comparable premises"); *Johnston v Commissioner for Railways* [1973] HCA 46; (1973) 128 CLR 632 per Stephen J at 640 ("the same or some comparable employment"); *Australian Wheat Board v Pantaleo* [1984] 3 NSWLR 530 ("the same or some comparable employment"); and, perhaps less relevantly, *Attorney General of Canada v Public Service Alliance of Canada* (1999) 180 DLR (4th) 95 at [104] ("work of equal or comparable value" and "comparable worth").

74 I do not find the argument based on the use of the different word "commensurate" in s 39D persuasive. In my opinion, the expression "commensurate with" in that section means, not "equal to", but "proportionate to". It is unlikely that the legislature would have intended to insist that the "profits or gains" of which s 39D speaks be equal to the amount of money expended in the carrying on of a particular research and development activity.

75 In my opinion, what is required if a taxpayer is to have the benefit of the concessionally enlarged deduction for expenditure upon particular research and development activities is that any actual contract or transaction that was entered into relating to the exploitation of the results of those activities must have been of the kind to be expected of hypothetical persons dealing with each other at arm's length and from positions of "similar" or "like" or "roughly equivalent" bargaining power.

76 This is not the approach which the AAT took in the present case. In my respectful opinion, it erred in attributing to the word "comparable" the narrow meaning "able to be compared and contrasted by reason of being of the same genus or possessing similar aspects". For this reason the matter should be remitted to the AAT for determination in accordance with law.

Issue 3

"Whether the Tribunal erred in giving primacy to, and treating as determinative, the comparability of bargaining power rather than the terms of the contract, where the statutory purpose was to determine whether the exploitation under the contract was `otherwise than on normal commercial terms'."

77 My conclusions in relation to Issues 1 and 2 make it unnecessary for me to address this issue, but those conclusions go a long way towards resolving it.

78 I agree with Branson J that s 39C is ill expressed. Grammatically, the expression "the contract or transaction" refers back to the actual "contract or transaction relating to the exploitation" mentioned earlier in the section. The section's description of the opinion of the Board invokes some elements of the actual case as its starting point, but which elements? The terms of the section do not identify many. Prima facie the hypothesis invoked is only one of a hypothetical person who has the actual result of the actual research and development activity in question available for exploitation, and who, apparently, is a not unwilling but not anxious exploiter: cf *Spencer v The Commonwealth of Australia* [1907] HCA 82; (1907) 5 CLR 418. The nature of the actual result of the actual research and development activity in question and of the available market for it may tend, in the outworking of the hypothesis, to draw in further elements of the real world, and may therefore falsely appear to draw in the circumstances surrounding the actual contract or transaction. But the AAT's approach was based upon those circumstances.

79 Unfortunately, the AAT's point of departure was not the hypothesis described in the section, but the actual negotiation of the TALA. It was wrongly applying the test whether Bridgestone had successfully negotiated with Bridgestone Japan for **some** changes of real and tangible benefit to it, and therefore exercised **some** bargaining power. But it cannot be assumed as part of the statutory hypothesis that the supposed person with the actual results of the actual research and development activities available for exploitation is an Australian subsidiary dependent upon, and negotiating with, its overseas parent, as Bridgestone in fact did. To make that assumption is to inject, without statutory authority, elements of the taxpayer's actual situation into the statutory hypothesis.

80 Senior counsel for Bridgestone distinguished between "being" or "not being" in positions of comparable bargaining power on the one hand, and "dealing" or "not dealing" from positions of comparable bargaining power on the other hand. He stressed that it is the latter concept which s 39C invokes and submitted that it is possible for two parties who are not **in** positions of comparable bargaining power, nonetheless to **deal with each other** from such positions. He relied on the course of negotiation which preceded the TALA and on the comparison which the AAT made between the TALA and other contracts for the provision of technology, as supporting its conclusion that Bridgestone dealt with Bridgestone Japan from a

position of some bargaining power which produced not inconsequential changes beneficial to Bridgestone.

81 Senior counsel's submission was consistent with the AAT's erroneous application of the "arm's length" and "comparable bargaining power" tests to Bridgestone and Bridgestone Japan. As I have already attempted to make plain, it is hypothetical persons, not actual ones, dealing with each other at arm's length and from positions of comparable bargaining power, to whom the section refers. Nonetheless, I make the following observations in relation to senior counsel's submission.

82 Senior counsel for Bridgestone conceded that Bridgestone and Bridgestone Japan **were not at** arm's length and **were not in** positions of comparable bargaining power. He submitted, however, that it was possible for them to have **dealt with each other** at arm's length and from positions of comparable bargaining power. He relied on *Barnsdall*, *Furse* and *Granby*, referred to earlier. In those cases, the expression "dealing with each other at arm's length" in various provisions of the *ITAA* were in question. In the earliest, *Barnsdall*, Davies J was concerned with the expression "not dealing with each other at arm's length" in subs 26AAA(4) of the *ITAA*. His Honour emphasised that the expression should not be read as if the words "dealing with" were not present. He said that a finding of a connection between parties was simply a step in the course of reasoning and would not be determinative of whether they had **dealt with each other** at arm's length. Similarly, in *Furse*, Hill J said that the expression "dealing with each other at arm's length" in subs 102AG(3) of the *ITAA* required, not that the two parties **be** at arm's length, but that they have **dealt with each other** at arm's length. His Honour stated (at 4015):

"The fact that the parties are themselves not at arm's length does not mean that they may not, in respect of a particular dealing, deal with each other at arm's length."

Finally, in *Granby*, Lee J accepted the correctness of the converse proposition, that is, that parties who were at arm's length might, nonetheless, not have dealt with each other at arm's length. His Honour stated (at 4244):

"If the parties to the transaction are at arm's length it will follow, usually, that the parties will have dealt with each other at arm's length. That is, the separate minds and wills of the parties will be applied to the bargaining process whatever the outcome of the bargain may be.

That is not to say, however, that parties at arm's length will be dealing with each other at arm's length in a transaction in which they collude to achieve a particular result, or in which one of the parties submits the exercise of its will to the dictation of the other, perhaps, to promote the interests of the other."

83 In my opinion, the treatment of the expression "dealing with each other at arm's length" in the three cases mentioned does not require that the expression "dealing with each other...from positions of comparable bargaining power" in s 39C be approached in the same way, because the latter expression refers to respective "positions" of bargaining power at the beginning of, and during, negotiations, **from** which the hypothetical persons must be supposed to deal with each other. That is, the expression refers to hypothetical static "positions of...bargaining power".

84 The AAT's approach was permeated by its application of the erroneous test whether Bridgestone had in fact exercised **some** bargaining power vis-à-vis Bridgestone Japan. It erred by failing to identify the nature of, and explore the implications of, the hypothetical construct described in s 39C and to match the result with the TALA.

CONCLUSION

85 For the above reasons I would allow the appeal, set aside the orders of the primary Judge and in lieu of those orders, set aside the decision of the AAT and remit the matter to it for hearing and determination according to law. As well, I would order Bridgestone to pay the Board's costs of the appeal and of the hearing at first instance.

I certify that the preceding seventy-four (74) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Lindgren.

Associate: [Click here for Picture](#)

Dated: 23 July 2001

IN THE FEDERAL COURT OF AUSTRALIA
SOUTH AUSTRALIA DISTRICT REGISTRY S 128 OF 2000
BETWEEN: INDUSTRY RESEARCH AND DEVELOPMENT BOARD

APPLICANT

AND: BRIDGESTONE AUSTRALIA LIMITED

RESPONDENT

JUDGE: BRANSON, LINDGREN AND MANSIFELD JJ

DATE: 23 JULY 2001

PLACE: ADELAIDE

REASONS FOR JUDGMENT

86 I have had the benefit of reading the reasons for judgment of Branson J and Lindgren J. I agree with their reasons and with the orders which they propose.

I certify that the one (1) preceding numbered paragraph is a true copy of the Reasons for Judgment herein of the Honourable Justice Mansfield.

Associate:

Dated: 23 July 2001

Counsel for the Appellant: Mr J Basten QC and Mr N J Williams

Solicitors for the Appellant: Australian Government Solicitor

Counsel for the Respondent: Mr R F Edmonds SC and Ms E A Collins

Solicitors for the Respondent: Piper Alderman Solicitors

Date of Hearing: 30 May 2001

Date of Judgment: 23 July 2001