



[\[Home\]](#) [\[Databases\]](#) [\[WorldLII\]](#) [\[Search\]](#) [\[Feedback\]](#)

Administrative Appeals Tribunal of Australia

You are here: [AustLII](#) >> [Databases](#) >> [Administrative Appeals Tribunal of Australia](#) >> [2014](#) >> [\[2014\] AATA 515](#)

[\[Database Search\]](#) [\[Name Search\]](#) [\[Recent Decisions\]](#) [\[Noteup\]](#) [\[Download\]](#) [\[Help\]](#)

GHP 104 160 689 Pty Ltd and Commissioner of Taxation [2014] AATA 515 (29 July 2014)

Last Updated: 1 September 2014

[\[2014\] AATA 515](#)

| | |
|----------------|--|
| Division | GENERAL ADMINISTRATIVE DIVISION |
| File Number(s) | 2011/4618, 4619, 4674 |
| Re | GHP 104 160 689 Pty Ltd APPLICANT |
| And | Commissioner of Taxation RESPONDENT |

DECISION

| | |
|----------|-------------------------|
| Tribunal | President D Kerr |
| Date | 29 July 2014 |
| Place | Sydney |

1. The decision under review is varied in accordance with these reasons.
2. The parties are to file a joint minute of the agreed quantum of the tax shortfalls arising in each tax year (if any). In the event that the parties are unable to agree on quantum, leave is granted to relist the proceedings.
3. The hearing of the applicant's request for remission of the shortfall interest charge is adjourned until the amount of the shortfall has been determined by agreement or order of the Tribunal.
4. The name of the applicant is amended to GHP 104 160 689 Pty Ltd.
5. The parties have 28 days from the date of this decision to review the Tribunal's reasons to identify any commercially sensitive information the publication of which they might seek to prevent; after 28 days these reasons (with any necessary redactions) will be published.

.....[SGD].....
President D Kerr

Catchwords

TAXATION AND REVENUE – income taxation – deductions for research and development expenditure – applicant conducted plant trials in copper and lead concentrator and copper smelter – whether expenditure deductible at a premium rate – whether expenditure “research and development expenditure” – whether expenditure “feedstock expenditure”

STATUTES – interpretation – centrality of statutory text – defined words – statutory purpose to be found in statutory text rather than in any a priori assumptions based on policy

PRACTICE AND PROCEDURE – extrinsic materials – whether Tribunal may have regard to materials capable of assisting in the ascertainment of the meaning of a statutory provision that would be inadmissible in a court – Tribunal not bound by rules of evidence – importance of consistent statutory interpretation by courts and tribunals – regard had to rules of evidence in determining the admissibility of extrinsic aids to statutory interpretation

Legislation

[Acts Interpretation Act 1901](#) (Cth) [s 15AB](#)

[Evidence Act 1995](#) (Cth) [ss 69, 182](#)

[Income Tax Assessment Act 1936](#) [ss 73B, 73B\(1AAA\), 73B\(1\), 73B\(1A\), 73B\(2B\), 73B\(2BA\), 73B\(2C\), 73B\(14\), 73B\(14B\), 73B\(34\)](#)

[Industry Research and Development Act 1986](#) [ss 39KA, 39L](#)

[Taxation Administration Act 1953](#) [ss 14ZZ, 14ZZE](#); Schedule 1 [ss 280-100, 280-160](#)

Cases

Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue (Northern Territory) [\(2009\) 239 CLR 27](#); [\[2009\] HCA 41](#)

Australian Education Union v Department of Education and Children's Services [\(2012\) 248 CLR 1](#); [\[2012\] HCA 3](#)

Certain Lloyd's Underwriters v Cross [\(2012\) 248 CLR 378](#); [\[2012\] HCA 56](#)

Commissioner of Taxation v Consolidated Media Holdings Ltd [\(2012\) 87 ALJR 98](#); [\[2012\] HCA 55](#)

Commissioner of Taxation v Unit Trend Services Pty Ltd [\(2013\) 87 ALJR 588](#); [\[2013\] HCA 16](#)

Re DBTL and Innovation Australia [\(2014\) 137 ALD 88](#); [\[2013\] AATA 573](#)

Esso Australia Resources Pty Ltd v Federal Commissioner of Taxation [\(2011\) 199 FCR 226](#); [\[2011\] FCAFC 154](#)

Haoucher v Minister for Immigration and Ethnic Affairs [\[1990\] HCA 22](#); [\(1990\) 169 CLR 648](#)

Industrial Equity Limited v Deputy Commissioner of Taxation [\[1990\] HCA 46](#); [\(1990\) 170 CLR 649](#) at 659

Industry Research and Development Board v Coal & Allied Operations Pty Ltd [\(2000\) 101 FCR 405](#); [\[2000\] FCA 979](#)

Project Blue Sky Inc v Australian Broadcasting Authority [\(1998\) 194 CLR 355](#); [\[1998\] HCA 28](#)

Richardson v Austin [\[1911\] HCA 28](#); [\(1911\) 12 CLR 463](#)

Sea Shepherd Australia Ltd v Federal Commissioner of Taxation [\(2013\) 212 FCR 252](#); [\[2013\] FCAFC 68](#)

Taylor v The Owners – Strata Plan No 11564 [\(2014\) 88 ALJR 473](#); [\[2014\] HCA 9](#)

XYZ v Commonwealth ([2006](#)) 227 CLR 532; ([2006](#)) HCA 25

Secondary Materials

Australian Taxation Office and AusIndustry, A guide to the R&D Tax Concession, February 2010, version 4.3

Mark Robertson QC, 'The dangers of the ATO's "policy intent" approach to the construction of Tax Acts' (2014) 43 Australian Tax Review 22

Second Reading of the Taxation Laws Amendment Bill (No 3), Assistant Treasurer, 12 December 1996, Senate, Debates (1996) Vol S181, p 7440

[Taxation Laws Amendment Bill \(No 3\) 1996](#) (Cth) Explanatory Memorandum

REASONS FOR DECISION

President D Kerr

29 July 2014

INTRODUCTION

1. In 1986 the Australian Parliament enacted s 73B of the [Income Tax Assessment Act 1936](#) (Cth) (the ITAA) to encourage companies to make additional expenditure on research and development (R&D). The means chosen was by way of enhanced tax deductibility for certain R&D expenditure. Initially the premium rate was established at 150%. Subject to compliance with the statutory scheme, expenditure on R&D could be deducted at the premium rate pursuant to s 73B(14) of the ITAA.
2. In 1996 the Parliament reduced the premium rate to 125% and introduced a number of complex provisions into the legislative scheme established by s 73B which, inter-alia, excluded "feedstock expenditure" from "research and development expenditure" for which the premium rate could be claimed.
3. This review relates to disputed entitlements to enhanced tax deductibility for R&D expenditure claimed by the applicant, GHP 104 160 689 Pty Ltd, a company previously known as Xstrata Holdings Pty Ltd prior to the merger of Xstrata and the Glencore Group. Although the applicant is entitled to a private hearing under [s 14ZZE](#) of the [Taxation Administration Act 1953](#) (Cth), and the hearing of the proceeding was held in private, the applicant has consented to the Tribunal disclosing its name in these reasons. It is part of a well-known corporate group. The applicant accepts that the Tribunal is bound to give reasons and that, given the amount of detail that must be revealed, even the use of pseudonyms in its reasons would not prevent readers deducing the applicant's identity.
4. The disputed expenditure was incurred over the course of a number of different tax years. The Commissioner accepts that the applicant is entitled to deduct any R&D expenses at the premium rate if it was "research and development expenditure" incurred by an eligible company that became part of the tax consolidated group. Accordingly for convenience, these reasons refer without distinction not only to GHP 104 160 689 Pty Ltd but also to the original companies that incurred those expenditures as "the applicant".
5. Over several tax years (2003-2007) the applicant undertook R&D, conducted by way of plant trials, to test various possible improvements to its copper and lead concentrators and its copper smelter. The expression "plant trial" refers to R&D undertaken by way of testing one or more altered integers of a plant under ordinary operational conditions to assess the changed integers' impacts on the operation of a plant as a whole. Some plant trials can run over a considerable period of time before results can be assessed. The evidence establishes that many of the plant trials conducted by the applicant ran over several months. However, it is not in dispute that the

- applicant's R&D as relevant to these proceedings was appropriately conducted as plant trials.
6. The applicant seeks to deduct a considerable part of its expenditure incurred during those plant trials at the premium rate of 125%.
 7. For each of the relevant tax years the Commissioner disallowed many, but not all, items of expenditure asserted by the applicant to be "research and development expenditure" and, as such, deductible at the premium rate. These are the decisions that are now subject to review. It is not disputed that the Tribunal has jurisdiction to review those decisions: [Taxation Administration Act 1953](#) (Cth) [s 14ZZ](#).
 8. The Tribunal must apply the law as it stood during each tax year—but conveniently the material provisions of the ITAA remained unchanged in the period between 1996 and the end of the 2007 tax year.
 9. The Commissioner does not dispute either (a) that the applicant incurred the expenses it claims to have or (b) that its expenditure was incurred *directly in respect of research and development activities carried on by...the company* within the meaning of subclause (c) of the definition of "research and development expenditure" in s 73B(1) of the ITAA.

The Commissioner's primary contentions

Feedstock expenditure

10. The Commissioner contends that the amounts are disallowed for deductibility at the premium rate in each tax year because they were "feedstock expenditure".
11. "Feedstock expenditure" is expressly excluded from the statutory definition of "research and development expenditure." The Commissioner submits that, in the facts applying, all of the disputed expenditure incurred by the applicant was *expenditure incurred by the company in acquiring or producing materials or goods to be the subject of processing or transformation by the company in research and development activities* and thus comes within the meaning that s 73B(1) of the ITAA gives to the term "feedstock expenditure".

Overlap

12. The Commissioner further contends, as an independent proposition, that because some of the applicant's R&D activities in respect of its Mt Isa copper concentrator and Mt Isa smelter overlapped for parts of a number of tax years and some of the copper concentrate produced by the applicant in its R&D activities during its concentrator processes was then fed into its copper smelter when the applicant was also concurrently undertaking R&D activities in its smelter; when such overlap occurred, all of the expenditure incurred by the applicant in producing copper concentrate actually fed into the smelter, including any expenditure relating to R&D in the concentrator, some of which expenditure the Commissioner accepts would otherwise have attracted the premium rate for deductibility, cannot be deducted at the premium rate because it thereby became "feedstock expenditure" in respect of the applicant's R&D activities (plant trials) conducted the smelter.
13. The expressions in quotation marks in the previous paragraphs are defined terms for the purposes of s 73B of the ITAA.

The issues for determination

14. The parties submit that the two fundamental issues that the Tribunal must decide are whether either or both of the Commissioner's primary contentions set out above are correct. The Tribunal agrees with that analysis noting that each party has also put forward alternative versions of their arguments that are addressed later in these reasons.
15. A third issue is contingent on the Tribunal's findings. If the Commissioner is wholly or partially successful in respect of either or both of the two primary issues a tax shortfall will result. The third issue is whether, on that assumption, the Commissioner should remit the shortfall interest charge (SIC) ordinarily accruing on tax shortfalls by operation of s 280-100 of Schedule 1 of the *Tax Administration Act 1953*.

16. A discretion to remit the SIC in full or in part is provided for by s 280-160. The applicant contends that the discretion should be exercised in its favour because the applicant acted on the faith of what appeared in a series of public documents indicating that the ATO had communicated to it and the world at large that the words “feedstock expenditure” carried the meaning for which the applicant now contends.
17. The applicant accepts that those previous statements cannot bind the Commissioner. Mr de Wijn QC, counsel for the applicant, acknowledges that the Commissioner is entitled to submit that the law requires a different result but submits that it would not be “fair and reasonable” for the applicant to bear the cost of the SIC in relation to an interpretive issue on which the Commissioner has altered his view without releasing a public ruling or similar communication to ensure that a change of position was made known.

Admissions

18. The applicant made certain formal admissions by a letter to the Tribunal dated 10 July 2013, following directions given by a conference registrar of the Tribunal.
19. In light of the conclusions reached by the Tribunal and because of the way the matter was argued by counsel it is unnecessary for the Tribunal to set out the terms of those admissions in its reasons. They are not material to the two principal issues. The admissions simply rule out a further contingent issue lacking factual foundations from having to be considered.

Calculation of assessment

20. The parties put a considerable body of detailed and complex material before the Tribunal detailing the applicant’s expenditures for each tax year and quantifying the amounts of disputed expenditure, the amount of concessional expenditure in issue and how other findings in respect of the overlap period might interrelate with those amounts. In the end there was only small disagreement between them on those details. However the parties accepted that unless the Tribunal found wholly in one or the other’s favour it would be impossible, even having regard to those materials, for the Tribunal to calculate the correct assessment which should be made without further evidence and/or submissions. Nor did counsel think it necessary or appropriate to burden the Tribunal with that task. While the parties were at odds with respect to the primary issues, once those issues were resolved they could agree on the consequences. Both Mr Lloyd SC (for the Commissioner) and Mr de Wijn indicated that it would be sufficient for their purposes for the Tribunal to determine which items of expenditure were or were not eligible for deduction at the premium rate and rule on the overlap issue. Its findings on those matters would allow the parties to undertake the precise calculation of the amounts (if any) to be substituted for the Commissioner’s current assessments. They asked the Tribunal to proceed on that basis. It has done so.

Deferral of shortfall interest charge issue

21. Both Mr Lloyd and Mr de Wijn proposed that if a SIC issue became relevant they would prefer to make detailed submissions in that regard after the Tribunal had handed down its decision regarding the principal issues in the case. The Tribunal acknowledged the common-sense of that proposal and agreed to permit submissions in writing were that contingent issue to arise.
22. The Tribunal is grateful for the practical approach counsel and their instructors have adopted in respect of both of those issues.

THE OBJECTIVES OF THE LEGISLATIVE SCHEME

Rewarding R&D involving innovation or high levels of technical risk

23. The core of the legislative scheme is contained in s 73B of the ITAA. However, there are important relationships between those provisions and certain provisions of the [Industry Research and Development Act 1986](#) (Cth) (the IRDA) with respect to how an eligible company can access the scheme.

24. While the Tribunal must apply the legislation as it stood in 2003-2007 the Tribunal will refer to the provisions of both Acts as at that time in the present tense unless the context requires otherwise.
25. The overall purpose of s 73B of the ITAA is explained by s 73B(1AAA):

The objective of this section is to provide a tax incentive, in the form of a deduction, to make eligible companies more internationally competitive by:

- (a) encouraging the development by eligible companies of innovative products, processes and services; and*
- (b) increasing investment by eligible companies in defined research and development activities; and*
- (c) promoting technological advancement of eligible companies through a focus on innovation or high technical risk in defined research and development activities; and*
- (d) encouraging the use by eligible companies of strategic research and development planning; and*
- (e) creating an environment that is conducive to increased commercialisation of new processes and product technologies developed by eligible companies.*

The benefits of the tax incentive are targeted by being limited to particular expenditure on certain defined activities.

26. Section 73B(1) defines what is meant by the expression “research and development activities”. Only systematic, investigative and experimental activities involving either innovation or high levels of technical risk carried on for the purpose of acquiring new knowledge or creating new or improved materials, products, devices, processes or services qualify.
27. Section 73B(2B) further states:

*For the purposes of the definition of **research and development activities** in subsection (1):*

- (a) activities are not taken to involve innovation unless they involve an appreciable element of novelty; and*
- (b) activities are not taken to involve high levels of technical risk unless:*

- (i) the probability of obtaining the technical or scientific outcome of the activities cannot be known or determined in advance on the basis of current knowledge or experience; and*
- (ii) the uncertainty of obtaining the outcome can be removed only through a program of systematic, investigative and experimental activities in which scientific method has been applied, in a systematic progression of work (based on principles of physical, biological, chemical, medical, engineering or computer sciences) from hypothesis to experiment, observation and evaluation, followed by logical conclusions.*

28. Section 73B(2BA) of the ITAA means that activities not carried out in accordance with a plan complying with guidelines formulated by the Industry Research and Development Board under s 39KA of the IRDA are not within the definition of “research and development activities”. Companies wanting to benefit from the tax incentive must submit their plans in advance.
29. The submission of a plan to the Industry Research and Development Board by an eligible company followed by that company’s subsequent expenditure on activities in accordance with the plan is a necessary but not sufficient condition for entitlement to the benefit of deductibility of that expenditure at the premium rate.
30. The Industry Research and Development Board (since renamed Innovation Australia) can reject a plan submitted to it for registration as not involving innovation or high levels of technical risk: see for example *Re DBTL and Innovation Australia* ([\(2014\) 137 ALD 88](#); [\[2013\] AATA 573](#) (*Re DBTL*)). However, as the Commissioner submits, unless the Industry and Development Board rejects a plan it automatically becomes registered.

31. The registration of a plan (unless an applicant also seeks and obtains the issue of a certificate pursuant to s 73B(34) of the ITAA) does not prevent the Commissioner disallowing a deduction claimed at the premium rate on the ground of either lack of innovation or want of high levels of technical risk.
32. The provisions of s 39L of the IRDA facilitate the Commissioner making an assessment “for the purpose of giving effect to s 73B” of the ITAA. The Commissioner also has a general administrative power pursuant to [s 8](#) of the ITAA including the due making of assessment to tax: *Industrial Equity Limited v Deputy Commissioner of Taxation* [\[1990\] HCA 46; \(1990\) 170 CLR 649](#) at 659 (Mason CJ, Brennan, Deane, Dawson, Toohey and McHugh JJ).

Findings regarding innovation and technical risk

33. It is common ground between the parties that a certificate pursuant to s 73B(34) of the ITAA was not sought by the applicant or issued.
34. Had the Commissioner considered he had proper grounds, he therefore could have issued assessments disallowing the claimed 125% deductions on the basis that the applicant was ineligible for the premium rate for its R&D expenditure because the activities the applicant undertook did not meet the threshold of innovation or high levels of technical risk required of research and development activities as defined by ss 73B(1) and 73B(2B) of the ITAA. [\[1\]](#)
35. Mr Lloyd acknowledged that as a matter of law the Commissioner had had that option but had not taken that course.
36. Moreover, in this review the Commissioner’s case was run on the contrary premise. In cross-examination Mr Lloyd repeatedly pressed the first two of the applicant’s witnesses to confirm that the R&D the applicant undertook involved high levels of technical risk. Unsurprisingly that was the evidence they gave.
37. Mr Strohmayer and Mr Siliezar each agreed to propositions put to them in cross-examination on the Commissioner’s behalf that as a result of the high levels of technical risk involved in the applicant’s R&D there could have been significant adverse commercial consequences for the company had what it had been testing caused problems within its plant. Thus Mr Strohmayer stated “...our company was prepared to do that [that is, undertake the risks associated with its R&D], looking for the longer term benefit”.
38. After Mr Strohmayer and Mr Siliezar had testified, Mr de Wijn indicated that to avoid repetition in cross-examination he would accept that similar answers would be given by each of the applicant’s witnesses in respect of each R&D project. Mr Lloyd indicated he was content to proceed on that basis.
39. In the light of that evidence the Tribunal has no alternative but to find, and finds, whatever the prospects of it coming to a different conclusion had an argument for disallowing the premium rate on the ground of lack of innovation or technical risk been advanced by the Commissioner, that the entire relevant R&D undertaken by the applicant involved high levels of technical risk within the meaning of s 73B of the ITAA.
40. For an identical reason the Tribunal has no alternative but to find, and finds, that those risks included adverse consequences being occasioned to the entire operations of the various plants in which the applicant’s plant trials were conducted.
41. The consequences of those findings are discussed later in these reasons.

Other aspects of the scheme relevant to this review

42. The provision of the ITAA that enacts the deduction is s 73B(14) of the ITAA. It states:

Subject to this section, where:

- (a) an eligible company incurs research and development expenditure (other than contracted expenditure) during a year of income; and*
- (b) the aggregate research and development amount in relation to the company in relation to the year of income is greater than \$20,000;*

the amount of that expenditure multiplied by 1.25 is allowable as a deduction from the assessable income of the company of the year of income.

43. The Commissioner does not dispute that the applicant is an eligible company; that its aggregate expenditure on R&D in each tax year is greater than \$20,000; or contend that its expenditure is contracted expenditure.
44. Section 73B(14) accordingly entitles the applicant, for each relevant year of income, to the benefit of a 125% deduction for such of its expenditure as is “research and development expenditure.”
45. Section 73B(1) is replete with defined terms: all are prefaced with the words “*unless the contrary intention appears*”.
46. The definition of “research and development expenditure” is as follows:

research and development expenditure, in relation to an eligible company in relation to a year of income, means expenditure (other than core technology expenditure, interest expenditure, feedstock expenditure, excluded plant expenditure or expenditure incurred in the acquisition or construction of a building or of an extension, alteration or improvement to a building) incurred by the company during the year of income, being:

(a) contracted expenditure of the company;

(b) salary expenditure of the company, being expenditure incurred on or after 1 July 1985; or

(c) other expenditure incurred on or after 1 July 1985 directly in respect of research and development activities carried on by or on behalf of the company on or after 1 July 1985;

and includes any eligible feedstock expenditure that the company has in respect of the year of income in respect of related research and development activities.

47. The definition of “research and development expenditure” accordingly excludes “feedstock expenditure”.
48. “Feedstock expenditure” is defined as follows:

feedstock expenditure, in relation to an eligible company, means expenditure incurred by the company in acquiring or producing materials or goods to be the subject of processing or transformation by the company in research and development activities, and includes expenditure incurred by the company on any energy input directly into the processing or transformation.

49. Thus, to the extent the applicant’s expenditure on R&D was “feedstock expenditure” the applicant is not entitled to a deduction from its assessable income of the amount of that expenditure multiplied by 1.25.
50. While “feedstock expenditure” is excluded from the definition of “research and development expenditure” the latter term does include what the ITAA somewhat confusingly refers to as “eligible feedstock expenditure.”
51. **Eligible feedstock expenditure** has the meaning given to it by s 73B(1A). That section provides:

For the purposes of this section, an eligible company has eligible feedstock expenditure in respect of a year of income in relation to related research and development activities if the company’s feedstock input in respect of the year of income in relation to those activities exceeded the company’s feedstock output in respect of the year of income in relation to those activities, and the amount of the excess constitutes the company’s eligible

feedstock expenditure in respect of the year of income in relation to those activities.

52. That definition in turn requires reference to two other terms defined in s 73B(1); “feedstock input” and “feedstock output”.
53. “Feedstock input” is defined as follows:

***feedstock input**, in relation to an eligible company in relation to a year of income, means the company’s feedstock expenditure in respect of materials or goods that were the subject of processing or transformation by the company in research and development activities during the year of income.*

“Feedstock output” is defined as follows:

***feedstock output**, in relation to an eligible company in relation to a year of income, means the sum of the amounts worked out under paragraphs (a) and (b) in relation to any products that were obtained by the company during the year of income from the processing or transformation of materials or goods the acquisition or production of which was feedstock expenditure of the company:*

(a) if any of those products were sold by the company during the year of income by a transaction or transactions entered into at arm’s length with the buyer or buyers—the amount or amounts received or receivable by the company from the sale or sales;

(b) if any of those products were not sold by the company during the year of income or were sold by the company otherwise than by a transaction or transactions entered into at arm’s length with the buyer or buyers—the amount or amounts (if any) that would have been received by the company by selling those products at the end of the year of income by a transaction or transactions entered into at arm’s length with the buyer or buyers.

54. Thus, if but only if, an eligible company’s expenditure on “feedstock input” exceeds the sum of the amounts it receives or is deemed to receive as “feedstock output” in any tax year the net amount becomes its “eligible feedstock expenditure” within the definition of “research and development expenditure” which can be multiplied by 1.25 under s 73B(14) and deducted from its assessable income.
55. If the amount a company receives or is deemed to receive as “feedstock output” in any tax year is greater than its expenditure on “feedstock input” there is no “eligible feedstock expenditure” in respect of which the premium rate can be claimed. In such a case s 73B(14B) allows the company a deduction, at the ordinary 100% rate for what is its “residual feedstock expenditure”. Because of the admissions referred to at [18]-[19] this provision has no further relevance to these proceedings.

THE FACTS: IN BROAD BRUSH

56. The facts in these proceedings although complex are not substantially in dispute. Unless the context demands otherwise they are explained in the present tense.
57. The applicant has mining operations in a number of sites in Australia. Its R&D activities were directed to developing new knowledge and increasing the effectiveness of copper and lead-zinc concentrators at sites at Mt Isa, Ernest Henry and McArthur River and a copper smelter at Mt Isa.
58. The Tribunal undertook a view of the applicant’s operations at Mt Isa where both concentrating and smelting activities are undertaken.
59. The view gave the Tribunal some insight into the large scale of the applicant’s operations which otherwise might not have been fully conveyed by the photographs, exhibits and oral evidence. Producing concentrate and smelting copper are both very large scale industrial processes.

60. The evidence discloses that while there are differences between the applicant's concentrator processes at Mt Isa, Ernest Henry and McArthur River, relating to the different ores involved and the different valuable minerals sought to be obtained, there are large similarities in the basic nature of what is involved in all of the relevant concentrator processes. Each of the applicant's concentrator plants receives ore containing various amounts of the minerals the applicant seeks and subjects that ore to a variety of steps involving grinding and flotation to separate out and remove unwanted material referred to by the applicant's witnesses as "gangue". Ore insufficiently treated at any one stage is recaptured and retreated until the best recovery technically and commercially available of the mineral(s) sought is achieved. The unwanted material once separated out becomes "tailings".
61. The applicant's copper concentrate produced at Mt Isa is then fed into the applicant's Mt Isa smelter. As Mr Harvey deposed regarding the applicant's Mt Isa operations:

The purpose of the Concentrator is to process the crushed ore from the mines so as to upgrade the copper content of the ore so that it is amenable to be fed into the smelter for further processing to produce metallic copper in the form of Copper Anode that will ultimately have a copper content of in excess of 99%.

62. For each tax year the applicant submitted its detailed plans for proposed R&D activities to the Industry Research and Development Board in advance of undertaking them. Those plans were registered.
63. The various R&D activities undertaken consistently with those plans thereafter by the applicant were referred to in evidence by the applicant's witnesses and by its counsel as "projects" and "plant trials".
64. Mr Lloyd takes issue with the applicant's use of the term "projects". He submits that the word "projects" potentially is misleading because it distracts attention from the word "activities" used in s 73B ITAA. However, nothing appears to the Tribunal to turn on its use in so far as it describes in a shorthand omnibus way the activities actually undertaken pursuant to the plans the applicant had submitted to the Industry Research and Development Board.
65. So understood there were seven separate R&D projects undertaken by the applicant in the course of the tax years in question—referred to in the evidence as MET/001, MET/023, MET/085, MET/089, MET/002, MRM2-99/00 and EHM/08 respectively. Each was a plant trial.
66. The MET/001 and MET/023 projects related to the applicant's Mt Isa copper concentrator process.
67. The MET/085 and MET/089 projects related to the applicant's Mt Isa copper smelter process.
68. The MET/002 project related to the applicant's Mt Isa zinc-lead concentrator process.
69. The MRM2-99/00 project related to the applicant's McArthur River zinc-lead concentrator process.
70. The EHM/08 project related to the applicant's Ernest Henry copper-gold concentrator process.
71. It now is convenient to set out in greater detail the activities that those projects involved. Given that the evidence in this regard is largely uncontentious the structure and content of the Tribunal's factual findings borrow significantly from Mr de Wijn and Ms Burnett's closing written submissions in which the facts relied on by the applicant were set out and footnoted to specific testimony. The Tribunal is satisfied that each of the applicant's witnesses gave their evidence honestly and their evidence can be accepted, save as otherwise expressly indicated. The Tribunal has satisfied itself that the applicant's closing written submissions at [A74]-[A115] upon which the Tribunal has drawn, carefully and accurately reflects the evidence given by those witnesses.
72. The only matter that the Tribunal thinks necessary to state additional findings in respect of issues in contest concerns how much of various "collectors" (explained below) find their ways through the concentrator process to remain as trace elements in the final concentrate. Mr Harvey, cross-examined by Mr Lloyd suggested that no more than 1-2% would do so. Mr Siliezar however gave evidence that four grams of SIBX (sodium isobutyl xanthate) and 12 grams of PAX (potassium isobutyl xanthate) were used for every tonne of ore and "that some

of that will—yes most of that will end up in the concentrate”.

73. The Tribunal finds that the logic of Mr Siliezar’s evidence is persuasive because collectors are intended to bond to the minerals sought and on that basis “most” of the collectors inserted into the circuit are likely to remain with those minerals and emerge in the final concentrate. Of course as a proportion to the volume of the concentrate the collectors will be present only as trace elements. They have no commercial value in that form. Moreover there is uncontested evidence that within a few hours those trace elements will break down and evaporate.

Mount Isa copper concentrator process - MET/001 and MET/023

74. The Mount Isa copper concentrator is located close to the applicant’s two copper mines at Mount Isa. It comprises a series of items of interconnected industrial plant.
75. R&D project MET/001 involved the flotation stage of the concentrator, the cyclones in the grinding stage, and copper dust recovery from the smelter. The project was primarily directed at acquiring new knowledge of electrochemical concepts to determine the best addition rates and addition points for chemicals and of new technology and novel configurations for the processes involved in the flotation stage of the concentrator. The project altered the circuit configuration so that the tailings from the scavenger retreatment tank were redirected to the cleaner scavenger tanks, and subsequently to the regrinding mill. A trial of Warman Cavex cyclones was also undertaken, as was the recovery of copper from the smelter electro-static precipitator dust.
76. R&D project MET/023 concerned the grinding stage of the concentrator and the effect of changed grinding conditions on the flotation process. Its purpose was to acquire new knowledge to improve the cost efficiency of the grinding circuits by optimising the grinding circuit performance to produce a more desirable flotation feed size distribution and improve the life of the mill liners. The applicant experimented with the design, configurations and usage of mill liners and lifters, grinding media, white iron inserts, grates and cyclones.
77. R&D projects MET/001 and MET/023 each involved plant trials, as well as other R&D activities. It was in the plant trials that the new grinding and flotation processes, and the new liner, lifter and cyclone parts, were used in the concentrator in order to assess their effectiveness in the operating environment. It was in these plant trials that the relevant expenditure was incurred. The general operation of the plant is described below. The items upon which expenditure is disputed as entitled to be deducted at the premium rate are highlighted in bold.
78. The Mt Isa copper concentrator receives copper ore from two nearby copper mines. When the raw ore from the mine is delivered to the copper concentrator, it is in lumps of rock of approximately 200 mm in diameter.
79. The purpose of the concentrator is to process the raw ore to remove waste minerals and thereby increase the concentration of copper rich minerals, predominantly chalcopyrite, the chemical formula of which is CuFeS_2 . What emerges from the concentrator is referred to as copper concentrate. The ore from the applicant’s Mount Isa copper mines at the relevant time contains about 3% to 4% copper. After the ore is processed through the concentrator the concentrated ore contains about 25% copper. The processes in the concentrator do not change the chemical composition of chalcopyrite. A process flow diagram depicting the processes at the concentrator as at the time of the relevant R&D projects is at Appendix A of these reasons.^[2]
80. The process of concentrating the ore consists of two main stages: the grinding stage and the flotation stage.
81. In the grinding stage, the ore is fed into one of two semi-autogenous grinding mills (“SAG mills”). The ore is fed into the SAG mills via two ore chutes where ore from the ore bins, as crushed in the mines, is fed into the SAG mills. The chutes are metal structures somewhat like a large funnel. The chutes are protected by metal liners fitted to the chute which wear over time as the ore slides down the chutes into the SAG mills. These liners are replaced as they wear down and are referred to as **Crusher Liners**.
82. The SAG mills are large cylindrical containers about 5 metres in length and about 10 metres high which rotate and contain **steel balls** which are 105 mm in diameter when introduced into

the mill. As the mill rotates the ore collides with the **steel balls** and the sides of the mill which are lined with steel liners and lifters called **mill liners**. Through a process of collision the ore is broken down into smaller pieces. The **mill liners** at the ends of the mill are called head liners while the curved section of the mill is covered with shaped liners which protrude from the wall of the mill and lift the ore effectively throwing it into the mill and causing it to collide with the **steel balls** and other ore.

83. Over time as the mills operate, the **steel balls** (also called **grinding media**) and **mill liners** (including lifters) wear down. The balls wear down progressively and each day additional steel balls are added to the mill meaning that at any one time there are balls of varying sizes in the mill. As the balls wear down to a sufficiently small diameter, they are rejected from the mill and not used for any further process in the concentrator.
84. When rejected from the mill the balls are collected in bins called “kibbles”. It usually takes a few weeks for the **steel balls** to reach that state after they are added to the mill. Fragments of the **steel balls** which are not collected in the kibbles end up as part of the waste referred to as tailings and are sent with the tailings to the tailings dam. No part of the **steel balls** remains in the final concentrate produced by the concentrator.
85. The **mill liners** also wear down. Once they are too thin to remain in service they are replaced during routine maintenance, approximately every four to five months. The head liners tend to wear more slowly than the lifters and are replaced when required. No parts of the **mill liners** remains in the final concentrate.
86. **Water** is continuously added to the ore in the SAG mills (and the ball mills, described below). The **water** helps to mobilise the ore in the SAG mills and transport the ground ore downstream from the SAG mills in what is referred to as slurry. Very little **water** remains in the final concentrate—however some does. The water in the slurry has no purpose save as a vehicle to help transport the ore and minimise dust during the process.
87. Once the SAG mills have broken down the ore to a sufficient size, the ore passes through a grate called a trommel screen which has holes (or apertures) of 12 mm in diameter, flaring to 25 mm in diameter. The grate uses rubber **screen panels** which wear down over time. Once the **screen panels** are too thin to remain in service they are removed and thrown away and replaced with new panels. No residue of the **screen panels** remains in the final concentrate produced by the concentrator.
88. As the particles coming out of the SAG mills are not consistent in size, and some particles are too large for the ball mills in which the secondary grinding process is carried out, **cyclones** are used to classify the particles based on size. **Cyclones** are cone shaped containers which through centrifugal force send smaller particles to the top and larger particles to the bottom of the cyclone. Some of the **cyclone** components, principally sacrificial liners, wear down with time and are replaced, on average every 2 months. Most of the worn **cyclone** parts are removed during the further separation processes but minute fractions could remain in the final concentrate produced by the concentrator. To the extent that occurs those residues have no commercial value. Once separated by the **cyclones**, the larger particles of ore are sent back through the SAG mills and the smaller particles go straight to the ball mills.
89. The ball mills are similar to the SAG mills but use smaller (80 mm diameter) **steel balls**. These steel balls wear down through use and are rejected in a similar way as the steel balls in the SAG mills when their diameter is approximately 20 mm.
90. The output of the ball mills passes through a second pack of **cyclones** and particles that are too large for the flotation process are sent back to the ball mills for further grinding.
91. The slurry from the ball mills (after passing from the top of the cyclones) first passes into pre-flotation tanks, where some naturally buoyant waste material such as talc floats by attaching to bubbles which are generated in the tank and are removed. The bubbles are “stabilised” so they do not pop by the addition of methyl isobutyl carbinol (“**MIBC**”). **MIBC** is known as a “frother”. A very small amount of **MIBC** is carried through the circuit to the final concentrate, at a maximum presence of 0.015% of the concentrate. In that state it has no commercial value.
92. The remaining tanks in the flotation stage work by making the chalcopyrite selectively attach to bubbles, which float to the surface of the tank and overflow into a collection launder. Sodium isobutyl xanthate (**SIBX**), known as a “collector”, is added to make the chalcopyrite “hydrophobic”, so it repels water and attaches to an air bubble. **Dextrin** and **sodium cyanide**

- (also referred to as **cyanide**), are known as “depressants”; these are added to prevent the waste material attaching to the bubbles and ensure it does not float to the surface. **Dextrin** is not carried through the circuit to the final concentrate. Trace elements of **SIBX** and/or **cyanide** are carried through the circuit to the final concentrate. The amount of **SIBX** that remains the concentrate as a trace element has no value and its quantity has never been measured.
93. The **SIBX** (xanthate) disintegrates quickly and any remaining xanthate left in the concentrate after the final flotation stage disappears from the concentrate within a few hours and before the time the concentrate is filtered.
 94. There are a number of tanks in the flotation stage, with different ratios of water, chalcopyrite and waste material. Some larger particles not sufficiently small are recovered and are sent back through a re-grinding circuit which consists of another grinding machine with 50 mm **steel balls**. The material that is ground through the regrinding circuit is returned to the flotation stage.
 95. At the end of the flotation stage, the slurry is thickened in large wide tanks called thickeners where the solids settle and excess water flows off the top. There is also a tailings thickener from which water is recovered to be reused in the circuit. **Flocculants** are used in the tailings thickener to more effectively separate the tailings from the water, which is to be recycled. **Flocculants** work by bringing particles together so they more readily sink to the bottom of the tank rather than staying suspended. The **flocculants** are not carried through the circuit to the final concentrate.
 96. Samples of the thickened concentrate slurry pass through special suction filters to further remove excess water. These samples are taken to test the concentrate’s composition and **filtering cloths** are used in the sampling process. The **filtering cloths** wear out every time the filter is used and the filters require maintenance approximately every two months.
 97. A number of other items were part of the applicant’s R&D expenditure in relation to the relevant R&D projects at the concentrator. None of those materials are carried through the circuit to the final concentrate produced by the concentrator. They are **anti-scalant, other reagents and chemicals, welding-related gases, materials including bolts and tools, explosives, lubricants and sealants, batteries, ground engaging tools and compressed air**.
 98. Save in respect of the periods when the final copper concentrate was sent to the Mt Isa copper smelter when the applicant’s R&D activities relating to the smelter were simultaneously being undertaken, for the purposes of this review the concentrate is a final product in that form. The overlap issue is discussed later.

Mount Isa zinc-lead concentrator process - MET/002

99. The Mount Isa zinc-lead concentrator is located close to the applicant’s Black Star zinc mine at Mount Isa, near the copper concentrator and copper smelter. It also processes ore from the applicant’s George Fisher zinc mine 20km to the north of Mount Isa. The zinc concentrates from the zinc-lead concentrator are exported overseas and are not subject to further processing in Australia. The lead concentrate goes from the zinc-lead concentrator to the on-site lead smelter.
100. R&D project MET/002 had the objective of improving the processes at the concentrator, and involved all of the concentrator. It included grinding capacity trials, a trial to attempt to reduce soda ash usage, a trial to reduce the density of feed to the ball mills and trialling a replacement for MIBC. This R&D project also involved operational trials in the concentrator as a whole, in order to assess the effectiveness of the trialled material or process in the operational environment and to examine its impact on the entire concentrator process.
101. Three process flow diagrams, depicting the rod mill grinding circuit, lead flotation circuit and zinc flotation circuit respectively at the concentrator as at the time of the relevant R&D projects, are at Appendix B of these reasons.^[3]
102. Conceptually the zinc-lead concentrator operates in a manner similar to the Mount Isa copper concentrator. As such, **steel balls, mill liners and lifters** for ball mills and SAG mill, **cyclones, screen consumables, cyanide, dextrin, MIBC, water, crusher liners, flocculant and filtering cloths** play a similar role to that described above in relation to the copper concentrator.

103. However, the concentrator is different from the Mount Isa copper concentrator in the following ways:
- (a) The ore fed into the concentrator contains about 4% lead and 7% zinc; the lead concentrate produced by the concentrator contains about 55% lead and the zinc concentrate produced contains about 52% zinc;
 - (b) The ore from the relevant mine is crushed in crushers lined with **crusher liners** and then passes through a heavy medium plant which uses **ferrosilicon**;
 - (c) There are, as well as ball mills, rod mills with large steel **rods** which roll over each other and the ore as the mill rotates and thereby grind the ore;
 - (d) There are separate flotation circuits for lead and zinc;
 - (e) In the lead flotation circuit:
 - (i) **Ethyl xanthate** is used as a collector; SIBX, used in the copper concentrator, is not used;
 - (ii) **Zinc sulphate** is used as a depressant, to make the zinc fall to the bottom of the tank and thus separate it from the lead;
 - (iii) **Lime** is used as a pH-modifier to ensure the **zinc sulphate** works properly;
 - (iv) **Soda ash** is used to keep iron in solution and prevent it from contaminating the valuable minerals in the slurry;
 - (v) Isamills with **fine grinding media** are used as is a lead Jameson cell;
 - (f) In the zinc flotation circuit:
 - (i) **Copper sulphate** is used so the zinc minerals bond to the collectors;
 - (ii) **Isopropyl xanthate** is used as a collector; SIBX is not used;
 - (iii) Zinc Isamills use **sand** as their grinding media and a tower mill uses **small high chrome pellets** as its grinding media.
104. The zinc-lead ore is crushed for the first time in a primary crusher at the mine site.
105. At the start of the concentrator process, secondary crushers are used to crush the ore from the mines into pieces approximately 12 mm in diameter. The crushers are lined with **crusher liners**, which wear out with use and are replaced after about 12 months. Worn metal from the **crusher liners** is captured in the tailings and does not form any part of the concentrate produced by the concentrator.
106. The ore is then sent to the heavy medium plant. The heavy medium plant is an additional early stage of the zinc-lead concentrator. It does not have an equivalent at the copper concentrator. Water is added to the crushed ore to form a slurry, to which **ferrosilicon** is added. **Ferrosilicon** is a reagent, in crystal form, which dissolves into the water and makes the lead and zinc more effectively separate from the waste material (mainly silica) based on their different densities (lead and zinc is generally denser than silica). **Ferrosilicon** does not attach to any of the minerals and does not remain in the concentrates produced by the concentrator. The **ferrosilicon** remains in the water when the slurry is dewatered in the heavy medium plant.
107. The slurry minus the waste mineral removed in the heavy medium plant is dewatered and sent to the grinding circuit.
108. The first part of the grinding circuit involves rod mills. These are cylindrical rotating mills approximately 22 feet long with large metal **rods** inside which are almost as long as the internal length of the mill, which tumble over each other to break up the ore particles.
109. The slurry then passes through grates in the rod mills and flows into ball mills containing **steel balls** of 52 mm diameter where it is further ground. The **rods** and **steel balls** are topped up each day for wear.
110. **Cyclones** are then used to classify the milled particles. The **cyclone** parts are maintained or replaced about every six months. Worn fragments of the **rods**, **steel balls** and **cyclones** do not remain in the concentrates produced by the concentrator.
111. In around October 2006, a SAG mill was introduced to the zinc-lead concentrator. It took a portion of the mined ore and crushed and ground it. The ore fed through the SAG mill does not need to go through the secondary crusher or the rod mills, but those machines are still used for the balance of the ore. The SAG mill contains **steel balls** and **mill liners and lifters**. The slurry passing through the grates at the end of the SAG mill then passed into a ball mill containing **steel balls** and **mill liners** for further grinding.
112. The first part of the flotation stage is the lead flotation circuit. It begins with a pre-flotation

stage which is similar to that in the copper concentrator and similarly uses **MIBC** as a “frother” to stabilise the bubbles to remove the waste material. The **MIBC** remains in the water and does not attach to the minerals which are being collected. Carbonaceous pyrite, which is naturally buoyant due to its surface properties, floats to the surface by attaching to bubbles and is removed to tailings.

113. **Ethyl xanthate** (a “collector”) is then added for the purpose of attaching to the lead material and making it float to the surface. Some **ethyl xanthate** remains attached to the lead in the concentrate produced by the concentrator as a trace element. It adds no value to the product. **Dextrin** (a “depressant”) is added to depress waste material. The **dextrin** is subsequently released into the tailings dam and none passes through into the concentrate produced by the concentrator. The **ethyl xanthate** and **dextrin** activate in the primary rougher flotation tanks, where the slurry is sent after the pre-flotation tanks.
114. Fine particled material from the heavy medium plant (“slimes”) are fed into separate flotation tanks, where **cyanide** (which is added at the ball mill stage) and **dextrin** are used to depress waste material, **ethyl xanthate** is used to make the lead material float to the surface and **MIBC** is used to stabilise the bubbles. Trace elements of **cyanide** and/or **ethyl xanthate** having no commercial value in that form are present in the final concentrate. **Zinc sulphate** is also added to depress the zinc material and **lime** is added as a pH modifier to ensure the **zinc sulphate** works properly. Neither **zinc sulphate** or **lime** is present in the final concentrate.
115. The residue from the preceding stages is sent through **cyclones** and then to a secondary ball mill containing **steel balls** of 52 mm diameter, and lined with **mill liners and lifters**, to extract remaining valuable mineral material. **Soda ash** is added to the underflow from the **cyclones**, to keep the iron material in solution and **cyanide** is added as a depressant for waste material. **Ethyl xanthate** (to float the lead minerals) and **MIBC** (to stabilise the bubbles) are added to the overflow from the cyclones. Of these, only trace elements of **cyanide** and/or **ethyl xanthate** are present in the final concentrate.
116. The next stage is the lead Isamills, which are cylindrical mills lined with **mill liners** and 80% filled with lead slag from the lead smelter process.
117. This produces a fine product of approximately 12 to 16 microns diameter, which is fed into the Jameson cell, along with **dextrin** which is added as a depressant to keep the zinc and waste particles in the slurry whereas the lead particles attach to bubbles and move to the top of the Jameson cell. The Jameson cell is a type of flotation tank which forces air bubbles to make contact with the slurry so what is desired in the concentrate attaches to bubbles and rises to the surface.
118. The concentrate from the top of the Jameson cell is thickened/dewatered in thickener tanks and becomes the final lead concentrate. The material from the bottom of the Jameson cell is sent to three lead cleaner tanks for further separation, with the lead floating and waste material and zinc sinking. The residue is sent back to the secondary ball mill and the floated material goes to the thickeners to be dewatered to join the final lead concentrate. For the purpose of these reasons the lead concentrate is a final product.
119. The zinc and waste materials depressed in the lead flotation circuit pass into the zinc flotation circuit.
120. The first flotation tanks in the zinc flotation circuit are referred to as rougher tanks. The slurry has **xanthate** added as a collector for the zinc, and **copper sulphate** is also added, which attaches to the zinc so it bonds to the **xanthate**. These attach to the zinc in the final concentrate as impurities comprising trace elements within the final concentrate; the precise proportion is not measured. They have no commercial value in that form.
121. The next stage is the zinc column flotation cells, where further **water** is added. The zinc particles float to the top of the columns and are pumped to a thickener to be dewatered and become the final zinc concentrate. In so far as these reasons are concerned that zinc concentrate is a final product in that state.
122. The material depressed in the zinc rougher tanks still contains some zinc, so it is passed through further tanks with the addition of further **copper sulphate** and **xanthate**. It then passes through a **cyclone** and the heavier particles progress to either the tower mill (using **small high chrome pellets** as the grinding media and a large internal screw to pick up the balls and the ore particles) or a zinc regrind Isamill (using **sand** as the grinding media).

123. The next stage is the three zinc cleaner tanks where further **copper sulphate** and **xanthate** are added; the floated material from this stage goes to the final zinc concentrate; the depressed material goes through further rougher and cleaner tanks, and a final thickener tank. **Flocculants** are added to the thickener tank to bring the zinc particles together to enable easier removal of the water. The **flocculants** remain in the concentrate but naturally decompose once it dries.
124. Other materials used in running the zinc-lead concentrator while the plant trials in R&D project MET/002 were being carried out were **explosives, compressed air, materials general, lubricants and related delivery equipment, other reagents and chemicals and anti-scalant, welding gases and batteries**. These materials formed no part of either the zinc or lead concentrate produced.

Mount Isa copper smelter process - MET/085 and MET/089

125. The Mount Isa copper smelter is a series of items of plant enclosed in a large multi-storey roofed structure mainly enclosed by walls. It is situated adjacent to the copper concentrator and zinc-lead concentrator although each is managed and operated independently.
126. R&D project MET/085 had the object of improving the life of the refractory brick lining of the Isasmelt furnace (and the other furnaces). It involved the selection and trialling of different lining material, the installation of the lining, the prediction of brick thickness and wear rates, and temperature control of the furnace during the campaign (between “rebrickings” of the furnace), including through creating “cold fingers” to cool the furnace shell. Operational trials were carried out in the smelter to trial the new materials and processes being tested and developed.
127. R&D project MET/089 had the objective of improving the identification of reaction end points in the converter furnaces. To this end, a device called Semtech was tested, including through operational trials in the smelter. Semtech was a device which included a series of cameras to detect certain off-gases, to try to better identify the reaction end points. The Semtech device was not a success and consequently the applicant focused on improving operator behaviour and observation of reaction end points.
128. The smelter processes copper concentrate from the Mount Isa copper concentrator and other sources (25%-27% copper), turning it into copper anode (99.7% copper). It does this by passing the material through a series of furnaces which use intense heat to reduce the material to molten form. During this process chemicals and oxygen are added to facilitate the separation of the copper metal from the waste material.
129. A process flow diagram of the copper smelter process as at the time of the relevant R&D projects is at Appendix C of these reasons.^[4]
130. Before entering the smelter, the copper concentrate is dewatered to a moist powder, including through the use of hyperbaric filters. These filters are fitted with **filter consumables and cloths**, which experience wear and tear as used and are replaced approximately every three weeks. No part of the **filter consumables and cloths** remain in the anode copper produced by the smelter.
131. The first phase in the smelter is the fluxing phase. **Silica** is added to the concentrate in order to remove iron from the copper in the Isasmelt stage. **Limestone** is added to ensure that the slag formed in the Isasmelt furnace is kept liquid. (**Silica** and **limestone** are known as “fluxes”).
132. The material then proceeds to the Isasmelt furnace, where it is heated to around 1,200 degrees Celsius and melts into a molten bath. **Oxygen** is injected into the molten bath to react with the iron in the molten bath and create iron oxide. The iron oxide then combines with the **silica** to make “slag”, which separates from and is lighter than copper sulphide, and is kept liquid by the **limestone**. The molten bath is tapped out of the bottom of the Isasmelt furnace into two rotary holding furnaces. **Drill consumables** and **drill rods** are used to drill the clay plug out of the taphole in the bottom of the Isasmelt furnace in order to tap the molten material. Three to four **drill consumables and drill rods** are used in rotation and replaced approximately every week. **Drill consumables** and **drill rods** are simply used to drill out the plug in the bottom of the furnace. In the rotary holding furnaces the slag is allowed to separate by floating to the top and the furnaces rotate to allow the slag to flow off the top. The slag has no commercial value. What remains is “matte”: about 60% copper, 23% iron and 17% sulphur.

133. The next stage involves four converter furnaces to which the matte is transferred. More **oxygen** is injected into these furnaces, and more **silica** and **limestone**, to create more slag. The injection of oxygen is referred to as a “slag blow”, after which the slag, which again floats, is skimmed from the top of the converter furnace into launders. The launders and the converter furnace are lined with **mill liners**. The **mill liners** wear down through use and are replaced approximately every three months (furnace) and three weeks (launder tiles). No part of the **mill liners** remains in the copper anode. The end of the second slag blow is a “reaction end point” as there is insufficient iron sulphide remaining to form slag.
134. The third injection of **oxygen** is the “copper blow”. It removes sulphur which exits as sulphur dioxide off-gas. That occurs because oxygen in the smelter reacts with chalcopyrite to create Cu and SO₂. The injection of oxygen ceases when the reaction end point is reached when any more oxygen would instead convert the copper to copper oxide, an undesirable outcome. After the copper blow the molten bath is “blister copper”, 99.5% copper.
135. The blister copper proceeds to the anode stage where it passes through two anode furnaces into which **oxygen** is continuously blown. This removes further sulphur, but it also causes some of the copper to become copper oxide which is skimmed from the top (the “anode skim”) and reintroduced into the converter furnaces. **Natural hydrocarbon gas** is then injected into the furnaces to burn out most of the remaining dissolved oxygen. The remaining molten bath is 99.7% copper. This anode copper is cast into 400kg solid ingots of copper anode to be shipped to Townsville. In respect of this review the anode copper is a final product in this form.
136. The SO₂ produced in the copper blow and the anode stage is collected and delivered to an acid plant off-site where it is used by a third party company to produce sulphuric acid. The third party company pays the applicant nothing for it.
137. A negligible amount of **oxygen** remains in the anode copper as an impurity which is later removed via a further refining process. The anode copper contains no **silica** or **limestone**.
138. The following materials are also used in the plant trials at the smelter as part of the running of the smelter: **forged balls 12.7mm and grinding media** (used to grind lime), **screen consumables, minor materials such as nuts and bolts, batteries, caustic soda, other chemicals, lubricants and sealants, water, other gases, detonators, ground engaging tools, hangar bars, anti-scalant and rockbolts**. No residue of these form any part of the copper anode.

McArthur River zinc-lead concentrator process – MRM2-99/00

139. The McArthur River zinc-lead concentrator is located at the McArthur River mine, which is a zinc, lead and silver deposit in the Northern Territory. In the 2005 year (and until 2006) it was an underground mine; since 2006 it has been an open-cut mine. The concentrator does not have separate zinc and lead flotation circuits like the zinc-lead concentrator at Mount Isa. The concentrator at McArthur River primarily targets zinc recovery but it produces a concentrate which contains zinc, lead and silver.
140. The ore in the McArthur River deposit is extremely fine grained and complex. This creates difficulties in the development of a cost effective milling process to separate the valuable minerals from the gangue (sphalerite and galena from pyrite and non-sulphide waste material). The concentrator at McArthur River undertakes an “ultrafine” particle grinding process; it is one of only two base metal operations in Australia, and probably the world, where ultrafine particle grinding is undertaken.
141. R&D project MRM2-99/00 had the objective of improving the quality, efficiency and throughput at the concentrator, particularly in light of the ultrafine particle sizes. The relevant expenditure in relation to MRM2-99/00 was in the 2005 year. In the 2005 year, MRM2-99/00 included nine plant trials in the rougher circuit, nine plant trials in the cleaner circuit, an orebody trial and nine plant trials in the primary grinding and regrinding circuit.
142. The zinc-lead concentrator at McArthur River has four stages: crushing/screening, grinding, flotation (and regrinding), and dewatering. A process flow diagram for the zinc-lead concentrator at McArthur River is Appendix D of these reasons.^[5]
143. The ore mined at McArthur River is crushed first in a primary crusher (a jaw-bone crusher) and

then secondary and tertiary crushers. The crushers are lined with **crusher liners** which wear down and need to be replaced every 4-6 months. No metal particles from the **crusher liners** remain in the final concentrate produced by the concentrator.

144. The crushed ore is conveyed to the SAG mill. It contains 78 mm **steel balls** and is lined with **mill liners and lifters** which lift and throw the balls. Ore that is ground to a sufficiently small size exits the mill through **grates** (also known as **screen consumables**). Water is added to the SAG mill to keep the ore moving and flow the sufficiently small particles through the grates. No part of the **steel balls, mill liners and lifters** or **screen consumables** remains in the final concentrate.
145. **Cyclones** classify the slurry exiting the SAG mill; the smaller particles go directly to the flotation circuit and the larger particles go back into the SAG mill or the vertimill for further grinding. **Cyclones** contain parts which wear out over time and need to be replaced. No residue of the **cyclone** parts remain in the final concentrate produced by the MrArthur River concentrator.
146. The vertimill is an upright grinding mill. It contains **steel balls** of 12 mm diameter and a large internal screw which rotates and lifts the ore and the steel balls up, so they come into contact with one another such that the ore is further broken down. The balls are dropped to the base of the mill to be picked up again. The slurry exiting the vertimill is classified through **cyclones**. Ore that is sufficiently small progresses to the flotation circuit, otherwise it is reground in the SAG mill and/or vertimill.
147. The first stage of flotation is the rougher circuit. Upon entering this circuit, the slurry is about 11% zinc. **MIBC** is added to the slurry to create a stable froth in the tanks, so the bubbles created by blowing compressed air into the tanks do not pop. Some **MIBC** remains in the McArthur River final concentrate as a trace element. In that form it has no commercial value. The **MIBC** degrades naturally once it leaves the concentrator circuit. **Xanthates (ethyl xanthate and propyl xanthate)** are added as “collectors” to attach to the zinc and make it hydrophobic (and therefore attach to the bubbles and float to the top). Some of these collectors will remain in the final concentrate but as trace elements with no commercial value. **Copper sulphate** is added as an “activator” to make the xanthates attach to the zinc more quickly. Waste material (primary silicates, pyrite and quartz) sinks to the bottom of the tanks and enters into the tailings stream. The slurry is at that point about 20% zinc, with a 93% recovery (that is, 7% of the zinc is unintentionally depressed or otherwise sent to tailings).
148. The slurry then progresses through **pre-cyclones** for classification. At that stage, it still contains some “composite” particles containing both valuable minerals and waste material. To separate these, the underflow from the pre-cyclones is pumped into regrind mills (Isamills), which contain **grinding media** of rotating discs and competent sand of approximately 3 mm diameter. The regrind mills further grind the particles down to approximately 7 microns in diameter. The slurry is classified by a further set of **cyclones**, with the underflow returning for more regrinding. The overflow is pumped to the cleaner circuit.
149. The cleaner circuit begins with two conditioner tanks, where **dextrin** and **tanigan** are added to the slurry. These are depressants, added to prevent the waste materials from floating. They do not form part of the final concentrate. More **xanthate** and **copper sulphate** are also added, to act as collectors and activators as described above in relation to the rougher circuit. Some **xanthate** and **copper sulphate** remains in the final concentrate as trace elements. Those trace elements add no value to the product. The slurry is then pumped through six stages of cleaner flotation tanks; the zinc material attaches to the bubbles, floats and passes over the top of the tank and is collected; the waste material sinks and is sent to tailings (although the tailings from the last three tanks are sent back into the previous tank in an attempt to liberate some zinc which may have unintentionally been depressed). Some waste material also floats, known as “entrainment”, and an objective of the cleaner circuit is to separate this entrained material and send it to tailings.
150. The concentrate at the end of the cleaner circuit is approximately 45-47% zinc. Although silver and lead are not targeted by the concentrator, they report through and are also collected with the zinc.
151. The final stage is dewatering. The concentrate is sent to thickener tanks where excess water is removed to be recycled. **Flocculants** are added to encourage the particles to sink so the water

can flow off. Small amounts of **flocculant** remain in the final concentrate but they have no value and break down with the passage of time. The dense underflow is pumped to stock tanks and from there to pressure filters, which filter the concentrate to approximately 13% moisture content. The filter machinery involves **filter consumables** such as filter cloths, valves and valve sleeves which wear out over time and have to be replaced. The final concentrate is then transported by trucks to a port for shipping. For the purposes of these reasons it is a final product in that state.

Ernest Henry copper-gold concentrator process EHM/08

152. The Ernest Henry copper-gold concentrator is located at the Ernest Henry mine, about 40km north-east of Cloncurry in north-western Queensland.
153. The R&D project EHM/08 was carried on at the concentrator in the 2003, 2004 and 2005 years. Its objective in those years was to increase the throughput of the concentrator to reduce the bottleneck at Ernest Henry. It involved trialling new materials, configurations and processes for the grinding media, liners and lifters. New grinding media, lifter and liner designs were trialled in the SAG mill, as were new configurations of these parts. New types of lining for the ball mill were also trialled, and the effect of different types of grinding media on the oxygen concentration of the slurry was tested. A trial of cyclone feed pumps (or sumps) was also undertaken.

The Ernest Henry process—in detail

154. A process flow diagram for the copper concentrator at Ernest Henry appears at Appendix E of these reasons.^[6]
155. The concentrator works similarly to the copper concentrator at Mount Isa. The main differences are that the ore at Ernest Henry is rougher than that at Mount Isa, so a stronger frother is needed in the flotation stage; there is no pre-flotation stage because the Ernest Henry ore does not contain naturally buoyant material; and the concentrate is dewatered using a gravity bell thickener at the end of the process.
156. The ore is delivered from the open pit Ernest Henry mine to a gyratory crusher. It is lined with **crusher liners** which wear down over time and need to be replaced every 8-12 months. No residue from the crusher liners remains in the final concentrate.
157. The ore progresses to the SAG mill, containing **steel balls** and lined with **mill liners and lifters** (including lifter bars). The lifters pick up the ore and the balls and fling them together around the mill, to break up the ore. Water is added to the SAG mill to help move the ore through the mills and the subsequent stages of the concentrator. The SAG mill also have **shell plates and discharge grates**. The **steel balls, mill liners and lifters, shell plates and discharge grates** wear down over time and have to be replaced once they reach a certain size. Nothing of these items remains in the final concentrate.
158. After the SAG mill, the ore passes over a vibrating screen consisting of **screen consumables** which wear down and need replacing every 6 months; the larger particles do not fall through and are sent back to the SAG mill; the smaller particles are classified through **cyclones** containing **cyclone parts** which wear down and need replacing on average every 6 months. The **cyclone** overflow contains the smaller particles, which progress to the flotation stage. The **cyclone** underflow of larger particles is sent to a ball mill for further grinding. The ball mill contains 50 mm and 60 mm **steel balls** which help to further grind the ore and separate its constituent particles. The ball mill is lined with **mill liners**; in the R&D project EHM/08 the use of rubber liners and white iron liners was trialled. No residue of the **screen consumables, cyclones, cyclone parts, steel balls or mill liners** remains in the final concentrate.
159. After being separated by further **cyclones** into smaller and larger particles (the latter being returned to the ball mill for further grinding), the ore progresses to the flotation stage. **SIBX** and **PAX** are added to the slurry to act as collectors to attach to the chalcopyrite (the mineral containing the valuable copper) and make it float. **W34** is added as a frother to stabilise the bubbles in the slurry and stop them from popping (**W34** is stronger than MIBC, the frother used at the Mount Isa copper concentrator, because the ore at Ernest Henry is rougher than that

at Mount Isa, so a stronger frother is required). **Lime** is added as a pH modifier to decrease the acidity of the slurry and thereby help depress the pyrite waste material. Trace amounts of lime and W34 pass through into the final concentrate. To the extent they do, they do so in negligible quantities having no commercial value and not as a desired part of the concentrate.

160. In the rougher tanks, the concentrate which has floated to the top overflows the tanks and is collected in launders; the waste material which has sunk is drained and sent to tailings. The concentrate is ground in a further (re-grind) mill containing **grinding media**. After being classified by **cyclones**, the concentrate progresses to a series of cleaner tanks, containing a higher water ratio. Further separation of the concentrate, floating to the top, and waste material, sinking to the bottom, takes place.
161. The tailings once separated from the concentrate are thickened in a tailings thickener with the addition of **flocculant**. No flocculant is added to the concentrate. The concentrate passes from the top of the cleaner tanks into a concentrate thickener tank, known as a gravity bell thickener. It contains a series of vertical chambers; each chamber is filled with slurry; the thickener squeezes the chambers together to force out water, then air is blown through to force out the dewatered concentrate. **Filter consumables** including filter cloth, which wears out and needs to be replaced every 3 to 4 months, are used in the gravity bell thickener but no residue from them remains in the final concentrate.
162. The final concentrate is about 92% solids, of which approximately 28% is copper. It is placed in a stockpile to be transported for sale. For the purposes of these reasons it is a final product in that state.

THE RESPONDENT'S SUBMISSIONS: FEEDSTOCK EXPENDITURE

163. The Commissioner's principal submission is that, properly understood, all of the applicant's disputed expenditure on the items marked in bold above was expenditure "incurred by the company in acquiring or producing materials or goods to be the subject of processing or transformation by the company in research and development activities" and thus within the meaning that s 73B(1) of the ITAA gives to the term "feedstock expenditure".
164. In their written closing submissions Mr Lloyd and Ms Hirschhorn referred the Tribunal to the principles of statutory interpretation which the respondent submitted govern the Tribunal's construction of the relevant provisions of the ITAA.
165. What follows is a verbatim account of the Commissioner's primary submissions, deleting only some comments on the applicant's submissions:

Construction principles

103. *In Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* [\[2009\] HCA 41](#); [\(2009\) 239 CLR 27](#), the High Court said at [47]:^[71]

This Court has stated on many occasions that the task of statutory construction must begin with a consideration of the text itself [69]. Historical considerations and extrinsic materials cannot be relied on to displace the clear meaning of the text [70]. The language which has actually been employed in the text of legislation is the surest guide to legislative intention [71]. The meaning of the text may require consideration of the context, which includes the general purpose and policy of a provision [72], in particular the mischief [73] it is seeking to remedy.

104. *The High Court has again recently emphasised the centrality of the text to the task of statutory construction. In Commissioner of Taxation v Consolidated Media Holdings Ltd* [\[2012\] HCA 55](#); [\(2012\) 87 ALJR 98](#), French CJ, Hayne, Crennan, Bell and Gageler JJ said at [39]:

"This Court has stated on many occasions that the task of statutory construction must begin with a consideration of the [statutory] text"[59]. So must the task of statutory construction end. The statutory text must be considered in its context. That context includes legislative history and extrinsic materials. Understanding context has utility if, and in so far as, it assists in fixing the meaning of the statutory text. Legislative history and extrinsic materials cannot displace the meaning of the statutory

text. Nor is their examination an end in itself. (underlining added)

105. *In Commissioner of Taxation v Unit Trend Services Pty Limited* [\[2013\] HCA 16](#); [\(2013\) 297 ALR 190](#), French CJ, Crennan, Kiefel, Gageler and Keane JJ at [47] quoted the first sentence of the above passage and added, “[c]ontext and purpose are also important”. They then went on to quote with approval the following passage from the judgment of French CJ and Hayne J in *Certain Lloyd’s Underwriters Subscribing to Contract No IH00AAQS v Cross* [\[2012\] HCA 56](#); [\(2012\) 293 ALR 412 \(Lloyds v Cross\)](#) at [24]:

[24] *The context and purpose of a provision are important to its proper construction because, as the plurality said in Project Blue Sky Inc v Australian Broadcasting Authority, “[t]he primary object of statutory construction is to construe the relevant provision so that it is consistent with the language and purpose of all the provisions of the statute” ... That is, statutory construction requires deciding what is the legal meaning of the relevant provision “by reference to the language of the instrument viewed as a whole” [quoting Cooper Brookes v FCT at 320], and “the context, the general purpose and policy of a provision and its consistency and fairness are surer guides to its meaning than the logic with which it is constructed” [quoting Commissioner for Railways (NSW) v Agalianos* [\[1955\] HCA 27](#); [\(1955\) 92 CLR 390](#) at 397].

106. *However, as French CJ and Hayne J went on to emphasize at [25] of Lloyds v Cross the “purpose” of a statute is one which resides in the text and structure of the statute and is gathered from the text and structure together with appropriate reference to extrinsic materials. It is not a reference to a subjective purpose or intention of the legislators. At [26] of Lloyds v Cross, French CJ and Hayne J went on to say:*

[26] *A second and not unrelated danger that must be avoided in identifying a statute’s purpose is the making of some a priori assumption about its purpose. The purpose of legislation must be derived from what the legislation says, and not from any assumption about the desired or desirable reach or operation of the relevant provisions. As Spigelman CJ, writing extra-curially, correctly said: [Spigelman, “The intolerable wrestle: Developments in statutory interpretation”* [\(2010\) 84 ALJ 822](#), p 826]

Real issues of judicial legitimacy can be raised by judges determining the purpose or purposes of Parliamentary legislation. It is all too easy for the identification of purpose to be driven by what the particular judge regards as the desirable result in a specific case. [Emphasis of French CJ and Hayne J]

And as the plurality said in Australian Education Union v Department of Education and Children’s Services [\[\[2012\] HCA 3](#); [\[2012\] HCA 3](#); [\(2012\) 285 ALR 27](#) at [\[28\]](#)]:

In construing a statute it is not for a court to construct its own idea of a desirable policy, impute it to the legislature, and then characterise it as a statutory purpose.

107. *A similar point had earlier been made by Griffith CJ in Richardson v Austin* [\[1911\] HCA 28](#); [\(1911\) 12 CLR 463 \(Richardson v Austin\)](#) at 470, as follows:

... there is nothing more dangerous and fallacious in interpreting a statute than first of all to assume that the legislature had a particular intention and then, having made up one’s mind what the intention was, to conclude that the intention must necessarily be expressed in a statute, and proceed to find it.

108. *Furthermore, in Construction, Forestry Mining & Energy Union v Mammoet Australia Pty Limited* [\[2013\] HCA 36](#); [\(2013\) 300 ALR 460 \(CFMEU v Mammoet\)](#) at [40], five members of the High Court – by reference to the observations of Gleeson CJ in *Carr v Western Australia* [\[2007\] HCA 47](#); [\(2007\) 232 CLR 132 \(Carr v WA\)](#) at [5]-[7] – referred to the limits of the use to which notions of policy can be put in the task of statutory construction. These limits arise from the fact that legislation rarely pursues a single purpose and is commonly a balance of

competing purposes with resultant uncertainty about how far the legislation pursues a single purpose or object. In Carr v WA at [6], Gleeson CJ, after referring to these matters, said:

Ultimately, it is the text, construed according to such principles of interpretation as provide rational assistance in the circumstances of the particular case, that is controlling.

109. *This was quoted with approval in CFMEU v Mammoet at [40].*

110. *In Sea Shepherd Australia Limited v Commissioner of Taxation [2013] FCAFC 68; 212 FCR 252, the Full Court recently summarised relevant principles concerning the construction of legislative provisions, from [34]:*

34 The general principles of construction of a statute were not in dispute. For present purposes, it is sufficient to record that they were identified by the Tribunal and may be summarised as follows:

1. The task is to construe the language of the statute, not individual words: St George Bank Ltd v Federal Commissioner of Taxation [2009] FCAFC 62; (2009) 176 FCR 424 at [28]; see also XYZ v Commonwealth [2006] HCA 25; (2006) 227 CLR 532 at [102]; R v Brown [1996] 1 AC 543 at 561 quoted in Agfa-Gevaert at 397 and Metropolitan Gas Co v Federated Gas Employees' Industrial Union [1925] HCA 5; (1924) 35 CLR 449 at 455.

2. The task is not to pull apart a provision, or composite phrase within a provision, into its constituent words, select one meaning, divorced from the context in which it appears, and then reassemble the provision: Lorimer v Smail [1911] HCA 44; (1911) 12 CLR 504 at 508–10; R v Carter; Ex parte Kisch [1934] HCA 50; (1934) 52 CLR 221; Biga Nominees Pty Ltd v Commissioner of Taxation (1991) 104 FLR 74 at 85–6. Indeed, it is rare that resort to a dictionary will be of assistance in searching for the legal meaning of a provision in a statute: R v Campbell [2008] NSWCCA 214; (2008) 73 NSWLR 272 at [49].

3. As Gleeson CJ said in XYZ v Commonwealth at [19]:

There are many instances where it is misleading to construe a composite phrase simply by combining the dictionary meanings of its component parts.

See also General Accident Fire & Life Assurance Corporation Ltd v Commissioner of Pay-roll Tax [1982] 2 NSWLR 52 referred to by Gleeson CJ where Lord Wilberforce remarked, in the course of argument, that an Australian who looked up the words “commission” and “agent” in a dictionary would probably be surprised to be told that, in England, a commission agent is a bookmaker.

4. The text of the provision is to be construed according to the context “by reference to the language of the instrument viewed as a whole”: Project Blue Sky Inc v Australian Broadcasting Authority [1998] HCA 28; (1998) 194 CLR 355 at [69] (citations omitted). In the present case, the word “care” is to be construed in the context of the composite phrase of which it forms part, being “short-term direct care”, in the context of the rest of the specific paragraph and in the context of para (b) of Item 4.1.6. Similarly, the phrase “animals without owners” is to be construed in context.

Argument and analysis

35 Sea Shepherd’s argument depended upon an atomised analysis of Item 4.1.6. Its submission depended upon taking separate words of the provision (particularly the word “care”) and, contrary to the principles of statutory construction, applying to each word one particular aspect of a dictionary definition. Sea Shepherd then sought to add the various definitions together and produce what it submitted was a meaning for the relevant provisions that accorded with its case.

36 This approach to construction of the relevant provisions was rightly rejected by the Tribunal. Construction of a statute cannot be undertaken with no more than the words of the provision in one hand and a dictionary in the other. Judge Learned Hand rightly cautioned against the mechanical examination of words in isolation. As his Honour said in Cabell v Markham, Allen Property

Custodian [148 F2d 737](#) (2d Cir 1945) at 739:

... it is one of the surest indexes of a mature and developed jurisprudence not to make a fortress out of the dictionary; but to remember that statutes always have some purpose or object to accomplish, whose sympathetic and imaginative discovery is the surest guide to their meaning."

111. *As a matter of statutory interpretation, a composite phrase must be given a meaning as a whole: R v. Brown ([1996](#)) AC 543 at 561, approved in Collector of Customs v. Agfa-Gevaert Ltd [[1996](#)] HCA 36; ([1996](#)) 186 CLR 389 at 396; see also Hartnett v. Migration Agents Authority ([2004](#)) 140 FCR 388; [[2004](#)] FCAFC 269 at [60]^[8].*
112. *In construing the meaning of the definition of "feedstock expenditure" in these proceedings, the relevant context in which that provision appears is important to consider. It is part of the scheme of "feedstock provisions" that were introduced into the Act at the same time and were intended to be read with and operate together. The provision needs to be considered in that context and not as an isolated definition.*
113. *[...] it is necessary to instead "construe the instrument as a whole" – this means that the other provisions in the scheme of feedstock provisions together with s 73B generally must be considered in determining the proper construction of the definition of "feedstock expenditure".*

The text of the definition of "feedstock expenditure"

114. *In relation, firstly, to the text of the definition of "feedstock expenditure", it refers to expenditure incurred in acquiring materials or goods to be the subject of processing or transformation by the company in R&D activities. In other words, the provision covers a situation where expenditure is "incurred" by a taxpayer in acquiring or producing materials or goods in an income year that is either in advance of or the same as the income year in which the materials or goods are actually the subject of processing or transformation in R&D activities.*
115. *In each income year, the taxpayer company is required to determine if the materials or goods that it has acquired or produced in that year are in that same income year or in the future, to be the subject of processing or transformation by the company in R&D activities – if so, then the definition will be satisfied and expenditure on those items will be automatically excluded from "research and development expenditure" in that income year.*
116. *The definition of "feedstock input" by contrast has regard to the taxpayer company's feedstock expenditure in relation to materials or goods that were the subject of processing or transformation by the company in R&D activities during the income year.*
117. *Likewise, the definition of "feedstock output" has regard to either the sales revenue or the arm's length value of any products that were obtained by the company during the year of income from the processing or transformation of materials or goods (the acquisition or production of which was feedstock expenditure).*
118. *The feedstock input and feedstock output definitions thus operate where, in the same or a subsequent income year (from the year in which the materials or goods were first acquired or produced), the relevant materials or goods have actually been the subject of processing or transformation in R&D activities and from which there has been produced marketable products. There has been a "convergence" between a taxpayer's R&D activities and a production process.*
119. *It makes understandable accounting and taxation sense to:*
 - (a) *automatically exclude the feedstock expenditure as a concessional deduction in the year it is "incurred" (when the taxation treatment of expenditure ordinarily needs to be determined by a taxpayer in their income tax return); but to*
 - (b) *have a mechanism in the income year in which the relevant processing or transformation of the materials and goods actually occurs so that there can be a proper comparison between the value of the marketable products that are produced and the expenditure on the feedstock inputs in order to determine if there is any "net cost" of materials and/or goods in obtaining any products through R&D activities. Any such "net cost" will be "eligible feedstock expenditure" which is then specifically included back*

into the definition of “research and development expenditure” in the income year that the processing/transformation took place and the marketable products were obtained.

120. *The purpose of the feedstock provisions is therefore to identify and act on the “net cost” of the materials and goods. It is clear from the definitions of “eligible feedstock expenditure” and “residual feedstock expenditure” that the purpose of calculating “feedstock input” and “feedstock output” is to compare them arithmetically in order to compute such a net cost of carrying out the R&D activities in question.*
121. *[...] as a matter of statutory construction, it is inappropriate to have regard to the ordinary meaning of words that are contained in an expression that is defined in the legislation in order to either construe the definition in question or to confirm a particular construction that is reached.*
122. *The ordinary meaning of the word “feedstock”, whatever that may be, is not an expression that appears in the legislation other than in defined expressions such as “feedstock expenditure”, “feedstock input”, “feedstock output” etc. Accordingly the ordinary meaning of that word in and of itself is not relevant in construing the definition of “feedstock expenditure” or in “confirming” any construction of the word “transformation”.*
123. *The Full Court has definitively stated the above principle in Esso Australia Resources Pty Ltd v. Federal Commissioner of Taxation ([2011](#)) 199 FCR 226; [\[2011\] FCAFC 154](#) at [\[101\]-\[107\]](#):*

101 One can readily understand that the meaning of a term which is defined is to be ascertained by reference to its definition. But acceptance of that proposition does not entail acceptance of the larger proposition that ambiguity in a definition cannot be resolved by reference to the words selected by Parliament to be the term defined. Given that ambiguity is to be resolved by an examination of the statute as a whole, it is surprising, if the co-venturers be correct, that that statute-wide examination is to have excluded from it the very phrase under consideration.

*102 The principle contended for by the co-venturers does, however, appear to be the established law of this country. ‘It would be quite circular to construe the words of a definition by reference to the term defined’: Owners of Shin Kobe Maru v Empire Shipping Co Inc [\[1994\] HCA 54](#); [\(1994\) 181 CLR 404](#) at 419 (Shin Kobe Maru). For that proposition the High Court cited *Wacal Developments Pty Ltd v Realty Developments Pty Ltd* [\[1978\] HCA 30](#); [\(1978\) 140 CLR 503 \(Wacal\)](#). It is true that in *Wacal Gibbs J* declined to allow the term defined in that case – ‘instalment contract’ – to be used as aid to the construction of the associated definition (“[w]ith all respect it is impermissible to construe a definition by reference to the term defined” (at 507)). But it may be doubted whether *Wacal* established anything so broad as the larger proposition that the term defined may not be used to resolve antecedent ambiguity in the definition. At least two members of the bench in *Wacal* thought that there was no ambiguity in the definition at all which required resolution. *Stephen J* thought that “[n]o doctrine of interpretation justifies, in the present circumstances, any departure from what I regard as the ordinary meaning of the legislature’s words” (at 513) and *Murphy J* thought that there “hardly seems to be any room for ambiguity” (at 522). It is difficult to discern from *Wacal* a ratio decidendi that requires abstention from the reference to the term defined as a device for resolving ambiguity in a definition for the case did not present that issue.*

*103 Nevertheless, Shin Kobe Maru does seem to establish that principle. There the question was whether the expression “a claim... relating to ... ownership” in [s 4\(2\)\(a\)](#) of the [Admiralty Act 1988](#) (Cth) extended to a claim to enforce an agreement that ownership in a vessel be transferred to a third party. The term defined was “proprietary maritime claim”. The passage already cited from *Shin Kobe Maru* shows that the Court held that the word “proprietary” could not be used as an interpretative aid in construing the definition (at 419). That would seem to close the question in Australia.*

*104 Accordingly, this Court is bound to disregard the word “marketable” in resolving ambiguity in the definition of “marketable petroleum commodity”. It may be that this approach is difficult to reconcile with the general approach to interpreting statutes which requires that the meaning of a provision be determined “by reference to the language of the instrument as a whole”: *Project Blue**

Sky at [69] and the authorities there cited. The phrase or expression is just as much a part of the statute as any other part.

105 *The learned author of Bennion on Statutory Interpretation (5th ed, Lexis Nexis, 2010) instances a number of English decisions where, as he puts it, the ‘potency’ of the term defined has influenced the construction of the definition. In MacDonald (Inspector of Taxes) v Dextra Accessories Ltd [2005] UKHL 47; [2005] 4 All ER 107 Lord Hoffmann said (at [18]):*

*“...a definition may give the words a meaning different from their ordinary meaning. **But that does not mean that the choice of words adopted by Parliament must be wholly ignored.** If the terms of the definition are ambiguous, the choice of the term to be defined may throw some light on what they mean.”*

[Emphasis added]

106 *A similar result occurred in Delaney v Staples (trading as De Monfort Recruitment) [1992] 1 All ER 944 at 947 where Lord Browne-Wilkinson construed the statutory definition of wages “bearing in mind the normal meaning of the word”. Lord Scott of Foscote, in dissent, did something similar with the expression “town or village green” in Oxfordshire County Council v Oxford City Council [2006] UKHL 25; [2006] 2 AC 674 at [82]- [83] although it is true that the majority in that appeal did not regard the definition as being sufficiently ambiguous to permit resort to the term defined. The majority included Lord Hoffman.*

107 *In any event, we proceed on the basis that no regard should be had to the word “marketable” for the balance of these reasons. We conclude that the textual and contextual indications to which we have referred mean that the expression “marketable petroleum commodities” does not apply to commodities which are not are not yet products capable of being marketed.*

The breadth of the terms used in the provision and the scheme of feedstock provisions generally

124. *The terms “materials”, “goods”, “processing”, “transformation” and “energy” used in the definition of “feedstock expenditure” are not defined in s 73B (or in the ITAA 1936 or ITAA 1997 generally) but are on their face very broad expressions.*
125. *As noted at the outset s 73B applies to Australian companies generally and therefore the scheme of feedstock provisions also applies to any of those Australian companies that undertake R&D activities and through those activities produce valuable marketable products. The provisions potentially apply to an extremely wide range of industries, R&D activities and products.*

“Materials”, “goods” and “energy inputs”

126. *The definition of “feedstock expenditure” uses the words “materials” or “goods”. The legislature did not see fit to use more specialised or narrow words such as “raw materials”, “natural resources”, “commodities” etc.^[9]*
127. *Without ignoring the real caution expressed in the Sea Shepherd case (supra) about construing provisions by the use of a dictionary definitions for single words rather than construing the “language of the statute” and avoiding a mechanical examination of the words in isolation, for the background assistance of the Tribunal, the relevant definitions of “material(s)” and “good(s)” in the Macquarie and Oxford dictionaries are as follows (underlining added):*
 - (a) *Macquarie^[10]: **material** (noun) 1. The substance or substances of which a thing is made or composed. 2. Any constituent element of a thing. 3. Anything serving as crude or raw matter for working upon or developing.....7. (plural) articles of any kind requisite for making or doing something 8. Formed or consisting of matter; physical; corporeal; the material world ...*
 - (b) *Oxford^[11]: **material** (n & adj) n 1.the matter from which a thing is made. 2... 3. (in*

pl) things needed for an activity (building materials, cleaning materials, writing materials)

*(c) Macquarie: **good** ...28. (plural) possessions, especially movable effects or personal chattels. 29. (plural) articles of trade; wares; merchandise, especially that which is transported by land...*

*(d) Oxford: **good** ... (n) (pl) 3. (a) movable property or merchandise (b) things to be transported, as distinct from passengers...*

128. *The plural definition of “material” (i.e. “materials”) in both cases above appears to refer to articles of any kind/things requisite for making or doing something or needed for an activity. The plural definition of “good” (i.e. “goods”) appears to refer to movable property, effects or personal chattels (i.e. as opposed to something that is immovable such as plant affixed to the ground).*
129. *Both words have very broad meanings, the individual words are plainly not necessarily mutually exclusive and it is likely that their meaning may overlap in many cases.*
130. *The Respondent does not apprehend that there is any real dispute between the parties in these proceedings that the disputed expenditure in question all fell within the meaning of either “materials” or “goods” or both. The real dispute lies in whether the disputed expenditure, being materials or goods, were “to be the subject of processing or transformation by the Applicant in research and development activities”.*
131. *It is noted that the definition of “feedstock expenditure” specifically includes “energy” inputs directly into the processing or transformation in the R&D activities. The Respondent apprehends that the Applicant may suggest that this somehow limits the expenditure on other materials and goods that will be the subject of processing or transformation in R&D activities. There are two answers to such a proposition.*
132. *The first is that some meanings of energy (in particular technical meanings in physics) may not be regarded as falling within the meaning of “materials” or “goods”. The definitions of this term in the Macquarie and Oxford dictionaries are as follows:*
- (a) Macquarie: **energy** (noun) 1. (habitual) capacity or habit of vigorous activity 2. The actual exertion of power; operations activity 3. Power as exerted 4. Ability to produce action or effect 5. Vigour or forcefulness of expression 6. Physics the capacity for doing work which exists in various forms, as kinetic energy, nuclear energy etc.*
- (b) Oxford: **energy** (n) 1. Force, vigour, capacity for activity 2.... 3: Physics the capacity of matter or radiation to do work 4. The means of doing work by utilising matter or radiation.*
133. *Given that “energy”, as defined in a physics context above, is the ability of “matter... to do work” and that “materials” or “goods” are themselves “matter”, express mention of the term was required to ensure that “feedstock expenditure” was not limited to physical materials.*
134. *Secondly, energy inputs are also somewhat different to expenditure on materials and goods, the latter can be purchased and kept in reserve for R&D activities in a later income year whereas expenditure on energy inputs (or at least some of them) would typically only be incurred at the time that the actual processing or transformation in R&D activities takes place (eg. Electricity, gas, oxygen in the smelter etc.)*

“...to be the subject of processing or transformation... in research and development activities”

135. *Having regard to the text of the definition of “feedstock expenditure” as a whole, it is necessary to determine whether the goods and materials (the disputed expenditure in question) were “to be the subject of processing or transformation... in research and development activities”. The statutory question is not “to be the subject of processing or transformation... in the production process generally”...*
136. *It is insufficient to say that there is no dispute that the Applicant undertook R&D activities or that the expenditures were related to them; the dispute in these proceedings concerns whether the disputed expenditures were incurred on goods or materials to be the subject of processing or transformation in R&D activities. In this sense, it is not irrelevant to consider the nature of those activities. Insofar as those activities comprise plant trials, it is important to note that for*

the period concerned the commercial objectives were subordinated to the characterisation of those activities as R&D activities.

137. *The use of “research and development activities” in the definition of “feedstock expenditure” inevitably means that **factual** questions will be raised as to whether the disputed expenditure was to be and/or was the subject of processing or transformation in the relevant registered R&D activities to which it related in the relevant income years. In answering this question, the Tribunal needs to consider the registered R&D activities in question and the disputed expenditure. In many cases the Tribunal saw and heard evidence that the disputed expenditure itself (or significant parts thereof) included the very materials and goods that were being trialled “in” the Applicant’s R&D activities (the evidence is discussed in greater detail below). In other words, on the Applicant’s construction of the legislative provision, these materials and goods were the very subject (i.e. focus) of processing or transformation in the R&D activities – the R&D trials were directed to how these items (often different brands that might be more cost effective or different sizes of items already used, for example, grinding balls or different types such as chrome media instead of carbon iron media) would work for the Applicant and the effect of the new/different items in the overall plant context..*
138. *There are no definitions of “processing” or “transformation” in s 73B or the ITAA 1936 or ITAA 1997 generally.*
139. *Like “materials” and “goods”, the expressions “processing” and “transformation” are both quite broad in their meaning. This is not particularly surprising given that the feedstock expenditure definition applies to Australian companies in a diverse range of R&D activities that involve not only activities such as processes to extract metals from ore but manufacturing activities where many materials and goods may be combined to make products.*
140. *For the background assistance of the Tribunal, the relevant definitions of “process”^[12] and “transformation” in the Macquarie and Oxford dictionaries are as follows:*
- (a) Macquarie: **process** / noun 1. A systematic series of actions directed to some end; the process of making butter 2. A continuous action, operation or series of changes taking place in a definite manner...9. The condition of being carried on... 11. To treat or prepare by some particular process, as in manufacturing 12. To convert (an agricultural commodity) into marketable form by some special process*
- (b) Oxford: **process** n. 1. A course of action or proceeding, esp. a series of stages in manufacture, computing etc. v tr 1. Handle or deal with by a particular process.*
- (c) Macquarie: **Transformation-** noun 1. The act of transforming 2. The state of being transformed 3. Change in form, appearance, nature or character. 4. Physics the change of one nuclide or element into another ...*
- (d) Oxford: **Transformation** n 1. The act or an instance of transforming; the state of being transformed...3. The induced or spontaneous change of one element into another...*
141. *In the present case, the Tribunal heard evidence in chief and under cross examination that the materials and goods that formed the disputed expenditure were the subject of “transformation” in the Applicant’s registered R&D activities.*
142. *There is nothing in the plain words of the provision to suggest that “to be the subject of processing or transformation... in R&D activities” means that, as the Applicant has suggested in the past, the relevant materials or goods must only be those that are the “topic”, “focus” or “matter” of processing or transformation in the Applicant’s R&D activities and, further, that this is always limited to what the Applicant refers to as “raw materials” (that is ore). This amounts to a gloss on the plain words of the provision.*
143. *First, as discussed above, the statutory question includes the phrase “in R&D activities”. It is necessary in all cases to look at the expenditure on materials and goods and to determine whether or not they are to be (or indeed already have been during the same income year) the subject of processing or transformation in R&D activities. The question as to whether materials and goods satisfy this statutory criteria is to be asked at the time the materials and goods are acquired or produced (that is, during the income year) but practically will be considered at the time the relevant taxpayer lodges its income tax return. At that time an R&D plan will have been prepared by the taxpayer and indeed an application may already have been made in relation to the registration of R&D activities already carried out in that income*

year with the Board (which registration needs to be made within 10 months after the end of the year of income^[13]).

144. Secondly, the plain text of other provisions in the feedstock scheme suggest that a narrow definition of feedstock expenditure is highly unlikely.
145. There would seem to be little warrant in this scheme of the provisions to have a very limited definition of feedstock expenditure (on the Applicant's submission in this case, it is limited to only to the ore and energy inputs) and compare this with **the proceeds from the sale or assumed arm's length value** of the concentrate in question. The feedstock input part of the equation would be missing significant costs of items that are clearly materials and goods used in the process of making the "product" obtained. It would also be more likely to mean, in a mathematical sense, that the feedstock output would be greater than the feedstock input and mean there was no eligible feedstock expenditure available for deduction at 125%. The scheme, evident in the provisions, would not work properly to allow a deduction only for the "**net cost**" of materials or goods processed or transformed to obtain any product in the R&D activities. Instead the more that certain materials and goods that are excluded from the definition of "feedstock expenditure" would mean, mathematically, that:
- (a) those materials and goods would be fully deductible at 125% - they are not excluded from "research and development expenditure"; and
 - (b) the limited "raw materials" (to borrow that expression from the Applicants) and energy that are conceded to be feedstock inputs by the Applicant would be extremely unlikely to exceed the value of final marketable products meaning that there would be no "eligible feedstock expenditure" for deduction at 125%.

Respondent's primary submission - the materials and goods were all the subject of "transformation"... in the R&D activities

146. It does not appear to be a matter of any dispute between the parties that the materials or goods in question "changed" in the R&D activities, although perhaps there are differences in the admitted "significance" of the changes. Even the Applicant conceded at the commencement of the proceedings (with three exceptions that it says relates to flocculants, dextrin and water) at AOS [146] that:

The balance of the materials, though, did change in some physical way in the course of the R&D projects, even if only in a minor way. The Machine Parts were gradually worn down (in the course of one R&D Project or over the course of several R&D Projects), some of the Chemicals underwent chemical reactions, and the Other Materials such as batteries and welding gases were used, and eventually used up.

147. It is clear that all materials and goods (including flocculants, dextrin and water as discussed below) all underwent transformation within the ordinary meaning of that word and in some cases the transformation was substantial. All items all changed in their physical appearance and often also in their form, nature and character in the R&D activities as set out in detail below by reference to the MRM2 99/00 R&D activities. None of the items, barring water that went through a recycling process (but only after first becoming "dirty" water and thus changing its appearance in the R&D activities), could be re-used for the same purpose – this is because the items were "consumed" and/or "used up".
148. [...] there is nothing in the ordinary meaning of "transformation" as it appears in the definition of "feedstock expenditure" that would suggest that in the case of chemicals, there must necessarily be a chemical transformation within the laws of chemistry^[14]. The Applicant's submission appears to suggest that the meaning of "transformation" will change having regard to the type of "materials" or "goods" in question and does not have a uniform meaning notwithstanding it must apply across all the relevant types of R&D activities that might be undertaken by eligible Australian companies. For example, in many pharmaceutical R&D activities, it is not unreasonable to expect that some new drugs may be developed by active ingredients being combined, and thus "transformed", into a new drug without there necessarily being a "chemical reaction" involving some or all of the active ingredients. To the

extent that the Applicant suggests that the meaning of “transformation” must differ depending on the nature of the materials or goods in question, then such a submission ought to be rejected by the Tribunal.

149. *In the case of the zinc (lead) concentrator process at Macarthur River Mining, as an example, the items that were the subject of the disputed expenditure were all plainly the subject of “transformation” within the ordinary meaning of the word in the R&D activities.*
166. *In relation to the expenditure items which the Commissioner had disallowed Mr Lloyd and Ms Hirschhorn submitted:*
184. *the word “transformation” is broad and contemplates any change in form, appearance, nature or character. There is nothing in the text of the definitions of “feedstock output” and “feedstock input” to suggest otherwise. The definition of “feedstock output” refers to “any products that were obtained by the company from the processing or transformation of materials or goods, the acquisition or production of which was feedstock expenditure of the company....”. It is noted that the definition does not say any products “made from” or “containing” the relevant materials and goods. As the Applicant accepted in its concession dated 10 July 2013 (at Appendix 1), even “by-products” would still be regarded as products for the purposes of the definition of “feedstock output”.*
185. *In relation to AOS [149], it is correct that Parliament did not intend to exclude all expenditure from the R&D allowance. There are at least two hurdles for expenditure to meet in order to be excluded under the “feedstock expenditure” exception:*
- (i) it must be expenditure to acquire or produce materials or goods (this will immediately exclude all “non-material” or “non-good” expenditure) and*
 - (ii) the materials and goods themselves must be acquired or produced “to be the subject of processing or transformation in R&D activities” – in other words there must be a link between the materials and goods and processing/transformation in the particular R&D activities (without that link then R&D expenditure even on materials or goods will not be feedstock expenditure – examples might be head office expenses such as office supplies, training or PPE equipment etc. as discussed below in relation to MET 002).*
186. *The constraint in the feedstock provisions on the deductibility at a premium rate for items that constitute “materials” and “goods” that are the subject of processing or transformation in R&D activities is therefore not a case where the “exception subsumes the rule”. There is an extremely wide variety of expenditure that a taxpayer may conceivably claim R&D deductions for and that would not fall within the feedstock expenditure exception.*
187. *For example in MET 002 in the lead/zinc concentrator at Mount Isa, the costs of operating the concentrator were claimed for 134 days in total during the 2005 income year at a daily rate based on the “total costs” of operating the concentrator for the month^[15]. A breakdown of the “total costs” for the concentrator for each month is contained in the T documents so that the Tribunal can see all of the costs claimed by the Applicant^[16]. In addition to the “disputed expenditure” in this case, the monthly costs of the operating the concentrator that went into working out the daily cost of the concentrator to be claimed for each day of the R&D plant trials included, inter alia, the costs of:*
- (a) [101] Wages*
 - (b) [111] Salary*
 - (c) [174] Training and seminars*
 - (d) [301] Office supplies*
 - (e) [302] Tools*
 - (f) [303] PPE*
 - (g) [305] Mobile equipment*
 - (h) [332] Lifting equipment*
 - (i) [403] Leased plant and equipment*
 - (j) [470] Telecommunications*

- (k) [482] IT computer
 - (l) [530] All Lab (i.e. laboratory)
 - (m) [573] All Equip hire
 - (n) [611] Mine leases
 - (o) [620] Print and stationery
 - (p) [621] Food supplies
 - (q) [684] Corp Off ch (this appears to mean “Corporate office charges”)
188. *A number of the categories of expenditure above might well be reasonably expected to include some “materials” or “goods” (e.g. office supplies, tools, PPE) but would not constitute feedstock expenditure because they are not the subject of processing or transformation in R&D activities (i.e. in the particular plant trials). Whilst they have obviously been regarded by the Applicant as being “directly related” to the R&D activities in order to be claimed as a deduction as “research and development expenditure”, the costs of such materials or goods would not be within the feedstock expenditure exception and were not costs adjusted by the ATO in the assessments before the Tribunal.*
189. [...]
190. *... An absolute statement that “an item is not “transformed” merely by being worn down or used up in its ordinary course” (AOS at [149]) is not an answer to the statutory question posed in the definition of “feedstock expenditure”. Instead it appears to be asking different questions (that is, what is the role of an item in the taxpayer’s ordinary course of business? has it been “transformed” in the taxpayer’s ordinary course of business? has it been transformed into a product made by the taxpayer?) and these are questions not posed by the statute.*

Consideration: the Commissioner’s primary submission

167. The difficulty the Tribunal has in accepting the conclusions the Commissioner urges flows not from the Tribunal rejecting the principles of statutory interpretation invoked by Mr Lloyd and Ms Hirschhorn but because of its duty to apply those principles.
168. The Tribunal accepts the respondent’s submissions at [R103]-[R112] and [R123] set out in [166] above as to the relevant principles of statutory interpretation that it is bound to apply.
169. Lest that short statement suggest any lack of detailed attention by the Tribunal to its duty to explain its reasoning the Tribunal explicitly endorses what the Commissioner submits in reliance on the passages cited from *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue (Northern Territory)* (2009) 239 CLR 27; [2009] HCA 41 at [47]; *Commissioner of Taxation v Consolidated Media Holdings Ltd* (2012) 87 ALJR 98; [2012] HCA 55 at [39] (ignoring the underlining added for emphasis by the respondent) and *Commissioner of Taxation v Unit Trend Services Pty Ltd* (2013) 87 ALJR 588; [2013] HCA 16 at [47] to establish the centrality of text to the task of statutory interpretation. The Tribunal need not repeat those submissions. For its part the Tribunal emphasises only that in construing a statute the text of any particular section must be read and understood as part of the statute viewed as a whole: *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355; [1998] HCA 28 at [69].
170. The Tribunal further endorses the Commissioner’s submission that the obligation to consider the text of a section in its context sometimes authorises reference to legislative history and extrinsic materials but that authorisation is not at large. It is to be understood and applied in terms explained and limited by the passages cited by the respondent from *Commissioner of Taxation v Unit Trend Services Pty Ltd* and *Certain Lloyd’s Underwriters v Cross* (2012) 248 CLR 378; [2012] HCA 56 at [24]- [26].
171. The Tribunal accepts that in ascertaining the purpose or intention of the Parliament a court or this Tribunal must not act on an *a priori* assumption about its purpose. The Tribunal agrees with the respondent’s submissions that the applicable law is as stated by French CJ and Hayne J in *Certain Lloyd’s Underwriters v Cross* at [26] to the same effect as Griffith CJ stated in *Richardson v Austin* [1911] HCA 28; (1911) 12 CLR 463 at 470:

....there is nothing more dangerous and fallacious in interpreting a statute than first of all to assume that the legislature had a particular intention and then, having made up one's mind what the intention was, to conclude that the intention must necessarily be expressed in a statute, and proceed to find it.

172. Further, the Tribunal agrees with the Commissioner's submission that it will often be misleading, for the reasons given by Gleeson CJ in *XYZ v Commonwealth* ([2006](#)) [227 CLR 532](#); [\[2006\] HCA 25](#) at [\[19\]](#), to simply assemble and combine various dictionary meanings of the words of a composite phrase found in a statute when purporting to construe it.
173. The Tribunal accepts it is bound by the decision of the Full Court of the Federal Court of Australia (Besanko and Gordon JJ; Dodds-Streeton J dissenting) in *Sea Shepherd Australia Ltd v Federal Commissioner of Taxation* ([2013](#)) [212 FCR 252](#); [\[2013\] FCAFC 68](#) as to the principles it must apply to the construction of a composite phrase: see per Gordon J at [34] set out in the respondent's submissions.
174. The Tribunal accepts the Commissioner's submission that it is equally bound by the decision of the Full Court of the Federal Court of Australia in *Esso Australia Resources Pty Ltd v Federal Commissioner of Taxation* ([2011](#)) [199 FCR 226](#); [\[2011\] FCAFC 154](#) to place no significance upon the ordinary meaning of a defined term.
175. Finally, the Tribunal accepts the respondent's submission that the Tribunal's duty to read the words comprising the definition of "feedstock expenditure" as part of the ITAA as a whole requires that the other provisions in the scheme of feedstock provisions together with s 73B generally must be considered in determining the proper construction of the definition of "feedstock expenditure".

Application of those principles to the definition of "feedstock expenditure"

176. The principles of statutory interpretation correctly identified by the Commissioner require the Tribunal to reach a contrary conclusion to that for which the Commissioner contended.
177. In the Tribunal's view the text of the relevant provisions, read as part of s 73B of the ITAA, allows the Tribunal to ascertain the meaning conveyed by the definition of "feedstock expenditure" without any requirement to resort to extrinsic materials.
178. The starting point for analysis is the definition of research and development expenditure.
179. The definition is as follows:

research and development expenditure, in relation to an eligible company in relation to a year of income, means expenditure (other than core technology expenditure, interest expenditure, feedstock expenditure, excluded plant expenditure or expenditure incurred in the acquisition or construction of a building or of an extension, alteration, or improvement to a building) incurred by the company during the year of income, being:

- (a) contracted expenditure of the company;*
- (b) salary expenditure of the company, being expenditure incurred on after 1 July 1985; or*
- (c) other expenditure incurred on or after 1 July 1985 directly in respect of research and development activities carried on by or on behalf of the company on or after 1 July 1985;*

and includes any eligible feedstock expenditure that the company has in respect of the year of income in respect of related research and development activities.

180. The definition posits a general rule (references to non-relevant details omitted) that all expenditure after 1 July 1985 incurred by an eligible company directly in respect of research and development activities carried on by that company is research and development expenditure in relation to a year of income.
181. That general rule is then made subject to a number of exclusions. Core technology expenditure,

interest expenditure, feedstock expenditure, excluded plant expenditure or expenditure incurred in the acquisition or construction of a building or of an extension, alteration or improvement to a building are all excluded. As previously noted the Commissioner accepts that subject to the exclusion referred to of feedstock expenditure the disputed expenditure of the applicant in each year of income comes within this general rule.

182. The general rule is also made subject to an inclusion. Any “eligible feedstock expenditure” that an eligible company has incurred in a year of income in respect of related research and development activities is included as research and development expenditure.
183. Each of the items for which expenditure is excluded with the exception of expenditure incurred in the acquisition or construction of a building or of an extension, alteration or improvement to a building (i.e. core technology expenditure, interest expenditure, feedstock expenditure and excluded plant expenditure) is further defined by s 73B(1) of the ITAA.
184. The circumstance that each of those terms have been defined by statute attracts the principle of statutory interpretation contended for by the Commissioner that no significance can be placed on the ordinary meaning those words might otherwise be thought to convey. Each of the defined terms must be construed as defined subject only to the proposition that the meaning of the definitions themselves may be informed by the context of the legislation read as a whole.
185. There is thus no place for *any a priori* assumptions based on the ordinary meaning of those words to narrow or broaden any such exception or inclusion.
186. Feedstock expenditure is defined as follows;

feedstock expenditure, in relation to an eligible company, means expenditure incurred by the company in acquiring or producing materials or goods to be the subject of processing or transformation by the company in research and development activities, and includes expenditure incurred by the company on any energy input directly into the processing or transformation.

187. As a matter of ordinary English grammar the definition of feedstock expenditure makes a critical distinction between:
 - (a) expenditure that is “incurred by the company in acquiring or producing materials or goods to be the subject of processing or transformation by the company in research and development activities”; and
 - (b) expenditure otherwise incurred by the eligible company directly in respect of research and development activities carried on by the company within the meaning of subclause (c) of the definition of “research and development expenditure” in s 73B(1) of the ITAA.

The Commissioner accepts that (a) does not entirely subsume (b). The former is not eligible to be deducted at the premium rate; the latter is.

188. Things which are acquired to be the subject of some process in an activity cannot share a common identity with those acquired to subject them to that activity. As a matter of ordinary grammar the exception does not extend to what a company spends (whether on materials, goods or otherwise) to subject goods or materials to processing or transformation in the company’s R&D activities.
189. The exception only applies to expenditure on such goods or materials as are acquired or produced in order that they will be subjected to processing or transformation in the activity. An example may illustrate the point.
190. Assume an eligible company that manufactures food products submits its plans for R&D activities in order to test whether a different mechanism might enhance its production of ground coffee. To conduct that R&D it buys new parts for its industrial scale grinding machine and uses the same coffee beans it ordinarily grinds.
191. Assume that the new grinding mechanism suffers at least minimal wear while grinding the coffee beans in the course of these R&D activities. On the Commissioner’s case that is enough to effect the coffee grinder’s mechanism’s “transformation”.

192. The result, on the Commissioner case, is that the company's expenditure not only on the coffee but also on the coffee grinding mechanism is "feedstock expenditure" incurred by the company "in acquiring or producing materials or goods to be the subject of processing or transformation by the company in research and development activities". That conclusion sounds decidedly odd.
193. The reason it is odd is because it has ignored the bifurcation inherent in the Parliament's use of the adjectival phrase "to be the subject". The company's expenditure on coffee beans clearly can be said to have been incurred in acquiring goods to be the subject of processing or transformation in the activity of testing the grinder mechanism. The beans are purchased with the object of their being processed or transformed into ground coffee. They thereby become the company's products. However, the company's expenditure on the grinding mechanism is incurred for a different reason. The expenditure in that instance is to acquire a means by which the company intends to subject the coffee beans to processing or transformation in its R&D activities. Expenditure on the mechanisms employed to subject the beans to those processes is logically distinct from anything to do with "feedstock expenditure".
194. No provision of the feedstock scheme requires the Tribunal to depart from what appears to it to be the natural reading of the definition. Rather, those provisions are entirely consistent with it. They are as follows:

***feedstock input**, in relation to an eligible company in relation to a year of income, means the company's feedstock expenditure in respect of materials or goods that were the subject of processing or transformation by the company in research and development activities during the year of income.*

***feedstock output**, in relation to an eligible company in relation to a year of income, means the sum of the amounts worked out under paragraphs (a) and (b) in relation to any products that were obtained by the company during the year of income from the processing or transformation of materials or goods the acquisition or production of which was feedstock expenditure of the company:*

- (a) if any of those products were sold by the company during the year of income by a transaction or transactions entered into at arm's length with the buyer or buyers—the amount or amounts received or receivable by the company from the sale or sales;*
- (b) if any of those products were not sold by the company during the year of income or were sold by the company otherwise than by a transaction or transactions entered into at arm's length with the buyer or buyers—the amount or amounts (if any) that would have been received by the company by selling those products at the end of the year of income by a transaction or transactions entered into at arm's length with the buyer or buyers.*

***eligible feedstock expenditure** has the meaning given by subsection (1A)*

(1A) For the purposes of this section, an eligible company has eligible feedstock expenditure in respect of a year of income in relation to related research and development activities if the company's feedstock input in respect of the year of income in relation to those activities exceeded the company's feedstock output in respect of the year of income in relation to those activities, and the amount of the excess constitutes the company's eligible feedstock expenditure in respect of the year of income in relation to those activities.

195. The definition of feedstock input simply identifies those parts of the goods and materials on which an eligible company has incurred feedstock expenditure which actually are subjected to processing or transformation in any tax year.
196. The definition of feedstock output, however, establishes a statutory mechanism to value any products derived from the processing or transformation of materials or goods the acquisition or production of which was feedstock expenditure of an eligible company during a year of income.
197. That definition provides a logical link between what a company spends on acquiring or

producing goods or materials to be the subject of processing or transformation (colloquially ingredients or raw materials) and what it subsequently earns on their sale (or deemed sale) after they have been subjected to processing or transformation and thereby have become products. Importantly, as the Commissioner accepts, the Tribunal is entitled to have regard to the inter-relationships between these defined terms as throw light on the construction of “feedstock expenditure”.

198. A statutory framework that anticipates that the outcome of R&D activities that commences with feedstock expenditure on goods and materials which are to be the subject of processing or transformation such the output is to be valued in the form of “products” is consistent with a premise that “feedstock expenditure” involves expenditure on goods or materials of a kind that in the course of their processing or transformation potentially may become “products”. It tortures language to refer to those things that undertake activities which produce products as being themselves the products of that activity.
199. The inter-relationship between the various definitions within the feedstock scheme accordingly provides a statutory lens through which the meaning to be attributed to the definition of “feedstock expenditure” can be viewed and ascertained. In turn that provides an additional foundation for rejecting the construction of the definition pressed upon the Tribunal by the Commissioner.
200. The scheme so enacted is coherent and self-contained. The distinctions it makes are simple to understand. The legislation facilitates a distinction between deductibility for expenses incurred by a company in acquiring the goods and materials to be the subject of processing or transformation for which the premium rate is denied and the enhanced deductibility which is available for expenditure otherwise in the R&D activities.

Specific submissions made on behalf of the Commissioner

201. The Tribunal now addresses five of the Commissioner’s more specific submissions which otherwise might be thought to have been overlooked. The Tribunal considers the respondent’s second alternative submission later in these reasons.

Accounting and taxation policy and “common sense commercial” considerations

202. The Commissioner submits that it makes understandable accounting and taxation sense to:
 - a. automatically exclude the feedstock expenditure as a concessional deduction in the year it is “incurred” (when the taxation treatment of expenditure ordinarily needs to be determined by a taxpayer in their income tax return); but to
 - b. have a mechanism in the income year in which the relevant processing or transformation of the materials and goods *actually occurs* so that there can be a proper comparison between the value of the marketable products that are produced and the expenditure on the feedstock inputs in order to determine if there is any “net cost” of materials and/or goods in obtaining any products through R&D activities. Any such “net cost” will be “eligible feedstock expenditure” which is then specifically included back into the definition of “research and development expenditure” in the income year that the processing/transformation took place and the marketable products were obtained.

From those propositions Mr Lloyd and Ms Hirschhorn submit that the purpose of the feedstock provisions is therefore to identify and act on the “net cost” of the materials and goods. They submit it is clear from the definitions of “eligible feedstock expenditure” and “residual feedstock expenditure” that the purpose of calculating “feedstock input” and “feedstock output” is to compare them arithmetically in order to compute such a net cost of carrying out the R&D activities in question.

203. In the Tribunal’s view this submission impermissibly privileges an *a priori* assertion of policy over the statute’s text. The Tribunal has no quarrel with the proposition advanced on behalf of the Commissioner that his preferred reading makes understandable accounting and taxation sense—but the Tribunal’s task is to construe the legislation as enacted by the Parliament. It must avoid falling into the error of assuming the legislature had a particular intention, and then,

having made up its mind what that intention was, to conclude that intention must necessarily be expressed in the statute, and proceeding to find it.^[17]

204. That a different policy might equally commend itself to the Tribunal provides no licence for the Tribunal to apply a policy not expressed by the legislative provisions in preference to that which is.
205. The same reasoning of course also requires the Tribunal to reject the applicant's closing written submissions in the passages reproduced by the Tribunal in these reasons at [152] that the construction of the legislation requires a "common-sense commercial approach" in so far as that proposition is advanced to support an outcome otherwise than that expressed by the text of the legislation itself.

Operation and effects

206. In closing oral submissions Mr Lloyd submitted that it can be convenient and useful in construing a statute to see how it operates and what the effects of that operation are in assessing its proper construction.
207. Mr Lloyd submitted that if the applicant's submissions on construction are accepted the economic advantage in being able to deduct virtually the entire cost of operating its plant during a plant trial at the premium rate is disproportionately large compared to the small risks and economic costs incurred by the applicant in undertaking its R&D.
208. Such disproportionality, Mr Lloyd submits, provides a reason to doubt the correctness of the construction proposed by the applicant and to prefer that advanced on behalf of the Commissioner.
209. Mr Lloyd gave an example to illustrate this submission—that of the applicant's trialling different types of cyclones and cyclone liners. Mr Lloyd laid the groundwork for this submission during in his cross-examination of Mr Magee in which Mr Magee conceded that changing a cyclone did not materially affect the level of expenses of any other consumables throughout the concentrator process.
210. Cyclones are cone shaped containers which through centrifugal force send smaller particles to the top and larger particles to the bottom. The smaller particles can then be disaggregated from the larger particles and transmitted to different parts of a plant for differential processing. As a discrete part of its R&D activities the applicant tested different types of cyclones and liners in plant trials. Mr Lloyd submits, and the Tribunal accepts, that as a financial component of the overall economics of operating the applicant's plant the cost of cyclones and their parts was small.
211. Mr Lloyd submitted:

So what you have there is this. You have a cyclone which cost in the order of \$25,000....You can have this very large plant, you can replace a cyclone in it to see if having a different brand cyclone works better; that will cost you \$25,000, take four to six hours to exchange and you don't even have to turn off the plant while you are doing it....Now on [the applicant's] view, that means the legislation has this consequence. If you replace the \$25,000 cyclone,..., testing it for six months because you get to deduct, on their view, all of the consumables other than – well, all of the consumables, not the ore,... at the higher rate, you would have millions of dollars' worth of expenditure which you get to deduct for six months and result in potentially millions of dollars of additional concessional deductions in order to see if the \$25,000 cyclone works well. Now we say, that would be a very surprising result from the legislation.^[18]

212. On first blush these submissions are persuasive. However, in the facts found by the Tribunal a contrary result is not so surprising. A stated purpose of the legislation in s 73B(1AAA) is to provide a tax incentive by promoting the technological advancement of eligible companies through a focus on innovation or high technical risk in defined R&D activities. What innovation and technical risk are is explained by s 73B(2B) and is made subject to the

exceptions in s 73B(2C).

213. It should be recalled that, whatever might have been the prospect of the Tribunal making different findings had the question been put in contest, given the way the Commissioner's case was conducted, the Tribunal is compelled to conclude that the entire relevant R&D undertaken by the applicant involved high levels of technical risk within the meaning of s 73B of the ITAA and that those high levels of technical risk included the risk of adverse consequences being occasioned to the entire operations of the various plants in which the trials were conducted.
214. Mr Lloyd's submission prompted a discussion between counsel and the Tribunal on the first day of closing submissions, in the course of which the Tribunal observed:

...the legislation provides that there must be a high level of technical risk... the Commissioner could have chosen a path to assert that in a particular instance like the cyclones that you raise, there was no such a level of technical risk...you have extracted out from the evidence a particular part that does seem, at least on the Tribunal's view to represent a benefit that is far in excess of the cost... but it was in the hands of the Commissioner to pursue a course directly to challenge the circumstances in which that arose and that not being done, it seems difficult to use that outcome as a basis to construe the legislation.

Mr Lloyd responded:

On [the applicant's] construction they get a benefit whether or not they are exposed to any particular expense, any significant high level of expense or whether or not any harm happens. On our construction they get the benefit, if they are exposed to a new high level of expense or if adverse harm results so the risk eventuates.

The Tribunal observed;

Maybe the statute is to be construed as intending to encourage investors, owners of plant and equipment and the like to take those risks...not merely to provide them with a fall-back position in case of disaster?

Mr Lloyd was invited to make, but did not make, further submissions, in relation to this exchange.

215. The Commissioner's submission that, at least in the case of the cyclones, the applicant stood to receive a disproportionate benefit as against the risk it incurred is a powerful one. However, it had been open to the Commissioner, had the Commissioner considered he had proper grounds, to have issued assessments disallowing the claimed 125% deductions on the basis that the applicant was ineligible for the premium rate for its R&D expenditure because the activities the applicant undertook to test the cyclones did not meet the threshold of innovation or high levels of technical risk required of research and development activities as defined by s 73B(1) and s 73B(2B) of the ITAA. Decisions such as *Re DBTL and Innovation Australia* [2013] AATA 573; (2014) 137 ALD 88 suggest that that course might not have been futile.
216. This Tribunal is not entitled to question why that course was not taken—it is bound by the way the parties conducted their respective cases. The Commissioner conducted this hearing on the basis that the R&D undertaken to test the cyclones by the applicant involved a high level of technical risk including the possibility of adverse consequences being occasioned to the entire operations of the plant in which those trials were conducted.
217. Mr Lloyd's proposition that an examination of the effects of the operation of the different meanings contended for a statute can assist in assessing its proper construction can be accepted. As between two available readings of the text of a statutory provision, if one produces an absurd or an implausible outcome that which avoids the absurdity or implausibility is to be preferred. However, the Commissioner cannot both appraise and reprobate. Even if, contrary to the Tribunal's conclusions, two readings are open, the Commissioner's submission that the

provision is absurdly overgenerous fails because of its inherent inconsistency.

218. If the applicant's R&D did not meet the statutory tests because the risks of failure were small the Commissioner had it in his hands to challenge the applicant's entitlement to the premium rate of deductibility for its expenditure on that basis. The statute cannot be construed on the basis that the Commissioner will fail to exercise his legal powers in that regard.
219. And, if the risks were large, as the Commissioner during the hearing expressly accepted them to be, that stands in the way of a submission that it is absurd or improbable that the legislature would provide for deductibility at the premium rate other than limited to a safety net for when the risk actually materialises.
220. The Commissioner having disavowed the direct route of attack available to him the suggested disproportion of risk to benefit can provide no reason for the Tribunal to give a strained reading of the language of s 73B(1) and s 73B(2B) of the ITAA to achieve indirectly a less generous outcome for the applicant's trialling of modifications to aspects of its production systems that the Act would entitle it to on the agreed common position of the parties that the expenditure was otherwise properly R&D.
221. There is nothing inherently irrational in Parliament providing a large incentive to encourage investors, owners of plant and equipment and the like to take large risks. How such risk taking should be encouraged and to what degree is inherently a contestable policy question. The Parliament by its enactment has made that choice. It is not for the Tribunal to second-guess it.
222. In reaching this conclusion the Tribunal places no reliance upon what the applicant asserts to be the "beneficial" policy intent expressed by s 73B(1AAA) of the ITAA. While that section declares that the scheme enacted by s 73B is intended "to provide a tax incentive..." the generality of that proposition is constrained by that sub-section's final sub-clause. The final sub-clause states that "[t]he benefits of the tax incentive are targeted by being limited to particular expenditure on certain defined activities".
223. In addressing which "defined activities" are to be benefited the statute distinguishes between expenditure on those things which are to be the subject of processing or transformation in an eligible company's R&D activities (which is excluded as "feedstock expenditure") and an eligible company's other expenditure directly related to research and development activities. In doing so it targets the benefit exclusively to expenditure on those latter activities—subject to other exclusions not relevant in the facts of this case. The Tribunal is not entitled to construe s 73B of the ITAA more broadly as beneficial legislation.
224. Mr Lloyd's submission fails to persuade the Tribunal because an argument that the statute should be read as restricting the availability of a tax incentive to a safety net requires an impermissible resort to policy. It may be that a policy other than that enacted by the Parliament would better balance the competing commercial interests of companies as against the interests of the community by limiting the costs of the tax incentive for R&D but the Tribunal is not entitled to use such reasoning to displace the meaning of the statute as expressed by its text.

The breadth of the words "processing" and "transformation"

225. The Commissioner makes extensive submissions based on dictionary meanings of several of the words contained in the statutory definition of feedstock expenditure to emphasise the scope of what the respondent submits is properly to be understood as the meaning of the words "processing" and "transformation".
226. In the Tribunal's opinion what was said by Judge Learned Hand in *Cabell v Markham* cited in the respondent's final written submissions regarding the error in undertaking a mechanical examination of words in isolation from their context applies to those submissions.
227. The compound phrase "expenditure incurred by the company in acquiring or producing materials or goods to be the subject of processing or transformation by the company in research and development activities", must be read as whole.
228. On that basis, whatever broad or narrow reach the words "processing" and "transformation" possess, those words can have no relevant operation in respect of an eligible company's expenditure on goods and materials *not* acquired to be the subject of processing or transformation by the company in research and development activities.

“Activities” and “projects”

229. Mr Lloyd drew the Tribunal’s attention to the observations of Lindgren J in *Industry Research and Development Board v Coal & Allied Operations Pty Ltd* ([\(2000\) 101 FCR 405](#); [\[2000\] FCA 979](#) at [\[45\]](#)- [\[49\]](#). In that case Lindgren J observed that it is incorrect for the AAT to apply s 39L IRDA at the level of a project rather than at the level of the particular activities to which that section refers.
230. All of the evidence that was led by the applicant was rigorously tested by cross-examination by Mr Lloyd on the basis that expenditure entitled to be deducted at the premium rate had to be in respect of specific R&D activities undertaken in accordance with a plan submitted to the Industry Research and Development Board.
231. The Commissioner’s final written submissions, with the one exception addressed below in these reasons, do not identify any lack of coincidence between what the applicant compendiously refers to as its R&D “projects” and the aggregate of the specific activities it had undertaken. During the hearing Mr Lloyd accepted that, at least in the facts of this case, what emerged was a distinction without a difference.
232. The Tribunal therefore rejects the Commissioner’s submission that the distinction between the applicant’s self-described R&D “projects” and the applicant’s R&D activities requires this review to be remitted for the Commissioner’s reconsideration.
233. There is one exception which does not affect the disposition of the broader submission.
234. The respondent’s closing written submissions at [R182] question whether the applicant’s expenditures on reagents and chemicals (expense 216 in the 2007 tax year) had any relevant association with the applicant’s R&D activities in the smelter. The submission points out that when cross-examined Ms Butler gave evidence that those chemicals underwent chemical reactions as part of testing, conditioning and treatment of by-products which were independent of the copper smelting process. The respondent’s submissions observe that “it is somewhat unclear therefore how these costs directly related to the R&D in question”.
235. Notwithstanding the hesitancy with which that submission is advanced the Tribunal accepts its premise. The Tribunal is not satisfied on the evidence that those costs directly related to activities in the R&D in question. It therefore excludes expenditure on expense item 216 in the 2007 tax year from entitlement for deductibility at the premium rate.

Respondent’s first alternative submission

236. Similar reasoning to that set out above in [176-200] disposes of the Commissioner’s first alternative submission. Mr Lloyd and Ms Hirschhorn in their closing written submissions submit that many goods such the chrome balls, grinding media and mill liners were themselves “the very subject or focal point of the plant trials” [R193] and “the very subject matter of the R&D activities” [R194]. It is not necessary for the Tribunal to address each suggested example—the propositions intrinsically substitute a notion not expressed in the statutory language for that which is: “expenditure incurred by the company in acquiring or producing materials or goods to be the subject of processing or transformation by the company in research and development activities”.
237. If additional support is required for this proposition, French CJ, Hayne, Kiefel, and Bell JJ held in *Australian Education Union v Department of Education and Children’s Services* ([\(2012\) 248 CLR 1](#); [\[2012\] HCA 3](#) at [\[28\]](#) that “[i]n construing a statute it is not for a court to construct its own idea of a desirable policy, impute it to the legislature, and then characterise it as a statutory purpose.”

SUBMISSIONS BY THE APPLICANT

238. The Tribunal intends no discourtesy to Mr de Wijn and Ms Burnett by addressing the applicant’s submissions only briefly.
239. It will be apparent that the Tribunal accepts the thrust of the applicant’s submissions that the ITAA requires that a critical distinction be made between expenditure on materials or goods to be the subject of processing or transformation and expenditure by an eligible company on the

actions or processes which thereby subject those materials or goods to processing and transformation in the applicant's R&D activities. However the Tribunal should not be understood to adopt the applicant's submissions as expressed. Its conclusions, although sharing some common premises, derive from the Tribunal's path of reasoning as expressed at [167]-[200].

240. As the applicant is substantially successful the Tribunal will therefore restrict itself to a brief explanation regarding those issues where its counsel's submissions are rejected.
241. A considerable part of the applicant's submissions sought to reinforce the construction it contended for by referring the Tribunal to various secondary materials—including the Explanatory Memorandum supplied for the amendments which introduced the feedstock provisions into the ITAA and ministerial speeches. However, because in the Tribunal's view the statutory language of those provisions is unambiguous the Tribunal concludes it is neither required, nor entitled, to have regard to the extrinsic materials that the applicant submits in its closing written submissions at [A201]-[A210] would assist to reveal the purpose of the feedstock scheme.
242. However, against the contingency that the Tribunal may be in error in those regards it should briefly state its opinion in respect of the various extrinsic materials that the applicant refers to.
243. In the Tribunal's opinion had the language of the feedstock provisions in s 73B of the ITAA been attended by ambiguity the provisions of Clause 9.17 of the [Taxation Laws Amendment Bill \(No 3\) 1996](#) (Cth) Explanatory Memorandum (the EM) would amply justify it preferring the construction it has adopted. That clause states:

(e) Modify the Deduction Rules for Feedstock

9.17 The cost of raw materials fed into processes that qualify as 'R&D activities' as defined in subsection 73B(1), may qualify for deduction at the concessional rate of [then] 150 per cent under subsection 74B(14).

However, the value of resultant product that may be commercially valuable or useable in further processes does not affect the quantum of the deduction.

244. The Tribunal accepts that it would be an error, even if regard can be had to the EM, to allow the words "raw materials" as found in the EM to substitute for the text of the Act.
245. However, the bifurcation the EM posits, between those things fed into processes that qualify for deduction at the concessional rate and the things that constitute the process itself, confirms the construction that the Tribunal has reached. The Commissioner did not join issue with that proposition.
246. The Commissioner's submissions were only to the effect that a plain reading of the statutory text does not require any attention to be given to extrinsic materials. As is evident the Tribunal agrees. However, to the extent that ambiguity exists, a conclusion other than that as advanced by Mr de Wijn is implausible and is rejected.
247. Further, to the extent there may be ambiguity, the language used by Senator Kemp, the then Assistant Treasurer in debate in the Senate is consistent with the construction reached by the Tribunal. In his speech the Minister referred to the detail of the proposed amendment having been the result of consultation with industry in September 1996 in Melbourne. He continued:

Industry indicated that they were not entirely comfortable with the changes to feedstock. However, the industry accepted that a change was required and that the treatment of the expense item was satisfactory. Increasingly, it became apparent that the manufacturing process said to be R&D would claim inputs at the premium rate while the output would be assessed only at 100 per cent. The bill seeks to allow deductions for only that part of the output [input] that is consumed in the process to receive the premium rate.

[\[19\]](#)

248. Mr Lloyd did not contest the applicant's submission that the final reference in the passage to "output" was clearly an error and should be understood as a reference to input.
249. Thus if regard can be had to the Minister's speech it can be understood as identifying the

mischief the bill sought to address—that of inputs being claimed at the premium rate while outputs were claimed at the ordinary rate—and the remedy proposed—that deductions at the premium rate would be limited to those parts of the input that are consumed in the process.

250. The Tribunal accepts that it would be an error, if regard is to be had to the Minister’s remarks, to allow words such as “consumed in the process” to substitute for the text of the Act, but the bifurcation posited between those inputs consumed in the process that qualify for deduction at the concessional rate and the things that constitute the process is consistent with the construction that the Tribunal has reached and inconsistent with that pressed for by the Commissioner.
251. The applicant also asked the Tribunal also take into account a Draft Treasury Minute prepared under the name of the Acting First Assistant Secretary, Taxation Policy Division. The Draft Minute refers to a meeting between industry, Treasury, ATO and AusIndustry officials on 18 September 1996 in Melbourne. Mr de Wijn asked the Tribunal to draw an inference that that Draft Minute recorded the outcome of the consultations referred to by Senator Kemp in his remarks in the Senate. Mr de Wijn submitted that while the Draft Minute is not within the description of materials referred to in [s 15AB\(2\)](#) of the [Acts Interpretation Act 1901](#) (Cth) that does not limit the classes of materials to which regard can be had under subs (1). The limiting factor in determining the material to which regard may be had under subs (1) is that it be capable of assisting in the ascertainment of the meaning of the provision.
252. The Draft Minute included the following statement:

Officials agreed with industry that the definition of feedstock should not be all embracing, but should cover only major inputs. This we have taken to include not only raw materials, or goods that may be transformed into saleable or commercially useable product, but also any direct energy inputs (such as gas, electricity, coal) to the process—to omit direct energy costs would mean that the proposed “net feedstock rule” would substantially affect processes involving the transformation of high cost raw materials with little or moderate energy costs, while only minimally affecting processes that utilise substantial energy processes that utilise substantial energy inputs in transforming low cost raw materials eg brick making or aluminium production.

253. The Tribunal expressly is exempted from the requirement to apply formal rules of evidence but in this instance it thinks it is appropriate (having given notice to the parties of its inclination to that effect) to do so. It would be entirely unsatisfactory for the Tribunal to reach a view as to the construction of a statute on the strength of materials not available to a court. Where issues of statutory interpretation are involved courts and tribunals should be expected to reach common conclusions.
254. Mr Lloyd therefore properly objected to the reception of the draft minute on the basis that its reception would be contrary to the provisions of the [Evidence Act 1995](#) (Cth). The relevant passages of the transcript that contain those submissions are at TS379-381, 444-451, 467-469. Mr de Wijn’s response is at TS525-527. Mr Lloyd also filed supplemental written submissions.
255. The Tribunal rejects Mr Lloyd’s submissions as to admissibility. In the Tribunal’s opinion the Draft Minute is admissible as an exception to the hearsay rule as a business record. In that regard its heading as a “draft” is of no consequence. [Section 69](#) of the [Evidence Act](#) sets out the business records exception to the hearsay rule. The maker of the draft minute might reasonably be supposed to have had personal knowledge of the facts asserted in it. [Section 182](#) of the [Evidence Act](#) extends the business records exception to Commonwealth records. The Tribunal also is prepared to draw the inference that that Draft Minute is a record of the consultations referred to by Senator Kemp in his remarks in the Senate. The co-incidence of the date, place and subject matter of the meeting warrants that conclusion.
256. However, notwithstanding that the Tribunal accepts that the document is admissible the Tribunal is not prepared to place any weight on its content. In the Tribunal’s view the language of the document is inconsistent with the Tribunal making a finding that the discussions in Melbourne had reached a sufficient degree of resolution as would permit it to conclude that the

parties had reached an agreement the terms of which were reflected in the final language of the amendment. Some important content of the draft minute is not a verbatim record of agreed terms but a statement of what officials “understood” from the meeting. The most that can be inferred was clearly agreed during the consultations is that the feedstock provisions should only cover major inputs. Knowing that adds nothing to what was conveyed by the Minister’s speech. Further it assumes, without a sufficient basis that the terms of the Melbourne discussions would be, and had been, reflected unchanged in drafting instructions. Accordingly, the use the applicant seeks to make of the draft minute is a bridge too far. In the Tribunal’s opinion the draft minute is not within the meaning of [s 15AB\(1\)](#) of the [Acts Interpretation Act 1901](#) because it is not capable of assisting the ascertainment of the meaning of the feedstock provisions in the ITAA.

257. The Tribunal also rejects one other submission which by implication is made by the applicant.

258. At [A173]-[A174] of its closing written submissions the applicant draws attention to the ordinary meaning of “feedstock” as found in the definitions of feedstock expenditure and feedstock input. Those paragraphs cite the *Oxford English Dictionary* (Second Edition) to support the applicant’s contention that the ordinary meaning of feedstock is “raw material supplied to a machine or processing plant (as pulpwood to a paper mill.” The Tribunal accepts that the *Oxford English Dictionary* definition selected by the applicant does convey the ordinary meaning of the term.

259. However, the Tribunal cannot gain any assistance from this submission. It accepts the respondent’s arguments set out comprehensively at [R121]-[R123] of its closing written submissions that the decision of the Full Court of the Federal Court of Australia in *Esso Australia Resources Pty Ltd v Federal Commissioner of Taxation* (2011) 199 FCR 226; [2011] FCAFC 154 at [101]- [106] means that the established law of Australia (however surprising the result seemed to the Full Court and seems to this Tribunal) prevents the Tribunal from gaining any assistance in resolving any ambiguity in those definitions by reference to the words selected by the Parliament to be the terms defined. A challenge to that proposition would need to be argued in a court with the power to decide otherwise.

RESPONDENT’S SECOND ALTERNATIVE SUBMISSION

260. Before the Tribunal turns to the application of these principles it must address the Respondent’s second alternative submission which addresses a separate and distinct issue.

261. The respondent’s second alternative submission is put on the basis that “[t]he factual evidence suggests that other “products” were obtained by the Applicant other than “ore” [sic] in the concentrator R&D activities and “concentrate” [sic] in the smelter R&D activities in question”. It is obvious that that sentence on page 69 of the respondent’s closing written submission intended to refer not to “ore” but to “concentrate” as the product of the applicant’s concentrator R&D activities, and not to “concentrate” but to “anode copper” as the product of the applicant’s smelter R&D activities. The Tribunal proceeds on that understanding.

262. The Tribunal accepts that by-products are equally “products” for the purpose of the definition of “feedstock output.” However, while the Tribunal accepts the principle expressed by the respondent in its second alternative submission it rejects that principle’s application to things like activators and collectors which might be present as unwanted residues in minute trace amounts in the final concentrate in the concentrator process or anode copper in the smelter process. Such trace elements are not “products”. Nor are things like worn out liners that have been discarded as waste.

263. The Tribunal has previously addressed what it understands to be conveyed the term “products”. As the term is used in the definitions relating to the feedstock scheme the word “products” refers to commercially viable products—things which can be sold or are capable of having an arms-length value attributed to them. Waste and unwanted residues without commercial value discarded from a process are therefore not “products”.

264. What is or is not a product is to be objectively determined— a company may “seek” only highly refined copper but if as a by-product it also produces commercially valuable silver or lead (or anything else) those too are “products”. That the applicant also implicitly accepts that proposition is self-evident in the admissions made by it in its letter of 10 July 2013 in which at

paragraph (c) it accepted that “the by products copper reverts and electrostatic precipitator dust produced by the copper smelter at Mt Isa Mines which were not recycled back into the copper smelter circuit at Mt Isa Mines” are products obtained from the processing or transformation of material and goods in “research and development activities” undertaken in the smelter.

265. Moreover some things considered waste in a process can, with changes in technology and demand, become products. An example relevant to these proceedings is the sulphur dioxide produced when oxygen under conditions of intense heat combines with sulphur in copper concentrate during smelting.
266. Decades ago sulphur dioxide produced in smelting copper was released into the environment as unwanted waste. That caused environmental harm. In the course of the hearing the Tribunal referred counsel to the example of the bare hills of Queenstown denuded of all vegetation by acid rain caused by the release of SO₂ from Mt Lyell. Modern environmental standards prohibit sulphur dioxide being released into the atmosphere.
267. If a modern copper smelter has no viable commercial options (perhaps because the smelter is too remote) any sulphur dioxide it produces will still have the character it had at Mt Lyell—unwanted waste with no commercial value which needs to be (now more environmentally sensitively) disposed of. However sulphur dioxide can have commercial applications. The applicant’s witnesses gave evidence that the SO₂ produced at Mt Isa was used to produce sulphuric acid. Accordingly that SO₂ is at least potentially within the meaning of “products” in the definition of “feedstock output”.

Application of principles

268. The Tribunal first sets out its general conclusions at a high level of generality and then addresses the individual items in dispute. To avoid repetition the Tribunal will deal with both the feedstock expenditure and product issues in the same discussion.

Feedstock expenditure

269. Mr de Wijn advised the Tribunal that the applicant’s accounts do not record the applicant’s expenditures on acquiring those ores as “feedstock expenditure”. The position appears to be the same with respect to the concentrate fed into its Mt Isa Smelter.^[20] However, a correct or erroneous characterisation of its expenditure in the applicant’s accounts is irrelevant to the Tribunal’s duty.
270. On the evidence before the Tribunal, the applicant’s expenditure on acquiring and producing ores to be the subject of processing in its concentrator processes in its research and development activities is undoubtedly “feedstock expenditure” within the meaning of the that defined term. It is expenditure incurred by the company in acquiring or producing materials or goods to be the subject of processing or transformation by the company in research and development activities carried on as plant trials in its concentrator plants.
271. Likewise the applicant’s expenditure on acquiring or producing copper concentrate to be fed into the applicant’s smelter process at Mt Isa to be the subject of transformation into anode copper in the course of the applicant’s R&D activities is “feedstock expenditure”. It is expenditure incurred by the company in acquiring or producing materials or goods to be the subject of processing or transformation by the company in research and development activities carried on as plant trials in its Mt Isa smelter.
272. However the Tribunal has found that none of the other disputed items on which expenditure was incurred by the applicant in its concentrator processes is “feedstock expenditure”.
273. The Tribunal has found that one of the disputed items on which expenditure was incurred in the smelter—the oxygen inserted into the furnace during the copper blow and later in the anode furnace—was “feedstock expenditure” within the meaning of s 73B(1) of the ITAA but otherwise none of the other disputed items on which expenditure was incurred by the applicant in its Mt Isa copper smelter process is “feedstock expenditure”.
274. None of the disputed items, with the exception of the oxygen inserted into the furnace during the copper blow and in the anode furnace, upon which the applicant incurred expenditure,

became the subject of processing or transformation in the applicant's R&D activities. Those materials and goods were acquired by the applicant to be agents of that processing or transformation—that is to become part of the process by which the applicant's feedstock input (constituted by the ore or the concentrate respectively) was subjected to processing or transformation during those activities.

275. Moreover none of those things were the ingredient of any products produced in those activities. The statutory relationship between “feedstock expenditure” and “feedstock output” that informs and reinforces the construction that the Tribunal has given to the first of those defined terms (see above at [194]-[200]) is on the facts found entirely absent.

Products

276. It is common ground between the parties that the concentrate produced by the applicant's various concentrator processes is a product within the meaning of the term “products” in the definition of “feedstock outputs” in s 73B(1) of the ITAA. It is equally common ground that the anode copper produced by the applicant's Mt Isa smelter is a product within the meaning of the term “products” in the definition of “feedstock outputs” in s 73B(1) of the ITAA. The Tribunal shares those conclusions.
277. However, each of the various concentrator processes produced not only concentrate but also tailings. Most of these tailings were waste lacking any actual or potential commercial value. Mr Strohmayr and Mr Siliezar gave evidence to that effect. That Tribunal accepts their evidence. Such waste needs to be disposed of in accordance with current environmental laws but it clearly is not a product within the meaning of the term “products” in the definition of “feedstock outputs” in s 73B(1) of the ITAA. There is one exception. The evidence establishes that some part of the tailings produced at Mt Isa was of considerable value to the applicant. Those tailing were mixed with cement and used as “paste fill” to shore up voids in the applicant's underground excavations.
278. Ms Butler gave evidence that about a third of the tailings from the Mt Isa concentrator process is transformed into “paste” which is used either with or without cement and pumped underground to stabilise the ground and for environmental reasons to minimise the amount of tailings that have to be stored above ground. It is a cost savings measure and saves on the volume of cement that would otherwise be required. The balance must be secured above ground as waste. The paste fill produced from the tailings therefore substituted for other products or techniques that would have had to be acquired or applied by the applicant to shore up its underground works. Although the applicant may not have considered any part of its tailings to be a by-product of its concentrator, assessed objectively, that part of its tailings the applicant applied to that purpose was. That part of the tailings that had commercial value in the hands of the applicant was a product within the meaning of the term “products” in the definition of “feedstock outputs” in s 73B(1) of the ITAA.
279. Similarly, the SO₂ produced by the applicant in the production of copper during smelting at Mt Isa must be regarded as a by-product of the applicant's R&D activities conducted at the Mt Isa smelter. The evidence establishes that the production of copper at Mt Isa requires the injection of oxygen to react with sulphur which is found in the ore chalcopyrite. A chemical reaction facilitated by intense heat bonds oxygen to the sulphur to produce copper and sulphur dioxide. The sulphur dioxide “off gas” is collected and piped to a third party industrial user which applies the SO₂ for the production of sulphuric acid. The evidence establishes that the SO₂ was supplied to the third party for no charge. Mr Lloyd submits that there is no evidence that this was an arms-length transaction. The Tribunal is not required to make findings in that regard. It notes that the parties have agreed that they will seek to resolve any outstanding issues following the Tribunal publishing its conclusions on issues of principle. If the quantification in dollar terms of that product's value pursuant to either paragraphs (a) or (b) of the definition of “feedstock output” cannot be resolved by agreement between the parties the issue can return to the Tribunal for resolution in due course.
280. That aside, the other unwanted residues with no commercial value and trace elements that find their way into the final concentrate or anode copper as the case may be are not, in the

Tribunal's opinion, products within the meaning of the term "products" in the definition of "feedstock outputs" in s 73B(1) of the ITAA. Nor are things such as worn out grinding media, liners, lifters, cyclones, screen consumables or drill rods discarded as commercially valueless waste after they have played their respective parts in subjecting the applicant's feedstock input to processing and transformation products within the meaning of the term "products" in the definition of "feedstock outputs" in s 73B(1) of the ITAA.

Detailed findings regarding each item of disputed expenditure

281. In each instance below (other than where explicitly provided to the contrary) the Tribunal accepts the factual description of the dispute expenditure set out in the respondent's closing written submissions, which in turn is based on the evidence of the applicant's witnesses. The respondent's closing written submissions provided extensive and accurate references to the relevant parts of the applicant's witnesses' evidence.

The concentrator processes

282. **Crusher liners** – the lining inside the crushers wore away. The crusher liners required replacement every 4-6 months. They wore out because of wear and abrasion wear. In the Tribunal's opinion expenditure on their acquisition was not incurred on goods to be the subject of processing or transformation by the company in research and development activities. Their acquisition was in order that they become part of an activity that subjected feedstock input to processing or transformation. The metal residues went to tailings as waste. The worn out parts were not the company's products.
283. **Mill liners** – the mill liners that acted as protective shells on the inside of the mill walls wore down because of abrasion. The SAG mill liners required replacement every 18 months. The vertimill liners wore down and required replacement every 3-12 months. In the Tribunal's opinion expenditure on their acquisition was not incurred on goods to be the subject of processing or transformation by the company in research and development activities. Their acquisition was in order that they become part of an activity that subjected feedstock input to processing or transformation. The metal residues went to tailings as waste. The worn out parts were not the company's products.
284. **Cyclones** – the rubber liners in the body of the cyclones and the ceramic liners for spigots and vortex finders (a sacrificial part that sits inside the top part of the cyclones where the overflow portion flowed through which is made of rubber) wore down. Those parts had to be physically pulled out and new ones put in. They became "thinner" and were replaced in the course of planned maintenance before they developed holes in them. In the Tribunal's opinion expenditure on their acquisition was not incurred on goods to be the subject of processing or transformation by the company in research and development activities. Their acquisition was in order that they become part of an activity that subjected feedstock input to processing or transformation. In one of the company's concentrator processes small residues of a particular type of cyclone liner reported as a trace element in the final concentrate but as unwanted residue of no commercial value and otherwise went to tailings. Neither those trace elements nor the worn out parts were the company's products.
285. **Forged balls 12.7mm** – the forged balls that were added to the vertimill were consumed (that is, used up) in the process of breaking up the ore at the rate of 58g for every tonne of feed ore. They wore out because of wear and abrasion wear. In the Tribunal's opinion expenditure on their acquisition was not incurred on goods to be the subject of processing or transformation by the company in research and development activities. Their acquisition was in order that they become part of an activity that subjected feedstock input to processing or transformation. The metal residues went to tailings as waste. The worn out balls were waste and not the company's products.
286. **Grinding media (other)** – this was a costs centre to which many types of grinding media at the concentrator were coded including: 78mm steel balls used in the SAG mill – these would wear down and 3.5% (7.7 tonnes) of steel balls would require replacement every day. The Archimedes screws used in the vertimills also wore down and 25% (7.5 tonnes) of screws

required replacement every 3 months). The grinding media was ground away, abraded away and consumed. These all wore out because of wear and abrasion wear. In the Tribunal's opinion expenditure on their acquisition was not incurred on goods to be the subject of processing or transformation by the company in research and development activities. Their acquisition was in order that they become part of an activity that subjected feedstock input to processing or transformation. The metal residues went to tailings as waste. The worn out items were waste and not the company's products.

287. **Vertimill media** – the vertimill media was ground away abraded and consumed. These wore out because of wear and abrasion wear. In the Tribunal's opinion expenditure on this media's acquisition was not incurred on goods to be the subject of processing or transformation by the company in research and development activities. Its acquisition was in order that it become part of an activity that subjected feedstock input to processing or transformation. Their residues went to tailings as waste. The worn out items were waste and not the company's products.
288. **Filtering consumables** – the filter cloths, mechanical valves and valve sleeves wore out in the course of fulfilling their functions. The filter cloths changed in appearance due to moisture and impurities. Filter cloths had to be replaced every 30 days and valves replaced every 50 days. The filter cloths eventually became bound up with very fine concentrate so they were no longer permeable or, through problems in the filter, tore. In the Tribunal's opinion expenditure on their acquisition was not incurred on goods to be the subject of processing or transformation by the company in research and development activities. Their acquisition was in order that they become part of an activity that subjected feedstock input to processing or transformation. No part of these consumables remained in the company's final concentrates. The worn out cloths and other filtering consumables were waste rather than the company's products.
289. **Screen consumables** – The rubber panels on the screens applied to the output of the SAG mills wore out and had to be replaced every two months. The slots on the rubber mats wore out – it was an abrasion-type wear. The apertures got bigger. In the Tribunal's opinion expenditure on their acquisition was not incurred on goods to be the subject of processing or transformation by the company in research and development activities. Their acquisition was in order that they become part of an activity that subjected feedstock input to processing or transformation. No part of these consumables remained in the company's final concentrates. The worn out consumables etc were waste rather than the company's products
290. **Copper sulphate** – as an “activator” it chemically reacted with the surface of the zinc ore and formed molecules of “copper sulphide”. The chemical reaction was: $ZnS + Cu^{2+} = CuS + Zn^{2+}$. The copper sulphate, once converted to copper sulphide remained in that chemical form throughout the process. Mr Strohmayer explained in cross-examination:

The copper ions adhere onto the zinc mineral surface and what that fundamentally does is it almost makes the zinc minerals behave like copper minerals, and then the subsequent process of adding the xanthate is stronger, so it – what ends up happening is that it increases the flotation rate of the zinc, so that's why it's called an activator, because it helps to float the zinc minerals.

291. In the Tribunal's opinion expenditure on the acquisition of copper sulphate was not incurred on goods to be the subject of processing or transformation by the company in research and development activities. It was acquired in order that it becomes part of an activity that subjected feedstock input to processing or transformation. Trace elements of copper sulphate remained in the applicant's final zinc concentrates. Such trace elements have no commercial value in that form and are not the company's products.
292. **Ethyl Xanthate and Propyl Xanthate** – as “collectors” these adsorbed to the surface of the copper coated zinc ore. Adsorption meant that it was “staying on the surface as opposed to penetrating the surface”. Xanthate was acquired in solid form then mixed with water, and added to the slurry where it physically attached to the copper coated zinc. They adhered to the zinc, lead and silver minerals like oil. Some xanthate got caught in with the tailings but the majority remained in the concentrate until it left the concentrator process. It evaporated very

shortly afterwards. In the Tribunal's opinion expenditure on their acquisition was not incurred on goods to be the subject of processing or transformation by the company in research and development activities. Their acquisition was in order that they become part of an activity that subjected feedstock input to processing or transformation. Trace elements by volume of such "collectors" remained in the final concentrates but evaporated quickly thereafter. Such trace elements had no commercial value in that form and were not the company's products.

293. **MIBC** – made the slurry frothy. It acted like adding detergent to water. The MIBC was a consumable and was not re-used. The majority of MIBC stayed in the circuit and eventually evaporated. In the Tribunal's opinion expenditure on the acquisition of MIBC was not incurred on goods to be the subject of processing or transformation by the company in research and development activities. Its acquisition was in order that it becomes part of an activity that subjected feedstock input to processing or transformation. No part of the MIBC remained in the final concentrate. It was not one of the company's products.
294. **Dextrin and Tanigan** (naphthalene sulphonate) – as depressants, these long chain polymer chemicals adsorbed to the surface of the gangue materials. They were added to the slurry where they physically attached to the gangue material which was then separated out of the concentrate to become tailings. In the Tribunal's opinion expenditure on the acquisition of Dextrin and Tanigan was not incurred on goods to be the subject of processing or transformation by the company in research and development activities. Their acquisition was in order that they become part of an activity that subjected feedstock input to processing or transformation. Once they had served that function they were wastes of no commercial value. No part of them remained in the final concentrate. They were not the company's products.
295. **Flocculants** – these adsorbed to very fine particles by way of electrostatic reaction to bind them together. Flocculants were added as a liquid. They do not undergo any chemical change. Mr Strohmayer explained in cross-examination that flocculants get added to both concentrate thickeners and tailings thickeners. The flocculant that gets added to the concentrate thickeners binds those fine particles together and some ends up in the concentrate. The flocculant that is added to the tailings thickener goes to tailings with the tailings solids. They then break down. The flocculants are not thereafter separated or able to be re-used. In the Tribunal's opinion expenditure on the acquisition of flocculants was not incurred on goods to be the subject of processing or transformation by the company in research and development activities. Their acquisition was in order that they become part of an activity that subjected feedstock input to processing or transformation. Once they had served that function they were wastes of no commercial value. Trace elements of the flocculants were in the final concentrates but broke down quickly thereafter. They were not the company's products.
296. Other items such as **Reagents other, Chemicals General, Lubricants/Sealants, Oxygen and Acetylene, Batteries and Minor Consumables** were consumed/used up and could not be re-used. The lubricants and oil became dirty and were used up. The oxygen and acetylene was used by boilermakers typically in a workshop for building things – it was used up in the cutting and welding. The minor consumables cost centre contained anything that did not fit into other cost centres – all were consumables and wore out or were used up. Batteries went flat. Chemicals general cost centre referred to small quantities of reagents that were used up in the laboratory.
297. In the Tribunal's opinion expenditure on the acquisition of these items was not incurred on goods to be the subject of processing or transformation by the company in research and development activities. There is no plausible connection as would permit such a conclusion.

The smelter process

298. **Detonators** – a bursting disk at the top of the Isasmelt lance and an explosive sealer relating to the same were consumed when they burst. In the Tribunal's opinion expenditure on their acquisition was not incurred on goods to be the subject of processing or transformation by the company in research and development activities. Their acquisition was in order that they become part of an activity that subjected feedstock input to processing or transformation. The residues of the detonators were waste rather than the company's products.
299. **Drill consumables and Drill rods** – the drill bits were worn down and replaced when they

could no longer do their duty. Drill rods became weaker as they were used over time and would wear out. Three to four drill consumables and drill rods were used in rotation and had to be replaced approximately every week. In the Tribunal's opinion expenditure on their acquisition was not incurred on goods to be the subject of processing or transformation by the company in research and development activities. Their acquisition was in order that they become part of an activity that subjected feedstock input to processing or transformation. Once worn out what remained was waste rather than the company's products.

300. **Lubricants and Sealants** – these wore out, broke down and needed replacing. In the Tribunal's opinion expenditure on their acquisition was not incurred on goods to be the subject of processing or transformation by the company in research and development activities. Their acquisition was in order that they become part of an activity that subjected feedstock input to processing or transformation. Once the lubricants and sealants wore out what remained was waste rather than the company's products.
301. **Forged balls 12.7mm** – these were used in the lime slaking mill – the balls are used to grind the lime and are worn away by physical abrasion in the process. In the Tribunal's opinion expenditure on their acquisition was not incurred on goods to be the subject of processing or transformation by the company in research and development activities. Their acquisition was in order that they become part of an activity that ultimately subjected feedstock input to processing or transformation—in this instance by the addition of ground lime. Once the forged balls wore out what remained was waste rather than the company's products.
302. **Mill Liner** – converter shells wear out and are periodically replaced every three months when a converter is shut down for repair. In the Tribunal's opinion expenditure on their acquisition was not incurred on goods to be the subject of processing or transformation by the company in research and development activities. Their acquisition was in order that they become part of an activity that subjected feedstock input to processing or transformation. Once the mill liners wore out what remained was waste rather than the company's products.
303. **Oxygen and Acetylene** – these were used up mainly for welding in the smelter in activities such as replacing the converter steel shells. In the Tribunal's opinion expenditure on their acquisition was not incurred on goods to be the subject of processing or transformation by the company in research and development activities. Their acquisition was in order that they facilitate an activity that subjected feedstock input to processing or transformation. They were entirely consumed in the course of facilitating that activity.
304. **Hangar bars** – these were used in the thickener tanks. The hangar bars rust over time and they are ultimately discarded. In the Tribunal's opinion expenditure on their acquisition was not incurred on goods to be the subject of processing or transformation by the company in research and development activities. Their acquisition was in order that they become part of an activity that subjected feedstock input to processing or transformation. When worn out they were discarded and became waste rather than the company's products.
305. **Converter** – this was a cost centre where “converter air” and “converter rebuilder” costs were coded. The converter air meant the cost of repairs to the reticulation system piping system. Those costs were for pressure valves and flow valves that had worn out and needed to be replaced and some pipeline repairs. In the Tribunal's opinion expenditure on their acquisition was not incurred on goods to be the subject of processing or transformation by the company in research and development activities. Their acquisition was in order that they facilitate an activity that subjected feedstock input to processing or transformation. When worn out and replaced they became waste rather than any part of the applicant's products.
306. **Filter consumables** – the hyperbaric filters that filtered the concentrate slurry wore out, tore and otherwise had holes in them that prevented them doing their job. The filter cloths had to be replaced every three weeks. In the Tribunal's opinion expenditure on their acquisition was not incurred on goods to be the subject of processing or transformation by the company in research and development activities. Their acquisition was in order that they become part of an activity that subjected feedstock input to processing or transformation. When worn out and replaced they became waste rather than any part of the applicant's products.
307. **Screen consumables** – the screen mesh on screens used to crush the “revert product” wore out and needed to be replaced from time to time. In the Tribunal's opinion expenditure on their acquisition was not incurred on goods to be the subject of processing or transformation by the

- company in research and development activities. Their acquisition was in order that they become part of an activity that subjected feedstock input to processing or transformation. When worn out and replaced they became waste rather than any part of the applicant's products.
308. **Minor consumables, Batteries** – these items wore out and had to be replaced. In the Tribunal's opinion expenditure on their acquisition was not incurred on goods to be the subject of processing or transformation by the company in research and development activities. Their acquisition was in order that they facilitate an activity that subjected feedstock input to processing or transformation. When worn out and replaced they became waste rather than any part of the applicant's products.
309. **Gases Non-Fuel** – anhydrous ammonia was used by the Applicant to neutralise the solids that condensed from the smelter prior to sending waste gases (SO₂) across to the sulphuric acid plant. In the Tribunal's opinion expenditure on their acquisition was not incurred on goods to be the subject of processing or transformation by the company in research and development activities. Their acquisition was in order that they facilitate an activity that subjected feedstock input to processing or transformation. They were entirely consumed in the course of facilitating that activity.
310. **Caustic soda** – was used in the water treatment plant for cooling in the water towers. The caustic soda neutralised the acid in the water to ensure there was no scale and build-up and to make sure it was safe for people to work around the cooling towers. In the Tribunal's opinion expenditure on their acquisition was not incurred on goods to be the subject of processing or transformation by the company in research and development activities. Their acquisition was in order that they facilitate an activity that subjected feedstock input to processing or transformation. They were entirely consumed in the course of facilitating that activity.
311. **Anti-scalant** – was a similar product added to water. Like caustic soda, it was used up over time. In the Tribunal's opinion expenditure on their acquisition was not incurred on goods to be the subject of processing or transformation by the company in research and development activities. Their acquisition was in order that they facilitate an activity that subjected feedstock input to processing or transformation. They were entirely consumed in the course of facilitating that activity.
312. **Chemicals General** – these chemicals were consumed and otherwise used up in the processes of the smelter. In the Tribunal's opinion expenditure on their acquisition was not incurred on goods to be the subject of processing or transformation by the company in research and development activities. Their acquisition was in order that they become part of and/or facilitate an activity that subjected feedstock input to processing or transformation. They were entirely consumed in the course of facilitating that activity.
313. **Fluxes** – silica dissolved the iron oxide in the smelting process. After the silica had been used it was discarded. It was changed in form from how the applicant bought it. In the Tribunal's opinion expenditure on the acquisition of fluxes was not incurred on goods to be the subject of processing or transformation by the company in research and development activities. Their acquisition was in order that they become part of an activity that subjected feedstock input to processing or transformation. The discarded silica was not a part of the applicant's products.
314. **Lime** – was used to keep the slag fluid. It was dissolved in the silica slag. It changed as a result of the role it played – it became part of the slag and was no longer limestone. In the Tribunal's opinion expenditure on the acquisition of lime was not incurred on goods to be the subject of processing or transformation by the company in research and development activities. Its acquisition was in order that it becomes part of an activity that subjected feedstock input to processing or transformation. The slag was valueless and not any part of the applicant's products.
315. **Water** – this was used for cooling in the smelter. It was lost in the form of spillage or steam. In the Tribunal's opinion expenditure on the acquisition of water for the purposes of the Mt Isa smelter was not incurred on goods to be the subject of processing or transformation by the company in research and development activities. Its acquisition was in order that it become part of an activity that subjected feedstock input to processing or transformation. It neither was, nor formed any part of, the applicant's products.
316. **Reagents and chemicals** – these were chemicals and reagents used for maintenance, testing

and conditioning. Chemicals used for the purpose of reducing corrosion to steel components or electrical components by acid waste water and biological agents were introduced into the water in the cooling tower to reduce the risk of contamination of the water. In the Tribunal's opinion expenditure on their acquisition was not incurred on goods to be the subject of processing or transformation by the company in research and development activities. Their acquisition was in order that they become part of and/or facilitate an activity that subjected feedstock input to processing or transformation. They were entirely consumed in the course of facilitating that activity.

317. **All Oxygen** (expense 509 in the 2007 year) – refers to the oxygen consumed in the Isasmelt furnace.
318. Mr Lloyd and Ms Hirschhorn submit in their closing written submissions at [R164]:

Importantly, the oxygen acquired in 2007... was consumed in the Isa[s]melt furnace where it reacted with the concentrate that contained chalcopyrite and pyrite and produced a new compound: sulphur dioxide. The sulphur dioxide was then collected in the smelter and delivered to the acid plant.

319. They further submit at [R183] that:

Ms Butler confirmed in cross-examination that the oxygen was all consumed in the Isa[s]melt furnace where it was used to react with the chalcopyrite and the pyrite in the concentrate in the "smelting reaction". Ms Butler confirmed that the oxygen reacted with the concentrate that contained chalcopyrite and pyrite and produced a new compound: sulphur dioxide. The sulphur dioxide was then collected in the smelter and delivered to the acid plant.

320. If this submission is understood to suggest that Ms Butler conceded in cross-examination that all of the oxygen injected in the furnace results in the production of sulphur dioxide, then, in the Tribunal's opinion, counsel for the respondent take what Ms Butler stated out of context. It is clear that the oxygen injected into the first three slag blows did not.
321. Ms Butler gave unchallenged evidence to the effect that when oxygen is added to the molten material in the furnace it preferentially reacts with iron. Oxygen is first injected into the molten bath because it reacts with the iron contained in chalcopyrite to create iron oxide. The iron oxide so produced combines with silica in the bath to make "slag", which separates from and is lighter than copper sulphide. The slag is then removed. The slag is a waste material with no commercial value. It is not a product.
322. Copper sulphide with some residual iron remains behind in the molten bath.
323. That initial process is followed by two "slag blows" where more oxygen is injected into the molten bath. A slag formed by the same chemical process is again removed.
324. In the Tribunal's opinion expenditure on the acquisition of oxygen used in these first three stages was not incurred on goods to be the subject of processing or transformation by the company in research and development activities. Its acquisition was in order that it become part of an activity that subjected feedstock input to processing or transformation. The slag produced has no commercial value and does not form any part of the applicant's products.
325. After the iron has reacted with oxygen and been removed there is a "copper blow". Oxygen is again injected into the molten bath where, without iron to react preferentially with, the oxygen reacts with the copper sulphide remaining in the bath to create copper and sulphur dioxide. Sulphur dioxide comes off as a gas. What remains in the molten bath after that stage is referred to as blister copper.
326. The blister copper then passes through two anode furnaces into which oxygen is continuously blown to remove more residual sulphur by the same chemical process to produce anode copper.
327. The latter two stages (the "copper blow" and the anode furnace) produce sulphur dioxide—which is, as the Commissioner submits, collected and delivered to a third party to be used for that third party's commercial purposes. It is a product. Oxygen is an integral ingredient of that product. Accordingly in the Tribunal's opinion the applicant's expenditure on the acquisition of

oxygen used in these last two stages was incurred on goods to be the subject of processing or transformation by the company in research and development activities. Its acquisition was in order that it be the subject of processing or transformation in the applicant's research and development activities.

THE SECOND PRINCIPAL ISSUE: OVERLAP

Findings

328. The evidence establishes that the applicant's employees responsible for the operations of the Mt Isa copper concentrator did not plan or co-ordinate what they intended to do by way of R&D activities with those who developed the applicant's R&D plans for the Mt Isa copper smelter—each developed their plans independently of each other intending them to be submitted by the applicant to the Industry Research and Development Board. From their point of view the timing of each other's R&D activities was mere coincidence.
329. However their mutual employer, the eligible company that submitted both sets of plans to the Industry Research and Development Board, had complete knowledge of what each of its senior staff in the Mt Isa copper concentrator and the Mt Isa smelter were proposing and thus had knowledge that overlaps in the extensive plant trials would occur as those plans were implemented—as became the fact for 201 days in the 2003 tax year (MET 001); 98 days in 2005; 106 days in 2006, and 61 days in 2007 (all MET 023).
330. Mr Harvey agreed in cross-examination that when the applicant's R&D activities were concurrently undertaken in the Mt Isa copper concentrator and the Mt Isa smelter all of the concentrate produced by the copper concentrator was sent to the smelter. Ms Butler under cross-examination testified that from the time copper concentrate left the concentrator process it usually took about 7 days until the concentrate was consumed in the smelter. The Tribunal accepts that evidence.

The applicant's submissions

331. The applicant accepts the factual accuracy of the proposition that there were a number of days in the 2005, 2006 and 2007 tax years on which one of the R&D projects involving the Mt Isa copper concentrator was taking place and one of the R&D projects involving the Mt Isa copper smelter was also taking place.
332. Mr de Wijn and Ms Burnett however observe that “[t]he Commissioner seizes on this coincidence of timing to argue that all the costs of producing the concentrate produced by the Mount Isa copper concentrator in the course of carrying on R&D activities was itself “feedstock expenditure”, with respect to the copper smelter R&D activities carried out on the same days”.
333. The applicant submits that such a conclusion would be clearly contrary to the policy intent described by Senator Kemp and that it would be a perverse result if expenditure otherwise within the definition of “research and development expenditure” and eligible for the 125% R&D concession was to be disallowed on that basis. It submits that an absurd construction should not be adopted where an alternative construction is open, particularly in construing beneficial legislation.
334. Counsel for the applicant submit that that copper concentrate was not produced in order “to be” processed in R&D activities in the smelter. Mr de Wijn and Ms Burnett submit that a series of systematic activities are required to satisfy the definition of R&D activities. This explains why the Guidelines pursuant to s 39KA of the IRDA refer to “R&D projects”. Thus at [A217] of the applicant's closing submissions:

The definitions of “research and development expenditure” and “feedstock expenditure” in s 73B(1) contemplate a relationship between the feedstock expenditure and the R&D activities. This is evident by the linking words “to be”, between the expenditure and the R&D activities. It is also evident from the requirement that R&D activities, together, be systematic, which suggests

that they are conceived of on a project-by project basis, consistently with the Guidelines.

335. Accordingly Mr de Wijn and Ms Burnett submit that the costs of the concentrator processes while the concentrator R&D activities are taking place are “research and development expenditure” and are not “feedstock expenditure” with respect to unrelated R&D activities in a different plant. The requisite link between the expenditure incurred in the copper concentrator and the unrelated R&D activities carried on in the copper smelter is absent.
336. The applicant puts an alternative argument against the possibility that the Tribunal might accept an argument advanced by the respondent that particular items of expenditure were “the focus” of certain plant trials. Because the Tribunal has stated its reasons for rejecting the premise upon which that alternative argument was advanced at [236]-[237] above it is not necessary to consider further the applicant’s alternative argument in respect of the overlap issue.

The Respondent’s submissions

337. The Commissioner summarises his submissions as follows:

Regardless of whether expenditure incurred in the concentrator plant would have been feedstock expenditure in relation to the research and development activities in that plant, insofar as that expenditure was incurred in producing copper concentrates to be used in research and development activities in the smelter trials, they are properly characterised as feedstock expenditure by reason of their relationship to the smelter trials. The existence of trials in the concentrator cannot negate that characterisation.

[\[21\]](#)

Consideration

338. There is force in the applicant’s submission that if all of the applicant’s expenditure on R&D in its concentrator processes, as a result of overlap, is to be lost for deductibility at the premium rate (at least for the time of the overlap) simply because the applicant used what was produced in its Mt Isa copper concentrator as feedstock input in the course of it carrying out unrelated R&D in its smelter, that outcome might be thought surprising. “Absurd” and “perverse” may be too strong as descriptors but such a result could be thought to be inconsistent with what the Parliament may have understood it was enacting when it legislated for the feedstock provisions assuming regard can properly be had to the EM, the Minister’s speech and the project-by-project basis of approval of planned R&D activities required by the Guidelines pursuant to s 39KA of the IRDA.
339. However, the difficulty the Tribunal has with the applicant’s submissions is that they fail to grapple with the clear and seemingly intractable statutory language of the definition of “feedstock expenditure” in the ITAA. There appears to be no textual warrant in the statute that would permit the Tribunal to read the words “to be” as meaning one thing for some forms of goods and materials the subject of processing and transformation and another when there is overlap of the kind in question. Subject to what is stated below the Commissioner’s submissions must be accepted.
340. The applicant can only succeed if (a) the Tribunal is entitled to have regard to the extrinsic materials referred to in paragraphs [244]-[257]; (b) it concludes that the definition read in the light of those materials manifestly fails to reflect an exception necessary to achieve the policy objectives the Act was enacted to implement; and (c) that it is legally open to the Tribunal to read into the definition of “feedstock expenditure” some words to give effect to an implied exception to the definition for those expenditures incurred on activities where two or more projects overlap in a tax year.
341. The first two of those steps are highly problematic.
342. The only possible basis which might allow resort to extrinsic materials in this specific instance

(as distinguished from the general approach that the Tribunal has adopted to the interpretation of the provision which has denied their relevance) is the existence of s 39KA of the IRDA. Both Acts address different aspects of the same subject matter. If both Acts are to be read and applied harmoniously the submitted disharmony of outcome described by the applicant as “absurd” might be concluded to reveal an implicit ambiguity that would permit resort to extrinsic materials to resolve whether or not the definition should be applied on a project-by-project basis.

343. The difficulty the Tribunal has with that argument is that while the Guidelines under the IRDA refer to projects, none of the secondary materials referred to the Tribunal by the applicant address the specific question of how projects that overlap should be treated for tax purposes. They are silent on that subject. For that reason the Tribunal can gain little or no guidance as to the Parliament’s intention from those materials.
344. The third of those steps is, in the circumstances applying, prohibited.
345. Even if the Tribunal is mistaken regarding the relevance of the extrinsic materials the third step requires the Tribunal to read additional words into the statute. The Tribunal would have to construe the definition of “feedstock expenditure” as if additional concluding words as shown in bold were included to the following effect:

feedstock expenditure, in relation to an eligible company, means expenditure incurred by the company in acquiring or producing materials or goods to be the subject of processing or transformation by the company in research and development activities, and includes expenditure incurred by the company on any energy input directly into the processing or transformation... but does not include expenditure incurred by the company on producing products to be the subject of processing or transformation by the company in other research and development activities.

346. In the Tribunal’s opinion such a substantial degree of re-writing or any comparable gloss on the statutory language is beyond that which current legal doctrine accepts to be permissible as an aspect of statutory interpretation: see *Taylor v The Owners – Strata Plan No 11564* (2014) 88 ALJR 473; [2014] HCA 9 per French CJ, Crennan and Bell JJ at [38]-[39].
347. Accordingly the Tribunal accepts Mr Lloyd and Ms Hirschhorn’s submissions on the question of overlap—with the minor qualification required by reason of Ms Butler’s evidence which the Tribunal has accepted, that the concentrate the applicant produced in its Mt Isa copper concentrator to be feedstock input in the applicant’s Mt Isa smelter was that which was produced 7 days prior to its consumption in the smelter.
348. The Tribunal is mindful of counsel for the applicant’s submission that the result is difficult to understand given that the applicant could have scheduled its R&D projects in a way that would have avoided the overlap but that observation only reinforces the strength of the Commissioner’s submissions.

CONCLUSION

349. As the applicant has been substantially successful on the first principal issue and the Commissioner wholly successful on the second principal issue the Commissioner’s assessments must be varied in accordance with these reasons.
350. A substantial tax shortfall of a lesser and yet to be quantified amount will result. The Tribunal notes that its reasons specifically exclude the applicant’s expenditure on expense item 216 in the 2007 tax year from entitlement for deductibility at the premium rate.
351. The Tribunal is grateful for the parties’ indication that they will undertake the necessary consequential calculations in good faith. The Tribunal trusts it will be unnecessary but the review may be relisted to finalise those matters if required.
352. As agreed by the parties, the hearing of the applicant’s request for remission of the shortfall interest charge is adjourned until the amount of the shortfall has been determined by agreement or order of the Tribunal.

353. In accordance with the directions given during the hearing, the parties have 28 days from the date of this decision to review the Tribunal's reasons to identify any commercially sensitive information the publication of which they might seek to prevent. After 28 days these reasons (with any necessary redactions) will be published.

I certify that the preceding 353 (three hundred and fifty-three) paragraphs are a true copy of the reasons for the decision herein of President D Kerr

.....
Associate

Dated 29 July 2014

| | |
|---------------------------------|--|
| Dates of hearing | 10-14, 18-19, 27 February; 13-14 March 2014 |
| Date final submissions received | 14 March 2014 |
| Counsel for the Applicant | Mr JW de Wijn QC and Ms CA Burnett |
| Solicitors for the Applicant | King & Wood Mallesons |
| Counsel for the Respondent | Mr S Lloyd SC and Ms M Hirschhorn |
| Solicitors for the Respondent | Maddocks Lawyers |

Appendix A

Appendix B

Appendix C

Appendix D

Appendix E

[1] While not referred to in submissions the Tribunal accepts that the ATO has stated publicly that the Commissioner will not disallow a claim on the grounds that activities do not qualify for R&D without first seeking the advice of Innovation Australia: Australian Taxation Office and AusIndustry, A guide to the R&D Tax Concession, Part A. Introduction, February 2010, version 4.3 [4.4.1]. While a failure on the Commissioner's part to seek the views of Innovation Australia could well give rise to procedural fairness issues of the kind discussed by the High Court in Haoucher v Minister for Immigration and Ethnic Affairs [\[1990\] HCA 22](#); [\(1990\) 169 CLR 648](#), any contrary view expressed by the Industry Research and Development Board/Innovation Australia when consulted does not affect the formal legal power of the Commissioner to disallow a claim on those grounds.

[2] Mr Magee's witness statement (Ex A10) at [9] confirmed that the process flow diagram is accurate.

[3] Mr Way's witness statement (Ex A9) at [8] confirmed that the process flow diagrams are accurate.

[4] Ms Butler's witness statement (Ex A7) at [9] confirmed that the process flow diagrams are accurate.

[5] Mr Strohmayer's witness statement (Ex A2) at [11] confirmed that the process flow diagram is accurate.

[\[6\]](#) Mr Siliezar's witness statement (Ex A5) at [\[6\]](#) confirmed that the process flow diagram is accurate.

[\[7\]](#) The following are cases footnoted in the Alcan (NT) Alumina Pty Ltd case:

[\[69\]](#) *Roy Morgan Research Centre Pty Ltd v Commissioner of State Revenue (Vict)* [\[2001\] HCA 49; \(2001\) 207 CLR 72](#) at 77 [\[9\]](#) per Gaudron, Gummow, Hayne and Callinan JJ, 89 [\[46\]](#) per Kirby J; [\[2001\] HCA 49](#); *Stevens v Kabushiki Kaisha Sony Computer Entertainment* [\[2005\] HCA 58; \(2005\) 224 CLR 193](#) at 206 [\[30\]](#) per Gleeson CJ, Gummow, Hayne and Heydon JJ, 240-241 [\[167\]-\[168\]](#) per Kirby J; [\[2005\] HCA 58](#); *Carr v Western Australia* [\[2007\] HCA 47; \(2007\) 232 CLR 138](#) at 143 [\[6\]](#) per Gleeson CJ; [\[2007\] HCA 47](#); *Director of Public Prosecutions (Vic) v Le* [\[2007\] HCA 52; \(2007\) 232 CLR 562](#) at 586 [\[85\]](#) per Kirby and Crennan JJ; [\[2007\] HCA 52](#); *Northern Territory v Collins* (2008) [\[2008\] HCA 49; 235 CLR 619](#) at 642 [\[99\]](#) per Crennan J; [\[2008\] HCA 49](#).

[\[70\]](#) *Nominal Defendant v GLG Australia Pty Ltd* [\[2006\] HCA 11; \(2006\) 228 CLR 529](#) at 538 [\[22\]](#) per Gleeson CJ, Gummow, Hayne and Heydon JJ, 555-556 [\[82\]-\[84\]](#) per Kirby J; [\[2006\] HCA 11](#). See also *Combet v The Commonwealth* [\[2005\] HCA 61; \(2005\) 224 CLR 494](#) at 567 [\[135\]](#) per Gummow, Hayne, Callinan and Heydon JJ; [\[2005\] HCA 61](#); *Northern Territory v Collins* [\[2008\] HCA 49; \(2008\) 235 CLR 619](#) at 642 [\[99\]](#) per Crennan J.

[\[71\]](#) *Hilder v Dexter* [\[1902\] AC 474](#) at 477-478 per Earl of Halsbury LC.

[\[72\]](#) *Commissioner for Railways (NSW) v Agalianos* [\[1955\] HCA 27; \(1955\) 92 CLR 390](#) at 397 per Dixon CJ; [\[1955\] HCA 27](#), quoted with approval in *Project Blue Sky Inc v Australian Broadcasting Authority* [\[1998\] HCA 28; \(1998\) 194 CLR 355](#) at 381 [\[69\]](#) per McHugh, Gummow, Kirby and Hayne JJ.

[\[73\]](#) *Heydon's Case* [\[1584\] EngR 9; \(1584\) 3 Co Rep 7a](#) at 7b [\[76\] ER 637](#) at 638].

[\[8\]](#) The fact that the phrase refers to the alternatives of 'acquiring' and 'producing', and 'processing' and 'transformation', separated by the word 'or', does not preclude it being regarded as a composite phrase: see, eg., *Fest & ors v Delegate of the Native Title Registrar & anor* [\(2008\) 173 FCR 150; \[2008\] FCA 1469](#); and *New Zealand v. Johnston* [\[2011\] FCAFC 2](#).

[\[9\]](#) *Esso Australia Resources Pty Ltd v Federal Commissioner of Taxation* [\[2011\] FCAFC 154](#) (per Keane CJ, Edmonds and Perram JJ at [\[100\]-\[107\]](#))

[\[10\]](#) *The Macquarie Dictionary*, Macquarie Dictionary Publishers Pty Ltd, Fifth Edition, 2009

[\[11\]](#) *The Australian Oxford Dictionary*, Oxford University Press, 2002

[\[12\]](#) The term "processing" has been considered judicially on occasion in respect of other statutes, particularly in a sales tax context: e.g. *Davies Coop & Co v Federal Commissioner of Taxation* [\[1948\] HCA 50; \(1948\) 77 CLR 299](#) at 311 per Latham CJ, *FC of T v Hamersley Iron Pty Ltd* 81 ATC 4582; [1981 12 ATR 429](#) etc. and also in the United Kingdom in relation to capital allowances: eg. *Kilmarnock Equitable Cooperative Society Ltd v Inland Revenue Commissioners* [\[1966\] SLT 224; \(1966\) 42 TC 675](#) etc.

[\[13\]](#) see s 39J(1A)(d)

[\[14\]](#) It is noted that the particular definition does not appear to be footnoted.

[\[15\]](#) Refer Ex A9-Way, 26 September 2012 at final page of Annexure D

[\[16\]](#) T31 at 1836-1837

[\[17\]](#) See Mark Robertson QC, 'The dangers of the ATO's "policy intent" approach to the construction of Tax Acts' [\(2014\) 43 Australian Tax Review 22](#).

[\[18\]](#) Transcript p 473.

[\[19\]](#) *Second Reading of the Taxation Laws Amendment Bill (No 3)*, Assistant Treasurer, 12 December 1996 (*Senate, Debates (1996) Vol S181*, p 7440).

[\[20\]](#) Referred to obliquely in the applicant's closing written submissions at [215] and fn 342.

[\[21\]](#) Respondent's closing written submissions at [R250].

AustLII: [Copyright Policy](#) | [Disclaimers](#) | [Privacy Policy](#) | [Feedback](#)

URL: <http://www.austlii.edu.au/au/cases/cth/AATA/2014/515.html>