Australian Government
Australian Taxation Office

Decision impact statement

Alcoa of Australia Ltd and Commissioner of Taxation [2025] ARTA 482

Relying on this Decision impact statement

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Table of Contents **Paragraph**

Venue:	Administrative Review Tribunal
Venue reference No:	2022/3549 - 3564
Judgment date:	30 April 2025

Summary of decision

1. This case concerned the transfer pricing consequences under former Division 13 of the *Income Tax Assessment Act 1936* (ITAA 1936) of corrupt dealing that had infected a commercial transaction. The transaction involved sales of alumina made by Alcoa of

Australia (AoA) through an intermediary during 1993 to 2009 (excluding 1996) (Relevant Years). The sales were delivered to a smelter in Bahrain owned by Aluminium Bahrain B.S.C. (Alba).

2. The Administrative Review Tribunal (Tribunal) determined that the dealing was not at arm's length by reason of steps taken to facilitate bribery of foreign officials but found that the dealing had not resulted in AoA receiving consideration that was less than the consideration that would have been received in an arm's length dealing. This conclusion was one of fact.

3. All legislative references in this Decision impact statement are to the ITAA 1936, unless otherwise indicated. All references to Division 13 are to former Division 13.

4. All decision references in this Decision impact statement are to the decision of *Alcoa of Australia Ltd and Commissioner of Taxation* [2025] ARTA 482, unless otherwise indicated.

Overview of material facts

5. The arrangement that is the subject of this case was the subject of criminal and civil investigations in the United States of America (US).

6. As of 1990, AoA was supplying alumina directly to Alba under a 10-year agreement with Alba (1990 Supply Agreement).[1] Under this agreement, the first 600,000 metric tonne (m/t) of alumina was priced in accordance with a formula (Formula Tonnage).[2] For any alumina supplied over and above that volume, the price was negotiated annually (Market Tonnage).[3] Under that agreement, the Formula Tonnage was invoiced to, and paid for by, Alba.[4]

7. 1993 was the first year the supply exceeded 600,000 m/t and in which Market Tonnage was supplied. In this year, AoA commenced to supply the Market Tonnage through an entity associated with Mr Dahdaleh (a VPD Entity).[5] While the 1990 Supply Agreement contemplated some of the supplies may be made through an agent or distributor at AoAs nomination, the VPD Entity was neither a party to the 1990 Supply Agreement nor had been nominated under it.[6] The VPD Entity was not associated with AoA through shareholding or common directorships.[7]

8. In 1993, the invoices for the Market Tonnage were invoiced to the VPD Entity and the VPD Entity was liable to pay AoA.[8] Other than these invoices, the terms on which the Market Tonnage was supplied to the VPD Entity were not put in writing.[9] The VPD entity on-sold the alumina to Alba. This arrangement continued throughout 1994 and 1995.

9. In 1996, AoA entered into another agreement with Alba to vary the terms of the 1990 Supply Agreement.[10] On the same day, AoA entered into a sales agreement with a VPD Entity for the supply of Market Tonnage from 1 January 1997 to 31 December 2000.[11] This agreement was superseded by another agreement entered into 3 months later (1996

[1] At [23] and [314].
[2] At [23]
[3] At [23].
[4] At [23].
[5] At [315].
[6] At [318].
[7] At [3]. None of the VPD Entities referenced in this Decision impact statement were associated with AoA through shareholding or common directorships. There were a number of VPD Entities involved throughout the Relevant Years. They are all referred to as a VPD Entity or, collectively, as VPD Entities.
[8] At [321].
[9] At [321].
[10] At [421].
[11] At [421].

Alumet Supply Agreement) pursuant to which AoA agreed to supply Market Tonnage to a VPD Entity from 1 January 1997 to 31 December 2001.[12]

10. Under the 1996 Alumet Supply Agreement, there was no longer an annual negotiation of prices for the Market Tonnage. Instead[13]:

- For 1997, the price was fixed at US$65 m/t.[14]
- For 1998 to 2001, a formula applied to quantities up to and including 375,000 m/t.
- For annual quantities over 375,000 m/t, Alcoa and the VPD Entity would agree on pricing based on global alumina market conditions.

11. During the period 1997 to 2001[15], Formula Tonnage was invoiced to Alba pursuant to the 1990 Supply Agreement (as amended) and Market Tonnage was invoiced to the VPD Entity under the 1996 Alumet Supply Agreement.[16] The VPD Entity on-sold the alumina to Alba.

12. During the period 1993 to 2001, both types of tonnages were commingled on the same ship and sent to Bahrain.

13. In 2002, AoA and a VPD Entity entered into a 3-year Distribution Agreement for all alumina to be provided to Alba.[17] AoA no longer had a supply contract with Alba.[18]

14. In 2005, AoA and a VPD Entity entered into a 10-year Distribution Agreement. This was terminated in 2009.[19]

15. Throughout 1993 to 2009, the price at which the VPD Entities sold the alumina to Alba was not known to AoA.[20] Some of the invoices issued by the VPD Entities to Alba were set out by the Tribunal. They show that Alba was paying the VPD Entity for the Market Tonnage between 18.9% and 109.2% more than the price paid by the VPD Entities to AoA for the same alumina.[21]

16. In the US the Department of Justice brought criminal proceedings against AoA's related company, Alcoa World Alumina LLC (AWA).[22] In 2014, AWA entered into a plea agreement whereby it pleaded guilty to one count of violating the *Foreign Corrupt Practices Act 1977* (USA).[23]

17. Administrative proceedings were also brought by the US Securities and Exchange Commission, Alcoa Inc, the US parent of AoA, submitted an offer of settlement and consented to findings of fact. Alcoa Inc's offer of settlement records that between 1989 and 2009 AoA and AWA 'retained a consultant to acts as their middleman in connection with sales of alumina to Alba and knew or consciously disregarded the fact that the relationship with the consultant was designed to generate funds that facilitate corrupt payments to

[12] At [422].
[13] At [435].
[14] At [436].
[15] No Market Tonnage was supplied in 1996 as AoA and the VPD Entity did not reach agreement as to price: at [432].
[16] At [23].
[17] At [472] and [484–485].
[18] At [472].
[19] At [473].
[20] At [125–126].
[21] At [299].
[22] At [11]
[23] At [11].

Bahraini officials'.[24] Further, '[o]n sales where the consultant acted as purported distributor, no legitimate services were provided to justify the role of the consultant as distributor'.[25]

18. After an audit, the Commissioner issued amended assessments for the Relevant Years. The amended assessments were issued on the basis of determinations under Division 13 for the 1993 to 1995 and 1997 to 2009 years. The Commissioner adjusted the consideration received for the Market Tonnage. The Commissioner did not adjust the prices of the sales to Alba of Formula Tonnage as there was no evidence that these sales produced a less than arm's length consideration as a result of non-arm's length dealings.

19. AoA objected to the amended assessments. The Commissioner disallowed the objections and AoA sought review by the Tribunal.

20. The Commissioner instructed its expert witnesses to prepare reports to opine on the arm's length consideration in respect only of the supplies between AoA and the VPD Entities.[26] AoA instructed its expert witnesses to prepare reports to opine on the arm's length consideration on the basis that where the alumina was supplied under 2 contracts, they should be construed as governing one overall commercial arrangement for the supply of alumina to Alba.[27]

21. On 30 April 2025, the Tribunal handed down a decision finding that AoA had proved the assessments were not excessive. The Commissioner did not appeal this decision.

Issues decided

Burden of proof

22. The Tribunal decided that, consistent with the reasoning in *Binetter v Commissioner of Taxation* [2016] FCAFC 163 and in accordance with section 14ZZK of the *Taxation Administration Act 1953*, it was for the taxpayer to prove that the parties were dealing at arm's length.[28]

Dealing at arm's length

23. The Tribunal decided that subsection 136AD(1) did not require that the parties to the transaction must be group members or otherwise be commonly controlled.[29]

24. The Tribunal agreed with the Commissioner's contention that facilitating the payments of bribes is inconsistent with an arm's length dealing.[30]

25. The Tribunal further decided that AoA had not proved that it was dealing at arm's length with the VPD Entities. The Tribunal rejected the taxpayer's submission that little or no weight should be given to the Offer of Settlement, findings by the US Securities and Exchange Commission and agreed Statement of Facts in the criminal proceedings.[31] The Tribunal did not itself make a positive finding that AoA 'knew of or consciously disregarded' that the VPD entities were inserted to facilitate bribes.[32]

[24] At [300].
[25] At [300].
[26] At [198].
[27] At [141–142].
[28] At [52].
[29] At [64] and [82].
[30] At [353].
[31] At [301].
[32] At [305] and [310].

The relevant supply and the relevant international agreement

26. This issue is relevant only to the 1993 to 2001 period during which AoA invoiced Alba and the VPD Entities separately and, in respect of the period 1997 to 2001, there existed separate written contracts.

27. The Commissioner's case was that under paragraph 136AD(1)(a), the relevant 'supply' was the supply of alumina to the VPD Entities and that this occurred under an 'international agreement' which did not incorporate the terms of any agreement by which AoA sold alumina to Alba.

28. The Tribunal agreed that the 'supply' for the purposes of paragraph 136AD(1)(a) was the supply to the VPD entities.[33] However, the Tribunal decided that the 'international agreement' was a tripartite agreement which included the terms of the 1990 Supply Agreement.[34]

Depersonalisation

29. The Tribunal said that the depersonalisation required meant neither 'utter disembodiment' nor a party 'standing entirely in the shoes of the taxpayer'.[35] They found that what was appropriate in this transaction was to consider a transaction between AoA and the VPD Entities that involved no bribery or corruption but still retained the supply by AoA to Alba of Formula Tonnage at a price higher than the Market Tonnage as part of the 'commercial context'.[36] They considered that the appropriate degree of depersonalisation did not require that the dealings with Alba be removed as a characteristic.[37]

30. The Tribunal found that to ignore the Formula Tonnage was to 'change an integral aspect of the actual supply by Alcoa'.[38] They further found that there was substantial evidence that the prices had been negotiated in tandem.[39]

Arm's length consideration

31. Having found that the relevant international agreement was a tripartite arrangement and that the supply of Formula Tonnage and Market Tonnage was inextricably linked, the Tribunal considered that the relevant hypothetical had to have the same characteristics.[40] The Tribunal went on to conclude that the Formula Tonnage could not be ignored for the purposes of determining whether AoA received less than arm's length consideration.[41] They further concluded that irrespective of the view of what the relevant 'supply' and 'international agreement' was, the consideration for the Market Tonnage encompassed the promises made regarding both the Market Tonnage and Formula Tonnage.[42]

32. The Tribunal went on to find that the approach adopted by the expert witnesses for AoA was to be preferred for the period 1993 to 2001.[43] They concluded that the evidence of those experts established that the consideration received in respect of Market Tonnage, while low on its own, was not less than arm's length when considered in the context of the

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[33] At [330] and [377].
[34] At [324] and [425].
[35] At [100].
[36] At [383].
[37] At [383].
[38] At [377].
[39] At [382].
[40] At [386].
[41] At [387].
[42] At [388].
[43] At [390].

contemporaneous supply of Formula Tonnage.[44] The relevant comparator was therefore the 'average of the prices for Market Tonnage and Formula Tonnage'.[45] For this period, the Tribunal then appeared to rely on a combination of the arm's length prices opined by the industry expert for the Commissioner, applied to the combined actual consideration, and the arm's length prices opined by the industry expert for AoA.[46]

33. In respect of the period 2002 to 2009, the Tribunal also concluded that the consideration received was not less than arm's length consideration.[47]

ATO view of this decision

Burden of proof

34. We agree that it is for the taxpayer to prove that the parties were dealing at arm's length.

Dealing at arm's length

35. We agree that the concept of 'dealing at arm's length' does not require there to be common control or other association. The transfer pricing laws are directed to where profits have been shifted overseas in circumstances where they ought to have been taxable in Australia. This is regardless of whether it can be identified that some other entity within a group of entities associated through shareholding or directorship received the 'shifted' profits.[48]

36. We agree with the Tribunal's view that parties to an arrangement designed to facilitate bribery and corruption are not dealing at arm's length. The concept of an arm's length dealing does not encompass illegal bribes regardless of how commercially advantageous or otherwise they may be.

The relevant supply and the relevant international agreement

37. The Commissioner took a different view to the one found by the Tribunal regarding the identification of the 'international agreement', and did not consider that the Market Tonnage supplies were made under a tripartite 'international agreement' which encompassed the terms and conditions upon which the supplies of Formula Tonnage were made. While the Tribunal noted that there was 'some force'[49] to the Commissioner's contentions in this regard, they ultimately identified the 'international agreement' differently.

38. This aspect of the decision of the Tribunal is unlikely to impact future Division 13 cases. The arrangement that gave rise to dispute regarding the nature of the relevant international agreement was very unusual.

39. If other arrangements did arise in which it is necessary to determine whether 2 separate contracts form the one 'international agreement' for the purposes of paragraph 136AD(1)(a), we will consider the terms, objects and circumstances of those agreements, and the agreement under which the obligation to supply the property arises, on a case-by-case basis.

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[44] At [416] in respect of the period 1993 to 1995 and at [468] for the period 1997 to 2001.
[45] At [415].
[46] At [415] and [465].
[47] At [512–520].
[48] See further *San Remo Macaroni Co v Commissioner of Taxation* [1999] FCA 1468, at [65], per Hill J.
[49] At [318].

Depersonalisation

40. We will continue to apply the approach set out in *Chevron Australia Holdings Pty Ltd v Commissioner of Taxation* [2017] FCAFC 62, *Commissioner of Taxation v Glencore Investment Pty Ltd* [2020] FCAFC 187 and *Singapore Telecom Australia Investments Pty Ltd v Commissioner of Taxation* [2024] FCAFC 29 at [134]. In particular, we will be guided by the view that 'objective attributes or features … should be included' and that the focus is not on the 'subjective or special factors of the parties involved'.[50]

Arm's length consideration

41. The Tribunal's finding of the relevant 'consideration' flowed from its view of the international agreement and the relevant degree of depersonalisation to apply when considering the hypothetical agreement. This led to its acceptance that the right approach was to compare the arm's length consideration with the average of the consideration received for the Market Tonnage and Formula Tonnage.

42. We will consider the totality of evidence to establish the arm's length conditions that might reasonably be expected to operate and the arm's length consideration. Noting the highly unusual facts attending these transactions, we do not consider that the Tribunal's findings and approach on these facts requires any alteration to our general approach in this regard.

Implications for affected advice or guidance

43. This decision has no implications for our advice and guidance products.

Comments

44. We invite you to advise us if you feel this decision has consequences we have not identified. Please forward your comments to the contact officer.

Due date:	25 September 2026
Contact officer:	Danielle Ellershaw
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Phone:	**08 8208 1907**

Commissioner of Taxation
27 August 2026

[50] *Commissioner of Taxation v Glencore Investment Pty Ltd* [2020] FCAFC 187 at [178], per Middleton and Steward JJ, endorsing Middleton J in *SNF (Australia) Pty Ltd v Commissioner of Taxation* [2010] FCA 635 at [44].

References

Legislative references:

ITAA 1936 former Div13
TAA 1953 14ZZK
TAA 1953 136AD(1)
TAA 1953 136AD(1)(a)

Foreign Corrupt Practices Act 1977 (USA)

Cases relied on:

Alcoa of Australia Ltd and Commissioner of Taxation [2025] ARTA 482; 2025 ATC 10-754

Binetter v Commissioner of Taxation [2016] FCAFC 163; 249 FCR 534; 2016 ATC 20-593; 104 ATR 145; (2016) 346 ALJR 357

Commissioner of Taxation v Glencore Investment Pty Ltd [2020] FCAFC 187; 281 FCR 219; 2020 ATC 20-770

Chevron Australia Holdings Pty Ltd v Commissioner of Taxation [2017] FCAFC 62; 251 FCR 40; 2017 ATC 20-615; 105 ATR 599 (2017) 345 ALJR 570

San Remo Macaroni Co v Commissioner of Taxation [1999] FCA 1468; 99 ATC 5138; 43 ATR 53

Singapore Telecom Australia Investments Pty Ltd v Commissioner of Taxation [2024] FCAFC 29; 302 FCR 192; 2024 ATC 20-897; 118 ATR 323

SNF (Australia) Pty Ltd v Commissioner of Taxation [2010] FCA 635; 2010 ATC 20-190; 79 ATR 193

ATO references

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