WHEN IS GOODWILL NOT GOODWILL?

By Michael Walpole

This article comments on the High Court of Australia's views on goodwill, as expressed in FC of T v Murry 98 ATC 4585. Although mostly obiter, the remarks made have established, or reiterated, a number of important principles concerning the nature of goodwill. The most important aspect of the High Court's remarks is that, from a legal perspective, goodwill is fundamentally different to the goodwill of a business referred to by accountants and business people. Legal goodwill is the attractive force of a business, while accounting goodwill seems to be the ability of a business to earn above the average for similar businesses. The importance of this lies in the fact that even an unprofitable business may be said to have legal goodwill although, for accounting purposes, it has none. This is significant for the operation of the relevant capital gains tax and stamp duty legislation.

1. INTRODUCTION

The High Court's decision in FC of T v Murry¹ has upset the apple cart when it comes to some views on "monopoly" goodwill.

It had become accepted that, as a result of the Full Federal Court's judgments in FC of T v Krakos Investments Pty Ltd ² and FC of T v Murry,³ a licence to carry on business, such as a liquor licence, a taxi licence or other statutory licence (and perhaps even a contractual licence) contained an element of "monopoly" goodwill. Accordingly, the transfer of a licence justified a claim to the 50% exemption from tax on the capital gain on goodwill transferred, under s 160ZZR of the Income Tax Assessment Act 1936 (Cth) ("ITAA36") (or Subdiv 118-C of the Income Tax Assessment Act 1997 (Cth) ("ITAA97") for disposals on or after 1 July 1998). It had also become likely, in stamp duty, for various State and Territory revenue offices to regard the transfer of such a licence as a transfer of property in the form of goodwill, which was dutiable. As a result of the High Court's decision in Murry, this will no longer automatically follow. The High Court has reaffirmed a narrower concept of goodwill and said that:

For legal purposes, goodwill is the attractive force that brings in custom and adds to the value of the business. It may be site, personality, service, price or habit that obtains custom. But with the possible exception of a licence to conduct a business exclusive of all competition, a licence that authorises the conduct of a business is not a source of goodwill.⁴

Murry's case involved the sale, by the taxpayer in partnership with her husband, of a Sunshine Coast taxi licence, shares in the taxi co-op, a meter and a taxi for $220,000. The meter and taxi, although included in the sale, were actually owned by a Mr Gower, who operated the taxi. Of the $220,000, some $189,000 was attributed to the licence and was said to be derived from the disposal of goodwill. The taxpayer claimed the 50% exemption, under s 160ZZR, on the capital gain derived from the sale of this goodwill. The Commissioner, on the other hand, regarded the $189,000 as a premium paid by the purchaser to enter the market and taxed the taxpayer's half share of the profit as a capital gain.

¹ 98 ATC 4585 ("Murry (HC)").
² 96 ATC 4063 ("Krakos").
³ 96 ATC 4703 ("Murry (FFC)").
⁴ Murry (HC) 98 ATC 4585, 4598.
The taxpayer was successful in the Administrative Appeals Tribunal\(^5\) and again in the Full Federal Court, but failed in the High Court. The majority of the High Court (Gaudron, McHugh, Gummow and Hayne JJ; with Kirby J dissenting) found that the taxpayer and her husband did not dispose of a business, nor did they dispose of an interest in a business including the goodwill; all they did was sell a taxi licence and some shares in a taxi co-operative. The High Court recognised that the licence had been:

… leased to a Mr Gower who, at the time of sale of the licence, owned the vehicle with which the licence was identified. In so far as the licence gave a right to conduct a taxi business, the business was conducted by Mr Gower. The sale of the licence was not a disposition by the taxpayer of the goodwill of Mr Gower's business. Nor did it dispose of the goodwill of the business of the taxpayer and her husband in so far as that business involved the running of another taxi and the leasing of the licence which is the subject of this appeal.\(^6\)

In other words, there had been two businesses involved. The taxi business, which seems to have been Gower's, and the business of letting out taxi licences, the latter being the Murrys'. The simple finding that, as they neither owned the vehicle nor operated it, the Murrys did not dispose of a taxi business, would have been enough to dispense with the matter, on the facts. However, the wider issue of the status of such licences for capital gains tax ("CGT") purposes was at stake, and the majority went on to hold that a licence such as a taxi licence\(^7\) "is not and does not contain any element of goodwill."\(^8\) The judgment criticises the view of "monopoly goodwill" expressed in Krakos (von Doussa, Hill and O'Loughlin JJ). The judgment also undertakes a full analysis of the concept of goodwill in Anglo/Australian common law and several aspects of this analysis will be disconcerting for taxpayers and their advisers. Not least of these will be the emphatic statement that, as has been suspected for some time, goodwill means one thing to lawyers and another to accountants and business people. Apparently the two concepts will never be reconciled. The statement that the two are different was criticised in the minority judgment of Kirby J, and it is of some surprise to the writer that it has not attracted wider comment since the judgment was handed down. The finding has, after all, considerably narrowed the concept of goodwill for CGT purposes.

The emphasis on goodwill as the attractive force of a business which brings in custom is a return to first principles as expressed by the House of Lords in IRC v Muller & Co's Margarine Limited.\(^9\) It seems, now, that "monopoly goodwill" will not be readily recognised by our courts and that only in constrained circumstances could one argue that the transfer of a licence also constitutes the transfer of goodwill of a business.\(^10\) A number of important principles relating to the meaning of goodwill emerged from, or were reaffirmed by, the High Court decision in Murry. Briefly stated, they are as follows:

- **Principle 1:** Goodwill is defined more narrowly for legal than accounting purposes.
- **Principle 2:** Goodwill may have different "sources" but does not have different "aspects".
- **Principle 3:** Goodwill is a form of property but is not severable from a business.
- **Principle 4:** Goodwill may not always date from when a business was acquired or established.
- **Principle 5:** Goodwill does not generally reside in a trading licence.
- **Principle 6:** Goodwill in taxi and similar businesses is negligible.

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\(^5\) Case 59, 95 ATC 473.
\(^6\) Murry (HC) 98 ATC 4585, 4587.
\(^7\) As will be discussed, this was said to be the case "with the possible exception of a licence to conduct a business exclusive of all competition ...": ibid 4598.
\(^8\) Ibid.
\(^9\) [1901] AC 217 ("Muller").
\(^10\) The latter argument arises only by virtue of the possible exception noted in above n 7.
The reasoning which supports these principles and their implications for the tax treatment of goodwill are examined below.

2. PRINCIPLE 1 - GOODWILL IS DEFINED MORE NARROWLY FOR LEGAL THAN ACCOUNTING PURPOSES

The majority judgment embarks on a lengthy analysis of the concept of goodwill, considering what the courts have said about the concept and how it has been treated in accounting literature. According to the learned judges:

Originally, the legal definition of goodwill emphasised the patronage of the business. In *Cruttwell v Lye*, Lord Chancellor Eldon said that goodwill was "nothing more than the probability, that the old customers will resort to the old place." However, "a wider view soon prevailed."¹¹

This "wider view" came to accommodate all of the "positive advantages"¹² that a business enjoyed but, in the analysis of their Honours:

The definitions of Lord Lindley, Lord Macnaghten [both in *Inland Revenue Commissioners v Muller & Co's Margarine Limited*] and Judge Swan [in the US case of *Haberle Crystal Springs Brewing Co v Clarke*] bring out the point that goodwill has three different aspects - property, sources and value which combine to give definition to the legal concept of goodwill. What unites these aspects is the conduct of a business.¹³

Later in the judgment, the learned judges repeat this customer-focused view of goodwill. As noted from the quote above,¹⁴ this view of goodwill is recognised by the High Court as narrower than "[t]he understanding of accountants and business persons as to the meaning of the term [which] differs from that of lawyers."¹⁵ The wider accounting view of the concept is illustrated by reference to a number of sources.

Australian accounting standards describe goodwill as comprising "the future benefits from unidentifiable assets which, because of their nature, are not normally individually brought to account." Some accounting theorists see goodwill as representing the difference between the present value of the future earnings of the business and the normal return on its identifiable assets. Business people see goodwill as concerned with the notion of excess value, a notion colourfully expressed in the statement of an American funds manager that "[i]f you pay $450 million for a TV station worth $2.5 million on the books, the accounts call the extra $447.5 million 'goodwill'." Accountants adopt a similar approach in the case of purchased goodwill. Approved Accounting Standard ASRB 1013 states that:

"Goodwill which is purchased by the company shall be measured as the excess of the cost of acquisition incurred by the company over the fair value of the identifiable net assets acquired."¹⁶

The High Court found, however, that it is:

... impossible to achieve a synthesis of the legal and the accounting and business conceptions of goodwill. Accounting and business conceptions of the term emphasise

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¹¹ *Murry* (HC) 98 ATC 4585, 4589.
¹² Ibid. The quoted words are from *Churton v Douglas* (1859) Johns 174, 188; 70 ER 385, 391.
¹³ Ibid 4590.
¹⁴ Ibid 4598.
¹⁵ Ibid 4589.
¹⁶ Ibid.
the necessity for the business to have some value over and above the value of the identifiable assets.\textsuperscript{17}

Indeed, there is a revision of his own view of goodwill, by McHugh J, because the accounting emphasis on the need for the business to have some fair value over and above the value of the identifiable assets means that:

\textldots{} the definition of goodwill by McHugh J in Hepples, which was much influenced by the accounting and commercial view of goodwill, should not be regarded as an accurate statement of the legal definition of goodwill.\textsuperscript{18}

What we are left with is a view of goodwill that does not encompass all advantages of a business represented by a value in excess of the assets of the business. This is because legal goodwill is rooted in the right to protection from unlawful competition. Thus, a business may have goodwill even when the value of the business is the same as, or less than, the tangible assets of the business. This apparent anomaly arises from the fact that courts will protect the ability of a business to attract custom, for example, under an action for passing off, whatever the "book value" of the goodwill may be. As the High Court expresses it:

A business may have goodwill for legal purposes even though its trading losses are such that its sale value would be no greater than its "break-up" value. Once the courts rejected patronage as the touchstone of goodwill in favour of the "added value" concept, it might seem impossible for a business to have goodwill for legal purposes when its value as a going concern does not exceed the value of the identifiable assets of the business. But the attraction of custom still remains central to the legal concept of goodwill. Courts will protect this source or element of goodwill irrespective of the profitability or value of the business. Thus, a person who has sold the goodwill of a business will be restrained by injunction from soliciting business from a customer of the old firm even though the value of that firm is no greater than the value of its identifiable assets.\textsuperscript{19}

In the High Court's view it would seem, the legal concept of goodwill rests on the extent to which a business owner's right to defend the business from unlawful competition can be enforced through the courts. This means that a business which has no justiciable right to defend itself from competition, is one without goodwill. This specific legal view of goodwill is very different indeed to that of the accountant. It takes the focus away from added value, to the justiciability of the right of the business to protection from unlawful competition.

However, when it comes to valuing goodwill, the High Court does accept that accounting methods may be acceptable, at least where a profitable business is concerned. In the case of a profitable business:

\textldots{} its value may be measured by adopting the conventional accounting approach of finding the difference between the present value of the predicted earnings of the business and the fair value of its identifiable net assets. Admittedly this approach can cause problems in valuing goodwill for legal purposes because the identifiable assets need to be valued with precision. Particular assets, as shown in the books of the business, may be under or over valued and may require valuations of a number of assets and liabilities which may be difficult to value. However in a profitable business, the value of goodwill for legal and accounting purposes will often, perhaps usually, be identical.\textsuperscript{20}

\textsuperscript{17} Ibid 4590.  
\textsuperscript{18} Ibid.  
\textsuperscript{19} Ibid.  
\textsuperscript{20} Ibid 4595.
This will not be the case where the business is not profitable, because it will still have legal goodwill when it may not have any goodwill on the books. Thus, the same valuation method will not suffice. The legal goodwill will have a value. The difficulty will be in ascertaining what this value is.

In a business trading at a loss or with less than industry average profitability, there may be a marked difference between the value of goodwill for legal purposes and its value for accounting or commercial purposes. That is because goodwill for legal purposes includes everything that adds value to the business - "every positive advantage" as Wood V-C pointed out in *Churton v Douglas*. As a result, a business may have valuable goodwill in the eyes of the law although an accountant would conclude that the business either has no goodwill or that, if it has, it is of nominal value only. The value of such goodwill may be difficult to assess. Having regard to the likely future of the business, often it may have only nominal value. But in some cases, the value of the goodwill may be more than nominal. It may be the difference between the revenues generated by the relevant advantages and the operating expenses (other than a share of the fixed costs) incurred in earning those revenues.21

With respect, this is all very well but one is at a loss as to how to resolve the difficulties that must inevitably arise. The accounting method of valuing goodwill is rooted in the accounting concept of goodwill. If the accounting concept of goodwill is abandoned it must be more difficult to establish a value for the "legal" goodwill. There may even be a need for the various accounting bodies to suggest an appropriate method of evaluation, or for the Commissioner of Taxation to issue a ruling.

Once this difficulty of valuation can be resolved, however, the analysis may well allow taxpayers who have sold a business with a relatively low goodwill value, or no goodwill value, to argue that there has nevertheless been a disposal of goodwill for tax purposes although this is not represented by the value on the books of the business. All the taxpayer need do, one supposes, is establish a reasonable and defensible value for the goodwill which has passed, and thus claim the pre-CGT status of, or the Subdiv 118-C partial exemption on, any capital gain involved. This does not, however, seem to be what the Commissioner of Taxation has in mind (see *Taxation Ruling TR 98/D13*).

The High Court's intentional divergence from accounting practice and general accounting concepts will certainly be criticised. Indeed, as has been mentioned, the dissenting judgment of Kirby J expresses reservations on the point. The learned judge enumerated a number of cogent reasons why the relief under s 160ZZR should be available to the taxpayer in this case, not least of them being the policy issues involved. Section 160ZZR is a relieving section and so should be generously interpreted if the will of the Parliament in affording the relief is not to be frustrated. According to Kirby J:

> It is wrong, in my opinion, to take a narrow view of the nature of goodwill in the present context, ... when, in revenue law, judges reach results which are out of harmony with economic analysis and accounting expertise, it is time for them to reconsider their preconceptions about the requirements of the legislation. Especially is this so where those requirements are found to produce results which involve conclusions which seem at odds with common sense.22

Certainly, the decision of the majority will have the effect of limiting access to the goodwill relief under CGT and to that extent it might be regarded as frustrating the intention of the relief. It would be surprising if, at the time of the introduction of the relief, and subsequent amendments to it, the legislature really had in mind anything other than

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21 Ibid.
22 Ibid 4602.
GOODWILL

the ordinary accounting and business concept of goodwill. It remains to be seen, however, whether there is widespread criticism of the use of a different meaning of goodwill in law to that used in accounting. Our tax cases are, after all, littered with statements to the effect that principles of taxation are not the same as, and should not be regarded as the same as, accounting principles.

3. PRINCIPLE 2 - GOODWILL MAY HAVE DIFFERENT "SOURCES" BUT DOES NOT HAVE DIFFERENT "ASPECTS"

The High Court regards the Full Federal Court as having missed the point that there is only one goodwill in a business although it may have a number of sources. The High Court's analysis is drawn from the fact that goodwill cannot be separated from the business to which it relates. In *Krakos*, Hill J had questioned the statements in *Muller* to the effect "that the 'goodwill of a business is one whole' and that to exist it must be attached to a business", and observed that:

Whether this proposition is universally correct must be doubted. For example, a business may have both goodwill attaching to a name and goodwill attaching to premises. There seems no reason why each of these aspects of the goodwill of such a business could not be dealt with separately.

The High Court's evaluation of this is that:

... it erroneously identifies the concept of goodwill as property with the sources of the goodwill and does not distinguish between the potential use value of an asset of a business and the goodwill of the business that is derived from the use of that asset.

The High Court says that:

Pushed to its logical conclusion ... [Hill J's analysis in *Krakos*] must mean, as his Honour's judgment recognises, that goodwill is not an asset but a series of assets that inhere in other assets of a business. Such a conclusion contradicts the two fundamental premises of the law of goodwill, that is to say, that goodwill has no existence independently of the conduct of a business and that goodwill cannot be severed from the business which created it.

This is an incorrect understanding of the law, and according to the High Court:

With the possible exception of some compensation cases, nothing in the case law, when it is properly understood, supports the proposition that the goodwill of a business is divisible and can be transferred in gross or as part of the transfer of an asset.

The descriptions of goodwill that we have become used to such as "site goodwill, personal goodwill, name goodwill and monopolies giving rise to goodwill" are, it seems, not types of goodwill but are merely descriptions which have been used, from time to time:

... because, in particular contexts, they are helpful in explaining, for example, where goodwill is situated or why some other asset has or has not been transferred with the goodwill of the business or why the transfer or mortgage of an asset also transfers or mortgages the goodwill of the business or why the goodwill of a business which has been sold arises from a monopoly and was not "attached to or connected with land a

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23 Ibid 4592.
24 *Krakos* 96 ATC 4063, 4068.
25 *Murry* (HC) 98 ATC 4585, 4593.
26 Ibid.
27 Ibid.
28 Ibid.
lease of which is granted assigned or surrendered".29

No longer may we talk of aspects or "types" of goodwill as what might have been thought to be types of goodwill are, in fact, mere labels used to explain the source of the goodwill of the relevant business.

4. PRINCIPLE 3 - GOODWILL IS A FORM OF PROPERTY BUT IS NOT SEVERABLE FROM A BUSINESS

The two (already well established)30 points that goodwill is indivisible from the business31 and that it is a form of property are made repeatedly in the judgment. For example it is stated:

Goodwill is correctly identified as property, ... because it is the legal right or privilege to conduct a business in substantially the same manner and by substantially the same means that have attracted custom to it. It is a right or privilege that is inseparable from the conduct of the business.32

And, again, it is stated:

Goodwill is an item of property and an asset in its own right. For legal and accounting purposes, it must be separated from those assets and revenue expenditures of a business that can be individually identified and quantified in the accounts of a business. Goodwill, as property, is "inherently inseparable from the business to which it relates". That which can be assigned and transferred from the business may, while it is connected to the business, be a source of the goodwill of the business but cannot logically constitute any part of the goodwill of the business.33

The court's view on the indivisibility of goodwill follows, in any event, from the criticism of the Federal Court's decision in Krakos and the fact that the High Court regards goodwill as potentially attributable to many sources, but as indivisible. It has been said, however, that:

... if Murry were taken to stand for the proposition that in all cases goodwill is only capable of being transferred together with the entire business with which it is associated, such a position would be difficult to reconcile with previous authority.34

Perhaps the better view is that goodwill is inseparable from the business, but a business with several parts may in actual fact constitute several, severable businesses each with its own goodwill.35

The view that goodwill is an item of property is formed with full recognition of the conflicting academic and practitioner views on the point. Even the arguments of AH Slater QC36 who successfully argued the Murry matter on the Commissioner's behalf, were dismissed.

Some writers assert that, jurisprudentially, goodwill is no more a form of property than information (see, for example, Slater, "The Nature of Goodwill", (1995) 24 Australian Tax Review 31 at 31 who argues that goodwill is a property in the sense of being a quality or attribute but is "neither property nor any sort of right, whether incorporeal or otherwise. Rather it is, like value, a quality or attribute which results from the presence of

28 Ibid.
30 See Geraghty v Minter (1979) 142 CLR 177.
31 See Geraghty v Minter (1979) 142 CLR 177.
32 Murray (HC) 98 ATC 4585, 4591.
33 Ibid 4592.
rights, assets, legal persons or qualities, none of which themselves are goodwill.\(^{37}\)

Such arguments, it seems, have been defeated both by the sheer weight of the case law and by reason of the nature of goodwill.

...courts and the judges of appellate courts have recognised goodwill as property for so long that the question whether goodwill is property must be taken as settled in favour of the view that it is. Moreover, as we have pointed out, goodwill is property because it is the legal right or privilege of the proprietor of a business to conduct the business in a particular way and by particular means.\(^{38}\)

With respect, one might accept that the argument against goodwill being property has been lost, for the practical reason of the number of judgments to the contrary, but the second argument that goodwill is property because it is the defensible legal right to adopt a particular course of conduct is not self-evident, and needs further explanation.

It can be expected that any State revenue authorities which have not already adopted provisions which make the issue irrelevant,\(^{39}\) will be delighted to hear that the High Court has affirmed their view that goodwill is capable of being property, and therefore dutiable.

5. PRINCIPLE 4 - GOODWILL MAY NOT ALWAYS DATE FROM WHEN A BUSINESS WAS ACQUIRED OR ESTABLISHED

The Commissioner of Taxation has, for a long time, accepted that in the case of goodwill created by the carrying on of a business, the goodwill may be taken to have been created when the business commenced. Section 160U(5) of the ITAA36 and s 109-10 of the ITAA97, have application to assets created by the taxpayer which vest in the taxpayer. In such cases the asset is deemed to have been acquired by the taxpayer when the construction or the work resulting in the creation of the asset commenced.\(^{40}\) In relation to s 160U, the Commissioner expressed the view in *Income Taxation Ruling* IT 2328 that goodwill of a business was deemed to have been created at the date when the business commenced. One hopes that this practical approach by the Commissioner will not be diverted in any way by the observation, made obiter, in *Murry’s* case that the source of the goodwill in an established business may change over the years. The learned judges recognise that:

The sources of the goodwill of a business may change and the part that various sources play in maintaining the goodwill may vary during the life of the business. But, as long as the business remains the "same business", the goodwill acquired or created by a taxpayer is the same asset as that which is disposed of when the goodwill of the business is sold or otherwise transferred.\(^{41}\)

The difficulty arises where the business in question undergoes changes because, although it may be in the same type of business, it may no longer be fairly said to be the "same business". As the High Court points out:

In determining whether the "same business" is being carried on, the sources of the goodwill may have changed so much that, although the business is of the same kind as previously conducted, it cannot be said to be the same business.\(^{42}\)

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\(^{37}\) Ibid, footnote 45.

\(^{38}\) Ibid.

\(^{39}\) As is now the case in New South Wales and has been the case for years in Northern Territory.

\(^{40}\) *Income Taxation Ruling* IT 2328, para 2.

\(^{41}\) *Murry (HC)* 98 ATC 4585, 4594.

\(^{42}\) Ibid 4595.
Their Honours go on to illustrate this concept by reference to some of Sydney’s better known "watering holes":

Hotels in the inner suburbs of Sydney provide an example, especially those in Paddington. For decades, many of these hotels drew their custom from the nearby locality. The goodwill of those hotels was site goodwill based on the residence of customers. Some years ago, some of these hotels, often with little change to their structural appearance, began to market themselves to people from a broader geographical area. Custom is no longer based on residence. The class of person patronising these hotels is completely different from what it was. Revenues are probably dramatically higher than they were before the change of marketing. In so far as site goodwill is a source of the present goodwill, it is of a different kind. While previously it derived from the proximity of residents to the hotel, it is now derived from the fact that the hotel is in the same locality as other hotels seeking to attract custom from patrons with the same interests. It is arguable that the goodwill asset of those hotels is not the same asset as it was two decades ago because it is not the same business as it was then.43

The danger is obvious, were the Commissioner to change his ruling and practice, and argue that the goodwill in a pre-CGT business is no longer pre-CGT goodwill because, for example, of a change in marketing, the "immunity" from CGT which comes with the pre-CGT status of the goodwill would be lost to the taxpayer selling such a business. Perhaps the risk of uncertainty warrants some assurance from the Commissioner, and this seems to have been forthcoming in Taxation Ruling TR 98/D13.

6. PRINCIPLE 5 - GOODWILL DOES NOT GENERALLY RESIDE IN A TRADING LICENCE

The High Court has now expressed the view that it is not licences which attract custom, but the "get up" of taxis. This view may partly have accounted for the reservations of Kiefel J44 in the Federal Court that:

...the fact that an asset be important, indeed essential, to a business and its income, does not render it goodwill. ... I am unable to agree that the collection of "rights"... (the "right to ply for hire": "the right to substantiate another licensee" and the "monopoly right" in the licence), whilst indicative of aspects of the licence itself, describe goodwill. It would then be equated with a person's ability to earn income and not particular aspects of an established business which combine to draw and keep custom.45

This view, that a licence such as a taxi licence or liquor licence, is a prerequisite to embarking on the business, and thus is the sine qua non of the business rather than the goodwill of the business, has been expressed by the High Court in such a way as to make it clear that the licence is not the attractive force of the taxi business, it is other characteristics which constitute that attractive force.

In this case it was found that:

The licence does not attract custom. It authorises conduct that in the ordinary course of events will attract custom ... . No doubt, because the number of licences is limited, the owner of a taxi business will probably obtain a greater share of patronage than he or she would if taxi businesses depended on

43 Ibid.
44 It should be mentioned that the High Court has, although not explicitly, resoundingly endorsed the dissenting judgment of Kiefel J.
45 Marry (FFC) 96 ATC 4703, 4719. The writer has also attempted to articulate this view elsewhere; see eg, M Walpole, "Small Business Roll-Overs and Exemptions - Dealing with Goodwill", ATAX CGT Conference Series, May/June 1998.
GOODWILL

market forces. But that does not mean that it is the licence that attracts the custom.\textsuperscript{46}

It was also found that:

A licence is a pre-requisite to the conduct of many professions, trades, businesses and callings. But it is not a source of the goodwill of a business simply because it is a pre-requisite of a business or calling. Nor is the situation different when only a limited number of licences are issued for a particular industry.\textsuperscript{47}

What attracts passengers to the taxi is its outward appearance and the advertising of its availability.

The "get up" of the vehicle is the attractive force which brings in a great deal of the custom of a taxi business. In the case of pedestrians, it is the get up which directly attracts the attention of potential customers and causes them to hail and enter the taxi. The extent of the custom will vary with the number of passengers desiring the use of taxis and "the skill of the driver" in finding the areas where they are likely to be. In the case of customers who book taxis, it is the various forms of advertising of the name and telephone number of the co-operative company which attract custom for the taxi.\textsuperscript{48}

The licence was not an attractive force in \textit{Murry}, it was a prerequisite allowing the business to operate and the attractive force to come into play.

When the licence was issued to the taxpayer and her husband, no goodwill was attached to it. It gave them the right to commence a business. In that respect, they were in no different situation to a person issued with a licence to conduct a television or radio station or build a drive-in-theatre. Until the station or the theatre commences business, no goodwill can exist.\textsuperscript{49}

This decision will obviously have impact in denying access to the 50% goodwill exemption to many taxpayers with statutory licences similar to taxi licences and liquor licences which constitute no more than a prerequisite to trade.\textsuperscript{50} To avoid this, the taxpayer would have to be more involved in the taxi business than the Murry partners were.

If the taxpayer had commenced a taxi business, it may have developed goodwill. Such a business including its goodwill could have been sold along with the licence. The value of the goodwill, if it existed, might be assessed in a number of ways.\textsuperscript{51}

Thus, a taxpayer who disposes of both the taxi licence and, perhaps, the motor vehicle to which it relates, and who truly does operate the business, for example by driving the vehicle, or letting it out whilst maintaining a sufficiently close connection with the operation of the taxi to be truly regarded as being in business, may still benefit from the partial relief from CGT on goodwill.

\textsuperscript{46} \textit{Murry} (HC) 98 ATC 4585, 4596.
\textsuperscript{47} Ibid 4598.
\textsuperscript{48} Ibid 4596.
\textsuperscript{49} Ibid 4597.
\textsuperscript{50} One such example is the licence to operate a milk run which was considered by some members of the Queensland Court of Appeal to create rights which were at least "akin to goodwill" in the case of \textit{Suncoast Milk Pty Ltd v Commr of Stamp Duties Qld} 96 ATC 4914. One issue in that matter was whether the contract of lease over a milk run entered between the taxpayer and the Queensland Dairy Industry Authority was dutiable as a contract for sale of property under which the taxpayer was entitled to the conveyance or transfer of property, in accordance with s 54(1) of the \textit{Stamp Act 1894} (Qld). The majority (Fitzgerald P and Fryberg J) of the Court found the agreement to be so dutiable. One of the majority (Fitzgerald P) found that the rights granted were analogous to goodwill. The judgment made no reference to the \textit{Krakos} decision and is a less than wholehearted recognition of the existence of goodwill inherent in a licence.
\textsuperscript{51} \textit{Murry} (HC) 98 ATC 4585, 4597.
7. PRINCIPLE 6 - GOODWILL IN TAXI AND SIMILAR BUSINESSES IS NEGLIGIBLE

Although taxpayers who truly engage in the taxi business stand a better chance of using the partial CGT relief, there are discouraging remarks, again obiter, concerning the value of their goodwill.

This observation is based on the High Court's comment that:

... the value of the goodwill of a taxi business, like the value of the goodwill of a money lending business, a mobile vending business, or a one person professional practice or trade is likely to be small.52

The reason for this low value lies in the haphazard or "accidental" nature of the taxi business.

Most of the custom of a taxi business is new custom. Repeat business is ordinarily accidental. That is not decisive against the existence of goodwill. But it is a powerful factor indicating that the business has no greater attraction than a similar business on its first day of operation. In Muller, Lord Macnaghten said that goodwill "is the one thing which distinguishes an old-established business from a new business at its first start." The history, conduct, site or get up of a taxi business ordinarily provides few inducements to distinguish it from similar businesses.53

This is not to say that no taxi business ever has goodwill but it will be rare.

A particular taxi business may attract a regular clientele; it may be connected with a network or co-operative which has a reputation for reliability or service; or it may employ highly skilled drivers who are able to generate above average earnings. Such advantages may give a particular taxi business goodwill because it has custom greater than the industry average. However, as with all those who sell goods or services that are virtually indistinguishable from the goods or services of others in a market and who have no special advantages over their competitors, above average industry earnings are difficult to achieve. And in the end, the value, as opposed to the existence, of goodwill for legal and commercial purposes is governed by the extent to which the earnings of a business exceed the norm.54

Presumably the less accidental the repeat business, the more goodwill the business will have. It may well be, in light of this, that even taxpayers who do conduct business actively, who can be distinguished from the passive investment style of "business" adopted by the Murry partnership, and who are able to point to aspects of the business other than a licence as the source of the goodwill, will find that their valuation of that goodwill is challenged.

8. OTHER IMPLICATIONS

There are other implications in the judgment which, although not principles in a strict sense, deserve comment.

One such implication is that there is goodwill in exclusive licences. The High Court's discussion of goodwill concluded that a licence which merely authorises the carrying on of a business is not a source of goodwill. A "possible exception" to this was mentioned, namely, "a licence to conduct a

52 Ibid.
53 Ibid.
54 Ibid.
business exclusive of all competition".55 Again this is obiter, but it affords hope for taxpayers who enjoy exclusive licences. The reason for the exception in the case of exclusive licences arises from the statements of the High Court in the case of Box v C of T.56 Box was the authority used by the Full Federal Court for holding that the sale of the liquor licence in the Krakos57 case constituted a disposition of goodwill. The Full Federal Court relied on part of the judgment of, Dixon CJ, Williams, Fullagar and Kitto JJ who said:

[i]n the case of a monopoly such as letters patent, or an exclusive licence to sell a commodity only obtainable from the licensor, such as a newspaper, in a particular area, the real value of the goodwill would lie in the fact of sole ownership and, so far as it has a locality, would be situated in the area over which the monopoly extended.58

The High Court in Murry found that this quotation from Box was inadequate authority for holding that the sale of the Krakos licence was a disposal of goodwill. There were three reasons for this:

- Box did not suggest that "the sale of a licence independently of a business involves the sale of goodwill", in fact the contrary would appear to be nearer the truth;59
- the High Court in Box did not suggest that all licences are a source of goodwill, even if an exclusive licence is a source of goodwill, a licence merely to enter a market is not;60 and
- the statement in Box which the Full Federal Court relied upon was "concerned with the value of goodwill and with a situation where the licence is exclusive and there is no competitor for custom."61

It seems that an exclusive licence is different to the type of licence involved in the taxi business because the taxi licence permits a business to become established in competition with a number of other businesses, whereas an exclusive licence goes much further than that. The matter, obviously, cannot be free from doubt, but the High Court has recognised the difference between such licences. Presumably the principle can be extended to other similar monopoly rights such as patents and similar forms of "industrial property".

The Box type of licence which "is exclusive and there is no competitor for custom", amounts to a monopoly and "a monopoly is similar to, but more protective of a business than, a restrictive covenant not to compete - which was the subject matter of the appeal in Box."62 The clear suggestion here is that an exclusive licence is a source of goodwill in much the same way that a covenant not to compete might be a source of goodwill. The High Court, it seems, is by no means committed to this view and it is no more than a possible assumption from the Box case that:

... their Honours' statement that the locality of the goodwill would extend over the area of the monopoly was intended to mean that the exclusive licence or monopoly was a source of goodwill...63

The argument that exclusive licences may be a source of goodwill is strengthened, however, by the High Court's own comment that:

An exclusive licence to conduct a business in a particular area is indistinguishable from an

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55 Ibid 4598.
56 (1952) 86 CLR 387 ("Box").
57 Krakos 96 ATC 4063, 4070.
58 Box (1952) 86 CLR 387, 397; Murry (HC) 98 ATC 4585, 4597.
59 Murry (HC) 98 ATC 4585, 4598.
60 Ibid.
61 Ibid.
62 Ibid.
63 Ibid.
absence of competition in that area. Because that is so, it may be that an exclusive licence not merely enhances the value of the goodwill of a business but should also be regarded as being a source of custom of the business.64

This distinguishes such a licence from a licence entitling no more than "entry into a market" which "cannot itself be a source of goodwill." Furthermore:

A non-exclusive licence, even a licence in an industry where the issue of licences is limited, is no more than a right to enter a market ... such a licence no more gives "the assurance of sharing in the available custom" than does entry into any market.65

It will only be possible to tell, later, whether the business has established any goodwill.

One is left wondering whether it is still possible to argue that a licence which is a necessary pre-cursor to trading may nevertheless be a source of goodwill if it is also an exclusive licence. The licence in issue in Box was an exclusive licence to distribute bread in a particular area. The difficulty that arises is that many pre-cursor type licences can also be said to be exclusive in one or more respect. The radio or television transmission licence is an exclusive licence to broadcast on a particular wave length, the newsagent's newspaper distribution licence is an exclusive licence to deliver newspapers to premises in a specific geographical area, but both the radio station (in respect of advertisers and listeners) and the newsagent (in respect of sales of publications that are not delivered) compete alongside other businesses for custom within the same or proximate geographical areas. The point is likely to remain uncertain until the High Court is faced with a set of facts permitting a decision to be made.

Another aspect of the discussion of the nature of goodwill in Murry should be remembered, namely the importance of goodwill in accessing the roll-over relief and retirement exemption available to owners of small business by virtue of Divs 17A and 17B of the ITAA3666 for which equivalent provisions in the ITAA97 have yet to be enacted. Because it would be unfair and unreasonably generous to allow small business taxpayers to enjoy both the 50% exemption from CGT and either the small business replacement roll-over relief, or the retirement exemption, the 50% exemption is not available if either of the two other concessions are utilised.67 In addition, so that a taxpayer may not roll-over amounts derived from disposal of non-goodwill assets into goodwill and later claim the 50% relief from CGT on goodwill, the net goodwill roll-over amounts, and the net non-goodwill roll-over amounts must be identified and are quarantined under the roll-over rules in Div 17A.68 The emphasis on goodwill, which is a consequence of this, reinforces the importance of the High Court's views in Murry.

The Murry decision also has implications for stamp duty. Several jurisdictions levy duty on the value of goodwill conveyed or acquired. Although the CGT liability in most circumstances will outweigh the stamp duty costs incurred in a transaction, the result in Murry will have the effect of limiting the impact of stamp duty in certain circumstances. For example, goodwill is included in the list of dutiable property, acquisitions of which are subject to duty in New South Wales.

Thus, until the latest decision in Murry, the Chief Commissioner in New South Wales might well have been able to argue that the acquisition of a licence ought to be valued, and duty paid, on the

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64 Ibid.
65 Ibid.
66 The simplified Tax Law Improvement Project ("TLIP") version of the small business replacement roll-over relief will be found in Div 123 and of the small business retirement roll-over relief in Div 118-F of the ITAA97.
67 ITAA97, s 118-255.
68 ITAA36, ss 160ZZPR and 160ZZPS.
basis that the licence included a component of goodwill. It seems that now this argument is likely to arise only in circumstances where it might be argued that the licence is an exclusive licence and so constitutes part of the "attractive force" of the goodwill of the business in question. Even then, the decision ought to discourage the various revenue authorities attempting to assess duty on identified non-goodwill assets on the basis that they represent goodwill. 69

9. CONCLUSION

The bad news for taxpayers is that the last in the round of the Murry series of cases has left the holders of taxi licences, and some other licences, worse off. If they are not truly in business the transfer of the licence alone will not entitle them to the partial relief from CGT under Subdiv 118-C of the ITAA97. Businesses which have exclusive licences, however, for example, a licence to exploit a particular formula within the whole of Australia, may still be able to access the relief because the High Court has not ruled out such a licence as a possible source of goodwill.

The good news for taxpayers is that, provided a value can be established, a business without goodwill in the ordinary accounting sense, and therefore without goodwill "on the books" may still be able to show that it has "legal goodwill". As the relief under Subdiv 118-C is not limited to accounting goodwill, the subdivision ought to apply to that goodwill. This means that even a business that is unprofitable, and has bad prospects such that it cannot be shown to have goodwill in an accounting sense, may nevertheless have a justiciable right to defend itself from competition and so can be said to have legal goodwill. Surely this means that, provided a portion of the purchase price of the business can somehow be attributed to that goodwill, the normal goodwill reliefs (pre-CGT status in some cases, Subdiv 118-C in others) may nevertheless apply.

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69 This point is well made by McMahon et al, above n 32, 10.