Capital Gains Tax in South Africa: Lessons from Australia?

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1 Introduction

In the budget review of 23 February 2000, the South African Minister of Finance announced that a capital gains tax (‘CGT’) would be introduced into South Africa, the anticipated start date at that point being 1 April 2001. Pursuant to the Taxation Laws Amendment Act 5 of 2001, a CGT of general operation was introduced into the South African Income Tax Act 58 of 1962 (the ‘ITA 1962’) through the insertion of the Eighth Schedule,¹ read together with s 26A of the Act. Section 26A is the charging provision that states that a person’s taxable income included their ‘taxable capital gain’. As discussed below, the start date was revised to 1 October 2001.

The new regime uses as its two key components the notions of ‘asset’, defined in terms of property in s 1, and ‘disposal’, broadly defined in terms of the ‘creation, variation, transfer or extinction of an asset’ in s 11(1). The two notions ‘asset’ and ‘disposal’ also provided the basis of the original version of the capital gains legislation in Australia. This was effected through the Income Tax Assessment Amendment (Capital Gains) Act 1986 and the Income Tax (Rates) Amendment (Capital Gains) Act 1986 which included a new Part IIIA (ss 160A-160ZZU) in the Income Tax Assessment Act 1936 (the ‘ITAA’). As a consequence of the use of these two terms, the Australian legislation became subject to considerable judicial criticism. This criticism was aimed particularly at two ‘disposal’ provisions, ss 160M(6) and (7), known as the ‘terrible twins’ and their interplay with the definition of asset in s 160A, which was also tied to the notion of property. In FCT v Cooling² Hill J stated that while both ss 160M(6) and (7)

‘present difficulties of construction, the former is drafted with such obscurity that even those used to interpreting the utterances of the Delphic oracle might falter in seeking to elicit a sensible meaning from its terms’.

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¹ All references to the ITA 1962 are to sections in the Eighth Schedule unless otherwise indicated.

² (1990) 90 ATC 4472 at 4488.
In *Hepples v FCT*\(^3\) Mason CJ added that ss 160M(6) and (7) ‘must be obscure, if not bewildering, both to the taxpayer who seeks to determine his or her liability by reference to them and to the lawyer called upon to interpret them’.

As a consequence of this criticism, Part IIIA was subsequently amended\(^4\) and ultimately rewritten in a manner that changed the very foundations of the legislation. It will be shown below that as part of the Tax Law Improvement Project (the ‘TLIP’), Part IIIA was replaced by Chapter 3 of the Income Tax Assessment Act 1997 (the ‘ITA 1997’). In this new version of the CGT legislation, the drafters moved away from the two notions of ‘asset’ and ‘disposal’ to a single key requirement, the notion of a ‘CGT event’.\(^5\) Moreover, the definition of ‘asset’ in s 108-5 ITAA 1997 was no longer confined to proprietary assets.

Given the history of CGT in Australia, it was somewhat strange to find that the South African legislature adopted the same prerequisites\(^6\) and definitions\(^7\) that had proven to be so troublesome in Australia.

It may be surmised that the Legislators were mindful of the differences in Australian (based on common law) and South African (based on Roman-Dutch law) property law, and believed that defining ‘asset’ in terms of property would not be as problematic in South African law. Given the breadth of the notion of ‘property’ in South African law, perhaps the Australian experience was considered irrelevant. While it will be seen that Australian and South African property law have different legal foundations, under both legal systems there are some rights that are not capable of transmission. Moreover, the types of right that are not transferable under South African law echo those personal rights that are not transferable under Australian law and thus are not considered property.

It will be seen that this, in turn, raises the same difficult issues that troubled the courts in Australia as to the meaning of an ‘asset’ and the ability to ‘dispose’ of certain rights under the CGT legislation. While there are some variations between the troublesome, original version of Part IIIA of the ITAA 1936 and the Eighth Schedule of the ITA 1962 which may lead the South African judiciary to approach the latter legislation in a different manner, the South African drafters could nevertheless have learnt from the Australian experience and avoided the notions of asset (proprietary) and disposal. Under one view, using a singular notion, a ‘CGT event’, as the trigger for the operation of the CGT legislation is much simpler. Most importantly, at the very least the South African drafters could have ascertained from the Australian experience that applying a CGT to personal rights is problematic and, in turn, carefully drafted the legislation so that it might accommodate such


\(^4\) The amended versions of ss 160A and 160M(6) and (7) were effective from 26 Jun 1992.

\(^5\) See s 102-20 of the ITAA 1997. These events are summarised in s 104-5 of the ITAA 1997.

\(^6\) That is, a ‘disposal’ of an ‘asset’: ss 3 and 4 of the ITA 1962.

\(^7\) In particular, defining an asset in terms of property: s 1 of the ITA 1962.
rights. In this regard it will be seen that the South African legislation is inherently incompatible with the treatment of all personal rights as assets for CGT purposes.

The South African legislation is also confusing in what it does not say. There are many conceptual ‘gaps’. Perhaps most significantly the ‘acquisition’ of an asset is really not addressed in the legislation. Largely, that an asset has been acquired seems to be presumed. Often one provision assumes the existence of another complimentary provision that simply does not exist. This is important because as the operation of the legislation is premised upon establishing certain prerequisites, a capital gain per se does not give rise to tax liability. The gain has to be coupled with an ‘asset’ (that had presumably been ‘acquired’) and then ‘disposed’. When considering the South African legislation, care is therefore required not to simply assume the existence of one prerequisite just because another has been satisfied. This is particularly so where the language used in a particular section seems to presume the existence of the other prerequisite(s).

In this regard it is submitted that the South African CGT legislation is even more poorly drafted, and has more conceptual ‘gaps’, than Part IIIA. Ultimately, it is potentially as confusing as the original version of the Australian CGT and will undoubtedly be met with similar criticism.

What follows is a consideration of the key components of the South African CGT legislation. As a detailed consideration of all aspects of this legislation is beyond the scope of this article, this discussion will be confined to the interplay between the definition of ‘asset’ and the notion of ‘disposal’ and the concept of an ‘acquisition’ under the Act.

2 Operative Date

Before the key notions ‘asset’ and ‘disposal’ are discussed, it should be noted that unlike the Australian legislation the South African CGT legislation applies to all assets whether or not they were acquired prior to the introduction of the legislation. By contrast, under the Australian legislation, generally Chapter 3 of the ITAA 1997 only applies to the
disposal of an asset acquired on or after 20 September 1985, when Part IIIA of the ITAA 1936 was introduced. It was considered that the Australian approach had resulted in a ‘lock-in’ effect in so far as taxpayers were reluctant to dispose of their pre-CGT assets. Moreover, it was said that this had led to tax avoidance schemes that were designed to shift value from post-CGT assets to pre-CGT assets. In turn, this required the introduction of complex anti-avoidance provisions. Further, the Australian measures had narrowed the tax base by exempting pre-CGT assets.

The distinction between pre-CGT assets, referred to in the South African legislation as ‘pre-valuation date assets’, and ‘post-CGT assets’ is, however, still very relevant under the South African legislation. Gains on pre-valuation date assets are given concessional treatment under Part V of the ITA 1962. In essence, where an asset is acquired before 1 October 2001, but disposed of after that date for an amount greater than its ‘cost base’, its acquisition cost plus other allowable expenditure under s 22, the capital gain will be determined by using three alternative methods for valuing the asset as at 1 October 2001. Under s 26, the three methods are market value as at 1 October 2001, 20 per cent of the proceeds upon disposal, or time-apportionment. The notion underlying these rules is that only gains that have accrued after the operative date will be assessed. However, it is pertinent to note that there is really no definition or guidance as to how to determine if an asset is a pre-valuation asset beyond the obvious, that is, whether it was acquired before 1 October 2001. This is part of a broader problem in the legislation, introduced above, namely that there is really no definition or guidance on the issue of the acquisition of an asset.

3 Asset and Interplay with Disposal

3.1 Is an Asset Confined to Proprietary Assets?

Section 1 of the ITA 1962 defines ‘asset’ in extremely wide terms. It includes rights and interests in both corporeal and incorporeal objects. However, the definition does have some potentially significant limits. The section appears to be confined to proprietary assets. It is stated in s 1(a)

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14 The SARS Guide op cit note 9 in para 3.3. This guide was authored by Duncan S McAllister.
15 Ibid.
16 Ibid.
17 Ibid.
18 Idem in para 3.5.
and (b) respectively that an asset includes ‘property’ or ‘a right or interest of whatever nature to or in such property’. Thus, subject to what is said below regarding the inclusionary nature of the definition of asset in s 1 and the possible impact of s 1(b) in expanding this definition, the South African CGT would appear to be confined to assets that are proprietary in nature and, it will be contended, excludes certain personal rights.

First, the original version of the definition of an asset in Australia was similarly defined in s 160A of the ITAA 1936 in terms of property. The section provided, inter alia, that ‘“asset” means any form of property’. It is instructive in considering s 1 to note that the Australian courts held the reference to property in s 160A confined the notion of asset to proprietary assets and significantly limited the definition of ‘asset’.19 Moreover, a number of the reasons given by the Australian courts for so concluding would appear equally applicable to s 1. First, as Part IIIA of the ITAA 1936 was based upon a ‘disposal’ of an asset, for the legislation to make sense, the courts said it was necessary that an asset be capable of transmission.20 It will be seen below that under Australian property law, the essence of ‘property’ is its transmissibility to a third party.21 Rights that are not capable of transmission are either ‘popular rights’ or ‘personal rights’ and were thus excluded from the definition of asset.22 For example, personal choses in action, that are not capable of transmission under Australian property law, were excluded from the definition of asset in s 160A.23

Equally, the South African CGT legislation is based on an asset being capable of transmission. Thus, the key provision, s 11(1) of the ITA 1962, is based upon a ‘disposal’ of an asset. Similarly, the timing provision in s 13(1)(a) refers to a ‘change of ownership’ as being a key determinative of the timing of the disposal. Thus, it seems necessary for the legislation’s operation that the asset be capable of transmission. While it will be shown below that the notion of property under South African law is much broader than under Australian law, and focuses on whether the asset can be valued 24 rather than explicitly on its transmissibility, it will be contended that ability to value is tied to the ability to sell an asset to a third party. It will be seen that some rights, namely ‘personality rights’ and certain ‘personal rights’ are not capable of transmission25 and thus under this reasoning arguably would not be assets under the South

19 Heples v FCT (1990) 90 ATC 4397 at 4512 and 4513.
20 FCT v Cooling supra note 2 at 4486, Heples v FCT supra note 19 at 5404.
21 Potter v CLR (1856) 10 Ex 148, 156 ER 392 at 396; Commissioner of Stamp Duties (NSW) v Yeend (1929) 43 CLR 235 (HC of A); The Queen v Tookay; Ex parte Meningie Station Pty Ltd (1982) 158 CLR 327 (HC of A); Heples v FCT supra note 3 at 4828; FCT v Orica Ltd (1998) 98 ATC 4574 at 5415.
22 FCT v Cooling supra note 2 at 4486, Heples v FCT supra note 19 at 4503, 5404, 4512-14 and 4517; Reuter v FCT (1993) 93 ATC 4537 at 4540-50.
23 See in particular Hill J in FCT v Cooling supra note 2 and Reuter v FCT supra note 22.
25 Idem in para 226 and 262-58. See the fuller discussion of this issue below.
African CGT legislation. Alternatively, such rights will be ‘assets’, but the South African CGT legislation has not been drafted in a manner that adequately accommodates its application to such assets. To this end, while some provisions of the Act appear workable when applied to such rights, largely through the expansive definition of ‘disposal’ in s 11(1) of the ITA 1962 (that is, to include the ‘creation’ of an asset) and the inclusion of deemed disposal provisions and other legal fictions,26 other aspects of the Act; such as the rules providing for the timing of disposals and acquisitions in s 13(1) and (2), and the need in certain cases to determine the market value of the asset in Parts V and VI, are unworkable when applied to these assets. The discussion that follows expands upon these difficulties.

Second, Part IIIA was also based on the premise that an asset could be valued. In determining the existence of a capital gain or loss, at times the actual amount paid by the vendor for the asset and/or the actual amount paid by the purchaser is replaced by the market value.27 Thus, the CGT legislation could only practically apply to assets for which a market value could be ascertained. To this end, under Australian property law, the saleability or ability to value an asset is also an attribute of property. Thus, Jowitt’s Dictionary of English Law states in relation to the concept of ‘property’28:

“In its largest sense property signifies things and rights considered as having a money value, especially with reference to transfer or succession.’

Similarly, the Court in Potter v IRC29 asserted that property is ‘that which belonged to a person exclusive of others, and which could be the subject of bargain and sale to another’. By contrast, popular and personal assets are unsaleable and cannot truly be valued. To this end the English Court of Appeal noted in O’Brien v Benson’s Hosiery (Holdings) Ltd30 that the market value of an employer’s right to employ an employee was impossible to comprehend as the subject matter of the contract was inherently unsaleable. It is only in a loose sense that the right to the services of an employee under a contract of personal service can be valued. This is especially so given that the contract is always liable to be determined by the death of either party to the contract. Thus, the Australian courts concluded that unsaleable popular and personal assets could not be within the contemplation of the CGT legislation.31

Again, this reasoning is equally applicable to the South African CGT legislation. The market value of the asset is consistently used in Parts V and VI of the ITA 1962 to determine, for example, an asset’s ‘base cost’

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27 Under the current legislative regime the relevant general provisions are ss 112-20 and 116-30. See also CGT Event II (s 104-60) and s 136-40 for more specific examples.
29 Supra note 21 at 396.
30 [1860] AC 562 (CA).
31 See further Gummow J in Hepples v FCT supra note 19 at 4516.
and the ‘proceeds’ of any sale. As noted above, market value is used in the context of determining the value of pre-CGT assets at the ‘valuation date’ in terms of s 26. By virtue of ss 12 and 40, emigration and death also involve deemed disposals of the taxpayer’s assets at market value. As noted above, and discussed in more detail below, under South African law the word ‘property’ refers to ‘everything which is susceptible of pecuniary evaluation, that is, everything which has a monetary value or can constitute an asset in an estate’. Thus, again, it would be logical that the s 1 definition of asset be confined to proprietary assets, otherwise those provisions that require the ascertainment of a market value could not apply. It will also be contended below that as with ‘popular’ and ‘personal’ rights under Australian law, ‘personality rights’ and non-transferable ‘personal rights’ are similarly unsaleable and thus a value cannot be placed on them as required by aspects of the Eighth Schedule of the ITA 1962.

Third, s 160A defined an ‘asset’ as ‘any form of property’ and then continued by stating that it included, inter alia, ‘an option, a debt, a chose in action, any other right, goodwill and any other form of incorporeal property’. When interpreting this inclusionary limb of s 160A, the Australian courts applied the principle of statutory interpretation eiuidem generis and limited the reference ‘any other rights’ to ‘proprietary rights’. The continual reference to ‘property’ in s 160A suggested that the legislature intended to confine the meaning of the general term ‘right’ to things belonging to the same class, that is, rights in the nature of property. The courts also pointed to the inclusion of the words ‘any other form of incorporeal property’ at the end of s 160(1)(a) as confining the scope of that paragraph to forms of incorporeal property. Thus, the incorporeal assets mentioned in s 160A(1)(a), such as debts and choses in action, were held to be confined to proprietary debts and proprietary choses in action and did not, therefore, include rights of actions pertaining to non-assignable personal rights. In expressing this view Gummow J in Hepples v FCT used a principle of statutory interpretation akin to noscitur a sociis to support his conclusion, noting that the specific terms included in s 160A(1)(a), such as ‘option’, ‘debt’, ‘chose in action’, and ‘goodwill’, are all technical and/or legal terms and that options and goodwill are proprietary assets. In light of these terms, he confined the reference to choses in actions to legally transferable choses in action, again thereby excluding personal choses in action.

32 LAWSA op cit note 24 in par 195. See further the discussion below.
33 See Gummow J in Hepples v FCT supra note 19.
34 See Gummow J in Hepples v FCT supra note 19; Brennan and Toohey JJ on appeal in Hepples v FCT supra note 3 at 301 and 326, 4812 and 4827; and Hill J in Reuel v FCT supra note 22 at 4909-50. See also Commissioner of Stamp Duties v Yeand supra note 21.
35 See Gummow J in Hepples v FCT supra note 19; Brennan and Toohey JJ on appeal in Hepples v FCT supra note 3 at 301 and 326, 4812 and 4827; and Hill J in Reuel v FCT supra note 22 at 4909-50.
36 Supra note 19.
The eiusdem generis and noscitur a sociis principles are also used in South African statutory interpretation. However, the language in s 1 of the ITA 1962 is in this respect, clearer than s 160A and to a large extent a resort to these principles is unnecessary to support a conclusion that the reference to incorporeal assets in s 1 is confined to proprietary ‘incorporeal’ assets and other proprietary ‘rights’. 37 This is because s 1(a) and (b) define an ‘asset’ as ‘property of whatever nature, whether moveable or immovable, corporeal or incorporeal’ and ‘a right or interest of whatever nature to or in such property’. Clearly, any reference to ‘incorporeal’ assets or ‘rights’ is confined to proprietary assets or rights, even without recourse to these principles of statutory interpretation. The issue of a broader interpretation of these terms would only arise from the inclusionary nature of the s 1 definition, discussed below. In that case the statutory context discussed above, in particular the legislation being premised on the transferability of the asset that may be valued and the continual reference to ‘property’ in s 1, would again support the conclusion that the references to incorporeal assets and rights is confined to proprietary assets or rights.

Finally, as noted above, in contrast to s 1 of the ITA 1962, the Australian definition of an asset was stated in exhaustive terms. 38 As a consequence, the definition of an asset as property was held to have the effect of excluding from s 160A personal and popular assets. 39 Thus, as Gummow J noted in Hepples v FCT: 40

‘[Section 160A states] that, in the absence of a contrary intention, ““asset” means any form of property” and includes the subject matter of para. (a), (b) and (c). The expression “any form of property” is central to the definition. . . . Section 160A uses the expression “means . . . and includes” rather than simply “means”, or “includes”. As a general proposition, the use of the expression “means and includes” indicates an exhaustive explanation of the meaning which for the purposes of the statute must be attached to the term the subject of the definition. . . . [T]he draftsman may have used “include” not so much to extend the ordinary meaning of the defined term as to specify as falling within the definition that which might otherwise have been in doubt. . . . This, in my view, is the function served by para. (a), (b) and (c).’

By contrast s 1 of the ITA 1962 is stated as being inclusionary in nature. The Explanatory Memorandum 41 makes no reference to the inclusionary language used in s 1. Moreover, there is no further guidance within s 1 indicating what is included in the notion of asset beyond the definition of an asset as property. Nor is there any further definition of asset elsewhere in the Act. This absence is particularly marked given that the key legislative provision, s 11 of the ITA 1962, is based on a ‘disposal’ of an ‘asset.’

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37 Note, s 1 has a generic reference to incorporeal assets without any inclusion of specific incorporeal assets such as debts and actions. The relevant provisions that deal with specific forms of incorporeal property are, however, discussed below.
38 Hepples v FCT supra note 19 at 4512-3.
39 FCT v Coagin supra note 2 at 4486; Hepples v FCT supra note 19 at 4503, 5404, 4512-14 and 4517; Ruster v FCT supra note 22 at 4009-50.
40 Hepples v FCT supra note 19 at 4512 and 4513.
41 Supra note 9.
Perhaps it was intended that other sections were to implicitly provide guidance as to the scope of the notion of an asset. Thus, if the operation of a section appears to contemplate an application to assets other than proprietary assets and/or assets that are not capable of transmission or valuation, then such a provision may indicate that the definition of an asset was not intended to be confined to property as suggested in s 1 and as contended above.

For example, it could be suggested that s 11(1) contemplates the legislation impacting on assets other than proprietary assets and assets that can be transmitted because it includes in the notion of ‘disposal’ the ‘creation’ of an asset.42 Personal assets, such as a personal chose in action (under Australian law) and a personal right of action (under South African law), may be ‘created’ by, inter alia, entering into a contractual relationship. Thus, these rights may be owned without a transfer or cession from a third party.43 As the Australian courts have recognised in the context of CGT, the creation of contractual rights merely involves the creation of correlative rights, rather than the transfer of assets from one contractual party to the other.44 Does this reference in s 11(1) indicate that s 1 is not confined to proprietary assets and/or includes personal assets that are not capable of transmission or valuation?

This is certainly arguable. However, an alternative interpretation would mean that this reference in s 11(1) was not intended to, even implicitly, impact on the definition of asset, but was included simply to recognise that the ownership of some proprietary assets arises through the ‘creation’ of an asset, without a corresponding disposal of that asset by a third party. The Australian legislation recognises this possibility in s 109-10 of the ITAA 97. Some assets, including both corporeal and incorporeal assets, are simply created or constructed and, once completed, are owned by the taxpayer. For example, if the taxpayer or her agent builds a physical structure, once it is completed the taxpayer is the owner even though there has been no transfer by a third party. In regard to incorporeal assets, intellectual property or inventions are not acquired through a disposal from a third party, but rather are created. If this was the intended purpose of the reference to ‘creation,’ s 11(1) may simply be contemplating the creation of proprietary assets or rights, and/or assets or rights that can be transferred or valued. This would appear logical given, as noted above, that s 1 refers to such ‘incorporeal assets’ in the context of forms of property. Note, however, there is a further problem inherent in the South African legislation in so far as s 11(1) determines when there is a disposal, not an acquisition. The scenarios

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42 Williams op cit note 26 at 23-4. Note, however, that Williams later suggested that the drafters 'nodded' off at this point of their drafting exercise and meant that the creation of such an asset were to constitute and 'acquisition', not a 'disposal' of the asset: idem at 26-7.
43 *Hepburn v FCT* op cit note 3 at 4359-40.
44 Ibid.
described involve an acquisition of the asset, not a disposal. Thus, even this interpretation of s 11(1) has problems, as expanded upon below.

Similarly s 12(5) of the ITA 1962, dealing with a variation of a debt, might appear to contemplate that the legislation includes within its scope all debts, including personal choses in action (under Australian law) and all personal actions (under South African law). Again, however, s 12(5) can be reconciled with a narrow definition of asset in s 1 if its operation is confined to debts of a proprietary nature or debts capable of transmission and valuation.

Before moving on, it should be noted that in one of the leading commentaries on the South African capital gains legislation it has been suggested that while s 1(a) defines assets in terms of proprietary assets, s 1(b) does not.55 Williams reasons that s 1(b) must have been inserted to extend the notion of asset to ‘rights’ and ‘interests’ that are not in themselves property.56 Otherwise, it is reasoned, s 1(b) would be unnecessary.57 In fact the author goes further and suggests that s 1(b) was inserted to overcome the Australian difficulties discussed above, namely that only those incorporeal assets, in particular, choses in action, that were proprietary in nature were assets within s 160A.58 In turn Williams suggests that s 1(b) defines ‘asset’ in terms of incorporeal rights and interests that are not property, and thus is broader than s 160A of the ITAA.59 It will be recalled that s 1(b) extends the notion of asset to ‘a right or interest of whatever nature to or in such property’. It may be surmised that Williams is suggesting that the words ‘of whatever nature’ were inserted into the South African legislation to have a similar effect to the amendment of s 160A, discussed below, so that it also applied to ‘any other right . . . whether legal or equitable and whether or not a form of property’.60 He fails to appreciate, however, that even s 1(b) is still defined in terms of property. The right or interest must still be a right or interest in property. This Williams seemingly acknowledges in his discussion of the term ‘interests’ in s 1(b) by asserting such ‘interests’ must be an ‘interest to or in property’ of the kind falling within subs (a) of the definition.61 In this regard it is submitted that s 1(b) merely reflects the Australian and English view that each proprietary asset constitutes a ‘bundle of rights’ and each of these ‘rights or interests’ themselves constitute property. Again Williams seemingly acknowledges this later in his discussion, suggesting that the South African courts will probably acknowledge that s 1(b) was included to ensure that property includes both corporeal objects, such as land, animals and machinery, but also

55 Williams op cit note 26 at 20-1.
56 Ibid.
57 Ibid at 20.
58 Ibid at 21.
59 Ibid at 20-2.
60 Ibid at 21.
61 Ibid at 22.
proprietary rights in such objects. Such are rights ‘in’ property within s 1(b). These are known in South African law as ‘real rights’ or rights in rem.

Ultimately, however, Williams still seems to conclude that the effect of s 1(b) is to extend the definition of asset to rights and interests beyond real rights and includes personal rights. Williams suggests that a right in personam – a personal action under South African law and a personal chose in action under Australian law – is still a right ‘to’ property within s 1(b). Thus, Williams uses the example of a personal right to demand delivery of certain property, presumably under a contract for the purchase of that asset. It will be seen, however, that a personal right, such as a personal chose in action under Australian law, and certain rights of action, such as a delictus personae, under South African law, are not tied to the right to demand the delivery of property. The common example is a restrictive covenant. There is no underlying property to which the contractual obligations are tied. There is no connection in such cases to real rights or rights in rem. In such cases there is, therefore, no right ‘to’ property within s 1(b). There is only a right to demand performance of an obligation, whether that be delictual (tortious) or contractual. This matter is expanded upon quite considerably below.

Particularly if we find that the s 1 definition of asset is in fact exhaustive and thus confined to proprietary assets, the difference between three categories of assets (proprietary, personal and popular) must be addressed in more detail. Even if s 1 is not confined to proprietary assets, and if Williams is correct in the suggestion that s 1(b) extends to non-proprietary rights and interests, the different classification of rights under South African property law still remains important. In this regard it will be suggested that the South African CGT does not easily accommodate the application of its terms to non-transmissible rights and assets.

3.2 Proprietary, Personal and Popular Assets under Australian Law

As noted above, under Australian property law the essence of property is its transmissibility to a third party. Proprietary assets differ from personal assets in so far as the former, but not the latter, are capable of transmission. Personal assets, while recognised in law and equity, are not capable of being sold.

52 Idem at 23.
53 Ibid.
54 Ibid.
55 Ibid.
56 Ibid.
58 Potter v IRC supra note 21 at 396; Commissioner of Stamp Duties v Yeend supra note 21; National Trustees Executors & Agency Co of Australasia Ltd v FCT (1954) 91 CLR 540 (HC of A) at 383; O v Toodby supra note 21 at 342; Heples v FCT supra note 3 at 4828; FCT v Orica Ltd supra note 21 at 5415.
59 FCT v Orica Ltd supra note 21 at 5415.
Examples of personal assets include knowledge, skill or experience, sometimes referred to as ‘know-how’, typically dealt with in restrictive covenants. These cannot be, as a matter of common law, the subject of a grant or assignment except insofar as they are ‘industrial property’. Another important example in this context is a personal chose in action. While some choses in action are transferable, a personal chose in action is recognised in law and equity but is not capable of being sold or transferred. Personal choses in action may be exercised only by the particular individual (that is, the contracting party), not by a third party to whom there has been a purported transfer of such rights of action. For example, the common law prohibits the transfer of rights under a contract of employment as such would be akin to modern day slavery. More generally, contractual rights are not capable of transmission ‘where the identity of the person in whose favour the obligation is to be discharged is a matter of importance to the party on whom the obligation rests, as in a contract for personal services’.

However, personal choses in action are not confined to contractual rights. Thus, the right to sue for ‘unliquidated damages in tort for personal injury’ is a personal chose in action. Under Australian law, future property, a mere spec, and ‘purely contingent interests which had not yet vested’, are also non-proprietary in nature. While the inability to transfer these rights may arise under a common-law principle, the inability to transfer a right may also be prescribed under statute.

Other non-proprietary assets are known as ‘popular assets’. These rights differ from proprietary and personal assets in so far as they are not recognised in law and equity. ‘Popular rights’ are non-technical rights that are merely seen as ‘rights’ in some popular sense. Thus, they are rights that in lay terms might popularly be called a right. Examples include the right to work and the right to compete in the market place.

An interesting application of these principles may be found in *Hepples v FCT*. It should be noted that the discussion of this case that follows is confined to the issue of the existence of an asset within s 160A. As a result of a rather curious interpretation of the relevant disposal provisions,

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60 Rapistan Canada Ltd v Minister of National Revenue (1974) 48 DLR (3d) 613 (FCA) at 616; *FCT v United Aircraft Corporation* (1983) 68 CLR 525 (HC of A); *Brent v FCT* (1973) 12 CLR 418 (HC of A); *Rolis Royce Ltd v Jeffrey* (1990) 90 ATC 4391. Note that Gummow J in *Hepples v FCT* supra note 19 at 4520 believed trade secrets were so protected in equity that they were not personal assets.

61 See eg, *FCT v Orica Ltd* supra note 21.


63 *Hepples v FCT* supra note 19 at 4514.

64 Ibid. See also *O’Brien v Benson’s House* Ltd supra note 30, *Reuter v FCT* supra note 22.

65 *Curtis v Wilcox* [1948] 2 All ER 573 (CA); *Hepples v FCT* supra note 19 at 4514.

66 *Re Rule’s Settlement* [1981] VLR 670 (SC of Vic) at 674; *Re Duffy, Lakeman v Attorney-General* [1940] Ch 28 (CA); *Hepples v FCT* supra note 19 at 4514.

67 *Hepples v FCT* supra note 19 at 4514.


69 Supra notes 3 and 19.
some members of the courts went on to consider the applicability of these provisions even though they concluded there was no asset owned by the taxpayer within s 160A.\footnote{For example, the majority of the Full Court of the Federal Court held that even though the taxpayer owned no asset within s 160A, that a third party, the taxpayer’s employer, had a proprietary asset (namely its goodwill) sufficed for Part IIIA to apply.}

In *Hepples v FCT*\footnote{Supra notes 3 and 19.} the taxpayer was employed under a written agreement as the marketing and general manager of the window furnishings division of Hunter Douglas Ltd ("HD Ltd"). The division accounted for approximately two-thirds of the business activities of HD Ltd. In June 1986, the taxpayer entered into a restrictive covenant deed with HD Ltd under which, in consideration of $40,000 paid to him by HD Ltd, the taxpayer covenanted that for two years immediately following the termination of his employment, he would not divulge any trade secrets or engage in competitive conduct. The Commissioner included the $40,000 payment in the taxpayer’s assessable income on the basis that it constituted a capital gain within Part IIIA of the ITAA.

It was ultimately held that the payment did not fall within the scope of Part IIIA. All members of the Full Court of the Federal Court held that s 160A was confined to proprietary assets that were recognised in law and equity. As the taxpayer’s right to work (a personal asset) and the chose in action (a personal asset) that arose out of the restrictive covenant were not proprietary in nature, they held that they could not constitute assets for the purposes of s 160A.\footnote{Supra note 19 at 4526.} Similarly, the contractual rights (a personal asset) HD Ltd acquired under the agreement were non-proprietary in character and thus could not constitute a relevant asset.\footnote{Idem at 4520.} The only proprietary assets affected by the transaction were HD Ltd’s goodwill and its trade secrets.\footnote{Idem at 4520, 4520-1 and 4525.} With respect to the latter asset, Gummow J believed trade secrets were sufficiently protected by law, particularly equity, to be considered proprietary in nature.\footnote{Idem at 4520.} However, a majority of the Full Court of the Federal Court held that the restrictive covenant fell within one of the deemed disposal provisions, s 160M(7).

On appeal this finding was overruled, a majority of the High Court finding that the transaction did not fall within either ss 160M(6) or 160M(7). At first glance, one could be excused for thinking that the High Court considered the interpretation of s 160A was not a major issue as not all members of the Court expressly adverted to the question of its scope in their judgments.\footnote{Though an acceptance of this reasoning was implicit in the judgments of the other members: see, eg, Toohey J idem at 4825.} However, most members of the High Court recognised that s 160A(1) was confined to forms of property. Brennan,
Toohey and McHugh JJ\(^77\) held that neither the right to trade, nor the taxpayer's covenant, were proprietary assets within s 160A as they could not be legally owned, were incapable of transmission, and did not affect the employer's existing goodwill.\(^78\) The Justices believed the only proprietary asset in this case was 'the benefit of the covenant' which constituted part of HD Ltd's goodwill.\(^79\) McHugh J believed that the transaction only affected HD Ltd's future goodwill and that, as s 160A only extended to existing assets, there was no asset in this case.\(^80\) Thus, for varying reasons, most\(^81\) members of the High Court found there was no proprietary asset held by the taxpayer and, in the case of McHugh J, no affected asset held by HD Ltd.

3.3 Amendment of Section 160A and Section 108-5 ITAA 1997

After the decision in *Hepples v FCT*, s 160A was amended to extend the notion of 'asset' to, inter alia, 'any other right ... whether legal or equitable and whether or not a form of property'. This amendment overcame the distinction between proprietary and personal assets by expressly extending s 160A(1)(a) to assets that were not proprietary in nature. The inclusion of the statement 'whether or not a form of property' indicated that the statement that assets were a form of property was no longer exhaustive and s 160A could extend beyond proprietary assets. Hence, the amended version of s 160A included assets of a personal nature.

However, not all rights are assets under this extended definition. To be an asset within the amended version of s 160A, the right still had to be recognised and protected either in law or equity. Thus, the amended version of s 160A continued to exclude popular rights. The basis for excluding those rights lies in the use of the phrase 'any other rights', rather than 'any rights'. The inclusion of the word 'other' suggests that the rights must be akin to the assets specified in s 160A(1)(a). Thus, the general phrase 'any other rights' must be confined to the same class of rights detailed in the subsection, namely options, debts, and choses in actions. These are all rights recognised in law or equity. As noted above, popular rights are not so recognised. This is confirmed by the *Explanatory Memorandum*\(^82\) that states, inter alia, that '[p]ersonal liberties and freedoms, such as the freedom to work or trade or to play amateur sport, are not legal or equitable rights and accordingly will not be assets'. Unless these popular rights become the subject of contractual

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\(^77\) With whom Mason CJ agreed.

\(^78\) supra note 3 at 4813-4, 4827-8, 4838, 4840 and 4841.

\(^79\) Ibid at 4817 and 4823, 4825, 4826 and 4827.

\(^80\) Ibid at 4837 and 4838.

\(^81\) Strangely, Caudron J stated that HD Ltd's right to enforce the covenant was an asset within s 160A and Deane J suggested the creation of a personal licence might fall within Part IIIA: idem at 4828 and 4821, respectively.

\(^82\) Op cit note 9.
relations, and are thereby transformed into personal choses in action, these rights continue to fall outside the scope of s 160A. As noted above, the current definition of a CGT asset is contained in s 108-5(1) of the ITAA 1997. This essentially echoes the first aspect of the amended version of s 160A. In general terms, s 108-5(1) defines an asset as ‘any kind of property or a legal or equitable right that is not property’. As with the amended version of s 160A, s 108-5(1) includes in the definition of ‘asset’ personal rights. To this end the Commissioner has suggested that this expanded definition will now extend to any legal right to, inter alia, compensation, even though that right may not be property in the ordinary sense of the word.\textsuperscript{83} As s 108-5(1) is still confined to legal and equitable rights, the distinction between legally recognised rights, in contradistinction to popular rights, still needs to be maintained.

### 3.4 Proprietary, Personal and Popular Assets under South African Law

Before considering South African concepts of ‘property’ in a bit more detail, it is interesting to note that one of the leading commentaries on the South African capital gains legislation, Williams' \textit{Capital Gain Tax: A Practitioner' Manual},\textsuperscript{84} discusses the notion of ‘property’ in the context of s 1 not in terms of South African property law, but rather with reference to English and Australian concepts of property. The author continues this discussion of Australian usages of the notion of property even in the context of areas of property law where the Australian and South African judiciaries have markedly diverged, such as whether future interests or rights are property.\textsuperscript{85}

While it is submitted that applying the South African CGT to South African property is as problematic as applying Part IIIA of the ITAA to Australian property law, it is nevertheless concerning that such a major application issue was not considered in a leading commentary. It is particularly troubling when the difference in Australian and South African property law was clearly intended to provide the ‘answer’ for nevertheless using the Australian concepts of ‘asset’ (in terms of property) and ‘disposal’ in the South African CGT.

As noted earlier, under the Roman-Dutch law adopted in South Africa the word ‘property’ refers to ‘everything which is susceptible of pecuniary evaluation’.\textsuperscript{86} It is ‘everything which has a monetary value or can constitute an asset in an estate’.\textsuperscript{87} The notion ‘property’ includes not only corporeal objects but also incorporeal objects ‘such as personal rights, shares in a company and patent rights’.\textsuperscript{88} In turn property is

\textsuperscript{83} Taxation Review TR 95/35.
\textsuperscript{84} Op cit note 26 at 19-25.
\textsuperscript{85} Idem at 19.
\textsuperscript{86} \textit{LAWSA} op cit note 24 in par 195.
\textsuperscript{87} Ibid.
\textsuperscript{88} Ibid.
distinguished under South African law from a ‘thing’. While property can include both corporeal and incorporeal objects, a ‘thing’ is restricted to ‘corporeal or moveable objects’.  

Under South African law, the distinction between proprietary and personal rights is not entirely akin to that under Australian law. While the classification, and thus distinction, between property and personal rights is recognised in South African law, the notion of property can include personal rights as long as they have ‘a monetary value’. However, it will be seen that this difference between South African and Australian property law is largely one of terminology, in particular how the term ‘personal right’ is used. Under South African law some ‘personal rights’ are transferable or cedable. Under Australian law such rights would not be ‘personal rights,’ but rather proprietary rights. Other personal rights are not transferable or cedable under South African law. They, too, would be personal rights under Australian law.

The transferability of a right depends on its classification. Rights may be classified as real rights; immaterial property rights; personality rights; and personal rights.

‘Real rights’ are rights to corporeal property, whether moveable or immovable. Real rights are transferred through delivery in the case of moveable property and registration in the case of immovable property. ‘Immaterial property rights’ are rights to, for example, patents, trademarks or copyright. Immaterial property rights are generally assigned through compliance with the relevant statutory regime. ‘Personality rights’ include matters such as the right to a reputation or privacy. These rights are not transferable. As they are part of a taxpayer’s personality, they cannot be divested. They also do not form part of a person’s estate. The method of transferring, or ability to transfer, the first three categories of rights may be seen to echo the Australian means of transferring corporeal property and intellectual property and, to some extent, the inability to transfer popular rights.

A ‘personal right’ is, in essence, the right to claim performance of an obligation. The term personal right is used interchangeably with the terms ‘action,’ ‘right of action’ or ‘right’. Whatever term is used, it refers to the right to claim performance of an obligation. Personal rights may arise under the terms of a contract, through a delict, or

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89 Ibid.
90 Idem in par 226.
91 Idem in par 225.
92 Ibid.
93 Idem in par 226.
94 Idem in par 225.
95 Idem in par 226.
96 Idem in par 225.
97 Idem in par 226.
98 Ibid.
100 Ibid.
through other causes of actions. Such rights, like other incorporeal property, can generally be transferred and may constitute part of a person’s estate. To this extent such rights are governed by the law of property.

Under South African law, the legal tie between the relevant parties in this context is described by using the terms ‘creditor’ and ‘debtor’. This can be a little confusing at first glance for common-law lawyers because personal rights do not only arise in the contractual context of borrowing money. The ‘creditor’ is the person who has ‘a right to a particular performance against the other’ and the ‘debtor’ is that other person who has ‘a corresponding duty to render such performance’. Thus, the arrangement also pertains to the law of obligations.

Personal rights under South African law are essentially akin to choses in action under Australian law. However, as some personal rights are transferable or cedable, they do not all fall into the Australian classification of personal choses in action. Rather, personal rights under South African law can include both proprietary and personal choses in action. As stated above, this is largely a matter of terminology, rather than one of nature. Those personal rights that are not transferable or cedable are akin to personal choses in action under Australian law and, it will be seen, the law determining whether a right can be ceded is very similar to that determining if a chose in action is a personal chose in action under Australian law. Equally, the categories of non-cedable personal rights echo the examples of personal choses in action discussed above. Thus, while it has been suggested that South African law’s treatment of the transfer of personal rights of action is very different to the common law notion of assignment of choses in action, it will be seen that the cession of actions is very similar to the assignment of choses in actions. In fact, South African scholars at times use the terms ‘cession’, discussed below, and ‘assignment’ interchangeably in this context.

As incorporeal property cannot be physically transferred, the law of ‘cession’ was developed to facilitate the quasi-delivery of incorporeal property. Thus, cession provides a method by which incorporeal

\begin{enumerate}
\item \textsuperscript{101} Idem at 1.1.
\item \textsuperscript{102} Idem at 2.1 and 3.1.
\item \textsuperscript{103} Idem at 1.1 and 2.1.
\item \textsuperscript{104} Idem at 1.1. Note, it is not the purpose of this paper to consider whether a cession of personal rights involves a transfer of right under property law or a substitution of creditors under the law of obligations. The discussion below is premised on the former view, but the author accepts that at least theoretically, the matter is contentious. See idem at 2.1.
\item \textsuperscript{105} LAWSA op cit note 24 in par 240.
\item \textsuperscript{106} Scott op cit note 99 at 2.1.
\item \textsuperscript{107} See, eg, Reinhard Zimmerman \textit{The Law of Obligations} (1990) at 38.
\item \textsuperscript{108} See further Susan Scott \textit{The Law of Cession} 2 ed (1991), Scott op cit note 99 supra at 1.1.
\end{enumerate}
rights may be transferred from one person to another under South African law.\textsuperscript{111} Cession is primarily concerned with personal rights, but in fact extends to all rights, whatever their nature, that are ‘capable of transmission by mere agreement between the proposed transferor and the proposed transferee’.\textsuperscript{112} In the context of personal rights, cession involves the creditor, the cedent, transferring her claim\textsuperscript{113} against the debtor to a third party, the cessionary.\textsuperscript{114} As a consequence of the transfer, the cessionary becomes the creditor of the debtor,\textsuperscript{115} and now holds the right of action and may directly enforce performance.\textsuperscript{116}

As in Australia in regard to choses in action, under South African law prima facie all personal rights are cedable.\textsuperscript{117} Thus, in \textit{Trust Bank of Africa Ltd v Standard Bank of South Africa Ltd},\textsuperscript{118} the Court asserted that ‘all rights in personam, subject to certain exceptions based principally upon the personal nature of the rights, . . . can be freely ceded’. Cedable rights include contingent rights\textsuperscript{119} and, while controversial,\textsuperscript{120} future rights.\textsuperscript{121} Thus, a right that is subject to pending litigation, a res litigiosa, is cedable.\textsuperscript{122} There are, however, some limitations to the cession of rights.

\begin{footnotes}
\footnote{111} LAWSA op cit note 24 in par 224.
\footnote{112} Idem in par 226.
\footnote{113} See Johnson v Incorporated General Insurances Ltd 1983 (1) SA 318 (A) at 331.
\footnote{114} Scott op cit note 99 at 1.1.
\footnote{115} Idem at 1.1 and 3.1. Cf Johnson v Incorporated General Insurances Ltd supra note 113 at 331.
\footnote{116} Johnson v Incorporated General Insurances Ltd supra note 113 at 331. Cf Scott op cit note 99 at 2.1.
\footnote{117} Palgen v Van Ryn Gold Mines Estates Ltd 1920 AD 600 at 614; Trust Bank of Africa Ltd v Standard Bank of South Africa Ltd 1968 (3) SA 166 (A) at 189; Sasfin (Pty) Ltd v Bexles 1989 (1) SA 1 (A) at 31. Cf Scott op cit note 99 at 4.3 and Scott op cit note 110 at 10.2.1.
\footnote{118} Supra note 117 at 189.
\footnote{119} Tickers Land & Development Corporation (Pty) Ltd v Strydom 1984 (1) SA 81 (A) at 26-5; Bank of Lisbon & South Africa Ltd v The Master 1987 (1) SA 276 (A) at 296. First National Bank of South Africa Ltd v Lynn NO 1996 (2) SA 339 (A) at 352-3 and 360-1.
\footnote{120} Thus, in Reinhard Zimmermann & DP Visser (eds) \textit{Southern Cross: Civil Law and Common Law in South Africa} (1996) at 365 it is stated that to regard a ‘speus’ as a ‘res’ is to strain that term beyond reasonable limits. See further Scott op cit note 99 at 4.3.1. Scott op cit note 110 at 10.2.2.3. See also Southwood (Pty) Ltd v \textit{The Fund Constituting the Proceeds of the First and Second Judicial Sales of the MV Nanakita} 1994 (2) SA 528 (C) especially at 558; Muller NO v Trust Bank of Africa Ltd 1961 (2) SA 117 (N) at 126-8. Standard General Insurance Co Ltd v Standard Brake CC 1995 (3) SA 806 (A) at 815.
\footnote{121} In \textit{First National Bank of South Africa Ltd v Lynn} supra note 119 at 346-7, the minority held that the cession of future rights was not possible as ‘a non-existing right of action or a non-existing debt . . . cannot qualify as the subject-matter of a cession’. The majority upheld the appeal, but on the facts they believed the right being ceded was a conditional right, not a future right (see at 353 and 360-1). Similarly, in \textit{Standard General Insurance Co Ltd v SA Brake supra note 120, the Court believed at 815 the subject right was contingent, rather than a spe. In \textit{First National Bank of South Africa Ltd v Lynn}, however, the majority went on to assert that ‘future rights can be ceded and transferred in anticipando’. The decisions of our Courts have thus been regarded for a very long period of time as being correct. Clearly these decisions have been acted upon and served as the basis for the general and well-known practice of taking security in the form of the cession of book debts (including future debts), cession of existing and future rights in \textit{securitatem debitis and factoring of existing and future rights} (at 360), citing Holmes’ \textit{Executor v Rawbone} 1936 (3) SA 703 (A) at 711; Harris v \textit{Minister of the Interior} 1952 (2) SA 428 (A) at 445; John Bell & Co Ltd v Ewen (Bpk) v \textit{Minister van Justisie} 1990 (1) SA 1038 (A) at 1051; Willis Faber Enthoven (Pty) Ltd v \textit{Receiver of Revenue} 1992 (4) SA 202 (A) at 220. Cf WA Joubert (ed) \textit{The Law of South Africa} Vol 2 (1993) (‘LAWSA’) in par 242.
\footnote{122} LAWSA op cit note 121 in par 243.
\end{footnotes}
A naturalis obligatio is not cedable. This is a ‘natural’ right that is unenforceable under the common law or statute. The rights under a wagering contract are an example of a naturalis obligatio. While the naturalis obligatio itself cannot be ceded, the underlying personal right can be ceded, though the cessionary will still not be able to enforce the right of action.

A more important category of non-cedable personal rights is delectus personae. These are akin to what are known under Australian law as personal choses in action. They are personal rights that involve obligations that are so personal they cannot be transferred. Thus, as noted above, in Trust Bank of Africa Ltd v Standard Bank of South Africa Ltd, the Court asserted that ‘the personal nature of the rights’ may be such that they are an exception to the general rule allowing the cession of personal rights. In such a situation the parties (the creditor and debtor) intend to deal only with each other personally and thereby create a delectus personae. Thus, a delectus personae is defined as a ‘choice of an irreplaceable person’ who is ‘bound to specific performance of the undertaking’.

As in Australia, under South African law statutory provisions may prohibit cession of particular rights. Scott identifies the following statutes as examples of enactments that prohibit cession: the Insolvency Act 24 of 1936; the Statutory Pensions Protection Act 21 of 1962; the War Veteran’s Pension Act 25 of 1968; the Blind Person’s Act 26 of 1968; the Alienation of Land Act 68 of 1981; the Matrimonial Property Act 88 of 1984; and the Public Service Act 111 of 1984.

Alternatively, cession may be prohibited by common law. For example, a right to maintenance cannot be ceded and unlike ordinary delictual rights of actions, the actio injuriarum (an action arising out of insult) and the action for pain and suffering, loss of amenities of

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124 See eg Swanepoel v Van der Westhuizen 1930 TPD 806.
125 Cf LAWSA op cit note 121 in par 242; Scott op cit note 110 at 12.2.1.
126 Trust Bank Ltd v Standard Bank Ltd supra note 117 at 189; Sasfin Ltd v Beukes supra note 117 at 31. Cf Scott op cit note 99 at 4.3.
127 Supra note 117 at 189.
128 Scott op cit note 99 at 4.3.2; Scott op cit note 110 at 10.3.1.5. See also Sasfin Ltd v Beukes supra note 117 at 31.
129 Hiemstra & Gomin op cit note 123.
130 Sasfin Ltd v Beukes supra note 117 at 637; LAWSA op cit note 121 in par 254; Scott op cit note 110 at 10.3.3.
131 Scott op cit note 110 at 10.3.3.
132 LAWSA op cit note 121 in par 255.
133 Tregoning v Tregoning 1914 WLD 95 at 96; Schierhout v Union Government 1926 AD 286 at 291; Greathead v Greathead 1946 TPD 404 at 411.
134 Hiemstra & Gomin op cit note 121.
135 Hoffa NO v SA Mutual Fire & General Insurance Co Ltd 1965 (2) SA 944 (C); Regering van die Republiek van SA v SANTAM Versicherungsmaatskaplik Bpk 1970 (2) SA 41 (NC) at 43; Government of the Republic of SA v Ngubane 1972 (2) SA 601 (A) at 608; Schonitz v Postkantoor 1972 (3) SA 371 (E) at 372.
life, and disfigurement cannot be ceded before, but only after, the close of legal proceedings. There may be other examples where the cession is prohibited because it would be contrary to public policy. It has been suggested that an arrangement whereby a person 'sought to cede all his future earnings' would be contrary to public policy and not capable of cession. In *Sasfin Ltd v Beukes*, the Court stated that in such circumstances the person was 'virtually relegated to the position of a slave'. Equally the cession by a doctor of her claims against a patient would be contrary to public policy.

A delectus personae may arise from the very nature of the contract or, externally from the contract, by reason of some other special circumstance. The categories of delectus personae that arise under common law by reason of the very nature of the contract echo examples of personal choses in action, discussed above. Thus, the personal nature of a contract for the services of a particular employee and contracts in restraint of trade give rise to non-cedable personal rights. Under South African law, rights of partners against each other are also not cedable.

As under Australian law, any contractual right may be so personal that it is not cedable under South African law. The test adopted in this regard also echoes the Australian test discussed earlier that determines the transferability of choses in action. The question is 'whether or not the contract is so personal in its character that it can make any reasonable or substantial difference to the other party whether the cedent or cessionary is entitled to enforce it'. In turn a 'right cannot be ceded without the consent of the debtor if the performance which the debtor would have to render to a proposed cessionary would differ in character from the performance which he is to render to his current creditor'. Where the parties have entered into such a 'personal contract neither of them can compel the other to accept a third person as a substitute for the party with whom [she] has personally contracted'.

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136 *Regering van die Republiek van SA v SANTAM* supra note 135.
137 It can be ceded after the litigation because, in essence, at this point the litigant acquires a personal right that is quasi-contractual and forms part of her estate. Scott op cit note 110 at 10.3.1.1. See also *Piensar & Marais v Pretoria Printing Works Ltd* 1906 TS 654 at 656, *Government of the Republic of SA v Ngubane* supra note 135 at 607, *Schouten v Postgier* supra note 135 at 372.
138 *LAWSA* op cit note 121 in par 255, Scott op cit note 110 at 10.3.1.
139 *LAWSA* op cit note 121 in par 242. See also *First National Bank of South Africa v Lynn* supra note 119 at 360, *Sasfin Ltd v Beukes* supra note 117 at 7 and 13-5.
140 *LAWSA* op cit note 121 in par 242. See also *Sasfin Ltd v Beukes* supra note 117 at 13-4.
141 *LAWSA* supra note 117 at 13.
142 Scott op cit note 110 at 10.3.1.5. See in this regard *Sasfin (Pty) Ltd v Beukes* (1989) 1 SA 1 (A).
143 Scott op cit note 99 at 4.3.2, Scott op cit note 110 at 10.3.1.5. See also *Sasfin Ltd v Beukes* supra note 117.
144 Scott op cit note 99 at 4.3.2; Scott op cit note 110 at 10.3.1.5, *LAWSA* op cit note 121 in par 257.
145 Scott op cit note 99 at 4.3.2; Scott op cit note 110 at 10.3.1.5.
146 Scott op cit note 110 at 10.3.1.5.
147 *Eastern Rand Exploration Co Ltd v Nel* 1903 TS 42 at 53.
148 *LAWSA* op cit note 121 in par 256.
149 *Gowie v Provident Insurance Co Ltd* (1885) 4 SC 118 at 122.
The credibility of options provides a good example of the application of these principles. Like any other contractual right, options are prima facie credible.\textsuperscript{130} However, in some cases the terms of the option or the particular circumstances will indicate that the person who granted the option did not intend the rights to be transferable.\textsuperscript{131} In such cases the right will not be credible.\textsuperscript{132} In the absence of express language, the key will be whether it would be material to the grantor ‘from whom the counter performance is to emanate’.\textsuperscript{133} This relates to the general principle that cession must not adversely impact on the debtor.\textsuperscript{134} Factors which Scott\textsuperscript{135} suggests would be relevant to determining if the parties to an option intended the underlying rights to be non-transferable include granting of credit,\textsuperscript{136} and the presence of warranties and arbitration clauses.\textsuperscript{137}

As may be implicit from the above discussion, cession may be prohibited or restricted (that is, by requiring the debtor’s consent or that the debtor be notified\textsuperscript{138}) by reason of an agreement between the parties, the debtor and creditor.\textsuperscript{139} Such an agreement or clause in an agreement is known as a pactum de non cedendo.\textsuperscript{140} While the essence of such a clause is to reinstate the personal nature of an obligation into what would otherwise be freely transferable rights,\textsuperscript{141} the effect of such a pactum de non cedendo will depend upon the particular circumstances.\textsuperscript{142} A purported cession of the rights contrary to the agreement is void.\textsuperscript{143}

3.5 Difficulties in Applying Capital Gains Tax to Personal Rights

Thus, the very nature of a personal right, a common law or statutory prohibition, or an agreement between the parties may have the effect of

\footnotesize\textsuperscript{130} Hensch v Nel 1948 (3) SA 696 (A) at 693. Cf Scott op cit note 110 at 10.2.2.1.
\footnotesize\textsuperscript{131} Scott op cit note 110 at 10.2.2.1; LAWSA op cit note 121 in par 245.
\footnotesize\textsuperscript{132} Hensch v Nel supra note 150 at 693. Cf Scott op cit note 110 at 10.2.2.1.
\footnotesize\textsuperscript{133} LAWSA op cit note 121 in par 245.
\footnotesize\textsuperscript{134} Idem in par 258; Scott op cit note 110 at 10.3.1.4. See Armstrong v Siewright (1983) 10 CLJ 257 at 259; Günsberg & Pencharz v Associated Press 1916 TPD 156 at 159; Duke v Allen 1953 (5) SA 702 (N) at 704; Spice v Hanford & Hanford Ltd 1940 TPD 1 at 5; Blakie & Co Ltd v Lancashire NO 1951 (4) SA 571 (N); Allen v Duke 1954 (1) SA 213 (N) at 214; Kief NO v Dettmann 1966 (2) SA 252 (A) at 275; Callman v Noordkaaplande Aartappelkemmerkoekwes Kooperasie Bpk 1972 (1) SA 761 (A) at 771.
\footnotesize\textsuperscript{135} Scott op cit note 110 at 10.2.2.1.
\footnotesize\textsuperscript{136} Scott (ibid) quotes in support Hensch v Nel supra note 150 at 699 where the Court asserted that ‘an option to obtain a loan would obviously stand on an entirely different footing from an option to buy for cash. And for the same reason an option to buy on credit also stands on a different footing’. In Dettmann v Goldfain 1975 (3) SA 385 (A) at 399, the Court reiterated that in the case of an option to buy for cash the right is, prima facie, credible.
\footnotesize\textsuperscript{137} Citing Seegray Bag Manufacturing Co (Pty) Ltd v African Bag Corp Ltd 1960 (1) SA 319 (T) at 320.
\footnotesize\textsuperscript{138} Scott op cit note 99 at 4.3.3.1.
\footnotesize\textsuperscript{139} Trust Bank Ltd v Standard Bank supra note 117 at 189. Cf LAWSA op cit note 121 in par 256; Scott op cit note 99 at 4.3.3.1.
\footnotesize\textsuperscript{140} Trust Bank Ltd v Standard Bank supra note 117 at 189. Cf Scott op cit note 99 at 4.3.3.1.
\footnotesize\textsuperscript{141} Scott op cit note 99 at 4.3.3.1.
\footnotesize\textsuperscript{142} Trust Bank Ltd v Standard Bank supra note 117 at 189.
\footnotesize\textsuperscript{143} Scott op cit note 99 at 4.3.3.1, citing in support Trust Bank Ltd v Standard Bank supra note 117 at 189 and MTK Saagmeide (Pty) Ltd v Kellman Estates (Pty) Ltd 1980 (3) SA 1 (A) at 11.
making a right not cedable. There are a number of difficulties in applying the South African CGT to personal rights generally, but in particular to such non-cedable personal rights. First, it has been noted above that if a right is not cedable it is difficult to see how it could be valued within the concept of property under South African law.164 While the primary focus of the definition of ‘property’ is its ability to be valued, rather than its transmissibility, it is contended that there is a link between the non-transferability of certain personal rights and the ability to value such non-cedable rights. If a right cannot be transferred, how can it have a value? As noted above, for this reason transferability and saleability or ability to be valued have been seen as interlinked aspects of the notion of ‘property’ under Australian law. If for the reasons detailed above the South African CGT is confined to assets that are property, arguably non-cedable personal rights that could not be valued would not be assets under s 1 of the ITA 1962.

For the reasons detailed below, and already noted above, this approach would be preferable as there are a number of other difficulties involved in applying the Eighth Schedule to such personal rights. The Explanatory Memorandum does not discuss the issue. It appears, however, that the South African government intended to apply its CGT to personal rights.165 The SARS Draft Comprehensive Guide: Capital Gains Tax166 states that the definition of asset ‘includes personal as well as real rights’. It states further that ‘[h]aving regard to the definition of “asset”, in par 11 which deals with disposals and in par 13(1)(b), the view is held that personal rights are assets for the purpose of the Eighth Schedule’.167 What is not clear is whether it was intended that it should apply to all personal rights, including those that may not be ceded. Again from the SARS Guide168 it would appear that the government intended such rights to be included. In the context of its discussion of the definition of ‘disposal’, the Guide refers to an agreement for restraint of trade as giving rise to a CGT disposal because it involves a creation of the right under the agreement.169 As noted above, the personal nature of a contract in restraint of trade gives rise to non-cedable personal rights.170 For the reasons detailed below, it may be surmised that the Legislature did not appropriately consider this issue when drafting of the Eighth Schedule. The legislation is inherently unworkable when applied to personal rights, in particular, non-cedable rights.

If all personal rights are assets within s 1, there are a number of difficulties involved in any purported application of the Eighth Schedule

164 LAWSA op cit note 24 in par 195. See further the discussion below.
165 See also G Swart ‘The Taxation of Trusts – Superimposing New Rules On Old Principles’
166 Op cit note 9 in par 4.1.
167 Idem in para 6.3.
168 Idem in par 6.1.
169 Ibid.
170 Scott op cit note 99 at 4.3.2; Scott op cit note 110 at 10.3.1.5.
of the ITA 1962 to, in particular, a delectus personae. For example, under s 11(1) of the ITA 1962, a disposal includes 'any event, act, forbearance or operation of law which results in the creation, variation, transfer or extinction of an asset'. Thus, a disposal for CGT purposes would prima facie arise from the creation, variation or extinction of a delectus personae. Again, how could the market value of such a personal right be determined (if necessary) under Parts V and VI of the ITA 1962?

More importantly, how is the time of disposal to be determined under s 13(1) of the ITA 1962? The primary timing rule specified in s 13(1)(a) is premised on a change in ownership. It is important to note at the outset that s 13(1) does not deem a change of ownership, but rather identifies the timing of that transfer when and if the change in ownership occurs. The creation of a personal right does not involve a change in ownership. It does not involve the disposal of the same asset, the right of action, from, for example, one contracting party (the creditor) to the other (the debtor). Neither party had the right to sue themselves. Thus, the personal right has not been transmitted from one party to the other. As noted above, the arrangement merely involves the creation of correlative rights in each party. Similarly, the performance of the contract does not entail the transfer of the personal rights between the contracting parties. Performance of the contract merely involves an extinction of the contractual rights, not a transfer of ownership of the personal rights. Ultimately, as there is no change in ownership, s 13(1)(a) cannot apply and there is no other timing rule in s 13(1) that deals with the disposal of an asset by way of creating a personal right in another.

Again, the Explanatory Memorandum does not address the issue. Moreover, the SARS Guide tries to tackle this problem in a very dismissive way. The commentary notes at one point that if 'for some reason there is no transfer of ownership then there is no disposal for the timing rule to apply to'. As noted above, the Guide identifies a contract for restraint of trade as involving a CGT disposal within s 11(1) because a personal right has been created under the agreement. The Guide does not, however, explain how s 13(1) would apply to this scenario.

The Guide does specifically discuss the timing of the disposal when a personal right is created in the course of contracting for the purchase of

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171 Cf the Australian courts' discussion of this issue in *Hepples v FCT* supra note 3 at 4839-40 and in the English context *Kirby v Thorn EMI* supra note 68. Note that the granting of a lease, while involving the creation of contractual rights, is different from other scenarios involving the creation of personal rights. The granting of a lease involves the transfer of actual proprietary rights, namely one of the bundles of rights that the owner of the property holds. Thus, in this circumstance there is an actual change in ownership. Thus, the author is able to agree to some extent with the explanation of the application of the South African CGT provisions to the granting of a lease provided in par 6.1 of the SARS Guide op cit note 9.

172 Cf the Australian courts' discussion of this issue in *Hepples v FCT* supra note 3 at 4839-40.

173 Cf the Australian courts' discussion of this issue in *Unilever Australia Securities Ltd v FCT* (1994) 94 ATC 4388 and *Case 37/95* (1995) 95 ATC 331.

174 Op cit note 9 in par 6.3.

175 Idem in par 6.1.
an asset, in this case involving deferred delivery. The commentary begins by acknowledging that s 13(1) ‘does not deem the transfer of ownership to have taken place but when it does take place, the time of disposal is deemed, for example, in the case of an unconditional contract to be when the contract is concluded’. The commentary continues, however, by stating that a contract to purchase an asset ‘results in the creation of a number of personal rights’ (that are disposals within s 11) which ‘are all deemed to have been exchanged, terminated or expired on the date of the conclusion of the contract. But there is no such deeming provision in the Eighth Schedule. The Guide itself acknowledges that s 13(1) does not deem any change in ownership. Nor does s 1 deem any such change in ownership. Section 11 deems the creation of the personal rights to be a disposal, but it does not deem there to have been a change in ownership of the personal rights between the contracting parties. In the absence of such a deeming provision, there is no change of ownership, only the creation of correlative rights, and thus s 13(1)(a) does not apply, with the consequence that no relevant timing rule can be identified. Contrary to the commentary in the Guide, the creation of personal rights is in fact an example where ‘there is no transfer of ownership [and thus] there is no disposal for the timing rule to apply to’.

Equally, there is no timing rule relevant to the acquisition of that personal right by each contracting party. Section 13(2) provides that the ‘person to whom an asset is disposed’ is treated as having acquired that asset at the time of the disposal specified in s 13(1). As we have seen, however, there is no relevant timing rule in s 13(1) that may be applied to the person in whom the personal right has been created within ss 11 and 13(2).

Perhaps it is pertinent at this point to return to Williams’ consideration of these provisions and his obvious frustration. He states whilst almost gnarling through the text:

‘So, if we are prepared to swallow the camel that the creation of an asset constitutes a disposal, we ought not to strain at the gnat of accepting that the person to whom the asset is thus disposed of is the creator.’

The application of the Eighth Schedule gives rise to a further fundamental problem in that more than one disposal may arise out of the one set of facts and, in turn, the possibility of double or triple

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176 Idem in par 6.3.
177 Ibid.
178 Ibid. Swart op cit note 165 at 128 seeks to deal with the problem differently, asserting that a ‘legal fiction is created’ in such situations whereby the change in ownership of the underlying asset is deemed to have occurred when the personal right to the transfer or delivery of the asset arises. The ‘actual delivery or transfer of the asset in a later tax year is ignored as it does not qualify as a disposal in that year’. Again, the legislation does not provide such reconciling rules, giving primacy to the creation of the contractual right, rather than the actual transfer of the underlying asset.
179 Op cit note 9 in par 6.3.
180 Ibid.
181 Williams op cit note 26 at 27.
taxation. If in accordance with s 11(1) there is a (deemed) disposal each
time there is a ‘creation, variation . . . or extinction’ of a personal right,
then the purchase of an asset, for example, will involve at least three CGT
disposals. First, when A agrees to buy B’s asset for a particular price, to
be delivered on a particular date, personal rights have been created. A has
a right to demand performance (delivery of the asset on that date) and B
has the right to demand the correlative performance (payment). Under
s 11(1), a disposal has occurred. When A performs the contract by paying
B and B performs the contract by delivering the asset to A, the underlying
personal rights have been extinguished. Another disposal has occurred.
Once delivery takes place a further disposal under s 11(1) occurs as A
acquires real rights to the asset. In a given case a further disposal could
occur if there has been a variation of the contract in the course of the
period of the contract. Alternatively a number of disposals could occur
in a given case if part performance (that is, part payment) were to occur
across the period of the contract. Each time a payment had been made
B’s personal right to demand payment would be partially extinguished
within s 11(1).

As the current definition of ‘asset’ in s 108-5 of the ITAA 1997 includes
coses in action, including personal choses in action, potentially the same
problem arises under the Australian CGT. Thus, under the Australian
CGT, in this example Event D1 would arise when the contract is entered
into (creation of a contractual right), Event A1 would also occur
(change of ownership of a CGT asset), as would Event C2 when the
contract is performed (ownership of an intangible asset, including a
contractual right, ends). However, the Australian legislation has a
number of reconciling rules that prevent double or triple taxation. For
example, Event D1 does not occur if the contract requires the taxpayer to
do another CGT Event, such as Event A1 in our example. Also, Event
D1 is a residual provision, that only applies if no other CGT Event other
than Event H2 (acts occurring in relation to a CGT asset) exists.

Under Chapter 3 there is also a general reconciling rule that specifies that
if two or more CGT Events exist, the most specific CGT Event must be
applied. Thus, the creation of a lease would potentially involve Event
A1 (change in ownership) and Event F1 (creation of a lease). Event F1 is
the most specific event and it will apply.

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162 Cf in the Australian context FCT v Sara Lee Household & Body Care (Australia) Pty Ltd [2001] ATC 4378.
163 Cf in the Australian context FCT v Orica Ltd supra note 21.
164 Section 104-3(1).
165 Section 104-10.
166 Section 104-25.
167 FCT v Orica Ltd supra note 21.
168 Section 104-3(5).
169 Section 102-25(1).
170 Section 102-25(1).
The South African CGT has no such reconciling rules. That the government is aware of this overlap is apparent from the SARS Draft Comprehensive Guide: Capital Gains Tax. It states in the context of its discussion of the definition of ‘asset’:\footnote{Op cit note 9 in par 4.1. Swart op cit note 165 similarly observes in regard to the capital gains implications of trusts that the creation of a trust or the vesting of a right to a trust asset in a beneficiary involves the creation of a ‘personal right’ against the trustee for the eventual transfer of the ownership of a specific trust asset. The subsequent transfer of such ownership to the beneficiary entitled thereto involves a second disposal by the trust. … The beneficiary’s personal right is, in other words, exchanged for a real right.’ Swart suggests that the existence of two disposals does not result in double taxation. He suggests that one of the disposals, whether that be the disposal arising from the creation of the personal right or the actual transfer of the asset, will be tax neutral as the cost base and capital proceeds of the disposal will be the same.}{\footnote{Idem in par 6.3.}}

For example, if A sells B an asset for a fixed sum, delivery and payment to take place in five years’ time, B will have a personal right against A, namely the right to expect A to deliver the asset to B on due date. Once delivery takes place, B will acquire a real right in the asset.\footnote{\textit{Op cit note 9 in par 6.1.}}

From this statement there is a clear appreciation of the existence of two CGT assets, the personal right for performance of the contract and the real right in the asset, and thus two potential disposals. Most importantly this matter is specifically discussed in the context of the timing of the disposal under s 13(1). The \textit{Guide} identifies the problem of double taxation in the context of an example of a sale involving deferred delivery in this way:\footnote{Idem in par 6.3.}

A sells a share to B, delivery and payment of the purchase price to take place in five years’ time. What are the CGT implications for the seller? Is the seller’s personal right to claim payment of the purchase price an asset for CGT purposes? Does this not lead to double CGT?\footnote{\textit{Op cit note 9 in par 6.1.}}

The commentary continues by reiterating the above statements that the personal rights created under the contract are assets within s 1 and the creation of personal rights is a disposal within ss 11 and 13.\footnote{Idem in par 6.3.} It then seems to suggest that the problem of double taxation will not arise because in such cases the courts will simply say that the relevant asset is the corporeal property itself, not the personal right.\footnote{\textit{Op cit note 9 in par 6.1.}} In support the \textit{Guide} quotes Warner J in \textit{Zim Properties Ltd v Proctor}:\footnote{(1984) 58 TC 371 at 392.}

I have no difficulty in accepting that not every right to a payment is an ‘asset’ within the meaning of the term in the capital gains tax legislation. Perhaps the most obvious example of one that is not is the right of the seller of property to be paid the purchase price. The relevant asset then is the property itself. What that shows, however, to my mind, is no more than the interpretation of the capital gains tax legislation requires, as
does the interpretation of any legislation, the exercise of common sense, rather than the brute application of verbal formulae.

It is submitted that it is a big assumption to make that the South African courts will correct this problem of overlapping disposals and potential double taxation, particularly where it is clear that the government intended the legislation to extend to personal rights. From the Australian experience such an assumption cannot be made. While initially members of the judiciary were conscious that Part IIA could have an excessively broad scope, extending to every contractual relationship, and refused to so interpret the legislation, as noted above, ultimately the Australian courts have concluded that the mere performance of a contract involves a CGT Event, CGT Event C2. Moreover, subject to the reconciling rules discussed above, CGT Event D1 occurs every time a contractual right is created. Similarly, s 11(1) expressly provides that a disposal occurs each time an asset or personal right is created or extinguished. Will the South African courts ignore such clear words? It would have been better had the matter been addressed by clear legislative direction. In fact, it has been suggested that this was a drafting error and that the Legislature probably intended that the creation of a personal right through a contract was to constitute an ‘acquisition’ of the personal right by its creator, not a ‘disposal’. As noted above, Williams believes that the drafters ‘nodded’ off when penning this aspect of the provision and stretched the concept of disposal beyond logical ‘breaking point’.

From this discussion of the definition of asset and its interplay with, inter alia, two key disposal provisions (ss 11 and 13), it will be apparent that lessons could have been learnt from the Australian experience and the application of the CGT provisions to personal rights will prove problematic.

4 Acquisition

Despite the importance of pinpointing the date of acquisition, acquisition is given very little consideration in the South African CGT legislation. It could be surmised that perhaps this is because a ‘disposal’, not an ‘acquisition,’ is the trigger for CGT liability and therefore the latter is a non-issue.

This argument meets a number of hurdles. First, it is important under the legislative regime to fix the time of acquisition for pre-CGT assets. As noted above, the disposal of pre-CGT assets is given concessional tax treatment. Determining whether the asset was acquired prior to

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196 For example, see Spender J in Unilever Australia Securities Ltd v FCT supra note 173 and Case 37/95 supra note 173. See also Hill J in FCT v Coolring supra note 2 in relation to the predecessor of CGT Event D1, s 160M(6).
197 FCT v Orica Ltd supra note 21.
198 Williams op cit note 26 at 26-7.
199 Idem at 26.
1 October 2001 is therefore important. Yet there is no specific provision that determines if an asset is a pre-valuation date asset, apart from the assertion in s 1 that an asset is a ‘pre-valuation date asset’ if it was acquired prior to 1 October 2001 and still held by that person at that date. As noted above, s 13(2) is clearly deficient in this regard.

Second, identifying the point of acquisition is also important to determining the cost base of the asset within Part V of the ITA 1962. The cost base includes the acquisition costs of the asset. Hence there is a further need to identify the point of acquisition to identify those costs associated with that event. This issue is also relevant to pre-valuation date assets. As noted above, s 26(1) allows taxpayers to elect to value their pre-CGT asset as at 1 October 2001 (i) as the asset’s market value within s 29, (ii) as 20 per cent of the proceeds on the disposal, less the deductible cost base within s 20, or (iii) by using a time apportionment rule to apportion the cost base across the pre and post CGT periods. Thus, for pre-valuation date assets determining when the asset was acquired and the costs associated with such is going to be important for both determining the costs that are deductible against the capital proceeds under the 20 per cent rule and applying the time-apportionment rule to the asset’s cost base.

Third, as noted above, the satisfaction of the s 1 definition of an asset does not in itself render a capital gain assessable. Generally, the mere retention of an asset that increases in value will not have tax implications. The existence of an asset must also generally be coupled with a disposal of an asset that had previously been acquired before the gain will be assessable. In this regard it is suggested that for two reasons generally an acquisition of that asset must also exist. First, as noted above, a key notion in the South African CGT legislation is the ‘disposal’ of an asset. The ordinary meaning of disposal is an alienation of an asset from one person to another. Thus, ordinarily a disposal entails a change in ownership from one party to the other – a disposal and an acquisition. This ordinary meaning of disposal is reflected in the key timing provision, s 13(1)(a). As noted above, s 13(1)(a) provides for the timing of a disposal where there has been a change in ownership. Again, such a change in ownership is premised upon a disposal by one party and an acquisition of the asset by another.

Nevertheless, as noted above, the notion of ‘acquisition’ is hardly dealt with in the South African CGT legislation. This is particularly striking given that the heading for Part III is stated as ‘Disposal and acquisition

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200 Idem at 26-7.
201 Section 20(1)(a) of the ITA 1962.
202 See also Williams op cit note 26 at 27.
203 Idem at 26-7.
204 Cf the SARS Guide op cit note 9 in par 3.5.
205 Cf ibid.
206 FCT v Cooling supra note 2 at 4486; Hepples v FCT supra note 19 at 4518.
of assets’, yet acquisition is really not considered in any substance in it.

Essentially, the only reference to acquisition in this Part is s 13(2), referred to above, that provides that the ‘person to whom an asset is disposed’ is treated as having acquired that asset at the time of the disposal specified in s 13(1). As discussed above, the timing rules in s 13(1) are far from comprehensive, leaving gaps in the acquisition of assets under s 13(2).

Moreover, the treatment of the category of assets that may be described as assets that are acquired, but not disposed of, is very limited. While generally an acquisition will occur through the disposal of the asset by another, as noted above, in some cases an asset is acquired without a corresponding disposal or change in ownership. For example, the Australian provision s 109-10 of the ITAA 1997 provides that if a taxpayer (or agent) creates or constructs a CGT asset and owns it when the construction is finished or the asset is created, it is acquired when the construction, or the work that resulted in the creation, started. There is no corresponding provision in the South African legislation. While s 11(1) provides for the ‘disposal’ of an asset through the ‘creation of an asset’, the actual ‘acquisition’ of that asset is not dealt with. As noted above, Williams suggests that the drafters probably intended that this aspect of s 11(1) was intended to deem an acquisition, not a disposal.

In the absence of such a deemed acquisition section, the problem remains that there is no provision in the Eighth Schedule that deals with the acquisition of an asset that is so created.

Moreover, there is no specific provision in the legislation to determine the actual time of such an acquisition. In this regard it is submitted we should not have to ‘presume’ a time of acquisition – as Williams does as he tries to battle with how the legislation would apply to a sculpture created by a sculptor. After pursuing what he refers to as a rather ‘circuitous route’, Williams ultimately asserts that ‘presumably the time of acquisition is the time when the work of construction began – or perhaps when it was complete’. As he states, ‘this point could usefully have been made explicit in the legislation’.

Further, as Williams points out, there is no provision in the Act that adequately deals with the creation of such an asset in a manner that it vests in a third party, rather than the creator herself. Thus he points to the example of a builder building a house on another person’s land. In such a case the owner of the land ‘acquires ownership of the building, on its

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207 Acquisition is also dealt with in the context of persons coming to reside in South Africa in s 12.
208 Formerly s 160M(5)(b) and (c).
209 Williams op cit note 26 at 26-7.
210 Ibid at 27.
211 Ibid.
212 Ibid.
213 Ibid.
construction, by accession.\textsuperscript{214} Again, it would have been useful if the Eighth Schedule had been explicit that, in these circumstances, the time of acquisition was the time that construction began or alternatively when it was completed.\textsuperscript{215}

Similarly, under the Australian provision s109-10,\textsuperscript{216} an issue or allotment of shares in a company constitutes an acquisition by the person to whom they are allotted. The acquisition occurs when the contract for the purchase is entered into or if there is no such contract, when the shares are issued or allotted. The allotment is not, however, to be taken to be a disposal of the shares by the company. This simply echoes the general law notion that the issuing of shares does not involve a disposal of company property.\textsuperscript{217} The South African legislation affirms the latter point regarding the absence of a disposal of a share by the company in s 11(2)(b), but makes no provision for the acquisition of the share by the shareholder.

Also, s 109-10 of the ITAA 1997\textsuperscript{218} provides that an issue of units in a unit trust by the trustee constitutes an acquisition by the person who receives the units. The acquisition occurs when the contract for purchase is entered into or if there is no such contract, when the units are issued. This does not amount to a disposal of the units by the trustee. Again the South African legislation only states in s 11(2)(c) that the issue of the unit is not a disposal of the unit. There is no reference in the South African legislation to the acquisition of the unit.

5 Disposal

The notion of disposal and the timing of that disposal have been considered in some detail above. In concluding on this point a few final issues relating to the notion of ‘change of owner’ are considered.

As noted earlier, the key definition of disposal is contained in s 11(1). In essence this provides that a ‘disposal is any event, act, forbearance or operation of law which results in the creation, variation, transfer or extinction of an asset’. The time of that disposal is stated in s 13(1)(a) as, generally,\textsuperscript{219} being tied to the notion of ‘change in ownership’. The combination of ss 11 and 13 echoes the Australian definition of disposal in s 104-10 (CGT Event A1), namely a change in ownership of an asset.\textsuperscript{220} As noted above, this simply echoes the ordinary meaning of disposal.\textsuperscript{221}

The ordinary meaning of ‘disposal’ does, however, have its limits. For example, a disposal does not occur if the change in ownership occurs as a

\textsuperscript{214} Ibid.
\textsuperscript{215} Ibid.
\textsuperscript{216} Formerly s 160M(5)(a).
\textsuperscript{217} FCT v St Helen's Farm (ACT) Pty Ltd (1981) 81 ATC 4040 at 4042.
\textsuperscript{218} Formerly s 160M(5)(aa).
\textsuperscript{219} See further s 13(1) for other specific timing rules.
\textsuperscript{220} Section 104-10(2).
\textsuperscript{221} FCT v Cooling supra note 2 at 4486; Hepple v FCT supra note 19 at 4518.
result of providing or redeeming a security.\textsuperscript{222} This provision is echoed in the South African legislation in s 11(2)(a). Moreover, a change in ownership will not constitute a disposal unless, as a corollary, there is a change in the beneficial (as opposed to legal) ownership of the asset.\textsuperscript{223} To this end, s 11(2)(f) of the South African CGT legislation originally stated that a change in trustees, for example, will not constitute a disposal of trust assets. Section 11(2)(f) has, however, been repealed. It appears this was done as the government took the view that ‘changes in appointments do not result in the disposal of the underlying assets which are held on behalf of vested or contingent beneficiaries, heirs, legatees etc.’\textsuperscript{224}

The Australian courts have also suggested that there to be a disposal under the predecessor to s 104-10, s 160M(1), there must be a correspondence between that sold and that acquired.\textsuperscript{225} Thus, in \textit{Naval, Military \& Airforce Club of SA (Inc) v FCT}\textsuperscript{226} the taxpayer was the registered owner of the subject heritage listed premises. Under the relevant planning laws the local council could give the taxpayer permission to ‘transfer’ floor area from that property site to another site and thereby increase the area of the latter that might be developed. The taxpayer obtained Council approval to transfer an area from its heritage site to BHAS Employees Superannuation Fund Pty Ltd (‘BHAS’). In return the taxpayer received $338,750 from BHAS. The Commissioner assessed the taxpayer on the payment on the basis that either s 160M(6) or (7), two key deemed disposal provisions, rendered the whole amount assessable. The taxpayer objected, asserting that the predecessor to s 104-10, s 160M(1), applied and that as the asset’s cost base was its market value at the point of acquisition, this was equal to the consideration paid by BHAS and thus no gain had been made. The Court held that s 160M(1) was not applicable as that acquired by BHAS was not the same asset as that owned by the taxpayer. Jenkinson J stated that the taxpayer’s asset was the right to confer the floor space on a third party. He believed there had been no disposition of that asset to BHAS. BHAS had not acquired the right to confer this floor space. Rather, the taxpayer merely exercised this right. Hence, s 160M(1) did not apply and the relevant provisions were, therefore, ss 160M(6) and (7). French J suggested the taxpayer’s asset to be the right to have a development application with respect to other land heard in light of the transferable floor area from its heritage site. Again, he believed this was not the same asset that was transferred to BHAS. Thus, s 160M(1) did not apply, but rather ss 160M(3)(b) or 160M(7). Van Doussa J disagreed with the majority view, asserting that the asset was the transferable floor area itself.

\textsuperscript{222} Section 104-10(7) of the ITAA 1997.
\textsuperscript{223} Section 104-10(2)(b).
\textsuperscript{224} SARS \textit{Guide} op cit note 9 in par 6.1.
\textsuperscript{225} \textit{Naval, Military \& Airforce Club of SA (Inc) v FCT} (1994) 94 ATC 4310.
\textsuperscript{226} Supra note 225.
and that a transfer of such occurred under s 160M(1). He agreed with the
taxpayer that no capital gain had arisen from the transfer.

The applicability of this requirement to the South African legislation is
unclear. While there is nothing explicit in s 11(1) determining the matter,
as a key aspect of s 13(1) is a change in ownership of the asset, this
requirement would appear to be implicit in the legislation. Moreover, the
reference in s 11(1) to a ‘transfer’ as a means of disposal would seem to
contemplate a transfer of the same asset from one party to another.

6 Conclusion

Given the criticism that was leveled at the initial version of the CGT in
Australia, it was somewhat strange to find that the South African
legislature adopted the same prerequisites\(^{227}\) and definitions\(^{228}\) that had
proven to be so troublesome there. It has been suggested that the
differences in Australian and South African property law will not avoid
the difficulties that stem from defining an ‘asset’ in terms of property. As
in Australia, some rights are not capable of transfer and can only be
valued in a very loose sense. This, in turn, raises the same difficult issues
that troubled the courts in Australia as to the meaning of an ‘asset’ and
the ability to ‘dispose’ of certain rights under the CGT legislation. As the
discussion of the interplay between the definition of ‘asset’ and the notion
of ‘disposal’ evidences, the South African legislature would have been
better to learn from the Australian experience and either excluded
personal rights from the definition of asset or drafted the CGT in clearer
and more comprehensive terms so as to accommodate the application of
a CGT to such rights.

Ultimately, as Williams suggests, ‘unless there is a statutory
amendment to clarify . . . the definition of “interest” in the definition of
“asset” in the Eighth Schedule, its meaning will remain in doubt until
decided by the courts’.\(^{229}\) Thus, he concludes that ‘[p]resumably the
drafters of the Eighth Schedule decided to leave it to the courts to
determine what interests should fall within the definition, and the courts
now face the formidable task of finding a rational limitation to the kinds
of interests whose “disposal” . . . will be subject to CGT.’\(^{230}\) It seems
irresponsible for the drafter to leave such a task to the South African
courts when a glance across the waters would have indicated to them the
nature of the treacherous waters in which they were seeking to swim.

\(^{227}\) That is, a ‘disposal’ of an ‘asset’; ss 3 and 4 ITA 1962.

\(^{228}\) In particular, defining an asset in terms of property: s 1 ITA 1962.

\(^{229}\) Williams op cit note 26 at 23.

\(^{230}\) Idem at 22.