IN THE HIGH COURT OF AUSTRALIA
BRISBANE REGISTRY

No. B28 of 2019

BETWEEN:

BHP BILLITON LIMITED (ACN 004 028 077)
(NOW NAMED BHP GROUP LIMITED)

Appellant

and

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COMMISSIONER OF TAXATION

Respondent

RESPONDENT'S SUBMISSIONS

PART I: CERTIFICATION

1. It is certified that this submission is in a form suitable for publication on the internet.

PART II: ISSUES

20 2. The appeal raises the following issues.

3. *First*, is it a necessary condition for a company to be "sufficiently influenced" by another entity for the purposes of s 318(6)(b) of the *Income Tax Assessment Act 1936* (Cth) (**ITAA 1936**) that the other entity controls the company in the sense that the other entity's directions, instructions or wishes *will* be complied with *irrespective* of whether the company considers it to be in its interests? The appellant (**Ltd**) says that the section is limited to control of that kind. The respondent (**the Commissioner**) says that the section is not confined to control; nor is it confined to control of that kind.

4. *Secondly*, in the phrase "directions, instructions or wishes", is the term "wishes" confined to things that would otherwise be a direction or instruction? Ltd says that the term is so

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limited. The Commissioner says that each word in the phrase has work to do, and that a wish is distinct from a direction or instruction.

5. *Thirdly*, did the Full Court err in finding – by reference to a number of factors – that during the relevant years, Ltd was sufficiently influenced by BHPB Billiton Plc (**Plc**) (and vice versa) and BHP Billiton Marketing AG (**BMAG**) was sufficiently influenced by Plc and Ltd.

PART III: SECTION 78B

6. The Commissioner has considered whether a notice is required under s 78B of the *Judiciary Act 1903* (Cth) and is of the view that none is required.

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PART IV: MATERIAL FACTS AND BACKGROUND

Statutory context

7. In the 2006 to 2010 income years (**the Relevant Years**), BMAG made profits on the sale of commodities it purchased from Plc's wholly-owned Australian subsidiaries. BMAG was a "controlled foreign company" (**CFC**) of Ltd for the purposes of Part X of the ITAA 1936.[1]

8. Under s 456(1) of the ITAA 1936 where CFC "has attributable income for a statutory accounting period in respect of an attributable taxpayer, the taxpayer's attribution percentage of the attributable income is included in the assessable income of the taxpayer of the year of income in which the end of the statutory accounting period occurs".

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9. Division 7 of Part X contains the rules for calculating the attributable income of a CFC for an attributable taxpayer. The attributable income of a CFC depends on whether the CFC is a resident of a listed country under Schedule 10 of *the Income Tax Regulations 1936* (Cth). BMAG is a tax resident of Switzerland, which is not a listed country. The basic rule for calculating the "attributable income" of an unlisted country CFC is to calculate the "notional taxable income" of the CFC as if it were a resident company under Australian law subject to certain modifications.

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1 See ITAA 1936 s 340.

10. Subsection 384(1) of the ITAA 1936 relevantly provides that the only amounts of "notional taxable income" are those to which subs 384(2) applies, which may and presently does, include "adjusted tainted income", within the meaning of s 386. In turn, s 386 includes "tainted sales income".

11. Section 447(1)(a) of the ITAA 1936 in turn defined the "tainted sales income" of a company. It relevantly provided:

> (1) Subject to this Division, for the purposes of this Part, the following amounts are tainted sales income of a company of a statutory accounting period:
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> (a) income from the sale of goods by the company where all of the following conditions are satisfied:
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> (i) the goods were sold to the company by another entity;
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> (ii) either of the following sub-subparagraphs applies at the time of the sale of the goods to the company:
>
> (A) the seller of the goods to the company was an **associate** of the company and a Part X Australian resident …

(emphasis added)

12. It is in this statutory context that one comes to construe the definition of "associate" in s 318 of the ITAA 1936. That section relevantly states:

> the following are associates of a company (in this subsection called the **primary entity**):
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> …
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> (d) another entity (in this paragraph called the **controlling entity**) where:
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> (i) the primary entity is sufficiently influenced by:
>
> (A) the controlling entity;
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> (B) the controlling entity and another entity or entities;
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> …
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> (e) another company (in this paragraph called the **controlled company**) where:
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> (i) the controlled company is sufficiently influenced by:
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> …

(B) another entity that is an associate of the primary entity because of another paragraph of this subsection;

...

(f) any other entity that, if a third entity that is an associate of the primary entity because of paragraph (d) of this subsection were the primary entity, would be an associate of that third entity because of subsection (1), because of another paragraph of this subsection or because of subsection (3).

13. "Sufficiently influenced", in turn, is defined in s 318(6)(b) as follows:

> [A] company is sufficiently influenced by an entity or entities if the company, or its directors, are accustomed or under an obligation (whether formal or informal), or might reasonably be expected, to act in accordance with the directions, instructions or wishes of the entity or entities (whether those directions, instructions or wishes are, or might reasonably be expected to be, communicated directly or through interposed companies, partnerships or trusts) ...

14. In the Relevant Years, Ltd included in its assessable income 58% of the profits derived by BMAG on the sale of commodities it purchased from Ltd's indirectly wholly-owned Australian subsidiaries. Those profits were "tainted sales income" and "attributable income".

15. However, by amended assessments for the Relevant Years, the Commissioner included in Ltd's assessable income 58% of the profits derived by BMAG from the sale of commodities it purchased from Plc's indirectly wholly-owned Australian subsidiaries, on the basis that those profits were also "tainted sales income" and "attributable income". The underlying revenue issue is whether Ltd has established that the Commissioner was wrong to include those profits in Ltd's assessable income.

16. At all stages of the proceedings, it has been common ground that Ltd must lose unless it establishes that each of the following was false during the Relevant Years: (1) Ltd was sufficiently influenced by Plc; (2) Plc was sufficiently influenced by Ltd; or (3) BMAG was sufficiently influenced by Plc and Ltd. The Full Court found that each of those was true: see FC [58], [174] (**CAB 93, 126**). It follows that in order to succeed Ltd must impugn each of the Full Court's ultimate conclusions.

Influence within the BHPB Group generally

17. The materials before the Full Court and the Tribunal evidenced that Ltd and Plc had an extraordinarily close relationship during the Relevant Years.

18. Ltd and Plc operated through Boards of Directors comprised of the same individuals: DLC Structure Sharing Arrangement cl 2(a) (**ABFM 160**). The Board of Ltd was required to take into account (and in fact took into account) the interests of the shareholders of Plc in the exercise of its powers as if Ltd and Plc were a single unified economic entity: DLC Structure Sharing Arrangement cl 2(b) (**ABFM 160**); Ltd Constitution cl 104(2) (**ABFM 54**). The Board of Plc was required to do the same (and 10 in fact did the same) in respect of the shareholders of Ltd: DLC Structure Sharing Arrangement cl 2(b (**ABFM 160**)); Plc Articles of Association cl 104(2) (**ABFM 129**). An important consequence of this is that Ltd and Plc could properly choose to do something *solely* because it was in the interests of the shareholders in the other company.

19. The Directors of Ltd and Plc did not breach any fiduciary duty by acting in accordance with the various legal documents by which the dual listing of Ltd and Plc was achieved including, amongst other things, the DLC Structure Sharing Arrangement: Ltd Constitution cl 104(1) (**ABFM 53-54**); Plc Articles of Association cl 104(2) (**ABFM 129**).

20. Ltd and Plc operated through a "unified senior executive management": DLC Structure 20 Sharing Arrangement cl 2(a) (**ABFM 160**). The chief executive officers of each company were the same persons.

21. Each subsidiary of Ltd and each subsidiary of Plc pursued the principle that Ltd and Plc operate as if they were a single unified economic entity: DLC Structure Sharing Arrangement cl 2 (**ABFM 160**). Ltd and Plc agreed to procure each of their subsidiaries to act in that way (and in fact procured their subsidiaries to so act): DLC Structure Arrangement cl 2 (**ABFM 160**).

22. Further, Ltd and Plc were obliged to "enter into such further transactions or arrangements, and do such acts and things, as the other may reasonably require from time to time in the furtherance of the common interests of the holders of BHP Ordinary Shares 30 and the holders of Billiton Ordinary Shares as a combined group or to give effect to the

[DLC Structure Sharing Arrangement]": DLC Structure Sharing Arrangements cl 13 (**ABFM 171**).

Influence within the BHPB Group: Class Rights Actions and Joint Electorate Actions

23. During the Relevant Years, Ltd and Plc were able to *control* – both positively and, at least, by means of a veto – decisions made by the general meeting of the other. This was the case in the context of "Joint Electorate Actions" and "Class Rights Actions".

24. The concepts of "Joint Electorate Actions" and "Class Rights Actions" were defined in cl 60 and cl 59 of the Ltd and Plc Constitutions (respectively) and are described at FC [115]-[116] (**CAB 110**). An example of a Joint Electorate Action is the appointment or
10 removal of a director. An example of a Class Rights Action is the voluntary liquidation of Ltd or Plc.

25. Ltd and Plc agreed, in respect of Joint Electorate Actions and Class Rights Actions, to hold general meetings on the same date or on dates as close together as practicable: DLC Structure Sharing Arrangement cl 6.1 (**ABFM 166**).

26. Resolutions in respect of Joint Electorate Actions and Class Rights Actions were to be put to shareholders at parallel general meetings of Ltd and Plc, with the result decided by a poll: see FC [118] (**CAB 111**); see also **ABFM 35-39** (cll 55(3), 56(1), 59(3), 60(2)); **ABFM 107-111** (cll 55(3), 56(1), 59(3), 60(2)).

27. Each of Ltd and Plc issued a "Special Voting Share" (**SVS**). The SVS in Ltd was held
20 by BHP SVC Pty Ltd (**BHP SVC**); the SVS in Plc was held by Billiton SVC Ltd (**Billiton SVC**). BHP SVC and Billiton SVC were owned by the Law Debenture Trust Corporation Plc (**Law Debenture Plc**). Ltd, BHP SVC, Plc, Billiton SVC and Law Debenture Plc were parties to the SVC Special Voting Shares Deed (**ABFM 215-225**).

28. BHP SVC and Billiton SVC, as holders of the SVS, had voting rights on Joint Electorate Actions and Class Rights Actions. Each SVS carried a "Specified Number" of votes, calculated in accordance with cl 62 of the Ltd and Plc Constitutions (**ABFM 40**, **113**). In respect of Joint Electorate Actions, the "Specified Number" available to be voted on one side (say, Ltd) was calculated by reference to the underlying number of votes cast in the parallel general meeting on the other side (say, Plc): see cl 62(2) of the Ltd and Plc

Constitutions (**ABFM 40**, **113**). In respect of Class Rights Actions, the "Specified Number" was a fixed percentage of the total number of votes able to be cast on the resolution: see cl 62(3) of the Ltd and Plc Constitutions (**ABFM 40, 113**).

29. Ltd and Plc were obliged to keep open any poll on which the holder of the SVS was or may have been entitled to vote for such time as was necessary for the votes attaching to the SVS to be calculated and cast on the poll: DLC Structure Sharing Arrangement cl 6.3 (**ABFM 167**).

30. Further, for Joint Electorate Actions, Ltd and Plc were obliged to notify (respectively) Plc and Ltd in writing of the number of votes cast at the Parallel General Meeting and its
10 calculation of the relevant Specified Number: cll 2.1 and 2.2 of the SVS Deed and FC [123] (**CAB 111-112**).

31. The effect of the SVS arrangements was such that:

   (a) in respect of Joint Electorate Actions, votes cast by the holder of the SVS were able to change from "yes" to "no" (or vice versa) the result that would otherwise have obtained on the poll: see FC [128] (**CAB 113**);

   (b) in respect of the Class Rights Actions, votes cast by the holder of the SVS were able to defeat any resolution: see FC [148] (**CAB 119**). As the Full Court said, "[i]f a resolution in respect of a Class Rights Action is defeated by the ordinary shareholders in one company it will necessarily be defeated in the other, irrespective of the wishes
20 of the ordinary shareholders in the other": FC [148] (**CAB 119**).

Influence within the BHPB Group: dividends

32. It was the practice of Ltd to recommend to Plc that it pay a particular dividend; and it was the practice of Plc thereafter to resolve to pay that particular dividend. There was a corresponding practice whereby Plc would make an equivalent recommendation to Ltd after which Ltd would in fact resolve to pay that dividend: see FC [156]-[162] (**CAB 121-122; RBFM 3-15**).

Influence within the BHPB Group: BMAG

33. The Full Court found that BMAG might reasonably be expected to follow instructions issued jointly by Ltd and Plc, its ultimate owners: FC [171] (**CAB 125**). There was also evidence that Ltd and Plc in fact did issue joint instructions to BMAG (along with other subsidiaries): they did so through joint marketing and governing policies that were approved by the Boards of both Ltd and Plc. An example was the Marketing Risk Management Standard which was applicable to [a]ll employees, contractors and consultants employed within BHP Billiton's marketing units" (**RBFM 16-34**). BMAG was a marketing unit.

10 *The asserted findings of fact at AS [15]*

34. At AS [15], Ltd refers to what are described as "findings of fact" made by the Tribunal. A number of the matters referred to are not findings of fact; they are instead properly characterised as conclusions of mixed fact and law and/or conclusory labels. Those conclusions and labels were, in turn, influenced by the Tribunal's misconstruction of s 318(6). This observation applies to the matters described at AS 15(b) (referring to a "joint venture"), 15(c) (referring to "subservience"), 15(f) (referring to "effective control"), 15(h) (referring to imposition of wishes and control) and 15(i) (referring to actions which "reflected or resulted" from "directions, instructions or wishes").

PART V: SUBMISSIONS

20 **Grounds 2 and 3:[2] construction of s 318(6)(b)**

35. At all stages in these proceedings, Ltd has contended that it should succeed because s 318(6)(b) is engaged *only* by a relationship of controller and controlled. It takes the same position in this Court: it contends that a company is not sufficiently influenced by another unless the other's directions, instructions or wishes are treated by the company as a "sufficient reason to act" (AS [20]) which, in effect, means that s 318(6)(b) is engaged *only* if the company is subjugated to the directions, instructions or wishes of the

[2] The AS describe this as Ground 1. However, the argument addressed at AS [20]-[39] appears to be directed to grounds 2 and 3 at CAB 150.

other.[3] Ltd's contention should not be accepted. It is not supported by the text, or by a consideration of context and purpose.

36. ***First***, s 318(6)(b) does not use the term "control". The absence of the term "control" in s 318(6)(b) can be contrasted with the express use of "control" as a criterion in many places in the ITAA 1936, including in s 318(6) itself: see s 318(6)(c); see also ss 94, 102AAG, 102N, 255, 326, 347, 349, 351, 352, 354, 355. The text of s 318(6)(b) is unambiguous: its subject is influence, not control.

37. ***Secondly***, contextually, in enacting s 318, Parliament chose not to adopt one of the then-current definitions of "associate" in the ITAA 1936 – that in s 102D(2). In s 102D(2),
10 the concept of "associate" was defined by reference to "control".

38. Under s 102D(2), a company was an associate of another company (that other company being called "the primary entity") if:

> (a) the affairs or operations of the primary entity are, or are able to be, controlled, either directly or indirectly, by the associate;
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> (b) the affairs or operations of the associate are, or are able to be, controlled, either directly or indirectly by the primary entity; or
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> (c) the operations of the primary entity are, or are able to be, controlled, either directly or indirectly by a person who controls or is able to control, or by persons who control or are able to control, either directly or indirectly, the
20 operations of the associate.

39. ***Thirdly***, also contextually, the distinction between sufficient influence and greater degrees of control is emphasised by the distinction drawn in s 318 itself between sufficient influence and a majority voting interest. The latter may entail sufficient influence; but Parliament plainly intended the former to be capable of being satisfied even though there was not a majority voting interest.

40. ***Fourthly***, the influence which is the subject of s 318(6)(b) can be exerted through the communication of *wishes*, which are neither directions nor instructions. Where a person

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[3] See also AS [25] contending that s 318(6)(b) is "directed at identifying a form of control over a company").

controls another, it is inapt to describe that person's exercises of control the mere expression of wishes. Control is exercised through commands.

41. ***Fifthly***, there can be sufficient influence for the purposes of s 318(6)(b) if, as a result of the exercise of influence, an entity *might reasonably be expected* to act in a particular way. If the relationship were one of controller and controlled, then the entity *would* act in accordance with the exercise of control; there would be no occasion to ask how it might reasonably be expected to act. Notably, in enacting s 318(6)(b) and choosing for it to be engaged where a company "might reasonably be expected" to act in a particular way, Parliament chose language broader than was used in the-then current s 26AAB(14)
10 of the ITAA 1936. That section deemed entities to be associates of each other, but it did not have any equivalent of the "might reasonably be expected" formulation.

42. ***Sixthly***, the context and purpose by reference to which s 318(6)(b) include the circumstances of its enactment. Section 318 was introduced by s 49 of the *Taxation Laws Amendment (Foreign Income) Act 1990* (Cth) (No 5 of 1991) (**the 1991 Act**). In the Second Reading Speech, that Act was described as a "major piece of anti-avoidance legislation", calculated to end "tax leakage" by bringing to tax certain "income derived in low-tax countries and being diverted accumulated offshore in foreign companies and trusts".[4] In that context, s 318(6)(b) should be given a broad and substantive construction; nor should it be hedged about with unexpressed, implied limitations.

20 43. ***Seventhly***, contextually, the breadth of the relationships which s 318 is intended to pick up is emphasised by provisions in s 318 other than s 318(6)(b). For example: (1) any entity that benefits under a trust is deemed to be an associate of the trustee: s 318(3)(a); (2) any entity that is a relative of a person who benefits under a trust is an associate of the trustee: s 318(3)(b), (2)(a); (3) any relative of a natural person is an associate of that person: s 318(1)(a); (4) an entity or entities are deemed to have a majority voting interest in a unit trust if the entities are entitled to more than 50% of the income or corpus of the trust: s 318(5)(c); and (5) if Trust A owns 50% of the shares in Company B and Company C is a beneficiary of Trust A, each of Company C's associates are also associates of Company B: s 318(2)(f), (3)(c).

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4 House of Representatives, *Hansard* (13 September 1990) 1858 (Minister Crean) (Second Reading Speech).

44. Ltd's arguments to the contrary should not be accepted.

45. It is erroneous to tether s 318(6)(b) to the law on shadow directors: contra AS [22], [37]-[38]. If the ITAA 1936 had intended to borrow from the corporations law concept of "shadow directors", one would expect a reference to the corporations law in the extensive extrinsic materials preceding the 1991 Act, but there is none. Further, there is no reason why Parliament would have borrowed from the corporations law concept of shadow directors: that concept serves a materially different function to s 318. The purpose of the corporations law concept of a "shadow director" is to identify those persons who, because of their control of the company, should owe duties to the company. As was said in *Ultraframe (UK) Ltd v Fielding* [2005] EWHC 1638 (Ch) at [1279], the "statutory definition of 'shadow director' has been enacted for the specific purposes of company legislation". In contrast, the immediate purpose of Part X is to identify entities whose income should be brought to tax because of their connection to other entities. Further, the language of s 318 is materially broader than the corporations law concept of "shadow directors": it refers to that which a company "might reasonably be expected to do". There is another important difference between s 318 and the "shadow director" provisions of the corporations law: the former extends to influence on a *company*, whereas the latter is concerned only with influence on the *directors*. Further, the decision in *Buzzle Operations Pty Ltd (in liq) v Apple Computer Australia Pty Ltd* (2011) 81 NSWLR 47 relied on by Ltd[5] substantially post-dated the enactment of s 318 and it cannot be said that Parliament had that decision in mind when enacting s 318.

46. That s 318 does not pick up the law concerning shadow directors does not prevent it from working "harmoniously" with the corporations law: contra AS [37]. That the tax and corporations laws should operate harmoniously does not mean that provisions in those laws serving different functions must bear the same meaning because some of their text is similar.

47. That s 318(2)(d) and (e) use as defined terms "controlling entity" and "controlled company" is irrelevant: contra AS [25](a). Those words are no more than labels applied once s 318(6)(b) is engaged.

5 See AS [22], by reference to FC [33] (**CAB 85**).

48. That s 318(2)(d)(ii) and (c)(ii) embody a form of control exercised over the company in general meeting does not assist Ltd: contra AS [25](b). It shows only that s 318 is directed to various kinds of influence, as one would expect in an anti-avoidance provision.

49. "Wishes" does not mean "commands" or something rising to the level of command: contra AS [25](c). If "wishes" bore that meaning, it would add nothing to "directions" and "instructions", and there would be superfluity: contra *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 382 [71] (McHugh, Gummow, Kirby and Hayne JJ). Rather, the phrase "directions, instructions or wishes"
10 is properly understood as identifying different means by which influence can be exerted. A "wish" is a "desire", denoting "a desire not attainable by one's own effort".[6]

50. It is not the case that the phrase "in accordance with" requires that the influenced party subordinate its action to that of the influencer such that, if the allegedly influenced party believes conduct to be in its self-interest, it is not sufficiently influenced: contra AS [27], [38]. To read the provision in that way would be to erroneously import a requirement of control. Further, to read the provision in that way would be contrary to ordinary language. On that reading, a patient who independently chooses to follow a doctor's recommendation as to what medicine to take because the patient considers that taking that medicine will be in his or her best interests would not be said to be "acting in
20 accordance with" the doctor's recommendation.

51. Nor is conduct denied the character of being "in accordance with" the directions, instructions or wishes of another merely because it is engaged in pursuant to a pre-existing contractual duty: contra AS [44]. Were it otherwise, s 318 could be avoided by device. Company A would simply enter into a contract with company B to act in accordance with company B's directions, instructions or wishes. And company A would then say that, when it thereafter did what B wanted, it was simply performing its obligation and was not acting "in accordance with" B's wishes.

52. That the Explanatory Memorandum to the *Taxation Laws Amendment (Foreign Income) Bill 1990* (Cth) described the "broad aim" of the proposals as relating to "foreign

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6 *Oxford English Dictionary* meaning 1(a).

companies that are controlled by Australian residents" does not require any contrary conclusion: contra AS [29](a). Speaking generally, one aim of Part X was to create a statutory concept known as a "controlled foreign company", the meaning of which is defined by s 340 of the ITAA 1936. That does not mean that s 318 is limited to controlled companies, and plainly it is not. For example, a company's associates include the company's partners (s 318(2)(a)), the spouses and children of a partner of the company (s 318(2)(b)) and the trustee of a trust under which the company benefits (s 318(2)(c)). None of those can be said to be relationships of control. In any event, the words of the Explanatory Memorandum are no replacement for the text actually selected by
10 Parliament: see, eg, *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252 at [31]-[32] (French CJ, Gummow, Hayne, Crennan and Kiefel JJ).

53. That the Explanatory Memorandum referred to "influence ... to direct" does not assist: contra AS [29](b). Influence given by direction is just one of the matters with which the section is concerned. It does not follow that that kind of directing or controlling influence is the only kind of influence with which the section is concerned. It is not a reason to read "wish" as if it means "command". Further, that the Explanatory Memorandum (in addressing a different provision, s 318(5)(b)) referred to influence being "imposed" does not assist: contra AS [29](c)]. Section 318 itself does not use that language. Further, so far as the Explanatory Memorandum directly addresses s 318(6)(b) itself, it refers to
20 "**influence**, because of obligation or custom, over a company or its directors" (emphasis added) and it confirms that the "**influence** ... may take the form of instructions, wishes or directions" (emphasis added).[7] When addressing s 318(6)(b), the Explanatory Memorandum makes no mention of control (or anything similar).

54. Ltd is not assisted by comments in the Explanatory Memorandum to the *Taxation Laws Amendment Bill (No 4) 1987* (Cth) (**the 1987 Act**) on s 159GZE: contra AS [30]. There is no mention of that document in any of the extrinsic materials relating to the enactment of s 318, and it is most unlikely that Parliament had it in mind when enacting a differently worded provision at a later time. In any event, the references to "foreign control" in the Explanatory Memorandum to the enactment of s 159GZE are explained by the fact that
30 the section was introducing a defined concept of "foreign controller". That does not

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[7] Explanatory Memorandum, Taxation Laws Amendment (Foreign Income) Bill 1990 (Cth), 205.

entail that *control* was a prerequisite to falling within that defined concept, and had Parliament intended control to be the test it could readily have said so. And it is clear that Parliament did not consider that "control" was necessary to the designation of an entity as a "foreign controller". For example, under s 159GZE, a "foreign controller" included a non-resident who "either alone or together with an associate or associates ... is beneficially entitled to receive, directly or indirectly, at least 15% of any dividends that are or might be paid, or of any distribution of capital that is or may be made, by a resident company": see s 159GZE(1)(a)(ii).

55. Nor is Ltd assisted by comments in the EM to the 1987 Act on s 159GZC: contra AS [30]. Ltd's contention stretches the fiction of objective parliamentary intention beyond its breaking point: Ltd asserts that, when enacting s 318 in 1991, Parliament had in mind comments from a 1980 EM because a provision enacted in that 1980 Bill was referred to in comments in a 1987 EM on a provision that had similar text to s 318. The 1980 comments have no bearing on the construction of the 1991 legislation. In any event, Ltd's logic undermines its own contention: if Parliament had in mind the EM to the 1987 Act and that EM indicated that s 159GZC has "substantially the same meaning" as s 26AAB, then it is telling that Parliament did *not* make the same observation in respect of s 318 and neither did the extrinsic materials. That would suggest that Parliament did not intend s 318 to bear the same meaning as the former s 26AAB. Further, it is most unlikely that s 318 was intended to bear the same meaning as s 26AAB: the latter was textually distinct, and did not contain the "might reasonably be expected" formulation.

56. Nor is Ltd assisted by comments in the EM to other Acts enacted in 1974, 1978 and 1987: contra AS [32]. There is no indication that Parliament had any of those comments in mind when it enacted s 318 (and the absence of any similar comments in the extrinsic materials to the 1991 Act in fact cuts against Ltd's case). The text of those EMs is not a replacement for the text that Parliament actually enacted following the issue of those EM's. And the text of each of the provisions referred to by Ltd was different to (and narrower than) the text of s 318.

57. That other provisions in the *Income Tax Assessment Act 1997* (Cth) (**the 1997 Act**) and the ITAA 1936 use similar (but not identical language) to identify when a relationship should be *deemed* to be one of control or should fall within the definition of control does not assist Ltd: contra AS [33]. Each of the provisions referred to by Ltd has different

text. In each case, the label "control" is the *result* of the deeming, not the cause of the deeming. And, if Parliament has elsewhere in the revenue laws used the label "control", it only serves to emphasise that Parliament chose not to use that label in s 318(6)(b).

58. That s 328-130 of the 1997 Act refers to action "in concert" does not assist Ltd: contra AS [33]. The Full Court did not hold that s 318(6)(b) applied to mere action in concert.

59. There was no error in Allsop CJ construing s 318 in a context which included Part X as a whole: contra AS [34]. His Honour did not suggest that the context within which s 318 was to be construed was exhausted by Part X; and it was plainly open to his Honour to have regard to Part X in construing s 318 since that is the Part of the ITAA 1936 in which s 318 takes its place (and was enacted). Indeed, it is *Ltd* which now advances the contention that s 318 should be construed by reference to the description of the "broad aim" of Part X of the ITAA 1936 in the EM to the 1991 Act: see AS [29](a). Nor was it an error for Allsop CJ to suggest that a purpose of s 318 was to identify when it is appropriate to attribute the income of one party to another: again, it is *Ltd* which now asserts that that is the broad aim of Part X.

60. Resort to the aphorism that tax statutes should furnish a clear and unambiguous criterion of liability to tax does not take matters any further: contra AS [34]. "[T]ax statutes do not form a class of their own to which different rules of construction apply": *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* (2009) 239 CLR 27 at [57] (Hayne, Heydon, Crennan and Kiefel JJ). In any event, it is clear that Parliament intended s 318(6)(b) to involve an evaluative standard calling for practical judgment: the provision expressly calls for a number of evaluative judgments, for example as to how a person might reasonably be expected to act, whether there is an "informal" obligation and whether or not wishes might be communicated through multiple interposed entities. The proposition that criteria relating to liability to tax should involve bright-line rules cannot greatly assist in that context. And, in any event, Ltd's proposed standard – control – does not do away with the need for evaluative judgments. The concept of "control" is both wide and vague: eg *Commissioner of Taxation of the Commonwealth of Australia v The Australia and New Zealand Banking Group Limited* (1979) 143 CLR 499 at 519 (Gibbs ACJ).

Grounds 4 and 5:[8] keeping the general meeting open (and other actions relating to the SVS)

61. The submissions at AS [40]-[44] focus on the Full Court's observation that Ltd and Plc were obliged to keep their general meeting open for a sufficient time to allow the SVS to be voted. It is suggested that this was the "only act of Ltd or Plc that Thawley J specifically identified as reasonably being expected to act in accordance with the directions, instructions or wishes of the other": AS fn 110. It is not clear what work the term "specifically" does in this footnote. If it is intended to suggest that the Full Court relied *only* on the keeping of the general meeting open in finding sufficient influence, then that is erroneous. The passages at FC [145] and [146] (**CAB 118**) referred to by Ltd at AS fn 110 were "further" reasons for rejecting a specific argument advanced by Limited and were not the totality of the FC's reasoning on Joint Electorate Actions: see FC [136] (**CAB 115**). The passage at FC [152] (**CAB 120**) did not refer only to an obligation to keep the poll open; and, in any event, it does not present as the Full Court's exclusive reasoning on the issue. Rather, the Full Court's reasoning at FC [111]-[163] (**CAB 109-123**) must be read as a whole. And, so read, it is clear that the Full Court considered that sufficient influence was exercisable through the SVS arrangements and, in particular, that a vote by Ltd or Plc on a Class Rights Action or Joint Electorate Action was a direction, instruction or wish which Plc or Ltd (respectively) might reasonably be expected to act in accordance with. That is why the Full Court dealt at some length with the capacity of one side's vote on a Joint Electorate Action to carry the day on the other side (FC [127], **CAB 113**) and why the Full Court referred to the "veto" power that both sides had in respect of Class Rights Actions (FC [148], [152], **CAB 119-120**). On Ltd's interpretation of the Full Court's reasoning, most of the paragraphs it wrote between FC [112] and [163] (**CAB 109** to **123**) were redundant. That is not a plausible reading of the Full Court's reasons. And Ltd (in part) accepts that by relying (at AS [44]) on the passage of Davies J at FC [41] (**CAB 88**) which is directed to the broader issues addressed by Thawley J.

62. Ltd asserts that the notifications given to Ltd and Plc under cll 2.1, 2.2, 3.1 and 3.2 of the SVS Deed were not communications of directions, instructions or wishes that the

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[8] The AS describe this as Ground 2. However, the argument at AS [40]-[44] is directed (in part) to Grounds 3 and 4 of the Notice of Appeal.

other keep its general meeting open: AS [41]-[42]. It can be accepted that the notifications under those clauses need not expressly contain such a direction. However, s 318(6)(b) is not limited to wishes communicated expressly. The notifications referred to in cll 2.1, 2.2, 3.1 and 3.2 of the SVS Deed are express notifications as to how the vote went on the other side. They impliedly express the wish that the recipient will keep the general meeting open in order to enable that wish to be voted by the relevant holder of the SVS. In any event, nothing in s 318(6)(b) requires a search for some specific or formal "communication" of a direction, instruction or wish. The section only asks whether the company might reasonably be expected to act in accordance with the
10 directions, instructions or wishes of another – howsoever communicated or expressed.

63. Ltd also asserts that any action following a notification under cll 2.1, 2.2, 3.1 and 3.2 of the SVS Deed was not action "in accordance with" the directions, instructions or wishes of the other side because any action was brought about by the underlying obligations in the DLC Structure Sharing Arrangement and SVS Deed: AS [43]-[44]. This argument assumes that a person cannot act in accordance with the wishes of another where one has a contractual obligation to engage in that act. That assumption is wrong for the reasons set out in paragraph 51.

Omissions in Ltd's case

64. Ltd does not impugn (either by its Notice of Appeal or its submissions) a number of
20 important aspects of the Full Court's reasoning. Ltd does not directly impugn the findings in respect of the DLC arrangement (FC [63]-[68], **CAB 93-95**) picked up at FC [163] (CAB 123); see also FC [3] and [16] (**CAB 75, 78**). Nor does Ltd impugn the Full Court's findings in respect of dividends: FC [156]-[163] (**CAB 121-123**); see also FC [16] (**CAB 78**).[9] Nor still does Ltd impugn the conclusions in respect of BMAG: FC [170]-[173] (**CAB 125-126**). In those circumstances, even if its arguments are otherwise accepted, it is not apparent that Ltd can obtain the relief in prayer 8 (**CAB 151**).

65. Perhaps the closest that Ltd comes to addressing the bulk of the Full Court's reasoning is (by sidewind) at AS [38] where it is suggested that the Full Court erred because Ltd,

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9 The findings in respect of dividends cannot be avoided by asserting that the Full Court did not "specifically" identify them as acts involving sufficient influence: contra AS fn 110. It is clear that the Full Court saw them as probative of sufficient influence: FC [163] (**CAB 123**).

Plc and BMAG only adopted the directions, instructions or wishes of others because they thought that it was in the best interests of their own company. There are a number of problems with that contention. Ltd and Plc were entitled to act because they thought it was in the interests of the shareholders of the *other* company: see paragraph 18 above. More fundamentally, the argument assumes that company A can only sufficiently influence company B if company can require company B to act against its best interests. That is to read into the section a limited conception of control which does not fit.

PART VI: STATEMENT OF ARGUMENT ON NOTICE OF CONTENTION OR CROSS-APPEAL

10 66. Not applicable.

PART VII: ESTIMATE FOR ORAL ARGUMENT

67. The Commissioner estimates he will require no more than 2 hours for oral argument.

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