

5 **BETWEEN:** **BHP BILLITON LIMITED (ACN 004 028 077)**
(NOW NAMED BHP GROUP LIMITED)
Appellant

10 **AND:** **COMMISSIONER OF TAXATION**
Respondent

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RESPONDENT'S OUTLINE OF ORAL ARGUMENT

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CERTIFICATION

1. This document is in a form suitable for publication on the internet.

SUMMARY OF ARGUMENT

Construction of section 318 (JBA¹ 1/31-32)

- 5 2. Section 318(6)(b) is not confined to relationships of “control” of the kind contended for by Ltd:² contra Appeal Ground 3.³ This follows from text, context and purpose.
3. As to **text**.
 - (a) Section 318(6)(b) does not use the term “control”: RS⁴ [36].
 - (b) Elsewhere, Parliament has used the term “control”: in s 318 itself, in Pt X and
10 throughout the ITAA 1936:⁵ RS [36].
 - (c) Influence can be exerted by the communication of wishes, falling short of directions or instructions: RS [40].
 - (d) Sufficient influence can exist because of how an entity “might reasonably be expected” to act, rather than how it “would” act: RS [41].
 - 15 (e) Section 318(6)(b) applies where B is *obliged* to act in accordance with A’s directions, instructions or wishes. The section contemplates complementary causes: A’s direction, instruction or wish, and B’s obligation. There is no textual limitation to involuntarily assumed obligations. They may be formal or informal.
 - (f) As a matter of natural language, A can act “in accordance with” the directions,
20 instructions or wishes of B even though A considers that the action is in its own interests: RS [51]; and contra Davies J at CAB [38]. A patient acts in accordance with a doctor’s instructions by doing what the doctor recommends; and that is so even though the patient considers it to be in his or her best interests.
 - (g) Section 318(6)(b) is not confined to control on the directors of a company
25 engaging in “business or daily ‘acts’”: contra ARS⁶ [9]. That submission has no textual basis. Section 318 extends to influence on the directors *or* the company.

¹ Joint Book of Authorities.

² BHP Billiton Limited (now named BHP Group Limited).

³ Core Appeal Book (CAB) 150.

⁴ Respondent’s Submissions dated 31 July 2019.

⁵ *Income Tax Assessment Act 1936* (Cth).

4. As to **context**.

(a) The relationships to which s 318 are directed are not exclusively relationships of controller and controlled: RS [43], [52]. The relationships picked up by s 318 include trustee/beneficiary; trustee/relative of a beneficiary; natural person/relative: RS [43]; ss 318(1)(a), (2)(a), (3)(a), (b).

(b) Sufficient influence can exist between A and B even though A does not have a majority voting interest in B: s 318(1)(e)(i) and (ii) (RS [39]).

(c) In enacting s 318, Parliament did not adopt the definition of “associate” in s 102D(2) of the ITAA 1936, which expressly required control: RS [38].

(d) Principles relating to “shadow directors” do not assist: RS [45]-[46]. Those principles serve a different function and arise from different statutory text.

(e) The extrinsic materials and statutory history relied on by Ltd do not assist: RS [52]-[57]. They relate to differently worded provisions in different contexts.

5. As to **purpose**. Section 318 was introduced as an element of a “major piece of anti-avoidance legislation”: RS [42]; JBA 4/1276. It should not be hedged with unexpressed, implied limitations. Section 318 takes its place in Part X of the ITAA 1936 Act: the object and scheme of Part X is to prevent deferral of tax liabilities. Nothing in the object and scheme of Part X requires or warrants a narrow construction of s 318.

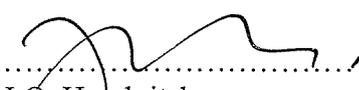
6. Ltd’s construction furthers no identified statutory purpose. It is not required to ensure that there is a clear and unambiguous criterion of liability to tax: RS [60]. Tax statutes use many evaluative, fact-dependent concepts: eg “income”; “capital”; “in gaining or producing”; “incurred in carrying on”. The language of s 318(6)(b) is inherently evaluative and fact-dependent. Ltd’s “control” criterion still calls for evaluation.

7. Justice Davies addressed whether merely “taking account” of the wishes of another was sufficient (CAB 83-84 [30]-[31]), but did not explain why “taking account” of the wishes of another *and then* acting on them was insufficient.

⁶ Appellant’s Reply Submissions dated 21 August 2019.

There was no error in the Full Court's findings of sufficient influence

8. Ltd's case was that s 318(6)(b) was confined to relationships of control and subservience: CAB 82 [26]; see also CAB 75 [5]. The Full Court correctly rejected that case. Sufficient influence was manifested in four (equally sufficient) ways.
- 5 9. **DLC arrangements.** Ltd and Plc operated, in all respects, "as one economic entity": CAB 75 [3]; CAB 93-4 [63]; RS [17]-[22]. Directors and senior executive management were unified. The Board of Ltd was obliged to take into account the interests of the shareholders of Plc (and vice versa).
- 10 10. **Class Rights Actions/Joint Electorate Actions.** For certain resolutions put to the Plc general meeting, the corresponding vote in the Ltd general meeting could and (for negative votes on a Class Rights Action) would determine the outcome for Plc (and vice versa): CAB 109-113 [112]-[128]; RS [23]-[31]. Ltd and Plc was each obliged to keep open its general meeting to ensure this could occur: CAB 118 [145]. The notification from Ltd to Plc (and vice versa) as to the votes cast was the communication of a direction, instruction or wish of the company: CAB 88 [40].
- 15 11. **Dividends.** There was a practice by which Ltd recommended that Plc pay a particular dividend and, thereafter, Plc paid the dividend (and vice versa): CAB 121-122 [156]-[162]; RS [32]; RBFM⁷ 3-15.
- 20 12. **BMAG.** The Full Court correctly held that BMAG might reasonably be expected to follow instructions issued jointly by its ultimate owners, Ltd and Plc: CAB 125 [171]; RS [33]. Ltd and Plc in fact issued joint policies to BMAG: RBFM 16-34.
13. To the extent relevant, the Full Court was not confined to the facts found by the AAT: *Administrative Appeals Tribunal Act 1975* (Cth) s 44(7); contra ARS [2].
- 25 14. Justice Davies' reasoning should not be accepted. It depended on the erroneous proposition that A does not sufficiently influence B if B follows A's instructions, but does so having formed the view that it is also in B's interests (whether or not B would have formed that view without A's instructions): CAB 88-89 [41], [42], [45].


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J.O. Hmelnitsky
Tel: (02) 9230 0689
Email: jhmelnitsky@sixthfloor.com.au


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D. P. Hume
Tel: (02) 8915 2694
Email: dhume@sixthfloor.com.au

⁷ Respondent's Book of Further Materials.