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

10 COMMISSIONER OF TAXATION
Respondent

APPELLANT'S SUBMISSIONS

Part I: CERTIFICATION

1. I certify that this submission is in a form suitable for publication on the internet.

Part II: CONCISE STATEMENT OF THE ISSUES

20 2. Assuming that there has been communicated a "direction, instruction or wish", does a company or its directors act "*in accordance with*" that direction, instruction or wish for the purposes of s 318(6)(b) of the *Income Tax Assessment Act 1936* (Cth) ("1936 Act")[1] after having determined, in the exercise of independent judgment, that it is in the interests of the company so to act; or must the company or its directors treat the direction, instruction or wish as itself being a sufficient reason so to act?

3. What are "*directions, instructions or wishes*" for the purposes of s 318(6)(b) of the 1936 Act?

4. In particular, where it was required by each company's respective constitution,[2] would each of the appellant[3] ("Ltd") and BHP Billiton Plc[4] ("Plc") (or their directors)
30 act "*in accordance with*" the other's directions, instructions or wishes by keeping its general meeting open to allow the unrelated holder of a "Special Voting Share" in the company to vote?

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[1] All legislative references in this submission are to the 1936 Act, unless otherwise stated.
[2] As well as other agreements, together defined in paragraph [13] as the "DLC Constituent Documents".
[3] Now named BHP Group Limited.
[4] Now named BHP Group Plc.

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Part III: SECTION 78B NOTICES

5. The appellant certifies that notice is not required under s 78B of the *Judiciary Act 1903* (Cth).

Part IV: CITATIONS

6. Administrative Appeals Tribunal ("Tribunal"): *MWYS v Commissioner of Taxation* (2017) 107 ATR 191 ("Tribunal Reasons").

7. Full Federal Court: *Commissioner of Taxation v BHP Billiton Limited* [2019] FCAFC 4.

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Part V: NARRATIVE STATEMENT OF FACTS

8. Since 2001, Ltd and Plc, being separate companies listed on the Australian Securities Exchange and the London Stock Exchange, respectively, have been parties to a "dual listed company" arrangement ("DLC Arrangement").[5] Ltd and Plc have each carried on a global resource business through their respective subsidiaries under the terms of that arrangement.[6]

9. BHP Billiton Marketing AG ("BMAG") is a company incorporated under the laws of Switzerland,[7] with a registered branch in Singapore, which at all material times, carried on a business of marketing and trading products and derivatives.[8] Originally,
20 BMAG was indirectly wholly owned by Plc. Since the formation of the DLC Arrangement, it has been 58% indirectly owned by Ltd and 42% indirectly owned by Plc.[9]

10. The present matter concerns the attribution of profits derived by BMAG to Ltd under the Controlled Foreign Company ("CFC") rules contained in Part X of the 1936 Act. Part X attributes to Australian residents "income, other than active business income,

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[5] Tribunal Reasons [4] [**CAB9-10**]/[**CAB39-40**]. Logan J (sitting as Deputy President of the Tribunal) made factual findings, some of which were based upon a "Joint Statement of Facts and Other Matters not in Dispute" ("JSOF") filed by the parties: see [2(a)], [3(a)] and [4] of the JSOF.
[6] Tribunal Reasons [4] (JSOF [6(b)]) [**CAB10**]/[**CAB40**].
[7] Tribunal Reasons [4] (JSOF [11]) [**CAB11**]/[**CAB41**].
[8] Tribunal Reasons [4] (JSOF [16]) [**CAB12**]/[**CAB42**].
[9] Reflecting the proportion of Ltd ordinary shares to Plc ordinary shares. Tribunal Reasons [4] (JSOF [12] and [15]) [**CAB11-12**]/[**CAB41-42**].

derived by foreign companies that are controlled by Australian residents".[10] BMAG is a CFC for the purposes of Part X and Ltd is an "attributable taxpayer" in relation to it.[11]

11. In the years ended 30 June 2006 to 30 June 2010 ("Relevant Years"), BMAG made profits on the sale of commodities it purchased from Ltd's indirectly wholly-owned Australian subsidiaries. Ltd included in its assessable income 58% of those profits as "*tainted sales income*".[12] There is no dispute regarding the inclusion of those profits in Ltd's assessable income.

12. By amended assessments for the Relevant Years, the respondent included in Ltd's assessable income profits derived by BMAG on the sale of commodities purchased from Plc's indirectly wholly-owed Australian subsidiaries as "*tainted sales income*". Ltd's liability to the additional tax under the amended assessments depends upon whether those of Plc's Australian subsidiaries which sold commodities to BMAG during the years in question were "*associates*" of BMAG within the meaning of s 318 of the 1936 Act. That, in turn, depends upon whether:

    (a) BMAG was "*sufficiently influenced*" by Plc and Ltd;[13]

    (b) Ltd was "*sufficiently influenced*" by Plc;[14] and/or

    (c) Plc was "*sufficiently influenced*" by Ltd,[15]

    in each case within the meaning of s 318(6)(b) of the 1936 Act.

The DLC Arrangement

13. The DLC Arrangement was governed by documents including, relevantly, each entity's respective constitution,[16] a "DLC Structure Sharing Agreement" ("Sharing

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[10] Explanatory Memorandum, Taxation Laws Amendment (Foreign Income) Bill 1990 (Cth) 3; Division 9 of Part X.
[11] Sections 340 and 361.
[12] Pursuant to the combined operation of (inter alia) ss 456, 383, 384, 386 and 447(1)(a).
[13] For the purposes of s 318(2)(d)(i)(B).
[14] For the purposes of s 318(2)(d)(i)(A).
[15] For the purposes of s 318(2)(e)(i)(A).
[16] Constitution of BHP Billiton Limited incorporating the amendments approved by shareholders at the 2005, 2007, 2008 and 2010 Annual General Meetings ("Ltd Constitution") [**AFM3**]; Articles of Association of BHP Billiton Plc incorporating the amendments approved by shareholders at the 2005 Annual General Meetings ("Plc Articles") [**AFM71**].

Agreement")[17] and an "SVC Special Voting Shares Deed" ("SVS Deed") (together, the "DLC Constituent Documents").[18] During the Relevant Years, the parties acted consistently with the terms of those documents.[19]

14. At all material times:

(a) management and control of the business and affairs of each of Ltd and Plc was vested in its board of directors, which was authorised to exercise all powers of the company, except powers required by its constitution or the law to be exercised in a general meeting;[20]

(b) pursuant to the Sharing Agreement, Ltd and Plc were required to pursue, and to procure (to the extent appropriate to do so) that each member of its respective group pursued, the "DLC Structure Principles" and "DLC Equalisation Principles";[21]

(c) the "DLC Structure Principles" included that:

(i) Ltd and Plc operate as if they were a single unified economic entity, through boards of directors which comprise the same individuals and a unified senior executive management;[22] and

(ii) the directors of Ltd and Plc, in addition to their duties to the company concerned, have regard to the interests of the ordinary shareholders of both companies as if the two companies were a single unified economic entity and for that purpose, take into account in the exercise

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[17] DLC Structure Sharing Agreement between BHP Limited and Billiton Plc dated 29 June 2001 [**AFM150**].
[18] SVC Special Voting Shares Deed between BHP Limited, BHP SVC Pty Limited, Billiton Plc, Billiton SVC Limited and The Law Debenture Trust Corporation p.l.c. as amended by the SVC Special Voting Shares Amendment Deed dated 13 August 2001 [**AFM 179**]; Tribunal Reasons [4] (JSOF [4]) [**CAB10**]/[**CAB40**].
[19] Tribunal Reasons [27(d)] [**CAB21**]/[**CAB51**] and [4] (JSOF [21]) [**CAB13**]/[**CAB43**]. The Tribunal also found that during the Relevant Years the terms of the DLC Constituent Documents were as set out in the versions described above (or were not materially different from the terms set out in those versions): Tribunal Reasons [4] (JSOF [20]) [**CAB 12-13**]/[**CAB42-43**].
[20] Rule 103 of the Ltd Constitution [**AFM53**]; Rule 103 of the Plc Articles [**AFM128**]; Tribunal Reasons [27(a)-(b)] [**CAB21**]/[**CAB51**].
[21] Clause 2 of the Sharing Agreement [**AFM160**] (the "DLC Structure Principles included observance of the "DLC Equalisation Principles" set out in clause 3); Tribunal Reasons [17(d)] [**CAB17**]/[**CAB47**].
[22] Clause 2(a) of the Sharing Agreement [**AFM160**]; Rule 104(2) of the Ltd Constitution [**AFM54**]; Rule 104(2)(a) of the Plc Articles [**AFM129**]; Tribunal Reasons [17(a)-(b)] [**CAB17**]/[**CAB47**].

of their powers the interests of the shareholders of the other company;[23]

(d) the "DLC Equalisation Principles" ensured, broadly, that the economic and voting rights of an ordinary share in each of Ltd and Plc remained in proportion to the prevailing "Equalisation Ratio" which, during the Relevant Years, was 1:1. Where a proposed action might disturb that state of affairs or might benefit the holders of ordinary shares in one party relative to the holders of ordinary shares in the other party, a "Matching Action" might be required;[24]

10 (e) by virtue of the DLC Constituent Documents, Ltd and Plc were required to declare matching dividends "as far as practicable" for their respective ordinary shareholders;[25]

(f) also by virtue of the DLC Constituent Documents, Ltd and Plc held general meetings on dates as close together as was practicable (referred to as "Parallel General Meetings").[26] Two main types of resolution could be proposed at Parallel General Meetings: resolutions on "Joint Electorate Actions" and resolutions on "Class Rights Actions".[27] The matters constituting Joint Electorate Actions and Class Rights Actions were prescribed in Ltd and Plc's respective constitutions and the Sharing Agreement;[28]

20 (g) on each type of resolution, the holder of a "Special Voting Share" in each company was entitled to cast a "Specified Number" of votes[29] and was

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[23] Clause 2(b) of the Sharing Agreement [**AFM160**]; Tribunal Reasons [17(c)] [**CAB17**]/[**CAB47**].
[24] Clause 3 of the Sharing Agreement [**AFM160-163**].
[25] Clause 3.1(b) of the Sharing Agreement [**AFM161**]; Davies J [42] [**CAB88**].
[26] Definition of "Parallel General Meeting" in Rule 2 of the Ltd Constitution [**AFM15**]; definition of "Parallel General Meeting" in Rule 2 of the Plc Articles [**AFM84**]; Clause 6.1 of the Sharing Agreement [**AFM166**]; Tribunal Reasons [17(e)] [**CAB17**]/[**CAB47**].
[27] Rules 59-60 of the Ltd Constitution [**AFM36-39**]; Rules 59-60 of the Plc Articles [**AFM109-111**]; Tribunal Reasons [18] [**CAB17**]/[**CAB47**].
[28] Rules 59(1) and 60(1) of the Ltd Constitution [**AFM36-39**]; Rules 59(1) and 60(1) of the Plc Articles [**AFM109-111**]; clauses 4.1 and 5.1 of the Sharing Agreement [**AFM164-165**]; Tribunal Reasons [18] [**CAB18**]/[**CAB48**].
[29] Set out in Rule 62 of the Ltd Constitution [**AFM40-41**] and Rule 62 of the Plc Articles [**AFM113**].

required to cast those votes in the manner prescribed in the SVS Deed.[30] Neither holder of the Special Voting Shares was related to Ltd or Plc;[31]

(h) in the case of "Joint Electorate Actions":

(i) the Specified Number of votes which the Special Voting Shareholder was entitled to cast was equal to the total number of votes validly cast on the poll on the equivalent resolution at the Parallel General Meeting of the other company;[32]

(ii) each of Ltd and Plc was required to notify the Special Voting Shareholder in the other company, and the other company, in writing, of the number of votes cast for and against the resolution at its general meeting, its calculation of the Specified Number of votes which the Special Voting Shareholder of the other company was to carry in relation to each such resolution and the way in which the Special Voting Shareholder was required to vote in accordance with the other company's constitution and the SVS Deed;[33] and

(iii) the Special Voting Shareholder was required to cast the Specified Number of votes attached to the Special Voting Share for and against each resolution as notified by the other company;[34]

(i) in the case of "Class Rights Actions":

(i) the Specified Number of votes the Special Voting Shareholder was entitled to cast was equal to 34 per cent (in relation to an action to be approved by special resolution) and 67 per cent (in relation to an action to be approved by ordinary resolution) of the aggregate number

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[30] Clause 4 of the SVS Deed [**AFM183-184**]; Tribunal Reasons [18] [**CAB18**]/[**CAB48**].
[31] The special voting shareholder in Ltd was BHP SVC Pty Limited (a company registered in Australia). The special voting shareholder in Plc was Billiton SVC Ltd (a company registered in the United Kingdom): Tribunal Reasons [4] (JSOF [1], [2(d)(ii)], [3(c)(iii)], [9] and [10]) [**CAB8-11**]/[**CAB38-41**]; Thawley J [112] [**CAB109**].
[32] Subject to some immaterial exceptions, and after application of the Equalisation Fraction in effect at the time: Rule 62(2) of the Ltd Constitution [**AFM40**]; Rule 62(2) of the Plc Articles [**AFM113**].
[33] Clauses 2.1 and 2.2 of the SVS Deed [**AFM183**].
[34] Clause 4.3(a)(ii) and (b)(ii) of the SVS Deed [**AFM184**].

of votes attaching to all classes of issued shares in the company which could be cast on such a resolution;[35]

(ii) each of Ltd and Plc was required to inform the Special Voting Shareholder in the other company, and the other company, in writing, whether or not the resolution was passed by the required majority of the holders of the company's ordinary shares;[36] and

(iii) relevantly, where the Special Voting Shareholder was notified by the other company that a resolution in relation to a Class Rights Action had not been approved by the required majority of ordinary shareholders in the other company, it was required to exercise all the votes then attaching to the Special Voting Share so as to defeat the resolution;[37] and

(j) pursuant to the DLC Constituent Documents, on any poll where the Special Voting Shareholder was entitled to vote, each of Ltd and Plc was required to keep its Parallel General Meeting open for such time as was necessary to allow the Parallel General Meeting of the other company to be held and for the votes attaching to the Special Voting Share to be calculated and cast.[38]

15. The appellant relies upon the following findings of fact made by the Tribunal:

(a) each of Ltd and Plc, by the separate judgments of their respective boards, determined that it was in its best interests to enter into the DLC Arrangement;[39]

(b) the DLC Arrangement in substance provided for a "very large joint venture" between Ltd and Plc[40] under which Ltd and Plc "chose to act in concert";[41]

(c) in implementing the DLC arrangement, neither Ltd nor Plc chose to act in

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[35] Rule 62(3) of the Ltd Constitution [**AFM40**]; Rule 62(3) of the Plc Articles [**AFM113**].
[36] Clauses 3.1 and 3.2 of the SVS Deed [**AFM183**].
[37] Or, if an equivalent resolution was not required to be passed by the company in which it held the Special Voting Share, it was required to notify the company in writing that it does not consent to the action requiring approval as a Class Rights Action: clause 4.4 of the SVS Deed [**AFM184**]; rule 59(3)(b) of the Ltd Constitution [**AFM37-38**] and rule 59(3) of the Plc Articles [**AFM110**].
[38] Rule 56(1) of the Ltd Constitution [**AFM36**]; Rule 56(1) of the Plc Articles [**AFM108**].
[39] Tribunal Reasons [31] [**CAB23**]/[**CAB53**], [28] [**CAB22**]/[**CAB52**] and [41] [**CAB27**]/[**CAB57**].
[40] Tribunal Reasons [30] [**CAB23**]/[**CAB53**].
[41] Tribunal Reasons [31] [**CAB23**]/[**CAB53**].

subservience, formal or informal, to the other nor to anyone else;[42]

(d) Ltd and Plc's respective boards of directors met and each exercised independent judgment when making decisions;[43]

(e) the directors of Ltd and Plc, respectively, acted in the interests of each company in their capacity as a director of that company;[44]

(f) there was no abrogation by either Ltd or Plc of an "effective control" either by the shareholders or the board of directors of either company;[45]

(g) neither company had the ability to dictate to the other party in the event of disagreement;[46]

(h) Ltd and Plc were "equals" – neither imposed its wishes, or controlled (formally or informally), the other;[47] and

(i) none of the actions taken (or not taken) by Ltd or Plc reflected or resulted from the directions, instructions or wishes of the other entity.[48]

BMAG

16. BMAG was governed by its Articles of Incorporation, the Swiss Code of Obligations ("SCO") and its Management Regulations.[49]

17. Pursuant to its Articles of Incorporation and the SCO, the shareholders' meeting was the supreme corporate body of BMAG. The shareholders' meeting had the following inalienable powers:

(a) the adoption and the amendment of the Articles of Incorporation;

(b) the election of the members of the BMAG Board and of its auditors;

(c) the approval of the annual report and the annual accounts;

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[42] Tribunal Reasons [31] [**CAB23**]/[**CAB53**].
[43] Tribunal Reasons [28] [**CAB22**]/[**CAB52**].
[44] Tribunal Reasons [34] [**CAB24**]/[**CAB54**].
[45] Tribunal Reasons [28] [**CAB22**]/[**CAB52**].
[46] Tribunal Reasons [36] [**CAB25**]/[**CAB55**] (by reason of clause 13 of the Sharing Agreement).
[47] Tribunal Reasons [32] [**CAB23-24**]/[**CAB53-54**].
[48] Tribunal Reasons [32] [**CAB23**]/[**CAB53**].
[49] Tribunal Reasons [44] [**CAB27-29**]/[**CAB57-59**].

(d) the approval of the annual financial statement as well as the resolution on the use of the balance sheet profit, in particular, the declaration of dividends and of profit sharing by directors;

(e) the granting of discharge to the members of the BMAG Board; and

(f) the passing of resolutions on matters which by law or pursuant to the BMAG Articles of Incorporation were reserved to the General Meeting of the Shareholders.[50]

18. Pursuant to BMAG's Articles of Incorporation, the SCO and the BMAG Management Regulations, the non-transferable and inalienable powers and duties of the board included the following:

(a) the ultimate management of BMAG and the giving of the necessary, related directives;

(b) the appointment and removal of BMAG's officers who had managerial responsibility and who had the authority generally to represent BMAG;

(c) the ultimate supervision of such officers, in particular, in view of compliance with the law, BMAG's Articles of Incorporation, regulations and directives; and

(d) subject to that ultimate supervision, an ability to delegate the implementation of some of the board's duties to an Executive Committee, a Managing Director, and other managerial officers.[51]

19. The Tribunal found that the actions of Ltd (as controlling shareholder) and BMAG's board were undertaken in accordance with the terms of BMAG's Articles of Incorporation and Management Regulations[52] and that no third party controlled the business or day-to-day activities of BMAG.[53] BMAG's board was obliged at law to act in the best interests of the company and its shareholders, and during the Relevant Years it did so.[54] Further, the Tribunal made findings of fact that:

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[50] Tribunal Reasons [44(a)] [**CAB28**]/[**CAB58**].
[51] Tribunal Reasons [44(b)] [**CAB28-29**]/[**CAB58-59**].
[52] Tribunal Reasons [47] [**CAB29**]/[**CAB59**].
[53] Tribunal Reasons [43] [**CAB27**]/[**CAB57**].
[54] Tribunal Reasons [52] [**CAB31**]/[**CAB61**].

(a) BMAG's board deliberated carefully and passed resolutions based on those deliberations;[55]

(b) BHP Billiton group guidelines regarding policies, strategies, procedures, etc. relating to the operation of BMAG, including marketing policies and frameworks, were considered and approved by BMAG's board before being implemented. These guidelines were, necessarily, capable of being revoked or amended at any time by BMAG's board;

(c) BMAG's board actively evaluated matters and recommendations put to it from BMAG's perspective;

10 (d) in some instances, BMAG's board rejected recommendations made to it and requested revised recommendations; or for amended resolutions to be put to it for consideration;

(e) BMAG's board was meticulous in ensuring adherence to its corporate governance structure and compliance with board obligations under the SCO, including in relation to delegated authorities; and

(f) any delegation by BMAG's board (including under various approval or authority frameworks) was subject to its ultimate management and supervision.[56]

20 **Part VI: ARGUMENT**

Appeal Ground 1 – meaning of "in accordance with"

20. Assuming the communication of a "direction, instruction or wish", the central issue for determination by the Court is how the words "*in accordance with*", as they appear in the definition of "*sufficiently influenced*" in s 318(6)(b), are to be interpreted. Those words are the fulcrum upon which the definition operates. They describe the causal connection required between the relevant "*directions, instructions or wishes*" and the acts of the company or its directors. It is that causal connection which, in

[55] Tribunal Reasons [49] [**CAB30**]/[**CAB60**].
[56] As to paragraphs 19(b)-(f): Tribunal Reasons [50] [**CAB30-31**]/[**CAB60-61**].

turn, gives content to the requirement for the existence of a custom, obligation or reasonable expectation.

21. The appellant respectfully submits that the majority of the Full Federal Court erred in finding that:

(a) conduct "freely undertaken" by a company or its directors after determining, in the exercise of independent judgment, that such conduct is in the best interests of the company could relevantly be conduct "*in accordance with*" directions, instructions or wishes of another;[57] and

(b) parties engaged in mutually advantageous decision-making as equals[58] could relevantly be acting "*in accordance with*" directions, instructions or wishes of each other.[59]

22. Rather, the appellant submits that the words "*in accordance with*" should be construed so as to require that the company or its directors treat the other entity's directions, instructions or wishes as themselves being a sufficient reason so to act. That is how the words "*in accordance with*" have been interpreted in the context of the similarly worded "shadow director" test contained in s 9 of the *Corporations Act 2001* (Cth) and, as Davies J stated below, "[n]either the legislative context nor purpose suggests that a different construction should be preferred".[60]

23. As the plurality said in *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue (Northern Territory)*:[61]

> *The language which has actually been employed in the text of legislation is the surest guide to legislative intention. The meaning of the text may require consideration of the context, which includes the general purpose and policy of a provision, in particular the mischief it is seeking to remedy.*

24. Legislative history and extrinsic materials are part of "'context' in its widest sense"[62] and understanding them "has utility if, and in so far as, it assists in fixing the meaning

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[57] Allsop CJ [14] [**CAB77**]; Thawley J [97] [**CAB105**].
[58] Allsop CJ [15] [**CAB77**].
[59] Allsop CJ [14]-[15] [**CAB77-78**]; Thawley J [98] [**CAB105**], [100] [**CAB106**] and [106] [**CAB108**].
[60] Davies J [33] [**CAB85**].
[61] (2009) 239 CLR 27, 47 [47] (Hayne, Heydon, Crennan and Kiefel JJ) (citations omitted).
[62] *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384, 408 (Brennan CJ, Dawson, Toohey and Gummow JJ).

of the statutory text".[63]

25. The immediate statutory context of s 318(6)(b) reveals that the defined term "*sufficiently influenced*" is directed at identifying a form of control over a company.[64] That context includes:

(a) subsections 318(2)(d) and (e) which describe the putative influencing entity as the "*controlling entity*" and the putative influenced company as the "*controlled company*";

(b) the alternative criterion contained in subsections 318(2)(d)(ii) and (e)(ii) which is a statutory embodiment of the common law test for legal control over a company – namely, the ability to cast, or control the casting of, a majority of votes at a general meeting of the company;[65]

(c) that the words "*directions*" and "*instructions*" convey the meaning of an imperative command.[66] The word "*wishes*" must be read as a part of a single collocation imbuing it with its ordinary meaning of "to command, request, or entreat";[67] and

(d) that Part X is concerned, generally, with Australian residents that "control" a foreign company.

26. There is nothing about the use of "*sufficiently influenced*" that suggests a contrary conclusion. A defined term cannot be used as an interpretive aid in construing the words of the definition[68] and the majority erred in doing so.[69] Moreover, as Allsop

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[63] *Commissioner of Taxation v Consolidated Media Holdings Ltd* (2012) 250 CLR 503, 519 [39] (French CJ, Hayne, Crennan, Bell and Gageler JJ).
[64] Cf Thawley J [81] [**CAB99**].
[65] *W P Keighery Pty Ltd v Federal Commissioner of Taxation* (1957) 100 CLR 66, 84 (Dixon CJ, Kitto and Taylor JJ); *Mendes v Commissioner of Probate Duties (Victoria)* (1967) 122 CLR 152, 169 (Windeyer J) (addressing, specifically, control of a company in the context of revenue laws); *Kolotex Hosiery (Australia) Pty Ltd v Commissioner of Taxation* (1973) 130 CLR 64, 77-78 (Mason J); (1975) 132 CLR 535, 572-3 (Gibbs J).
[66] "Direction" is relevantly defined to mean "order; command"; and "instruction" is relevantly defined to mean "the act of furnishing with authoritative directions": Macquarie Dictionary, Seventh Ed.
[67] Macquarie Dictionary, Seventh Ed.
[68] See *The Owners of the Ship Shin Kobe Maru v Empire Shipping Company Inc* (1994) 181 CLR 404, 419 where this Court (Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ) said that "[i]t would be quite circular to construe the words of a definition by reference to the term defined"; *Esso Australia Resources Pty Ltd v Federal Commissioner of Taxation* (2011) 199 FCR 226, 257 [102]-[105] (Keane CJ, Edmonds and Perram JJ) and the reference to this principle in *Independent Commission Against Corruption v Cunneen* (2015) 256 CLR 1, 21 [33] and 29 [60] (French CJ, Hayne, Kiefel and Nettle JJ).
[69] Allsop CJ [13] [**CAB77**]; Thawley J [175] [**CAB126**]; see also Allsop CJ [5] [**CAB75**], [6] [**CAB75**], [10] [**CAB76**], [12] [**CAB76**], [15] [**CAB78**]; Thawley J [81] [**CAB99**], [104] [**CAB107**], [134] [**CAB115**], [155]

CJ observed below, the words merely beg the question "'sufficiently influenced' for what purpose or object?"[70] Read in context, the answer is: "sufficient so as to amount to a form of control".

27. Whether the form of control described by s 318(6)(b) is properly characterised as "effective control", "de facto control" or, indeed, "sufficient influence" is not to the point. Ultimately, the words of the definition must be read into subsections 318(2)(d)(i) and (e)(i) and those provisions must then be construed in their context[71] bearing in mind their purpose and the mischief that they were designed to overcome.[72] When that is done, the definition of "*sufficiently influenced*" can be seen to describe a species of control in which a company or its directors act, or might reasonably be expected to act, by "following"[73] the directions, instructions or wishes of another entity. It does not, in the appellant's submission, extend to a state of affairs where a company or its directors freely decide to act having determined, after exercising independent judgment, that to do so is in the best interests of the company. Nor, in the appellant's submission, does it apply to a state of affairs where two companies act jointly in the pursuit of common economic objectives, neither subservient to the other, each having independently determined that it is in their interests to do so.

28. These conclusions are supported by the wider context including the provision's legislative history and relevant extrinsic materials.

[**CAB120**]. Judges of the New South Wales and Victorian Courts of Appeal have expressed some doubt as to the "universal truth" of this principle, particularly in construing contractual (rather than statutory) provisions. See: *Segelov v Ernst & Young Services Pty Ltd* (2015) 89 NSWLR 431, 448 [87] (Gleeson JA, Meagher and Leeming JJA agreeing); *Barangaroo Delivery Authority v Lend Lease (Millers Point) Pty Ltd* [2014] NSWCA 279, [10]-[11] (Leeming JA, Beazley P and Tobias AJA agreeing), referring to *Chartbrook Ltd v Persimmon Homes Ltd* [2009] 1 AC 1101, 112-3 [17] (Lord Hoffmann); and *Hardy Wine Company Ltd v Janevruss Pty Ltd* [2006] VSCA 28, [5] (Callaway JA, Eames and Ashley JJA agreeing).

[70] Allsop CJ [13] [**CAB77**].

[71] See paragraph [34] below.

[72] *Kelly v The Queen* (2004) 218 CLR 216, 253 [103] (McHugh J).

[73] Davies J [31] [**CAB 84**].

29. Section 318 was introduced into the 1936 Act in 1990 as part of the new CFC rules in Part X. The Explanatory Memorandum for the Bill for the Act which inserted the section:

(a) provided in relation to Part X generally:[74]

> *The broad aim of the proposals in relation to companies is to attribute to Australian residents income, other than active business income, derived by foreign companies that are controlled by Australian residents other than in the case of a company that is subject to a tax system comparable to Australia's or is predominantly engaged in active business.*

(b) stated further:[75]

> *Paragraph 318(6)(b) clarifies the expression "sufficiently influenced" that is used in section 318 in relation to a company. Where any entity or entities have influence, because of obligation or custom, over a company or its directors to direct the actions of the company either directly or through interposed entities, that company will be sufficiently influenced by that entity or those entities.*

(c) referred to the influence being "imposed" or being reasonably expected to be "imposed".[76]

30. Section 318(6)(b) followed existing tests of association contained within the Act. The test for an "*associate*" of a person in former s 159GZC (in the thin capitalisation rules) included paragraphs in materially identical terms to s 318(6)(b).[77] Materially identical words were also included in the definition of "*foreign controller*" in former s 159GZE, which was enacted at the same time. The Explanatory Memorandum for the Bill for the Act which introduced these provisions stated, in relation to s 159GZE:[78]

> *Paragraph (b) sets out the fourth test which operates where control is less direct or formal. This test applies to a resident company and to the directors of a resident company. Under the paragraph, foreign control will exist where such a company or such directors are accustomed to act or are under a*

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[74] Explanatory Memorandum, Taxation Laws Amendment (Foreign Income) Bill 1990 (Cth) 3-4.
[75] Explanatory Memorandum, Taxation Laws Amendment (Foreign Income) Bill 1990 (Cth) 205.
[76] Explanatory Memorandum, Taxation Laws Amendment (Foreign Income) Bill 1990 (Cth) 204 (in relation to s 318(5)(b), which defines when a public unit trust entity is taken to be "*sufficiently influenced*" by another entity or entities).
[77] Former ss 159GZC(1)(a)(v)(A), (b)(iv)(A) and (b)(v)(A).
[78] Explanatory Memorandum, Taxation Laws Amendment Bill (No. 4) 1987 (Cth) 72-3.

formal or informal obligation to act in accordance with the directions, instructions or wishes of a non-resident.

31. The Explanatory Memorandum also provided that the definition of "*associate*" in s 159GZC was to have substantially the same meaning as in other parts of the 1936 Act, including the then current ss 26AAB and 160E.[79] The definition of "*associate*" in s 26AAB (which applied for the purpose of determining assessable income from the sale of leased motor vehicles) also included language materially similar to s 318(6)(b).[80] The Explanatory Memorandum for the Bill for the Act which introduced that provision relevantly stated that the test captured "a company that is effectively controlled…by the taxpayer".[81]

32. The Explanatory Memorandum for the Bill for the Act which introduced the test for an "*associate*" of a taxpayer in former s 160E (in the capital gains rules) also characterised it as being one of effective control.[82] Explanatory memoranda for earlier Bills for Acts which introduced provisions into the 1936 Act using a similar form of words to s 318(6)(b), including the definitions of "*associate*" in former ss 26AAC(14), 78A and 82KH, referred to companies which are "effectively under the direction or control"[83] or are "effectively controlled"[84] by another party.[85]

33. The broader statutory context also confirms that s 318(2)(b) is concerned with control. Other provisions within the Tax Acts[86] use the same language to define "*control*" for a particular purpose (rather than "*sufficiently influenced*").[87] By way of contrast, the definition of "*affiliate*" in s 328-130 of the *Income Tax Assessment Act*

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[79] Explanatory Memorandum, Taxation Laws Amendment Bill (No. 4) 1987 (Cth) 71.
[80] See former s 26AAB(14)(a)(v)(A).
[81] Explanatory Memorandum, Income Tax Assessment Amendment Bill (No. 2) 1980 (Cth) 13.
[82] Explanatory Memorandum, Income Tax Assessment Amendment (Capital Gains) Bill 1986 (Cth) 25.
[83] Explanatory Memorandum, Income Tax Assessment Bill (No. 2) 1974 (Cth) (which introduced former s 26AAC) 39.
[84] Explanatory Memorandum, Income Tax Assessment Amendment Bill 1978 (Cth) (which introduced s 78A) 33; Explanatory Memorandum, Income Tax Assessment Amendment Bill (No. 5) 1978 (Cth) (which introduced s 82KH) 11.
[85] It is a"sound rule of construction to give the same meaning to the same words appearing in different parts of a statute unless there is reason to do otherwise": *Registrar of Titles of the State of Western Australia v Franzon* (1975) 132 CLR 611, 618 (Mason J), cited in *IMM v The Queen* (2016) 257 CLR 300, 339 [143] (Nettle and Gordon JJ); *Commissioner of Police (NSW) v Eaton* (2013) 252 CLR 1, 28 [78] (Crennan, Kiefel and Bell JJ) and 33 [98] (Gageler J); *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355, 381-2 [69]-[70] (McHugh, Gummow, Kirby and Hayne JJ).
[86] Being the 1936 Act, 1997 Act and *Taxation Administration Act 1953* (Cth) ("TAA").
[87] For example, ss 207-130(6)(d), 727-360(2)(d) and 820-790(2)(d) of the 1997 Act; and ss 6F(3)(b), 102AAG(1)(d) and 347(2)(d) of the 1936 Act.

1997 (Cth) ("1997 Act"),[88] whilst employing similar language to s 318(6)(b), extends also to a company which acts "in concert with" an entity. If s 318(6)(b) extended to parties acting in concert, those additional words in the definition of "*affiliate*" would be otiose. Further, the partnership limb of the "*associates*" definition in s 318(2)(a) would have no work to do.[89]

34. The appellant respectfully submits that the Full Court fell into error when identifying the context and purpose of the definition of *"associates"* in s 318. Allsop CJ incorrectly assumed that the purpose and object of s 318 was to understand whether two entities have a relationship whereby it is appropriate to attribute the income of one to the other.[90] The provision cannot, in any case, be construed in the context of Part X only without regard to the over 160 other provisions in the Tax Acts which invoke the definition for a variety of purposes,[91] from eligibility for scrip for scrip rollover relief[92] to the entitlement to deduct expenditure on a work uniform.[93] In some instances, it operates as a criterion for offences carrying penalties.[94] Section 318 must be read together with all of these subsequent amendments.[95] This has the consequence that the words of s 318(6)(b) need to be construed so as to provide a clear and unambiguous criterion of liability that can be consistently applied.[96]

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[88] The definitions of "*associate*" in ss 12(2)(c) and 15(1)(a) of the *Corporations Act 2001* (Cth) also expressly refer to parties acting, or proposing to act, in concert.

[89] See *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355, 382 [71] (McHugh, Gummow, Kirby and Hayne JJ); cf Thawley J [102] [**CAB106**] citing *Yacoub v Federal Commissioner of Taxation* (2012) 83 ATR 722, 731 [24] (Jagot J) ("all partnerships involve a joint venture but not all joint ventures involve a partnership").

[90] Allsop CJ [14] [**CAB77**]. Section 318 does not serve that function within Part X. Its principal function is to aggregate ownership interests for the purposes of applying various control tests: see, eg, ss 340 and 349.

[91] Section 995-1 of the 1997 Act defines "*associate*" by reference to s 318 of the 1936 Act. The definition of "*connected entity*" in s 995-1 also incorporates the concept of an "*associate*", as defined in s 318.

[92] Sections 124-782, 124-783(1) and (6) and 124-780(3)(d)-(e) of the 1997 Act.

[93] Sections 34-10 and 34-15 of the 1997 Act.

[94] For example, s 16-25 of Schedule 1 to the TAA creates a strict liability offence for failing to pay an amount to the Commissioner as required by Division 13 and Subdivision 14-C. That requirement may depend upon whether an entity is an *"associate"* of another as defined by s 318 of the 1936 Act (see ss 13-15(3)(a) and 14-180(b)). See also s 40-140 of the 1997 Act, which imposes a penalty.

[95] Section 11B of the *Acts Interpretation Act 1901* (Cth); *Commissioner of Stamps (South Australia) v Telegraph Investment Company Pty Ltd* (1995) 184 CLR 453, 463.6 (Brennan CJ, Dawson and Toohey JJ) and 479.3 (McHugh and Gummow JJ); *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355, 381 [69] (McHugh, Gummow, Kirby and Hayne JJ) and *Certain Lloyd's Underwriters v Cross* (2012) 248 CLR 378, 389 [24] (French CJ and Hayne J).

[96] *Anderson v Commissioner of Taxes (Victoria)* (1937) 57 CLR 233, 243 (Rich and Dixon JJ); cited with approval in *Hepples v Commissioner of Taxation* (1992) 173 CLR 492, 510-11 (Deane J); *Western Australian Trustee Executor & Agency Company Ltd v Commissioner of State Taxation of the State of Western Australia*

35. As the respondent conceded in the Full Court, s 318(6)(b) requires a causal connection between the putative directions, instructions or wishes and the relevant acts.[97] It is the meaning given to the words *"in accordance with"* that fixes the nature and quality of that connection. "[A]s with all questions of causality, the starting point is the identification of the purpose (here the legislative purpose) to which the question is directed."[98] In the appellant's submission, the causal connection should not be based upon a nebulous concept of "influence"; [99] rather it should be a measurable standard of causation.

36. Thawley J stated below that the s 318(6)(b) description of "*sufficiently influenced*" may be seen to describe a species of control or influence, or expected control or influence, which falls short of legal control and that the critical issue in the proceedings was how far short it falls.[100] With respect, however, neither his Honour nor Allsop CJ went on to answer that question. Davies J, on the other hand, provided a workable test based on what Hodgson JA had said in *Buzzle Operations Pty Ltd (In liq) v Apple Computer Australia Pty Ltd* in relation to the "shadow director" provisions in s 9 of the *Corporations Act 2001* (Cth), namely:[101]

> *[T]he statutory formula contemplates the directors being accustomed to act in accordance with the instructions or wishes of a person, in the sense of treating those instructions or wishes as themselves being a sufficient reason so to act, rather than making their own decisions in which those instructions or wishes are merely taken into account as one factor, external to the management of the company, bearing on what is in the best interests of the company*.

37. In the appellant's respectful submission, both Logan and Davies JJ[102] were correct in applying this test.[103] The "shadow director" provisions employ similar language to

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(1980) 147 CLR 119, 126-7 (Gibbs J); *Commissioner of Taxation v Westraders Pty Ltd* (1980) 144 CLR 55, 59 (Barwick CJ).

[97] Davies J [25] [**CAB81**].

[98] *Commissioner of Taxation v Sun Alliance Investments Pty Ltd (in liq)* (2005) 225 CLR 488, 514 [77] (Gleeson CJ, Gummow, Kirby, Callinan and Heydon JJ).

[99] Cf Allsop CJ [5] [**CAB75**], [6] [**CAB75**], [10] [**CAB76**], [12] [**CAB76**], [13] [**CAB77**], [15] [**CAB78**]; Thawley J [81] [**CAB99**], [104] [**CAB107**], [134] [**CAB115**], [155] [**CAB120**].

[100] Thawley J [81] [**CAB99**].

[101] (2011) 81 NSWLR 47, 51 [9].

[102] Logan J sitting as Deputy President of the Tribunal.

[103] Tribunal Reasons [22] [**CAB19-20**]/[**CAB49-50**], [52] [**CAB31**]/[**CAB61**]; Davies J [31] [**CAB84**]. Logan J acknowledged that error can lie in analogy: Tribunal Reasons [22] [**CAB19**]/[**CAB49**]. Similarly, Davies J acknowledged that case law on the "shadow director" definition "does not provide the answer" to

s 318(6)(b) and have a long provenance in company law.[104] Section 318(2), being concerned with the conduct of companies, can be expected to "operate harmoniously" with company law[105] and that provenance forms part of the context in which the words "*in accordance with*" in s 318(6)(b) are to be construed.[106]

38. It follows that if a company or its directors, acting in compliance with the company's constitution and any relevant duties at law, have applied their minds to the question of whether a particular action is in the interests of the company, the company cannot be said to have acted "*in accordance with*" the directions, instructions or wishes of another entity for the purposes of s 318(6)(b), because the company or its directors will not have treated such directions, instructions or wishes as a "sufficient reason" so to act. Actions "freely undertaken" by a company in "harmonious correspondence, agreement or conformity with" the directions, instructions or wishes of another entity are not enough.[107] Further, the notion that companies acting in concert and engaging in mutual decision-making can, at the same time, be said to be acting in accordance with the directions, instructions or wishes of each other should be rejected.

39. It follows that the definition in s 318(6)(b) is not engaged; neither Ltd nor Plc was "*sufficiently influenced*" by the other and BMAG was not "*sufficiently influenced*" by Plc and Ltd. Given the factual findings made by the Tribunal set out in paragraphs 15 and 19 above regarding the independent decision-making by each of the companies,[108] the contrary view of the majority in the Full Court[109] was, with respect, reached in error.

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how s 318(6)(b) is to be construed: [27] [**CAB82**]. Contrary to Thawley J's suggestion at [134] [**CAB115**], the appellant is not seeking to "equate" the "shadow director" definition with s 318(6)(b).

[104] The so-called "shadow director" test was first inserted into the definition of "*director*" in the *Companies (Consolidation) Act 1908* (UK) in 1917 and has formed part of the definition of "director" for certain purposes in Victoria since the *Companies Act 1931* (Vic). Similar words have also been used to define "*associate*" in other contexts (in both Commonwealth and State legislation), e.g. s 8(5) in the former *Banks (Shareholdings) Act 1972* (Cth).

[105] *Commissioner of Taxation v BHP Billiton Ltd* (2011) 244 CLR 325, 339 [45] (French CJ, Heydon, Crennan and Bell JJ); *Commissioner of Police (NSW) v Eaton* (2013) 252 CLR 1, 33 [98] (Gageler J).

[106] Cf Allsop CJ [9]-[10] [**CAB76**]; Thawley J [93] [**CAB103**]. This has been accepted in the context of other taxing provisions (for example, the "reasonable expectation" test in Part IVA: *Commissioner of Taxation v Peabody* (1994) 181 CLR 359, 385.3 (Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ), citing *Dunn v Shapowloff* [1978] 2 NSWLR 235, 249 (Mahoney JA)).

[107] Cf Allsop CJ [13]-[14] [**CAB77**]; Thawley J [141] [**CAB117**], [175] [**CAB126**]; cf Davies J [41] [**CAB88**].

[108] Section 44 of the *Administrative Appeals Tribunal Act 1975* (Cth) limits any appeal from the Tribunal to the Federal Court of Australia to questions of law.

[109] Thawley J [155] [**CAB120**], [170]-[171] [**CAB125**]; Allsop CJ [16] [**CAB78**].

Appeal Ground 2 – keeping general meeting open

40. The appellant respectfully submits that the majority of the Full Court erred in finding that, by keeping the general meeting open in accordance with the DLC Constituent Documents for such time as was necessary for the votes attaching to the Special Voting Share issued in each to be calculated and cast, Ltd and Plc (or their directors) would be acting in accordance with the directions instructions or wishes of the other.[110]

41. *First*, in the case of "Joint Electorate Actions", the notification to be given by Ltd and Plc to the other (and to the other's Special Voting Shareholder), would not constitute the communication of a "*direction, instruction or wish*" that the other keep its general meeting open.[111] The communication to the Special Voting Shareholder in the other company would be as to the way in which the latter was required to vote in accordance with the DLC Constituent Documents.[112]

42. In the case of "Class Rights Actions", the notice would merely "inform" the other company (and its Special Voting Shareholder) as to whether or not the resolution had been passed by the required majority of the first company's ordinary shareholders.[113]

43. *Second*, the only act to be undertaken in consequence of the notice was to be undertaken by the unrelated Special Voting Shareholder in the other company. In the case of "Joint Electorate Actions", it was the Special Voting Shareholder which would be required to cast the "Specified Number" of votes for and against the resolution as notified by Ltd or Plc (as applicable).[114] In the case of "Class Rights Actions", it was the Special Voting Shareholder which would be required to exercise its votes to defeat the resolution or notify the relevant company that it did not consent to the action requiring approval as a Class Rights Action.[115]

44. In the appellant's submission, there would be no causal nexus between the giving of a notice by Ltd or Plc and the act of the other company in keeping its general meeting

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[110] Cf Thawley J [145] [**CAB118**], [146] [**CAB118**], [152] [**CAB120**]; Allsop CJ [16] [**CAB78**]. This was the only act of Ltd or Plc that Thawley J specifically identified as reasonably being expected to be in accordance with directions, instructions or wishes of the other: cf. [163] [**CAB123**].
[111] Cf Thawley J [141] [**CAB117**] and [145] [**CAB118**].
[112] Clauses 2.1 and 2.2 of the SVS Deed [**AFM183**].
[113] Clauses 3.1 and 3.2 of the SVS Deed [**AFM183**]; cf Thawley [151] [**CAB119**].
[114] Clause 4.3 of the SVS Deed [**AFM184**].
[115] Clause 4.4 of the SVS Deed [**AFM184**].

open to enable the Special Voting Shareholder's votes to be calculated and cast. Each company would keep its general meeting open to enable the Special Voting Shareholder's votes to be calculated and cast pursuant to the terms of the DLC Constituent Documents. Even assuming a direction, instruction or wish for the purposes of the section, Davies J was correct in finding:

> *The fact that under the special voting arrangements each company must follow a procedure designed to achieve uniform resolutions at general meetings of the companies is not one company acting "in accordance with" the direction, instruction or wishes of the other company within the meaning of that phrase as used in s 318(6)(b). It is each company giving effect to the contractual terms governing the DLC Arrangement pursuant to which the companies act jointly with a mutuality of interest.*[116]

Part VII: ORDERS

45. The name of the appellant in this matter be amended to "BHP Group Limited".

46. The appeal be allowed.

47. The orders of the Full Court of the Federal Court of Australia made 29 January 2019 be set aside and in lieu thereof it be ordered that the appeal be dismissed with costs.

48. The respondent pay the appellant's costs of the appeal to this Court.

Part VIII: ESTIMATE FOR HEARING

49. It is estimated that 4 hours will be required for the appellant's oral argument.

Dated: 3 July 2019

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[116] Davies J [41] [**CAB88**]; cf Thawley J's reference to "comply[ing] with its obligations" at [141] [**CAB117**].