IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY **No S228 of 2012**

ON APPEAL FROM THE FULL COURT OF THE FEDERAL COURT OF AUSTRALIA

BETWEEN: **COMMISSIONER OF TAXATION**
Appellant

and

CONSOLIDATED MEDIA HOLDINGS LTD
(ACN 009 071 167)
Respondent

APPELLANT'S SUBMISSIONS

Part I: *Certification for publication*

1. These written submissions are in a form suitable for publication on the internet.

Part II: *Issues*

2. Whether the purchase price of $1,000,000,000 paid by Crown Melbourne Limited ("**Crown**") to the respondent (or "**CMH**") for the buyback of 840,336,000 shares was deemed to be a dividend by s 159GZZZP of the *Income Tax Assessment Act* 1936 ("**ITAA 1936**")?

3. Whether the words "*debited against amounts standing to the credit of the company's share capital account*" in s 159GZZZP(1) should be read to require that a debit be made "*in*" the company's share capital account rather than "*against amounts standing to the credit of*" such an account? If the answer to that issue is "no", the remaining issues do not arise.

4. If the answer to the question posed in paragraph 3 is "yes":

   4.1. whether the account Crown labelled "Share Buy-Back Reserve" (or "**SBBR**") was an account that Crown kept of its share capital within the meaning of s 6D(1)(a) of the ITAA 1936?

   4.2. whether the debit entry in that account was made "*against amounts standing to the credit of the company's share capital account*" within the meaning of s 159GZZZP(1)?

Filed on behalf of the Appellant, the Commissioner of Taxation, by:

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Part III: *Judiciary Act 1903, s 78B*

5. The appellant considers that notice is not required pursuant to s 78B of the *Judiciary Act 1903*.

Part IV: *Reports of reasons for judgment*

6. The reasons of the Full Court of the Federal Court ("**FC**") are reported at (2012) 201 FCR 470. The reasons of the primary judge ("**J**") are reported at (2011) 82 ACSR 637.

Part V: *Relevant facts*

7. The respondent (at the relevant time named Publishing and Broadcasting Limited) held 100% of Crown's issued shares (2,938,587,410 shares): FC[3], AB-xx.

8. On 13 June 2002 (FC[3], AB-xx):

   8.1. Crown's board of directors considered, and resolved to undertake, a share buy-back of 840,336,000 of CMH's shares for $1 billion; and

   8.2. Crown made a written offer to CMH for such a buy-back on the terms set out in a draft share buy-back agreement.

9. On 28 June 2002, Crown and CMH entered into a share buy-back agreement ("**Buy-Back Agreement**") for the purchase of 840,336,000 shares for $1 billion. The Buy-Back Agreement provided for completion on 1 August 2002 or such other date as might be agreed between the parties: FC[4], AB-xx.

10. Before 28 June 2002, Crown had the following accounts in its general ledger (FC[5], AB-xx):

    10.1. "Shareholders Equity Account" numbered 310200;

    10.2. "Inter-company Loan (Payable) Account" numbered 215120;

    10.3. "Inter-company Receivables Account" numbered 112529.

11. On 28 June 2002 (FC[5], [6], AB-xx):

    11.1. an account titled "Share Buy-Back Reserve Account", numbered 310250, was established with a nil balance in Crown's general ledger;

    11.2. a debit of $1 billion was made to the Share Buy-Back Reserve Account; and

    11.3. a credit of $1 billion was made to the Inter-company Receivables Account.

12. The credit entry made to the Inter-company Receivables Account was reversed by correcting journal entries processed on 25 July 2002, with effect from 30 June 2002. The correcting entries involved a debit to the Inter-company Receivables Account, number 112529, and a credit to the Inter-company Loan (Payable) Account, number 215120: FC[6], AB-xx.

13. No entry was made in the Shareholders Equity Account, number 310200, in relation to the buy-back: FC[7], AB-xx.

14. There have been no entries made in the Share Buy-Back Reserve Account, number 310250, since the initial debit entry made on 28 June 2002, and that account still exists in Crown's general ledger with a debit balance of $1 billion: FC[7], AB-xx.

15. The completion date was ultimately 6 August 2002: FC[3], AB-xx and [8], AB-xx. On that day:

15.1. a transfer by CMH to Crown of 840,336,000 shares in Crown for a consideration of $1 billion was executed;

15.2. a deed of assignment of a debt of $1 billion owed by Publishing and Broadcasting (Finance) Limited to Crown was executed in satisfaction of the purchase price payable by Crown to CMH under the Buy-Back Agreement; and

15.3. Crown cancelled 840,336,000 of the shares held by CMH.

16. In its published financial statements for the year ended 30 June 2002[1], Crown reported under the item "Shareholders' Equity" that the total shareholders' equity of the company as a standalone entity as at 30 June 2002 was $1,507,531,000 made up as follows:

Contributed equity	$1,411,823,000
Reserves	$123,060,000
Retained profits (losses)	($27,352,000)
Total Shareholders' Equity	$1,507,531,000

17. The financial statements of Crown as at 30 June 2001 had showed that "Contributed Equity" was $2,411,823,000[2]. Consequently the 2002 financial statements confirmed that there had been a $1,000,000,000 reduction in "Contributed Equity" in the year ending 30 June 2002. The item for "Reserves" remained unchanged: J[24], AB-xx.

18. The relevant note in the 2002 financial statements relating to Contributed Equity (Note 16)[3] disclosed a reduction of $1,000,000,000 to the "Issued and Paid Up Capital (Ordinary shares fully paid)" of Crown as a standalone entity as follows [emphasis added]:

	Consolidated		The Company	
	2002 $'000	2001 $'000	2002 $'000	2001 $'000
16. CONTRIBUTED EQUITY				
(a) Issued and Paid Up Capital				
Ordinary shares fully paid	1,411,823	2,411,823	**1,411,823**	**2,411,823**
	1,411,823	2,411,823	**1,411,823**	**2,411,823**

19. The audit report in respect of the 2002 year, prepared by Ernst & Young, showed a reduction in share capital of $1,000,000,000[4].

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1 Exhibit BJL-2 to the affidavit of Brian James Long sworn 15 December 2009, page 10, AB-xx.

2 Ibid.

3 Exhibit BJL-2, page 22, AB-xx.

4 Annexure A to the Affidavit of Brian James Long sworn 4 March 2011 at pages 5, AB-xx and 11, AB-xx.

20. Crown's auditor, Mr Long, agreed in cross examination that the SBBR entry showed the reduction in shareholder's equity referred to at page 5 of the Audit Report, and that the reduction in shareholder's equity was a reduction of share capital[5]. Mr Long also agreed in cross examination that the audited financial statements showed that there had been a reduction in paid-up capital of $1,000,000,000[6].

21. After an audit, the Commissioner assessed CMH[7] on the basis that CMH had made a net capital gain under Part 3-1 of the *Income Tax Assessment Act* 1997 (Cth) ("**ITAA 1997**") as a consequence of the share buy-back. CMH objected[8] to this assessment, contending that s 159GZZZP applied such that the $1 billion consideration for the purchase of shares was taken to be a dividend included in CMH's assessable income under s 44 of the ITAA 1936.

22. At first instance, Emmett J reached the following conclusions (J[70] - [72], AB-xx):

22.1. the cancelled shares were a part of the share capital of Crown;

22.2. some record had to be made by Crown of the fact that part of its share capital was returned to CMH;

22.3. the sum of $1,000,000,000 was capital returned to CMH that was in excess of the needs of Crown;

22.4. as a consequence of the share buy-back, the capital contributed by Crown's shareholders was reduced by $1,000,000,000;

22.5. the debit in respect of that capital reduction was recorded in the SBBR account;

22.6. the SBBR account was part of the account kept by Crown of its share capital;

22.7. the Shareholder's Equity Account and the SBBR account together constituted the account kept by Crown of its share capital.

23. The Full Court allowed CMH's appeal, concluding that whether or not s 159GZZZP applied was not answered by reaching a conclusion that the share buy-back resulted in a return of capital: FC[42], AB-xx.

24. The Full Court assumed (incorrectly in the appellant's submission) that it was necessary for the purposes of determining whether or not s 159GZZZP applied that the Share Buy-Back Reserve fall within the definition of "share capital account" in s 6D of the ITAA 1936. The Full Court concluded at FC[45], [46], [47], AB-xx that:

24.1. the "Shareholders Equity Account" was, in terms of s 6D(1)(a) of the ITAA 1936, an account in which Crown kept its share capital;

24.2. the "Share Buy-Back Reserve" was neither such an account nor was it an account to which s 6D(1)(b) applied;

24.3. even if the Share Buy-Back Reserve did fall within s 6D(1)(b), s 6D(2) did not operate to deem a debiting of that account to have been made against an amount standing to the credit of the Shareholders Equity Account;

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5 Transcript 7/3/2011 page 35 line 32 to page 36 line 6, AB-xx; page 34 lines 28-37, AB-xx.

6 Transcript 7/3/2011 page 33 line 24 to page 34 line 8, AB-xx; page 34 lines 28-37, AB-xx.

7 AB-xx.

8 AB-xx.

24.4. it followed from those conclusions that no part of the purchase price was debited against amounts standing to the credit of Crown's share capital account and that s 159GZZZP therefore operated to deem the purchase price to be a dividend.

25. If it was necessary to reach a conclusion with respect to s 6D (contrary to the appellant's primary position), the appellant's secondary argument involves a challenge to the last three conclusions set out above.

26. The primary judge found that the consequence of the buy-back was that $1,000,000,000 of share capital was returned to the respondent: J[70], AB-xx. The Full Court agreed with that finding: FC[42], AB-xx.

27. It is not in dispute between the parties that:

27.1. Crown could not have funded the buy-back out of profits;

27.2. the buy-back was in fact funded entirely out of share capital.

Part VI ***Argument***

28. Pursuant to s 159GZZZP(1)(b), to the extent that the purchase price was "debited against amounts standing to the credit of the company's share capital account" it would be taken into account for the purpose of determining any capital gain realised by the respondent in respect of the disposal of the shares, and would not be deemed to be a dividend.

29. Conversely, to the extent that the purchase price was not "debited against amounts standing to the credit of the company's share capital account" it would be deemed to be a dividend.

30. The appellant contends, and the primary judge held, that the whole of the purchase price was "debited against amounts standing to the credit of [Crown's] share capital account". The respondent contends, and the Full Court held, that none of the purchase price was so debited.

31. The explanation for why the respondent seeks to use s 159GZZZP to achieve a deeming it was never intended to effect lies in the fact that, if the respondent was able to treat the return of capital as a dividend, the respondent could take advantage of the inter-corporate dividend rebate which then existed in s 46 of the ITAA 1936 rather than make a capital gain. The respondent proceeded to treat the $1,000,000,000 return of capital as a fully rebatable dividend, relying upon s 159GZZZP to deem the return of capital to be a dividend. The effect of the assessment issued by the appellant after audit was to treat the $1,000,000,000 return of capital as capital proceeds giving rise to a capital gain of $402,461,564 in respect of the shares bought back. That capital gain was substantially set off against existing capital losses.

<u>The purpose of s 159GZZZP</u>:

32. Before 1967, a distribution by a company to a shareholder where the relevant share ceased to exist (such as a liquidator's distribution or a payment made in a capital reduction) was capital in nature even where the amount returned to the shareholder exceeded the amount of the paid-up value of the share. Such a return was not a dividend because payment of a dividend assumed the continued existence of the share;

the return was thus of a capital nature and involved no receipt of income: *Thornett v FCT* (1938) 59 CLR 787 at 797, 802-803; *C of T (NSW) v Stevenson* (1937) 59 CLR 80 at 99; *FCT v Blakely* (1951) 82 CLR 388 at 407; *FCT v Uther* (1965) 112 CLR 630. This treatment enabled schemes to return profit (which would have been taxable if paid as a dividend) disguised as capital (which was not taxable): *Uther* at 643-44.

33. When *Uther* was decided, "dividend" was defined to include "any distribution ... but does not include a return of paid up capital ..."[9]. Section 44(1) included in the assessable income of a shareholder "dividends paid to him by the company out of profits derived by it from any source". There was no provision which expressly stated that, where there was a return of paid up capital but the amount paid exceeded the amount paid up on the share, the excess was a dividend or that such an excess was deemed to be paid out of profit.

34. Kitto J (dissenting[10]) was of the view that:

34.1. an amount paid to a shareholder in excess of the amount paid up on his share was not a "return of paid up capital" and, accordingly, was not excluded from the s 6(1) definition of dividend as it then stood;

34.2. the decision in *Inland Revenue Commissioners v United Grinding Wheel Co Ltd* [1955] AC 807 (relied upon by the Full Court in the present case at FC[41], AB-xx) turned on the words "applied in reducing the share capital" and would have been decided in the opposite way if the words had been "returned to shareholders in a reduction of capital": at 635-36;

34.3. the definition of "dividend" (which had been amended to include the expression "but does not include a return of paid up capital") and the introduction of s 16AA (the former s 44(1)) changed the criterion for the inclusion of a shareholder's receipts from a capital reduction in assessable income from the character of the receipt from the shareholder's point of view (viz entirely capital) to the profit character – from the company's point of view – of the source from which distributions were made: at 639-40.

35. Unlike Kitto J, Taylor J did not decide whether the amount paid to a shareholder above the amount paid up on the share constituted a "return of paid up capital" within the meaning of the definition of "dividend"; he assumed that the excess fell within the definition of "dividend": at 641.2. He held that the Act did no more than characterize as a dividend any distribution made by a company to its shareholders other than a return of paid up capital and did not go further (unlike s 47 which dealt with liquidators' distributions) to deem any such dividend so defined to have been *paid out of profits derived by the company.* The omission of this final step was fatal to the amount being included in a shareholder's assessable income as a dividend: at 641-42.

36. Menzies J took the view that the words "return of paid up capital" did not warrant "the splitting up of a single distribution which exceeds the amount of the nominal reduction into two elements, one having the character of a return of capital and the other some different and unidentified character": at 644.4. If there was to be an apportionment of

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9 *Income Tax and Social Services Contribution Assessment Act* 1936-1962 (Cth), s 6(1).

10 In *FCT v Slater Holdings Pty Limited* (1984) 156 CLR 447 at 457.2 Gibbs CJ (with whom Mason, Brennan, Deane and Dawson JJ agreed) found the dissenting reasons of Kitto J to be "compelling" and concluded (at 459.6) it was unnecessary to decide whether the majority views in *Blakely* and *Uther* were correct.

what is, according to company law, a return of capital into a return of capital and dividend for tax purposes, a provision like s 47 would have been necessary: at 645.

37. In response to *Uther*, the *Income Tax Assessment Act (No 4)* (Cth) (Act No 85 of 1967) amended the definition of "dividend", so that paragraph (e) of the definition continued to exclude the return of paid-up share capital, but specifically captured any excess over the amount to which the share was paid up. Section 44(1B) (also introduced by Act No 85 of 1967) deemed that excess to be paid out of profits. These changes were expressly introduced to "overcome the anomaly" revealed by the decision in *Uther*.[11] The Minister for Air and Minister assisting the Treasurer noted in his Second Reading Speech:[12]

> As to distributions in association with a reduction of capital, I mention that for more than a quarter of a century our taxation law has, in broad terms, treated as dividends, and therefore as income subject to tax in shareholders' hands, any distribution made by a company as a going concern, other than a return of paid up capital. A majority decision of the High Court has in recent years, however, ruled that the law is not effective to tax amounts – greatly in excess of actual paid up capital returned – that are paid to shareholders when a company reduces its capital. This means that a company can, by reducing its capital, pay profits out to shareholders free of tax which would be subject to tax in the shareholders' hands if distributed by way of a conventional dividend.

38. Share buy-backs (as opposed to reductions of capital as occurred in *Uther*) were first permitted under amendments made in 1989 to the *Companies Act* 1981 (Cth). The *Taxation Laws Amendment Act (No 3)* 1990 introduced Division 16K into the ITAA 1936 to deal with the taxation consequences of share buy-backs. When introduced, it provided that so much of the purchase price as exceeded the sum of (a) the amount to which the share was paid-up immediately before the buy-back and (b) the part of the purchase price which is debited against amounts standing to the credit of a share premium account was treated as a dividend paid by the company out of profits.

39. That is, s 159GZZZP was introduced to ensure that buy-backs under the newly introduced provisions would be treated in the same way as reductions in capital had been treated pursuant to the amendments following the decision in *Uther*.

40. The legislative object of Division 16K was consistent with the 1967 changes to the definition of "dividend" and the introduction of s 44(1B): it was directed to preventing profits being used to effect buy-backs, and distributed to shareholders as a return of capital rather than taxable dividends. Or – as it was put in the Explanatory Memorandum to the *Taxation Laws Amendment Bill (No 3)* 1990 which introduced s 159GZZZP – to ensure "that, to the extent that an off-market purchase is funded from a company's distributable profits, the purchase price will be treated as a dividend". The purpose was not one of providing a choice to the company (as CMH submitted to the Full Court), less still one of deeming a return of share capital to be a dividend.

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11 Explanatory Memorandum to the *Income Tax Assessment Bill (No 4)*1967 (Cth), notes to cl 4(2) and 8(a). See also *FCT v Slater Holdings Pty Limited* (1984) 156 CLR 447 at 459.4, per Gibbs CJ.

12 Second Reading Speech, *Income Tax Assessment Bill (No 4) 1967* (Cth).

41. In 1998 the *Company Law Review Act* 1998 (Cth) was enacted to abolish the concept of "par value" in relation to shares. It was necessary to make consequential amendments to taxation laws.

42. Section 159GZZZP was amended by the *Taxation Laws Amendment (Company Law Review) Act 1998* (Cth) so as to omit reference to "a share premium account" and to substitute a reference to "the share capital account" in s 159GZZZP(1)(b). The changes also had the effect that the 'excess' (being the amount which would be deemed to be a dividend) was now to be calculated by looking at the difference between the purchase price and the amount debited against amounts standing to the credit of the share capital account (rather than the amount by which the purchase price exceeded the sum of the amount paid-up and the amount debited against amounts standing to the credit of a share premium account).

43. The 1998 corporate law reforms abolished the concept of par value, but not the concept of paid-up capital. Those reforms removed the distinction between paid up capital and share premium meaning that it was no longer appropriate to determine the 'excess' by reference to the sum of the amount paid-up and the amount debited against a share premium account. It had been noted in the Explanatory Memorandum to the *Taxation Laws Amendment (Company Law Review) Bill 1998* (Cth) that as a result of the corporate law reforms:

> [T]he distinction between share premium and paid up capital will be removed, effectively creating one share capital account comprising both paid-up capital and share premiums. This will ... necessitate consequential amendments to the tax laws that are dependent on these concepts.[13]

44. These amendments were not directed at altering the objects of s 159GZZZP. The principal object remained one of ensuring that, if profits were used to effect a buy-back, then those profits would be deemed to be dividends in the hands of shareholders rather than a non-taxable or preferentially taxed return of capital (which would have been the case absent the legislative provision: *Uther*). The purpose remained one of ensuring "that, to the extent that an off-market purchase is funded from a company's distributable profits, the purchase price will be treated as a dividend".[14]

45. There is nothing in s 159GZZZP as originally enacted (or in the form it took in the year in question) which suggests that the purpose of the legislation was to provide a company reducing its capital with a choice as to the taxation consequences of a buy-back. Less still is there anything which suggests the purpose of the legislation was to deem the component of the return which was funded out of the company's share capital to be a dividend. Rather, the legislation was drafted against the historical background that a payment made in respect of a reduction in capital (or share buy-back) is a return of capital in the shareholders' hands (*Uther* at 645), except to the extent that legislation specifically operates to deem part of it to constitute a dividend.

46. The respondent seeks to use the provision to achieve a deeming which was never intended, namely to deem to be a dividend that which was in fact entirely a return of share capital.

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13 *Taxation Laws Amendment (Company Law Review) Act 1998* (Cth) at paragraph 1.8.

14 Explanatory Memorandum to the *Taxation Laws Amendment Bill (No 3)* 1990 (Cth).

47. The result of the Full Court's construction is that s 159GZZZP can now be used to effect a deeming which was never intended and is contrary to the evident purpose for which the provision was introduced. It was not the legislative intent to deem to be a dividend that part of a payment made in a return of capital which was funded out of share capital and the section should not be construed so as to have that effect: *FCT v Comber* (1986) 10 FCR 88 at 96; *Wiest v DPP* (1988) 23 FCR 472 at 502; *Commonwealth v Genex Corporation Pty Ltd* (1992) 176 CLR 277 at 291-2; *Marshall (Inspector of Taxes) v Kerr* [1995] 1 AC 148; *DCC Holdings Ltd v HM R&C Commrs* [2011] 1 WLR 44; [2011] 1 All ER 537 at [37] to [39].

48. The Full Court did not undertake the task of examining the legislative purpose for which s 159GZZZP was introduced, nor the historical and legislative background which informed its introduction. Rather, the Full Court approached the task by:

48.1. ignoring the purpose for which s 159GZZZP was introduced;

48.2. examining the legislative object (as identified in certain extrinsic material) of amendments made, some years after the introduction of s 159GZZZP, to the definition of "share capital account" in s 6D (which amendments were introduced to deal with a quite different issue, namely the then recent abolition of the concept of par value);

48.3. treating those objects as those of the "amended s 159GZZZP": FC[34], AB-xx.

49. In doing so, it erred.

The application of s 159GZZZP to the facts: a debit against amounts standing to the credit of the company's share capital account

50. Section 159GZZZP required conclusions to the following questions:

50.1. what was the purchase price for the share buy-back;

50.2. what amounts were standing to the credit of the company's share capital account;

50.3. what part of the purchase price was debited against amounts standing to the credit of the company's share capital account.

51. The answers to these questions were (and are):

51.1. $1,000,000,000;

51.2. $2,411,823,000;

51.3. $1,000,000,000.

52. The share capital of Crown before the buy-back was $2,411,823,000. The share capital of Crown immediately after the buy-back was $1,411,823,000. CMH does not purport to contend, to the public by its accounts (see paragraph 18 above) or to the Court, that its share capital remains $2,411,823,000.

53. The question of whether or not the Share Buy-Back Reserve was a share capital account, which preoccupied CMH's submissions and the Full Court, does not control the operation of s 159GZZZP(1). Whatever sort of account it was, the debit to that account was a debit made "against amounts standing to the credit of [Crown's] share capital account". The financial statements demonstrate that it was a debit made to record a return of share capital and that it was consequently a debit against the company's share

capital account. The fact that Crown chose not to record that debit *in* the "Shareholders Equity Account" but rather in another account which it chose to label "Share Buy-Back Reserve" does not provide an answer to the statutory question. The financial statements show a reduction in contributed equity of $1,000,000,000, from $2,411,823,000 to $1,411,823,000. It is plain that, as a matter of fact, the debit entry was made against the amounts standing to the credit of the "Shareholders Equity Account".

54. The Full Court erroneously assumed (FC [46], AB-xx) that the debit in respect of the share buy-back needed to be made *in* the share capital account rather than "*against* amounts standing to the credit of" that account, notwithstanding the appellant's submission to the contrary recorded at FC[30(b)], AB-xx. Section 159GZZZP(1) does not expressly specify the account in which the debit need be made; it might or might not be a "share capital account" as defined. The statutory question is one of fact: was the debit which was made one which was made against amounts standing to the credit of the share capital account?

55. The distinction between a debit *against* amounts standing to the credit of the share capital account, and a debit *in* (or to) the share capital account, is recognised by the definition of dividend in s 6(1). Like s 159GZZZP(1), paragraph (d) refers to an amount "*debited against* an amount standing to the credit of the share capital account ...". By contrast paragraph (e)(iii) refers to an amount "*debited to* the company's share capital account."

56. The evidence makes it plain that the debit made in the "Share Buy-Back Reserve" was a debit made against amounts standing to the credit of the "Shareholders Equity Account". The note to the financial statements at paragraph 17 above confirmed that share capital was reduced by $1,000,000,000 – and thus confirmed that the amount was debited *against* amounts standing to the credit of the share capital account. It may be accepted, as the respondent submitted, that those financial statements are not themselves ledgers containing debit or credit entries. However, the financial statements of Crown had to comply with accounting standards and had to reflect, accurately and in a non-misleading way, a true and fair view of the company's financial position and performance: ss 296 and 297 *Corporations Act 2001* (Cth). The financial statements were audited. The auditor agreed in cross-examination that the financial statements reflected that there had been a reduction in contributed equity from $2.411 billion (shown in the "Shareholders Equity Account") to $1.411 billion and a reduction of $1 billion in paid-up capital.[15] The respondent does not dispute that Crown's share capital was in fact reduced by $1 billion as a consequence of the transaction. Assuming the financial statements are accurate in disclosing a $1 billion reduction in share capital – and the correctness of them was at all times and continues to be affirmed – then the $1 billion debit made to the account Crown chose to label "Share Buy-Back Reserve" was made for the purpose of recording a return of share capital, and was necessarily made "*against*" amounts standing to the credit of the account which Crown labelled "Shareholders Equity Account". There is no evidence which suggests otherwise.

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15 Transcript 7/3/2011 page 33, AB-xx.

The application of s 159GZZZP if, contrary to the appellant's case, it is necessary for the debit to be made "in" the share capital account:

57. If, contrary to the appellant's primary argument, it was necessary for the Share Buy-Back Reserve to constitute a "share capital account" within the meaning of s 6D, then the Full Court erred in concluding that:

57.1. the Share Buy-Back Reserve was not a "share capital account" as defined;

57.2. even if it was, a debit entry made in it was not deemed to be made against amounts standing to the credit of the share capital account.

58. A consequence of the Full Court's view is a $1 billion inconsistency between Crown's paid up share capital for company law and accounting purposes (now $1,411,823,000) and its paid up share capital for tax purposes - still an amount of $2,411,823,000 by virtue of the definition of "paid-up share capital" in s 6(1) of the ITAA 1936. On the Full Court's view that the only "share capital account" is the "Shareholders Equity Account", it is the amount standing to the credit of that account ($2,411,823,000) which is the amount of the "paid-up share capital" for taxation purposes.

The "Share Buy-Back Reserve" was a share capital account:

59. Crown had no account called a "share capital account". Rather, it chose to record movements in its share capital in two accounts: one which it called the "Shareholders Equity Account" and a newly created account which it chose to label a "Share Buy-Back Reserve". The former recorded receipts of share capital, the latter recorded the return of share capital consequent upon the buy-back.

60. It is clear that the function of the Share Buy-Back Reserve was to record movements or dealings in share capital: in that account Crown recorded a return of $1 billion of share capital, a record which was necessary in order to reflect accurately that Crown's share capital after the buy-back was $1,411,823,000 rather than the amount of $2,411,823,000 which it was prior to the buy-back.

61. Notwithstanding the fact that the Share Buy-Back Reserve recorded movements in share capital, the Full Court concluded that it was, nevertheless, not within the definition of "share capital account" in s 6D: FC[45(b)], AB-xx. It erred in so concluding.

62. It reached that conclusion by construing the following words of s 6D(1)(a):

> "(1) A company's share capital account is (a) an account that the company keeps of its share capital"

to mean:

> "(1) A share capital account is (a) the company account, however described, to which the paid up capital of the company was originally credited" (FC[40]);

or, alternatively:

> "(1) A share capital account is (a) merely whichever one in which a company ordinarily keeps its share capital on contribution" (FC[43], AB-xx).

63. It concluded that there could only be one account within the meaning of s 6D(1)(a): FC[43], AB-xx. The Full Court stated its first construction did not "strain the language" of s 6D, but did not explain why: FC[40], AB-xx. It does strain the language of the section.

64. The Full Court concluded that, if s 6D(1)(a) is read as including more than one account, as the ordinary language of the section suggests, such a construction would "exacerbate or perpetuate" (FC[33], AB-xx) the problems which the 1999 amendments were introduced to address. Again, it did not explain why and it is not in fact the case.

65. The Full Court's construction of s 6D(1)(a) gave it a meaning which ruled out the possibility that an account to which a company makes no credit entries, but merely makes debit entries recording returns of share capital to shareholders, could be a share capital account. However on a plain reading of that provision there is no reason why it would not include an account established and maintained by a company solely for the purpose of making entries reflecting returns of share capital. Such an account would clearly be "an account which the company keeps of its share capital".

66. The Full Court's construction of s 6D(1) was arrived at so as to "obviate" a contended anomaly (FC[40], AB-xx). That anomaly was recorded at FC[38], AB-xx, in the following terms:

> [38] In the course of oral argument, the following anomaly was submitted by counsel for CMH to flow from the construction of s 6D propounded by the Commissioner and adopted by the primary judge. Suppose after a year of income, an amount were to be transferred from a profit account to a reserve account of a company. On the construction of s 6D adopted below, that reserve account and an equity account would together constitute the "share capital account" of a company the transfer of year end profits from the profit account to the reserve account would "taint" the entire share capital account with the result that a distribution paid out of share capital which might have been paid up years beforehand would become a tainted distribution for the purposes of s 160ARDM of the 1936 Act.

67. The Full Court erroneously concluded that the example demonstrated an "anomaly" . It did not. The result described is not anomalous. If the "reserve account" into which the profit is transferred was not an account which the company keeps of its share capital, then clearly there would not be any tainting. However if the "reserve account" in the asserted anomaly was properly characterised as an account which the company kept of its share capital, then a transfer of profit into it would taint that account. If there was more than one account which recorded share capital, the company's notional combined share capital account would be tainted. That was the intended consequence of the legislation as the note to s 6D(2) expressly states. A company may have more than one share capital account. That possibility is contemplated by the terms of s 6D. A company cannot avoid the operation of the share tainting rules by keeping several accounts of share capital; if it chose to act in a manner which tainted one of the accounts, then all of its share capital accounts would be tainted.

68. The construction of s 6D arrived at by the Full Court to "obviate" that contended anomaly was wrong, and its argument as to the purpose for the introduction of s 6D in

fact demonstrated as much, showing that s 6D(1)(a) necessarily comprehends more than one account. The respondent argued that one of the purposes of s 6D was to ensure that the compulsory merger (on 1 July 1998) of share capital accounts with share premium accounts (which might be tainted) did not unintentionally cause both accounts to become tainted. It achieved that by deeming the two accounts to be one so that there was no "transfer" (within the meaning of the share tainting provisions) between them. It necessarily follows that the share capital account and tainted share premium account must both fall within s 6D(1)(a). The tainted share premium account could not fall within s 6D(1)(b), because that paragraph only applies to accounts created on or after 1 July 1998. The Full Court's reasoning as to the purpose of s 6D lent no support to its conclusions at FC[43], AB-xx.

69. It is the construction of the provision adopted by the Full Court which, if correct, results in "anomalies":

69.1. If the "Shareholders Equity Account" in the present case is the only share capital account within the meaning of s 6D(1) then the "paid-up share capital" of Crown for tax purposes remains at the figure of $2.4 billion, notwithstanding that since the buy-back Crown's financial statements have reported its share capital as being an amount of $1.4 billion. "Paid-up share capital" was defined in s 6(1) of the ITAA 1936 as "the amount standing to the credit of the company's share capital account reduced by: (a) the amount (if any) that represents amounts unpaid on shares; and (b) the tainting amount (if any). The definition is now contained in s 995-1(1) of the ITAA 1997 as "the amount standing to the credit of the company's share capital account reduced by the amount (if any) that represents amounts unpaid on shares".

69.2. Crown could theoretically return the remaining $1.4 billion of share capital to shareholders and make the debit entries in the Share Buy-Back Reserve account, or in some other account established for the purpose of recording only returns of share capital. On the Full Court's construction of s 6D(1), those accounts would not be share capital accounts. The result would be that Crown's published accounts would show it as having no share capital for accounting and company law purposes, but for tax purposes it would still have a "paid-up share capital" of $2.4 billion.

69.3. Companies with more than one share capital account created before 30 June 1998 are in the position that – for all purposes under the ITAA 1936 and ITAA 1997 – it is only the account originally created which is a share capital account. If a company issued shares in 1990, 1992 and 1994 and credited the amounts subscribed to three separate accounts, the 1992 and 1994 accounts would not be share capital accounts.

<u>The debit in the "Share Buy-Back Reserve" was made against amounts standing to the credit of the share capital account:</u>

70. Although the Full Court did not consider the question of whether there was a debit to amounts standing to the credit of the share capital account if the "Share Buy-Back Reserve" *was not* a "share capital account" within the meaning of s 6D(1), the Full Court did consider the question of whether there was a debiting against the "Shareholders Equity Account" if the "Share Buy-Back Reserve" *was* a "share capital

account" within the meaning of s 6D(1)(b): FC[46], AB-xx. It concluded that s 6D(2) only created:

> "one statutory fiction, not two. It deems multiple accounts to be a single account. It does not deem the act of debiting against one account to have occurred against an amount standing to the credit of another account."

71. This reasoning contains at least two errors:

71.1. First, the question was not whether s 6D(2) operated to deem a debit in one account to be a debit in another. Such a question simply did not arise. The question was whether, within the meaning of s 159GZZZP(1), there was a debit *against* an amount standing to the credit of the "share capital account" (as defined in s 6D(1)). Section 159GZZZP(1) does not expressly specify the account *in* which such a debit need be made; it might or might not be made in a "share capital account" as defined. The issue is one of fact: was the debit which was made one which was made *against* amounts standing to the credit of the share capital account? As noted above, the definition of dividend in s 6(1) recognises that distinction: paragraph (d) refers to an amount "*debited against* an amount standing to the credit of the share capital account ...", and in contrast paragraph (e)(iii) refers to an amount "*debited to* the company's share capital account."

71.2. Secondly, if the debit is made to a "share capital account" within s 6D(1) which is one of a number of share capital accounts, s 159GZZZP(1) would capture a debit made to the combined notional share capital account, irrespective of the fact that the credit against which the amount was debited was in a different account within the one notional account to that in which the debit entry was made.

72. The Full Court at FC[46], AB-xx, citing *FCT v Comber* (1986) 10 FCR 88 at 96, correctly recognised that it is necessary to construe a deeming provision by reference to the object sought to be achieved by the relevant provisions. The object of s 6D is tolerably clear. If a company has several accounts which it uses to record its share capital, then each will be a "share capital account", and s 6D(2) will deem them to be a single account. The provisions of the Act operate as if those share capital accounts were one. It necessarily follows from the deeming that what occurs in any account occurs in the one share capital account. The object of the deeming is defeated if the provision is construed as nevertheless meaning that the different accounts which are deemed to constitute the single share capital account are treated separately when considering credit and debit entries made in them. No useful purpose is served by such a distinction which in truth merely nullifies the deeming. The appellant's construction did not involve an extension of the fiction; it merely gave effect to the provision. Nor was the appellant's construction of s 6D "subversive of the 1998 amendment to s 159GZZZP" as the Full Court asserted, without reasoning or basis, at FC[46], AB-xx.

73. **Conclusion:**

74. Crown reduced its share capital by $1,000,000,000 by buying back shares of that value and debiting an amount of $1,000,000,000 to an account which it labelled "Share Buy-Back Reserve". The buy-back effected a return of paid up capital and resulted in a $1,000,000,000 reduction in Crown's paid up capital. The debit in the SBBR was made against the amount of $2.411 billion standing to the credit of Crown's account called "Shareholders Equity Account", which was a share capital account within the meaning

of s 159GZZZP(1) (and s 6D). It does not matter whether or not the SBBR was a "share capital account".

75. Alternatively, if it is necessary so to conclude, the SBBR is a share capital account within the meaning of s 6D and the debit of $1,000,000,000 made in it was made against amounts standing to the credit of the share capital account within the meaning of s 6D and s 159GZZZP.

76. For those reasons s 159GZZZP does not deem any part of the return of capital to be a dividend.

Part VII: ***Legislative materials***

10 77. See Annexure A.

Part VIII: ***Orders sought***

78. Appeal allowed.

79. The judgment of the Full Court of the Federal Court be set aside and, in lieu thereof:

79.1. the appeal to the Full Court of the Federal Court be dismissed;

79.2. the appellant in the Full Court pay the respondent's costs of that appeal.

80. The respondent pay the appellant's costs.

Part IX: ***Estimate of oral argument***

81. 2 Hours.

Dated: 31 August 2012

20

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IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No S 228 of 2012

ON APPEAL FROM THE FULL COURT OF THE FEDERAL COURT OF AUSTRALIA

BETWEEN:

COMMISSIONER OF TAXATION
Appellant

and

CONSOLIDATED MEDIA HOLDINGS LTD
(ACN 009 0710167)
Respondent

ANNEXURE A: LEGISLATION

(A) RELEVANT PROVISIONS IN FORCE AT THE TIME

The issues raised in this appeal relate to the income tax year ended 30 June 2002. The relevant statutory provisions as they existed at the relevant time are as follows:

Income Tax Assessment Act 1936

Act No. 27 of 1936 as amended

Part I—Preliminary

...

6 Interpretation [*see* Note 12]

...

(1) In this Act, unless the contrary intention appears:

...

dividend includes:

(a) any distribution made by a company to any of its shareholders, whether in money or other property; and

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(b) any amount credited by a company to any of its shareholders as shareholders;

(c) (Repealed)

but does not include:

(d) moneys paid or credited by a company to a shareholder or any other property distributed by a company to shareholders (not being moneys or other property to which this paragraph, by reason of subsection (4), does not apply or moneys paid or credited, or property distributed for the redemption or cancellation of a redeemable preference share), where the amount of the moneys paid or credited, or the amount of the value of the property, is debited against an amount standing to the credit of the share capital account of the company; or

(e) moneys paid or credited, or property distributed, by a company for the redemption or cancellation of a redeemable preference share if:

(i) the company gives the holder of the share a notice when it redeems or cancels the share; and

(ii) the notice specifies the amount paid-up on the share immediately before the cancellation or redemption; and

(iii) the amount is debited to the company's share capital account;

except to the extent that the amount of those moneys or the value of that property, as the case may be, is greater than the amount specified in the notice as the amount paid-up on the share; or

(f) a reversionary bonus on a policy of life-assurance.

...

paid-up share capital of a company means the amount standing to the credit of the company's share capital account reduced by:

(a) the amount (if any) that represents amounts unpaid on shares; and

(b) the tainting amount (if any).

...

6D Meaning of *share capital account*

(1) A ***share capital account*** is:

(a) an account which the company keeps of its share capital; or

(b) any other account (whether or not called a share capital account), created on or after 1 July 1998, where the first amount credited to the account was an amount of share capital.

(2) If a company has more than one account covered by subsection (1), the accounts are taken, for the purposes of this Act, to be a single account.

Note: Because the accounts are taken to be a single account (the ***combined share capital account***) tainting any of the accounts has the effect of tainting the combined share capital account.

(3) However, an account that is tainted for the purposes of Division 7B of Part IIIAA is not a share capital account for the purposes of this Act other than for the purposes of:

(a) the definition of ***paid-up share capital*** in subsection 6(1); and

(b) subsection 44(1B); and

(c) section 46H; and

(d) subsection 159GZZZQ(5); and

(e) Division 7B of Part IIIAA; and

(f) subsection 160ZA(7A).

...

Part III—Liability to taxation

...

Division 16K—Effect of buy-backs of shares

....

Subdivision A—Interpretation

159GZZZJ Interpretation

In this Division:

buy-back has the meaning given by paragraph 159GZZZK(a).

off-market purchase has the meaning given by paragraph 159GZZZK(d).

on-market purchase has the meaning given by paragraph 159GZZZK(c).

purchase price has the meaning given by section 159GZZZM.

seller has the meaning given by paragraph 159GZZZK(b).

159GZZZK Explanation of terms

For the purposes of this Division, where a company buys a share in itself from a shareholder in the company:

(a) the purchase is a buy-back; and

(b) the shareholder is the seller; and

(c) if:

(i) the share is listed for quotation in the official list of a stock exchange in Australia or elsewhere; and

(ii) the buy-back is made in the ordinary course of trading on that stock exchange;

the buy-back is an on-market purchase; and

(d) if the buy-back is not covered by paragraph (c)—the buy-back is an off-market purchase.

...

Subdivision C—Off-market purchases

159GZZZP Part of off-market purchase price is a dividend

(1) For the purposes of this Act, but subject to subsection (1A), where a buy-back of a share or non-share equity interest by a company is an off-market purchase, the difference between:

(a) the purchase price; and

(b) the part (if any) of the purchase price in respect of the buy-back of the share or non-share equity interest which is debited against amounts standing to the credit of:

(i) the company's share capital account if it is a share that is bought back; or

(ii) the company's share capital account or non-share capital account if it is a non-share equity interest that is bought back;

is taken to be a dividend paid by the company:

(c) to the seller as a shareholder in the company; and

(d) out of profits derived by the company; and

(e) on the day the buy-back occurs.

(1A) If the dividend is included to any extent in the seller's assessable income of any year of income, it is not taken into account to that extent under section 118-20 of the *Income Tax Assessment Act 1997*.

(2) The remainder of the purchase price is taken not to be a dividend for the purposes of this Act.

159GZZZQ Consideration in respect of off-market purchase

(1) Subject to this section, if a buy-back of a share is an off-market purchase, then:

(a) in determining, for the purposes of this Act:

(i) whether an amount is included in the assessable income of the seller under a provision of this Act other than Parts 3-1 and 3-3 of the *Income Tax Assessment Act 1997* (about CGT); or

(ii) whether an amount is allowable as a deduction to the seller; or

(b) whether the seller makes a capital gain or capital loss;

in respect of the buy-back, the seller is taken to have received or to be entitled to receive, as consideration in respect of the sale of the share, an amount equal to the purchase price in respect of the buy-back.

Deemed consideration increased to market value

(2) If apart from this section:

(a) the purchase price in respect of the buy-back;

is less than:

(b) the amount that would have been the market value of the share at the time of the buy-back if the buy-back did not occur and was never proposed to occur;

then, subject to subsection (3), in making the determinations mentioned in paragraphs (1)(a) and (b), the amount of consideration that the seller is taken to have received or to be entitled to receive in respect of the sale of the share is equal to the market value mentioned in paragraph (b) of this subsection.

Deemed consideration reduced where dividend assessable etc.

(3) Subject to subsection (8), if there is a reduction amount in respect of the buy-back (see subsection (4)), then, in making the determinations mentioned in paragraphs (1)(a) and (b), the amount of consideration that the seller is taken to have received or to be entitled to receive in respect of the sale of the share, after any application of subsection (2), is reduced by the reduction amount.

Reduction amount

(4) The following steps are to be taken in working out whether there is a reduction amount in respect of the buy-back:

(a) first, work out whether the whole or part of the purchase price in respect of the buy-back is taken to be a dividend by section 159GZZZP;

(b) second, for any amount satisfying paragraph (a), work out whether the whole or part of it is either:

(i) included in the seller's assessable income of any year of income (disregarding section 128D); or

(ii) an eligible non-capital amount (see subsection (5)).

The amount worked out is the ***reduction amount*** in respect of the buy-back.

Eligible non-capital amount

(5) An amount is an ***eligible non-capital amount*** if it is neither:

(a) debited against a share capital account or a reserve to the extent that it consists of profits from the revaluation of assets of the company that have not been disposed of by the company; nor

(b) attributable, either directly or indirectly, to amounts that were transferred from such an account or reserve of the company.

Debit for deemed dividend

(7) For the purposes of subsection (5), an amount of the purchase price that is taken to be a dividend by section 159GZZZP is taken to have been debited against the account or reserves against which the purchase price was debited, and to the same extent.

Rebatable amount excluded from reduction where loss

(8) If:

(a) the amount of consideration that the seller is taken by subsection (1) or (2) to have received or to be entitled to receive in respect of the sale of the share is, apart from this subsection, reduced by a reduction amount under subsection (3); and

(b) the dividend mentioned in paragraph (4)(a), so far as it does not exceed the reduction amount, consists to any extent of a rebatable amount (see subsection (9)); and

(c) disregarding this subsection, as a result of the operation of this section:

(i) for the purposes of Parts 3-1 and 3-3 of the *Income Tax Assessment Act 1997* (about CGT), the seller incurs a capital loss or an increased capital loss (which loss or increase is the ***loss amount***) in respect of the buy-back; or

(ii) a loss, or an increased loss, (which loss or increase is also the ***loss amount***) in respect of the buy-back is allowable as a deduction to the seller under a provision of a Part of this Act other than Part 3-1 or 3-3 of the *Income Tax Assessment Act 1997*; or

(iii) the amount of a deduction allowable from the seller's assessable income of any year of income in respect of the issue or acquisition of the share exceeds, or exceeds by a greater amount, (the excess or increased excess is also the ***loss amount***) the amount included in the seller's assessable income of any year of income in respect of the buy-back of the share;

then the reduction in the amount of the consideration under subsection (3) is instead a reduction equal to:

(d) the reduction amount;

less:

(e) so much of the rebatable amount as does not exceed the loss amount.

Meaning of rebatable amount

(9) For the purposes of subsection (8), if the seller is entitled to a rebate of tax under section 46 or 46A in the seller's assessment for a year of income in respect of the dividend, the dividend consists of a ***rebatable amount*** worked out using the formula:

$$\frac{\text{amount of rebate}}{\text{general company tax rate within the meaning of section 160APA}}$$

(B) WHETHER PROVISIONS STILL IN FORCE IN THIS FORM

1. The definition of "*dividend*" in s 6 of the *Income Tax Assessment Act 1936* was amended by Act No. 83 of 2004 and Act No. 41 of 2011. The amending provisions are as follows:

Tax Laws Amendment (2004 Measures No. 2) Act 2004

Act No. 83 of 2004

...

3 Schedule(s)

Each Act that is specified in a Schedule to this Act is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to this Act has effect according to its terms.

...

Schedule 1—Life insurance companies

Part 7—Amendments commencing on Royal Assent

Income Tax Assessment Act 1936

108 Subsection 6(1) (paragraph (f) of the definition of *dividend*)

Omit "a policy of life-assurance", substitute "a life assurance policy".

Tax Laws Amendment (2011 Measures No. 2) Act 2011

Act No. 41 of 2011

...

3 Schedule(s)

Each Act that is specified in a Schedule to this Act is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to this Act has effect according to its terms.

...

Schedule 5—Other amendments

Part 8—Definitions and signposts to related material

Income Tax Assessment Act 1936

61 Subsection 6(1) (at the end of the definition of *dividend*)

Add:

Note: Subsection (4) sets out when paragraph (d) of this definition does not apply.

2. The definition of "*paid up share capital*" in s 6 of the *Income Tax Assessment Act 1936* has been replaced (Act No. 56 of 2010, s 3, Sch 6, Item 122) by the following:

6 Interpretation

(1) In this Act, unless the contrary intention appears:

...

paid-up share capital has the meaning given by subsection 995-1(1) of the *Income Tax Assessment Act 1997*.

The definition of "paid up share capital" in subsection 995-1(1) of the *Income Tax Assessment Act 1997* is in the following terms:

Chapter 6—The Dictionary

Part 6-5—Dictionary definitions

Division 995—Definitions

995-1 Definitions [*see* Notes 2, 3 and 19]

(1) In this Act, except so far as the contrary intention appears:

...

paid-up share capital of a company means the amount standing to the credit of the company's *share capital account reduced by the amount (if any) that represents amounts unpaid on shares.

3. Section 6D of the *Income Tax Assessment Act 1936* was repealed by Act No. 80 of 2006 (s 3, Sch 4, Item 22). Section 975-300 of the *Income Tax Assessment Act 1997* contains the following definition of "share capital account":

Chapter 6—The Dictionary

...

Part 6-1—Concepts and topics

...

Division 975—Concepts about companies

...

Subdivision 975-G—What is a company's share capital account?

...

975-300 Meaning of *share capital account*

(1) A company's ***share capital account*** is:

(a) an account that the company keeps of its share capital; or

(b) any other account (whether or not called a share capital account) that satisfies the following conditions:

(i) the account was created on or after 1 July 1998;

(ii) the first amount credited to the account was an amount of share capital.

(2) If a company has more than one account covered by subsection (1), the accounts are taken, for the purposes of this Act, to be a single account.

Note: Because the accounts are taken to be a single account (the ***combined share capital account***), tainting of any of the accounts has the effect of tainting the combined share capital account.

(3) However, if a company's *share capital account is *tainted, that account is taken not to be a share capital account for the purposes this Act, other than:

(a) subsection 118-20(6); and

(b) Division 197; and

(ba) paragraph 202-45(e); and

(c) the definition of ***paid-up share capital*** in subsection 6(1) of the *Income Tax Assessment Act 1936*; and

(d) subsection 44(1B) of the *Income Tax Assessment Act 1936*; and

(f) subsection 159GZZZQ(5) of the *Income Tax Assessment Act 1936*.

4. The provisions of Division 16K of Part III of the *Income Tax Assessment Act 1936* as set out above remain in force as at the date of these submissions with the exception of subss (4), (8) and (9) of s 159GZZZQ. The relevant amending provisions are as follows:

Tax Laws Amendment (2004 Measures No. 6) Act 2005

Act No. 23 of 2005

...

3 Schedule(s)

Each Act that is specified in a Schedule to this Act is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to this Act has effect according to its terms.

...

Schedule 3—Simplified Imputation System

...

Part 2—Miscellaneous consequential and technical amendments

Income Tax Assessment Act 1936

...

48 Before paragraph 159GZZZQ(8)(a)

Insert:

(aa) the seller is a corporate tax entity; and

49 Paragraph 159GZZZQ(8)(b)

Omit "a rebatable amount", substitute "an offsetable amount".

Note: The heading to subsection 159GZZZQ(8) is replaced by the heading "*Offsetable amount excluded from reduction where loss*".

50 Paragraph 159GZZZQ(8)(e)

Omit "rebatable amount", substitute "offsetable amount".

51 Subsection 159GZZZQ(9)

Repeal the subsection, substitute:

Meaning of offsetable amount

(9) For the purposes of subsection (8), if the seller is entitled to a tax offset under Division 207 of the *Income Tax Assessment Act 1997* in the seller's assessment for a year of income in respect of the dividend, the dividend consists of an ***offsetable amount*** worked out using the formula:

$$\frac{\text{Amount of offset}}{\text{Corporate tax rate}}$$

...

Tax Laws Amendment (Loss Recoupment Rules and Other Measures) Act 2005

Act No. 147 of 2005

...

3 Schedule(s)

Each Act that is specified in a Schedule to this Act is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to this Act has effect according to its terms.

...

Schedule 2—Foreign residents' income with an underlying foreign source

Part 2—Other amendments

Income Tax Assessment Act 1936

...

10 Subparagraph 159GZZZQ(4)(b)(i)

After "128D", insert "of this Act and section 802-15 of the *Income Tax Assessment Act 1997*".