HIGH COURT OF AUSTRALIA

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Details of Filing

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IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

BETWEEN: **Appeal S157/2025**

Commissioner of Taxation
Appellant

and

Gordon Stanley Merchant
First Respondent

and

GSM Pty Ltd ACN 074 508 124
Second Respondent

BETWEEN: **Appeal S158/2025**

Gordon Stanley Merchant
First Appellant

and

GSM Pty Ltd ACN 074 508 124
Second Appellant

and

Commissioner of Taxation
Respondent

APPELLANT'S SUBMISSIONS IN APPEAL S157/2025 CROSS APPELLANT'S SUBMISSIONS IN APPEAL S158/2025

Part I: Certification

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

Part II: Issues

2. This appeal raises two issues concerning the proper construction of s 177E of Part IVA of the *Income Tax Assessment Act* 1936 (Cth) (**ITAA 1936**):

   (a) Does a scheme have substantially the effect of a scheme by way of, or in the nature of, dividend stripping only if it completely or substantially completely avoids tax on a "substantial proportion" of the "accumulated profits" of the target company?

   (b) Is the substantial effect of a scheme by way of, or in the nature of, dividend stripping to be assessed having regard to the application of s 177D to another taxpayer?

Part III: Section 78B Notice

3. No notices under s 78B of the *Judiciary Act* 1903 (Cth) are required.

Part IV: Citation of Decisions Below

4. The decision of the Federal Court is *Merchant v Commissioner of Taxation* [2024] FCA 498 (Thawley J) (**J**). The decisions of the Full Court of the Federal Court are *Merchant v Federal Commissioner of Taxation* [2025] FCAFC 56; (2025) 309 FCR 144 (Logan, McElwaine and Hespe JJ) (**FC**) and *Merchant v Commissioner of Taxation (Costs)* [2025] FCAFC 81 (Logan, McElwaine and Hespe JJ) (**FC Costs**).

Part V: Background

5. Mr Merchant was the co-founder of what ultimately became the ASX listed company "Billabong International Ltd" (**BBG**): **FC**[97]. At the time of the relevant transactions in 2014 and 2015, entities controlled by Mr Merchant (the **Merchant Group**) held approximately 10% of the voting power in BBG: **FC**[100]. A significant number of the shares were held by Gordon Merchant (No 2) Pty Ltd (**GM2**) as trustee of the Merchant Family Trust (**MFT**). GM2 as trustee of the MFT was also the sole shareholder in **Plantic** Technologies Limited, which was a developer of plant-based packaging: **FC**[98].

6. On 2 September 2014, GM2 as trustee of the MFT transferred approximately 10 million BBG shares to GSM Superannuation Pty Ltd (**GSMS**) in its capacity as trustee of the Gordon Merchant Superannuation Fund (**GMSF**) for consideration of $5,844,827: **FC**[82]. As a consequence, the MFT crystallised a capital loss of $56,561,940: **FC**[82]. At that time, it was "objectively reasonably likely" that the MFT would sell its shares in Plantic in the reasonably foreseeable future, and there was no real point in not proceeding with the sale of the BBG shares when a sale of those shares was known to be possible (having regard to the trading window available to Mr Merchant): **J**[284], [344], [375], [377], [379(b)], [406]; **FC**[287], [288].

7. In April 2015, the MFT sold its shares in Plantic to Kuraray, an unrelated third party. The MFT received USD45.56 million for the shares, plus earn-out rights: **FC**[83], [119], [242]. That crystallised a capital gain for the MFT of $73,539,297. It was a condition of that sale that company loans owed by Plantic to related companies of Mr Merchant be forgiven: **FC**[83]. This condition, however, "was not something which had its genesis in any requirement suggested by" potential purchasers of the shares; rather, it was the MFT's preferred structure following Mr Merchant's receipt of advice from EY and was initially resisted by the purchaser: **J**[531]-[537]; **FC**[355]. As both the primary judge and the majority in the Full Court observed, there were in fact a myriad of other ways in which the related party debts may have been dealt with: **J**[524]-[530], **FC**[350].

8. To satisfy the condition, just prior to the sale, **GSM** Pty Ltd forgave $50.192 million owed to it by Plantic, and **Tironui** Pty Ltd forgave $4.215 million also owed to it by Plantic: **FC**[306(3)]. In doing so, GSM and Tironui received no consideration from the MFT, notwithstanding that the debts were "real debts and were worth their face value": **J**[539]-[540]. The effect was to reduce the undistributed profits of GSM and Tironui, and effectively convert the loans to equity in Plantic, thereby increasing the value of the shares in Plantic and the consideration received by the MFT upon their sale: **FC**[307]. In other words, profits in GSM and Tironui (the target companies) were transferred to the MFT (the stripper), where, because of the MFT's capital losses (including, but not limited to, those crystallised on the sale of the BBG shares), they would form part of the corpus of the trust without any tax consequences: **J**[386], [571]-[572]; **FC**[345].

9. On 20 July 2020, the Commissioner made three determinations under Part IVA of the ITAA 1936 to cancel tax benefits obtained by Mr Merchant and the MFT: **FC**[84].

10. The Commissioner made two determinations (the **s 177E Determinations**) to include in Mr Merchant's assessable income in the 2015 income year amounts equivalent to the debts forgiven by GSM and Tironui (see ss 177E(1)(f),(g) and s 177F(1)(a)) on the basis that the forgiving of debts by GSM and Tironui were part of a scheme (the **Debt Forgiveness Schemes)** that had substantially the effect of a scheme by way of or in the nature of dividend stripping within the meaning of s 177E(1)(a)(ii): **FC**[84(2)]. The Commissioner "formed the opinion required by s 177E(1)(b) that the forgiveness of the debts by GSM and Tironui was a disposal of property…, and represented a distribution of profits to the MFT (as "another person")": **FC**[304(a)]. He considered that s 177E(1)(c) was satisfied because, immediately before the scheme was entered into, if GSM and Tironui had paid dividends to Mr Merchant in the amounts forgiven, those amounts would have been assessable income of Mr Merchant: **FC**[304(b)].

11. On the same date, the Commissioner made another determination (the **s 177D Determination**) to cancel the $56,561,940 capital loss that was made by the MFT in connection with a scheme comprising the sale of the shares in BBG between related parties, being the MFT and the GMSF (the **BBG Share Sale Scheme**). That capital loss was expected to offset the capital gain from the anticipated sale of its shares in Plantic. The effect of the s 177D Determination was to increase the "net income" for tax purposes of the MFT, which was assessed to GSM as the beneficiary of the MFT presently entitled to 100% of the trust law income: **FC**[84(1)].

12. The BBG Share Sale Scheme was the first step in the broader Debt Forgiveness Schemes. The further steps were: (1) the entry into a contract for sale of the Plantic shares requiring the release and forgiveness of Plantic's loans to GSM and Tironui; (2) the forgiveness of debts by GSM and Tironui for nil consideration; and (3) the sale of the shares in Plantic to Kuraray: **FC**[306]. These further steps, in the context of additional crystallised capital losses by the MFT, resulted in a different and greater tax benefit than did the BBG Share Sale Scheme. As such, the s 177D Determination and the s 177E Determinations, and the consequential amended assessments, were not alternatives; they concerned different schemes, gave rise to different tax benefits, and applied to different taxpayers.

13. Aside from one valuation issue, the primary judge dismissed the proceedings and upheld the Commissioner's determinations: **J**[408], [573]. The majority in the Full Court similarly dismissed the challenges to the s 177D Determination (**FC**[299]), and the challenges to the s 177E Determinations in so far as it concerned the primary judge's

findings that the Debt Forgiveness Schemes had the requisite tax avoidance purpose, and that the Tironui Debt Forgiveness Scheme had the requisite effect: **FC**[358], [381].

14. However, the majority in the Full Court (Logan J not deciding) differed from the primary judge on whether it was necessary to have regard to the effect of the s 177D Determination (on the MFT and GSM) when considering the effect of the scheme (on the MFT) for the purposes of applying s 177E (to Mr Merchant), and in particular, on whether the scheme had substantially the effect of a scheme by way of, or in the nature of, dividend stripping. This arose because the s 177D Determination cancelled the BBG capital losses which were otherwise available to shelter the increased capital proceeds that arose from the forgiveness of the Plantic loans (the subject matter of the s 177E Determinations).

15. The approach taken by the Commissioner was to assess the application of s 177D to the BBG Share Sale Scheme and s 177E to the Debt Forgiveness Schemes separately, that is, without taking into account the cancellation of the tax benefit from the BBG Share Sale Scheme when analysing the effect of the Debt Forgiveness Schemes in applying s 177E(1)(a)(ii). The primary judge upheld that approach, noting that compensating adjustments could be made under s 177F(3) where fair and reasonable: **J**[488]-[491].

16. Conversely, the majority in the Full Court held that it was necessary, when assessing the effect of the Debt Forgiveness Schemes, to take into account the effect of the cancellation of the tax benefit arising from the BBG Share Sale Scheme: **FC**[373]. Adopting that approach in assessing the effect of the GSM Debt Forgiveness Scheme, the Full Court reasoned that, once the s 177D determination operated to cancel the capital losses to which that determination applied, there were insufficient capital losses remaining in the MFT to shelter all of the increased capital gain attributable to the amount forgiven by the GSM Debt Forgiveness Scheme (after accounting for the losses absorbed by the Tironui Debt Forgiveness Scheme). That was so because, after taking account of the effect of the s 177D determination, $33.912 million of the increased capital gain attributable to the GSM Debt Forgiveness Scheme remained taxable to GSM as the beneficiary assessable on the capital gains of the MFT in the 2015 income year: **FC**[386], [387].

17. Taking into account the s 177D Determination in applying s 177E, the majority found that the GSM Debt Forgiveness Scheme still resulted in GSM paying at least $3 million

less in tax than Mr Merchant would have paid had GSM declared a dividend of the amount identified by s 177E(1)(c) (being the relevant counterfactual).[1]

18. Nonetheless, the majority determined that the "core characteristics [of dividend stripping] have quantitative elements": **FC**[399]. Having regard to its quantitative findings, the majority found those elements to be absent and that the GSM Debt Forgiveness Scheme lacked the requisite effect because: (a) "[t]he amount of the loan forgiven by GSM represented less than 25% of the accumulated profits of GSM"; and (b) "[t]he effect of the cancellation of the BBG Capital Loss was to subject an amount equal to a substantial proportion of the debt forgiven amount to tax at a higher rate than would have been payable by Mr Merchant had he received a fully franked dividend from GSM": **FC**[402].

19. By contrast, the majority determined that the Tironui Debt Forgiveness Scheme—which was identical in concept to the GSM Debt Forgiveness Scheme—*did* have the requisite effect of a scheme by way of or in the nature of a dividend stripping scheme. The majority so concluded because: (a) that scheme had the effect of stripping "substantially all of the retained profits of Tironui"; and (b) even having regard to the s 177D determination that cancelled the capital losses derived from the BBG Share Sale Scheme, the MFT had other accrued capital losses that were sufficient to shelter the increased capital gain arising from the sale of the Plantic shares attributable to the forgiveness of Plantic's debt to Tironui (the Tironui Debt Forgiveness Scheme having been considered before the GSM Debt Forgiveness Scheme): **FC**[380]-[381]. It was for that reason that the appeal, insofar as it concerned the Tironui Debt Forgiveness Scheme, was dismissed.

Part VI: Argument

Ground 1: Substantially Complete Avoidance on a Substantial Proportion of Profits?

20. The construction of the expression "dividend stripping" in s 177E(1)(a)(ii) preferred by the majority of the Full Court imposed two limitations on the operation of s 177E. Their Honours described these as "quantitative elements" constituting "core characteristics" of

[1] If GSM had distributed a dividend of $50.192 million, Mr Merchant would have paid tax at an effective rate of 27.14% on that sum even after accounting for franking credits, viz, $13.602 million: **FC**[389]. Even accounting for the effect of the s 177D Determination, the GSM Debt Forgiveness Scheme resulted in profits of $50.192 million extracted from GSM which would bear tax of at most $10.173 million: **FC**[388].

dividend stripping. In order to have substantially the effect of a scheme by way of, or in the nature of, a dividend stripping, the majority held that:

(a) *first*, the scheme had to strip all or a substantial proportion of the target company's "accumulated profits": **FC**[402];[2] and

(b) *second*, the accumulated profits stripped out had to be made substantially tax free, having regard to any tax payable by the recipient of the capital proceeds: **FC**[370], [402].

21. Justice Logan, otherwise in dissent, supported the second limitation, but went further, holding that dividend stripping entailed a conversion of corporate profits into something that "will not be taxed", and that neither of the Debt Forgiveness Schemes satisfied that requirement because the debt forgiveness *increased* the amount of the capital gain on the sale of the Plantic shares: **FC**[55], [56], c.f. the majority at **FC**[368].

22. The consequence of these limitations was that the GSM Debt Forgiveness Scheme was not caught by Part IVA of the ITAA 1936, notwithstanding that the requisite purpose was present, the scheme involved the same series of steps as the Tironui Debt Forgiveness Scheme (but involving different entities, and a greater quantum), and avoided tax of over $3 million (even if, which is disputed, it was correct to include the effect of the s 177D Determination).

23. This Court should hold that neither limitation is consistent with the meaning of the expression "dividend stripping", nor the terms of s 177E properly construed.

<u>The protean nature of the expression "dividend stripping"</u>

24. The expression "dividend stripping", which was central to the majority's identification of the two limitations, is not defined in Part IVA. In accordance with ordinary principles, it is to be construed having regard to its statutory context and the legislative purpose that it serves, and regard may also be had to relevant extrinsic materials if that material is capable of assisting in the ascertainment of the meaning of the provision. This includes the history of the expression as one that was, when Part IVA was enacted, a well-known

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2 The existence of the first limitation was not propounded by Mr Merchant or by the primary Judge, nor was it the subject of any argument, at trial or on appeal.

part of "tax avoidance discourse": *Commissioner of Taxation v Consolidated Press Holdings Ltd* (2001) 207 CLR 235 (***CPH***) at [100], [104]-[105].[3]

25. Before its adoption in s 177E, the expression "dividend stripping" had a generally understood, if protean, meaning in tax avoidance discourse. In ***Investment & Merchant Finance*** *Corporation Ltd v Federal Commissioner of Taxation* (1970) 120 CLR 177 at 179, Windeyer J (whose judgment was cited with evident approval in *CPH* at [105]-[107][4]) referred to the definition of the term in ***Fowler's*** *Modern English Usage* (2nd ed, 1965) at pp 61-62, which is as follows:

> "In the course of the duel provoked by them between the tax avoider and the legislature they have developed a protean variety of detail, but their essence remains the same. … In their original and simplest form they were collusive transactions by which a person liable to high rate of surtax would avoid liability by selling investments cum dividend and buying them back at a lower price after the dividend had been paid to the purchaser; in this way he converted what would have been taxable income in his hands into a non-taxable gain. … Thus, provided that the difference between the two prices … did not exceed the amount of the dividend, the only loser would be the Revenue."[5]

26. The Commissioner initially sought to address such schemes by applying the general anti-avoidance provision in former s 260 of the ITAA 1936, with some success when applied to the shareholder who might otherwise have received a dividend: e.g. ***Newton*** *v Commissioner of Taxation (Cth)* (1957) 96 CLR 577 at 654-5 (HC), affirmed in (1958) 98 CLR 1 (PC) and ***Hancock*** *v Commissioner of Taxation (Cth)* (1961) 108 CLR 258; but c.f. *Slutzkin v Federal Commissioner of Taxation* (1977) 140 CLR 314. That section, however, was found not to operate to redress tax benefits obtained by the stripper: *Commissioner of Taxation (Cth) v* ***Patcorp*** *Investments Ltd* (1976) 140 CLR 247.

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3 Second Reading Speech, *Income Tax Assessment Bill 1972* (Hansard, House of Representatives, 9 December 1971, p 4453) "*The term… has come to have a widely understood connotation in professional and financial circles*".

4 Reversed but without criticism of this point in *Investment and Merchant Finance Corporation Limited v Federal Commissioner of Taxation* (1971) 125 CLR 249.

5 See also ***BandF Investments*** *Pty Ltd v Federal Commissioner of Taxation* (2023) 298 FCR 449 at [91] (Moshinsky, Colvin and Hespe JJ).

27. The first legislative effort directed specifically at dividend stripping was s 46A of the ITAA 1936, which was introduced by the *Income Tax Assessment Act (No 3) 1972* (Cth),[6] and was expressly intended to "deal with dividend stripping from the angle of the stripping company".[7] It had the effect of denying a dividend rebate on a dividend, the payment of which "arose out of, or was made in the course of, a transaction, operation undertaking, scheme or arrangement that the Commissioner was satisfied was by way of dividend stripping", in cases where the stripper could not only claim a rebate of tax on dividend income, but could also deduct a loss on resale or, upon revaluation of the shares, a decrease in the value of shares held. Such schemes allowed the purchasing shareholder (the stripper) to render *other* income partially or wholly tax free, by "offsetting the loss on resale against the profits which it has otherwise made".[8]

28. Sections 177D and 177E were enacted later as part of the reforms in 1981 to replace s 260 of the ITAA 1936 with a more robust set of anti-avoidance provisions that were designed to overcome certain difficulties and limitations in the application of s 260. The specific purpose of s 177E itself, as expressed in the Explanatory Memorandum and in the Second Reading Speech[9], was to be a "supplementary code" to fill what was anticipated may be a lacuna in the operation of the general provisions in Part IVA, arising as "it may not always be able to be concluded that, if the scheme had not been entered into, the relevant dividends would have been (or might reasonably be expected to have been) included in assessable income: the company may simply have retained the profits for the time

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[6] Following the introduction of the imputation system in 1987, s 46A was joined by ss 160APHA and 160APP(6) of the ITAA 1936 (enacted by *Taxation Laws Amendment Act (No 3)* 1987 (Cth), later replicated by s 207-155 of the *Income Tax Assessment Act 1997* (Cth) (**ITAA 1997**)), which provisions operated to deny a double benefit to a company or individual who is able to claim both a franking credit *and* a tax loss for the difference between the cost of the share and its value upon resale or re-valuation ex-dividend: see Explanatory Memorandum to the *Taxation Laws Amendment (No 3) Bill 1987* (Cth) pp 5-6. Section 46A has now been repealed. Its effect was limited following the introduction of the franking credits system (*New Business Tax System (Consolidation and Other Measures) Act (No. 1) 2002* (Cth) Sch 16), and then subsequently repealed.

[7] Explanatory Memorandum to the *Income Tax Laws Amendment Bill (No 2) 1981* (Cth), p 15.

[8] *Patcorp* (1976) 140 CLR 247 at 253-254 (Mason J).

[9] Second Reading Speech to the *Income Tax Laws Amendment Bill (No 2) 1981* (Cth) (Hansard, House of Representatives, 27 May 1981, pp 2684-5).

being."[10] Section 177E was targeted at the tax benefits obtained *by shareholders* and had the effect of assessing stripped profits in the hands of the vendor shareholder as if a dividend had been paid to them, without regard to whether a dividend may have been included in the assessable income of the stripper.

29. At the time of the enactment of s 177E, the expression "dividend stripping" was adopted and consistently used in both s 46A and s 177E. The scope of s 177E was broader because s 177E(1)(a)(ii) extended it to address schemes having "substantially the effect of a scheme by way of or in the nature of a dividend stripping", that is, schemes which stripped profits other than by way of a dividend (or a deemed dividend). Nevertheless, and although s 46A and s 177E addressed different tax mischiefs, the consistent use of the same expression in both sections is a firm indication that the legislature, at the time s 177E was enacted, was referring in both to the same kind of schemes.

30. Section 177D was not specifically targeted at dividend stripping schemes but as the general anti-avoidance provision that had the capacity to respond to schemes where a counterfactual involving the payment of a dividend could be established.

31. The scheme of the ITAA 1936 in respect of dividend stripping since the enactment of s 177E has been:

    (a) to deny tax-free status to a dividend in the hands of the dividend stripper, by s 46A and the provisions that replaced it; and

    (b) by s 177D and more particularly, s 177E, to include an amount in the assessable income of a pre-scheme shareholder who has participated in dividend stripping (or a scheme having substantially the effect of a dividend stripping scheme).

32. A further relevant feature of the statutory architecture is s 177F(3), which permits the making of a compensating adjustment where a determination has been made under s 177F(1) or (2A) to cancel a tax benefit. Section 177F(3)(a) provides that the Commissioner may, where it is fair and reasonable, make a determination that an amount that would not have been included in the taxable income of a taxpayer (who may be a different taxpayer to one to whom the Part IVA determination applied) if the scheme had not been entered into or carried out, will not be included in the assessable income of that taxpayer . It was also introduced in 1981 with s 177D and s 177E.

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[10] Explanatory Memorandum to the *Income Tax Laws Amendment Bill (No 2) 1981* (Cth), p 4; *CPH* at [108]-[109].

<u>The First Limitation – A Substantial Proportion of Accumulated Profit</u>

33. The first limitation adopted by the majority below is not a feature of the meaning of the term "dividend stripping", properly understood in light of its accepted meaning and the text of s 177E as a whole. The first limitation is also inconsistent with the statutory context and purpose of Part IVA.

34. ***First***, the majority's first limitation is inconsistent with the terms of s 177E(1)(b). That sub-section requires the Commissioner to form an opinion that the property disposed of as a result of a scheme within either limb of s 177E(1)(a) "represents, in whole or in part, a distribution… of profits of the company (whether of the accounting period in which the disposal occurred or of any earlier or later accounting period)".

35. There are two significant textual features of this provision. The first is that the required opinion is not that the disposal of property represents a distribution of "all profits" or "the profits", but simply "profits of the company". The second is that the bracketed words make clear that "profits" may be profits of the accounting period when the scheme was executed, *or* a later period (e.g. in the case of a "forward stripping"[11]), *or* an earlier period. Taken together, these features demonstrate that the drafters did not anticipate that a scheme within s 177E(1)(a) would necessarily have stripped *all* accumulated profits at a particular point in time. Rather, they evince an intention that the reference to a "dividend stripping" may encompass schemes which strip only some, but not all or even a "substantial proportion", of a company's profits.

36. ***Second***, the definition in *Fowler's*, adopted by Windeyer J and referred to above, does not include any suggestion that the dividend paid must substantially deplete profits of the company. Rather, the essence of the scheme described in that definition was the avoidance of tax by the conversion of profits into capital form, followed by a dividend paid to the stripper reducing but not necessarily exhausting the value of shares in the company. This is the content of the concept of dividend stripping that gives it a meaning that is not "so protean as to be meaningless": c.f. *BandF Investments* at [111(2)].

37. ***Third***, the first limitation is not consistent with the meaning of the expression "dividend stripping" as it was used across the ITAA 1936 at the time that s 177E was enacted. In particular, s 46A(3) of the ITAA 1936 provided that, in considering whether the payment of a dividend arose out of, or was made in the course of, a transaction, operation,

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[11] Explanatory Memorandum to the *Income Tax Laws Amendment Bill (No 2) 1981* (Cth), p 15.

undertaking, scheme or arrangement by way of dividend stripping, the Commissioner "shall take into consideration":

(a) whether the effect of the payment was "to reimburse the shareholder wholly or substantially for the amount or amounts paid by him in respect of the acquisition of the relevant shares"; and

(b) whether the value of the shares was "substantially less than the value of those shares at the time when they were acquired by the shareholder and, if so, whether the reduction in value was wholly or mainly attributable to the payment of a dividend to the shareholder by the company".

38. Each of these sub-paragraphs were included to capture different forms of dividend stripping.[12] There is no suggestion in these sub-paragraphs, however, that what was required for dividend stripping was a quantitative comparison between the amount stripped and the total accumulated profits. As to (a), the comparator was the "amount paid" by the stripper, *not* the accumulated profits of the target; the required equivalence was instead between the amount paid for the shares and the dividend. As to (b), it did not require the value of the shares to be *nil* ex-dividend, only "substantially less" than what they were cum-dividend.

39. There is no suggestion in either s 46A or s 177E, explicitly or by necessary implication, that the expression 'dividend stripping' required a substantial proportion of profits to be affected by the scheme.

40. ***Fourth***, to the extent that the majority below relied upon the reference at **FC**[325] to *Commissioner of Taxation v Consolidated Press Holdings Ltd (No 1)* (1999) 91 FCR 524 (***CPH FC***) at [161] in reaching the conclusion as to the first quantitative requirement at **FC**[361], [399] and [402], it does not support that conclusion. That paragraph in *CPH FC*, which contained an observation that the existence of "substantial assets other than profits … suggests that the scheme might not readily be described as or by way of a scheme in the nature of dividend stripping", was concerned with a factual scenario where there were substantial other assets, and a transfer of those assets as part of a larger

[12] Explanatory Memorandum to the *Income Tax Assessment Bill 1972* at p 4, referring to what became (by later amendment to the Bill) s 46A(3)(a) and (b) of the ITAA 1936. the later Explanatory Notes to amendments to the Bill which introduced s 46A(3) to it, sub-ss (a) and (b) were described as "features common to dividend stripping as the term is ordinarily understood" that "do not exist in normal commercial transactions".

corporate reorganisation. It was not an observation that supports the proposition that a scheme by way of or in the nature of a dividend stripping requires a substantial proportion of the dividends to be stripped.

41. ***Fifth***, the protean nature of the concept means that an analysis of prior cases for common characteristics, as the Full Court did in *CPH FC* at [136]-[137] by reference to the cases identified in *Patcorp,* and as the majority did at **FC**[361]-[367], has limited utility. Not only is such an exercise self-selecting—because the sample is limited to those cases that come before a court—but it can also tend to be self-defeating, by frustrating the legislature's intentional adoption of a protean term. The present case is a case in point. The recognition of the first limitation may encourage the partial or piecemeal stripping of profits.

42. ***Sixth***, as to the majority of the Full Court's identification of a common feature of past cases being the "substantial depletion" of the accumulated profits (**FC**[361]-[367), it is true that many of the schemes historically challenged by the Commissioner did involve the stripping of all or a large part of the accumulated profits of a company: e.g. *Rowdell Pty Ltd v Commissioner of Taxation (Cth)* (1963) 111 CLR 106. However, the Full Court erred by treating this as a necessary, core characteristic of dividend stripping, rather than a feature of the particular facts of those cases.

43. As indicated by the definition in *Fowler's* adopted by Windeyer J, the history of dividend stripping includes schemes that had as their purpose the avoidance of a tax on a company's undistributed profits above a certain threshold, known as "Div 7 tax" (imposed prior to the introduction of the imputation system on 1 July 1987), rather than the avoidance of tax on a shareholder. Such schemes did not always strip substantially all accumulated profits; they could be limited to what was necessary to avoid the imposition of Div 7 tax, or they could capitalise profits required by the company as working capital without the payment of Div 7 tax: see e.g. *Newton* (1957) 96 CLR 577 at 654-5 (HC), affirmed in (1958) 98 CLR 1 at 9-10 (PC), this being one of the examples identified by Gibbs J in *Patcorp* at 300. Further, the majority's reference in **FC**[361] to the "milking" of a target company in *Hancock* also does not import a requirement of exhaustion or near exhaustion. So much is illustrated in *Hancock* at 270-1, where Fullagar J noted that the vendor shareholder could only "obtain all the shares in Mulga Downs—a milked but by no means crippled Mulga Downs—if they could get their share of the available profits of that company without having to pay income tax thereon". The dividend required to give

effect to this scheme was only £50,000, significantly less than the book value of the company's net assets (£70,500). The stripping operation also left intact profits representing the company's principal asset (a cattle station and associated plant and livestock) that was undervalued in the company's accounts.

44. Further, in its adoption of the term 'substantial' (**FC**[361]), the majority of the Full Court has adopted a term that is quantitatively imprecise: "it is a word calculated to conceal a lack of precision … it can, in an appropriate context, mean real or of substance as distinct from ephemeral or nominal. It can also mean large, weighty or big. It can be used in a relative sense or can indicate an absolute significance, quantity or size".[13] In this case, the majority's adoption of the term does not derive from the statutory language, rather, it supposedly arises from the meaning of the expression "dividend stripping" itself as it is used in s 177E. However, the content given by the majority to such a substantiality requirement at **FC**[402] (requiring a 'substantial proportion' of profits to have been stripped) is not consistent with a concept of dividend stripping that is protean and adaptive and able to respond to the various ways in which dividend stripping might emerge. It is also inconsistent with the example given in *Fowler's* of a scheme where "the difference between the two prices [for the purchase and later resale of the shares in the target company] … did not exceed the amount of the dividend [paid to the stripper]".

45. The majority therefore erred at **FC**[361] insofar as they concluded that a scheme required profits greater than some quantitative threshold of substantiality to have been stripped, and also at **FC**[402] in taking the further step of imposing a comparison between the stripped amount and the accumulated profits.

46. ***Seventh***, in any event, the Debt Forgiveness Schemes were not schemes by way of or in the nature of dividend stripping, rather, they were schemes having substantially that effect within the meaning of s 177E(1)(a)(ii) of the ITAA 1936. This second limb of s 177E[14] encompasses schemes which strip profits by means other than by way of a dividend. The means available to a taxpayer may not always enable the stripping of all profits of the target company. In this case, the sale of Plantic provided the opportunity for profits to be stripped, and the means was the forgiveness of its debts which was limited by the amount of those debts (representing only part of the accumulated profits of GSM). Significantly,

[13] *Tillmanns Butcheries Pty Ltd v Australasian Meat Industry Employees' Union* (1979) 42 FLR 331 at 348 (Deane J).

[14] Discussed in paragraph 29 above.

the Debt Forgiveness Schemes *fully exhausted* the means by which profits were capable of being stripped, that is, the entirety of the debts owed by Plantic were forgiven.

47. For these reasons, all of the textual, contextual, and purposive considerations favour a construction that does not the exclude from the scope of s 177E of schemes that milk a target company of some, although not "substantially all" profits.

<u>The Second Limitation – Substantially Tax Free</u>

48. The majority's recognition of the second limitation (**FC**[324]-[325]) originates in the Full Court's remarks in *CPH FC* at [159] and [162]-[163], that "[t]he critical point is that the vendor shareholders received a consideration which is in a tax-free or largely tax-free form", and that the existence of "a significant assessable capital gain … tends to suggest that the scheme may not fall within the first limb of s 177E(1)(a)".

49. These remarks were *obiter*, as was made clear at *CPH FC* at [164]. However, they were repeated by this Court in *CPH* at [129], in the context of the applicable purpose test, which was held to be that "the required tax avoidance purpose" was "ordinarily … that of enabling the vendor shareholders to receive profits of the target company in a substantially tax-free form, thereby avoiding tax that would or might be payable if the target company's profits were distributed to shareholders by way of dividends".

50. Nevertheless, as indicated by the use of the qualifying word 'ordinarily', this Court in *CPH* did not resolve whether avoidance of substantially all tax on the accrued profits was strictly necessary, nor whether it was a quantitative requirement of the effect of a scheme.

51. These issues squarely arise for decision in this case, if, despite the arguments in respect of Ground 2, this Court upholds the majority's decision that it was necessary to take into account the effect of the s 177D Determination in assessing the effect of the Debt Forgiveness Schemes. For the reasons which follow, this Court should hold that it is not a core characteristic of dividend stripping schemes that vendor shareholders (or their associates) receive profits in a substantially tax-free form.

52. ***First***, nothing in the text of s 177E suggests a requirement that there be an amount that is made substantially tax free. Further, the immediate statutory context, including the location of s 177E in Part IVA, weighs against this limitation. As this Court held in *CPH* at [132], s 177E generally, and the expression "dividend stripping" specifically, must be construed on the basis that s 177E is located within Part IVA "for a reason related to the necessity to supplement, in a particular respect, the general anti-avoidance provisions".

The general definition of a tax benefit in Part IVA in s 177C is not constrained by any requirement of substantiality; the non-inclusion of "an amount" in taxable income is sufficient for there to be a tax benefit within the meaning of s 177C(1)(a). In the case of a scheme within s 177E, that amount is deemed by s 177E(1)(f) to be the notional amount defined by s 177E(1)(c). In turn, the notional amount is the amount which, if the target company had paid a dividend of an amount equal to the amount of profits the distribution of which is in the Commissioner's opinion represented by the disposal referred to in s 177E(1)(a), would have been included or might reasonably be expected to have been included in the assessable income of the taxpayer.

53. As such, provided that the dominant purpose of the scheme was the non-payment of tax on profits of the company that would have otherwise been distributed as dividends (as required by *CPH*, and as it was found to be in this case), the amount of alternative tax that is payable by the vendor shareholder (or a related party) is irrelevant to a consideration of effect, at least when it is less. As the primary judge correctly observed at **J**[497], s 177E can apply where higher tax would have been "payable on dividends, albeit a lower amount of tax is still payable as a result of the scheme".

54. ***Second***, the observations in *CPH FC* at [162], relied on by the majority below, were based on the Full Court's identification at [136]-[137] of certain supposedly essential characteristics of dividend stripping schemes, drawn from four cases referred to by Gibbs J in *Patcorp* at 300. However, as discussed above, the expression "dividend stripping" is protean, and there is limited utility in drawing conclusions from the particular facts of those cases, as those particular characteristics cannot become de facto statutory criteria that limit the adaptability of the concept.

55. ***Third***, the second limitation identified by the majority in the Full Court has the effect of *creating* a lacuna that does not exist in the operation of Part IVA, which is antithetical to the legislature's original purpose in enacting s 177E, as discussed above. It does so by, on the facts of this case, rendering the GSM Debt Forgiveness Scheme, which had the requisite avoidance purpose involving a tax reduction of more than $3 million (even if the effect of the s 177D Determination is taken into account), untouched by Part IVA.

56. ***Fourth***, while the Explanatory Memorandum to the *Income Tax Laws Amendment Bill (No 2) 1981* asserts that the effect of dividend stripping is "to place company profits in the hands of shareholders in a tax-free form, in substitution for taxable dividends", this is no more than a statement in the extrinsic materials. It should not be elevated to a term of

the statute when the statute itself suggests no such thing. Nor should it drive the interpretation of an expression which otherwise already had an established meaning in tax avoidance discourse. There is no basis in the language or remaining statutory context of s 177E(1)(a) to confine the first limb to schemes that involve a complete or almost complete avoidance of tax in the hands of anyone, let alone to confine the second limb in that way.

57. ***Fifth***, if the avoidance of "substantially all tax" is not inherent in the protean meaning of the expression "dividend stripping", but is part of the purpose test recognised by this Court in *CPH*, then, based on the majority's finding that the Debt Forgiveness Schemes had the dominant purpose of avoiding all tax (**FC**[357]), on the Full Court's analysis, the Debt Forgiveness Schemes fall within s 177E. That is notwithstanding the fact that the dominant purpose of the scheme was frustrated by the Commissioner's action taken under s 177F in respect of a scheme which met the requirements of s 177D: **FC**[397]-[398].

58. *Sixth*, as to Logan J's judgment in concurrence on this point, his Honour's conclusion that profits must be converted into something that "will not be taxed" puts the threshold even higher than the majority. But, as discussed above, there is no legislative foundation for such a requirement. Further, Logan J's observation at **FC**[55], that the effect of the schemes was to increase the amount of the capital gain on the sale of Plantic's shares by the MFT, was irrelevant. Plantic was not the target company of the Debt Forgiveness Schemes. Rather, it was simply the increase in the value of Plantic's shares that was part of the mechanism by which profits were stripped from the target entities, GSM and Tironui, bringing the schemes within the second limb of s 177E(1)(a) of the ITAA 1936.

59. The majority's reasoning elevates an *obiter* remark in *CPH FC* about substantial avoidance of tax into a seventh characteristic of a dividend stripping scheme, additional to the six identified at *CPH FC* at [136], [137]. This marks a substantial change to the construction of s 177E that is unsupported by the statutory context.

Ground 2: The Application of s 177E is Unaffected by a Related s 177D Determination

60. The Full Court concluded that, when applying s 177E(1)(a)(ii), the effect of each Debt Forgiveness Scheme was to be assessed having regard to the cancellation of the tax benefit arising from the s 177D Determination. The reasons for that conclusion were that: (a) questions of effect are to be determined with the benefit of hindsight; and (b) the exercise of power under s 177F(1)(c) has the effect of determining that a loss "was not

incurred by the taxpayer during that year of income", and the "effect of the statutory language is to deny the crystallisation of the capital loss" retrospectively: **FC**[373].

61. This analysis conflated two distinct questions. The critical question was not whether a determination under s 177F has a retrospective effect, as it may for some purposes. Rather, the critical question was whether that effect is taken into account in assessing whether a scheme is a dividend stripping scheme (or a scheme having substantially such an effect) for the purposes of s 177E. The majority erred by assuming that the answer to the first question also answered the second, and thus erred in holding that the effect of the Debt Forgiveness Schemes for the purpose of applying s 177E(1)(a)(ii) of the ITAA 1936 had to take account of the consequences of the s 177D Determination. As the primary judge held at **J**[487]-[488], the correct answer to the second question is "no".

62. ***First***, the language of s 177E(1)(a)(ii) indicates that the relevant time to determine a scheme's effect is the time of the disposal of the relevant "property of the company" (here, the chose in action relating to the Plantic loans).

63. That follows because the disposal of property of the target company required by s 177E(1)(a) must be "as a result of" a qualifying scheme. As such, whether a scheme meets either sub-paragraph (i) or (ii) must be capable of being judged at the time the steps in the scheme that bring about the disposal of property have been completed.

64. ***Second***, properly construed, the reference to "effect" in s 177E(1)(a)(ii) is to the results of the steps constituting the scheme. That is because, as this Court held in *CPH* at [140], the purpose of the second limb of s 177E was to broaden the scope of the section beyond traditional schemes captured by the first limb (which strip profits by a dividend or a deemed dividend), to modes of disposition of profits other than dividends or deemed dividends, reflecting the protean nature of the concept. It was not to invite a broader enquiry into the events which may ultimately flow from the scheme, in conjunction with other matters and circumstances, not required in the application of the first limb.

65. In any event, the s 177D Determination was not an "effect" of the Debt Forgiveness Schemes, even though the BBG Share Sale was a step in the Debt Forgiveness Schemes. Rather, the s 177D Determination reflected the Commissioner's application of s 177F(1)(c) to cancel the capital losses, having regard to the matters referred to in s 177D(2) as to the objective purpose of the taxpayer.

66. ***Third***, the relevant purpose is a purpose of bringing about a tax effect of the same kind which is characteristic of dividend stripping: **FC**[337], [340]. The Full Court's construction has the consequence that the assessment of purpose and effect may occur at different times and on different "taxable facts".[15] The majority acknowledged that "[p]urpose has a prospective connotation" and agreed with the primary judge that purpose was to be judged by reference to what might have been expected to have been achieved by the scheme when it was entered into: **FC**[342]-[344]. Furthermore, as this Court decided in *CPH* at [138], the reference to effect in s 177E(1)(a)(ii) does not require the element of purpose to be discarded.

67. ***Fourth***, the majority's construction is not supported by the broader legislative context. A dividend strip will often involve multiple and distinct tax mischiefs, with both the vendor shareholder, and the stripper, avoiding tax. The Act has long provided for multiple responses to dividend stripping arrangements. As discussed above, former s 46A of the ITAA 1936 was enacted to prevent the *stripper* (being the acquiring company) from obtaining a tax rebate on dividends when it already had a tax deduction;[16] similarly s 207-145 of the ITAA 1997 which denies tax offsets for franked distributions. In contrast, s 177E was enacted to prevent the avoidance of tax by the *vendor shareholder* on the receipt of consideration for the sale of its shares which, pre-CGT, it obtained tax free. These provisions could apply, and are intended to apply, simultaneously to different taxpayers in respect of the same or related schemes.

68. However, the majority's reasoning allows s 177D to limit or deny the operation of s 177E (or, indeed, other sections such as s 46A before its repeal) to a distinct tax mischief, distorting the application of distinct legislative measures directed to related schemes. In this case, the effect of the BBG Share Sale within the context of the Debt Forgiveness Schemes was to maintain, artificially, pre-existing capital losses within the MFT for future use.

69. In the absence of an express statutory command requiring the cancellation of one tax benefit to be taken into account in assessing the existence of another, the construction which is consistent with context and the purpose of Part IVA as a strengthening of anti-

15 *Commissioner of Taxation v Thomas* (2018) 264 CLR 382 at [84].

16 Inserted by the *Income Tax Assessment Act (No 3) 1972* (Cth).

avoidance legislation[17] is one that permits the Commissioner to cancel each benefit accruing to each taxpayer separately. The contrary approach of the majority leaves unaddressed the transfer of some $16 million to the corpus of the MFT, available for distribution to Mr Merchant, or any beneficiary, tax free: **FC**[386].

70. ***Fifth***, the separate power to make compensating adjustments in s 177F(3) is an express legislative solution to the concern identified by the majority: **FC**[410]. That s 177F(3) was not raised by the parties was a matter that vexed the majority: **FC**[410]. However, contrary to the suggestion at **FC**[407]-[410], s 177F contemplates that an application for a compensating adjustment may be made well *after* a s 177F(1) determination has been made (indeed, there is no time limit on amendment: s 177G). Further, a party that is dissatisfied with a decision on that application has separate objection rights: ss 177F(5), (7). Consistently with the parties' approach below, that permits the question of what adjustments should be made to be addressed, if it is necessary to do so, once objection and appeal rights have been exhausted in respect of whether the tax benefits have been correctly identified and cancelled. That is an orthodox approach as it avoids the potential prejudice to the revenue that may arise from an earlier s 177F(3) determination being made: see *Australian and New Zealand Banking Group Ltd v Federal Commissioner of Taxation* (2003) 137 FCR 1 at [48]-[57]. If the s 177F determination in issue is ultimately set aside by the Court, the Commissioner may be out of time to further amend the assessment of the taxpayer who benefits from the s 177F(3) compensating adjustment.

71. The fact that the ITAA 1936 facilitates a later s 177F(3) adjustment is a strong indication that it is not the role of the Court to attempt to resolve a perceived unfairness in analysing s 177D and s 177E as they apply to different taxpayers by interpreting one to have an effect on the operation of the other.

72. If the Commissioner is successful in this appeal, and if the s 177D Determination is also upheld by this Court, the Commissioner will make a compensating adjustment under s 177F(3)(a) of the ITAA 1936. Specifically, the Commissioner is of the opinion that, if the Debt Forgiveness Schemes had not been entered into, there would not have been a capital gain (from the MFT) assessable to GSM in the 2015 income year. If all the Commissioner's Determinations are upheld, the Commissioner is of the opinion that on the facts of this case it would be fair and reasonable that this capital gain should not be

17 *CPH FC* (1991) 91 FCR 524 at [148]-[152]; *Income Tax Laws Amendment Bill (No 2) 1981 Explanatory Memorandum* at pp 4, 14.

included in GSM's assessable income. In this event, the Commissioner will determine that the amount of the capital gain from the MFT should not have been included in GSM's assessable income and will issue an amended assessment to give effect to this.

73. ***Sixth***, arbitrary results follow if the effect of a determination under s 177F is taken into account in assessing the effect of Part IVA in relation to a different tax benefit. In this case, the majority considered the s 177D Determination prior to the s 177E Determinations. Had the majority in the Full Court considered the s 177E Determinations first, those determinations are likely to have been upheld in respect of both Debt Forgiveness Schemes. Alternatively, had the majority in the Full Court considered s 177D first, but then considered the GSM Debt Forgiveness Scheme prior to the Tironui Debt Forgiveness Scheme, their Honours would likely still (on their analysis) have concluded that insufficient tax was avoided because the increased gain resulting from the GSM Debt Forgiveness more than exhausted the capital losses in the MFT (given the findings on Ground 1). But a change in the order in which the schemes were considered would probably have produced the opposite conclusion with respect to Tironui, because the MFT would have had no remaining capital losses to offset the gain resulting from that scheme: c.f. **FC**[380].

74. None of these issues arise if the effect of the s 177D Determination is disregarded for the purposes of considering the effect of the Debt Forgiveness Schemes. The lack of specific statutory architecture dealing with circumstances where both s 177D and s 177E are engaged is a strong legislative indication that such schemes are to be assessed independently of each other, and that any "unfairness" (**FC**[410]) is to be resolved using s 177F(3) where the criteria in that provision are met. Where those criteria are not met, the concurrent operation of s 177D and s 177E should be accepted as being intended by the legislature.

75. The construction preferred by the Full Court constrains Part IVA by limiting its ability to capture all tax benefits obtained from schemes to which it is intended to apply. Tax schemes continue to develop to seek to avoid the operation of Part IVA, as they always have (**J**[456]). The Full Court's construction permits Part IVA to respond to only one tax benefit in a case where s 177E and s 177D both apply in the circumstances, even though two or more benefits are obtained by different taxpayers executing different schemes. This defeats the evident legislative intention.

Cross-Appeal: The Application of s 177E is Unaffected by a Related s 177D Determination

76. GSM and Mr Merchant have been granted separate special leave to appeal the judgment of the majority of the Full Court, in High Court proceeding S158/2025.

77. In that proceeding, GSM contends that the Full Court should have upheld the appeal from the s 177D Determination, on the basis that it was an error to find that the dominant purpose of the BBG Share Sale Scheme was to obtain a tax benefit.

78. If GSM's appeal is successful, then the Commissioner seeks special leave to cross-appeal because, if s 177D is found not to apply to the BBG Share Sale Scheme, then: (a) the Full Court's analysis of the effect of the GSM Debt Forgiveness Scheme for the purpose of applying s 177E(1)(a)(ii) of the ITAA 1936 must be erroneous insofar as it took into account the effect of the s 177D Determination; and (b) the Full Court should have concluded that s 177E applies to the GSM Debt Forgiveness Scheme.

79. As set out above, the majority of the Full Court held that the GSM Debt Forgiveness Scheme did not have the requisite effect of a dividend stripping scheme because it failed two quantitative elements: it did not strip a substantial proportion of GSM's accumulated profits and it did not avoid substantially all tax on the distributed profits: **FC**[373], [382]-[394], [402].

80. In the absence of the s 177D Determination, the majority's analysis with respect to the effect of the GSM Debt Forgiveness Scheme would necessarily have been different. At **FC**[395], the majority specifically emphasised that "[h]ad the scheme operated as intended and the capital gain attributable to the debt forgiven amount been wholly or substantially offset by capital losses, a different conclusion may have been reached".

81. If the cancellation of the capital loss from the BBG Share Sale is disregarded (because the s 177D Determination is not upheld), then the conclusion of the majority that "the value transferred from GSM … was only partly sheltered by capital losses" (FC[401]) cannot be maintained. In that event, the stripped profits were received by the MFT entirely tax free. That is because the capital loss from the BBG Share Sale increased the total available capital losses in the year ended 30 June 2015 to $96,655,732.12 (amounts in **FC**[375(2)] plus **FC**[29]), which exceeded (and thus completely sheltered) the total capital gain of $74,005,102,[18] from the sale of the Plantic shares plus other capital gains

[18] This is equal to the capital gain from the Plantic share sale of $73,539,297, plus the other capital gains of $465,805: **FC**[375(3)(ii)].

in that year. As such, there was an accretion to the capital of the MFT as a result of the scheme in the amount of the debts forgiven, which was then available to distribute as capital to any of the MFT's discretionary objects tax free.

82. Before the Full Court, Mr Merchant contended that the MFT could distribute the accretion to capital to GSM (as a corporate beneficiary), in which case profits would ultimately still be taxed when distributed by GSM by dividend to its shareholder, Mr Merchant. This contention was correctly rejected by the majority of the Full Court at FC[395], by reference to the decision of the Full Court in *Federal Commissioner of Taxation v Michael John Hayes Trading Pty Ltd* (2024) 303 FCR 62 at [40] (Bromwich, Thawley and Hespe JJ). Further and in any event, the suggestion or prediction that the accretion to capital would be distributed to GSM in the future is without foundation in the evidence. As a matter of fact, at the end of the 2015 financial year, the MFT did not make any appointment of the trust's capital (**FC**[387]), and it would be contrary to Mr Merchant's interests for the trustee to appoint the capital to GSM (where it would need to be distributed as a dividend in the future) rather than directly to Mr Merchant.

83. With respect to the first quantitative element, for the reasons set out above in respect of Ground 1(a), it is not a necessary condition of a dividend stripping scheme that substantially all, or a substantial proportion, of the accumulated profits of the target company be stripped. While the debt forgiven by GSM represented around 25% of its accumulated profits, the GSM Debt Forgiveness Scheme still had the effect of Mr Merchant avoiding $13,602,000 in tax for which he would have been liable had GSM's profits been paid as a dividend (**FC**[389], being 27.14% of $50,192,000), which is by any measure a substantial amount. The quantum of the stripping both exhausted the means (forgiving the whole debt) and remained within the boundary of the shelter provided by the loss on the BBG Share Sale.

84. Thus, if GSM is successful in arguing that the s 177D did not apply to the BBG Share Sale Scheme, then this Court should find that s 177E applies, and the Commissioner should wholly succeed in respect of the GSM Debt Forgiveness Scheme.

Part VII: Orders Sought – Commissioner's Appeal

85. The appeal be allowed.

86. Set aside the orders made by the Full Court of the Federal Court of Australia on 18 June 2025 and, in lieu thereof, order that:

    (a) the appeal to the Full Court of the Federal Court be dismissed with costs; and

    (b) the Respondents pay the Appellant's costs of the appeal to the Full Court of the Federal Court.

87. The Respondents pay the Appellant's costs of the appeal in this Court.

Part VII: Orders Sought – Commissioner's Cross-Appeal

88. In the event that GSM is successful in High Court matter S158/2025, the following orders should be made:

    (a) The cross-appeal be allowed.

    (b) Set aside order 2 made by the Full Court of the Federal Court of Australia on 18 June 2025.

    (c) GSM and Mr Merchant pay the Commissioner's costs of the appeal in this Court.

Part VIII: Time Required for Presentation of Argument

89. The Appellant estimates that up to four hours will be required for the presentation of his oral argument, for both this appeal and the Respondents' appeal in S158/2025, plus up to 30 minutes in reply.

Dated: 27 November 2025

KDeards.

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K Deards with D Ananian-Cooper and N Derrington

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ANNEXURE TO APPELLANT'S SUBMISSIONS

No	**Description**	**Version**	**Provisions**	**Reason for providing this version**	**Applicable date or dates**
1.	*Income Tax Assessment Act (No 3) 1972* (Cth)	As enacted: 7 June 1972		Insertion of s 46A of ITAA 1936, providing statutory context when s 177E was later enacted	N/A
2.	*Income Tax Laws Amendment Act (No 2) 1981* (Cth)	As enacted: 24 June 1981		Insertion of Part IVA of ITAA 1936	N/A
3.	*Taxation Laws Amendment Act (No 3) 1987* (Cth)	As enacted: 13 November 1987		Insertion of ss 160APHA and 160APP, illustrative of the history of regulating dividend stripping	N/A
4.	*Income Tax Assessment Act 1936* (Cth)	As at 20 March 2015 (Compilation No 126)	Part IVA	Act in force on the date the Debt Forgiveness Scheme was executed	2 April 2015
5.	*Income Tax Assessment Act 1997* (Cth)	As at 20 March 2015 (Compilation No 135)	ss 207-145 - 207-155	Act in force on the date the Debt Forgiveness Scheme was executed	2 April 2015