# HIGH COURT OF AUSTRALIA

GLEESON CJ,
McHUGH, GUMMOW, KIRBY, HAYNE, CALLINAN AND HEYDON JJ

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COMMISSIONER OF TAXATION APPELLANT

AND

LINTER TEXTILES AUSTRALIA LTD (IN LIQUIDATION) RESPONDENT

*Commissioner of Taxation v Linter Textiles Australia Ltd (In Liquidation)*
[2005] HCA 20
*26 April 2005*
S606/2003

**ORDER**

1. *Leave to amend notice of appeal granted and amended notice of appeal treated as filed and served.*

2. *Appeal allowed.*

3. *Set aside the orders of the Full Court of the Federal Court of Australia made on 14 April 2003 and in their place order:*

   *(a) appeal allowed with costs;*

   *(b) set aside the orders of Hely J made on 6 September 2002 and in their place order:*

      *(i) objection decision dated 9 February 2001 affirmed;*

      *(ii) applicant to pay the costs of the proceedings before Hely J.*

4. *Appellant to pay the respondent's costs of and incidental to the proceedings in this Court.*

On appeal from the Federal Court of Australia

**Representation:**

M R Aldridge SC with S J McMillan and N Perram for the appellant (instructed by Australian Government Solicitor) at the hearing on 3 August 2004

A Robertson SC with M R Aldridge SC and S J McMillan for the appellant (instructed by Australian Government Solicitor) at the hearing on 9 December 2004

D H Bloom QC with J Davies SC and S H Steward for the respondent (instructed by Phillips Fox)

## CATCHWORDS

### Commissioner of Taxation v Linter Textiles Australia Ltd (In Liquidation)

Income tax – Allowable deductions – Loss carry forward provisions – Losses incurred by taxpayer company in preceding years – Requirement of continuity during year of income of beneficial ownership in shares in the taxpayer company that carry between them various rights – Winding-up order made in respect of parent of taxpayer company and subsequently in respect of taxpayer company – Liquidators appointed in each case – Whether shares in the taxpayer company still carried between them the rights required to be attached to those shares.

Income tax – Allowable deductions – Loss carry forward provisions – Losses incurred by taxpayer company in preceding years – Requirement of continuity during year of income of beneficial ownership in shares in the taxpayer company that carry between them various rights – Winding-up order made in respect of parent of taxpayer company and subsequently in respect of taxpayer company – Liquidators appointed in each case – Whether, subsequent to winding up of parent company, the shares held by parent company in the taxpayer company were not "beneficially owned" by the parent company.

Income tax – Allowable deductions – Loss carry forward provisions – Losses incurred by taxpayer company in preceding years – Discretion in Commissioner of Taxation to apply additional requirements for carrying forward previous tax losses – Requirement that voting power in taxpayer company be controlled, or capable of being controlled, by an individual or two or more persons not being companies – Ultimate holding company of parent of taxpayer company was trustee of two trusts administered for benefit of a family – Whether family still controlled voting power in taxpayer company.

Statutes – Construction – Loss carry forward provisions in income tax legislation – Meaning of requirement that shares held in taxpayer company be "beneficially owned" by parent company – Effect of intervening winding-up orders and appointment of liquidators in each company – Meaning and purpose of the requirement of beneficial ownership in this context – Relevance and utility of analysis by reference to the law of trusts and equitable ownership of property.

Corporations – Involuntary winding up – Whether company in liquidation divested of beneficial ownership of assets – Whether liquidator trustee for the benefit of creditors.

Trusts – Whether liquidator trustee for the benefit of creditors.

Appeal – Appeal before High Court – Application to amend notice of appeal to raise explicitly the application of statute to the facts and circumstances of the case – Whether amendment should be granted – Whether any procedural injustice involved in such amendment – Considerations relevant to the determination of application.

Words and phrases – "beneficially owned", "trustee", "satisfaction".

*Income Tax Assessment Act* 1936 (Cth), s 80A.

1 GLEESON CJ, GUMMOW, HAYNE, CALLINAN AND HEYDON JJ. The appellant ("the Commissioner") appeals from the judgment of the Full Court of the Federal Court (Hill, Goldberg and Conti JJ)[1]. The Full Court dismissed the Commissioner's appeal against the judgment of Hely J[2]. His Honour upheld an "appeal" by the respondent taxpayer ("Linter Textiles") against the disallowance by the Commissioner of its objection to an assessment of income tax under the *Income Tax Assessment Act* 1936 (Cth) ("the Act") for the year of income ended 30 June 1992.

2 These reasons seek to demonstrate that the appeal to this Court should be allowed, but only on a ground available to the Commissioner by amendment of the grounds of appeal. The necessary leave for that amendment should be granted.

The effect of winding-up orders

3 At all material times, the taxpayer, Linter Textiles, was a wholly owned subsidiary of Linter Group Ltd ("Linter Group"). The ultimate holding company of Linter Group was Pochette Nominees Pty Ltd ("Pochette"). That company was the trustee of two trusts, which, while described as discretionary trusts, nevertheless were administered solely for the benefit of the Goldberg family[3].

4 On 12 April 1991, an order was made by the Supreme Court of New South Wales that Linter Group be wound up under the *Companies (New South Wales) Code* ("the Code"). Thereafter, on 24 February 1992, an order was made by that Court for the winding up of Linter Textiles under the Corporations Law ("the Law"). In each case, the Court appointed a liquidator to the company. What were the legal consequences of those orders and appointments? The answer supplies the context in which the issues in this Court are to be considered.

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**1** *Commissioner of Taxation v Linter Textiles Australia Ltd (In liquidation)* (2003) 129 FCR 42.

**2** *Linter Textiles Australia Ltd (In liquidation) v Federal Commissioner of Taxation* (2002) 20 ACLC 1708; 50 ATR 548.

**3** In this appeal, no question has arisen respecting the treatment of discretionary trusts in Taxation Determination TD 2000/27, a public ruling for the purposes of Pt IVAAA of the *Taxation Administration Act* 1953 (Cth).

5 Each liquidator, as Deane and Gaudron JJ put it in *Tanning Research Laboratories Inc v O'Brien*[4], "assume[d] a responsibility, as an officer of the court, to administer the statutory scheme for the winding up of a company". In respect of Linter Group, s 374(1) of the Code stated that the liquidator "shall take into his custody or under his control all the property to which [Linter Group] is or appears to be entitled". Section 374(2) empowered the Supreme Court on the application of the liquidator by order to direct that all or any part of the property of Linter Group vest in the liquidator; if such an order were made, thereupon the property in question would vest in the liquidator. No such order was made.

6 It may be noted that rather differently expressed provision was made in the Code respecting the effect of a voluntary winding up. Section 394(1) of the Code provided that, from the commencement of the winding up, the company was to cease to carry on its business "except so far as is in the opinion of the liquidator required for the beneficial disposal or winding up of that business, but the corporate state and corporate powers of the company, notwithstanding anything to the contrary in its articles, continue until it is dissolved". Section 493(1) of the Law was in similar terms. It will be necessary later in these reasons to note the significance that has been attached in some of the cases to distinctions between voluntary and involuntary winding up.

7 Another consequence of the order made for the winding up of Linter Group was provided in s 371(2) of the Code. No action or other civil proceeding might be commenced or be proceeded with against Linter Group without the leave of the Supreme Court in accordance with such terms as the Supreme Court imposed.

8 The Law contained provisions to like effect of s 371 and s 374 of the Code, and these operated upon the winding up of Linter Textiles[5]. As with Linter Group, no vesting order was made in respect of the assets of Linter Textiles.

9 Section 58 of the *Bankruptcy Act* 1966 (Cth) provides for the automatic vesting in the Official Trustee of the property of the bankrupt. However, as exemplified by the above provisions of the Code and the Law, the successive

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**4** (1990) 169 CLR 332 at 352.

**5** Sections 471(2) and 474 respectively. Like provision is now made in the *Corporations Act* 2001 (Cth), ss 471B and 474 respectively.

companies statutes have not included an equivalent of s 58[6]. It also should be noted that it has long been settled that an action commenced at the instigation of the liquidator would nevertheless be instituted by the company as the party on the court record[7].

10 As Hely J pointed out[8], it was not an inevitable consequence of the orders for the winding up of Linter Group and Linter Textiles that they be dissolved. The Code (s 383) and the Law (s 482) empowered the Supreme Court to order the stay or termination of the winding up[9]. His Honour added[10]:

> "Where an order is made terminating the winding up, directions may be given with a view to restoring management and control of the company to its officers. It was accepted by counsel for the Commissioner that if an order staying or terminating the winding up were made, the company would thereupon resume beneficial ownership of its assets."

11 That reference to beneficial ownership introduces the issues of revenue law which arise on this appeal.

Loss carry forward provisions

12 On 23 December 1999, the Commissioner issued an assessment under the Act against the taxpayer, Linter Textiles, for the year ended 30 June 1992 ("the 1992 year"). In the 1992 year, Linter Textiles derived as assessable income an amount of $10,163,773, but sought to carry forward certain losses. Generally speaking, in the 1992 year, a taxpayer which in preceding years had incurred or was deemed itself to have incurred a loss was entitled to a deduction for the year of income for that loss which the taxpayer was able to carry forward. The Full Court approached the matter on the basis that the losses which Linter Textiles

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**6** *Tanning Research Laboratories Inc v O'Brien* (1990) 169 CLR 332 at 341, 352-353.

**7** *Jones v The Davies Franklin Cycle Co Ltd* (1902) 27 VLR 649; *Growden v Wiltshire* (1935) 52 CLR 286.

**8** (2002) 20 ACLC 1708 at 1712; 50 ATR 548 at 553.

**9** *McAusland v Commissioner of Taxation* (1993) 47 FCR 369 at 372-374.

**10** (2002) 20 ACLC 1708 at 1713; 50 ATR 548 at 553.

sought to carry forward had been incurred after the 1989 year of income, with the consequence that the relevant provision was s 79E, rather than s 80 which would have applied had the losses been incurred in an earlier year[11].

13 In what appears to have been accepted as the year ended 30 June 1990 ("the loss year"), Linter Group had incurred a tax loss of $9,929,676. By operation of s 80G of the Act, the Linter Group loss was deemed to have been incurred by Linter Textiles, the taxpayer, in the loss year. Linter Textiles itself had incurred a tax loss of $10,393,871. Section 80G of the Act made detailed provision for the transfer of losses within a company group. It is common ground that, but for the arguments turning upon the consequences for the Act of the winding-up orders, the losses from the loss year were available to Linter Textiles to offset against its assessable income for the 1992 year. In particular, there is no separate question disputing the operation of s 80G. Rather, the critical questions concern the construction of s 80A in the light of the consequences of the winding-up orders. The losses in question were not available to Linter Textiles unless the criteria in s 80A were satisfied.

14 The entitlement under the income tax law to carry forward losses has been subject to limitations and conditions which have changed as the Act has been amended from time to time. The legislative history, beginning with the *Income Tax Assessment Act* 1944 (Cth) ("the 1944 Act"), was traced by Hely J. The 1944 Act added what was then s 80(5), the forerunner of s 80A, the provision in issue here.

15 The 1944 Act was what now would be called an anti-avoidance measure. In the Explanatory Note to what became s 80(5), the Treasurer (the Hon J B Chifley) had said:

> "Whilst a company is an entity separate and distinct from its shareholders, the shareholders are the real owners of the business carried on by the company and there is no justification for the allowance of a loss sustained by an entirely different set of shareholders in earlier years."

These notions of ownership and control, and of form and substance, have, in varying degrees, also informed the later legislation, including that with which this appeal is concerned.

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**11** (2003) 129 FCR 42 at 45.

16 The *Income Tax and Social Services Contribution Assessment Act (No 3)* 1964 (Cth) ("the 1964 Act") omitted s 80(5) and included s 80A[12] in a form which then was replaced by the s 80A inserted by the *Income Tax Assessment Act* 1973 (Cth) ("the 1973 Act")[13]. Section 80A was amended by statutes including the *Taxation Laws Amendment Act (No 2)* 1990 (Cth) ("the 1990 Act"). The 1990 Act introduced s 79E, to which reference has been made above, and inserted references to the new section into s 80A[14]. In general terms, the Explanatory Memorandum on the Bill for the 1964 Act spoke of the requirement of a substantial continuity of beneficial ownership, and that for the 1973 Act spoke of the strengthening of the "continuing ownership test".

Section 80A(1)

17 It is convenient to turn now to s 80A(1). It will be necessary later in these reasons also to consider s 80A(2), (3). So far as is relevant, the text of s 80A(1) was as follows:

> "[A] loss incurred by a company in a year before the year of income shall not be taken into account for the purposes of section 79E, 79F, 80, 80AAA or 80AA unless –
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> (a) the company satisfies the Commissioner; or
>
> (b) in the case of a company that is not a private company in relation to the year of income, the Commissioner considers that it is reasonable to assume,
>
> that, at all times during the year of income, shares in the company *carrying between them –*
>
> (c) *the right* to exercise more than one-half of the voting power in the company;
>
> (d) *the right* to receive more than one-half of any dividends that may be paid by the company; and

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**12** By s 17 of the 1964 Act.

**13** By s 8 of the 1973 Act.

**14** By ss 11 and 59, Sched 1, Pt 1, Sched 1, Pt 2.

(e) *the right* to receive more than one-half of any distribution of capital of the company,

*were beneficially owned* by persons who, at all times during the year in which the loss was incurred, beneficially owned shares in the company carrying between them rights of those kinds." (emphasis added)

For the present facts, "the company" is Linter Textiles and the "persons" is Linter Group.

18 In this Court, as in the Federal Court, two issues arise respecting the application of s 80A(1). The first is whether, by reason of the order for the winding up of Linter Textiles, the taxpayer, the shares of Linter Group in Linter Textiles ceased to be shares "carrying between them" the rights identified in pars (c), (d) and (e) of s 80A(1). The second is whether, by reason of the order for the winding up of Linter Group, it no longer "beneficially owned", within the meaning of s 80A(1), the shares it held in Linter Textiles.

The first issue concerning s 80A(1)

19 This turns upon the construction of the expression "shares in the company carrying between them" the rights to exercise more than one-half of the voting power, to receive more than one-half of any dividends that may be paid and to receive more than one-half of any distribution of capital. The Commissioner submits that, as a consequence of the making of the order on 24 February 1992 for the winding up of Linter Textiles, it could not be said that at all times during the 1992 year there were shares in Linter Textiles which carried those rights. This is because the exercise of the rights in question was constrained by the supervening appointment of the liquidator to Linter Textiles and the consequential operation of the companies legislation.

20 The Commissioner's submission should be rejected. Section 80A(1) turns upon the criterion of beneficial ownership of shares, unlike (as will appear) s 80A(3), which turns upon the control of voting power and other matters. In s 80A(1), the phrase "shares in the company carrying" the rights in question is adjectival. It identifies the nature of the shares as indicated by the constituent provisions of the articles of association of Linter Textiles. It is the beneficial ownership of the shares which is critical for the operation of the sub-section. The Full Court pointed out that the phrase in s 80A(1) does not pose the issue whether, in the events that had happened, there could be general meetings, dividends or reduction of capital. Rather, the issue is whether there would be the

capacity to vote, or to receive dividends or distributions of capital should the occasion arise. Their Honours continued[15]:

> "There is no change in the rights attaching to the shares merely because the company has gone into liquidation. The shares continue to carry the same rights. In our view the question can only be answered by looking at the rights which, in accordance with the articles of association of [Linter Textiles] attach to the relevant shares. Those rights are such that at all times in the year of income there was the necessary continuity of rights as existed in the year of loss. In our view, therefore, the tests of s 80A(1) do not operate to disqualify the losses otherwise available to [Linter Textiles] from being an allowable deduction to it in the year of income."

We agree in that statement. The Commissioner fails on the first issue under s 80A(1).

The winding up of Linter Group

21 For the second issue under s 80A(1), which is further and in the alternative to the first, the Commissioner fixes upon the consequences attributed to the winding-up order made in respect of Linter Group in 1991. The submission is that, thereafter, the shares held throughout by Linter Group in Linter Textiles were not "beneficially owned" by Linter Group.

22 The short answer is to be found in the reasoning in *Franklin's Selfserve Pty Ltd v Federal Commissioner of Taxation*[16]. That was a decision where Menzies J, sitting in the original jurisdiction of the Court, considered the phrase "beneficially held" as it appeared in what was then s 80(5) of the Act. His Honour said that he examined the authorities dealing with the consequences in company law of a winding-up order "not to control the language of s 80(5) but to inform myself of the principles to be applied"[17]. Menzies J continued[18]:

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**15** (2003) 129 FCR 42 at 62.

**16** (1970) 125 CLR 52.

**17** (1970) 125 CLR 52 at 71.

**18** (1970) 125 CLR 52 at 71.

> "I have come to the conclusion that I would be going further than the statute warrants were I to hold that, for the purposes of s 80(5), a company which owns shares beneficially in another company ceases, upon its liquidation, to own those shares beneficially. These shares remain the property of the company and the beneficial interest is not, by virtue of the liquidation, vested in any other person or persons."

23 When used in relation to companies, "hold" normally refers to legal ownership established by reference to the register of members[19]. The relevant phrase in s 80A(1) is "beneficially owned" rather than "beneficially held".

24 That distinction aside, the Commissioner challenges the conclusion reached by Menzies J in *Franklin's*. In particular, the Commissioner relies upon remarks by Lord Diplock in *Ayerst v C & K (Construction) Ltd*[20] when construing the phrase "beneficial ownership" in s 17 of the *Finance Act* 1954 (UK). Lord Diplock, who delivered the only speech in the House of Lords[21], said that the phrase "beneficial ownership" was repeated in the 1954 statute from earlier revenue legislation and that there was "a consistent line of judicial authority that upon going into liquidation a company ceases to be 'beneficial owner' of its assets as that expression has been used as a term of legal art since 1874"[22].

*Oriental Steam*

25 The reference by Lord Diplock to 1874 was to the decision in that year of the Court of Appeal in *In re Oriental Inland Steam Company. Ex parte Scinde Railway Company*[23]. Earlier in his reasons, Lord Diplock had introduced his

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**19** *Dalgety Downs Pastoral Co Pty Ltd v Federal Commissioner of Taxation* (1952) 86 CLR 335 at 341-342.

**20** [1976] AC 167.

**21** Viscount Dilhorne, Lord Kilbrandon and Lord Edmund-Davies expressed their agreement.

**22** [1976] AC 167 at 181.

**23** (1874) LR 9 Ch App 557.

discussion of *Oriental Steam* and *In re Albert Life Assurance Co* (*The Delhi Bank's Case*)[24] by saying[25]:

> "The nature of a company's interest in its assets after a winding-up order had been made first fell to be considered by the Court of Chancery under the Companies Act 1862. It was, perhaps, inevitable that the court should find the closest analogy in the law of trusts."

26 However, a more recent statement in the joint judgment of this Court in *Clay v Clay*[26] is immediately in point. The Court said[27]:

> "It is to be recalled that, in the past, the term 'trustee' sometimes was used to describe the position of a director in relation to the company in question[28]. Such a use of the term 'trustee' could at best be metaphorical because property of the company was not vested in the directors. Again, in *Knox v Gye*[29], Lord Westbury said:
>
> > 'Another source of error in this matter is the looseness with which the word "trustee" is frequently used. The surviving partner is often called a "trustee," but the term is used inaccurately. He is not a trustee ...
> >
> > The application to a man who is improperly, and by metaphor only, called a trustee, of all the consequences which would follow if he were a trustee by express declaration – in other words a complete trustee – holding the property exclusively for the

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**24** (1871) 15 SJ 923.

**25** [1976] AC 167 at 179.

**26** (2001) 202 CLR 410.

**27** (2001) 202 CLR 410 at 430-431 [41].

**28** *Re International Vending Machines Pty Ltd and the Companies Act* [1962] NSWR 1408 at 1419-1420; *Mulkana Corporation NL (in liq) v Bank of New South Wales* (1983) 1 ACLC 1143 at 1148-1150; 8 ACLR 278 at 283-285; Sealy, "The Director as Trustee", (1967) *Cambridge Law Journal* 83.

**29** (1872) LR 5 HL 656 at 675-676.

benefit of the cestui que trust, well illustrates the remark made by Lord Mansfield, that nothing in law is so apt to mislead as a metaphor.'"

27 It is true that in *Oriental Steam* Mellish LJ had said of the *Companies Act* 1862 (UK) ("the 1862 Act")[30]:

"No doubt winding-up differs from bankruptcy in this respect, that in bankruptcy the whole estate, both legal and beneficial, is taken out of the bankrupt, and is vested in his trustees or assignees, whereas in a winding-up the legal estate still remains in the company. But, in my opinion, the beneficial interest is clearly taken out of the company. What the statute says in the 95th section is, that from the time of the winding-up order all the powers of the directors of the company to carry on the trade or to deal with the assets of the company shall be wholly determined, and nobody shall have any power to deal with them except the official liquidator, and he is to deal with them for the purpose of collecting the assets and dividing them amongst the creditors. It appears to me that that does, in strictness, constitute a trust for the benefit of all the creditors, and, as far as this Court has jurisdiction, no one creditor can be allowed to have a larger share of the assets than any other creditor."

28 In the same case, James LJ had observed[31]:

"The English Act of Parliament has enacted that in the case of a winding-up the assets of the company so wound up are to be collected and applied in discharge of its liabilities. That makes the property of the company clearly trust property. It is property affected by the Act of Parliament with an obligation to be dealt with by the proper officer in a particular way. Then it has ceased to be beneficially the property of the company; and, being so, it has ceased to be liable to be seized by the execution creditors of the company."

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**30** (1874) LR 9 Ch App 557 at 560. Section 94 of the 1862 Act provided for liquidators to take into their custody or under their control all the property, effects and things in action to which the company was or appeared to be entitled. Section 95 empowered liquidators with the sanction of the court to do all such things as might be necessary for winding up the affairs of the company and distributing its assets.

**31** (1874) LR 9 Ch App 557 at 559.

29 In the year after *Oriental Steam*, and in another context respecting liquidation law, James LJ preferred to describe the liquidator as an "agent" and Mellish LJ contrasted the vesting of title in a trustee in bankruptcy[32].

30 Insofar as their Lordships were proceeding in *Oriental Steam* upon an assumption that the law of property requires the location at all times and in all circumstances of distinct legal and beneficial ownership, that assumption since has been exploded by *Commissioner of Stamp Duties (Q) v Livingston*[33]. In *Franklin's*, Menzies J made this point respecting the significance of *Livingston*[34]. McLelland J later rightly emphasised[35] "the imprecision of the notion that absolute ownership of property can properly be divided up into a legal estate and an equitable estate". Hope JA said[36]:

> "[A]n absolute owner in fee simple does not hold two estates, a legal estate and an equitable estate. He holds only the legal estate, with all the rights and incidents that attach to that estate."

31 Shortly before *Ayerst* arrived to quell debate in England[37], Megarry J had considered the English cases up to the decision of Buckley J in *Inland Revenue Commissioners v Olive Mill Ltd (In Liquidation)*[38]. In *In re Calgary and Edmonton Land Co Ltd*, Megarry J remarked[39]:

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**32** *In re Anglo-Moravian Hungarian Junction Railway Company. Ex parte Watkin* (1875) 1 Ch D 130 at 133, 134 respectively.

**33** (1964) 112 CLR 12; [1965] AC 694.

**34** (1970) 125 CLR 52 at 70.

**35** *Re Transphere Pty Ltd* (1986) 5 NSWLR 309 at 311; cf the remarks of Nourse LJ in *Sainsbury (J) Plc v O'Connor* [1991] 1 WLR 963 at 978.

**36** *DKLR Holding Co (No 2) Pty Ltd v Commissioner of Stamp Duties* [1980] 1 NSWLR 510 at 519; revd on other grounds (1982) 149 CLR 431.

**37** See Megarry V-C's subsequent remarks in *Tito v Waddell (No 2)* [1977] Ch 106 at 226.

**38** [1963] 1 WLR 712; [1963] 2 All ER 130.

**39** [1975] 1 WLR 355 at 359; [1975] 1 All ER 1046 at 1050-1051.

> "Some of these authorities seem to me to do little or nothing to support the proposition that the members of the company are beneficiaries under a trust. It is one thing to say that there is a trust or a fiduciary duty, and another to say that the members are beneficiaries under a trust. The high water-mark in the authorities are some words of James and Mellish LJJ in *In re Oriental Inland Steam Co*[40], spoken in relation to creditors rather than members. An alternative way of regarding the matter is to treat the company and the liquidator as being bound by fiduciary or statutory obligations towards the creditors and members to administer the company's assets in accordance with their respective rights under the law. The parallel is with the rights of those entitled under an intestacy or gift of residue, on the line of authorities of which *Commissioner of Stamp Duties (Queensland) v Livingston*[41] is one of the latest."

32 A statutory regime for the custody and administration of property on behalf of others may render the custodian and administrator a trustee in the ordinary sense, even without the use of the term "trust" in the statute. *Registrar of the Accident Compensation Tribunal v Federal Commissioner of Taxation*[42] provides a recent example. However, references in *Oriental Steam* to a trust are at best analogical or metaphorical, as an attempted description of the operation of the statutory regime of winding up by court order.

33 The conscription of the term "trust" in *Oriental Steam* was received with caution in Australia and New Zealand[43]. In 1935, well before *Ayerst*, Davidson J observed in the New South Wales Full Court[44]:

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**40** (1874) LR 9 Ch App 557 at 559, 560.

**41** [(1964) 112 CLR 12 at 22, 23;] [1965] AC 694, especially at 712, 713.

**42** (1993) 178 CLR 145 at 165-166.

**43** Lowenstern, "Liquidator as Trustee", (1928) 2 *Australian Law Journal* 255; *Shaw Savill and Albion Co Ltd v Commissioner of Inland Revenue* [1956] NZLR 211 at 216-217.

**44** *Thomas Franklin & Sons Ltd v Cameron* (1935) 36 SR (NSW) 286 at 296. See also *Commissioner for Corporate Affairs v Peter William Harvey* [1980] VR 669 at 695.

> "[A] liquidator is principally and really an agent for the company but occupies a position which is fiduciary in some respects and is bound by the statutory duties imposed upon him by the [Companies] Act."

Davidson J, with reference to *Oriental Steam*, remarked that[45]:

> "even in [that] case ... where the liquidator is said to be a trustee, there is added the qualification that no individual creditor can be allowed a larger share than another".

34 In *In re A Caveat. Ex parte The Canowie Pastoral Company Ltd*[46], Angas Parsons J held that it did not follow from *Oriental Steam* that a shareholder of a company in liquidation which had paid all its debts had a sufficient interest in the assets to support a caveat against dealings by the liquidator with a mortgage held by the company.

35 Not only does the liquidator, in the absence of a specific vesting order, lack the legal title to the assets of the company; the liquidator is not accountable as a trustee. The point was made fairly soon in England after *Oriental Steam* by Romer J in *Knowles v Scott*[47]. His Lordship remarked[48]:

> "In my judgment the liquidator is not a trustee in the strict sense, with such a liability affecting his position as has been contended for by the Plaintiff. The consequences would be very serious if such a doctrine were to be upheld. If a liquidator were held to be a trustee for each creditor or contributory of the company, his liability would indeed be onerous, and would render the position of a liquidator one which few persons would care to occupy."

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**45** (1935) 36 SR (NSW) 286 at 294.

**46** [1931] SASR 502; noted (1932) 6 *Australian Law Journal* 16 and cf *Shaw Savill and Albion Co Ltd v Commissioner of Inland Revenue* [1956] NZLR 211; *Re Your Size Fashions Ltd* [1990] 3 NZLR 727 at 734.

**47** [1891] 1 Ch 717.

**48** [1891] 1 Ch 717 at 721-722.

36 *Knowles* concerned the position of a liquidator in a voluntary winding up and in a similar context was applied by the New South Wales Full Court in *In re Paul and Gray Ltd*[49].

37 *Olive Mill*[50] was also a case of a voluntary winding up. Buckley J referred[51] to *Oriental Steam* as authority that on the passing of a resolution for voluntary winding up, the beneficial interest of the shares of the holding company "ceased to reside in the holding company".

38 In *Franklin's*, Menzies J, after referring to *Olive Mill* and *Oriental Steam*, said[52]:

> "It seems to me, however, that once a company is in liquidation the statutory provisions apply whether it be solvent or insolvent and it is not an easy distinction to say that if a company is insolvent it has ceased to have a beneficial interest in its assets, but, if it is not, it continues to do so. In each case it is for the liquidator to carry out the statutory scheme of liquidation, to pay creditors and to divide any surplus that there may be among contributories. Whether or not there may be a surplus hardly seems to me to bear upon the relationship between the company in liquidation and its assets."

Indeed, in *Ayerst*[53], Lord Diplock indicated that the essential characteristics of the scheme for dealing with the assets of a company do not differ between a voluntary winding up and a compulsory winding up. That may be conceded. But what are those essential characteristics? Do the authorities upon which Lord Diplock relied support his formulation of principle or that which earlier had been identified by Menzies J in *Franklin's*? Or are they beside the point of construction of s 80A(1) here at issue? The answer to the last question is "yes". We turn to indicate why this is so.

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**49** (1932) 32 SR (NSW) 386 at 393.

**50** [1963] 1 WLR 712; [1963] 2 All ER 130.

**51** [1963] 1 WLR 712 at 726-727; [1963] 2 All ER 130 at 139.

**52** (1970) 125 CLR 52 at 70.

**53** [1976] AC 167 at 176.

The 1862 Act

39 The 1862 Act presented situations, particularly in insolvent administrations, which called for the exercise of some judicial ingenuity. Recourse was had to the trust concept but this went beyond what was necessary for the decision in the cases in hand. From that over-response in one field has followed confusion in others. Two examples will suffice.

40 First, prior to the enactment of the *Supreme Court of Judicature Act* 1875 (UK), the insolvency set-off provision in the bankruptcy legislation did not apply to liquidations under the 1862 Act; however, rights of set-off for mutual debts were found in the provisions of the Statutes of Set-off[54]. One difficulty was that the debt sought to be set off against the company would not have been recoverable by action against it because after the winding-up order the action could not have been brought without leave of the court. Another difficulty arose where a contributory sought to set off against a call of unpaid shares a debt owed by the contributory to the company. The requirement of mutuality on its face was satisfied but the statutory set-off otherwise available might be denied on equitable grounds and such an equitable ground was found in the circumstance that the assets of the company were now subject to due administration in the course of the winding up.

41 Bramwell B said that in an action by the company the "real plaintiff" would be the liquidator and he will be suing "for the benefit of the general body of creditors"; the result was that the debts, in substance and in fact, were not mutual debts within the meaning of the Statutes of Set-off[55]. Thereafter, in *In re Paraguassu Steam Tramroad Co. Black & Co's Case*[56], Lord Selborne LC, in holding that a contractor could not set off against the amount due by him on calls a debt due to him by the company, said[57] that it was "essential in such cases that the rights should be substantially the same". To permit one creditor to pay himself while retaining his own calls would in effect give him a preference and exonerate him from his obligation as a shareholder to contribute towards the debts of the other creditors.

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**54** Derham, *The Law of Set-off*, 3rd ed (2003), §6.06.

**55** *Sankey Brook Coal Co v Marsh* (1871) LR 6 Ex 185 at 189.

**56** (1872) LR 8 Ch App 254.

**57** (1872) LR 8 Ch App 254 at 261.

42 The good sense of these decisions may be accepted without taking the further step that the rights were not substantially the same because a trust had arisen in respect of the company's assets upon the making of the order for winding up. However, in *Black & Co's Case* Lord Selborne LC had gone further and added[58]:

> "[T]he hand which receives the calls necessarily receives them as a statutory trustee for the equal and rateable payment of all the creditors."

43 *Oriental Steam* is another case of judicial ingenuity dealing with new situations which arose after the passage of the 1862 Act. Oriental Steam was a company incorporated in England but had carried on business in India. An order in England was made for the winding up of Oriental Steam. Thereafter, a creditor attached property of Oriental Steam in India to obtain satisfaction of a judgment against Oriental Steam recovered in India. The question for the Court of Appeal was whether, in the English administration, the creditor should be denied the fruits of the attachment.

44 *Oriental Steam* is treated as authority for the proposition that under the 1862 Act and succeeding legislation an order for the winding up of a company incorporated in England is regarded in England as having a worldwide effect[59]. A creditor who successfully completed execution of a foreign judgment would be able to gain priority in England over the unsecured creditors. To prevent this, the English court has jurisdiction to restrain creditors from bringing or continuing the foreign execution process. In *Mitchell v Carter*[60], Millett LJ referred to *Oriental Steam* as an example of the exercise of that jurisdiction.

45 Hence the statement by James LJ in *Oriental Steam* respecting what had been said below by Malins V-C[61]:

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**58** (1872) LR 8 Ch App 254 at 262.

**59** *Mitchell v Carter* [1997] 1 BCLC 673 at 686 per Millett LJ; Dicey and Morris, *The Conflict of Laws*, 13th ed (2000), §30-072-§30-073. See also *In re International Tin Council* [1987] Ch 419 at 446-447 per Millett J (affd on other grounds [1989] Ch 309).

**60** [1997] 1 BCLC 673 at 686-687.

**61** (1874) LR 9 Ch App 557 at 559.

> "There were assets fixed by the Act of Parliament with a trust for equal distribution amongst the creditors. One creditor has, by means of an execution abroad, been able to obtain possession of part of those assets. The Vice-Chancellor was of opinion that this was the same as that of one *cestui que trust* getting possession of the trust property after the property had been affected with notice of the trust. If so, that *cestui que trust* must bring it in for distribution among the other *cestuis que trust*."

46 This passage explains both the occasion for and the lack of necessity in fixing upon the notion of a trust. The animating principle, as Millett LJ later recognised in *Mitchell*, is more akin to that jurisdiction "to grant what amounts to an anti-suit injunction in order to restrain execution proceedings in a foreign court which would prevent the liquidator from getting in the assets"[62]. Seen in that light, *Oriental Steam* is an example of a court seized of the administration of a winding up reacting to foreign proceedings interfering with or having a tendency to interfere with its administration.

47 In *Oriental Steam* itself, there was no occasion to protect the English administration by what now would be called an anti-suit injunction[63]. That was because, in the events that had happened, there was a fund in the English court representing the proceeds of the Indian attachment. The decision was that the liquidator was entitled to those proceeds and that they should not be paid out to the creditor.

48 It is from this particular adoption of the trust analogy to meeting what in 1874 was a novel situation that there has developed a line of authority in England which has extended into other spheres and in *Ayerst* was applied in the construction of the revenue law. The analogy is of no utility, and indeed is misleading, when the task involves a comparison between the operation of the companies legislation respecting winding up on the one hand and the criteria selected on the other hand for the operation of revenue legislation.

49 The proper conclusion respecting the operation of the principles of company law in an insolvent administration such as that of Linter Group and

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**62** [1997] 1 BCLC 673 at 687.

**63** See *CSR Ltd v Cigna Insurance Australia Ltd* (1997) 189 CLR 345 at 391-392.

Linter Textiles was indicated in *Franklin's* by Menzies J in the following passage[64]:

> "Even if a company, being insolvent, goes into liquidation, I find difficulty in regarding the company itself as trustee for anybody, notwithstanding that it can no longer employ its assets in its business, nor dispose of them. The assets must be held for the purpose of its own liquidation in accordance with statute. Of course its assets have to be realized by the liquidator and distributed among the company's creditors but this is done in accordance with elaborate statutory provisions for bringing about the result for which the statute provides. The matter is not left to the application of general law relating to trustees and cestuis que trust."

The construction of s 80A(1)

50 Given that conclusion, the principal issue on this branch of the appeal becomes, as indeed it always has been, one of construing the phrase "beneficially owned" in s 80A(1). The phrase "is to be construed in context and must reflect the purposes of the section in which it occurs"[65].

51 The Commissioner submitted that in the present context "beneficially owned" meant the ability of Linter Group to use its shares in Linter Textiles for its own benefit, by selling them and applying the proceeds as it thought fit; the liquidator of Linter Group had had the power to cause the transmission of the ownership of the shares of Linter Group in Linter Textiles, but "beneficial ownership" by Linter Group had been lost because the liquidator was bound to apply proceeds of sale in accordance with the statutory formula of distribution between creditors.

52 The term "beneficial" is usually employed in trust law as a cognate of "beneficiary". That term identifies those persons for whose benefit the trustee of a private trust (ie not a charitable purpose trust) is bound to administer the trust property. Where A holds Blackacre on a bare trust for B, it may accurately be said that B is the beneficial owner.

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**64** (1970) 125 CLR 52 at 69-70.

**65** *Martin v Martin* [1988] 1 NZLR 722 at 731.

53 But that use of the word "owner" does not entail enjoyment by B of all the rights which the law as a whole confers in relation to Blackacre. Thus, as Hope JA explained in *DKLR Holding Co (No 2) Pty Ltd v Commissioner of Stamp Duties*[66], although B may be entitled by equitable remedies to be put into possession, B cannot sue A in ejectment. Again, the will or settlement conferring an equitable fee simple may qualify that gift and render it determinable by the conferral upon another of an option to purchase[67], or by the imposition of a condition subsequent which is certain and does not contravene the policy of the law[68].

54 The authors of a leading Australian text correctly wrote as follows of the effect of a winding-up order[69]:

> "Whether the company is insolvent or solvent, the company holds its property beneficially but subject to the statutory scheme of liquidation under which the liquidator is to pay creditors and distribute any surplus among members. Unsecured creditors and contributories have the benefit of the liquidator's administration of the company's estate. Their special interest is to some extent like that of objects of a discretionary trust; they have a right to have a fund of assets protected and properly administered. That interest, although not an interest in specific assets, will be protected against third persons. For example, a holder of an unregistered registrable charge who asks the court to extend the time for registration[70] or a person who seeks rectification of an instrument of charge which could prejudice unsecured creditors[71] will not ordinarily succeed if the company is in liquidation or on the verge of liquidation."

The critical point is that the change in control of the affairs of the company has no impact upon its beneficial ownership of its assets.

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**66** [1980] 1 NSWLR 510 at 519-520.

**67** *Oliver v Oliver* (1958) 99 CLR 20 at 24, 26.

**68** *Church Property Trustees, Diocese of Newcastle v Ebbeck* (1960) 104 CLR 394.

**69** *Ford and Austin's Principles of Corporations Law*, 7th ed (1995) at 1013.

**70** *Re Ashpurton Estates Ltd* [1983] Ch 110.

**71** *J J Leonard Properties Pty Ltd v Leonard (WA) Pty Ltd* (1987) 12 ACLR 1.

55 By analogy with the general law, the circumscribing or suspension by reason of the appointment of the liquidator of the exercise by the usual organs of the company of the incidents of ownership of the assets of the company does not mean that the company itself has ceased to own beneficially its assets within the meaning of s 80A(1). Power to deal with an asset and matters of ownership or title are not interchangeable concepts[72].

56 The 1944 Act used the phrase "beneficially held". In *Dalgety Downs Pastoral Co Pty Ltd v Federal Commissioner of Taxation*[73], this Court decided that shares registered in the name of X, but as mortgagee from Y, were not "held" by Y within the meaning of s 80(5). Webb, Fullagar and Kitto JJ said that the modification in s 80(5) of "held" by the adverb "beneficially" did not justify acceptance of the displacement of the ordinary meaning of "held" as "registered" when used of shares[74]. Their Honours said of the inclusion of "beneficially"[75]:

> "This word serves more naturally the purpose of excluding the case of a holding for the benefit of others than the purpose of so broadening the meaning of the word 'held' beyond the particular significance which it normally has in relation to shares as to make it equivalent to 'owned' in the most general sense of that word."

Earlier, in *Avon Downs Pty Ltd v Federal Commissioner of Taxation*[76], Dixon J had said of the expression, in what was then s 80(6) of the Act, "beneficially held by the trustee of his estate" that it conveyed:

> "the idea that the trustee of the estate holds it as part of the estate and not for some person claiming adversely to the beneficiaries. In other words, if the testator was a nominee, his executor is to be in no better position than he is. It seems to me that a transferor of a share who has been paid the consideration for the transfer, holds simply as a passive trustee until the

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**72** cf *Blankfield v Federal Commissioner of Taxation* (1972) 127 CLR 610 at 615-616.

**73** (1952) 86 CLR 335.

**74** (1952) 86 CLR 335 at 341-342.

**75** (1952) 86 CLR 335 at 342.

**76** (1949) 78 CLR 353 at 364-365.

registration of the transfer and the entry of the transferee's name on the register. He could not be said to hold 'beneficially.'"

57 The 1964 Act replaced "beneficially held" with "beneficially owned" as the criterion for determining substantial continuity of shareholding and the 1973 Act continued that criterion. Given the outcome in *Dalgety Downs*, the change evidently was made to assist the taxpayer, by allowing the taxpayer to go beyond the face of the share register.

58 The point was expressed by Hely J as follows[77]:

> "The winding up of [Linter Group] does not strip [Linter Group] of the risks and benefits of ownership of the shares which it holds in [Linter Textiles]. If [Linter Textiles] was not in liquidation and a general meeting of [Linter Textiles] were called whilst [Linter Group] was in liquidation, [Linter Group] could vote; if dividends were declared or capital returned by [Linter Textiles], then [Linter Group] would be the recipient of the payment."

In these matters Linter Group would not be subject to direction by any third party for whose benefit it owned the shares in Linter Textiles. True enough, unsecured creditors and contributories would have the benefit of the administration of the affairs of Linter Group by the liquidator. But that does not carry any corollary that the shares in Linter Textiles were no longer beneficially owned by Linter Group. To adapt the reasoning of Menzies J in *Franklin's*[78], the ownership of the shares was not "for the benefit of others"; the ownership of the shares was subjected to the purposes of the liquidation in accordance with company law.

59 The Commissioner's argument on s 80A(1) thus fails on its second branch, as on its first. But other issues arise concerning s 80A(2) and s 80A(3).

Section 80A(2)

60 As indicated earlier in these reasons, Linter Textiles sought to establish that it was entitled to utilise the losses provided that the criteria in s 80A(1) were satisfied. They were satisfied but, on the face of the Act, that was not necessarily fatal to the Commissioner's case.

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**77** (2002) 20 ACLC 1708 at 1721; 50 ATR 548 at 563.

**78** (1970) 125 CLR 52 at 71.

61 Sub-section (2) of s 80A reads:

> "Where –
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> (a) subsection (1) would, but for this subsection, apply for the purpose of determining whether a loss incurred by a company in a year before the year of income is to be taken into account for the purposes of section 79E, 79F, 80, 80AAA or 80AA;
>
> (b) during the whole or any part of the year in which the loss was incurred, or during the whole or any part of the year of income, another company or other companies beneficially owned all or any of the shares in the first-mentioned company or an interest or interests in all or any of those shares; and
>
> (c) the first-mentioned company requests the Commissioner at the time when it furnishes to him a return (or, if more than one return is furnished, the first return) of its income of the year of income, or within such further period as the Commissioner allows, that subsection (3) should apply for the purpose referred to in paragraph (a) *or the Commissioner considers it reasonable that that subsection should apply for that purpose*,
>
> then subsection (3) applies for that purpose in lieu of subsection (1)." (emphasis added)

62 Section 80A(2) sets out steps whereby s 80A(3) applies in place of s 80A(1), for the purposes of determining whether losses are to be taken into account. One of the conditions for the supplanting of s 80A(1) is that the sub-section "would, but for [sub-s (2)], apply for the purpose of determining whether a loss ... is to be taken into account for the [purpose] of section 79E" (s 80A(2)(a)). In the present case, as has been indicated in these reasons, the application of s 80A(1) would determine that the losses in question were to be taken into account for the purposes of s 79E.

63 However, another condition specified in s 80A(2) is that the Commissioner may consider it reasonable that s 80A(3) apply (s 80A(2)(c)). Paragraph 10 of the Commissioner's statement of facts, issues and contentions which was filed in the Federal Court stated:

> "The [Commissioner] formed the opinion (that if the requirements of section 80A(1) of [the Act] were met) then it was reasonable in terms of subparagraph (c) of subsection 80A(2) of the Act that subsection 80A(3) should apply for the purpose of determining whether the loss incurred by [Linter Textiles] should be taken into account for the purpose of section 79E in lieu of subsection (1) thereof for the year ended 30 June 1992."

64 This repeated the substance of what the Commissioner had indicated in the Reasons for Decision disallowing the objection by Linter Textiles to the assessment. That exercise of the discretion or power conferred by par (c) of s 80A(2), if otherwise effective, would be deemed by s 169A(3) of the Act to have occurred when the initial assessment was made.

65 At trial, there was cross-examination of the Commissioner's responsible officer concerning the matters she had considered relevant in the exercise of the discretion (or power) under s 80A(2) of the Act. The officer stressed that the answer to the question whether the requirements of s 80A(1) were met turned upon matters of law. The taxpayer's grounds of objection had contained detailed reference to *Ayerst* and *Franklin's*. Against the contingency that s 80A(1) was satisfied, the Commissioner had "consider[ed] it reasonable", within the meaning of s 80A(2)(c), that s 80A(3) apply in lieu of s 80A(1).

66 There may have been an issue whether that exercise of discretion (or power) was open to challenge by the respondent. But, at trial, no point was taken that s 80A(3) could not apply because the precondition to it doing so, provided by par (c) of s 80A(2), had not been met[79]. Nothing in these reasons should be taken as indicating any view on that question.

Section 80A(3)

67 However, at trial, there remained other issues respecting the interpretation of s 80A(3). One concerned any differential operation between private and public companies. After reservation of judgment, counsel concurred in a written statement to his Honour. This Hely J in his reasons recorded as an agreement

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**79** cf *Avon Downs Pty Ltd v Federal Commissioner of Taxation* (1949) 78 CLR 353 at 360; *Giris Pty Ltd v Federal Commissioner of Taxation* (1969) 119 CLR 365 at 383-385.

that "subject to the impact (if any) of the winding up orders, the requirements of s 80A(1) or (3) are met"[80].

68 That agreement, Hely J said, made it unnecessary to determine what was a dispute on the written submissions "of whether s 80A(3) is an alternative test to s 80A(1), or whether it is cumulative"[81]. The agreement also had the effect of putting to one side any possible argument by the Commissioner that, by reason of the discretionary trusts of which Pochette was the corporate trustee, s 80A(1) could not apply because at the end of a tracing process required by the sub-section there was disclosed no beneficial owner of the shares in Linter Textiles, and par (a) of s 80A(3) could not apply because there were no individuals controlling the voting power.

69 However, the phrase set out above, "subject to the impact (if any) of the winding up *orders*" (emphasis added), which repeated the written statement by the parties, was apt to identify the orders made against both Linter Group and Linter Textiles. To the significance of this it will be necessary to return.

70 The phrase "apply for the purpose" and cognate expressions appear in s 80A(2) and s 80A(3). They do so to identify the operation on the one hand of s 80A(1) and on the other of s 80A(3). Where, as here, the taxpayer establishes that the criteria specified in s 80A(1) are satisfied, then, unless its operation is displaced by another provision, s 80A(1) must be said to apply the loss provision of s 79E. A question would arise if the criteria specified in s 80A(1) were not met by the taxpayer's case and the taxpayer wished to go on to enlist s 80A(3) as an alternative and sufficient route to the favourable destination of enlivening s 79E. No such issue now arises for determination and it may be put to one side.

71 What s 80A(2) does indicate, in the closing words of par (c), is that it was apparently possible for the Commissioner to bring about the result that s 80A(3) applies in this case. That was the point of the formation of the opinion by the Commissioner to which reference has been made above.

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**80** (2002) 20 ACLC 1708 at 1710; 50 ATR 548 at 550.

**81** (2002) 20 ACLC 1708 at 1710; 50 ATR 548 at 550.

72 The first part of s 80A(3) reads as follows[82]:

> "Where, by virtue of subsection (2), this subsection applies for the purpose of determining whether a loss incurred by a company (in this subsection referred to as the '**loss company**') in a year before the year of income is to be taken into account for the purposes of section 79E, 79F, 80, 80AAA or 80AA, then, notwithstanding those sections but subject to subsection (5) and sections 80B, 80DA and 80E, that loss shall not be taken into account for the purposes of section 79E, 79F, 80, 80AAA or 80AA unless the Commissioner is satisfied, or considers that it is reasonable to assume, that:
>
> (a) at all times during the year of income the voting power in the loss company was, either directly or through one or more interposed companies, trustees or partnerships, *controlled*, or *capable of being controlled*, by a person not being a company, or by 2 or more persons not being companies, who, either directly or through one or more interposed companies, trustees or partnerships, controlled, or was or were capable of controlling, the voting power in the loss company at all times during the year in which the loss was incurred". (emphasis added)

73 What then was the impact of the orders for the winding up of Linter Group and Linter Textiles upon the requirements of s 80A(3)(a)? Section 80A(3) stipulates three requirements, in pars (a), (b) and (c), each of which must be satisfied. Paragraphs (b) and (c) were considered by Hely J as follows[83]:

> "What may be important for present purposes is that under pars (b) and (c) of s 80A(3) the ultimate human controller(s) of the loss company should be entitled to receive for his or their 'own benefit' more than one half of dividends distributed or capital returned. In the Commissioner's submission this provision provides some insight into the meaning of 'beneficially owned' in s 80A(1). In my view it does not assist. The same

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**82** Reprint No 9, to which the Court was referred by the parties, omits "79E, 79F" where first occurring and thus does not reflect the text as it stood after the 1990 Act.

**83** (2002) 20 ACLC 1708 at 1721; 50 ATR 548 at 562-563.

question is thrown up, namely whether property is held for a person's own benefit unless it is held, by that person, on behalf of some other person."

74 It is apparent that a focus of the submissions to the primary judge was the meaning of "beneficially owned" as it appeared in s 80A(1), and that the phrase "own benefit" as it appears in pars (b) and (c) of s 80A(3) was referred to as throwing light on the earlier provision. Paragraph (a) of s 80A(3) does not use the phrase "own benefit" and par (a) was not referred to by Hely J in this connection.

75 Nevertheless, the Commissioner had never relinquished reliance upon s 80A(3) as an alternative path to the success of the case against the respondent, and the taxpayer presented no issue challenging the reliance by the Commissioner upon par (c) of s 80A(2). Against that background, one of the grounds of appeal by the Commissioner to the Full Court was that Hely J should have held that the requirements of s 80A(3) were not satisfied from the time of the winding up of Linter Group and the time of the winding up of Linter Textiles.

76 The Full Court said[84]:

"The main question in the appeal therefore was whether the winding up orders made with respect to both [Linter Group] and [Linter Textiles] brought about the result that [Linter Textiles] could not, in the year of income, comply with the requirements of s 80A(1) or (3) so as to permit it to deduct against the assessable income of that year under s 79E of [the Act] the prior year losses it had incurred."

77 Paragraph (a) of s 80A(3) was considered by the Full Court but in relation to the winding up of Linter Textiles alone. Unlike pars (b) and (c), it speaks not in terms of benefit, but of control and capacity to control voting power by natural persons. One issue taken by the Commissioner in the Full Court fixed upon the Linter Textiles winding-up order. However, the Full Court dealt with it as follows[85]:

"Counsel for the Commissioner submitted that there was a third issue which arose for decision, that being whether the making of a winding up order in relation to [Linter Textiles] had the consequence that

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**84** (2003) 129 FCR 42 at 44-45.

**85** (2003) 129 FCR 42 at 47.

> the persons referred to in s 80A(3) of [the Act] ceased to have the control or rights of the kind identified in the section. However, it was common ground that if the other two questions were answered in favour of [Linter Textiles] then this third question would likewise be answered in favour of [Linter Textiles] and the appeal would accordingly be dismissed. For that reason we do not propose to consider separately this third issue."

78 In this Court, the Commissioner submits that a consequence of the winding-up orders made in respect of Linter Group (if not of the order made thereafter in respect of Linter Textiles) was that the voting power in Linter Textiles was no longer controlled or capable of being controlled by the Goldberg family; the liquidator of Linter Group, and no one else, would vote and control the voting of its shares in Linter Textiles and "control" here was not used adjectivally as was "carrying" in s 80A(1)[86]. A submission to that effect had been open upon the ground of appeal to the Full Court to which reference has been made above. This referred distinctly to each of the winding-up orders.

79 In the course of argument in this Court, the Commissioner sought an amendment to par 4 of the Notice of Appeal to refer specifically to the winding up of Linter Group. Paragraph 4 would then read:

> "The Court erred in failing to hold that on the making of the *winding-up orders* in relation to [Linter Textiles] *and [Linter Group]* the persons referred to in subsection 80A(3) of the Act ceased to have control or rights of the kind identified in that section."

80 That leave should be granted and, as a consequence, the appeal be allowed. Special leave was granted to the Commissioner on terms that, irrespective of the result, the Commissioner pay the taxpayer's costs of the appeal. The narration in these reasons of the conduct of the litigation at trial and in the Full Court indicates that the point sought to be raised in this Court by the amendment was open at both stages in the Federal Court. The respondent taxpayer did not, in opposition to the amendment, deny that all the relevant facts had been established or deny that the point is one of construction and law. It is expedient and in the interests of justice to allow the amendment and to entertain the issue it raises[87].

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**86** The first issue concerning s 80A(1) turned on the adjectival use of "carrying".

**87** *Water Board v Moustakas* (1988) 180 CLR 491 at 497.

Outcome respecting s 80A(3)

81 There are several contrasts between the text and structure of sub-s (1) and sub-s (3) of s 80A. Sub-section (1), as applied to the facts of this case, is concerned with the beneficial ownership, by individuals or companies, of the shares in Linter Textiles carrying certain rights. The focus of sub-s (3) is not upon beneficial ownership by any entity of any shares in any company. Rather, the legislative concern with the strengthening of the "continuing ownership test" is manifested in par (a) of sub-s (3) by fixing upon the control of (or the capacity to control) the voting power in Linter Textiles by an individual or by two or more persons not being companies; that control or capacity to control may be exercised by that individual or those individuals either directly or "through" interposed entities; and the required control or capacity to control must exist in respect of the voting power in Linter Textiles at all times during the year of income ended 30 June 1992. The litigation has been conducted on the footing that, despite the presence of the discretionary trusts, the members of the Goldberg family were to be treated as the individuals by whom any relevant control was capable of exercise.

82 Unless these various criteria in s 80A(3)(a) were met, the loss was not to be taken into account for the purposes of s 79E.

83 The Commissioner submits that, on the making of the order for the winding up of Linter Group on 12 April 1991 and at all times thereafter, the voting power in Linter Textiles ceased to be controlled, or to be capable of being controlled, by those persons being the Goldberg family who, before the making of the winding-up order, had been in that position. They no longer could control the exercise of the voting power of Linter Group in its wholly owned subsidiary Linter Textiles. It is unnecessary for this purpose to determine whether, within the meaning of par (a) of s 80A(3), that control had passed to, and was vested in, the liquidator of Linter Group. The Commissioner need only establish the negative proposition that the control was not that of the Goldberg family.

84 These submissions should be accepted. Counsel for the taxpayer sought to outflank them by putting to one side the inconvenient turn taken by the facts when Linter Group was ordered to be wound up. The submission was that the "control" and capacity to control spoken of in par (a) of s 80A(3) was not to be confused with a present ability to exercise the voting rights. Rather, there was an assumption to be made that a general meeting of Linter Textiles was called and voting was in accordance with the articles of that company.

85 The taxpayer appeared to rely upon a distinction drawn in such cases as *W P Keighery Pty Ltd v Federal Commissioner of Taxation*[88] and *Federal Commissioner of Taxation v Sidney Williams (Holdings) Ltd*[89] between capability to control existing in law by the exercise of legal or equitable rights or powers and de facto control by persons acting in breach of the rights of others. But that reasoning cannot assist. It may be assumed, without deciding the point, that the capacity to control spoken of in par (a) of s 80A(3) was to be exerted by the exercise of legal or equitable rights or powers by the Goldberg family and the intermediaries identified in par (a). The winding-up order in respect of Linter Group was a drastic act in the law which disrupted any such exercise of legal or equitable rights and powers. Again, if de facto capacity be sufficient, no case has been made that such control was capable of exercise through the liquidator who was responsible as a court officer to administer the statutory scheme for the winding up of Linter Group.

86 That conclusion respecting par (a) of s 80A(3) is sufficient to be fatal to the taxpayer's case under that provision. It is unnecessary to consider par (b) or par (c) of s 80A(3) or the effect of s 80A(4).

Orders

87 Leave should be granted for the amendment to the Notice of Appeal and the Amended Notice of Appeal should be treated as filed and served. The appeal should be allowed. The respondent's costs of the appeal to this Court nevertheless must, as indicated above, be paid by the appellant. The orders of the Full Court should be set aside and in place thereof the appeal to the Full Court allowed with costs, the orders of the primary judge set aside and the objection decision affirmed, with the costs of the proceeding before Hely J to be borne by the respondent.

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**88** (1957) 100 CLR 66.

**89** (1957) 100 CLR 95.

88 McHUGH J. This appeal concerns the construction of ss 80A(1)-(3) of the *Income Tax Assessment Act* 1936 (Cth) and their application to the facts of the case. The central issue is whether orders for the winding up of a parent company and its subsidiary result in the subsidiary being unable to meet the conditions prescribed by those sub-sections for deducting prior year losses from the assessable income of the current year.

89 In my opinion, although the subsidiary met the conditions specified in s 80A(1) of the Act, it did not meet the conditions specified in s 80A(3). That is because, on the winding up of the parent company, the persons who controlled the parent company were no longer able to exercise control and no longer had the capacity to control the voting power of the subsidiary. As a result, the Commissioner acted within his powers when he disallowed the claim to offset prior year losses against the assessable income for the relevant period.

Statement of the case

90 In March 2000 the Commissioner served a notice of assessment on the respondent, Linter Textiles Australia Ltd (in Liq) ("Linter Textiles"), in respect of the 1992 income year. In April 2000, Linter Textiles lodged an objection to the assessment. The Commissioner disallowed the objection. Linter Textiles appealed to the Federal Court against the Commissioner's disallowance of the objection. The appeal was heard by Hely J who allowed it[90]. The Full Court of the Federal Court (Hill, Goldberg and Conti JJ) unanimously dismissed an appeal by the Commissioner against the decision of Hely J[91].

91 This Court subsequently granted the Commissioner special leave to appeal against the orders of the Full Court.

Statement of the material facts

92 At all material times the respondent, Linter Textiles, was a wholly owned subsidiary of Linter Group Ltd (in Liq) ("Linter Group"). Pochette Nominees Pty Ltd, as trustee for two discretionary trusts – the Goldberg Family (Deborah) Trust and the Goldberg Family (Faye) Trust ("the Goldberg Family Trusts") – indirectly held shares in Linter Group. Members of the Goldberg family were the beneficiaries under the Trusts. In April 1991, the Supreme Court of New South Wales ordered that Linter Group be wound up under the *Companies*

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**90** *Linter Textiles Australia Ltd (in Liq) v Federal Commissioner of Taxation* (2002) 50 ATR 548.

**91** *Commissioner of Taxation v Linter Textiles Australia Ltd (in Liq)* (2003) 129 FCR 42.

*(New South Wales) Code* ("the Companies Code"). In February 1992, that Court ordered that Linter Textiles be wound up under the Corporations Law. In each case a liquidator was appointed[92].

93 In the year of income ended 30 June 1992, Linter Textiles had derived an assessable income of $10,163,773. Linter Textiles had also incurred losses in the year of income ended 30 June 1990 totalling $10,393,871 that it sought to carry forward. Section 80G of the *Income Tax Assessment Act* 1936 (Cth) ("the 1936 Act") also deemed the company to have incurred losses of $9,929,676. That deemed loss was a consequence of the transfer to it, under s 80G, of losses that had been incurred by Linter Group in the year of income ended 30 June 1990.

94 There was no change in the natural persons who were the ultimate beneficiaries of the Goldberg Family Trusts between the loss year (ended 30 June 1990) and the income year (ended 30 June 1992).

95 In the hearing before Hely J, the parties agreed that, but for the winding up orders that were made with respect to Linter Group and Linter Textiles, the requirements of s 80A(1) or (3) and s 80G(6) of the 1936 Act were met. Accordingly, the losses would have been available to Linter Textiles as an offset to the assessable income derived by it in the 1992 year of income. Neither Hely J nor the Full Court dealt with the question whether s 80A(3) was an alternative test to s 80A(1) or whether it was cumulative. As I later show, the omission of the primary judge and the Full Court to deal with this matter and the agreement of the parties does not prevent this Court from examining the issue.

The issues

96 The main issue in the appeal is whether the orders for the winding up of both Linter Group and Linter Textiles brought about the result that, in the 1992 year of income, Linter Textiles could not comply with the requirements of s 80A(1) or (3). Unless it satisfied those conditions, it could not deduct against the assessable income of that year under s 79E of the 1936 Act the prior year losses it had incurred. The issue raises several questions in respect of the application of s 80A(1) and s 80A(3) of the Act:

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**92** By way of background, the Linter group of companies were associated with Mr Abraham Goldberg and carried on business primarily as manufacturers and distributors of clothing and handled brands such as King Gee, Speedo, Pelaco, Exacto, Formfit, Kortex and Stubbies. The group collapsed in January 1990 with an estimated deficiency of approximately $550 million. Linter Group and all of its operating companies were put into receivership. The receivers sold each of the businesses and brand names. During 1991 and 1992 the companies, by then each a shell, were serially put into liquidation.

1. In relation to s 80A(1):

   (a) whether, by reason of the order for the winding up of Linter Textiles, the shares of Linter Group in Linter Textiles ceased to be shares "carrying between them" the rights in s 80A(1)(c)-(e), that is, the rights to exercise more than one-half of the voting power, to receive more than one-half of any dividends that may be paid and to receive more than one-half of any distribution of capital; and

   (b) whether, by reason of the order for the winding up of Linter Group, it no longer "beneficially owned" the shares it held in Linter Textiles within the meaning of s 80A(1).

2. If the requirements of s 80A(1) were satisfied and it was reasonable for the Commissioner under s 80A(2) to determine that s 80A(3) applied, whether, by reason of the order for the winding up of Linter Group, the Goldberg family ceased:

   - to control or be capable of controlling the voting power in Linter Textiles; or

   - to have a right to receive (directly or indirectly and for their own benefit) more than one-half of any dividends that may be paid and more than one-half of any distribution of capital within the meaning of s 80A(3).

97 The resolution of these questions turns on the construction of s 80A(1) and s 80A(3). The words of the sub-sections must be construed in the context in which they appear, and read in light of the legislative objects of the sections.

The application of s 80A(1)

*Introduction: the interpretation of s 80A(1)*

98 Section 80A is entitled "Losses of previous years not to be taken into account unless there is substantial continuity of beneficial ownership of shares in company". It appears in Div 3 (Deductions) of Pt III (Liability to Taxation) of the 1936 Act. Section 80A(1) provided at the relevant time:

> "Notwithstanding sections 79E, 79F, 80, 80AAA and 80AA but subject to this section and sections 80B, 80DA and 80E, a loss incurred by a company in a year before the year of income shall not be taken into account for the purposes of section 79E, 79F, 80, 80AAA or 80AA unless:
>
> (a) the company satisfies the Commissioner; or

(b) in the case of a company that is not a private company in relation to the year of income, the Commissioner considers that it is reasonable to assume;

that, at all times during the year of income, shares in the company carrying between them:

(c) the right to exercise more than one-half of the voting power in the company;

(d) the right to receive more than one-half of any dividends that may be paid by the company; and

(e) the right to receive more than one-half of any distribution of capital of the company;

were beneficially owned by persons who, at all times during the year in which the loss was incurred, beneficially owned shares in the company carrying between them rights of those kinds."

99 In its natural and ordinary meaning, s 80A(1) provided that a company was not entitled to claim a deduction for a loss year unless the Commissioner considered that it was reasonable to assume that at all times during the loss year and the income year the same "persons" "beneficially owned" "shares in the company carrying between them" the rights:

- to exercise more than one-half of the voting power in the company;
- to receive more than one-half of any dividends that may be paid by the company; and
- to receive more than one-half of any distribution of capital of the company.

100 The expression "shares carrying between them" directed the Commissioner's inquiry to the shares in the company and the rights that attached to those shares as conferred by the company's memorandum and articles of association. The inquiry was whether those shares carried between them rights of the relevant kind. The 1936 Act did not define the expression "beneficially owned", but the "test" in s 80A(1) was satisfied if it was reasonable to assume that at all relevant times certain persons "beneficially owned" shares that between them carried those rights under the company's articles of association.

101 Section 80A(1) was inserted into the 1936 Act by the *Income Tax and Social Services Contribution Assessment Act (No 3)* 1964 (Cth) ("the 1964 Act"). Unlike its predecessor sections, which applied only to private companies, s 80A(1) applied specifically to public companies. The Explanatory

Memorandum to the Income Tax and Social Services Contribution Assessment Bill (No 3) 1964 (Cth) ("the 1964 Bill") noted that ss 80(5) and (6) of the 1936 Act (which applied to private companies) were enacted[93]:

> "to inhibit a practice under which shareholders in a private company with accumulated losses sold their shares in that 'loss' company to a successful company [with the result] that losses incurred by a private company at a time when it was owned by various individual shareholders became deductible from income derived by that company after the shares in the 'loss' company had been transferred to the purchasing company."

102 The Memorandum also noted that "the Commonwealth lost tax on an amount of income equal to the losses accumulated at the time the shares were sold."[94] Remedial legislation had proved to be ineffective and in any event had no application in relation to public companies. The Explanatory Memorandum identified a further defect in that "in a few isolated cases [the provisions] have operated with undue severity."[95] The Memorandum continued[96]:

> "Broadly, the legislation now proposed is designed to remove the weaknesses in the law, extend it to public companies and correct anomalies that have come under notice."

103 Sub-sections (5) and (6) of s 80 of the 1936 Act were inserted by the *Income Tax Assessment Act* 1944 (Cth) ("the 1944 Act"). The 1944 Act was directed at the problem that, under the 1936 Act as it then stood, a company was entitled to a deduction in respect of previous income years, even though the shareholders in those years and the income year were entirely different. An Explanatory Note to the Income Tax Assessment Bill 1944 (Cth) described the operation of s 80 – which provided for business losses from previous income years to be carried forward – and asserted that companies were using the provision for the purpose of avoiding income tax. The Explanatory Note stated[97]:

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**93** Australia, Income Tax and Social Services Contribution Assessment Bill (No 3) 1964 (Cth) at 37-38.

**94** Australia, Income Tax and Social Services Contribution Assessment Bill (No 3) 1964 (Cth) at 38.

**95** Australia, Income Tax and Social Services Contribution Assessment Bill (No 3) 1964 (Cth) at 38.

**96** Australia, Income Tax and Social Services Contribution Assessment Bill (No 3) 1964 (Cth) at 38.

**97** Australia, Income Tax Assessment Bill 1944 (Cth) at 48.

> "There is in existence, evidence showing that in order to avoid income tax, some people are acquiring the shares of companies which have sustained losses in previous years and have ceased to carry on business but have not formally gone into liquidation.
>
> ...
>
> Whilst a company is an entity separate and distinct from its shareholders, the shareholders are the real owners of the business carried on by the company and there is no justification for the allowance of a loss sustained by an entirely different set of shareholders in earlier years."

104 The *Income Tax Assessment Act* 1973 (Cth) ("the 1973 Act") repealed s 80A and inserted s 80A(1) in essentially its current form. The Explanatory Memorandum to the Income Tax Assessment Bill 1973 (Cth) ("the 1973 Bill") described "a main purpose" of the proposed amendments as "the strengthening of the 'continuing ownership test'". It also stated that the amendments were "designed to ensure that the test operates in the way intended when it was introduced into the law."[98]

105 The legislative background to s 80A(1) indicates that the section was enacted to further the legislative purpose of conditioning the entitlement of taxpayer companies to carry forward business losses from previous income years. Hely J and the Full Court took slightly different views of the purpose of s 80A(1). Hely J found that the purpose of the section was to protect the revenue against the consequences of trafficking in losses[99]. This end was achieved by lifting the corporate veil and requiring a substantial continuity in the beneficial ownership of the shares in the loss company in both the year of income and the year of loss. The Full Court adopted a broader view of the mischief at which s 80A(1) was directed. It said that the object of s 80A "is to ensure that losses will not be available to a company where there has not been a continuity of ownership of shares during the year of income and the year of loss."[100]

106 The legislative history of s 80A(1) supports the conclusion that the section was enacted with respect to public companies for the immediate purpose of protecting the revenue against the consequences of public companies trafficking in business losses. The mischief at which the section was initially directed was

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**98** Australia, Income Tax Assessment Bill 1973 (Cth) Explanatory Memorandum at 18.

**99** *Linter Textiles* (2002) 50 ATR 548 at 562 [60].

**100** *Linter Textiles* (2003) 129 FCR 42 at 60 [57].

the hawking of losses. The section had a clear anti-avoidance purpose. Over time, the anti-avoidance object has been strengthened in order to overcome various attempts by taxpayers to circumvent the limitations on the entitlement to claim a deduction for business losses[101] and to ameliorate some unduly severe effects of the section. The characteristic chosen by the Parliament for the purposes of conditioning the entitlement to carry forward business losses is the identity of the owners of the shares in the loss company. Section 80A(1) requires a substantial continuity in the beneficial ownership of the shares in the loss company in both the year of income and the year of loss. The limitations and conditions imposed on the entitlement to carry forward losses have changed from time to time but, in general, the limitations require continuity of ownership of the shares of the company during the relevant years. The limitations are directed at the size of the shareholding and the nature of the shareholding.

*Shares in the company "carrying between them"*

107 The purpose of the Commissioner's inquiry under s 80A(1) was to ascertain the identity of share ownership in the loss company at the relevant times and whether there was continuity of beneficial ownership. The inquiry prescribed by the section was directed at, first, the nature of the rights attaching to the shares and, second, the beneficial ownership of the shares. The Explanatory Memorandum to the 1964 Bill stated that the focus of the inquiry under s 80A(1) was the rights that attach to the relevant shares. It implied that it is erroneous to treat the relevant inquiry as one into the power to exercise those rights in particular circumstances. The Explanatory Memorandum stated[102]:

> "The rights that need to be attached to the relevant shares are –
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> …
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> (c) in the event of the company being wound up – a right to 40% of any distributions of capital (which would include accumulations of profits of a company being wound up)".

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**101** The 1936 Act allows for losses to be carried forward and to be offset against income derived in a subsequent year: s 79E.

**102** Australia, Income Tax and Social Services Contribution Assessment Bill (No 3) 1964 (Cth) Explanatory Memorandum at 39. This formulation was repeated in the Explanatory Memorandum to the Income Tax Assessment Bill 1965 (Cth): Australia, Income Tax Assessment Bill 1965 (Cth) Explanatory Memorandum at 57. Although the words "in the event of the winding up" were later deleted from the text of s 80A(1), the expression "shares in the company carrying between them" specified the rights that were preserved. Thus, the relevant requirement was also preserved and the focus of the inquiry remained the same.

108 As a result, the inquiry was directed at whether the shares carried the rights identified in s 80A(1)(c), (d) and (e) and not at whether, during the relevant time, there was a power to actually exercise those rights. On this construction of s 80A(1), it would be reasonable for the Commissioner to assume that the requirements of the section are satisfied if the shares in Linter Textiles carried the rights referred to in s 80A(1)(c), (d) and (e). That is so whether or not Linter Group, the shareholder, was actually capable of exercising those rights by reason of the order for the winding up of Linter Group. The articles of association of Linter Textiles provided the answer to the inquiry.

109 The question is not whether there could be general meetings, dividends or reduction of capital. It is whether the articles of association of Linter Textiles provided that the rights attaching to the relevant shares (held by Linter Group) included a right to vote, a right to receive dividends and a right to distributions of capital. The Full Court found that those rights attached to the relevant shares and that there was no change in the rights attaching to the shares by reason of the making of the winding up order. The Court found that the shares continued to carry those rights[103]:

> "There is no change in the rights attaching to the shares merely because the company has gone into liquidation. The shares continue to carry the same rights. In our view the question can only be answered by looking at the rights which, in accordance with the articles of association of [Linter Textiles] attach to the relevant shares. Those rights are such that at all times in the year of income there was the necessary continuity of rights as existed in the year of loss."

110 On this finding, the shares in Linter Textiles, which Linter Group held, at all relevant times carried between them the rights identified in s 80A(1)(c), (d) and (e). No change in the nature of the rights that attached to the shares occurred because the exercise of those rights became subject to the statutory winding up regime. Accordingly, there is no error in the Full Court's conclusion in relation to the first question.

*Were the shares in Linter Textiles "beneficially owned" by Linter Group at all relevant times?*

111 The 1964 Act introduced the expression "beneficially owned" into s 80A(1) in place of the expression "beneficially held" in the predecessor section to s 80A(1). The 1936 Act did not define "beneficial ownership", and the 1964 Act did not insert a definition. The Explanatory Memorandum to the 1964 Bill explained that the amendments were introduced because, in some cases, the

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**103** *Linter Textiles* (2003) 129 FCR 42 at 62 [64].

provisions had operated with undue severity and had given rise to several anomalies[104]. But it did not identify those situations and anomalies.

112 The amendment took place against the background of the decision of this Court in *Dalgety Downs Pastoral Co Pty Ltd v Federal Commissioner of Taxation*[105]. In *Dalgety Downs*, the Court (Webb, Fullagar and Kitto JJ) held that shares were not "beneficially held" by a shareholder unless the name of the person appeared on the register of members in respect of the shares and that person held the shares for his, her or its own exclusive benefit. Their Honours also held that the expression "beneficially held" was not interchangeable with the expression "beneficial ownership" and that the Parliament used "unequivocal language" for the purpose of referring to the ownership of the beneficial interest separately from the legal interest in shares[106]. The Parliamentary drafters were therefore well aware that the expressions "beneficially held" and "beneficially owned" were legal terms of art and would also have been aware of the consequences of replacing the expression "beneficially held" with the expression "beneficially owned".

113 The Full Court held that it could be inferred that the purpose of substituting the expression "beneficially owned" for "beneficially held" was "to overcome the problem that losses would be unavailable if the owner was not on the register both in the year of loss and the year of income."[107] The change from "held" to "owned" was therefore designed to assist the taxpayer company by enabling the Commissioner to look beyond the share register to determine whether the same persons "beneficially owned" the shares at the relevant times.

114 The Explanatory Memorandum to the 1964 Bill said that, for the purposes of s 80A(1), it would be sufficient if "the same persons owned, throughout the year of income and the year when the loss was incurred shares which between them carry rights of the kind mentioned."[108] This suggests that the focus of the "beneficial ownership" requirement in s 80A(1) was on continuity of ownership, rather than on continuity of power to exercise the rights attaching to the shares.

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**104** Australia, Income Tax and Social Services Contribution Assessment Bill (No 3) 1964 (Cth) Explanatory Memorandum at 38.

**105** (1952) 86 CLR 335.

**106** *Dalgety Downs* (1952) 86 CLR 335 at 342.

**107** *Linter Textiles* (2003) 129 FCR 42 at 49 [20].

**108** Australia, Income Tax and Social Services Contribution Assessment Bill (No 3) 1964 (Cth) Explanatory Memorandum at 39.

115 Support for this conclusion is found in subsequent amendments to the 1936 Act. For example, the *Income Tax Assessment Act* 1965 (Cth) ("the 1965 Act") inserted a new s 80E into the 1936 Act. The new s 80E provided a "continuing business" test as an alternative to the then existing "percentage of shareholding" test which the 1936 Act provided. In outlining the operation of the new s 80E, the Explanatory Memorandum to the Income Tax Assessment Bill 1965 (Cth) ("the 1965 Bill") referred to the entitlement to carry forward losses "notwithstanding a substantial or total change in the identity of the owners of shares in the company"[109]. The 1965 Act also enacted s 80D, the precursor to s 80A(3). According to the Explanatory Memorandum[110], one purpose of that section was to preserve an entitlement to a deduction for a prior loss of a company:

> "in relation to cases of infrequent occurrence where, although there is a substantial or total change in the actual shareholdings in a company, there is no significant change in the identity of the persons who held indirect beneficial interests in the company in the year in which a loss was incurred and in the year of income."

116 The amendments were intended to preserve the entitlement[111]:

> "where persons who have direct or indirect beneficial interests in a company throughout the year of income … are the same persons who had such direct or indirect interests in the company throughout the year of loss."

117 As I have indicated, the 1973 Act inserted s 80A(1) into the 1936 Act in essentially its current form. The "continuing ownership test" was incorporated into s 80A(1). The Explanatory Memorandum to the 1973 Bill stated that the "continuing ownership test" was to be strengthened. The test would call for the shares carrying the relevant rights "to be owned by the same persons at all times during the year of loss and during the year of income for which the deduction is claimed"[112].

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**109** Australia, Income Tax Assessment Bill 1965 (Cth) Explanatory Memorandum at 57.

**110** Australia, Income Tax Assessment Bill 1965 (Cth) Explanatory Memorandum at 58.

**111** Australia, Income Tax Assessment Bill 1965 (Cth) Explanatory Memorandum at 58.

**112** Australia, Income Tax Assessment Bill 1973 (Cth) Explanatory Memorandum at 18.

118 Accordingly, the legislative history of the section indicates that the focus of the inquiry in s 80A(1) in relation to "beneficial ownership" is whether there has been a change in the identity of the beneficial owners of the shares in the loss company during the relevant times. In order for the section to operate, it may not be necessary for the Commissioner to identify whether a third person actually acquired or obtained beneficial ownership of the shares during any of the relevant times. For the purposes of disallowing a deduction, the Commissioner need only be satisfied of a negative, namely, that the person who beneficially owned the shares in the loss company at all times during the loss year did not beneficially own the shares at all times during the income year. The Full Court gave examples of instances where the "continuing ownership test" would not be satisfied. They included the result of an attempt to traffic in losses or "where a shareholder having the relevant percentage of shares declared a trust of those shares for another or for others, while remaining on the register."[113]

119 What, then, was the effect of the making of the order for the winding up of Linter Group on that company's "beneficial ownership" of the shares in Linter Textiles? To answer the question whether the order had the effect that Linter Group no longer "beneficially owned" the shares in Linter Textiles at all relevant times within the meaning of s 80A(1), it is necessary to examine the consequences of the making of a winding up order.

120 Under the Companies Code and the Corporations Law (as they then stood), upon the making of a winding up order the liquidator acquired custody and control of the company's assets and property and came under a statutory duty to deal with the company's assets in accordance with the statutory scheme[114]. It is uncontroversial that at this point there was a change in control of the affairs of the company and its assets. For example, contributories (formerly, the "members" of the company) lost the power to dispose of their shares: any transfer of shares after the commencement of the order was void unless the court ordered otherwise[115]. However, the company's property did not vest automatically in the liquidator, although the court had the power under s 374(2) of the Companies Code and s 474(2) of the Corporations Law to order that all or any part of the company's property vest in the liquidator.

121 Long-standing Australian authority indicates that, despite the making of a winding up order, "the company is not deprived of any ownership that it has in

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**113** *Linter Textiles* (2003) 129 FCR 42 at 61 [57].

**114** Companies Code, s 374(1), Corporations Law, s 474(1).

**115** Companies Code, s 368(1), Corporations Law, s 468(1).

any assets, unless the court makes an order under s 474(2) vesting its property in the liquidator"[116]. The company holds its property beneficially, but subject to the statutory scheme of liquidation, "under which the liquidator is to pay creditors and distribute any surplus among members."[117] Menzies J in *Franklin's Selfserve Pty Ltd v Federal Commissioner of Taxation*[118], when considering the meaning of the different expression "beneficially held" in s 80(5) of the 1936 Act (the precursor section to s 80A(1)), held that the continuing identity of interest required by that section did not cease when a company went into liquidation. His Honour said[119]:

> "My problem here, however, is what is meant by the words 'beneficially held' in s 80(5) of the [1936] Act and not in any other provision, and I do find in the section itself an indication that a trustee who holds for cestuis que trust nevertheless holds beneficially for the purposes of the section. Thus in s 80(6) there is a reference to shares 'beneficially held by the trustee'. I am encouraged, by what I think underlies the provisions of sub-s (6), to think that what the section is concerned with is a continuing identity of interest such as there is, for instance, between a shareholder and the person who, upon his death, becomes his trustee, notwithstanding that he holds for beneficiaries. In the context here, I do not consider that this identity of interest ceases when a shareholder, which is a company, goes into liquidation. Even if a company, being insolvent, goes into liquidation, I find difficulty in regarding the company itself as trustee for anybody, notwithstanding that it can no longer employ its assets in its business, nor dispose of them. The assets must be held for the purpose of its own liquidation in accordance with statute. Of course its assets have to be realized by the liquidator and distributed among the company's creditors but this is done in accordance with elaborate statutory provisions for bringing about the result for which the statute provides. The matter is not left to the application of general law relating to trustees and cestuis que trust. Furthermore, the realization of the assets of a company which was insolvent may nevertheless produce a surplus and in that event contributories would be entitled to that surplus. Perhaps, indeed, the

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**116** Ford, Austin and Ramsay, *Ford's Principles of Corporations Law*, (looseleaf), vol 2 at [27.120], citing *In re Paul and Gray Ltd* (1932) 32 SR (NSW) 386 and *United Tool & Die Makers Pty Ltd (in Liq) v JV Marine Motors Pty Ltd* [1992] 1 VR 266.

**117** Ford, Austin and Ramsay, *Ford's Principles of Corporations Law*, (looseleaf), vol 2 at [27.120].

**118** (1970) 125 CLR 52 at 69.

**119** *Franklin's Selfserve* (1970) 125 CLR 52 at 69-71 (footnotes omitted).

> company could be given a fresh lease of life. To regard a company in liquidation as, in any strict sense, a trustee for creditors and contributories, would, I think, be inconsistent with *Commissioner of Stamp Duties (Q) v Livingston*. Of course a liquidator may have vested in himself the assets of the company in liquidation, including the shares, and such a step would produce an entirely different situation for the purposes of s 80(5); cf *In re Farrow's Bank Ltd*. I have not been persuaded, however, that liquidation, of itself, deprives the company in liquidation of the beneficial holding of its shares. They are available for the purposes of its winding up.
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> …
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> As I have said, I do not think that, from the date of its liquidation, Major 8 held its shares in the taxpayer 'for the benefit of others'. They were held for the purpose of its liquidation in accordance with the statute. Had the shares been sold, the liquidator would have held the proceeds simply as part of the realization of the company's assets to be dealt with in accordance with law.
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> Having examined the authorities cited, not to control the language of s 80(5) but to inform myself of the principles to be applied, I have come to the conclusion that I would be going further than the statute warrants were I to hold that, for the purposes of s 80(5), a company which owns shares beneficially in another company ceases, upon its liquidation, to own those shares beneficially. These shares remain the property of the company and the beneficial interest is not, by virtue of the liquidation, vested in any other person or persons."

122 If this reasoning is correct, it follows that the shares in Linter Textiles were "beneficially owned" by Linter Group at all relevant times for the purposes of satisfying s 80A(1). However, the Commissioner contends that the reasoning of and the conclusion reached by Menzies J in *Franklin's Selfserve* are erroneous. It is necessary, therefore, to examine his Honour's reasoning in more detail.

123 Menzies J's decision raises two matters for consideration. First, whether the fact that a shareholder loses the power to control its shares (eg, to deal with them or dispose of them) by reason of the winding up order means that the shareholder no longer "beneficially *owns*" those shares. Second, whether the making of a winding up order creates some kind of "trust" in relation to the company's assets such that the shareholder no longer "beneficially owns" its shares.

124 The Commissioner contends in relation to the first matter that a company shareholder ceases to be the beneficial owner of shares when a court makes an order for the winding up of the company. The Commissioner relies on two considerations to support this view. First, a company put into liquidation loses

many of the rights that beneficial ownership of its assets entails (for example, its right to control its assets passes to the liquidator) and the shareholders lose many of their rights. Second, the purpose of the statutory liquidation scheme is to protect creditors. Although the beneficial ownership of those shares may be revived if the liquidation is terminated, while the company is in liquidation its assets are administered for the benefit of creditors and, hence, cease to be "beneficially owned" within the meaning of s 80A(1).

125 However, the correct view is that the change in control of a company's assets brought about by the winding up order does not have the effect that shares in another company held by the company cease to be "beneficially owned" by the company, the subject of the winding up order. On liquidation, the *ownership* of the shares is not "for the benefit of others"; rather, the *administration* of the assets is for the benefit of the creditors. Although a company shareholder, which is the subject of a winding up order, is no longer able to exercise many of the rights in the "bundle of rights" that attach to its shares, it does not cease to be the beneficial owner of the shares. The company retains its interest in the shares and continues to be subject to the liabilities provided by the company's memorandum and articles of association and the legislation. For example, it may be liable as a contributory in relation to any part-paid shares it holds. Moreover, it retains some rights, such as the right to participate in the distribution of surplus assets available for shareholders on a winding up. It does not lose its interest in a company in which it holds shares (as measured by a right to a specified amount of the share capital of a company) on the making of a winding up order. Rather, that interest simply becomes subject to the set of liabilities prescribed by the statutory scheme and the company's memorandum and articles of association. There is a difference between the power to deal with an asset and ownership of that asset. It is unnecessary to conflate the two concepts in order to give effect to the legislative purpose of the section.

126 The position of a company shareholder, which is the subject of a winding up order, may be contrasted with that of bankrupts. At all material times, the 1936 Act prevented bankrupts from carrying forward losses in years preceding their bankruptcy. There has never been a corresponding provision in relation to companies that are placed into liquidation. Section 80(4) of the 1936 Act provided that if, prior to a year of income, a taxpayer became bankrupt, or was released from his or her debts by the operation of the *Bankruptcy Act* 1924 (Cth), then no loss incurred by the taxpayer before his or her bankruptcy was an allowable deduction[120]. The Parliament made express provision for bankrupts,

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**120** An Explanatory Note to the Income Tax Assessment Bill 1944 (Cth) at 19 stated in relation to s 80(4) that: "This sub-section, however, does not apply to companies because section 5 of the Bankruptcy Act excludes companies from the operation of the Bankruptcy Act."

even though on bankruptcy the property of the bankrupt vests automatically in the trustee in bankruptcy. The Parliament could quite easily have inserted a similar section in relation to companies that have been placed in liquidation. It has not done so. The legislative history of s 80A(1) does not suggest that the section is designed to operate to preclude a company that is subject to a winding up order from carrying forward business losses or from beneficially owning shares, simply because the company is being wound up.

127 The second matter must also be decided against the Commissioner. The making of a winding up order does not create any kind of "trust" in relation to the company's assets such that the company no longer "beneficially owns" those assets. The argument that it does stems from a line of English authority that includes *In re Oriental Inland Steam Co; Ex parte Scinde Railway Co*[121], *Inland Revenue Commissioners v Olive Mill Ltd (in Liq)*[122], *Ayerst v C & K (Construction) Ltd*[123] and *Mitchell v Carter*[124]. As the Full Court observed[125], there is an "apparent conflict" between the English authority and the decision of Menzies J in *Franklin's Selfserve*. The authors of *Ford's Principles of Corporations Law* assert that the view expressed in *Oriental Inland Steam Co*, "that on liquidation a company becomes a trustee of its assets for its creditors and contributories was rejected in [*Franklin's Selfserve*]. That rejection could also conflict with the views of House of Lords in [*Ayerst*] in which it held that the beneficial ownership is in suspense"[126] because it is too early to attribute beneficial ownership to the persons for whose benefit the assets are being administered. Australian authority has favoured the view that beneficial ownership of the assets of a company in liquidation remains with the company,

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**121** (1874) LR 9 Ch App 557 at 559, 561.

**122** [1963] 1 WLR 712 at 726-727; [1963] 2 All ER 130 at 139.

**123** [1976] AC 167.

**124** [1997] 1 BCLC 673 at 686.

**125** *Linter Textiles* (2003) 129 FCR 42 at 57 [44].

**126** *Ford's Principles of Corporations Law*, (looseleaf), vol 2 at [27.120] (footnote omitted), which also referred to *Re Starkey* [1994] 1 Qd R 142; *Mineral & Chemical Traders Pty Ltd v T Tymczyszyn Pty Ltd (in Liq)* (1994) 15 ACSR 398, and the conflict that was noted but not resolved in *Federal Commissioner of Taxation v St Hubert's Island Pty Ltd (in Liq)* (1978) 138 CLR 210 at 233 per Mason J, 249 per Aickin J; *Shaw Savill and Albion Co Ltd v Commissioner of Inland Revenue* [1956] NZLR 211; *Elfic Ltd v Macks* [2003] 2 Qd R 125.

"free from any trust, albeit bound by the statutory scheme for distribution in company law legislation."[127]

128 The use of trust language in this context invites error. There is no trust in any sense that equity would recognise. To describe the manner in which the company holds its assets for the purpose of discharging its liabilities in accordance with the statutory scheme as bearing the indicia of an equitable trust is erroneous. As the authors of *Australian Corporation Law: Principles and Practice* observe[128], the only sense in which the winding up order imposes a trust upon the relationship of the company to its property:

> "is insofar as the property of a company in liquidation cannot be used or disposed of by the legal owner for its own benefit, but must be used or disposed of for the benefit of other persons. The company holds the assets for statutory *purposes* not for *persons*."

129 The learned authors assert that the use of trust language has proceeded from a confusion of terms, the proper language being that of James LJ in *In re General Rolling Stock Co*. There, his Lordship said that "[a] duty and a trust are thus imposed upon the Court, to take care that the assets of the company shall be applied in discharge of its liabilities."[129] There is a difference between "being under a duty of trust" and "holding something on trust". The former describes the obligation of a person in relation to the assets; the latter is the modern form of a use. It is not the case that the shareholders or creditors are beneficiaries under a trust. To the extent that *Ayerst* and other English authorities express a contrary view, they should not be followed.

130 The purpose of the statutory liquidation scheme is to ensure that the assets of the company are applied in favour of those who have the real interest in the liquidation. However, it does not follow that the shares held by that company cease to be "beneficially owned" by the company. This conclusion is consistent with the legislative object of s 80A(1). A finding that at all relevant times Linter

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**127** *Linter Textiles* (2003) 129 FCR 42 at 57 [44]. See, eg, *Mineral & Chemical Traders Pty Ltd v T Tymczyszyn Pty Ltd (in Liq)* (1994) 15 ACSR 398 at 416 per Santow J; *Re Turner Corporation Ltd (in Liq)* (1995) 17 ACSR 761 at 769 per Sackville J; *Commissioner of Taxation v Macquarie Health Corporation Ltd* (1998) 88 FCR 451 at 468-469 per Emmett J.

**128** *Australian Corporation Law: Principles and Practice*, (looseleaf), vol 2 at [5.4.0495] (footnote omitted, original emphasis).

**129** *Australian Corporation Law: Principles and Practice*, (looseleaf), vol 2 at [5.4.0495], citing *In re General Rolling Stock Co* (1872) LR 7 Ch App 646 at 648-649.

Group "beneficially owned" "shares in [Linter Textiles] carrying between them" the rights identified in s 80A(1)(c), (d) and (e) does not result in any "trafficking" in losses contrary to the anti-avoidance objectives of s 80A(1).

The application of s 80A(3)

131 The second issue in this appeal is whether, by reason of the order for the winding up of Linter Group, the Goldbergs ceased to control or be capable of controlling the voting power in Linter Textiles within the meaning of s 80A(3)(a) of the 1936 Act. A preliminary issue arises as to whether it was open to the Commissioner to raise this issue in this Court.

*The Commissioner's application for leave to amend*

132 When the argument before this Court on 3 August 2004 concluded, counsel for the Commissioner sought leave to amend the notice of appeal. He applied to add a further ground that asserted that the Full Court had erred in failing to hold that, on the making of the winding up order, the persons referred to in s 80A(3) of the 1936 Act ceased to have control or rights of the kind identified in that section[130].

133 Counsel for the Commissioner conceded that the question of the application of s 80A(3) was not squarely addressed before Hely J – at least not in the way which the Commissioner sought to put the issue before this Court. However, he did not make the same concession in relation to the Full Court appeal[131]. Counsel nevertheless acknowledged that the way in which he sought to raise the issue in this Court was not precisely how it was put before Hely J or the Full Federal Court. Counsel pointed out that the question was addressed in the Commissioner's reasons for decision, which stated:

> "Further, on the assumption that the requirements of subsection 80A(1) [of the 1936 Act] are met by the taxpayer for the income year ended 30 June 1992 in respect of the whole or part of a loss incurred by

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**130** The notice of appeal (if leave to amend were granted) would read:

> "4. The [Full Federal] Court erred in failing to hold that on the making of the winding up order in relation to [Linter Textiles] and Linter Group the persons referred to in subsection 80A(3) of the [1936 Act] ceased to have control or rights of the kind identified in that section."

**131** Indeed, counsel for Linter Textiles said that his understanding of the way the case was run before Hely J and the Full Federal Court was only based upon the liquidation of Linter Textiles, not based upon the liquidation of Linter Group.

> the taxpayer in the income year ended 30 June 1990, the Commissioner considers it reasonable, within the meaning of paragraph (c) of subsection 80A(2) [of the 1936 Act], that subsection 80A(3) should apply for the purpose of determining whether the loss incurred by the taxpayer in the income year ended 30 June 1990 is to be taken into account for the purpose of section 79E for the year ended 30 June 1992.
>
> On the assumption that subsection 80A(3) … so applies, the Commissioner is not satisfied [that each of the requirements in pars (a), (b) and (c) of s 80A(3) is met]."

134 The issue also formed part of the Commissioner's statement of facts, issues and contentions: "The [Commissioner] contends that [Linter Textiles] failed to meet the tests set out in section 80A of the [1936 Act] and is not entitled to deduct its prior year losses". The statement of facts, issues and contentions also indicated that:

> "The [Commissioner] formed the opinion (that if the requirements of section 80A(1) of the [1936 Act] were met) then it was reasonable in terms of subparagraph (c) of subsection 80A(2) of the [1936 Act] that subsection 80A(3) should apply for the purpose of determining whether the loss incurred by [Linter Textiles] should be taken into account for the purpose of section 79E in lieu of subsection (1) thereof for the year ended 30 June 1992."

135 Linter Textiles' statement of facts, issues and contentions also put the question in issue. It did so by contending alternatively that, if s 80A(3) applied in lieu of s 80A(1), the Commissioner should have been satisfied of each of the requirements in s 80A(3)(a), (b) and (c). Accordingly, there is force in the Commissioner's argument that the s 80A(3) issue was always a live issue between the parties.

136 Before Hely J, the parties reached agreement on a number of issues. I will later refer to some of them. For present purposes, it is sufficient to note an unsigned document prepared by the parties that was before Hely J entitled "Questions posed for the assistance of the Court and concessions made by the parties" which stated:

> "***Concessions***
>
> The [Commissioner] accepts that but for the orders made by the court with respect to [Linter Textiles] and/or [Linter Group] the requirements of subsections 80A(1) or (3) … are met on the facts".

137 The parties also agreed that "subject to the impact (if any) of the winding up *orders*, the requirements of s 80A(1) *or (3)* are met, as are the requirements of s 80G(6)."[132] The use of the plural "winding up orders" is significant: it refers to the winding up orders made in relation to Linter Textiles *and Linter Group*. The agreement therefore did not take out of contention the operation and application of s 80A(3) in relation to the winding up order made against Linter Group. As a result, the question as to the application of s 80A(3) appears to have been a live issue before Hely J.

138 The Commissioner's notice of appeal to the Full Court also raised the issue in a ground of appeal. It asserted that Hely J "erred in not holding that from the time of the winding up of [Linter Textiles] and from the time of the winding up of [Linter Group] the requirements of s 80A(3) were not satisfied." As a matter of law then, the issue concerning s 80A(3) was a live issue before that Court. The Full Federal Court noted that it was common ground before Hely J and before that Court that, "but for the winding up *orders* that were made with respect to [Linter Group] and [Linter Textiles], the requirements of s 80A(1) or (3) and s 80G(6) of the 1936 Act were met"[133]. Again, the use of the plural "winding up orders" suggests that the issue was before the Full Court.

139 Significantly, the Full Court referred to the winding up orders in relation to both Linter Textiles and Linter Group when it described the main issue in the appeal as being[134]:

> "whether the winding up orders made with respect to both [Linter Group] and [Linter Textiles] brought about the result that [Linter Textiles] could not, in the year of income, comply with the requirements of s 80A(1) or (3) so as to permit it to deduct against the assessable income of that year under s 79E of the 1936 Act the prior year losses it had incurred."

140 However, the Full Court did not expressly consider the effect of s 80A(3)(a) in relation to Linter Group; rather, the Court described the s 80A(3)(a) issue in relation to Linter Textiles as follows[135]:

> "[W]hether the making of a winding up order in relation to [Linter Textiles] had the consequence that the persons referred to in s 80A(3) of

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**132** *Linter Textiles* (2002) 50 ATR 548 at 550 [6] per Hely J (emphasis added); see also at 562-563 [62].

**133** *Linter Textiles* (2003) 129 FCR 42 at 44 [6] (emphasis added).

**134** *Linter Textiles* (2003) 129 FCR 42 at 44-45 [6].

**135** *Linter Textiles* (2003) 129 FCR 42 at 47 [10].

> the 1936 Act ceased to have the control or rights of the kind identified in the section. However, it was common ground that if the other two questions were answered in favour of [Linter Textiles] then this third question would likewise be answered in favour of [Linter Textiles] and the appeal would accordingly be dismissed."

141 The Full Court's failure to consider the effect of s 80A(3)(a) in relation to Linter Group does not prevent the Commissioner from relying upon this ground of appeal before this Court. The issue was a live issue as a matter of law before the Full Court, that Court appears not to have dealt with it, and there does not appear to be any reason to refuse a grant of leave in respect of it.

142 Linter Textiles does not suggest that the Commissioner made an election between s 80A(1) and s 80A(3) that operated to preclude the Commissioner from relying on s 80A(3) as it applied to Linter Group. No issue was taken at trial or on the appeal that it was not open to the Commissioner to exercise the discretion under s 80A(2) and to "consider it reasonable" within the meaning of s 80A(2)(c) that s 80A(3) apply in lieu of s 80A(1). There was thus no issue that s 80A(3) could not apply because the Commissioner had failed to satisfy the requirements in s 80A(2)(c). As Linter Textiles did not seek to challenge this exercise of the Commissioner's discretion, this matter did not prevent the Court from treating the s 80A(3) issue as a live issue.

143 Moreover, it does not appear that Linter Textiles would suffer any evidentiary prejudice if leave to amend were granted. The s 80A(3) issue in relation to Linter Group is predominantly a question of law involving matters of statutory construction. The facts are not in dispute and the parties' agreement before the primary judge seems to remove any dispute about procedural issues (such as whether an election had occurred). In the absence of such prejudice, and given that the issue was before the Full Court and was fully argued before this Court, it would seem to be in the interests of the administration of justice to grant leave to amend. Accordingly, I would grant the Commissioner leave to amend his notice of appeal.

*The application of s 80A(3)(a): control or capacity to control voting power*

144 The substantive question in relation to the amended ground is whether the order for the winding up of Linter Group resulted in the Goldberg family ceasing to control or to be able to control the voting power in Linter Textiles within the meaning of s 80A(3)(a) of the 1936 Act.

145 Section 80A(3)(a) provides:

> "(3) Where, by virtue of subsection (2), this subsection applies for the purpose of determining whether a loss incurred by a company (in this subsection referred to as the 'loss company') in a year before

> the year of income is to be taken into account for the purposes of section 79E, 79F, 80, 80AAA or 80AA, then, notwithstanding those sections but subject to subsection (5) and sections 80B, 80DA and 80E, that loss shall not be taken into account for the purposes of section 79E, 79F, 80, 80AAA or 80AA unless the Commissioner is satisfied, or considers that it is reasonable to assume, that:
>
> (a) at all times during the year of income the voting power in the loss company was, either directly or through one or more interposed companies, trustees or partnerships, controlled, or capable of being controlled, by a person not being a company, or by 2 or more persons not being companies, who, either directly or through one or more interposed companies, trustees or partnerships, controlled, or was or were capable of controlling, the voting power in the loss company at all times during the year in which the loss was incurred".

146 Here the loss company is Linter Textiles. By virtue of Taxation Determination TD 2000/27, trustees of a discretionary family trust may be regarded as beneficially owning shares in the relevant company for the purposes of satisfying the continuity of beneficial ownership test in s 80A. For this reason, and also because of the agreement reached between the parties, the litigation was conducted on the basis that, for the purposes of s 80A(3)(a), the Goldberg family were to be treated as the individuals who were capable of exercising the relevant control. This was so, notwithstanding the existence of the discretionary family trusts.

147 Under s 80A(3)(a), a company is not entitled to claim a deduction for a loss year unless the Commissioner considers it reasonable to assume certain matters. They are that, at all times during the loss year and the income year, the voting power in the loss company was ultimately controlled or capable of being controlled by the same person or persons not being a company or companies. The natural or ordinary meaning of the words of s 80A(3)(a) directs the Commissioner's inquiry to the voting power in the loss company and the ultimate human controller or controllers of that voting power. The focus is on the control of or the capacity to control the voting power in Linter Textiles by an individual or individuals (who are not companies). Such control or capacity to control may be exercised either directly or indirectly through interposed entities. That control or capacity to control must exist at all times during the loss year and the income year. Unlike s 80A(1), the text of s 80A(3) directs the inquiry not at the rights attaching to shares, but rather at the actual control or capacity to control exercisable by the person or persons in relation to the voting power in the loss company.

148 This construction of the section is consistent with the legislative purpose of the section as evidenced by the legislative history.

*Legislative history of s 80A(3)(a)*

149 The precursor section to s 80A(3) was s 80D of the 1936 Act (although s 80C was also relevant). Section 80D (Tracing beneficial ownership of shares through a series of companies for the purposes of section 80A) was inserted into the 1936 Act by the 1965 Act. The Explanatory Memorandum to the 1965 Bill described one purpose of s 80D as[136]:

> "to preserve an entitlement to a deduction for a loss incurred in a prior year where, although there is a change in the beneficial ownership of shares in a 'loss' company or a holding company otherwise sufficient to preclude the deduction, the persons who had the requisite beneficial interests in the loss company, either directly or indirectly, throughout the year in which the loss was incurred continue to have those interests throughout the year of income."

150 Section 80D initially operated to the benefit of the taxpayer: the taxpayer was required to request the Commissioner that the section should apply.

151 The Explanatory Memorandum to the 1965 Bill also stated[137]:

> "If, after the beneficial interests are traced, it is found that persons who had the specified beneficial interests [namely, interests equivalent to rights to 40 per cent of the voting power, 40 per cent of dividends paid and 40 per cent of any distributions of capital] in the 'loss' company throughout the year of income are the same persons who had such

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**136** Australia, Income Tax Assessment Bill 1965 (Cth) Explanatory Memorandum at 62-63. The Explanatory Memorandum gave as examples instances where shares in a sub-subsidiary company are transferred from one company in the group to another company in the same group; where the shares in a subsidiary company are transferred from the parent company to persons who had been shareholders in the parent company; and where a company that had a controlling interest in a "loss" company during the loss year ceased to have that interest before or during the income year, even though the persons who had beneficial interests in at least 40 per cent of the voting power, dividends and capital of the "loss" company throughout the loss year held those interests throughout the income year.

**137** Australia, Income Tax Assessment Bill 1965 (Cth) Explanatory Memorandum at 63.

> interests throughout the year in which the loss was incurred, neither section 80A nor section 80C will operate to deny a deduction for the loss."

152 The Explanatory Memorandum noted that, in applying the tests of s 80A (which would be applied if s 80D applied), the Commissioner would have regard "to the beneficial interests held in the 'loss' company, whether directly or through one or more interposed companies, by individual shareholders throughout the year the loss was incurred and the year of income. Indirect beneficial interests will be traced to individual shareholders"[138]. The section thus provided for the tracing of interests in the loss company to the ultimate human controller or controllers of that company. The focus of the tracing provisions in s 80D was the identity of the persons who had beneficial interests in the loss company throughout the year of income and the year of loss.

153 Section 80D used the concept of "voting interest" as the means for tracing the holder or holders of the relevant beneficial interests in the loss company. That concept was described in s 80D(5)(a) as "a reference to the person having been, or being, at that time the beneficial owner of shares in the company that carried, or carry, at that time the right to exercise any of the voting power in the company". Although s 80D referred to "controlling interest", the focus of the test in that section did not appear to be on whether the persons who held those rights could actually exercise them or not. The references to "control" and "controlling interest" appeared to relate to the rights attaching to the shares.

154 The 1973 Act repealed ss 80C and 80D of the 1936 Act and inserted s 80A(3) in essentially its current form. The concept of "voting interest" in s 80D(2) was replaced by the concept of "voting power", and the test for ascertaining "voting power" was also changed. In particular, the test introduced by the 1973 Act did not focus on the rights attaching to shares in the company. Rather, the inquiry was directed to the person or persons who "controlled" or were capable of controlling the voting power in the company.

155 The Explanatory Memorandum to the 1973 Bill described the condition on a company's entitlement to carry forward losses as the "continuing ownership test" and stated that that test would be strengthened by[139]:

> "withdraw[ing] provisions relating to companies with controlling interests in 'loss' companies and replac[ing] them with more direct provisions to

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**138** Australia, Income Tax Assessment Bill 1965 (Cth) Explanatory Memorandum at 64.

**139** Australia, Income Tax Assessment Bill 1973 (Cth) Explanatory Memorandum at 19.

> allow beneficial interests in a loss company to be traced through any interposed companies, trusts or partnerships, either at the loss company's request or on the initiative of the Commissioner."

156 The Explanatory Memorandum also noted that the amendments were "proposed to strengthen the 'continuing ownership test' and to enact safeguarding provisions against devices designed to avoid the operation of the test."[140] This was to be achieved by "extend[ing] the area of application of provisions under which the ownership of direct and indirect interests in a 'loss' company can be traced through interposed companies, trusts and partnerships to individual persons ... and [to] enable regard to be had to the subordination of the rights, powers and interests of continuing shareholders in a 'loss' company to those of other persons who had little or no beneficial interest in the company in the year in which the loss was incurred."[141] Other amendments aimed at strengthening the test were directed at arrangements entered into voluntarily by shareholders. Hence, the object of the amendments was to tighten the anti-avoidance provisions of the 1936 Act in relation to the entitlement to carry forward business losses.

157 According to the Explanatory Memorandum to the 1973 Bill, the proposed s 80A(3) could operate to the advantage of either the taxpayer or the Commissioner. The Commissioner would be able to invoke s 80A(3) in order to deny a deduction[142]:

> "where, for example, there has been no disqualifying change in the beneficial ownership of a company or companies of shares in a 'loss' company but there is such a change among the natural persons beneficially owning shares in the corporate shareholders to the extent that the required continuing ownership of shareholders' rights cannot be found by reference to those natural persons."

158 The Explanatory Memorandum did not identify the situations in which "such a change among the natural persons beneficially owning shares" might occur. Nor did the Memorandum explain what was meant by the "required continuing ownership of shareholders' rights" in relation to those natural persons.

159 Two important amendments were effected by the 1973 Act. First, s 80A(3)(a) could be applied to the advantage of the Commissioner while its

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**140** Australia, Income Tax Assessment Bill 1973 (Cth) Explanatory Memorandum at 1.

**141** Australia, Income Tax Assessment Bill 1973 (Cth) Explanatory Memorandum at 2.

**142** Australia, Income Tax Assessment Bill 1973 (Cth) Explanatory Memorandum at 20-21.

predecessor section applied only to the advantage of the taxpayer. The significance of this amendment is that a court should not approach the construction of the section with any presumption against a construction that favours the Commissioner. Second, the focus of the inquiry in relation to "voting interest" or "voting power" shifted from ascertaining the rights attaching to shares to ascertaining who had actual control of or capacity to control the loss company. The 1973 Act strengthened the "continuing ownership test" by requiring a "continuity of control" by the ultimate human controllers of the loss company. That issue was to be ascertained by an inquiry that went beyond an examination of the loss company's articles of association.

160 The amendments effected by the 1973 Act had the object of strengthening the anti-avoidance measures in the 1936 Act. They attempted to preserve the original purpose of the anti-avoidance provisions. But they also gave effect to a legislative policy that a business can deduct losses from previous income years if the business was conducted by the same owners (even if those owners changed the nature of the business during the loss years and the income years) (s 80A).

161 Counsel for Linter Textiles relied on the Explanatory Memorandum to the 1973 Bill. He contended that the change in the test from ownership in s 80A(1) to control in s 80A(3) simply reflects the idea of tracing. On this view, the inquiry depends on whether the company that can control the voting power in the loss company remains a member. The company remains a member if it has control of the voting power. The tracing test is then repeated until an ultimate natural person or persons can be reached.

162 Counsel for Linter Textiles also contended that the observations of Hely J[143] and the Full Federal Court[144] to the effect that s 80A(1) implicitly assumes that *some person* has the relevant rights (ie can be identified as the beneficial owner or owners in both the loss and income years) also apply to s 80A(3). He contended that s 80A(3) contained the implicit assumption that one or more persons can be identified as controlling or having the capacity to control the voting power in the company at each of the relevant times. On this view, the purpose of the legislation "intends a change in beneficial ownership, and only a change in beneficial ownership somewhere in the chain to be the disqualifying factor." Thus, Linter Textiles asserted that the object of the section was to preclude an entitlement to a deduction only where there was a positive change in the identity of the persons who control or have the capacity to control the voting power in the loss company.

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**143** *Linter Textiles* (2002) 50 ATR 548 at 562 [60].

**144** *Linter Textiles* (2003) 129 FCR 42 at 61 [60].

163 However, it is not inconsistent with the legislative object of the section – in particular, the strengthening of the anti-avoidance provisions – that a continuity of control test be imposed. Nor is it inconsistent with that object that such a test does not require a positive change in beneficial ownership before the entitlement to a deduction is lost. The section can operate without the need to assume that some person or persons can be identified as ultimately controlling or being capable of controlling the voting power in the loss company at the relevant times. A loss company may fail the continuity of control test notwithstanding that the identity of the person who controlled or had the capacity to control the voting power in the loss company at the relevant times cannot be established with precision. The section requires the Commissioner to do no more than establish a negative. It is enough that the Commissioner is not satisfied or does not consider it reasonable to assume that the same person or persons (not being a company or companies) exercised or was or were capable of exercising the voting power in the loss company.

*The inquiry under s 80A(3)(a): whether the "voting power in the loss company" was "controlled or capable of being controlled"*

164 Unlike s 80A(1)(c)-(e), the inquiry under s 80A(3)(a) is not whether the shares in the loss company are shares that carry between them certain rights, such as the right to exercise more than one-half of the voting power in the company. The inquiry under s 80A(3)(a) is whether, directly or through interposed entities, the *voting power* in the loss company was *controlled, or capable of being controlled,* by natural persons (the ultimate human controllers). This test focuses on *actual* control or actual capacity to control, not on the mere existence of a right to control that attaches to the shares as prescribed in the company's articles of association.

165 The Commissioner contended that shareholders control a company through the exercise of voting power in the company. Control of voting power has traditionally been understood as the ability to carry an ordinary resolution at a general meeting of shareholders[145]. The Commissioner contended that, by reason of the winding up order made against Linter Group, the voting power in Linter Textiles ceased to be controlled by the Goldbergs and the Goldbergs ceased to have the capacity to control the voting power in Linter Textiles.

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**145** See *W P Keighery Pty Ltd v Federal Commissioner of Taxation* (1957) 100 CLR 66 at 85 per Dixon CJ, Kitto and Taylor JJ, McTiernan J agreeing; *Kolotex Hosiery (Australia) Pty Ltd v Federal Commissioner of Taxation* (1973) 130 CLR 64; *Kolotex Hosiery (Australia) Pty Ltd v Federal Commissioner of Taxation* (1975) 132 CLR 535 at 551-552 per Barwick CJ.

166 In *Kolotex Hosiery (Australia) Pty Ltd v Federal Commissioner of Taxation*[146] Mason J considered the meaning of "voting power in the company" in the context of ss 80A(1)(c) and 80C(1)(b)(i) of the 1936 Act (as to whether shares in the company carried between them the right to exercise not less than two-fifths of the voting power in the company). The facts of the case required his Honour to consider the effect of voting rights attaching to an office, as well as voting rights attaching to shares in the taxpayer company. (The articles of association of the taxpayer company conferred voting rights on the "Governing Director".) Mason J held that the words "voting power in the company" in ss 80A(1)(c) and 80C(1)(b)(i) as they then stood signified "the *entire voting power in the company*"[147]. They included any voting rights attaching to an office, and "not merely that voting power which is attached to shares" in the company. His Honour noted authorities to the effect that "capacity to control a company resides with the shareholders who by virtue of the voting power attaching to their shares are able to control the company in general meeting."[148] But his Honour considered that those authorities were "neither decisive nor persuasive, in relation to the question now under consideration."[149] He said that the capacity to control a general meeting is central to the concept of control of a company and that capacity rests on majority voting power, regardless of the source of that voting power[150].

167 Mason J's decision is authority for the proposition that, for the purposes of determining who has control of a company (for income tax deduction purposes), it is permissible to look beyond the voting power attaching to shares. It is also permissible to consider any other voting power conferred on persons by the company's articles of association. But *Kolotex* is not directly in point because the focus of the inquiry under s 80C differed from the inquiry that has to be undertaken under the present s 80A(3)(a). Mason J was not required to look beyond the loss company's articles of association to ascertain the voting power in the loss company. In particular, he was not required to consider whether external

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**146** (1973) 130 CLR 64 at 77; aff'd on appeal in *Kolotex Hosiery (Australia) Pty Ltd v Federal Commissioner of Taxation* (1975) 132 CLR 535.

**147** *Kolotex* (1973) 130 CLR 64 at 77 (emphasis added).

**148** *Kolotex* (1973) 130 CLR 64 at 77, citing *B W Noble Ltd v Commissioners of Inland Revenue* (1926) 12 TC 911 at 926 per Rowlatt J; *Inland Revenue Commissioners v J Bibby & Sons Ltd* [1945] 1 All ER 667 at 670 per Lord Macmillan. In these cases the issue was the voting rights attaching to the shares. There was no issue as to voting rights attaching to an office.

**149** *Kolotex* (1973) 130 CLR 64 at 77.

**150** *Kolotex* (1973) 130 CLR 64 at 77.

events had brought about the result that the voting power in the company was no longer "controlled" by the persons on whom the formal voting power was conferred by the company's articles of association.

168 In *W P Keighery Pty Ltd v Federal Commissioner of Taxation*[151], this Court held that a company was "capable of being controlled" by a person where two conditions existed. First, the person is "able to dictate the decisions of the general meeting, through a preponderance of voting power which either is vested in him or is subject to his command." Second, the person has a "presently existing power of control." Dixon CJ, Kitto and Taylor JJ (McTiernan J agreeing) said the expression "capable of being controlled" means[152]:

> "possessing, as a present attribute, a liability to be controlled. And a liability to be controlled by one person … involves … that there is one person who holds, or has a right to command, the major portion of the existing voting power".

169 Their Honours went on to say that "capable of being controlled"[153]:

> "connotes the existence of either one person whose enforceable and immediately exercisable rights enable him to control, or a number of persons whose enforceable and immediately exercisable rights enable them, if they act in concert, to control."

In other words, a person has the capacity to control the voting power in a company at any particular time if, at that time, the person has "enforceable and immediately exercisable rights" that enable such control. In *Federal Commissioner of Taxation v Sidney Williams (Holdings) Ltd*[154], Dixon CJ, Kitto and Taylor JJ, with whom McTiernan J agreed, construed the expression "capable of being controlled" as meaning "a liability to a lawful control by the exercise of legal or equitable rights or powers which persons are shown to possess", not "a possibility of being wrongfully subjected to de facto control by persons acting in breach of the rights of others." In *Federal Commissioner of Taxation v Casuarina Pty Ltd*, this Court also held that a liability to lose control in the future did not contradict the present existence of a capacity to control[155].

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**151** (1957) 100 CLR 66 at 85, 86 per Dixon CJ, Kitto and Taylor JJ (McTiernan J agreeing).

**152** *W P Keighery* (1957) 100 CLR 66 at 86.

**153** *W P Keighery* (1957) 100 CLR 66 at 87.

**154** (1957) 100 CLR 95 at 112.

**155** (1971) 127 CLR 62 at 92 per Walsh J, Barwick CJ, Owen and Gibbs JJ agreeing.

170 The question then is whether the Goldbergs controlled or were capable of controlling the voting power in Linter Textiles at all times during the loss year and the income year, not whether someone else was capable of doing so. The Commissioner is not required to prove that someone else controlled or was capable of controlling the voting power in Linter Textiles at those times. The Commissioner has to show no more than that the Goldbergs did not control or were not capable of controlling the voting power in Linter Textiles at those times. The issue is whether the making of the winding up order in relation to Linter Group had the effect that the Goldberg family ceased to control or to be capable of controlling the voting power in Linter Textiles. This requires consideration of the consequences of the making of such an order.

*Consequences of the making of a winding up order*

171 The consequences of the making of a winding up order under the Companies Code and the Corporations Law (as they then stood) were that members ceased to be called "members" and became "contributories". General meetings of the company could only be held if the court required and ordered them. Calls of any uncalled capital could be made on contributories. Transfers of shares after the winding up order were void as against the company unless the court ordered otherwise[156]. The liquidator assumed custody and control of the company and its assets[157] and was given the discretion to manage the affairs and property of the company and the distribution of the company's property[158]. The company could no longer declare or pay dividends to members. On a winding up order being made, the members lost the power to pass resolutions in general meeting about what the company should do. Without a court order[159] directing that a general meeting occur prior to a stay or termination of a liquidation, there was no provision for the members to hold a general meeting.

172 Under the Companies Code and the Corporations Law, however, the liquidator was required to convene a meeting of contributories for the purpose of ascertaining their wishes if requested to do so by at least one-tenth in value of contributories[160]. The liquidator was required to have regard to any directions

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**156** See Companies Code, s 368, Corporations Law, s 468.

**157** See Companies Code, s 374, Corporations Law, s 474.

**158** Companies Code, s 377, Corporations Law, s 477.

**159** See Companies Code, s 383(3), Corporations Law, s 482(3).

**160** Companies Code, s 379(2), Corporations Law, s 479(2).

given by resolution of the contributories at any general meeting[161], but the contributories lost the power to pass resolutions in general meeting that could effect a change in the management of the company. Any voting power that the contributories exercised did not extend to the control of the company in relation to the appointment of officers or the distribution of property or assets.

173 The statutory regime provided that the court "may" have regard to the contributories' wishes in relation to all matters pertaining to the winding up of the company. Moreover, the court might direct that meetings of contributories be convened for the purpose of ascertaining those wishes. But the contributories could not control the company in any real sense. Although the court "may" have regard to the contributories' wishes (and "shall" have regard to the number of votes conferred on the contributory by the company's constitution), it was not compelled to act on the contributories' wishes[162].

174 Hence, the making of the winding up order in relation to Linter Group had the consequence that the shareholders in Linter Group were no longer able to exercise "control" of and no longer had the "capacity to control" the voting power in Linter Textiles. The shareholders no longer had enforceable and immediately exercisable rights enabling such control. By reason of the winding up order, the Goldbergs, through various interposed entities, could not carry and were not capable of carrying an ordinary resolution at a general meeting of shareholders of Linter Textiles. They had no control or potential control of the company in any meaningful sense.

175 It is true that the statutory scheme permitted at least one-tenth in value of the contributories of Linter Group to require the liquidator of Linter Group to convene a general meeting of contributories. The liquidator was required to have regard to any resolutions passed by the contributories at such a meeting. However, the liquidator was not compelled to comply with those resolutions. If those resolutions directed the liquidator to convene a general meeting of the shareholders of Linter Textiles, for example, the liquidator of Linter Group would have been required to have regard to that resolution, but would not have been compelled to comply with it. The Goldbergs therefore would not have controlled the voting on the shares in Linter Textiles, if a general meeting of Linter Textiles were held.

176 If anybody had control of the voting power in Linter Textiles, arguably it was the liquidator of Linter Group. In any event, upon the making of the winding up order in relation to Linter Group, the Goldbergs were not able to

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**161** Companies Code, s 379(1), Corporations Law, s 479(1).

**162** Companies Code, s 431, Corporations Law, s 547.

satisfy the test in s 80A(3)(a) of the 1936 Act in relation to Linter Textiles. The concept of "control" of, or the "capacity to control", the voting power in Linter Textiles contemplates the existence at a particular point in time of enforceable and immediately exercisable rights enabling such control. That requires consideration of any matters or facts that then bear on the existence of those rights, such as the appointment of a liquidator under the corporations law. Once the winding up order in respect of Linter Group was made, the Goldbergs were unable to satisfy the test in s 80A(3)(a) in relation to Linter Textiles.

177 It is true that the Supreme Court of New South Wales made no order vesting the property of Linter Group in the liquidator. But that omission has no bearing on the question of the "control" of, or the "capacity to control", the voting power in Linter Textiles.

178 Given the result that obtains on the application of s 80A(3)(a) of the 1936 Act, it is unnecessary to consider the operation of pars (b) and (c) of s 80A(3). It is unnecessary to decide whether, under those paragraphs, the Goldbergs ceased to have a "right to receive … for … their own benefit" more than one-half of any dividends that might be paid by Linter Textiles at any time during the loss year and the income year. Nor is it necessary to decide whether the Goldbergs ceased to have the right to receive any distribution of capital that might have been made by that company.

Orders

179 I agree with the orders proposed by Gleeson CJ, Gummow, Hayne, Callinan and Heydon JJ.

180 KIRBY J. This appeal comes from a judgment of the Full Court of the Federal Court of Australia[163]. That Court affirmed the decision of Hely J at first instance[164] deciding issues arising under the *Income Tax Assessment Act* 1936 (Cth) ("the Act") against the Commissioner of Taxation ("the Commissioner"). By special leave, the Commissioner now appeals to this Court.

181 The task before this Court is one of statutory construction. As such, it is not a task involving the elaboration of principles of the common law or of equity or the application of such principles[165]. In recent years, this Court has repeatedly insisted upon fidelity to the text and purpose of legislation[166]. This instruction has been given in an attempt to correct the tendency of courts and legal practitioners to weave around statutory language notions comfortable to lawyers, derived from earlier judge-made law but extraneous to the statute. Upon this point, which has a constitutional foundation[167], it is essential that this Court should be consistent in what it says and in what it does[168].

182 Ultimately, this observation provides me with a determining principle for the appeal. The issues presented should be resolved by reference to the text and objectives of the Act. Analogies, metaphors, similes, arguments and inferences

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**163** *Commissioner of Taxation v Linter Textiles Australia Ltd (in liq)* (2003) 129 FCR 42.

**164** *Linter Textiles Australia Ltd (in liq) v Commissioner of Taxation* (2002) 20 ACLC 1708; 50 ATR 548.

**165** *Rich v Australian Securities and Investments Commission* (2004) 78 ALJR 1354 at 1369 [62], 1374-1375 [90]-[94]; 209 ALR 271 at 291, 298-300.

**166** See, for example, *Roy Morgan Research Centre Pty Ltd v Commissioner of State Revenue (Vict)* (2001) 207 CLR 72 at 89 [46]; *Victorian WorkCover Authority v Esso Australia Ltd* (2001) 207 CLR 520 at 545 [63]; *Allan v Transurban City Link Ltd* (2001) 208 CLR 167 at 184-185 [54]; *The Commonwealth v Yarmirr* (2001) 208 CLR 1 at 111-112 [249]; *Conway v The Queen* (2002) 209 CLR 203 at 227 [65]; cf Hayne, "Letting Justice Be Done Without the Heavens Falling", (2001) 27 *Monash University Law Review* 12 at 16.

**167** The duty of all courts, judges and people to obey "all laws made by the Parliament of the Commonwealth under the Constitution". See Constitution, covering cl 5; cf *Trust Company of Australia Ltd v Commissioner of State Revenue* (2003) 77 ALJR 1019 at 1029 [68]; 197 ALR 297 at 310.

**168** cf *Visy Paper Pty Ltd v Australian Competition and Consumer Commission* (2003) 216 CLR 1 at 10 [24].

derived from other fields of law must be subordinated to the duty to carry into effect the statutory purpose, as stated in the language used[169].

183 In the foregoing remarks, I agree with what is expressed in the reasons of Gleeson CJ, Gummow, Hayne, Callinan and Heydon JJ ("the joint reasons")[170] and in the reasons of McHugh J[171]. However, whilst the joint reasons criticise analogical, metaphorical and other attempts to gloss the language of statutes[172], they enter upon observations about the law of trusts which are unnecessary to resolve this appeal[173]. It is sufficient that I agree that the operation of the Act, where it requires elucidation in the light of the provisions of company law dealing with the liquidation of companies, must comply with the "elaborate statutory provisions for bringing about the result for which the [companies] statute provides"[174].

184 My approach results in a conclusion that, upon two points, the judges of the Federal Court erred in the construction they gave to the Act. The consequence is that the appeal must be allowed and the Commissioner's initial disallowance of the taxpayer's objection to the assessment of income tax for the year of income ended 30 June 1992 must be restored. However, in reaching this conclusion I take a path somewhat different from that chosen by the other members of the Court. The path that I follow is one that would return Australian revenue law to closer consistency with decisions on like questions reached by

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**169** *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384 at 408; *Newcastle City Council v GIO General Ltd* (1997) 191 CLR 85 at 112-113; *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 381 [69], 384 [78].

**170** Joint reasons at [48].

**171** Reasons of McHugh J at [97].

**172** Joint reasons at [32].

**173** Joint reasons at [32]-[49]; cf reasons of McHugh J at [128].

**174** *Franklin's Selfserve Pty Ltd v Federal Commissioner of Taxation* (1970) 125 CLR 52 at 69-70 per Menzies J. See joint reasons at [49], [58].

courts of high authority in the United Kingdom[175], Ireland[176], New Zealand[177] and Hong Kong[178].

The facts and applicable legislation

185 The background facts are stated in the joint reasons[179]. There too are set out, or described, the relevant provisions of the applicable company law[180], the contrasting provisions of bankruptcy law[181] and the applicable sections of the Act concerning the carrying forward of losses for the purpose of corporate deductions from liability to income tax[182]. Also contained in the joint reasons is a description of the history of the provisions of the Act, traced back to the first time the Act was amended, in 1944, to provide an entitlement to carry forward such losses[183]. I will not repeat any of this material.

186 It is clear from the Act, and accepted in the joint reasons[184], that the entitlement of corporations to carry forward such losses is subject to compliance with the limitations and conditions stated in the Act. So much is self-evident. In a statute of such volume and complexity, frequently amended in particular respects and often lacking symmetry and coherence, it is generally fruitless to

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**175** *Ayerst v C & K (Construction) Ltd* [1976] AC 167.

**176** *In re Frederick Inns Ltd (in liq)* [1994] 1 ILRM 387.

**177** *Shaw Savill and Albion Company Ltd v Commissioner of Inland Revenue* [1956] NZLR 211 at 232, 234 per Shorland J.

**178** *Re Yaohan Hong Kong Corp Ltd* [2001] 1 HKLRD 363 at 370 per Rogers V-P.

**179** Joint reasons at [3]-[4].

**180** *Companies (New South Wales) Code*, ss 371(2), 394(1). See also ss 368, 438, 440, 441; Corporations Law, ss 471(2), 474, 493(1); cf joint reasons at [5]-[8].

**181** *Bankruptcy Act* 1966 (Cth), s 58. See joint reasons at [9].

**182** The Act, relevantly s 80A(1): joint reasons at [17]. See also the Act, ss 80A(2), 80A(3): joint reasons at [61], [72].

**183** Joint reasons at [14]-[16]. See also *Linter Textiles* (2002) 20 ACLC 1708 at 1713-1715 [17]-[31] per Hely J; 50 ATR 548 at 553-556.

**184** Joint reasons at [14].

complain about the absence of a clear policy to support one interpretation of its terms over another[185].

187 Ultimately, what was being provided by the Act, to the specified taxpayers, was a benefit in the nature of a deduction. In default of compliance with the limitations and conditions stated by the Parliament, that benefit is unavailable. Abuse, involving trafficking in tax losses, became an important problem that led to legislative attempts to amend and tighten up the limitations and conditions applicable to such deductions[186]. Such dangers make it prudent, in construing the Act, to focus upon its language. Whenever the judicial eye is tempted to wander back to concepts of judge-made law on the topic of trusts, the interpreter must steadfastly resist the temptation. At least this must be done unless there is a clear textual justification for incorporating past legal doctrine into the terms of the Act.

188 On these matters of approach, all members of the Court speak with a single voice. However, the application of the foregoing principles leads us in different directions before, ultimately, we reach the same orders.

The issues

189 As is explained in the joint reasons, three issues were argued before this Court. As refined by the argument in this appeal, those issues are:

(1) *The s 80A(3) control issue*: Whether, after the making of the winding up orders in respect of Linter Group and Linter Textiles[187], the persons referred to in s 80A(3) of the Act ceased to control, or to be capable of

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**185** See *Commissioner of Taxation v Linter Textiles* (2003) 129 FCR 42 at 61 [59].

**186** The respondent relied on the Income Tax Assessment Bill 1965 (Cth) introducing s 80D into the Act and the passages in the Explanatory Memorandum for that Bill explaining that the purpose of the clause that became s 80D was to preserve an entitlement to a deduction for a prior year loss "in relation to cases of infrequent occurrence where, although there is a substantial or total change in the actual shareholdings in a company, there is no significant change in the identity of the persons who held indirect beneficial interests in the company in the year in which a loss was incurred and in the year of income": see Australia, House of Representatives, Income Tax Assessment Bill 1965 Explanatory Memorandum at 58. See also *Federal Commissioner of Taxation v Students World (Australia) Pty Ltd* (1978) 138 CLR 251 at 263-264.

**187** I shall use the same abbreviations as in the joint reasons. See joint reasons at [1], [3].

controlling, the voting power of the relevant company referred to in s 80A(3)(a) or to have the rights referred to in s 80A(3)(b) and (c) of the Act;

(2) *The s 80A(1) carrying of rights issue*: Whether, after the making of the winding up order in respect of Linter Textiles, the shares in Linter Textiles carried the right to exercise voting power in the company referred to in s 80A(1)(c) and the rights referred to in s 80A(1)(d) and (e); and

(3) *The s 80A(1) beneficial ownership issue*: Whether, after the making of the winding up order in respect of Linter Group, that company ceased, for the purposes of s 80A(1), to own beneficially its shares in Linter Textiles.

190 If the Commissioner were to succeed in any one of the foregoing issues[188], that would require (subject to identified procedural arguments) that the appeal be allowed and the Commissioner's initial disallowance of the taxpayer's objection to the assessment of income tax be restored.

Permitting a question of law to be raised

191 *Amendment of the notice of appeal*: As explained in the joint reasons, the case for the Commissioner was presented before this Court in a way somewhat different from the manner in which it was understood in the Federal Court[189]. Before the primary judge, an agreement between the parties was recorded that led him to conclude that it was unnecessary for him to determine whether s 80A(3) of the Act was an alternative test to s 80A(1) or whether it was cumulative[190]. The Full Court recorded its understanding of the submissions put before it on behalf of the Commissioner concerning the application of s 80A(3) of the Act[191]. On the basis of what it understood to be the "common ground", the Full Court indicated that it would not consider what I have described as the first issue, so far as it concerned the application of s 80A(3)(a)[192].

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**188** Joint reasons at [59].

**189** Joint reasons at [73]-[77].

**190** Joint reasons at [67]-[68] citing *Linter Textiles* (2002) 20 ACLC 1708 at 1710 [6]; 58 ATR 548 at 550.

**191** *Commissioner of Taxation v Linter Textiles* (2003) 129 FCR 42 at 47 [10], set out in the joint reasons at [77].

**192** *Commissioner of Taxation v Linter Textiles* (2003) 129 FCR 42 at 47 [10], set out in the joint reasons at [77].

192 In this Court, the Commissioner sought leave to amend his notice of appeal (and to enlarge the grant of special leave) so as to raise squarely the application of s 80A(3) of the Act to the circumstances of this case. The joint reasons conclude that such leave should be granted. I agree. However, in deference to the arguments that the respondent strongly pressed upon this Court, resisting such a result, I will explain why I would take that course.

193 The respondent submitted that, because of the manner in which the Commissioner had put his case at trial (and on appeal), he should not be permitted in this Court to enlarge the issues so as to add what I have described as the first issue – being the one placed in the foreground of the Commissioner's arguments before us[193].

194 *The Court's duty to the law*: Having granted special leave to the Commissioner to appeal from the orders of the Federal Court, this Court's duty (so far as it lawfully may) is accurately to express and apply the relevant law. It should endeavour to avoid narrow, procedural and insubstantial objections to the provision by the Court of an accurate exposition of the law and the entry of an order affording an outcome, formulated in the judgment, that represents the determination that the law, properly construed, requires[194]. Subject to considerations of procedural fairness and justice in the case, it is not for parties, by the way they plead or present their arguments, to oblige this Court, by its orders, to give effect to outcomes that are inconsistent with the law[195].

195 *Lawful finality to litigation*: The extent to which this Court will cut through procedural impediments to bring to conclusion longstanding litigation, according to the law found to be applicable, is illustrated in *Gattellaro v Westpac Banking Corporation*[196]. There, over the objection of a party, and outside the issues upon which special leave had been granted, a new ground of appeal was allowed at the very last stage in a protracted contest. This involved not only the determination of a new point of law but the resolution of a factual question

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**193** Especially in his written argument, and in oral argument when the appeal, after the initial hearing, was referred for further argument before the Court.

**194** *Gipp v The Queen* (1998) 194 CLR 106 at 153-155 [134]-[138].

**195** cf *Roberts v Bass* (2002) 212 CLR 1 at 54 [143]; *British American Tobacco Australia Ltd v Western Australia* (2003) 77 ALJR 1566 at 1586 [106]; 200 ALR 403 at 430; *Gattellaro v Westpac Banking Corporation* (2004) 78 ALJR 394 at 409 [93]; 204 ALR 258 at 278-279.

**196** (2004) 78 ALJR 394 at 402-403 [55], 403 [60]; 204 ALR 258 at 269, 270.

requiring elucidation of further evidence[197]. In that case, I did not favour the enlargement of the appeal. However, the majority considered that bringing about a lawful finality to the litigation was paramount.

196 The present is a much stronger case than *Gattellaro* for enlargement of the issues. Substantially, there is no relevant factual contest. The applicable facts were set out in the statements of facts, issues and contentions filed respectively by Linter Textiles and by the Commissioner. Such facts were clear and relevantly uncontested. In matters of such a kind, courts such as this must strive to be consistent in the approach that they adopt.

197 *The course of the evidence*: There is no doubt (as explained in the joint reasons[198]) that, in his initiating document before the Federal Court, the Commissioner had put Linter Textiles on notice of the fact that he had formed the opinion that, if the requirements of s 80A(1) of the Act were met, "it was reasonable in terms of subparagraph (c) of subsection 80A(2) of the Act that subsection 80A(3) should apply for the purpose of determining whether the loss incurred by [Linter Textiles] should be taken into account for the purpose of section 79E in lieu of subsection (1) thereof" for the applicable year of taxation.

198 Other provisions of the Commissioner's initiating document confirm the reliance he placed at trial on s 80A(3). Linter Textiles' statement of facts, issues and contentions was filed in response to the Commissioner's statement. Linter Textiles' statement must therefore be taken to have placed before the Federal Court all matters of fact that were considered necessary and relevant to Linter Textiles' response to the Commissioner's statement. Any subsequent concessions (or supposed concessions), and the way the case was presented and argued in the Federal Court, cannot alter the factual foundation upon which the argument proceeded[199].

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**197** (2004) 78 ALJR 394 at 406 [78]; 204 ALR 258 at 274-275. See also *Dovuro Pty Ltd v Wilkins* (2003) 215 CLR 317 at 358 [122].

**198** Joint reasons at [63], [75], [80].

**199** The Commissioner, in supplementary submissions, contested that he had ever resiled from reliance on both s 80A(1) and s 80A(3). He referred, in particular, to par 21 of his written submissions before the primary judge. This refers specifically to s 80A(3) and states: "From the commencement of the winding up the shareholders of [Linter Textiles] and of [Linter Group] ceased to have any right to *control* the company through the exercise of voting power" (emphasis added). This could only be a reference to s 80A(3) of the Act.

199 In these circumstances, and based on such a modest evidentiary record, there was no procedural unfairness to Linter Textiles in permitting the Commissioner, on the basis of the record, to present an argument that was foreshadowed in the initiating document and elsewhere. Intermediate concessions, agreements and the presentation of the case occasion no relevant procedural unfairness or injustice. This is not, therefore, an instance where the primary inhibition upon enlarging an appeal on a point of law will be presented to the appellate court, as explained in *Coulton v Holcombe*[200]. The suggestion of procedural unfairness to Linter Textiles is fanciful. No relevant prejudice to the respondent was identified[201].

200 *Appeals on new legal points*: This Court, and other courts of high authority, have acknowledged many times the permissibility (and sometimes the obligation) for an appellate court, including an ultimate court of appeal, to determine a question of law that is raised belatedly and presented for resolution and that involves "the construction of a document, or [a decision] upon facts either admitted or proved beyond controversy" where such resolution is "expedient in the interests of justice"[202]. In effect, this is no more than the acknowledgment of the duty of a court to the rule of law which lies at the heart of Australia's constitutional arrangements[203].

201 There are times when justice as between the parties will demand the determination of an appeal otherwise than as the law, properly construed, would oblige when applied to the entirety of the facts[204]. Thus, there are times when considerations of procedural fairness demand that a party, with an apparently good legal argument, be prevented from relying on it, with adverse consequences as the result. Such instances should, in my view, be regarded as exceptional. At

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**200** (1986) 162 CLR 1 at 6-9.

**201** See, for example, [2004] HCATrans 255 at 2975.

**202** See *O'Brien v Komesaroff* (1982) 150 CLR 310 at 319; see also *Connecticut Fire Insurance Company v Kavanagh* [1892] AC 473 at 480; *Green v Sommerville* (1979) 141 CLR 594 at 607-608; *University of Wollongong v Metwally [No 2]* (1985) 59 ALJR 481 at 483; 60 ALR 68 at 71-72; *Coulton* (1986) 162 CLR 1 at 8.

**203** *Australian Communist Party v The Commonwealth* (1951) 83 CLR 1 at 193 per Dixon J.

**204** *Dovuro* (2003) 215 CLR 317 at 343 [76], 345-348 [86]-[93]; *Australian Communication Exchange Ltd v Deputy Commissioner of Taxation* (2003) 77 ALJR 1806 at 1808 [7], 1815 [51]; 201 ALR 271 at 274, 283.

least this should be so where all that is involved is the application of a legal text to facts found or admitted[205].

202 The law in question in this appeal is an enactment of the Federal Parliament. Its validity is uncontested. Courts do not construe revenue law in favour of a taxpayer out of some sense of judicial sympathy or compassion. Revenue laws are an important expression of democratic governance. There is no doubt disappointment, but there is no injustice, in permitting the Commissioner to rely on arguments based on s 80A(3) of the Act, confined to submissions on the law to be applied to the relevantly uncontested factual record. Any legitimate sense of grievance can be fully recompensed by appropriate costs orders.

203 *Settling residual legal questions*: This case has ascended the court hierarchy. The likelihood of an early return to the Court of the issue presented by the Commissioner's first argument is remote. In this Court, taxation appeals are now *rarae aves*. The Commissioner drew attention to a Treasury discussion paper suggesting (doubtless on the basis of the decisions here challenged) that the tax law should be amended not only to strengthen the response to Treasury concerns "that liquidated companies may be used for loss trafficking" but also to clarify the circumstances in which the commencement of liquidation or related proceedings in respect of a taxpayer corporation will impinge on the carrying forward of tax losses[206]. The law in the future may indeed be changed. This makes it more important for this Court to clarify, and apply, s 80A(3) of the Act in its current form for the present parties and any others residually affected by it.

204 *Conclusion: grant leave to raise s 80A(3)*: It follows that I too would grant leave to the Commissioner to amend his notice of appeal in this Court. I would treat the added ground, raising the arguments based on s 80A(3) of the Act, as within the grant of special leave. No issue as to costs arises for the reasons stated by the joint reasons[207]. In my view, s 80A(3) affords the clearest answer to the contest between the parties. Accordingly, it should be dealt with first.

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**205** The different treatment of outstanding questions of law, as distinct from questions of fact, has been explained in many contexts: see, for example, *Stead v State Government Insurance Commission* (1986) 161 CLR 141 at 145.

**206** Australia, The Treasury, *Loss Recoupment Rules for Companies*, (2004) at 29 [76]-[77].

**207** Joint reasons at [80].

The application of s 80A(3)(a)

205 *The s 80A(3)(a) issue*: As the joint reasons explain, in outlining this issue, s 80A(2) details the steps by which s 80A(3) may apply "in place of" s 80A(1) of the Act[208]. The key words, found in s 80A(2)(c), are those given emphasis in the joint reasons[209]. They provide for the situation where, whatever the taxpayer asserts, the Commissioner "considers it reasonable that [s 80A(3)] should apply" for the purpose stated in s 80A(2)(a). That purpose is one "of determining whether a loss incurred by a company in a year before the year of income is to be taken into account" for the purposes of the provisions of the Act providing for the carrying forward of losses so as to obtain a deduction for a given year of income for that loss.

206 Accepting for the moment that the application of s 80A(1) would determine that the losses in question *were* to be taken into account for the purposes of s 79E (as decided in the joint reasons), this is a conclusion that engages s 80A(2) of the Act. It does so because s 79E is expressly referred to in s 80A(2)(a). The Commissioner, by his initiating statement in the Federal Court, asserted that, in such circumstances, he had formed the opinion "that subsection 80A(3) should apply". Accordingly, s 80A(3) was engaged.

207 By s 80A(3), the satisfaction of the Commissioner on three matters is required before the section can be engaged. Importantly, s 80A(3)(a) requires of the Commissioner that he be satisfied that:

> "at all times during the year of income the voting power in the loss company was … *controlled, or capable of being controlled*, by a person not being a company, or by 2 or more persons not being companies, who … controlled, or was or were capable of controlling, the voting power in the loss company at all times during the year in which the loss was incurred". (emphasis added)

208 According to the Commissioner's argument on this first issue, the application of s 80A(3)(a) was clear. Linter Textiles was a wholly owned subsidiary of Linter Group. Linter Group had been ordered to be wound up by the Supreme Court of New South Wales on 12 April 1991. A liquidator had been appointed for that purpose. Likewise Linter Textiles was ordered to be wound up on 24 February 1992. A liquidator was also appointed for that purpose. In the 1992 year of income, Linter Textiles sought the benefit, under s 80G of the Act, of losses that had been incurred by Linter Group in the 1990 year of income. It

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**208** Joint reasons at [61]-[63], referring to the closing words of s 80A(2) ("in lieu of").

**209** Joint reasons at [61].

was common ground that, but for the effect (if any) of the winding up orders on the two companies, such losses were available to Linter Textiles pursuant to s 80G of the Act, to be "taken into account for the purposes of section 79E" of the Act in determining its assessable income. It was also common ground that the question of whether s 80G operated so as to permit the losses of Linter Group to be "taken into account" by Linter Textiles raised no issue separate from that arising under s 80A.

209 It follows that the availability of the losses to Linter Textiles depended upon the application of s 80A of the Act. Neither the primary judge nor the Full Court of the Federal Court addressed themselves to the operation of s 80A(3)(a) and the Commissioner's assertion in his initiating document – maintained in this Court – that he had formed the opinion that s 80A(3) should apply for the purpose of determining whether the loss in question should be taken into account for the purpose of s 79E of the Act.

210 *Control or capability of control after liquidation*: Had the last-mentioned issue been considered in the Federal Court, the question it presented was relatively straight-forward. It was whether the voting power in the loss company was "controlled or capable of being controlled during the year of income" by the propounded "controllers", the Goldbergs. (I put aside any question that might arise from the interposition of the ultimate holding company of Linter Group, namely Pochette Nominees Pty Ltd. I also disregard for these purposes the character and provisions of the two trusts, described as discretionary trusts[210]. I will assume that, these interpositions notwithstanding, the necessary control by the members of the Goldberg family would be established.) As the joint reasons indicate, s 80A(3)(a) refers not to considerations of "benefit" or "ownership" but to control and capacity to control the voting power in the loss company by a person or two or more natural persons[211].

211 In this Court, the Commissioner submitted, correctly in my view, that shareholders "control" a company through the exercise of voting power. The meaning of the cognate expression "voting power in the company", appearing in s 80A(1)(c) of the Act[212], was considered by Mason J in *Kolotex Hosiery (Australia) Pty Ltd v Federal Commissioner of Taxation*[213]. Whilst acknowledging in that case that the provisions of the Act "give rise to some difficulties of interpretation", Mason J considered that the words referring to

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**210** Joint reasons at [3].

**211** Joint reasons at [77]. See also at [81].

**212** Set out in the joint reasons at [17].

**213** (1973) 130 CLR 64.

voting power "should be given their natural meaning, signifying the entire voting power in the company"[214]. Likewise, with the connected question arising from the expression "controlling interest" in s 80C(1), Mason J went on[215]:

> "The appellant pointed to statements made in the decided cases which indicate that capacity to control a company resides with the shareholders who by virtue of the voting power attaching to their shares are able to control the company in general meeting. A notable example is the often-quoted observation concerning 'controlling interest' made by Rowlatt J in *B W Noble Ltd v Commissioners of Inland Revenue*[216]: 'it means the man whose shareholding in the company is such that he is the shareholder who is more powerful than all the other shareholders put together in general meeting'. See also *Inland Revenue Commissioners v J Bibby & Sons Ltd*, per Lord Macmillan[217]."

212 In *Kolotex*, Mason J accepted that analogies were neither decisive, nor necessarily persuasive, in relation to such circumstances. Words uttered by earlier judges in the context of voting rights that attach to shares did not cover every eventuality. In short, that form of "control" might be sufficient to attract the notion of actual or potential control of a corporation; but it was not essential. In each case, the issue to be addressed was to be answered by reference to the actuality or capability of control of the designated corporation, as contemplated by the preconditions set forth in the Act[218].

213 Against the background of the language and apparent purposes of s 80A(3) of the Act, so explained, and taking into account relevant authority, the consequence of the winding up orders made in respect of Linter Group (and of Linter Textiles) was indeed, as the joint reasons state[219], "drastic". It was that the voting power in Linter Textiles was no longer "controlled, or capable of being controlled" by the natural person or persons stipulated, namely the members of the Goldberg family. Instead, it was the liquidator of Linter Textiles who controlled the voting on the shares in Linter Textiles, in discharge of the liquidator's duties under company law. Likewise, it was the liquidator of Linter

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**214** (1973) 130 CLR 64 at 77.

**215** (1973) 130 CLR 64 at 77.

**216** (1926) 12 TC 911 at 926.

**217** [1945] 1 All ER 667 at 670.

**218** See now s 80A(3)(a). See *Kolotex* (1973) 130 CLR 64 at 80.

**219** Joint reasons at [85].

Group who would control the voting on shares in that company whilst in liquidation. Alternatively, it was the creditors and contributories, enjoying the benefit of the administration of the companies in liquidation, who ultimately controlled that voting. Before the liquidation, voting power in each company was controlled by the Goldbergs. Thus the continuity of control, or of the capacity of control, of the voting power, necessary for the application of the tax loss carry forward provisions, was not engaged once the liquidators intervened.

214 *The Commissioner's satisfaction is sustained*: The foregoing applies the plain language of the Act to the circumstances ensuing from the interposition of the degree of "control" or "capability of control" afforded by law following the liquidation of Linter Group and Linter Textiles. I see no reasonable contention that casts doubt on this understanding of the meaning of s 80A(3)(a). On this footing, the Commissioner's expressed satisfaction was, on the uncontested facts in the record, open to him. It was factually and legally correct. For there to be control over, or capacity to control, the voting power in a company at any particular time, it is necessary that there must be enforceable and immediately exercisable rights enabling such control to be effected[220]. As the Commissioner argued, where a company is in liquidation, shareholders can have no such rights and no such control or capacity of control.

215 The stated satisfaction of the Commissioner was therefore fatal to the claim by Linter Textiles to the benefit of the loss carry forward provisions of the Act. I do not myself doubt that, on proper evidence, it would be open to a court to examine an asserted "satisfaction" of the Commissioner on the usual grounds provided by constitutional and administrative law. The satisfaction spoken of in the Act is a lawful satisfaction, enlivened for the purposes of the Act, as established by the Parliament. It is an objective, not a subjective, construct. It does not refer to the whim or fancy of the Commissioner. However, when the facts are considered with a proper understanding of the language and purpose of s 80A(3), it can be seen that the satisfaction asserted by the Commissioner was reasonably open to him. The contrary has not been shown.

216 It follows that the foregoing application of s 80A(3) is determinative of Linter Textiles' claim to the deduction it asserted. The claim fails. This conclusion is sufficient to require that the appeal be allowed and the Commissioner's disallowance of the deduction restored.

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**220** *W P Keighery Pty Ltd v Federal Commissioner of Taxation* (1957) 100 CLR 66 at 87. See also *Federal Commissioner of Taxation v Casuarina Pty Ltd* (1971) 127 CLR 62 at 93.

The application of s 80A(1) of the Act

217 *The context of the problem*: Although it is strictly unnecessary, in light of the foregoing conclusion, to consider additionally the application of s 80A(1) of the Act, an examination of that sub-section in this appeal produces the same result. It is here that I differ from the other members of this Court and from the judges of the Federal Court. Out of respect for the different opinion and the arguments of the parties, I will say why.

218 For the requirements of s 80A(1) to be established, the Commissioner has to be satisfied that, at all times during the loss year and the year of income, Linter Group "beneficially owned" shares in Linter Textiles carrying between them (amongst other things) the right to exercise more than one half of the voting power in the company. In the context of s 80A, the defined "right to exercise … voting power in the company" must be a right that exists at all times during the relevant loss year and the year of income. However, it is misleading to talk of shares carrying "the right to exercise … voting power" if, as a matter of law, and by reason of a supervening liquidation, the right to vote is incapable of being exercised at the shareholders' behest and for the shareholders' benefit.

219 *The meaning of beneficial ownership*: For the purposes of considering s 80A(1), I will assume that what is described in the joint reasons as "the first issue"[221] concerning s 80A(1), might be decided in favour of Linter Textiles and against the Commissioner. Because, as there indicated, the greater part of the argument of the parties was devoted in this appeal to the second aspect of s 80A(1) (the "second issue" in the joint reasons and the Commissioner's "third issue")[222], I will go directly to this.

220 That issue concerns whether the shares held by Linter Group in Linter Textiles were, or were not, beneficially owned by Linter Group after the commencement of the intervening liquidation. In my view, on the making of the winding up order in respect of Linter Group, that company ceased beneficially to own the shares in Linter Textiles. This conclusion follows not from considerations of the law of trusts and notions of beneficial ownership in other legal contexts. It follows solely from the meaning of beneficial ownership in the context of s 80A(1) of the Act, which is the only context that is relevant and applicable in this appeal.

221 The meaning of beneficial ownership of property and rights in property obviously depends on the context. In the context of s 80A of the Act, the

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**221** Joint reasons at [18].

**222** Joint reasons at [18].

expression "beneficially owned" connotes an ability of the putative beneficial owner to enjoy the rights in the property for its own benefit. With due deference, the error of the primary judge and of the Full Court lay in their respective conclusions that a company in liquidation, bound to deal with its own assets in accordance with the statutory regime contained in the companies legislation governing liquidation, did not cease beneficially to own its assets *for the purposes of s 80A(1) of the Act*.

222 Similarly, the primary judge erred in equating the concept of beneficial ownership, appearing in s 80A(1)[223], by reference to "the traditional sense which encompasses both equitable ownership, and legal ownership where nobody else would be regarded by a court of equity as having a proprietary interest in the shares". In fact, this approach involves the very mistake drawn to notice at the outset of these reasons and also by the joint reasons[224]. It diverts attention from the interpretation and application of the Act. It glosses the statute with concepts developed for other, earlier and different legal purposes[225]. To burden s 80A of the Act with all of the expositions about beneficial ownership derived from the law of trusts, and elsewhere in the law, is to fall into a serious error of statutory interpretation. The duty of the interpreter is to give the words in the Act meaning in the context and to achieve the purposes of s 80A and those purposes alone.

223 Approaching the task in hand in this way, I reach, on this issue, a conclusion different from the majority in this Court. I do so for reasons of the statutory language; the statutory history; the statutory purpose and the consistent meaning given to overseas equivalent statutory expressions.

224 *The statutory language*: The focus of the language of s 80A(1) is upon whether shares in the identified companies "were beneficially owned" by identified persons "at all times during the year in which the loss was incurred". This is a precondition to the deduction entitlement that the Act confers. It must therefore be complied with. This provides the setting for the determination of the meaning of "beneficially owned" in s 80A(1).

225 In that context, it cannot be said that a person beneficially owns shares during a specified interval if, throughout that time, the person is incapable of exercising, on that person's own behalf, and for his or her benefit, the rights ordinarily co-extensive with ownership. What are those rights? Normally, a person who beneficially owns shares is entitled by law, under the benefit of

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**223** (2002) 20 ACLC 1708 at 1720-1721 [61] per Hely J; 50 ATR 548 at 562.

**224** See above at [183].

**225** Joint reasons at [48].

ownership, to the right to vote, the contingent right to a return of capital, and the right to the distribution to the owner of the profits of the company concerned, attributable to those shares. A person cannot be said to be the beneficial owner of property unless that person has the right to deal with the property as that person's own. In the case of shares, such dealing ordinarily includes the unimpeded possibility of disposal or sale of the shares and enjoyment of the fruits of such disposal or sale. Unless the person has these ordinary incidents of beneficial ownership, the person is not the "beneficial owner" of the shares within the use of that term in s 80A(1) of the Act[226].

226 Addressing the words "beneficially owned" is sufficient to indicate that the Parliament intended, as a condition for the availability of the deduction of losses carried forward, that the shares in the company concerned should be owned by persons who enjoy the large bundle of rights conventionally accompanying the beneficial ownership of such shares. In this case, the interposition of a liquidator of the companies diminished, to the extent of the liquidator's powers, the bundle of rights usual to the beneficial ownership of such shares. From the moment the liquidators were appointed, they respectively enjoyed powers in relation to such shares afforded to them by company law. It is true that, as such, and unlike bankruptcy[227], there was no automatic vesting of the property in the shares in the liquidator. But that is not the question in issue. By s 80A(1) of the Act, that question is addressed to the assertion of beneficial ownership by persons who claim to fulfil the requirements of that sub-section and who must do so in order to gain the benefits for which it provides. To deny the modification of the bundle of rights derived by such persons from such shares, to the extent of the powers afforded to and duties imposed upon the liquidator, is to deny the plain terms of the applicable law of company liquidation.

227 Under that law, the *rights* to voting power, to dividends and to distribution of capital of the company, that are otherwise ordinarily carried by the shares, are, during the liquidation, subject to the rights of the liquidator. Moreover, the *purpose* of the control of the company in liquidation is no longer, as such, to maximise the returns to the shareholders. Instead, it is primarily to ensure the protection of the creditors of the company[228]. To this extent, important conventional attributes of beneficial ownership of the shares in the company are diminished.

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**226** See *Wood Preservation Ltd v Prior* [1969] 1 WLR 1077 at 1096-1097; [1969] 1 All ER 364 at 368.

**227** *Bankruptcy Act* 1966 (Cth), s 58. See joint reasons at [9].

**228** See *Hiley v The Peoples Prudential Assurance Company Ltd (in liq)* (1938) 60 CLR 468 at 496.

228 Of course, the persons possessed of the shares continue to have rights. These include, contingently, the revival of full beneficial ownership upon any termination of the liquidation. However, to speak of such persons beneficially owning the shares in the company during the liquidation is to deny the essential point of the liquidation, which is the administration of the company *pro tempore* for the "benefit" of the creditors, not of the shareholders. This is the fundamental reason why the concept of "beneficially owned" as used in the Act is inconsistent with the existence of the statutory powers and duties of the liquidator. Millett LJ explained this point in *Mitchell v Carter*[229]:

> "The making of a winding-up order divests the company of the beneficial ownership of its assets which cease to be applicable for its own benefit."

229 The mistake of those who have reached the contrary view is that they have fastened upon the distinction derived from bankruptcy law and upon the fact that the making of a winding up order in relation to a company does not, as such, effect a transfer to the liquidator of any interest in the company's property. This point of distinction was fully accepted by the Commissioner. However, the transfer of shares (or of property in them) is not a prerequisite to a failure of the "beneficial ownership" test in s 80A(1). In relation to that test, the question is whether the person claiming the deduction can establish the prerequisite of "beneficial ownership" of the shares, with its large connotation in respect of the rights attributable to such ownership. It is not whether, as such, the Commissioner can prove affirmatively that beneficial ownership has passed to someone else[230].

230 *The statutory history*: Support for this view may also be found in the statutory history. Originally, the predecessor to s 80A(1), namely s 80(5) of the Act as it formerly stood, spoke of shares being "beneficially held". It was this statutory expression that resulted in the decision of Menzies J in *Franklin's*

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**229** [1997] 1 BCLC 673 at 686; see also at 688 per Leggatt LJ agreeing; cf *Buchler v Talbot* [2004] 2 AC 298 at 308-309 [28].

**230** In this respect, the issue is somewhat analogous to the treatment, in the joint reasons, of the question of control and capability of control. As the joint reasons point out at [83], on that issue the Commissioner needed only to establish the negative proposition that the control was not in the Goldberg family. Here it is enough for him to show that "beneficial ownership" in the shares, as that term is to be understood in s 80A(1), did not continue in the same persons as before the liquidation, also a negative proposition.

*Selfserve Pty Ltd v Federal Commissioner of Taxation*[231]. It was that phrase that led his Honour to conclude that he "would be going further than the statute warrants were [he] to hold that, for the purposes of s 80(5), a company which owns shares beneficially in another company ceases, upon its liquidation, to own those shares beneficially"[232].

231 The remarks of Menzies J cannot be taken as deciding the meaning of the different expression ("beneficially owned") now appearing in s 80A(1). This is because, as Menzies J pointed out[233], the statutory expression with which he was concerned was "beneficially held". His Honour was influenced by the fact that s 80(6) of the Act, as then appearing, spoke of shares being "beneficially held by the trustee". He expressed the view that what "under[lay] the provisions of sub-s (6) … [was that] the section [was] concerned with … a continuing identity of interest such as there is, for instance, between a shareholder and the person who, upon his death, becomes his trustee, notwithstanding that he holds for beneficiaries".

232 The former s 80(5) of the Act has been repealed. The language of *holding* shares has been removed. The stronger requirement has been substituted, requiring that the taxpayer claiming the deduction must demonstrate continuous beneficial *ownership*, with all that that large notion imports. The issue that exercised Menzies J in *Franklin's* is now dealt with specifically by s 80B(3) of the Act which, in the specified circumstances, deems shares to have been "beneficially owned by the same person ... if the person has died". There is no like provision covering the liquidation of a company. That case is left to the application of the general language of s 80A(1). The language of that sub-section states the applicable requirement more emphatically than in the Act as it appeared at the time of *Franklin's*. To the extent that the precondition has been re-expressed, the changed language suggests that after Menzies J wrote his reasons in *Franklin's* there was a deliberate escalation of the statutory requirements.

233 However that may be, there is no binding rule in *Franklin's* that decides this appeal, concerned as it is with different statutory language. To the extent that the reasons of Menzies J, addressing a different expression, suggest any different conclusion in this case, I would respectfully decline to follow it.

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**231** (1970) 125 CLR 52.

**232** (1970) 125 CLR 52 at 71.

**233** (1970) 125 CLR 52 at 69.

234 *The statutory purpose*: In addition to the foregoing considerations the construction of the Act, as urged by the Commissioner, is more consonant with the evident policy of the tax loss provision as he explained it. That policy is that (subject to exceptions specifically provided in respect of the "same business" in s 80E) a company may only deduct losses carried forward from an earlier taxation year where the requisite percentage of shareholders who potentially stand to gain for their own benefit from the ability to deduct losses also stood to suffer when the losses were incurred.

235 One can easily understand the object of such a provision and the policy lying behind it. To the limited extent provided, it lifts the corporate veil. It addresses the actuality of the flow of profits and losses to and from the natural persons controlling the respective companies.

236 Once a winding up order is made, and a liquidator is appointed to perform the functions provided by law for the protection of creditors, the scene has changed. When the corporate veil is lifted, the flow of funds is not, or is not primarily or necessarily, into the pockets of the same natural persons. During the liquidation, it is primarily into the pockets of the creditors. But it is inconsistent with the policy evident in the Act for the benefit of the losses to be available to creditors who are typically different natural persons from those who earlier controlled the subject company. If such a benefit is to be allowed to the advantage of creditors, it must be specifically enacted. It cuts across both the language and the purpose of s 80A(1), so expressed.

237 The Full Court in this case expressed the opinion that it was difficult to see what policy reason there could be for the Parliament to disallow a deduction to a company that had gone into liquidation[234]. However, with all respect, that statement mistakes the object that lies behind the loss carry forward provisions in the Act. The question is not whether, as a matter of overall fairness, it might be desirable to provide for corporate losses to be carried forward to the advantage of creditors in the event of the liquidation of a relevant company. That point could doubtless be argued both ways. It is now the subject of the Treasury paper to which I have referred[235]. However, that flow of tax advantages (and the provision of tax deductions) for the benefit of creditors would reflect a policy different from the one appearing in s 80A(1). If there is to be such a different policy, it requires the approval of the Parliament to different statutory provisions.

238 The statutory provisions last enacted ("beneficially owned") contradict the suggested application of s 80A(1), at least for so long as the company concerned

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**234** *Commissioner of Taxation v Linter Textiles* (2003) 129 FCR 42 at 61 [59].

**235** See these reasons at [203].

is in liquidation. To say that the shareholders during such liquidation "beneficially owned" their shares is to ignore the interposition of the liquidator with his superimposed legal powers and duties under company law, primarily for the benefit of the creditors.

239 *Consideration in other jurisdictions*: The conclusion reached in the Federal Court on the issue of benefical ownership in s 80A(1) of the Act, a conclusion favourable to the respondent and now accepted by a majority in this Court, is also inconsistent with a strong trend of highly persuasive authority addressed to analogous language in revenue legislation in a number of jurisdictions of the common law to which this Court would ordinarily pay regard.

240 In *Ayerst v C & K (Construction) Ltd*[236], the House of Lords considered the meaning of the expression "beneficial ownership" as used in the *Finance Act* 1954 (UK), s 17(6)(a). Their Lordships unanimously held that, upon a company going into liquidation, it ceases to be the "beneficial owner" of its assets. The reasoning of Lord Diplock in that case, with the concurrence of Viscount Dilhorne and Lords Kilbrandon and Edmund-Davies, rests on arguments of general principle, not matters peculiar to United Kingdom revenue law. Lord Diplock referred to the expression "beneficial ownership" as "a term of legal art since 1874"[237]. He invoked[238] what Lord Cairns had said in *In re Albert Life Assurance Company* (*The Delhi Bank's Case*)[239]:

> "'… the assets of the company from the moment of winding up, … become fixed and inalienable; the executive and the direction of the company are unable to alienate them or to part with them for any purpose; they become fixed and impressed with the trust declared by section 98,' – (which corresponds to section 257(1) of the Act of 1948) – 'a trust by which all the assets of the company are to be applied in discharge of the liabilities of the company.'"

241 It was that notion of beneficial ownership of the company's property after the commencement of winding up that was given effect in *In re Oriental Inland Steam Company; Ex parte Scinde Railway Company*[240], the 1874 decision that

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**236** [1976] AC 167.

**237** [1976] AC 167 at 181.

**238** [1976] AC 167 at 179; cf *Tito v Waddell [No 2]* [1977] Ch 106 at 226-227 per Megarry V-C.

**239** (1871) 15 SJ 923 at 924.

**240** (1874) LR 9 Ch App 557.

Lord Diplock regarded as establishing the principle applicable in *Ayerst*. In that case, James LJ[241] had said of the effect of liquidation:

> "The English Act of Parliament has enacted that in the case of a winding-up the assets of the company so wound up are to be collected and applied in discharge of its liabilities. [That makes the property of the company clearly trust property.] It is property affected by the Act of Parliament with an obligation to be dealt with by the proper officer in a particular way. Then it has ceased to be beneficially the property of the company".

242 The introduction of analogies, taken from the law of trusts, which occasions the attempt, in the joint reasons in this Court, to distinguish this settled line of authority on this aspect of revenue law in the United Kingdom, is, with respect, a forensic red-herring. It appears to have been introduced into these proceedings in a not unfamiliar reaction to keep the Australian waters of equity and trust law unsullied by foreign and supposedly deleterious intrusions, even where (as here) the intrusions originated in the country from which the law of equity and trusts itself derives. I have no sympathy for such parochial inflexibilities[242].

243 The reference to "trust property" in the earlier English authority was not, as such, an attempt to import all of the features of the law of trusts into defined statutory relationships following a company liquidation. Self-evidently, that could not have been intended by the knowledgeable and experienced judges involved. Instead, it was an attempt (in effect in an aside in the course of reasoning) to explain the construction and operation of a statute in terms that would have been understood by lawyers in the English Court of Chancery in 1874, who had the responsibility of applying the pertinent statute. The analogy was not the essence of the reasoning of the English judges. This can be seen by the simple expedient of deleting the reference to the analogy to trust property (shown in brackets in the foregoing quotation) from the reasons of James LJ. His Lordship's reasons remain coherent and convincing without the words in brackets. The essence of those words was an attempt to draw on a familiar analogy to help explain the operation which the Act of Parliament had upon the property in question. By that operation "it has ceased to be beneficially the property of the company".

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**241** (1874) LR 9 Ch App 557 at 559 (I have added brackets around the second sentence for the reasons explained below at [243]).

**242** *Breen v Williams* (1994) 35 NSWLR 522 at 542-549 (see *Breen v Williams* (1996) 186 CLR 71); cf *Pilmer v Duke Group Ltd (in liq)* (2001) 207 CLR 165 at 209-210 [116]-[118].

244 In *Ayerst*, Lord Diplock noted that the holding in *Oriental Inland Steam Company*, based on the relevant United Kingdom legislation, had been repeated in successive editions of *Buckley on the Companies Acts* "from 1897 to the present day"[243]. As such, it had clearly passed muster before a great many English lawyers of high distinction and experience, who fully understood the law of company liquidation. Lord Diplock recorded the invitation before the House of Lords to say that the reasoning was wrong "because it was founded on the false premise that the property is subject to a 'trust' in the strict sense of that expression as it was used in equity before 1862"[244]. His Lordship rejected that sterile argument. Instead, he grounded his interpretation of the phrase in the settled meaning of beneficial ownership in this context which was to be taken as incorporated in revenue law when the notion of "beneficial ownership" was first used in a United Kingdom taxing statute in 1927. He thus expressly considered, and rejected, the reasoning that prevailed in the Federal Court in this case and now finds favour with a majority in this Court. Not a single Law Lord dissented from Lord Diplock's speech.

245 I can see no reason of legal authority, principle or policy to justify this Court's taking a different course from that adopted by the unanimous opinion of the House of Lords on a precisely identical point of revenue law. Only an elaborate reasoning, founded on metaphors, similes and analogical references (and based on a somewhat parochial antipodean inflexibility concerning the law of trusts), could persuade this Court to impose, on similar Australian statutory language, a construction opposite to that which has been followed for one and a quarter centuries in the United Kingdom. There is no reason why we should take such a course. There are many reasons why we should not.

246 The differences that emerge between the respective views expressed by Menzies J in *Franklin's* and by the House of Lords in *Ayerst* (concededly upon somewhat different statutory language) have been noted in a number of

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**243** [1976] AC 167 at 180.

**244** [1976] AC 167 at 180.

decisions[245] and in text commentaries[246]. The decision in *Ayerst*, as I have previously stated, is consistent with the approach taken by the courts of New Zealand, Ireland and Hong Kong[247]. This fact should also make this Court pause before striking out on the opposite approach in what, clearly, is a common problem of revenue law arising in many like jurisdictions.

247 *Conclusion: the s 80A(1) error*: It is those last words that afford the ultimate justification for the line of authority, adopted in other countries of our legal tradition, which this Court should also, in my view, follow. The context of the provision for the deduction of past tax losses requires clear identification of the purpose and policy for such a deduction. Hence, it requires understanding of the statutory language in which the prerequisites are expressed. When these factors are given due weight, the conclusion reached in the overseas authorities is compelling. The only way to justify a different conclusion, in respect of similar language in the Act, is to impose upon that language presuppositions derived from notions of judge-made law, specifically the law of trusts. But if that is done, a judicial remark in analogical reasoning is pressed far beyond its intent. The fundamental duty of this Court, namely to interpret and uphold the purpose of the Parliament as stated in the language of the Act, is then forgotten. This is the flaw in the reasoning about s 80A(1) of the Act that led the judges of the Federal Court to their orders. It is an error that requires correction by this Court. It is to expose that error that I have added these remarks concerning that part of the joint reasons with which I respectfully disagree.

Orders

248 It follows that, on the first and third issues[248], and not just on the first, the Commissioner is entitled to succeed. It is for these reasons that I agree in the orders proposed in the joint reasons.

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**245** *Federal Commissioner of Taxation v St Hubert's Island Pty Ltd (in liq)* (1978) 138 CLR 210 at 232-233, 249-250; *Deputy Commissioner of Taxation v AGC (Advances) Ltd* [1984] 1 NSWLR 29 at 36-37; *Re Allan Fitzgerald Pty Ltd (in liq)* (1992) 112 FLR 203 at 208-209; *Mineral & Chemical Traders Pty Ltd v T Tymczyszyn Pty Ltd (in liq)* (1994) 15 ACSR 398 at 416-417; *CPH Property Pty Ltd v Commissioner of Taxation* (1998) 88 FCR 21 at 50-51; *Commissioner of Taxation v Macquarie Health Corporation Ltd* (1998) 88 FCR 451 at 468.

**246** McPherson, *The Law of Company Liquidation*, 4th ed (1999) at 219; Meagher, Heydon and Leeming, *Equity: Doctrines and Remedies*, 4th ed (2002) at 132-133 [4-055].

**247** See these reasons at [184].

**248** Of the issues identified in these reasons at [189].