HIGH COURT OF AUSTRALIA

FRENCH CJ,
HAYNE, CRENNAN, BELL AND GAGELER JJ

COMMISSIONER OF TAXATION APPELLANT

AND

CONSOLIDATED MEDIA HOLDINGS LTD RESPONDENT

Commissioner of Taxation v Consolidated Media Holdings Ltd
[2012] HCA 55
5 December 2012
S228/2012

ORDER

1. *Appeal allowed with costs.*

2. *Set aside the orders made by the Full Court of the Federal Court of Australia on 20 March 2012 and in their place order that the appeal from the orders made by Emmett J on 14 April 2011 be dismissed with costs.*

On appeal from the Federal Court of Australia

Representation

B J Sullivan SC with T M Thawley SC for the appellant (instructed by Australian Government Solicitor)

D H Bloom QC with K J Deards and C A Burnett for the respondent (instructed by King & Wood Mallesons)

CATCHWORDS

Commissioner of Taxation v Consolidated Media Holdings Ltd

Taxation – Income tax – Share buy-back – Off-market purchase – Company's financial record of transaction – Whether dividend or capital gain – Whether purchase price "debited against amounts standing to the credit of … the company's share capital account" – Meaning of "share capital account" – Relevance of legislative history.

Words and phrases – "account", "buy-back", "combined share capital account", "debited against amounts standing to the credit of", "financial records", "financial statements", "purchase price", "share capital account".

Corporations Act 2001 (Cth), Pt 2J.1 of Ch 2J, Pt 2M.2 of Ch 2M.
Income Tax Assessment Act 1936 (Cth), ss 6D, 159GZZZP.

1 FRENCH CJ, HAYNE, CRENNAN, BELL AND GAGELER JJ. This appeal concerns the characterisation for income tax purposes of consideration received by the respondent, then Publishing and Broadcasting Ltd ("PBL"), for shares sold to Crown Melbourne Ltd, then Crown Ltd ("Crown"), in an off-market buy-back in the year of income ended 30 June 2002.

Legislative setting

2 The legislative setting for the off-market buy-back comprised the *Corporations Act* 2001 (Cth) ("the Corporations Act") as well as the *Income Tax Assessment Act* 1936 (Cth) ("the ITAA 1936") and the *Income Tax Assessment Act* 1997 (Cth) ("the ITAA 1997").

3 The Corporations Act allows a company to buy back its own shares if the buy-back does not materially prejudice the company's ability to pay its creditors and if the company follows procedures laid down in Div 2 of Pt 2J.1 of Ch 2J. The way a company accounts for a buy-back is governed by the general obligations of the company under Pt 2M.2 of Ch 2M. Under Pt 2M.2 of Ch 2M, the company has an obligation to keep "written financial records" that "correctly record and explain its transactions and financial position and performance" and that "would enable true and fair financial statements to be prepared and audited"[1]. The company also usually has an obligation to prepare an annual financial report, consisting of financial statements for a financial year as well as notes to those statements and a directors' declaration about those statements and notes[2]. The financial statements and notes for a financial year must comply with accounting standards made for the purposes of the Corporations Act and any further requirements in regulations made under that Act[3] and must give a true and fair view of the financial position and performance of the company[4]. The expression "financial records" includes "documents of prime entry" as well as "other documents needed to explain … the methods by which financial

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1 Section 286(1) of the Corporations Act.

2 Sections 292 and 295 of the Corporations Act.

3 Sections 9, 296 and 334 of the Corporations Act.

4 Section 297 of the Corporations Act.

statements are made up … and … adjustments to be made in preparing financial statements"[5].

4 For the purposes of the ITAA 1936 and the ITAA 1997, the effect of a company buying a share in itself from a shareholder in the company is addressed in Div 16K of Pt III of the ITAA 1936. Within Div 16K: such a "purchase" is a "buy-back"[6]; the shareholder is the "seller"[7]; the amount or the sum of the amounts the seller is entitled to receive as a result of or in respect of the buy-back is the "purchase price"[8]; and, except where the buy-back is an "on-market purchase" (made in the ordinary course of trading on a stock exchange on which the share is quoted in an official list), the buy-back is an "off-market purchase"[9]. The effect of an off-market purchase is addressed in Subdiv C.

5 The pivotal provision of Subdiv C of Div 16K of Pt III of the ITAA 1936 is s 159GZZZP. Section 159GZZZP(1) provides that, for the purposes of the ITAA 1936 and the ITAA 1997[10], where a buy-back of a share by a company is an off-market purchase, the difference between the purchase price and "the part (if any) of the purchase price … which is debited against amounts standing to the credit of … the company's share capital account" is taken to be a dividend paid by the company to the seller on the day the buy-back occurs out of profits derived by the company. Section 159GZZZP(2) provides that the remainder of the purchase price is taken not to be a dividend.

6 The consequences of the classification of the purchase price by s 159GZZZP for the operation of the ITAA 1936 and the ITAA 1997, in respect of a seller that is an Australian resident company, can be sufficiently summarised for present purposes as follows. To the extent that the purchase price is taken by force of s 159GZZZP(1) to be a dividend, the amount of the purchase price is

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5 Section 9 of the Corporations Act.

6 Section 159GZZZK(a) of the ITAA 1936.

7 Section 159GZZZK(b) of the ITAA 1936.

8 Section 159GZZZM(a) of the ITAA 1936.

9 Section 159GZZZK of the ITAA 1936.

10 Section 6(1) of the ITAA 1936 ("this Act").

ordinarily included in the seller's assessable income[11] and the seller is ordinarily entitled to a corresponding rebate of income tax[12]. To the extent that the purchase price is taken by force of s 159GZZZP(2) not to be a dividend, and subject to adjustments, an amount equal to the purchase price is ordinarily taken to be the amount the seller has received or is entitled to receive as consideration in respect of the sale of the shares in determining whether the seller makes a capital gain or a capital loss in respect of the buy-back as worked out in accordance with Pts 3-1 and 3-3 of the ITAA 1997[13].

7 In the year of income ended 30 June 2002, "share capital account" was defined in s 6D of the ITAA 1936. Section 6D(1) provided:

> "A ***share capital account*** is:
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> (a) an account which the company keeps of its share capital; or
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> (b) any other account (whether or not called a share capital account), created on or after 1 July 1998, where the first amount credited to the account was an amount of share capital."

8 Section 6D(2) provided:

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

9 Section 6D(3) qualified ss 6D(1) and 6D(2) by providing that an account that was "tainted" for the purposes of Div 7B of Pt IIIAA of the ITAA 1936 was not a share capital account other than for specified purposes. A company's share capital account ordinarily became tainted for the purposes of Div 7B of Pt IIIAA if the company transferred "an amount to its share capital account from any of its other accounts"[14]. A note to s 6D(2), which formed part of the ITAA 1936[15],

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11 Section 44 of the ITAA 1936.

12 Section 46 of the ITAA 1936.

13 Section 159GZZZQ of the ITAA 1936.

14 Section 160ARDM of the ITAA 1936.

15 Sections 2-35, 2-45 and 995-1 ("this Act") of the ITAA 1997.

explained that "[b]ecause the accounts are taken to be a single account (the ***combined share capital account***) tainting any of the accounts has the effect of tainting the combined share capital account".

Buy-back

10 For the whole of the year ended 30 June 2002, PBL owned all of the nearly three billion issued and paid-up ordinary shares in Crown. On 28 June 2002, PBL and Crown entered into a share buy-back agreement which provided for the sale by PBL to Crown of just over 840 million of those shares for a purchase price of $1 billion ("the share buy-back agreement"). The share buy-back agreement provided for completion on 1 August 2002 or such other date as might be agreed between the parties.

11 Before 28 June 2002, Crown had established accounts in its general ledger which included those labelled a "Shareholders Equity Account" and an "Inter-company Loan (Payable) Account". On 28 June 2002, Crown established a new account in its general ledger labelled a "Share Buy-Back Reserve Account".

12 On 28 June 2002, Crown debited $1 billion to the newly established Share Buy-Back Reserve Account. On the same day, Crown made a corresponding credit entry in its ledger which, as subsequently corrected with effect from 30 June 2002, was shown as a $1 billion credit to the Inter-company Loan (Payable) Account. No entry was made in the Shareholders Equity Account, which retained a constant credit balance throughout the year ended 30 June 2002 in excess of $2.4 billion.

13 The share buy-back agreement was completed on 6 August 2002. On that date, amongst other things, PBL transferred to Crown the shares the subject of the share buy-back agreement for a consideration of $1 billion and Crown cancelled those shares.

14 Crown's audited financial statements for the financial year ended 30 June 2002 showed a reduction in "Contributed Equity" of $1 billion from an opening figure of just over $2.4 billion (corresponding with the balance shown in the Shareholders Equity Account) to a closing figure of just over $1.4 billion. Notes against "Contributed Equity" explained it to refer to issued and paid up capital comprising ordinary shares fully paid, and recorded that:

> "On 28 June 2002, 840,336,000 ordinary shares (28.6% of total shares on issue) were bought back by Crown … The shares were repurchased from [PBL] for a total consideration of $1,000,000,000."

15 There is no dispute that Crown followed the procedures laid down in Div 2 of Pt 2J.1 of Ch 2J of the Corporations Act in entering into and giving effect to the share buy-back agreement. There was an unresolved dispute on the evidence at first instance as to whether the method of accounting for the share buy-back adopted by Crown was appropriate as a matter of accounting practice, but it was common ground that the method was neither expressly permitted nor expressly prohibited by the applicable accounting standards.

Assessment and appeal proceedings

16 The Commissioner of Taxation ("the Commissioner") took the view that s 159GZZZP(2) of the ITAA 1936 applied to the $1 billion PBL was entitled to receive under the share buy-back agreement as at 30 June 2002 and went on to assess PBL to have made a capital gain in respect of the buy-back. PBL objected to the assessment on the ground that it was s 159GZZZP(1) that applied, with the result that the $1 billion was taken to be a dividend to be included in its assessable income and entitling it to a rebate of income tax.

17 The Commissioner disallowed the objection, following which PBL commenced a proceeding in the Federal Court under Pt IVC of the *Taxation Administration Act* 1953 (Cth) appealing against that disallowance. The proceeding was dismissed at first instance by Emmett J. The Full Court (Stone, Greenwood and Logan JJ) allowed an appeal from that dismissal and allowed the objection. The present appeal is brought from the orders of the Full Court.

Issue

18 The issue in the appeal is whether the $1 billion PBL was entitled to receive under the share buy-back agreement was, as at 30 June 2002, "debited against amounts standing to the credit of [Crown's] share capital account" within the meaning of s 159GZZZP(1) of the ITAA 1936.

19 The resolution of that issue by Emmett J at first instance proceeded on the basis that, as at 30 June 2002, Crown's "share capital account", as defined in s 6D, comprised, for the purposes of s 159GZZZP(1) of the ITAA 1936, its Shareholders Equity Account to which the amount in excess of $2.4 billion stood credited together with its newly created Share Buy-Back Reserve Account. That was because each was an "account" kept by Crown "of its share capital" within the meaning of s 6D(1)(a) and because the two accounts were to be taken by s 6D(2) for the purposes of the ITAA 1936 to be a single account. The $1 billion debited to the Share Buy-Back Reserve Account was therefore debited against the amount in excess of $2.4 billion standing to the credit of what was, for the

purposes of s 159GZZZP(1) of the ITAA 1936, taken to be that single share capital account[16].

20 The resolution of the issue by the Full Court was different because the Full Court took a narrower view of s 6D of the ITAA 1936. In the view of the Full Court: s 6D(1)(a) referred to no more than "the company account, however described, to which the paid up capital of the company was originally credited"; s 6D(1)(b) applied "to any *other* post 30 June 1998 account … to which the first amount credited was an amount of share capital"; and s 6D(2) did no more than to treat "each of those accounts as a single account thereby facilitating transfers between them"[17]. Applying that view, the Full Court concluded that: the Shareholders Equity Account was Crown's share capital account because it was "in terms of s 6D(1)(a) … an account in which Crown kept its share capital"; the Share Buy-Back Reserve Account was "neither such an account nor was it an account to which s 6D(1)(b) … applied"; and s 6D(2) therefore had no application[18]. The Full Court added that, even if the Share Buy-Back Reserve Account did fall within s 6D(1)(b) so as to be required by s 6D(2) to be taken with the Shareholders Equity Account to be a single account, the statutory fiction of a single account created by s 6D(2) did not go so far as to "deem the act of debiting against one account to have occurred against an amount standing to the credit of another account"[19].

21 The Full Court was persuaded to that narrower view of s 6D of the ITAA 1936 by arguments presented on behalf of PBL which relied on a detailed analysis of the historical development of corporations and taxation legislation in their application to share buy-backs and other capital reductions up to the year of income ended 30 June 2002. PBL and the Commissioner both adopted a similar historical approach to the presentation of competing arguments in the appeal.

22 Although addressed in these reasons, consideration of the historical development of corporations and taxation legislation ultimately contributes little

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16 *Consolidated Media Holdings Ltd v Commissioner of Taxation* (2011) 82 ACSR 637 at 652-653 [70]-[73].

17 *Consolidated Media Holdings Ltd v Federal Commissioner of Taxation* (2012) 201 FCR 470 at 484 [40], 485 [43].

18 (2012) 201 FCR 470 at 486 [45].

19 (2012) 201 FCR 470 at 486 [46].

to the construction and application of either s 6D or s 159GZZZP(1) of the ITAA 1936.

Legislative history

23 In the year of income ended 30 June 2002, the provisions of the Corporations Act and the ITAA 1936 relating to share buy-backs were of relatively recent origin. So were the provisions in Div 7B of Pt IIIAA of the ITAA 1936 and the definition of "share capital account" in s 6D of that Act.

24 The preceding two decades had seen developments in corporations law to which sequential amendments to the ITAA 1936 were largely responsive.

25 The Companies Code, in the form in which it commenced in 1981[20], followed earlier companies legislation in: requiring the share capital of a company to be divided into shares of a fixed amount[21], known as the "nominal value" or "par value" of the shares; requiring the confirmation of a court for the company to reduce its share capital including by paying off any paid-up share capital in excess of the needs of the company[22]; and prohibiting a company from acquiring its own shares or interests in its own shares[23]. A company (other than a no liability company) could issue shares at a "discount" from their par value only if specified conditions were satisfied[24] and a company that issued shares at a "premium" to their par value was required to transfer the aggregate amount of that premium to a "share premium account" to which provisions relating to the reduction of capital applied as if the share premium account were paid-up share capital of the company[25]. Save only that the share premium account could be

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20 *Companies Act* 1981 (Cth). See also *Companies (Application of Laws) Act* 1981 (NSW); *Companies (Application of Laws) Act* 1981 (Vic); *Companies (Application of Laws) Act* 1981 (Q); *Companies (Application of Laws) Act* 1981 (WA); *Companies (Application of Laws) Act* 1982 (SA); *Companies (Application of Laws) Act* 1982 (Tas); *Companies (Application of Laws) Act* (NT).

21 Section 37(1)(c) of the Companies Code.

22 Section 123 of the Companies Code.

23 Section 129 of the Companies Code.

24 Section 118 of the Companies Code.

25 Section 119 of the Companies Code.

applied in the payment of dividends satisfied by the issue of shares, the company was prohibited from paying dividends to shareholders except out of profits[26]. Another requirement of the Companies Code was that, where a company redeemed preference shares otherwise than out of the proceeds of a fresh issue of shares, the nominal value of the shares redeemed was to be transferred out of profits otherwise available for dividends to a "capital redemption reserve", to which the provisions relating to the reduction of capital applied as if the capital redemption reserve were paid-up share capital of the company[27].

26 An exception to the prohibition against a company acquiring its own shares or interests in its own shares was created by an amendment to the Companies Code in 1989[28]. The Companies Code, as then amended, permitted a company to buy back its shares if prescribed conditions were satisfied[29] with the consequence that, immediately after their transfer to the company, the shares bought back were automatically cancelled and the company's issued share capital was reduced by their nominal value[30]. The exception created by that amendment was reflected in the Corporations Law, which commenced in 1991[31]. Until 1995, any premium paid by the company over the nominal value of the shares bought back had to be written-off by the company first against any amount standing to the credit of its share premium account and only after that against its distributable

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26 Sections 119 and 565 of the Companies Code.

27 Section 120 of the Companies Code.

28 Section 16 of the *Co-operative Scheme Legislation Amendment Act* 1989 (Cth).

29 Division 3A of Pt IV of the Companies Code.

30 Section 133PC of the Companies Code.

31 Division 4B of Pt 2.4 of the Corporations Law, inserted into the *Corporations Act* 1989 (Cth) from 1 January 1991 by Sched 5 to the *Corporations Legislation Amendment Act* 1990 (Cth), and applied by the *Corporations (New South Wales) Act* 1990 (NSW), *Corporations (Victoria) Act* 1990 (Vic), *Corporations (South Australia) Act* 1990 (SA), *Corporations (Queensland) Act* 1990 (Q), *Corporations (Western Australia) Act* 1990 (WA), *Corporations (Tasmania) Act* 1990 (Tas), and *Corporations (Northern Territory) Act* 1990 (NT).

profits[32]. Under simplified provisions substituted in 1995[33]: that latter requirement was omitted; providing for consideration payable by the company on a buy-back of its shares became a permissible but not mandatory application of a share premium account[34]; and, immediately after the registration of the transfer to the company of the shares bought back, the shares were automatically cancelled but without reducing the company's nominal share capital[35].

27 The concept of shares in a company having a par value was abolished as part of a major revision of the Corporations Law effected by amending legislation which commenced on 1 July 1998[36]. On and after that date: shares in a company no longer had a par value[37]; a company was no longer required to have a share premium account or a capital redemption reserve; a company was able to capitalise profits without issuing shares[38]; and the requirement that a dividend only be paid out of profits of the company became unqualified[39]. Section 1446 of the Corporations Law, a transitional provision, provided that immediately after the commencement of the amending legislation, "any amount standing to the credit of the company's share premium account and capital redemption reserve [became] part of the company's share capital".

28 The same amending legislation repealed the simplified share buy-back provisions that had been substituted in 1995 and re-enacted those provisions, with some changes, as Pt 2J.1 of Ch 2J of the Corporations Law. It remained the

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32 Section 133PD of the Companies Code (inserted by s 16 of the *Co-operative Scheme Legislation Amendment Act* 1989 (Cth)) and s 206PD of the Corporations Law.

33 *First Corporate Law Simplification Act* 1995 (Cth).

34 Section 191(2)(ea) of the Corporations Law.

35 Section 206I of the Corporations Law.

36 *Company Law Review Act* 1998 (Cth).

37 Section 254C of the Corporations Law as amended by Sched 5 to the *Company Law Review Act* 1998 (Cth).

38 Section 254S of the Corporations Law.

39 Section 254T of the Corporations Law.

case that, immediately after the registration of the transfer to the company of the shares bought back, the shares were automatically cancelled[40] but no reference was made to the effect on the company's nominal share capital, which had ceased to be a relevant concept.

29 The same amending legislation also replaced, with Pt 2M.2 of Ch 2M of the Corporations Law, various accounting and reporting obligations which had largely been carried over into the Corporations Law from the Companies Code. Those earlier obligations had included an obligation for a company to keep such "accounting records" as correctly recorded and explained the transactions and financial position of the company and to do so in a manner as would enable the preparation from time to time and auditing or review of "true and fair accounts" comprising "profit and loss accounts" and "balance sheets" together with statements, reports and notes attached to or intended to be read with them[41]. Part 2M.2 of Ch 2M of the Corporations Law substituted the broader concept of "financial records" for the earlier concept of "accounting records" and correspondingly substituted the concept of "true and fair financial statements" for the earlier concept of "true and fair accounts".

30 The form and structure of Pt 2J.1 of Ch 2J and Pt 2M.2 of Ch 2M of the Corporations Law were replicated in the Corporations Act, which commenced on 15 July 2001.

31 Amendments to the ITAA 1936 over the same period tracked the amendments to the Companies Code and the Corporations Law.

32 At the commencement of the Companies Code, the ITAA 1936 ordinarily included dividends paid by a company out of profits derived by the company within the assessable income of a shareholder[42]. As defined since 1967[43], "dividend" excluded (amongst other things and subject to exceptions) distributions where the amount of the moneys paid was "debited against an amount standing to the credit of a share premium account of the company" and

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40 Section 257H of the Corporations Law.

41 Sections 9 ("accounts" and "accounting records") and 289(1) of the Corporations Law. See also ss 266 and 267(1) of the Companies Code.

42 Section 44(1) of the ITAA 1936.

43 *Income Tax Assessment Act (No 4)* 1967 (Cth).

"moneys paid … by way of repayment … of moneys paid up on a share" but otherwise included "any distribution made by a company to [a] shareholder"[44]. A "share premium account" was defined to mean "an account … to which the company [had], in respect of premiums received by the company on shares issued by it, credited amounts, being amounts not exceeding the respective amounts of the premiums" but not an account "where any other amount is included in the amount standing to the credit of such an account" or an account "where an amount that has been credited to such an account in respect of a premium received by the company on a share issued by it … could not, at any time before it was so credited, be identified in the books of the company as such a premium"[45]. The overall effect was that a distribution made by a company to a shareholder in a reduction of capital was ordinarily a dividend if and to the extent that the distribution exceeded the sum of the amount paid up on cancelled shares and any amount debited against an amount standing to the credit of a dedicated share premium account.

33 Division 16K of Pt III was inserted into the ITAA 1936 in 1990[46] in consequence of the amendment to the Companies Code for the first time permitting a company to buy back its shares. Section 159GZZZP(1) as enacted provided that, for the purposes of the ITAA 1936, where a buy-back of a share by a company was an off-market purchase, the amount taken to be a dividend paid by the company to the seller out of profits derived by the company was so much of the purchase price as exceeded the sum of the amount to which the share was paid up immediately before the buy-back and the part (if any) of the purchase price which was debited against amounts standing to the credit of the company's share premium account.

34 Division 7B of Pt IIIAA was introduced into the ITAA 1936, and s 159GZZZP(1) was amended to take the form in which it relevantly remained, by amending legislation enacted in consequence of, and which commenced with, the amendment of the Corporations Law on 1 July 1998[47]. The same amending

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44 Section 4(2)(a) of the *Income Tax Assessment Act (No 4)* 1967 (Cth), amending s 6(1) of the ITAA 1936.

45 Section 4(2)(b) of the *Income Tax Assessment Act (No 4)* 1967 (Cth), amending s 6(1) of the ITAA 1936.

46 *Taxation Laws Amendment Act (No 3)* 1990 (Cth).

47 *Taxation Laws Amendment (Company Law Review) Act* 1998 (Cth).

Act inserted into the ITAA 1936 a definition of "share capital account" which, so far as relevant, was to the effect that "share capital account … [did] not include an account that [was] tainted for the purposes of [Div 7B of Pt IIIAA]"[48].

35 The Explanatory Memorandum for that amending legislation in 1998 described one of its purposes as being to "ensure that existing provisions within the tax laws dependent on the concept of par value (and associated terms such as share premiums, share premium account and paid-up capital) continue to operate appropriately"[49]. The Explanatory Memorandum went on to explain the purpose of Div 7B of Pt IIIAA. It stated[50]:

> "The current definition of 'share premium account' in the Act operates in such a way that the tainting of the account by amounts other than share premiums (eg by crediting the account with profits) results in the account ceasing to be a share premium account for tax purposes.
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> Under the new Corporations Law, companies will be permitted … to capitalise profits by transferring an amount from their profit account to their share capital account. For the same reason that a share premium account is tainted by the transfer of profits into the account, a tainting rule will also apply in respect of a company's share capital account."

36 The definition of "share capital account" as introduced from 1 July 1998 was repealed, and s 6D was introduced into the ITAA 1936 in its place, by further amending legislation in 1999[51], which was given retrospective effect to

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48 Section 6(1) of the ITAA 1936.

49 Australia, House of Representatives, Taxation Laws Amendment (Company Law Review) Bill 1998 (Cth), Explanatory Memorandum at [1.5].

50 Australia, House of Representatives, Taxation Laws Amendment (Company Law Review) Bill 1998 (Cth), Explanatory Memorandum at [1.59]-[1.60].

51 *Taxation Laws Amendment Act (No 7)* 1999 (Cth).

1 July 1998[52]. The Explanatory Memorandum for that further amending legislation explained its purpose as including to ensure that[53]:

> "a share capital account does not become tainted by the merger of tainted share premiums with share capital unless the share capital account ceases to be more than the total of the tainted share premium account immediately before the merger".

It went on to explain[54]:

> "The tainting rule within [Div 7B of Pt IIIAA of the ITAA 1936] prevents companies disguising a profit distribution as a tax-preferred capital distribution from the share capital account by first transferring profits into that account and then distributing from it. A similar rule applied to share premium accounts before their abolition on 1 July 1998: in cases where the share premium account contained amounts other than share premiums ('tainted share premium accounts') the share premium account was also treated as a profit account.
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> Since the tainting rule's inception two unintended outcomes have emerged. First, the merger of tainted share premiums with share capital on 1 July 1998 has the effect of tainting the new share capital account for tax purposes, thereby preventing the distribution of profits in the guise of share capital. This has the inappropriate flow-on effect of producing an automatic franking debit upon merger and it removes the ability of companies to defer distribution of tainted amounts already transferred to share premium accounts.
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> Second, under the rules formerly applicable to share premium accounts before 1 July 1998, a share premium account did not become tainted when share premiums were credited to another account and then transferred to the share premium account, provided they could be

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52 Section 2(2) of, and items 1 and 2 of Sched 1 to, the *Taxation Laws Amendment Act (No 7)* 1999 (Cth).

53 Australia, House of Representatives, Taxation Laws Amendment Bill (No 7) 1999 (Cth), Explanatory Memorandum at [1.1].

54 Australia, House of Representatives, Taxation Laws Amendment Bill (No 7) 1999 (Cth), Explanatory Memorandum at [1.6]-[1.8].

identified in the books of the company at all times as such a premium. The law in its present form does not expressly provide for this exception."

37 The first of the two "unintended outcomes" identified in the Explanatory Memorandum for the further amending legislation in 1999 was an outcome of the application of Div 7B of Pt IIIAA in circumstances where the transitional provision in s 1446 of the Corporations Law caused an amount standing to the credit of a company's share premium account or capital redemption reserve automatically to become part of the company's share capital on 1 July 1998[55]. It was addressed by a transitional provision in the further amending legislation[56].

38 The second of the two "unintended outcomes" identified in the Explanatory Memorandum for the further amending legislation in 1999 – the tainting of a share capital account occurring by reason of an amount of share capital first credited to another account being transferred to the share capital account in circumstances where the amount could at all times be identified in the books of the company as share capital – was addressed by a combination of the insertion of the new definition in s 6D and the creation of a new exception to the rule in Div 7B of Pt IIIAA that a company's share capital account would ordinarily become tainted if the company transferred an amount to it from another account[57]. By virtue of the new definition in s 6D, notwithstanding the transfer to it of an amount first credited to another account, an account would be and remain a share capital account (by operation of s 6D(1)(a)) if it was "an account which the company [kept] of its share capital" or (by operation of s 6D(1)(b)) if it was created on or after 1 July 1998 and the first amount credited to it was share capital. Because two or more share capital accounts were to be taken (by operation of s 6D(2)) to be a single account, transfers between them would fall outside the scope of the ordinary rule that a company's share capital account would become tainted if the company transferred an amount to that account from any of its other accounts. Even if an amount of share capital were transferred to a share capital account from another account that fell outside the

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55 Australia, House of Representatives, Taxation Laws Amendment Bill (No 7) 1999 (Cth), Explanatory Memorandum at [1.34]-[1.35].

56 Item 7 of Sched 1 to the *Taxation Laws Amendment Act (No 7)* 1999 (Cth), amending item 9 of Sched 2 to the *Taxation Laws Amendment (Company Law Review) Act* 1998 (Cth).

57 Australia, House of Representatives, Taxation Laws Amendment Bill (No 7) 1999 (Cth), Explanatory Memorandum at [1.23]-[1.28].

new definition in s 6D, by virtue of the new exception the rule would not apply if the amount "could be identified in the books of the company as an amount of share capital at all times before it was credited to the share capital account"[58].

Resolution

39 "This Court has stated on many occasions that the task of statutory construction must begin with a consideration of the [statutory] text"[59]. So must the task of statutory construction end. The statutory text must be considered in its context. That context includes legislative history and extrinsic materials. Understanding context has utility if, and in so far as, it assists in fixing the meaning of the statutory text. Legislative history and extrinsic materials cannot displace the meaning of the statutory text. Nor is their examination an end in itself.

40 The Commissioner in the appeal emphasised that Div 7B of Pt IIIAA of the ITAA 1936 as enacted treated a share buy-back in much the same way as the ITAA 1936 had since 1967 treated a distribution made in a reduction of capital and that there was nothing in the extrinsic material accompanying the amendment of s 159GZZZP(1) in 1998 to indicate a legislative intention to alter that similarity of treatment. In a reprise of its argument to the Full Court, PBL emphasised that the legislation amending the ITAA 1936 on 1 July 1998 in response to changes in the Corporations Law had the immediate result, in the language of a contemporary discussion paper[60], that "the source of funds for distributions (profits or contributed capital) is a matter of choice for companies, and operates by reference to the company's accounts" and that the legislative focus of the retrospective enactment of s 6D in 1999 was on the interaction of the new definition of "share capital account" it introduced with Div 7B of Pt IIIAA, not with s 159GZZZP(1).

41 Each of those aspects of legislative history may be acknowledged. The problem is that none is of much assistance in fixing the meaning of s 6D or in

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58 Section 160ARDM(2)(a) of the ITAA 1936, inserted by item 3 of Sched 1 to the *Taxation Laws Amendment Act (No 7)* 1999 (Cth).

59 *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* (2009) 239 CLR 27 at 46 [47]; [2009] HCA 41.

60 See Australia, Review of Business Taxation, *A Platform for Consultation*, Discussion Paper 2 (1999), vol 2 at [19.2].

applying s 159GZZZP(1) in the light of that meaning. Section 159GZZZP(1) was to apply from 1 July 1998 in accordance with its amended terms. The definition of "share capital account" in s 6D, introduced in 1999 retrospectively to 1 July 1998, applied to that expression in s 159GZZZP(1) as much as it applied to the use of that expression elsewhere in the ITAA 1936.

42 An aspect of legislative history that is of greater utility in the construction and application of ss 6D and 159GZZZP(1) of the ITAA 1936 is the contemporaneous commencement on 1 July 1998 of Pt 2M.2 of Ch 2M of the Corporations Law. Section 6D must be read in light of that Part's replacement of the previous notions of a company having "accounts" and "accounting records" with the broader and more functional notion of a company having "financial statements" and "financial records". The reference in s 6D(1)(a) to "an account which the company keeps *of* its share capital" (emphasis added) cannot in that light be confined, in the manner suggested by the Full Court, to the account "to which the paid up capital of the company was originally credited"[61] or to "one *in* which a company ordinarily keeps its share capital on contribution"[62] (emphasis added). Much less can it be confined, as PBL argued in the appeal, to an account which the company kept of its share capital on 1 July 1998.

43 The word "account" in s 6D doubtless referred to a record of debits and credits relating to a designated topic. Neither limb of s 6D(1) turned on how the topic of a particular record of debits or credits was designated. Section 6D(1)(b) applied only to an account created after 1 July 1998, and turned entirely on the nature of the amount first credited. Section 6D(1)(a) applied irrespective of when an account was created, and was not confined to turn on any amount having been credited to the account, whether first or at all.

44 In a context in which the relevant record-keeping obligation of a company under Pt 2M.2 of Ch 2M of the Corporations Law was to keep written financial records that correctly recorded and explained its transactions and financial position and performance and that would enable true and fair financial statements to be prepared and audited, it was sufficient for an account to answer the description in s 6D(1)(a) of "an account which the company keeps *of* its share capital" (emphasis added) that the account, whether debited or credited with one or more amounts, be either a record of a transaction into which the company had

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61 (2012) 201 FCR 470 at 484 [40].

62 (2012) 201 FCR 470 at 485 [43].

entered in relation to its share capital, or a record of the financial position of the company in relation to its share capital.

45 Section 6D(2) required that all share capital accounts that individually answered the description in either s 6D(1)(a) or s 6D(1)(b) be treated as a single account for all purposes of the ITAA 1936. Section 6D(2) could not be confined in a way that made it merely facilitative of transfers between share capital accounts. That the operation of s 6D(2) in combination with Div 7B of Pt IIIAA might result in a transfer from a profit account to a reserve account tainting the whole company's combined share capital account was not, as PBL argued, "anomalous". It was the outcome specifically foreshadowed in the note to s 6D(2) forming part of the statutory text.

46 Crown's Share Buy-Back Reserve Account in which, as corrected, the only entry as at 30 June 2002 was a $1 billion debit was a record of the transaction by which Crown had on 28 June 2002 entered into an executory contract to reduce its share capital by that amount. As illustrated by the derivation of the figure for "Contributed Equity" later shown in Crown's audited financial statements, the financial position of Crown in relation to its share capital as at 30 June 2002 could only be understood by subtracting the $1 billion debit balance in its Share Buy-Back Reserve Account from the credit balance of just over $2.4 billion in its Shareholders Equity Account. On either basis, the Share Buy-Back Reserve Account answered the description of an account which Crown kept of its share capital within s 6D(1)(a). The Share Buy-Back Reserve Account was therefore a share capital account.

47 As Crown's Share Buy-Back Reserve Account, along with its Shareholders Equity Account, was, as at 30 June 2002, a share capital account, the Share Buy-Back Reserve Account and the Shareholders Equity Account were, by the operation of s 6D(2), to be taken for the purposes of s 159GZZZP(1) of the ITAA 1936 to be Crown's single combined share capital account. Taken as a single account, Crown's combined share capital account had an amount of just over $2.4 billion standing to its credit and a debit of $1 billion to the same combined share capital account. To characterise that debit as a debit "against" the amount standing to the credit of the combined share capital account is not to extend the fiction created by s 6D(2), but to apply it.

48 In addition to reiterating the construction of s 6D to which it had persuaded the Full Court, PBL sought to raise a new argument in the appeal to this Court to the effect that s 159GZZZP(1) of the ITAA 1936 was not engaged as at 30 June 2002 given that the share buy-back agreement was not completed and the shares held by PBL were not cancelled until 6 August 2002. Assuming

without deciding that it is open to PBL to raise the new argument, the new argument must be rejected. PBL accepted that the share buy-back agreement was a "buy-back" within the meaning of Div 16K of Pt III of the ITAA 1936 that occurred when the share buy-back agreement was entered into on 28 June 2002. PBL also accepted that the amount of $1 billion PBL was then entitled to receive under the share buy-back agreement on completion was a "purchase price" within the meaning of Div 16K of Pt III of the ITAA 1936. Just how in those circumstances the executory nature of the share buy-back agreement resulted in s 159GZZZP(1) not being engaged as at 30 June 2002 was not articulated by PBL and is not apparent.

49 The $1 billion PBL was entitled to receive under the share buy-back agreement was, as at 30 June 2002, therefore "the purchase price in respect of the buy-back of the share[s] … which [was] debited against amounts standing to the credit of … [Crown's] share capital account" within the meaning of s 159GZZZP(1) of the ITAA 1936. It was not to the point that the share buy-back agreement remained to be completed and the shares had not been cancelled.

Orders

50 The following orders should be made:

1. Appeal allowed with costs.

2. Set aside the orders made by the Full Court of the Federal Court of Australia on 20 March 2012 and in their place order that the appeal from the orders made by Emmett J on 14 April 2011 be dismissed with costs.