HIGH COURT OF AUSTRALIA

KIEFEL CJ,
GAGELER, KEANE, GORDON AND EDELMAN JJ

BHP BILLITON LIMITED (NOW NAMED BHP GROUP LIMITED) APPELLANT

AND

COMMISSIONER OF TAXATION RESPONDENT

BHP Billiton Limited v Commissioner of Taxation
[2020] HCA 5
Date of Hearing: 5 November 2019
Date of Judgment: 11 March 2020
B28/2019

ORDER

Appeal dismissed with costs.

On appeal from the Federal Court of Australia

Representation

D H Bloom QC and E F Wheelahan QC with C M Horan for the appellant (instructed by King & Wood Mallesons)

J O Hmelnitsky SC with D P Hume for the respondent (instructed by Australian Government Solicitor)

Notice: This copy of the Court's Reasons for Judgment is subject to formal revision prior to publication in the Commonwealth Law Reports.

CATCHWORDS

BHP Billiton Limited v Commissioner of Taxation

Income tax (Cth) – Assessable income – Controlled foreign companies – Where Pt X of *Income Tax Assessment Act 1936* (Cth) ("Act") attributes income of controlled foreign company ("CFC") to Australian resident taxpayer who has sufficiently substantial interest in it – Where BHP Billiton Marketing AG ("BMAG") CFC of BHP Billiton Ltd ("Ltd") – Where income of BMAG derived from sale of commodities purchased by BMAG from BHP Billiton Plc's ("Plc") Australian entities – Where that income included in assessable income of Ltd if Plc's Australian entities "associates" of BMAG – Where company "associate" of entity under s 318(2) of Act if "sufficiently influenced" by entity – Where s 318(6)(b) provides that company "sufficiently influenced" by entity if accustomed or under obligation or might reasonably be expected to act in accordance with directions, instructions or wishes of entity – Where Ltd and Plc part of dual-listed company arrangement and operated as if "single unified economic entity" – Whether Plc's Australian entities "associates" of BMAG – Whether Ltd "sufficiently influenced" by Plc – Whether Plc "sufficiently influenced" by Ltd – Whether BMAG "sufficiently influenced" by Plc and Ltd.

Words and phrases – "assessable income", "associate", "attribute", "combined businesses", "controlled foreign company", "dual-listed", "effective control", "in accordance with the directions, instructions or wishes", "single unified economic entity", "sufficiently influenced", "tainted sales income".

Income Tax Assessment Act 1936 (Cth), ss 318, 340, 447.

1 KIEFEL CJ, GAGELER, KEANE, GORDON AND EDELMAN JJ. Part X of the *Income Tax Assessment Act 1936* (Cth) ("the 1936 Act"), headed "Attribution of income in respect of controlled foreign companies", was introduced in 1991[1] to address the possibility that Australian resident taxpayers could defer or avoid tax on foreign-sourced income by interposing entities in low-tax jurisdictions between the source of income and the Australian resident.

2 In general terms, Pt X applies to an Australian resident taxpayer who has a sufficiently substantial interest in a controlled foreign company, or "CFC"[2]. Relevantly, it operates to "attribute" a share of specified income of the CFC to the Australian resident taxpayer, the entity that it is assumed will ultimately benefit from that income derived by the CFC. It operates on an accruals basis[3].

3 The appellant, BHP Billiton Ltd[4] ("Ltd"), an Australian resident taxpayer, is part of a dual-listed company arrangement ("the DLC Arrangement") with BHP Billiton Plc ("Plc"). BHP Billiton Marketing AG ("BMAG") is a Swiss company which, during the relevant years[5], was a CFC of Ltd because Ltd indirectly held 58 per cent of the shares in BMAG, while Plc indirectly held 42 per cent. BMAG purchased commodities from Ltd's Australian subsidiaries and Plc's Australian entities for sale into the export market. BMAG derived income from those sales.

4 There was no dispute that BMAG's income from the sale of commodities it purchased from Ltd's Australian subsidiaries was "tainted sales income"[6] to be

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1 *Taxation Laws Amendment (Foreign Income) Act 1990* (Cth).

2 1936 Act, ss 316(1)(a), 349-355. A CFC is a foreign resident company where that foreign company is controlled by Australian entities and their associates: 1936 Act, s 340.

3 Australia, House of Representatives, *Taxation Laws Amendment (Foreign Income) Bill 1990*, Explanatory Memorandum at 1.

4 Now named BHP Group Limited.

5 Namely, the 2006 to 2010 income years.

6 1936 Act, s 447.

included in the assessable income of Ltd under Pt X. The question is whether BMAG's income from the sale of commodities it purchased from Plc's Australian entities ("the disputed income") was also to be included in the assessable income of Ltd under Pt X. That depends on whether Plc's Australian entities, the sellers of the commodities to BMAG, were "associates" of BMAG for the purposes of s 318(2) of the 1936 Act.

5 One company is an "associate" of another for the purposes of Pt X in a number of situations, including where a company is *sufficiently influenced* by the other entity[7]. Section 318(6)(b) provides that:

> "a company is *sufficiently influenced* by an entity or entities if the company, or its directors, are accustomed or under an obligation (whether formal or informal), or might reasonably be expected, to act in accordance with the directions, instructions or wishes of the entity or entities (whether those directions, instructions or wishes are, or might reasonably be expected to be, communicated directly or through interposed companies, partnerships or trusts)". (emphasis added)

6 The Commissioner contended that Plc's Australian entities were "associates" of BMAG for three independently sufficient reasons: Ltd was "sufficiently influenced" by Plc[8]; Plc was "sufficiently influenced" by Ltd[9]; and BMAG was "sufficiently influenced" by Plc and Ltd[10]. All three contentions should be accepted.

7 Contrary to the contentions of Ltd, for a company to be "sufficiently influenced" by another does not require that the first entity is in the "effective control" of the other entity. A company is "sufficiently influenced" by another entity within the meaning of s 318(6)(b) if, as a matter of past or present fact, or future expectation, the company or its directors are accustomed, or under a formal or informal obligation, or might reasonably be expected, to act in accordance with the directions, instructions or wishes of the other entity. That the

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7 1936 Act, s 318(2)(d)(i) and (2)(e)(i).

8 1936 Act, s 318(2)(d)(i)(A).

9 1936 Act, s 318(2)(e)(i)(A).

10 1936 Act, s 318(2)(d)(i)(B).

relevant act of the company merely coincides with the relevant direction, instruction or wish of the other is not sufficient. Something more is required, and what that is will necessarily vary from entity to entity and be fact specific. The appeal should be dismissed with costs.

Background

8 Ltd and Plc entered into a "DLC Structure Sharing Agreement" whereby they agreed "to establish a dual listed companies structure for the purposes of the future conduct of their combined businesses" and further agreed that "the implementation, management and operation of their combined businesses and affairs shall be undertaken in accordance with the terms" of that agreement and, in particular, the DLC Equalisation Principles and the DLC Structure Principles set out in that agreement[11].

9 The "DLC Structure" is defined to mean "the arrangement whereby, inter alia, [Ltd] and [Plc] have a unified management structure and the businesses of both [Ltd] and [Plc] are managed on a unified basis in accordance with the provisions" of the DLC Structure Sharing Agreement[12]. The DLC Structure Principles, which Ltd and Plc agreed were "essential to the implementation, management and operation of the DLC Structure", were set out in cl 2.

10 First, Ltd and Plc were required to operate "as if they were a single unified economic entity", through common boards of directors[13]. In addition to the common boards, Ltd and Plc were required to operate through "a unified senior executive management"[14].

11 Second, the common directors of Ltd and Plc, in addition to their duties to the company concerned, were required to have regard to the interests of the holders of ordinary shares in Ltd and Plc "as if the two companies were a single unified economic entity" and, for that purpose, had to "take into account in the

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11 DLC Structure Sharing Agreement, Recital A.

12 DLC Structure Sharing Agreement, cl 1.1 definition of "DLC Structure".

13 DLC Structure Sharing Agreement, cl 2(a).

14 DLC Structure Sharing Agreement, cl 2(a).

exercise of their powers the interests of the shareholders of the other"[15]. The Constitution of Ltd[16] and the Articles of Association of Plc[17] expressly allowed the directors of those companies to act in this way. The Constitution of Ltd[18] and the Articles of Association of Plc[19] also provided that the directors of Ltd and Plc did not breach any fiduciary duty by acting in accordance with the various legal documents which set up the DLC Arrangement, including the DLC Structure Sharing Agreement. Thus, Ltd and Plc could choose to do something solely because it was in the interests of the shareholders of the other company.

12 Third, the DLC Structure Sharing Agreement provided that the "DLC Equalisation Principles must be observed"[20]. Those principles[21], in substance, were designed to ensure that the economic returns and voting rights of the shareholders in Ltd and Plc would be in proportion to the prevailing "Equalisation Ratio" provided for by the DLC Structure Sharing Agreement, which was at the relevant time 1:1[22].

13 Fourth, Ltd and Plc agreed to pursue, and to procure (to the extent appropriate to do so) that each member of its respective group (namely Ltd or Plc and its respective subsidiaries from time to time) would pursue, the DLC Structure Principles[23].

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15 DLC Structure Sharing Agreement, cl 2(b).

16 Ltd Constitution, r 104(2).

17 Plc Articles of Association, Art 104(2).

18 Ltd Constitution, r 104(1).

19 Plc Articles of Association, Art 104(1).

20 DLC Structure Sharing Agreement, cl 2(c).

21 DLC Structure Sharing Agreement, cl 3.

22 DLC Structure Sharing Agreement, cl 1.1 definition of "Equalisation Ratio".

23 DLC Structure Sharing Agreement, cll 2, 1.1 definitions of "Group", "BHP Group" and "Billiton Group".

14 By cl 13 of the DLC Structure Sharing Agreement, Ltd and Plc further agreed that, without limiting cl 2, each would "enter into such further transactions or arrangements, and do such acts and things, as the other may reasonably require from time to time in the furtherance of the common interests" of the shareholders of Ltd and Plc "as a combined group or to give effect to [the DLC Structure Sharing Agreement]". Moreover, cl 12 further provided that in the event of any conflict between that agreement and either Ltd's Constitution or Plc's Articles of Association, the parties would use their best endeavours to ensure that any required amendment to the Constitution or the Articles of Association was proposed at general meetings of Ltd or Plc (as the case may be) in order to conform one or both to the provisions of the DLC Structure Sharing Agreement.

15 Two other aspects of the DLC Arrangement, which were consistent with, and necessary for implementation of, the DLC Structure Principles, should be mentioned: dividends and voting.

16 Clause 3.3 of the DLC Structure Sharing Agreement required Ltd and Plc to pay matching dividends. The procedure in practice was that concurrent board meetings of Ltd and Plc resolved to recommend matching dividends to the "Risk & Audit Committee", which was the delegate of the boards for the purposes of resolving to pay dividends. As part of this process, the Ltd and Plc boards recommended dividend amounts for both their own, and the other, company.

17 In relation to voting, shareholders of Ltd and Plc were able to affect decisions made by the general meeting of the other entity in relation to "Joint Electorate Actions" and "Class Rights Actions". Indeed, Ltd and Plc agreed, in respect of Joint Electorate Actions and Class Rights Actions, to use their best endeavours to hold general meetings on the same date or on dates as close together as practicable[24].

18 Clause 5, headed "Joint electorate matters", provided that for a prescribed list of matters, including, for example, the appointment, removal or re-election of any director of Ltd or Plc (or both)[25] and the receipt or adoption of annual

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24 DLC Structure Sharing Agreement, cl 6.1(b).

25 DLC Structure Sharing Agreement, cl 5.1(a). See also Ltd Constitution, r 60; Plc Articles of Association, Art 60.

accounts of Ltd or Plc (or both) or accounts prepared on a combined basis[26], the number of ordinary shareholder votes cast in a Plc general meeting would *also* be cast in a "Parallel General Meeting"[27] of Ltd (and vice versa) through a special voting mechanism[28]. There was no dispute that that mechanism operated so that the same number of votes for and against a resolution would be cast in each company. Thus, for example, a resolution which may not have passed in Ltd, were it to be determined solely on the votes cast by the ordinary shareholders in Ltd, might nevertheless pass because the number of votes cast by the ordinary shareholders in Plc would be voted in the Ltd meeting by the holder of a special voting share in Ltd.

19 In relation to a Class Rights Action, which included such matters as the voluntary liquidation of Ltd or Plc and the amendment of the DLC Structure Sharing Agreement, cl 4 of the DLC Structure Sharing Agreement provided that if a resolution was not carried by the ordinary shareholders in one company, it would not be carried in the other company.

20 In the relevant years, BMAG was 100 per cent indirectly owned by the "single unified economic entity" of Ltd and Plc. BMAG was part of that single unified economic entity. BMAG purchased commodities from Ltd's Australian subsidiaries and Plc's Australian entities for sale into the export market, and maintained a hub in Singapore for, among other things, the marketing and trading of those commodities. And, as further evidence of it being part of that single unified economic entity, Ltd and Plc issued "Group Level Documents" including a "Marketing Risk Management Standard" that applied to BMAG and which "[d]efine[d] [the] governance model and control requirements for managing the ***commodity price risks*** and ***credit risks*** within [BMAG]".

Decisions below

21 In the relevant years, the Commissioner issued to Ltd amended assessments to include the disputed income. The Commissioner disallowed Ltd's

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26 DLC Structure Sharing Agreement, cl 5.1(b).

27 Ltd Constitution, r 2(1) definition of "Parallel General Meeting"; Plc Articles of Association, Art 2(1) definition of "Parallel General Meeting".

28 Ltd Constitution, rr 55(3), 56(1), 59(3), 60(2); Plc Articles of Association, Arts 55(3), 56(1), 59(3), 60(2); SVC Special Voting Shares Deed.

objection to those assessments. Ltd sought review of the Commissioner's objection decision in the Administrative Appeals Tribunal under Pt IVC of the *Taxation Administration Act 1953* (Cth). The Tribunal concluded that the amended assessments were excessive and set aside the objection decision. The Commissioner contended that by reason of the DLC Arrangement, Ltd and Plc were both sufficiently influenced by the other and that Ltd and Plc together, by reason of their shareholding, the DLC Arrangement and its implementation, sufficiently influenced BMAG. These contentions were rejected by the Tribunal. It concluded that Plc's Australian entities were not "associates" of BMAG, within the meaning of s 318(6)(b) of the 1936 Act, for any of the three reasons identified by the Commissioner. The Tribunal found that BMAG's board followed the wishes or directions of Ltd or Plc only when it considered that it would be in BMAG's interests to do so.

22 The Commissioner's appeal to the Full Court of the Federal Court of Australia was allowed (Allsop CJ and Thawley J, Davies J dissenting).

23 Allsop CJ stated that s 318(6)(b) could be seen to be wide enough to include circumstances of mutually advantageous decision making by parties as equals acting in accordance with the directions, instructions or wishes of each other for the common economic goal of operating a single economic entity, and thus found that Ltd and Plc sufficiently influenced each other.

24 Thawley J placed emphasis in particular on the voting and dividend arrangements in the DLC Structure Sharing Agreement. His Honour held that the voting arrangement with respect to Joint Electorate Actions "was one in which both [Ltd and Plc] had what was in substance a say (and potentially a controlling or determinative say) in the passing of resolutions on relevant matters in the other", and, with respect to Class Rights Actions, "gave one company what was in substance a power of veto". The matching dividend arrangements also supported a conclusion that Ltd and Plc sufficiently influenced each other. In relation to BMAG, Thawley J stated that the Tribunal's conclusion that BMAG did follow the wishes and directions of Ltd or Plc implied that s 318(6)(b) applied.

25 In dissent, Davies J considered that to act in concert with a common aim and mutuality of interest was not to act in accordance with the directions, instructions or wishes of another entity. In relation to BMAG, her Honour relied on the finding of the Tribunal that the board of BMAG, when performing its functions, exercised independent judgment about its own best interests and acted accordingly.

Legislation

26 Under Pt X, there are three questions[29]: is the foreign company a CFC[30]; is there an Australian resident "attributable taxpayer"[31] and what is its "attribution interest"[32]; and, finally, what is the CFC's "attributable income"[33]? The answers to these questions determine whether a percentage of the "attributable income" of a CFC is included in the assessable income of an attributable taxpayer.

27 There was no dispute in this appeal that BMAG was a CFC of Ltd[34], that Ltd was an attributable taxpayer[35] of BMAG and that Div 7 of Pt X operated so that the "tainted sales income" of BMAG would be included in Ltd's assessable income.

28 "[T]ainted sales income" is relevantly defined in s 447(1) to include:

"(a) income from the sale of goods by the company where all of the following conditions are satisfied:

(i) the goods were sold to the company by another entity;

(ii) either of the following sub-subparagraphs applies at the time of the sale of the goods to the company:

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29 1936 Act, s 456.

30 1936 Act, s 340.

31 1936 Act, s 361.

32 1936 Act, ss 356-362.

33 1936 Act, Pt X, Div 7.

34 1936 Act, s 340.

35 An "attributable taxpayer" in relation to a CFC is defined in s 361(1) of the 1936 Act.

> (A) the seller of the goods to the company was an *associate* of the company and a Part X Australian resident;
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> ..." (emphasis added)

29 As seen earlier, the issue was whether the income derived by BMAG from the sale of commodities it purchased from Plc's Australian entities was also "tainted sales income" to be included in the calculation of the attributable income of BMAG to be included, in turn, in the assessable income of Ltd. For that income to be included, Plc's Australian entities, being the "sellers of goods" to BMAG within the meaning of s 447(1)(a)(ii)(A), had to be "associates" of BMAG within the meaning of s 318(2).

30 Section 318 identifies when two (or more) entities have a relationship or are in some way connected such that one entity is an "associate" of another. It addresses associates of natural persons (s 318(1)), associates of companies (s 318(2)), associates of trustees (s 318(3)), associates of partnerships (s 318(4)) and associates of trustees of public unit trusts (s 318(5)). Whilst the object of s 318 is to identify the circumstances (or relationships or connections) in which an entity is to be regarded as an "associate" of another, the nature of the "primary entity" is relevant to which sub-section applies.

31 Section 318(2) deals specifically with associates of companies. The fact that it addresses companies is important to its construction. It relevantly provides:

> "For the purposes of this Part, the following are associates of a company (in this subsection called the ***primary entity***):
>
> (a) a partner of the primary entity or a partnership in which the primary entity is a partner;
>
> (b) if a partner of the primary entity is a natural person otherwise than in the capacity of trustee – the spouse or a child of that partner;
>
> (c) a trustee of a trust where the primary entity, or another entity that is an associate of the primary entity because of another paragraph of this subsection, benefits under the trust;
>
> (d) another entity (in this paragraph called the ***controlling entity***) where:

(i) the primary entity is sufficiently influenced by:

(A) the controlling entity; or

(B) the controlling entity and another entity or entities; or

(ii) a majority voting interest in the primary entity is held by:

(A) the controlling entity; or

(B) the controlling entity and the entities that, if the controlling entity were the primary entity, would be associates of the controlling entity because of subsection (1), because of subparagraph (i) of this paragraph, because of another paragraph of this subsection or because of subsection (3);

(e) another company (in this paragraph called the ***controlled company***) where:

(i) the controlled company is sufficiently influenced by:

(A) the primary entity; or

(B) another entity that is an associate of the primary entity because of another paragraph of this subsection; or

(C) a company that is an associate of the primary entity because of another application of this paragraph; or

(D) 2 or more entities covered by the preceding sub-subparagraphs; or

(ii) a majority voting interest in the controlled company is held by:

(A) the primary entity; or

(B) the entities that are associates of the primary entity because of subparagraph (i) of this paragraph and the other paragraphs of this subsection; or

(C) the primary entity and the entities that are associates of the primary entity because of subparagraph (i) of this paragraph and the other paragraphs of this subsection;

..."

32 As will be self-evident, paras (a), (b) and (c) of s 318(2) do not turn on any question of "control". The existence of the relationship itself establishes that the relevant entity is an "associate" of the primary entity – that is, the company.

33 Paragraphs (d) and (e) are in different terms. Paragraph (d) provides that another entity, referred to as the "controlling entity", is an associate of a company (called the "primary entity") where the primary entity is *sufficiently influenced* by the controlling entity, alone or with other entities[36], *or* where a majority voting interest in the primary entity is held by the controlling entity, alone or together with entities which would be associates of the controlling entity by reason of other specific provisions[37].

34 Paragraph (e) provides that another company, called a "controlled company", is an associate of the "primary entity" where the controlled company is *sufficiently influenced* by, or a majority voting interest is held in the controlled company by, the primary entity, either alone or together with entities which would be associates of the primary entity by reason of other specific provisions.

35 The definition of "sufficiently influenced" in s 318(6)(b) has been set out earlier[38]. It comprises a range of activities and influence, where a company (or its directors):

(a) is accustomed (*by reference to past action*),

(b) is under an obligation (whether formal or informal) (*present obligation*), or

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36 1936 Act, s 318(2)(d)(i).

37 1936 Act, s 318(2)(d)(ii).

38 See [5] above.

(c) might reasonably be expected (*future action*),

to act in accordance with the directions, instructions or wishes of the other entity or entities (whether those directions, instructions or wishes are, or might reasonably be expected to be, communicated directly or through interposed companies, partnerships or trusts). Each of (a) to (c) above is independently sufficient to attract the conclusion that a company or its directors are "sufficiently influenced" by the other entity or entities.

36 The focus and operation of the phrase "sufficiently influenced" are not limited. Section 318(6)(b) directs attention to the position of the company *and* the position of its directors. It directs attention to three time periods – the past, the present and the future. It directs attention to the *facts* necessary to underpin a finding that the company (or its directors) has acted, is acting, or might reasonably be expected to act, in accordance with the directions, instructions or wishes of the other entity.

37 Those aspects – the company or its directors, the three time periods and the different nature of the inquiry in each time period – mean that a legal liability for one entity to act on the directions, instructions or wishes of another entity is sufficient for it to be an associate of that other entity, but such a liability is not necessary. On the other hand, mere coincidence that a given act accorded with the relevant direction, instruction or wish of the other entity is not sufficient. Nor is it sufficient if a company is purely acting in its own interests in a way that happens to align with the wishes of another company.

38 There is nothing in s 318(6)(b) which specifies how many, or what types of, acts must be "in accordance with the directions, instructions or wishes" of the other entity. The paragraph provides that the act or acts must have been, must be, or must reasonably be expected to be, "in accordance with" the relevant directions, instructions or wishes of the other entity. Whether that is so is a factual inquiry specific to the primary entity and the controlling entity or the directors of those entities. It is a factual inquiry about how and why the company or its directors are accustomed to (past acts), must (present acts), or might reasonably be expected to (future act by reference to some other fact or matter presently existing) *act in accordance with* the directions, instructions or wishes of the other entity.

39 Thus, the phrase "in accordance with" does not import or require considerations of causation. Indeed, to import considerations of causation would be to ignore the fact that the paragraph applies where a company "might reasonably be expected" to act in accordance with the

"directions, instructions or wishes" of another entity. Of course, if such a causal link can be made, then the provision may well be satisfied. But the provision may also be satisfied if the facts provide some other basis to conclude a requisite degree of contribution from the "directions, instructions or wishes" to the act that was, is, or is expected to be, undertaken[39], or link between them.

40 There is nothing in the text or context of s 318(6)(b) to support Ltd's contention that "sufficiently influenced" requires the controlling entity to be in "effective control" of the other entity, which is in turn subservient to it. Section 318(6)(b) does not use the word "control". It is concerned with influence, not control. It may be noted here that Ltd argued that the fact that s 318(2)(d) and (e) refer to the "controlling entity" and the "controlled company" respectively is a contextual indication that in s 318(6)(b) the expression "sufficiently influenced" is concerned with control exercised by the controlling entity over the controlled company. That argument should not be accepted. The term "control" is not used in s 318(6)(b), in contrast to other provisions of the tax legislation in which that term is used, including s 318(6)(c) of the 1936 Act. In addition, the expressions "controlling entity" and "controlled company" come to be deployed only when s 318(6)(b) has been satisfied. They are deployed as an aid to the orientation of the application of the test in s 318(2)(d) and (e) precisely because sufficient influence is not, in contrast to control, necessarily unidirectional.

41 Indeed, s 318(6) itself draws a stark distinction between influence (in s 318(6)(b)) and control (in s 318(6)(c)). The definition of "majority voting interest" in s 318(6)(c) provides that "an entity or entities hold a majority voting interest in a company if the entity or entities are in a position to cast, or control the casting of, more than 50% of the maximum number of votes that might be cast at a general meeting of the company". A "majority voting interest", therefore, may entail sufficient influence, but, in order for s 318(6)(b) to have some work to do, there may be sufficient influence without a majority voting interest and, therefore, without the "control" of the casting of votes of which s 318(6)(c) speaks.

42 Put in different terms, the phrase "sufficiently influenced" identifies a species of influence over the company or its directors which falls short of the control contemplated by s 318(2)(d)(ii) and (e)(ii), namely, control of a

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39 *Australian Securities and Investments Commission v King* [2020] HCA 4 at [39], [90].

"majority voting interest". And that conclusion is reinforced by the fact that the influence can be asserted through the communication of wishes, which are neither directions nor instructions; they are desires. Control is exercised through commands. Where a person controls, or is in effective control of, another, it would be inapt to describe that person's exercise of control as the expression of mere wishes.

43 Ltd's submission that, consistent with the decision in *Buzzle Operations Pty Ltd (In liq) v Apple Computer Australia Pty Ltd*[40], s 318(6)(b) requires that the "directions, instructions or wishes" constitute a "sufficient reason to act" should also be rejected. *Buzzle* was concerned with provisions in the *Corporations Act 2001* (Cth) relating to shadow directors: provisions in a different statute, using different language and directed to a different purpose – to identify those persons who, because of their control of a company, owe duties to that company. The immediate purpose of Pt X of the 1936 Act is to identify entities whose income should be brought to tax because of their connection to other entities. Consistent with that broader purpose, s 318(6)(b) not only refers to what a company "might reasonably be expected" to do but extends the relevant influence to the company *or* its directors, not just the directors themselves. Indeed, at the time of the enactment of s 318(6)(b), the definition of "director" in the *Corporations Law* which captured shadow directors was in different terms: it was concerned with a person in accordance with whose "directions or instructions" the directors were accustomed to act, but did not extend to "wishes"[41]. It was not until 1999 that the definition of "director" deleted "directions" and substituted "wishes"[42].

Ltd and Plc are associates of each other

44 In June 2001, the DLC Structure Sharing Agreement, including the DLC Structure Principles, provided that Ltd and Plc, as "combined businesses" and a "single unified economic entity", through common boards of directors and a unified senior executive management, would operate then and in the future in that manner and consistently with the terms of that agreement. For that reason alone, Ltd was "sufficiently influenced" by Plc, as Ltd or its directors

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40 (2011) 81 NSWLR 47.

41 *Corporations Law*, s 9 definition of "director", s 60(1)(b).

42 *Corporate Law Economic Reform Program Act 1999* (Cth), Sch 3, item 109.

"might reasonably be expected ... to act in accordance with the directions, instructions or wishes" of Plc in circumstances where they are operating as "combined businesses" and a "single unified economic entity", with shared senior executive management. Necessarily, the "wishes" of Plc (whether communicated or anticipated) would be taken into account when making decisions for both entities as a "single unified economic entity". Moreover, in the circumstances of this appeal, those matters also provided a basis to conclude that Ltd was "accustomed", and pursuant to the DLC Structure Sharing Agreement and the DLC Structure Principles was "under an obligation", to act in accordance with the "directions, instructions or wishes" of Plc. Indeed, to fail to do so would be contrary to the terms of the DLC Structure Sharing Agreement and the DLC Structure Principles.

45 The same applies in reverse. Plc was and remains sufficiently influenced by Ltd. The DLC Structure Sharing Agreement and the DLC Structure Principles alone compel the conclusion that each of Ltd and Plc was accustomed to acting, was under an obligation to act, and might reasonably be expected to act, in accordance with the "directions, instructions or wishes" of the other entity. And in circumstances where s 318(6)(b) is concerned with influence rather than control, that the influence may be mutual is, of itself, no bar to the application of the provision. Moreover, there is nothing to suggest that Ltd and Plc did not so act.

46 The other aspects of the DLC Arrangement – the matching dividend and voting arrangements – provide further reasons to conclude that Plc and Ltd "sufficiently influenced" each other. The Ltd and Plc boards each recommended that the other company provide a matching dividend, which occurred. And under the voting arrangements, votes at one company's general meeting were given effect in the general meeting of the other company. Plc and Ltd were therefore at least "accustomed" to act in accordance with the "directions, instructions or wishes" of each other. Moreover, these arrangements were each a mechanism, an important mechanism, that ensured that Ltd and Plc were, are and would be operated and able to be operated as a "single unified economic entity".

47 Contrary to the submissions of Ltd, the fact that Ltd and Plc operated in this way pursuant to a contract does not preclude a finding that they "sufficiently influenced" each other – otherwise, any company would be able to place itself outside the reach of the statute (of being "sufficiently influenced" by another company) by forming a contract to govern their relationship. The issue necessarily turns on the terms of the contract and whether, as in this case, the terms give rise to a reasonable expectation of one party acting "in accordance with the directions, instructions or wishes" of the other party.

BMAG

48 Three groups of facts compel the conclusion that Ltd and Plc sufficiently influenced BMAG: their shareholding in BMAG; the DLC Structure and the DLC Structure Principles; and Group Level Documents that were issued by Ltd and Plc and which applied to BMAG.

49 In the relevant years, not only was BMAG 100 per cent indirectly owned by the "single unified economic entity" of Ltd and Plc, but it was operated and was required to be operated by them as part of that single unified economic entity by reason of the DLC Structure and the DLC Structure Principles. It was in that context that BMAG purchased commodities from Ltd's Australian subsidiaries and Plc's Australian entities and then marketed and traded those commodities in accordance with the Group Level Documents issued by Ltd and Plc, which included the Marketing Risk Management Standard that "[d]efine[d] [the] governance model and control requirements for managing the ***commodity price risks*** and ***credit risks*** within [BMAG]". No conclusion other than that Ltd and Plc sufficiently influenced BMAG was open.

Conclusion

50 For those reasons, the appeal should be dismissed with costs.