



Civil and Administrative Tribunal New South Wales

Medium Neutral Citation:	Integrated Construction Equipment Pty Limited v Chief Commissioner of State Revenue [2019] NSWCATAD 131
Hearing dates:	13 May 2019
Date of orders:	05 July 2019
Decision date:	05 July 2019
Jurisdiction:	Administrative and Equal Opportunity Division
Before:	AR Boxall, Senior Member
Decision:	The decision under review is affirmed.
Catchwords:	Payroll tax – joint and several liability – grouping – single director company – exercise of voting power at directors’ meetings – body corporate
Legislation Cited:	Administrative Decisions Review Act 1997, ss 58, 63 Corporations Act 2001 (Cwth), s119 Payroll Tax Act 2007 ss 6, 7, 8, 9, 68, 69, 72, 74, 81 Taxation Administration Act 1996 ss 4, 45, 71, 72, 96, 100
Cases Cited:	Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue (2009) 239 CLR 27 B&L Linings Pty Ltd v Chief Commissioner of State Revenue (2008) 74 NSWLR 481 CIC Insurance Ltd v Bankstown Football Club Ltd (1997) 187 CLR 387 East v Bennett Brothers [1911] 1 Ch D 163 In the matter of Climbform Australia Pty Limited [2016] NSWSC 1977 Re Hastings Deering (1985) 9 ACLR 755 Sharpe v Dawes [1876] 2 QBD 26
Texts Cited:	Shorter Oxford English Dictionary, 3rd Edition
Category:	Principal judgment
Parties:	Integrated Construction Equipment Pty Limited (Applicant) Chief Commissioner of State Revenue (Respondent)

Representation: A Fenwick, Director, acting as agent (Applicant)
S Richardson (Respondent)

Solicitors:
Crown Solicitor (Respondent)

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REASONS FOR DECISION

Introduction

- 1 In this application the Applicant seeks the review of a decision made by the Respondent on 12 July 2018 in which he issued to the Applicant Payroll Tax Assessment Notices for the financial years 2014 and 2015. The assessments are individually referred to as, respectively, the *2014 Assessment* and the *2015 Assessment*, and collectively as the *Assessments*.
- 2 In these reasons:
 - (1) References to the *Section 58 Documents* are to the bundle of documents filed by the Respondent with the Tribunal on 27 February 2019 pursuant to section 58 of the Administrative Decisions Review Act 1997 (*ADRA*); and
 - (2) References to particular pages of the Section 58 Documents are to the corresponding numbered pages in that bundle.
- 3 The 2014 Assessment_[1] assessed the Applicant with the following taxation (or taxation related) liabilities in relation to the financial year 1 July 2013 to 30 June 2014:

Description of liability	\$
Payroll tax	68,391.74
Interest as at 12 July 2018	5,661.63
Penalty tax	13,678.35
Interest on penalty tax	0.00
Total	87,731.72

- 4 The 2015 Assessment_[2] assessed the Applicant with the following taxation (or taxation related) liabilities in relation to the financial year 1 July 2014 to 30 June 2015:

Description of liability	\$
Payroll tax	40,657.37
Interest as at 12 July 2018	2,318.24
Penalty tax	8,131.47
Interest on penalty tax	0.00
Total	51,107.08

- 5 The Assessments were based, in whole or in part, on:
- (1) a determination by the Respondent that the Applicant was under section 72 of the Payroll Tax Act 2007 (the **PTA**) a member of a group of commonly controlled businesses during the two financial years in question; and
 - (2) the operation of:
 - (a) section 81 of the PTA, which imposes on each member of such a group joint and several liability with all other members of the group for amounts which any member of the group is required to pay under the PTA; and
 - (b) section 45 of the Taxation Administration Act 1996 (the **TAA**), which imposes on persons who are jointly and severally liable to pay any tax a corresponding joint and several liability to pay associated amounts, such as interest and penalty tax.
- 6 This is apparent from the Respondent's communication dated 12 July 2018 to the Applicant, headed:
- "Notice of Joint and Several Liability
Section 45(2A) of the Taxation Administration Act 1996 (TAA)
Section 81 of the Payroll Tax Act 2007 (PTA)" **[3]**.
- 7 On or about 7 September 2018 the Applicant lodged with the Respondent an objection to the Assessment (the **Objection**) **[4]**. On 15 November 2018 the Respondent disallowed that Objection by letter of that date to the Applicant's accountant, Mr R Forbes **[5]**.
- 8 Subsequently, on 15 January 2019 the Applicant applied under section 96 of the TAA for the administrative review by the Tribunal of the Respondent's decisions.

The general nature of the review

- 9 The provisions of section 100 of the TAA apply to this review. Notably:
- (1) sub-section 100(2) of that Act provides that neither the Applicant nor the Respondent is limited in the present application to the grounds of the Objection; and
 - (2)

sub-section 100(3) of that Act provides that the Applicant has “... *the onus of proving the applicant’s case in an application for review*”, an onus which is discharged by reference to the ordinary civil standard: *B&L Linings Pty Ltd v Chief Commissioner of State Revenue* (2008) 74 NSWLR 481.

- 10 Under section 63(1) of the ADRA, in conducting a review the Tribunal “.. *is to decide what the correct and preferable decision is having regard to the material then before it, including the following:*
- (a) any relevant factual material,
 - (b) any applicable written or unwritten law”.
- 11 Moreover, under section 63(2) of that Act 1997, in doing so the Tribunal “... *may exercise all of the functions that are conferred or imposed by any relevant legislation on the administrator who made the decision*”.

Legislative Background

- 12 The substantive legislative starting point is section 6 of the PTA which imposes payroll tax on all taxable wages. Section 7 then goes on to allocate liability for the tax so imposed, providing that:
- The employer by whom taxable wages are paid or payable is liable to pay payroll tax on the wages.
- 13 Section 8 then provides that the elaborate provisions of Schedules 1 and 2 of the PTA apply in ascertaining the amount of payroll tax payable.
- 14 Section 9 sets out when an employer who under section 7 is liable to pay payroll tax on taxable wages must make payment:

9 When must payroll tax be paid

- (1) A person who is liable to pay payroll tax on taxable wages must pay the tax:
 - (a) within 7 days after the end of the month in which those wages were paid or payable, other than the month of June, and
 - (b) within 21 days after the end of the month of June in relation to taxable wages paid or payable in the month of June.

This is subject to the ability of the Respondent to advance the payment date by notice, in circumstances which are not relevant to this review.

- 15 The PTA then expands on the concepts of wages (in Part 3) and taxable wages (Part 1, Division 2) and provides in Part 4 for the exemption of certain categories of wages – determined by reference either to the characteristics of the employer or the nature of the employee’s services – from inclusion in taxable wages.
- 16 The central provision for purposes of the present review is section 81, which provides as follows:

81 Joint and several liability

If a member of a group fails to pay an amount that the member is required to pay under this Act in respect of any period, every member of the group is liable jointly and severally to pay that amount to the Chief Commissioner.

If 2 or more persons are jointly or severally liable to pay an amount under this section, the Chief Commissioner may recover the whole of the amount from them, or any of them, or any one of them.

If, under this section, 2 or more persons are jointly and severally liable to pay an amount that is payable by any one of them, each person is also jointly and severally liable to pay:

any amount payable to the Chief Commissioner under this or any other Act in relation to that amount, including any interest and penalty tax, and

any costs and expenses incurred in relation to the recovery of that amount that the Chief Commissioner is entitled to recover from any such person.

A person who pays an amount in accordance with the liability imposed by this section has such rights of contribution or indemnity from the other person or persons as are just.

This section applies whether or not the person was an employer during the relevant period.

17 The concept of a “group” is elaborated in:

- (1) Section 69 of the PTA, which provides that:

69 Constitution of groups

A group is constituted by all the persons or bodies forming a group that is not a part of any larger group.

- (2) Section 74 of the PTA, which provides that:

74 Smaller groups subsumed by larger groups

(1) If a person is a member of 2 or more groups, the members of all the groups together constitute a group.

(2) If 2 or more members of a group have together a controlling interest in a business (within the meaning of section 72), all the members of the group and the person or persons who carry on the business together constitute a group.

- (3) Section 68 of the PTA, which affects the operation of sections 69 and 74, by providing that:

68 Grouping provisions to operate independently

The fact that a person is not a member of a group constituted under a provision of this Part does not prevent that person from being a member of a group constituted under another provision of this Part.

18 Section 72 of the PTA Act sets out some quite elaborate rules for determining whether persons form a group. Those on which the Respondent relied in reaching its conclusion in the Assessments were the following provisions of section 72 of the PTA:

72 Groups of commonly controlled businesses

(1) If a person or set of persons has a controlling interest in each of 2 businesses, the persons who carry on those businesses constitute a group.

(2) For the purposes of this section, a person or set of persons has a controlling interest in a business if:

(a)....., or

(b)....., or

(c) in the case of a business carried on by a corporation:

(i) the person or each of the set of persons is a director of the corporation and the person or set of persons is entitled to exercise more than 50% of the voting power at meetings of the directors of the

corporation, or

(ii) a director or set of directors of the corporation that is entitled to exercise more than 50% of the voting power at meetings of the directors of the corporation is under an obligation, whether formal or informal, to act in accordance with the direction, instructions or wishes of that person or set of persons, or

(d) in the case of a business carried on by a body corporate or unincorporate—that person or set of persons constitute more than 50% of the board of management (by whatever name called) of the body or control the composition of that board, or

(e) in the case of a business carried on by a corporation that has a share capital—that person or set of persons can, directly or indirectly, exercise, control the exercise of, or substantially influence the exercise of, more than 50% of the voting power attached to the voting shares, or any class of voting shares, issued by the corporation, or

(f), or

(g)

The Respondent's grouping analysis

19 The Respondent's analysis of the application of sections 68, 69, 72 and 74 of the PTA (the *grouping provisions*) to the Respondent involves consideration of:

- (1) five different companies: the Applicant, Hows Ya Bin Pty Ltd (*HYB*), Australian Demolition and Scrap Recovery Pty Ltd (*ADSR*), Comlix Pty Ltd (*Comlix*) and Recycling Yard Pty Limited (*RY*);
- (2) three separate periods: 1 July 2013 to 17 September 2014, 18 September 2014 to 24 September 2014, and 25 September 2014 to 30 June 2015; and
- (3) the relationships of two persons – Mr Anthony Fenwick (*Mr Fenwick*) and Ms Karen Fenwick (*Ms Fenwick*) – with those five companies during each of those periods.

20 In relation to the period 1 July 2013 to 17 September 2014 the Respondent concluded as follows:

- (1) HYB and the Applicant formed a group, on the basis that during that period Mr Fenwick had a controlling interest in both companies' businesses within the meaning of section 72 of the PTA since:
 - (a) He was the sole director of each company.
 - (b) As such, he was “.. *entitled to exercise more than 50% of the voting power at meetings of the directors of ..*” each company, thus satisfying the test in section 72(2)(c)(i) of the PTA; and
 - (c) Because each company was a body corporate, as the sole director of each company he constituted “.. *more than 50% of the board of management (by whatever name called) of ..*” each such body corporate, thus satisfying the test in section 72(2)(d) of the PTA.
- (2) HYB and Comlix formed a group, on the basis that during that period Mr Fenwick and Ms Fenwick were a set of persons who had a controlling interest in both companies' businesses within the meaning of section 72 of the PTA since:
 - (a) They were shareholders in each company:
 - (i) HYB had 2 ordinary shares, 1 A class share and one B class share on issue, of which Mr Fenwick held 1 ordinary and the A class share, and Ms Fenwick held the other ordinary share and

the B class share; and

- (ii) Comlix had 2 ordinary, 1 A class, 1 B class, 1 C class and 1 D class shares on issue, of which Mr Fenwick held 1 ordinary and 1 A class share, and Ms Fenwick held 1 ordinary 1 B class share;
 - (b) In the case of HYB, between them they held the entire issued capital;
 - (c) In that of Comlix, the voting shares were the ordinary, Class A, Class B and Class C shares, of which Mr Fenwick and Ms Fenwick collectively held 4 out of 5;
 - (d) They were thus collectively “.. *entitled to exercise more than 50% of the voting power attached to the voting shares of, or any class of voting shares of ..*” each company, thus satisfying the test in section 72(2)(e) of the PTA; and
 - (e) Because each company was a body corporate, as the sole director of each company he constituted “.. *more than 50% of the board of management (by whatever name called) of ..*” each such body corporate, thus satisfying the test in section 72(2)(d) of the PTA.
- (3) The Applicant and ADSR formed a group, on the basis that during that period Mr Fenwick had a controlling interest in both companies’ businesses within the meaning of section 72 of the PTA since:
- (a) He was the sole director of each company.
 - (b) As such, he was “.. *entitled to exercise more than 50% of the voting power at meetings of the directors of ..*” each company, thus satisfying the test in section 72(2)(c)(i) of the PTA; and
 - (c) Because each company was a body corporate, as the sole director of each company he constituted “.. *more than 50% of the board of management (by whatever name called) of ..*” each such body corporate, thus satisfying the test in section 72(2)(d) of the PTA.
- (4) The groups comprising:
- (a) HYB and the Applicant, and HYB and Comlix, together constitute a single group under section 74(1) of the PTA, because of the common membership of HYB; and
 - (b) HYB and the Applicant, and the Applicant and ADSR, together constitute a single group under section 74(1) of the PTA, because of the common membership of the Applicant.
- (5) The two composite groups together constitute a single group pursuant to section 74(1) of the PTA, by reason of the common membership of the Applicant and HYB in both of them.

21 In relation to the period 18 September 2014 to 24 September 2014 the Respondent concluded as follows:

- (1) HYB and the Applicant formed a group, on the basis that during that period Mr Fenwick had a controlling interest in both companies’ businesses within the meaning of section 72 of the PTA for the reasons outlined above in relation to the period 1 July 2013 to 17 September 2014.
- (2) HYB and Comlix formed a group, on the basis that during that period Mr Fenwick and Ms Fenwick were a set of persons who had a controlling interest in both companies’ businesses within the meaning of section 72 of the PTA. This was for the same reasons as applied in relation to the period 1 July 2013 to 17 September 2014.
- (3)

The Applicant and ADSR formed a group, on the basis that during that period Mr Fenwick had a controlling interest in both companies' businesses within the meaning of section 72 of the PTA. This was for the same reasons as applied in relation to the period 1 July 2013 to 17 September 2014.

- (4) The Applicant and RY formed a group, on the basis that during that period Mr Fenwick had a controlling interest in both companies' businesses within the meaning of section 72 of the PTA since:
 - (a) He was the sole director of each company.
 - (b) As such, he was "*.. entitled to exercise more than 50% of the voting power at meetings of the directors of ..*" each company, thus satisfying the test in section 72(2)(c)(i) of the PTA; and
 - (c) Because each company was a body corporate, as the sole director of each company he constituted "*.. more than 50% of the board of management (by whatever name called) of ..*" each such body corporate, thus satisfying the test in section 72(2)(d) of the PTA.
- (5) The groups comprising:
 - (a) HYB and the Applicant, and HYB and Comlix, together constitute a single group under section 74(1) of the PTA, because of the common membership of HYB; and
 - (b) HYB and the Applicant, the Applicant and ADSR, and the Applicant and RY together constitute a single group under section 74(1) of the PTA, because of the common membership of the Applicant.
- (6) The two composite groups together constitute a single group pursuant to section 74(1) of the PTA, by reason of the common membership of the Applicant and HYB in both of them.

22 In relation to the period 25 September 2014 to 30 June 2015 the Respondent concluded as follows:

- (1) HYB and the Applicant formed a group, on the basis that during that period Mr Fenwick had a controlling interest in both companies' businesses within the meaning of section 72 of the PTA for the reasons outlined above in relation to the period 1 July 2013 to 17 September 2014.
- (2) HYB and Comlix formed a group, on the basis that during that period Mr Fenwick and Ms Fenwick were a set of persons who had a controlling interest in both companies' businesses within the meaning of section 72 of the PTA. This was for the same reasons as applied in relation to the period 1 July 2013 to 17 September 2014.
- (3) The Applicant and ADSR formed a group, on the basis that during that period Mr Fenwick had a controlling interest in both companies' businesses within the meaning of section 72 of the PTA. This was for the same reasons as applied in relation to the period 1 July 2013 to 17 September 2014.
- (4) The groups comprising:
 - (a) HYB and the Applicant, and HYB and Comlix, together constitute a single group under section 74(1) of the PTA, because of the common membership of HYB; and
 - (b) HYB and the Applicant, and the Applicant and ADSR, together constitute a single group under section 74(1) of the PTA, because of the common membership of the Applicant.

(5)

The two composite groups together constitute a single group pursuant to section 74(1) of the PTA, by reason of the common membership of the Applicant and HYB in both of them.

The effect of the grouping analysis on the Assessments

- 23 In making the Assessments, the Respondent made the following findings as to the amounts of taxable wages paid by the group members during the 2014 and 2015 financial years [6]:

Company	1/7/2013 to 30/6/2014 (in dollars)	1/7/2014 to 30/6/2015 (in dollars)		
		1/7/2014 to 17/9/2014	18/9/2014 to 24/9/2014	24/9/2014 to 30/6/2015
Comlix	40,905	3,506.30	310.68	12,383.01
Applicant	1,151,651.53	206,672.99	16,324.09	194,276.70
RY	0	0	3,304.44	0
ADSR	812,337.85	235,204.72	20,840.92	798,183.08
Sub-Total		445,384.01	40,780.13	1,009,842.79
Total	2,004,894.38	1,496,006.93		

- 24 ADSR entered into liquidation on 9 February 2016, in a creditors' voluntary winding up [7].
- 25 As a consequence of:
- (1) his analysis of the grouping provisions as outlined above,
 - (2) his application of section 81 of the PTA to the group members in relation to the payroll tax liabilities determined by reference to those taxable wages, and
 - (3) presumably, a concern that ADSR is unable to meet its individual payroll tax liabilities by reason of circumstances associated with its external administration,
 - (4) the Respondent has in the Assessments assessed the Applicant with the payroll tax liabilities referable to ADSR's conduct of its business during the relevant periods. This is in addition to the payroll tax liabilities referable to the Applicant's conduct of its own business.
- 26 Total taxable wages paid by the Applicant during the relevant periods were \$1,568,925.31, while total taxable wages paid by ADSR during those periods were \$1,866,566.57. The effect of grouping the Applicant and ADSR is therefore to increase by 118% the total taxable wages by reference to which the Applicant's liability to payroll

tax during the relevant periods is calculated. As well, pursuant to section 81(3) of the PTA and its homologue in section 45(2A) of the TAA, he has also assessed the Applicant with penalty tax and interest referable to the payroll tax liabilities attributable to ADSR's business. The financial consequences for the Applicant are therefore significant.

The Applicants' position

27 The Applicants dispute the correctness of the Respondent's decisions. Their arguments are set out in a document headed *Arguments Listing* and received by the Tribunal on 8 April 2019, and are as follows:

- (1) **Argument 1** The Assessments against the Applicant were made following an investigation into the payroll tax affairs of RY, not the Applicant. RY had not been a member of any group with the Applicant either before 18 September 2014 or after 24 September 2014. The investigation into RY began on or about 7 February 2018, and did not extend to the Applicant, which never received any notice of investigation.
- (2) **Argument 2** As was the case with the Applicant, RY had not been a member of any group with ADSR either before 18 September 2014 or after 24 September 2014. The investigation into RY began on or about 7 February 2018, and did not extend to ADSR, which never received any notice of investigation. Moreover, the Applicant says that the Assessments, which covered payroll tax liabilities of ADSR, were issued after ADSR had gone into liquidation and that "*.. it seems unjust that a company can be retrospectively included for grouping purposes after the date it had been placed in liquidation*".
- (3) **Argument 3** The decisions to group HYB and the Applicant, the Applicant and ADSR, and the Applicant and RY pursuant to section 72(2)(c)(i) of the PTA, on the basis that Mr Fenwick was "*.. entitled to exercise more than 50% of the voting power at meetings of the directors of ..*" each company, was incorrect. This was because each of those companies had only one director, being Mr Fenwick, and it was conceptually impossible for him to meet with himself. That paragraph was thus incapable of application to a sole director company.
- (4) **Argument 4** The decisions to group HYB and the Applicant, the Applicant and ADSR, and the Applicant and RY pursuant to section 72(2)(d) of the PTA, on the basis that each of the companies was a body corporate of which Mr Fenwick, as the sole director of each company he constituted "*.. more than 50% of the board of management (by whatever name called) of ..*", was incorrect. This was because each of those companies was a corporation, not "*... a body corporate or incorporate ..*", and was therefore outside the scope of section 72(2)(d).
- (5) **Argument 5** The Assessments against the Applicant, to the extent that they relate to the payroll tax affairs of ADSR, effectively give the Respondents a preference over other unsecured creditors of ADSR and are therefore unjust in their operation.
- (6) **Argument 6** The Assessments are unfair, since:
 - (a) the reason for ADSR's insolvency was that the failure of a head contractor for which it worked to pass on payments received by the head contractor in connection with a contract with a NSW government entity;
 - (b) this occurred in circumstances where the head contractor had made false representations to the government entity as to the payment of sub-contractors, which the government entity had not adequately verified; and

- (c) it is unfair for the Respondent, as another NSW government entity, to seek the payment of payroll tax referable to ADSR's business activities in these circumstances.

28 The Applicant does not appear to dispute either:

- (1) the arithmetic correctness of the Respondent's calculation of the taxable wages for the relevant periods paid by the Applicant, ADSR, Comlix or RY, or
- (2) the inclusion in the Assessments of penalty tax and interest, or the calculation of those amounts.
- (3) In any event, it provided no evidence on either matter. In consequence, it failed to discharge its burden of proof in relation to any such dispute (if in fact it did dispute those matters).

The Respondent's position

29 The Respondent's position is as follows, using the same numbering as in the summary set out above of the Applicant's arguments:

- (1) **Argument 1** The Applicant's liability for tax and associated amounts referable to ADSR's activities arises through the issue of the Assessments based on the combined effect of sections 6 to 9 of the PTA (which impose payroll tax on ADSR in respect of its business activities), section 72 (which operates to group persons who have a controlling interest, as defined, in ADSR's business), and section 81 (which operates to impose joint and several liability for relevant tax debts of one group member – here, ADSR – on all persons grouped with it). That the original investigation concerned RY is irrelevant to the issue of the Assessments, since:
 - (a) The Respondents enjoy under Division 2 of Part 9 of the TAA wide investigative powers, and the use of the results of their exercise is not limited in the way that the Applicant contends, and
 - (b) In any event, the Tribunal's jurisdiction under section under section 96 of the TAA is limited to a review of a decision of the Respondent which was subject to an objection, and the only decisions which formed the subject of objection were the Assessments.
- (2) **Argument 2** Although the Assessments may have been made after ADSR went into liquidation, they are reflective of liabilities:
 - (a) Which were incurred by ADSR by reason of the operation of sections 6 to 9 of the PTA before, and in relation to events and circumstances which occurred before, the liquidation, and
 - (b) For which the Applicant became automatically jointly and severally liable before the commencement of ADSR's liquidation by reason of the operation of sections 72 and 81 of the PTA.
- (3) **Argument 3** Although the ordinary meaning of the expression "meeting" may predicate the coming together of 2 or more persons, in the context of both Australian corporations law generally and the PTA itself there are convincing legal reasons to conclude that the concept of a "meeting" is apt to describe the deliberative and decision-making processes as such of the sole director of an Australian corporation.
- (4) **Argument 4** An Australian corporation is a body corporate, which is a generic term whose meaning encompasses an Australian corporation.
- (5) **Argument 5** The effect of the Assessments on the relative positions of the Respondent, on the one hand, and other unsecured creditors of ADSR, on the other, in the winding-up of ADSR is irrelevant to the Tribunal, since it goes to the

effect of the Assessments rather than to their validity.

(6) **Argument 6** The argument is futile, since:

- (a) the Respondent's obligation is to administer the taxation laws (including the PTA) in accordance with their terms; and
- (b) if the Assessments are issued in accordance with the law, their unfairness, if any, having regard to ADSR's direct or indirect commercial history with the NSW government is irrelevant.

Reasoning and decision

30 I now set out my views on the Applicant's arguments, using the same headings.

31 **Argument 1**

- (1) The PTA is a "*taxation law*" for purposes of the TAA. Section 4 of the TAA expressly so provides.
- (2) The TAA provides in section 71 that:
- (3) A function conferred under this Division may be exercised only for the purposes of a taxation law.
- (4) The functions referred to include that under section 72(1)(a) of the TAA, to:

32 .. require a person, by written notice, to do any one or more of the following:

33 (a) to provide to the Chief Commissioner (either orally or in writing) information that is described in the notice

 - (1) Section 72(2) of the TAA qualifies this power to a degree, by providing that:
 - (2) The Chief Commissioner must, if the requirement is made of a person to determine that person's tax liability, indicate in the notice that the requirement is made for that purpose, but the Chief Commissioner is not otherwise required to identify a person in relation to whom any information, evidence, instrument or record is required under this section.
 - (3) The Respondent's letter to the Applicant's accountants dated 7 February 2018 [8]:
 - (a) is headed "***Payroll tax – notice of investigation***";
 - (b) contains an opening paragraph in the following terms:
 - (c) "*We advise that this letter constitutes the commencement of an investigation under the Taxation Administration Act 1996 (TAA). Our investigation will assess the compliance of Recycling Yard Pty Ltd with the Payroll Tax Act 2007 (PTA), including any businesses with which Recycling Yard Pty Ltd may be grouped under the PTA*"; and
 - (d) then proceeds to specify the information (covering the past 4 financial years) which RY was required to provide in response and indicates that, amongst other responses to RY's provision of information, the Respondent may contact RY "*.. to obtain further information*".
 - (4) Several conclusions follow:
 - (a) The information request is clearly made for the purposes of a taxation law, being the PTA, and is an exercise of the Respondent's information gathering function under section 72 of the TAA;
 - (b) Consistently with section 72(2) of the TAA, the letter indicates to RY that the request is made for the purpose of determining the liability of RY to taxation under the PTA; and

- (c) It foreshadows that the investigation will extend to include compliance with the PTA not only of PTA itself but also of “*any businesses with which Recycling Yard Pty Ltd may be grouped under the PTA*”; in doing so it identifies generically that the affairs of other entities may be or become relevant to the investigation and in doing so is entirely in conformity with section 72(2) of the TAA; this recognises the reality of matters, that the identity of other relevant entities will not necessarily be known at the beginning of the investigation, since their relevance may well only become apparent in the course of (and from information gleaned during) the investigation.
- (5) I see, therefore, no deficiency in either the Respondent’s initiation of the investigation or his requests for and utilisation of information concerning the compliance by other businesses or entities with which RY may have at time during the relevant periods been grouped under section 72 of the PTA.
- (6) In any event, as the Respondent points out, the Tribunal’s concern lies with the review of the Assessments, not with the Respondent’s underlying investigative processes. Even if my conclusion in (7) is incorrect, that would not impinge on the Tribunal’s assessment of the correctness or incorrectness of the Assessments which is the purpose of this review.
- (7) Argument 1 is rejected.

34 **Argument 2**

- (1) There are three elements in this argument.
- (2) The first is in effect a reiteration of the first argument. My observations in relation to Argument 1 are equally applicable here.
- (3) The second is that RY was not a member of any group with ADSR and the Applicant at the time the notice of investigation was issued. There are three points to be made here:
 - (a) That may well be the case, but it is of no consequence, since nothing prevents the Respondent from making historical investigations. Indeed, the methods established under the PTA for assessing, paying and recovering payroll tax are such that any investigation is necessarily historical in nature.
 - (b) If those investigations reveal that for a time during the period under investigation the relevant taxpayer was grouped with one or more other persons in relation to a business, then the fact that they are no longer so grouped does not disentitle the Respondent from, as the Respondent foreshadowed in his letter of 7 February 2018, seeking information in relation to those other persons.
 - (c) Equally, if they disclose that at any relevant time those other persons were grouped with one or more persons (not being the original subject of the investigation), then the absence of the original subject from such a grouping does not change either the fact of that grouping, or the Respondent’s general responsibility under the PTA to give effect to the consequences of that grouping.
- (4) The third is that it is unjust for ADSR to “... *be retrospectively included for grouping purposes after the date it had been placed into liquidation*”. This argument assumes that the grouping of ADSR with the Applicant is the result of a decision by the Respondent having retrospective effect. This assumption is incorrect:
 - (a) It is clear from section 72 of the PTA that grouping is the result, not of any decision by the Respondent, but rather of the operation of section 72(1), which is automatic and non-discretionary in its operation: ‘*If a person or*

set of persons has a controlling interest in each of 2 businesses' then it inevitably follows that *'the persons who carry on those businesses constitute a group'*.

- (b) Equally, it is clear from section 72(2) that for so long as a person or set of persons satisfies, in relation to a business, one or more of the tests specified in paragraphs (a) to (g) of that sub-section, then that person or set of persons *'has a controlling interest in the business'*, so as to engage the grouping provision of section 72(1).
- (c) The joint and several liability of group members for the tax liabilities of fellow group members itself arises under section 81 of the PTA without any intervention by the Respondent. So, if at a time at which a liability to PTA arises for a group member, all other group members at that time are jointly and severally liable of that PTA by force of section 81 alone.
- (d) The liability of an employer to pay payroll tax in respect of taxable wages arises under section 9 of the PTA within a brief period after the end of the month in which the relevant taxable wages were paid. In the case of ADSR's payroll tax for the 2013 and 2014 financial years, the latest day on which either:
 - (i) ADSR incurred a liability under section 9 of the PTA, or
 - (ii) The Applicant incurred a joint and several liability with ADSR, under section 81 of the PTA,
 - (iii) to pay any portion of it was in accordance with section 9(1)(b) of the PTA 21 July 2015. This was more than 6 months before the commencement of ADSR's liquidation.
- (e) The effect of the Assessments was to recognise and quantify the liability of the Applicant as a group member which arose automatically under the PTA during the 2013 and 2014 financial years through the combined operation of sections 9, 72 and 81 of the PTA. It did not involve what the Applicant describes as retrospective grouping.

(5) Argument 2 is rejected.

35 **Argument 3**

- (1) It is uncontroversial that:
 - (a) The word "*meeting*" in its normal acceptation refers to "*... an assembly of a number of people for ... discussion ...*"[9];
 - (b) The legal starting point in relation to meetings has long been consistent with that meaning[10];
 - (c) The law has, however, particularly in relation to meetings of deliberative bodies of companies, accepted that the expression "*... can be used in particular contexts in an artificial sense which is satisfied by the presence of a single individual*"[11]; and
 - (d) There is a long series of cases, both in Australia and in the United Kingdom, which there is little point in reciting, which explore and apply that proposition.
- (2) One of those cases, *East v Bennett Brothers* [1911] 1 Ch D 163, sets out an approach to the issue. The case concerned the requirement of a company's memorandum of association that a proposal of a particular kind be approved by a resolution passed at a meeting of the company's preference shareholders. Since there was only one such shareholder, the question arose as to whether such a meeting could occur. In his judgment, Warrington J said relevantly:

(3)

One must regard the memorandum as far as possible as providing for circumstances which in the ordinary course may arise. That being so, I think I may very fairly say that where one person only is the holder of all the shares of a particular class, and as that person cannot meet himself, or form a meeting with himself in the ordinary sense, the persons who framed this memorandum having such a position in contemplation must be taken to have used the word 'meeting', not in the strict sense in which it is usually used, but as including the case of one single shareholder.

- (4) Warrington J's reasoning can be applied to the present question:
- (a) The PTA was enacted in 2007 and included section 72 in its present form.
 - (b) The Corporations Act 2001 was in force at that time, and had since its enactment:
 - (i) Allowed in section 201A(1) the possibility for a proprietary company to have one director only; and
 - (ii) Provided in section 248B for the possibility of single-director companies passing a resolution of the director by having the director sign and record the resolution.
 - (c) It can reasonably be concluded, adopting Warrington J's reasoning, that the legislature used the word 'meeting' in section 72 of the PTA in full awareness of the Corporations Act's acceptance and facilitation of the operations of single director companies and can therefore be taken to have used it, not in the strict sense, but as including the voting power exercisable in the case of a single-director company by that single director.
- (5) This conclusion is, in any event, a straight-forward application of the propositions as to statutory construction put forward by the High Court of Australia in *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* (2009) 239 CLR 27 and *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 387:
- (a) In the earlier case, the court observed at [47] that '*... the modern approach to statutory construction (a) insists that the context be considered in the first instance, not merely at some later stage when ambiguity might be thought to arise, and (b) uses 'context' in its widest sense to include such things as the existing state of the law and the mischief which, by legitimate means such as those just mentioned, one may discern the statute was intended to remedy ...*';
 - (b) In the later it said at 408 that '*.... the task of statutory construction must begin with a consideration of the text itself ... The meaning of the text may require consideration of the context, which includes the general purpose and policy of a provision, in particular the mischief it is seeking to remedy ..*'.
 - (c) The context of section 72's use of the word '*meeting*' has four elements:
 - (i) The first is the mischief which the section seeks to prevent, which is for businesses which are effectively under common control to avoid or minimise payroll tax by manipulating their ownership structures so as to receive in relation to multiple businesses the benefit of the tax-free threshold amount contemplated by clauses 1 and 2 of Schedule 1 of the PTA;
 - (ii) The method adopted by the PTA in order to prevent this manipulation is the grouping provisions provided for in Part 5 of the PTA, which relevantly includes section 72;

- (iii) The existence of single-director companies, as discussed above; and
- (iv) The anomalous outcome, that if the strict meaning of the word '*meeting*' were adopted in section 72 not only would the grouping provisions fail, in the context of single-director companies, to address the mischief against which they are directed but also would produce entirely inconsistent outcomes as between single and multiple director companies.
- (d) These contextual considerations all support the conclusion, that the word '*meeting*' in section 72 encompasses the deliberative and decision-making process of the sole director of a single-director company.
- (6) Moreover, the issue has been considered in a number of cases to which counsel for the Respondent referred. The clearest statement is found in Brereton J's judgment in *In the matter of Climbform Australia Pty Limited* [2016] NSWSC 1977, which considered whether two companies, Climbform Australia Pty Limited and HLHG Pty Ltd, were grouped for purposes of section 72 of the PTA by reason of the involvement with both of them of a Mr Laukka. The relevant passage in His Honour's reasons, at [11], is as follows:
 - (a) '*As will be apparent from the share structure and directorships to which I have referred, Mr Laukka was, in respect of HLHG, the sole director and thus, for the purposes of section 72, was entitled to exercise more than 50% of the voting power at meetings of the directors of HLHG ..*'
- (7) Brereton J's observations serve to confirm the correctness of the conclusions set out above, that the sole director of a company is a person who, for purposes of section 72(2)(c)(i) of the PTA, entitled to exercise more than 50% of the voting power at meetings of the directors of the company.
- (8) Argument 3 can, therefore, be rejected.

36 **Argument 4**

- (1) This argument can also be dismissed.
- (2) This is for the simple reason that section 119 of the Corporations Act provides that a company '*... comes into existence as a body corporate* [underlining added for emphasis] *at the beginning of the day on which it is registered*'. In other words, companies incorporated by registration under the Corporations Act are all bodies corporate: they form a specific (and presumably by far the largest) category of bodies corporate in Australia, but they are necessarily bodies corporate.
- (3) The evidence shows that both the Applicant [12] and ADSR [13] are incorporated by registration under the Corporations Act 2001.

37 **Argument 5**

- (1) The issues raised by the Applicant in this argument are of no relevance to this review, which is concerned solely with the Respondent's decisions in the Assessments and not with their consequences for ADSR or its creditors.
- (2) It can therefore be rejected.
- (3) In any event, it is misconceived to suggest that the ability of the Respondent to recover from the Applicant payroll tax for which ADSR is liable disadvantages the creditors of ADSR. It certainly benefits the Respondent in a way which is not available to other unsecured creditors of ADSR but does so without causing them any disadvantage, since it is the Applicant which is required to make payment, not ADSR.
- (4)

Moreover, the Applicant has a right of indemnity under section 81(4) of the PTA for any amounts of payroll tax and associated amounts referable to taxable wages paid by ADSR which are paid by it in satisfaction of its joint and several liability under section 81. The net result is that, having paid ADSR's payroll tax, the Applicant can prove for that amount in the winding-up of ADSR so that the overall position of ADSR's creditors is neither worsened nor improved by the Respondent claiming the unpaid tax from the Applicant under section 81.

38 **Argument 6**

- (1) The Tribunal's function is to review the Assessments. It is neither authorised nor competent to express any view on issues relating to the effectiveness to protect sub-contractors of the arrangements to which the Applicant referred.
- (2) Argument 6 can therefore be dismissed.

Orders

- 39 Accordingly, pursuant to section 63(3)(a) of the Administrative Decisions Review Act 1997 I affirm the decision under review.

I hereby certify that this is a true and accurate record of the reasons for decision of the New South Wales Civil and Administrative Tribunal.

Registrar

Endnotes

1. Section 58 Documents, pp78-80
2. Section 58 Documents, pp81-84
3. Section 58 Documents, pp88-95
4. Section 58 Documents, pp 145-154
5. Section 58 Documents pp164-169
6. Section 58 Documents, p94
7. Section 58 Documents, pp155-158.
8. Section 58 Documents pp1-2
9. Shorter Oxford English Dictionary, 3rd Edition
10. Sharpe v Dawes [1876] 2 QBD 26
11. Re Hastings Deering (1985) 9 ACLR 755, per Kearney J
12. Section 58 Documents, pp142-144
13. Section 58 Documents, pp155-158

I hereby certify that this is a true and accurate record of the reasons for decision of the Civil and Administrative Tribunal of New South Wales.

Registrar

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Decision last updated: 05 July 2019