SUPREME COURT OF QUEENSLAND

CITATION:	*Salemade Pty Ltd & Ors v Commissioner of State Revenue* [2021] QSC 19
PARTIES:	**SALEMADE PTY LTD** as trustee for the Posible Unit Trust (first appellant) **SALEMADE PTY LTD** as trustee for the Big Tree Discretionary Trust (second appellant) **SALEMADE PTY LTD** as trustee for the Salemade Unit Trust (third appellant) **AUSTRALIAN TABLEFORM DESIGN PTY LTD** (fourth appellant) **OAKDALE BUILDING SERVICES PTY LTD** (fifth appellant) **OAKDALE GROUP PTY LTD** (sixth appellant) **LILLIES GROUP PTY LTD** (seventh appellant) **ACN 123 577 453 PTY LTD (IN LIQUIDATION) (FORMERLY, OAKDALE QUEENSLAND PTY LTD)** (eighth appellant) **POPPY'S ON OAKDALE ROAD PTY LTD AS TRUSTEE FOR THE POPPY'S UNIT TRUST** (ninth appellant) **v** **COMMISSIONER OF STATE REVENUE** (respondent)
FILE NO/S:	BS9327 of 2018
DIVISION:	Trial
PROCEEDING:	Appeal from Commissioner of State Revenue
DELIVERED ON:	18 February 2021
DELIVERED AT:	Brisbane
HEARING DATES:	29 July 2020-31 July 2020 Last written submissions received 12 August 2020
JUDGE:	Dalton J
ORDER:	**Appeal Dismissed**
CATCHWORDS:	TAXES AND DUTIES – PAYROLL TAX – OBJECTIONS, APPEALS AND REVIEWS –where appellants submitted an application to be excluded from a grouping on the basis of an objection – where Commissioner issued reassessment notices and new groupings under Part IV of the *Payroll Tax Act 1971*

(Qld) – where appellants' solicitors made objections to the assessments – where Commissioner nominated one of the appellants as designated group employer (DGE) pursuant to s 75(2) of the *Payroll Tax Act 1971* (Qld) – where the Commissioner did not exercise the discretion to exclude members from the grouping under s 74 of the *Payroll Tax Act 1971* (Qld) – where the appellants appealed pursuant to s 70 of the *Taxation Administration Act 2001* (Qld) – nature of such an appeal under s 69 of the *Taxation Administration Act 2001* (Qld) – where appeal adjourned and Commissioner reassessed decision on remission under s 70B of the *Taxation Administration Act 2001* (Qld) – where appellants filed amended notice of appeal

TAXES AND DUTIES – PAYROLL TAX – LIABILITY TO TAXATION – EXEMPTIONS – GROUPING OF EMPLOYERS – business groups – whether taxpayer member a group of commonly controlled companies under s 71 of the *Payroll Tax Act 1971* (Qld) – whether a single director has a controlling interest in a business under s 71(2)(c)(i) of the *Payroll Tax Act 1971* (Qld) – where the Commissioner relied on ASIC records to determine directorship of businesses as opposed to evidence supplied by the appellants – where appellants produced contradictory evidence as to shareholding and directorship

TAXES AND DUTIES – PAYROLL TAX – ASSESSMENT, COLLECTION AND RECOVERY OF PAYROLL TAX – where appellants contended that the Commissioner's delegate erred in including payments made by the fifth and sixth appellants to subcontractors as taxable wages – *Payroll Tax Act 1971* (Qld), s 13B

TAXES AND DUTIES – STAMP DUTIES – ASSESSMENT AND AMOUNT PAYABLE INCLUDING FINES – GENERALLY – QUEENSLAND – where Commissioner imposed a penalty tax of 75% – where appellants sought leave in this proceeding pursuant to s 70(5) of the *Taxation Administration Act 2001* (Qld) to appeal the decision not to remit penalty tax

CONSTITUTIONAL LAW (CTH) – *Commonwealth Constitution,* s 109 – where appellants submitted that the nomination of a designated group employer (DGE) under the *Payroll Tax Act 1971* (Qld) by the Commissioner, after

liquidation of the taxpayer, was inconsistent with winding up provisions in the *Corporations Act 2001* (Cth)

Company Law Review Act 1998 (Cth)
Corporations Act 2001 (Cth)
Acts Interpretation Act 1954 (Qld)
Payroll Tax Act 1971 (Qld)
Payroll Tax Act 2007 (NSW)
Payroll Tax Act Amendment Act 1975 (Qld)
Payroll Tax (Harmonisation) Amendment Act 2008 (Qld)
Taxation Administration Act 2001 (Qld)

Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue (2009) 239 CLR 27
Barboutis v the Kart Centre Pty Ltd (No 2) [2020] WASCA 41
Chief Commissioner of State Revenue v Smeaton Grange Holdings Pty Ltd [2017] NSWCA 184
Climbform Australia Pty Limited [2016] NSWSC 1977
Drummond v Drummond [1999] NSWSC 923
Forrest v Cosmetic Company Pty Ltd [2008] SASC 152
Gosford Christian School Ltd v Totonjian [2006] NSWSC 725
Harvey v Commissioner of State Revenue [2015] QCA 258
Integrated Construction Equipment Pty Ltd v Chief Commissioner of State Revenue [2019] NSWCATAD 131
Kable v Director of Public Prosecutions (NSW) (1996) 189 CLR 51
Orica IC Assets Pty Ltd & Anor v Commissioner of State Revenue [2011] QSC 1
Re Hastings Deering Pty Ltd (1985) 9 ACLR 755
Scott and Bird & Ors v Commissioner of State Revenue [2016] QSC 132
Wakefield & Ors v Commissioner of State Revenue [2019] QSC 85
Work Health Authority v Outback Ballooning Pty Ltd (2019) 266 CLR 428

COUNSEL: F L Harrison QC for the appellants
G Del Villar QC with J S Byrne for the respondent

SOLICITORS: PPM Tax & Legal Pty Ltd for the appellants
Crown Law for the respondent

[1] This is an appeal by the appellant taxpayers pursuant to s 70 of the *Taxation Administration Act 2001* (Qld) (TAA). In 2019 the appeal was adjourned pursuant to s 70B(2) of that Act and on 18 May 2020 the Commissioner made some new decisions. They did not resolve any of the appeal points, so this proceeding continued and an amended notice of appeal was filed to deal with aspects of the 18 May 2020 decisions.

[2] So far as there is material before me which was not before the Commissioner the parties were agreed that I should continue to hear the matter rather than further remit it to the Commissioner – t 1-5. There was no oral evidence before me. By agreement the parties did not take any *Browne v Dunn* points. I record that, because the matter was contentious for so long, the Commissioner's delegate changed from time to time which accounts for my using pronouns appropriate to different genders throughout this judgment.

Nature of this Appeal

[3] Bowskill J gave a very helpful exposition of the authorities bearing on the nature of an appeal under s 69 of the TAA in *Wakefield & Ors v Commissioner of State Revenue*.[1] Her conclusions were as follows:

> "[30] The nature of an appeal to the Supreme Court under s 69 of the *Taxation Administration Act* is a rehearing (more aptly, a fresh hearing, as no hearing has previously taken place), conducted by the Supreme Court in its original jurisdiction, on the materials that were before the Commissioner, subject to the power of the Court to admit new evidence under s 70B(1).
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> [31] Where the Court is prepared to admit new evidence, it must first give the Commissioner the opportunity to reconsider the objection having regard to all of the evidence, including the new evidence (s 70B(2)). But the Court can proceed to hear the appeal, if the Commissioner declines that opportunity (s 70B(3)).
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> [32] The Supreme Court does not stand in the shoes of the Commissioner, but exercises its original jurisdiction to make such judgment as it considers ought to have been given, on the facts and the law, at the time of the hearing of the appeal. The appeal is in that sense a hearing de novo.
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> …
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> [34] Where, as in this case, the appeal is from a decision involving the application of the law to objective conclusions of fact, which are not dependent upon the Commissioner's state of satisfaction, it is open for the Court to give such judgment on the appeal as it considers ought to have been given, on the law and facts as they are at the time of the hearing of the appeal. The exercise of the Court's powers in this regard are not dependent upon the demonstration of some legal, factual or discretionary error by the decision-maker.
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> [35] However, where the decision appealed is one which depended upon the Commissioner being satisfied of a particular fact or matter, the appellant does need to demonstrate an error of principle in the Commissioner reaching, or not reaching, that state of satisfaction, before the Court would intervene. As observed by Wilson J in the *Feez Ruthning* case, where that is

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1 [2019] QSC 85.

> shown, the next question would be whether the Court can or should re-exercise the discretion, or whether the mater should be sent back to the decision maker. I would not construe ss 69-70C of the *Taxation Administration Act* as conferring a power on the Supreme Court to stand in the shoes of the Commissioner, and re-exercise any discretionary power conferred on the Commissioner. …"

Factual Background

[4] The eighth appellant (Oakdale Qld) was incorporated in 2006. It carried out construction work. Its directors were Kaye Ann Crane and Douglas Charles Crane, a married couple. Ms Crane ceased to be a director in April 2007. Mr Crane continued to be a director until sometime (which is contentious) in 2011. In 2014 Oakdale Qld was put into external administration and in March 2015, into liquidation.

[5] The other appellants are all in some way related to Mr Crane and Ms Crane, or their family members.

[6] Oakdale Qld employed people and paid payroll tax in Queensland, but not on the basis that it was part of a group. In October 2014 a delegate of the Commissioner began an investigation into Oakdale Qld because it submitted an application to be excluded from a grouping as part of an objection. Neither that objection, nor the exclusion application, are in evidence before me, although subsequent objections and exclusion applications are.

[7] The investigation period was as to the 2010 financial year and forward. Oakdale Qld did not co-operate with the investigation. The information which the Commissioner's delegate had was fairly sparse, and in the main limited to public source information such as ASIC records.

[8] As a result of the investigation, the Commissioner denied Oakdale Qld's application for exclusion (3 February 2015) and issued reassessment notices for the 2010 to 2014 financial years (4 February 2015) on the basis that Oakdale Qld was grouped under Part IV of the *Payroll Tax Act 1971* (Qld) (PTA) with eight other entities (the second to ninth appellants and ACN 146 264 511 Pty Ltd, formerly Sydney Falsework Systems Pty Ltd).

[9] Because s 51A of the PTA provides that all members of a group are liable for the payroll tax obligations of other members in the group, letters of demand were issued to all the appellants on 25 March 2015 on the basis of the 4 February 2015 reassessments. After the Commissioner threatened to issue statutory demands in August 2015, solicitors acting for the appellants made objections against the Commissioner's assessments.

[10] In September 2015 the appellants provided some information to the Commissioner. It ought to have been provided during the investigation process, but was not. The information still was not comprehensive. In consequence of this new information the Commissioner made a new grouping which was notified to the taxpayers on 20 January 2016. That grouping was said to be preliminary, and the Commissioner

called for further information. This letter also invited the taxpayers to make a new application for exclusion from grouping.

[11] By letters dated 22 and 23 February 2016 solicitors acting for the taxpayers provided some further information and applied on behalf of the appellants to be excluded from the grouping which the Commissioner had proposed as preliminary.

[12] On 14 March 2016 the Commissioner notified the taxpayers that he had made some additional (not replacement) groupings based on the new information which they had provided.

[13] On 12 May 2016 solicitors acting for the taxpayers provided further factual information in relation to the second and seventh appellants in support of their exclusion applications. This letter also clarified that the solicitors did not act for ACN 146 264 511 (Sydney Falsework) which was by that time in liquidation. This accounts for the fact that while it was originally grouped by the Commissioner, it is not an appellant in this proceeding.

[14] On 1 June 2016 the Commissioner's delegate wrote to solicitors for the appellants deciding their exclusion applications against them. As part of the reasons for that decision, the letter outlined new groupings between the appellants. It nominated Oakdale Qld as the Designated Group Employer (DGE) of the group for all periods between 1 July 2010 and 24 January 2014. The letter also dealt with the further information which the taxpayers had provided in relation to the quantum of any group assessment; in particular as to payments which were made by the fifth and sixth appellants in New South Wales which the Commissioner assessed as taxable wages, and the appellants contended were exempt payments to contractors. In relation to this matter the Commissioner remained of the opinion the payments were taxable. Assessments and reassessments were issued.

[15] On 29 July 2016 the taxpayers wrote what is titled an "amended objection letter". It is clear from the Commissioner's letter of 4 August 2016 and the taxpayers' letter of 25 August 2016, that the assessments of 1 June 2016 and the objections of 29 July 2016 superseded the parties' previous positions.

[16] On 25 August 2016, and again on 27 March 2017, the taxpayers made further arguments and gave the Commissioner further information in support of their objections. On 24 May 2017 the Commissioner called for statutory declarations and any supporting evidence in relation to some of the new factual assertions made by the taxpayers, and pointed to deficiencies in information which the taxpayers had provided to date. This letter gave a deadline of 30 June 2017 for the information to be provided.

[17] Statutory declarations were provided on or about 29 September 2017 and quite full submissions were made by the solicitors acting for the taxpayers on 3 October 2017.

[18] On 4 July 2018 a delegate for the Commissioner disallowed the taxpayers' objection made on 29 July 2016 and gave detailed reasons for that. From this decision the taxpayers appealed by this proceeding.

[19] The Commissioner's decision after reconsideration pursuant to s 70B of the TAA is dated 18 May 2020. It allowed the objection in part, although it did not dispose of

any one issue in this proceeding. It rested on new groupings pursuant to Part IV of the PTA, and calculated different time periods for the existence of those groups.

[20] There are various issues between the parties in this proceeding and I will deal with them one by one.

Section 71(2)(c) PTA and Single Director Companies

[21] Part IV of the PTA deals with grouping provisions. Section 71 provides:

> "(1) If a person … has a controlling interest in each of 2 businesses, the persons who carry on those businesses constitute a group.
>
> …
>
> (2) For this section, a person … has a ***controlling interest*** in a business if any of the following applies –
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> …
>
> (c) for a business carried on by a corporation –
>
> (i) the person … is a director of the corporation, and the person … is entitled to exercise more than 50% of the voting power at meetings of the directors of the corporation; …
>
> …"

[22] The Commissioner interprets s 71(2)(c)(i) as applying so as to mean that Douglas Crane has a controlling interest in Oakdale Qld for the time he was the sole director of that company. The taxpayers argue that s 71(2)(c)(i) could not apply to single director companies because there can be no "meetings of the directors" of such companies, nor can there be voting at such meetings. Consequently there cannot be any "voting power at meetings". Although the argument primarily centred on Oakdale Qld, the Commissioner's reasoning, and the argument, also apply to Douglas Crane having a controlling interest in the fourth, fifth and sixth appellants, and Kaye Crane having a controlling interest in the second, third, seventh and ninth appellants.

[23] The appellants acknowledge that there is authority to the effect that, "… the expression 'meeting' can be used in particular contexts in an artificial sense which is satisfied by the presence of a single individual."[2] Contexts where provisions in a company's Memorandum and Articles, or in statutes, referred to meetings but plainly applied where there was, or might be, only one director or shareholder provide examples.

[24] The appellants' argument rests on two principles of statutory interpretation. First, that the text of the provision to be construed is the first and surest guide to interpretation. Reliance is placed on the High Court in *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue*:

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2 *Re Hastings Deering Pty Ltd* (1985) 9 ACLR 755, citing *East v Bennett Bros Ltd* [1911] 1 Ch D 163.

> "This Court has stated on many occasions that the task of statutory construction must begin with a consideration of the text itself. Historical considerations and extrinsic materials cannot be relied on to displace the clear meaning of the text. The language which has actually been employed in the text of legislation is the surest guide to legislative intention. 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."[3]

[25] Secondly, the appellants rely upon the history of the provision at s 71(2)(c)(i) of the PTA which they say is relevant in circumstances where the Commissioner relies upon a purposive approach, or an approach calculated to discern what mischief Parliament was seeking to remedy. Section 71(2)(c)(i) is the statutory successor to s 16D(3)(a) of the PTA. That latter section was added to the PTA by an amendment in 1975.[4] The provision, after that amendment, read as follows:

> "**16D. Grouping of commonly controlled businesses.**
>
> (1) A reference in this section to two businesses does not include a reference to two businesses both of which are owned by the same person not being a trustee or by the trustee or trustees of a trust.
>
> (2) For the purposes of this Act, where the same person has … a controlling interest as referred to in subsection (3) in each of two businesses the persons who carry on those businesses constitute a group.
>
> (3) For the purposes of subsection (2), the same person has … a controlling interest in each of two businesses if that person has … a controlling interest under any of the following paragraphs in one of the businesses and a controlling interest under the same or another of the following paragraphs in the other business:-
>
> (a) a person has … a controlling interest in a business, being a business carried on by a corporation, if the directors or a majority of the directors or one or more of the directors, being a director or directors who is or are entitled to exercise a majority in voting power at meetings of the directors, of the corporation are or is accustomed or under an obligation (whether formal or informal) to act in accordance with the directions, instructions or wishes of that person …"

[26] The 1975 amendments introduced what was then a new "Part IVA – Grouping Provisions". This was, "to put an end to the scheme of payroll tax avoidance which has been developing whereby a business literally divides itself into a large number

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3 (2009) 239 CLR 27, [47].

4 *Payroll Tax Act Amendment Act 1975* (Qld), No 80 of 1975, s 14.

of separate employers solely for the purpose of gaining the advantage of multiple exemptions from payroll tax."[5]

[27] In 1975 companies were required to have at least two directors. Single director companies were permitted from 1998. By the *Company Law Review Act 1998* (Cth), s 248B of the *Corporations Act 2001* (Cth) was introduced. It states:

> "(1) The director of a proprietary company that has only 1 director may pass a resolution by recording it and signing the record.
>
> (2) The director of a proprietary company that has only 1 director may make a declaration by recording it and signing the record. Recording and signing the declaration satisfies any requirement in this Act that the declaration be made at a directors' meeting."

[28] The Explanatory Memorandum to the Company Law Review Bill 1997 (Cth) gives the reason for that amendment: "One person cannot conduct a meeting" – [10.14].

[29] The appellants argue that Parliament could not have intended s 71(2)(c)(i) to apply to single director companies because, in 1975 when s 16D(3)(a) was introduced into the PTA, there were no companies which had only one director. The difficulty for the appellants is that s 16D(3)(a) was replaced by s 71(2)(c)(i) in 2008.[6]

[30] While s 16D(3)(a) and s 71(2)(c)(i) are in similar terms, they are not in identical terms. I reject the appellants' submission that what is relevant to my interpretation is Parliament's intention in 1975. In my view what is relevant is Parliament's intention when s 71(2)(c)(i) was enacted in 2008. At that time it was possible for a company to have only one director. The Parliamentary purpose in combating the mischief of splitting businesses so as to avoid payroll tax was evident in the Explanatory Notes to the Payroll Tax Amendment (Harmonisation) Bill 2008, p 16.

[31] Having regard to the purpose of the grouping provisions, and the mischief at which they were aimed, it seems to me that s 71(2)(c)(i) should be interpreted in the way the Commissioner has interpreted it, ie, that despite its literal terms, it applies when there is a corporation with a single director who by use of the facilitative provisions at s 248B of the *Corporations Act* is able to pass resolutions of the company without holding a meeting. As the authority cited at [23] above shows, the word "meeting" can be interpreted in such a way where the context warrants it, and I am prepared to say that the expression "voting power" can also be interpreted that way. This is in my view in accordance with the passage taken from *Alcan* at [24] above and the approach outlined by Sackville AJA in *Chief Commissioner of State Revenue v Smeaton Grange Holdings Pty Ltd*.[7] It is also in accordance with s 14 of the *Acts Interpretation Act 1954* (Qld).

[32] There is no authoritative decision on this point. In *Smeaton Grange* (above) a separate question as to the effect of disclaiming an interest under a discretionary trust was heard in a grouping case. The Commissioner there had acted on the basis that someone who held all the shares in a company, and was the sole director of it,

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5 Queensland Parliamentary Debates, Legislative Assembly, 28 November 1975, p 2389.
6 Section 15 of the *Payroll Tax (Harmonisation) Amendment Act 2008* (Qld).
7 [2017] NSWCA 184, [104].

had a controlling interest within the meaning of s 72(2)(c)(i) of the *Payroll Tax Act 2007* (NSW) – [62]. The parties in that case did not argue to the contrary – [134]. The Court of Appeal resolved the question about discretionary trust property against the taxpayer, but nothing is said about the issue which arises for my determination here.

[33] In *Climbform Australia Pty Limited*[8] Brereton J gave an *ex tempore* decision on an application to set aside a statutory demand. The statutory demand was for payroll tax owing on an assessment made in respect of another company which the Commissioner had grouped with Climbform. Climbform wanted to contend that the grouping was invalid, but as there had been no objection, the assessment of the Commissioner was conclusive evidence against it – [3].

[34] By way of *obiter* Brereton J explained that in his view the Commissioner's grouping was valid. It is apparent that he regarded a sole director as someone entitled to exercise "more than 50% of the voting power at meetings of the directors" – [10]. However, it does not appear that the point taken by the appellants here was argued before Brereton J.

[35] The point was argued in *Integrated Construction Equipment Pty Ltd v Chief Commissioner of State Revenue,*[9] a decision of the Civil and Administrative Tribunal of New South Wales. The determination of Senior Member Boxall is of assistance. It favours the Commissioner.

[36] My conclusion is that Douglas Crane did have a controlling interest in the fourth, fifth, sixth and eighth appellants at the times he was sole director of them, and that Kaye Crane did have a controlling interest in the second, third, seventh and ninth appellants during the times she was sole director of them.

Douglas Crane Director of Eighth Appellant from 23 May 2011 – 29 September 2011

[37] The Commissioner's grouping is on the basis that Douglas Crane was the sole director of Oakdale Qld for the above period. This is in accordance with the ASIC records. The appellants contend he ceased to be a director on 26 May 2011.

[38] As mentioned above, the information provided by the appellants to the Commissioner was scant, and in relation to this issue, inconsistent. I will first record what the ASIC records show, and then outline the information provided by the appellants to the Commissioner over time.

[39] The ASIC records show that Douglas Crane was the sole director of Oakdale Qld from 23 January 2007, when it was incorporated, until 11 April 2011. His ceasing to be a director on that date appears from a form lodged with ASIC and signed by Bradley Scott Harding. The same form shows that Mr Harding became the sole director from 11 April 2011.

[40] A form dated 24 May 2011 signed by Douglas Crane shows that Douglas Crane was appointed a director on 23 May 2011. Further, a form signed by Douglas Crane on

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8 [2016] NSWSC 1977, [10].
9 [2019] NSWCATAD 131.

24 May 2011 shows a change of an officeholder's (his) residential address. On 8 June 2011 Mr Crane signed a form to the effect that Mr Harding ceased to be a director on 23 May 2011. A form signed by Mr Harding showed that Mr Crane ceased to be a director on 29 September 2011, and that Mr Harding became the sole director from that date. Lastly, a form signed by Mr Harding on 24 January 2014 showed that on that date he became the sole shareholder of Oakdale Qld.

[41] There are some ASIC records in relation to Salemade Pty Ltd which are relevant to this issue. On 11 April 2011 Mr Crane ceased to be a director of Salemade Pty Ltd and his wife was appointed as company shareholder. Then, on 24 May 2011 Mr Crane was re-appointed as director of Salemade effective 23 May 2011. On 8 June 2011 Mr Crane signed a form showing that Ms Crane ceased to be a director of Salemade on 23 May 2011. On 26 October 2011 a form was signed by Mr Crane notifying that Ms Crane had been appointed as a director and company secretary of Salemade effective 26 May 2011. On 27 October 2011 Douglas Crane transferred the only share in the company to his wife.

[42] The Commissioner's original investigation, which concluded on 3 February 2015, relied solely on the ASIC records as the appellants would not co-operate with it. That this was the basis on which the Commissioner's delegate determined the directorships of Oakdale Qld was plain from his letter of 4 February 2015, and again from his letter of 20 January 2016. The appellants did not assert any contrary basis until their solicitor's letter of 22 February 2016.

[43] The Commissioner's letter of 20 January 2016 asked the appellants for information as to the relationships between Douglas and Kaye Crane; Douglas and Kaye Crane and Phyllis Mowett; and Douglas and Kaye Crane and Bernard and Kathleen Crane. It also asked the appellants to "provide an explanation as to how Mr Crane and Mr Harding are associated or related".

[44] On 22 February 2016 solicitors for the appellants explained that Douglas and Kaye Crane were husband and wife; Phyllis Mowett was Kaye Crane's mother and that Bernard and Kathleen Crane were Douglas Crane's parents. That letter also said, "Bradley Scott Harding was a construction supervisor who subsequently acquired Oakdale [Qld] in the circumstances described below." This was only part of the truth. Mr Harding was Douglas Crane's brother-in-law, but that information was not provided at that time.

[45] In a series of letters dated 22 and 23 February 2016 the appellants' solicitors made exclusion applications on behalf of the appellants. The letters are all in similar terms. In one letter dated 22 February 2016 they said that Oakdale Qld had been set up by Douglas Crane as a formwork contractor in Queensland. Early in 2011 Douglas Crane lost his QBCC licence and as a result was unable to continue as a director of Oakdale Qld because it was a company engaged in building work. The letter continued:

> "5. As a result, on 11 April Mr Crane sold the company, including the name, to Mr Harding, and Mr Harding ran the business from this date. …

> 6. Mr Crane was wrongly reappointed a director on 23 May 2011, but this was rectified on 29 September 2011, when the error was discovered.
>
> 7. However, the transfer of the share from the Posible Unit Trust to Mr Harding was delayed until Mr Harding had fully paid for the business. It was registered on 24 January 2014." (my underlining)

[46] In explanation of paragraph 7 in the above quotation, the sole share in Oakdale Qld was originally owned by the first appellant, ie, Salemade Pty Ltd as trustee for the Posible Unit Trust.

[47] The Commissioner did find evidence that the Building Services Authority of Queensland notified Douglas Crane on 19 March 2011 that he could no longer remain a director of Oakdale.

[48] At least one of the letters dated 23 February 2016 from the appellants' solicitors to the Commissioner enclosed an unsigned letter dated 12 February 2016 addressed to the Office of State Revenue Queensland. The heading on the letter was "Salemade Pty Ltd as trustee for Posible Unit Trust". At the foot of the letter was the name of the fourth appellant. The letter made provision for signature by Mr Douglas Crane, although it was not signed. The letter stated that Salemade Pty Ltd as trustee for the Posible Unit Trust held shares in Oakdale Qld until "the business was sold on 11 April 2011 and since this date has not been connected with in any way with the carrying on of Oakdale Qld P/L business." It also gave the following information under the heading "The Posible Unit Trust": "Units – Doug Crane 50%, Kaye Crane 50% since 01/07/2006."

[49] On 1 June 2016 the Commissioner rejected the exclusion applications of the appellants variously dated 22 and 23 February 2016. In explaining the reasons for those determinations the Commissioner recorded that he was working on the basis that (1) Mr Harding did not become the beneficial owner of Oakdale Qld until 24 January 2014 when the share in the company was transferred according to the ASIC records, and (2) that until January 2014 Douglas and Kaye Crane were the unit holders of the Posible Unit Trust.

[50] In the amended objection letter of 29 July 2016 solicitors for the appellants wrote:

> "Douglas Charles Crane was a director of Oakdale between 11 April 2007 and 11 April 2011 and from 23 May 2011 to 26 May 2011, and not … 23 May 2011 to 29 September 2011."

There was no reason or factual basis given for this assertion.

[51] Solicitors for the appellants wrote to the Commissioner again on 25 August 2016. Reference was made to the factual assertions at [45] above and in relation to numbered paragraph 5 it was said: "It would have been more accurate if we had said … not that Mr Crane sold the company, but that Salemade Pty Ltd as trustee of the Posible Unit Trust sold the one issued share in the company to Mr Harding". Further, as to the previous statements made on behalf of their clients, see [45] above, the solicitors said:

"9. There is an undated written resolution appointing Mr Crane as a director, and according to in the ASIC form 484 (Electronic Lodgement Document No. 1E7414655) lodged 24.5.11 … that happened on 23 May 2011.

10. The written resolution is irregular, in that it is signed by both Mr Harding and Mr Crane, when Mr Crane wasn't a director at the time. But we will assume for the purposes of argument that despite that, it was effective … to appoint Mr Crane as an additional director.

11. There is also an ASIC form 484 (Electronic Lodgement Document No. 1E7454315) lodged 8.6.11 … stating that Mr Harding ceased to be a director on 23.5.16. However, it seems that Mr Harding never in fact signed any written resignation as a director.

12. In that regard, Oakdale was governed by the replaceable rules contained in the *Corporations Act*. Section 203A provides:

> '**203A Director may resign by giving written notice to company (replaceable rule - - see s 135)**
>
> A director of a company may resign as a director of the company by giving a written notice of resignation to the company at its registered office.'

13. That never happened.

14. So despite the lodgement of the form 484 stating that Mr Harding had ceased to be a director, Mr Harding in fact continued to be a director for the period during which Mr Crane was a director. That means that Mr Crane never had a controlling interest in Oakdale following his resignation on 11 April 2011 within s 71(2)(c) of the *Payroll Tax Act*.

15. The accountant has advised us further that because of some miscommunication between staff in his office, the ASIC form that was supposed to be then lodged advising of Mr Crane's resignation as a director of the company was not lodged with ASIC until September 2011 even though it had been intended to lodge a form showing that he had resigned as a director on the 26 May 2011. A letter from Davidsons is attached for your information."

[52] As to the shareholding in Oakdale Qld that letter said:

"22. As already adverted above, the sale of the share and transfer of control to Mr Harding was necessitated by the *Queensland Building and Construction Commission Act* 1991 under which the licence referred to above was granted. Here, the agreement was clearly that Mr Harding should have control of the company pending payment for the shares – hence the transfer of directorship – and it would have been a breach of that agreement for Posible Unit Trust to have voted to change that,

> for example, for Mr Crane to have sought to take back control of the company by exercising the voting power nominally attached to his share the subject of the contract of sale." (my underlining)

[53] Enclosed with this letter was a letter from Davidson Accountants to the appellants addressed to their solicitors dated 25 August 2016. The letter was headed as relating to Oakdale Qld and read in its entirety:

> "Because Mr Crane was notified that he was considered to be an excluded individual by the Building Services Authority on 21 March 2011 and therefore could not have any connection with the company he resigned as a director on the 11 April 2011 and sold his interest in the company.
>
> We lodged the form with ASIC recording his resignation as a director on the 11 April 2011.
>
> However, in mid-May 2011 the company was required to sign documents on an unrelated matter and the new director, Mr Harding was going to be unavailable when the documents were expected to have to be signed. Mr Crane agreed to step in as a director for a few days. Mr Crane was appointed as a director of the above company on the 23 May 2011 with the intention that he only remain as a director until the 26 May 2011. We completed and lodged the ASIC form recording his appointment but because of miscommunication between staff in our office we did not lodge the ASIC form recording Mr Crane's resignation as a director on the 26 May 2011.
>
> We realised our error later that year in September and lodged the ASIC form recording Mr Crane's resignation as a director as at the 29 September 2011 when the resignation should have been recorded as at the 26 May 2011."

[54] ASIC records show that on 15 June 2011 Douglas Crane, as a sole director and company secretary of Oakdale Qld, signed a fixed and floating charge in favour of the Bank of Western Australia over Oakdale Qld for a maximum prospective liability of $16 million – ASIC document 026209001.

[55] The Commissioner's letter to the appellants' solicitors dated 24 May 2017 invited the appellants to provide statutory declarations from Mr Crane and Mr Harding as to matters bearing on the shareholding and directorships in Oakdale Qld.

[56] A statutory declaration of Bradley Harding dated 29 September 2017 was provided. Mr Harding declares that, "In about March 2011 Mr Crane approached me with an offer to acquire Oakdale [Qld] at a nominal price and with vendor finance to assist with running the business". He says that he cannot locate the agreement for the purchase but that he recalls that he was to be appointed director of Oakdale Qld and Mr Crane was to retire as a director. He was to pay $1 for the share in Oakdale Qld, "… and Mr Crane would have no further interest in Oakdale …" (my underlining).

[57] As to the directorship, he refers to what is shown in the ASIC record and swears:

> "8. I am surprised that I am recorded as having resigned as a director on the 23 May 2011 and reappointed on the 29 September 2011. I have no recollection of having resigned from Oakdale after I was appointed in April 2011, and never intended to resign.
>
> 9. I recall Mr Crane informing me at around [May 2011] that he had to be reappointed as a director for a short time to sign documents with a bank. I agreed as long as it was only a short time. I recall that it was a bank requirement.
>
> 10. I allowed Mr Crane to sign a charge over the assets of Oakdale in favour of the Bank of Western Australia because I thought Mr Crane had given me a wonderful opportunity to run my own business at minimal cost. I knew there were still some things to work out with Mr Crane's financing and I also understood that my failure to consent would have placed increased financial pressure on Mr Crane and my sister, Kaye. …" (my underlining)

[58] He further swears, "I recall that the change in shareholding of the company took place at the same time as the change in directors."

[59] Mr Davidson, the accountant, made a statutory declaration which is undated. He says:

> "3. I am aware that there were some failings in the management of my firm's ASIC lodgement system during the periods mentioned below. The administration of this system was left to my employed staff who included my administration manager supported by junior staff.
>
> 4. None of the junior staff remain in my employ. I no longer have paper copies of the files and statutory records because we moved to an electronic filing system where we outsourced storing these records."

He does not explain why he has not retrieved an electronic copy of the relevant documents.

[60] Mr Davidson sets out the information which is apparent from the ASIC records as to Oakdale Qld and then says:

> "8. I accept that Mr Crane's resignation as a director should have been recorded as the 26 May 2011, however because of failings in the ASIC lodgements administration this was shown as having taken place on the 19 September 2011."

There is nothing to suggest a factual basis for Mr Crane having resigned on 26 May 2011.

[61] Mr Davidson goes on to say:

> "9. Even though Mr Harding is recorded as having resigned as a director on the 23 May 2011 he did not sign a resignation as director. My office prepared the resignation however we cannot find any record of it having been signed by Mr Harding, or any other record of his having resigned.
>
> 10. If Mr Harding had resigned as a director, his reappointment should have been recorded as the 26 May 2011 if he actually resigned on the 23 May 2011, because Mr Crane was to be a director only for the purposes of signing the bank documents.
>
> 11. My recollection is that Mr Harding purchased Salemade's share in Oakdale at the same time as the change in directors occurred i.e. on the 11 April 2011 and not the 24 January 2014. I am of the view that the later date was used because of an oversight by my administration staff and to avoid late lodgement penalties.
>
> I recall a basic agreement for the sale of the share being produced. I do not know where that document now is."

[62] As to the ASIC records which show Mr Crane resigned as a director of Salemade on 26 May 2011, Mr Davidson says:

> "My recollection is that Mr Crane gave us instructions for his resignation as a director of Salemade to be effective on the 26 May 2011 which coincides with his resignation as a director of Oakdale. I consider due to an oversight in my office by my administration staff the resignation was not recorded on the 26 May 2011 rather on the 29 September 2011."

I assume in his favour that he means to say that Mr Crane's resignation as a director of Oakdale Qld was to be on the same day as his resignation from Salemade Pty Ltd, ie, 26 May 2011.

[63] As to the units held in the Posible Unit Trust Mr Davidson swears:

> "14. Once my office had received the sole management of the register for the Posible Unit Trust, the register showed the unit holders as Alison Beazley for five units and Philip James Beazley for five units. Even though I understand those units were intended to have been redeemed by the unit holders, such a transaction has never been recorded in the register."

[64] Mr Douglas Crane also made a statutory declaration at or around this time. He said:

> "2. In late 2010 I was having cash flow issues and started negotiations with … Bankwest to provide me with a finance facility. I needed a $1.5m overdraft facility.
>
> 3. By January 2011 Bankwest agreed to provide me with the facility. …
>
> 4. Bankwest required security over all the companies in which I had an interest as at January 2011 … and the following

companies in which my wife, Kaye had an interest as at January 2011. …

5. On the 21 March 2011 the Building Services Authority of Queensland (BSA) informed me that they intended to make me an excluded person the effect of which would be that I would not be allowed to be a director of a company in Queensland undertaking construction work.

…

8. I infer … that I believed at the time when I was re-appointed as a director of Oakdale that I had not yet been disqualified from being a director of or influential in the affairs of that company.

9. In March 2011 Oakdale was active in the construction industry in Queensland. Because of the notice from BSA I had to either close Oakdale or sell the business.

10. I was already under a lot of financial pressure at the time and suffering a great deal of stress and anxiety. I was very concerned that if Oakdale stopped trading and [did] not finish various projects it would be sued by the builder/clients resulting in the majority of its credits not being paid and I would be exposed to personal financial risk.

11. I negotiated a deal with my brother-in-law Brad Harding to buy the company <u>for a nominal amount</u> on the basis that:

    - Oakdale completed all current projects;
    - all Oakdale's creditors would be paid;
    - Oakdale would continue hiring my formwork system owned by [Australian Tableform Design Pty Ltd].

12. Brad Harding took over Oakdale on the 11 April 2011 which was the same day that I resigned as a director and Salemade sold its interest in Oakdale to him.

13. I had been negotiating the finance facility with Warren Collins of Bankwest. I recall in May 2011 Mr Collins informed me the Bank's finance documents were ready to be signed. About that time I informed Mr Collins that Mr Harding had become the director and shareholder of Oakdale. Mr Collins told me that he would be concerned about going back to the Bank asking for Oakdale to be left out of the transaction. Mr Collins suggested I become a director of Oakdale again and resign after the documents were signed.

14. When [my solicitors] first asked me why I had been re-appointed as a director of Oakdale, I remembered that it was because some documents had to be signed and that Mr Harding couldn't sign them. I assumed that he must have been going away, but now that other facts have been brought to my

attention, I have remembered that it was [because] Mr Collins of the bank had asked for that to be done, as explained above.

15. I contacted my accountant Mr Davidson's office and asked that I be re-appointed as a director of Oakdale. I do not recall who I spoke to. I do not recall asking for Mr Harding to be removed as a director. I informed Mr Davidson's office that I was to be recorded as a director for a few days and then removed again. I left it to them to do the paperwork recording my appointment and removal but I understand this was not done correctly.

16. Later in May 2011 I certainly signed the finance documents with Bankwest but I do not recall whether Mr Harding signed the documents. Neither Mr Harding nor any meeting of directors of Oakdale authorised me to perform any other action as a director of Oakdale, and I did not do anything in relation to the business of Oakdale other than to execute the documents as authorised by Mr Harding.

17. The sole intention for me to become a director of Oakdale was to allow the transaction with Bankwest to proceed and for no other reason.

18. I recall that when Mr Collins arranged for the documents to be signed he said to leave the dates blank and my copies of documents from Bankwest are all unsigned and undated. …

19. Salemade [Pty Ltd] was registered on the 14 October 2002. My wife, Kaye and I were appointed directors on that date. I was appointed the company secretary.

20. I resigned as a director on the 11 April 2011. I was re-appointed on the 23 May 2011 which was the same day that my wife resigned as a director. My re-appointment as a director was at the suggestion of Mr Collins of Bankwest to allow me to sign documents to complete the transaction.

21. When I contacted my accountant Mr Davidson's office about my appointment and resignation as a director of Oakdale I also asked the person to record my re-appointment as a director of Salemade and resignation a few days later to allow the finance documents with Bankwest to be signed. At the same time I asked that my wife be recorded as retiring as a director on the 23 May 2011 and be re-appointed a few days later.

22. In the case of Salemade the accountant's office appears to have followed my instructions because ASIC's records show my re-appointment as a director on the 23 May 2011 and retirement on the 26 May 2011 and my wife's retirement as a director on the 23 May 2011 and re-appointment on the 26 May 2011." (my underlining)

[65] In his second affidavit in these proceedings Mr Douglas Crane added this as to the ownership of the units in the Posible Unit Trust:

> "16. Sometime in around 2006 or possibly earlier, I was advised by Davidson Accountants that shares in companies, in which I may become a director over time, should be held in a trust.
>
> 17. Based on this advice, I decided that my wife (Kaye Crane) and I would hold the units in the Posible Unit Trust.
>
> 18. However this transaction did not proceed, not from any conscious decision but, rather, my wife and I simply did not sign any forms or documentation to receive any units in the Posible Unit Trust. To the best of my knowledge and recollection, I had neither seen nor was presented with any such documentation.
>
> 19. I am aware, however, that Salemade Pty Ltd became the trustee of the Posible Unit Trust in around 2006.
>
> 20. Neither my wife nor I have received any distribution or benefit from the Posible Unit Trust at any time."

[66] The Bankwest documents in evidence were by no means complete. However there is a letter at p 101 of the Trial Bundle from Bankwest to Oakdale Group Pty Ltd agreeing to increase the borrowings of Oakdale Group Pty Ltd on the guarantee of, amongst others, Oakdale Qld. That letter begins, "We refer to our Offer Letter dated 06 June 2011 and to any variation letters (together the 'Agreement')". Document 026209001 shows that the charge over Oakdale Qld was created on 15 June 2011. The notification of the details of charge is signed by Douglas Crane on 15 June 2011 as director of Oakdale Qld. Annexed to it is a copy of the Bankwest Fixed and Floating Charge. This is also dated 15 June 2011 and signed by Douglas Crane as sole director and sole company secretary. The charge appears to have been lodged with the New South Wales Stamp Duties Office on 22 June 2011.

[67] Also in evidence at pp 109 and 111 of the Trial Bundle are the pages of the varied facility executed by Mr Harding on behalf of Oakdale Qld and Salemade on 12 December 2011.

[68] These contemporary Bankwest documents are inconsistent with the idea that the loan was signed by Mr Crane between 23 and 26 May 2011. Even if he signed undated documents, it is most unlikely that he did so before the bank's letter of offer of 6 June 2011. More fundamentally, the variation being signed by Mr Harding tends to show that Mr Crane did not have to sign on behalf of Oakdale Qld. If it is the case that Mr Harding consented to Oakdale Qld giving the guarantee, there was no need for Mr Crane to be re-appointed as a director in order for this to happen. Thirdly, if the need for Mr Crane's resignation and re-appointment to Oakdale Qld was caused by the QBSA exclusion, what was the reason for the changes to the directorships of Salemade Pty Ltd? There is no evidence that the company carried on building work in Queensland, or did anything other than act as trustee for the three various unit trusts named as the first, second and third appellants in this proceeding. Even if Salemade Pty Ltd did carry on building work in Queensland, there is no reason on the evidence why Mr Crane had to be re-appointed to its

directorship between 23 and 26 May 2011. There is no apparent reason why Ms Crane could not have acted on its behalf between those dates. Fourthly, ASIC records show that Douglas Crane signed documents on behalf of Oakdale Qld on 8 and 15 June 2011. This is inconsistent with the idea that his re-appointment was only between 23 and 26 May 2011, and inconsistent with his believing that at the time.

[69] In short, the appellants' current story as to the need for re-appointment of Mr Crane between 23 and 26 May 2011 because of a bank requirement does not make sense. Additionally, the current story is the fourth different explanation given on behalf of the appellants – see [45] and [53] above.

[70] The existence of successive conflicting explanations for Douglas Crane's re-appointment to Oakdale Qld is a reason not to rely upon what he says in this regard. There is a reluctance to be truthful shown in the letter of 22 February 2016 – [44] above. Paragraph 8 of Mr Crane's statutory declaration of around September 2017, [64] above, could not possibly be accepted as a truthful statement when paragraphs 5 and 9 of that statutory declaration are considered and against the background of Mr Crane's resignation as a director of Oakdale Qld in April 2011 being necessary because of the QBSA exclusion letter.

[71] The underlined parts of the passages at [45], [52], [53] and [64] above make it perfectly clear that Mr Crane regarded himself as controlling Oakdale Qld and owning it, notwithstanding the points taken by his accountants and lawyers. This does not assist in bolstering his credit.

[72] Lastly, the idea that Mr Harding says that he bought the share in the Posible Unit Trust for a nominal consideration does not sit with the explanation that the transfer of the share was delayed until 24 January 2014 because Mr Harding required time to fully pay for it – [45] and [56] above. That is, there is no sensible reason advanced as to why, if the share in Oakdale Qld Pty Ltd was sold on 11 April 2011, that transaction was not recorded with ASIC until 24 January 2014.

[73] The Commissioner chose to rely upon the ASIC record rather than the versions of events received from the appellants. Having regard to all the evidence before me my conclusion is the same as the Commissioner's, namely, the evidence which the appellants have produced as to the directorship of Oakdale Qld is too inconsistent to be reliable. It is preferable to rely upon the ASIC records. Section 1274B(2) of the *Corporations Act* gives ASIC records some evidentiary status. It has been regarded as conferring a status of *prima facie* evidence on them.[10] However, I note the judgment of the Court of Appeal in Western Australia in *Barboutis v the Kart Centre Pty Ltd (No 2)*[11] to the effect that the evidentiary status is somewhat less than this. Even accepting that the ASIC records are not *prima facie* evidence, and that in this case the appellants have put on evidence other than that contained in the database to contradict it, I still prefer to act on the ASIC records. They are contemporary records. The documents were made for a serious purpose and were signed by Mr Douglas Crane and Mr Harding.

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10 Austin J in *Drummond v Drummond* [1999] NSWSC 923, [32], cited in *Gosford Christian School Ltd v Totonjian* [2006] NSWSC 725, Barrett J; *Forrest v Cosmetic Company Pty Ltd* [2008] SASC 152, [22], White J.

11 [2020] WASCA 41, [44].

[74] Like the Commissioner, I conclude that Mr Crane was a director of Oakdale Qld from 23 May 2011 until 29 September 2011.

Commissioner's Designation of Oakdale Qld as DGE

[75] Section 75 of the PTA provides as follows:

> "**75 Designation of group member as DGE**
>
> (1) The members of a group may, by an instrument in writing in the approved form executed by or on behalf of each member of the group and served on the commissioner, designate 1 of its members to be the DGE in respect of the group for the purposes of this Act.
>
> (2) If the members of a group do not in accordance with subsection (1) designate 1 of the members of the group to be the DGE in respect of the group for the purposes of this Act, the commissioner may exercise in respect of the group the powers of designation conferred on members of the group by that subsection and for the purposes of this Act such a designation by the commissioner shall be by instrument in writing served on the member of the group designated as the DGE and shall have the same effect and give rise to the same consequences as if validly made by the members of the group.
>
> …"

[76] The nomination of a DGE is necessary for a group to be taxed under the PTA – see s 23. Pursuant to s 75(3)(a), a DGE ceases to be the DGE in respect of any group when the composition of that group alters.

[77] No one but the Commissioner has sought to designate Oakdale Qld as the DGE for any relevant group. The Commissioner first nominated Oakdale Qld as DGE on the last page of his letter of 4 February 2015. As discussed above, after more information was provided by the appellants, the Commissioner made a new set of groupings, notified by letter of 20 January 2016. That letter formally nominated Oakdale Qld as the DGE from 1 July 2009.

[78] On 1 June 2016 the Commissioner wrote to solicitors for the appellants rejecting their exclusion applications. In that letter the Commissioner expressly only reviewed the period 1 July 2010 onwards – p 2. He set out new groupings and a new final group composition. At p 7 he nominated Oakdale Qld as the DGE for all relevant periods from 1 July 2010 until 24 January 2014. The nomination is distinct and formal.

[79] In their amended objection letter of 29 July 2016, solicitors for the appellants objected to the designation of Oakdale Qld as DGE as being:

> "… invalid by reason of s 109 of the *Commonwealth of Australia Constitution* as being inconsistent with the scheme established by the

> *Corporations Act 2001* (Cth) for the distribution of assets of companies limited by shares by Part 5.6 (Winding up generally) of that Act, and in particular, as being inconsistent with ss 471A (Powers of other officers suspended during winding up), 553 (Debts or claims that are provable in a winding up), 553E (Application of *Bankruptcy Act* to winding up of insolvent company) and 554 (General rule – compute amount as at relevant date) of the *Corporations Act 2001* (Cth)."

[80] This objection was made on the basis that the relevant designation of Oakdale Qld as DGE was made after it had been placed into liquidation.

[81] The delegate of the Commissioner disallowed the objection, see paragraphs 61-68 and 87-88 of the Statement of Reasons dated 4 July 2018. She found that the designation as DGE complied with the requirements of s 75(2) of the PTA and that as s 75(2) of the PTA did not require the designation to be made before assessments were made, so that the designation was valid notwithstanding it was made on 1 June 2016, the same date as the assessments.

[82] The Commissioner rejected the constitutional inconsistency argument. She noted that the argument remained undeveloped in that neither the particular Commonwealth law nor the particular State law said to be inconsistent was identified. *Smeaton Grange* (above) was cited as authority for the proposition that assessments are to be made having regard to the facts extant at the time period relevant to the assessment, in the circumstances that exist at that time. In those circumstances the Commissioner thought that the groupings relied upon, and the liability to pay tax relied upon, had all occurred before 5 March 2015 so that Oakdale Qld's entry into liquidation on that date could not alter the right of the Commissioner to designate it as DGE, nor its liability to pay payroll tax for periods before its liquidation – see paragraphs 32 to 36 and 87 and 88 of the Reasons for Decision dated 4 July 2018.

[83] In this proceeding the appellants repeat the assertion that because (relevantly) Oakdale Qld was not appointed DGE until 1 June 2016, assessments cannot be made against it on the basis that it was the DGE for any group prior to this time. The only support for this argument which the appellants seek to advance is that s 32 of the PTA provides that subdivision 2 of the "PTA applies to an employer who, on 30 June in a financial year, is the DGE for a group". I cannot see that there is anything in this argument.

[84] The second point which was taken on behalf of the appellants was that the designation of Oakdale Qld as DGE was invalid because the provisions of the PTA allowing designation, and providing for the financial consequences which flow from it, were inconsistent with the winding up provisions in Part 5.6 of the *Corporations Act 2001*.

[85] The appellants' submissions on this point were limited, being essentially confined to the submission outlined at [79] above with the extra explanation that the designation of Oakdale Qld as DGE, "… occurred after the commencement of the winding up of [Oakdale Qld], thereby purporting to increase the amount provable in the winding up by [the Commissioner] by virtue of the actions of the [Commissioner] happening

after the commencement of the winding up". This argument was abandoned during the hearing of the appeal – t 3-17.

[86] A third argument was made that the designation of Oakdale Qld as DGE was invalid because, "… the Grouping provisions [of the PTA] are inconsistent with the scheme of the *Corporations Act* providing for limited liability for companies limited by shares, in that they impose liabilities on members of the payroll tax group for debts of other members of the payroll tax group, in particular, by reference to actions or characteristics of other persons (including corporations) than the person made liable."

[87] The law as to s 109 of the Constitution was reviewed in *Work Health Authority v Outback Ballooning Pty Ltd*.[12] The majority judgment contains the following passages:

> "[29] When a law of a State is inconsistent with a law of the Commonwealth, s 109 of the *Constitution* resolves the conflict by giving the Commonwealth law paramountcy and rendering the State law invalid to the extent of the inconsistency.
>
> …
>
> [31] In *Victoria v The Commonwealth* (*'The Kakariki'*), Dixon J referred to two approaches which might be taken to the question whether an inconsistency might be said to arise between State and Commonwealth laws. …
>
> [32] The first approach has regard to when a State law would 'alter, impair or detract from' the operation of the Commonwealth law. This effect is often referred to as a 'direct inconsistency'. …
>
> [33] The second approach is to consider whether a law of the Commonwealth is to be read as expressing an intention to say 'completely, exhaustively, or exclusively, what shall be the law governing the particular conduct or matter to which its attention is directed'. This is usually referred to as an 'indirect inconsistency'. A Commonwealth law which expresses an intention of this kind is said to 'cover the field' or, perhaps more accurately, to 'cover the subject matter' with which it deals. …
>
> [34] The question whether a State or Territory law is inconsistent with a Commonwealth law is to be determined as a matter of construction. In a case where it is alleged that a State or Territory law is directly inconsistent with a Commonwealth law it will be necessary to have regard to both laws and their operation. Where an indirect inconsistency is said to arise, the primary focus will be on the Commonwealth law in order to determine whether it is intended to be exhaustive or exclusive with respect to an identified subject matter.

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12 (2019) 266 CLR 428.

> [35] … A provision which, expressly or impliedly, allows for the operation of other laws may be a strong indication that it is not so intended. …
>
> …
>
> [45] In *Ex parte McLean*, Dixon J explained that when the Commonwealth and State Parliaments each legislate on the same subject matter 'and prescribe what the rule of conduct shall be', they make laws which are inconsistent and s 109 applies. …"

[88] Counsel for the Commissioner rightly points out that the appellants have identified only in the vaguest terms the statutory provisions in the *Corporations Act* with which provisions in the PTA are said to be inconsistent. Indeed, the same might be said as to the provisions of the PTA which are relied upon. The appellants have made no attempt to identify any specific subject matters or rules of conduct, to use the language from *McLean*, which are said to be directly or indirectly inconsistent. It is impossible therefore to undertake the task of construction referred to at [34] of the High Court decision in *Outback Ballooning*, or in any other away assess the appellants' arguments. They remain entirely undeveloped. Responding to the appellants' arguments at the same level of generality with which they are advanced, they appear to be wrong because the provisions of the PTA make rules about when liabilities will be owed to the Commissioner, and the provisions of the *Corporations Act* make provisions about when members might be responsible for liabilities of a company.

[89] I do note s 5E of the *Corporations Act,* which allows for concurrent operation of State laws, and I accept the Commissioner's arguments that this makes it unlikely that there is any direct inconsistency between the PTA and the *Corporations Act*, see [35] of *Outback Ballooning* above.

[90] Other than this there is little to say about this constitutional argument. I reject it.

[91] One last point was taken, belatedly, by the appellants in relation to this issue. It was said that the reassessment on remission (18 May 2020) did not contain a valid appointment of Oakdale Qld as DGE. That re-appointment was necessary because that remitted reassessment was based on a new grouping so that pursuant to s 75(3)(a) of the PTA, Oakdale Qld ceased to be the DGE when the Commissioner changed the composition of the group.

[92] The remitted decision of 18 May 2020 contained the following paragraph:

> "17. The assessment for 2011/12 is not confirmed and must be reassessed on the basis that [Oakdale Qld]:
>
> (a) is a member of the [new group], and is the DGE for that group, from 1 July 2011 to 29 September 2011; and
>
> (b) is not a member of a group from 30 September 2011 to 30 June 2012. Penalty tax and UTI is to be remitted in full for the period 30 September 2011 to 30 June 2012." (my underlining)

[93] Why the Commissioner would choose to make such an informal designation in a case where every available point is taken by the taxpayers, I cannot fathom. In my view the designation of a person as DGE ought to be a formal and distinct part of any written communication from the Commissioner. Nonetheless, I do accept that the delegate writing the 18 May 2020 letter had authority to designate Oakdale Qld as a DGE, and that paragraph 17(a) quoted above sufficiently did so.

Section 109 Arguments as to Assessments

[94] As well as making arguments based on s 109 of the Constitution in relation to the designation of the DGE, the appellants relied on the same asserted inconsistency to say that the Commissioner's assessments were invalid. This argument was even less developed than the one dealt with above. I cannot see that there is anything in it.

***Kable* Point**

[95] The appellants take another constitutional point based on the decision of *Kable v Director of Public Prosecutions (NSW)*.[13] The appellants rely upon s 69(1)(b) of the TAA which requires the taxpayer to pay the whole of the Commissioner's assessment as a precondition to the right to appeal against the Commissioner's decision on an objection. This point was rejected in *Harvey v Commissioner of State Revenue*.[14] The appellants acknowledge that I am bound by that decision to reject their *Kable* argument and I do so.

Apportionment of Grouping Periods

[96] The appellants submitted that Oakdale Qld was liable to be assessed as DGE for a payroll tax group only where the group existed for the entire period in which the assessments were made, or where it was the DGE at the end of the period of assessment. No specific section of the PTA was relied upon in support of this argument and there was no case authority to support it. The argument was not developed either in written or oral submissions. The appellants' submissions did not descend to any detail as to which of the assessments they contended were invalid or the factual basis for their contention. I reject it.

Failure to Exclude Members of the Group

[97] Section 74 of the PTA provides as follows:

> "**74 Exclusion of persons from groups**
>
> (1) The commissioner may, by order in writing (an ***exclusion order***), exclude a person from a group.
>
> (2) The commissioner may make an exclusion order only if the commissioner is satisfied a business carried on by the person is carried on independently of, and is not connected with the carrying on of, a business carried on by any other member of the group.

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13 (1996) 189 CLR 51.

14 [2015] QCA 258, [66]ff.

(3) For deciding whether to make an exclusion order, the commissioner must have regard to –

(a) the nature and degree of ownership and control of the businesses carried on by the person and the other members of the group; and

(b) the nature of the businesses; and

(c) any other matters the commissioner considers relevant.

…"

[98] Section 74 of the PTA depends upon the Commissioner exercising a discretion. This discretion is only available to the Commissioner once he or she has become satisfied of the matters at s 74(2).[15] For this reason, my task on this appeal is limited to deciding whether or not the Commissioner has erred in either forming the state of satisfaction preliminary to the exercise of the discretion, or in exercising the discretion – see [3] above.

[99] As set out above, the Commissioner's interest in Oakdale Qld seems to have begun with an application by it to be excluded from a group. On 3 February 2015 the Commissioner determined the exclusion application against Oakdale Qld saying, "I have considered the facts presented in your application and have determined that there is insufficient evidence to support a finding that the requirements of s 74(3) detailed above have been satisfied." That letter records that the Commissioner had requested supporting documentation and information, "much of which was required by the form itself", but that no documentation or information was received.

[100] In February, April and May 2016 the first to eighth appellants all made further exclusion applications in relation to being grouped together. The applications were all refused by the Commissioner's letter of 1 June 2016. The exclusion decision is at pp 7 to 21 of the Commissioner's letter. It depended upon certain factual findings by the Commissioner which I will discuss.

[101] First, and non-controversially, the Commissioner determined that at all material times:

(a) The unitholders of the Salemade Unit Trust were Douglas Crane and Kaye Crane.

(b) Douglas Crane was the sole director of Australian Tableform Design Pty Ltd, Oakdale Building Services Pty Ltd and Oakdale Group Pty Ltd.

(c) Douglas Crane and Kaye Crane had a controlling interest in the Big Tree Trust.

(d) Kaye Crane was the sole director of Lillies Group Pty Ltd.

(e) Douglas Crane and Kaye Crane were related persons.

[102] Secondly, the Commissioner found that Douglas Crane was the sole director of Oakdale Qld between 11 April 2007 and 11 April 2011, and again from 23 May

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15 See *Scott and Bird & Ors v Commissioner of State Revenue* [2016] QSC 132, [19].

2011 to 29 September 2011. As discussed above, the evidence before the Commissioner, and before me on this appeal, supported that finding.

[103] Thirdly, the Commissioner found that Salemade Pty Ltd was the non-beneficial owner of the sole share in Oakdale Qld from 23 January 2007 to 24 January 2014. The appellants contended that the share in Salemade passed to Mr Harding on 11 April 2011. The Commissioner preferred the evidence in the ASIC records rather than the contradictory and poor quality evidence provided from the appellants which I have discussed above.

[104] On the objection from this 1 June 2016 decision, the Commissioner's delegate referred to the lack of evidence provided by the appellants as to how much Mr Harding paid for the share and the lack of any agreement pursuant to which he purchased the share. She referred to Oakdale Qld's constitution which provided that someone remains a shareholder until the transfer is registered in the share register. The appellants have never revealed Oakdale Qld's share register. The Commissioner relied on ASIC Form 2E0617886 (lodged with ASIC on 11 June 2014) as showing that Mr Harding was not entered in the Register of Members until 24 January 2014 and acted on that basis. For the same reasons as are given above at [69]ff, my view on this appeal is the same as that which the Commissioner took.

[105] Lastly, the Commissioner assumed that Douglas Crane and Kaye Crane were at all material times the unitholders of the Posible Unit Trust. This was what the appellants had told the Commissioner at the time of the 1 June 2016 decision – see [48] above.

[106] However, after 1 June 2016 the appellants changed their position as to this. They then said that, due to an oversight, the units in the Posible Unit Trust had never been transferred from the initial beneficiaries to Douglas and Kaye Crane – see [65] above. In train of their amended objections, the appellants' solicitors wrote to the State on 3 October 2017 saying:

> "… although [the Commissioner's] analysis in relation to controlling interests in the Posible Unit Trust would have been correct if Mr and Mrs Crane had become beneficiaries of that trust, by the operation of the terms of the trust deed and, among other things, the failure ever to register Mr and Mrs Crane as unit holders, Mr and Mrs Crane have never become unit holders in that trust, and thus have never become beneficiaries under that trust."

[107] In her decision of 4 July 2018, the Commissioner's delegate noted the late change of position as to the facts. Further, that the deed by which Salemade Pty Ltd became trustee of the Posible Unit Trust recited that there had been a transfer of units to Douglas and Kaye Crane and that other contemporary documents such as financial reports and directions to Salemade Pty Ltd's accountants showed that it was Mr and Mrs Crane, rather than the original unitholders, who controlled the Posible Unit Trust. The Commissioner concluded that Douglas and Kaye Crane each held five ordinary units in the Posible Unit Trust and had done since 2006.[16]

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16 Paragraph 84 of the Decision on Objection dated 4 July 2018.

[108] In an email dated 23 March 2020, and more formally in his remitted decision of 18 May 2020, the Commissioner's delegate resiled from that determination, and accepted that assessments should be made on the basis that Douglas and Kaye Crane never became unitholders of the Posible Unit Trust. As the Commissioner's email of 23 March 2020 put it, that meant that the payroll tax groups therefore needed to be "reconstituted from scratch". In the remitted decision the Commissioner no longer grouped the business Salemade as trustee for the Posible Unit Trust. He grouped the remaining appellants up to 29 September 2011, the date Douglas Crane ceased to be a director of Oakdale Qld. Otherwise, the Commissioner relied upon the 4 July 2018 decision on the objection.

[109] I now consider the Commissioner's decision on the objection – paragraphs 89 to 123 of the decision of 4 July 2018, as changed by the May 2020 decision about unitholding in the Posible Unit Trust.

[110] In 2018 the Commissioner noted the factual findings in the decision of 1 June 2016 and relied upon them. Further, the Commissioner had regard to factual information provided by the appellants after the decision of 1 June 2016 in support of their objections. In this regard the Commissioner relied upon Mr Crane's re-appointment to Oakdale Qld from 23 May 2011 to 29 September 2011 as being relevant to show connections between the business carried on by Oakdale Qld and the other appellants.

[111] The Commissioner relied upon Douglas and Kaye Crane signing the Bankwest finance facilities discussed above, and their using Oakdale Qld and other grouped entities to provide security for borrowing by Oakdale Group Pty Ltd. She relied upon other members of the group providing security for this borrowing: a registered first mortgage given by Frias Pty Ltd, together with Fixed and Floating Charges over Australian Tableform Design, Frias, Oakdale Group Pty Ltd, Oakdale Qld and Salemade Pty Ltd, together with guarantees and indemnities from Douglas Crane, Australian Tableform Design, Salemade as trustee for the Big Tree Trust, Oakdale Qld, Salemade Pty Ltd, and the Salemade Unit Trust. The Commissioner noted that the Fixed and Floating Charge signed by Mr Crane over the assets of Oakdale Qld was security up to the amount of $16 million. The Commissioner regarded the granting of this Fixed and Floating Charge over Oakdale Qld as a significant factual connection between it and the other group members.

[112] The Commissioner noted an earlier financing relationship between Oakdale Qld and Australian Tableform Design. ASIC records show that on or about 18 February 2010 Australian Tableform Design lent Oakdale Qld $1.07 million.

[113] The Commissioner noted that at about the same time Douglas Crane signed the Bankwest guarantee on behalf of Oakdale Qld, he also signed identical documents for Salemade Pty Ltd, Australian Tableform Design and Oakdale Group Pty Ltd as sole director in each case. Further, that Ms Crane signed identical documents for Frias Pty Ltd as its sole director. The Commissioner concluded, "Based on this evidence, it is clear that Mr and Mrs Crane were acting together to secure finance across the group."

[114] The Commissioner relied upon the familial connection between Douglas Crane and Mr Harding and Mr Harding's statement that he consented to Mr Crane signing the Fixed and Floating Charge over Oakdale Qld because of that familial relationship.

[115] The Commissioner's delegate referred to the fact that the appellants bore the onus of persuading her to make an exclusion. She noted that they had not even provided all the information required by the exclusion application forms. This was despite two specific requests in relation to the forms from the Commissioner, and despite the fact that from the initial investigation in 2014, the appellants had time and again refused to provide even the most basic information requested by the Commissioner.

[116] Not surprisingly, the appellants focused upon the fact that the 1 June 2016 decision was based, to a significant extent, on the factual premise that Douglas and Kaye Crane owned the units in the Posible Unit Trust so that the ultimate ownership "of Oakdale Qld was vested in them". This argument rather ignores the fact that (1) the factual basis upon which the Commissioner acted in making the exclusion decision of 1 June 2016 was the factual basis put forward at that time by the appellants, and (2) the appeals to this Court are from the decision on the objection, ie, the 4 July 2018 decision and the remitted decision of 2020. In the remitted decision the objection was not allowed on the basis that, even without the factual premise that Douglas and Kaye Crane were unitholders in the Posible Unit Trust, there was still no basis to exercise the discretion at s 74 of the PTA.

[117] Secondly, the appellants argued that s 74 of the PTA made the carrying on of business activities the main focus for the Commissioner's attention in deciding whether or not to be satisfied within the terms of the section. Here, it was said, there was insufficient evidence of business activities carried on in common between the eighth appellant and the other members of the group and that the Commissioner focused too much, or wrongly, on other connections between Oakdale Qld and the rest of the group, and in particular focused too much, and wrongly, upon Oakdale Qld's guaranteeing the Bankwest loan to Oakdale Group Pty Ltd.

[118] In my view the fact that Oakdale Qld gave security for this borrowing was a relevant and significant factor for the Commissioner to take into account in deciding whether or not the state of satisfaction required by s 74(2) of the PTA was reached. On the information provided by Mr Crane, the bank would not have lent without that security. The borrowing was for a large amount and the potential charge over Oakdale Qld's assets was even larger. There had been past lending from Australian Tableform Design to Oakdale Qld in an amount of over $1 million.

[119] It is hard to see what commercial benefit Oakdale Qld received from guaranteeing the loan to Oakdale Group Pty Ltd. None is apparent on the face of the material and Mr Harding's statutory declaration is to the effect that the security given by Oakdale Qld was for the benefit of the group of companies and the Cranes personally.

[120] In this regard, as is made plain by Mr Harding's statutory declaration, it is relevant that the Cranes, and their relatives, were involved with all the companies which the Commissioner groups. The involvement of Douglas Crane in returning to become a director of Oakdale Qld, in order to provide security to Oakdale Group Pty Ltd emphasises this. As discussed above, I am not satisfied that the material provided by the appellants as to this provides the full story about the matter. However, it is evident that Douglas Crane simply treated Oakdale Qld as a company over which he would exercise control if needs be. This attitude is also evident in his language: see the underlined passages at [64] above.

[121] Thirdly, the appellants submit that the business conducted by Oakdale Qld was independent of the businesses conducted by the other appellants. They say that there were no common transactions, sharing of resources, facilities, premises or purchases of goods or services.

[122] In terms of services, all the appellants used Davidson Accountants, so in that regard there was something which could be regarded as a common purchase.

[123] Insofar as the other matters are concerned, it is relevant to consider that even though the appellants bore the onus of persuading the Commissioner, first to the state of satisfaction required by s 74(2), and then to exercise her discretion, they provided almost no information about any of the companies in the group. The forms completed by the appellants omitted to answer many questions posed. This was notwithstanding the Commissioner on at least two occasions asked for further information and asked that, as a minimum, the forms were to be properly completed. Where information was provided on the forms applying for exclusion, it was provided in the briefest way imaginable. In most cases a group of words were provided which did not even amount to a sentence. This same attitude has been evident in all the appellants' dealings with the Commissioner since the investigation began in 2014. Brief, unsatisfactory, incomplete and contradictory information has been provided.

[124] Similarly, in the occasional letter which one of the appellants wrote to the Commissioner in support of the exclusion applications, bland assertions were made with not the slightest substantiation by reference to facts, accounting materials, time periods etc. For example, on 12 February 2016 on a piece of paper headed "Salemade Pty Ltd as trustee for Posible Unit Trust" and ending, "Yours faithfully, Doug Crane, Australian Tableform Design Pty Ltd" (not in fact signed) it was asserted:

> "Salemade Pty Ltd is a trustee company for various trusts. It does no other business.
>
> Posible Unit Trust holds shares in various companies. It does no other business.
>
> Salemade Pty Ltd ATF the Posible Unit Trust did hold shares in Oakdale Queensland Pty Ltd until the business was sold on 11/04/2011 and since this date has not been connected with in any way with the carrying on of Oakdale Queensland'P/L business.
>
> By nature Salemade P/L ATF the Posible Unit Trust is a completely different business than Oakdale Queensland as well as a not related body corporate."

[125] To submit, as the appellants do, that in total this information showed, for example, no material transactions or sharing of resources between the appellants is hardly persuasive. It is evident that the Commissioner was well aware of the poor quality of information provided by the appellants, and took this into account, as she was entitled to do.

[126] In my view the Commissioner made no appealable error in determining to reject the exclusion applications.

Overstated Taxable Wages

[127] The appellants contend that the Commissioner's delegate erred in including in her assessment of taxable wages, certain amounts paid by the fifth and sixth appellants. It is said that the Commissioner ought to have recognised that those payments were not wages, but payments made to subcontractors which were not caught by provisions of the PTA. The fifth and sixth appellants operate in New South Wales.

[128] Section 13B of the PTA contains some very complicated and poorly drawn provisions the purpose of which is to define when payments made to persons engaged to perform work will be taxable as wages under the PTA, and when they will not.

[129] The Commissioner's decision of 1 June 2016 (correctly) said this about the material which was provided by the appellants in relation to this issue:

> "You submit that none of the payments to contractors are subject to payroll tax. In support of this, you provided correspondence from the company to the [NSW] Commissioner which confirmed the exemptions upon which the company is relying.
>
> You were invited to provide further evidence which supported your exemptions, including (but not limited to) correspondence from the [NSW] Commissioner to Oakdale Group confirming agreement with the exemptions. In response, you provided a NSW OSR information sheet which explains the exemption criteria. I do not consider this sufficient confirmation that the payments are not subject to payroll tax."

[130] The letter referred to in the first paragraph of the above quotation was dated 18 September 2015. It was from Oakdale Group Pty Ltd and sent the NSW Commissioner a schedule of payment to various subcontractors identifying (by reference to the New South Wales legislation) the provisions which Oakdale Group Pty Ltd relied upon to say that the payments were not taxable wages caught by the NSW PTA. It is not possible to understand the factual basis for any of these claims from this document.

[131] There were some schedules at p 950ff of the Trial Bundle which in my view added nothing more to the factual basis upon which the appellants contended that the Commissioner ought not treat the disputed payments by the fifth and sixth appellants as taxable wages.

[132] The provisions at s 13B of the PTA are difficult to understand, so much so that Queen's Counsel for the appellants, a specialist in taxation law, was unable to explain the relevant provisions to me in the course of the hearing.[17] Notwithstanding this, the submission was made that the Commissioner should have acted, and I should act, upon the implied assertions in these schedules that all the factual matters necessary to bring the listed payments within one or more of the statutory exemptions had been satisfied because Mr Crane, or Davidson Accountants, asserted that that was so – t 1-48. Apart from any questions going to the willingness of either Douglas Crane or his accountants to provide proper and

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17 See t 1-2ff and t 1-44ff.

honest information to either the Commissioner or the Court, it simply could not be accepted that merely because one or either of them had made assertions in these schedules that the assertions were correct.

[133] There was an affidavit from a Mr Tyler Whiteman which exhibited correspondence between the Queensland Commissioner and the New South Wales Office of State Revenue. I cannot see that this takes the appellants' case any further.

[134] The appellants argued that because this appeal is from the Commissioner, and because the role of the Court is to determine it on the facts before the Commissioner, the material upon which this Court acts need not comply with the rules of evidence, for there is no such requirement in relation to material submitted to the Commissioner. I need not to decide that point. By s 70A of the TAA, the appellants bear the onus of proof in this appeal. Whether or not the conclusory statements of opinion as to law and fact contained in the schedules relied upon by the appellants were admissible before me, they could not possibly persuade me of the appellants' case. They do not allow me to understand the factual basis of each of the exemptions claimed. I cannot test for myself, according to the statutory criteria, whether or not those claims are good.

[135] An argument was made that because the Commissioner could have asked the appellant taxpayers for more information about this topic, rather than decide the point, I should allow the appeal.

[136] After the Court ordered the Commissioner to reconsider the objection having regard to the new evidence which had been produced during the course of this proceeding, the appellants' solicitors wrote to the Commissioner on 9 October 2019 saying:

> "Given the long history of this matter, we would suggest that it would be most inappropriate for your client to disallow (or partly disallow) the objection on the basis that your client was to assert that there was now insufficient evidence before the Commissioner of any relevant matter.
>
> If [you consider] that further information is or may be required, we submit that the most appropriate course of action would be to request such information from our clients …"

[137] On 6 May 2020 the appellants' solicitors wrote more specifically in relation to this part of the objection asking that the Commissioner review the information it had in relation to contractor payments and request further information if required.

[138] The Commissioner did not ask for further information.

[139] In my view, having regard to the totality of correspondence between the taxpayers and the Commissioner since 2014 the appellants were accorded more than a fair opportunity to provide anything they wanted to the Commissioner. Further, had there been information which did in fact support their arguments in relation to this point, they could have sought to introduce the material in this proceeding pursuant to s 70B of the TAA. In that respect, Mr Crane provided a little more information as to this issue in his second affidavit. He does not address the totality of the payments in issue; he merely gives some very brief explanation in relation to a few of the payments which are said to be by way of example. Even so far as the

payments which are addressed are concerned, the affidavit falls far short of providing the facts which are necessary to allow me to understand the basis for the payments, and to judge for myself whether or not they fall within any of the exemptions claimed.

[140] Lastly on this point, the appellants say that the appeal ground ought to succeed because the decision on objections of 4 July 2018 does not deal with this issue at all. In response the Commissioner points to the very limited elucidation of the point in the objection notice dated 29 July 2016:

> "Construed as a whole, Part IV does not include in a group a person or persons not paying taxable wages, or in the alternative, not paying taxable wages or interstate wages."

[141] While this may be wide enough to include the point made here (and the Commissioner did not submit that it was not), it is understandable that the Commissioner did not interpret it as referring to this contractor's payment point, for the appellants made submissions to the Commissioner as to grouping persons not paying taxable wages (not pursued on this appeal).

[142] In circumstances where it seems accepted by the Commissioner that there was an objection based on the contractor's payment point, it ought to have been dealt with by the Commissioner. However, to allow the appeal on this basis would be pointless because my decision would be the same as the Commissioner's decision of 1 June 2016; that is, the appellants should fail.

Penalty tax

[143] Penalty tax is automatically imposed under s 58 of the TAA at 75%, but the Commissioner has a power to remit it in whole or in part – see s 60 of the TAA. There are no express statutory considerations for the exercise of the Commissioner's discretion under s 60. In *Orica IC Assets Pty Ltd & Anor v Commissioner of State Revenue*[18] McMurdo J said this about the discretion:

> "[93] … The relevant considerations are confined only by the subject-matter, scope and purpose of the relevant legislation. The respective arguments agree that it is relevant and indeed necessary to consider the facts and circumstances which contributed to an assessment which had to be the subject of a reassessment. If the fault had been completely that of the Commissioner, there would be the strongest case for remission. If the taxpayer was at fault, by misstating the facts or not stating all of the relevant facts up to the time of the original assessment, then the case for remission would be weaker. In turn, it would be relevant to consider whether that misstatement or non-disclosure was made knowingly, or was instead inadvertent. It would also be relevant to consider whether it was made by the taxpayer in reasonable reliance upon professional advice."

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18 [2011] QSC 1.

[144] Section 70(5) of the TAA provides that the grounds of appeal to the Supreme Court are limited to the grounds of objection unless the Court otherwise orders. There was no objection about the decision not to remit penalty tax in the appellants' amended objection letter of 29 July 2016, or in the further objections and submissions made by the appellants' solicitors in the letter dated 27 March 2017. The same can be said for the appellants' solicitor's letter of 3 October 2017. Leave was sought in this proceeding pursuant to s 70(5) to appeal the decision not to remit penalty tax. I received no submissions from any party as to whether or not I should grant leave.

[145] In circumstances where the appellants had four attempts at articulating their grounds of objection (20 August 2015, 29 July 2016, 27 March 2017 and 3 October 2017); had required various extensions of time in order to make these objections, and provided no factual explanation as to why they had not earlier objected to non-remission of penalty tax, I see no reason to grant leave.

[146] In any event, I am against the appellant on the substance of the objection. Section 60(1) gives the Commissioner a discretion to remit the whole or any part of penalty tax. In determining this appeal I am not re-exercising the Commissioner's discretion, but looking to see if the Commissioner exercised that discretion properly – see [3] above.

[147] The initial investigation reported on 3 February 2015. It recorded that:

> "On 23 October 2014, notices pursuant to s 87 of the *Taxation Administration Act* 2001 (Qld) were issued with investigation entry letters. The due date for information/documents was 21 November 2014. At date of writing, no response has been received to these notices, <u>despite a further extension being granted to 16 January 2015</u>." (my underlining)

[148] Section 87 of the TAA empowers the Commissioner to require a person to give information or documents and s 121 of the TAA makes a failure to do so an offence.

[149] The investigation recommendation was that "75% penalty tax be applied given the client's non-response to the s 87 notices". The first of these reassessments was notified to the appellants by letter dated the next day, 4 February 2015. In this letter the Commissioner's delegate (who was also the investigating officer) said:

> "Public Ruling TAA0602.3 sets out the general manner in which the Commissioner will decide whether or not to remit penalty tax and the extent of any remission. In accordance with this Ruling, I (as a delegate of the Commissioner) have decided not to remit any penalty tax. This is because the information requested via s 87 notice dated 23 October 2014 was not provided.
>
> I believe you have intentionally disregarded your obligations under tax laws to provide information and documents in accordance with these s 87 notices. This is evidenced by the subsequent emails received from [Davidson Accountants] in which it is acknowledged that the notices have been received and that the information will not be provided."

[150] Objections were lodged in relation to the 2015 reassessments. The determination of these objections was delayed awaiting the outcome of new exclusion applications. Those exclusion applications were refused by the letter of 1 June 2016. The delegate of the Commissioner who gave that decision also dealt with penalty tax saying:

> "The reassessments completed in 2015 imposed penalty tax of 75%. The earlier investigation exit letter explained that the decision to do this was made as a result of Oakdale's intentional disregard of its obligations under tax laws to provide information and documents pursuant to a notice issued under s 87 of the TAA.
>
> To reiterate, s 87 notices were issued on 22 October 2014 to Oakdale's accountants, Davidson Accountants. These contained a due date of 21 November 2014. A phone call held with … Davidson Accountants on 13 November 2014 confirmed that the notices had been received. A letter dated 9 December 2014 was further issued to your client, along with copies of s 87 notices. <u>The letter required the provision of information and documents no later than COB 9 January 2015</u>.
>
> On 19 December 2014 a Right to Information request was lodged for investigation document. At no stage was a response received from Oakdale.
>
> In completing the above assessments/reassessments, I have maintained 75% penalty tax. …" (my underlining)

[151] The submission made on behalf of the appellants was that the letter of 1 June 2016 was in error because it omitted to mention the grant of extension to 16 January 2015 – compare the underlined passages at [147] and [150] above. This extension had been mentioned in the investigation report of 3 February 2015. The delegate of the Commissioner who wrote the letter of 1 June 2016 was the same delegate who wrote the investigation report.

[152] The point the appellants take is that because of the omission to mention the extension to 16 January 2015, "The factual basis for the refusal to remit penalty tax is incorrect". It is difficult to imagine a less meritorious point. I find that the Commissioner's delegate had not mistaken the facts which he thought were relevant to the remitting of penalty tax; it is just that the letter of 1 June 2016 omitted reference to a letter of extension.

[153] The issue of penalty tax was dealt with again in the decision of 4 July 2018. In the reasons for disallowing the objections the delegate of the Commissioner said:

> "17. Penalty tax was imposed because the Commissioner was required to make reassessments and default assessments of your payroll tax liability for the relevant periods.
>
> 18. At the time the assessments were issued, the Commissioner considered that your conduct fell within Category 3, Case A of PR TAA 060.2 for the reasons set out on page 27 of her letter of 1 June 2016. …

> 19. Your grounds of objection, as set out in your letter of 27 March 2017, do not dispute the imposition of penalty tax at the statutory rate of 75%."

[154] Category 3, Case A Public Ruling TAA 060.2.6 deals with deliberate tax default or an intentional disregard of tax obligations.

[155] The amended notice of appeal raises the point that the Commissioner's delegate was wrong to exercise her discretion based on events which occurred subsequent to the periods in respect of which each relevant assessment or reassessment was made. The Commissioner's decision was based on the deliberate conduct of the appellants in failing to comply with the s 87 TAA notices, or otherwise co-operate with the investigation. I do not think the discretion was exercised improperly. There is no doubt this conduct is something which is relevant to consider in exercising the discretion to remit penalty tax. I would not interfere with the exercise of that discretion.

Unpaid Tax Interest

[156] Section 54 of the TAA imposes unpaid tax interest and s 60 of that Act gives the Commissioner a discretion to remit it.

[157] The appellants argued that the Commissioner ought to have remitted unpaid tax interest because, by regulation, it is charged at the bank bill yield rate plus an uplift of 8%. It is said that this is excessive when compared to usual commercial interest rates and so operates as an additional penalty.

[158] The investigation report recommended that unpaid tax interest be charged in full with no remission and the letter of 4 February 2015 explained that Public Ruling TAA 060.1.4 provides that the discretion to remit unpaid tax interest will only be exercised when exceptional circumstances apply or where the tax has been paid to the wrong jurisdiction. The letter continues that "in accordance with this Ruling", no unpaid tax interest will be remitted in this instance. The letter notes that unpaid tax interest applies to compensate the State for a delay in paying tax, and also to encourage compliance with tax laws. This appears to be taken from the Explanatory Memorandum to the TAA.[19]

[159] In substance the same thing is said in the Commissioner's letter of 1 June 2016 and the reasons of 4 July 2018 add nothing further to that.

[160] Again, I am dealing with the exercise of discretion by the Commissioner and my only role is to see whether the Commissioner made any appealable error when exercising that discretion. The Commissioner had regard to the correct law and the relevant Public Ruling. The amount which the TAA imposed is one set by regulation and I cannot see any merit in the appellants' submission that it is higher than commercial interest rates. The purpose of the interest is not only compensatory. I cannot see that there is any appealable error made by the Commissioner in this regard.

Rights of objection and appeal

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[19] Explanatory Notes, Taxation Administration Bill 2001, pp 6-7.

[161] Section 63 of the TAA provides as follows:

> "**63 Right to object**
>
> (1) A taxpayer who is dissatisfied with an original assessment, other than a compromise assessment, may object to the assessment.
>
> (2) Also, a taxpayer who is dissatisfied with a reassessment increasing a taxpayer's liability for tax, or a reassessment under section 18(b) decreasing a taxpayer's liability for tax, may object to the reassessment.
>
> …"[20]

[162] Two of the reassessments the subject of appeal in this case (1 July 2014 – 14 September 2014 and 15 September 2014 – 22 September 2014) were assessments which decreased the liability of the appellants to pay tax. They were not assessments to which s 18(b) applied. The Commissioner argued therefore that the appellants had no right to object (and therefore appeal) in relation to these assessments. In view of my findings and determinations above, I need not determine this point of statutory construction.

Account

[163] It was submitted on behalf of the appellants that I ought to order an account. They asserted that the amount refunded as a consequence of the 18 May 2020 decision ought to have been greater but did not really explain why that was or develop the submission in any detailed way. I am not convinced that there is any need for an account. If the appellants claim they ought receive more money from the Commissioner, they ought to make a detailed submission to the Commissioner setting out the factual basis for that contention.

Costs

[164] I will hear the parties as to the costs of these appeals.

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20 Since the hearing of this appeal s 63 has changed, however not so as to affect this point.