



Decision impact statement

Commissioner of Taxation v Hicks [2025] FCAFC 171

❶ Relying on this Decision impact statement

This publication provides our view on the implications of the court or tribunal decision discussed, including on related public advice or guidance.

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Venue: Full Federal Court of Australia
Venue reference No: QUD 368 of 2024
QUD 369 of 2024

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QUD 372 of 2024

Judgment date:

3 December 2025

Summary of decision

1. This Decision impact statement outlines the ATO's response to this case, which concerned the application of section 45B and Part IVA of the *Income Tax Assessment Act 1936* to a series of steps carried out as part of a restructure of a private group of entities in the 2016 income year. Under the scheme, shareholders of a company received capital distributions through the selective buy-back of shares to facilitate the repayment of Division 7A loans within the group.
2. The Full Federal Court dismissed the Commissioner's appeal and found that each of the Taxpayers was not liable to tax as a result of section 45B or Part IVA of the *Income Tax Assessment Act 1936*. Broadly, the Court concluded that:
 - section 45B did not apply as the capital distribution could not be viewed as being made in substitution for a dividend, due to the relevant 'profits' being profits of a trust, and
 - Part IVA did not apply as the Court, in considering what 'might reasonably be expected to have happened' in the absence of the scheme, accepted the Taxpayer's alternative postulate.
3. The Commissioner applied for special leave to appeal the Full Federal Court's decision to the High Court, which was refused.
4. All further legislative references in this Decision impact statement are to the *Income Tax Assessment Act 1936*.
5. All judgment references in this Decision impact statement are to *Commissioner of Taxation v Hicks* [2025] FCAC 171 (*Hicks*) unless otherwise indicated.

Overview of facts

Background

6. The City Beach Trust (CBT) is a unit trust, settled in February 1985. Its trustee is Fewstone Pty Ltd (Fewstone). It operates the City Beach retail business and was, at all relevant times, controlled by Mr Ierna and Mr Hicks.
7. Prior to a restructure in the 2016 income year, the units in CBT were held as follows:
 - 14 units held by Mr Ierna, acquired prior to 20 September 1985
 - 1 unit held by the trustee of the Ierna Family Trust (IFT), acquired in June 1991, and
 - 15 units held by the trustee of the William Hicks Family Trust (WHFT), acquired prior to 20 September 1985, (together, the Unitholders).
8. The IFT and WHFT are discretionary trusts. The trusts were controlled by Mr Ierna and Mr Hicks, respectively, via a corporate trustee.
9. The units in CBT did not carry fixed entitlements to distributions of income. It was at Fewstone's discretion as trustee how CBT's trust income was to be distributed each year.

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10. Before the restructure, the income of CBT was historically distributed equally between IFT and WHFT, which then distributed their income to a corporate beneficiary.

- For a period prior to the 2012 income year, this corporate beneficiary was Mastergrove Pty Ltd (Mastergrove) a company ultimately controlled by Mr Ierna and Mr Hicks.
- From 2012, IFT and WHFT each distributed its income to different corporate beneficiaries, Ierna Beneficiary Pty Ltd (Ierna Beneficiary) and Hicks Beneficiary Pty Ltd (Hicks Beneficiary), respectively.

11. The corporate beneficiaries did not distribute all of their income as dividends. Instead, they advanced loans to their controllers (Mr Ierna and Mr Hicks) and their related entities. These loans complied with section 109N as to minimum interest rate and loan period requirements, such that they were not deemed to be dividends due to the application of Division 7A (Division 7A loans).

12. The Division 7A loans needed to be repaid by 30 June 2016. Prior to the restructure, as at 29 June 2016, the aggregate balance of the Division 7A loans advanced by the corporate beneficiaries was \$51,873,148.35.

Restructure

13. A restructure was undertaken in the income year ended 30 June 2016 (Restructure). It involved 3 steps.

Step 1 – interposition of a new company between CBT and its unitholders

14. A new company, Methuselah Holdings Pty Ltd (Methuselah), acquired all the units in CBT in exchange for shares issued in itself. The shares issued in Methuselah were priced by reference to the value of the underlying City Beach business operated by CBT. Following the interposition of Methuselah, each of Mr Ierna, IFT and WHFT held the same proportionate interests in Methuselah as they had held in CBT.

15. Mr Ierna and the trustee of WHFT had acquired their units in CBT prior to 20 September 1985. Both chose to apply a roll-over for CGT purposes on the disposal of their CBT units, such that the shares in Methuselah which they received in exchange were treated as pre-CGT assets. The shares in Methuselah issued to the trustee of IFT were not treated as pre-CGT assets.

Step 2 – selective share capital reduction and loan-back

16. Methuselah undertook a selective share capital reduction of the shares held by each of Mr Ierna and WHFT (a total of 10,400,000 shares, amounting to a capital return worth approximately \$52 million). As part of this step, Mr Ierna and WHFT did not require payment of the full cancellation amount, but rather provided interest-free, on-demand loans back to Methuselah.

17. As a consequence of the share capital reduction being paid in respect of pre-CGT shares in Methuselah, the distribution did not give rise to any income tax consequences for either Mr Ierna or WHFT in the 2016 income year.

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Step 3 – debt assignment and discharge of Division 7A loans

18. Mr Ierna and WHFT assigned part of the capital reduction debt owed to them by Methuselah to the corporate beneficiaries that had previously made the Division 7A loans. This extinguished the Division 7A loans and left the companies with an interest-free, on-demand receivable from Methuselah which was not subject to Division 7A.

19. With effect from 1 July 2016, Methuselah and CBT formed a tax consolidated group with Methuselah as the head company. The income of CBT could be accumulated within Methuselah, rather than being distributed through the series of family trusts. No income tax consequences should arise in respect of any intra-group distributions of that income.

The Commissioner's determinations

20. The Commissioner made determinations under subsection 45B(3) to treat the \$26 million in capital benefits (the proceeds for the selective share capital reduction) received by each of Mr Ierna and WHFT as unfranked dividends paid by Methuselah. WHFT's net income was assessed to Hicks Beneficiary as the beneficiary presently entitled to all of WHFT's income in the 2016 income year.

21. In the alternative, the Commissioner made determinations under section 177F of Part IVA in respect of Mr Ierna and Mr Hicks to cancel the tax benefits they obtained in connection with the scheme. The tax benefit was identified by reference to an alternative postulate involving the repayment of the Division 7A loans being funded by \$26 million in franked dividends.

22. Mr Ierna, Mr Hicks and Hicks Beneficiary are collectively referred to as the Taxpayers.

Issues decided

23. The Court unanimously held that the Taxpayers were not liable to be assessed on an additional amount of tax by operation of the specific anti-avoidance rule contained in section 45B or, alternatively, by the operation of the general anti-avoidance rule contained in Part IVA.

Decision on section 45B

24. The first question considered by the Court was whether the interposition of Methuselah above CBT and the return of capital from Methuselah was a scheme that attracted the operation of section 45B. Key to this was whether the scheme was entered into for the non-incidental purpose of enabling the Taxpayers to obtain a relevant 'tax benefit', as defined in subsection 45B(9).

25. Subsection 45B(9) looks to identify a tax benefit for the purposes of section 45B by way of comparison to the tax outcomes which would have arisen if the relevant demerger benefit or capital benefit had instead (hypothetically) been an assessable dividend.

26. In its decision, the Court concluded that the hypothetical assessable dividend posited for the purposes of subsection 45B(9) itself, does not need to be a 'possible' or 'reasonably expected' dividend.¹

¹ At [100].

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27. However, the Court also observed that when considering the purpose of the scheme under paragraph 45B(2)(c), it is difficult to comprehend how a scheme could be said to have been entered into for the purpose of achieving the tax benefit required by subsection 45B(9), if it was not possible for there to have been a payment of a hypothetical assessable dividend at all.²

28. The Court's view was informed by the statements regarding the 'purpose' of section 45B as set out in subsection 45B(1).³ Subsection 45B(1) identifies that one purpose of section 45B is ensuring that amounts are treated as assessable dividends if a distribution is made in substitution for dividends.

29. The Court found that the share capital account of Methuselah was 'attributable' to the unrealised profits of CBT, and rejected the Taxpayers' argument that paragraph 45B(8)(a) requires that the identified profits be 'causative' of the decision to return capital.

30. However, the Court then observed that, prior to entry into the scheme, the relevant profits were the profits of a trust (CBT) that was not treated as a company for tax purposes. Accordingly those profits were at no point available to be distributed as a dividend to either of the beneficiaries.⁴

31. On this basis, the Court held that on the facts at issue, each of the 'relevant circumstances' in subsection 45B(8) did not point to the requisite purpose.⁵

32. Therefore, the Court found that despite the capital of Methuselah being 'attributable' to the profits of an associate, the return of that capital under the scheme could not be viewed as being in 'substitution' for a dividend, with the result that the scheme could not be considered to have been entered into for the purpose of achieving the specific tax benefit identified in subsection 45B(9).⁶

Decision on Part IVA

33. In considering the application of Part IVA, the Court began by considering whether Mr Ierna and Mr Hicks had obtained a tax benefit for the purposes of section 177C.

34. The Court considered that its task in relation to this question was to 'find what might reasonably be expected to have happened if the scheme had not been entered into or carried out, based on the facts, circumstances and totality of the evidence'.⁷

35. The Court further considered that, where a scheme is carried out as a part of a wider set of transactions, the identification of the alternative postulate may involve modification to associated or connected transactions if supported by evidence. The analysis cannot be confined by an articulation of a (narrower) scheme.⁸

36. In that context, the Court found that had the scheme not been entered into or carried out, the Unitholders of CBT would have transferred those units to Methuselah in

² At [106].

³ See [83–94].

⁴ At [119].

⁵ At [152].

⁶ At [122].

⁷ At [189].

⁸ At [191–192].

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exchange for shares and a receivable owed by Methuselah, with that receivable then being utilised to repay the Division 7A loans.⁹

37. Under this alternative postulate, the tax benefits identified by the Commissioner would not have arisen, as there would be no assessable dividend and the sale of the units would have been effectively tax free due to all of their units in CBT being pre-CGT assets. Accordingly, the Court held that Mr Ierna and Mr Hicks had satisfied their onus of establishing that there was no tax benefit for the purposes of section 177C.

38. Notably, the Court then stated that having found that Mr Ierna and Mr Hicks had positively demonstrated what might reasonably be expected to have happened if the scheme had not been entered into or carried out, it was unnecessary to consider whether the Commissioner's alternative postulate was itself 'reasonable'¹⁰, or whether the identified scheme satisfied the 'purpose' test in section 177D(1).

ATO view of this decision

Section 45B

Relevance of particular facts

39. We accept that it was open to the Court to conclude, on the facts at issue, and in respect of the scheme identified by us, that the factors identified in subsection 45B(8) did not support the conclusion that the participants entered into or undertook the scheme for the purposes of enabling any party to gain a relevant tax benefit.

40. Key facts we consider relevant for the outcome in this case include the following:

- The profits of CBT had accumulated prior to the acquisition of CBT by Methuselah. A distribution of those profits by CBT would not have given rise to a distributable profit in the hands of Methuselah. The Court considered this to be relevant to determining the effect of paragraph 45B(8)(a).¹¹
- Other companies in the private group (for example, Mastergrove) did not have a history of distributing dividends to all of the relevant Taxpayers, nor were any dividends used to repay Division 7A loans. The Court considered this to be relevant to determining the effect of paragraph 45B(8)(b).¹²
- The majority of the issued shares in Methuselah were pre-CGT assets, as were the original CBT units prior to the restructure. This provided a range of avenues for the Taxpayers to realise the value of CBT in a tax-free manner, beyond the identified scheme. The Court considered this to be relevant to determining the effect of paragraph 45B(8)(d).¹³

Requirement for a hypothetical dividend

41. We agree with the Court's observation that it is not necessary for the purposes of subsection 45B(9) to identify an alternative hypothetical dividend that meets any of a 'possible', 'reasonably expected' or 'would have happened' standard.¹⁴

⁹ At [202].

¹⁰ At [204].

¹¹ At [120].

¹² At [127–128].

¹³ At [135].

¹⁴ At [99–100].

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Application of section 45B to structures involving trusts

42. We consider that *Hicks* may have the effect of limiting the application of paragraph 45B(8)(a), in situations where a company pays a distribution that is attributable to the profits of a trust (that is not treated as a company for tax purposes), and which is not attributable to profits of the company itself, or any other associated company.

43. However, where a corporate group has introduced a trust into its structure or otherwise moved the profits of a company into a trust, for the purpose of aligning itself with the facts of *Hicks*, we may identify such steps as a part of a broader scheme which may continue to attract the application of section 45B.

Interposition of new company not determinative

44. We agree with the Court's observation that paragraph 45B(8)(a) may be enlivened even where the company that paid the capital benefit itself has no profits available to be distributed as a dividend.¹⁵

45. The Court particularly observed:

- An example where section 45B could still have potential application, is where 'a new holding company is interposed over a chain of subsidiary companies, each with accumulated retained earnings'.¹⁶
- The share capital account of Methuselah was itself 'attributable' to the unrealised profits of CBT.¹⁷

'Attributable' does not require causation

46. We agree with the Court's observation that the term 'attributable' in paragraph 45B(8)(a) does not require that the identified profits be 'causative' of the decision to return capital.¹⁸

Part IVA

Standard required for an alternative postulate

47. In concluding that it was unnecessary to consider whether the Commissioner's identified postulate was also reasonable because the Taxpayers had 'positively demonstrated what might reasonably be expected to have happened if the scheme had not been entered into', on one view the Court might be understood as implicitly adopting the view that there can be but one alternative postulate.¹⁹

48. Moreover, in identifying the existence of a tax benefit, the Court appeared to consider that it was the Court's task to find 'what might reasonably have happened if the scheme had not been entered into or carried out'²⁰. This could, on one view, be understood as a test of likelihood of the postulate itself, rather than whether a tax effect might reasonably be expected to have occurred, based on a postulate that is a reasonable alternative.

¹⁵ At [114].

¹⁶ At [114].

¹⁷ At [117].

¹⁸ At [117].

¹⁹ At [204].

²⁰ At [189].

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49. We consider that approach would sit in tension with the recent statements of the High Court in *Commissioner of Taxation v PepsiCo Inc* [2025] HCA 30 (*PepsiCo*), in which the Court raised the possibility that there can be more than one alternative postulate that is reasonable.²¹ Furthermore, we consider that approach would sit in tension with the stated aim behind the introduction of section 177CB, which is not to identify what the taxpayer would have done in the absence of the scheme, if anything, but rather to identify a reasonable substitute for the scheme.²²

50. The parties did not advance written submissions before the Court in *Hicks* on the question of whether there can be multiple reasonable alternative postulates for the purposes of identifying a tax benefit under subsection 177CB(3).

51. Since the decision in *Hicks*, Younan J has handed down a decision in the case of *Hilton International Australia Pty Ltd v Commissioner of Taxation (No 2)* [2026] FCA 1325 (*Hilton*) (see Intermin Decision impact statement on *Hilton International Australia Pty Ltd v Commissioner of Taxation (No 2)* [2026] FCA 1325 for further detail). In *Hilton*, the question of whether subsection 177CB(3) requires the identification of a single 'preferred' postulate arose for consideration. Her Honour observed (after argument) that there can be more than one reasonable alternative postulate for the purposes of subsection 177CB(3).²³ Her Honour further observed that the relevant test was not one of probability.²⁴ We respectfully agree with her Honour's observations.

Our application of *Hicks*

52. Where the choice of alternative could affect the amount of the tax benefit, it is presently our practice to seek to identify what, in our view, is the most likely alternative having regard to the matters mentioned in subsection 177CB(3), as well as relying on other apparently reasonable courses of action by way of alternative, should his preferred postulate not be accepted.

53. In practice, Part IVA cases that involve a dispute as to tax benefit generally involve factual disputes going to the relative probability of alternative courses of action, as indeed was the case in *Hicks*. Normally, the parties will contend that their suggested postulate is in fact the most probable alternative, as well as a 'reasonable' alternative. Further, it is not unusual for either the Commissioner or the taxpayer, or both, to advance more than one postulate. This reflects the fact that the extent to which evidence or testimony will be accepted or rejected is often difficult to predict (especially in the earlier stages of a dispute).

54. We will seek to obtain findings of fact as to the reasonableness and likelihood of all postulates advanced by either party, so that if the question of whether it is open to advance more than one postulate as 'reasonable', and the relevance of the actual likelihood of any given course of action to its 'reasonableness' for the purposes of subsection 177CB(3), arises again at an appellate level, it can be definitely settled.

²¹ *PepsiCo* at [207].

²² Explanatory Memorandum to the Tax Laws Amendment (Countering Tax Avoidance and Multinational Profit Shifting) Bill 2013 (2013 EM) described the purpose and context of the introduction of section 177CB. The 2013 EM notes that section 177CB was introduced to ensure that Part IVA could apply where the Commissioner identified 'a reasonable substitute for the scheme' (at paragraphs 1.53 and 1.85) rather than requiring 'an open-ended inquiry into what, if anything, the taxpayer might reasonably have done' (paragraphs 1.48 to 1.51).

²³ *Hilton* at [104].

²⁴ *Hilton* at [92].

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Implications for affected advice or guidance

55. We are reviewing the impact of this decision on related advice or guidance, including:

- Law Administration Practice Statement PS LA 2005/24 *Application of General Anti-Avoidance Rules* which provides guidance to tax officers who are contemplating the application of Part IVA or other general anti-avoidance rules to an arrangement.
- Law Administration Practice Statement PS LA 2008/10 *Application of section 45B of the Income Tax Assessment Act 1936 to share capital reductions* which provides instruction and guidance to tax officers on the application of section 45B to a share capital reduction by a company.

Comments

56. We invite you to advise us if you feel this decision has consequences we have not identified. Forward your comments to the contact officer.

Due date: 20 November 2026
Contact officer: Antony Faisandier
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Commissioner of Taxation
21 October 2026

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References

Legislative references:

- ITAA 1936 6
- ITAA 1936 45B
- ITAA 1936 45B(1)
- ITAA 1936 45B(3)
- ITAA 1936 45B(2)(c)
- ITAA 1936 45B(3)
- ITAA 1936 45B(8)
- ITAA 1936 45B(8)(a)
- ITAA 1936 45B(8)(b)
- ITAA 1936 45B(8)(d)
- ITAA 1936 45B(9)
- ITAA 1936 109N
- ITAA 1936 177C
- ITAA 1936 177CB
- ITAA 1936 177CB(3)
- ITAA 1936 177D(1)
- ITAA 1936 177F
- ITAA 1936 Pt IVA
- ITAA 1936 Div 7A

Cases relied on:

Commissioner of Taxation v Hicks
[2025] FCAC 171
Commissioner of Taxation v PepsiCo
Inc [2025] HCA 30
Hilton International Australia Pty Ltd v
Commissioner of Taxation (No 2)
[2026] FCA 1325

Other references:

Explanatory Memorandum to the Tax
Laws Amendment (Countering Tax
Avoidance and Multinational Profit
Shifting) Bill 2013
PS LA 2005/24
PS LA 2008/10

ATO references

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