



Interim decision impact statement

Hilton International Australia Pty Ltd v Commissioner of Taxation (No 2) [2026] FCA 1325

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Venue: Federal Court of Australia
Venue reference No: NSD 565 of 2023
Judgment date: 9 September 2026

Summary of decision

1. This Interim decision impact statement is intended to be read with the Decision impact statement on *Commissioner of Taxation v Hicks* [2025] FCAFC 171.

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2. This Interim decision impact statements outlines the ATO's response to *Hilton International Australia Pty Ltd v Commissioner of Taxation (No 2)* [2026] FCA 1325. The case concerned the application of Part IVA of the *Income Tax Assessment Act 1936* to a scheme consisting of a pre-sale restructure within the Hilton Group immediately before a sale of shares in an eligible tier-1 (ET-1) company that owned the Hilton Hotel Sydney. The scheme was of the kind described by Taxpayer Alert TA 2019/1 *Multiple entry consolidated (MEC) groups avoiding CGT through intra-group debt*. The scheme had the result that the hotel, which had greatly appreciated in value, was effectively sold to an unrelated third party on commercial terms; however, Hilton only returned a small net capital gain of approximately \$21 million on that sale.
3. The Court upheld the Commissioner's Part IVA determination and accordingly dismissed Hilton International Australia Pty Ltd's (HIA) appeal against the objection decision. It held that the taxpayer obtained a tax benefit, as the Commissioner's 3 alternative postulates, each of which resulted in the obtaining of a tax benefit of the same amount, were all reasonable alternatives to the scheme. The Court also found that the taxpayer's submitted alternative was not a reasonable alternative, and if that were wrong and the taxpayer's submitted alternative were a reasonable alternative, it would not be the preferred alternative. It also held that the Hilton Group entered into or carried out a scheme for the dominant purpose of enabling HIA to obtain a tax benefit in connection with the scheme. Consequently, Part IVA applied to the scheme.
4. The taxpayer has appealed to the Full Federal Court of Australia.
5. All further legislative references in this Interim decision impact statement are to the *Income Tax Assessment Act 1936*, unless otherwise indicated.
6. All further judgment references in this Interim decision impact statement are to the judgment of *Hilton International Australia Pty Ltd v Commissioner of Taxation (No 2)* [2026] FCA 1325, unless otherwise indicated.

Administrative treatment

7. The Commissioner will continue his practice in relation to the identification of reasonable alternatives to the scheme for the purposes of determining whether there is a tax benefit under sections 177C and 177CB as outlined at paragraphs 52 to 55 of the Decision impact statement on *Commissioner of Taxation v Hicks* [2025] FCAFC 171 (*Hicks*).

Overview of facts

8. HIA was the provisional head company of a multiple entry consolidated group (HIA MEC Group) during the year of income ending 31 December 2015. The foreign top company was Hilton Worldwide International Luxembourg Holding S.a.r.l (HWIH). HWIH was the sole owner of the single share in Admiral Holdings Australia Pty Ltd (AHA), as well as the sole owner of HIA. Both AHA and HIA were ET-1 companies.
9. Prior to the sale of the Hilton Hotel Sydney, a complex group restructure was undertaken which included steps to transfer all the sale assets into one entity (AHA) with significant intragroup debt. The value of the sale assets was approximately \$449 million. It was the steps of this pre-sale restructure that comprised the scheme, for the purposes of Part IVA.
10. When HWIH sold its share in AHA to the third-party purchaser, Glory Property III Investment Pty Ltd (Glory), the consideration for that sale was approximately \$29 million

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cash and the agreement that Glory would repay a \$420 million intercompany loan note owing by AHA to HIA.

11. The debt loading and the ET-1 status of AHA were 2 factors of the scheme which, when combined, resulted in a depressed net capital gain being returned of approximately \$21 million on what was in substance a sale of assets worth approximately \$449 million.

12. The Commissioner submitted that there were 3 alternative postulates to the scheme (AP1, AP2 and AP4). AP1 involved a direct asset sale (instead of an entity sale). AP2 and AP4 involved entity sales. Under AP2, the sale would be achieved using an existing entity, Admiral Investments Pty Ltd (AIPL). Under AP4, the sale would be achieved using a newly created clean skin entity, NewCo. All 3 of the Commissioner's alternative postulates identified that the net capital gain on the sale should have been approximately \$179 million and accordingly resulted in the same tax benefit amount. Under the Commissioner's alternatives it would be HIA (as the provisional head company of the Hilton MEC Group) that should have returned the net capital gain.

13. HIA submitted its own alternative postulate (AP3). It contemplated a share sale of AHA and removed the intragroup debt from AHA prior to sale. AP3 resulted in a higher net capital gain to HWIH than what had been returned in 2015.

14. The Commissioner made a determination under paragraph 177F(1)(a) of Part IVA to cancel the tax benefit and issued an amended assessment to HIA to reflect this. HIA objected to the amended assessment and the Commissioner disallowed this objection. HIA appealed that decision to the Federal Court of Australia.

Issues decided by the Court

15. The Court considered whether HIA obtained a tax benefit and whether the Hilton Group's dominant purpose in carrying out the scheme was to obtain the tax benefit.¹

Did Hilton International Australia Pty Ltd obtain a tax benefit?

16. The Court determined that all 3 of the Commissioner's alternative postulates (AP1, AP2 and AP4) were reasonable alternatives, within the meaning of subsection 177CB(3).² The Court also determined that HIA's alternative postulate (AP3) was itself a Part IVA scheme, and therefore not a reasonable alternative.³

Identifying a 'reasonable alternative' to the scheme

17. In observations that are not part of the ratio decidendi (for reasons explained below) the Court accepted the Commissioner's submission that there could be multiple alternative postulates and rejected the taxpayer's submission that it was the task of the Court to identify a single preferred alternative postulate. The Court referred to the language of subsection 177CB(3) with the reference to 'a reasonable alternative', rather than '*the* reasonable alternative', and observed that it is not necessary that an alternative

¹ The parties were in agreement that the transactions identified by the Commissioner (which, together, constitute the Actual Sale) constitute a 'scheme' within the meaning of section 177A, at [69].

² At [237].

³ At [238].

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postulate be the *most* reasonable alternative postulate in order to be a reasonable alternative.⁴

18. In this context, the Court considered that the task required of a Court is to look at all of the alternative postulates proposed by the parties and ask whether one or more is reasonable. Of the alternatives determined to be reasonable, the Court then considers whether the taxpayer's income would have been higher under each alternative. If the taxpayer's income would have been higher under more than one alternative, then the highest point indicates the extent of the disparity between the scheme and 'a reasonable alternative', and therefore the extent of any tax benefit in relation to the scheme.⁵ We agree with these observations.

19. However, the Court considered that it was not necessary to reach a conclusion on whether paragraph 177C(1)(a) and subsection 177CB(3) required the identification of a single reasonable alternative postulate on the basis that:

- (a) There was at least one reasonable alternative to the scheme that resulted in a tax benefit.
- (b) All the alternative postulates found to be reasonable would result in the same taxpayer obtaining the same tax benefit.
- (c) HIA's alternative, AP3, was not reasonable as it was itself a Part IVA scheme.⁶ Further, if it were a reasonable alternative and it was necessary to identify a single reasonable alternative, it would not be the preferred alternative.
- (d) If it were necessary to identify a single reasonable alternative, the preferred alternative was AP4.
- (e) The Court further observed that paragraph 177C(1)(a) and section 177CB do not prescribe a test of the degree of probability or likelihood that an alternative postulate would be adopted in the absence of the scheme. Subsection 177CB(3) provides the sole test, in that what might reasonably be expected to have occurred in the absence of the scheme for the purposes of determining whether there is a tax benefit under section 177C is ascertained only by reference to a reasonable alternative to the scheme.⁷

Substance of the scheme and alternative postulates under subsection 177CB(4)

20. The Court emphasised that the assessment of reasonableness under subparagraph 177CB(4)(a)(i) focuses on the commercial and economic substance of the scheme rather than its legal form. The Court held, applying *Commissioner of Taxation v PepsiCo Inc* [2025] HCA 30 (*PepsiCo*), that the reasonable alternative postulate should correspond to the commercial and economic substance of the scheme, in the sense that the commercial and economic substance of the reasonable alternative postulate should generally accord with the commercial and economic substance of the scheme.⁸ The Court rejected HIA's submission that this requires the alternative to exhibit the same substance

⁴ At [104] and [161].

⁵ At [104].

⁶ At [239].

⁷ At [92].

⁸ At [94].

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as found in the scheme and that the share sale structure itself formed part of the commercial and economic substance of the scheme.⁹

Whether a postulate can be a reasonable alternative if it is itself a Part IVA scheme

21. The Court decided that when undertaking the assessment under subsection 177CB(3), the Court should not have regard to a postulate that meets the description of a Part IVA scheme.¹⁰

22. In considering the intent of section 177CB, the Court concluded that there was nothing in paragraph 177CB(4)(b) that requires a tax-avoidance purpose underlying an alternative postulate be disregarded when assessing its reasonableness as an alternative to the scheme; such a purpose is not a tax cost to be disregarded¹¹ and has no role to play in the comparison required by paragraph 177C(1)(a) between the scheme and the reasonable alternatives.¹² The comparative exercise required by paragraph 177C(1)(a) points against a Part IVA scheme being a reasonable alternative as the use of a Part IVA scheme as a comparator leads to a potentially interminable enquiry where the tax effect of one scheme is measured by reference to the tax effect of another scheme¹³ and circumvents the purpose and design of section 177C.¹⁴

23. In assessing whether AP3 was itself a Part IVA scheme the Court compared AP3 with the other alternative postulates and considered it had the same tax-avoidance hallmarks as the scheme.¹⁵ The Court held HIA did not discharge its onus of demonstrating that AP3 would not have been subject to Part IVA and found that it was itself a Part IVA scheme.¹⁶

24. The Court also found if it was wrong about AP3 being a Part IVA scheme, AP3 would otherwise be a reasonable alternative, but it was not the preferred alternative¹⁷ as, if it were necessary to decide, AP4 was the preferred alternative.

Dominant purpose

25. The Court concluded that, although the scheme was consistent with the pursuit of a commercial gain, the dominant purpose of the scheme was to enable HIA to obtain a tax benefit because the objective evidence showed that the chosen structure was not explained by the commercial objectives but was instead a tax-driven arrangement.¹⁸ The manner in which the scheme was carried out, as well as the disparity between the form and substance indicate that the dominant purpose was not the commercial advantages secured by the actual sale.¹⁹

⁹ At [95] and [133].

¹⁰ At [222].

¹¹ At [216].

¹² At [218].

¹³ At [221].

¹⁴ At [222].

¹⁵ At [225], [232], [233] and [236].

¹⁶ At [238].

¹⁷ At [238].

¹⁸ At [310].

¹⁹ At [311].

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ATO view of decision

26. The decision provides significant guidance on the analysis required by section 177CB as to the identification of reasonable alternatives to a scheme, for the purposes of establishing a tax benefit.

Identifying a reasonable alternative to the scheme

27. The Court observed, consistently with the observations of the High Court in *PepsiCo*²⁰, that there can be more than one reasonable alternative, that all alternative postulates proposed by the parties must be considered by the Court, and if there are multiple reasonable alternatives, the tax benefit is the highest amount produced by any of them.²¹ This observation reflects that the task of identifying an alternative postulate has changed after the introduction of section 177CB. Subsection 177CB(3) requires a comparison with reasonable substitutes for the scheme, not a comparison with what the taxpayer might be expected to have done in the absence of the scheme and is the sole test of what might reasonably be expected to have occurred in the absence of the scheme for the purposes of section 177C. We agree with these observations and considers that the Court's approach to the construction of subsection 177CB(3) is correct and is consistent with the purpose of, and context to, the introduction of section 177CB, as well as the relevant extrinsic material.

Substance of the scheme and alternative postulates under subsection 177CB(4)

28. The Court confirmed that the form and structure of a scheme is not part of the substance of a scheme, and paragraph 177CB(4)(a) does not require the alternative postulates to exhibit the same substance as the scheme to be reasonable alternatives; correspondence means that the substance of an alternative postulate need only generally accord with that of the scheme. We consider that the Court has correctly followed the guidance in this regard as stated by the High Court in *PepsiCo*.²²

Whether a postulate can be a reasonable alternative if it is itself a Part IVA scheme

29. This is the first case, involving the post 2013 amendments, where a Court has ruled against a taxpayer's proposed alternative postulate on the basis that it would, itself, have been a scheme to which Part IVA applied. (See, however, *Commissioner of Taxation v Trail Bros Steel & Plastics Pty Ltd* [2009] FCA 1210 at [52]; *Futuris Corporation Limited v Commissioner of Taxation* [2010] FCA 935 at [113] where the principle was accepted, under the pre-2013 provisions of Part IVA.)

30. The Court decided that subsection 177CB(3) requires a comparison with an alternative postulate that is a reasonable substitute for the scheme, not an alternative that is also a tax avoidance arrangement. We consider the Court's construction of paragraph 177C(1)(a), subsection 177CB(3) and paragraph 177CB(4)(b) to be correct; if it were otherwise, it would undermine the purpose and design of the tax benefit provisions. We

²⁰ Per Gordon, Edelman, Steward and Gleeson JJ at [207] and Gageler CJ, Jagot and Beech-Jones JJ at [96].

²¹ Subsection 177F(1) provides that the Commissioner 'may' cancel 'the whole or part of' a tax benefit.

²² Per Gordon, Edelman, Steward and Gleeson JJ at [218] and Gageler CJ, Jagot and Beech-Jones JJ at [95].

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agree with the finding that AP3 was a scheme with ‘the same tax-avoidance hallmarks’ and thus it was not a reasonable alternative to the scheme under subsection 177CB(3).

31. Although the judgment of Younan J, is entirely consistent with the Commissioner’s view of the law, these questions are not finally settled. As noted at paragraph 4 of this Interim decision impact statement, the taxpayer has appealed to the Full Federal Court of Australia. Consequently, while we take the view that multiple alternative postulates may be available in an application of subsection 177CB(3), it will continue to be our practice, when applying subsection 177CB(3), to identify a single preferred alternative where the choice of alternative could affect the amount of the tax benefit, as well as all reasonable alternatives, with a view to obtaining appropriate findings of fact, pending final resolution of the issue. See, further, paragraphs 52 to 54 of the Decision impact statement on *Commissioner of Taxation v Hicks* [2025] FCAFC 171.

Commissioner of Taxation

21 October 2026

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References

Legislative references:

- ITAA 1936 177(1)(a)
- ITAA 1936 177A
- ITAA 1936 177C
- ITAA 1936 177C(1)(a)
- ITAA 1936 177CB
- ITAA 1936 177CB(3)
- ITAA 1936 177CB(4)
- ITAA 1936 177CB(4)(a)(i)
- ITAA 1936 177CB(4)(b)
- ITAA 1936 177D
- ITAA 1936 177F
- ITAA 1936 177F(1)(a)

Cases relied on:

Commissioner of Taxation v PepsiCo Inc [2025] HCA 30; 2025 ATC 20-969; 124 ATR 1
Commissioner of Taxation v Hicks [2025] FCAFC 171; 2025 ATC 20-985
Commissioner of Taxation v Trail Bros Steel & Plastics Pty Ltd [2009] FCA 1210; 2009 ATC 20-141; 75 ATR 916
Futuris Corporation Limited v Commissioner of Taxation [2010] FCA 935; 2010 ATC 20-206; 80 ATR 330

Other references:

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ATO references

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