



MEMO

To: Board of Directors
From: Company Secretary
Subject: **ULTIMATE HOLDING COMPANY**

In response to your question about whether ECL is in fact the Ultimate Holding Company of BPL, I advise and comment hereunder.

Simply put, **a company is an Ultimate Holding Company if it has a subsidiary (and/or its subsidiary in turn has a subsidiary) but it is itself not a subsidiary of another company.** That is, it is the 'top' company in a chain of [one or more] other subsidiary companies (or companies it controls) 'below' it.

Therefore, I believe it is quite clear that ECL is the Ultimate Holding Company of BPL. That is:

- BPL is a subsidiary of GEL, so GEL is its holding company.
- GEL is a subsidiary of ECL, so ECL is its holding company.
- ECL is not a subsidiary of any other company.
- Therefore, ECL must be the Ultimate Holding Company of BPL.

By way of additional information and background in relation to an Ultimate Holding Company, I further advise:

ASIC Reporting

The name of a company's Ultimate Holding Company, if it has one, must be advised to ASIC when a new company is being formed (sec.117 & Form 201) or if, after it is formed, another company later becomes the company's Ultimate Holding Company then ASIC must be advised (sec.349B).

Under sec.117(ma) when application is lodged to form a new company the name of the Ultimate Holding Company must be inserted on the form, regardless of what type of company is being formed. However, strangely, sec.349A states that changes to an Ultimate Holding Company (which need to be reported to ASIC under secs.349B-D) need only be lodged with ASIC if the company is a proprietary company (Pty Ltd).

It does not matter if the share holding in a company is stated to be non-beneficial because the existence of any underlying trust is not generally recognised. It is the 'legal owner' that is relevant, so a company could be shown as an Ultimate Holding Company even though it is not the beneficial holder of the shares or interests.



These requirements apply whether or not the Ultimate Holding Company is situated in Australia or offshore (and if not registered in Australia, the place at which it was incorporated or formed).

ASIC must also be advised if a company ceases to be an Ultimate Holding Company (sec.349C) or it changes its name (sec.349D).

Such advices to ASIC must be lodged within 28 days of the event occurring (sec.349A).

Under sec.188 the Company Secretary has a specific responsibility to notify ASIC of Ultimate Holding Company changes, using Form 484.

Definitions

Relevant Corporations Act definitions (sec.9) are:

ultimate holding company, in relation to a body corporate, means a body corporate that:

- (a) is a holding company of the first-mentioned body; and
- (b) is itself a subsidiary of no body corporate.

holding company, in relation to a body corporate, means a body corporate of which the first body corporate is a subsidiary.

and (in sec.46):

subsidiary

A body corporate (in this section called the *first body*) is a subsidiary of another body corporate if, and only if:

- (a) the other body:
 - (i) controls the composition of the first body's board; or
 - (ii) is in a position to cast, or control the casting of, more than one-half of the maximum number of votes that might be cast at a general meeting of the first body; or
 - (iii) holds more than one-half of the issued share capital of the first body (excluding any part of that issued share capital that carries no right to participate beyond a specified amount in a distribution of either profits or capital); or
- (b) the first body is a subsidiary of a subsidiary of the other body.

Control

In practical terms, 'control' in determining if/whether a company is or has an Ultimate Holding Company may not necessarily be through share ownership, it may be in other ways.



It is considered that it would be a matter of public interest that this information be made available (as to who is the Ultimate Holding Company of a company) so that persons dealing with the company can know where the real “control” ultimately/really lies. Control does not always mean ownership or shareholding but can be exercised by other means. Therefore, the meaning of “Ultimate Holding Company” focuses on the ultimate controller of a company.

An Ultimate Holding Company must be the holding company of another and must not be a subsidiary of any other company. What this means is that one company can control another company (for example by exercising voting powers or controlling the composition of the company’s board of directors). Control may be exerted by interposed companies and therefore does not necessarily rely on a “holding company” directly holding shares in the company.

Registered Foreign Companies

If a foreign company is registered in Australia (ie, it has an ARBN), then there is no need – in fact no provision in the Act – for such company to provide its Ultimate Holding Company, if applicable, to ASIC – although any Australian incorporated subsidiary must itself lodge the name of/any change in its Ultimate Holding Company.

Financial Assistance to Acquire Shares

A company (“the first company”) may provide financial assistance to another company (or person) to enable them to acquire shares in the first company, provided (sec.260A):

(a) the giving of such assistance does not materially prejudice the interests of the first company, its shareholders, or its ability to pay its creditors;

or

(b) the assistance is approved by special resolution of the first company’s shareholders.

However, if following the acquisition the first company will have an Australian Ultimate Holding Company, then the shareholders of that holding company must also approve by special resolution the assistance by the first company – sec.260B(3).

DISCLAIMER

The comments in this memo reflect some commercial aspects and observations on the matter experienced or observed by the writer in practice as he understands them. The information is given as a guide only and does not represent a definitive or legal view of any of the issues raised, covered or referred to and the reader is urged to seek his own professional advice on all aspects of, or pertaining to, this and any related matter.