

# PART IVA: THE GENERAL ANTI-AVOIDANCE PROVISIONS IN AUSTRALIAN TAXATION LAW

G T PAGONE\*

[This article reviews Australia's principal tax anti-avoidance provision. It examines the perceived defects with s 260 of the Income Tax Assessment Act 1936 (Cth), the historical genesis of Part IVA and the analysis of this Part in recent cases. The author examines some challenges to the application of anti-avoidance provisions in the context of commercial transactions and in dealings which take account of tax effects.]

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## I INTRODUCTION

This article seeks to analyse the role of the general anti-avoidance provisions in Australian tax law and, in particular, to consider the problems which have emerged in recent cases in the attempts to apply the provisions in different

\* BA, Dip Ed, LLB (Monash), LLM (Canterbury), LLM (Cambridge); Professorial Fellow, Faculty of Law, The University of Melbourne; Queen's Counsel of the Supreme Court of Victoria.

contexts. General anti-avoidance provisions occupy a very special role in tax laws because their role is to underpin the effectiveness of the primary operative provisions when those primary provisions fail to achieve their purpose.<sup>1</sup> The particular way in which the legislature has sought to achieve that through Part IVA of the *Income Tax Assessment Act 1936* (Cth) ('ITAA') involves a substantial departure from the principles that tax laws should be applied literally and that taxpayers should be allowed to order their affairs 'so as that the tax attaching under the appropriate Acts is less than it otherwise would be.'<sup>2</sup> Part IVA seeks both to tax the amount that 'would otherwise' not be caught, and to do so upon the basis of a judgment made on a partial selection of the actual facts, rather than upon some precise and exacting application of the letter of the law to all of the facts as they are found. An actual purpose of tax avoidance is not a necessary factual ingredient in the application of the anti-avoidance provisions in Australian income tax law.

## II GENERAL ANTI-AVOIDANCE PROVISIONS IN AUSTRALIA: FORMER SECTION 260

The predecessor to Part IVA was the much shorter s 260 of the Act (a provision with antecedents dating to at least 1915, and probably 1895).<sup>3</sup> That section provided that every contract, agreement or arrangement was absolutely void as against the Commissioner of Taxation insofar as it had, or purported to have, a certain purpose or effect. That purpose or effect was described in the section as being any one of:

- (a) altering the incidence of any income tax;
- (b) relieving any person from liability to pay any income tax or make any return;
- (c) defeating, evading or avoiding any duty or liability imposed on any person by this Act; or
- (d) preventing the operation of this Act in any respect.

The words of the section were simple and, perhaps as a consequence, carried the risk of a broader application than intended. This, in turn, led to much criticism of the section and to various attempts to give a meaning to its terms that would give it reasonable and predictable application.

As long ago as 1921, Knox CJ in *Federal Commissioner of Taxation v Purcell* said of the precursor to s 260 of the 1936 Act: 'The section, if construed literally, would extend to every transaction whether voluntary or for value which had the effect of reducing the income of any taxpayer.'<sup>4</sup>

<sup>1</sup> See G T Pagone, 'Tax Planning or Tax Avoidance' (2000) 29 *Australian Tax Review* 96.

<sup>2</sup> *Commissioners of Inland Revenue v Duke of Westminster* [1936] AC 1, 19 (Lord Tomlin).

<sup>3</sup> The provisions of s 260 in the Act were substantially the same as those in s 53 of the *Income Tax Assessment Act 1915* (Cth) ('1915 Act'). They, in turn, can be traced to similar provisions in the *Land Tax Assessment Act 1910* (Cth) s 63, the *Income Tax Act 1895* (Vic) s 44 and the *Land and Income Tax Assessment Act 1895* (NSW) s 63.

<sup>4</sup> (1920) 29 CLR 464, 466.

For this reason, his Honour sought to construe the section to curb it of unintended excesses. Criticism of the terms in which the anti-avoidance provisions were expressed was sometimes blunt. In *Federal Commissioner of Taxation v Newton*, Kitto J said '[s]ection 260 is a difficult provision, inherited from earlier legislation, and long overdue for reform by someone who will take the trouble to analyse his ideas and define his intentions with precision before putting pen to paper.'<sup>5</sup> In the same case, Fullagar J said 'the "purposes" or "effects" which will attract its operation are stated vaguely. If we interpret it literally, it would seem to apply to cases which it is hardly conceivable that the legislature should have had in mind.'<sup>6</sup>

These doubts and uncertainties bred the various limitations upon s 260 that led ultimately to its replacement with Part IVA.<sup>7</sup>

### III THE PREDICATION TEST: *NEWTON'S CASE*

An important bridge between s 260 and the current Part IVA is the predication test enunciated by the Privy Council in the appeal from the High Court in *Newton v Federal Commissioner of Taxation*.<sup>8</sup> In that case, the Privy Council grappled with the principles by which to decide when a transaction was to come within the operation of the anti-avoidance provision. Lord Denning, delivering the judgment, said:

In order to bring the arrangement within the section you must be able to predicate — by looking at the overt acts by which it was implemented — that it was implemented in that particular way so as to avoid tax. If you cannot so predicate, but have to acknowledge that the transactions are capable of explanation by reference to ordinary business or family dealing, without necessarily being labelled as a means to avoid tax, then the arrangement does not come within the section. Thus, no one, by looking at a transfer of shares cum dividend, can predicate that the transfer was made to avoid tax. Nor can anyone, by seeing a private company turned into a non-private company, predicate that it was done to avoid Division 7 tax ... Nor could anyone, on seeing a declaration of trust made by a father in favour of his wife and daughter, predicate that it was done to avoid tax.<sup>9</sup>

This test required a consideration of the particular transaction to determine whether the objectively ascertainable purpose of the transaction was to avoid taxation. No inquiry into the actual motive or purpose (whether subjective or objective) of the participants in the transaction was necessary. Rather, the test contemplated a dispassionate assessment of the objective purpose of the transac-

<sup>5</sup> (1956) 96 CLR 577, 596.

<sup>6</sup> *Ibid* 646.

<sup>7</sup> See *Clarke v Federal Commissioner of Taxation* (1932) 48 CLR 56; *Bell v Federal Commissioner of Taxation* (1951) 87 CLR 548; *W P Keighery Pty Ltd v Federal Commissioner of Taxation* (1956) 100 CLR 66; *Rowdell v Federal Commissioner of Taxation* (1962) 111 CLR 106; *Mullens v Federal Commissioner of Taxation* (1975) 135 CLR 290; *Slutzkin v Federal Commissioner of Taxation* (1976) 140 CLR 314; *Cridland v Federal Commissioner of Taxation* (1977) 140 CLR 330.

<sup>8</sup> (1958) 98 CLR 1 ('*Newton's Case*').

<sup>9</sup> *Ibid* 8–9.

tion itself. The essence of the application of this test was whether the transaction that was attacked was to be explained as having been implemented in that particular way so as to avoid tax.

In *Hancock v Federal Commissioner of Taxation*,<sup>10</sup> the High Court upheld the application of s 260 to an agreement or arrangement to avoid a liability which would have arisen under the then Division 7 of the Act. Kitto J, speaking of the overt acts by which the plan had been implemented, said: 'If those acts are capable of explanation by reference to ordinary dealing, such as business or family dealing, without necessarily being labelled as a means to avoid tax, the arrangement does not come within the section.'<sup>11</sup>

In *Peate v Federal Commissioner of Taxation*,<sup>12</sup> the High Court applied *Newton's Case* to invalidate a plan pursuant to which a number of doctors dissolved a partnership through which they had practised and began to work for a company they had established. The company in turn distributed income to family companies of each of the doctors, which paid each doctor a salary.

#### IV DEMISE OF SECTION 260

A different approach to the interpretation of s 260 subsequently emerged, which substantially weakened the *Newton's Case* predication test and led directly to the enactment of Part IVA. It was these weaknesses which Part IVA was designed to overcome.

##### A *The Choice Principle: Keighery*

In *W P Keighery Pty Ltd v Federal Commissioner of Taxation*<sup>13</sup> (which was decided before *Newton's Case*) the High Court held that s 260 did not apply to a taxpayer that had rearranged its affairs to become a public company and thereby avoided private company taxation under Division 7. The Court said:

The very purpose or policy of Division 7 is to present the choice to a company between incurring the liability it provides and taking measures to enlarge the number capable of controlling its affairs. To choose the latter course cannot be to defeat evade or avoid a liability imposed on any person by the Act or to prevent the operation of the Act. For that simple reason the attempt must fail, and the commissioner cannot rely upon s 260 in order to treat as void any more extensive set of facts, for an attempt to do so could not stop short of including the incorporation of the appellant company itself.<sup>14</sup>

The decision in *Keighery* was explained in *Newton's Case* as an example where no one could, 'by seeing a private company turned into a non-private company, predicate that it was done to avoid Division 7 tax.'<sup>15</sup> Hence, in *Keighery*, even though the conversion took place solely (as was conceded) to

<sup>10</sup> (1961) 108 CLR 258.

<sup>11</sup> Ibid 283.

<sup>12</sup> (1964) 111 CLR 443.

<sup>13</sup> (1957) 100 CLR 66 ('*Keighery*').

<sup>14</sup> *Keighery* (1957) 100 CLR 66, 93-4 (Dixon CJ, Kitto and Taylor JJ).

<sup>15</sup> (1958) 98 CLR 1, 9 (Lord Denning).

avoid a liability to tax on undistributed income, s 260 could not apply to deny taxpayers a right of choice, which the Act itself lays open to them. Thus was born the so-called ‘choice principle’.

### B *The Choice Principle Extended: Mullens, Slutzkin and Cridland*

The application of the choice principle was extended in *Mullens v Federal Commissioner of Taxation*,<sup>16</sup> *Slutzkin v Federal Commissioner of Taxation*<sup>17</sup> and *Cridland v Federal Commissioner of Taxation*.<sup>18</sup> *Mullens* concerned an arrangement entered into by a taxpayer to take advantage of s 77A, which provided for a tax deduction for certain expenditure.<sup>19</sup> The arrangement in *Mullens*, unlike the corporate reorganisation in *Keighery*, was elaborate and designed only to obtain a tax deduction. In *Keighery*, the reorganisation meant only that the taxpayer’s ordinary commercial transactions would be taxed by reference to the applicable regime. In *Mullens*, the deduction was unconnected with the taxpayer’s ordinary business activities; it was obtained merely for its own fiscal advantages.

In *Slutzkin*, the taxpayers relied upon legal form to avoid the payment of tax. A company had accumulated profits. The shareholders in the company sold their shares for cash. The price was equivalent to the value of the company’s assets and the buyer stipulated both that the company’s assets should have been converted to cash by the settlement date of the transaction and that it should have no liabilities. The buyer subsequently caused dividends to be declared on the shares. The choice principle thus extended not only to a choice provided by the Act but also to permit the choice of construction of circumstances for a taxpayer to fall outside the operation of the Act.<sup>20</sup> In *Cridland*, the choice principle was held to apply to the creation of a situation which attracted tax consequences for which the Act made specific provision.<sup>21</sup>

### C *Section 260 Affects ‘Annihilation Only’: No Ability to Reconstruct*

Another important limitation on s 260 was that it did not authorise the Commissioner to embark upon a hypothetical reconstruction.<sup>22</sup> The operation of s 260 to annihilate a transaction would not alter the incidence of tax unless there had been an ‘antecedent transaction or situation’ for which the transaction under attack was substituted. In other words, tax incidence is unchanged unless the annihilation left exposed a ‘set of actual facts’ from which liability did arise.<sup>23</sup>

<sup>16</sup> (1976) 135 CLR 290 (‘*Mullens*’).

<sup>17</sup> (1977) 140 CLR 314 (‘*Slutzkin*’).

<sup>18</sup> (1977) 140 CLR 330 (‘*Cridland*’).

<sup>19</sup> (1976) 135 CLR 290, 298.

<sup>20</sup> See especially *Slutzkin* (1977) 140 CLR 314, esp 319 (Barwick CJ), 322 (Stephen J), 327 (Aickin J).

<sup>21</sup> (1977) 140 CLR 330, 339–40 (Mason J).

<sup>22</sup> See *John v Federal Commissioner of Taxation* (1989) 166 CLR 417, 433 (Mason CJ, Wilson, Dawson, Toohey and Gaudron JJ).

<sup>23</sup> See *Clarke v Federal Commissioner of Taxation* (1932) 48 CLR 56, 77 (Rich, Dixon and Evatt JJ); *Bell v Federal Commissioner of Taxation* (1953) 87 CLR 548, 572–3 (Dixon CJ, Williams, Webb, Fullagar and Kitto JJ); *Rowdell Pty Ltd v Federal Commissioner of Taxation* (1963) 111 CLR 106, 125 (Dixon CJ, Kitto and Menzies JJ). See also *Mullens* (1976) 135 CLR

## V PART IVA

Part IVA replaces s 260 and was introduced to overcome the problems which judicial decisions on s 260 had identified.<sup>24</sup> The Explanatory Memorandum identified four categories of limitations to the scope of s 260 as exposed by judicial decisions, namely:

- (a) The ‘choice principle’ is an interpretative rule according to which section 260 will not apply to deny to taxpayers a right of choice of the form of transaction to achieve a result if the Principal Act itself lays open to them that form of transaction. To do so does not alter the incidence of tax and this is so notwithstanding that the transaction in question is explicable only by reference to a desire to attract the operation of a particular provision of the Act and so achieve a reduction in liability to tax below what it would have been if that course had not been taken.
- (b) The section is expressed in such a way that the purposes or motives of the person entering into an arrangement are not to be enquired into in deciding whether the section applies to the arrangement. Rather, the ‘purpose’ of an arrangement is to be tested only by examining the effect of the arrangement itself.
- (c) It is unclear whether an arrangement to which the section is found to apply must be treated as wholly void or whether it can be treated as only partly void, ie, to the extent necessary to eliminate the sought-after tax benefit.
- (d) The section does not, once it has done its job of voiding an arrangement, provide a power to reconstruct what was done, so as to arrive at a taxable situation.<sup>25</sup>

According to the Explanatory Memorandum, it was these difficulties that the Bill was specifically intended to overcome.<sup>26</sup>

The predication test in *Newton’s Case* seems to have been thought by the government of the day to be embodied in the provisions enacted in Part IVA and, if for that reason alone, the test continues to have importance in Australian tax jurisprudence. The Explanatory Memorandum to the Bill circulated by the then Treasurer, John Howard, said of the proposed new anti-avoidance provisions:

The proposed new Part IVA, which this Bill will insert into the Principal Act, is designed to overcome these difficulties and provide — with paramount force in the income tax law — an effective general measure against those tax avoidance arrangements that — inexact though the words be in legal terms — are blatant, artificial or contrived. In other words, the new provisions are designed to apply where, on an objective view of the particular arrangement and its surrounding circumstances, it would be concluded that the arrangement was entered into for the sole or dominant purpose of obtaining a tax deduction or having an amount left out of assessable income.<sup>27</sup>

290, 302–3 (Barwick CJ); *War Assets Pty Ltd v Federal Commissioner of Taxation* (1954) 91 CLR 53, 97 (Dixon CJ, Williams and Kitto JJ).

<sup>24</sup> Explanatory Memorandum, Income Tax Laws Amendment Bill (No 2) 1981 (Cth) 1–2.

<sup>25</sup> *Ibid* 2.

<sup>26</sup> *Ibid*.

<sup>27</sup> *Ibid*.

In the second reading speech in the House of Representatives, he said:

One possibility considered was to adopt the language of the Privy Council in the well-known decision in *Newton's Case* and, positive tests of inclusion having been expressed, make the new provisions inapplicable to schemes entered into in the course of ordinary business or family dealing. It has been decided, however, that the better test of what is blatant, contrived or artificial is the positive one that has been adopted. That test seems best to capture the essence of the views expressed by the Privy Council which, in fact, characterised an ordinary business or family dealing as representing a situation other than one in which it can be predicated that it was implemented in the particular way so as to avoid tax.<sup>28</sup>

There can thus be little doubt that the government saw the predication test enunciated by the Privy Council in *Newton's Case* as its model for capturing the essence of what was to be caught by the anti-avoidance provisions. The government elected not to propose an exclusion in the terms expressed by the Privy Council in *Newton's Case*, where the scheme was entered into in the course of ordinary business or family dealings. That was not, so it seems, because the government thought that such dealings should come within the anti-avoidance provisions; rather, the government thought that such dealings would not come within the operation of the anti-avoidance provisions if the transactions were 'in fact, characterised [as] an ordinary business or family dealing' in the same way as the Privy Council had said. Similarly, and of fundamental importance, the criterion for determining whether something fell within the operation of the anti-avoidance rule was whether the impugned scheme might be said to be, in the words used by the Treasurer in the second reading speech, 'blatant, contrived or artificial'.<sup>29</sup>

## VI MECHANICS OF PART IVA

The formal trigger for the application of Part IVA is the making of a determination by the Commissioner under s 177F of the Act. There are two express preconditions in this section to the making of a determination, namely (a) that a 'tax benefit' either has been or would be obtained were it not for the application of Part IVA itself and (b) that the tax benefit was obtained in connection with a scheme to which Part IVA applies.<sup>30</sup> The first of these preconditions means that the anti-avoidance provisions can only be invoked where the operative taxing provisions have secured a favourable result for a taxpayer. The second precondition qualifies the first by requiring that the tax benefits be obtained by a taxpayer in connection with a scheme to which the Part applies. Therefore, (a) there must be a 'tax benefit', (b) the tax benefit must have been, or would have been, obtained in connection with a 'scheme' and (c) the scheme must be one to which the Part applies. The tax benefits which may come within the operation of Part

<sup>28</sup> Commonwealth, *Parliamentary Debates*, House of Representatives, 27 May 1981, 2684 (John Howard, Treasurer).

<sup>29</sup> See also *Federal Commissioner of Taxation v Spotless Services Ltd* (1996) 186 CLR 404, 407 (Brennan CJ, Dawson, Toohey, Gaudron, Gummow and Kirby JJ) ('*Spotless*').

<sup>30</sup> *ITAA* s 177F.

IVA are those identified in s 177C. The schemes which are contemplated by the Part are those defined in s 177A. The schemes then caught by s 177D come within the operation of Part IVA.

#### A Scheme: Section 177A

The role played in Part IVA by the identification of the relevant scheme has been the matter of some debate. The power of the Commissioner to make a determination under s 177F requires that the tax benefit be, or would be, obtained 'in connection with a scheme' to which the Part applies. Such schemes are identified in s 177D as being those schemes where, amongst other things, a tax benefit has been, or would be, obtained in connection with the scheme and a particular conclusion 'would be' reached when regard is had to a precisely specified class of matters. It is those matters which lie at the heart of the application of Part IVA.

The need for the Commissioner to identify the scheme correctly may be less significant than it might at first appear. In *Commissioner of Taxation of the Commonwealth v Peabody*,<sup>31</sup> the High Court held that the Commissioner's erroneous identification of a scheme will result in a wrongful exercise of the discretion under s 177F only if 'the tax benefit which the Commissioner purports to cancel is not a tax benefit within the meaning of Part IVA.'<sup>32</sup> An error by the Commissioner in the detail of the scheme will not invalidate a determination, although the incorrect identification of a taxpayer would.<sup>33</sup> The view underlying these conclusions is that the operation of Part IVA does not depend upon the subjective opinion of the Commissioner, but rather upon the objective facts which produce the tax benefits.<sup>34</sup>

#### B Tax Benefit: Section 177C

Part IVA cannot apply unless a tax benefit has been obtained or would be obtained but for the application of the Part itself. For these purposes, a 'tax benefit' is that which is defined in s 177C. This includes the non-derivation of income, the allowance of a deduction, the incurring of a capital loss and the allowance of a foreign tax credit. In each case, the legislation contemplates as a tax benefit both a benefit which 'would have been' (or, alternatively, 'would not have been') secured and a benefit which 'might reasonably have been expected' to have been (or not to have been) secured. The first defined tax benefit, for example, is:

An amount not being included in the assessable income of the taxpayer of a year of income where that amount would have been included, or might reasonably be expected to have been included, in the assessable income of the tax-

<sup>31</sup> (1994) 181 CLR 359 ('Peabody').

<sup>32</sup> Ibid 382 (Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ).

<sup>33</sup> Ibid 364.

<sup>34</sup> Ibid 382.



payer of that year of income if the scheme had not been entered into or carried out.<sup>35</sup>

According to this definition, a tax benefit will exist where an amount has not been included in assessable income if it can be hypothesised that the amount either *would* have been included or that it *might reasonably have been expected* to have been included. The first hypothesis involves a greater degree of predictability than the second. A reasonable expectation is more than a mere possibility and involves a prediction as to events that ‘must be sufficiently reliable for it to be regarded as reasonable.’<sup>36</sup>

Similar predictions are contemplated in the case of the other tax benefits, and in each case the prediction calls for a hypothesis of events which have not occurred. In other words, the definition of tax benefits requires that the hypothetical situation of the relevant scheme not having been entered into or carried out be considered. It is in this hypothetical context that it is necessary to ask another hypothetical question about what would have happened or what might reasonably be expected to have happened.

There will be many cases where the hypothesis may easily be undertaken. The task in many other cases, however, will not be easy. In that context it is important to bear in mind that the burden of proof in a tax appeal falls upon the taxpayer.<sup>37</sup> That burden has been said to include that ‘of establishing the facts upon which [the taxpayer] relies and if it is necessary for [the taxpayer] to establish a particular fact in order to displace the assessment [the taxpayer] must satisfy the court with respect to that fact.’<sup>38</sup> The burden may require a taxpayer to prove a negative.<sup>39</sup> Such a task may be especially difficult and obtuse where that which is to be disproved is not only a negative but a negative in the context of a hypothesis. A taxpayer who has obtained a tax deduction impugned under Part IVA may need, for example, to disprove that, in the hypothesis of the transaction not having occurred, it is not reasonable to expect that a tax deduction would not have been obtained.

The definition of tax benefit is wide and capable of encompassing a great number of amounts, deductions, capital losses or foreign tax credits which should not be caught or were not intended to be caught. For that reason, the section contains many detailed exclusions. One category of broad exclusion is where the amount, deduction, capital loss or foreign tax credit has been, or would be, obtained in part by reason of something expressly provided for by the Act itself. The precise operation of this exclusion is not yet fully known. It is unlikely to be a statutory adoption of the ‘choice principle’ as enunciated by the courts in the jurisprudence of s 260 before the enactment of Part IVA. It is likely

<sup>35</sup> *ITAA* s 177C(1)(a).

<sup>36</sup> *Peabody* (1994) 181 CLR 359, 385.

<sup>37</sup> *Taxation Administration Act 1953* (Cth) ss 14ZZK(b), 14ZZO(b).

<sup>38</sup> *Danmark Pty Ltd & Forestwood Pty Ltd v Federal Commissioner of Taxation* (1944) 7 ATD 333, 337 (Latham CJ). See also *George v Federal Commissioner of Taxation* (1952) 86 CLR 183; *Federal Commissioner of Taxation v Dalco* (1989) 168 CLR 614; *Federal Commissioner of Taxation v ANZ Savings Bank Ltd* (1994) 181 CLR 466.

<sup>39</sup> *Federal Commissioner of Taxation v Hines* (1952) 9 ATD 413, 420 (Dixon CJ, Williams and Fullagar JJ); *George v Federal Commissioner of Taxation* (1952) 86 CLR 183, 190 (Kitto J).

that this exclusion will be more narrowly construed. In any event, the exclusion itself is expressly qualified by being inapplicable where a scheme which was entered into or carried out ‘for the purpose of creating any circumstance or state of affairs the existence of which is necessary to enable’ the step that would otherwise permit the exclusion to operate.<sup>40</sup>

### C *Dominant Purpose: Section 177D*

Part IVA cannot apply unless the conclusion contemplated by s 177D is reached once the matters identified in paragraph (b) of the section have been considered. The section bears much similarity to the predication test enunciated by the Privy Council in *Newton’s Case*. However, the section requires a focus upon the dominant purpose of a person entering into a scheme, rather than upon the purpose of the transaction itself. Section 177D provides that Part IVA applies to a scheme where:

- (a) a taxpayer (in this section referred to as the *relevant taxpayer*) has obtained, or would but for section 177F obtain, a tax benefit in connection with the scheme; and
- (b) having regard to:
  - (i) the manner in which the scheme was entered into or carried out;
  - (ii) the form and substance of the scheme;
  - (iii) the time at which the scheme was entered into and the length of the period during which the scheme was carried out;
  - (iv) the result in relation to the operation of this Act that, but for this Part, would be achieved by the scheme;
  - (v) any change in the financial position of the relevant taxpayer that has resulted, will result, or may reasonably be expected to result, from the scheme;
  - (vi) any change in the financial position of any person who has, or has had, any connection (whether of a business, family or other nature) with the relevant taxpayer, being a change that has resulted, will result or may reasonably be expected to result, from the scheme;
  - (vii) any other consequence for the relevant taxpayer, or for any person referred to in subparagraph (vi), of the scheme having been entered into or carried out; and
  - (viii) the nature of any connection (whether of a business, family or other nature) between the relevant taxpayer and any person referred to in subparagraph (vi);

it would be concluded that the person ... who entered into ... the scheme ... did so for the purpose of enabling the relevant taxpayer ... or other taxpayers ... to obtain a tax benefit in connection with the scheme ...

<sup>40</sup> ITAA s 177C(2)(b)(ii).

In the joint judgment in *Spotless*, their Honours said of this provision:

The eight categories set out in par (b) of s 177D as matters to which regard is to be had ‘are posited as objective facts’. That construction is supported by the employment in s 177D of the phrase ‘it would be concluded that ...’. This phrase also indicates that the conclusion reached, having regard to the matters in paragraph (b), as to the dominant purpose of a person or one of the persons who entered into or carried out the scheme or any part thereof, is the conclusion of a reasonable person. In the present case, the question is whether, having regard, as objective facts, to the matters answering the description in paragraph (b), a reasonable person would conclude that the taxpayers entered into or carried out the scheme for the dominant purpose of enabling the taxpayers to obtain a tax benefit in connection with the scheme.<sup>41</sup>

In undertaking this inquiry it is essential to emphasise that s 177D does not depend upon a factual finding about a taxpayer’s actual dominant purpose. The task is not to find a fact or to determine legal rights, but rather to make a judgment about what a person would conclude, where that person’s attention is directed to the matters specifically contemplated by the section. The scope of the eight matters may still be open to debate. It may not yet be clear, for example, precisely what is meant by ‘form’ and ‘substance’ — does ‘substance’ mean ‘legal substance’, ‘economic substance’ or something else? — and whether form and substance are intended to describe two related areas of inquiry — that is, the nature of the scheme — or are used as concepts in contradistinction with each other. Nor is it entirely clear what it is *about* these matters that is to provide the indicia of the dominant purpose. What, for example, does the timing of a transaction indicate about the dominant purpose of a transaction? In that case, is an inquiry into the time of the transaction in relation to the fiscal year required, or is it relevant to consider the factual circumstances surrounding the transaction *at the time* it was entered into?

In any event, it is from a consideration of the facts relevant to each of these eight factors that the required conclusion is to be ascertained. The inquiry to be undertaken involves two steps. First, those facts (not being conclusions or opinions) falling within each of the eight factors must be identified. Second, an evaluation of whether the facts identified point towards the conclusion contemplated by s 177D must be made.

The requirements of s 177D may present an onerous evidentiary burden for taxpayers to overcome. It may indeed be sufficient for the Commissioner to invoke the operation of Part IVA if it can be said that ‘a reasonable person’ would reach the conclusion contemplated by the section. The reasons in the joint judgment in *Spotless* referred to a reasonable person on more than one occasion and that approach is consistent with that adopted elsewhere.<sup>42</sup> Section 177D does not expressly identify the person who would be making the conclusion, nor the characteristics, knowledge or perspective of the hypothetical ‘concluder’. In that light, the Court’s dicta that the conclusion is one which is to be made by ‘a

<sup>41</sup> (1996) 186 CLR 404, 421–2 (Brennan CJ, Dawson, Toohey, Gaudron, Gummow and Kirby JJ).

<sup>42</sup> *Atwood Oceanics Australia Pty Ltd v Federal Commissioner of Taxation* (1989) 20 ATR 742, 750–1 (Lee J); *Roads and Traffic Authority of New South Wales v Federal Commissioner of Taxation* (1993) 43 FCR 223, 238 (Hill J).

reasonable person' may be significant. It may perhaps be sufficient for the application of Part IVA that the conclusion would be reached by a person within the range or band of people fitting the description of *a reasonable person* without having to determine whether it is the only conclusion that could be reached by the hypothetical reasonable person. The difference has an effect upon the breadth of application of Part IVA: if the s 177D conclusion is to be made by reference to *a* reasonable person, Part IVA will apply to more schemes than if the conclusion was to be made by reference to *the* reasonable person. It will act in a way that is similar to the exercise of a discretionary power, and appeals from its application will operate in a way analogous to judicial review.

## VII STRUCTURED TRANSACTIONS

A particularly difficult area of the operation of Part IVA lies in 'structured' transactions where regard is had by the parties to the tax effect of the transaction so that its shape is in some way or measure influenced by tax consequences. The tension between a permissible regard to the consequence of taxation in 'shaping' a transaction and the adoption of an impermissible form which will be caught by the anti-avoidance provisions was expressly referred to in the joint judgment of the High Court in *Spotless*, where their Honours said:

A taxpayer within the meaning of the Act may have a particular objective or requirement which is to be met or pursued by what, in general terms, would be called a transaction. The 'shape' of that transaction need not necessarily take only one form. The adoption of one particular form over another may be influenced by revenue considerations and this, as the Supreme Court of the United States pointed out, is only to be expected. A particular course of action may be, to use a phrase found in the Full Court judgments, both 'tax driven' and bear the character of a rational commercial decision. The presence of the latter characteristic does not determine the answer to the question whether, within the meaning of Pt IVA, a person entered into or carried out a 'scheme' for the 'dominant purpose' of enabling the taxpayer to obtain a 'tax benefit'.<sup>43</sup>

In this important passage, there is clear recognition that tax may permissibly shape the nature of a transaction. The passage, however, also explains that the impermissible anti-avoidance purpose may be found notwithstanding that the decision being taken by those entering into the transaction may bear the character of a 'rational commercial decision'.

There are many examples where the tax effect of a transaction is a natural, commonplace and permissible consideration for those entering into transactions. An ordinary trader will naturally consider the tax effect of deductible or depreciable purchases upon prices and profits. Similarly, and as naturally, a financier who seeks to secure an advance of money to a customer, by taking legal title to goods purchased with the money and which are leased to the customer, will (and should) take account of the tax deduction to the financier which follows from having legal title. That tax deduction will result in the financier enjoying an after-tax profit from the transaction which will be higher than for a simple loan

<sup>43</sup> (1996) 186 CLR 404, 416, (Brennan CJ, Dawson, Toohey, Gaudron, Gummow and Kirby JJ).

of money at interest. For that reason, there is likely to be pressure upon the financier to lower the cost of the transaction to the customer (who would otherwise enjoy the tax deduction as owner of the goods) to approximate the standard after-tax rate of return required. This pressure is likely to prove effective because of competition between financiers and because, all things being equal, the tax deduction flowing from the mere fact of legal title will compel consideration of who has the most to gain from being the legal owner.

The relevant question is thus how to determine which of the two purposes will govern any particular transaction. In this regard, their Honours went on to say in *Spotless* immediately after the passage quoted above that '[m]uch turns upon the identification, among various purposes, of that which is "dominant"'. In its ordinary meaning, dominant indicates that purpose which was the ruling, prevailing, or most influential purpose.<sup>44</sup>

Their Honours identified the task on the facts before them as deciding whether the taxpayers had taken steps to maximise their 'after-tax return' by doing so 'in a manner indicating' the presence of a dominant purpose of obtaining a tax benefit.<sup>45</sup> Their Honours reasoned that the relevant tax avoidance criteria would be met if the dominant purpose was to achieve a result whereby an amount that might reasonably be expected to have been included in the assessable income if the scheme was not entered into or carried out was excluded. Their Honours then considered the facts before them and concluded that the transactions entered into came within the operation of Part IVA.

In *Spotless*, the overall commercial objective did not save the transaction from the application of Part IVA. The argument for the taxpayer was that the dominant purpose of the investment 'was to invest a very large sum securely for the required time for a satisfactory rate of return.'<sup>46</sup> There was no doubt that the taxpayer had a very large sum of money which it deposited at interest and that, pursuant to that investment, it received interest over the period of the deposit. Each of these is, on its face, a commercial transaction with a commercial purpose. However, those circumstances did not prevent the transaction from being caught by the anti-avoidance provisions because the dominant purpose of entering into *that* transaction was held to be the tax benefit flowing from the non-derivation of Australian-sourced interest income.

#### VIII OVERALL COMMERCIAL PURPOSE NOT DETERMINATIVE

Until the decision of the High Court in *Commissioner of Taxation v Consolidated Press Holdings Ltd*,<sup>47</sup> it might have been thought that Part IVA could not apply where a tax benefit was obtained in the context of a transaction which had an overall commercial objective not determined by the tax benefit to be obtained. The decision in *Spotless* could be explained as a case where the overall commercial purpose of obtaining interest from monies deposited had its commercial

<sup>44</sup> Ibid.

<sup>45</sup> Ibid.

<sup>46</sup> Ibid 409.

<sup>47</sup> (2001) 207 CLR 235 ('*Consolidated Press Holdings*').

explanation in the very tax benefit which the transaction produced. However, that kind of transaction is fundamentally different from one in which the overall commercial objective of a transaction is unrelated to the tax benefit which might be produced through some of the detail by which the overall commercial transaction is effected.

In *Consolidated Press Holdings*, an issue for consideration was whether the overall commercial purpose of a transaction would govern the appropriate conclusion to be drawn about the particular part of the transaction through which a tax benefit was obtained. Specifically, the argument put to the Court was that it was artificial for the Commissioner to select a part of an overall transaction as the scheme to be caught by the application of Part IVA. In that case, the evidence had been that any tax benefit had been obtained in the context of participation by members of the Consolidated Press group of companies ('CPH Group') in a takeover bid in the United Kingdom of BAT Industries plc ('BAT'). A takeover bid for BAT was announced on 11 July 1989 and, if successful, was expected to produce substantial profits to those who had participated, including the members of the CPH Group. The Commissioner's application of Part IVA in this respect was confined to the method by which the CPH Group had structured the funding for their participation in the takeover bid. The essence of that participation involved an Australian company obtaining shares in another subsidiary, MLG, which in turn acquired shares in an offshore subsidiary, CPIL (UK). This enabled CPF, the financing company in the CPH Group, to lend money within the group that was then applied to obtain the shares first in MLG and then in CPIL (UK). By this means, any interest paid by the CPH Group in Australia continued to be deductible without the quarantining effect of s 79D (or its various statutory equivalents from time to time).

The Court rejected the taxpayer's argument that the dominant purpose of this element of the transaction was governed by the overall commercial transaction of which it formed a part. Specifically, the Court said:

Objection was also taken to what was said to be the artificiality of the selection of part of the overall transaction as the scheme. This, it was said, was not warranted by *Peabody* or *Spotless*. The artificiality was said to result from the fact that the overall transaction was for the clearly commercial purpose of financing the Group's participation in the takeover bid for BAT. However, as was held in *Spotless*, a person may enter into or carry out a scheme, within the meaning of Pt IVA, for the dominant purpose of enabling the relevant taxpayer to obtain a tax benefit where that dominant purpose is consistent with the pursuit of commercial gain in the course of carrying on a business. The fact that the overall transaction was aimed at a profit making does not make it artificial and inappropriate to observe that part of the structure of the transaction is to be explained by reference to a s 177D purpose. Nor is there any inconsistency involved, as was submitted, in looking to the wider transaction in order to understand and explain the scheme, and the eight matters listed in s 177D.<sup>48</sup>

The significance of this paragraph should not be underestimated. It contains a clear rejection of the proposition that the overall commercial objective of a

<sup>48</sup> Ibid 264 (Gleeson CJ, Gaudron, Gummow, Hayne and Callinan JJ) (citations omitted).

transaction will make Part IVA inapplicable. It will support the Commissioner's view that a part of a transaction may be singled out for application of Part IVA, notwithstanding that the part of the transaction owes its explanation and existence to some broader non-tax driven objective.

There are many consequences which follow from this aspect of the decision in *Consolidated Press Holdings*. Chief amongst them is that taxpayers and their advisers considering the application of Part IVA must focus carefully upon 'that part of the structure of the transaction' which gives rise to a tax benefit and ask specifically what dominant purpose is applicable.<sup>49</sup> The outcome in *Consolidated Press Holdings* might presumably have been otherwise if what was described economically as the 'interposition of MLG' had been found to have had a dominant purpose that was other than the neutralisation of the quarantining effect of s 79D.<sup>50</sup> In many cases, transactions of the same kind as those considered in *Consolidated Press Holdings* will result in a different conclusion about the dominant purpose of the transaction, notwithstanding any tax benefit that might arise. After all, the use of a special purpose vehicle to participate in a takeover bid is not uncommon domestically when questions about the application of s 79D might be thought to be irrelevant.

#### IX SALE AND LEASE-BACK ARRANGEMENTS

The application of Part IVA to sale and lease-back transactions was considered by the Full Federal Court in *Federal Commissioner of Taxation v Metal Manufactures Ltd*<sup>51</sup> and *Eastern Nitrogen Ltd v Federal Commissioner of Taxation*.<sup>52</sup> Sale and lease-back transactions have a long legal heritage and commercial usage. It was the form of legal transaction which for many years was, and in the case of some property transactions remains, the only way in which a financier may adequately secure its interests. General law mortgages were fundamentally a conveyance by the owner of the land to a lender with, in effect, a 'lease-back' from the financier to the borrower. At one time this form of conveyance was necessary for the lender to obtain legal title to the property so as to prevent any dealing with the land contrary to the lender's interest. Equity gave the borrower an 'equity of redemption' to ensure that the legal owner could not act contrary to the dictates of conscience. From a fiscal point of view, however, a sale and lease-back transaction may procure to the seller a fiscal benefit through the deductibility of lease payments which may, in some cases, have some component economically referable to a repayment of the capital which the financier ventures into the transaction. From an economic point of view, therefore, there may be a part of a rental payment which attracts tax deductibility that provides to the vendor an attractive tax outcome justifying this choice of financing in respect of property already owned.

<sup>49</sup> *Ibid.*

<sup>50</sup> *Ibid.* 251.

<sup>51</sup> (2001) 108 FCR 150 ('*Metal Manufactures*').

<sup>52</sup> (2001) 108 FCR 27 ('*Eastern Nitrogen*').

The outcomes of the first instance decisions in *Eastern Nitrogen Ltd v Commissioner of Taxation*<sup>53</sup> and *Metal Manufactures Ltd v Federal Commissioner of Taxation*<sup>54</sup> may be of interest, if only as case studies of how different minds reach different conclusions on similar facts. *Eastern Nitrogen v Commissioner of Taxation* was decided by Drummond J on 5 November 1999 and *Metal Manufactures v Federal Commissioner of Taxation* at first instance was decided by Emmett J on 8 December 1999. Drummond J held that Part IVA applied whilst Emmett J, having seen the earlier decision, held that it did not. On appeal in both cases to a similarly constituted Full Court, it was decided that Part IVA did not apply in either case, although these decisions were made before the High Court handed down its decision in *Consolidated Press Holdings*.<sup>55</sup>

The principal reasons for judgment in relation to the application of Part IVA in both cases are those of Carr J in *Eastern Nitrogen*. In that case, his Honour concluded that, upon balancing the various factors, it could not be said that the ruling, prevailing or most influential purpose of the taxpayer was to obtain a tax benefit. Rather, his Honour held that a reasonable person would conclude that ‘the ruling prevailing or most influential purpose was to obtain a very large financial facility on the best terms reasonably available.’<sup>56</sup> This conclusion followed from a consideration by his Honour of the eight factors set out in s 177D.<sup>57</sup>

The Full Court, of course, did not have the advantage of the reasons for judgment of the High Court in *Consolidated Press Holdings*. The judgment in *Eastern Nitrogen* does not explicitly distinguish the commercial objectives of the overall transaction (which support the conclusion reached in *Eastern Nitrogen* and *Metal Manufactures*) from those produced specifically by the form of the transaction which gave rise to any tax benefit. Such a distinction might possibly not be available in the transactions in both those cases, or perhaps more broadly, where funds are clearly obtained from outside sources.

The decisions provide authority for the proposition that Part IVA should not apply in circumstances where a tax benefit has been obtained through a form where the form itself serves commercial objectives other than the tax benefit. Carr J was impressed by such matters as the taxpayer’s need to enhance ‘the balance sheet structure by improving certain balance sheet ratios’ as well as the overall need to obtain finance.<sup>58</sup> Special leave to appeal was refused by the High Court in these two matters.

## X SUBJECTIVE MOTIVATION AND THE ROLE OF THE ADVISER

The decisions in *Eastern Nitrogen* and *Metal Manufactures* also considered whether it was relevant to have regard to the subjective purpose of a taxpayer in

<sup>53</sup> (1999) 43 ATR 112.

<sup>54</sup> (1999) 43 ATR 375.

<sup>55</sup> Both *Eastern Nitrogen* (2001) 108 FCR 27 and *Metal Manufactures* (2001) 108 FCR 150 were handed down in Perth on 3 April 2001.

<sup>56</sup> *Eastern Nitrogen* (2001) 108 FCR 27, 50.

<sup>57</sup> *Ibid* 46–9.

<sup>58</sup> *Eastern Nitrogen* (2001) 108 FCR 27, 48.



determining the dominant purpose required by s 177D. The issue was made particularly relevant because Drummond J had said in *Eastern Nitrogen v Commissioner of Taxation* that '[e]vidence of the subjective intentions of scheme participants is ... well capable of assisting' in relation to s 177D.<sup>59</sup> On appeal, it was held that subjective intentions are not the relevant enquiry for s 177D.<sup>60</sup>

This point also arose in, and was similarly decided by, the High Court in *Consolidated Press Holdings*, although it arose there in a somewhat different context. The Court accepted the observation of the trial judge that s 177D 'depends upon objective facts, and is not concerned with subjective motivation.'<sup>61</sup> Their Honours went on to say: 'In some cases, the actual parties to a scheme subjectively may not have any purpose, independent of that of a professional advisor, in relation to the scheme or part of the scheme, but that does not defeat the operation of section 177D'.<sup>62</sup>

Thus, a taxpayer may not succeed in defending a Part IVA assessment by reliance upon a subjective intention not to obtain a tax benefit. There may be many circumstances in which a taxpayer enters into a transaction for the subjective purpose of obtaining a commercial benefit independently of any tax benefit that may form part of the arrangement. It seems clear now that any such subjective purpose or motivation (if these two concepts be different) will be irrelevant to a consideration of s 177D.

What figured prominently in *Consolidated Press Holdings*, however, was the attribution of a purpose of a professional adviser to a taxpayer. The High Court said on that issue: 'Attributing the purpose of a professional adviser to one or more of the corporate parties in the present case is both possible and appropriate.'<sup>63</sup>

Care must always be taken not to take a sentence from a judgment out of context or to place too much reliance upon what is but one sentence in a complex set of reasons for a decision in a difficult case. However, that sentence is important and of significance in its context because it signals approval by the Court of the attribution to a taxpayer of the purpose of the professional adviser.

The issue in the High Court had arisen for debate from statements that had been made by Hill J at first instance. The Commissioner had argued that the persons who had entered into or carried out the scheme were relevantly CPIL (UK), MLG and ACP, and that they were the persons relevant for the purpose of s 177D.<sup>64</sup> Hill J held at first instance that

the dominant purpose of some person who participated in the scheme, and in particular those (perhaps not Mr Cherry, but there were others) who advised the

<sup>59</sup> *Eastern Nitrogen v Commissioner of Taxation* (2000) 43 ATR 112, 131.

<sup>60</sup> *Eastern Nitrogen* (2001) 108 FCR 27, 45 (Carr J).

<sup>61</sup> *Consolidated Press Holdings* (2001) 207 CLR 235, 263.

<sup>62</sup> *Ibid* 264.

<sup>63</sup> *Ibid*.

<sup>64</sup> *Ibid*.

Group at Arthur Young and later Ernst & Young, was to bring about the result that a deduction would be allowed [to the taxpayer].<sup>65</sup>

This finding was criticised by the taxpayer both in the Full Federal Court and in the High Court on the ground that it was not a finding about the dominant purpose of CPIL (UK), MLG or ACP.<sup>66</sup>

The High Court accepted, however, that his Honour's finding was not that the purpose was that of the unidentified person personally, but rather that the purpose of the adviser was one that could be attributed to either CPIL (UK), MLG or ACP. In other words, that the purpose of one of the relevant people could be seen from the purpose identified *through* the advisers. In this regard the Court said:

The finding made by Hill J, set out above, was criticised both in the Full Court and in this Court on the ground that, as the case was particularised by the Commissioner, the persons who entered into or carried out the scheme were CPIL (UK), MLG and ACP. They were the persons referred to in s 177D; not some unidentified advisors. There is no point in making a finding about what would be concluded concerning the purpose of an advisor unless that purpose is then attributed to a relevant person. It is reasonably clear that, albeit in a slightly elliptical fashion, Hill J was doing that. He was justified in doing so. As was mentioned above, it is to be expected that those who participate in a complex, international, commercial transaction will be concerned about its tax implications, and will seek expert advice. Attributing the purpose of a professional advisor to one or more of the corporate parties in the present case is both possible and appropriate. In some cases, the actual parties to a scheme subjectively may not have any purpose, independent of that of a professional advisor, in relation to the scheme or part of the scheme, but that does not defeat the operation of s 177D. If, in the present case, there had been evidence which showed that no director or employee of any member of the Group had ever heard of s 79D, that would not conclude the matter in favour of the taxpayer. One of the reasons for making s 177D turn upon the objective matters listed in the section, it may be inferred, was to avoid the consequence that the operation of Pt IVA depends upon the fiscal awareness of a taxpayer.<sup>67</sup>

This passage will doubtlessly become the subject matter of much dispute between the Commissioner, taxpayers and their advisers in the immediate future. How far it can be taken may need to await further developments.

Whether attribution is permissible, however, is different from whether it is appropriate. In *Consolidated Press Holdings*, the High Court held that attribution was 'both possible and appropriate', but that may not be so on other facts. Significantly, it is worth remembering that the relevant purpose attributed to the taxpayer was not of a subjective kind. Thus, *Consolidated Press Holdings* is not a case where a professional adviser had a subjective motivation or a subjective purpose (if the two be different) which was thought to be engrafted upon a taxpayer who was otherwise able to show that neither could apply on the

<sup>65</sup> *Consolidated Press Holdings Ltd v Commissioner of Taxation* (1998) 88 FCR 21, 42.

<sup>66</sup> *Commissioner of Taxation v Consolidated Press Holdings Ltd [No 1]* (1999) 91 FCR 524, 540 (French, Sackville and Sundberg JJ); *Consolidated Press Holdings* (2001) 207 CLR 235, 255, 263.

<sup>67</sup> *Consolidated Press Holdings* (2001) 207 CLR 235, 264.

particular facts. Rather, it was a case in which any relevant objective purpose flowed from the effects and consequences of the structure which was designed and created for the purpose of giving effect to those consequences. The attribution which had apparently been approved by the Full Federal Court was of ‘the objective purposes associated with the implementation of [the] advice ... to those who implemented it’,<sup>68</sup> and the High Court did not criticise that analysis. It may be that the attribution contemplated by the High Court was just the attribution of a purpose necessarily connected with the implementation of a transaction with certain ‘design features’. It is one thing to say that the purpose of a designer of a structure is to be attributed to the person who implements it, but quite another thing to say that a subjective purpose or motivation of a designer should apply to a person who can be shown did not ‘adopt’ the design by implementation or otherwise, but who nonetheless happens to be affected by the consequences of the designed product.

The extent to which all ‘design features’ incorporated by an architect of a transaction may be attributed to those who adopt the transaction may have application to transactions widely marketed to the public including, but by no means limited to, those which are frequently referred to as ‘mass marketed’ tax transactions. Commercial transactions, even of the simplest kind, frequently enliven complicated arrangements. A simple deposit of money by a retired person through a financial adviser may enliven an enormous range of issues concerning fiscal consequences and design. Deposit funds are treated differently if placed with banks, friendly societies, insurance agents, annuity providers and so forth. The consequences of financial deposits differ depending on the nature of the deposit, even with the one deposit receiver. The nature of the person to whom deposits are made, and the precise legal and commercial arrangements created in respect of each kind of deposit available, are typically not accidental. The extent to which the purpose of the designer is to be attributed to the taxpayer may, if attributed too liberally, permit the application of Part IVA in circumstances that could scarcely have been intended. It is for that reason that care must be taken to consider when attribution is both possible and appropriate. In that regard, it will be important to recall the fundamental objectives of Part IVA as the measure by which such difficult questions are to be determined.

It is understood that a scheme, to be the subject of the application of Part IVA, must be capable of standing on its own without being robbed of all practical meaning. A set of circumstances, however, may amount to a scheme in its own right, even though it might also be part of a wider scheme. What has been left to future cases to explore is when a set of circumstances will or will not amount to a scheme; precisely what is meant in this context by a scheme being robbed of all practical consequences; and when there may be a scheme within the meaning of Part IVA which is nonetheless part of a wider scheme.

<sup>68</sup> *Federal Commissioner of Taxation v Consolidated Press Holdings [No 1]* (1999) 91 FCR 524, 544.

XI THREE RECENT DECISIONS: *VINCENT*, *PUZEY* AND *HART*

Three recent cases in the Federal Court on Part IVA are of interest for the way in which they have dealt with the issues considered by the earlier cases.

## A Vincent

The decision in *Vincent v Commissioner of Taxation*<sup>69</sup> concerned an investment by Vincent in a cattle breeding project in New South Wales. Her entry into the transaction entitled her to claim tax deductions in the 1994–95 and 1995–96 financial years. The effect of the deductions was that her investment in the project was substantially equal to the amount of tax which she saved by entering into the transaction. The trial judge held that Part IVA did apply to the scheme in such circumstances. The Full Federal Court on appeal disposed of the proceeding on the basis that the payments by Vincent were to acquire a capital item and, therefore, that the amounts she paid were not deductible under s 51(1) of the Act. As a result, the Full Court did not need to consider whether Part IVA would have applied to the scheme in question because there was no tax benefit obtained in connection with it for the purposes of Part IVA.<sup>70</sup> The result in the case was that the 1995–96 financial year was disposed of in favour of the Commissioner on the basis that the amounts claimed as deductions were not allowable because the outgoings were incurred on capital account. The scheme, therefore, was ineffective in achieving the anticipated tax benefits. In the 1994–95 financial year, it was held that the Commissioner was out of time to amend the assessment under the general limitation provisions in s 170, and that since the taxpayer was not entitled to the tax benefits under the general taxing provisions, the Commissioner could not rely upon Part IVA.<sup>71</sup>

It was not necessary for the Full Federal Court to consider the Part IVA issues in the case, but it did express a view on whether the trial judge had erred in considering whether it would be concluded that the promoter had carried out the scheme for the dominant purpose of obtaining the tax benefit for Ms Vincent. On this matter the Court said:

It is clear both from the language of s 177D and the decision of the High Court in *Federal Commissioner of Taxation v Consolidated Press Holdings Ltd* ... that a determination can be made if there is any person, be it the taxpayer, a promoter of a tax scheme or a legal or accounting adviser of whom it would be concluded that he, she or it entered into or carried out the scheme or any part of it for the dominant purpose of securing for the taxpayer a tax benefit. In considering the question of purpose by reference to the promoter his Honour did not err. We may doubt, however, whether we would reach the same conclusion as to the purpose of the promoter in this case. Indeed, we would be inclined to the view that the dominant purpose of the promoter here was to obtain the

<sup>69</sup> (2002) 193 ALR 686 (*Vincent*).

<sup>70</sup> *Ibid* 707–8 (Hill, Tamberlin and Hely JJ).

<sup>71</sup> *Ibid* 706.

profits that clearly would have flowed to the various companies associated with him. However, it is not necessary to reach a concluded view on this question.<sup>72</sup>

There are two particular matters of interest in this obiter statement by the Full Court. The first is its view concerning the breadth of the observation in *Consolidated Press Holdings*. The Full Court endorsed the view of the trial judge that the question of purpose could be considered by reference to the promoter. The second matter of interest is the doubt expressed by the Full Court about whether it would have reached the same conclusion as the trial judge about the purpose of the promoter in that case, adding to that doubt the Full Court's tentative view that the dominant purpose of the promoter was 'to obtain the profits that clearly would have flowed' to the various companies associated with him.

The significance of this arises where the profits to be obtained by a promoter are dependent upon obtaining a tax benefit for a taxpayer. In the case, for example, of a widely-marketed scheme which is dependent upon obtaining tax deductions for taxpayers, it might be thought that the profits obtained by the promoter are no more than the fruits flowing from a scheme which was directed to obtaining tax benefits for the taxpayers. In other words, there may be no true distinction between, on the one hand, the purpose of obtaining tax benefits for a taxpayer and, on the other, the purpose of the promoter of schemes to obtain the profits flowing from the successful obtaining of the tax benefits, the latter being but a consequence of the former. Nonetheless, the Full Federal Court did express, at least tentatively, a view that the two may be different. The dominant purpose of a promoter devising schemes which are dependent upon the obtainment of tax benefits for taxpayers may not be the obtainment of those tax benefits but, rather, its benefits unaffected in character from the purpose of securing a tax benefit for the taxpayers. The view of the Full Court is to be contrasted not only with that of the trial judge, but also with what was said by Lee J at first instance in *Puzey v Commissioner of Taxation*.<sup>73</sup>

### B Puzey

*Puzey* concerned what was described as a 'tax effective investment' in a sandalwood project.<sup>74</sup> The taxpayer combined an amount of his own funds with an amount borrowed through the scheme and secured, by participation in the scheme, a tax deduction sufficient to cover the amount invested: the tax deduction, as in *Vincent*, was effectively the source of the investment. Significantly, however, this transaction was found to be fully recourse, in other words, that the taxpayer could be called upon to repay the loan in the future.

Lee J at first instance held that the transactions were effective under the general taxing provisions to produce the expected tax effects (that is, apart from the application of Part IVA).<sup>75</sup> His Honour also found that during the relevant time the taxpayer was both carrying on a business and that the project represented to

<sup>72</sup> Ibid 708 (citations omitted).

<sup>73</sup> (2002) 194 ALR 615, 637 ('*Puzey*').

<sup>74</sup> *Puzey* (2002) 194 ALR 615, 617.

<sup>75</sup> Ibid 636–7.

the taxpayer a reasonable expectation that assessable income could be gained.<sup>76</sup> His Honour rejected the Commissioner's contention that the amounts claimed as deductions were capital in nature,<sup>77</sup> although his Honour did not have the benefit of the reasoning of the Full Court on this issue in *Vincent*.

In any event, what is of interest for present purposes is Lee J's comments about Part IVA, given that his Honour's decision was upheld on appeal. The essence of the transaction was explained by his Honour thus:

The scheme entered into was the presentation and execution of a seedling purchase agreement under which the cost of seedlings was calculated to provide to a participant in the project an outgoing in an amount able to provide a tax benefit in a sum understood by the participant and the promoter to be necessary to reduce the assessable income of the participant in such a degree that the tax 'saved' would cover payments to be made by the participant to, and for, the purposes of the project, including the delivery of seedlings to the participant. The Loan Agreement, and the agreement for loan made between Allrange and Sandalwood, were ancillary to the seedlings purchase agreement and to the scheme. The Loan Agreement fixed the time at which the balance of monies payable by a participant under the project was to be paid and provided the contract under which the participant could pay monies to the project out of the consequences of the tax benefit. The agreement for loan between Allrange and Sandalwood provided the means by which the foregoing steps could be undertaken.<sup>78</sup>

His Honour went on to say:

The essence of the scheme by which the tax benefits in the form of deductions would be obtained was the seedling purchase agreement. By that agreement the price stipulated for the seedlings was inflated as required for the purpose of obtaining tax benefits for the applicant sufficient to generate taxation savings for the applicant commensurate with the sum of A\$28 000 to be paid by the applicant to the project. The construction of the tax benefit by the scheme was important to the marketing of the project as a 'tax effective' investment.<sup>79</sup>

Lee J considered the facts relevant to the eight factors in s 177D(b) and concluded that the dominant purpose of Puzey in entering into or carrying out the scheme was to obtain a tax benefit of sufficient magnitude to provide tax 'savings' to underwrite participation in the project.<sup>80</sup> The circumstance that the loan arrangement was not limited recourse did not prevent his Honour from concluding that Part IVA applied.

The Full Court upheld his Honour's conclusion with respect to the application of Part IVA to the facts, Hill and Carr JJ observing that, when the matters under s 177D(b) were considered, 'there is no doubt that it would be concluded that Mr Puzey entered into and carried out the scheme for at least the dominant purpose of obtaining for himself the taxation deductions which it was expected the

<sup>76</sup> Ibid 629.

<sup>77</sup> Ibid. Cf *Vincent* (2002) 193 ALR 686, 705.

<sup>78</sup> *Puzey* (2002) 194 ALR 615, 634.

<sup>79</sup> Ibid.

<sup>80</sup> Ibid 635-7.

scheme would bring.<sup>81</sup> Significant in reaching that conclusion was the fact that the taxation benefits were certain whilst the commercial benefits were speculative.<sup>82</sup>

These are important results for the application of Part IVA because it was held to apply where the transaction impugned was one where the tax saved from entering into a scheme was used as the source of the payment for investing in a commercial venture. Neither Lee J nor the Full Court explained whether (and, if so, why) a different result might be reached in the case of a direct negatively-gearred investment. However, some hint may be found in the way Lee J distinguished the sale and lease-back cases. His Honour said:

The totality of the foregoing shows that this was not a case where the applicant was a party carrying on an existing business where, in the course of that business, a choice was made as to a course of action, that choice being influenced by consideration of taxation consequences, but without that consideration constituting the dominant purpose of the taxpayer. This was a case where the applicant elected to participate in a project represented as being 'tax effective'. The represented tax effectiveness of the project was the delivery of tax benefits that would produce tax 'savings' that would underwrite the principal initial payments the applicant was required to make to the project.<sup>83</sup>

The critical distinction between the facts in *Puzey* and, in his Honour's view, those in *Eastern Nitrogen*, *Metal Manufactures* and, perhaps, negatively-gearred investments, lies in the conclusion about dominant purpose. Presumably, the dominant purpose of a taxpayer making a direct negatively-gearred purchase of a rental property will be found to be the acquisition of the property, rather than the benefit of the tax deduction.

### 1 Promoter's Purpose

Lee J also held that the dominant purpose of the promoter in entering into and implementing the scheme was to achieve a result whereby Puzey would obtain tax deductions. His Honour's treatment of the purpose of the promoter, therefore, differs from that tentatively adopted by the Full Federal Court in *Vincent*. In *Puzey*, his Honour said:

Furthermore, a reasonable person considering the circumstances objectively, would conclude that the dominant purpose of the promoter in entering into and implementing the scheme was to achieve a result whereby the applicant would obtain deductions in the years of income that might reasonably be expected not to have been allowable to the applicant if the scheme had not been entered into. That is to say, but for the scheme it might reasonably be expected that the outgoings incurred by the applicant under the project for the cost of seedlings, and the allowable deductions therefore in each year of income, would not have exceeded A\$14 000 in each year. In putting the project together the promoter sought enrichment. In constructing and implementing a scheme to inflate the cost of seedlings as part of that project, the plain and dominant purpose of the

<sup>81</sup> *Puzey v Commissioner of Taxation* [2003] FCAFC 197 (Unreported, French, Hill and Carr JJ, 26 August 2003) [79].

<sup>82</sup> *Ibid* [70], [79].

<sup>83</sup> *Puzey* (2002) 194 ALR 615, 636 (citations omitted).

promoter in entering into and carrying out that scheme was to create tax benefits for the applicant by way of deductions in such amounts as proposed in each year of income that would encourage the applicant to participate in the project and subscribe funds thereto to be applied to the benefit of Allrange.<sup>84</sup>

In other words, his Honour was of the view that the dominant purpose of the promoter was to obtain the tax deduction for the taxpayer: the promoter's enrichment was through the taxpayers obtaining their tax benefits. There is much force to this view, notwithstanding its apparent difference from the tentative view expressed by the Full Court in *Vincent*, and it should be recalled that the opinion expressed there was expressly said to be non-conclusive.

### C Hart

The decision in *Hart v Commissioner of Taxation*<sup>85</sup> (in which the High Court has since granted the Commissioner special leave to appeal) concerned a financing structure which enabled the taxpayers to obtain greater tax deductions from borrowing money than they would otherwise have obtained had they borrowed in the usual way. The taxpayers had a property at Jerrabomberra on which they had an existing loan from the ANZ Bank. The interest on that loan was not deductible. In 1996 they decided to acquire a property in Fadden as a residence and to rent out the Jerrabomberra property. The interest payable on moneys borrowed for the Fadden loan would not have been deductible, but the interest payable upon the Jerrabomberra property would become deductible upon the change of purpose for which they would continue to hold the property. However, the taxpayers refinanced their existing ANZ borrowings and simultaneously borrowed further funds from Austral Mortgage. On 8 October 1996, \$202 888 was applied to acquire the Fadden property (loan account 1) and to repay moneys borrowed by Mrs Hart's mother to another bank, and \$95 112 was applied to repay moneys owing to the ANZ Bank on the Jerrabomberra property (loan account 2). It was agreed between the taxpayers and Austral that all repayments they made would be appropriated to loan account 1 until it was repaid in full. The unpaid interest due on loan account 2 was capitalised and compound interest was debited to that account. The taxpayers claimed a tax deduction both for the unpaid interest and the compound interest accruing on loan account 2.

The Full Federal Court reversed the decision of the trial judge, holding that Part IVA could not apply to the transaction through which deductions were incurred for the unpaid interest and the compound interest.<sup>86</sup> The Full Court did so notwithstanding the clear and undoubted role played by the endeavour to obtain the tax deductions which the structure was designed to secure and which was the explanation for the structure. The trial judge found that the tax advantage was central to the adoption of the transaction by the taxpayers. His Honour said:

<sup>84</sup> Ibid 637.

<sup>85</sup> (2002) 121 FCR 206 ('Hart').

<sup>86</sup> Ibid 228 (Hill J), 231 (Hely J), 232 (Conti J).



It can hardly be seriously doubted that a purpose of both Austral and the ordinary borrower in entering into a transaction such as that in issue here would be to take advantage of the tax benefits claimed and demonstrated by Austral, namely, the deductibility of all interest, including additional and further interest. This was a significant advantage of the product.<sup>87</sup>

Later, his Honour said:

I am satisfied that there would be no commercial rationale for the arrangements in issue without the borrower being able to deduct all of the interest incurred for taxation purposes. It would make no sense otherwise. This is borne out by the manner in which the product was presented by Austral.<sup>88</sup>

The centrality of the tax deduction to the structure of the scheme may also be seen in the reasons for judgment of the members of the Full Court, although they reached a different conclusion concerning the application of Part IVA.<sup>89</sup>

Notwithstanding the importance of securing the tax benefit to the transaction, and to its form in particular, the Full Federal Court held that Part IVA did not apply. Their Honours considered that a reasonable person would conclude that the dominant purpose in entering into or carrying out the scheme was the commercial end of borrowing the money for use in financing and refinancing the two properties, rather than to secure the tax benefit which the form and structure was accepted as having been designed to achieve.<sup>90</sup>

### 1 *Conclusion as to Purpose*

The difference between the conclusion reached by the trial judge and that by the members of the Full Federal Court cannot simply be a mere difference of view about the factual conclusion to be drawn from the evidence; otherwise the appellate court would need to have been satisfied that the conclusion reached by the trial judge was one that was not open to him. The Full Court did not decide that the trial judge erred on a finding of fact on the evidence, but that the legal conclusion he had reached was not open to him. Hill J expressed himself in these terms:

However, with all respect to his Honour, I do not think that a reasonable person would conclude that any person entered into or carried out the scheme or any part of it with the dominant purpose of ensuring that Mr and Mrs Hart merely obtained a higher deduction for interest. *On any view of the matter* the dominant purpose of the scheme which included the borrowing by the Harts of funds used to finance and refinance the two properties was the obtaining of funds to permit them to do so. ... *The scheme was directed to a commercial end*, the borrowing of money for the use in financing and refinancing the two properties. That is what a reasonable person would conclude was the ruling, prevailing or most influential purpose of the Harts in entering into or carrying out the scheme.<sup>91</sup>

<sup>87</sup> *Hart v Federal Commissioner of Taxation* (2001) 189 ALR 584, 604 (Gyles J).

<sup>88</sup> *Ibid.*

<sup>89</sup> *Hart* (2002) 121 FCR 206, 227–8 (Hill J), 229–30 (Hely J), 232 (Conti J).

<sup>90</sup> *Ibid* 228 (Hill J), 230 (Hely J), 232 (Conti J).

<sup>91</sup> *Ibid* 228 (Hill J) (emphasis added).

A similar view may be seen from the reasons for judgment of Hely and Conti JJ.<sup>92</sup> The view of the Full Court was that, notwithstanding the structuring for tax effect, a transaction which is ‘directed to a commercial end’ has the dominant purpose of that end, rather than of the structuring, which may explain its shape and may be the reason for the transaction being entered into in that form.

It is also clear that the difference between the decisions of the trial judge and the Full Court was not thought to be merely a matter of opinion about which different minds might reach different conclusions. Rather, the Full Court’s view depends upon the trial judge’s conclusion being wrong in law. It is of particular interest to determine precisely what the difference in outcome depended upon. The trial judge seems to have seen *Hart* as being like *Spotless* and *Consolidated Press Holdings*, with *Eastern Nitrogen* laying down no principle contrary to his Honour’s analysis of the former two decisions.<sup>93</sup> The Full Court, on the other hand, saw the facts in *Hart* as ‘similar to *Eastern Nitrogen* and distinguishable from *Spotless*’.<sup>94</sup> The difference between the views of the trial judge and the Full Court may thus lie in what they considered the earlier cases to have decided. It may be, however, that the difference between the views of the trial judge and the Full Court depends upon the extent to which the elements making up the tax effective components of the overall structure may amount to a scheme capable of standing on its own feet and, therefore, the extent to which *Hart* may be distinguished from the decision in *Consolidated Press Holdings*.<sup>95</sup>

The decision exposes a potential difference of judicial view about the extent to which the commercial end of a transaction as a whole may preserve a structured transaction from the operation of Part IVA. The debate on this point will need to take into account what was said on the topic by the High Court in *Consolidated Press Holdings* and which, unfortunately, received little detailed analysis in the reasons of the Full Federal Court. In *Consolidated Press Holdings*, the High Court had said:

The fact that the overall transaction was aimed at a profit making does not make it artificial and inappropriate to observe that part of the structure of the transaction is to be explained by reference to a s 177D purpose. Nor is there any inconsistency involved, as was submitted, in looking to the wider transaction in order to understand and explain the scheme, and the eight matters listed in s 177D.<sup>96</sup>

It is plain from this passage that the overall commercial purpose of a transaction will not prevent the application of Part IVA where part of the structure of the transaction is to be explained by reference to a s 177D purpose. Indeed, the language in the passage quoted might arguably be apt to describe a transaction of the kind considered in *Hart*. The members of the Full Court in *Hart*, however, did not expressly explain why the passage from *Consolidated Press Holdings*

<sup>92</sup> Ibid 230–1 (Hely J), 232 (Conti J).

<sup>93</sup> *Hart v Federal Commissioner of Taxation* (2001) 189 ALR 584, 609 (Gyles J).

<sup>94</sup> *Hart* (2002) 50 ATR 369, 386–7 (Hill J).

<sup>95</sup> See *Peabody* (1994) 181 CLR 359, 383–4.

<sup>96</sup> (2001) 207 CLR 235, 264.

was not applicable. It might be thought that the passage from *Consolidated Press Holdings* was directed to a composite transaction where, within the composite whole, there could be discerned a part which was explicable by reference to a s 177D purpose. If that is the correct reading of the passage in *Consolidated Press Holdings*, it would seem to follow that it would apply to facts like those in *Hart*, unless there was some other reason why it would not. One potential reason for it not applying might be that the part of the overall transaction considered in *Consolidated Press Holdings* as having the s 177D purpose was itself a scheme not falling foul of the dicta in *Peabody* (that is, that the relevant part of the overall commercial transaction in *Consolidated Press Holdings* was itself a scheme capable of standing on its own feet without being ‘robbed of all practical meaning’), whilst the part of the scheme in *Hart* which contained a s 177D purpose did fall foul of the *Peabody* dicta (that is, that the relevant part of the overall commercial transaction in *Hart* was not itself a scheme capable of standing on its own feet without being ‘robbed of all practical meaning’).

Even so, for the passage in *Consolidated Press Holdings* not to apply in *Hart*, it would still be necessary to conclude that a composite scheme, which included the commercial purpose of the transaction (as part of its necessary elements), compelled a conclusion contrary to that required by s 177D. In this last point lies the particular importance of the issues raised by *Hart* for future cases; namely, the proposition that an irreducible scheme with a commercial purpose cannot be subject to Part IVA unless, like *Spotless*, the commercial aspect of the transaction was itself lacking in commerciality.<sup>97</sup> In other words, in *Hart* there emerge two fundamental matters concerning the interpretation of Part IVA: first, the basis for deciding whether the scheme identified either is, or is not, a scheme within the meaning of Part IVA in line with the dicta in *Peabody*; second, the basis for concluding that a scheme which includes the commercial aspect of the transaction either does, or does not, permit the conclusion as to purpose required by s 177D.

## 2 *The Scheme*

The first issue to consider is the scheme in question. The trial judge in *Hart v Federal Commissioner of Taxation* had been of the view that a narrow scheme could be identified comprising all the steps leading to, and the entry into and implementation of, the loan arrangements, but excluding the making of the loan.<sup>98</sup> His Honour went on to hold, however, that even the wider scheme, which included the making of the loan, could be attacked by Part IVA; in other words, that the relevant purpose under s 177D could also be found in the broader scheme, which included the making of the loan.<sup>99</sup> The members of the Full Federal Court thought otherwise on both points.

Hely J was of the view that the scheme could not be defined to the exclusion of the borrowing because to do so would ‘rob it of its practical context’ and that

<sup>97</sup> See *Hart* (2002) 121 FCR 206, 228 (Hill J).

<sup>98</sup> *Hart v Federal Commissioner of Taxation* (2001) 189 ALR 584, 602 (Gyles J).

<sup>99</sup> *Ibid.*

this would be contrary to the decision in *Peabody*.<sup>100</sup> What is not clear, however, is why the scheme in *Consolidated Press Holdings* was not thought by Hely J to be similarly robbed of its ‘practical context’. A similar analysis to that of Hely J can be seen in the reasons for judgment of Hill J.<sup>101</sup>

For present purposes we may assume that nothing turns upon the difference in the language used by Hill and Hely JJ in their statement of the principle to be derived from *Peabody* (‘rob it of its practical context’ per Hely J, as against ‘robbed of all practical meaning’ per Hill J). More important is the meaning and application of the principle in *Peabody* to the facts in *Hart* and beyond. The end commercial objective of participating in a takeover battle in *Consolidated Press Holdings* — undoubtedly commercial and real — was not thought sufficient either (a) to prevent the scheme from being defined more narrowly than a scheme which included the takeover battle; rather, it could be sufficiently described as ‘part only of the total plan or course of conduct involved in the corporate arrangements that were made within the group for the purposes of the BAT takeover bid’;<sup>102</sup> or (b) to prevent the conclusion that the dominant purpose of the scheme so defined (but with reference to the wider objects) came within the operation of Part IVA. The significant point is that the essential nature of that part of the total plan or course of conduct was not regarded as being robbed of all practical meaning in *Consolidated Press Holdings*, notwithstanding the subservient role played by the part to the broader commercial objective, which was both undoubtedly commercial and undoubtedly real.

An unresolved issue is the basis upon which it is to be decided whether a scheme is or is not robbed of all practical meaning. Several options may be available. One is that the test should be based upon a commercial evaluation of the scheme and its place in the whole transaction. That test would seem to run against the dicta in *Consolidated Press Holdings*. Another test might be whether that which is identified as a scheme is capable in the abstract of standing alone as a transaction, without regard to its commercial purpose. Thus, a purchase of shares in a company, which in turn subscribes for shares in another company, might be thought to be a scheme in itself, because it has practical meaning without regard to the individual transactions themselves. In contrast, it might be said that there cannot be a scheme — that is, a scheme not robbed of practical meaning — in the terms of a contract and the arrangement of the parties whereby they agree to conduct which produces a tax benefit. This might be consistent with *Peabody* and the facts in *Consolidated Press Holdings*, but relies upon a distinction that may be contrary to the wide language used in Part IVA. One might also ask what purpose is served by an interpretation of the word ‘scheme’ that permits the effective obtainment of tax benefits by careful drafting.

### 3 *Lack of Commerciality*

The next issue to consider is the role and nature of commerciality in the application of Part IVA. In *Hart*, Hill J explained why an opposite conclusion was

<sup>100</sup> *Hart* (2002) 121 FCR 206, 231.

<sup>101</sup> *Ibid* 221.

<sup>102</sup> (2001) 207 CLR 235, 254.

required in *Spotless* from the one reached by the Full Court in *Hart*. His Honour explained that the scheme identified by the High Court in *Spotless* ‘was not commercial for the simple reason that the interest obtained on those funds was very considerably less than the interest that could be derived by deposits in Australia.’<sup>103</sup>

Thus, his Honour saw a lack of commerciality as being the essence of the transaction in *Spotless* and that it was that which explained the result in that case. The lack of commerciality evidenced there was in the terms of interest secured for the deposit, rather than evidenced from the ‘after-tax return’: that is, the lack of commerciality was the fact that the interest rate was too low when compared to other rates available, rather than the fact that the ‘after-tax return’ to the taxpayer was too low. The test of dominant purpose in s 177D is not, of course, simply a test of whether the scheme is commercial. However, to the extent to which commerciality is a measure under s 177D, there may be questions about how business commerciality is to be determined. A contrary view in relation to the facts in *Hart* might be that it is uncommercial for a financier not to require payment of a loan and agree to the capitalisation of its interest in the absence of non-tax commercial reasons for doing so. The case proceeded upon the basis that the features of the split loan arrangements, whereby the deductible interest was not paid and capitalised, had no commercial explanation other than tax. Where the reason for the postponement of the payment of interest (and its capitalisation) is found only in the tax advantage which that arrangement produces, it might be said of the arrangement that, like *Spotless*, it too lacked commerciality; as in *Spotless*, what made the particular arrangement commercially attractive was the tax consequences of the particular arrangement. In any event, the questions remain: how is commerciality to be measured and what role does it have in the application of s 177D?

## XII CONCLUSION

The decision in *Hart* raises squarely the question of the extent and interrelationship permitted under Part IVA between tax effective structuring and impermissible tax avoidance. There can be no doubt that the tax consequences of a transaction are taken into account in ordinary commercial dealings, and that the shape and form of a transaction will often have its explanation in the tax consequences which arise. Lease financing may be a useful illustration of transactions having their selection, shape and form dependent in part upon the tax consequences which occur through the chosen structure. In part, the explanation for selection, form and shape lies in the consequence for depreciation purposes of the subject matter of a lease. A difference in principle, however, between those transactions and ones like those in *Hart*, *Vincent* and *Puzey* may lie in who bears the economic cost of the tax effect of the transaction. A lease transaction which does no more than shift the benefit of a tax consequence from one taxpayer to another is, in principle, revenue neutral. In contrast, transactions which have the effect of reducing the overall tax payable have the consequence of there being a

<sup>103</sup> *Hart* (2002) 121 FCR 206, 228.

necessary shift of the economic cost of the transaction to the revenue. The issue becomes more acute when ostensibly commercial investments only expose investors to an amount equal to the tax saved by entering into the transaction. It may be that such an investment is capable of producing economic returns in the long term, but the limitation of the investor's exposure to the tax saved from entering into the transaction means that the economic risk is removed from the taxpayer and the economic cost of the investment is placed upon the revenue as a whole. Whether Part IVA should, or is capable of, applying to such transactions has broader significance than merely the technical issues concerning the application of statutory language.

In addition, a commercial venture which is able to harness tax savings as a source of funding gives the venture a competitive advantage which will not be enjoyed by others. Plantations, breeding programs, jet fleets and any other activity which attracts funds from the tax saved by investors not only shift the economic cost and risk from the participants to the revenue, but also distort competition in the relevant markets in which they operate. The distortion occurs in part because the funds employed in the venture are not sourced from places which have the same rigours and constraints concerning funding. An investor whose commercial exposure to an investment is limited to the tax saved by entering into the transaction may be expected to be less concerned about how diligently the operator will undertake the activity or about the amount, if any, of the return in the end. An operator who is able to secure funds from such an investor may obtain funds at a lower cost than would otherwise be available from a lender who, in turn, would ordinarily not benefit from the success of the venture other than to ensure that its funds and interest are effectively secured and protected. Such an operator, therefore, may be able to compete unfairly in a market where others are not able to gear upon their investor's tax position to achieve the same economic advantages. However forlorn it may be to hope for a tax system that does not distort the marketplace, it may at least be hoped that the construction of the anti-avoidance provisions does not do so without conscious regard to such consequences.