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Private Business Tax Retreat

Is tax planning dead? Part IVA cases

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1. Preface

1.1 *Swinging* attitudes to tax planning in Australia[1]

Commencing in the author's formative years: a *teddy bear's picnic* for taxpayers

> *[T]he citizen has every right to mould the transaction into which he is about to enter into a form which satisfies the requirements of the statute. It is nothing to the point that he might have attained the same or a similar result as that achieved by the transaction into which he in fact entered by some other transaction, which, if he had entered into it, would or might have involved him in a liability to tax, or to more tax than that attracted by the transaction into which he in fact entered. Nor can it matter that his choice of transaction was influenced wholly or in part by its effect upon his obligation to pay tax.*
>
> - per Barwick CJ in *Commissioner of Taxation v Westraders Pty Ltd* (1980) 144 CLR 55 at 60.

A *new wave* becomes fashionable in the early 1980s

> *When, in 1981, the Commonwealth Parliament decided to re-visit the possibility of a general provision to replace s 260 it was faced with a political problem... It had to respond to public exasperation with increasingly aggressive tax schemes, and the apparent inability of the three branches of government to control them, without resort to over-kill. At the same time it had to find a way of making a reasonable distinction between legitimate tax planning and illegitimate tax avoidance; a distinction that was acceptable both to the profession and to the public. …*
>
> - per The Hon. Murray Gleeson AC KC (former Chief Justice of the High Court) in the *Foreword* to the first edition of GT Pagone AM KC's text[2], *Tax Avoidance in Australia* (2023)

The *new wave* was not to everyone's taste *(19 July 2006)*

> *Your Honour, this is a tax avoidance scheme, and it works …*
>
> - the author's unreliable recollection of the taxpayer's Senior Counsel's opening submission in *Trust Co of Australia v Chief Commissioner of State Revenue* (2006) 66 NSWLR 551[3]

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[1] For further reading on the difference between tax *planning*, tax *minimisation*, tax *avoidance*, and *tax evasion*, the author recommends the excellent article by the renowned tax silk, Mr David Bloom KC (also a member of Sydney's New Chambers), *Tax Avoidance – A View from the Dark Side* (2016) 39 Melbourne University Law Review 950. The author acknowledges sourcing certain of the quotations above from that article.

[2] Tony Pagone AO KC, former Co-ordinating Judge of the Federal Court Tax List, also a member of Sydney's New Chambers.

[3] A stamp duty case concerned with the application of a targeted anti-avoidance provision of the *Duties Act 1997* (NSW). The author was one of the taxpayer's instructing solicitors. Postscript: the taxpayer lost at first instance. On appeal ([2007] NSWCA 255), Giles JA observed (at [84]) that: "The legislature may have a target, but the [anti-avoidance] legislation must hit it." His Honour agreed that the legislature had *missed*. Unfortunately, Mason P and Santow J were of a different disposition.

And a warning for those still *living in the 70s*

> *I direct the Registrar to forward a copy of these reasons to the Commonwealth Director of Public Prosecutions, the Australian Securities and Investments Commission and the Australian Federal Police. The facts I have found strongly suggest widespread money laundering, tax fraud of the most serious kind and, possibly in some instances, insider trading. The conduct revealed in this case is disgraceful.*

- Perram J in *Hua Wang Bank Berhad v Commissioner of Taxation* (the *Bywater case*) [2014] FCA 1392

1.2 Ethical and professional conundrums of the tax adviser

On the ethics (or morals) of tax planning

> *Requesting a tax lawyer to discuss the ethics of tax planning will be considered by some as akin to inviting the devil to deliver a sermon. A fresh outlook will be anticipated. At least it will be expected that the statement should be brief*
>
> – attributed to leading Canadian tax lawyer of the mid 20th Century, Philip Vineberg QC.

On the pitfalls of failing to advise on tax planning

> *One thing a reasonably prudent [tax lawyer] could not do was stay mute, especially if they proposed to charge for their time. Marcel Marceau was not a tax lawyer.*
>
> - per Beech Jones J **(**when a Judge of the NSW Supreme Court) in *Symond v Gadens Lawyers Pty Ltd* (2013) 96 ATR 658 at [304])

2. Introduction

2.1 Where is the boundary?

This is the question posed not by another ageing out-of-form middle order test batsman curiously selected out of position to open for his or her country without having played any long form cricket for 18 months, but by the organising committee to me as regards the metes and bounds of permissible tax planning.

The Hon. Murray Gleeson AC KC (former Chief Justice of the High Court) acknowledged the difficulty in defining the boundary and distinguishing between the permissible and impermissible[4]:

> *There is a body of public opinion which holds not merely that a distinction between legitimate tax planning and illegitimate tax avoidance is elusive but that it is impossible to express.*

The thesis of this paper is that several recent cases concerning the application of the General Anti-avoidance Rules (or "GAAR") found in Part IVA (Schemes to reduce income tax) of the *Income Tax Assessment Act 1936* (Cth) (**ITAA1936**)[5] assist to locate and define the boundary.

The recent decisions of the courts in *Minerva*, *Mylan* and *Ierna* in particular describe the line between permissible and impermissible tax planning:

- *Permissible tax planning:* On one side of the line is tax planning that *influences* but does *not drive* the commercial or other decision-making and actions of the taxpayer.
- *Impermissible tax planning*: On the other side of the line is where the tax benefits identified and targeted in tax planning become the *driver* of the taxpayer's decision-making or actions. The latter is clearly what occurred in *Merchant*. And appears to have occurred in *Guardian*.

I hope the reader looks more kindly on my efforts in the tax sphere than my boyhood cricket coach did of my batting skills – he was heard to remark that my Boycott-like batting rarely troubled the boundary.

2.2 Structure of this paper

For ease of reference:

- The current provisions of Part IVA are set out in the **Schedule** to the paper but excluding the "diverted profits tax" provisions (ss 117H to 177R) which apply only to "significant global entities" and are not a focus of this conference.
- **Section 3** outlines the principles applicable to the application of Part IVA generally and also in respect of the "dividend stripping" provisions (s 177E).
- **Sections 4 to 8** analyse the following recent decisions of the Federal Court in chronological order:

[4] The Hon. Murray Gleeson AC KC (former Chief Justice of the High Court) in the *Foreward* to the first edition of GT Pagone AM KC's text, *Tax Avoidance in Australia* (2023)
[5] Legislative references are to the ITAA1936 unless otherwise indicated.

- **Section 4:** *Commissioner of Taxation v **Guardian** AIT Pty Ltd ATF Australian Investment Trust* [2023] FCAFC 3 (per Perry, Derrington and Hespe JJ).

- **Section 5**: ***Minerva** Financial Group Pty Ltd v Commissioner of Taxation* (2024) 302 FCR 52; [2024] FCAFC 28 (per Besanko, Colvin and Hespe JJ) (8 March 2024).

- **Section 6:** ***Mylan** Australia Holding Pty Ltd v Commissioner of Taxation (No 2)* [2024] FCA 253 (per Button J).

- **Section 7**: ***Merchant** v Commissioner of Taxation* [2024] FCA 498 per Thawley J

- **Section 8**: ***Ierna** v Commissioner of Taxation* [2024] FCA 592 per Logan J.

- **Section 9:** Conclusion

- **Schedule**: Legislation: Part IVA

3. Part IVA: the principles

3.1 The legislative scheme: old and new Part IVA

The current[6] form of the legislation (omitting the DPT provisions) is set out in the Schedule to this paper.

In broad terms, Part IVA applies to "schemes" broadly defined (s 177A) and confers on the Commissioner the power (s 177F) to cancel "tax benefits" (ss 177C) in circumstances where having regard to the 8 matters enumerated in s 177D it would be concluded that one or more persons who entered into or carried out the scheme did so for the purpose of enabling the taxpayer to obtain a tax benefit in connection with the scheme.

As referred to above, the concept of a "tax benefit" is defined in s 177C to include matters such as an amount not being included in the taxpayer's ordinary income, and a deduction being allowable to the taxpayer, where the income would have been (or might reasonable by expected to have been) included or deduction not been (or might not reasonably be expected to have been) allowable: s177C(1)(a)-(b). It extends to matters such as capital losses, foreign income tax offsets, and other offsets and credits. It requires a comparison of what actually occurred (the scheme) with what would have, or might reasonably be expected to have occurred (the counterfactual or alternate postulate).

Other provisions of Part IVA expand the scope of "tax benefits" that the Commissioner may cancel under s 177F, including s 177E (stripping of company profits) which treats a tax benefit to which Part IVA applies as arising in respect of dividend stripping schemes or schemes in the nature of dividend stripping.

As is notorious, Part IVA was amended in 2013 to recast s 177D, and also insert 177CB. So-called "new Part IVA" applies to schemes commencing on or after 15 November 2012.[7] Section 177CB regulates certain aspects of the statutory inquiry in relation to the identification of a "tax benefit" including relevantly directing that in determining what would have occurred or might reasonably be expected to have occurred - that is, in identifying the counterfactual or alternate postulate – one must "disregard any result in relation to the operation of this Act that would be achieved by the postulate for any person" (s 177CB(4(b)); that is, one must ignore tax consequences in determining whether the counterfactual or alternate postulate is reasonable. This means of course that a counterfactual that has seriously adverse tax consequences and would consequently never have been undertaken may be considered "reasonable" because those adverse tax consequences are ignored.

This paper seeks only to deal with the provisions relevant to analysing the recent decisions. It is not a comprehensive review of Part IVA. As already mentioned it does not address the DPT provisions. Nor does it concern itself with ss 177DA (Schemes that limit a taxable presence in Australia), 177EA (creation of franking debit or cancellation of franking credits), or 177EB (Cancellation of franking credits – consolidated groups).

[6] As at 1 January 2025
[7] Refer *Tax Laws Amendment (Countering Tax Avoidance and Multinational Profit Shifting) Act 2013* (Cth), s 2 (table, item 1) and Schedule 1, item 10.

3.2 The general principles

As explained in more detail in Section 4 below, the Full Federal Court in *Guardian* (Perry, Derrington and Hespe JJ) commented on the principles applicable to both old Part IVA and new Part IVA.

References in this Section 3 to paragraphs of a judgment are to the Full Court's judgment in *Guardian* unless otherwise indicated.

3.2.1 The scheme (s 177A)

Scheme is broadly defined and includes an arrangement, understanding and proposal: s 177A(1) and (3). It looks to the particular form of the transaction entered into: at [151]. At [149], the Court observed that:

> The definition of "scheme" encompasses not only a series of steps which together can be said to constitute a "scheme" or a "plan" but also (by its reference to "action" in the singular) the taking of but one step. There is no reference to a scheme having some commercial or other coherence: *[Commissioner of Taxation v **Hart*** (2004) 217 CLR 216] at 238 [47] (Gummow and Hayne JJ). It is noted, however, that the manner by which the scheme came to be entered into or carried out is a factor required to be considered in determining the dominant purpose of the parties to the scheme: s 177D(2)(a). In that respect, any cohesion or planning may have implications for the conclusion to be drawn in respect of that purpose. This is considered further below.

3.2.2 The tax benefit (s 177C and 177CB)

As referred to above, the "legislation requires a comparison between the relevant scheme and an alternative postulate": *Federal Cmr of Taxation v **Trail Bros** Steel & Plastics Pty Ltd* [2010] FCAFC 94; (2010) 186 FCR 410 at 418 [25]–[26] (Dowsett and Gordon JJ) referring to *Hart* at 243 [66] per Gummow and Hayne JJ.

There are two limbs, the "would have" limb (or "annihilation approach") and the "might reasonably be expected to" limb (or "reconstruction" approach). A postulate posited for the "would have" limb must comprise only events that actually occurred (s 177CB(2)); *PepsiCo, Inc v Commissioner of Taxation* [2023] FCA 1490 at [432] per Moshinsky J.

As to the postulates, in a passage from *Trail Brothers* at [26] approved by the Court in *Guardian* at [155], Dowsett and Gordon JJ observed that (citations omitted; emphasis as per Court):

> The alternative postulate requires a "prediction as to events which would have taken place *if the relevant scheme had not been entered into or carried out* and that prediction must be sufficiently reliable for it to be regarded as reasonable". "A reasonable expectation requires more than a possibility". The question posed by s 177C(1) is answered on the assumption that the scheme had not been entered into or carried out..

The taxpayer bears the onus of proving that it did not obtain a tax benefit in connection with the scheme for the purposes of s 177C: *Guardian* at [156]. Simply proving the Commissioner's counterfactual is unreasonable may not discharge the onus by reason that the Court may determine objectively by reference to the evidence what would or might reasonably be expected to have occurred, and that the Court's counterfactual may give rise to a tax benefit. Nor does the Court

accepting that the Commissioner's counterfactual is reasonable preclude the taxpayer proving that what would have or might reasonably be expected to have been done gave rise to no or a lesser tax benefit: ***RCI** Pty Ltd v FCT* [2011] FCAFC 104 at [128]–[131] per Edmonds, Gilmour and Logan JJ (referred to in *Guardian* at [156]).

For schemes to which "new" Part IVA applies, s 177CB "is a statutory directive as to how the alternate postulate for the purposes of s 177C is to be determined": *Guardian* at [173]. It requires the Commissioner and the Court on appeal to disregard higher Australian income tax costs: at [174].

It is convenient to deal with tax benefits being treated as arising in respect of dividend stripping scheme separate (s 177E): see Section 3.3 below.

3.2.3 The dominant purpose (s 177D)

The court in *Guardian* explained at [17]-[178] that (citations omitted):

> For Part IVA to apply, it is necessary that it would be concluded that at least one of the parties who entered into or carried out the scheme (or any part thereof) did so for the sole or dominant purpose of enabling Mr Springer to obtain at tax benefit in connection with the scheme: ITAA 1936 s 177D. The conclusion must be one that would be drawn by a reasonable person.

A dominant purpose is the ruling, prevailing or most influential: s 177A(5).

Section 177D directs attention to the following 8 matters which are posited as objective facts. It requires a conclusion as to the purpose ascertained objectively; it does not permit an inquiry into subjective motives or actual intention: see [180].

Events that are not part of the scheme may be relevant to relevant to the 8 matters enumerated in s 177D: [182].

As to those 8 matters:

1. *Manner in which the scheme was entered into or carried out*: This is concerned with how the scheme was established, came to be, or was carried out: at [184], [191]. So tax planning may be relevant.

2. *The form and substance of the scheme*: This is concerned with an evaluation of the extent to which the form of the scheme matches the outcome achieved by it: at [197]. One example is "sham". Another is where the form of the scheme was to confer a financial benefit or other entitlement on an entity but the substance (without sham) is to financially benefit the taxpayer. In *Guardian,* the form of the scheme was to confer a present entitlement to a trust distribution on a company but the substance (without any suggestion of sham) was to enrich the taxpayer by conferring ownership and control of that present entitlement on the taxpayer: [200].

3. *The time at which the scheme was entered into and the length of the period during which the scheme was carried out*: This will depend on the particular facts and circumstances: at [202]-[204].

4. *The result in relation to the operation of the ITAA 1936 and the Income Tax Assessment Act 1997 that would be achieved by the scheme, but for Part IVA*: The fact that a taxpayer obtained a tax benefit does not compel the conclusion that doing so was the dominant purpose of one or more

parties entering into the scheme: *Hart* at [53]. This factor cannot be considered in isolation from the other factors: [205]-[208].

5. *Change in financial position of the taxpayer that has resulted from the scheme*: One must have regard to the other possibilities open to the parties at the relevant time in weighing this factor. The identification of a "commercial" end is not inconsistent with the obtaining of a tax benefit – contentions to the contrary famously draw a "false dichotomy": *Hart* at [64].

6. *Change in the financial position of a connected person*: Similar considerations apply as to the previous factor.

7. *Any other consequence of the scheme for Mr Springer or any other person*: This requires an identification of the other consequences and an objective analysis of whether they point towards a person having the relevant dominant purpose or not.

8. *Nature of any connection between the relevant taxpayer and any connected person*: This may include familial ties, the ownership or control by one entity of another and the reason for establishing an entity.

Drawing a conclusion from the 8 factors is not a mathematical exercise. Nor does it pose a causation test ("but for" or otherwise): refer ***Minerva** Financial Group Pty Ltd v Commissioner of Taxation* [2024] FCAFC 28 at [62]. It may require consideration of what was *driving* the transactions. Some factors may be more important than others in the particular circumstances of a case. Some may be *neutral* in a particular case: *Minerva* at [60(10)]. In some cases, "the relevant dominant purpose may be so apparent, taken from the evidence as a whole that the consideration of the statutory factors can be collapsed into a global assessment of purpose": *Commissioner of Taxation v Consolidated Press Holdings Ltd* (1999) 91 FCR 524 at [93] (and on appeal see (2001) 207 CLR 235 at [94]).

The fact that a taxpayer pays less tax than if the transaction had been effected in a different form does not demonstrate that Part IVA applies: *Hart* at [15], [53].

As stated by the Full Court (Besanko, Colvin and Hespe JJ) in *Minerva* at [60(8)](bold added):

> There is a **distinction** between a taxpayer adopting a form of transaction that is **influenced by taxation considerations** (where the presence of a fiscal objective does not mean that it is to be concluded, having regard to the factors listed in s 177D, that the dominant purpose of the taxpayer was to obtain a tax benefit) and a **taxpayer taking steps to maximise after-tax returns** in a manner objectively indicating the presence of a dominant purpose to obtain a tax benefit: *Hart* at [16]–[18]; *Commissioner of Taxation v Spotless Services Ltd* [1996] HCA 34; (1996) 186 CLR 404 at 416, 423.

3.3 Tax benefit (dividend stripping): s 177E

As referred to above, s 177E treats a tax benefit to which Part IVA applies as arising in specified circumstances where one may not otherwise arise under s 177C.

In broad terms, s 177E provides that a taxpayer is taken to have obtained a tax benefit where:

- There is a scheme[8] in relation to a company that is by way of or in the nature of dividend stripping, or has substantially the effect of such a scheme;
- As a result of the scheme, property of the company is disposed of;
- In the Commissioner's opinion, the disposal represents a distribution of the company's accrued, current year or future profits;
- If prior to the scheme the company had paid a dividend out of profits equal to the amount of the profits distributed by the disposal, by reason of that dividend an amount would have or might reasonably be expect to be included in a taxpayer's assessable income.

The tax benefit is taken to have been obtained is equal to the notional amount not included in the taxpayer's assessable income.

Relevantly, the term "property" is broadly defined (s 177E(3)) and a reference to "disposal of the property of a company" in s 177E(1) includes the payment of a dividend and the making of a loan by the company: s 177E(2).

3.3.1 A peep at "dividend stripping" (s 177E): *Bblood v Commissioner*

The phrase "dividend stripping" is not defined in the legislation. The history and principles of the concept are outlined in detail in the judgment of Thawley J *in **Bblood** Enterprises Pty Ltd v FCT* 2022 ATC 20-840; [2022] FCA 1112 at [299]-[323].[9] Relevantly, in *FCT v Consolidated Press Holdings Ltd* (No 1) (1999) 91 FCR 524 at [136]-[137], the Full Court identified six characteristics of a dividend strip drawn from the earlier cases:

> "• a target company, which had substantial undistributed profits creating a potential tax liability either for the company or its shareholders;
>
> • the sale or allotment of shares in the target company to another party (a company in three cases and individuals resident in the then Territory of New Guinea in Bell);
>
> • the payment of a dividend to the purchaser or allottee of the shares out of the target company's profits;
>
> • the purchaser escaping Australian income tax on the dividend so declared (whether by reason of a s 46 rebate, an offsetting loss on the sale of the shares, or the fact that the shareholders were resident outside Australia); and
>
> • the vendor shareholders receiving a capital sum for their shares in an amount the same as or very close to the dividends paid to the purchasers (there being no capital gains tax at the relevant times).
>
> …

[8] Entered into after 27 May 1981.

[9] The history is further elaborated upon in the author's article "Dividend stripping: the life and times of s 177E" (2011) 26(1) Australian Tax Forum 51.

> • [the schemes] were carefully planned, with all the parties acting in concert, for the predominant if not the sole purpose of the vendor shareholders, in particular, avoiding tax on a distribution of dividends by the target company."

At [156]-[157] the Full Court continued in relation to the "first limb" of s 177E(1)(a) ("a scheme by way of or in the nature of dividend stripping"):

> "[156] … The use of the words "by way of or in the nature of" suggests that variations from the paradigm will not necessarily result in the scheme being excluded from the first limb, provided it retains the central characteristics of a dividend stripping scheme.
>
> [157] Since the legislation does not identify those central characteristics, it is necessary to look to the decided cases preceding the 1981 Act and to the extrinsic materials accompanying the relevant legislation. We have identified what we would see as the central characteristics of a dividend stripping scheme, by reference to the High Court decisions discussed in Patcorp. The six characteristics so identified are set out in [136] and [137]. They are similar to those identified by the primary Judge as comprising the "essential character" of a dividend stripping operation."

The Full Court in ***Lawrence*** *v FCT* (2009) 175 FCR 277 referred to these observations with approval. At [51] the Full Court in *Lawrence* endorsed the observation of the primary judge that "the requirement of a tax-avoidance purpose, being basic to the idea of dividend stripping in any form, existed equally [for both limbs]". Contrary to the conclusions of Thawley J in *Bblood* at [315], the parties on appeal to the Full Court in ***B&F Investments*** *Pty Ltd as trustee for Illuka Park Trust v Commissioner of Taxation* (2023) 298 CR 449 accepted that "the purpose of the scheme was to be assessed objectively": at [108].

Thawley J further observed in respect of the first limb that (*Bblood* at [353]):

> "At its simplest, a dividend stripping operation is an operation to extract profits from a company in a way intended to avoid or reduce tax which, absent the operation, would have been payable by a person on those profits being distributed by way of dividends. Historically, this was often done by: (a) the original shareholder selling its shares to a new shareholder, say $10m reflecting the accumulated profit in the company; (b) the company paying the new shareholder a dividend (company profits of $10m) in respect of which the new shareholder would not be liable to tax. When a dividend stripping operation is carried out in this way, the original shareholder receives a capital sum rather than taxable dividend income."

See the observations of the Full Court in *B&F Investments* at [111].

As to the operation of the second limb, the Full Court in *Lawrence* observed at [41]:

> "Sub-paragraph (ii) of para (a) of s 177E(1) is concerned with the effect of a scheme; whether a scheme had substantially the effect of a scheme by way of or in the nature of dividend stripping. Clearly, it is referring to a scheme which does not qualify as a scheme by way of or in the nature of dividend stripping within sub-para (i). On the other hand, it predicates a knowledge of the effect of a scheme by way of or in the nature of dividend striping; otherwise, one would not be able to determine whether the scheme in question met the test of substantially having the same effect. That might suggest that, under sub-para (ii), one is not concerned with what is a scheme by way of or in the nature of dividend stripping, only its effect. But that would be a mistake because at least one of the indicia identified by the courts as being common to transactions characterised as dividend stripping schemes looks to the

effect of the scheme – the vendor shareholders receiving a capital sum for their shares the same as, or very close to, the dividends paid to the purchasers."

See also the observations of the Full Court in *B&F Investments* at [116].

In *Bblood*, Thawley J was considering the application of s 207-155 of the ITAA1977 which defines a scheme as a "dividend stripping operation" in the same terms as the two limbs of s 177E for the purpose of denying tax offsets on franked distributions under s 207-150. The six steps in the scheme are outlined at paras [19]-[28] of the judgment. In substance, a company ("IP Co") had significant retained earnings. It bought back 99 of its 100 shares on issue from a discretionary trust ("IP Trust") for approximately $10 million and debited its retained earnings for most of that amount. The buy-back amount was treated as a deemed dividend under s 159GZZZP of the ITAA1936 and was fully franked. The definition of "income" in the IP Trust deed was varied to that determined by the trustee according to ordinary concepts. The trustee of the IP Trust resolved to distribute all its income to a recently introduced corporate beneficiary ("BE Co"). The buy-back amount although a deemed dividend for tax purposes was a capital amount according to ordinary concepts so it was not included in the income distributed to BE Co. However, by reason of the operation of Div 6, Be Co was treated as presently entitled to the deemed dividend but paid no tax on its because it was entitled to the associated tax offsets: refer [33]. The IP Trust retained the buy-back amount as corpus.

At [356] Thawley J set out his assessment of the scheme:

> "Assessing the circumstances and events objectively, but also taking into account the evidence of subjective purpose, the predominant purpose of entering into the scheme was to move the profits of IP Co to its shareholder (IP Trustee) in capital form and without subjecting any person to tax beyond the level of corporate tax already paid on the profits, as reflected in the Franking Credits. Absent the scheme, dividends would have been declared and paid to the IP Trust and additional tax would have been paid. BE Co has not discharged the onus of establishing that the scheme was not undertaken for a tax avoidance purpose. The hallmark feature of tax avoidance necessary for both limbs of s 207-155 permeates the scheme."

The reference to taking account of subjective purpose in that passage should be ignored: *B&F Investments* at [108].

3.4 Cancellation of tax benefits to which Part IVA applies (s 177F)

Where Part IVA applies to a tax benefit, whether by reason of a tax benefit arising under s 177C and the scheme being one in respect of which it ought be concluded that it was carried out for the dominant purpose of enabling a taxpayer to obtain a tax benefit (s 177D) or by reason that s 177E (dividend stripping) applies, the Commissioner may cancel the tax benefit (s 177F).

The Commissioner has a discretion as to the determination of the quantum of the tax benefit (*Commissioner of Taxation v Sleight* (2004) 136 FCR 211 at [103]-[104]) but not as to the exercise of the power to cancel the tax benefit (*Cumins v Federal Commissioner of Taxation* [2007] FCAFC 21 at [41]): see *Channel Pastoral Holdings Pty Ltd v Commissioner of Taxation* (2015) 232 FCR 162 at [120] per Pagone J.

3.5 Conclusion

It is in the context of those principles that the recent decisions are analysed with a view to describing the boundaries of permissible tax planning.

4. Guardian (100A and Part IVA)

Commissioner of Taxation v Guardian AIT Pty Ltd ATF Australian Investment Trust [2023] FCAFC 3 (per Perry, Derrington and Hespe JJ) (24 January 2023)

On appeal from the decision of Thawley J: [2021] FCA 1619.

ATO Decision Impact Statement[10]

4.1 The salient facts

Following a largely successful business career, Mr Springer decided to transition to retirement in 2007, and as part of that took up residence in Vanuatu after previously residing in Australia. The transition included winding down his business interests which included a number of companies.

The taxpayer was the corporate trustee of a discretionary trust known as to the Australian Investment Trust (**AIT**). Mr Springer controlled the corporate trustee and had power to appoint new beneficiaries of the AIT. From around 2007, the AIT was a passive investment vehicle.

In 2012 a company (**AITCS**) was registered with AIT holding all issued shares.

Up until 2012, AIT distributed trust income to Mr Springer's companies on an "as needs" basis"; at [34].

Trust distributions were made to Mr Springer and his son in those years.

In the 2012 income year, AIT distributed some $8.2 million and Mr Springer had a cumulative unpaid present entitled to trust distributions (**UPE**) of over $10.5 million" at [47].

Following the ATO publicly stating its view that UPEs were loans for the purpose of Division 7A[11], which would be treated as unfrankable deemed dividends unless discharged prior to the date of lodgement of the tax return for the income year in which the "loan" was made unless a s 109N compliant loan agreement was entered into, Mr Springer and AIT entered into such an agreement. Mr Springer's evidence, consistent with contemporary emails, was that he did not have control of AITCS's bank account and in those circumstances did not want a large sum of money transferred to it: [52]-[53].

As to AIT's 2012 income (at [59]):

- On 28 June 2012, AIT appointed c. $2.6 million of income (not being franked dividends) to AITCS, which was left outstanding thus creating a UPE.
- On 17 April 2013, AIT drew on the UPE to meet its tax liabilities rising from AIT's appointment of income.
- On 1 May 2013, AITCS declared a fully franked dividend of approx.. $1.85 million to which AIT was entitled. AITCS's obligation to pay the dividend to AIT was offset against the AITCS's UPE which was reduced to nil.

[10] https://www.ato.gov.au/law/view/document?LocID=%22LIT%2FICD%2FQUD36of2022%2F00001%22&PiT=99991231235958
[11] Which view was recently rejected by the Full Federal Court in *Commissioner of Taxation v Bendel* [2025] FCAFC 15.

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- On 23 June 2013, AIT appointed the net income attributable to the AITC fully franked dividend to Mr Springer, together with other fully franked dividend income.

Similar steps were taken in respect of AIT's distribution to AITCS, and AIT's net income, in the 2013 income year (at [64]).

As regards Mr Springer, he was not liable to any tax on AIT's distribution of fully franked dividend income because as a resident of Vanuatu it was treated as non-exempt non-assessable income. If non-franked dividend income had been distributed to Mr Springer, it would have been taxed at the marginal tax rates for non-residents (up to 45%) with no tax-free threshold: see [69].

The Commissioner assessed AIT's trustee under s 99A of the ITAA1936 in respect of the 2012 to 2014 income years one the basis that there was a "reimbursement" agreement within the meaning of s 100A(7) – which in broad terms is, in relation to the beneficiary of a trust, an arrangement for payment of money to a person other than a beneficiary.

In the alternative, the Commissioner determined that Part IVA applied.

4.2 Primary Judge's decision

The Primary Judge rejected that as a matter of fact there was a "reimbursement agreement" by reason that as a matter of fact there was no relevant arrangement. Those conclusions were not disturbed on appeal.

The Primary Judge also rejected that Part IVA applied on the grounds that the purpose of the "schemes" (see below) was to minimise risk to Mr Springer in retirement and for AITCS to serve as a vehicle for wealth accumulation and passive investment: relevant passages reproduced at [136]-[138]. There was no tax benefit. And there was no dominant purpose of conferring a tax benefit: see [139]-[144].

4.3 The appeal

On appeal, the Commissioner focussed his Part IVA case to the narrow "related" schemes propounded in respect of the 2012 and 2013 income years.

4.3.1 The schemes (s 177A)

Those schemes effectively the same. The 2012 scheme involved the following steps (at [130]):

(i) the incorporation of AITCS and the determination by Mr Springer, as Principal of the AIT, to make AITCS a member of the eligible class of beneficiaries;

(ii) the appointment of income of the AIT for the 2012 year to AITCS;

(iii) the drawing down by AITCS of part of that entitlement to discharge its liability to income tax for the year ended 30 June 2012;

(iv) the declaration and payment by AITCS of a fully franked dividend on 1 May 2013 to the trustee for the AIT (reducing AITCS's unpaid present entitlement from the year ended 30 June 2012 to nil); and

(v) the appointment of franked income of the AIT for the year ended 30 June 2013 to Mr Springer.

4.3.2 The alternate postulate (ss 177C and 177CB)

The Commissioner's alternate postulate was that:

> [I]t might reasonably be expected that Mr Springer would have been made presently entitled to the amount of net income of the AIT for each of the income years ended 30 June 2012 and 30 June 2013 to which AITCS had been made presently entitled. As a result, Mr Springer might reasonably have been expected to have had included in his assessable income the amounts of the AIT net income which AITCS included in its assessable income in each of those years of income

The taxpayer's adviser, Mr Fisher, gave evidence that he would never have advised that unfranked AIT income be distributed to Mr Springer exposing him to tax at the highest marginal tax rate: at [167].

By reason of s 177CB(4)(b), the tax cost at the highest marginal rate should have been disregarded in determining whether the Commissioner's alternate postulate was reasonable. The Court determined that it was reasonable and rejected that the taxpayer had discharged the onus by proving that it might reasonably be expected that it would have taken some other course not giving rise to a tax benefit or giving rise to a lesser tax benefit: at [174]-[176].

4.3.3 The dominant purpose (s 177D)

Applying the 8 factors, and having regard to the fact that the events of 2012 were the product of evolving circumstances rather than a strategy, the Court concluded that the dominant purpose was not to confer a tax benefit.

However, the 2013 scheme was the product of the implementation of a strategy developed with tax advice, and this tipped the scales in favour of the conclusion the dominant purpose was to confer a tax benefit on Mr Springer.

4.4 Observations

In one sense, it can be seen that "tax planning" ahead of the 2013 income year was the reason that the Court concluded that the dominant purpose was to confer a tax benefit, and that the taxpayer enjoyed success in 2012 because of ignorance or lack of planning.

However, in this case the better view is simply that the tax planning failed to have regard to the surrounding circumstances, in particular that the deliberate change of strategy from Mr Springer receiving both franked and unfranked income to only receiving franked income in all the circumstances, absent a non-tax main purpose, compelled the conclusion that the schemes were entered into for the dominant purpose of conferring a tax benefit.

Another aspect of the case was the contrived nature of the transaction, and the disjuncture between "form and substance". As observed by Full Court (at [200]),

> "The form of the 2012 related scheme and the 2013 related scheme involved making AITCS presently entitled to net income of the AIT but the substance of the schemes was that Mr

> Springer would enjoy direct ownership and control of the value of that present entitlement (after AITCS paid its resulting tax liability) within a few months of AITCS becoming so presently entitled. The outcome achieved by the schemes was the direct enrichment of Mr Springer.

The Full Court considered this supported their conclusion as regards the 2013 scheme

It is a reminder to tax advisers to consider these type of “form and substance” issues, and not simply focus on whether the arrangements are legally effective.

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5. Minerva (corporate restructuring)

***Minerva** Financial Group Pty Ltd v Commissioner of Taxation* (2024) 302 FCR 52; [2024] FCAFC 28 (per Besanko, Colvin and Hespe JJ) (8 March 2024).

An appeal from the decision of O'Callaghan J: [2022] FCA 1092 (16 December 2022).

ATO Decision Impact Statement[12]

5.1 The salient facts

The taxpayer was a member of the **Liberty group** of entities. At all times the ultimate parent entity was incorporated in the Netherlands. Pre-12 April 2013 the parent was "Jupiter". Post that date it was "Vesta".

Liberty group raised funds for its non-bank lending business by way of securitisation which involved the establishment of special purpose securitisation trusts. The trustee of those trusts issues *notes* to third parties, and "residual income units" (**RIUs**) and "residual capital units" (**RCUs**) to a related entity. The holder of the RIUs was entitled to the balance of trust income after obligations to noteholders and other expenses were met, and the holder of the RCUs was entitled to the balance of capital after repayment of noteholder funds and obligations to any other financiers.

"LF" performed the treasury function for the Liberty group. Other group members made excess funds available to LF by way of loans, the balance of which was reduced when LF paid amounts in satisfaction of that group member's liabilities to other parties (see [38]-[40]).

Up to 2007, LF's shares were owned by the ultimate parent entity. LF received the profits from the securitisation trusts and held the RIUs and RCUs: [7]. Subsequently, it derived management and administration fees: [28].

In 2007, in anticipation of an initial public offering (or "IPO") of stapled securities, the Liberty group reorganised itself into a "trust silo" and a "corporate silo". Consistent with advice about the optimal structure for an IPO, the stapled securities were to consist of a share in the taxpayer and a unit in a unit trust referred to as "MGFT": at [9]. As part of the reorganisation, the taxpayer acquired all the shares in LF form the ultimate parent: [12]. MFGT was also established. MFGT issued 2 units, both to the taxpayer.

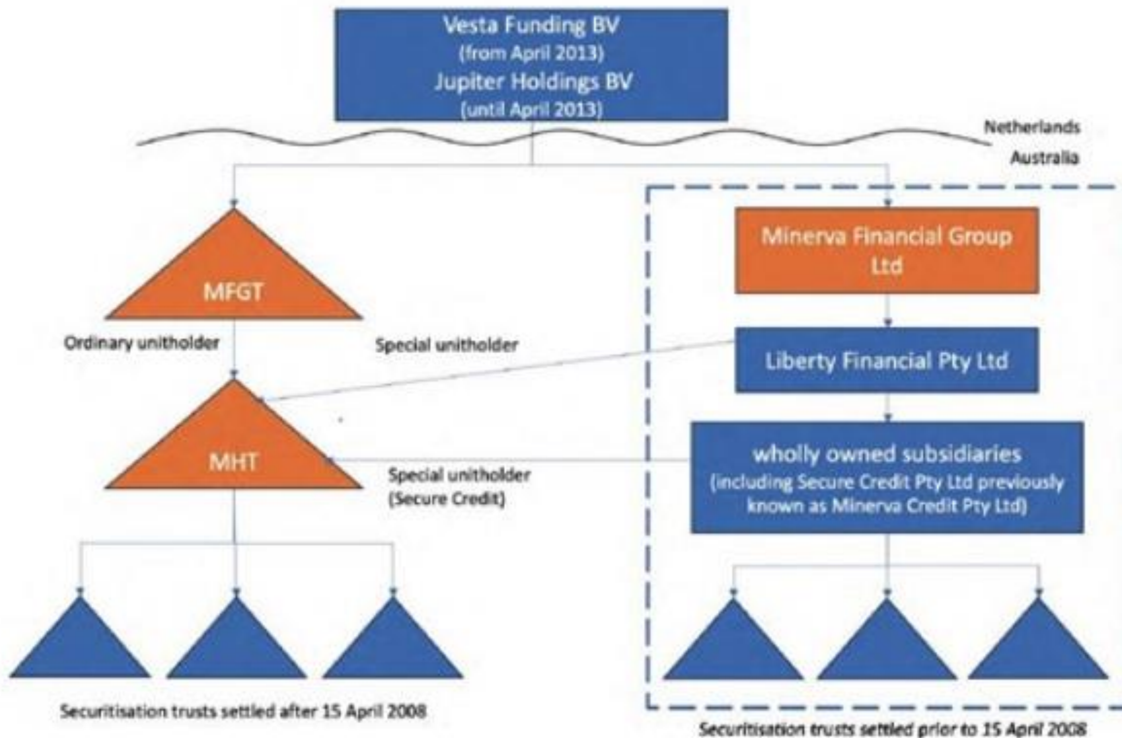
In July / Augst 2007, the Liberty group decided to postpone the IPO due to adverse market conditions. Subsequently, the taxpayer transferred the two MFGT units to the ultimate parent (Jupiter).

In April 2008, a holding trust (**MHT**) was established with one ordinary unit issued to MFGT and one special unit issued to each of LF and a subsidiary of LF. The taxpayer was the trustee of MHT ([33]). As per the pre-IPO plan, the special unit allowed for income to be distributed to LF if LF required additional funding: at [11].

From April 2008, RIUs and RCUs in new securitisation trusts were issued to MHT rather than LF.

A simplified structure diagram for the Liberty group was included in the judgment at [18].

[12] https://www.ato.gov.au/law/view/view.htm?docid=%22LIT%2FICD%2FVID662of2022%2F00001%22



In July 2010, MFGT issued 5 units to Jupiter in consideration for the assignment to MFGT of a promissory note issued by the taxpayer (shown in orange as Minerva Financial Group Ltd).

In August 2010, an application was made to deregister MFGT as a managed investment scheme (or "MIS").

On 30 June 2012, MFGT issued approximately 199 million units to Jupiter.

In April 2013, Vesta replaced Jupiter as the ultimate parent company.

In March 2015, LF commenced raising senior unsecured interest-bearing debt with a $100 million issue of so-called Medium Term Notes (or "MTNs").

In September 2016, the Liberty group again considered an IPO of stapled securities but it did not proceed due to conditions associated with the COVID-19 pandemic.

In December 2020, Liberty group stapled securities were listed on the ASX.

In the period from 2007 to 2020, Liberty group's loan portfolio from around $3.7 billion to $11.6 billion: [27].

In 2012 to 2015, MHT distributed considerable profits to MFGT which in turn distributed them to Jupiter or Vesta as sole ordinary unitholder ([33]), attracting withholding tax at 10% compared to the 30% paid by LF on the group's profits up to 2007: [29]. No amounts were distributed to LF as special unit holder in 2012, and only nominal amounts were so distributed in each of 2013, 2014 and 2015: [33]-[34].

5.2 The relevant "schemes" and the "counterfactual"

At first instance, the Primary Judge concluded that Part IVA applied to the second and third schemes identified by the Commissioner.

The second scheme concerned Jupiter's acquisition of all units in MFGT, MHT distributing no more than nominal income to LF, and MHT using distributions received on the RIUs to fund loan advances to LF: [46].

The third scheme was similar but did not include Jupiter's acquisition of all units in MFGT: [47].

The Commissioner's alternate postulate largely rested on the manner in which Liberty group had carried on its business pre-2007: [122].

In evaluating the first and third factors in s 177D (form and substance, and timing, respectively) in respect of the second scheme (at [50]):

> … the primary judge considered the first part of the scheme (involving the transfer of the units in MFGT from the appellant to Jupiter) separately from the second part of the scheme (involving the non-exercise of the discretion of the trustee of MHT to make distributions to the special unitholders and the lending by MHT of the amounts it receive as distributions on the RIUs to LF). The primary judge considered that there was no evidence from the appellant as to the commercial reasons why it only distributed nominal amounts of income from MHT to the special unitholders in the relevant years. The primary judge concluded that the first and third factors supported a conclusion that a party (namely the appellant) entered into or carried out the second scheme for the dominant purpose of enabling it to obtain a tax benefit. The remaining factors were considered by the primary judge to be neutral.

5.3 The Full Court's decision

The Full Court remarked on the significance to the Commissioner's case of treating LF's activities within the Liberty group as "static" pre and post the 2007 reorganisation: at [56]. This caused difficulties for the Commissioner because the restructure itself had been rejected as a scheme to which Part IVA applied, and in subsequent years there was significant growth and changes in sources of funding and in the way LF was remunerated ([57]) which flowed through to a change in risks assumed ([83]). The failure of the Commissioner's case to engage with those changes meant it was not possible to reason from the pre-2007 operations to what might reasonably be expected to have occurred from 2012: [58].

This led the Court to conclude that Part IVA did not apply and thus allow the taxpayer's appeal.

Below is summary of the Court's key comments on selected factors.

5.3.1 1st factor (s 177D): manner in which scheme carried out

The change in unitholder of MFGT, the intra-group loan arrangements, and the remuneration arrangements of LF on a cost recovery basis were not unorthodox. None suggested that the *manner* in which the scheme was carried out had a purpose of conferring a tax benefit. It was "not sufficient to show that the taxpayer would have paid more tax if something different had been done" (at [85]).

5.3.2 3rd factor (s 177D): time

The Court observed that the timing of the decision as to whether MHT would distribute any amounts to LF as special unit holder were a function of and explained by the terms of the trust and the need to pass a resolution prior to the year end.

The Court concluded that the timing of the determination "tells one nothing about the dominant purpose" in this case: [96].

5.3.3 5th and 6th factors (changes in financial position of taxpayer / others)

The Court rejected the Commissioner's contention that LF's financial position was adversely effected by the failure of MHT to distribute amounts to LF as a special unitholder. The Court rejected this for reasons including that distributions to MFGT had "real economic financial advantages" to the parent entities including putting them in funds to repay debts owed to LF as treasury entity: [106]. Equity injections required by LF were a function of the group's growth and LF's need to maintain an adequate debt to equity ratio to ensure that it continued to enjoy an investment grade rating: [107].

The Court delved into the financial advantages and disadvantages for the taxpayer and other entities involved in the *schemes*. A close analysis of those circumstances exposed sound commercial reasons for the events that indicated that these factors were either neutral or indeed supported the taxpayer's case as regards the application of s 177D.

5.3.4 8th factor (connection between taxpayer and affected persons)

The Court at [120] took the opportunity to refer to the observation of Gordon J (when a Judge of the Federal Court) in *Noza Holdings Pty Ltd v Commissioner of Taxation* [2011] FCA 46 at [315] that:

> the transactions in issue are all intercompany transactions within a group in which distributions are paid otherwise than in cash, and are transactions believed to have significant Australian taxation consequences, if considered alone "would very probably excite the closest attention to the possible application of Pt IVA".

Nonetheless, as the Court observed this potential *excitement of interest* occasioned by the entities affected all being connected:

> casts no light on whether a party to any of the schemes had the requisite dominant purpose.

5.4 Observations

Minerva is an example of a case in which tax planning no doubt occurred, and was carried out in the context of seeking to achieve commercial objectives including in this case reorganising the group in readiness for an IPO and ensuring adequate capitalisation and funding of entities within a group, and resulted in the Court concluding that Part IVA did not apply. This is not to fall prey to the false dichotomy by suggesting that identification of a commercial purpose precludes a conclusion that Part IVA applies. Rather, this case is an example of tax considerations no doubt *influencing* the taxpayer in its subjective decision making, however when it came time to consider the 8 factors, the benefit of paying 10% withholding tax versus 30% corporate tax on income from the special purpose securitisation trusts was not the *dominant* purpose of the schemes.

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6. Mylan (debt push down)

Mylan Australia Holding Pty Ltd v Commissioner of Taxation (No 2) [2024] FCA 253 per Button J (20 March 2024).

6.1 Outline of the facts and issues in contest

This case was concerned with a debt "push down". The taxpayer (**MAHPL**) is the head company of a tax consolidated group whose ultimate parent company was Mylan Inc. MAHPL is MAPL's immediate parent entity.

In October 2007, the Mylan group acquired operating subsidiaries of the Merck group's global generic pharmaceutical business, including relevantly MAPL's acquisition of all the shares in Alphapharm Pty Ltd. MAPL funded the acquisition with a debt to equity ratio of 3:1. MAPL's debt funding was provided by a Luxemburg member of the Mylan group. MAPL incurred significant interest expenses which the consolidated tax group claimed as deductions.

The Commissioner posited a *broad* and *narrow* scheme which involved the creation of the tax consolidated group, the debt funding, and the capitalisation of a significant amount of interest: see [222].

The Commissioner's counterfactual was that the Mylan group might reasonably be expected to have acquired Alphapharm's Netherlands based parent entity "MGGBV" (at [223]) resulting in no interest deductions. Alternative counterfactuals were posited involving borrowing lesser sums on secured terms at lower floating rates: see [225]. The Commissioner abandoned a counterfactual based on interest free borrowings.

6.2 The Court's decision: Part IVA does *not* apply

The Court rejected the Commissioner's primary counterfactual on the basis that the evidence demonstrated that debt funding is more flexible than equity and a mix of debt and equity is generally preferred: see [252]-[253].

The primary Judge then undertook a detailed review and analysis of evidence concerning the mix of debt and equity and matters relevant to the quantum and terms on which debt would be provided including cash flow, capitalisation of interest, fixed or floating interest rates, debt serving and amortisation, guarantees: [249]-[400].

Based on that analysis, the Primary Judge identified a *preferred* counterfactual which relevantly included debt in a similar amount to that actually borrowed (equivalent to A$785 million): at [394]. That counterfactual appeared to give rise to a tax benefit: at [397].

The Court concluded however that consideration of the 8 factors in s 177D did not lead to a conclusion that the preferred scheme was entered into for the dominant purpose of providing the taxpayer with a tax benefit (interest deductions).

In this regard, the following passage at [526] concerning the *manner* in which the scheme was carried out (citations omitted) (at [526]) is telling as regards the Court's conclusion that the dominant purpose was not to confer a tax benefit on the taxpayer:

> The selection of the form of transaction represented by the scheme, and not any of those alternatives, is not a matter that is explicable only by reference to enabling MAHPL to obtain a tax benefit in connection with the scheme .. or the below market rate investment of excess funds with a related party ... The choice of related party (cf third party) funding provided obvious commercial benefits in flexibility as to capitalisation of interest and the terms concerning repayment of principal. The choice of a scheme which involved fixing the interest rate (rather than leaving a floating rate in place) does not, at the time that choice was made (as to which the evidence has been addressed above), suggest a dominant purpose of the kind referred to in s 177D as it could not then be foretold that a floating rate would, over the course of the borrowing, be more advantageous than the fixed rate.

6.3 Observations

It is clear that the taxpayer's decisions were *informed* by advice on tax issues. And it is clear that the structure of the acquisition, while orthodox and conferring commercial benefits, also conferred tax benefits in the form of interest deductions. Nevertheless, as the courts have emphasised, that is not dispositive of the statutory question. In this case, the Court was comfortably satisfied that the dominant purpose was not the conferral of a tax benefit. It is a case to give comfort that Part IVA is no bar to taxpayer's engaging in careful tax planning .

7. Merchant (surfing capital wave)

Merchant v Commissioner of Taxation [2024] FCA 498 per Thawley J (14 May 2024)

7.1 Taxpayer's wipeout

This case makes for unhappy reading. It is no surprise that the taxpayer commenced separate proceedings against the professional advisers: referred to at [25]. It involved what may be characterised as impermissible tax planning. It is not a case that sheds light on where the boundary between permissible and impermissible tax planning lies.

7.2 Swept away by the 'wash sale' and debt forgiveness

At the risk of gross oversimplification, the taxpayer (Mr Merchant) co-founded the surf accessories retail business known as "Billabong" in 1973. The business was subsequently carried on through Billabong Limited (**BBG**) whose shares were listed for trade on the ASX in August 2000 (and subsequently delisted in August 2018).

Mr Merchant established and controlled a discretionary family trust with a corporate trustee known as the Merchant Family Trust (or "MFT") which in turn owned all the shares in a company (**Plantic**) that carried on a start up business. Other entities controlled by Mr Merchant had advanced loans in the aggregate amount of $55 million to Plantic to fund it activities.

In May / June 2014, a foreign company expressed interest in acquiring Plantic. Mr Merchant was advised that the preferable sale structure involved ([5]):

- a sale by MFT of Plantic's shares rather than a sale of business assets, realising a substantial capital gain;
- the forgiveness of the $55 million of loans;
- Mr Merchant's self-managed superannuation fund (**GMSF**) acquiring a substantial number of MFT's high cost BBG shares, realising a significant capital loss.

The anticipated sale of Plantic did not proceed with the initial potential acquirer. Nevertheless, in September 2014, GMSF acquired 10.3 million BBG shares for $5.844 million realising a capital loss for MFT of $56.5 million.

Another potential investor reengaged with MFT about acquiring Plantic in October 2014. On 31 March 2015, a share sale agreement was executed which resulted in MFT realising a capital gain of some $85 million: [9]. It was a condition precedent to completion that the $55 million of loans were forgiven: [8].

7.3 The Commissioner's peaked interest

The Commissioner made a determination by reference to the "Share Sale Scheme" under s 177F to cancel the tax benefit in the form of the $56.5 m capital loss ([12]); and that the "Debt Forgiveness Scheme" involving the forgiveness by two companies of an aggregate of $54 million of Plantic's debt

was a scheme in the nature of dividend stripping (s 177E) resulting in the amount forgiven being included in Mr Merchant's assessable income: [15]. These gave rise to the two main issues in the case (at [478]).

As to the "Share Sale Scheme", the only issue was whether the dominant purpose of the scheme was to provide the taxpayer with the conceded tax benefit of the capital loss sheltering the capital gain from tax (s 177D): at [243]-[244]. Notably, the scheme did not result in a change in Mr Merchant's *economic ownership* of the BBG shares acquired by his self-managed superannuation fund: [369]. The Court had little hesitation in concluding that the manner, form and substance, timing, and other factors weighed in favour of providing the tax benefit being the dominant purpose.

As regards the "Debt Forgiveness Scheme", the Judge concluded that there was a tax avoidance purpose, being the purpose of avoiding the augmentation of the lenders' retained earnings upon repayment and tax to Mr Merchant upon the entities disgorging those profits by way of dividend. Rather, by forgiving the debts, MFT's interest in Plantic and thus MFT's capital was augmented and realised in a tax free way by reason of the capital loss being used to offset the discount capital gain on disposal of the Plantic shares: see [542], [548], [564], [568]. Thawley J considered that the steps taken to avoid the top up tax on the dividends was "contrived": [568]. Having regard to these matters, his Honour concluded that the scheme was in the nature of dividend stripping: at [571]-[572].

7.4 Observations

The less said about this case the better. It was clearly a "contrivance".

8. Ierna (Section 45B and Part IVA)

Ierna v Commissioner of Taxation [2024] FCA 592 per Logan J (6 June 2024)

The Commissioner's appeal from the Primary Judge's decision is set down for hearing by the Full Court on 11-12 March 2025 (Federal Court Proceeding No QUD372/2024).

8.1 Outline of fact and issues

This decision concerned 3 taxpayers. Two individuals, Mr Ierna and Mr Hicks, who since 1985 have carried on a successful retail business through a unit trust known as the City Beach Trust (or CBT) of which **Fewstone** Pty Ltd was the trustee. The third taxpayer is Hicks Beneficiary Pty Ltd.

The focus of the decision is the manner in which the individual taxpayers and associated entities ultimately discharged significant Div 7A compliant loans advanced variously by **Mastergrove** Pty Ltd, **Ierna Beneficiary** Pty Ltd and **Hicks Beneficiary** Pty Ltd, by way of assigning receivables owed by **Methuselah** Holdings Pty Ltd.

8.1.1 Mastergrove Div 7A loans to individual taxpayers

From the time its settlement in 1985 until the events of 2016 described below, CBT had 30 units on issue, 15 held by Mr Ierna and 15 by the trustee of a discretionary trust known as the William Hicks Family Trust (or "WHFT") of which Mr Hicks and Hicks Beneficiary were beneficiaries.

In June 1991, Mr Ierna transferred one of CBT's units to the trustee of a discretionary trust known as the "Inerna Family Trust" (or "IFT"). With the exception of that one unit, all other units were pre-CGT assets (ITAA 1997, s 100-25).

In the 2011 to 2015 income years, CBT distributed 50% of its income to each of WHFT and IFT. Aggregate profits available to distribute in those years were close to $50 million: [16].

Up to and including the 2011 income year, the practice of each of WHFT and IFT was to appoint the income to Mastergrove: [18]. Each of Mr Ierna and Mr Hicks held one share in Mastergrove.

As referred to above, Mastergrove's practice was to lend funds to Mr Ierna, Mr Hicks, and the trustees of discretionary trusts known as the Hicks Property Trust and the Ierna Property Trust: at [20]-[22]. The loans were compliant with s 109N of the ITAA1936 and thus did not give rise to unfrankable deemed dividends under Division 7A: at [24].

8.1.2 Ierna Beneficiary and Hicks Beneficiary Div 7A loans to taxpayers

From the 2012 to 2016 income years, rather than WHFT and IFT appointing the income to Mastergrove, WHFT appointed its income to Ierna Beneficiary, and IFT appointed its income to Hicks Beneficiary: at [25].

Hicks Beneficiary advanced loans to Mr Hicks, and Ierna Beneficiary advanced loans to Mr Ierna: at [26]. These were also made on Division 7A compliant terms: at [27].

8.1.3 Events preceding the 2016 discharge of Div 7A loans

From the 2005 to 2013 income years, Mastergrove paid aggregate annual dividends of between $2.2 million and $9.2 million: at [31]. The profitability of the City Beach business decreased over time from $25 million in 2007 to $4.6 million in 2016: at [36].

In 2010, the Commissioner issued a ruling expressing the view that UPEs (unpaid present entitlements) would be treated as loans for the purposes of Division 7A (contra *Bendel*). The taxpayers' tax adviser considered that the ruling disadvantaged persons conducting business through a trust, as did the need to distribute all the trust's income each year rather than accumulate that income lest the income be taxed at the top marginal tax rate: at [43]-[44]. The Division 7A loan payments were funded from Mastergrove's dividends: at [45].

In light of the above, in 2011 the taxpayer's tax adviser raised the prospect of carrying on the City Beach business through a company rather than a trust: at [48].

In 2016, after considering and rejecting other proposals, the taxpayers acted on advice to restructure their affairs which had the effect of effectively discharging the Div 7A loans.

8.1.4 Balance of Div 7A loans in 2016 ($52 million)

As at 29 June 2016, the aggregate balance of the Div 7A compliant loans owed by Mr Ierna and the Ierna Property Trust to Mastergrove and Ierna Beneficiary respectively was approximately $26 million: [28]. A similar aggregate amount was owed by Mr Hicks and the Hicks Property Trust to Mastergrove and Hicks Beneficiary respectively: at [29].

8.1.5 Methuselah: acquisition of CBT and $52 million capital reduction

The reorganisation was preceded by the registration of a company **Methuselah** Holdings Pty Ltd. Methuselah issued 30 ordinary shares: 14 to Mr Ierna, 1 to IFT, 15 to WHFT: [67].

On 20 May 2016 (at [76]):

- Mr Ierna sold his 14 CBT units to Methuselah in consideration for the issue of 14 million Methuselah shares.
- IFT sold its one CBT unit to Methuselah in consideration for the issue of one million Methuselah shares,
- WHFT sold its 15 CBT units in consideration for the issue of 15 million Methuselah shares.

Reflecting the value of CBT's assets, the Methuselah shares were issued at a share price of $2.50.

Methuselah's shareholders chose to obtain a CGT roll-over under Subdiv 615-A of the ITAA 1997 (disposing of interests in one entity for shares in a company): at [82].

On 23 May 2016, Methuselah effected a selective capital reduction of 10.4 million of its shares held by each of Mr Ierna and WHFT respectively in consideration for $26 million per 10.4 million shares: at [90]. Following that capital reduction, Methuselah's shareholders held the following interests: Mr Ierna (39.13%), IFT (10.87%) and WHFT (50%).

Methuselah's debts of $26 million owed to Mr Ierna and WHFT respectively were left outstanding on interest free terms: at [93]-[94].

8.1.6 Discharge of Div 7A loans: assignment of Methuselah $52m receivables

Mr Ierna and WHFT then variously assigned portions of Methuselah's indebtedness to Mastergrove, Hicks Beneficiary and Ierna Beneficiary respectively by way of reduction of outstanding Div 7A loans – but this had no affect on the net asset position of Mastergrove, Hicks Beneficiary and Ierna Beneficiary, as lenders. While the assignments reduced the value of balance of the Div 7A loans on the balance sheet of the lenders (or assignees), the value of the reduced Div 7A loan asset was replaced by a commensurate increase in the value of Methuselah's indebtedness owed to those entities: at [99]-[100]; [112]-[113].

8.1.7 2016 distributions and formation of tax consolidated group

In the 2016 income year:

- CBT distributed all its income and capital gains (some $4.6 million) to its sole shareholder Methuselah: at [103].
- IPT made Mr Ierna presently entitled to all capital gains including discount capital gains and Ierna Beneficiary presently entitled to other income. WHFT passed similar resolutions in relation to Mr Hicks and Hicks Beneficiary: at [105].
- HPT made a corporate beneficiary "Dissh" presently entitled to all income ([107]) which returned nil assessable income after applying caried forward tax losses: [134]-[136].

On 6 March 2018, Methuselah elected to form a tax consolidated group with effect from 1 July 2016. CBT was a subsidiary member of the group.

8.1.8 Section 45B (capital benefits) & Part IVA determinations ($52m dividend)

The Commissioner made determinations that the taxpayers received capital benefits under s 45B(3)(b) and in accordance with s 45C the capital benefits were taken to be unfranked dividends paid out of the profits of Methuselah: see, e.g., [118].

The Commissioner also made determinations that:

- Mr Ierna and Mr Hicks respectively received a capital benefit of $26 million under s 45B(3)(b) and in accordance with s 45C that benefit was taken to be an unfranked dividend paid out of Methuselah's profits in the 2016 income year.
- Alternatively, the Commissioner made determinations under s 177F including in the assessable income of Mr Ierna and Mr Hicks respectively amounts referable to a fully franked dividend equivalent to approximately $26 million: [119]-[120], [125], [146].

8.2 Judgment

8.2.1 Section 45B (capital proceeds) does not apply absent profits

For context only, in broad terms, the purpose of s 45B is to ensure amounts are treated as assessable dividends for taxation purposes if payments or distributions are made in substitution for dividends: s 45B(1). The Court observed that the purpose of section 45B is to ensure that companies do not distribute what are effectively profits to shareholders as preferentially-taxed capital rather than dividends: [197].

Methuselah acquired CBT's units at market value. At the time of the capital reduction, Methuselah had no profits. It had only a share capital account. In those circumstances, the Judge concluded that the return of capital occasioned by Methuselah's capital reduction could not "be regarded as a substitute for payment of a 'divided' ..": at [209]. The court rejected the Commissioner's determinations.

8.2.2 Part IVA does not apply (no tax benefit / non-tax *driver* of scheme)

Logan J acknowledged (at [212]) that income tax law had informed the reorganisation "reflect[ing] the reality of business life", noting that his had been accepted in *Spotless Services Ltd* (1996) 186 CLR 404 at 416.

The scheme was identified as involving the capital reduction, and steps taken to discharge the Div 7A loans: at [214]. The Commissioner postulated that it might be expected that Mastergrove would determine to pay a $52 million dividend to fund the discharge of the Div 7A loans: [217].

Logan J identified a number of problems with this counterfactual. It did not achieve the same commercial outcome; and it did not accommodate repayment of the Div 7A loans advanced by Hicks Beneficiary and Ierna Beneficiary. Moreover, Mastergrove's dividend history was not consistent with paying such a large dividend. It also deprived Mastergrove of much needed capital to fund its operations; and failed to accommodate the changes in relative interests in Methuselah achieved by the scheme. The postulate was a *theoretical possibility* rather than based on reasonable expectations: [218]-[226].

The taxpayers advanced postulates that had the benefit of achieving the same commercial ends as those actually achieved by the scheme. They gave rise to no tax benefit.

That rendered it unnecessary to consider the dominant purpose of the entities entering into the scheme (s 177D). Logan J observed however that this was not to avoid the inclusion of a $26 million dividend in the income of the individual taxpayers but rather to use the CBT units (pre-CGT assets) to repay the Div 7A loans: at [223]. The repayment of the loans had become a commercial imperative by 2016.

8.3 Observations

This case, as the Judge acknowledged, involved careful tax planning, and the taking of steps influenced by tax outcomes. Nonetheless, in the circumstances, the commercial imperatives of repaying the Div 7A loans, and maintaining adequate capital in Mastergrove, were the *drivers* of the

scheme. These matters may be revisited by the Full Court on appeal but at the matter presently stands, this case demonstrates that tax planning is very much alive.

9. Conclusion: tax planning ain't dead

The answer to the question posed in paper's title is "no"- tax planning ain't dead.

Indeed, one may surmise that Part IVA requires a more sophisticated and nuanced approach to tax planning informed by the provisions of the GAAR. Tax planning predominantly to achieve tax objectives is apt to be caught by the GAAR.

The recent decisions indicate that the distinction between permissible and impermissible tax planning is best described as the difference between the tax planning influencing the form of a transaction, and the tax planning being directed to maximising the taxpayer's after-tax returns with the dominant purpose of obtaining a tax benefit: see *Minerva* at [60(8)].

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SCHEDULE: PART IVA (excl DPT provisions)[13]

Part IVA—Schemes to reduce income tax

177A Interpretation

(1) In this Part, unless the contrary intention appears:

associate has the same meaning as in Part X.

Australian customer, of a foreign entity, means another entity who:
(a) is in Australia, or is an Australian entity; and
(b) if the foreign entity is a member of a global group—is not a member of that global group.

Australian entity has the same meaning as in Part X.

Australian permanent establishment of an entity means:
(a) if:
(i) the entity is a resident in a country that has entered into an international tax agreement (within the meaning of subsection 995-1(1) of the *Income Tax Assessment Act 1997*) with Australia; and
(ii) that agreement contains a permanent establishment article (within the meaning of that subsection);
a permanent establishment (within the meaning of that agreement) in Australia; or
(b) otherwise—a permanent establishment of the person in Australia.

capital loss has the meaning given by subsection 995-1(1) of the *Income Tax Assessment Act 1997*.

DPT base amount has the meaning given by subsection 177P(2).

DPT provisions means sections 177H, 177J, 177K, 177L, 177M, 177N, 177P, 177Q and 177R.

DPT tax benefit has the meaning given by subsection 177J(1).

entity has the meaning given by section 960-100 of the *Income Tax Assessment Act 1997*.

foreign entity has the meaning given by subsection 995-1(1) of the *Income Tax Assessment Act 1997*.

foreign entity participant:
(a) if a beneficiary of a trust estate or a partner in a partnership is a foreign entity, the trust estate or partnership has a ***foreign entity participant***; and
(b) if a trust estate or partnership has a foreign entity participant (including through a previous operation of this paragraph):
(i) a trust of which the trust estate or partnership is a beneficiary also has a ***foreign entity participant***; and
(ii) a partnership in which the trust estate or partnership is a partner also has a ***foreign entity participant***.

foreign income tax offset means a tax offset allowed under Division 770 of the *Income Tax Assessment Act 1997*.

[13] In the interests of brevity, definitions of defined terms such as “scheme” are not reproduced in the Schedue.

foreign law has the meaning given by subsection 995-1(1) of the *Income Tax Assessment Act 1997*.

global group means a group of entities, at least one of which is a foreign entity, that are consolidated for accounting purposes as a single group.

innovation tax offset means a tax offset allowed under:
(a) Subdivision 61-P (about early stage venture capital limited partnerships) of the *Income Tax Assessment Act 1997*; or
(b) Subdivision 360-A (about early stage investors in innovation companies) of that Act.

non-refundable R&D tax offset means a tax offset allowed under Division 355 of the *Income Tax Assessment Act 1997*, other than a refundable R&D tax offset.

refundable R&D tax offset means a tax offset allowed under Division 355 of the *Income Tax Assessment Act 1997* that is subject to the refundable tax offset rules under section 67-30 of that Act.

scheme means:
(a) any agreement, arrangement, understanding, promise or undertaking, whether express or implied and whether or not enforceable, or intended to be enforceable, by legal proceedings; and
(b) any scheme, plan, proposal, action, course of action or course of conduct.

significant global entity has the meaning given by section 960-555 of the *Income Tax Assessment Act 1997*.

standard corporate tax rate means the rate of tax in respect of the taxable income of a company covered by paragraph 23(2)(b) of the *Income Tax Rates Act 1986*.

supply has the meaning given by section 9-10 of the GST Act, but does not include any of the following, or of any combination of 2 or more of the following:
(a) a supply of an equity interest in an entity;
(b) a supply of a debt interest in an entity;
(c) a supply of an option for:
  (i) a supply of a kind referred to in paragraph (a) or (b); or
  (ii) any combination of 2 or more such supplies.

taxpayer includes a taxpayer in the capacity of a trustee.

(2) The definition of ***taxpayer*** in subsection (1) shall not be taken to affect in any way the interpretation of that expression where it is used in this Act other than this Part.

(3) The reference in the definition of ***scheme*** in subsection (1) to a scheme, plan, proposal, action, course of action or course of conduct shall be read as including a reference to a unilateral scheme, plan, proposal, action, course of action or course of conduct, as the case may be.

(4) A reference in this Part to the carrying out of a scheme by a person shall be read as including a reference to the carrying out of a scheme by a person together with another person or other persons.

(5) A reference in this Part (other than sections 177DA and 177J) to a scheme or a part of a scheme being entered into or carried out by a person for a particular purpose shall be read as including a reference to the scheme or the part of the scheme being entered into or carried out by the person for 2 or more purposes of which that particular purpose is the dominant purpose.

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177B Operation of Part

(1) Nothing in the following limit the operation of this Part:

(a) the provisions of this Act (other than this Part);

(b) the *International Tax Agreements Act 1953*.

(2) This Part does not affect the operation of Division 393 of the *Income Tax Assessment Act 1997* (Farm management deposits).

(3) Where a provision of this Act other than this Part is expressed to have effect where a deduction would be allowable to a taxpayer but for or apart from a provision or provisions of this Act, the reference to that provision or to those provisions, as the case may be, shall be read as including a reference to subsection 177F(1).

(4) Where a provision of this Act other than this Part is expressed to have effect where a deduction would otherwise be allowable to a taxpayer, that provision shall be deemed to be expressed to have effect where a deduction would, but for subsection 177F(1), be otherwise allowable to the taxpayer.

177C Tax benefits

(1) Subject to this section, a reference in this Part to the obtaining by a taxpayer of a tax benefit in connection with a scheme shall be read as a reference to:

(a) 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 taxpayer of that year of income if the scheme had not been entered into or carried out; or

(b) a deduction being allowable to the taxpayer in relation to a year of income where the whole or a part of that deduction would not have been allowable, or might reasonably be expected not to have been allowable, to the taxpayer in relation to that year of income if the scheme had not been entered into or carried out; or

(ba) a capital loss being incurred by the taxpayer during a year of income where the whole or a part of that capital loss would not have been, or might reasonably be expected not to have been, incurred by the taxpayer during the year of income if the scheme had not been entered into or carried out; or

(baa) a loss carry back tax offset being allowable to the taxpayer where the whole or a part of that loss carry back tax offset would not have been allowable, or might reasonably be expected not to have been allowable, to the taxpayer if the scheme had not been entered into or carried out; or

(bb) a foreign income tax offset being allowable to the taxpayer where the whole or a part of that foreign income tax offset would not have been allowable, or might reasonably be expected not to have been allowable, to the taxpayer if the scheme had not been entered into or carried out; or

(bbaa) an innovation tax offset being allowable to the taxpayer where the whole or a part of that innovation tax offset would not have been allowable, or might reasonably be expected not to have been allowable, to the taxpayer if the scheme had not been entered into or carried out; or

(bba) an exploration credit being issued to the taxpayer where the whole or a part of that exploration credit would not have been issued, or might reasonably be expected not to have been issued, to the taxpayer if the scheme had not been entered into or carried out; or

(bc) the taxpayer not being liable to pay withholding tax on an amount where the taxpayer either would have, or might reasonably be expected to have, been liable to pay withholding tax on the amount if the scheme had not been entered into or carried out; or

(bd) a refundable R&D tax offset, or a non-refundable R&D tax offset, being allowable to the taxpayer in relation to a year of income where the whole or a part of the offset would not have been allowable, or might reasonably be expected not to have been

allowable, to the taxpayer in relation to that year of income if the scheme had not been entered into or carried out;

and, for the purposes of this Part, the amount of the tax benefit shall be taken to be:

(c) in a case to which paragraph (a) applies—the amount referred to in that paragraph; and

(d) in a case to which paragraph (b) applies—the amount of the whole of the deduction or of the part of the deduction, as the case may be, referred to in that paragraph; and

(e) in a case to which paragraph (ba) applies—the amount of the whole of the capital loss or of the part of the capital loss, as the case may be, referred to in that paragraph; and

(ea) in a case where paragraph (baa) applies—the amount of the whole of the loss carry back tax offset or of the part of the loss carry back tax offset, as the case may be, referred to in that paragraph; and

(f) in a case where paragraph (bb) applies—the amount of the whole of the foreign income tax offset or of the part of the foreign income tax offset, as the case may be, referred to in that paragraph; and

(faa) in a case where paragraph (bbaa) applies—the amount of the whole of the innovation tax offset or of the part of the innovation tax offset, as the case may be, referred to in that paragraph; and

(fa) in a case where paragraph (bba) applies—the amount of the whole of the exploration credit or of the part of the exploration credit, as the case may be, referred to in that paragraph; and

(g) in a case to which paragraph (bc) applies—the amount referred to in that paragraph; and

(h) in a case to which paragraph (bd) applies—the amount of the whole of the offset or of the part of the offset, as the case may be, referred to in that paragraph.

(2) A reference in this Part to the obtaining by a taxpayer of a tax benefit in connection with a scheme shall be read as not including a reference to:

(a) the assessable income of the taxpayer of a year of income not including an amount that would have been included, or might reasonably be expected to have been included, in the assessable income of the taxpayer of that year of income if the scheme had not been entered into or carried out where:

(i) the non-inclusion of the amount in the assessable income of the taxpayer is attributable to the making of a declaration, agreement, election, selection or choice, the giving of a notice or the exercise of an option (expressly provided for by this Act or the *Income Tax Assessment Act 1997*) by any person, except one under Subdivision 126-B, 170-B or 960-D of the *Income Tax Assessment Act 1997*; and

(ii) the scheme was not entered into or carried out by any person for the purpose of creating any circumstance or state of affairs the existence of which is necessary to enable the declaration, agreement, election, selection, choice, notice or option to be made, given or exercised, as the case may be; or

(b) a deduction being allowable to the taxpayer in relation to a year of income the whole or a part of which would not have been, or might reasonably be expected not to have been, allowable to the taxpayer in relation to that year of income if the scheme had not been entered into or carried out where:

(i) the allowance of the deduction to the taxpayer is attributable to the making of a declaration, agreement, election, selection or choice, the giving of a notice or the exercise of an option by any person, being a declaration, agreement, election, selection, choice, notice or option expressly provided for by this Act or the *Income Tax Assessment Act 1997*, except one under Subdivision 960-D of the *Income Tax Assessment Act 1997*; and

(ii) the scheme was not entered into or carried out by any person for the purpose of creating any circumstance or state of affairs the existence of which is necessary to enable the declaration, agreement, election, selection, choice, notice or option to be made, given or exercised, as the case may be; or

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(c) a capital loss being incurred by the taxpayer during a year of income the whole or part of which would not have been, or might reasonably be expected not to have been, incurred by the taxpayer during the year of income if the scheme had not been entered into or carried out where:
   (i) the incurring of the capital loss by the taxpayer is attributable to the making of a declaration, agreement, choice, election or selection, the giving of a notice or the exercise of an option (expressly provided for by this Act or the *Income Tax Assessment Act 1997*) by any person, except one under Subdivision 126-B, 170-B or 960-D of the *Income Tax Assessment Act 1997*; and
   (ii) the scheme was not entered into or carried out by any person for the purpose of creating any circumstance or state of affairs the existence of which is necessary to enable the declaration, agreement, election, selection, notice or option to be made, given or exercised, as the case may be; or

(ca) a loss carry back tax offset being allowable to the taxpayer the whole or a part of which would not have been, or might reasonably be expected not to have been, allowable to the taxpayer if the scheme had not been entered into or carried out, where:
   (i) the allowance of the loss carry back tax offset to the taxpayer is attributable to the making of a declaration, agreement, election, selection or choice, the giving of a notice or the exercise of an option by any person, being a declaration, agreement, election, selection, choice, notice or option expressly provided for by this Act; and
   (ii) the scheme was not entered into or carried out by any person for the purpose of creating any circumstance or state of affairs the existence of which is necessary to enable the declaration, agreement, election, selection, choice, notice or option to be made, given or exercised, as the case may be; or

(d) a foreign income tax offset being allowable to the taxpayer the whole or a part of which would not have been, or might reasonably be expected not to have been, allowable to the taxpayer if the scheme had not been entered into or carried out, where:
   (i) the allowance of the foreign income tax offset to the taxpayer is attributable to the making of a declaration, agreement, election, selection or choice, the giving of a notice or the exercise of an option by any person, being a declaration, agreement, election, selection, choice, notice or option expressly provided for by this Act; and
   (ii) the scheme was not entered into or carried out by any person for the purpose of creating any circumstance or state of affairs the existence of which is necessary to enable the declaration, agreement, election, selection, choice, notice or option to be made, given or exercised, as the case may be; or

(e) an innovation tax offset being allowable to the taxpayer the whole or a part of which would not have been, or might reasonably be expected not to have been, allowable to the taxpayer if the scheme had not been entered into or carried out, where:
   (i) the allowance of the innovation tax offset to the taxpayer is attributable to the making of a declaration, agreement, election, selection or choice, the giving of a notice or the exercise of an option by any person, being a declaration, agreement, election, selection, choice, notice or option expressly provided for by this Act; and
   (ii) the scheme was not entered into or carried out by any person for the purpose of creating any circumstance or state of affairs the existence of which is necessary to enable the declaration, agreement, election, selection, choice, notice or option to be made, given or exercised, as the case may be; or

(f) a refundable R&D tax offset, or a non-refundable R&D tax offset, being allowable to the taxpayer in relation to a year of income the whole or a part of which offset would not have been, or might reasonably be expected not to have been, allowable to the taxpayer in relation to that year of income if the scheme had not been entered into or carried out, where:

(i) the allowance of the offset to the taxpayer is attributable to the making of a declaration, agreement, election, selection or choice, the giving of a notice or the exercise of an option by any person, being a declaration, agreement, election, selection, choice, notice or option expressly provided for by this Act; and

(ii) the scheme was not entered into or carried out by any person for the purpose of creating any circumstance or state of affairs the existence of which is necessary to enable the declaration, agreement, election, selection, choice, notice or option to be made, given or exercised, as the case may be.

(2A) A reference in this Part to the obtaining by a taxpayer of a tax benefit in connection with a scheme is to be read as not including a reference to:

(a) the assessable income of the taxpayer of a year of income not including an amount that would have been included, or might reasonably be expected to have been included, in the assessable income of the taxpayer of that year of income if the scheme had not been entered into or carried out where:

(i) the non-inclusion of the amount in the assessable income of the taxpayer is attributable to the making of a choice under Subdivision 126-B of the *Income Tax Assessment Act 1997* or an agreement under Subdivision 170-B of that Act; and

(ii) the scheme consisted solely of the making of the agreement or election; or

(b) a capital loss being incurred by the taxpayer during a year of income the whole or part of which would not have been, or might reasonably be expected not to have been, incurred by the taxpayer during the year of income if the scheme had not been entered into or carried out where:

(i) the incurring of the capital loss by the taxpayer is attributable to the making of a choice under Subdivision 126-B of the *Income Tax Assessment Act 1997* or an agreement under Subdivision 170-B of that Act; and

(ii) the scheme consisted solely of the making of the agreement or election; or

(c) an exploration credit being issued to the taxpayer the whole or a part of which would not have been, or might reasonably be expected not to have been, issued to the taxpayer if the scheme had not been entered into or carried out, where:

(i) the issuing of the exploration credit to the taxpayer is attributable to the making of a choice under Division 418 of the *Income Tax Assessment Act 1997*; and

(ii) the scheme consisted solely of the making of the choice.

(3) For the purposes of subparagraph (2)(a)(i), (b)(i), (c)(i), (ca)(i), (d)(i), (e)(i) or (f)(i) or (2A)(a)(i), (b)(i) or (c)(i):

(a) the non-inclusion of an amount in the assessable income of a taxpayer; or

(b) the allowance of a deduction to a taxpayer; or

(c) the incurring of a capital loss by a taxpayer; or

(ca) the allowance of a foreign income tax offset to a taxpayer; or

(caa) the allowance of an innovation tax offset to a taxpayer; or

(cab) the allowance of a loss carry back tax offset to a taxpayer; or

(cb) the issuing of an exploration credit to a taxpayer; or

(cc) the allowance of a refundable R&D tax offset, or a non-refundable R&D tax offset, to a taxpayer;

is taken to be attributable to the making of a declaration, election, agreement or selection, the giving of a notice or the exercise of an option where, if the declaration, election, agreement, selection, notice or option had not been made, given or exercised, as the case may be:

(d) the amount would have been included in that assessable income; or

(e) the deduction would not have been allowable; or

(f) the capital loss would not have been incurred; or

(fa) the loss carry back tax offset would not have been allowable; or

(g) the foreign income tax offset would not have been allowable; or
(ga) the innovation tax offset would not have been allowable; or
(h) the exploration credit would not have been issued; or
(i) the refundable R&D tax offset, or non-refundable R&D tax offset, would not have been allowable.

(4) To avoid doubt, paragraph (1)(a) applies to a scheme if:
(a) an amount of income is not included in the assessable income of the taxpayer of a year of income; and
(b) an amount would have been included, or might reasonably be expected to have been included, in the assessable income if the scheme had not been entered into or carried out; and
(c) instead, the taxpayer or any other taxpayer makes a discount capital gain (within the meaning of the *Income Tax Assessment Act 1997*) for that or any other year of income.

(5) Subsection (4) does not limit the generality of any other provision of this Part.

177CB The bases for identifying tax benefits

(1) This section applies to deciding, under section 177C, whether any of the following (***tax effects***) would have occurred, or might reasonably be expected to have occurred, if a scheme had not been entered into or carried out:
(a) an amount being included in the assessable income of the taxpayer;
(b) the whole or a part of a deduction not being allowable to the taxpayer;
(c) the whole or a part of a capital loss not being incurred by the taxpayer;
(ca) the whole or a part of a loss carry back tax offset not being allowable to the taxpayer;
(d) the whole or a part of a foreign income tax offset not being allowable to the taxpayer;
(daa) the whole or a part of an innovation tax offset not being allowable to the taxpayer;
(da) the whole or a part of an exploration credit not being issued to the taxpayer;
(e) the taxpayer being liable to pay withholding tax on an amount;
(f) the whole or a part of a refundable R&D tax offset, or of a non-refundable tax offset, not being allowable to the taxpayer.

(2) A decision that a tax effect would have occurred if the scheme had not been entered into or carried out must be based on a postulate that comprises only the events or circumstances that actually happened or existed (other than those that form part of the scheme).

(3) A decision that a tax effect might reasonably be expected to have occurred if the scheme had not been entered into or carried out must be based on a postulate that is a reasonable alternative to entering into or carrying out the scheme.

(4) In determining for the purposes of subsection (3) whether a postulate is such a reasonable alternative:
(a) have particular regard to:
(i) the substance of the scheme; and
(ii) any result or consequence for the taxpayer that is or would be achieved by the scheme (other than a result in relation to the operation of this Act); but
(b) disregard any result in relation to the operation of this Act that would be achieved by the postulate for any person (whether or not a party to the scheme).

(5) Subsection (4) applies in relation to the scheme as if references in that subsection to the operation of this Act included references to the operation of any foreign law relating to taxation:
(a) if this Part applies to the scheme because of section 177DA or 177J; or

(b) for the purposes of determining whether this Part applies to the scheme because of section 177DA or 177J.

177D Schemes to which this Part applies

Scheme for purpose of obtaining a tax benefit

(1) This Part applies to a scheme if it would be concluded (having regard to the matters in subsection (2)) that the person, or one of the persons, who entered into or carried out the scheme or any part of the scheme did so for the purpose of:

(a) enabling a taxpayer (a ***relevant taxpayer***) to obtain a tax benefit in connection with the scheme; or

(b) enabling the relevant taxpayer and another taxpayer (or other taxpayers) each to obtain a tax benefit in connection with the scheme;

whether or not that person who entered into or carried out the scheme or any part of the scheme is the relevant taxpayer or is the other taxpayer or one of the other taxpayers.

Have regard to certain matters

(2) For the purpose of subsection (1), have regard to the following matters:

(a) the manner in which the scheme was entered into or carried out;

(b) the form and substance of the scheme;

(c) the time at which the scheme was entered into and the length of the period during which the scheme was carried out;

(d) the result in relation to the operation of this Act that, but for this Part, would be achieved by the scheme;

(e) 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;

(f) 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;

(g) any other consequence for the relevant taxpayer, or for any person referred to in paragraph (f), of the scheme having been entered into or carried out;

(h) the nature of any connection (whether of a business, family or other nature) between the relevant taxpayer and any person referred to in paragraph (f).

Note: Section 960-255 of the *Income Tax Assessment Act 1997* may be relevant to determining family relationships for the purposes of paragraphs (f) and (h).

Tax benefit

(3) Despite subsection (1), this Part applies to the scheme only if the relevant taxpayer has obtained, or would but for section 177F obtain, a tax benefit in connection with the scheme.

When schemes entered into etc.

(4) Despite subsection (1), this Part applies to the scheme only if:

(a) the scheme has been or is entered into after 27 May 1981; or

(b) the scheme has been or is carried out or commenced to be carried out after that day (and is not a scheme that was entered into on or before that day).

Schemes outside Australia

(5) This section applies whether or not the scheme has been or is entered into or carried out in Australia or outside Australia or partly in Australia and partly outside Australia.

177DA Schemes that limit a taxable presence in Australia

Scheme for a purpose including obtaining a tax benefit etc.

(1) Without limiting section 177D, this Part also applies to a scheme if:
- (a) under, or in connection with, the scheme:
  - (i) a foreign entity makes a supply to an Australian customer of the foreign entity; and
  - (ii) activities are undertaken in Australia directly in connection with the supply; and
  - (iii) some or all of those activities are undertaken by an Australian entity who, or are undertaken at or through an Australian permanent establishment of an entity who, is an associate of or is commercially dependent on the foreign entity; and
  - (iv) the foreign entity derives ordinary income, or statutory income, from the supply; and
  - (v) some or all of that income is not attributable to an Australian permanent establishment of the foreign entity; and
- (b) it would be concluded (having regard to the matters in subsection (2)) that the person, or one of the persons, who entered into or carried out the scheme or any part of the scheme did so for a principal purpose of, or for more than one principal purpose that includes a purpose of:
  - (i) enabling a taxpayer (a ***relevant taxpayer***) to obtain a tax benefit, or both to obtain a tax benefit and to reduce one or more of the relevant taxpayer's liabilities to tax under a foreign law, in connection with the scheme; or
  - (ii) enabling the relevant taxpayer and another taxpayer (or other taxpayers) each to obtain a tax benefit, or both to obtain a tax benefit and to reduce one or more of their liabilities to tax under a foreign law, in connection with the scheme;

  whether or not that person who entered into or carried out the scheme or any part of the scheme is the relevant taxpayer or is the other taxpayer or one of the other taxpayers; and
- (c) the foreign entity is a significant global entity for a year of income in which the relevant taxpayer, or one or more other taxpayers, would (but for this Part):
  - (i) obtain a tax benefit; or
  - (ii) reduce one or more of their liabilities to tax under a foreign law;

  in connection with the scheme.

Have regard to certain matters

(2) For the purposes of paragraph (1)(b), have regard to the following matters:
- (a) the matters in subsection 177D(2);
- (b) the extent to which the activities that contribute to bringing about the contract for the supply are performed, and are able to be performed, by:
  - (i) the foreign entity; or
  - (ii) another entity referred to in subparagraph (1)(a)(iii); or
  - (iii) any other entities;
- (c) the result, in relation to the operation of any foreign law relating to taxation, that (but for this Part) would be achieved by the scheme.

Deferral of foreign tax liabilities

(3) For the purposes of paragraph (1)(b), a deferral of a taxpayer's liabilities to tax under a foreign law is taken to be a reduction of those liabilities, unless there are reasonable commercial grounds for the deferral.

Tax benefit

(4) Despite subsection (1), this Part applies to the scheme because of this section only if the relevant taxpayer has obtained, or would but for section 177F obtain, a tax benefit in connection with the scheme.

Commissioner not required to enquire into foreign tax matters

(5) The Commissioner is required to have regard to a matter referred to in paragraph (2)(c) only so far as information relevant to that matter is available to the Commissioner, and is not required to acquire further information in order to have regard to that matter.

Schemes outside Australia

(6) This section applies whether or not the scheme has been or is entered into or carried out in Australia or outside Australia or partly in Australia and partly outside Australia.

Income from supply by trust estate or partnership

(7) Subsection (8) applies if:
   (a) both of the following conditions are satisfied:
      (i) a trust estate or partnership makes a supply to an entity;
      (ii) that entity would be an Australian customer of the trust estate or partnership if the trust estate or partnership were a foreign entity; and
   (b) because of the supply, an amount of ordinary income, or statutory income, is included in the assessable income of the trust estate or partnership (as worked out for the purposes of working out its net income for a year of income); and
   (c) the trust estate or partnership has a foreign entity participant at any time in that year of income; and
   (d) any of the following conditions are satisfied at the time the supply is made:
      (i) the trust estate or partnership is connected with (within the meaning of the *Income Tax Assessment Act 1997*) a foreign entity;
      (ii) the trust estate or partnership would be an affiliate (within the meaning of that Act) of a foreign entity if the trust estate or partnership were an individual or a company;
      (iii) the trust estate or partnership and a foreign entity are members of the same global group.

(8) For the purposes of this section:
   (a) treat the foreign entity mentioned in paragraph (7)(d) as having made the supply; and
   (b) treat the entity mentioned in subparagraph (7)(a)(ii) as being an Australian customer of the foreign entity; and
   (c) treat the foreign entity as having derived the ordinary income, or statutory income, from the supply.

177E Stripping of company profits

(1) Where:
   (a) as a result of a scheme that is, in relation to a company:
      (i) a scheme by way of or in the nature of dividend stripping; or
      (ii) a scheme having substantially the effect of a scheme by way of or in the nature of a dividend stripping;

   any property of the company is disposed of;
   (b) in the opinion of the Commissioner, the disposal of that property represents, in whole or in part, a distribution (whether to a shareholder or another person) of profits of the company (whether of the accounting period in which the disposal occurred or of any earlier or later accounting period);

(c) if, immediately before the scheme was entered into, the company had paid a dividend out of profits of an amount equal to the amount determined by the Commissioner to be the amount of profits the distribution of which is, in his or her opinion, represented by the disposal of the property referred to in paragraph (a), an amount (in this subsection referred to as the ***notional amount***) would have been included, or might reasonably be expected to have been included, by reason of the payment of that dividend, in the assessable income of a taxpayer of a year of income; and

(d) the scheme has been or is entered into after 27 May 1981, whether in Australia or outside Australia;

the following provisions have effect:

(e) the scheme shall be taken to be a scheme to which this Part applies;

(f) for the purposes of section 177F, the taxpayer shall be taken to have obtained a tax benefit in connection with the scheme that is referable to the notional amount not being included in the assessable income of the taxpayer of the year of income; and

(g) the amount of that tax benefit shall be taken to be the notional amount.

(2) Without limiting the generality of subsection (1), a reference in that subsection to the disposal of property of a company shall be read as including a reference to:

(a) the payment of a dividend by the company;

(b) the making of a loan by the company (whether or not it is intended or likely that the loan will be repaid);

(c) a bailment of property by the company; and

(d) any transaction having the effect, directly or indirectly, of diminishing the value of any property of the company.

(2A) This section:

(a) applies to a non-share equity interest in the same way as it applies to a share; and

(b) applies to an equity holder in the same way as it applies to a shareholder; and

(c) applies to a non-share dividend in the same way as it applies to a dividend.

(3) In this section, ***property*** includes a chose in action and also includes any estate, interest, right or power, whether at law or in equity, in or over property.

177EA Creation of franking debit or cancellation of franking credits

(1) In this section, unless the contrary intention appears:

relevant circumstances has a meaning affected by subsection (17).

relevant taxpayer has the meaning given by subsection (3).

scheme for a disposition, in relation to membership interests or an interest in membership interests, has a meaning affected by subsection (14).

(2) An expression used in this section that is defined in the *Income Tax Assessment Act 1997* has the same meaning as in that Act, except to the extent that its meaning is extended by subsection (16), (18) or (19), or affected by subsection (15).

Application of section

(3) This section applies if:

(a) there is a scheme for a disposition of membership interests, or an interest in membership interests, in a corporate tax entity; and

(b) either:

(i) a frankable distribution has been paid, or is payable or expected to be payable, to a person in respect of the membership interests; or

(ii) a frankable distribution has flowed indirectly, or flows indirectly or is expected to flow indirectly, to a person in respect of the interest in membership interests, as the case may be; and

(c) the distribution was, or is expected to be, a franked distribution or a distribution franked with an exempting credit; and

(d) except for this section, the person (the ***relevant taxpayer***) would receive, or could reasonably be expected to receive, imputation benefits as a result of the distribution; and

(e) having regard to the relevant circumstances of the scheme, it would be concluded that the person, or one of the persons, who entered into or carried out the scheme or any part of the scheme did so for a purpose (whether or not the dominant purpose but not including an incidental purpose) of enabling the relevant taxpayer to obtain an imputation benefit.

Bare acquisition of membership interests or interest in membership interests

(4) It is not to be concluded for the purposes of paragraph (3)(e) that a person entered into or carried out a scheme for a purpose mentioned in that paragraph merely because the person acquired membership interests, or an interest in membership interests, in the entity.

Commissioner to determine franking debit or deny franking credit

(5) The Commissioner may make, in writing, either of the following determinations:

(a) if the corporate tax entity is a party to the scheme, a determination that a franking debit or exempting debit of the entity arises in respect of each distribution made to the relevant taxpayer or that flows indirectly to the relevant taxpayer;

(b) a determination that no imputation benefit is to arise in respect of a distribution or a specified part of a distribution that is made, or that flows indirectly, to the relevant taxpayer.

A determination does not form part of an assessment.

Notice of determination

(6) If the Commissioner makes a determination under subsection (5), the Commissioner must:

(a) in respect of a determination made under paragraph (5)(a)—serve notice in writing of the determination on the corporate tax entity; or

(b) in respect of a determination made under paragraph (5)(b)—serve notice in writing of the determination on the relevant taxpayer.

Publication of determination in relation to listed public company denying imputation benefit

(7) If the Commissioner makes a determination under paragraph (5)(b), in respect of a distribution made by a listed public company, the Commissioner is taken to have served notice in writing of the determination on the relevant taxpayer if the Commissioner causes the notice to be published in a manner that results in the notice being accessible to the public and reasonably prominent. The notice is taken to have been served on the day on which the publication takes place.

Objections

(9) If a taxpayer to whom a determination relates is dissatisfied with the determination, the taxpayer may object against it in the manner set out in Part IVC of the *Taxation Administration Act 1953*.

Effect of determination of franking debit or exempting debit

(10) If the Commissioner makes a determination under paragraph (5)(a):

(a) on the day on which notice in writing of the determination is served on the entity, a franking debit or exempting debit of the corporate tax entity arises in respect of the distribution; and

(b) the amount of the franking debit or exempting debit is such amount as is stated in the Commissioner's determination, being an amount that:

(i) the Commissioner considers reasonable in the circumstances; and

(ii) does not exceed the amount of the franking debit or exempting debit of the entity arising under item 1 of the table in section 205-30 of the *Income Tax Assessment 1997* or item 2 of the table in section 208-120 of that Act in respect of the distribution.

Effect of determination that no imputation benefit is to arise

(11) If the Commissioner makes a determination under paragraph (5)(b), the determination has effect according to its terms.

Application of section to non-share dividends

(12) This section:

(a) applies to a non-share equity interest in the same way as it applies to a membership interest; and

(b) applies to an equity holder in the same way as it applies to a member; and

(c) applies to a non-share dividend in the same way as it applies to a distribution.

Meaning of ***interest in membership interests***

(13) A person has an interest in membership interests if:

(a) the person has any legal or equitable interest in the membership interests; or

(b) the person is a partner in a partnership and:

(i) the assets of the partnership include, or will include, the membership interests; or

(ii) the partnership derives, or will derive, income indirectly through interposed companies, trusts or partnerships, from distributions made on the membership interests; or

(c) the person is a beneficiary of a trust (including a potential beneficiary of a discretionary trust) and:

(i) the membership interests form, or will form, part of the trust estate; or

(ii) the trust derives, or will derive, income indirectly through interposed companies, trusts or partnerships, from distributions made on the membership interests.

Meaning of ***scheme for a disposition***

(14) A scheme for a disposition of membership interests or an interest in membership interests includes, but is not limited to, a scheme that involves any of the following:

(a) issuing the membership interests or creating the interest in membership interests;

(b) entering into any contract, arrangement, transaction or dealing that changes or otherwise affects the legal or equitable ownership of the membership interests or interest in membership interests;

(c) creating, varying or revoking a trust in relation to the membership interests or interest in membership interests;

(d) creating, altering or extinguishing a right, power or liability attaching to, or otherwise relating to, the membership interests or interest in membership interests;

(e) substantially altering any of the risks of loss, or opportunities for profit or gain, involved in holding or owning the membership interests or having the interest in membership interests;

(f) the membership interests or interest in membership interests beginning to be included, or ceasing to be included, in any of the insurance funds of a life assurance company.

(15) In determining whether a distribution flows indirectly to a person, assume that the following provisions of the *Income Tax Assessment Act 1997* had not been enacted:

(a) section 295-385 (about income from assets set aside to meet current pension liabilities), section 295-390 (about income from other assets used to meet current pension liabilities) and 295-400 (about income of a PST attributable to current pension liabilities); or

(b) paragraph 320-37(1)(a) (about segregated exempt assets) or paragraph 320-37(1)(d) (about income bonds, funeral policies and scholarship plans).

When imputation benefit is received

(16) A taxpayer to whom a distribution flows indirectly receives an ***imputation benefit*** as a result of the distribution if:

(a) the taxpayer is entitled to a tax offset under Division 207 of the *Income Tax Assessment Act 1997* as a result of the distribution; or

(b) where the taxpayer is a corporate tax entity—a franking credit would arise in the franking account of the taxpayer as a result of the distribution.

Note: Where the distribution is made directly to the taxpayer, see subsection 204-30(6) of the *Income Tax Assessment Act 1997* for a definition of ***imputation benefit***.

*Meaning of **relevant circumstances** of scheme*

(17) The ***relevant circumstances*** of a scheme include the following:

(a) the extent and duration of the risks of loss, and the opportunities for profit or gain, from holding membership interests, or having interests in membership interests, in the corporate tax entity that are respectively borne by or accrue to the parties to the scheme, and whether there has been any change in those risks and opportunities for the relevant taxpayer or any other party to the scheme (for example, a change resulting from the making of any contract, the granting of any option or the entering into of any arrangement with respect to any membership interests, or interests in membership interests, in the corporate tax entity);

(b) whether the relevant taxpayer would, in the year of income in which the distribution is made, or if the distribution flows indirectly to the relevant taxpayer, in the year in which the distribution flows indirectly to the relevant taxpayer, derive a greater benefit from franking credits than other entities who hold membership interests, or have interests in membership interests, in the corporate tax entity;

(c) whether, apart from the scheme, the corporate tax entity would have retained the franking credits or exempting credits or would have used the franking credits or exempting credits to pay a franked distribution to another entity referred to in paragraph (b);

(d) whether, apart from the scheme, a franked distribution would have flowed indirectly to another entity referred to in paragraph (b);

(e) if the scheme involves the issue of a non-share equity interest to which section 215-10 of the *Income Tax Assessment Act 1997* applies—whether the corporate tax entity has issued, or is likely to issue, equity interests in the corporate tax entity:

(i) that are similar, from a commercial point of view, to the non-share equity interest; and

(ii) distributions in respect of which are frankable;

(f) whether any consideration paid or given by or on behalf of, or received by or on behalf of, the relevant taxpayer in connection with the scheme (for example, the amount of any interest on a loan) was calculated by reference to the imputation benefits to be received by the relevant taxpayer;

(g) whether a deduction is allowable or a capital loss is incurred in connection with a distribution that is made or that flows indirectly under the scheme;

(ga) whether a distribution that is made or that flows indirectly under the scheme to the relevant taxpayer is sourced, directly or indirectly, from unrealised or untaxed profits;

(h) whether a distribution that is made or that flows indirectly under the scheme to the relevant taxpayer is equivalent to the receipt by the relevant taxpayer of interest or of an amount in the nature of, or similar to, interest;

(i) the period for which the relevant taxpayer held membership interests, or had an interest in membership interests, in the corporate tax entity;

(j) any of the matters referred to in subsection 177D(2).

Meaning of ***greater benefit from franking credits***

(18) The following subsection lists some of the cases in which a taxpayer to whom a distribution flows indirectly receives a ***greater benefit from franking credits*** than an entity referred to in paragraph (17)(b). It is not an exhaustive list.

(19) A taxpayer to whom a distribution flows indirectly receives a ***greater benefit from franking credits*** than an entity referred to in paragraph (17)(b) if any of the following circumstances exist in relation to that entity in the year of income in which the distribution giving rise to the benefit is made, and not in relation to the taxpayer if:

(a) the entity is not an Australian resident; or

(b) the entity would not be entitled to any tax offset under Division 207 of the *Income Tax Assessment Act 1997* because of the distribution; or

(c) the amount of income tax that would be payable by the entity because of the distribution is less than the tax offset to which the entity would be entitled; or

(d) the entity is a corporate tax entity at the time the distribution is made, but no franking credit arises for the entity as a result of the distribution; or

(e) the entity is a corporate tax entity at the time the distribution is made, but cannot use franking credits received on the distribution to frank distributions to its own members because:

(i) it is not a franking entity; or

(ii) it is unable to make frankable distributions.

Note: Where the distribution is made directly to the taxpayer, see subsections 204-30(7), (8), (9) and (10) of the *Income Tax Assessment Act 1997* for a list of circumstances in which the taxpayer will be treated as deriving a greater benefit from franking credits than another entity.

177EB Cancellation of franking credits—consolidated groups

Expressions to have same meanings as in section 177EA and Income Tax Assessment Act 1997

(1) Unless the contrary intention appears, expressions used in this section:

(a) if those expressions are defined in section 177EA—have the same meanings as in that section (subject to subsection (10) of this section); and

(b) otherwise—have the same meanings as in the *Income Tax Assessment Act 1997*.

This section and section 177EA do not limit each other

(2) This section does not limit the operation of section 177EA, and section 177EA does not limit the operation of this section.

Application of section

(3) This section applies if:

(a) there is a scheme for a disposition of membership interests in an entity (the ***joining entity***); and

(b) as a result of the disposition, the joining entity becomes a subsidiary member of a consolidated group; and

(c) a credit arises in the franking account of the head company of the group because of the joining entity becoming a subsidiary member of the group; and

(d) having regard to the relevant circumstances of the scheme, it would be concluded that the person, or one of the persons, who entered into or carried out the scheme or any part of the scheme did so for a purpose (whether or not the dominant purpose but not including an incidental purpose) of enabling the credit referred to in paragraph (c) to arise in the head company's franking account.

Bare acquisition of membership interests

(4) It is not to be concluded for the purposes of paragraph (3)(d) that a person entered into or carried out a scheme for a purpose mentioned in that paragraph merely because the person acquired membership interests in the joining entity.

Commissioner to determine no franking credit

(5) The Commissioner may make, in writing, a determination that no credit is to arise in the head company's franking account because of the joining entity becoming a subsidiary member of the consolidated group. A determination does not form part of an assessment.

Effect of determination

(6) A determination under subsection (5) has effect according to its terms.

Notice of determination

(7) If the Commissioner makes a determination under subsection (5), the Commissioner must serve notice in writing of the determination on the head company.

Objections

(9) If a taxpayer to whom a determination relates is dissatisfied with the determination, the taxpayer may object against it in the manner set out in Part IVC of the *Taxation Administration Act 1953*.

Relevant circumstances

(10) The ***relevant circumstances*** of a scheme include the following:

(a) the extent and duration of the risks of loss, and the opportunities for profit or gain, from holding membership interests in the joining entity that are respectively borne by or accrue to the parties to the scheme, and whether there has been any change in those risks and opportunities for the head company or any other party to the scheme (for example, a change resulting from the making of any contract, the granting of any option or the entering into of any arrangement with respect to any membership interests in the joining entity);

(b) whether the head company, or a person holding membership interests in the head company, would, in the year of income in which the joining entity became a subsidiary member of the group or any later year of income, derive a greater benefit from franking credits than other persons who held membership interests in the joining entity immediately before it became a subsidiary member of the group;

(c) the extent (if any) to which the joining entity was able to pay a franked dividend or distribution immediately before it became a subsidiary member of the group;

(d) whether any consideration paid or given by or on behalf of, or received by or on behalf of, the head company in connection with the scheme (for example, the amount of any interest on a loan) was calculated by reference to the franking credit benefits to be received by the head company;

(e) the period for which the head company held membership interests in the joining entity;

(f) any of the matters referred to in subsection 177D(2).

Section to apply to exempting credits

(11) This section applies to exempting credits arising in the exempting account of the head company of a consolidated group in the same way that it applies to credits arising in the head company's franking account.

177F Cancellation of tax benefits etc.

(1) Where this Part applies to a scheme in connection with which a tax benefit has been obtained, or would but for this section be obtained, the Commissioner may:

(a) in the case of a tax benefit that is referable to an amount not being included in the assessable income of the taxpayer of a year of income—determine that the whole or a part of that amount shall be included in the assessable income of the taxpayer of that year of income; or

(b) in the case of a tax benefit that is referable to a deduction or a part of a deduction being allowable to the taxpayer in relation to a year of income—determine that the whole or a part of the deduction or of the part of the deduction, as the case may be, shall not be allowable to the taxpayer in relation to that year of income; or

(c) in the case of a tax benefit that is referable to a capital loss or a part of a capital loss being incurred by the taxpayer during a year of income—determine that the whole or a part of the capital loss or of the part of the capital loss, as the case may be, was not incurred by the taxpayer during that year of income; or

(ca) in the case of a tax benefit that is referable to a loss carry back tax offset, or a part of a loss carry back tax offset, being allowable to the taxpayer—determine that the whole or a part of the loss carry back tax offset, or the part of the loss carry back tax offset, as the case may be, is not to be allowable to the taxpayer; or

(d) in the case of a tax benefit that is referable to a foreign income tax offset, or a part of a foreign income tax offset, being allowable to the taxpayer—determine that the whole or a part of the foreign income tax offset, or the part of the foreign income tax offset, as the case may be, is not to be allowable to the taxpayer; or

(da) in the case of a tax benefit that is referable to an innovation tax offset, or a part of an innovation tax offset, being allowable to the taxpayer—determine that the whole or a part of the innovation tax offset, or the part of the innovation tax offset, as the case may be, is not to be allowable to the taxpayer; or

(e) in the case of a tax benefit that is referable to an exploration credit, or a part of an exploration credit, being issued to the taxpayer—determine that:

(i) the whole or a part of a junior minerals exploration incentive tax offset that would otherwise be allowable to the taxpayer in relation to the exploration credit, or the part of the exploration credit, as the case may be, is not to be allowable to the taxpayer; or

(ii) the whole or a part of a franking credit that would otherwise arise in the franking account of the taxpayer in relation to the exploration credit, or the part of the exploration credit, as the case may be, is not to arise in the franking account of the taxpayer; or

(f) in the case of a tax benefit that is referable to:

(i) a refundable R&D tax offset; or

(ii) a non-refundable R&D tax offset; or

(iii) a part of a refundable R&D tax offset; or

(iv) a part of a non-refundable R&D tax offset;

being allowable to the taxpayer in relation to a year of income—determine that the whole or a part of the offset, or the part of the offset, as the case may be, is not to be allowable to the taxpayer in relation to that year of income;

and, where the Commissioner makes such a determination, he or she shall take such action as he or she considers necessary to give effect to that determination.

(2) Where the Commissioner determines under paragraph (1)(a) that an amount is to be included in the assessable income of a taxpayer of a year of income, that amount shall be deemed to be included in that assessable income by virtue of such provision of this Act as the Commissioner determines.

(2A) Where a tax benefit that is covered by paragraph 177C(1)(bc) has been obtained, or would but for this section be obtained, by a taxpayer in connection with a scheme to which this Part applies:

(a) the Commissioner may determine that the taxpayer is subject to withholding tax under section 128B on the whole or a part of that amount; and

(b) if the Commissioner makes such a determination, he or she must take such action as he or she considers necessary to give effect to that determination.

(2B) A determination under paragraph (1)(c) or subsection (2A) must be in writing.

(2C) Notice of the determination must be given to the taxpayer and, in the case of a determination under subsection (2A), to the person who paid the amount.

(2E) A failure to comply with subsection (2C) does not affect the validity of a determination.

(2F) If the Commissioner makes a determination under subsection (2A), the amount that the Commissioner determines is taken to be subject to withholding tax is taken to have been subject to withholding tax at all times by virtue of such provision of section 128B as the Commissioner determines.

(2G) If the taxpayer is dissatisfied with a determination under paragraph (1)(c) or subsection (2A), the taxpayer may object against it in the manner set out in Part IVC of the *Taxation Administration Act 1953*.

(3) Where the Commissioner has made a determination under subsection (1) or (2A) in respect of a taxpayer in relation to a scheme to which this Part applies, or the Commissioner has made a DPT assessment in respect of a taxpayer in relation to a scheme to which this Part applies, the Commissioner may, in relation to any taxpayer (in this subsection referred to as the ***relevant taxpayer***):

(a) if, in the opinion of the Commissioner:

(i) there has been included, or would but for this subsection be included, in the assessable income of the relevant taxpayer of a year of income an amount that would not have been included or would not be included, as the case may be, in the assessable income of the relevant taxpayer of that year of income if the scheme had not been entered into or carried out; and

(ii) it is fair and reasonable that that amount or a part of that amount should not be included in the assessable income of the relevant taxpayer of that year of income;

determine that that amount or that part of that amount, as the case may be, should not have been included or shall not be included, as the case may be, in the assessable income of the relevant taxpayer of that year of income; or

(b) if, in the opinion of the Commissioner:

(i) an amount would have been allowed or would be allowable to the relevant taxpayer as a deduction in relation to a year of income if the scheme had not been entered into or carried out, being an amount that was not allowed or would not, but for this subsection, be allowable, as the case may be, as a deduction to the relevant taxpayer in relation to that year of income; and

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(ii) it is fair and reasonable that that amount or a part of that amount should be allowable as a deduction to the relevant taxpayer in relation to that year of income;

determine that that amount or that part, as the case may be, should have been allowed or shall be allowable, as the case may be, as a deduction to the relevant taxpayer in relation to that year of income; or

(c) if, in the opinion of the Commissioner:

(i) a capital loss would have been incurred by the relevant taxpayer during a year of income if the scheme had not been entered into or carried out, being a capital loss that was not incurred or would not, but for this subsection, be incurred, as the case may be, by the relevant taxpayer during that year of income; and

(ii) it is fair and reasonable that the capital loss or a part of that capital loss should be incurred by the relevant taxpayer during that year of income;

determine that the capital loss or the part, as the case may be, should be incurred by the relevant taxpayer during that year of income; or

(ca) if, in the opinion of the Commissioner:

(i) an amount would have been allowed, or would be allowable, to the relevant taxpayer as a loss carry back tax offset if the scheme had not been entered into or carried out, being an amount that was not allowed or would not, apart from this subsection, be allowable, as the case may be, as a loss carry back tax offset to the relevant taxpayer; and

(ii) it is fair and reasonable that the amount, or a part of the amount, should be allowable as a loss carry back tax offset to the relevant taxpayer;

determine that that amount or that part, as the case may be, should have been allowed or is allowable, as the case may be, as a loss carry back tax offset to the relevant taxpayer; or

(d) if, in the opinion of the Commissioner:

(i) an amount would have been allowed, or would be allowable, to the relevant taxpayer as a foreign income tax offset if the scheme had not been entered into or carried out, being an amount that was not allowed or would not, apart from this subsection, be allowable, as the case may be, as a foreign income tax offset to the relevant taxpayer; and

(ii) it is fair and reasonable that the amount, or a part of the amount, should be allowable as a foreign income tax offset to the relevant taxpayer;

determine that that amount or that part, as the case may be, should have been allowed or is allowable, as the case may be, as a foreign income tax offset to the relevant taxpayer; or

(da) if, in the opinion of the Commissioner:

(i) an amount would have been allowed, or would be allowable, to the relevant taxpayer as an innovation tax offset if the scheme had not been entered into or carried out, being an amount that was not allowed or would not, apart from this subsection, be allowable, as the case may be, as an innovation tax offset to the relevant taxpayer; and

(ii) it is fair and reasonable that the amount, or a part of the amount, should be allowable as an innovation tax offset to the relevant taxpayer;

determine that that amount or that part, as the case may be, should have been allowed or is allowable, as the case may be, as an innovation tax offset to the relevant taxpayer; or

(e) if, in the opinion of the Commissioner:

(i) an amount would have been allowed, or would be allowable, to the relevant taxpayer as a junior minerals exploration incentive tax offset if the scheme had not been entered into or carried out, being an amount that was not allowed or would not, apart from this subsection, be allowable, as the case may be, as a junior minerals exploration incentive tax offset to the relevant taxpayer; and

(ii) it is fair and reasonable that the amount, or a part of the amount, should be allowable as a junior minerals exploration incentive tax offset to the relevant taxpayer;

determine that that amount or that part, as the case may be, should have been allowed or is allowable, as the case may be, as an exploration development incentive tax offset to the relevant taxpayer; or

(f) if, in the opinion of the Commissioner:

(i) an amount of a franking credit would have arisen, or would arise, in the franking account of the relevant taxpayer in relation to an exploration credit, being an amount that did not arise, or would not, apart from this subsection, have arisen, as the case may be, in the franking account of the relevant taxpayer in relation to the exploration credit; and

(ii) it is fair and reasonable that the amount, or a part of the amount, should arise, in the franking account of the relevant taxpayer in relation to the exploration credit;

determine that that amount or that part, as the case may be, should have arisen, or arises, as the case may be, in the franking account of the relevant taxpayer in relation to the exploration credit or

(g) if, in the opinion of the Commissioner:

(i) an amount would have been allowed, or would be allowable, to the relevant taxpayer as a refundable R&D tax offset, or a non-refundable R&D tax offset, in relation to a year of income if the scheme had not been entered into or carried out, being an amount that was not allowed or would not, apart from this subsection, be allowable, as the case may be, as a refundable R&D tax offset, or a non-refundable R&D tax offset, as the case may be, to the relevant taxpayer in relation to that year of income; and

(ii) it is fair and reasonable that the amount, or a part of the amount, should be allowable as a refundable R&D tax offset, or a non-refundable R&D tax offset, as the case may be, to the relevant taxpayer;

determine that that amount or that part, as the case may be, should have been allowed or is allowable, as the case may be, as a refundable R&D tax offset, or a non-refundable R&D tax offset, as the case may be, to the relevant taxpayer in relation to that year of income;

and the Commissioner shall take such action as he or she considers necessary to give effect to any such determination.

(4) Where the Commissioner makes a determination under subsection (3) by virtue of which an amount is allowed as a deduction to a taxpayer in relation to a year of income, that amount shall be deemed to be so allowed as a deduction by virtue of such provision of this Act as the Commissioner determines.

(5) Where, at any time, a taxpayer considers that the Commissioner ought to make a determination under subsection (3) in relation to the taxpayer in relation to a year of income, the taxpayer may post to or lodge with the Commissioner a request in writing for the making by the Commissioner of a determination under that subsection.

(5A) Subsection (5B) applies if the taxpayer considers that the Commissioner ought to make the determination under subsection (3) because the Commissioner has made a DPT assessment in respect of a taxpayer in relation to a scheme to which this Part applies.

(5B) Despite subsection (5), the request may be posted to or lodged with the Commissioner only after the end of the period of review (within the meaning of section 145-15 in Schedule 1 to the *Taxation Administration Act 1953*) for the DPT assessment.

(6) The Commissioner shall consider the request and serve on the taxpayer, by post or otherwise, a written notice of the Commissioner's decision on the request.

(7) If the taxpayer is dissatisfied with the Commissioner's decision on the request, the taxpayer may object against it in the manner set out in Part IVC of the *Taxation Administration Act 1953*.

177G Amendment of assessments

Nothing in section 170 prevents the amendment of an assessment at any time if the amendment is for the purpose of giving effect to subsection 177F(3).

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