Tax-avoidance after Spotless

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Tax-avoidance after Spotless

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Major Issues Summary

One of the most important attributes of an equitable tax system is that taxpayers are unable to avoid the imposition of tax through the use of artificial or contrived arrangements. The Australian taxation system attempts to achieve this by specific and general anti-avoidance provisions. These provisions necessarily add to the complexities of tax legislation and result in increasing compliance costs to taxpayers particularly in a self-assessment tax system.

The general anti-avoidance provisions of the *Income Tax Assessment Act* 1936 are contained in Part IVA which was introduced in 1981 by the then Treasurer, The Hon John Howard, in order to overcome the limitations of section 260 (the then anti-avoidance provision) by striking 'down blatant, artificial or contrived arrangements'. Section 260 had been criticised for having too limited a scope and therefore not being effective in stemming anti-avoidance behaviour.

Part IVA is drafted in wide terms and gives a large degree of discretion to the Commissioner of Taxation to disregard an arrangement and either include an amount in a taxpayer's assessable income or to disallow a deduction. These provisions whilst intended to prevent the erosion of the income tax base generally, were designed to ensure that they are not impediments to genuine commercial and financial transactions entered into with a view to making profits.

Anti-avoidance laws attempt to strike a balance between the interests of revenue and taxpayers. The recent decision of the High Court in the *Spotless* case, which indicated the potential for a wide interpretation of the provisions of Part IVA, appears to have tilted the balance in favour of the Australian Taxation Office (the 'ATO'). The High Court held that the mere fact that a transaction can be justified as a rational commercial decision will not of itself be sufficient to avoid the operation of the anti-avoidance provisions in Part IVA. The obtaining of a tax benefit on its own may not attract Part IVA but if the whole transaction made 'no sense' without the tax benefit then, *Spotless* states, Part IVA may apply.

The implications of the *Spotless* decision are that Part IVA will need to be considered in a greater number of commercial transactions, given that taxation considerations are important in most commercial decisions.
This decision has caused some concern in the business community. For example, the Law Council of Australia in its 12 June 1997 media release highlighted the imbalance caused by the application of the wide interpretation of Part IVA in the *Spotless* decision to loan arrangements entered into by small business to reduce borrowing costs.\(^1\)

This is the first time, since the High Court *Spotless* case, that the ATO has sought to apply anti-avoidance provisions to common - and legitimate - business arrangements, despite assurances to the contrary.

Part IVA should be used against tax avoidance arrangements which have no commercial substance. It should not be used, particularly just prior to the end of the financial year, to frighten taxpayers and banks who enter into normal and proper commercial arrangements with respect to the repayment of money borrowed for commercial purposes.

On the other hand what constitutes 'normal and proper commercial arrangements' are often in the eye of the beholder.
Introduction

The paper commences with an outline of the operation of the general anti-avoidance provisions contained in Part IVA of the *Income Tax Assessment Act 1936* ('the Act') together with a review of the relevant statutory provisions.

The three necessary prerequisites for the Taxation Commissioner to have a discretion to cancel a tax benefit obtained by a taxpayer are considered; namely that there is a scheme entered into after 27 May 1981, having regard to a number of specified matters it can be concluded that the scheme was entered into or carried out with the sole or dominant purpose of obtaining a tax benefit and thirdly that the taxpayer did in fact obtain a tax benefit. The terms 'scheme' and 'tax benefit' are defined in the Act.

The role of 'dominant purpose' as being one of the essential preconditions to the operation of Part IVA is examined in more detail together with an analysis of the judgment of the High Court in the *Spotless Services Case* and its implications in relation to the dominant purpose test. The matters to be taken into account when ascertaining purpose in light of the High Court's judgment are also considered.

The relationship between identification of the relevant scheme and the test of dominant purpose is analysed. The application of Part IVA to commercial transactions with a significant tax benefit and to commercial transactions more generally is also considered. The paper goes on to analyse the possible limits to the operation of Part IVA, including possible limitations arising out of the Courts' interpretation of the definition of 'tax benefit'.

The difficulties in finding a balance between certainty of operation of the taxation laws and also retaining the effectiveness of the general anti-avoidance provisions is discussed. Part IVA was introduced to overcome the limitations of section 260 (the predecessor section to Part IVA). The judicial interpretation of section 260 and the limits to the section are considered.

Finally, the paper examines the implications of the proposed extension of Part IVA to Australia's withholding tax regime as announced by the Treasurer in the budget speech and considers whether Part IVA is a disincentive for foreign investment in Australia or Australian investment overseas.
An Outline of the Operation of Part IVA

The general anti-avoidance provisions which are contained in Part IVA of the Act comprise sections 177A to 177G and were introduced in 1981.\(^3\)

In order that Part IVA may apply to a taxpayer there are three preconditions:

a) there must be a scheme (as defined by the Act) entered into after 27 May 1981;

b) having regard to a number of specified matters, the scheme must be entered into or carried out with the sole or dominant purpose of obtaining a tax benefit; and

c) the taxpayer must obtain a tax benefit as defined.

If these three matters are satisfied, Part IVA applies and the Commissioner has a discretion to cancel either the whole or part of the tax benefit by either including the amount of the relevant tax benefit in the taxpayer's assessable income or by disallowing a deduction to the taxpayer equal to the amount of the tax benefit. Part IVA is conditional on the Commissioner exercising his or her discretion.\(^4\)

The Commissioner's discretion is only to cancel the tax benefit if the three preconditions exist as objective facts. The Commissioner has no discretion in relation to the existence of the three preconditions which must be determined objectively.\(^5\)

Part IVA was introduced to replace section 260 which in 1981 was the current anti-avoidance provision. As a result of the introduction of Part IVA, section 260 only applies to contracts, agreements or arrangements entered into before 28 May 1981. Prior to 1981, section 260 had operated unamended since the introduction of the Act. A provision identical to section 260 was also contained within the Income Tax Assessment Act 1915 and the Income Tax Assessment Act 1922.\(^6\)

An understanding of section 260 is important given that Part IVA was introduced to overcome the limitations of section 260. The judicial interpretation of section 260 had imposed a number of limitations on the operation of the section, although it is interesting that after the introduction of Part IVA the Courts construed section 260 more widely.\(^7\)

The specific anti-avoidance provisions contained within the Act will apply in priority to Part IVA. Part IVA will apply only after all other provisions in the Act have had potential operation. Examples of specific anti-avoidance provisions are section 80DA which applies in relation to the carrying forward of company losses and sections 82KH to 82KL which apply in relation to schemes involving contrived deduction arrangements.

At the time of the introduction of Part IVA on 27 May 1981, the then Treasurer The Hon John Howard stated in the second reading speech\(^8\) that:
The proposed provisions - embodied in a new Part IVA of the Income Tax Assessment Act 1936 - seek to give effect to a policy that such measures ought to strike down blatant, artificial or contrived arrangements, but not cast unnecessary inhibitions on normal commercial transactions by which taxpayers legitimately take advantage of opportunities available for the arrangement of their affairs.

...

Some writers on the subject suggest that tax avoidance involves conduct entered into for the sole or dominant purpose of obtaining a particular tax advantage.

That description could be expected to cover the types of tax avoidance that, again using the language of social or political or debate, are blatant artificial or contrived, and which are indeed intended to be covered by this Bill.

But it is also apt to describe other arrangements, including some family arrangements, which are beyond the appropriate scope of general anti-avoidance measures and ought if need be, to be dealt with by specific measures.

In order to confine the scope of the proposed provisions to schemes of the 'blatant' or 'paper' variety, the measures in this Bill are expressed so as to render ineffective a scheme whereby a tax benefit is obtained and an objective examination, having regard to the scheme itself and to its surrounding circumstances and practicable results, leads to the conclusion that the scheme was entered into for the sole or dominant purpose of obtaining a tax benefit.

In the explanatory memorandum to the Income Tax Laws Amendment Bill (No 2), No.110 of 1981, the Treasurer stated Part IVA was designed to apply to blatant, artificial or contrived arrangements but that arrangements of a normal business or family kind, including those of a tax planning nature will be beyond the scope of Part IVA.

Notwithstanding the Treasurer's statement in the second reading speech and the explanatory memorandum, it appears that the operation of Part IVA is not necessarily confined to the circumstances set out in the speech. As an example, it is unclear from the terms of Part IVA that it will not apply to trust arrangements where income is distributed to family members and to arrangements designed to ensure the maximum deductibility of interest on borrowings by family businesses.

The Relevant Provisions in the Income Tax Assessment Act 1936

Section 177D prescribes the circumstances in which Part IVA will apply as follows:

This Part applies to any scheme that has been or is entered into after 27 May 1981, and to any scheme that has been or is carried out or commenced to be carried out after that
date (other than a scheme that was entered into on or before that date), whether the scheme has been or is entered into or carried out in Australia or outside Australia or partly in Australia and partly outside Australia, where-

(a) taxpayer (in this section referred to as the 'relevant taxpayer') has obtained, or would but for section 177F obtain, a tax benefit in connection with the scheme; and

(b) having regard to-

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

(ii) the form and substance of the scheme;

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

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

(v) any change in the financial position of the relevant taxpayer that has resulted, will result, or may reasonably be expected to result, from the scheme;

(vi) any change in the financial position of any person who has, or has had, any connection (whether of a business, family or other nature) with the relevant taxpayer, being a change that has resulted, will result or may reasonably be expected to result from the scheme;

(vii) any other consequence for the relevant taxpayer, or for any person referred to in subparagraph (vi), of the scheme having been entered into or carried out; and

(viii) the nature of any connection (whether of a business, family or other nature) between the relevant taxpayer and any person referred to in subparagraph (vi),

it would be concluded that the person, 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 enabling the relevant taxpayer to obtain a tax benefit in connection with the scheme or of 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).

Section 177A(1) provides that in Part IVA, unless the contrary intention appears, '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.

The definition of scheme is expanded by section 177A(3) which expressly includes a unilateral scheme.

Section 177A(5) provides that:

A reference in this Part 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 two or more purposes of which that particular purpose is the dominant purpose.

Section 177C(1) defines the obtaining by a taxpayer of a tax benefit in connection with a scheme as follows:

(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.

The amount of the tax benefit is defined in section 177C(1) as being the amount included in the taxpayer’s assessable income or the amount of the whole or part of the deduction.

The Commissioner’s discretion to cancel the tax benefit is contained in section 177F of the Act.

The Role of 'Dominant Purpose' when Considering the Operation of Part IVA

When considering the operation of Part IVA, the relevant purpose is to be ascertained objectively by reference to the matters specified in section 177D(b)(i) to (viii). These matters are the only matters which may be considered. The subjective purpose or intent of a person to obtain a tax benefit is not referred to as a factor to be taken into account and is irrelevant. It is no defence that the taxpayer is either innocent or ignorant. As stated by the majority judgment of the High Court in the Spotless Services Case the question is whether, having regard, as objective facts, to the matters answering the description in paragraph (b),
a reasonable person would conclude that the taxpayers entered into or carried out the scheme for the dominant purpose of enabling the taxpayers to obtain a tax benefit in connection with the scheme.

It is only necessary that one of the persons who entered into or carried out the scheme (or any part of the scheme) did so with the requisite purpose. It is not necessary that all participants to the scheme have the necessary purpose. Furthermore it is not necessary that the person who actually obtained the tax benefit be involved in all aspects of the scheme, be the instigator of the scheme or be the person with the requisite purpose. It is however necessary that the relevant taxpayer subject to the operation of Part IVA be the person who actually obtained the tax benefit, although there does not however need to be an exact correspondence between the tax benefit which was obtained and that which was intended to be obtained.

The matters to be taken into account when determining the sole or dominant purpose contained in section 177D(b)(i) to (viii). These matters are discussed below.

(i) The manner in which the scheme was entered into or carried out

Relevant factors under this category include the way in which the particular scheme in question was established including the method or procedure. The background of the scheme and the alternative purposes which could objectively be attributed to the taxpayer in entering into the scheme are also to be considered. It would also be relevant if the scheme which the taxpayer entered into was promoted by an entrepreneur such as a merchant bank. The way in which the taxpayer operated before and after the scheme and commercial practices more generally may also be relevant.

(ii) The form and substance of the scheme.

Whether the scheme is a one off situation or a business like transaction carried out for a substantial period of time are relevant factors. It is also clear that the 'choice principle' discussed below has no application in relation to Part IVA.

(iii) The time at which the scheme was entered into and the length of the period during which the scheme was carried out.

In this regard it may be relevant if the scheme was carried out immediately before the close of the financial year.

(iv) The result in relation to the operation of this Act that, but for this Part, would be achieved by the scheme.
The result which would arise out of the normal operation of the Act excluding the possible application of Part IVA is relevant as is the result which would arise if the scheme had not been entered into.

(v) Any change in the financial position of the relevant taxpayer that has resulted, will result, or may reasonably be expected to result, from the scheme.

It would appear to be relevant under this category if the taxpayer was able to claim a deduction in circumstances where no actual payment has been made and his or her net assets remained constant.

(vi) Any change in the financial position of any person who has, or has had, any connection (whether of a business, family or other nature) with the relevant taxpayer, being a change that has resulted, will result or may reasonably be expected to result from the scheme, a connection of any other nature is sufficient.

The person does not need to have any connection with the taxpayer of a business or family kind.

(vii) Any other consequence for the relevant taxpayer, or for any person referred to in subparagraph (vi), of the scheme having been entered into or carried out.

Where arrangements have been made between related parties it is necessary to pay particular regard to whether the documentation accurately reflects what the parties contemplate will occur and whether expressed reasons for a particular course of action are to be taken at face value.  

(viii) The nature of any connection (whether of a business, family or other nature) between the relevant taxpayer and any person referred to in subparagraph (vi).

Given the reference to 'any connection' it is likely that the links which may be considered under this subparagraph may be extremely wide.

It is necessary for the Commissioner to consider each of the matters referred to in paragraphs 177D(b)(i) to (viii), however it is permissible for him or her to conclude that having regard to a particular matter if the Commissioner sees nothing to assist him or her to conclude whether or not the requisite purpose existed.
The Matters to be Taken into Account when Ascertaining Dominant Purpose in Light of the High Court's Judgment in the Spotless Services Case

In September 1986, Spotless Services Limited and Spotless Finance Pty Limited ('the Spotless companies') had approximately $40 million of surplus funds which they decided to place on deposit in the Cook Islands. The investment had been promoted in Australia by a merchant bank and the Spotless companies had been approached about the investment by the merchant bank. Importantly, the rate of interest obtained by the Spotless companies in the Cook Islands was approximately 4% lower than the interest rate which could have been obtained by investing the funds on deposit in Australia. The investment was secured by a letter of credit issued by the Midland Bank plc.

The Spotless companies had also considered other investment alternatives including a similar kind of investment to be made in Hong Kong. This investment was also suggested by a merchant bank. This proposal involved a tax clearance certificate being granted by the Commissioner. After discussions with their legal advisers, the Spotless companies decided not to proceed with the investment in Hong Kong.

The Spotless companies claimed that the interest they derived from the monies on the deposit in the Cook Islands was exempt from income tax pursuant to section 23(q) of the Act on the basis that the interest had been derived from a source outside Australia and Papua New Guinea and that withholding tax had been paid on the interest in the Cook Islands. At that time section 23(q) (which has since been repealed) provided that income derived by a resident from sources out of Australia was exempt income, provided that there was a liability for tax in the country where that income was derived and the Commissioner was satisfied that tax had been paid or would be paid.

The Commissioner asserted that the taxpayers had obtained a tax benefit in connection with a scheme to which Part IV A of the Act applied, namely, that the interest would have been included or might reasonably be expected to have been included in the taxpayers' assessable income if the scheme had not been entered into or carried out.

The Spotless companies were successful both at first instance before Lockhart J and before the Full Federal Court. However on appeal to the High Court the Commissioner succeeded in establishing that Part IVA applied. The High Court's judgment was handed down on 3 December 1996. Brennan CJ, Dawson, Toohey, Gaudron, Gummow and Kirby JJ handed down the joint majority judgment. McHugh J also agreed that the appeals should be allowed, however on the basis that the case involved a very special set of facts.

The majority judgment of the High Court appeared to accept the formulation of the relevant scheme identified by Cooper J in the Full Federal Court. Cooper J identified the scheme as being the proposal of the taxpayer to invest $40 million on deposit in the Cook
Islands and to pay the Cook Islands withholding tax on the interest earned, and the taking of all necessary steps to implement the proposal.

The High Court found that the taxpayers had the requisite purpose in connection with the scheme. A person may enter into or carry out a scheme within the meaning of Part IVA, for the dominant purpose of enabling the relevant taxpayer to obtain a tax benefit where that dominant purpose is consistent with the pursuit of commercial gain in the course of carrying on a business. The majority stated that there was no dichotomy between the obtaining of a tax benefit as the dominant purpose of the taxpayers in making the investment on the one hand and a rational commercial decision on the other. The adoption of one particular form over another may be influenced by tax considerations and a particular course of action may be both tax driven and bear the character of a rational commercial decision. Accordingly it is clear that the mere fact that a transaction can be justified as a rational commercial decision will not of itself be sufficient to avoid the operation of Part IVA.

The High Court held that in its ordinary meaning dominant indicates that purpose which was the ruling, prevailing or most influential purpose. The High Court held that notwithstanding that the taxpayers took steps to maximise their after tax return, it was still possible for them to do so in a manner indicating the presence of a dominant purpose to obtain a tax benefit.

One interpretation of this aspect of the High Court's judgment is that where a person has a number of purposes in entering into an arrangement and one of the those purposes is to obtain a tax benefit, it is possible for that purpose to be the dominant purpose notwithstanding that it does not constitute more than 50% of the overall purpose. Given the importance of taxation considerations in most commercial transactions and the fact that generally a taxpayer has a number of purposes in entering into a particular transaction, the meaning given to 'dominant' by the High Court, may mean that it is relatively easy to conclude that a taxpayer has the necessary purpose such that Part IVA applies.

The majority judgment of the High Court also noted that the operation of Part IVA is not limited to the diversion of an existing income stream in such a way that it would not attract tax. After the introduction of Part IVA in 1981, it had been thought by many advisers that that operation of Part IVA was limited to these circumstances.

The terms of section 177D(b)(i) to (viii) bear upon the manner in which the scheme was entered into and the form and substance of the scheme. The High Court held that in the context in which they appear in section 177D(b)(i), the terms manner and entered into are not given any restricted meaning. 'Manner' includes consideration of the way in which the particular scheme in question was established, including the method or procedure. The majority stated that the question was whether, having regard, as objective facts, to the matters answering the description in paragraph (b), a reasonable person would conclude
that the taxpayers entered into or carried out the scheme for the dominant purpose of enabling the taxpayers to obtain a tax benefit in connection with the scheme.

The High Court relied on the fact that the interest rate earned on the investment in the Cook Islands was approximately 4 per cent below the applicable bank rates available in Australia and concluded that the form and substance of the proposal had been to take steps to ensure that the source of the interest was located in the Cook Islands. In those circumstances it could be objectively concluded that the taxpayers in entering into and carrying out the particular scheme had, as their most influential and prevailing or ruling purpose, and thus their dominant purpose, the obtaining of a tax benefit.

The commercially unattractive interest rate was more than offset by the exemption from Australian income tax. This collateral tax advantage was the key to the whole transaction and gave it its particular commercial attraction. Without that tax benefit the proposal would have made no sense and would not have been undertaken. Although the Spotless companies were concerned with obtaining adequate security for the investment, viewed objectively, it was the obtaining of the tax benefit which directed the taxpayers in taking steps they otherwise would not have taken by entering into the scheme.

The majority of the High Court went on to conclude that the Spotless companies also obtained a tax benefit. The reasonable expectation was that, in the absence of any other acceptable alternative proposal for off-shore investment at interest, the taxpayers would have invested the funds for the balance of the financial year in Australia. The amount derived from that investment would then have been included in the assessable income of the taxpayers. It could reasonably be concluded that the amount the taxpayers would have received on the Australian investment would have been not less than the amount of interest in fact received from the investment in the Cook Islands. Accordingly the High Court found that there was no error adverse to the taxpayers in identifying the amount of the tax benefit as an amount equal to the interest less the Cook Islands withholding tax.

While not expressly stated in the majority judgment, it follows that in the Spotless Services Case the amount of the tax benefit under Part IVA could have been greater than that identified by the Commissioner. While the Commissioner identified the tax benefit as being the net interest from the Cook Islands, it appears that it would have been legitimate for the Commissioner to identify the tax benefit as being the amount which would have received as interest had the funds been invested in Australia. If such an amount had been identified as the tax benefit, the ultimate position of the taxpayers after the operation of Part IVA would be worse than if the funds had been invested in Australia. The taxpayers would have been taxed as if the funds were invested in Australia, however would only have received the lower Cook Islands interest rate on the investment of the funds.

The High Court held that Part IVA is to be construed and applied according to its terms and not according to old arguments concerning United Kingdom tax legislation. The
principle that taxpayers are entitled to order their affairs to minimise tax\textsuperscript{12} has no relevance in relation to Part IVA.

Mr Justice McHugh held in a separate judgment that the elaborate nature of the scheme lead to the conclusion that its purpose was to enable the taxpayer to obtain a tax benefit, however he stated that such a conclusion would seldom if ever be drawn if no more than a change of business or investment produced a tax benefit.

**The Relationship Between Identification of the Relevant Scheme, Dominant Purpose and the Obtaining of a Tax Benefit**

Given the very wide definition of 'scheme' contained in section 177A(1) of the Act it will be relatively easy for the Commissioner to find that a scheme exists. It may, however, be more difficult to determine what the relevant scheme was for the purposes of Part IVA, especially given that it is possible that a transaction may constitute several schemes for the purposes of the Part. The particularisation of the scheme is important as it sets the parameters for determining whether the taxpayer obtained a tax benefit in connection with the scheme and whether a person entered into or carried out the scheme (or any part of the scheme) for the purpose of enabling the relevant taxpayer to obtain a tax benefit in connection with the scheme.

Both section 177A(5) and section 177D refer to purpose in relation to part of a scheme. The author's view is that this means that a person can have the necessary purpose when he or she only participates in part of the scheme as opposed to the interpretation that a person need only have the relevant purpose in relation to part of the scheme.

It is clear that when determining whether the taxpayer obtained a tax benefit, there must be a tax benefit in connection with a scheme, not merely in connection with part of a scheme. The first significant litigation on the operation of Part IVA was the case of *Federal Commissioner of Taxation v Peabody\textsuperscript{13}*. The High Court in that case noted that part of a scheme, which cannot be regarded as a scheme in itself, although entered into or carried out by a person with the requisite purpose, cannot give rise to a tax benefit for the purposes of Part IVA. This conclusion follows from the wording of section 177C which links the definition of tax benefit to the identification of a scheme.

When determining what constitutes a scheme, the High Court in *Peabody's Case* held that while it was possible for a step or steps in a wider scheme to comprise a separate narrower scheme, it was important that those isolated steps did of themselves constitute a scheme.\textsuperscript{14} The High Court noted that Part IVA does not provide that a scheme includes part of a scheme and held that it was possible, despite the very wide definition of a scheme, to conceive of a set of circumstances which constitutes only part of a scheme and not a
scheme in itself. That will occur where the circumstances are incapable of standing on their own without being robbed of all practical meaning.\textsuperscript{15}

It is clear from the judgment of the High Court in \textit{Peabody's Case} that the Commissioner can reformulate the definition of scheme. Even if the Court decides upon a different definition of scheme to that put forward by the Commissioner, this does not necessarily mean that Part IVA has no application. The Court will go on to consider if there is the necessary purpose and tax benefit in connection with the proper definition of the scheme. An error by the Commissioner in the identification of a scheme as being one to which Part IVA applies or an error regarding the connection of a tax benefit with such a scheme will only result in the wrongful exercise of the discretion conferred by section 177F if the tax benefit which the Commissioner purports to cancel is not a tax benefit within the meaning of Part IVA.\textsuperscript{16} The crucial question in relation to the identification of the scheme is whether a tax benefit which the Commissioner has purported to cancel is in fact a tax benefit obtained in connection with a Part IVA scheme and so susceptible to cancellation at the discretion of the Commissioner.

The High Court in \textit{Peabody's Case} also held that the Commissioner is entitled to put his or her case in alternative ways and to put forward a number of alternative identifications of the relevant scheme, although he or she may be required to supply particulars of the scheme or schemes relied upon.\textsuperscript{17} The Commissioner is entitled to rely upon a narrower scheme within a wider scheme which has been identified as meeting the requirements of Part IVA, provided that it causes no undue embarrassment or surprise to the other side. If it does cause embarrassment or surprise to the other side, the situation may be cured by an amendment, provided the interests of justice allow such a course.\textsuperscript{18}

\textbf{The Possible Application of Part IVA to Commercial Transactions with a Significant Tax Benefit and to Transactions Generally}

The High Court's interpretation of Part IVA in the \textit{Spotless Services Case} gives the Part a potentially very wide application. It is clear that the mere fact that a transaction can be justified as a rational commercial decision will not of itself be sufficient to avoid the operation of Part IVA. However the mere fact that a taxpayer obtains a tax benefit in connection with a transaction is not of itself sufficient to fall within the Part.

It appears that a transaction is arguably outside the scope of Part IVA, if after having regard to the eight factors set out in section 177D(b)(i) to (viii) that the transaction makes sense, will stand alone or is justifiable without any tax benefit obtained and the tax benefit merely makes the transaction more attractive. Alternatively if having regard to the eight factors set out in section 177D(b)(i) to (viii) the transaction makes 'no sense' without the tax benefit it is possible that the Part will apply. Adopting the language of the High Court
in the *Spotless Services Case* it is necessary to determine if it was the 'collateral tax advantage' which provided the key to the whole transaction and without that benefit the proposal would have made 'no sense'.

In order to make these determinations it is sometimes necessary to compare the transaction with a normal or ordinary transaction. For example in the *Spotless Services Case* the High Court compared the interest rate that was obtained on the investment in the Cook Islands with the interest rate the Spotless companies would have obtained on investing the funds in Australia in Australian bank bills. In some cases such as the *Spotless Services Case* involving the investment of funds at fixed interest, it is relatively easy to make such comparisons, however in more complicated transactions such comparisons may not be so easy to make.

An example of a case where Part IVA was held not to apply notwithstanding that a tax benefit was obtained is *WD & HO Wills (Australia) Pty Limited v Commissioner of Taxation*,19 although the judgment was handed down before the judgment of the High Court in the *Spotless Services Case*. Sackville J considered a scheme involving an offshore captive insurer.20 Sackville J concluded that objectively having regard to the eight factors set out in section 177D(b), the parties to the scheme identified by the Commissioner (namely the taxpayer parent company and its subsidiary captive insurer) had a number of purposes including the inability to obtain the insurance on the general market. Sackville J concluded that any tax benefit obtained by the taxpayer as a result of the scheme was merely incidental to the other non-tax objectives.21 Disregarding the tax benefits, the proposal still made sense for non-tax reasons.

At the end of the day, whether or not Part IVA will apply in any given case is a question of fact and will detailed examination of all the matters to be taken into account under section 177D.

**Limits to the Operation of Part IVA**

Part IVA contains a number of express limitations to the operation of Part IVA. Section 177C(2) excludes from the definition of tax benefit an amount not included in the assessable income of a taxpayer, or an amount allowed as a deduction to a taxpayer, where the taxpayer makes a declaration, election or selection, or gives notice or exercises an option expressly provided for by the Act. The section 177C(2) exclusion does not apply where the scheme was 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, election, selection, notice or option to be made, given or exercised.
Section 177D(2) provides that Part IVA is not to be taken to affect the operation of Division 16C of Part III which provides for the primary producer income equalisation deposits scheme.

Given the definition of tax benefit contained in section 177C, Part IVA will not apply to schemes which result in the increase in the amount of a rebate or credit. Similarly Part IVA would not apply to a scheme relating to tax rates, such as for example a scheme to ensure that a minor is taxed at ordinary rates rather than the higher rates under Division 6AA or a scheme relating to the status of a company. Schemes to circumvent the tax instalment provisions would also fall outside Part IVA. In addition as is discussed below, Part IVA as currently drafted will not apply to schemes that reduce withholding tax.

The explanatory memorandum to the Income Tax Amendment Bill (No.2) of 1981 at page 10 stated:

In other words Part IVA applies only in relation to things that go to make up a person’s taxable income and not to rebates of or credits against the tax on a person’s taxable income. Withholding taxes, being taxes that are not based on the difference between assessable income and allowable deductions will also be outside the scope of Part IVA.

It is possible that the scope of Part IVA may be limited given the definition of tax benefit contained in section 177C. Broadly section 177C defines the tax benefit as being the amount of the assessable income which would have been included in the taxpayer’s assessable income or the amount of the allowable deduction which would not have been allowed to the taxpayer in relation to the year of income if the scheme had not been entered into or carried out.

Accordingly in order for there to be tax benefit it is necessary to establish what would have happened if the scheme had not been entered into or carried out. If there is a clear pre-existing course of conduct there may not be any difficulties in establishing this. If, however, there is no pre-existing, course of conduct there may be difficulties in the Commissioner establishing that an amount might reasonably have been expected to have been included in the taxpayer’s assessable income or that an amount might reasonably be expected not to have been an allowed deduction if the scheme had not been entered into or carried out.

The High Court in Peabody’s Case held that reasonable expectation for the purposes of the definition of tax benefit requires more than a possibility. It involves a prediction of the events that would have occurred if the scheme had not been entered into or carried out and the prediction must be sufficiently reliable for it to be regarded as reasonable.

Difficulties arise in establishing that the taxpayer has obtained a tax benefit where there are discretionary powers vested either in the directors of a company in respect of dividends or in the trustees of a discretionary trust. In these circumstances it is difficult to determine
whether or not an amount might reasonably be expected to have been included in the assessable income of an object of the discretionary power or of a shareholder.

The trustee of a discretionary trust may choose to distribute income to a beneficiary who has tax losses or no other income, rather than distribute income to other beneficiaries who have other assessable income. While it is possible that such action would constitute a scheme and would also satisfy the purpose requirement, it may be difficult to identify 'an amount that would have been included, or might reasonably have been included' in the assessable income of the taxpayer if the trustee had not exercised the discretion in that way.

In *Peabody’s Case* the taxpayer was a beneficiary under a discretionary trust. The High Court held that the taxpayer did not obtain a tax benefit because it could not reasonably be expected that if the scheme had not taken place that the profit would have flowed to the trustee and to the taxpayer in that year of income. In these circumstances it could not be said that there was an amount which would have been included or might reasonably have been expected to have been included in the taxpayer’s assessable income had the scheme not taken place.

Given the wide definition of 'scheme' contained in section 177A, it is unlikely that there will be significant limitations imposed on the operation of Part IVA arising from the necessity to identify a scheme.

**The Difficulties in Providing Express Limitations to Part IVA**

Part IVA has, potentially, very wide application, however, there is no clear expression of this in Part IVA. As an example it is common practice to use trust, company or partnership arrangements in order to distribute income within a family in order to reduce tax as a result of the progressive tax rates. In these cases it is possible that the three preconditions to the operation of Part IVA would be satisfied. In many transactions the three preconditions to the application of Part IVA will be satisfied and the Commissioner will have a discretion to cancel the tax benefit obtained by the taxpayer. In light of the High Court’s interpretation of Part IVA in the *Spotless Services Case*, Part IVA potentially applies to schemes other than those of the blatant or paper variety to which the Second Reading speech stated that the Part was directed. There are also clear statements in both the Second Reading Speech and the explanatory memorandum that schemes explained on the basis of ordinary business and family dealings will not be within the terms of section 177D, however there is no clear expression of this in Part IVA. Section 177F gives no guidance as to when the Commissioner will exercise his or her discretion to cancel a tax benefit and taxpayers may be under some uncertainty as to whether Part IVA will be applied. It would be unconducive to investment and other business activity if taxpayers are left in a position...
of uncertainty as to their tax position, although the need to effectively counter tax avoidance also needs to be considered.

There are difficulties in drafting anti-avoidance provisions wide enough to be effective, but not so wide as to apply to every transaction. While the wide grant of discretion contained in Part IVA may give rise to uncertainty, the grant of discretion may be necessary for Part IVA to be in these terms in order for the provisions to be effective. There may for example be difficulties in including a provision in Part IVA that the Part will not apply generally in circumstances where the Act has given a specific concession, as this may allow the Courts to interpret Part IVA in such as way as to allow the operation of the 'choice' principle (discussed below) which effectively neutralised the operation of section 260, the predecessor to Part IVA.

Part IVA was enacted in order to overcome the deficiencies of the old section 260\textsuperscript{24} and it is useful to consider the deficiencies in the old section 260 when considering Part IVA. The explanatory memorandum to Part IVA, noted that in accordance with the judicial interpretation of section 260 at that time, there were four major limitations to the scope of section 260 to which Part IVA was directed. These limitations were stated as follows:

(a) The 'choice principle' was held to apply in relation to section 260. The 'choice principle' was an interpretative rule according to which section 260 did not apply to deny to taxpayers a right of choice of the form of transaction to achieve a result if the Act gave the option of that form of transaction. Under the choice principle, section 260 was interpreted as protecting the general provisions of the Act from frustration, but not as operating to deny the taxpayer any right of choice between alternatives which the Act itself lays open to him or her.\textsuperscript{25}

(b) Section 260 was expressed in such a way that the purposes or motives of the persons entering into the arrangement were not to be considered when deciding whether the section applied to the arrangement. The 'purpose' of an arrangement was to be tested only by examining the effect of the arrangement itself.

(c) It was unclear whether an arrangement to which section 260 was found to apply must be treated as wholly void or whether it can be treated as only partly void, that is to the extent necessary to eliminate the sought-after tax benefit.

(d) Once it had done its job of voiding an arrangement, section 260 did not provide a power to reconstruct what was done, so as to arrive at a taxable situation.

Furthermore section 260 did not operate to deny a taxpayer a deduction for an outgoing which was otherwise deductible under section 51.\textsuperscript{26}
It is arguable that in order for Part IVA to overcome the limitations of section 260 identified above it was necessary for the Part to be drafted in the wide terms in which it was enacted.

**The Possibility of Obtaining a Ruling from the Commissioner**

As discussed above, Part IVA has potential application to a wide range of transactions. While it is unlikely that the Commissioner will seek to apply Part IVA in all the circumstances in which he or she is entitled to under the terms of the Part, taxpayers may still be left in a position of some uncertainty. One possibility to minimise any uncertainty may be for the Commissioner to give some indication of the circumstances in which he or she will seek to exercise the discretion.

The Commissioner has indicated in general terms that he or she will seek to apply the judgment of the High Court in the *Spotless Services Case* only in artificial, blatant and contrived situations. It may, however, be appropriate for the Commissioner to indicate with more specificity the types of transactions in which he or she will seek to apply Part IVA and the circumstances in which Part IVA will not be applied.

In the second reading speech the Treasurer stated that:

> But I do assert that taxpayers who *simply* take advantage of concessions for the purposes for which they were put in the law cannot and will not be affected by the new provisions. Specifically, for example, Part IVA will not deny to people who simply respond to our concessions for investment in Australian films the benefit of the tax advantages that are part of those concessions. But I think it incontrovertible that blatant misuse of those and other 'incentive' concessions ought to be within the scope of Part IVA. A general anti-avoidance provision would be of little worth if it could not be used to prevent unintended exploitation of such concessions in the law, or to operate as a back up to a specific anti-avoidance provision in circumstances where a taxpayer has tailored arrangements so that the provision is circumvented in form but not in substance.

There are, however, no express provisions contained in Part IVA to the effect that taxpayers who *simply* take advantage of concessions for the purposes for which they were included in the Act will not be within the Part. In areas where the Act has given specific concessions as a matter of policy (for example infrastructure financing) it may be appropriate for the Commissioner to give a ruling that will not seek to apply Part IVA to areas where as a matter of policy a specific concession has been granted.

It is also possible for a taxpayer is to request a private ruling from the Commissioner in relation to the proposed arrangements. The Commissioner will examine the issue as if the facts which the taxpayer has provided have actually occurred. A private ruling is specific
to the particular taxpayer and the particular transaction, act or event. There is also a system of public rulings which sets out the Commissioner’s opinion as to the way in which a tax law applies to a person or class of persons in relation to an arrangement or a class of arrangements.

It should be remembered however that the Commissioner has stated in Taxation Ruling 1 that a public ruling cannot supplant the terms of the law and does not have the effect of an estoppel against the operation of the law, although the Commissioner will generally treat the ruling as administratively binding.

The Implications of Extending Part IVA to Australia’s Withholding Tax Regime

In the Treasurer’s budget speech of 20 August 1996, the following statement was made:

From tonight, the general anti-avoidance provisions of the income tax law – Part IVA will be extended so that they can apply to Australia’s withholding tax regime.

Other amendments to the withholding tax provisions will further assist in preventing tax avoidance. These measures do not signal any change in the Government’s policy regarding withholding taxes.

As Part IVA is currently drafted, the definition of tax benefit contained in section 177C would not apply to schemes that reduce withholding tax. The withholding tax system is a means of collecting tax from a third party (usually the person making the payment to the person deriving the income) with the tax collected being credited to the taxpayer who bears the liability for the tax. In general terms, section 128D excludes from assessable income of a person certain income subject to withholding tax. Accordingly withholding tax is a final tax to be deducted by the payer and borne by the recipient.

A non-resident whose income includes a dividend, interest or a royalty from which withholding tax has been deducted is entitled to a credit against the withholding tax liability imposed by Division 11A of the Act. Often the credit equals the withholding tax liability and accordingly the tax liability is extinguished.

As the obligation to pay withholding tax is not imposed on the person who derives the income, a scheme to relieve a person of an obligation to pay withholding tax would not result in a reduction of that person’s assessable income and accordingly there would not be a tax benefit as defined in section 177C(1). Interest or dividends subject to withholding tax are not ‘assessable income’ to the person who has the obligation to pay the withholding tax.

Assume that an Australian bank pays interest to a non-resident of Australia and that a scheme is adopted under which no withholding tax is required to be paid by that Australian
bank. As the law is currently drafted the Australian bank has not obtained a tax benefit as there is no reduction of the Australian bank's assessable income. All that has been avoided is an obligation to withhold monies. The non-resident's assessable income also remains the same, all that has been avoided is a withholding of tax on account of tax which may become due on his or her assessable income. Accordingly the non-resident has not obtained a tax benefit.

As the person paying the withholding tax is not the person with the ultimate liability, it would appear to be necessary for the provisions extending the operation of Part IVA to the Australian withholding tax regime to ensure that the person with the ultimate liability obtains a credit for any withholding tax imposed as a result of Part IVA.

As the withholding tax payments is common area for tax avoidance, it may be appropriate to extend the operation of Part IVA to Australia's withholding tax regime. It is likely that a large part of the effect of such an extension to the operation of Part IVA will fall on non residents who may be particularly wary of taxes dependent on the Commissioner's discretion

Whether Part IVA is a Disincentive for Foreign Investment in Australia or for Australian Investment Overseas

The main area in which Part IVA may operate as a disincentive for foreign investment arises from the wide discretion which is given to the Commissioner and the resulting uncertainty as to when the Commissioner may seek to cancel a tax benefit obtained by a taxpayer.

It is possible that overseas residents investing in Australia may have more concerns in respect of this uncertainty as they may be less familiar with the Australian system and have less confidence than an Australian resident that the Commissioner will not seek to exercise his or her discretion in circumstances other than artificial, blatant or contrived situations. It is also likely that overseas residents may be particularly concerned with the operation of Part IVA being extended to Australia's withholding tax regime.

It seems unlikely that Part IVA would operate as a disincentive to Australian residents investing overseas to any greater degree than it may operate as a disincentive to Australian residents investing in Australia. The main area in which Part IVA may operate as a disincentive to investment generally also arises from the uncertainty given the wide discretion which has been given to the Commissioner.

One qualification is that it is possible that the operation of Part IVA may be more uncertain in relation to transactions in respect of foreign investment in Australia and
Australian investment overseas as it is likely that the structure of such transaction may be more complicated.

In any event in order to draw any firm conclusions as to whether Part IVA is a disincentive for foreign investment in Australia or for Australian investment overseas, it would be necessary to consider the particular tax regime of the other country.

**Concluding Comments**

It is necessary for any general anti-avoidance provisions such as Part IVA to achieve a difficult balance. On the one hand, in order for the anti-avoidance provisions to be effective, it is unavoidable that they be drafted in very wide terms. The limitations of section 260, the predecessor provisions to Part IVA, illustrate this. The grant of a discretion to the Commissioner may be an essential element to any effective anti-avoidance provision. On the other hand, any taxation system requires that a taxpayer be able to determine with some degree of certainty his or her liability to taxation. Arguably, Part IVA favours effectiveness over certainty, although it may be possible to reduce any uncertainty by the Commissioner giving some indication as to when Part IVA will be applied.

It is clear from the judgment of the High Court in the *Spotless Services Case* that the mere fact that a transaction can be justified as a rational commercial decision will not of itself be sufficient to avoid the operation of Part IVA. It also follows from the High Court’s judgment that where a taxpayer has a number of purposes in entering into a transaction and one of those purposes is to obtain a tax benefit, it is possible for that purpose to be the dominant purpose, notwithstanding that it does not constitute more than 50% of the overall purpose.

While concern has been expressed by taxpayers as to the possible scope of Part IVA, whether any scheme was entered into or carried out with the sole or dominant purpose of obtaining a tax benefit will always be a question of fact to be determined in the particular circumstances of the case, having regard to the matters listed in section 177D(b)(i) to (viii) of the Act. An important aspect of the facts in the *Spotless Services Case* was that the rate of interest obtained by the Spotless companies on the investment of the funds in the Cook Islands was approximately 4% lower than the interest rate which could have been obtained by investing the funds in Australia. The only logical justification for this apparently irrational behaviour was the tax advantage which was obtained by the Spotless companies. In the words of the High Court, it was the collateral tax advantage which provided the key to the whole transaction and without that benefit the proposal would have made no sense.
The implications for small business of the *Spotless* decision may well be significant. The Law Council has highlighted that legitimate business arrangements, such as the loans arranged by small business so as to reduce borrowing costs, might be caught. Certainly the majority of commercial transactions do have taxation considerations as a main feature and therefore, potentially, might now be caught by Part IVA. It is this potentially wide application that arguably will most affect small business.

As this paper notes there are difficulties in providing express limitations to the application of Part IVA so as to exclude all genuinely commercial transactions from its operation. Likewise, it would be unconducive to investment and other business activity to leave taxpayers uncertain as to whether Part IVA will be applied to their transactions.

The difficulties of preventing the further erosion of the income tax base in the context of the liberalisation of the trade and financial sectors have played a significant role in fuelling the current debate on the need for tax reform. Tax reform in the current phase of the debate is the search for a broader base such as goods and services which would yield substantial indirect taxes and minimise the potential for tax avoidance. Nevertheless, as income tax will continue to be a major contributor to revenue, genuine and total tax reform must take on board a review of the provisions of Part IVA to meet the needs of the complexities of present day commercial and financial activities.

**Endnotes**

1. Since the Law Council of Australia's media release, the Australian Taxation Office issued draft ruling TR97/D7 on 30 June 1997 in relation to split loan arrangements. The draft ruling, which is not law but rather a guideline, indicated that the ATO would only seek to apply Part IVA to loan products which are deliberately structured to create larger tax deductions for interest.


3. Part IVA was introduced by the Income Tax Laws Amendment Act (No 2), No. 110 of 1981 which came into operation on 24 June 1981.


5. See the judgment of the High Court in *Commissioner of Taxation v Peabody* (1994) 181 CLR: 359 at 382–383.

7. See for example Federal Commissioner of Taxation v Gulland 85 ATC: 4765. The composition of the High Court also changed over this time with Sir Garfield Barwick retiring as Chief Justice of the High Court on 11 February 1981.

8. The Treasurer also stated in the second reading speech that one possibility considered by the Government in deciding the basis of new general anti-avoidance provisions was to adopt the language of the Privy Council in Newton v Federal Commissioner of Taxation [1958] AC 450 and make any provisions inapplicable to schemes entered into in the course of ordinary business or family dealings. In Newton's Case the Privy Council held that if transactions are capable of explanation by reference to ordinary business or family dealings, without necessarily being labelled as a means to avoid tax, the arrangement was not within section 260. The Treasurer said however that it had been decided that the better test of what is blatant, contrived or artificial is the positive one that was adopted.


10. At first instance before Lockhart J, the Spotless companies argued that the Commissioner erred in the determination of the scheme in that a small piece of the relevant events was considered, namely the acts of their agents in leaving Australia for the Cook Islands with authority to enter into the relevant transaction, travelling there and carrying out the transaction, and determined that those events constituted the scheme.

Lockhart J rejected the Commissioner's narrow definition of the scheme. A critical part of the steps taken by the taxpayers to achieve their investment was the sending of their agent to the Cook Islands and the entry by him there into the transactions on their behalf, which constituted acceptance of the offer. However, the offer itself could not be ignored as part of the scheme and the intervening acts leading up to the acceptance also constituted the relevant commercial transaction and the scheme. Lockhart J held that the Commissioner was not entitled to select only some of the relevant series of steps and classify that isolated segment as the scheme for the purposes of Part IVA.

After rejecting the Commissioner's definition of the scheme, Lockhart J found that as the Commissioner approached the question of purpose on an erroneous basis, it was unnecessary to go on to consider the question of purpose. The Commissioner also sought to include the interest received on the deposit in the taxpayer's assessable income on the basis that it was derived from a source within Australia. Lockhart J rejected this contention and held that the source of the interest derived by the Spotless companies was the Cook Islands.

Lockhart J's judgment was handed down before the judgment of the High Court in Peabody's Case and his reasons for finding against the Commissioner in relation to Part IVA have now been found to be incorrect by the High Court in Peabody's Case.

11. The Commissioner unsuccessfully appealed from the Lockhart J's judgment to the Full Federal Court. At the time of the appeal the High Court's judgment in Peabody's Case had been handed down.


14. In *Federal Commissioner of Taxation v Peabody* the Commissioner identified the scheme in wide terms as comprising ten steps. At first instance O'Loughlin J considered that the Commissioner had particularised the scheme too widely, however concluded that by adopting either of the Commissioner's own narrower formulations of the relevant scheme, the dominant purpose of the taxpayer was still to obtain a tax benefit.

On appeal, the Full Federal Court held that the only scheme it could consider when reviewing the exercise of the Commissioner's discretion was the actual scheme identified by the Commissioner. The Commissioner was not permitted to isolate one step in the identified scheme and treat it as a separate scheme. The Full Federal Court held that in relation to the scheme propounded by the Commissioner and relied on in the Commissioner's determination, there was no tax benefit to the taxpayer and the conclusion as to purpose required by section 177D could not be reached.

On appeal, the High Court disapproved of the reasoning of the Full Federal Court in relation to the identification of the scheme, although reached the same conclusion as the Full Federal Court in relation to the tax benefit issue. The High Court held that the Commissioner was entitled to rely on the narrower scheme identified by O'Loughlin J at first instance, thus disapproving the reasoning of the Full Federal Court on this aspect.


16. 181 CLR 359 at 382.

17. 181 CLR 359 at 382.

18. The High Court in *Peabody's Case* also held that the taxpayer did not obtain a tax benefit. This aspect of the case is discussed under the heading 'The limits to the operation of Part IVA'.

19. 96 ATC: 4223.

20. In general terms a captive insurer is a wholly owned subsidiary of a parent company which provides insurance coverage only to other companies within the same group.

21. It was unnecessary for Sackville J to consider whether the taxpayer obtained a tax benefit in connection with the scheme, however on the evidence before him Sackville J would have found that the taxpayer did obtain a tax benefit in connection with the scheme. Both the taxpayer and the Commissioner had agreed that there was in existence a scheme as defined by section 177A of the Act.

22. For an example of where the status of the company was important see *Federal Commissioner of Taxation v Casuarina Pty Limited*, High Court (1971) 71 ATC 4068.

23. 181 CLR 359 at 385.

24. For examples of judgments where the scope of Part IVA was restricted see *Cridland v FC of T* 77 ATC 4538, *Mullens v FCT* 76 ATC 4288 and *Slutzkin v FCT* 77 ATC 4076, although...
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... after the introduction of Part IVA the scope of Part IVA was held to be wider FC of T v Gulland 85 ATC 4765.


28. Concern has already been expressed about the possible application of Part IVA to infrastructure financing following the judgment of the High Court in the Spotless Services Case, see for example the article 'Another ride on infrastructure's $26bn highway' by Prudence Moodie, page 2, Australian Financial Review, 30 December 1996.

29. On 23 July 1997, the Taxation Commissioner said that the ATO is set to crack down on withholding tax-avoiders who use complicated and contrived cross-border leasing arrangements. The ATO planned a draft ruling and the Taxation Commissioner said they would apply the provisions of Part IVA in these circumstances.