COMPARING THE GAARS UNDER THE INCOME TAX AND GST SYSTEMS

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ABSTRACT

Roughly 20 years has passed between the introduction of Part IVA of the Income Tax Assessment Act 1936 *and Division 165 of the* A New Tax System (Goods and Services Tax) Act 1999*, being the general anti-avoidance rules (GAARs) for the Australian income tax and GST systems respectively. A quick glance at the respective structures for the GAARs reveals some large differences, suggesting that the drafting of the GST GAAR has benefited from the system's experience with Part IVA. This paper examines these structural differences and analyses for substantive points of distinction, focusing on the central aspects of the purpose test (for income tax) and the principal effect test (for GST). Once it has been established that the principal effect test under the GST GAAR provides for a clearer scope compared with its income tax cousin, the paper goes on to consider the likely outcome in selected cases that applied Part IVA. This analysis takes on a greater significance in the context of the Commonwealth Treasury present review of the income tax system's anti-avoidance provisions with the recent introduction of the* Tax Laws Amendment (Countering Tax Avoidance and Multinational Profit Shifting) Bill 2013 *which proposes to counter the weakness surrounding the identification of a tax benefit. While the purpose test is not part of the present scope of that review, this does represent the first review of Part IVA since its introduction. Coupled with calls from the profession and other stakeholders, these circumstances give rise to the prospect that the subsequent formal review will be expanded in scope to consider all aspects of Part IVA. Such a review is likely to draw upon the experience with the GST GAAR in reforming Part IVA's provisions. This paper, then, will provide a preliminary assessment of that relationship.*

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I INTRODUCTION

The general anti-avoidance rules (GAARs) have become of central importance to the operation of Australian taxation.[1] Tax avoidance occurs when, despite having followed the black letter of the law, a taxpayer minimises their tax liability in a way that is inconsistent with the intent of the main tax provisions.[2] As a result, it is recognised that there is a need for Parliament to legislate against unforeseen tax avoidance arrangements[3] that 'would otherwise not be caught'.[4] Justice Sackville has expressed the view that 'no Parliament, of whatever political complexion, can be expected to tolerate indefinitely the drain on revenue that flow from a widespread and successful use of blatant tax avoidance schemes'.[5] As a result, the anti-avoidance measures aim to prevent this type of mischief and to provide a framework for a fairer tax system.

It is recognised that the GARRs are necessary to deter taxpayers from committing tax avoidance and in the context of Part IVA, the application of the GAAR depends on 'the particular means adopted' by the taxpayer[6]. Further, in an attempt to strike down tax avoidance the legislature has enacted specific and general anti- avoidance provisions. The GARRs are expressed in broad terms and will often cause frustration when attempting to determine the distinction between legitimate tax planning and illegitimate tax avoidance.[7] This potential problem is exacerbated by the need to use the GAARs to reconcile competing taxpayer and revenue objectives.[8]

The role of the GAARs is to strike down tax avoidance arrangements when the primary provisions fail to achieve their intended purpose when properly interpreted and applied.[9] As such, they are implemented to act as a supplement to the primary taxing provisions to ensure the effectiveness of the primary provisions when in the eyes of the law the primary provisions fail to achieve their purpose.[10]

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1 Justice Ronald Sackville, 'Avoiding Tax Avoidance, The Primacy of Part IVA' (2004) 39 *Taxation in Australia*, 298.

2 G T Pagone, 'Part IVA: The General Anti-Avoidance Provisions in Australian Taxation Law' (2003) 27 *Melbourne University Law Review* 770, 771.

3 Graeme Cooper, 'International Experience with General Anti-Avoidance Rules' (2001) 54 *Southern Methodist University Law Review* 83, 83.

4 Pagone, above n 2, 771.

5 Sackville, above n 1, 298.

6 *FCT v Spotless Services Limited* (1996) 186 CLR 404, 423.

7 Stephen Barkoczy, 'The GST General Anti- Avoidance Provisions – Part IVA with a GST Twist?' (2000) 3 *Journal of Australian Taxation* 35, 37.

8 Maurice Cashmere, 'Towards an Appropriate Interpretative approach to Australia's General Tax Avoidance Rule – Part IVA' (2006) 35 *Australian Tax Review* 231, 231.

9 G T Pagone, 'Where are we with Part IVA? Current Issues Involving Part IVA' (2007) *The Victorian Bar* <http://www.vicbar.com.au/GetFile.ashx?file=BarAssocTaxFiles%2FWhere+are+we+with+part+IVA+Web+site+version+27.03.07.doc>.

10 G T Pagone, 'Tax Planning or Tax Avoidance' (2000) 29 *Australian Tax Review* 96, 96.

The outcome of a tax consequence is imperative when determining whether the GAARs will have any application. In every day ordinary commercial dealings, taxpayers are encouraged to ensure that the shape and form[11] of their transaction will not be caught by the GAARs. Although, the courts have recognised that based on revenue considerations, it is generally expected that taxpayers will choose one particular scheme over another.[12]

Approximately 20 years has passed since the introduction of Part IVA of the *Income Tax Assessment Act* 1936 (ITTA 1936) and Division 165 of the *A New Tax System (Goods and Services Tax) Act* 1999 (GST Act). It is therefore now a ripe time for a comparison between the two parts. This paper will examine the structural differences between the two parts while focusing on the central components of the purpose test in the ITTA 1936 and the principal effect test in the GST Act.

The first section will provide a discussion of the predecessor to Part IVA, namely s 260 (ITAA 1936) and an overview of the introduction of both Part IVA and Division 165. It will then proceed to provide an analysis of a dominant purpose and the principal effect test and then consider in detail how each part should be determined. Following this analysis is an assessment of the eight comparable factors contained in each part and an emphasis is placed on the similarities and differences. Finally, an evaluation of the likely outcome in selected cases that have applied Part IVA is discussed.

II General Anti-avoidance Rules in Australian Taxation

A *Section 260*

The predecessor to Part IVA is s 260[13] and evolved for almost 50 years. The application of the then anti avoidance provision was not a discretionary election by the Commissioner but was instead self-executing.[14] The application of the provision aimed to apply to every contract, agreement or arrangement to the extent that it had, or purported to have specific tax purposes. In *Newton v Federal Commissioner of Taxation* (*'Newton's Case'*),[15] the Privy Council explained that the arrangement was to be looked at by the overt acts through which the transaction was implemented. The determining focus was whether it was implemented in such a way as to avoid tax.[16] This came to

11 Justice Graham Hill, 'GST Anti-Avoidance – Division 165' (1999) 4 *Journal of Australian Taxation* 295, 296.

12 *FCT v Spotless Services* (1996) 186 CLR 404, 416 (Brennan CJ, Dawson, Toohey, Gaudron, Gummow and Kirby JJ).

13 *Income Tax Assessment Act 1936* (Cth).

14 Barbara Smith, 'Part IVA – A Tiger, or Toothless?' (1994) 4 *Revenue Law Journal* 6, 165.

15 *Newton v FCT* (1958) 98 CLR 1.

16 *Newton v FCT* (1958) 98 CLR 1, 8-9 (Viscount Simonds, Lord Tucker, Lord Keith of Avonholm, Lord Somervell of Harrow and Lord Denning).

mean that the test would not apply to transactions that were purported to be ordinary, such as business or family dealings.[17]

It was in this case that Lord Denning MR endorsed the predication doctrine.[18] The predication test involved a consideration of the objective purpose of a particular transaction to ascertain objectively the purpose of that transaction. It did not involve a consideration of the actual motive or purpose of the participants to an arrangement. A further doctrine that the courts endorsed in the application of s 260 was the choice principle.[19] This principle allowed a taxpayer to choose freely any form of transaction that was subject to the literal reading of the legislation so that it would not contravene s 260.[20]

Section 260 was ultimately rendered ineffective as it posed significant difficulties for an effective and efficient application of the provision to tax avoidance arrangements. This was largely due to the fact that the section was read down by the courts and given a narrow interpretation. In particular, the difficulty lay in the application of the predication test and the choice principle. In addition, it was also troubled by the fact that if the section was to be construed literally it would have been applicable to almost every transaction. The transactions that it sought to apply to included those that reduced the income of a taxpayer, irrespective of whether they had entered into the arrangement voluntarily or for value.[21] Ultimately, Kitto J expressed the view that s 260 was 'long overdue for reform'.[22]

Having suffered much criticism and difficulty in construing a proper meaning to the terms in s 260 the section was replaced with Part IVA which was introduced to overcome the weakness of the predication test. In effect, the legislature used the predication test in *Newton's Case* as a model for Part IVA although unlike s 260, Part IVA was developed so that it would not be self executing and instead, discretionary. The adoption of the predication test in *Newton's Case* was expressed in the Explanatory Memorandum[23] and it was explained 'the test in s. 177D effectuates a position to counter tax avoidance akin to that in the decision of Newton'. It is for this reason that the predication test is still relevant in the Australian tax system today.[24]

B *Part IVA and Division 165*

Parliament has enacted Part IVA and Division 165 to combat arrangements that are of a tax avoidance nature. The provisions are specifically designed to apply to transactions

17 *Hancock v FCT* (1961) 108 CLR 258.
18 *Newton v FCT* (1958) 98 CLR 1, 8.
19 *WP Keighery Pty Ltd v FCT* (1957) 100 CLR 66.
20 *Slutzkin v FCT* (1977) 140 CLR 314, 319 (Barwick CJ).
21 *FCT v Purcell* (1920) 29 CLR 464, 466 (Knox CJ).
22 *Newton v FCT* (1958) 98 CLR 1 (Kitto J).
23 Explanatory Memorandum, Income Tax Laws Amendment Bill (No.2) 1981 (Cth), 9553.
24 G T Pagone, *Tax Avoidance in Australia* (Federation Press, 2010), 128.

that may not have been contemplated at the time of enacting the provisions. It is the requirement of assessing the relevant 'purpose'[25] as determined by an evaluation of specific factors that creates uncertainty and unpredictability in the application of either of the GAARs.[26] This in turn has produced an enormous amount of doubt on taxpayers, advisers and the Commissioner when deciding whether the provisions should apply to the tax arrangements. Consequently, it is inimical to taxpayers in the planning of their business and private transactions[27].

As compared to s 260, Part IVA has been given a broad operation so that it is capable of allowing the Commissioner to strike down any transaction that purports to provide a tax benefit. Part IVA is not however subject to the same limitations as s 260. This was demonstrated in *Federal Commissioner of Taxation v Spotless Services Ltd* (*'Spotless Services'*),[28] as the High Court specifically explained that Part IVA would be 'construed and applied according to its terms, not under the influence of muffled echoes of old arguments concerning other legislation'.[29]

The Explanatory Memorandum[30] makes it clear that Part IVA will not apply where a taxpayer has entered into a transaction for the purpose of a family business or normal business. In the Treasurer's Second Reading Speech[31] the policy of Part IVA was described to strike down 'blatant, artificial and contrived' arrangements. This is comparable to Division 165, although s 165-1, GST Act specifically enshrines the policy objective that the provision 'is aimed at artificial or contrived schemes'.

Since Part IVA was enacted in 1981, it has been known as a provision of last resort.[32] The provision is only applicable where under the other provisions of the ITAA 1936 a taxpayer's arrangement is found to be soundly based, that is, the intended legal effect of the arrangement is on its face, effective.[33] As a result, Part IVA serves to confer upon the Commissioner a wide discretion to cancel or reconstruct[34] a taxpayer's tax arrangement so that it may be 'fair and reasonable'[35]. This occurs if the obtaining of a tax benefit is established as the dominant purpose of the transaction. In addition, s 177C(2), ITAA 1936 also recognises that taxpayers are entitled to and should take advantage of any tax benefits that can be obtained by the provisions in the tax

25 Grame Cooper, 'The Emerging High Court Jurisprudence on Part IVA' (2006) 9 *The Tax Specialist* 234, 241.
26 G T Pagone, 'Anti-avoidance Provisions and Tax Reform' (2001) 30(2), *Australian Tax Review* 80, 82.
27 Ibid.
28 *FCT v Spotless Services Limited* (1996) 186 CLR 404.
29 Ibid 414.
30 Explanatory Memorandum, Income Tax Laws Amendment Bill (No 2) 1981 (Cth), 9553.
31 Second Reading Speech, Income Tax Laws Amendment Bill (No 2) 1981 (Cth), 2648.
32 See Keith Kendall, "The Structural Approach to Tax Avoidance in Australia" (2006) 9 *The Tax Specialist* 290, 291.
33 Ibid 290.
34 *Income Tax Assessment Act 1997* (Cth) s 177F.
35 G Hart and J Sekhon, *Barrett & Green's Principles of Income Taxation* (Law Book Company, 5th ed, 1996).

legislation. This is primarily because taxpayers are able to enter into transactions as provided by the elections[36].

An application of Part IVA requires the Commissioner to exercise his discretion[37] by making a determination to apply Part IVA in order to reverse or cancel a tax benefit. Before Part IVA will apply, three pre-conditions must be established. There must be a scheme[38] entered into, commenced or carried out after 27 May 1981, a tax benefit that has or would but for s 177D be obtained by the taxpayer in connection with the scheme[39] and the scheme must have been entered into for the dominant purpose of enabling a taxpayer to obtain a tax benefit.[40] Whether or not there was a dominant purpose is determined according to the specific eight factors as listed in s 177D(b)[41], ITAA 1936. It is the need to establish a dominant purpose through an evaluation of findings of fact against the eight objective matters that requires a judgmental decision and creates a range of different views.[42]

Division 165 was part of the original legislation implementing the GST and is designed to combat arrangements that produce tax consequences. This includes for example, an increase in input tax credits, the creation of a variation in the time in which GST should be paid or when refunds should be due and transactions that are shaped in a way to reduce a taxpayer's GST.

As Part IVA has been used as a model for Division 165,[43] these provisions bear many similarities to those in Part IVA,[44] however there are some differences. Of significance is the similarity in the need for three pre-conditions to be satisfied by the Commissioner when exercising his discretion.[45] These are, the existence of a scheme,[46] the taxpayer must have obtained a GST benefit in connection with the scheme[47] and that there is a conclusion of either the sole or dominant purpose of an entity obtaining the GST benefit

36 *Income Tax Assessment Act 1997* (Cth) 177C(2).
37 *Income Tax Assessment Act 1997* (Cth) s 177F.
38 Ibid s 177A.
39 Ibid s 177C(1). Whether a tax benefit has been obtained has been analysed before determining whether there is a dominant purpose. See *Commissioner of Taxation v Futuris Corporation Limited* [2012] FCAFC 32. Cf *Macquarie Bank Limited v Commissioner of Taxation* [2011] FCA 1076 and the Commissioner's appeal was dismissed by the Full Federal Court, see *Commissioner of Taxation v Macquarie Bank Limited* [2013] FCAFC 13. The recent introduction of the *Tax Laws Amendment (Countering Tax Avoidance and Multinational Profit Shifting) Bill* 2013 (Cth) proposes to ensure that the assessment of tax benefit and dominant purpose are assessed together, thus preventing an analysis of tax benefit as a gateway to assessing dominant purpose.
40 Ibid s 177A(5).
41 *Commissioner of Taxation v Hart* (2004) 217 CLR 216, 226.
42 Richard Edmonds, 'Part IVA & Anti-Avoidance – Where are we now?' (2003) 6 *The Tax Specialist* 96, 96.
43 Barkoczy, above n 7, 35.
44 Ibid.
45 Hill, above n 11, 301.
46 *A New Tax System (Goods and Services Tax) Act 1999* (Cth) s 165-10(2).
47 Ibid s 165-10(1)(a)-(d).

from entering into the scheme or part of the scheme or that the principal effect of the scheme or part of it is a GST benefit.[48]

Comparable to s 177D(b), ITAA 1936 is the requirement to take into account a list of factors[49] so that it is reasonable to conclude that there is a conclusion of a dominant purpose or principle effect for the obtaining of the GST benefit. In Division 165, though, instead of eight specific criteria there are twelve. This is one of the most apparent differences between Part IVA and Division 165 as the list of factors includes a consideration of 'the GST Act and other provisions',[50] 'any other relevant circumstances'[51] and 'the circumstances surrounding the scheme'.[52] The last two factors are defined rather broadly and potentially extend beyond the eight factors contained in s 177D(b), ITAA 1936 to include a range of other considerations. Another apparent difference is that the evaluation of a conclusion of dominant purpose can in the alternative be a conclusion as to the principal effect[53].

Section 165-12(2), GST Act corresponds with s 177A(5), ITTA 1936 in that the matters operate with part of the scheme in the same manner that they apply to a scheme. In both Part IVA and Division 165, if the three pre-conditions are satisfied, the Commissioner may choose to negate the benefits, make compensatory adjustments and impose penalties.[54]

III A DOMINANT PURPOSE OR PRINCIPAL EFFECT

A *Part IVA*

Once the first two pre-conditions in Part IVA[55] are established, the critical issue is to determine whether there was the relevant dominant purpose, subject to the matters listed in s 177D(b), ITAA 1936 and the particular circumstances of the case. While s 177D(b), ITAA 1936 is similar to the predication test in *Newton's Case*[56] the requisite focus is not on the transaction itself but on the dominant purpose of a taxpayer having entered into the scheme.

It has been recognised by the High Court in *Spotless Services*[57] that the conclusion of a dominant purpose is the lynchpin of Part IVA. The court expressed the view that 'the

48 Ibid s 165-5(1)(c).
49 Ibid s 165-15(1)(b).
50 Ibid s 165-15(1)(c).
51 Ibid s 165-15(1)(k).
52 Ibid s 165-15(1)(l).
53 Hill, above n 11, 305.
54 *A New Tax System (Goods and Services Tax) Act 1999* (Cth) s 164-40, s 164-45; *Taxation Administration Act 1953* (Cth) Subdivision 284-C, Schedule 1; *Income Tax Assessment Act 1997* (Cth) s 177F(1) and (3).
55 *Income Tax Assessment Act 1997* (Cth), ss 177A and 177C.
56 Pagone, above n 2, 779.
57 *FCT v Spotless Services Limited* (1996) 186 CLR 404.

making of such a determination is the pivot upon which the operation of Part IVA turns'.[58]

B *Division 165*

The conclusion to be drawn as to the taxpayer's purpose under Division 165 includes the dominant purpose test and is extended to include the principal effect test, which has no equivalent in Part IVA. As the dominant purpose test and the principal effect test are alternatives, it is sufficient if only one of these is satisfied. It is still possible and acceptable, though, if they both apply. Both the dominant purpose test and the principal effect test are applied in Division 165 cases and are evaluated in turn.

Section 165-5(1)(c)(i), GST Act states that the conclusion as to purpose is that an entity, alone or with others, entered into or carried out the scheme, or a part of it, with the *sole or dominant purpose* of itself or another entity obtaining a GST benefit from the scheme[59]. This test is similar to s 177D(b), ITAA 1936 as it requires an assessment of the purpose of the participants to the scheme with a dominant purpose of securing a tax benefit.

Alternatively, s 165-5(1)(c)(ii), GST Act provides that the conclusion reached can also be the principal effect of the scheme or part of the scheme so that an entity receives the GST benefit from the scheme of part thereof, either directly or indirectly. Reaching a conclusion for the principal effect test must also be determined by reference to a reasonable conclusion drawn from a consideration of the twelve factors contained in s 165-15(1), GST Act.

While the Explanatory Memorandum explained that the test for principal effect was the dominant effect and not merely the incidental effect, [60] it failed to explain the exact difference between dominant purpose and principal effect. It did, however, explain that the principal effect test was different to the dominant purpose test. This was to the extent that it specifically applied to the taxpayer and the GST benefit that was obtained by a taxpayer. In order to gain a better understanding of what the difference may be, the Commissioner has issued a Practice Statement[61] which has identified that the principal effect test is based on the result of a scheme and the consequence of the transaction.[62]

For this reason, the principal effect test is different from the conclusion for dominant purpose as it does not require a conclusion of the objective purpose of the participants

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58 Ibid 413.

59 The definition of entity can be found in *Income Tax Assessment Act 1997* (Cth) s 184-1 which defines 'entity' to include individuals, corporations, partnerships, unincorporated associations, trusts and superannuation funds.

60 Explanatory Memorandum, A New Tax System (Tax Administration) Bill (No 2) 2000 (Cth), [1.95].

61 Australian Tax Office, Practice Statement Law Administration, PS LA 2005/24. 'Tax Avoidance Conclusion, paragraph 165-5(1)(c) and section 165-15 of the GST Act'.

62 Ibid, 177.

to the scheme. To that end, when referring back to the predication test that was enunciated in *Newton's Case* where the Privy Council described the purpose of an arrangement as 'the effect which it is sought to achieve'.[63] It appears that the current test of the principal effect is most similar to what was required by s 260.[64]

In the context of s 260, Williams J stated in *Newton's Case*[65] that 'purpose or effect' were alternatives, however, they did not appear to have any real difference in meaning. On appeal, the Privy Council expressed the view that purpose and effect were not similar, although it was explained that 'effect' indicated the end that was accomplished or achieved. A similar explanation was given which suggested that purpose was the result aimed at and effect was the result achieved.[66] In considering both of these views, it has been expressed that there may well be a difference between the purpose and effect of the scheme.[67]

In the view of the AAT in *Case 3/2010*,[68] it was considered that the enquiry into the principal effect of the scheme or part of the scheme involved a consideration of 'from whose perspective is the effect measured' and 'what is the effect that is to be measured'.[69] Encompassing the view expressed in the Explanatory Memorandum and s 165-5 and s 165-15, GST Act, the AAT embraced the view that the focus would be on the participants who implemented the scheme. This is primarily if the participants attracted the GST liability or would have attracted the GST liability but for the scheme. It clearly rejected the need to conduct the principal effect test 'from the perspective of the representative taxpayer'.[70]

On this basis, the tribunal lay down the view that not all of the twelve factors as set out in s 165-5(1), GST Act were relevant for consideration of the principal effect test. It was found that factors concerning the manner in which the scheme was entered into,[71] the purpose of the GST Act,[72] the timing and period of the scheme,[73] the nature of the connection between the taxpayer and other parties to the scheme,[74] any other relevant circumstance[75] and other circumstances surrounding the scheme[76] did not provide for an assessment of the effect of the scheme.

63 *Newton v Commissioner of Taxation* (1958) 98 CLR 1.
64 Barkoczy, above n 7, 40.
65 *Newton v Commissioner of Taxation* (1958) 98 CLR 1 (Williams J).
66 *Insomnia (No 2) Pty Ltd v FCT; Insomnia (No 3) Pty Ltd v FCT* (1986) 84 FLR 278, 290 (Murphy J).
67 Barkoczy, above n 7, 49.
68 *Case 3/2010* (2010) 76 ATR 917, 953 [149].
69 Ibid.
70 Ibid, 954 [151].
71 *A New Tax System (Goods and Services Tax) Act 1999* (Cth) s 165-5(1)(a).
72 Ibid s 165-5(1)(c).
73 Ibid s 165-5(1)(d)(e).
74 Ibid s 165-5(1)(j).
75 Ibid s 165-5(1)(k).
76 Ibid s 165-5(1)(l).

At the other end, the effect of the scheme could be considered in light of the form and substance of the scheme,[77] any change in the taxpayer's position,[78] whether or not there was a GST benefit[79] and the change in the financial position of connected entities[80] as these factors touched on the effect of the scheme. In considering these factors, the AAT explained that the conclusions that were reached in considering the dominant purpose of a scheme were equally applicable under the principal effect test. Once the relevant matters were evaluated and the effect of the scheme was measured, a conclusion as to whether Division 165 applied could be determined.

IV DETERMINING A DOMINANT PURPOSE OR PRINCIPAL EFFECT CONCLUSION

When Part IVA and Division 165 were respectively enacted, the legislature did not explain how the factors should be construed in order to ascertain a conclusion as to dominant purpose or principal effect. It also did not provide an explanation on what the required standard was for a conclusion of dominant purpose or principal effect.[81]

A comparison of the established propositions dealing with the proper construction and application of dominant purpose as enunciated by the courts in regards to Part IVA is relevant and necessary for the interpretation of s 165-15(1)(b).[82] In *Re VCE and Federal Commissioner of Taxation* (*'Re VCE'*),[83] SA Forgie embraced the view that where the provisions are comparable, then to that extent the provisions in Division 165 are to be considered in the same way as Part IVA.

A *Standard of Conclusion*

Section 177D(b) requires that 'it would be concluded' that the dominant purpose of a person who entered into or carried out the scheme did so to enable a taxpayer to obtain a tax benefit. The use of the word 'would' rather than 'could' or 'might reasonably' appears to set a high standard of satisfaction. It does not need to be shown that the taxpayer who obtained the tax benefit had a subjective purpose or that the relevant purpose was involved in the whole scheme, it only needs to be found that there was 'a tax benefit'.[84]

It is through an objective consideration of the eight relevant matters that the determining factor is not in fact the actual purpose of a taxpayer, but rather, how that

77 Ibid s 165-5(1)(b).
78 Ibid s 165-5(1)(g).
79 Ibid s 165-5(1)(f).
80 Ibid s 165-5(1)(h).
81 Hill, above n 11, 301.
82 Barkoczy, above n 7, 49.
83 (2006) 63 ATR 1249, 1290 [153].
84 *Income Tax Assessment Act 1997* (Cth) s 177D.

purpose was achieved.[85] This was explained by the court in *Spotless Services*[86] that in relation to the dominant purpose of a person or one of the persons who carried out the scheme or any part of it, the conclusion is that of 'a reasonable person'. In the context of Division 165, the relevant standard for the conclusion to be reached must be what is 'reasonable to conclude'. This suggests that the required conclusion should be assessed objectively and not subjectively.

In the context of Part IVA, the relevant conclusion is 'of a reasonable person'[87] and in the context of Division 165 the legislation spells out 'a reasonable person'[88]. It has been pointed out that it appears that this slight difference in wording has no practical effect[89].

B *Having Regard to the Eight/ Twelve Factors Inclusive*

The interpretation or application of Part IVA concerns only an application according to its own terms,[90] that is, there is no basis whatsoever to introduce any additional factors other then what has already been described in s 177D(b), ITAA 1936; the reason being that these factors are intended to be exhaustive.

Gummow and Hayne JJ have explained that the question posed by s 177D(b), ITAA 1936 is whether 'having regard to all' of the eight factors, it is reasonable to conclude that any of the persons who entered into or carried out the scheme, or any part of the scheme, did so for the sole or dominant purpose of enabling the relevant taxpayer to obtain a tax benefit.[91] This proposition is also applicable in the context of Division 165.[92]

C *Timing of the Dominant Purpose/ Principal effect*

In both Part IVA and Division 165 'the time for testing the dominant purpose must be the time at which the scheme was entered into or carried out and by reference to the law as it then stood'.[93] On the same point, the objective test of dominant purpose should be assessed at the time in which the taxpayer entered into or carried out the scheme or part of the scheme.[94]

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85 G T Pagone, 'Part IVA – The Voyage Continues' (2006) 10 *The Tax Specialist* 36, 37.
86 *FCT v Spotless Services Limited* (1996) 186 CLR 404.
87 Ibid 422 (Brennan CJ, Dawson, Toohey, Gaudron, Gummow and Kirby JJ).
88 *A New Tax System (Goods and Services Tax) Act 1999* (Cth) s 165-5(1)(c).
89 Pagone, above n 25, 150.
90 *Commissioner of Taxation v Hart* (2004) 217 CLR 216, 239 (Gummow and Hayne JJ).
91 Ibid 252.
92 *Case 3/2010* (2010) 76 ATR 917, 947 [115].
93 *CPH Property Pty Ltd v Commissioner of Taxation* (1998) 88 FCR 21, 42.
94 *Commissioner of Taxation v Mochkin* (2003) 127 FCR 185, 199; *Vincent v Commissioner of Taxation* (2002) 124 FCR 350, 372; *CPH Property Pty Ltd v Commissioner of Taxation* (1998) 88 FCR 21, 42.

D *An Objective Focus*

In the context of Part IVA it has been established that the enquiry into a taxpayer's purpose is to be objectively ascertained by the factors listed in s 177D(b), ITAA 1936[95] and not an enquiry into the purpose of the scheme itself.[96]

A taxpayer's actual subjective purpose or motivation is also irrelevant as it is not one of the eight matters specified.[97] The objective analysis identifies the scheme in which Part IVA may eventually apply and considers the conclusion that a person would reach if they directed their attention to the eight matters as set out in the s 177D(b).[98] In any case, this provision will still be applied even if it is found that a taxpayer had no actual purpose of tax avoidance.[99]

What is relevant in determining the dominant purpose is an objective assessment of the eight factors as listed in s 177D(b) to draw out a conclusion that will impute or attribute that a taxpayer entered into the arrangement to obtain a tax benefit. In the joint judgment of *Spotless Services*[100] it was made clear that the eight factors are posited as objective facts[101].

Subsequent cases have supported the requirement of ascertaining an objective purpose and not a subjective purpose. The issue that was to be determined in these cases was whether it was necessary to have regard to the subjective purpose of a taxpayer when contemplating s 177D(b). A clear illustration of this is in *Eastern Nitrogen v Federal Commissioner of Taxation* (2001) (*'Eastern Nitrogen'*)[102] where Drummond J was considered to have taken subjective purpose into account and this was found to be incorrect by the Full Federal Court.[103] In further cases such as *Federal Commissioner of Taxation v Metal Manufactures* (2001) (*'Metal Manufactures'*),[104] *Commissioner of Taxation v Consolidated Press Holdings* (2001) (*'Consolidated Press Holdings'*) [105] and *Commissioner of Taxation v Sleight* (2004) (*'Sleight'*)[106] the courts accepted that that the actual subjective purpose of a taxpayer was irrelevant and the conclusion depended only on the objective factors.

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95 *Commissioner of Taxation v Consolidated Press Holdings* (2001) 207 CLR 235, 263.
96 *FCT v Spotless Services Limited* (1996) 186 CLR 404, 406.
97 Ibid 409; *Commissioner of Taxation v Hart* (2004) 217 CLR 216, 243 (Gummow and Hayne JJ); *Commissioner of Taxation v Consolidated Press Holdings* (2001) 207 CLR 235; *Commissioner of Taxation v Sleight* (2004) 136 FCR 211, 229 (Hill J).
98 Pagone, above n 2, 82.
99 *Peabody v FCT* (1993) 40 FCR 531, 543; *FCT v Spotless Services Limited* (1996) 186 CLR 404, 421-422 (Brennan CJ, Dawson, Toohey, Gaudron, Gummow and Kirby JJ).
100 *Commission of Taxation v Spotless Services Limited* (1996) 186 CLR 404.
101 Ibid 421.
102 *Eastern Nitrogen v FCT* (2001) 108 FCR 27.
103 Ibid 44.
104 *FCT v Metal Manufactures* (2001) 108 FCR 150, 162.
105 *Commissioner of Taxation v Consolidated Press Holdings* (2001) 207 CLR 235, 263 (Gleeson CJ, Gaudron, Gummow, Hayne and Callinan JJ).
106 *Commissioner of Taxation v Sleight* (2004) 136 FCR 211, 253 (Carr J).

This proposition is also applicable to Division 165 and was applied in *Case 3/2010*.[107] The AAT recognised that based on the principles expressed by Gummow and Hayne JJ[108] the relevant enquiry was whether having regard to the twelve factors set out in s 165-15(1)(b), GST Act, it would be reasonable to conclude a sole or dominant purpose of the obtaining of a tax benefit by one of the persons[109]. Thus, the conclusion reached in *Case 3/2010*[110] was that s 165-15(1)(b), GST Act required a consideration of the twelve matters in relation to the taxpayers or any other person who entered into or carried out the scheme. In addition, in applying *Commissioner of Taxation v Hart* (2004) (*'Hart'*)[111], the AAT found that it 'does not require or even permit, any inquiry into the subjective motives'.[112]

Based on the authorities, the fact that the subjective purpose under s 165-15(1)(b), GST Act of a taxpayer is irrelevant appears prima facie to be the case.[113] However, in considering Division 165, another view has been expressed that subjective purpose could be brought in through the 'back door'.[114] This is particularly if it can be assumed that the subjective state of mind is a 'circumstance'.[115] With this is mind, if the subjective purpose were indeed GST avoidance then it would be difficult to reach a conclusion that was not consistent with that actual purpose.

It has been recognised that the 'difference between the actual purpose of a taxpayer…and the purpose which is to be imputed to the taxpayer based upon an exclusive set of criteria…is not without subtlety and has been misunderstood before'.[116] On this issue, in *Commissioner of Taxation v News Australia Holdings Pty Ltd* [2010] (*'News Australia Holding'*),[117] the Commissioner put forward the argument that the Tribunal had erred in its acceptance of evidence from various witnesses. This was in relation to the restructuring of the 'no tax, no tax risk' and it was argued that as a result the Tribunal impermissibly took subjective purpose into account. The Full Federal Court found against the submission that the Tribunal had failed to apply the relevant legal principle correctly, explaining that the Tribunal had done so on the 'basis of objectively ascertainable evidence'.[118] The consideration was undertaken by the evaluation of the manner in which the scheme was entered into or carried out[119] and this was an objective factor as required by the Act.[120]

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107 *Case 3/2010* (2010) 76 ATR 917, 948 [115].
108 *Commissioner of Taxation v Hart* (2004) 217 CLR 216 (Gummow and Hayne JJ).
109 *Case 3/2010* (2010) 76 ATR 917, 947 [115].
110 Ibid.
111 *Commissioner of Taxation v Hart* (2004) 217 CLR 216.
112 Ibid 243 (Gummow and Hayne JJ).
113 Barkoczy, above n 7, 49.
114 Hill, above n 11, 304.
115 *A New Tax System (Goods and Services Tax) Act 1999* (Cth) s 165-15(1)(k)(l).
116 *Commissioner of Taxation v Zoffanies Pty Ltd* (2003) 132 FCR 523, 545.
117 *Commissioner of Taxation v News Australia Holdings Pty Ltd* (2010) 79 ATR 461.
118 Ibid 470.
119 *Income Tax Assessment Act 1997* (Cth) s 177D(b)(i).
120 *Commissioner of Taxation v News Australia Holdings Pty Ltd* (2010) 79 ATR 461, 473.

E *A Wide Commercial Goal*

The mere fact that a scheme is carried out with an overall commercial gain of securing a profit, that the GST benefit has a non-tax commercial outcome or that the arrangement is an ordinary business transaction and tax driven does not save a taxpayer from the application of Part IVA or Division 165.[121] As such, it will not be artificial and inappropriate to draw a conclusion as to a purpose of securing a tax benefit.[122]

Both Part IVA and Division 165 are applicable if there is an overall commercial objective of the entire transaction as explicable by the scheme or part of the scheme.[123] In *Hart*,[124] it was made clear that the commercial goal of the transaction would be dominant if the arrangement that was pursued by a taxpayer to obtain a tax benefit was significantly artificial or contrived; or if the transaction had 'no other explanation other than the fiscal consequences contrived by the particular form of the transaction.'[125]

In *Spotless Services Ltd*,[126] the taxpayer put forward that a 'rational commercial decision' which shaped the transaction could not bear the finding of a dominant purpose. However, the joint judgment found that irrespective of the reason underlying the investment, Part IVA would apply to a commercially rational decision.[127] This was due to that fact it is generally undeniable that tax considerations lie at the heart of every business decision and that the form of transactions can and often will take many forms. As a result, tax considerations can influence a taxpayer's decision to choose one type of transaction over another so that it is tax driven and a rational commercial decision. The court made it clear that an assessment of the 'particular means' adopted by the taxpayer to secure the commercial objective was necessary.[128] On the same point, Brennan CJ also recognised that 'the mere presence of commerciality would not oust the operation of Part IVA'.[129]

This finding was further supported and well demonstrated by the High Court in *Hart*[130] as significantly important. What was important in *Hart* was the difference in findings reached in the Full Federal Court and the High Court. In the Full Federal Court,[131] it was found that the borrowing of the funds by the taxpayers to refinance one property and acquire another was to secure the borrowing and therefore had a wider commercial

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121 *FCT v Spotless Services Limited* (1996) 186 CLR 404, 417; *Commissioner of Taxation v Hart* (2004) 217 CLR 216, 243; *Case 3/2010* [2010] 76 ATR 917, 947 [114].

122 *Commissioner of Taxation v Consolidated Press Holdings* (2001) 207 CLR 235, 264 (Gleeson CJ, Gaudron, Gummow, Hayne and Callinan JJ).

123 Ibid.

124 *Commissioner of Taxation v Hart* (2004) 217 CLR 216.

125 *Commissioner of Taxation v Hart* (2004) 217 CLR 216, 228 (Gleeson CJ and McHugh J).

126 *FCT v Spotless Services Limited* (1996) 186 CLR 404.

127 Ibid 416 (Brennan CJ, Dawson, Toohey, Gaudron, Gummow and Kirby JJ).

128 Ibid.

129 Ibid.

130 *Commissioner of Taxation v Hart* (2004) 217 CLR 216, 227-228.

131 *Hart v Commissioner of Taxation* (2002) 121 FCR 206.

objective.[132] This meant that the court could not reach a conclusion that the dominant purpose was for a tax benefit.[133] When the matter was heard in the High Court, the decision in the Full Federal court was overturned. Their Honours explained the same kind of proposition, that seeking a wider commercial objective is not the antithesis of a purpose of seeking a tax benefit.[134] Justices Gummow and Hayne indicated that in that particular case the elements comprising the scheme could only be explicable by the tax consequences obtained by the taxpayers.[135]

The divergence between the findings in the Full Federal Court and the High Court highlights the need to analyse the particular means that are adopted by a taxpayer to achieve a commercial objective. It is the steps of the scheme in the transaction with which the evaluation is concerned. If it is found that there are steps involved in the scheme that have no other commercial explanation other than a tax benefit, the conclusion reached is more likely to be directed towards a dominant purpose. However, if a taxpayer pays less tax through the implementation of one transaction over another, it will not indicate a dominant purpose conclusion.[136]

In *Macquarie Finance Ltd v Federal Commissioner of Taxation* (2005) (*'Macquarie Finance'*)[137] a case heard after *Hart*, Hely J expressed the view that it was inappropriate to point to the commercial end of a scheme in answering the question posed by s 177D, ITAA 1936. However, it was important to consider commercial considerations in relation to the factor of 'consequences for the taxpayer'[138] as contained in the eight objective factors.

F *Global Assessment*

Both s 177D(b), ITAA 1936 and s 165-15(1), GST Act do not identify how the eight and twelve factors respectively should be weighed against each other nor do they explain the possible effect of a conclusion that should be made. The reason why each of the eight (and twelve) factors must be considered is to identify and evaluate the particular purpose from the scheme which ultimately needs to be discerned.[139]

Part IVA and Division 165 call for a global assessment of the eight factors[140] although each of the factors must be taken into account.[141] It will not always be the case where each and every one of the factors point to a dominant purpose of a tax benefit and this particular point has been acknowledged by Hill J in *Peabody v Federal Commissioner*

132 Ibid 227-228.
133 Ibid.
134 *Commissioner of Taxation v Hart* (2004) 217 CLR 216, 227.
135 Ibid 245.
136 *Commissioner of Taxation v Hart* (2004) 217 CLR 216, 227 (Gleeson and McHugh JJ).
137 *Macquarie Finance Ltd v FCT* (2005) 146 FCR 77, 132.
138 *Income Tax Assessment Act 1997* (Cth) s 177D(b)(viii).
139 Pagone, above n 25, 84
140 *Commissioner of Taxation v Consolidated Press Holdings* (2001) 207 CLR 235, 263-264 (Gleeson CJ, Gaudron, Gummow, Hayne and Callinan JJ).
141 *Commissioner of Taxation v Sleight* (2004) 136 FCR 211, 229-230.

of Taxation.[142] His Honour explained that in some cases the factors will point in one direction and the others in the opposite direction, what is necessary is 'an evaluation of the matters alone or in combination' in order to reach a conclusion based on s 177D, ITAA 1936.[143] Further it has been stated that the factors need not all point in the one direction for the provisions to be applied.[144]

In other words, while each of the eight individual factors needs to be evaluated,[145] the fact that one or more of the factors may indicate an uninformative or unequivocal finding does not preclude a determination of dominant purpose and instead that factor will be regarded as neutral or irrelevant.[146] It is, therefore, an evaluation of these matters that will determine the requisite conclusion for dominant purpose.[147] The court in *Consolidated Press Holdings*[148] emphasised this point by explaining that when the Commissioner or court on appeal considers these matters, the manner in which it does so must have full regard to each and every one of the eight matters.[149]

This approach has been adopted in *Citigroup Pty Ltd v Commissioner of Taxation* (2010) (*'Citigroup Pty Ltd'*),[150] where Edmonds J made it clear that any of the considerations of the factors that did not fall within the scope of the eight criteria could not be taken into account in drawing a conclusion. As a result, his Honour proceeded to analyse only five of the eight factors as the other three were not relevant but were instead regarded as neutral.[151] Nevertheless, there will still be cases where each of the matters unequivocally point to tax avoidance.[152]

In *Futuris Corporation Ltd v FCT* (2010) (*'Futuris'*),[153] the court assessed each of the eight factors contained in s 177D(b), ITAA 1936 and then proceeded to form a global assessment of the eight factors in order to draw out a conclusion as to whether or not there was a dominant purpose of securing a tax benefit by the applicant. Although Besanko J did not need to go through dominant purpose as he was not satisfied that a tax benefit was obtained in connection to the scheme. On this point, he expressed the view that had both of the first two pre-conditions been established, he would have found the first two factors contained in s 177D(b), ITAA 1936 of most relevance.[154]

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142 *Peabody v FCT* (1993) 181 CLR 359.
143 Ibid 543.
144 *Calder v FCT* (2005) 61 ATR 267, 292.
145 *Commissioner of Taxation v Hart* (2004) 217 CLR 216, 244 (Gummow and Hayne JJ); *Re VCE and FCT* [2006] AATA 821, 1275 [40] (SA Forgie).
146 *Commissioner of Taxation v Hart* (2004) 217 CLR 216, 244-245 (Gummow and Hayne JJ).
147 *Metal Manufacturers Ltd v FCT* (1999) 43 ATR 375, 432 (Emmett J).
148 *Commissioner of Taxation v Consolidated Press Holdings* (2001) 207 CLR 235.
149 Ibid 263-264.
150 *Citigroup Pty Ltd v Commissioner of Taxation* (2010) 81 ATR 412. The decision of Edmonds J was upheld by the Full Federal Court. See *Commissioner of Taxation v Citigroup Pty Ltd* [2011] FCAFC 61.
151 Ibid 423.
152 *CC (New South Wales) Pty Ltd (in liq) v FCT* (1997) 34 ATR 604, 630.
153 *Futuris Corporation Ltd v Commissioner of Taxation* (2010) 80 ATR 330.
154 Ibid 364.

G *A Sole or Dominant Purpose/ Principal Effect*

Purpose is stated in s 177D and this has been clarified in *Spotless Services*[155] that application of Part IVA requires that a person entered into the scheme or carried out the scheme or any part of the scheme for the 'sole or dominant purpose' of obtaining a tax benefit in connection with the scheme.

The High Court[156] explained that the dominant purpose conclusion to be reached is 'the ruling, prevailing, or most influential purpose'.[157] As a result, where an arrangement produces a number of purposes or effects, then the assessment will focus primarily on the most principal and significant purpose or effect.[158]

In the context of Division 165, in *Case 3/2010*[159] the AAT also adopted and applied this proposition and presumably this can also apply in reaching a conclusion as to principal effect.[160]

H *The Counterfactual*

The court has recognized that when assessing dominant purpose, a comparison of the scheme that was entered into and an alternative postulate should be considered to determine what 'other possibilities existed'.[161] In effect, this requires a consideration of other ways in which the scheme could have been entered into in order to obtain the same commercial objective that the taxpayer received. This allows for an investigation into the scheme itself and whether there are certain elements within the scheme that are solely for the purpose of securing a tax benefit.

This point was identified in *Federal Commissioner of Taxation v Peabody* (1994) (*'Peabody'*).[162] The court explained that any prediction of an alternative manner in which the scheme could have been carried out must be, at the least, more than just a possibility and should be 'sufficiently reliable for it to be regarded as reasonable'.[163]

In *Hart*[164] it was explained by the court that to draw a conclusion of dominant purpose required an inquiry into the eight factors in connection with the scheme[165] and a consideration of what other possibilities may have existed. Their Honours applied the words of Hill J[166] that 'the manner in which the scheme was formulated and thus

155 *Federal Commission of Taxation v Spotless Services Limited* (1996) 186 CLR 404, 425.
156 Ibid.
157 Ibid 416.
158 *Commissioner of Taxation v Sleight* (2004) 136 FCR 211, 223 [39].
159 *Case 3/2010* (2010) 76 ATR 917, 948 [115].
160 Barkoczy, above n 7, 49.
161 *Commissioner of Taxation v Hart* (2004) 217 CLR 216, 243 (Gummow and Hayne JJ).
162 *FCT v Peabody* (1994) 181 CLR 359.
163 Ibid 385.
164 *Commissioner of Taxation v Hart* (2004) 217 CLR 216.
165 Ibid 232.
166 Ibid 241.

entered into or carried out is certainly explicable only by the taxation consequences'.[167] It is evident that a comparison between what was done and the other options in which it could have been done should be evaluated to determine whether the manner in which the scheme was entered into was explicable only by tax effects. As such, if it is found that a scheme that was entered into or carried out with has no other possible outcomes other than a fiscal one, then a dominant purpose may potentially be concluded.

Based on this assessment, Gummow and Hayne JJ came to the conclusion that Part IVA did apply to the arrangement. This was due to the fact that the other ways in which the money could have been borrowed would only have produced an outcome that was only explicable by the taxation consequences.

Although in *Pridecraft v Federal Commissioner of Taxation*,[168] Sackville J did not adopt the same approach as Gummow and Hayne JJ and Callinan J in *Hart*. While his Honour identified the counterfactual he did not evaluate what other possibilities could have existed. This could have potentially meant that he thought that they were both the same requirement or instead he overlooked the need to assess what other possibilities that may have existed.[169]

The need to assess the counterfactual is also relevant in the context of Division 165. In *Case 3/2010*,[170] the AAT considered the manner in which the scheme was entered into or carried out by having specific regard to the counterfactual. As a result the tribunal considered the determination of what other types of possibilities could have existed as one of relevance.

I *Purpose of Persons*

Part IVA provides that the relevant purpose can be drawn from an observed inference of a person other than the taxpayer. In s 177D, ITAA 1936 it is stated that purpose is of relevance to persons 'who entered into or carried out the scheme or any part of the scheme'[171] and this indicates that the relevant taxpayer can be any person involved. An enquiry into the possible individuals that may come within the scope of a scheme is based on the evidence and decided as a question of fact.[172]

The person may be, but need not need to be the taxpayer[173] and where corporations are involved, it has been recognised that the activities of the agents, employees, directors,

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167 Ibid.

168 *Pridecraft v FCT* (2004) 58 ATR 210.

169 Domenic Carbone and John Tretolta 'FCT v Hart: An Analysis of the Impact of the High Court Decision on the Application of Pt IVA' (2005) 34 *Australian Tax Review* 196, 214. Cf *Noza Holdings Pty Ltd v Commissioner of Taxation* [2011] FCA 46 where the Commissioner's counterfactuals were taken into consideration by Gordon J.

170 *Case 3/2010* (2010) 76 ATR 917, 948 [117].

171 *Income Tax Assessment Act 1997* (Cth) s 177D.

172 Pagone, above n 86, 37.

173 *FCT v Hart* (2004) 217 CLR 216, 257; *Commissioner of Taxation v Sleight* (2004) 136 FCR 211, 229 (Hill J).

officers and board of directors may be necessary[174]. It is also possible for the purpose of an adviser or promoter of a scheme[175] to be inquired into and this is regardless of the fact of whether they have followed instructions or are in breach of their duties to a taxpayer.[176]

This proposition is well illustrated in *Consolidated Press Holdings*[177] where the issue concerned the treatment of advisers. The High Court[178] upheld the decision of Hill J at first instance and explained that in determining the purpose of a relevant participant to the scheme, it was both possible and appropriate to attribute the purpose of a professional advisor to one or more of the corporate parties involved.[179] In essence, this also avoided any consideration of the subjective fiscal awareness of the taxpayer.

In *Vincent v Commissioner of Taxation* (2002) (*'Vincent'*),[180] the court focused on the High Court's language in *Consolidated Press Holdings* and expressed the view that a determination could be made by any person who was either the taxpayer, promoter of a scheme, legal adviser or accounting adviser who had entered into or carried out the scheme or any part of it.[181]

On this point, it appears that the AAT has taken a different view as to who may be considered to be a relevant taxpayer in considering cases concerning Division 165. In *Case 3/2010*,[182] the AAT adopted the approach in *Eastern Nitrogen*.[183] Deputy President PE Hack SC explained that the mere fact that the scheme may have been brought in by an external specialist GST adviser did not enliven the application of Division 165 even though 'it would not otherwise be caught by Division 165'.[184] Although, one of the reasons as to why the court provided little weight to this proposition was due to the fact that the taxpayer had not proceeded to adopt the earlier proposals and instead had adopted the particular one in question.

J *Potential overlap*

In s 177D(b) there are certain factors that will often overlap and need to be considered together. In the context of Part IVA, the potential overlap has been emphasised in *Spotless Services.*[185]. The High Court identified that in considering the time and

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174 *FCT v Spotless Services Limited* (1996) 186 CLR 404, 421; *FCT v Consolidated Press Holdings* (2001) 207 CLR 235, 4 [4347]. See also *Macquarie Finance Ltd v FCT* (2004) 57 ATR 115, 103.

175 *Commissioner of Taxation v Consolidated Press Holdings* (2001) 207 CLR 235, 264. See also *Vincent v Commissioner of Taxation* (2002) 124 FCR 350; *Commissioner of Taxation v Sleight* (2004) 136 FCR 211; *Calder v FCT* (2005) 59 ATR 655.

176 *De Simone & Anor v FCT* (2009) 77 ATR 936, 944 (Sundberg, Stone and Edmonds JJ).

177 *Commissioner of Taxation v Consolidated Press Holdings* (2001) 207 CLR 235.

178 Ibid 263-264.

179 Ibid 264 (Gleeson CJ, Gaudron, Gummow, Hayne and Callinan JJ).

180 *Vincent v Commissioner of Taxation* (2002) 50 ATR 20.

181 Ibid 53 [122].

182 *Case 3/2010* (2010) 76 ATR 917.

183 *Eastern Nitrogen Ltd v Commissioner of Taxation* (2003) 131 FCR 203 (Hill J).

184 *Case 3/2010* (2010) 76 ATR 917, 948 [119].

185 *FCT v Spotless Services Ltd* (1996) 186 CLR 404, 420.

duration of a scheme of when it was entered into or carried out, it would also *throw light* on the factors concerning the form and substance of the scheme and the manner in which the scheme was entered into or carried out.

Another potential overlap is the consideration of changes in the financial positions[186]. The changes can be caused to other persons[187] and entities[188] that may be affected by the scheme and this falls within the form and substance factor.

V AN ASSESSMENT OF THE EIGHT COMPARABLE FACTORS

A consideration of the eight corresponding factors as set out in both in s 177D(b)(i), ITAA 1936 and s 165-15(1)(b), GST Act is necessary to determine the similarities and differences in relation to the relevant considerations for the dominant purpose test. It has been explained by SA Forgie in *Re VCE*[189] that jurisprudence concerning s 177D(b), ITAA 1936 factors are to be considered in the same way as s 165-15(1)(b), GST Act factors, to the extent that they correspond with each other. An outline of the similarities and differences between the eight and twelve factors is provided in the table in the Appendix.

A *Manner in which the scheme was entered into or carried out: s 177D(b)(i) and s 165-15(1)(a)*

Both Part IVA and Division 165 contemplate this factor and the following interpretation of the manner in which the scheme should be entered into or carried out applies equally to both provisions. That is, the manner in which the scheme was entered into or carried out is a consideration of the *particular way* or *procedure* in which the scheme was implemented and established.[190] The High Court also emphasised the point that the words 'manner' and 'entered into' are not to be given a restricted meaning.[191] The relevant considerations under this factor include the degree of unnecessary complexity and the extent of the taxpayer's involvement.

This particular factor encompasses the predication test that was enunciated in *Newton's Case*[192] requiring a consideration of the overt acts in which the arrangement was

186 *Income Tax Assessment Act 1997* (Cth); *A New Tax System (Goods and Services Tax) Act 1999* (Cth).

187 *Income Tax Assessment Act 1997* (Cth) s 177D(b)(v); *A New Tax System (Goods and Services Tax) Act 1999* (Cth) s 165-5(1)(g).

188 *Income Tax Assessment Act 1997* (Cth) s 177D(b)(vi); *A New Tax System (Goods and Services Tax) Act 1999* (Cth) s 165-5(1)(h).

189 *Re VCE and FCT* [2006] AATA 821, 1272 [80].

190 *FCT v Spotless Services Limited* (1996) 186 CLR 404, 420; *Futuris Corporation Ltd v FCT* (2010) 80 ATR 330, 360.

191 Ibid.

192 *Newton v FCT* (1958) 98 CLR 1, 9 (Viscount Simonds, Lord Tucker, Lord Keith of Avanholm, Lord Somervell of Harrow and Lord Denning).

entered into. Ultimately, to determine whether it was done in such a way as to avoid tax.

In *Futuris*,[193] the taxpayer argued that the transactions that were entered into were implemented in a manner to achieve commercial purposes and were also described as routine commercial transactions. Besanko J found that the scheme could be explained to have a dominant tax purpose because through Division 19A[194] the manner in which the transaction was designed and carried out was so that the applicant could achieve a maximum saving on capital gains tax in that particular tax year. Therefore, based on the maximum saving by the taxpayer, the court explained that it was neither inappropriate nor artificial in reaching a dominant purpose conclusion.

In a case concerning foreign tax credits in Australia,[195] the structure of the scheme was implemented based on a Guideline issued by HKIRD on bond transactions of the kind exemplified by the HKBTs[196] however the choice of participants in the structure was not dictated by the Guidelines[197]. The court found that the choice of the taxpayer in selecting partners to the structure may have provided a conclusion that was "explicable solely on the basis of the foreign tax credit regime in Australia"[198] and could potentially draw a conclusion as to dominant purpose.

In *Case 3/2010*,[199] the AAT recognised that in order to come to a conclusion as to whether the steps involved had a commercial and non-tax or tax considerations required an analysis of the twelve factors against other possibilities that existed.[200] The taxpayer in this case put forward that the dominant purpose was asset protection against unknown litigants or a class of litigants. Based on this, the AAT considered other possible ways that asset protection could have been achieved. The AAT considered the Part IVA case of *Hart*, and it was contrasted to the scheme involved in the present case. The manner of the scheme in *Hart* was compared to the manner of the scheme involved in the present case. In the present case in examining the manner and execution of the scheme in contrast with the counterfactual a GST perspective was taken. On this focus, the AAT found that the manner of the scheme was not one that could have been explained only by reference to GST benefits and on that note also reaching the same conclusion for the counterfactual. In coming to this conclusion, the AAT considered that it was not relevant whether the taxpayer had brought the concept of the sale to the group and that Division 165 would not be triggered by the mere fact that external

193 *Futuris Corporation Ltd v FCT* (2010) 80 ATR 330. The matter was heard by the Full Court of the Federal Court. Kenny, Stone and Logan JJ confirmed that the taxpayer did not obtain a tax benefit and therefore did not examine dominant purpose. See *Commissioner of Taxation v Futuris Corporation Ltd* [2012] FCAFC 32.

194 *Income Tax Assessment Act 1936* (Cth) Division 19A, Part III dealt with the former value shifting provisions.

195 *Citigroup Pty Ltd v Commissioner of Taxation* (2010) 81 ATR 412.

196 Ibid 424-425.

197 Ibid 445.

198 Ibid.

199 *Case 3/2010* (2010) 76 ATR 917.

200 Ibid 948 [117].

advisers were involved.[201] It was also considered that the arrangement took the form of an ordinary business transaction that a taxpayer would have been expected to adopt in sales that were of arms length.[202] To that end, the court provided minimal weight to this factor.

B *The form and substance of the scheme: s 177D(b)(ii) and s 165-15(1)(b)*

The form and substance of the scheme includes the legal rights and obligations involved in the scheme and the economic and commercial substance of the scheme. Section 165-15(1)(b) is comparable to s 177D(b)(ii). It provides a mechanism to assess the form, rights, substance and commercial consequences[203] of the arrangement by looking at the extent to which the form matches the tax consequences that have been achieved.

It has been explained by Toohey J that this may also require a consideration of whether artificiality was predominant in the form and substance of the scheme.[204] In the context of Part IVA, it has been identified[205] that the legal form of a transaction may very well determine its substance. Nevertheless, where form and substance conflict the conclusion may point more towards a dominant purpose of tax avoidance. In *Clough Engineering Ltd v FCT*,[206] it was taken into account by the court that the commercial consequence that was obtained by the taxpayers could have been achieved in an easier way and therefore the transactions were illusory and lacked any substance.[207]

Based on the observations made by Hill J in *Sleight*,[208] it was submitted by the taxpayer in *Futuris*[209] that if the form and substance of the scheme was consistent then this factor could not point to a conclusion of a dominant tax purpose. That argument was rejected[210] and the court explained that while a difference in form and substance was a significant matter in determining the relevant conclusion, Hill J did not put forward the principle that a difference in form and substance indicated a conclusion against dominant purpose.

This proposition is further supported in the context of Division 165. In *Re VCE*,[211] it was suggested that a dominant purpose or principal effect could be more readily established if the scheme that was used was not similar in its legal form as compared to its economic substance.

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201 Ibid 948 [119].
202 Ibid.
203 Pagone, above n 24, 86.
204 *FCT v Spotless Services Limited* (1996) 186 CLR 404, 420-421.
205 *Eastern Nitrogen v FCT* (2001) 108 FCR 27, 47.
206 *Clough Engineering Ltd v FCT* (1997) 35 ATR 1164, 1197-1198.
207 Ibid. See also Dr Justin Dabner 'The Spin of a Coin – In Search of a Workable GAAR' [2000] 3 *Journal of Australian Taxation* 5.
208 *Commissioner of Taxation v Sleight* (2004) 136 FCR 211, 233.
209 *Futuris Corporation Ltd v FCT* (2010) 80 ATR 330, 361.
210 Ibid (Besanko J).
211 *Re VCE and FCT* [2006] AATA 821, 1279 [106].

C *The timing of the scheme and the period over which it is entered into or carried out – s 177D(b)(iii) and s 165-15(d) and (e)*

The timing of the scheme is a necessary factor to be considered in both Part IVA and Division 165. The Commissioner has expressed the view that the factors in s 165-15(1)(d) and (e), GST Act correspond with s 177D(b)(iii), ITAA 1936.[212] The reference to timing is directed to the question of when the particular scheme was entered into or carried out. While s 165-15(1)(d), GST Act identifies that the time is 'the timing of the scheme',[213] Part IVA identifies that the relevant time is 'the time at which the scheme was entered into or carried out'.[214]

It is generally important to consider whether the scheme was implemented at the start or end of a tax period[215] and also whether the transaction was carried out within a short period of time as compared to the duration that it would take to be completed in an ordinary transaction of the same nature. Where a scheme is carried out for only a short period of time, it is more likely a tax avoidance conclusion will be reached. Whether the steps were carried out in a 'flurry of activity'[216] was applied in *Futuris*.[217] Due to the fact that the transactions were carried out and completed within minutes of each other, a dominant tax purpose was concluded. On the other hand, in *Case 3/2010*,[218] asset protection was argued by the taxpayer to be the dominant purpose. The AAT found that the delay in the implementation of the scheme resulted in a delay in asset protection and instead produced a greater GST benefit.[219]

In the cases of *Sleight*[220] and *Vincent*,[221] the courts considered whether there was a connection between the timing and the flow of funds by the scheme. It was recognised that if the timing and flow of funds of the scheme are needed for a tax benefit to be produced then the conclusion of a dominant purpose is more likely to be ascertained.

The timing that is relevant for Division 165 is stated in a much wider and broader sense than that of Part IVA. As compared with s 177D(b)(iii) ITAA 1936, it potentially includes both the time in which the individual steps of the transaction were carried out and the time that the scheme was implemented.[222] On the other hand, s 177D(b)(iii), ITAA 1936 appears to include only a consideration of circumstances and external events of when the scheme was implemented. However, the same consideration as to

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212 Australian Taxation Office Practice Statement Law Administration: 2005/24, 'Division 165 of the GST- Act – GST' [184].
213 *A New Tax System (Goods and Services Tax) Act 1999* (Cth) s 165-15(d)(e).
214 *Income Tax Assessment Act 1997* (Cth) s 177D(b)(iii).
215 *WD & HO Wills (Australia) Pty Ltd v FCT* (1996) 65 FCR 298; *Commissioner of Taxation v Sleight* (2004) 136 FCR 211, 233-234.
216 *Commissioner of Taxation v Sleight* (2004) 136 FCR 211, 233.
217 *Futuris Corporation Ltd v FCT* (2010) 80 ATR 330, 362.
218 *Case 3/2010* (2010) 76 ATR 917, 951 [132].
219 Ibid.
220 *Commissioner of Taxation v Sleight* (2004) 136 FCR 211, 222.
221 *Vincent v Commissioner of Taxation* (2002) 124 FCR 350, 372.
222 *Re VCE and FCT* [2006] AATA 821, 50 [107] (SA Forgie).

the circumstances and external events of when the scheme was implemented is more likely to be considered in the factor concerning 'the period over which the scheme was entered into and carried out'[223] or alternatively in the factor relevant to 'the circumstances surrounding the scheme'.[224]

D *Result/ effect achieved by the scheme but for Part IVA/ Division 165: s 177D(b)(iv) and s 165-15(1)(f)*

This factor requires a consideration of the result that would be achieved by the scheme without the application of s 177D(b)(iv), ITAA 1936 or s 165-15(1)(g), GST Act, that is, the effect of the legislation without the application of the GAAR. In effect, this allows for an evaluation of the requisite conclusion of a dominant purpose through considering the availability, amount and significance of the tax benefit that was received by a taxpayer.[225]

In applying this factor, even if the alleged tax benefit was the result of another scheme, it will not preclude the fact that it could be the same result that was achieved by the scheme in question.[226] Without the application of Part IVA, where there is found to be a significant reduction in the tax liability of a taxpayer and if it is argued as it were in *Futuris*[227] that the tax benefit secured was not part of the scheme or an alternative scheme it will also not preclude a finding of a dominant purpose. This is because the factor is wide enough to include a finding not in the taxpayer's favour even if a tax benefit would not have been obtained or was instead sufficiently remote.[228]

Division 165 requires an evaluation of the GST benefit that was secured in determining a dominant purpose or principal effect conclusion. In *Case 3/2010*,[229] it was explained by the AAT that even if a taxpayer received a tax consequence from a transaction it would not infer a dominant purpose[230] and would not operate in favour of a taxpayer.

E *Change in financial position of the taxpayer – s 177D(b)(v) and s 165-15(1)(g)*

An assessment of the financial position of a taxpayer in connection with the scheme is necessary. Both s 177D(b), ITAA 1936 and s 165-15(1)(b), GST Act require an evaluation of the tax benefit and is determined by evaluating the economic significance

223 *A New Tax System (Goods and Services Tax) Act 1999* (Cth) s 165-15(1)(k).
224 Ibid s 165-15(1)(e).
225 Pagone, above n 24, 87.
226 *Futuris Corporation Ltd v FCT* (2010) 80 ATR 330, 362-363.
227 Ibid.
228 *Commissioner of Taxation v News Australia Holdings Pty Limited* (2010) 79 ATR 461, 473.
229 *Case 3/2010* (2010) 76 ATR 917, 34 [160].
230 Ibid.

of a taxpayer's position. Where a scheme has no commercial benefit and only a tax benefit, there will be no real change in the financial position of a taxpayer.[231]

The High Court has established[232] that the beneficial change in a taxpayer's financial position is wholly dependent on the tax benefit that was obtained and changes in other financial benefits or the securing of fees of a taxpayer.[233]

Relevant to both Part IVA and Division 165 is that when viewed globally if a taxpayer's financial position is changed solely based on the tax benefit received, then a finding of tax avoidance is more likely to be discerned.[234]

F *Change in financial position of person connected with taxpayer that will result or may be reasonably expected to result from the scheme: s 177D(b)(vi) and s 165-15(1)(h)*

This factor also requires an enquiry of the financial position but to that of a relative or related entity connected with a taxpayer. It is applicable to a taxpayer's business, family or any other connections that a taxpayer may have. If the financial position of another person is improved, this is likely to suggest against the taxpayer having pursued the arrangement for the dominant purpose of obtaining a tax benefit.[235] Instead, the conclusion reached is more likely to be dominant purpose for a commercial objective for a group or family dealing.

In considering this factor, *Case 3/2010*[236] identified that it overlaps with the considerations and conclusions reached in relation to the change in the taxpayer's position[237]. In addition, the conclusions that are applied under that factor should also be applied under s 165-15(1)(h), GST Act.

G *Any other consequence for taxpayer or other person connected with taxpayer: s 177D(b)(vii) and s 165-15(1)(i)*

Both s 177D(b), ITAA 1936 and s 165-15(1)(i), GST Act require a consideration of any other types of consequences for the taxpayer, entities and related parties. This takes into consideration the objective circumstances beyond the realm of tax and financial consequences of the scheme.[238]

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231 Hill, above n 11, 308.
232 *Commissioner of Taxation v Hart* (2004) 217 CLR 216.
233 Ibid.
234 Ibid, 241 [60]; See also *Case 3/2010* (2010) 76 ATR 917, 953 [143]; *Futuris Corporation Ltd v FCT* (2010) 80 ATR 330, 363.
235 Pagone, above n 24, 87.
236 *Case 3/2010* (2010) 76 ATR 917, 33 [159].
237 *A New Tax System (Goods and Services Tax) Act 1999* (Cth) s 165-15(1)(g).
238 Pagone, above n 24, 87.

Consequences can include whether or not a taxpayer's cost base has been reduced to nil.[239] Although in some cases this factor will provide no relevant criteria that need to be addressed.[240]

H *Nature of the connection between taxpayer and other person: s 177D(b)(viii) and s 165-15(1)(j)*

The final factor contained in s 177D(b), ITAA 1936 requires a consideration of the nature of the connection between the taxpayer and other persons or entities, such as other persons that the taxpayer was connected with.

More specifically, s 165-15(1)(j), GST Act makes it clear that this factor aims to assess whether the dealing was carried out between the parties at arms length. Generally, parties that are not related to one another will deal with each other at arms length and where that does occur, 'a GST avoidance conclusion will more easily be drawn'.[241] Where in a case the parties have not dealt with each other at arms length, it is possible that there was no dominant purpose in obtaining a tax benefit by the taxpayer. Instead there may be another explanation such that it may be inferred that the dominant purpose was in fact, a gift to a family member.

VI THE ADDITIONAL FOUR FACTORS IN DIVISION 165

There are four additional factors that need to be considered in the application of the GST GAAR. Of the four extra factors, only s 165-15(1)(e), GST Act, which considers the period over which the scheme was entered into and carried out, is similar to what is required in s 177D(b)(iii), ITAA 1936 concerning the time in which the scheme was entered into and the length of period during which the scheme was carried out. The other three factors have no equivalent in Part IVA.

A *Specific Consideration of the Purpose of the GST Act, its Provisions and Other Provisions Relevant in the GST Act: s 165-15(1)(c)*

This factor is the third contained in s 165-15(1), GST Act and involves an assessment of the purpose or object of the GST Act, the provisions contained within the Division and any other relevant provisions in the GST Act.

In determining the relevant conclusion to be reached, it has been found that a consideration of the broad policy objectives concerning the GST Act is relevant.[242] Although Hill J has expressed that it is unclear whether this factor has any real

239 *Futuris Corporation Ltd v FCT* (2010) 80 ATR 330, 363.
240 *Case 3/2010* (2010) 76 ATR 917, 953 [145].
241 Hill, above n 11, 304.
242 *Re VCE and FCT* [2006] AATA 821, 1286 [136] (SA Forgie).

significance.[243] On this point, his Honour has suggested that this factor may potentially consider the enshrined policy objective of Division 165 concerning whether the scheme was artificial or contrived and other broader policy objectives.[244]

B *The Period Over Which the Scheme was Entered into and Carried Out: s 165-15(1)(e)*

The Commissioner[245] has explained that ss 165-15(1)(d) and (e), GST Act[246] correspond to s 177D(b)(iii), ITAA 1936.[247] It appears more likely than not[248] that this factor ties in with reaching a conclusion for the factor of timing as per s 165-15(1)(c), GST Act and s 177D(b)(iii), ITAA 1936 and this view is supported by the analysis conducted in *Case 3/2010*.[249]

In the case of *Re VCE*,[250] SA Forgie explained that it was unclear how this requirement would point to a conclusion of tax avoidance. In particular, whether or not attention is to be directed to the period in which the scheme was implemented, its duration or the external events and circumstances of the period in which the scheme was implemented.[251]

C *The Circumstances Surrounding the Scheme: s 165-15(1)(k)* and *Any Other Relevant Circumstances: s 165-15(1)(l)*

Consideration must also be given to 'the circumstances surrounding the scheme' and 'any other relevant circumstances' as set out in ss 165-15(1)(k) and (l) GST Act respectively. While it is of utmost importance that the relevant circumstances that are considered are directed towards a conclusion of either purpose or principal effect because ss 165-15(1)(l) and (k), GST Act are expressed in such broad terms, it is difficult to determine the extent of other relevant circumstances that can be considered.[252]

The Commissioner has recognised in Practice Statement PSLA 2005/24[253] that these two factors may possibly allow regard to be had to the prevailing economic conditions or industry practices that are relevant to the scheme.

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243 Hill, above n 11, 304.
244 Hill, above n 11, 303.
245 Australian Tax Office, Practice Statement Law Administration, PS LA 2005/24, 'Tax Avoidance Conclusion, paragraph 165-5(1)(e) and section 165-15 of the GST Act' [184].
246 A New Tax System (Goods and Services Tax) Act 1999 s 165-15)(d) and (e).
247 *Income Tax Assessment Act 1997* (Cth) 177D(b)(iii).
248 Hill, above n 11, 303.
249 *Case 3/2010* (2010) 76 ATR 917, 954 [154].
250 *Re VCE and FCT* [2006] AATA 821, 1280 [111].
251 Ibid.
252 Pagone, above n 24, 156.
253 Australian Tax Office, Practice Statement Law Administration, PS LA 2005/24, 'Tax Avoidance Conclusion, paragraph 165-5(1)(c) and section 165-15 of the GST Act' [177].

When taking these two factors into consideration, it is clear that the factors allow for transactions to be seen in a new light. Due to the fact that these two factors are expressed in rather broad terms, SA Forgie has expressed the view that they may potentially include the subjective purposes, motives and intentions of the participating entities or subsequent reasons for explanations.[254] However considering the view that s 260 and Part IVA itself were specifically designed to prevent any consideration of the 'fiscal awareness of a taxpayer',[255] it is unlikely that this provision was inserted to allow for an assessment of a taxpayer's subjective motives. Although, it has been pointed out that in considering s 165-15(k), GST Act it is possible that the 'subjective matters were intended to be taken into account in reaching an objective reasonable conclusion about purpose'.[256]

VII AN EVALUATION OF SECTION 177D(B) AND SECTION 165-15(1)

Based on the analysis of the jurisprudence concerning Part IVA and Division 165, it is apparent that there has been a continuous incremental development in the interpretation of the GAARs and that the corresponding eight factors in s 177D(b), ITAA 1936 and s 165-15(1), GST Act have been considered by the courts and tribunals in a very similar manner. With the exception that s 165-15(1)(j) in Division 165 specifically asks the question whether the avoider and connected entity dealt with each other at arms length and the corresponding provision of s 177D(b)(viii) in Part IVA does not.

In interpreting and applying Division 165, the courts have used Part IVA cases to assist in drawing a conclusion as a dominant purpose.[257] To that extent, where it has been of relevance, many of the important propositions relevant to s 177D(b), ITAA 1936 that were initially transferred and applied to s 165-15(1), GST Act continue to be applied and followed by the courts and tribunals.

Division 165 has been cast in much wider terms as compared to what is generally considered to apply in the operation of Part IVA[258] and therefore in contrasting s 177D(b) ITAA 1936 and s 165-15(1) GST Act, Division 165 should be interpreted in its own context. There are indeed several differences between the provisions that in effect provide Division 165 with further efficacy and predictability. The differences that have been included in Division 165 to which Part IVA has no equivalent are the principal effect test and the additional factors contained in s 165-15(1). These include, the specific consideration of the purpose of the GST Act, its provisions and other

254 *Re VCE and FCT* [2006] AATA 821, 1286 [137].
255 *Commissioner of Taxation v Consolidated Press Holdings* (2001) 207 CLR 235, 264 (Gleeson CJ, Gaudron, Gummow, Hayne and Callinan JJ).
256 Pagone, above n 24, 156.
257 Barkoczy, above n 7, 50.
258 Ibid.

provisions relevant in the GST Act,[259] the circumstances surrounding the scheme[260] and any other relevant circumstances.[261]

When Part IVA replaced s 260, it was the ineffectiveness and deficiencies of s 260 that provided the legislature with guidance on how Part IVA should have been implemented to overcome these weaknesses.[262] The same approach of using Part IVA, the GAAR that had existed and was interpreted and applied by the courts for almost 18 years before the enactment of Division 165, has been adopted by the legislature. Justice Hill has explained that Division 165 was designed with much 'forethought' and that the 'the legislature has attempted to subtly address a number of limitations that have confronted Part IVA'.[263]

A *The Principal Effect Test*

The differences between the principal effect test and the dominant purpose test have been examined and are well illustrated in *Case 3/2010*.[264] In that case, the conclusion made by the AAT in relation to the principal effect test after having considered the six factors that were of relevance to the effect of the scheme, was that the principal effect of the scheme was to secure a GST benefit. The conclusion for both transactions was found to be the same as what was concluded under the dominant purpose test. The AAT specifically determined the relevant factors by transferring the considerations and conclusions drawn from the factors as considered in light of the dominant purpose test to the principal effect test.[265] However, instead of applying those factors to the objective purpose of a taxpayer, the focus was on the scheme itself in connection with the participants who implemented the scheme or would have attracted the GST benefit but for the scheme. This particular focus is similar to the predication test as endorsed in *Newton's Case*, however it is not limited by the scope of s 260 and instead is considered in the context of Division 165.

Since the enactment of Part IVA, the policy objective has been to strike down transactions of a tax avoidance nature and to provide for certainty and predictability.[266] It is clear that both s 260 was and Part IVA is neither certain nor predictable. In order to overcome this frustration, by implementing a second limb, Division 165 has provided greater certainty and predictability as both tests can be utilised when determining the possible tax consequences of a transaction and whether the GAAR will apply. This has been demonstrated in *Case 3/2010*[267] and, although the outcome concerning the

259 *A New Tax System (Goods and Services Tax) Act 1999* (Cth) s 165-15(1)(c).
260 Ibid s 165-15(1)(k).
261 Ibid s 165-15(1)(l).
262 Christopher Bevan, 'Proposal to Amend Anti-Avoidance Rule: Part IVA' (2000) 4 *The Tax Specialist* 24, 24.
263 Hill, above n 11, 54.
264 *Case 3/2010* (2010) 76 ATR 917.
265 Ibid 954 [153].
266 Pagone, above n 24, 22.
267 *Case 3/2010* (2010) 76 ATR 917.

principal effect test and the dominant purpose test was in the end the same, there will be instances where this is not the case.

The ability to use two tests to evaluate a conclusion as to dominant purpose has proven to be effective as the test provides a separate analysis of an arrangement that can be tested against the transaction to determine whether or not there was a dominant purpose of a tax benefit as obtained by a taxpayer. As the High Court in *Spotless Services Ltd*,[268] has pointed out, the determination of dominant purpose is the 'pivot upon which Part IVA turns' and by implementing a second limb, the principal effect test provides greater certainty to this fundamental enquiry.

B *Specific Consideration of the Purpose of the GST Act, its Provisions and Other Provisions Relevant in the GST Act*

In the context of Part IVA, the court has specifically acknowledged that the broader policy objectives as expressed in the Explanatory Memorandum such as whether the arrangement is 'blatant, artificial and contrived' should be considered.[269] The main difference with this policy objective for Part IVA is that it has been expressly included into Division 165 and more specifically is directly evaluated in s 165-15(1)(c), GST Act.

A consideration of broader policy objectives concerning the GAARs is important as it is the policy objectives that dictate and guide the underlying reasons as to why the anti-avoidance provisions have been enacted and more importantly articulate the role and objectives of the provisions.

The implementation of this specific factor to s 165-15(1), GST Act has provided greater clarity and predictability to Division 165 as it effectively makes it clear that the policy objectives concerning the anti-avoidance legislation are to be taken into account.

The approach of using the policy objectives contained in the Explanatory Memorandum in assisting the courts in reaching a conclusion as to dominant purpose has already been adopted. For instance, in *Consolidated Press Holdings*,[270] the High Court identified that it would not be artificial to draw a conclusion as to purpose of securing a tax benefit in specific circumstances. In *Hart*,[271] the court made it clear that a dominant purpose could be drawn if the transaction appeared to be artificial or contrived. It is therefore evident that, the High Court has acknowledged the concepts of artificiality as embraced in the policy objectives of Part IVA. If this factor was expressly recognised in s 177D(1)(b), ITAA 1936, it would create certainty and predictability as those attempting to apply the GAAR would be aware of this specific consideration.

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268 *FCT v Spotless Services Limited* (1996) 186 CLR 404, 413.
269 Explanatory Memorandum, Income Tax Laws Amendment Bill (No.2) 1981 (Cth), 9552.
270 *Commissioner of Taxation v Consolidated Press Holdings* (2001) 207 CLR 235, 264.
271 *Commissioner of Taxation v Hart* (2004) 217 CLR 216, 254 [86].

C *The Circumstances Surrounding the Scheme and any Other Relevant Circumstances*

The two factors contained in s 165-15(1), GST Act have stirred up much debate as to whether subjective purpose may be taken into account as a 'circumstance'. SA Forgie[272] has expressed the view in *Re VCE* that the subjective purposes, motives and intentions of the participating entities or subsequent reasons for explanations[273] could potentially be considered.

It has been illustrated[274] that the actual fiscal awareness and subjective intentions of a taxpayer are in fact irrelevant, therefore, it is possibly the case that one of the intended purposes of these two factors is to take subjective matters into account in reaching an objective conclusion as to a taxpayer's purpose.[275]

This is similar to the view expressed by the court in *News Australia Holdings.* In this case concerning Part IVA, the Commissioner submitted that the Tribunal had erred in its decision. It was recognised by the Tribunal that subjective purpose was irrelevant, the Tribunal proceeded to assess the taxpayer's 'no risk, no tax' policy as it considered that this matter should have been addressed.

In considering this issue, the Full Federal Court, emphasised the point that the Tribunal did not err in its decision to take this matter into account. It identified that the matter was a significant one and instead, it was explained that the Tribunal had considered this matter, although a subjective one, in the context of the objective factors contained in s 177D(b), ITAA 1936. More to the point, their Honours clearly recognised that it would not be surprising if the objective intention of a taxpayer accorded with the taxpayer's subjective intention as 'if subjective intention is reflected in objective evidence, no error is made by taking that evidence into account albeit that it is consistent with the person's subjective intention'.[276] Thus, the Commissioner failed on this particular submission on its appeal to the Full Federal Court.

Based on this explanation by the Full Federal Court, it appears to be the case that by taking a taxpayer's subjective intention into account as reflected in an assessment of the objective factors is similar to the circumstance's that would be considered in s 165-15(1)(k) and (l), GST Act.

If these two factors were inserted into Part IVA, there would most likely have been no basis for the Commissioner to appeal on that specific finding by the Tribunal. This is

272 *Re VCE and FCT* (2006) 63 ATR 1249, 1274-1275.
273 Ibid.
274 *FCT v Spotless Services Limited* (1996) 186 CLR 404. *Commissioner of Taxation v Hart* (2004) 217 CLR 216, 243 (Gummow and Hayne JJ); *Commissioner of Taxation v Consolidated Press Holdings* (2001) 207 CLR 235, 264; *Commissioner of Taxation v Sleight* (2004) 136 FCR 211, 253 (Hill J).
275 Pagone, above n 24, 157.
276 *Commissioner of Taxation v News Australia Holdings Pty Limited* (2010) 79 ATR 461, 472.

because it would have been acknowledged that the evaluation of the subjective intention to discern the objective intention of a taxpayer would have been a relevant consideration contained in Part IVA. Presumably, this would have provided the Commissioner with greater predictability and certainty before appealing to the Full Federal Court on this issue.

VIII CONCLUSION

The inclusion in Division 165 of the principal effect test and the three additional factors contained in s 165-15(1) GST Act as compared with s 177D(b) ITAA 1936 has cast new light on the general anti-avoidance provisions in Australia. The lack of certainty and predictability of Part IVA has continued to remain a significant problem and has caused confusion to those who attempt to enforce the provision and those who try to fight against it.

When taking into consideration that Division 165 was designed to address a number of the limitations that had confronted Part IVA, an amendment to Part IVA to reflect Division 165 would provide taxpayers, advisers, the courts and the Commissioner with further predictability when seeking to determine whether the GAARs would apply to a particular transaction and whether or not 'tax avoidance' has been committed.

An attempt to reconstruct s 177D(b), ITAA 1936 to achieve a similar effect to that of s 165-5(1), GST Act would not affect the competing interests of the taxpayer and the revenue objectives of Government but it would, as Division 165 has proved, pave the way forward for achieving greater certainty of the general anti-avoidance provision in Australian taxation.

Appendix

Division 165		**Part IVA**	
s 165-15(1)(a)	Manner in which the scheme was entered into or carried out	s 177D(b)(i)	The manner in which the scheme was entered into or carried out
s 165-15(1)(b)	Form and substance of the scheme (including legal rights and obligations involved in the scheme and economic and commercial substance of the scheme)	s 177D(b)(ii)	Form and substance of the scheme
s 165-15(1)(c)	Specific consideration of the purpose of the GST Act, its provisions and other provisions relevant in the GST Act		
s 165-15(1)(d)	Timing of the scheme	s 177D(b)(iii)	Time in which the scheme was entered into and the length of period during which the scheme was carried out
s 165-15(1)(e)	Period over which the scheme was entered into and carried out		
s 165-15(1)(f)	The effect that this Act would have in relation to the scheme apart from this Division	s 177D(b)(iv)	The result in relation to the operation of this Act that, but for this Part, would be achieved by the scheme
s 165-15(1)(g)	Any change in the avoider's financial position that has resulted, or may be expected to result, from the scheme	s 177D(b)(v)	Any change in the financial position of the taxpayer has resulted, will result, or may reasonably be expected to result, from the scheme
s 165-15(1)(h)	Any change or may be reasonably expected to result from the scheme in the financial position of an entity (a connected entity) that has or had a connection or dealing with the avoider, whether the connection or dealing is or was a family, business or other nature	s 177D(b)(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;
s 165-15(1)(i)	Any other consequences for the avoider or a connected entity of the scheme having been entered into or carried out	s 177D(b)(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
s 165-15(1)(j)	The nature of the connection between the avoider and a connected entity, including the question whether the dealing is or was at arms length	s 177D(b)(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);
s 165-15(1)(k)	The circumstances surrounding the scheme		
s 165-15(1)(l)	Any other relevant circumstances		