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If it wasn't broken, why try to fix it? 211

ARTICLES

Judicial construction of Part IVA: What to expect from the application of existing principles going forward – *Justice Richard Edmonds*

In recent times the High Court has repeatedly emphasised that the task of statutory construction not only begins with a consideration of the text itself, but ends there as well. That legislative history and extrinsic materials cannot displace the meaning of the statutory text. Nor is their examination an end in itself. Nowhere is this better exemplified than the High Court's construction of the provisions of Pt IVA in the cases which have come before the court to date: Peabody, Spotless, Consolidated Press, and Hart. Only in Consolidated Press has the court thought it necessary to have regard to extrinsic material to better understand the meaning of the expression "dividend stripping" as used in s 177E; to have regard to its history as part of tax avoidance discourse. Otherwise, such material has been eschewed. The recent amendments to Pt IVA contain no guidance within the text of the statute as to the type of scheme to which s 177CB(2) is to apply, the type of scheme to which s 177CB(3) is to apply, nor to prevent the Commissioner from applying both. Moreover, reliance on the material in the Explanatory Memorandum to the Bill by which the amendments were introduced is unlikely, under more recent principles of statutory interpretation espoused by the High Court, to attract resonance with the courts of a kind to which the drafters of the amendments may have aspired. 213

The 2013 Part IVA "reforms" – *A H Slater QC*

The 2013 amendments to Pt IVA, enacted to remedy perceived deficiencies in the operation of the provisions, are here suggested to have been largely unnecessary. But not least as a consequence of the admirable responsiveness of the authors of the amendments to suggestions from the profession, they are moderate and do no material damage to the structure of the general anti-avoidance provisions. 221

The new "improved" Part IVA – with extra tax benefit! – *Gordon Cooper* and *Tim Russell*

Following a string of recent high profile failures in the Federal Court of Australia involving interpretation of the general anti-avoidance rule, the Australian Taxation Office has persuaded Treasury to re-draft the provisions contained in Pt IVA of the Income Tax Assessment Act 1936 (Cth) to improve its prospects of success in litigation. In particular, new s 177CB has been added to the statute book with the intention of increasing the frequency with which the Federal Commissioner of Taxation can evidence the existence of a tax benefit for s 177C purposes. In this article, the authors explore the development of Australia's general anti-avoidance rule and the interpretative factors which have led the government to favour its re-drafting. The authors consider some of the practical consequences which emerge from the re-written rule and the difficulties that taxpayers are likely to encounter with its future operation. 234

Taxation by analogy – *Graeme S Cooper*

This article argues that anti-abuse rules in tax law require both a destruction and reconstruction step. It considers the claim, which prompted the 2013 changes, that Australia's reconstruction rule was defective and then examines some of the theoretical options that were available for reforming the reconstruction step. It discusses some issues arising from the way the rules are now built on an inconsistent foundation and ponders some of the curious outcomes that may arise when the new provisions have to be applied. While the mechanisms chosen for Australia may seem odd and contradictory, the experience elsewhere in the common law world does not offer a more cogent approach. 255

The GAAR panels in Australia and the UK: Identical twins or distant cousins? – *Ann O'Connell*

An important component of the recently introduced United Kingdom general anti-avoidance rule (GAAR) is an Advisory Panel which will advise Her Majesty's Revenue and Customs as to whether it is reasonable to apply the GAAR in particular cases. The United Kingdom Panel will also approve guidance developed by the Revenue on the difference between abusive tax arrangements and reasonable tax planning. It is likely that the Advisory Panel was inspired by the Australian GAAR Panel, but there are significant differences between the way in which the United Kingdom Panel is expected to operate and the operation of its Australian counterpart. This article examines both panels and considers whether there are any features of the United Kingdom model that could usefully be adopted in Australia. 269

When is avoiding tax not abusive? Comparative approaches to a GAAR in Australia and the United Kingdom – *Malcolm Gammie CBE QC*

Income tax liabilities should depend upon outcomes, not the manner in which they are achieved. An income tax may require the support of a statutory GAAR but perceptions as to the "reasonableness" of taxpayers' conduct are an inappropriate basis for determining liabilities or addressing legislative inadequacies. In this respect the new United Kingdom GAAR is less suited than the Australian GAAR for addressing the real issues of avoidance. 279

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