DUTIES GENERAL ANTI-AVOIDANCE RULES: LESSONS FROM INCOME TAXATION

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In keeping with the Australian tradition of reliance upon broad and relatively undefined discretionary powers, the Victorian Parliament has enacted duties general anti-avoidance rules designed to anticipate, forestall and deter tax avoidance practices and arrangements that seek to circumvent liability to duty on transfers of property and dealings in land-rich entities.

The new rules rely on broad concepts and low thresholds. They will apply in circumstances where there is an arrangement that is tainted by tax avoidance. Essentially any arrangement that results in the reduction, elimination or postponement of liability to duty would be caught if tax avoidance is one of its purposes or effects.

Unlike the income tax general anti-avoidance rule, the Victorian rules do not require a conclusion that the dominant purpose of the impugned arrangement was to obtain the sought after tax benefit. There is much to be learned from the jurisprudence developed in relation to the application of the income tax rule. However, it is clear that the intention of the Victorian Parliament, as discerned from the text of the rules and related statements, is to enact rules that have a very wide ambit so as to arm the Commissioner of State Revenue with the power to deal with the unknown.

Such breadth of ambit vests significant discretionary powers in the Commissioner and could, unless contained by later Court decisions, produce much uncertainty and inequity in the operation of the Victorian duty law.

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1. INTRODUCTION

Many countries have adopted some form of a general anti-avoidance rule to deal with the perceived growth in tax avoidance and the failure of statutory responses to effectively anticipate and deal with the evolving and chameleon-like character of tax avoidance practices. Until relatively recently, general anti-avoidance rules have largely been absent from stamp duty legislation. For the most part, legislatures were content with specific anti-avoidance provisions to target particular areas of perceived abuse. Queensland was the first Australian jurisdiction to introduce a stamp duty general anti-avoidance rule. In December 2003, the Australian Capital Territory inserted into its *Taxation Administration Act 1999* (ACT) a general anti-avoidance rule applicable to territory taxes such as stamp duty. The Parliament of Victoria has also recently enacted transfer duty and land-rich duty general anti-avoidance rules.

The Queensland, Australian Capital Territory and Victorian rules are yet to be judicially considered. However, the rules draw on tested concepts and principles that form a part of the income tax general anti-avoidance rule as contained in Pt IVA of the *Income Tax Assessment Act 1936* (Cth) (“ITAA36”). Part IVA has been the subject of extensive judicial scrutiny and jurisprudence in various High Court and Federal Court cases. A number of principles emerge from these authorities which should be used to guide the interpretation and application of the Queensland, Australian Capital Territory and Victorian rules.

The purpose of this article is to examine the Queensland, Australian Capital Territory and Victorian rules, and advance possible interpretations and approaches to their application that may be adopted by Courts, including the High Court of Australia. The article also considers the potential application of the United Kingdom’s common law doctrine of fiscal nullity in jurisdictions which have a duties general anti-avoidance rule, and in jurisdictions which do not have such a rule.
2. FRAMEWORK OF GENERAL ANTI-AVOIDANCE RULES

The operation of general anti-avoidance rules is normally directed at a broadly defined category of tax-significant transactions or arrangements which result in or could, if carried out, result in the reduction, elimination or postponement of tax otherwise payable. For any general anti-avoidance rule to operate effectively there are some basic design characteristics or elements that are usually regarded as necessary. The expression and formulation of the elements of general anti-avoidance rules may vary, but essentially the elements comprise:

- a definitional component; and
- a reconstructive component.¹

2.1 Definitional Component

The definitional component identifies, in general terms, the specific and particular characteristics of transactions to which the general anti-avoidance rule is intended to apply and deter. Consequently, it is the task of the definitional component to distinguish between acceptable tax planning and unacceptable tax-avoidance transactions.

The definitional component may be further divided into two elements:

- the physical element, which focuses upon the physical characteristics of matters to which the rule is intended to apply; and
- the mental element, which predicates the operation of the rule upon findings or conclusions as to the state of mind which actuated the physical transaction.

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2.1.1 Physical Element

In general, the operation of an anti-avoidance rule depends on the existence of some relevant event or occasion which produces a result at which the rule is directed. That event may take a positive form, where the taxpayer assumes or undertakes a particular course of action, or a negative form, where the taxpayer refrains from undertaking a particular course of action.

The specific and particular event is not itself at issue, unless it produces the proscribed tax-avoidance result. The expression and formulation of the event and the result may vary, but essentially general anti-avoidance rules require some form of a “transaction” or “scheme” in respect of which the taxpayer obtains a “tax benefit”. Unless there is some scheme, there can be no relevant tax benefit and, unless there is some tax benefit, however defined or described, there can be no relevant alteration of the incidence to taxation and therefore no basis, in law or policy, for the application of a general anti-avoidance rule.

The concept of “scheme” therefore defines or identifies the relevant conduct to which the rule is directed, and the concept of “tax benefit” defines the proscribed category of fiscal results or consequences. The concept of tax benefit presupposes the existence of some benchmark or standard by reference to which liability which should have arisen is determined. In this sense, it assumes the existence of a state of affairs which the taxpayer should have adopted but did not in order to obtain the relevant tax benefit. Unless there is

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4 See the provisions referred to in note 2 above.
a tax benefit there will be no basis for the application of any general anti-avoidance rule, and in this respect the arrangement must produce a result which can be described as a proscribed tax-avoidance benefit.

The physical element is not peculiar to any particular general anti-avoidance rule but rather it is a general requirement for the operation of general anti-avoidance rules and extends to common law anti-avoidance doctrines. For example, the United States’ business purpose test operates to deny the taxation benefits of transactions entered into and carried out for tax-avoidance purposes or without bona fide business purposes. The doctrine of fiscal nullity requires the existence of a preordained series of transactions or a single composite transaction into which there have been steps inserted which have no commercial purpose apart from the avoidance of a liability to taxation.

2.1.2 Mental Element

General anti-avoidance rules normally require relevant conclusions as to the state of mind of taxpayers who carried out or participated in the scheme. The mental element provides a further criterion which seeks to identify and define the category of arrangements to which the general anti-avoidance rule is intended to apply. It focuses upon factors, matters or considerations which

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5 Orow, Seriously Flawed, above n 3, 57; and Orow, Uncertainty Rules, above n 3, 35.
6 See the provisions referred to in note 2 above.
7 Gregory v Helvering, 293 US 465 (1935); and Stubart Investments Ltd v The Queen (1984) 10 DLR (4th) 1.
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influenced the nature and design of the arrangement and the manner in which it was entered into and carried out.9

The focus of the mental element of a general anti-avoidance rule will be upon the presence and strength of tax-avoidance purpose or influence.10 The proscribed purpose may range anywhere from “a” tax-avoidance purpose to tax-avoidance as the “sole” purpose.11 “Sole” purpose is rarely adopted as the threshold.12 Often, the proscribed purpose is somewhere between tax-avoidance as the “dominant” purpose and tax-avoidance as “a” purpose.13

Unlike the requirements of scheme and tax benefit, the mental element is not a critical or indispensable element of general anti-avoidance rules, nor is it an essential feature of tax avoidance. However, the presence of a particular state of mind may be a circumstance which, when combined with the other elements, indicate that as a matter of construction the arrangement is one for the avoidance of tax to which the general anti-avoidance rule is intended to apply.

Whether and the extent to which purpose should play a role in the characterisation and identification of transactions for the purposes of the application of general anti-avoidance rules is a difficult question of policy, on which there is much disagreement. The principal source of difficulty derives from the fact that tax purposes and commercial purposes are not necessarily mutually exclusive, and that tax purposes are common to both tax planning and tax avoidance.14

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9 Orow, above n 1, 111; Orow, Seriously Flawed, above n 3, 57-8; and Orow, Uncertainty Rules, above n 3, 35.
11 See the provisions referred to in note 2 above.
13 See the provisions referred to in note 2 above.
2.2 Reconstructive Component

The reconstructive component forms a part of the second stage in the design and operation of general anti-avoidance rules. Once the requisite criteria of operation are satisfied, then a general anti-avoidance rule must provide some process for the readjustment of the tax consequences of the impugned arrangement and the redetermination of the consequences to the affected taxpayers. This is a critical aspect of the effective operation of general anti-avoidance rules because it provides the necessary framework for the denial of the relevant tax benefit.

The process of reconstruction involves two questions. The first question relates to whether reconstruction (and hence cancellation of the tax benefit) is expressed in mandatory terms such that, once the definitional component is satisfied, there is an automatic cancellation of the tax benefit, \(^{15}\) or, in discretionary terms, where the revenue authority is granted a general or specific power to decide whether to reconstruct and the circumstances in which that is warranted. \(^{16}\) The second question relates to the appropriate process to be adopted to that end. The process may be guided by appropriate formulas which must be applied to redetermine the tax consequences to the relevant taxpayer or left completely to the revenue authority to determine as it considers appropriate in the particular circumstances so as to counteract the tax benefit. \(^{17}\)

By way of example, previous s 260 of the ITAA36 and s 108 of the *Land and Income Tax Act 1954* (NZ) only permitted the relevant revenue authority to impose tax by reference to the scheme that remained after the tax-avoidance scheme had been impugned. \(^{18}\) In

\(^{14}\) Orow, above n 1, 112.


\(^{17}\) See the provisions referred to in note 2 above.

\(^{18}\) See, eg, *Cecil Bros Pty Ltd v FC of T* (1964) 111 CLR 430; *Newton v FC of T* (1958) 98 CLR 1; *FC of T v Gulland* (1985) 160 CLR 55; *John v FC of T* (1989)
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contrast, current anti-avoidance rules authorise the relevant revenue authority to construct an alternative (and essentially hypothetical) state of affairs by reference to which liability to taxation can be determined.19

In view of the fact that:

- the operation of general anti-avoidance rules is not limited to one category of transactions; and

- the transactions to which the rules could apply are not necessarily known or foreseeable, it is submitted that the hypothetical state of affairs to be assumed cannot be determined in advance by any specific and comprehensive formula which defines the exact consequences following satisfaction of the definitional component. This requires the reconstructive formula to be sufficiently broad and to incorporate a discretionary element.20 Regardless of the whether the reconstructive process is expressed in mandatory terms or in discretionary terms, it entails, by definition, a significant element of speculation and uncertainty as to the appropriate hypothesis which has to be made in the particular circumstances.21


19 For example, Pt IVA of the ITAA36; A New Tax System (Goods and Services Tax) Act 1999 (Cth), Div 165; Income Tax Act 1994 (NZ), s BG1; Income Tax Act 1988 (Can), s 245; and Taxes Consolidation Act 1997 (Ire), s 811.


21 Orow, Seriously Flawed, above n 3, 58; and Orow, above n 1, 180-1.
3. DUTY SAVING ARRANGEMENTS THAT MAY BE IMPUGNED BY THE NEW RULES

In terms of its scheme and history, duties law began its life as a tax on instruments. Recently however, stamp duty has become more of a tax on transactions, especially in jurisdictions that have “rewritten” their duties legislation. Before the introduction of duties general anti-avoidance rules, taxpayers may have been able to limit their liability to duty in a number of ways.

3.1 Effectively Passing Commercial Ownership of Land Without Transferring That Land

Unless an exemption applies, a transfer of land is subject to duty. However, commercial ownership of land may effectively pass without any dutiable transaction occurring. For example, instead of transferring land and thereby incurring transfer duty, a long-term (e.g. 300 year) lease over the land is given to one entity and an option over the remainder granted to a related entity, with the lease and option contained in separate agreements. Duty generally is only payable on the exercise of an option, and some jurisdictions do not impose lease duty. Courts have indicated that neither a lease nor an option can be described as a transfer, because leases and options are created at the moment they are granted.

22 There is no such thing as a lease in perpetuity under the general law. See Sevenoaks, Maidstone & Tunbridge Railway Co v London, Dover & Chatham Railway Co (1879) 11 Ch D 625, 635.
23 Cf Duties Act 2000 (Vic), s 7(1)(b)(v).
25 For example, Victoria and Tasmania. See State Taxation Acts (Tax Reform Implementation) Act 2001 (Vic), s 5; and Revenue Legislation (Miscellaneous Amendments) Act 2002 (Tas), s 23.
26 Littlewoods Mail Order Stores Ltd v Inland Revenue Commissioners [1961] Ch 597, 623-4 (per Lord Evershed MR, with whom Harman and Donovan LJJ relevantly agreed) (“Littlewoods”); Commissioner of Taxes (Qld) v Camphin (1937) 57 CLR 127, 133-4 (per Latham CJ, with whom Rich and McTiernan JJ agreed);
grant of a lease and option effectively passes commercial and economic ownership of the land that is subject to the lease and option.\textsuperscript{27}

3.2 Changing the Form of an Arrangement While Preserving Its Commercial Outcome

The example considered above is one manifestation of where a desired commercial outcome is achieved through an arrangement that avoids duty, when the same effective outcome, if arrived at by different means, might have resulted in more duty being payable. The effectiveness of this approach lies in the fact that with duties legislation, Courts generally look to see whether the “transaction” or “instrument” falls within the category of transactions or instruments subject to duty, rather than considering whether the arrangement is one that has the same commercial outcome as a transaction or instrument on which duty is imposed.\textsuperscript{28}

For example, in \textit{Burbury v Commissioner of Stamp Duties}\textsuperscript{29} the taxpayer wanted to give her son some shares. Instead of making a

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\textit{Cory} [1965] AC 1088, 1106-7 (per Lord Reid, with whom Lords Hodson and Pearce agreed), 1108-9 (per Lord Morris) and 1109-10 (per Lord Donovan); \textit{Fairey Australasia v Commissioner of Stamp Duties (SA)} (1998) 72 SASR 1, 5 (per Lander J); \textit{Adamson v Hayes} (1973) 130 CLR 276, 303 (per Gibbs J); \textit{Allina Pty Ltd v FC of T} (1991) 28 FCR 203, 210 (per Lockhart, Burchett and Gummow JJ). See generally, \textit{Coles Myer Ltd v Commissioner of State Revenue} [1998] 4 VR 728, 730, 740 (per Ormiston JA, with whom Winneke P agreed).

\textsuperscript{27} Cf \textit{Commissioner of State Taxation (WA) v Linton} (1978) 8 ATR 526, 527-8 (per Burt CJ, with whom Wickham and Smith JJ agreed); and \textit{Farm Products Cooperative (Tararua) Ltd v Inland Revenue Commissioners (NZ)} [1969] NZLR 874.


\textsuperscript{29} (1972) 3 ATR 313 (“Burbury”).

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gift of the shares and incurring gift duty,\textsuperscript{30} she gave her son a gift of $4,250 (this being the market value of the shares). Her son then bought the shares from her for this amount.

Justice Mettlefold held that the taxpayer was free to order her affairs as she wished, and added:

There is nothing in the ... Act which authorises the court to ignore the ... effect of an instrument which operates ... to lessen the ... duty which will be payable if the transaction were effected in another way.\textsuperscript{31}

His Honour held that the consideration for the transfer was genuine, and that he could not find otherwise without denying legal effect to the payment which the son had made. To that end, his Honour observed that:

To treat the transfer as a transfer by way of gift ... it would be necessary to treat the payment by the son as a ... fiction. But this cannot be done because the cheque operated ... to produce the effect which it purported to have. It cannot be ... treated as a fiction save by the operation of a ... provision designed to produce that result. But there is no such provision in the law.\textsuperscript{32}

\subsection*{3.2.1 Sale of Business}

The form over substance approach adopted in \textit{Burbury} has also been adopted in the context of sale of business. An acquirer of stock may be liable to duty on the acquisition if the stock is acquired as part of the purchase of a business.\textsuperscript{33} Instead of purchasing the stock\textsuperscript{34} and thereby incurring duty, the stock is made the subject of a separate agency agreement under which the purchaser of the business

\textsuperscript{30} Under s 9 and Sch 2, Pt 3, item 36(b) of the \textit{Stamp Duties Act 1931} (Tas).
\textsuperscript{31} \textit{Burbury} (1972) 3 ATR 313, 314.
\textsuperscript{32} Ibid 315-6.
\textsuperscript{33} See, eg, \textit{Stamp Duties Act 1923} (SA), ss 4 and 31 and Sch 2; and \textit{Duties Act 2001} (Qld), ss 9, 10 and 29.
\textsuperscript{34} On what constitutes stock, see \textit{FC of T v St Hubert’s Island Pty Ltd} (1978) 138 CLR 210, 226 (per Mason J); and \textit{FC of T v Suitons Motors (Chullora) Wholesale Pty Ltd} (1985) 157 CLR 277.
physically holds the stock but sells it on the vendor’s behalf as the vendor’s agent. The vendor then pays the purchaser an appropriate “agency fee” calculated by reference to the net profit that the purchaser would have made had it sold the stock on its own account.

3.2.2 Transfer of Shares In Company Owning Land

In jurisdictions that do not subject the transfer of shares to duty, duty may be saved by transferring the shares in a company which owns land (but which does not come within the land-rich duty provisions) in place of transferring the land itself. For example, a proprietary company owns land worth $498,000. Instead of a prospective purchaser of the land taking a transfer of the land and being liable for transfer duty, the purchaser acquires all of the shares in the company with appropriate indemnities from the vendor regarding the company’s past liabilities.

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35 In *Campbells Hardware Pty Ltd v Commissioner of Stamp Duties* (1998) 40 ATR 1, the arrangement in question was held to be an “in substance” sale of the stock because substantially all the risks and benefits in relation to that stock passed to the purchaser.

36 Alternatively, with an Australia-wide business the stock physically located in jurisdictions that impose duty on the transfer of stock with a sale of business could be run down before the sale, with stock in other jurisdictions not being utilised.

37 Such as Victoria and Tasmania. These transfers may alternatively be taxed at a lower rate than a transfer of land.


41 Such indemnities would normally be expected. Cf *Woolcock Street Investments Pty Ltd v CDG Pty Ltd (formerly Cardno & Davies Australia Pty Ltd)* (2004) 205 ALR 522.
3.3 Designing an Instrument So That It Does Not Fall Within the Class of Instruments Subject To Duty

It may be permissible to achieve a commercial outcome through an arrangement that avoids duty when the same outcome if arrived at by different means might result in greater liability to duty payable. That requires a transaction or instrument to be structured so that it does not come within the class of transactions or instruments that are subject to duty. Such structuring provides the means by which liability to duty can be avoided.

For example, in some jurisdictions a mortgage that is subject to duty is defined (amongst others) as a mortgage or charge that, at the date it is first executed, secures property wholly or partly in the jurisdiction. A charge given over shares that are to be specified following execution of the charge therefore escapes duty, even if the specification of the shares is a condition precedent for finance.48

43 See, eg, Duties Act 1997 (NSW), ss 205(a), 208 and Sch 2; Duties Act 2001 (Tas), ss 139(a) and 142; and Duties Act 1997 (Qld), ss 248(1)(a) and 252.
44 On what constitutes a charge, see, eg, Burlinson v Hall (1884) 12 QB 347, 350 (per Day J); and Re Price; Ex parte Tinning (1931) 26 Tas LR 158, 160 (per Nicholls CJ).
45 At common law, shares are usually located in the jurisdiction where the share register is kept. See, eg, Treasurer of Ontario v Blonde [1947] AC 24.
3.4 “Splitting” the Transaction

In circumstances where an acquisition by a single entity might result in maximum duty being payable, duty may be minimised if the acquisition is effected by more than one entity. For example, where site goodwill is the main goodwill of a business, the value of this goodwill may be part of the dutiable value of the land on which the business is conducted if the land is sold together with the business. To avoid this result, the land may be sold to a land holding entity and the business to a related entity together with a lease over the land. The acquiring entities may be created for the purposes of the transaction.

Because duty may be assessed on the value of a transaction, arrangements which effectively reduce this value could accordingly reduce the amount of duty payable. In Vopak Terminals Australia Pty Ltd v Commissioner of State Revenue it was recognised that equitable interests in fixtures are not encumbrances on the land to

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Section 33A(4) of the Stamps Act 1938 (Vic) required the Commissioner to not decide an objection concerning the value of any land without consulting the Valuer-General, but this appears not to have been done in Uniqema (2004) 56 ATR 19 or Morvic (2002) 50 ATR 64. Compare Palace Hotel 2004 ATC 4550.
52 Cf Duties Act 1997 (NSW), s 24; Duties Act 2001 (Tas), s 21; and Duties Act 2000 (Vic), s 23.
which the fixtures attach, but they nevertheless reduce the dutiable value of the land when they are held by someone other than the owner of the land and allow removal of the fixtures. Such interests could be granted to an entity before the land is transferred to a related entity, thereby reducing the dutiable value of the land and thus the duty payable on transfer of the land.

4. STRUCTURE OF THE DUTIES GENERAL ANTI-AVOIDANCE RULES

The Duties Act 2001 (Qld), Duties Act 2000 (Vic) and the Taxation Administration Act 1999 (ACT) contain duties general anti-avoidance rules. The following Section examines the nature and scope of these rules and, where necessary, identifies flaws and potential problem areas.

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54 On what are and are not encumbrances, see Chief Commissioner of Stamp Duties (NSW) v Buckle (1998) 192 CLR 226, 244-5 (per Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ); and Wallace v Love (1922) 31 CLR 156.

55 Compare Commissioner of State Revenue (Vic) v Bradney Pty Ltd (1996) 34 ATR 233 (in relation to leases); and Duties Act 2000 (Vic), s 22.

56 Cf Duties Act 1997 (NSW), s 24; Duties Act 2001 (Tas), s 21; and Commissioner of State Revenue v Pioneer Concrete (Vic) Pty Ltd (2002) 209 CLR 651. Note that in Victoria, this option continues to be available following the enactment of new s 22A of the Duties Act 2000 (Vic). However, it may be subject to the general anti-avoidance rule discussed in the text accompanying notes 66-80 below.

57 It should be noted that South Australia has a provision dealing with the avoidance or evasion of duty on conveyances on sale (s 70 of the Stamp Duties Act 1923 (SA)), and Western Australia has a section on land-rich duty avoidance (s 76AV of the Stamp Act 1921 (WA)). The Northern Territory’s stamp duty anti-avoidance rule (s 4B of the Taxation (Administration) Act 1978 (NT)) will be discussed in notes 71 and 72 below.
4.1 Queensland

Chapter 11 of the *Duties Act 2001* (Qld) contains a broad general anti-avoidance rule. The stated purpose of Ch 11 is to deter artificial, blatant or contrived schemes to reduce liability to duty.

In terms and structure, Ch 11 is similar to the general anti-avoidance rules of Pt IVA of the ITAA36 and Div 165 of the *A New Tax System (Goods and Services Tax) Act 1999* (Cth). In general, Ch 11 allows the Queensland Commissioner of State Revenue to disregard a duty benefit from a scheme where obtaining a duty benefit is at least the dominant purpose of the impugned scheme.

**4.1.1 Definitional Component**

The definitional component of Ch 11 is satisfied if there is:

- a “scheme” entered into after the commencement of the *Duties Act 2001* (Qld);[58]
- from which an entity gets a duty benefit not attributable to an exemption or concession provided by the Act;[59] and
- it is reasonable to conclude that the sole or dominant purpose of the scheme is to obtain a duty benefit.[60]

A “scheme” is defined by the dictionary in Sch 6 of the Act to essentially comprise any kind of conduct. A “duty benefit” is obtained by an entity if the amount of duty payable by that entity (leaving aside Ch 11) is or could reasonably be expected to be less than it would have been apart from the scheme.[61]

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58 Queensland’s duties general anti-avoidance rule was originally s 81 of the *Stamp Act 1894* (Qld). The section was introduced in 1959 and its terms are similar to those of former s 260 of the ITAA36.
59 *Duties Act 1997* (Qld), s 432(1).
60 *Duties Act 1997* (Qld), ss 433(1) and 436(1).
61 *Duties Act 1997* (Qld), s 433(1)(a).
62 *Duties Act 1997* (Qld), ss 433(1)(a) and 433(1)(b).
63 *Duties Act 1997* (Qld), s 433(1)(c).
64 *Duties Act 1997* (Qld), s 434(1).
Various matters which must be taken into account in determining any entity’s purpose for entering into or carrying out the scheme are set out in s 435 of the Act. These matters are practically and conceptually similar to the matters listed in Pt IVA of the ITAA36 and Div 165 of the *A New Tax System (Goods and Services Tax) Act 1999* (Cth).

### 4.1.2 Reconstructive Component

If the definitional component is satisfied, the Queensland Commissioner of State Revenue may decide that a particular amount of the duty benefit is payable by the entity as duty. Under s 434(2) of the Act, the amount of the duty benefit is the difference between the amount of duty payable and the amount of duty that would have been payable apart from the scheme.

### 4.2 Victoria

Part 6 of Ch 2 to the *Duties Act 2000* (Vic) is headed “Tax Avoidance Schemes” and was inserted as an amendment to the Act by s 11 of the *State Taxation Acts (Tax Reform) Act 2004* (Vic). Part 6 is a general anti-avoidance provision that applies to transactions entered into from 16 June 2004, the date the *State Taxation Acts (Tax Reform) Act 2004* (Vic) received Royal Assent.

#### 4.2.1 Definitional Component

The general anti-avoidance rule in the *Duties Act 2000* (Vic) allows the imposition of additional transfer duty on a transaction in respect of which such duty would have been payable “but for a tax avoidance scheme”. The expression “but for” effectively requires a reassessment by reference to an alternative and essentially hypothetical state of affairs that did not exist in fact but that was reasonably expected in the circumstances. Effectively, the question would be:

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65 *Duties Act 1997* (Qld), s 436(1).
66 *State Taxation Acts (Tax Reform) Act 2004* (Vic), s 2(1).
68 *Duties Act 2000* (Vic), ss 69B and 69C.
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If the affected taxpayer did not enter into or carry out the impugned scheme, what would a reasonable person expect the taxpayer to have done?69

A “tax avoidance scheme” is extremely widely defined70 by s 69B(1) as a:

scheme that directly or indirectly –

(a) has tax avoidance as its purpose or effect; or

(b) has tax avoidance as one of its purposes or effects, if the purpose or effect of tax avoidance is not merely incidental to another purpose or effect of the scheme.71

Section 69B(2) then effectively defines a “scheme” as any kind of conduct.72 “Tax avoidance” is regarded by the section to be the


70 As acknowledged in Victoria, Parliamentary Debates, Legislative Assembly, 2 June 2004, 53 (Robert Clark, Member for Box Hill).

71 Compare s 4B(2) of the Taxation (Administration) Act 1978 (NT), which refers to a “collateral purpose” of obtaining the benefit of an exemption or concession, or reducing the tax or duty otherwise payable.

72 “Scheme” includes the whole or any part of –

(a) a contract, agreement, arrangement, understanding, promise or undertaking (including all steps and transactions by which it is carried into effect) –

(i) whether made or entered into orally or in writing;
(ii) whether express or implied;
(iii) whether or not enforceable;

(b) a plan, proposal, action, course of action or course of conduct, whether or not unilateral;

(c) a trust.

In this respect, the definition of “scheme” in s 69B(2) is similar to the definition of a scheme under s 4B(1) of the Taxation (Administration) Act 1978 (NT).

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elimination, reduction or postponement of any person’s liability to pay transfer duty.

Effectively, the first requirement in s 69B(1) – that the scheme has tax avoidance as its purpose or effect – is completely subsumed by the second element of the section. Provided the relevant tax avoidance purpose or effect is not merely incidental then the definitional component would be satisfied.\(^{73}\) It is by no means clear what the expression “merely incidental” means or how it can be used as a threshold condition to identify the transactions to which the general anti-avoidance rule is intended to apply.\(^{74}\) That expression is likely to take its meaning and content from a particular context and particular facts and it would be very difficult to formulate a general principle to determine what purpose or effect is merely incidental to other purposes or effects of the relevant scheme.\(^{75}\)

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\(^{73}\) As pointed out in Victoria, Parliamentary Debates, Legislative Assembly, 2 June 2004, 53 (Robert Clark, Member for Box Hill).

\(^{74}\) The Macquarie Dictionary (3rd ed, 1997) 1079 ascribes the following meanings to the word “incidental”:

1. happening or likely to happen in fortuitous or subordinate conjunction with something else;
2. incurred casually and in addition to the regular or main amount: *incidental expenses* – noun;
3. something incidental, as a circumstance;
4. *plural* minor expenses – phrase;
5. incidental to, liable to happen in connection with; naturally appertaining to.


\(^{75}\) Whether or not something is incidental has been considered in cases such as Royal Park Protection Group Inc v Urban Camp Melbourne Co-operative (1998) 101 LGERA 381; Brisbane City Council v Bemcove Pty Ltd (1998) 104 LGERA 1; Enoka v Shire of Northampton (1996) 15 WAR 483; Re Finance Sector Union of Australia; Ex parte Financial Clinic (Vic) Pty Ltd (1993) 178 CLR 352 (“Financial Clinic Case”); Royal Australian Nursing Federation v Private Hospitals & Nursing Homes Association of Australia (1992) 46 IR 219; Kemp v FC of T (1992) 110 ALR 375; Piscitelli v District Council of East Torrens (1992) 41 APA 391; Fletcher
4.2.2 Reconstructive Component

If the Victorian Commissioner of State Revenue “considers”\textsuperscript{76} that a person has participated in a tax avoidance scheme, the Commissioner may:\textsuperscript{79}

- determine what transfer duty would have been payable “but for” the scheme;\textsuperscript{78} and
- assess or reassess that, or any other person’s liability to duty accordingly.\textsuperscript{79}

It is trite to note that the Commissioner must make these determinations in accordance with the law and it is critical that such determinations are founded upon relevant facts that justify such a determination.\textsuperscript{80}

4.2.3 Victorian Land-Rich Duty

Both the definitional and reconstructive components of the transfer duty general anti-avoidance provision are replicated in the context of land-rich duty by Div 6 of Pt 2 to Ch 3 of the \textit{Duties Act}.


\textsuperscript{76} \textit{Duties Act 2000} (Vic), ss 69C(1).

\textsuperscript{77} Victoria, \textit{Parliamentary Debates}, Legislative Assembly, 2 June 2004, 53 (Robert Clark, Member for Box Hill) incorrectly suggests that reconstruction is mandatory once the definitional component is satisfied.

\textsuperscript{78} \textit{Duties Act 2000} (Vic), ss 69C(1)(b).

\textsuperscript{79} \textit{Duties Act 2000} (Vic), ss 69C(1)(c).

\textsuperscript{80} Cf \textit{Jeffery v Commissioner of Stamps (SA)} (1980) 23 SASR 398; \textit{Old Reynella Village Pty Ltd v Commissioner of Stamps (SA)} (1989) 51 SASR 378; \textit{Holiday v Lockwood} [1917] 2 Ch 47; and \textit{Kimbers and Co v Inland Revenue Commissioners} [1936] 1 KB 132.
2000 (Vic). However (out of an abundance of caution)\(^8\) under the reconstructive component of the land-rich duty general anti-avoidance provision, when determining what land-rich duty would have been payable “but for” the scheme, the Commissioner is expressly allowed to:

- deem a company or unit trust scheme to be a landholder of a particular class;\(^8\)
- deem a landholder or the trustee of a unit trust scheme to hold land and determine the extent of that landholding;\(^8\)
- deem a landholder to be land-rich;\(^8\)
- deem a relevant acquisition to have been made by any person and determine the extent of that interest;\(^8\) and
- determine the value of any land.\(^8\)

For example, where the scheme involves the manipulation of the land-rich threshold (by changing the asset composition of the entity) then the Commissioner may determine the extent of land holding and determine that the landholder is land-rich. In other words, such determinations are only open to facilitate the making of an assessment by reference to the reasonably expected alternative course of action that the taxpayer would have undertaken but for the impugned scheme.

Under both the transfer duty general anti-avoidance rule and the land-rich duty general anti-avoidance rule, the liability to additional duty is taken to have arisen at the time that that duty would have been payable if not for the tax avoidance scheme.\(^8\)

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\(^8\) *Duties Act 2000* (Vic), s 89I(3).
\(^8\) *Duties Act 2000* (Vic), s 89I(2)(a).
\(^8\) *Duties Act 2000* (Vic), s 89I(2)(b).
\(^8\) *Duties Act 2000* (Vic), s 89I(2)(c).
\(^8\) *Duties Act 2000* (Vic), s 89I(2)(d).
\(^8\) *Duties Act 2000* (Vic), s 89I(2)(e).
\(^8\) *Duties Act 2000* (Vic), ss 69A(2) and 89G(2).
4.3 Australian Capital Territory

The Australian Capital Territory’s duties general anti-avoidance rule is contained in s 8 of the Taxation Administration Act 1999 (ACT). The rule combines aspects of the Queensland and Victorian rules.88

4.3.1 Definitional Component

The definitional component of the Australian Capital Territory rule is satisfied if there is a “tax avoidance scheme”, being:

- a “scheme”;
- by which a person obtains (or seeks to obtain) a reduction in, or exemption from, tax that would otherwise be payable;
- where, having regard to certain matters,89 it is reasonable to conclude that the person entered into the scheme “principally” for the purpose of obtaining the reduction or exemption.90

Like the Victorian rule,91 s 8(5) of the Australian Capital Territory Act effectively defines a “scheme” to extend to any kind of

88 Discussed in the text accompanying notes 59-87 above.
89 Namely:
   (a) the way in which the scheme was entered into or carried out;
   (b) the form and substance of the scheme;
   (c) the time when the scheme was entered into and the length of time during which it was carried out;
   (d) the extent to which the scheme reduces the tax that would otherwise be payable;
   (e) whether the scheme has resulted in, or can reasonably be expected to result in, a change in any person’s financial position, or in any other consequence for any person; and
   (f) the nature of any connection (whether business, family or of any other nature) between the person and a person referred to in (e).
90 Taxation Administration Act 1999 (ACT), s 8(5).
91 Duties Act 2000 (Vic), s 69B(2), discussed above in the text accompanying note 72.
conduct. However, unlike the Victorian rule, the definitional component of the Australian Capital Territory rule is satisfied only if it can reasonably be concluded that obtaining a tax benefit was the principal purpose of entry into the scheme. In this respect, the Australian Capital Territory rule is similar to the Queensland rule. The matters to which regard must be had in determining purpose under the Australian Capital Territory rule are similar to those that must be considered under the Queensland rule.

4.3.2 Reconstructive Component

The reconstructive component of the Australian Capital Territory rule is similar to the reconstructive component of the Victorian rule. Under the Australian Capital Territory rule, if the Commissioner for Australian Capital Territory Revenue “is satisfied” that a person has used a tax avoidance scheme, the Commissioner may:

- determine the tax to which the person and other persons would have been liable apart from the scheme; and
- take the action that he or she considers necessary to allow assessments of tax so determined.

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92 “Scheme” includes –
   (a) any plan, action or conduct of a person; and
   (b) any trust, agreement, arrangement or other understanding between persons, whether oral or in writing, whether express or implied and whether or not it is intended to be legally binding; and
   (c) any series or combination of schemes referred to in paragraphs (a) and (b).

93 Taxation Administration Act 1999 (ACT), s 8(5).
94 See Duties Act 2001 (Qld), s 433(1)(c).
95 Under s 8(5) of the Taxation Administration Act 1999 (ACT).
96 Section 435 of the Duties Act 2001 (Qld).
97 Section 69C(1) of the Duties Act 2000 (Vic), discussed above in the text accompanying notes 76-88 above.
98 Taxation Administration Act 1999 (ACT), s 8(1)(a).
99 Taxation Administration Act 1999 (ACT), s 8(1)(b).
The expression “is satisfied” is also found in s 65 of the Migration Act 1958 (Cth), which provides that a protection visa must be granted if the relevant decision maker is satisfied that the visa applicant is someone to whom Australia has protection obligations. In V872/00A v Minister for Immigration and Multicultural Affairs, Hill J referred to the expression in the context of s 65 and observed that:

[T]he issue before the Tribunal is not whether the applicant is a person to whom Australia has protection obligations. Rather, the issue is whether on the material before it the Tribunal is satisfied that Australia has, towards the applicant, protection obligations. The existence of that element of satisfaction provides a degree of flexibility in the decision making process.

As is the case with the reconstructive component of the Victorian rule, in the context of the reconstructive component of the Australian Capital Territory rule it is trite to note that the Commissioner’s satisfaction must be in accordance with law and it is critical that the Commissioner’s determinations are founded upon relevant facts that justify such determinations.

Under s 9 of the Taxation Administration Act 1999 (ACT), the Commissioner is authorised to make an assessment of tax liability in accordance with “the legal interpretations and assessment practices generally applied by the Commissioner to matters of that kind at the time the tax liability arose”. This is a somewhat vague expression in that it may not always be clear what the relevant “interpretations and assessment practices” may be in a given case and what meaning to attribute to the expression “matters of that kind”.

100 (2002) 122 FCR 57.
101 Ibid 60. See also Minister for Immigration and Ethnic Affairs v Wu (1996) 185 CLR 259; and Minister for Immigration and Ethnic Affairs v Eshetu (1999) 197 CLR 611.
102 Section 69C(1) of the Duties Act 2000 (Vic), discussed above in the text accompanying notes 76-80 above.
5. LESSONS FROM INCOME TAXATION

The Queensland, Victorian and Australian Capital Territory duties general anti-avoidance rules are based on broad principles and design that have been employed in Pt IVA of the ITAA36 and Div 165 of the A New Tax System (Goods and Services Tax) Act 1999 (Cth). Part IVA of the ITAA36 has been considered by the Courts on various occasions, and the principles from these cases may be used to anticipate possible interpretations of the Queensland, Victorian and Australian Capital Territory rules.


105 See, eg, Pearce and Geddes, above n 74, 77-8, although note Fullagar J’s reservation to a similar approach in Reserve Bank of Australia v Commissioner of Pay-roll Tax (Vic) (1985) 16 ATR 404, 411 ("RBA").
5.1 Identifying the “Scheme”

The Queensland, Victorian and Australian Capital Territory general anti-avoidance rules require there to be a “scheme”. A conclusion as to the tax benefit and purpose must be made by reference to a specific scheme.

In relation to Pt IVA of the ITAA36, it has been held that the Federal Commissioner of Taxation has significant discretion in the identification and particularisation of the relevant scheme by reference to which the Commissioner seeks to apply Pt IVA. In FC of T v Peabody, the High Court held that, within a wider scheme which has been identified, the Commissioner is permitted to rely upon a narrower scheme as meeting the requirements of Pt IVA. This is possible provided:

- the decision to rely upon the narrower scheme does not cause embarrassment or surprise to the other side; and
- the circumstances are capable of standing on their own as a scheme within s 177A of the ITAA36 without being robbed of all practical meaning.

In FC of T v Hart, Gummow and Hayne JJ expressed strong reservations about the requirement that the circumstances must be capable of standing on their own as a scheme without being robbed of all practical meaning. Their Honours referred to the expression “robbed of all practical meaning” and remarked that this:

appears to have been understood ... as a criterion which must be applied in deciding whether there is a scheme to which Pt IVA applies. That is not right. First, it is far from clear what legal test is

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106 Duties Act 1997 (Qld), s 433(1)(a); Duties Act 2000 (Vic), ss 69B and 89H; Taxation Administration Act 1999 (ACT), s 8(5).
107 Duties Act 1997 (Qld), ss 433(1)(a) and 433(1)(b); Duties Act 2000 (Vic), ss 69B and 89H; and Taxation Administration Act 1999 (ACT), s 8(5).
intended by saying that a scheme must “stand on its own feet”. It is not clear how the metaphor is to be translated into legal principle. Secondly, ... the words “robbed of all practical meaning”, which were adopted in Peabody, were taken from Inland Revenue Commissioners v Brebner. There they were used in a very different context ... The legislation ... in Brebner required comparison with what the statute called “bona fide commercial reasons”. ... What Lord Pearce said would be “robbed of all practical meaning”, if one part of an arrangement were to be isolated from other parts, was the sub-section, not the arrangement. Thirdly, and most importantly, there is no basis to be found in the words used in Pt IVA for the introduction of some criterion additional to those identified in the Act itself.\textsuperscript{111}

Whilst there is merit in these reservations, the test was expressed and supported by a strong and unanimous High Court authority\textsuperscript{112} and cannot be denied operation by two judges questioning its legal content and practical operation.\textsuperscript{113}

If the relevant Revenue Commissioner erroneously identifies the relevant scheme for the purposes of the duties general anti-avoidance rules, that will result in the wrongful exercise of discretion conferred under the relevant rule only if the duty benefit which the Commissioner purports to cancel is not a duty benefit within the meaning of the rule.\textsuperscript{114} As the High Court indicated in Peabody, that is unlikely to be the case if the error goes to the mere detail of the scheme relied upon by the Commissioner.\textsuperscript{115}

\begin{footnotesize}
\begin{enumerate}
\item Questionable reservations have the support of high court authority.
\item Peabody (1994) 181 CLR 359, 382 (per Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ).
\end{enumerate}
\end{footnotesize}
DUTIES GENERAL AVOIDANCE RULES

Territory general anti-avoidance rules,\(^{116}\) and the manner in which a “scheme” for the purposes of the general anti-avoidance rule in Pt IVA of the ITAA36 has been interpreted by the courts,\(^{117}\) it is submitted that in practice little will turn on the question whether there is a scheme. Almost anything can constitute a scheme, and further the scheme can be reformulated in any way necessary to support findings as to a tax benefit and conclusions as to purpose.\(^{118}\)

5.2 Requirement of a Tax Benefit

Unless there is some tax benefit (howsoever defined or described) that derives or results from the scheme, there can be no relevant alteration of the incidence to taxation and therefore no basis, in law or policy, for the application of general anti-avoidance rules.\(^{119}\)

Section 434(1) of the *Duties Act 2001* (Qld) states that a “duty benefit” is obtained by an entity for the purposes of the Queensland duties general anti-avoidance rule if the amount of duty payable by that entity (leaving aside the general anti-avoidance rule) is or could reasonably be expected to be less than it would have been apart from the scheme.\(^{120}\) Under the Victorian transfer duty and land-rich duty general anti-avoidance rules, the relevant benefit is the elimination, reduction or postponement of any person’s liability to pay transfer duty or land-rich duty, if this benefit would not have been obtained “but for” the scheme.\(^{121}\)

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\(^{116}\) See Sch 6 to the *Duties Act 1997* (Qld); s 8(5) of the *Taxation Administration Act 1999* (ACT); and ss 69B(2) and 89H(2) of the *Duties Act 2000* (Vic).


\(^{118}\) Compare Deutsch et al, above n 114, 3.

\(^{119}\) Orow, *Seriously Flawed*, above n 3, 57; Orow, *Uncertainty Rules*, above n 3, 35; and Orow, above n 1, 76.

\(^{120}\) Compare s 8(5) of the *Taxation Administration Act 1999* (ACT).

\(^{121}\) *Duties Act 2000* (Vic), ss 69B, 69C, 89H and 89I.
In comparison, Pt IVA of the ITAA36 refers to what might reasonably be expected to have happened if the scheme had not been entered into or carried out.\textsuperscript{122} The High Court in \textit{Peabody} held that a reasonable expectation for the purposes of Pt IVA requires more than a possibility.\textsuperscript{123} It involves a prediction as to the events that would have occurred if the scheme had not been entered into or carried out and that prediction must be sufficiently reliable for it to be regarded as reasonable.\textsuperscript{124}

The notions of scheme and tax benefit are by their very nature not capable of distinguishing between unacceptable tax avoidance and acceptable tax planning. The notion of tax benefit is particularly problematic because duties legislation contains a range of choices that taxpayers are able to make which have different tax consequences. Where taxpayers merely make a choice between alternatives that the legislation itself lays open to them, can it be said that there is a tax benefit? Like s 177C(2) of the ITAA36, ss 433(1)(a) and 433(1)(b) of the \textit{Duties Act 2001} (Qld) seek to anticipate this problem by permitting benefits attributable to an exemption or concession from duty under the \textit{Duties Act 2001} (Qld). There is no equivalent of ss 433(1)(a) and 433(1)(b) of the \textit{Duties Act 2001} (Qld) in the Victorian and Australian Capital Territory general anti-avoidance rules, meaning that exemptions or concessions from duty under the \textit{Duties Acts} of these jurisdictions might potentially constitute tax benefits and subsequently be caught by the rules. Unlike s 177C(2) of the ITAA36 however, ss 433(1)(a) and 433(1)(b) of the \textit{Duties Act 2001} (Qld) are not on their face limited to schemes that are not entered into or carried out for the purpose of creating any circumstance or state of affairs the existence of which is necessary to enable the exemption or concession from duty under the \textit{Duties Act 2001} (Qld) to be obtained.

\textsuperscript{122} ITAA36, s 177C(1).
\textsuperscript{123} \textit{Peabody} (1994) 181 CLR 359, 385 (per Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ).
\textsuperscript{124} Ibid citing \textit{Dunn v Shapowloff} [1978] 2 NSWLR 235, 249 (per Mahoney JA).
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Further, unlike s 177C(2) of the ITAA36, ss 433(1)(a) and 433(1)(b) of the Duties Act 2001 (Qld) do not appear to be limited to exemptions or concessions “expressly provided for” by the Act. They may therefore extend to exemptions or concessions that are merely open under the Duties Act 2001 (Qld). In relation to business structures, it has been held that while the ITAA36 recognises partnerships, trusts and companies, the use of one or other of these vehicles is not a choice “expressly” provided for in the Act. Absent this express limitation in ss 433(1)(a) and 433(1)(b) of the Duties Act 2001 (Qld), it may be questioned whether these sections are restricted in this way. However, because much tax avoidance owes its existence to choices under tax legislation, an expanded choice principle would have the necessary consequence of reducing the general anti-avoidance rule in the Duties Act 2001 (Qld) to irrelevance. It is submitted that it would be more sensible to limit choices potentially available under the Duties Act 2001 (Qld) to choices that are consistent with the general purpose and policy of the particular provisions that grant the relevant choices.

5.3 Purpose

5.3.1 Queensland and Australian Capital Territory

The general anti-avoidance rule in the Duties Act 2001 (Qld) applies to a scheme where, having regard to a number of objective factors or matters, it is reasonable to conclude that one of the scheme participants who entered into or carried out the scheme (or any part of it) did so for the sole or dominant purpose of enabling the relevant taxpayer to obtain a duty benefit from the scheme. Under s 435 of the Act, these matters are:

- the circumstances surrounding the scheme;
• the purpose of the Act or a provision of the Act, whether or not that purpose is expressly stated;\(^\text{129}\)
• the effect that the Act would have in relation to the scheme apart from the anti-avoidance provision;\(^\text{130}\)
• any change in the financial position of the taxpayer (or any person who has, or has had, any connection with the taxpayer) that has resulted, will result, or may reasonably be expected to result from the scheme;\(^\text{131}\)
• any other consequence for the taxpayer or any related person of the scheme being entered into or carried out;\(^\text{132}\) and
• the nature of any connection between the taxpayer and any related person.\(^\text{133}\)

These matters are similar to those that a Court must consider in determining the dominant purpose under s 177D(b) of the ITAA36 and s 8(5) of the *Taxation Administration Act 1999* (ACT). In *FC of T v Consolidated Press Holdings Ltd*,\(^\text{134}\) the High Court held that it was not necessary for a Court to refer to the s 177D(b) matters individually and that a Court is permitted to take all these specified matters into account in forming “a global assessment of purpose”.\(^\text{135}\)

Because of the similarity between s 177D(b) of the ITAA36, s 435 of the *Duties Act 2001* (Qld) and s 8(5) of the *Taxation Administration Act 1999* (ACT), it is submitted that a similar approach may be taken in relation to the Queensland and Australian Capital Territory rules.\(^\text{136}\)

129 *Duties Act 2001* (Qld), s 435(1)(d).
130 *Duties Act 2001* (Qld), s 435(1)(e).
131 *Duties Act 2001* (Qld), ss 435(1)(f) and 435(1)(g).
132 *Duties Act 2001* (Qld), s 435(1)(h).
133 *Duties Act 2001* (Qld), s 435(1)(i).
135 Ibid 263 (per Gleeson CJ, Gaudron, Gummow, Hayne and Callinan JJ).
136 See, eg, Pearce and Geddes, above n 74, 77-8; although note *RBA* (1985) 16 ATR 404, 411 (per Fullagar J).
5.3.2 Approach To Purpose Under Part IVA

According to Hill J in *FC of T v Sleight*, the following propositions in relation to purpose may be gleaned from the cases on Pt IVA:

- Part IVA does not authorise evidence of the subjective purpose or motivation of a particular person to be considered. The subjective state of mind of a person is not a matter listed in s 177D(b) of the ITAA36. Rather, this provision requires consideration of the eight matters listed and no other matters. Section 177D(b) therefore seeks to establish the conclusion which would be reached by reference to what may be referred to as objective factors, that conclusion being however, a conclusion as to the purpose of a person who entered into or carried out the scheme.

- The reference to dominant purpose in a case where more than one purpose is present is a reference to the “ruling, prevailing or most influential” purpose.

- The conclusion as to dominant purpose may be reached not only with respect to the dominant purpose of the taxpayer. It may also be reached by reference to the dominant purpose of any other person or persons, so long as they are persons who entered into or carried out the scheme or any part of it. Likewise, the purpose of an adviser may be attributed to the taxpayer in an appropriate case.

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137 2004 ATC 4477 ("Sleight").
138 Ibid 4491-2 (per Hill J, with whom Hely J agreed).
139 *FC of T v Zoffanies Pty Ltd* (2003) 54 ATR 280, 294-5 (per Hill J, with whom Hely and Giles JJ relevantly agreed).
140 *FC of T v Spotless Services Ltd* (1996) 186 CLR 404, 423 (per Brennan CJ, Dawson, Toohey, Gaudron, Gummow and Kirby JJ) ("Spotless Services").
141 *Consolidated Press* (2001) 207 CLR 235, 264 (per Gleeson CJ, Gaudron, Gummow, Hayne and Callinan JJ)
• As noted above,\textsuperscript{142} it is possible to arrive at the conclusion as to purpose by making a global assessment of the facts, so long as it is clear that the relevant eight factors have been taken into account.\textsuperscript{143}

• Some of the eight factors (and there is plainly some overlap between them) may point one way, others may point in the opposite direction, and some may be neutral. It is the evaluation of these matters, alone and in combination, some for, some against, that Pt IVA requires in order for the conclusion to which Pt IVA refers to be reached.\textsuperscript{144}

• There is no inconsistency between a finding that a taxpayer’s purpose is the pursuit of commercial gain in the course of carrying on a business, and a finding that the dominant purpose is to enable the taxpayer to obtain a tax benefit.\textsuperscript{145}

In reality, there is no necessary dichotomy between commercial and tax avoidance purposes, particularly because both seek to achieve the same practical results. Tax forms an integral part of commercial activity and hence sound commercial transactions must consider the taxation implications of proposed transactions.\textsuperscript{146}

In \textit{FC of T v Spotless Services Ltd},\textsuperscript{147} the Full Federal Court considered the potential application of Pt IVA to an arrangement which involved an investment offshore, where as a result of the operation of the foreign taxation laws and the existing Australian taxation laws, the net return after payment of all applicable taxes and other costs, was higher than in Australia. The Court concluded that in

\textsuperscript{142} Text accompanying note 135 above.
\textsuperscript{144} \textit{Peabody v FC of T} (1993) 40 FCR 531, 543 (per Hill J).
\textsuperscript{146} Deutsch et al, above n 114, 6.
\textsuperscript{147} (1996) 186 CLR 404.
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investing offshore it cannot objectively be said that the dominant purpose of the taxpayer was to obtain a tax benefit. The purpose was to obtain the maximum return on the money invested after payment of all applicable costs including tax. In this regard the interest rate offered on the investment offshore would admit of a rational commercial decision to invest there in preference to Australia, even though the rate offered on the investment offshore was lower than the rate offered in Australia.

The High Court rejected the dichotomy between a rational commercial decision on the one hand and a dominant purpose to obtain a tax benefit on the other. The Court said that a taxpayer may enter into or carry out a scheme within the meaning of Pt IVA, for the dominant purpose of enabling the relevant taxpayer to obtain a tax benefit, where that dominant purpose is consistent with the pursuit of commercial gain in the course of carrying on a business. In other words, a decision to avoid or minimise liability to taxation can itself admit of a rational commercial decision.

The Federal Court sought to place some sensible limits on the potential scope of Pt IVA by denying it any operation on arrangements which are explicable by reference to commercial purposes and considerations. Whilst that is a sound approach on policy grounds because it promotes a degree of certainty in commercial dealings, it creates problems in distinguishing “commercial” from “tax purposes”.\(^\text{148}\) The High Court in *Spotless Services* recognised the fact that there is no necessary dichotomy between commercial and tax purposes and accordingly Pt IVA applies in accordance with its terms.\(^\text{149}\) That is:

- if taxpayers take steps to maximise their after tax return; and

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\(^{148}\) Deutsch et al, above n 114, 6.

they do so in a manner indicating a dominant purpose to obtain a tax benefit, then the criteria which must be satisfied before the Commissioner is able to apply the reconstructive provisions of Pt IVA are met. It is submitted that a Court might take the same approach under Ch 11 of the Duties Act 2001 (Qld) and s 8 of the Taxation Administration Act 1999 (ACT).

Principal or dominant purpose conclusions can arguably be made in many ordinary tax planning arrangements. In Spotless Services, the High Court concluded that the dominant purpose of the taxpayers in taking steps to ensure that the source of the interest was located offshore was to achieve a tax benefit in Australia in the form of the exemption under former s 23(q) of the ITAA36. Without that benefit, the proposal would have made no sense.

By way of comparison, in FC of T v Mochkin the Full Federal Court held that Pt IVA did not apply to an arrangement under which the taxpayer’s family trust companies were used to carry on a stockbroking consultancy business. Before this, the taxpayer (an investment consultant) acted as agent for stockbroking firms in a personal capacity. The Court accepted that the relevant arrangements were not entered into for the dominant purpose of obtaining a tax benefit, but rather were implemented mainly to limit personal exposure to the liabilities arising from the conduct of the business. Although the structure used by the taxpayer had tax advantages (eg avoiding the income of the business being taxed at the taxpayer’s higher marginal tax rate), the Court found that they were subsidiary to the dominant purpose of obtaining protection from the very real risk of personal liability. The taxpayer had

151 See, eg, Pearce and Geddes, above n 74, 77-8; although note RBA (1985) 16 ATR 404, 411 (per Fullagar J).
152 As Deutsch et al, above n 114, 6 point out.
154 Cf the “change mid-stream” argument of Barwick CJ in Mullens v FC of T (1976) 135 CLR 290, 302-7.
previously been sued, and did not personally guarantee the performance of his family trust companies’ obligations.

In view of the foregoing, it is submitted that in the context of Ch 11 of the Duties Act 2001 (Qld) and s 8 of the Taxation Administration Act 1999 (ACT), whether a dominant or principal purpose of tax avoidance is present will very much depend on the facts. In view of the similarity of Ch 11 of the Duties Act 2001 (Qld) and s 8 of the Taxation Administration Act 1999 (ACT) to the terms of Pt IVA of the ITAA36, and the manner in which Pt IVA has been interpreted and applied by the High Court, Ch 11 of the Duties Act 2001 (Qld) and s 8 of the Taxation Administration Act 1999 (ACT) have a substantial and broad operation that extends to arrangements of all kinds regardless of whether they are of a tax planning character. In effect, the Queensland Commissioner of State Revenue and Commissioner for Australian Capital Territory Revenue have been given a very broad power to impugn arrangements of all kinds unguided by any discernible general principle or rule.155

5.3.3 Victoria

As noted above,156 the definitional component of the transfer duty general anti-avoidance rule is satisfied where the “purpose or effect” of a scheme is the elimination, reduction or postponement of any person’s liability to pay transfer duty.157 This raises a question as to the meaning of the word “effect” and its relationship to the word “purpose”.158

5.3.4 Effect As Separate From Purpose

On one view, the use of the expression purpose or effect proceeds on the basis that there is a difference between the purpose

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155 Compare Deutsch et al, above n 114, 7; and Orow, Uncertainty Rules, above n 3, 37.
156 See text accompanying notes 70-75 above.
157 Duties Act 2000 (Vic), s 69B(1).
158 The observations made here apply equally to the land-rich duty general anti-avoidance rule in Ch 3, Pt 2, Div 6 of the Duties Act 2000 (Vic).
and effect of a scheme. On this view, the purpose of the scheme looks to the actual driving force behind the scheme whereas the effect looks to the actual consequence, result or outcome of the scheme. It would follow that regardless of why, objectively, the scheme was entered into or carried out, if the scheme actually results in the reduction, elimination or postponement of liability to transfer duty then the rule would apply. The presence of commercial or non-tax considerations or influences would be irrelevant.

On this construction of the word “effect”, the first requirement of “purpose” would be made completely redundant because the presence of some form of a transfer duty gain is a condition precedent to the application of the rule and yet the presence of such a gain would provide the impugned effect. This follows because a purpose to avoid liability to duty (by means of reduction, elimination or postponement) is not enough unless the scheme actually results in a duty gain and hence would have the requisite impermissible effect.

The Victorian transfer duty general anti-avoidance rule may be compared to previous s 260 of the ITAA36, the predecessor to Pt IVA. Section 260 was expressed to operate upon contracts, agreements or arrangements which have or purport to have any of the following purposes or effects:

- altering the incidence of any income tax;

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159 For an application of the literal approach to statutory interpretation in a stamp duty context, see Brisbane Water County Council v Commissioner of Stamp Duties [1979] 1 NSWLR 320, 326-7 (per Waddell J).

160 For authority suggesting that the word “or” indicates that the words “purpose” and “effect” should be read disjunctively, see, eg, Finance Facilities Pty Ltd v FC of T (1971) 127 CLR 106, 133 (per Windeyer J); Nettlefold Advertising Pty Ltd v Nettlefold Signs Pty Ltd (1998) 160 ALR 184, 200 (per Wilcox J, with whom Tamberlin and Merkel JJ relevantly agreed); and Pearce and Geddes, above n 74, 296.

161 As pointed out in Victoria, Parliamentary Debates, Legislative Assembly, 2 June 2004, 53 (Robert Clark, Member for Box Hill).

162 See the terms of 69B and 69C of the Duties Act 2000 (Vic).
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- relieving any person from liability to pay any income tax or make any return;
- defeating, evading or avoiding any duty or liability imposed on any person by the ITAA36; or
- preventing the operation of the Act in any respect.\(^{163}\)

It was observed early in the life of s 260 that if the section were construed literally, it would “extend to every transaction whether voluntary or for value which had the effect of reducing the income of the taxpayer”.\(^{164}\) This was the difficulty confronting Courts when interpreting s 260.\(^{165}\) S Hill J observed in *Davis v FC of T*,\(^{166}\) the Court’s task is to adopt a construction which places a general anti-avoidance rule “in a proper perspective vis-à-vis the other provisions of the Act while on the other hand giving the section work to do in an appropriate case”.\(^{167}\)

5.3.5 Effect As an Element of Purpose

The alternative to the view that there is a difference between the purpose and effect of a scheme is to treat purpose as an element in assessing the effect of a scheme. On this view, the determination of the effect of the impugned scheme requires an examination of the consequences of the scheme and the objective purpose of the scheme. As noted,\(^{168}\) a mere purpose to avoid duty can never be enough unless the scheme has that effect.

The question as to the meaning of the word effect and its relationship to the word purpose has been raised in the context of

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\(^{163}\) For a detailed discussion of s 260, see Spry, above n 18.

\(^{164}\) *Deputy FC of T v Purcell* (1921) 29 CLR 464, 466 (per Knox J). See also *Davis v FC of T* (1989) 86 ALR 195, 225-6 (per Hill J).


\(^{166}\) (1989) 86 ALR 195.

\(^{167}\) Ibid 225.

\(^{168}\) See text accompanying notes 161-162 above.
s 177E(1)(a) of the ITAA36. Section 177E(1)(a) provides that one of the elements of a “dividend stripping scheme” is:

(i). a scheme by way of or in the nature of dividend stripping; or

(ii). a scheme having substantially the effect of a scheme by way of or in the nature of a dividend stripping.\(^{169}\)

The meaning of this section was considered in *Consolidated Press*.\(^{170}\) At first instance, Hill J took the view that:

- there is a difference between a dividend stripping scheme, and a scheme that has the effect of such a scheme;
- a tax avoidance purpose is relevant to a characterisation of a scheme, but not to a determination of its effect; and
- that effect is to be judged in relation to the vendor of shares in the target company and the target company itself.\(^{171}\)

A unanimous High Court disagreed with Hill J, noting that:

The difficulty with this process of reasoning is that it fails to follow through the logic of the purposive construction … [of] s 177E(1)(a)(i). Furthermore, as the Full Court observed, it gives s 177E(1)(a)(ii) a meaning which appears to make s 177E(1)(a)(i) otiose. If sub-par (ii) meant what Hill J said, it would never be necessary to look past the effect of a scheme.

... The reference in sub-par (ii) to effect does not require the element of purpose to be discarded. In particular, it does not require that any scheme which produces a substantial consequence which is in any respect the same as a consequence of a dividend stripping scheme is within the sub-paragraph.\(^{172}\)

\(^{169}\) Emphasis added.


\(^{171}\) *CPH Property Pty Ltd v FC of T* (1998) 88 FCR 21, 49-50.

\(^{172}\) *Consolidated Press* (2001) 207 CLR 235, 276 (per Gleeson CJ, Gaudron, Gummow, Hayne and Callinan JJ) [emphasis added].
It is submitted that the expression “purpose or effect” should be interpreted and applied as a composite expression that requires a determination of the purpose and effect of the scheme.\(^{173}\) A mere tax effect without the impermissible tax avoidance purpose would not be enough and likewise a mere tax avoidance purpose without the impermissible tax effect would not be enough. It follows that the general transfer duty anti-avoidance rule would only apply where a scheme is tainted by a purpose of reducing, eliminating or postponing transfer duty that is not merely incidental and that the scheme actually or potentially has the effect of reducing, eliminating or postponing liability to transfer duty.

This is consistent with the broad scheme and policy of the legislation. In essence, purpose looks to the factors that explain why the scheme was entered into or carried out whilst effect looks to its consequences. Where s 69B(1) (at the end of the definition of “tax avoidance scheme”) refers to a scheme that has the relevant purpose or effect “whether the scheme had that effect at the time it was entered into, or only subsequently”, it is submitted that Parliament intended the rule to apply to a scheme that is tainted by a tax avoidance purpose at the time when it was entered into or carried out but has a delayed tax avoidance effect.

Unlike the Queensland and Australian Capital Territory general anti-avoidance rules, the Victorian transfer duty general anti-avoidance rule does not specify the matters that must be considered in determining the purpose or effect of the impugned scheme. However, the specification of such factors is not necessary because the rule applies where one of the purposes or effects is tax avoidance. This is subject to only one qualification that such a purpose or effect is not merely incidental to another purpose or effect of the scheme. Effectively, the requisite threshold is very low and such a purpose

\(^{173}\) Compare Electricity Supply Industry Superannuation (Qld) Ltd v Deputy FC of T (2003) 199 ALR 339 (a purpose, but not an incidental purpose, of enabling the taxpayer to obtain a franking credit benefit).
may be gleaned from any of the surrounding circumstances that explain the structure and implementation of the scheme.

In practice, however, Courts are likely to identify and focus on what may be called purpose indicators similar to those stated in Pt IVA of the ITAA36 and those specified in the Queensland and Australian Capital Territory general anti-avoidance rules. 174 Whilst technically the presence of one or more of these indicators is not itself conclusive of the question of purpose, it is necessary to remember that the threshold is very low and hence it would not be a significant conceptual leap to conclude that one of the purposes or effects of the impugned scheme was to avoid transfer duty.

No doubt there will be other matters that Courts would identify as relevant to the conclusion. Tax avoidance has conventionally been defined by reference to certain observable criteria and functional characteristics which include:

- the extent to which the transaction was influenced or actuated by the proscribed taxation purpose;
- whether the transaction was artificial or contrived (or both);
- whether the transaction sought to exploit statutory loopholes or weaknesses; and
- whether the transaction lacks economic reality. 175

These attributes are arguably not unique to tax avoidance practices and certainly are, in themselves, not sufficient and conclusive of whether a particular tax advantage should be permitted or denied.

174 See text accompanying notes 127-136 above.
6. APPLICATION OF THE DOCTRINE OF FISCAL NULLITY

In the early 1980s, the House of Lords adopted an approach to statutory interpretation which sought to forestall tax-minimisation schemes which are contrary to the purpose and policy of the tax legislation. Known as the doctrine of fiscal nullity (or the Ramsay doctrine, after the case in which it was first espoused), it operates to see through a series of individual transactions and characterises the overall arrangement by reference to the end result of the series as a whole rather than to each individual transaction considered.

According to Lord Brightman in Furniss (Inspector of Taxes) v Dawson (DER), in order for the operation of the doctrine to be triggered:

- there must be a pre-ordained series of transactions or one single composite transaction. This composite transaction may or may not include the achievement of a legitimate commercial or business end; and
- there must be steps inserted which have no commercial or business purpose apart from the avoidance of liability to tax, not no business effect.

If those ingredients exist, the inserted steps are to be disregarded for fiscal purposes and the Court must then look at the end result.

In John v FC of T, the High Court referred to the doctrine of fiscal nullity as “essentially a principle arising from the construction

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176 WT Ramsay Ltd v Inland Revenue Commissioners [1982] AC 300 (“Ramsay”).
180 Furniss [1984] AC 474, 527 (per Lord Brightman); Craven [1989] AC 398, 500 (per Lord Oliver); and McGuckian [1997] 1 WLR 991.
of the statute”. The Court’s view was that the doctrine does not apply to the ITAA36 because the Act already contains a general anti-avoidance provision. By parity of reasoning, it is submitted that the presence of a general anti-avoidance provision in the Duties Act 2001 (Qld) and the Taxation Administration Act 1999 (ACT) similarly renders the doctrine inapplicable under the relevant duties legislation, and the existence of transfer duty and land-rich duty general anti-avoidance provisions in the Duties Act 2000 (Vic) means that the doctrine does not apply to these two duties. In contrast, in Ingram v Inland Revenue Commissioners the doctrine of fiscal nullity was held to apply to stamp duty legislation in the United Kingdom.

The High Court considered the doctrine of fiscal nullity in a stamp duty context in Ashwick (Vic) No 4 Pty Ltd v Comptroller of Stamps (Vic). In that case, Carlton and United Breweries Ltd (“CUB”) issued 10,000 redeemable preference shares to the taxpayer in exchange for $1,000,000. These shares were then redeemed by CUB. In consideration of the redemption, CUB transferred to the taxpayer a hotel valued at $899,557 and paid the taxpayer $100,443.

It was held that the hotel transfer clearly fell within cl 19 of Sch 3 to the Stamps Act 1958 (Vic) which exempted from duty any instrument for the conveyance of real property held by a company, where the conveyance is made to a shareholder in the course of any distribution of the company’s assets in consequence of a capital reduction. However, the High Court held that the case was an inappropriate one for the application of the doctrine of fiscal nullity, even if the doctrine did apply to stamp duty in Australia. Essentially, the Court’s view was that although the result was pre-ordained, the precise steps by which it was achieved were not.

182 Ibid 434 (per Mason CJ, Wilson, Dawson, Toohey and Gaudron JJ).
183 [1986] 2 WLR 598.
185 (1989) 20 ATR 823.
Supreme Court of Western Australia also left open the possibility of whether the doctrine of fiscal nullity applies to stamp duty.

Even if the doctrine does apply to stamp duty in jurisdictions or areas that are not covered by the general anti-avoidance provisions, the House of Lords has recently reformulated the principle with a view to shifting the emphasis away from the technical steps of the principle to what the principle is seeking to achieve. In MacNiven (Her Majesty's Inspector of Taxes) v Westmoreland Investments Ltd, Lord Hoffman distinguished between commercial and purely legal or juristic concepts used in a taxing statute. According to his Lordship, the doctrine of fiscal nullity applies where, on a proper construction of the terms of the statute, it is found that Parliament intended to refer to commercial concepts. Where the statute refers to purely legal concepts then it makes no difference that the relevant transaction has no business purpose. His Lordship added:

Even if a statutory expression refers to a business or economic concept, one cannot disregard a transaction which comes within the statutory language, construed in the correct commercial sense, simply on the ground that it was entered into solely for tax reasons. Business concepts have their boundaries no less than legal ones.

The Westmoreland formulation of the doctrine of fiscal nullity expressly rejects the requirement of a business purpose as a general implication which colours the operation of the whole revenue statute without regard to the question whether the relevant statute contemplates such an implication. It is submitted that the

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186 Namely New South Wales and Tasmania, and the hire of goods, insurance, motor vehicle and sale of livestock duties under the Duties Act 2000 (Vic). South Australia has a provision dealing with the avoidance or evasion of duty on conveyances on sale (s 70 of the Stamp Duties Act 1923 (SA)), and Western Australia has a section on land-rich duty avoidance (s 76AV of the Stamp Act 1921 (WA)). The Northern Territory’s stamp duty anti-avoidance rule (s 4B of the Taxation (Administration) Act 1978 (NT)) was discussed in notes 71 and 72 above.


188 Ibid 334 (per Lord Hoffman, with whom Lords Hope, Hutton and Hobhouse agreed).
Westmoreland formulation would operate to deny a transaction devoid of business purpose (or one that lacks any discernible non-tax purpose) the hoped for tax effect where the text and context of the relevant revenue law indicate a function, pattern and design characteristic of commercial kind transactions. This is expressed as a requirement to determine whether the taxing statute is concerned with commercial or juristic concepts. Where the statute is concerned with purely legal or juristic concepts and the relevant transaction falls within the relevant legal description, then the absence of any business or commercial purpose could not justify the application of the doctrine of fiscal nullity and the denial of any taxation advantages.\(^{189}\)

The Westmoreland formulation brings the doctrine of fiscal nullity closer to other common law doctrines. The United States’ doctrine of business purpose is an interpretive rule that looks to the terms and scheme of the revenue law to determine its intended legal operation. It demands the presence of some business purpose only where the terms and scheme of the relevant revenue law (properly interpreted) predicate or justify such conclusion. This was the original formulation of the principle by Learned Hand CJ in \textit{Gregory v Helvering}.\(^{190}\) In \textit{Stubart Investments Ltd v The Queen},\(^{191}\) the Supreme Court of Canada rejected the business purpose doctrine in its strict sense as a general implication that affects the operation of revenue law. The Court adopted the business purpose doctrine as an interpretive rule with the effect that the formal validity of transactions would not be sufficient or determinative where the provisions of the revenue law relate to identified business functions.

Even if the doctrine of fiscal nullity does apply to stamp duty in jurisdictions or areas that are not covered by the general anti-

\(^{190}\) 69 F 2d 809 (1934). See also Sutherland J’s comments on appeal in \textit{Gregory v Helvering}, 293 US 465, 469 (1935).
avoidance provisions, the actual application of the doctrine may therefore be limited. As has been noted, duties legislation:

imposes duty not upon the ultimate substantive outcome but upon the form and structure employed. In relation to transactions on which duty is imposed, duty may be payable at different rates or at concessional rates, depending on the circumstances. For example, if land is purchased, duty is incurred. If land is leased (even for a significant period) but no option to purchase is granted, no duty is payable. If assets are acquired without the acquisition of an interest in land, no duty is payable. If assets are acquired together with an interest in land, duty is payable upon both the value of the land and the assets.

In other circumstances, a taxpayer has a choice as to whether to buy company assets or opts [sic] to buy the shares in the company. The purchase of the assets would give rise to duty; the purchase of the shares gives rise to no duty. The taxpayer opts for the share purchase because there is no duty. Why is that not tax avoidance?

These outcomes are often anomalous but, if so, that is because the legislature has elected to tax some types of transactions differently to others. The differences in outcome arise from the very fact that the legislature has determined to treat certain transactions in a different manner to others.

192 Namely New South Wales and Tasmania, and the hire of goods, insurance, motor vehicle and sale of livestock duties under the Duties Act 2000 (Vic). South Australia has a provision dealing with the avoidance or evasion of duty on conveyances on sale (s 70 of the Stamp Duties Act 1923 (SA)), and Western Australia has a section on land-rich duty avoidance (s 76AV of the Stamp Act 1921 (WA)). The Northern Territory’s stamp duty anti-avoidance rule (s 4B of the Taxation (Administration) Act 1978 (NT)) was discussed in notes 71 and 72 above.

7. CONCLUSION

The introduction of the Queensland, Australian Capital Territory and Victorian duties general anti-avoidance rules is likely to create uncertainty in the operation of the law and pose a significant challenge to practitioners seeking to advise on dutiable transactions in Queensland, the Australian Capital Territory or Victoria. The relevant rule must be considered on every occasion where advice is provided on the potential application of duties legislation in these jurisdictions.

Victorian Courts face a greater challenge in the determination of the boundaries of the Victorian transfer duty and land-rich duty general anti-avoidance rules, because they contain very broad concepts and low thresholds to ensure a very broad and arguably indeterminate operation. Such a broad operation must be reconciled with perceived legislative intention and policy. Under a literal interpretation of the rules, a transaction may be impugned even though it may be commercial in every respect except for a purpose or effect of reducing or postponing liability to transfer duty or land-rich duty.