Revenue Law Journal

Volume 17 | Issue 1 Article 3

9-21-2007

Federal Commissioner Of Taxation V Hart:Did the High Court set the Threshold too Low?

Linda Zeman
lindazeman@hotmail.com

Follow this and additional works at: http://epublications.bond.edu.au/rlj

Recommended Citation
Zeman, Linda (2007) "Federal Commissioner Of Taxation V Hart:Did the High Court set the Threshold too Low?," *Revenue Law Journal*: Vol. 17: Iss. 1, Article 3.
Available at: http://epublications.bond.edu.au/rlj/vol17/iss1/3

This Journal Article is brought to you by the Faculty of Law at ePublications@bond. It has been accepted for inclusion in Revenue Law Journal by an authorized administrator of ePublications@bond. For more information, please contact Bond University's Repository Coordinator.

Federal Commissioner Of Taxation V Hart:Did the High Court set the Threshold too Low?

Abstract
When does legitimate taxation planning become tax avoidance prohibited by Part IVA of the Income Tax Assessment Act 1936? The most recent High Court consideration of this question occurred in Federal Commissioner of Taxation v Hart. This article argues that the High Court in Hart broadened the application of Part IVA contrary to the requirements of the legislation. The result is that arrangements Part IVA was not enacted to proscribe may now be caught in its net. Has the High Court in Hart spelt the end of 'legitimate taxation planning'?

This journal article is available in Revenue Law Journal: http://epublications.bond.edu.au/rlj/vol17/iss1/3

FEDERAL COMMISSIONER OF TAXATION V HART: DID THE HIGH COURT SET THE THRESHOLD TOO LOW?

LINDA ZEMAN*

When does legitimate taxation planning become tax avoidance prohibited by Part IVA of the Income Tax Assessment Act 1936? The most recent High Court consideration of this question occurred in *Federal Commissioner of Taxation v Hart*. This article argues that the High Court in *Hart* broadened the application of Part IVA contrary to the requirements of the legislation. The result is that arrangements Part IVA was not enacted to proscribe may now be caught in its net. Has the High Court in *Hart* spelt the end of 'legitimate taxation planning'?

INTRODUCTION

Was the arrangement entered into by the Harts one that Part IVA of the ITAA was enacted to strike down? This author does not think so. The Harts just wanted to borrow money to buy a new house and finance the retention of their former home as an income-producing property. They simply arranged for the second part of the borrowing to be more highly geared then the first utilising a 'wealth optimiser product'.[1]

This article suggests the High Court in *Commissioner of Taxation (Cth) v Hart*[2] ('Hart') broadened the application of Part IVA beyond the requirements of the Act. By broadening the application of Part IVA the High Court in Hart set the threshold for avoidance arrangements too low. This means arrangements Part IVA was not enacted to proscribe, including legitimate taxation planning, may be caught by the provision.

Central to the High Court's application of Part IVA in Hart was their interpretation of the 'scheme' requirement of Part IVA. It is argued the High Court in Hart reduced the requirement of a 'scheme' to a nullity. The more narrowly 'scheme' is defined the

---

* The author is a tax consultant employed at Greenwoods & Freehills Pty Limited.

1 The subjective motive of the taxpayer is irrelevant to the objective conclusion that needs to be reached to satisfy s 177D. However, note that in F Buffini, 'Loan was Not a Rort' *Australian Financial Review*, 28 May 2004, the Harts made it clear their subjective reason for entering the wealth optimiser structure was not tax; to quote Mr Hart, 'We thought, so there's a tax saving but that wasn't even a bit of a reason.' He expressed his disappointment that he did not get a chance to say what his motivation was.

2 (2004) 78 ALJR 875.

more likely it is the remaining Part IVA requirements will be satisfied, thereby broadening Part IVA. That the High Court reduced 'scheme' to a nullity may explain why the High Court and the Full Federal Court came to diametrically opposed conclusions about the application of Part IVA to the arrangement in Hart.[3]

1 – BACKGROUND

The history and interpretation of Part IVA

Part IVA was enacted on 27 May 1981 to replace s 260 of the 1936 Act.[4] On the introduction of the Bill containing Part IVA, then Treasurer, John Howard MP stated that Part IVA was designed to combat tax avoidance arrangements that are 'blatant, artificial or contrived.' Arrangements of a normal business or family kind, including those of a tax planning nature, were to be beyond the scope of Part IVA.[5] This limitation on the scope of Part IVA reflects the second limb of the test developed by the Privy Council to limit the operation of s 260. It is arguable that the second limb of the predication test informs Part IVA because the High Court made it clear in *Federal Commissioner of Taxation v Spotless Services Ltd ('Spotless')*[6] that previous court decisions in respect of s 260 had no operation in respect of Part IVA. Part IVA was to be construed and applied according to its own terms.[7]

Lord Denning formulated the two pronged test referred to above in *Newton v Federal Commissioner of Taxation*[8], and called it the 'predication test'.[9] The first limb of the predication test states that to bring an arrangement within the anti-avoidance section it must be possible to predicate that a transaction was implemented in a particular way to avoid tax. The first limb of the predication test was not incorporated into Part

---

3 Other potential explanations are beyond the scope of this article.

4 For more information on the legislative history of s 260 see: JH Momsen, 'Ordinary business or family dealing revisited' (2006) 41(1) TIA 33.

5 House of Reps, *Income Tax Laws Amendment Bill (No 2) 1981 (Cth)*, *Second Reading Speech* by the Hon John Howard MP at [5] – [7]. This is also stated in House of Reps, Income Tax Laws Amendment Bill (No 2) 1981, *Explanatory Memorandum*, 2.

6 (1996) 186 CLR 404.

7 Ibid, [186] (Brennan CJ, Dawson, Toohey, Gaudron, Gummow and Kirby JJ). To explore the history of Part IVA in greater detail see: G Cooper, 'The emerging High Court jurisprudence on Part IVA' (2006) *The Tax Specialist* vol 9 no 5, 234; and/or W Thompson, 'Applying Part IV' (2007) *The Tax Specialist* vol 10 no 4, 186.

8 *Newton v Federal Commissioner of Taxation* (1958) 98 CLR 1.

9 Ibid 8.

IVA.[10] The second limb of the test states that if you could not so predicate but had to acknowledge that the transaction could be explained in another way it did not come within the section. In Australia the second limb of the test was taken to mean that it was only if there was no valid commercial reason to explain the transaction that the predominant tax avoidance purpose could be established. This approach reached its climax under the Sir Garfield Barwick led High Court that upheld certain artificial and contrived arrangements on the basis that the predominant tax avoidance purpose was not established.[11] Part IVA was enacted in response to the problems encountered by s 260.

The Act states that the three requirements of Part IVA are sections 177A, 177C and 177D. Section 177D makes Part IVA applicable to a particular arrangement. Where it does s 177F becomes relevant. Part IVA gives the Commissioner the discretion to cancel a 'tax benefit' that has been obtained, or would, but for s 177F, be obtained, by a taxpayer in connection with a scheme to which Part IVA applies. Importantly, Part IVA requires a conclusion that links these concepts together – the scheme must be entered into with the purpose of obtaining a tax benefit in connection with the scheme.[12] None of the Part IVA requirements can operate on its own and for an arrangement to be caught by Part IVA each element must be satisfied.[13]

This article contends that the High Court in *Hart* incorporated the first limb of the predication test into their reasoning and application of Part IVA. That is, the High Court in *Hart* asked; but for a scheme with a *particular form, shape and structure* would a tax benefit as described in s 177C(1)(a) to (ba) be acquired. This is another way of expressing the first limb of the *Newton* predication test (ie, it must be possible to predicate that a transaction was implemented in a *particular way* to avoid tax). This construction is problematic because the more a scheme is limited to the structural elements that gave rise to the tax benefit the more likely it is that the dominant purpose of obtaining the tax benefit will be established. The first limb of the *Newton* test was not incorporated into Part IVA. The result is that the application of Part IVA is broadened and Part IVA may catch arrangements it was not enacted to proscribe.

---

10 House of Representatives, *Income Tax Laws Amendment Bill* (No 2) 1981, *Explanatory Memorandum*.

11 M Cashmere, 'Part IVA after Hart' (2005) 24 *AT Rev* 131, 132.

12 M Kobetsky, A O'Connell and M Stewart, *Income Tax – Text, Materials and Essential Cases* (5th edn, 2005) 640.

13 Ibid.

2 IDENTIFICATION OF THE SCHEME

The meaning of the High Court judgments in totem

It is difficult to determine the impact of the High Court's decision in *Hart* on the application of Part IVA, or identify any new propositions that emerged. This is because in *Hart* three separate judgments were delivered by five High Court justices on a 2:2:1 basis as compared with either the joint judgments of the Court in *Peabody,*[14] *Consolidated Press*[15] or the clear majority in *Spotless.*[16] However, it is suggested that the following propositions concerning the identification of a scheme for Part IVA purposes emerged from *Hart*:

1 Gummow and Hayne JJ expressly accepted the procedural conception of s 177A.[17] Gleeson CJ and McHugh and Callinan JJ impliedly accepted this conception by reducing the relevant scheme to the structural components of the loan that gave rise to the tax benefit;[18]

2 The majority of their Honours argue that the substance of the transaction will be considered as part of the s 177D(b) inquiry therefore the breadth of the scheme accepted for s 177A is inconsequential;[19] and

3 The *Peabody* 'capable of standing on its own feet' survived attack by Gummow and Hayne JJ; however, the remaining justices gave little if any indication of how the test translates into legal principle.

The High Court's acceptance of the narrow scheme can be contrasted with the Full Federal Court's application of s 177A in *Hart*. Hill, Hely and Conti JJ held that the relevant scheme commenced with the marketing of the loan to the taxpayers and concluded with the incurring of interest on Loan Account 1 and the repayment of capital and interest on Loan Account 2. The scheme was directed to a commercial end, the borrowing of money for use in financing and refinancing the two properties. Their Honours held that by accepting the narrower scheme put forward by the Commissioner Gyles J (single judge at first instance) had misinterpreted s 177A.[20]

---

14 *Federal Commissioner of Taxation v Peabody* (1994) 181 CLR 359, 382.

15 *Federal Commissioner of Taxation v Consolidated Press Holdings Ltd* (2001) 207 CLR 235.

16 *Newton v Federal Commissioner of Taxation* (1958) 98 CLR 1.

17 *Federal Commissioner of Taxation v Hart* (2004) 78 ALJR 875, [24].

18 Ibid, [6] (Gleeson CJ and McHugh J) and [89] (Callinan J).

19 *Federal Commissioner of Taxation v Hart* (2004) 78 ALJR 875, [85] (Gummow and Hayne JJ) and [87] (Callinan J).

20 *Hart v Federal Commissioner of Taxation* [2002] FCAFC 222, [44] (Hill J), [88] (Hely J) and [94] (Conti J).

Hill, Hely and Conti JJ noted that a Part IVA scheme cannot be limited to a particular 'shape, form or structure', in this case the 'wealth optimiser structure'.[21] That is, a s 177A scheme must have some meaning beyond the s 177C tax benefit identified. Hely J states that the danger of confining a scheme to the essential elements by which the tax benefit is obtained is that it is more likely that the dominant purpose of the person entering into a scheme so defined was to obtain a tax benefit.[22] Their Honours did not heed the Full Federal Court's warning about the consequences of limiting the breadth of the scheme.

Concluding remarks on 'scheme'

The High Court has eroded the requirement that a tax benefit be obtained by a scheme and that this occurred because there was division about how narrowly a scheme can be drawn. Two main points should be repeated. First, their Honours unanimously accepted the narrow definition of the scheme. In comparison, the Full Federal Court unanimously accepted the wider scheme. The High Court's limitation of the breadth of the scheme is problematic, as it makes the s 177D dominant purpose conclusion inevitable. Second, shifting the focus to the s 177D(b) factors, as Gummow, Hayne and Callinan JJ suggested, does not redress this. Their Honours in *Hart* reduced the importance of the scheme requirement of Part IVA. The result is that the application of Part IVA is broadened, making it easier for the Commissioner to capture arrangements that Part IVA is not designed to proscribe.

3 A TAX BENEFIT 'IN CONNECTION WITH A SCHEME'

The tax benefit in *Hart* was not the whole of the interest on the investment part of the loan; it was that part of the interest that resulted from the special, non-standard features of the arrangements between the lenders and borrowers.[23] Those features that defined the 'wealth optimiser structure', and distinguished it from the standard financing arrangements, were held to be definitive of the scheme in connection with which the tax benefit was obtained.[24] If the scheme accepted by the Court was limited in this way, their Honours could not have accepted the wider scheme (as Gleeson CJ and McHugh J argued that they did). Therefore, the court in *Hart* unanimously let the identification of the tax benefit restrict the identification of the relevant scheme to those structural elements that gave rise to the tax benefit.[25]

---

21 Ibid, [22] (Hill J), [88] (Hely J) and [94] (Conti J).

22 Ibid, [87] (Hely J).

23 M D'Ascenzo, 'Part IVA: Post *Hart'* (2004) 7(2) *Journal of Australian Taxation* 357, 363.

24 *Federal Commissioner of Taxation v Hart* (2004) 78 ALJR 875: [5], [6], [12] (Gleeson CJ and McHugh J), [32] (Gummow and Hayne JJ) and [91] (Callinan J).

25 Ibid.

This alters the inquiry in ss 177C(1) and 177D(a) from looking for a 'tax benefit in connection with a scheme' to looking for 'a tax benefit in connection with a scheme of a particular form, shape or structure'. Part IVA is not a statutory reflection of the *Newton* predication test. *Newton* was only referred to in the Explanatory Memorandum for Part IVA to emphasise that it was only if there was no valid commercial reason to explain the transaction that the predominant tax avoidance purpose could be established. Taking more from *Newton* broadens Part IVA in a way contrary to the requirements of the legislation. This brings arrangements into the Part IVA net that it was not intended to strike down. The next section will explore the High Court's interpretation of s 177D of Part IVA.

4 THE DOMINANT PURPOSE OF THE SCHEME

The taxpayer conceded that, if the relevant scheme was the narrower scheme, Part IVA would apply. Therefore, the only sustainable argument before the High Court in relation to s 177D was whether, if the relevant scheme was the wider scheme, the required conclusion regarding purpose could be reached.[26] In other words, does Part IVA apply if there is a commercial transaction (ie, one that was entered into for a commercial object, in this case the purchase of a residential property and the retention of another as an investment), where the transaction is structured in a tax effective way designed to obtain a tax advantage?[27]

The High Court paid no attention to the commercial objective of the arrangement. Unlike the Full Federal Court, the High Court did not ask why the borrowing itself was entered into but why borrowing on particular terms and conditions was entered into (ie, the wealth optimiser structure). To answer this s 177D inquiry, Gleeson CJ, McHugh and Callinan JJ relied on evidence in relation to the form and substance (s 177D(b)(ii)),[28] of the arrangement, and Gummow and Hayne JJ focused on the manner (s 177D(b)(i)) in which the scheme was entered into, to the exclusion of the other s 177D(b) matters.

The High Court unanimously held that the Harts had the necessary tax avoidance purpose required by s 177D; therefore Part IVA applied to the arrangement. The

---

26 M Cashmere, 'Part IVA after Hart' (2005) 24 AT Rev 131, 13 and 144.

27 Ibid.

28 Taxation Ruling TR 98/22, *Income Tax: the taxation consequences for taxpayers entering into certain linked or split loan facilities* at paragraph [56] defines 'form' as the inherent structure of split loan facilities being an overall principal and interest payment arrangement provided by one financier, incorporating the form of two separate loans or loan accounts. Paragraph [57] defines 'substance' as the conversion of a non-deductible interest to a tax deductible interest.

Commissioner could exercise the discretion given in s 177F to cancel the tax benefit identified. The High Court's application of the three requirements of Part IVA can be summarised as follows. First, the High Court accepted the narrowly defined scheme identified by the Commissioner. It included the provision in the loan for the division into two portions and the direction of the repayments to one or other portion, and the direction by the Harts of the repayments to the home loan portion. These were the features that defined the 'wealth optimiser structure', and distinguished it from the standard financing arrangements. Second, the tax benefit identified was not the whole of the interest on the investment part of the loan; it was that part of the interest that resulted from the special, non-standard features of the arrangements between the lenders and borrowers. Third, when applying s 177D, their Honours did not ask why the borrowing itself was entered into, but why a borrowing on the particular terms and conditions was entered into. To answer their s 177D inquiry their Honours relied on evidence in relation to ss 177D(b)(i) and 177D(b)(ii) to the exclusion of the other s 177D(b) matters.

Concluding remarks on 'dominant purpose'

An identified tax benefit should not lead inevitably to satisfaction of the dominant purpose test. Two propositions emerge from *Hart* to support this argument. First, when applying the s 177D(b) factors the High Court in *Hart* focused too much on the manner, and form and substance criteria (ie, ss 177D(b)(i) and (ii)). Second, that they ignored the 'commerciality' of the arrangement when coming to a conclusion about dominant purpose. To answer the s 177D inquiry Gleeson CJ, McHugh and Callinan JJ relied on evidence in relation to the form and substance, of the arrangement (s 177D(b)(ii)), and Gummow and Hayne JJ focused on the manner in which the scheme was entered into (s 177D(b)(i)), to the exclusion of the other s 177D(b) factors.

When their Honours were applying s 177D, they ignored Hely J's warning that confining a scheme to the essential elements by which the tax benefit is obtained, makes it is more likely that the dominant purpose of the person entering into a scheme so defined was to obtain a tax benefit.[29] Unlike the Full Federal Court, the High Court did not ask what the Harts' purpose was in obtaining the borrowing, but why they had borrowed on the terms and conditions of the wealth optimiser product offered by Austral. As Hely J predicated, inevitably the answer was that the Harts entered the arrangement to obtain a tax advantage in connection with a scheme (narrowly defined). Rather, their Honours should have evaluated whether, in the context of the commercial transaction, the Harts' commercial objective was more significant than the objective of obtaining a tax deduction. The Full Federal Court

[29] *Hart v Federal Commissioner of Taxation* [2002] FCAFC 222, [87] (Hely J).

framed the s 177D inquiry in this way. By doing so they put transactions of a normal business or family kind, including those of a tax planning nature, beyond the scope of Part IVA. This reflects the fact that Part IVA was not enacted to combat these types of arrangements. The danger is that, by broadening Part IVA, the High Court may have put these transactions in the firing line.

Concluding remarks on the Part IVA inquiry in *Hart*

This article argues that the High Court's interpretation of the scheme requirement in *Hart* is central to their application of Part IVA. In particular, the High Court in *Hart* reduced the requirement of a scheme to a nullity. It has been established that the High Court's definition of a s 177A scheme added nothing to their definition of a s 177C tax benefit. This raises the question; if the scheme is a direct reflection of the tax benefit, why define it at all? Alternatively, if a tax benefit is a direct reflection of the scheme, why define it at all? Sections 177A and 177C can be distinguished by their role in Part IVA. The s 177C tax benefit is the subject matter of the Commissioner's discretion in s 177F; therefore it must be defined because, without the s 177C tax benefit, Part IVA makes no sense. However, Part IVA can remain operative, even if s 177A is ignored. The consequence of ignoring s 177A, though, is that it makes the answer to the s 177D inquiry inevitable.

For s 177D (and s 177A(5)), the two competing purposes for entering the loan in *Hart* were the commercial objective of obtaining borrowing to refinance their existing home and buy a new home versus the objective of obtaining a taxation advantage. Their Honours did not use the s 177D(b) factors to evaluate the dominant purpose of entering the borrowing itself, but the dominant purpose of entering a borrowing on the particular terms and conditions; the terms and conditions that were essential to the wealth optimiser product. Compare this with the question asked by the Full Federal Court; what was the dominant purpose of entering into the borrowing itself? Phrasing the s 177D inquiry in the way the High Court did, and then relying on evidence in relation to one s 177D(b) matter to answer it (either ss 177D(b)(i) or 177D(b)(ii)), makes it inevitable that the dominant purpose of the entering the arrangement was to obtain a taxation advantage. By reducing the scheme requirement to a nullity the High Court has made it much more likely that Part IVA will apply to an arrangement. Their Honours broadened the application of Part IVA in a way contrary to the requirements of the legislation. Contrary, in particular, to the requirement that a scheme identified for the purposes of s 177A should have more meaning then the s 177C tax benefit.

Was the arrangement entered into by the Harts one that Part IVA was enacted to proscribe? In other words, could the arrangement be classified as tax avoidance rather than legitimate tax planning? The Full Federal Court unanimously disagreed.

The High Court, in comparison, unanimously agreed that the arrangement constituted tax avoidance. The High Court's conception of 'scheme' is a significant part of the reason why the High Court and the Full Federal Court came to diametrically opposed conclusions about the application of Part IVA to the arrangement in *Hart*. By reducing the 'scheme' requirement to a nullity the High Court broadened Part IVA, thereby lowering the threshold for avoidance arrangements. According to the legislation, Part IVA contains three requirements and each one has a role to play in identifying tax avoidance. If Part IVA is not applied according to the requirements in the legislation, the provisions no longer help courts to distinguish between legitimate tax avoidance and legitimate tax planning. It is much easier to distinguish between legitimate tax planning and tax avoidance if a s 177A scheme is identified according to the requirements in the legislation. When properly applied, Part IVA will strike down the avoidance arrangements it was enacted to combat, without catching legitimate taxation planning arrangements in the Part IVA net.

Consideration of *Hart*

Hart has been considered by the following cases:[30]

- *Re Taxpayers and Federal Commissioner of Taxation* (2005) 61 ATR 1132;
- *Re McCutcheon and Federal Commissioner of Taxation* (Cth) (2006) 63 ATR 1323;
- *Re Iddles and Federal Commissioner of Taxation* (2005) 60 ATR 1187; and consequently,
- *Iddles v Commissioner of Taxation (Cth)* (2006) 63 ATR 1323 ('*Iddles*'). This case is considered in more detail below.

The taxpayer in *Iddles* appealed against an amended assessment issued by the Commissioner disallowing deductions for certain expenses incurred by the applicant in relation to his investment in the Austvin scheme (grape growing and a vineyard).

[30] *Cumins v Commissioner of Taxation* [2007] FCAFC 21 is also an interesting Part IVA case. It does not expressly consider *Hart*; however, it cites *Hart* as support for the suggestion that the Commissioner must compare the consequences of the scheme and those of 'alternative postulates'. Gummow and Hayne JJ (at para [67] in *Hart*) state that the juridical basis for the 'alternative postulate' test is s 177C (ie, different name for the counterfactual). However, Gummow and Hayne JJ, make no express comparison with the s 177C counterfactual, rather, they rely on the marketing material provided by Austral to reemphasise the advantages of the split loan and therefore, the impact of the mortgage structure.

The main issue on appeal was whether the Tribunal member erred in concluding that pursuant to s 177D the scheme was one to which Part IVA applied.

Prior to considering the appellant's submissions in the context of the eight s 177D(b) factors, Besanko J made the following general observation at paragraph 73:

> A relevant taxpayer may have more than one purpose and one of his or her purposes may be to obtain commercial benefits. However, if having regard to the matters in s 177D(b), his or her dominant purpose is to obtain a tax benefit in connection with a scheme, then Part IVA applies even if one of the relevant taxpayer's other purposes is to obtain commercial benefits.[31] The question is to be determined objectively in the sense that the question is not as to the relevant taxpayer's subjective intention and purpose. What these propositions mean in this case is that the applicant's subjective purpose in entering the scheme, even if a commercial one, is not of itself relevant.[32]

His Honour has cited Gleeson CJ and McHugh J's discussion of dominant purpose in *Hart* in support of classifying the commercial purpose of a transaction as an inferior consideration. This is a true expression of Gleeson CJ and McHugh J's reflection on the commercial objective of the wealth optimiser structure in *Hart.* That is, Gleeson CJ and McHugh J did not consider the Harts' commercial objective at all. Gleeson CJ and McHugh J used the s 177D(b) matters to evaluate the Harts' dominant purpose for entering a loan with the features of the 'wealth optimiser' product. That is, their Honours did not use the s 177D(b) factors to evaluate the dominant purpose of entering the borrowing itself, but the dominant purpose of entering a borrowing on the particular terms and conditions; the terms and conditions that were essential to the wealth optimiser product. Phrasing the s 177D inquiry in this way and then relying on one s 177D(b) matter to answer it (ie, s 177D(b)(ii)), makes it inevitable the dominant purpose of the entering the arrangement was to obtain a taxation advantage. This broadens Part IVA.

The author highlighted this element of *Iddles* to emphasise that the challenge of Part IVA is evaluating whether, in the context of the commercial transaction, the commercial objective is more significant than the tax objective (assessed according to the eight s 177D(b) criteria). The point at which a transaction crosses the line is

---

31 *Calder v Federal Commissioner of Taxation* (2005) 61 ATR 267, 291-2; *Commissioner of Taxation v Spotless Services Ltd* (1996) 186 CLR 404, 415-6; *Commissioner of Taxation v Sleight* (2004) 136 FCR 211, 229-30 and 238-9 per Hill J (with whom Hely J agreed); and, *Commissioner of Taxation v Hart* (2004) 78 ALJR 875, 227 [16] (Gleeson CJ and McHugh J).

32 *Calder v Federal Commissioner of Taxation* (2005) 61 ATR 267, 291-2; *Commissioner of Taxation v Spotless Services Ltd* (1996) 186 CLR 404, 421-2; *Peabody v Commissioner of Taxation* (1993) 40 FCR 531, 542; and, *Commissioner of Taxation v Hart* (2004) 78 ALJR 875, 233 and 243 (Gummow and Hayne JJ).

where it becomes, 'blatant, artificial or contrived'; the type of transactions Part IVA was enacted to combat in the first place. Phrasing the inquiry in a way that ignores the commerciality of the arrangement contributes to broadening Part IVA by reducing 'scheme' to a nullity. What will be the next arrangement caught in the Part IVA net cast by *Hart*?